

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ROSALIE SIMON, et al.

Plaintiffs,

vs.

THE REPUBLIC OF HUNGARY, MAGYAR  
ÁLLAMVASUTAK Zrt., and RAIL CARGO  
HUNGARIA Zrt.,

Defendants.

Case No.: 1:10-cv-01770-BAH

Hon. Beryl A. Howell

**THE REPUBLIC OF HUNGARY AND MAGYAR ÁLLAMVASUTAK ZRT.'S  
REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION  
TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT**

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The Republic of Hungary (“Hungary”) and Magyar Államvasutak Zrt. (“MÁV”) submit this Reply Memorandum of Law in Further Support of Their Motion to Dismiss the First Amended Class Action Complaint (the “Complaint”) filed by Hungarian Holocaust survivors (“Plaintiffs”).

### **PRELIMINARY STATEMENT**

Rather than directly address many of Hungary and MÁV’s arguments for dismissal, Plaintiffs’ opposition focuses instead on again recounting the horrors of the Holocaust. It is undeniable that the treatment of the Jewish people during World War II by the Nazi war machine and its allies was reprehensible. However, for several reasons, this case and this Court are not the proper forum to address the tragic events that took place during the Holocaust.

*First*, as explained in their moving papers, this Court does not have subject matter jurisdiction over Hungary and MÁV because they are sovereign entities entitled to immunity under the FSIA.<sup>1</sup> And, Plaintiffs’ argument that the expropriation exception to the FSIA overcomes Hungary and MÁV’s sovereign immunity fails for several reasons. A sovereign’s taking of the property of its own nationals is not a violation of international law as required by FSIA § 1605(a)(3). Nor have Plaintiffs alleged any facts showing that Hungary or MÁV currently own and/or operate any of the allegedly taken property or its proceeds, as required by FSIA § 1605(a)(3). Rather, Plaintiffs have just recited the language of the statutory exception, which is not enough under the pleading standards set by the United States Supreme Court to survive a motion to dismiss. Because Plaintiffs cannot establish that an exception to the FSIA applies, Hungary and MÁV are immune from suit under the FSIA.

*Second*, the Court should dismiss the case under the political question doctrine. In their

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<sup>1</sup> All capitalized terms, unless otherwise noted, have the same meanings as those ascribed to them in Hungary and MÁV’s moving brief [D.E. 22-1] (“Mot.”).

opposition, Plaintiffs fail to address Hungary and MÁV's central argument regarding why this case is not justiciable: history shows that war reparations claims, specifically including Holocaust-related restitution claims, are resolved through government-to-government negotiations, not litigation. Here, the United States Government has already demonstrated its intention to resolve reparations claims against Hungary arising out of World War II and the Holocaust through diplomatic negotiations by entering into two separate agreements with the Hungarian Government – the 1947 Peace Treaty and the 1973 Agreement. Both of these agreements specifically discuss the actions Hungary agreed to undertake in an effort to address the wrongs that took place during World War II and the Holocaust in Hungary.

Plaintiffs do not deny the purpose of these agreements, nor do Plaintiffs deny that Hungary has taken a number of steps to address Holocaust-related compensation in Hungary. Rather, Plaintiffs argue that the actions taken by Hungary are not sufficient. Therefore, Plaintiffs want this Court to pass judgment on the actions taken by the United States Government, as well as actions taken by the Hungarian Government, to resolve reparations issues arising out of World War II and the Holocaust. This would require the Court to review and evaluate the sufficiency of the steps taken by the United States and Hungarian Governments and agreed to through diplomatic negotiations over the years – this goes directly to the heart of second guessing that the political question doctrine question was designed to avoid. Accordingly, this case presents a non-justiciable political question.

*Finally*, Plaintiffs' claims should also be dismissed under the doctrine of *forum non conveniens*. This is a case challenging actions undertaken by the Hungarian Government, in Hungary, during World War II, against Hungarian citizens, who at all relevant times to the Plaintiffs' Complaint lived in Hungary. Thus, Plaintiffs cannot – and do not – deny that the

claims at issue in this case have everything to do with Hungary and almost nothing to do with the United States or the District of Columbia. Further, contrary to Plaintiffs' arguments, dismissal on *forum non conveniens* is appropriate because Hungary is a fully available and adequate alternative forum for adjudication of Plaintiffs' claims. In addition, Plaintiffs do not dispute that a majority of the evidence and sources of proof are located in Hungary. Hungary's overwhelming interest in addressing and resolving the claims at issue and the lack of any meaningful connection between the United States and the operative facts, make clear that Hungary, and not the District of Columbia, is the proper forum for this action.

### **ARGUMENT**

#### **I. PLAINTIFFS CANNOT SATISFY THE EXPROPRIATION EXCEPTION TO THE FSIA AND, THEREFORE, HUNGARY AND MÁV ARE ENTITLED TO SOVEREIGN IMMUNITY.**

Plaintiffs concede that "Hungary is a sovereign nation," Am. Compl. ¶82, and that MÁV "is an agency or instrumentality of the Republic of Hungary for purposes of the Foreign Sovereign Immunities Act," *id.* ¶85. Thus, to avoid the immunity the FSIA affords Hungary and MÁV because of their sovereign status, Plaintiffs argue that the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3), should apply in this case.<sup>2</sup> Plaintiffs argument fails for two reasons. First, a sovereign's alleged takings of the property of its own nationals does not violate international law. Second, the Plaintiffs have not alleged – and cannot allege – any facts showing that the either Hungary or MÁV currently own and/or operate any of the allegedly taken property or its proceeds, or that MÁV engaged in any commercial activities in the United States.

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<sup>2</sup> Plaintiffs' opposition leaves no doubt that they are *only* relying on the expropriation exception (28 U.S.C. § 1605(a)(3)) to argue that Hungary and MÁV should not be immune. Plaintiffs attempt to transform genocide – which is a tort and should therefore be brought under the tort exception to the FSIA (28 U.S.C. § 1605(a)(5)) – into a taking in order to attempt to avoid dismissal on sovereign immunity grounds. As discussed in Hungary and MÁV's moving brief, the FSIA's tort exception under § 1605(a)(5) requires that the tort occur in the United States for the exception to apply, and therefore, cannot preclude dismissal in this case. *See* Mot. at 7 n.9; 28 U.S.C. § 1605(a)(5).

Accordingly, the expropriation exception does not apply and Hungary and MÁV are “immune from the jurisdiction of the courts of the United States.” 28 U.S.C. § 1604.<sup>3</sup>

**A. Alleged Takings Do Not Violate International Law.**

Plaintiffs ask this Court to ignore the well-established principle that “[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.” *Rong v. Liaoning Provincial Gov’t*, 362 F. Supp. 2d 83, 101 (D.D.C. 2005) (quoting *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)). Plaintiffs’ suggestion that the alleged takings at issue in this case “violate international law because they were discriminatory” (Opp. at 8), is contrary to law and is simply a red herring. Indeed, as the D.C. Circuit has recognized, “confiscations by a state of the property of its own nationals, *no matter how flagrant* and regardless of whether compensation has been provided, do not constitute violations of international law.” *Rong*, 362 F. Supp. 2d at 102 (emphasis added) (quoting *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966)). Therefore, pursuant to the applicable standard of review, Plaintiffs’ attempt to invoke the expropriation exception in this case is “wholly insubstantial” and “frivolous.” *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934, 941 (D.C. Cir. 2008).

In this regard, the Plaintiffs’ reliance on the *Garb*, *Freund*, and *Bodner* cases is at best misplaced—at worst, disingenuous. In *Garb*, neither the district court nor the Second Circuit ruled on the question of whether a sovereign’s taking of property from its own nationals violates

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<sup>3</sup> Plaintiffs’ suggestion that “Defendants have not challenged the basic factual underpinnings advanced by Plaintiffs” is misplaced. Pls.’ Mem. of Law in Opp’n to Mot. of Defs.’ to Dismiss the First Am. Compl. [D.E. 24] (“Opp.”) at 11. As the Court is well aware, in evaluating a motion to dismiss, all well-pleaded facts must be assumed to be true, and therefore, a motion to dismiss is not the appropriate mechanism for Hungary and MÁV to challenge the factual allegations of plaintiffs. Accordingly, Hungary and MÁV have not done so at this stage of the proceedings. Rather, Hungary and MÁV’s motion is focused on the point that Plaintiffs have not adequately plead the required facts in the first instance to establish the expropriation exception; and, even if they could, the alleged takings do not violate international law.

international law. *See Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 34 (E.D.N.Y. 2002), *aff'd*, 440 F.3d 579, 591 (2d Cir. 2006). In fact, the Second Circuit noted that “the District Court therefore concluded that a substantial legal ‘hurdle’ must be overcome before plaintiffs can show that their property was taken in violation of international law.” 440 F.3d at 589. In *Freund*, the court actually granted defendants’ motion to dismiss because it “lack[ed] subject matter jurisdiction to adjudicate Plaintiffs’ claims under the [FSIA].” *Freund v. Republic of France*, 592 F. Supp. 2d 540, 545 (S.D.N.Y. 2008). Because the plaintiffs in *Freund* alleged that France had “victimized citizens of a number of nations,” the court did not address whether the alleged takings by France from its own nationals violated international law. *Id.* at 555 & n.6. And in *Bodner*, the defendants were private banks—not a sovereign nation or its instrumentalities—so that court’s holding has no relevance at all to the instant dispute. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 130-31 (E.D.N.Y. 2000) (“This is a lawsuit between private litigants for specific historical injury.”). Thus, *Garb*, *Freund* and *Bodner* do not contradict the numerous cases cited by Hungary and MÁV holding that the expropriation exception does not apply where, as here, a sovereign nation and one of its instrumentalities are alleged to have expropriated the property of its own nationals. *See Mot.* at 8.<sup>4</sup>

Similarly, Plaintiffs’ new argument that “[c]ontrary to Defendants’ assertion . . . not all of the Plaintiffs were considered Hungarian citizens when they were deported by Defendants” (Opp. at 3) cannot save their claims. The Amended Complaint clearly alleges that Hungary and

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<sup>4</sup> Plaintiffs’ reliance on *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) is similarly misplaced. *See Opp.* at 13-14. In *Cassirer*, “[t]he district court’s determination that [the victim of the allegedly wrongful taking by Germany] was no longer regarded by Germany as a German citizen [at the time of the alleged taking] was not challenged on appeal.” 616 F.3d at 1023. Indeed, neither of the defendants in *Cassirer* “contend[ed] that Germany’s actions with respect to the painting were not a taking in violation of international law.” *Id.* at 1027. Thus, the court had no occasion to examine whether the alleged expropriation by a sovereign nation of its own nationals’ property violates international law, and *Cassirer* does not support the Plaintiffs’ arguments here.

MÁV “orchestrated, collaborated and participated in the confiscation of the personal possessions of their *Hungarian Jewish victims* and their transportation by train to the killing fields and death camps of Nazi Germany-occupied Poland and the Ukraine.” Am. Compl. ¶3 (emphasis added); *see also id.* ¶82 (“Hungary facilitated the destruction of the vast majority of *its own* Jewish Population.”) (emphasis added). Further, Plaintiffs do not dispute that thirteen of the fourteen named plaintiffs were Hungarian nationals. And, as to the fourteenth named plaintiff (Tzvi Zelikovich), the Amended Complaint alleges that he and his parents were Hungarian nationals and the Plaintiffs concede that even he believed he was a Hungarian national at the time of the takings. *See* Am. Compl. ¶94; *id.* ¶14 (noting that both Zelikovich’s parents were Hungarian citizens and that he was born and raised in a Hungarian-annexed territory); Opp. at 3. “It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.” *Arbitraje Casa de Cambio, S.A. de C.V. v. United States Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003). Thus, the expropriation exception is not applicable to this case because the Complaint concedes that all Plaintiffs were Hungarian nationals at the time of the alleged taking, and therefore, there was no violation of “settled principles of international law.” *Rong*, 362 F. Supp. 2d at 101.<sup>5</sup>

Plaintiffs’ argument that Hungary’s “express undertaking” in the 1947 Peace Treaty somehow converts the alleged takings into violations of international law (Opp. at 14-16) is

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<sup>5</sup> Plaintiffs’ suggestion that certain unnamed class members may not have been Hungarian nationals at the time of the alleged takings is irrelevant. *See* Opp. at 3, 16-17. Traditionally, when determining whether a court has jurisdiction over a putative class action, the court need only consider the citizenship of the named plaintiffs. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *see also Nat’l Bank of Wash. v. Mallery*, 669 F. Supp. 22, 25 (D.D.C. 1987) (“[T]he citizenship of class members who are not designated ‘representatives’ is irrelevant to the jurisdictional inquiry.”) (internal citation omitted). Moreover, if the Court concludes that Hungary and MÁV are entitled to sovereign immunity for the named plaintiffs’ claims, the issue of whether the alleged takings of any unnamed class members’ property violated international law becomes moot because this putative class action cannot be maintained without class representatives.

similarly unpersuasive. Plaintiffs' argue that because the alleged takings were "a fit subject for an international treaty," the alleged takings must therefore be "a fit subject for international law." Opp. at 16. This is an overly simplistic view and was recently rejected by the Second Circuit, which noted that often "the very reason of [a] treaty [is] to create an obligation which would not have existed by the general [international] law, or to exclude an existing rule which would otherwise have applied." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 137 (2d Cir. 2010) (quoting J.L. Brierly, a "distinguished scholar of international law"). Thus, "[t]hat a provision appears in one treaty (or more) . . . is not proof of a well-established norm of customary international law." *Id.* at 138 (concluding that corporate liability is not a norm of customary international law, notwithstanding the existence of some treaties providing for corporate liability).

**B. Plaintiffs Have Not Pursued And Exhausted Domestic Remedies, Which Is Required To Establish A Violation Of International Law.**

Plaintiffs' opposition does not respond to Hungary and MÁV's additional point that the alleged takings at issue in this case cannot be considered a violation of international law due to the Plaintiffs' failure to exhaust domestic remedies. *See* Mot. at 8 n.10. As argued in Hungary and MÁV's moving brief, regardless of the nationality of specific plaintiffs, international law requires plaintiffs to show that they have "pursued and exhausted domestic remedies in the foreign state that is alleged to have caused the injury." *Millicom Int'l Cellular v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 714 (2004) (Breyer, J., *concurring*) ("A plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in 'expropriating' state may have trouble showing a 'taking in violation of international law.'"); *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (noting that consideration of whether a claimant "must have exhausted any remedies

available in the domestic legal system, and perhaps in other forums such as international claims tribunals” before asserting a claim in U.S. courts should be undertaken in appropriate cases). Plaintiffs have not made this showing. At most, in opposing Hungary and MÁV’s *forum non conveniens* argument, Plaintiffs assert that they *might* encounter a variety of obstacles, delays, and trauma *if* they were to pursue their claims in Hungary. Accordingly, Plaintiffs’ failure to actually pursue and exhaust their domestic remedies in Hungary provides a separate and independent basis for concluding that the alleged takings cannot be considered a violation of international law.

**C. Plaintiffs Have Not Adequately Alleged Hungary’s and MÁV’s Current Ownership And/Or Operation Of The Allegedly Taken Property Or Its Proceeds, Or That MÁV Is Involved In Commercial Activities In The United States.**

Although the Plaintiffs take issue with the characterization of their allegations regarding Hungary’s and MÁV’s current ownership and/or operation of the allegedly taken property or its proceeds as “barebone allegations” and “bald assertions,” Opp. at 18, the fact remains that Plaintiffs have done no more than repeat the statutory language contained in the expropriation exception. Allowing this case to proceed on the basis of these patently deficient allegations would run afoul of the U.S. Supreme Court’s recent pronouncements in *Twombly* and *Iqbal*. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2004) (holding that allegations in a complaint must “raise a right to relief above the speculative level,” and must be, at a minimum, “plausible”); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (noting that “[w]here a complaint pleads facts that are merely consistent with a defendants’ liability, it stops short of the line between possibility and plausibility of entitlement to relief”) (internal quotations and citations omitted). As the Supreme Court has instructed, a “formulaic recitation of the elements of a cause of action will not do.” *Iqbal*, 129 S.Ct. at 1949.

Under the expropriation exception, with respect to Hungary, the Plaintiffs must plausibly allege that property taken in violation of international law by Hungary, or any property exchanged for such property, is present in the United States in connection with a commercial activity carried on in the United States by Hungary. 28 U.S.C. § 1605(a)(3). With respect to MÁV, Plaintiffs must plausibly allege that property taken in violation of international law by MÁV, or any property exchanged for such property, is owned or operated by MÁV and that MÁV is engaged in a commercial activity in the United States. *Id.* It is in connection with these key requirements where Plaintiffs' allegations fall short. *See* Am. Compl. ¶83 (making the conclusory allegations that Hungary “maintains property in, the United States, that has been exchanged for the property it stole from the plaintiffs herein” and “that property is present in the United States in connection with commercial activity carried on by Hungary within the United States”); *id.* ¶85 (making the conclusory allegation that “MÁV owns and/or operates property and property exchanged for property that it stole from Hungarian Jewish deportees”).<sup>6</sup> These are nothing more than “bald assertions” and Plaintiffs have “failed to set forth any facts” in support of such assertions. *Crist v. Republic of Turkey*, 995 F. Supp. 5, 11 (D.D.C. 1998); *see Freund v. Republic of France*, 592 F. Supp. 2d 540, 559-60 (S.D.N.Y. 2008) (finding that plaintiffs' conclusory allegations that defendant took property sixty years ago did not justify inference that

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<sup>6</sup> Not only is Plaintiffs' allegation concerning Hungary's ownership and/or operation of the allegedly taken property or its proceeds completely conclusory, but it is also based on the underlying allegation that such “property is owned and operated by MÁV and/or other agencies and instrumentalities of Hungary that are engaged in commercial activity in the United States.” Am. Compl. ¶83. Therefore, Plaintiffs seem to concede that Hungary *itself* does not own or operate the allegedly taken property or its proceeds. This apparent concession is also supported by Plaintiffs' allegation that the allegedly taken property was “converted to cash through sales and other means” and that such cash was “transferred to the Hungarian government treasury and co-mingled with other Hungarian government revenues.” *Id.* ¶99. Taking this allegation to its logical conclusion, such “cash” would have simply been spent by the government in the normal course on various governmental expenditures, and likely would not have been “exchanged” for other property, meaning that *neither* Hungary *nor* MÁV would currently own or operate the allegedly taken property or its proceeds.

defendant still owned or operated such property today).

In their opposition, Plaintiffs request that the Court allow them to engage in discovery relating to their claimed exception to sovereign immunity under the FSIA. *See* Opp. at 49 n.50. However, the Supreme Court has held that plaintiffs are not entitled to discovery in order to save a complaint that does not establish a plausible entitlement to relief. *See Twombly*, 550 U.S. at 559 (rejecting plaintiff’s attempt to argue that “a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process”). This is particularly relevant when dealing with issues of immunity, given that immunity is designed “to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’” *Iqbal*, 129 S.Ct. at 1953. Thus, Plaintiffs’ failure to plead the basic facts to necessary to establish an entitlement to relief in their Complaint does not entitle them to use discovery as a fishing expedition.

In short, there is no dispute that Hungary and MÁV are sovereign entities. Therefore, under the FSIA, Hungary and MÁV are presumptively immune from the jurisdiction of this Court. Plaintiffs rely solely on the expropriation exception to the FSIA, but cannot satisfy the requirements for that exception because (i) their alleged rights in property were not taken “in violation of international law,” *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 474-75 (D.C. Cir. 2007), *reh’g denied*, and (ii) they have not—and cannot—allege Hungary’s or MÁV’s current ownership and/or operation of the allegedly taken property or its proceeds, and have not alleged any facts showing that such property is present in the United States in connection with a commercial activity by Hungary or that MÁV has engaged in commercial activity in the United States. Accordingly, the Court does not have subject matter jurisdiction over Hungary or MÁV, and Plaintiffs’ Amended Complaint against them should be dismissed. *See Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000)

(“If no exception applies, a foreign sovereign’s immunity under the FSIA is complete: The district court lacks subject matter jurisdiction over the plaintiff’s case.”).

## **II. THE PLAINTIFFS’ CLAIMS PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS.**

Contrary to Plaintiffs’ assertions, Hungary and MÁV are not claiming that all cases that may touch on foreign relations in any way are non-justiciable under the political question doctrine. Opp. at 19-20. Rather, Hungary and MÁV’s point is much narrower: war reparations claims generally – and Holocaust-related reparations claims specifically – have traditionally been resolved through international political negotiations by the Executive Branch, not through the court system.<sup>7</sup> Moreover, claims relating to World War II and Holocaust reparations *by Hungary* have specifically been addressed previously through international negotiations, which resulted in the 1947 Peace Treaty and the 1973 Agreement.

### **A. Holocaust Reparations Claims Have Been Resolved Through Diplomatic Negotiations, Not Litigation.**

Holocaust-related reparations claims have traditionally been handled through the political process rather than the court system. Courts have routinely dismissed claims for compensation relating to the Holocaust on political question grounds, finding that the United States has made a policy decision to “resolv[e] Holocaust-era restitution claims through international agreements rather than litigation.” *Whiteman v. Dorotheum GmbH & Co., KG*, 431 F.3d 57, 59 (2d Cir. 2005). As the Supreme Court explained, the Executive Branch has engaged in a practice of

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<sup>7</sup> In fact, even prior to World War II, war reparations were historically resolved through diplomatic negotiations rather than litigation. *See, e.g., Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (holding that the Treaty of 1783, which concluded the Revolutionary War resolved all claims for damages sustained by the Governments or people of the United States and Britain and were not subject to redress by the courts); *Garrison v. United States*, 30 Ct. Cl. 272, at \*4 (1895) (noting that “amnesty, by the very nature of the peace, is necessarily implied in it; . . . all damages caused during the war are likewise buried in oblivion, and . . . no action can be brought for those [damages] of which the treaty does not stipulate the reparation”).

settling claims in the aftermath of war in order to remove “sources of friction” that present an “impediment to resumption of friendly relations” between nations. *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 420-21 (2003) (“The issue of restitution for [Holocaust-related claims] has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century...”).<sup>8</sup>

Plaintiffs fail to distinguish the cases cited by Hungary and MÁV showing that courts routinely find that cases relating to World War II and Holocaust reparation claims are better left to the political process and dismiss these cases on justiciability grounds. None of the cases have held that claims are only non-justiciable where the United States has submitted a Statement of Interest or where the Executive Branch has engaged in a specific level of activity in resolving Holocaust-related claims with that country. Rather, the cases have consistently held that claims seeking restitution for wrongs committed during World War II, including specifically Holocaust-related claims, are the exclusive province of the Executive Branch. *See, e.g. Princz v. Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999) (“As an issue affecting U.S. relations with the international community, war reparations fall within the domain of the political branches and are not subject to judicial review.”); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 282 (D.N.J. 1999) (holding that questions regarding the adequacy of reparations agreements relating to the victims of Nazi oppression and the adequacy of the implementation of those reparation agreements “are political questions which a court must decline to determine”).

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<sup>8</sup> The Executive Branch has stated that it is the “policy of the U.S. Government to resolve matters of Holocaust era restitution and compensation through dialogue, negotiation and cooperation.” Hearings on H.R. 293 before the Sub-Committee of Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform, 107th Cong., 2d Sess., 24 (2002) (statement of Ambassador Bell); Hearings on Status of Insurance Restitution For Holocaust Victims and Heirs before House Committee on Government Reform, 107th Cong., 1st Sess., 77 (2001) (same, statement of Ambassador Bindenagel).

The cases Plaintiffs cite in support of their argument that these types of claims are not the exclusive province of the Executive Branch are inapposite. In *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), the defendant was not a sovereign entity with whom the United States had undertaken negotiations to resolve World War II-related claims like occurred with Hungary. Therefore, the circumstances that are present in those cases that have been dismissed on political question grounds relating to World War II and the Holocaust – negotiation and agreements by the Executive Branch discussing war reparations and restitution – was not present in that case.

In another case cited by Plaintiffs, *Ungaro Benages v. Dresdner Bank AG*, the court found that the Foundation Agreement entered into between the United States and Germany covering the claims at issue specifically provided that it did “not provide an independent legal basis for dismissal.” 379 F.3d 1227, 1235 (11th Cir. 2004). While the court did not dismiss the case on political question grounds based on the contents of the Foundation Agreement – which had been negotiated by the Executive Branch – it did dismiss the case on international comity grounds. The Court found that the Foundation provided the proper forum for the plaintiff’s grievances. *Id.* at 1240-41. Similarly, the agreements reached between the United States and Hungary specifically contemplate that resolution of Holocaust-era restitution claims would be resolved through the negotiation process or in Hungary, not through litigation in the U.S. courts. *See* Mot. at 13-15; *see also* 1947 Peace Treaty [D.E. 22-4]; 1973 Agreement [D.E. 22-5]. Under such circumstances, the Executive Branch has made the policy determination that these claims should be resolved through the political process rather than the legal process.<sup>9</sup>

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<sup>9</sup> The other case cited by Plaintiffs in support of their argument, *Kadic v. Karadzic*, did not deal with restitution related to World War II and the Holocaust, and therefore, the court did not have a basis for determining that the Executive Branch had made a policy determination to resolve such claims through diplomatic negotiations. 70 F.3d 232, 249 (2d Cir. 1995), *reh’g denied*.

**B. The United States Executive Branch Has Addressed Hungary's Holocaust-Related Obligations In The 1947 Peace Treaty and the 1973 Agreement.**

Contrary to Plaintiffs' assertion, the 1947 Peace Treaty and the 1973 Agreement expressly addressed and resolved the issue of compensation of Hungarian Jews for Holocaust-related confiscation of property. *See* 1947 Peace Treaty at Art. 27 [D.E. 22-4]. The introduction to the 1947 Peace Treaty makes clear that the purpose for entering into the treaty was to "settle questions still outstanding as a result of [World War II] and form the basis of friendly relations between" Hungary and the Allied Powers, including the United States.<sup>10</sup> This statement makes clear that issues arising out of World War II, which included issues relating to Holocaust reparations,<sup>11</sup> were handled through diplomatic negotiations resulting in the 1947 Peace Treaty. And, the inclusion of Article 27 dealing with Holocaust reparations by Hungary demonstrates that this issue was reserved to the policy judgment of the Executive Branch.

Plaintiffs attempt to paint Article 27 of the 1947 Peace Treaty as nothing more than a "declar[ation] of international law," and a recognition by Hungary of its obligation to compensate Holocaust victims such as the Plaintiffs in this action. This reading completely ignores the introductory language cited above, which makes clear that the 1947 Peace Treaty was designed to "settle questions" that remained outstanding following the war. Moreover, it ignores the subsequent legislation enacted in Hungary that was designed to comply with the obligations Hungary undertook in negotiating the 1947 Peace Treaty. *See* Mot. at 13-14.

Similarly, Plaintiffs attempt to downplay the significance of the 1973 Agreement entered into between the United States and Hungary. Plaintiffs do not argue that the 1973 Agreement is

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<sup>10</sup> As noted in Hungary and MÁV's moving brief, the 1947 Peace Treaty was not negotiated solely between the United States and Hungary. Rather, it included a number of other countries whose foreign policy decisions are reflected in the treaty. *See* Mot. at 13 n.15.

<sup>11</sup> The inclusion of Article 27, which deals with Holocaust reparations, in the 1947 Peace Treaty undercuts Plaintiffs' attempts to distinguish the Holocaust from World War II. *See* Opp. at 23 n.21.

merely declaratory – it specifically provides for payment of \$18.9 million by Hungary to the United States “in full and final settlement and in discharge of all claims” of the United States and U.S. nationals – rather, they claim that the 1973 Agreement does not apply to the Plaintiffs’ claims in this case because none of the Plaintiffs were United States nationals “at the time the claims arose.” Plaintiffs’ argument, however, misses the point. Regardless of whether the 1973 Agreement applies to any of the Plaintiffs in this case who are now U.S. nationals, the 1973 Agreement demonstrates the Executive Branch’s policy decision that claims against Hungary arising out of World War II and the Holocaust should be resolved through government-to-government negotiations, not litigation.

**C. Resolution By This Court Would Require The Court To Pass Judgment On The Political Decisions Of The United States And Hungary.**

Plaintiffs argue that resolution of their claims does not require this Court to evaluate the sufficiency of the compensation schemes put in place by the United States and Hungary. Opp. at 29-30.<sup>12</sup> However, awarding the damages sought by the Plaintiffs in this action would require just such an evaluation. As shown above, as well as in Hungary and MÁV’s moving brief, the 1947 Peace Treaty was specifically designed to address questions of compensation following World War II, including restitution of property expropriated during the Holocaust. The Executive Branch made the policy decision to make Hungary responsible for those determinations.

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<sup>12</sup> In the Complaint, Plaintiffs certainly argued that the measures previously taken were insufficient to adequately compensate Plaintiffs. *See, e.g.*, Am. Compl. ¶79 (noting compensation previously received by plaintiff Ella Feuerstein Schlanger); *id.* ¶127 (noting that the Hungarian Government “did implement an array of legislative enactments and remedial statutes,” but complaining that “the Jews saw no tangible results”); *id.* ¶132 (noting that Hungarian Parliament adopted laws “providing compensation” for Holocaust-related losses, but complaining that the “remedies provided by these statutes” were “paltry and wholly inadequate”). Thus, the very purpose of this action by Plaintiffs appears to be an attempt to obtain what they consider to be appropriate compensation based on their dissatisfaction with the remedies provided by Hungary as a result of international agreements negotiated between Hungary and various other nations, including the United States.

Moreover, as discussed in Hungary and MÁV's moving brief – and conceded by Plaintiffs – Hungary has enacted a number of compensation statutes in an effort to comply with the obligations it undertook in the 1947 Peace Treaty. *See* Mot. at 13; *see also* Nagy Decl. [D.E. 22-2] ¶¶23-25, 28-29. By hearing this case and awarding the damages sought by Plaintiffs, the Court would implicitly be finding that it did not agree with the Executive Branch's decision to make Hungary responsible for such claims and that the compensation schemes developed by Hungary are insufficient. Therefore, not only would resolution of the Plaintiffs' claims infringe on the United States foreign policy interests and decisions, but it would infringe upon the interests of the Hungarian Government – and second guess Hungary's decisions – in determining how to carry out its responsibilities under the 1947 Peace Treaty. Additionally, it would require this Court to second guess the Hungarian Government's 2007 Government Decision declaring that Hungary had complied with its obligations under the 1947 Peace Treaty. *See id.* ¶30.<sup>13</sup>

To the extent the Hungarian Government is deemed not to be living up to its obligations undertaken in the 1947 Peace Treaty, that is an issue to be negotiated and resolved through diplomatic negotiations between the United States Executive Branch and the Hungarian Government.<sup>14</sup> Issues surrounding Hungary's responsibility for actions taken against Hungarian Jews during the Holocaust have already been the subject of negotiations between Hungary and the United States, among others, and Plaintiffs' attempts to have the courts pass judgment on those negotiations is the type of second guessing about the resolution of World War II claims

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<sup>13</sup> Mr. Nagy's declaration, submitted in support of Hungary and MÁV's moving brief, sets forth the basic facts on the current status of various Holocaust compensation statutes, including decisions from the Hungarian Constitutional Court and the Hungarian Government. Nagy Decl. [D.E. 22-2] ¶¶23-31. Although Plaintiffs highlight Mr. Nagy's association with Weil, Gotshal and Manges LLP, and question the reliability of his declaration, Plaintiffs do not – and cannot – dispute the basic facts presented in his declaration about Hungary's legal system and compensation statutes.

<sup>14</sup> This is precisely what the United States Government did in negotiating the 1973 Agreement with respect to claims by the United States and its citizens.

that numerous courts have previously refused to do. *See Burger-Fischer*, 65 F. Supp. 2d at 285 (“One need only consider the damage which would be created if foreign nations negotiating with the United States were confronted with a situation in which a solemn pact reached with the Executive Department and ratified by the Senate could be undone by a court.”).<sup>15</sup>

Thus, the 1947 Peace Treaty, the various compensation statutes enacted by the Hungarian Government, and the 1973 Agreement, when taken together, establish a comprehensive scheme designed to resolve all Holocaust-era restitution claims through government-to-government negotiations, not litigation. These compensation vehicles are the product of governmental negotiation and determination; under the political question doctrine, they should not be a proper subject for second guessing by this Court.

**III. PLAINTIFFS’ CLAIMS SHOULD ALSO BE DISMISSED UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*, AS HUNGARY IS THE PROPER FORUM TO RESOLVE THE INSTANT DISPUTE.**

Plaintiffs do not – and cannot – seriously dispute that Hungary, as the situs where the actions giving rise to Plaintiffs’ claims took place, has a vested interest in resolving those claims. Claims that have everything to do with Hungary and little to do with the United States. Instead, Plaintiffs argue that this case represents one of those “rare circumstances” where a court should find that the remedy offered in another forum – an alternative forum with a fully operating and functioning judiciary and a member state of the European Union<sup>16</sup> and the Council of Europe<sup>17</sup> –

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<sup>15</sup> In addition to second guessing the actions taken by the Hungarian Government, evaluation of Plaintiffs’ claims by this Court would also require it to second guess the Hungarian Constitutional Court’s decisions evaluating the adequacy of Hungary’s actions.

<sup>16</sup> As a member of the European Union, Hungary has accepted and is bound by the Treaty on European Union, Art. 6, point 1, which states that “The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Nagy Decl. [D.E. 22-2] ¶6, n.3; *see also Stroitelstvo Bulgaria Ltd. v. Bulgarian-Am. Enter. Fund*, 589 F.3d 417, 421 (7th Cir. 2009) (finding that Bulgaria was an adequate forum in part due to its membership in the EU requiring that it have a stable legal system guaranteeing the rule of law).

is clearly unsatisfactory. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981), *reh'g denied*. Contrary to Plaintiffs' arguments, though, Hungary is available as an alternative forum, and it is an adequate forum for resolving the claims raised in this case. And, contrary to Plaintiffs' arguments, the public and private factors weigh strongly in favor of dismissal based on *forum non conveniens* grounds.<sup>18</sup>

#### **A. Hungary Is An Available Forum.**

Plaintiffs do not dispute that the determination of whether an alternative forum exists is “satisfied when the defendant is amenable to process in another jurisdiction.” *Piper*, 454 U.S. at 255 n.22 (internal citation omitted); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-507 (1947). Nor do Plaintiffs contest that Hungary and MÁV are subject to service and suit in Hungary. Opp. at 35. Instead, Plaintiffs speculate that Hungary may, at some point in the future, be an unavailable forum. Opp. at 35. Plaintiffs support this contention by pointing to Hungary's new constitution, the Basic Law. This new constitution, though, does not take effect until January 1, 2012. Opp. at 35. As a result, the Basic Law has neither been interpreted or applied by a single court in Hungary. Thus, the speculation of Plaintiffs' expert András Hanák's that this litigation may be barred by the Preamble of the Basic Law sometime in the future, resulting in Plaintiffs

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<sup>17</sup> As a member of the Council of Europe, Hungary is subject to Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Nagy Decl. [D.E 22-2] ¶6, n.4.

<sup>18</sup> Plaintiffs focus on the current U.S. citizenship of four of the named plaintiffs should not distract from the fact that, while there is ordinarily a strong presumption in favor of a plaintiff's choice of forum, citizenship is not dispositive. *Piper*, 454 U.S. at 256 n.23; *see also Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 156 (2d Cir. 1980) (discussing various of courts dismissing American plaintiffs' claims on *forum non conveniens* where the locus of events occurred in the forum jurisdiction, noting an “American citizen does not have an absolute right...to sue in an American court” (internal citations omitted)). Indeed, the Supreme Court has cautioned that while “citizens or residents deserve somewhat more deference than foreign plaintiffs,” dismissal on *forum non conveniens* is not “automatically barred when a plaintiff has filed suit in his home forum.” *Piper*, 454 U.S. at 256 n.23. In addition, all of the remaining named plaintiffs are foreign and it is proper to give “less weight to a foreign plaintiff's choice of forum.” *Id.*

“likely inability to litigate this suit in Hungary” at a later time does not make Hungary an unavailable forum. Opp. at 35.

For the same reasons, Plaintiffs’ reliance on *Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146 (2d Cir. 2005) does not support their argument. In *Norex*, the court found that the alternative forum was unavailable because Russian courts had *already litigated and applied the law to the claims at issue in the case*. *Id.* at 159. The court concluded that, due to the findings of the Russian courts, the *Norex* plaintiffs were precluded from bringing their case in Russia. *Id.* The same cannot be said for Plaintiffs here. It is simply too early for this Court to reach a conclusion with regard to the interpretation and application of the Hungarian Basic Law – which has not even taken effect yet – to Plaintiffs’ claims. To do otherwise could result in the very thing that the Supreme Court sought to avoid in formulating the *forum non conveniens* doctrine: U.S. courts having to “untangle problems in conflict of laws, and in law foreign to itself.” *Piper*, 454 U.S. at 251, quoting *Gilbert*, 330 U.S. at 509. Moreover, it would fly in the face of the long-standing tradition of comity and recognition of the legislative and judicial acts of a foreign nation. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (discussing the principle of international comity and the recognition “which one nation allows within its territory to the legislative, executive or judicial acts of another nation”). Thus, Hungary remains an available forum.<sup>19</sup>

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<sup>19</sup> In an article published in the Hungarian journal *Élet és Irodalom*, Plaintiffs’ expert Mr. Hanák stated that he would not have initiated a factually similar case – *Victims of the Hungarian Holocaust v. Hungarian State Railways* (“MÁV I”), No. 1:10-cv-00868 (N.D. Ill. filed Feb. 9, 2010) – in a United States forum. Mr. Hanák reasoned that MÁV was “not the same defendant anymore as the one that committed the terrible acts that occurred 65 years ago and the state behind the defendant is not the same Hungarian State which let down its Jewish citizens.”

**B. Hungary Is An Adequate Alternative Forum.**

Plaintiffs argue that Hungary is an inadequate alternative forum for two reasons: (1) the alleged anti-semitism and biases of the Hungarian judiciary and legal system and (2) differences in the Hungarian and U.S. legal systems. Both of these arguments must fail.

Plaintiffs support their claims that the Hungarian judiciary and legal systems may be religiously and ethnically prejudiced against any Jewish plaintiffs (Opp. at 35) by pointing to articles on the general rise of anti-semitism in Hungary as well as other parts of Europe. None of the articles, however, allege that the Hungarian judiciary suffers from these same biases. Moreover claims of judicial corruption and biases are routinely rejected as grounds for denying a dismissal on *forum non conveniens*. *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 337-8 (S.D.N.Y. 2008) (dismissing on *forum non conveniens* over objections from Israeli and Jewish plaintiffs that Egypt was an inadequate alternative forum due to pervasive anti-semitism in the legal and judicial system); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997) (stating that the argument that “the ‘alternative forum is too corrupt to be adequate’ ... does not enjoy a particularly impressive track record.”); *El-Fadl v. Centr. Bank of Jordan*, 75 F.3d 668, 678 (D.C. Cir. 1996) (explaining that a “foreign forum is not inadequate...because of general allegations of corruption in the judiciary system”); *Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002) (noting a reluctance of courts to find foreign courts corrupt or biased); *Stroitelstvo*, 589 F.3d at 421-2 (finding that plaintiffs general claims of corruption in the Bulgarian legal system did not support a finding that Bulgaria was an inadequate forum).

Numerous U.S. courts have also found it is inappropriate for a U.S. court on the one hand to assume that it is unbiased while on the other, to assume that foreign courts “are unable to ignore the biases that might exist in the[ir] country.” *Niv*, 710 F.Supp. 2d at 337. To hold

otherwise would “be a black day for comity among sovereign nations when a court of one country, because of a perceived ‘negative predisposition,’ declares the incompetence or worse of another nation’s judicial system.” *Flores v. S. Peru Copper Corp.*, 253 F.Supp.2d 510, 539 (S.D.N.Y. 2002) (internal citation omitted).<sup>20</sup>

Plaintiffs also argue that Hungary is an inadequate alternative forum because of “substantial legal differences” between the substantive and procedural law of the United States and Hungary. Opp. at 38-40. In support of this position, Plaintiffs point to alleged delays in the Hungarian legal system, disallowance of class actions, restrictions on civil damages, document production and inspection, injunctions, pre-trial discovery, the alleged inability to collect damages, and Hungary’s fee shifting system. *Id.* In doing so, Plaintiffs’ attempt to obscure the simple but well established principle that “the availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum, nor on identical remedies.” *Norex*, 416 F.3d at 158 (internal citation omitted). Instead, an alternative forum is adequate as long as it provides plaintiffs with a fair hearing and some remedy for the alleged wrong. *Stroitelstvo*, 589 F.3d at 421; *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 803 (7th Cir. 1997) (noting that “an alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly); *Piper*, 454 U.S. at 249 (finding that “dismissal may not be barred solely because of the possibility of an unfavorable change in law”). Indeed, the Supreme Court in *Piper* held that “the possibility of a change in substantive law should ordinarily not be given

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<sup>20</sup> In fact, the cases Plaintiffs cite in support of their argument hold the same. *MBI Group, Inc. v. Credit Foncier du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010) (dismissing on *forum non conveniens* because plaintiffs failed to timely raise judicial corruption allegations, but noting that “general allegations of deficiency do not alone warrant the conclusion that a foreign forum is inadequate”) (quoting *El-Fadl v. Centr. Bank of Jordan*, 75 F.3d 668, 678 (D.C. Cir. 1996); *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006) (dismissing on *forum non conveniens* grounds because plaintiff’s “anecdotal evidence of corruption and delay” in Philippine courts was insufficient to show inadequacy).

conclusive or even substantial weight in the *forum non conveniens* inquiry.” *Id.* at 247. To hold otherwise would make the *forum non conveniens* doctrine “virtually useless.” *Id.* at 250.

Courts have also consistently held that arguments based on differences between legal systems are irrelevant to a *forum non conveniens* analysis. For example, Plaintiffs’ claim that alleged delays in the Hungarian judicial system make the forum inadequate are generally rejected in a *forum non conveniens* analysis. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1086 (S.D. Fla. 1997); *Manela v. Garantia Banking Ltd.*, 940 F. Supp. 584, 591 (S.D.N.Y. 1996) (delay of three years or longer did not make Brazil an inadequate alternative forum); *Simcox v. McDermott Int’l, Inc.*, 152 F.R.D. 689, 695 (S.D. Tex. 1994) (potential two to three year delay in United Kingdom did not render it an inadequate alternative forum). Indeed, the very case that Plaintiffs cite in support of their contention states that “delays of a few years [are] of no legal significance in the *forum non conveniens* calculus[.]” *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227-8 (3d Cir. 1995). In *Bhatnagar*, the court held that a delay of approximately 25 years was so excessive as to render the alternative forum inadequate. *Id.* Even assuming that Mr. Hanák’s predictions are correct – that this case could take up to four years from filing the complaint through trial – this delay hardly amounts to the egregious levels found in *Bhatnager*.<sup>21</sup>

The unavailability of a class action mechanism under Hungarian law is also irrelevant to a *forum non conveniens* analysis. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002) (although Ecuador courts did not recognize class actions, it was still an adequate alternative

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<sup>21</sup> There can be little doubt that “delay is an unfortunate but ubiquitous aspect of the legal process.” *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227-8 (3d Cir. 1995). This is as true in the United States as it is in Hungary. Indeed, the U.S. Courts website indicates that there is little to no difference between the time it takes to bring a case to trial in Hungary and the District Court for the District of Columbia. Statistics for 2009-2010 show that the median time between filing a complaint and seeing that case through trial averages anywhere from three to four years as well. Available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf> (last visited May 26, 2011).

forum because, while more burdensome than a traditional class action, litigants could still join together in a single lawsuit and authorize the action). Similarly, the lack of U.S. style document discovery and other helpful litigation procedures available in this Court does not render Hungary an inadequate alternative forum. *Manela*, 940 F. Supp. at 591 (Brazil was an adequate alternative because the “unavailability of U.S.-style document discovery in Brazil is far from dispositive on the issue of the adequacy of a Brazilian forum”) (citing *Scottish Air Int’l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996). see also *Blanco v. Banco Industrial de Venezuel, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993) (holding that “the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate”).

Plaintiffs’ objection to Hungary’s fee shifting arrangement was explicitly identified by the Supreme Court as a reason American courts are considered particularly attractive by foreign plaintiffs and why dismissal on *forum non conveniens* may be appropriate. *Piper*, 454 U.S. at 252 n.18. As the Supreme Court noted, to hold otherwise would make U.S. courts “even more attractive [to foreign plaintiffs]. The flow of litigation into the United States would increase and further congest already crowded courts.” *Id.* at 252. As such, courts have expressly rejected arguments on fee shifting as irrelevant to the *forum non conveniens* analysis. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 484 F.3d 951, 958 (7th Cir. 2007) (holding that the United Kingdom’s fee shifting rule was irrelevant to a *forum non conveniens* analysis); *Auxer v. Alcoa, Inc.*, 406 Fed. App’x 600 (3d Cir. 2011).

Plaintiffs point to Hungarian legal restrictions on civil and non-pecuniary damages as yet another reason that Hungary is an inadequate alternative forum. *Opp.* at 38. Again, this statement merely highlights Plaintiffs’ preference for an American forum because of differences

between Hungarian law and American jurisprudence; in this instance, because of restrictions on recovery of civil damages.<sup>22</sup> Hanák Decl. [D.E. 24-2] ¶11. However, differences in damages that can be recovered in an alternative forum is not a basis for showing that the alternative forum is not an adequate forum. *Alcoa*, 654 F.2d at 159. Moreover, Mr. Hanák himself acknowledges that non-pecuniary damages may, in fact, be awarded by a Hungarian court under Section 354 of Act IV of 1959 (the Hungarian Civil Code). Hanák Decl. [D.E. 24-2] ¶11 n.3. The focus of Mr. Hanák's discussion of pecuniary damages is instead on the conceptual difference between the treatment of such damages in both legal systems. *Id.* In essence, it is another argument claiming that the Hungarian forum presents an unfavorable change in law. This simply cannot support a finding that a forum is inadequate. *Piper*, 454 U.S. at 249. Given the above, it is clear that Hungary provides a more than adequate alternative for Plaintiffs to pursue their claims.

**C. Plaintiffs Have Not Rebutted Hungary and MÁV's Showing That The Private And Public Interest Factors Favor Dismissal On *Forum Non Conveniens*.**

As discussed in Hungary and MÁV's moving brief, (see Mot. at 28), a case can be dismissed on forum non conveniens grounds if either the private factors or the public factors warrant dismissal. See *Piper*, 454 U.S. at 242-4; see also *Jackson v. Am. Univ. of Cairo*, 52 Fed. App'x 518, 518 (D.C. Cir. 2002). Such is the case here, where both the private and public factors weigh in favor of dismissal. Plaintiffs' arguments to the contrary cannot rebut the overwhelming truth: as Plaintiffs concede, this is a case challenging Hungary's alleged actions during World War II and the Holocaust against "former residents of geographic areas of what

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<sup>22</sup> Hungary and MÁV also note that civil damages are clearly contemplated and permitted under the Hungarian Civil Code. For example, Section 355 of Act IV of the 1959 Civil Code provides for complete compensation for losses incurred by a damaged plaintiff. Nagy Decl. [D.E. 22-2] ¶12. Furthermore, it is clear that "the prospect of a lesser recovery does not justify refusing to dismiss on the ground of forum non conveniens." *Alcoa S.S. Co.*, 654 F.2d at 159 (dismissing on forum non conveniens over plaintiffs' objections that it could only recover \$570,000 in the alternate forum, versus \$8,000,000 in the United States).

today is or what once was, at all times relevant to this Complaint, part of the Republic of Hungary.” Am. Compl. ¶1.

Plaintiffs argue that private interest factors such as document location, location and availability of witnesses, legal differences,<sup>23</sup> and an undue burden<sup>24</sup> all weigh against a *forum non conveniens* dismissal. As discussed in Hungary and MÁV’s moving brief, and despite Plaintiffs’ allegations to the contrary, courts routinely dismiss cases on *forum non conveniens* grounds where nearly – and in this case, most likely all – the documentary evidence is located in a foreign country. *See* Mot. at 28-29, n.27.<sup>25</sup> Moreover, the availability of witnesses with materially important testimony still weighs in favor of dismissal, since the bulk of Hungary’s and MÁV’s witnesses – to the extent they are alive – are elderly and reside in Hungary or other European nations. Plaintiffs contend that any such disparity can be overcome by the use of depositions at trial. *Opp.* at 44. However, most, if not all, of the witnesses are likely to be Hungarian and not parties to this action. Given that these events took place more than 65 years ago, it is unlikely that Hungary or MÁV will have any control over any of their former employees, and therefore, they will not be subject to compulsory process. “The inability to bring witnesses to the United States for live cross-examination weighs heavily in favor of finding litigation in an United States court inappropriate.” *Moscovits v. Magyar Cukor Rt.*, No. 00 CV

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<sup>23</sup> *See* reply to Plaintiffs’ alleged differences in legal systems, *supra*, Section III B.

<sup>24</sup> Plaintiffs argue that bringing this case to trial in Hungary would present an undue burden on Plaintiffs, given their advanced elderly age. In addition, Plaintiffs argue that such travel would be too emotionally burdening as well. *Opp.* at 46. Hungary and MÁV do not dispute that such an experience may be difficult for the Plaintiffs. However, it should be noted that regardless of where this action is held, substantial travel will be required of all the named plaintiffs, even those residing in the United States, as none of the plaintiffs live in the District of Columbia or immediate vicinity.

<sup>25</sup> *See also Deirmenjian v. Deutsche Bank, A.G.*, CV 06-00774 MMM, 2006 WL 4749756, at \*13 (C.D. Cal. Sept. 25, 2006) (even though modern technological advances have reduced the cost of producing and transporting documents from a foreign forum, their mere location in the foreign forum still makes a U.S. court less convenient).

0031 VM, 2001 WL 767004 , at \*6 (S.D.N.Y. July 9, 2001). As the *Moscovits* court noted, alternative methods of live-testimony substitution for the vast majority of witnesses in a case is often “inefficient and expensive.” *Id.*

Plaintiffs’ arguments regarding the public interest factors all fail to address Hungary and MÁV’s point that the claims at issue in this case are so closely tied to Hungary – and so tenuously to the United States – that Hungary’s local interest alone overwhelmingly militates in favor of dismissal. *See* Mot. at 30-32. A generic U.S. interest in violations of international human rights law<sup>26</sup> and holocaust reparations cannot overcome the simple fact that this is a case completely centered on the actions of the Hungarian state during World War II and the Holocaust and the sufficiency of its attempts to compensate victims of the Holocaust. The current U.S. residency of a few of the named plaintiffs should not obscure the fact that there is absolutely no nexus between the United States and the operative facts of the claims at issue here. A majority of the evidence and sources of proof are located in Hungary, none of the underlying events occurred in the United States, and given Hungary’s significant interest in this case, the public and private factors clearly weigh in favor of dismissal.

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<sup>26</sup> Moreover, as noted by Mr. Nagy, Hungary also “respects the generally accepted principles of international law and has undertaken to harmonize its laws in accordance with its international obligations.” Nagy Decl. [D.E. 22-2] ¶6.

**CONCLUSION**

For the above reasons, as well as the reasons set forth in Hungary and MÁV's moving papers, Hungary and MÁV respectfully request that the Court grant the instant motion, dismiss the Amended Complaint, and grant Hungary and MÁV such other and further relief as this Court deems just and necessary.<sup>27</sup>

Dated: May 27, 2011.

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<sup>27</sup> The Plaintiffs' Notice of Supplemental Authority [D.E. 26] attaching a recent decision from the Northern District of Illinois in *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, et al.*, No. 10 C 1884 (N.D. Ill. filed Mar. 25, 2010), should have no bearing on this matter. In addition to not binding this Court, the *Magyar Nemzeti Bank* case is contrary to or ignores decisions by the D.C. Circuit relating to the FSIA, the political question doctrine, and the doctrine of *forum non conveniens*. As such, the decision is erroneous and should not be followed. Moreover, the Judicial Panel on Multidistrict Litigation (JPML) already recognized that the various cases pending against Hungary or Hungarian companies are unique when it originally declined to consolidate the various Hungarian Holocaust cases. In denying to consolidate the cases, the JPML noted *Magyar Nemzeti Bank* case "is brought against different defendants (including various European banks) and involves essentially different factual issues." *In re: Hungarian Holocaust Litig.*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 346940, at \*1 (J.P.M.L. Feb. 3, 2011). Indeed, in refusing to establish an MDL for the Hungarian Holocaust cases, the Panel relied on Plaintiffs' representation that these cases "will be principally litigated on Rule 12 motions," *id.*, implicitly recognizing that different district courts could reach different conclusions on the pleadings and legal issues presented.

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was filed electronically with the Clerk of the Court using CM/ECF on May 27, 2011. As such, the foregoing was served electronically upon all counsel of record.

/s/ Michael J. Lyle  
Michael J. Lyle