

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSALIE SIMON, et al.,

Plaintiffs,

v.

REPUBLIC OF HUNGARY, et al.,

Defendants.

Civil Action No. 10-01770 (BAH)

Judge Beryl A. Howell

**MEMORANDUM OF LAW
IN SUPPORT OF THE MOTION OF
DEFENDANT RAIL CARGO HUNGARIA ZRT.
TO SET ASIDE THE ENTRY OF DEFAULT
AND TO DISMISS THE COMPLAINT**

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PRELIMINARY STATEMENT

Rail Cargo Hungaria Zrt. (“RCH”), an indirectly owned subsidiary of the Republic of Austria, moves to vacate the entry of default and to dismiss the first amended complaint (the “Complaint”) against it on the following grounds:

A. RCH’s default resulted from its good faith reliance on the erroneous advice of the general counsel of its parent company, Rail Cargo Austria AG (“RCA”), that no defense to the Complaint needed to be asserted because: (i) RCH, which was incorporated in 2005, had no responsibility for any wrongdoing that occurred during the Hungarian Holocaust; (ii) RCH had no contacts with the United States; and (iii) any judgment rendered against RCH would therefore not be recognized in either Hungary or Austria. After the default was entered, RCA consulted independent Austrian counsel, who informed RCA of the need to defend this action. (Declaration of Dr. Maximilian Kindler (the “Kindler Decl.”), ¶¶ 3-5); Declaration of Attila Czöndör, (the Czöndör Decl.), ¶¶ 7-8.) RCH then retained Alston & Bird LLP (“A&B”) to represent RCH in this law suit. (Czöndör Decl. ¶ 9.) A&B promptly reached out to plaintiffs’ counsel in an attempt to obtain an agreement to vacate the entry of default. When plaintiffs’ counsel conditioned a voluntary vacatur on a waiver of RCH’s right to move to dismiss, RCH informed plaintiffs’ counsel that this condition was unacceptable and negotiated an agreement that RCH would file this motion on or before June 28, 2011. Plaintiffs’ counsel further agreed in writing that it would not contend that the less than six week period between May 19, 2011, the date A&B initially contacted them, and June 28, 2011 should be “charged against RCH” in considering whether plaintiffs have sustained prejudice as a result of RCH’s failure to timely respond to the Complaint. A complete copy of the correspondence between RCH’s and

plaintiffs' counsel concerning vacating the entry of default is attached as Exhibits B and C to the declaration of Amber Wessels of Alston & Bird (the "Wessels Decl.").

B. Plaintiffs have not suffered any material prejudice. Briefing on the co-defendants' motion to dismiss was not completed until June 16, 2011, just twelve days before the filing date of this motion. To minimize delay, RCH is also combining its motion to vacate and dismiss. Under Local Rule 7, RCH's motion should be fully briefed by July 19 (though it is possible that either plaintiffs or RCH will request a reasonable extension of time), so the total delay is likely to be a little more than 30 days. Indeed, the very fact that plaintiffs were prepared to stipulate to the vacatur of the entry of default (albeit on unacceptable terms) is striking evidence that plaintiffs themselves do not perceive that they have suffered any prejudice from this modest delay.

C. RCH has meritorious defenses:¹

1. Plaintiffs' claims against RCH violate the provisions of Executive Agreements entered into between the United States and the Republic of Austria in 2000 and 2001, which provide, *inter alia*, for an exclusive forum in Austria for the adjudication, pursuant to a set of lenient procedures, of all Holocaust-related claims against Austria and Austrian companies, in exchange for "legal peace" (i.e., freedom from suit in the US) for Austria and Austrian companies. Pursuant to the Executive Agreements, the United States has filed, in similar actions, Statements of Interest ("SOI") formally expressing the position of the Executive Branch that the pendency of such claims in our courts seriously impairs the foreign policy interests of the United States. The Supreme Court and both federal appellate and district courts have repeatedly held

¹ Points 1, 2, 4, and 6 of these below-listed points are grounds for immediate dismissal of this Complaint with prejudice, as is set forth in this Memorandum of Law. Points 3, 5, and 7 are additional meritorious defenses supporting lifting the entry of default.

that such SOIs (i) are entitled to deference by the courts and (ii) raise substantial political questions that are deemed non-justiciable under the criteria set forth in *Baker v. Carr*, 369 U.S. 186, 211 (1962). RCH is deemed an “Austrian company” under the Executive Agreements, and therefore entitled to their protections, because RCH is a 99.99% subsidiary of RCA, a corporation incorporated in Austria with principal place of business in Vienna. (Kindler Decl. ¶¶ 1 and 8.) Accompanying this Memorandum, as Exhibit D to the Wessels Decl., is a Statement of the Austrian Ambassador to the United States (the “Austrian Ambassador’s Statement”) informing this Court that “It is the strongly held position of the Republic of Austria that the Litigation against RCH should be dismissed because the United States and Austria entered into executive agreements in 2000 and 2001 that created funds and other measures for Holocaust victims in exchange for all-embracing and enduring legal peace on behalf of Austria and Austrian companies.” RCH anticipates that the United States will file a SOI in this action urging dismissal of the claims against RCH to avoid impairment of the foreign relations of the two allies.²

2. RCH is not subject to the general personal jurisdiction of this Court because the plaintiffs’ claims do not arise out of any transaction that occurred or caused injury in the United States, and RCH does not have systematic and continuous contacts in the District of Columbia or anywhere else in the United States.

3. RCH was incorporated by defendant Magyar Államvasutak Zrt (“MÁV”) in 2005 as a special purpose vehicle to which MÁV contributed only specified assets and liabilities. MÁV sold almost all of RCH’s shares to RCA in 2008. RCH did not assume any Holocaust-

² RCH also joins in the political question arguments of its co-defendants based on Treaties and Agreements between the US and Hungary. Because RCH is incorporated in Hungary and has its principal place of business in Budapest, it also comes within the Treaties’ and Agreements’ protections for Hungarian companies.

related liabilities of MÁV. (Kindler Decl. ¶ 12; Czöndör Decl. ¶¶ 5-6.) Consequently, RCH is not, as plaintiffs allege, a general successor to MÁV or any MÁV-related entity. Therefore RCH is not responsible or liable for any wrongdoing that MÁV may have committed.³

4. The longest statute of limitations applicable to plaintiffs' claims is 10 years. Since the acts and events alleged in the Complaint all are alleged to have occurred at least 65 years before this action was commenced and since the Complaint fails to set forth a factual foundation for tolling any applicable statutes of limitations, this action is time-barred. Plaintiffs are also barred by laches from asserting their claims against RCH because RCH has been materially prejudiced by their delay in bringing suit.

5. The Court lacks subject matter jurisdiction of all or some of plaintiffs' claims. There is no subject matter jurisdiction under 28 U.S.C. § 1332 because there is not complete diversity of jurisdiction between the parties, since some of the plaintiffs and all of the defendants are aliens. There is no subject matter jurisdiction under 28 U.S.C. § 1331, since the treaties on which plaintiffs purport to base their claims are (i) not self-executing and/or (ii) were never ratified by the United States. There is no subject matter jurisdiction against RCH under 28 U.S.C. § 1330, since it is not a "foreign state" as defined in 28 U.S.C. § 1603(a). There is no subject matter jurisdiction under 28 U.S.C. § 1350, since (i) U.S. citizens cannot sue under the Alien Tort Claims Act (the "ATS"), (ii) a corporation, such as RCH, cannot be sued under the ATS, and (iii) under *Sosa* and its progeny, the wrongful acts alleged, however horrendous, did not constitute violations of the law of nations or commonly recognized violations of international

³ Because RCH recognizes that this defense involves factual issues that are not appropriate for resolution on a motion to dismiss, RCH is raising this defense at this time solely for the purpose of showing that RCH has meritorious defenses that satisfy the test for vacating an entry of default. RCH reserves the right to brief the successorship issue in greater detail at a later date if that should be necessary.

law at the time they were allegedly committed. There is no subject matter jurisdiction under the Torture Victim Protections Act (the “TVPA”), 28 U.S.C. §1350 app., since it applies only to “individual” defendants, and not corporations, such as RCH, and plaintiffs have not alleged RCH acted under actual, or apparent, authority, or color of law, of any foreign nation, or that an act of torture, as that term is defined under the TVPA, was committed by RCH. There is no subject matter jurisdiction against RCH under the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1605, since only “first-tier” instrumentalities come within its ambit and RCH is only indirectly owned by the Republic of Austria. The Declaratory Judgment Act, 28 U.S.C. §2201(a), does not confer subject matter jurisdiction; it only creates a remedy. There is no supplemental subject matter jurisdiction under 28 U.S.C. § 1367, since, for the foregoing reasons, this Court lacks original jurisdiction over any of plaintiffs’ claims against RCH.

6. The District of Columbia is not an appropriate venue under the doctrine of *forum non conveniens*.⁴

7. In compliance with Local Rule 7(g), RCH has filed the Verified Answer of Rail Cargo Hungaria to First Amended Class Action Complaint (the “Verified Answer”) as part of these motion papers. A copy is attached to the Wessels Decl. as Exhibit A.

RCH has not asserted, at this time, either in this motion or in its Verified Answer, the defense that the Complaint fails to state a claim for relief, because Hungarian law will govern most, if not all, of plaintiffs’ claims and A&B (in light of the 21 days plaintiffs granted RCH to make this motion) has not yet had a chance to consult Hungarian law experts on which claims are recognized by Hungary and what the essential elements of those claims are under Hungarian

⁴ See the motion of RCH’s co-defendants on this issue, which RCH hereby joins in and adopts. Although, as noted at the outset of this Memorandum, RCH is ultimately a subsidiary of the Republic of Austria, RCH is not eligible to join in the motion of its co-defendants to dismiss under the FSIA because RCH is not a first-tier subsidiary of Austria.

law. RCH nevertheless hereby gives notice, pursuant to Fed. R. Civ. P. 44.1, that RCH “intends to raise an issue about a foreign country’s law”.

ARGUMENT

Point I:

THE ENTRY OF DEFAULT SHOULD BE VACATED

A. The Principles Governing Vacating Entries of Default

The Court of Appeals instructed, in the leading case of *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980), that “Default judgments are not favored by modern courts, perhaps because it seems inherently unfair to use the court’s power to enter and enforce judgments as a penalty for delays in filing. Modern courts are also reluctant to enter and enforce judgments unwarranted by the facts.” The Court of Appeals has cautioned that “a default judgment must be a sanction of last resort to be used only when less onerous methods . . . will be ineffective or obviously futile.” *Webb v. Dist. of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) (internal quotation marks omitted).

The courts have been particularly lenient in vacating default judgments and entries of default issued against foreign sovereigns or quasi-sovereigns, such as RCH, which is a virtually wholly-owned indirect subsidiary of the Republic of Austria, because of the potential impact on the foreign policy of the United States. *Practical Concepts, Inc. v. Rep. of Bolivia*, 811 F.2d 1543, 1551 n. 19 (D.C. Cir. 1987) (“Intolerant adherence to default judgments against foreign states could adversely affect [the United States’] relations with other nations . . . ”); *Gilmore v. Palestinian Interim Self-Gov’t Auth.*, 675 F. Supp. 2d 104, 109 (D.D.C. 2009) (“When the defendant is a foreign sovereign, default is especially disfavored . . .”)

The added leniency normally accorded foreign defendants is not based solely on concern over potential impact on foreign policy. It also reflects a recognition that defendants who are

unfamiliar with the American legal system are understandably more likely to be ignorant of, or confused about, what their obligations are. *Von Pein v. Bonucci*, No. 92-4310, 1993 WL 276987, *6 (E.D. Pa. July 8, 1993) (“the equities in this case involving foreign defendants, less familiar with our legal system, weigh in favor of setting aside the entry of a default judgment”); *Castro v. Saudi Arabia*, 510 F. Supp. 309, 313 (W.D. Tex. 1980) (“Saudi Arabia’s unique cultural differences . . . distinguish Saudi Arabia from domestic corporations who fail to answer”).

The standards for setting aside an entry of default under Rule 55(c) are less stringent than Rule 60(b)’s requirements for setting aside default judgments. *Jackson* 636 F.2d at 835. A court must balance three factors in deciding whether to set aside an entry of default: “whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious.” *Jackson*, 636 F.2d at 836 (quoting *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 373 (D.C. Cir. 1980)); *see Canales v. A.H.R.E., Inc.*, 254 F.R.D. 1, 8-12 (D.D.C. 2008) (applying the *Jackson* three-factor test). When balancing these factors, “all doubts are resolved in favor of the party seeking relief.” *Jackson*, 636 F.2d at 836.

1. RCH’s Default Was Not “Willful”

RCH’s default is directly attributed to its good faith reliance on the erroneous advice of the general counsel of RCA that no defense needed to be asserted because (i) RCH had no responsibility for any wrongdoing that occurred during the Hungarian Holocaust, (ii) RCH had no contacts with the United States, and (ii) any judgment rendered against RCH would therefore not be recognized in either Hungary or Austria. (Kindler Decl. ¶¶ 3-5; Czöndör Decl. ¶¶ 7-8.) The Court of Appeals has admonished that a defendant normally should not be penalized, on a motion to vacate a default, for reliance on the erroneous advice of its counsel: “Default judgments were not designed as a means of disciplining the bar at the expense of a litigant’s day

in court” and “the negligence of a lawyer is not imputed to his clients on a motion to set aside a default judgment”. *Jackson*, 636 F.2d at 837; *Barber v. Turberville*, 218 F. 2d 34, 36 (D.C. Cir. 1954) (on a motion to set aside a default or default judgment, “courts have been reluctant to attribute to the parties the errors of their legal representatives”); *Palestinian Interim Self-Gov’t Auth.*, 675 F. Supp. 2d at 109 (“a finding of willfulness requires that defendants, and not just their attorneys, were responsible for the default”).

RCH submits that this principle is even more applicable, and the failure to respond timely even more excusable, where the counsel who provides the erroneous advice practices law in a foreign country, such as Austria, whose legal system is very different from the U.S. system.⁵

2. Plaintiffs Have Not Been Prejudiced

This action is still in its very earliest stage. Briefing on the co-defendants’ motion to dismiss was completed on June 16, 2011, just twelve days before RCH has filed this motion to vacate and dismiss. RCH’s counsel reached out to plaintiffs’ counsel on May 19, 2011 (less than a week after being retained) to request that plaintiffs voluntarily vacate the entry of default so RCH could proceed expeditiously to move to dismiss. Plaintiffs’ counsel were prepared to vacate the entry of default (evidencing that they did not perceive that the short delay had caused plaintiffs any prejudice), but only if RCH agreed to waive its right to move to dismiss. This condition was unacceptable to RCH because it would thereby effectively relinquish its defenses that (i) under the terms of Executive Agreements between the United States and Austria, Austrian companies (including their foreign subsidiaries, such as RCH) were granted “legal peace” from being sued in US courts for Holocaust-related claims, and (ii) RCH is not subject to personal jurisdiction in the United States. (Wessels Decl., Exh. B.)

⁵ Austria is a civil code country, with different concepts of jurisdiction and civil procedure from those of the United States. See *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F. Supp. 2d 376, 390 (S.D.N.Y. 2002).

The negotiations between counsel for RCH and plaintiffs continued until June 7, 2011 when they reached agreement that (i) RCH would file a motion to vacate (ii) no later than June 28, 2011, and (iii) plaintiffs would “not argue that the delay in filing between the time that Ms. Wessels first contacted [Charles Fax, one of plaintiffs’ counsel], through the duration of our discussions, should be charged against Rail Cargo [RCH].” (Wessels Decl., Exh. C.) This motion to vacate and dismiss is being filed within the agreed upon 21 day period. Under Local Rule 7(g), this motion should be fully briefed by July 19, 2011. Even if the parties agree upon, and this Court grants, a reasonable extension of the Rule’s briefing schedule, the motion should be submitted to the Court a little more than 30 days from the completion of briefing of the co-defendants’ motions.

Moreover, “delay in and of itself does not constitute prejudice”. “The issue is not mere delay, but rather its accompanying dangers: loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion.” *Haskins v. U.S. One Transportation, LLC*, 755 F. Supp. 2d 126, 131-32 (D.D.C. 2010) (quoting from *KPS & Assocs., Inc. v. Designs by FMC, Inc.* 318 F.3d 1, 15 (1st Cir. 2003); *Estate of Gaither v. Dist. of Columbia*, 653 F. Supp. 2d 35, 42 (D.D.C. 2009) (same); and *Essroc Cement Corp. v. CTI/D.C., Inc.*, 263 F.R.D. 17, 21 (D.D.C. 2009) (“delay and legal costs are part and parcel of litigation and typically do not constitute prejudice for the purposes of Rule 55 (c)”) (quoting *Capital Yacht Club v. Vessel AVIVA*, 228 F.R.D. 389, 394 (D.D.C. 2005)). None of these factors is present in this case. Under these circumstances, the plaintiffs cannot demonstrate any material prejudice.

3. RCH’s Defenses Are “Meritorious”

The threshold for establishing the existence of a “meritorious defense” is quite low. “Likelihood of success is not the measure. Defendants’ allegations are meritorious if they contain ‘even a hint of a suggestion’ which, proven at trial, would constitute a complete

defense.” *Keegel*, 627 F.2d at 374 (citations omitted); *Whelen v. Abell*, 48 F.3d 1247, 1259 (D.C. Cir. 1995) (“the movant is not required to *prove* a defense, but only to *assert* a defense that it may prove at trial”) (emphasis added); *Gaither*, 653 F. Supp. 2d at 44-45 (D.D.C. 2009) (same).

RCH more than meets this requirement. As shown by its Verified Answer (Wessels Decl. Exh. A), RCH denies all of the material allegations of the Complaint and sets forth the following affirmative defenses, any one of which, if proved, is sufficient to result in the dismissal of all of plaintiffs’ claims against RCH:

- (a) The claims against RCH constitute non-justiciable political questions (*See* the First Affirmative Defense to the Complaint and Point II below);
- (b) RCH is not subject to the personal jurisdiction of this Court (*See* the Second Affirmative Defense to the Complaint and Point III below);
- (c) The claims against RCH are barred by the applicable statutes of limitations and the doctrine of laches (*See* the Third and Fourth Affirmative Defenses to the Complaint and Points IV and V below);
- (d) RCH did not succeed to any liabilities that MÁV may have regarding plaintiffs’ claims (*See* the Fifth Affirmative Defense);
- (e) This Court lacks subject matter jurisdiction (*See* the Sixth Affirmative Defense);
and
- (f) This Court is not a convenient forum (*See* the Seventh Affirmative Defense and the *forum non conveniens* argument set forth in the motion papers of the co-defendants).

Because the successorship defense may not properly be the subject of a motion to dismiss since it involves issues of fact, it is not separately discussed as part of RCH’s motion to dismiss.

RCH reserves, if necessary, its right to challenge subject matter jurisdiction in a motion on the pleadings, pursuant to Fed. R. Civ. P. 12(c). RCH submits, however, that the allegations concerning successorship and subject matter jurisdiction set forth in the Verified Answer suffice to establish that they are meritorious defenses.

Point II:

THE CLAIMS AGAINST RCH ARE NON-JUSTICIABLE

The political question doctrine requires dismissal of an action that involves resolution of an issue committed to the political branches. In this instance, that issue is what balance is to be drawn between (i) the interests of victims of World War II and the Holocaust in obtaining restitution through the U.S. courts, and (ii) the foreign policy interests of the United States in supporting efforts to bring some measure of justice to victims in their lifetimes through negotiated executive agreements, and recognizing the need for its ally Austria to achieve comprehensive and enduring legal peace for Austrian companies such as RCH. The Executive Branch has already resolved this issue by entering into comprehensive Executive Agreements with Austria in 2000 and 2001, which (i) provide for comprehensive measures and the availability of funds for the benefit of a large number of victims, (ii) define the rights of victims, (iii) limit the obligations of Austrian companies, and (iv) establish an exclusive forum and procedure for adjudication of compensation claims. (*See* the declaration of Ambassador Hans Winkler (the “Winkler Decl.”) ¶¶ 23-40) and the Austrian Ambassador’s Statement, p. 1, Wessels Decl. Exh. D.) This Court should defer to that resolution. (*See* generally *Baker v. Carr*, 369 U.S. 186 (1962), which is discussed in detail in the separate brief of the co-defendants.)

The plaintiffs’ claims necessarily raise questions of international relations and the judiciary is not the appropriate forum for resolving issues involving foreign policy. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 386 (2000) (“the foreign policy of the United

States [is . . .] much more the province of the Executive Branch and Congress than of [the Court]” (internal quotations and citations omitted); *see also Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (foreign policy decisions are “decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility”); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (U.S. foreign policy is “committed by the Constitution to the executive and legislative – ‘the political’ – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”).

The U.S. State Department has resolved a number of German, Austrian and French World War II and Holocaust-related lawsuits through carefully negotiated executive agreements providing compensation to Holocaust victims and enduring legal peace to the corporations defined as nationals of the countries at issue. As a result of these executive agreements, United States courts have consistently dismissed cases such as this one, on the grounds that they would require second-guessing these foreign policy determinations. *See, e.g., In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 374-83 (D.N.J. 2001); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 272-280 (D.N.J. 1999); *Iwanowa*, 67 F. Supp. 2d 424, 483-91 (D.N.J. 1999); *In re Austrian & German Holocaust Litig.*, 250 F.3d 156, 163-64 (2d Cir. 2001); *Kelberine v. Societe Internationale*, 363 F.2d 989, 994-95 (D.C. Cir. 1966); *Oetjen v. Cent. Leather Co.*, 246 U.S. at 301-04.

Baker v. Carr sets forth a list of six non-justiciability factors, and holds that if any *one* of these factors is present, then the case *must* be dismissed as non-justiciable. As is set forth below

and in the co-defendants' separate brief, many of these factors are satisfied with regard to RCH, which compels the conclusion that this litigation presents a non-justiciable political question.⁶

A. The Political Branches Have Already Resolved the Liability of Austrian Companies

The United States' foreign policy decisions with respect to Austria are a matter of historical fact of which this Court may take judicial notice under Fed. R. Civ. P. 12. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986); *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 705 (3d Cir. 2004); *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004).

In October 2000 and January 2001, the United States and Austria entered into two separate Executive Agreements (the first of which focused on forced labor compensation, and the second of which focused on compensation for property claims). These Executive Agreements set the scope and limits of liability of Austria and Austrian companies for all private Holocaust claims and established compensation funds as the exclusive forums in which such claims were to be addressed and resolved. (Winkler Decl. ¶¶1, 7; Austrian Ambassador's Statement, p. 1, Wessels Decl. Exh. D.)

In negotiating and entering into these Executive Agreements, both the United States and Austria intended to establish all-embracing and enduring legal peace in exchange for immediate and necessary compensation to victims of the National Socialist era. The United States fulfilled its critical foreign policy goals of providing immediate justice to Holocaust survivors and other victims of the National Socialist era who, by 2000, were elderly and dying at an accelerated rate, and who would likely see no other compensation in their lifetimes due to the glacial progress of

⁶ To avoid burdening the court with needless repetition, RCH adopts and incorporates herein the political question analysis of the co-defendants, including their discussion of the impact of the Treaty of Paris of 1947, which applies to RCH because it is, within the meaning of that Treaty, a Hungarian company. RCH focuses its own discussion of the political question doctrine primarily on the additional issues and factors that apply to RCH as an Austrian company in light of the United States / Austria Executive Agreements.

the pending U.S. class action litigations against Austria and Austrian companies. In return, Austria fulfilled its critical foreign policy goals of ensuring that all World War II and Holocaust-era claims against Austria and Austrian companies were resolved once and for all, and that the United States committed to take steps to assist Austria and Austrian companies in achieving all-embracing and enduring legal peace in United States courts. (Winkler Decl. ¶¶8, 9, 11; Austrian Ambassador's Statement, p. 1, Wessels Decl. Exh. D.)

In fact, on January 19, 2001, United States Secretary of State Madeline Albright issued a statement detailing multiple reasons “why the establishment of the [Forced Labor Fund] is in the foreign policy interests of the United States and why it would be in the foreign policy interests of the United States for the Fund to be the exclusive forum and remedy for the resolution of all claims asserted against Austria and/or Austrian companies involving or related to the use of slave or forced labor during the Nazi era or World War II, as well as any other claims covered by the Fund”. (Exhibit C to the Winkler Decl.) These same foreign policy interests apply equally to the resolution of property claims. (Declaration of Stuart E. Eizenstat, attached as Exhibit F to the Winkler Decl.; Winkler Decl. ¶¶11, 40.)

“Austrian companies” are defined pursuant to these executive agreements as:

1. Enterprises that, at any given time, had or have their headquarters within the borders of the present-day Republic of Austria as well as their parent companies (past or present, direct or indirect), even when the latter had or have their headquarters abroad.
2. Enterprises situated outside the borders of the present-day Republic of Austria in which Austrian enterprises as described in Sentence (1), at any given time, had or have a direct or indirect financial participation of at least 25 percent.

(Winkler Decl. ¶27 and Annex B to Exhibit D to the Winkler Decl.) The definition of “Austrian companies” was purposely made as broad as possible. (Winkler Decl. ¶28.) Since RCA is incorporated and headquartered in Austria and owns more than 25% of RCH's shares, RCH is

deemed to be an “Austrian company” under the Executive Agreements. (Austrian Ambassador’s Statement, p. 1, Wessels Decl. Exh. D.)

The Executive Branch of the United States government has therefore addressed and conclusively resolved all claims that have been or may be asserted against Austria and/or Austrian companies arising out of or related to the National Socialist era or World War II (with the sole exception of *in rem* claims for works of art) by obtaining compensation funds for victims and promising in return to support the dismissal of any such claims in the United States courts on any valid legal ground. Consequently, under *Baker v. Carr*, plaintiffs’ claims against RCH are not justiciable.

These very principles have been recognized by United States courts in Holocaust-related cases. See *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d at 377-78 (“[T]he post-war claims settlement regime had been exclusively constructed by the political branches, and . . . it was not the place of courts to resolve [these] claims.”); *Burger-Fischer*, 65 F. Supp. 2d at 272-73 (holding that certain claims of World War II slave laborers present non-justiciable political questions); *Iwanowa*, 67 F. Supp. 2d at 487 (“[I]f civil litigation were the preferred, or even contemplated, avenue for resolution of [individual] claims, the resulting government-to-government negotiations could have, and would have, plainly provided for such a potentiality.”).

Although Plaintiffs may disagree with the foreign policy decisions made a decade ago, they cannot now, through litigation, second-guess those policies or turn back the clock and adjudicate claims that the executive branch of our government resolved as part of international relations. The political question doctrine forbids such a result.

B. There Are No Judicially Discoverable or Manageable Standards for Adjudication

Courts are not equipped to adjudicate what are in essence historical grievances disguised as legal claims. Even if the plaintiffs' disparate injuries could be demonstrated, and the insurmountable issues of causation and proof could be overcome, there would still be no intelligible standard to fashion an appropriate remedy. *See, e.g., Burger-Fischer*, 65 F. Supp. 2d at 284 ("Were the court to undertake to fashion appropriate reparations for the Plaintiffs in the present case, it would lack any standards to apply.") Directly on point also is *Kelberine*, 363 F.2d at 995, which rejected claims by Holocaust survivors for reparations from private companies 20 years after the conclusion of World War II:

[T]he problem is not within the established scope of judicial authority. . . . The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tortfeasors is too indefinite. The procedure sought – adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power – is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

The facts of *Kelberine* do not differ from those of this case in any material respect. In both cases, the claims arose outside "the territorial jurisdiction of the courts of the United States": Germany in *Kelberine*, and Hungary in this case. In both cases, "[t]he span between the doing of the damage and the application of the claimed assuagement is too vague": 20-30 years in *Kelberine*, and more than 65 years here. In both cases, the identity of the alleged tortfeasor is too indefinite: the "Nazi Regime" in *Kelberine*, and variously the "Nazis", Dr. Mengele, "Germans", "Gestapo" "Hungarians", "Hungarian government officials", "Hungarian authorities", "Hungarian police", "guards", "kapos" "gendarmes", "school teachers", the "Arrow Cross", the "Nvilas Party", or "Railway Defendants" here. (Complaint ¶¶12-81, 99-123.) This vagueness can be ascribed in part at least to the passage of so many years since the alleged

operative events took place, the death of witnesses, the distance of the court and counsel from the relevant geographical locations, and the destruction or loss of records from years of war and decades of communist rule.

Finally, in both cases, the procedure sought of adjudicating in U.S. courts thousands of claims – some two thousand claims in *Kelberine*, and here, according to Paragraph 144 of the Complaint, “the Class consists of over 5,000 survivors, and countless heirs and estates, throughout the world ...” – for damages inflicted decades ago in a foreign country by a government no longer in power is, in the words of *Kelberine*, “too complicated, too costly, to justify undertaking by a court” without some sort of legislative guidance. *Id.*, see also *Iwanowa*, 67 F. Supp. 2d at 489 (“The specter of adjudicating thousands of claims arising out of a war that took place more than fifty years ago amounts to a more daunting task for this Court to tackle than the *Kelberine* court could have ever contemplated.”).

Two more recent cases from California, *Anderman v. Fed. Rep. of Austria*, 256 F. Supp. 2d 1098 (C.D. Cal. 2003) and *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659 (N.D. Cal. 2002), demonstrate the continuing vitality and recognition of the principles articulated in *Kelberine* as the events of the Holocaust recede further into the past. Both cases addressed claims brought by WWII survivors seeking remedies for property allegedly looted during the Nazi era. Both courts noted the various factors that would make it difficult, if not impossible, to adjudicate the claims and that rendered the claims non-justiciable: thousands of potential plaintiffs; inter-governmental treaties that potentially foreclosed such claims; and evidence scattered around the world.

In short, the only relevant distinction is that those cases addressed allegations arising from events that took place approximately between twenty and fifty years after the Holocaust; because of plaintiffs’ delay, the Hungarian claims are now being brought over sixty-five years

after the Holocaust. If there were no discoverable and manageable standards for adjudicating those WWII-era claims years ago when these other cases were resolved, it is *a fortiori* clear that plaintiffs' claims here are incapable of judicial resolution.

Point III:

RCH IS NOT SUBJECT TO PERSONAL JURISDICTION

“The plaintiffs have the burden of establishing the court’s personal jurisdiction” over RCH. *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1091 (D.C. Cir. 2008). Plaintiffs have not set forth any facts satisfying their burden to substantiate a basis for specific or general personal jurisdiction over RCH.

A. Plaintiffs Have Not Alleged Any Connection Between the Jurisdictional Contacts and the Complaint Allegations, So Cannot Establish Specific Jurisdiction

Plaintiffs admit that RCH does not do or transact business in the District of Columbia, since they admit RCH is “not subject to jurisdiction in any state’s courts of general jurisdiction,” and purport to base jurisdiction only on Fed. R. Civ. P. 4(k)(2) (Complaint ¶¶86, 89). Moreover, the sole jurisdictional contact that they allege between RCH and the United States is RCH’s current website, www.railcargo.hu.⁷ Plaintiffs do not allege any connection between RCH’s alleged U.S. contacts and the Hungarian Holocaust. Because RCH has been in existence for only six years, and its alleged current internet-based jurisdictional contacts bear no relation whatsoever to the injuries allegedly suffered by plaintiffs 65 years ago, there is no basis for specific national jurisdiction over RCH.

⁷ In paragraph 2 of their Complaint, Plaintiffs misleadingly define RCH as “MÁV Cargo” in order to try to generate a non-existent link between the circa World War II freight operations of co-defendant MÁV, and RCH, which was incorporated in 2005 and is not a successor-in-interest to any MÁV Holocaust liabilities. There is no “MÁV Cargo” website, just as there was no separate “MÁV Cargo” operating in Hungary during the Hungarian Holocaust. RCH addresses this successor liability defense in its Verified Answer to the Complaint, filed herewith as Exh. A to the Wessels Declaration, and simply mentions it here as explanation for why plaintiffs refer to “MÁV Cargo’s Website” when the actual website at issue is RCH’s website, www.railcargo.hu.

In fact, just yesterday the Supreme Court, in a unanimous opinion, reminded the lower courts and parties about the differences between general and specific personal jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, No. 10-76, -- U.S. --, 2011 WL 2518815 (June 27, 2011). The Court held that “[i]n contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.” *Goodyear*, 2011 WL 2518815 at *3. (internal quotation omitted.) See also *ALS Scan, Inc., v. Digital Serv. Consultants*, 293 F.3d 707, 712 (4th Cir. 2002) (“[I]f the defendant’s contacts with the State are not also the basis for suit, then jurisdiction over the defendant must arise from the defendant’s general, more persistent, but unrelated contacts with the State.”)

RCH’s contacts with the United States must therefore reach the “significantly higher” level of systematic, continuous contacts sufficient to establish general jurisdiction over it. *ALS Scan*, 293 F. 3d at 715. As the Supreme Court just held, this level of contacts must be “so ‘continuous and systematic’ as to render [the defendant] essentially at home in the forum state.” *Goodyear*, 2011 WL 2518815 at *3. In other words, as the Ninth Circuit has found, this higher standard “requires that the defendant's contacts be of the sort that approximate physical presence.” *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

Accordingly, the only basis upon which the Court can determine that there is personal jurisdiction over RCH is if plaintiffs can meet their pleading burden by demonstrating that RCH, through operation of a Hungarian website visible in the U.S. currently⁸ has such systematic, continuous nationwide contacts with the U.S. such that RCH should reasonably anticipate being

⁸ The question of whether RCH is subject to personal jurisdiction must be determined on the basis of RCH’s contacts with the United States at the time the action was commenced. See *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Allen v. Russian Fed’n*, 522 F. Supp. 2d 167, 193-194 (D.D.C. 2007).

haled into *any* U.S. court. *Holland Am. Line, Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 462 (9th Cir. 2007) (“[R]ather than considering contacts between the [defendants] and the forum state, we consider contacts with the nation as a whole”).

B. Plaintiffs Cannot Establish 4(k)(2) General Jurisdiction Over RCH

Few courts even consider the issue of whether a website can establish general jurisdiction with contacts “of the sort that approximate physical presence.” *Bancroft & Masters*, 223 F.3d at 1086. Those that have considered the question flatly reject the plaintiffs’ arguments – even where plaintiffs have also alleged a few additional contacts. In *Soma Medical Int’l v. Standard Chartered Bank*, the court examined a website “offering information concerning [defendant’s] services and soliciting business from all over the planet, which allows access from anywhere, including Utah” and held that “we have no difficulty concluding” that the website did not establish general jurisdiction “*under any standard promulgated by any court.*” 196 F.3d 1292, 1297 (10th Cir. 1999). The court declined to find general jurisdiction over the defendant, even though the defendant had also filed UCC statements and had brought litigation in Utah, because there was not “the kind of ‘substantial and continuous local activity’ necessary to subject [defendant] to general jurisdiction.” *Id.* Similarly, in *Burleson v. Toback*, plaintiff attempted to base general jurisdiction on a Canadian website that provided advertising to North Carolina residents, discussed a North Carolina event, and had between 22 and 44 North Carolina members, and the court held “there is absolutely no basis in this case for the exercise of general jurisdiction” and that the plaintiff did “not come close to meeting the standards” for general jurisdiction. 391 F. Supp. 2d 401, 414 (M.D.N.C. 2005). *See also ALS Scan*, 293 F.3d at 712 (denying general jurisdiction where plaintiff only alleged the existence of a website as the basis for jurisdiction).

Moreover, as plaintiffs tacitly admit by virtue of focusing all of their alleged jurisdictional contacts on the existence of RCH's website, RCH lacks other contacts with the United States that could support an exercise of general jurisdiction. The attached declaration of Attila Czöndör establishes conclusively that since RCH's formation in 2005, RCH has not engaged in any continuous or systematic business anywhere in the United States.⁹ Specifically, at no time during its existence has RCH:

- (a) been licensed to do business anywhere in the U.S.;
- (b) conducted or transacted business anywhere in the U.S.;
- (c) had a registered agent for service of process anywhere in the U.S.;
- (d) owned or leased any office space or other facility of any kind anywhere in the U.S.;
- (e) maintained a telephone, telex or telefax number anywhere in the U.S.;
- (f) owned any real property or tangible personal property anywhere in the U.S.;
- (g) had any directors, officers, employees or agents anywhere in the U.S.;
- (h) had a bank or brokerage account anywhere in the U.S.;
- (i) shipped freight to any customer located anywhere in the U.S.;
- (j) committed any tortious act anywhere in the U.S.;
- (k) caused any injury anywhere in the U.S.;
- (l) availed itself of the courts or other government agencies or services anywhere in the U.S.; or

⁹ This court may consider matters outside of the pleadings, such as declarations, on a motion to dismiss for lack of jurisdiction, including personal jurisdiction. *Artis v. Greenspan*, 223 F. Supp. 2d 149, 152 (D.D.C. 2002) (citing *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947)).

(m) engaged in any other continuous and systematic activity of any kind anywhere in the U.S.

See Czöndör Decl. ¶ 3.

Because RCH's website is not accompanied by these tangible, systematic, continuous contacts within the forum, it is clear that there is no basis whatsoever for general jurisdiction against it. In *Bancroft & Masters*, the court held that a defendant that was not registered or licensed to do business in California, paid no taxes in California, maintained no bank account in California, and targeted no print, television, or radio advertising toward California was not subject to general jurisdiction, even though its passive website was accessible in California and though it made "occasional, unsolicited sales of tournament tickets and merchandise to California." 223 F.3d at 1086. Even though the defendant also had some contracts with California residents, those agreements "constitute doing business with California, but do not constitute doing business in California." *Id.* *See also Ecodisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1088 (C.D. Cal. 2010) (denying general jurisdiction where defendant had a website that was not designed specifically for the California or U.S. market, and did not have a bank account, employees, offices, assets, properties, or an agent for service of process in California, even where defendant held nine meetings in California over a 12-year period); *Stutzman v. Rainbow Yacht Adventures Ltd.*, no. 06-CV-0300, 2007 WL 415355, *9 (N.D. Tex. 2007) (denying general jurisdiction because of "tenuous, insignificant and sporadic" contacts including a website advertising its services and including a U.S. post office box address and toll-free international telephone numbers for use in the U.S., where defendant did not maintain an office in the U.S., had no agents, employees, or representatives in the U.S., owned or leased no U.S. property, paid no U.S. taxes and maintained no bank accounts in the

U.S.). *Telcordia Techs. v. Alcatel S.A.*, No. 04-874, 2005 WL 1268061 (D. Del. May 27, 2005) (denying general jurisdiction where defendant did not have offices, property bank accounts, or employees in the U.S. and where defendant's website was not intended to reach U.S. customers, even though defendant had ADRs on the NYSE and a U.S. patent.)

These decisions are entirely in line with yesterday's Supreme Court *Goodyear* decision, in which the court noted that the foreign defendants at issue:

are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers.

Goodyear, 2011 WL 2518815 at *5. Therefore, even though defendants had manufactured tens of thousands of tires that "were distributed within North Carolina by other Goodyear USA affiliates", these "attenuated connections to the State . . . "fall far short of the 'the [sic] continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." *Id.* at *10. "A corporation's 'continuous activity of some sorts within a state,' *International Shoe* instructed, 'is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'" *Id.* at *1. (citation omitted.)

This is even more true in the 4(k)(2) context, where a plaintiff admits that there is no basis for jurisdiction in any one state. *Ecodisc Tech*, 711 F. Supp. 2d at 1077 (noting that plaintiff had admitted there were not sufficient contacts with California, and holding that defendant's "aggregated contacts with the United States are no greater than, and not meaningfully different from, its contacts with California").

In fact, a visit to www.railcargo.hu readily shows that this is a passive website that is not directed towards the United States:

(1) Searches for each of the words or phrases “United States,” “America,” “American,” and “dollar” have zero results.

(2) The only “international” tariffs listed on the websites are those between Hungary and other European nations.

(3) The only telephone numbers provided on the website contain a +36 country code prefix indicating that they are Hungarian telephone numbers. The only email addresses provided on the website end in “.hu”, which is Hungary’s domain extension.

(4) The “call centre” for customer information not only uses a +36 country code prefix, but is only open during the following Hungarian business hours: “Monday to Thursday: 8.00 a.m. to 15.00 p.m.” and “Friday, 8.00 a.m. to 1 p.m.” Hungary uses Central European Time, so this call center is open Monday to Thursday 2:00 a.m. to 9:00 a.m. and Friday 2:00 a.m to 7:00 a.m. Washington D.C. time. It is similarly open between either 11:00 p.m. and 6:00 a.m. or 11:00 p.m and 4:00 a.m. California time.

(5) The website’s “intermodal” shipping pages focus on shipping products by rail between Hungary and other European countries.

(Wessels Declaration ¶ 6, Exhs. E, F, G, H, I.)

These passive contacts demonstrate that the website is not aimed at the United States, does not target shipping in the U.S. and could not subject RCH to jurisdiction in any court *even for claims directly related to the website’s activities*. *GTE New Media Servs. Inc. v. Bell South Corp.*, 199 F.3d 1343, 1349-51 (D.C. Cir. 2000) (holding that plaintiffs could not even satisfy the lesser specific jurisdiction standard of contacts “based solely on the ability of District residents to access the defendants’ websites, for this does not by itself show any persistent course of conduct by the defendants in the District”); *See also Holland America*, 485 F.3d at 450; *Quick Techs, Inc.*

v. Sage Grp PLC, 313 F.3d 338 (5th Cir. 2002); *Mink v. AAAA Dev. LLC*, 190 F.3d 333 (5th Cir. 1999); *Neuromechanical, LLC v. Kiro Kids Pty. Ltd.*, No. CV-10-1068, 2011 WL 333337 (D. Ariz. Jan. 31, 2011).

Plaintiffs' sole non-website alleged contact in paragraph 86 of their Complaint is a fleeting reference to RCH's "customers in the United States" or "its U.S. customers". This conclusory allegation is not even supported with any "information and belief" statements that such customers exist and is not entitled to any presumption of truth, particularly when RCH's motion is supported by an exploration of the website and detailed declaration of the lack of RCH's systematic, continuous contacts by persons with knowledge of the facts. *In re Papst Licensing GmbH & Co. KG Litig.*, 590 F. Supp. 2d 94, 97-98 (D.D.C. 2008); *D'Onofrio v. SFX Sports Grp., Inc.*, 534 F. Supp. 2d 86, 89-90 (D.D.C. 2008). In the face of this detailed information, the Complaint's unsupported conclusory allegations concerning RCH's website do not come even remotely close to satisfying plaintiffs' burden of proof to show general jurisdiction. *Papst*, 590 F. Supp. 2d at 97-98; *D'Onofrio*, 534 F. Supp. 2d 89-90. In the wake of the Supreme Court's new guidance in *Goodyear*, it is patently obvious that a website accessible around the world, including to Americans, cannot satisfy the "essentially at home" level of contacts necessary for general personal jurisdiction.

Point IV:

THE CLAIMS AGAINST RCH ARE TIME-BARRED

A. Plaintiffs' Claims Accrued No Later than 1945

RCH does not question that the Hungarian Holocaust was an unspeakable horror and that many Hungarian Jews suffered loss of life and property because of their religion and Nazi racist ideology. That does not, however, change the fact that the federal courts have repeatedly held that even Holocaust-based claims are subject to the applicable statutes of limitations. *See*

Iwanowa v. Ford Motor Co., 67 F. Supp. 2d at 466-68 (dismissing WWII-era forced labor claims as untimely); *Fishel v. BASF Group*, Civ. No. 4-96-Civ-10449, 1998 U.S. Dist. LEXIS 21230, *26-33 (S.D. Iowa, Mar. 11, 1998) (same); *Sampson v. Fed. Rep. of Germany*, 975 F. Supp. 1108, 1122-23 (N.D. Ill. 1997), *aff'd*, 250 F. 3d 1145 (7th Cir. 2001) (holding claim seeking compensation for illegal imprisonment by Nazi Germany barred by statute of limitations); *Handel v. Artukovic*, 601 F. Supp. 1421, 1432-36 (C.D. Cal. 1985) (holding claim against Nazi puppet-state-official based on violation of international law barred by statute of limitations).

Although plaintiffs denominate their claims variously as conversion (Count I), unjust enrichment (Count II), breach of fiduciary and special duties imposed on common carriers (Count III), false imprisonment (Count IV), torture (Count V), assault and battery (Count VI), wrongful death (Count VII), survival (Count VIII), intentional infliction of emotional distress (Count IX), negligent infliction of emotional distress (Count X), recklessness (Count XI), negligence (Count XII), conspiracy (Count XIII), aiding and abetting (Count XIV), restitution (Count XV), international law violations (Count XVI), Alien Tort Claims Act violations (Count XVII), Accounting (Count XVIII), and Declaratory Judgment and Injunctive Relief (Count XIX) what they all have in common are that they are common law claims and accrue when the acts that are alleged to give rise to them occurred and caused injury. *Johnson v. Holder*, 377 F. App'x 31 (D.C. Cir. 2010) (“[A] cause of action accrues either when a readily discoverable injury occurs or, if an injury is not readily discoverable, when the plaintiff should have discovered it.”) (quoting from *Commc'ns Vending Corp. of Ariz., Inc. v. FCC.*, 365 F.3d 1064, 1074 (D.C. Cir. 2004)); *Tolbert v. Nat'l Harmony Mem'l Park*, 520 F. Supp. 2d 209, 212 (D.D.C. 2007). Since plaintiffs' claims are all based on events and acts that affected them directly (*e.g.*, being compelled to ride in railway cars, under unspeakable conditions, after their

personal property was taken from them), there can be no issue but that they were immediately on notice that they had been injured, thereby triggering both their right to sue and the commencement of the statutory period for asserting their claims.

On the face of the Complaint, plaintiffs' claims thus accrued no later than 1945, when the Hungarian Holocaust ended and transportation by rail to concentration camps ceased. *See, e.g.*, paragraph 90 of the Complaint, in which plaintiffs allege that the Holocaust "began in 1933 when the Nazi Party rose to power in Germany, and ended in 1945 with Germany's defeat by the Allied powers." *See also* paragraphs 93-123, in which plaintiffs set forth the details of what they alleged transpired between 1941 and 1945, which constitutes the gravamen of their Complaint. Although the Complaint alleges that after the end of the War the defendants failed to provide the plaintiffs with appropriate redress, the wrongful acts and injuries for which they seek compensation, according to their own allegations, all took place before the end of the War. *Id.* at 93-123.

B. The Applicable Statutes of Limitations for Plaintiffs' "State" Common Law Claims Have Run

Since plaintiffs invoke the diversity jurisdiction of this Court, the procedural law of the District of Columbia governs all of plaintiffs' claims that are not based on federal law. "[T]he D.C. choice-of-law rules . . . treat statutes of limitations as procedural, and therefore almost always mandate application of the District's own statute of limitations." *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F. 3d 1454, 1458 (D.C. Cir. 1995).

Addressing plaintiffs' non-federal claims Count by Count, the applicable District of Columbia statutes of limitations range from one to three years. Count I (conversion) has a 3 year limitations period. *Forte v. Goldstein*, 461 A.2d 469, 472 (D.C. 1983) ("The statute of limitations governing an action for conversion is three years."). Count II (unjust enrichment) has

a 3 year limitations period. *Fred Ezra Co. v. Psychiatric Inst. of Wash., D.C.*, 687 A.2d 587, 589, fns. 1-2 (D.C. 1996) (noting that the parties agreed that the applicable statute of limitation is three years pursuant to D.C. Code §12-301). Count III (breach of fiduciary duty) has a 3 year limitations period. *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1122 (D.C. Cir. 1991) (holding that the statute of limitation for breach of fiduciary duty is three years). Count IV (false imprisonment) has a 1 year limitations period. *Curtis v. Lanier*, 535 F. Supp. 2d 89, 94 (D.D.C. 2008) (“D.C. Code § 12-301(4) provides a one year statute of limitations for claims of . . . false imprisonment.”). Count VI (assault and battery) has a 1 year limitations period. *Hunter v. Dist. of Columbia*, 943 F.2d 69, 72 (D.C. Cir. 1991) (holding that plaintiff’s claim for assault and battery is “clearly barred by the one-year statute of limitations in § 12-301(4)”). Count VII (wrongful death) has a 1 year limitations period. *Flemmings v. Dist. of Columbia*, 719 A.2d 963, 964 (D.C. 1998) (citing D.C. Code § 16-2702). Count VIII (survival) has a 3 year limitations period. *Melara v. China N. Indus. Corp.*, 658 F. Supp. 2d 178, 180 (D.D.C. 2009) (“The statute of limitations on other tort claims that have accrued to the ‘legal representative of the deceased,’ D.C. Code § 12-101, is three years.”). Counts IX and X (intentional and negligent infliction of emotional distress) have a 1 year limitations period. *Rendall-Speranza v. Nassim*, 107 F.3d 913, 920 (D.C. Cir. 1997) (Because D.C. Code § 12-301 does not specifically mention either negligent or intentional infliction of emotional distress, these two claims are ordinarily subject to the three-year limitations period of D.C. Code § 12-301(8). “However, a claim for emotional distress that is intertwined with any of the causes of action for which a period of limitation is specifically provided . . . is subject to the limitation period for the intertwined claim”) (internal citations and quotations omitted). Count XI (recklessness) is not a cause of action but instead lies on the “continuum that runs from simple negligence through gross negligence to intentional

misconduct.” *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668 (D.C. Cir. 1996). Since the closest cause of action to recklessness is gross negligence, which has a 3 year limitations period (*see Sykes v. U.S. Att’y for the Dist. of Columbia*, No. 10-1393, 2011 WL 899386, at *2 (D.D.C. Mar. 16, 2011)), that limitations period should be borrowed and applied to the cause of action for recklessness. *In re Consol. Rail Corp.*, 867 F. Supp. 25, n. 38 (D.D.C. 1994) (holding that the court would “follow the well established rule and, accordingly, borrow the most analogous District of Columbia statute of limitations”). Count XII (negligence) has a 3 year limitations period. *Burgess v. Pelkey*, 738 A.2d 783, 786 (D.C. 1999) (negligence claim barred by the three-year statute of limitations, D.C. Code § 12-301(3)). Count XIII (conspiracy) has a 3 year limitations period. *Curtis v. Lanier*, 535 F. Supp. 2d at 95 (“Conspiracy does not have its own statute of limitations under District of Columbia law.” Consequently, D.C. Code § 12-301(8) applies.); *but see Nader v. Democratic Nat’l Comm.*, 567 F.3d 692, 697 (D.C. Cir. 2009) (civil conspiracy is not an independent tort and it “incorporates not only every substantiative element of the underlying tort, but also its statute of limitations”). Count XIV (aiding and abetting) has a 3 year limitations period. *Hancock v. Homeq Servicing Corp.*, No. 05-0307(PLF), 2007 WL 1238746, at *9 (D.D.C. Apr. 27, 2007) (aiding and abetting claims have the same statute of limitations as the underlying tort, in this instance conversion). Count XV (restitution) is not a cause of action but a form of compensation. *Nwaoha v. Onyeoziri*, No. 04-1799, 2006 WL 3361540, at *4 (D.D.C. Nov. 20, 2006) (“[R]estitution [is] not [a] separate civil cause[] of action under District of Columbia law. Restitution is a form of compensation.”) Count XVIII (accounting) has a 3 year limitations period. *Nat’l Realty Trust v. Neelon Mgmt. Co., Inc.*, No. 1123-72, 1973 WL 398, at *3 (D.D.C. July 6, 1973) (holding that D.C. Code § 12-301(8) applies). Count XIX (declaratory judgment and injunctive relief) has the same statute of

limitations as applied to the related causes of action at law. *Saffron v. Dep't of the Navy*, 561 F.2d 938, 942-43 (D.C. Cir. 1977) (holding that statute of limitations applied to equitable causes of action when redress was sought in both law and at equity). Since these claims were not asserted until 2010, they have all been time-barred for at least 60 years.

C. The Time Period for Asserting Plaintiffs' "Federal" Claims Has Also Long-Since Passed

Count XVI, which is denominated by plaintiffs as "International Law Violations" and Count XVII, which plaintiffs describe as "violations of the law of nations and actionable torts under the Alien Tort Claims Act" (Complaint, ¶209) purport to be based on federal law.¹⁰ Since neither has its own statute of limitations, federal courts look to the most closely analogous cause of action to determine what statute of limitations to apply. *See Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 118 (D.D.C. 2003) ("The ATCA lacks a specific statute of limitations. In such a situation, courts apply the statute of limitations of a closely analogous federal statute, if federal law 'provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'") (quoting *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989)).

Count V (torture) is brought under the TVPA (*see* Complaint ¶ 87), which has a 10 year limitations period. 28 U.S.C. §1350 Sec. 2 (c). Since the enactment of the TVPA, federal courts have also applied this 10 year statute of limitations to ATS claims. *Islamic Salvation Front*, 257 F. 2d at 118 (and cases collected therein). As to plaintiffs' claims for violation of "customary international law", federal courts have held that "when a cause of action under federal civil law

¹⁰ Although RCH is not presently moving to dismiss these claims either for lack of subject matter jurisdiction or failure to state a claim for relief, we note that the treaties on which plaintiffs purport to rely are either not self-executing or not ratified by the United States, and thus do not give rise to a private right of action (*see Tele-Oren v. Libyan Arab Rep.*, 726 F. 2d 774 (D.C. Cir. 1984)). Moreover the Complaint appears to assert the ATS claim on behalf of all the plaintiffs, including those who are citizens of the United States, despite the fact that the Act, by its terms, provides relief only for aliens.

does not have a directly applicable limitations period, the Supreme Court has instructed that the court should not assume that no time limit for the cause of action was intended. Instead, the court must ‘borrow’ the most suitable limitations period from some other source.” *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001) (holding that the most analogous source for a limitations period was the TVPA).

Consequently, the statutes of limitations on plaintiffs’ “federal-based” claims expired at least 55 years ago.

D. Plaintiffs Have a Heavy Burden Tolling the Statutes of Limitations

Statutes of limitations fulfill important societal functions, and a party seeking to extend the limitations period through tolling has a heavy burden. Time limitations “‘are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. They protect important social interests in certainty, accuracy, and repose.’” *Anderson v. Local 201 Reinforcing Rodmen*, 886 F. Supp. 94, 97 (D.D.C. 1995) (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990)). They “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” *United States v. Kubrick*, 444 U.S. 111, 117. (1979). The underlying theory behind these statutes of limitations is that even if one has a just claim “it is unjust to fail to put the adversary on notice to defend within a specified period of time and that ‘the right to be free of stale claims in time comes to prevail over the right to prosecute them.’” *Id.* (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)). Statutes of limitations are therefore “not to be disregarded by courts out of a vague sympathy for particular litigants.” *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002).

E. Plaintiffs Have Failed to Establish a Ground for Tolling

Since RCH has shown that the applicable limitation periods have lapsed, plaintiffs have the burden to prove that the statute was tolled. *See Saltz v. Lehman*, 672 F.2d 207, 209 (D.C. Cir. 1982) (holding that plaintiff had the burden of pleading and proving reason for tolling); *Gallucci v. Schaffer*, 507 F. Supp. 2d 85, 92 (D.D.C. 2007) (same). Because plaintiffs recognize their statute of limitations problems, they attempt to throw a number of theories against the wall in the hopes that one will salvage their claims, but every one of these theories fails to meet plaintiffs' burden to establish an exception to the statute of limitations.

1. Plaintiffs' Contention That Holocaust Claims Are "Exempt" Is Unsupported

Plaintiffs' first contention is that "No limitations period should be imposed on the prosecution of this action, due to the heinous and unprecedented quality of the wrongdoing giving rise to this action, and for the same reasons that no limitations period is imposed on criminal prosecutions for the violations of international law, war crimes and crimes against humanity alleged herein." (Complaint, ¶156.)

There are at least three fundamental flaws to plaintiffs' contention. First, plaintiffs' claims, though unquestionably awful, are not unique. Other plaintiffs have also asserted Holocaust-based claims, in which they, too, set forth great suffering, and courts have dismissed those claims as time-barred. *See* the cases collected at page 25, above. Second, Congress imposed a ten year statute of limitations when it enacted the TVPA, which provides redress for similarly horrible instances of murder and torture, including the intentional infliction or threat of infliction of severe physical pain and suffering and the application of mind altering drugs "calculated to disrupt profoundly the senses or personality". So both the courts and Congress have rejected the idea that there is any class of civil actions that is exempt from the statute of limitations. Third, the fact that certain heinous crimes may not be covered by criminal statutes of

limitations does not mean that a similar exemption should or does apply to civil actions based on those crimes. Thus while murder is exempt in the District of Columbia from any limitation on prosecution, its civil analogue, a wrongful death claim, is subject to a one year statute of limitations.

2. Plaintiffs Allege Continuing Injuries, Not Continuing Violations

Plaintiffs next seek to rely on the “continuing wrong” doctrine. (*See* Complaint, ¶¶ 157-158.) However, they appear to confuse “continuing injuries” with “continuing violations”. The Complaint graphically describes the horrors that the Jewish community, including the plaintiffs, suffered during the Hungarian Holocaust. But by plaintiffs’ own admission, the Hungarian Holocaust ended in 1945. (Complaint, ¶90.) What the plaintiffs fail to allege, and what is required for them to establish “continuing violation”, is (i) that those violations continued for decades after the War ended (*i.e.*, until between 1 and 10 years before this action was commenced, depending on the claims), and (ii) that the plaintiffs did not know and could not reasonably have known that they had been injured when they were transported to death camps and their property was stolen, or who were the alleged perpetrators of those wrongs.

This miscasting of the “continuing violation” theory has been thoroughly discredited in reparations cases such as *In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027, 1071-72 (N.D. Ill. 2004) (“All of the other ills and consequences that flowed from this injury, no matter how dreadful, do not constitute new or continuing claims. They are merely the alleged effects of an injury that occurred over a century ago, and not a continuing series of acts”). It has also been explicitly rejected in conversion cases. *Dubois v. Wash. Mut. Bank*, No. 09-2176, 2010 WL 3463368, at **3-4 (D.D.C. Sept. 3, 2010) (“[P]laintiff’s argument that the defendants’ misconduct and his injuries are continuous to the present day . . . is unavailing because the District of Columbia employs the discovery rule.”); *see also Forte*, 461 A.2d at 472

(holding that the periodic renewal of a CD of the converted funds did not toll the running of the statute of limitation because the cause of action accrued when the conversion occurred); *Nelson v. Sotheby's Inc.*, 115 F. Supp. 2d, 925, 929 (N.D. Ill. 2000). (“The basis of this argument is that every day Sotheby’s refused to return the painting was an additional act of conversion. This is not the law; there is only one violation or act of conversion alleged here, not a recurring set of wrongs. Moreover, such a contortion of the continuing violation doctrine would never provide repose in these types of cases.”). As *Nelson* recognizes, plaintiffs’ mistaken theory that the “ongoing failure to return the plaintiffs’ assets” without compensation constitutes a continuing violation (Complaint ¶157) would moot statutes of limitations in every case alleging bailment or conversion, because the limitations period would never end if the aggrieved party never received the goods at issue.

A review of cases where a “continuing violation” *has* been found shows how far plaintiffs’ claims fall short of satisfying that test. “A continuing violation is ‘one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period.’” *Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997) (quoting *Dasgupta v. Univ. of Wisc. Bd. of Regents*, 121 F. 3d 1138, 1139 (7th Cir. 1997)); *Thomas v. Vilsack*, 718 F. Supp. 2d 106, 117-18 (D.D.C. 2010) (same). It is a doctrine associated primarily with Title VII employment discrimination cases, where the statute of limitations is so short that an employee may not realize in time that a seemingly isolated incident was actually part of a pattern of discrimination. In fact, in *Rosner v. U.S.*, a district court noted this distinction, holding that the “continuing violation” doctrine “is usually invoked in the context of Title VII or employment discrimination actions where the applicable limitations period is a mere 300 days,” and declining

to apply it to a claim by Hungarian Jews that their property had been illegally seized during World War II. 231 F. Supp. 2d 1202, 1207 (S.D. Fla. 2002).

“The circumstances meriting application of the continuing violation exception must be compelling.” *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000). Plaintiffs’ claims do not meet this stringent standard. In the first place, unlike the short statute of limitations of Title VII, the applicable limitations periods for most of plaintiffs’ claims range between 3 and 10 years, more than ample time for a reasonably prudent person to have determined he or she had a claim and to have commenced litigation to assert his or her rights – particularly when the claims are based on conduct that is as egregious and has such an immediate impact on the victims as the acts and events alleged in the Complaint. No “reasonably prudent person” could have failed to have perceived that he or she was the victim of unlawful and actionable conduct under those extreme circumstances.

While plaintiffs may need access to documents to quantify their damages, knowledge of the amount of a claim is not a prerequisite to asserting a claim. *See Beard v. Edmondson & Gallagher*, 790 A.2d 541, 546 (D.C. 2002) (plaintiff cannot “defer legal action indefinitely if she knows or should know that she may have suffered injury and that the defendant may have caused her harm Nor need all damages be sustained, or even identified for the cause of action to accrue; any appreciable and actual harm flowing from the defendant’s conduct is sufficient”) (internal citations and quotations omitted); *see also In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d at 1071-72 (Descendants of slaves are not permitted to toll the statute of limitations until they are able to ascertain the amount of their damages).

In short, the injuries that plaintiffs assert flowed from the events in Hungary of 1944 and 1945, “no matter how dreadful, do not constitute new or continuing claims. They are merely the

alleged effects of an injury that occurred over [half] a century ago, and not a continuing series of acts.” *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 776 (continuing consequences of slavery do not constitute continuing violations); *accord Oppenheim v. Campbell*, 571 F.2d 660, 662 (D.C. Cir. 1978) (without any continuing unlawful actions by defendant, plaintiff’s claim accrued when he was “first harmed”).

3. Plaintiffs’ Claims Are Not Subject to Equitable Tolling

Plaintiffs next allege that the statute of limitations should be equitably tolled because (i) “plaintiffs were kept ignorant of vital information necessary to pursue their claims without any fault or lack of due diligence on their part” and (ii) “the Holocaust, World War II, and the subsequent diaspora” constitute extraordinary circumstances. (Complaint, ¶¶ 159-160.)

Equitable tolling requires plaintiffs, regardless of the subject matter of their asserted claims, to exercise reasonable diligence in investigating and bringing their claims. *McPherson v. United States*, 392 F. App’x 938 (3rd Cir. 2010); *Norman v. United States*, 467 F.3d 773, 776 (D.C. Cir. 2006) (holding that equitable tolling is allowed “only in extraordinary and carefully circumscribed circumstances” and requires due diligence by plaintiff); *Battle v. Rubin*, 121 F. Supp. 2d 4, 7-8 (D.D.C. 2000) (“[P]laintiff will not be afforded extra time to file without exercising due diligence, and the plaintiff’s excuse must be more than a garden variety claim of excusable neglect.”) (internal quotation omitted). Plaintiffs’ own allegations in the Complaint establish their failure to satisfy this test. Plaintiffs set forth in detail the injuries suffered by each plaintiff and his or her family during the Hungarian Holocaust. They also recount how shortly after the War they sought to no avail to recover their property. (Complaint ¶¶ 11-81 and 125-131.) Plaintiffs likewise admit that their suffering is a well known aspect of the historical record and even cite at footnotes 1-14 numerous historical studies concerning the Hungarian Holocaust.

Moreover, in ATS claims, “extraordinary circumstances” equitable tolling is typically available only as long as the repressive regime that committed the alleged acts is in power. *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 110 (2009). The Nazis were defeated over 65 years ago, and by Plaintiffs’ own admission, communism in Hungary ended more than twenty years ago. (Complaint ¶132.) Even though the Holocaust was horrific, courts have been dismissing Holocaust-related cases as time-barred for decades as discussed at page 25, above. Other plaintiffs brought Holocaust-based claims in large numbers more than a decade before these plaintiffs commenced the present lawsuit. *See, e.g., In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d at 374-83; *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d at 272-280; *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d at 483-91; *In re Austrian & German Holocaust Litig.*, 250 F.3d at 163-64; *Kelberine v. Societe Internationale*, 363 F.2d at 994-95. There is no excuse for plaintiffs’ delay and lack of diligence. Moreover, as RCH discusses in Point V below, it is plaintiffs who should be equitably estopped from suing RCH, under the doctrine of laches, rather than RCH, who should be equitably estopped from asserting the statute of limitations.

Point V:

PLAINTIFFS’ CLAIMS ARE BARRED BY LACHES

Even if plaintiffs’ action were not barred by the statute of limitations, it still should be dismissed under the equitable doctrine of laches. Laches is “an equitable defense that applies where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 882 (D.C. Cir. 2009). “If only a short period of time elapses between accrual of the claim and suit, the magnitude of prejudice required before suit would be barred is great; if the delay is lengthy, a lesser showing of prejudice is required.” *Gulf Airborne Instruments, Inc. v. Weinberger*, 694 F.

2d 838, 843 (D.C. Cir. 1982). Moreover, the burden is on the plaintiffs to justify waiting over 65 years from the time their claims accrued to commence this action.

RCH addressed in Point IV the excuses that plaintiffs proffered in the Complaint for their extraordinary delay in instituting this action. However, there is another point that RCH submits is dispositive: although the Complaint sheds little light on where most of the plaintiffs resided from the end of the Holocaust until the commencement of this action, where the Complaint does provide information, it shows that at least some of the plaintiffs have lived in “safe havens”, such as Israel, since 1948. Thus it is revealed that “After the State of Israel was proclaimed in 1948, [plaintiff] Tzvi was able to emigrate [to Israel]. He served in the Israel Defense Forces and became a founding member of Moshav Nordiyya east of Netanya, where he lives today.” (Complaint, ¶20.) Similarly plaintiff Magda entered “the newly created State of Israel after its founding in 1948. Magda became an Israeli citizen, married and raised her own family, and now lives in Haifa, Israel.” (Complaint ¶26.) Plaintiff Zehava went to Sweden in 1945, remained there for two years and then was “able to reach Palestine, which became Israel, where Zehava has lived ever since.” (Complaint ¶37.) “After the war, [plaintiff] Moshe and one of his sisters, Sarah, emigrated to Israel, where he settled and raised a family ...” (Complaint ¶81.)

The plaintiffs, who are alleged to have lived in Israel continuously from 1948 to the present, were able, had they chosen to do so, to have brought an action against MÁV any time after 1948, both individually and on behalf of “all others similarly situated”, free from any fear of repression. Israel was a supportive environment where Jews, such as these four plaintiffs, could have received counseling as to their legal rights and would have received encouragement to assert them. Moreover, if they were able to come to the United States to sue RCH in 2010, they could have done so to sue MÁV as early as 1948. Their failure to assert their claims then,

and their decision to defer doing so for over 60 years after emigrating to Israel, was an “unreasonable delay”. And since they instituted this action in a representative capacity and not solely as individual plaintiffs, their delay should be attributable to the putative class.

The prejudice to RCH of this 65-year delay is clear. It has materially decreased the likelihood of RCH finding witnesses with knowledge of the subject matter of the action, as any person who could have been an adult during the time at issue in the Complaint would be at least 85 years old now. In addition, under normal document retention policies in place in Hungary, documents that are 65 or more years old are unlikely to have been retained in the ordinary course of business. (Czöndör Decl. ¶10.) As noted in *NAACP v. NAACP Legal Defense & Educ. Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985), one of the principal prejudices to a defendant that the doctrine of laches is intended to protect against is loss of pertinent evidence.

Although Holocaust victims have suffered greatly, that does not alter the basic facts that (i) Holocaust cases are subject to the doctrine of laches, (ii) other Holocaust victims commenced their actions to recover damages over a decade before these plaintiffs did, and (iii) Holocaust victims have been afforded, pursuant to the Austrian GSF, an opportunity to assert claims, under simplified procedures and a relaxed standard of proof, against Austrian defendants, such as RCH, notwithstanding the bar of laches and the expiration of all applicable statutes of limitations. Under these circumstances, the doctrine of laches should protect RCH against the prejudice caused by plaintiffs’ delay in commencing this action.

Point VI:

THE MEMORANDUM OPINION IN THE CHICAGO HOLOCAUST BANK CASE IS NOT BINDING AND SHOULD NOT BE FOLLOWED

RCH anticipates that plaintiffs will contend that the arguments raised by RCH on its motion to vacate have been rejected by the court in *Holocaust Victims of Bank Theft v. Magyar*

Nemzeti Bank, No. 10-CV-01884 (N.D. Ill.) (Judge Samuel Der-Yeghiayan) (May 18, 2011 Memorandum Opinion) (the “Bank Case”), where A&B represents defendant Erste Group Bank AG (“Erste”). RCH submits that the decision in the Bank Case (the “Memorandum Opinion”) is not binding on, and should not be followed by, this Court.

A. The Two Cases Are Quite Dissimilar Both Factually and Legally

Although both cases relate to the Hungarian Holocaust, the factual allegations and the claims asserted are quite different. Indeed, when the plaintiffs petitioned the Judicial Panel on Multidistrict Litigation (“JPML”) for transfer and consolidation of another Hungarian Holocaust action against MÁV that was pending before the same Chicago court and judge, they conspicuously did not request that the Bank Case be included in the transfer and consolidation. Moreover, when MÁV listed the Bank Case as a “tag-along case”, plaintiffs objected, informing the JPML that: “other than the common historical context, there are no real factual issues in common between the [Bank 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.” The JPML agreed with the plaintiffs, noting “it is questionable whether [the Bank Case] is, in fact, a proper tag-along, as it is brought against different defendants (including various European banks) and involves essentially different factual issues.” (Wessels Decl. Exhs. J, at p. 6 and K, at p. 2.)

The legal issues in the current action also are quite different from those in the Bank Case. Only 3 of the 19 Counts in the Complaint purport to be based on federal law, as opposed to local common law, and plaintiffs’ perception of their relative significance is best illustrated by their placement of the ATS and “international law violations” claims at virtually the end of the Complaint. In marked contrast, the emphasis in the Bank Case is on federal claims.

B. The Memorandum Opinion Did Not Resolve the Issues Raised in RCH's Motion to Dismiss

With regard to the political question defense, the Memorandum Opinion held that it was “premature to address at this juncture whether the Executive Agreements and Treaties cited by Defendants may limit certain Plaintiffs’ claims, since their applicability raises factual issues not properly adjudicated at the motion to dismiss stage of the proceedings.” Similarly, the Memorandum Opinion stated that “it is premature at this juncture to resolve the statute of limitations and laches issues.” In both instances, the Memorandum Opinion expressly held that the Defendants could raise the issues again on a motion for summary judgment. (Wessels Decl. Exh. L.) In neither instance did the Memorandum Opinion identify what facts were purportedly in dispute that caused the court to think it “premature” to address the motions on their merits.

While the Memorandum Opinion did deny the bank defendants’ personal jurisdiction motions outright, it did not identify what “contacts” the defendants had with the forum that caused the court to conclude that they were “extensive continuous and systematic general business contacts that would subject them to general personal jurisdiction.” In any event, personal jurisdiction is dependent on the specific contacts of the movant and, in RCH’s case, as is shown in Point III above, it has no contacts with the United States.

C. The Memorandum Opinion is Neither Binding nor Persuasive

There is no issue preclusion, because RCH was not a party to the Bank Case. *See Franco v. Dist. of Columbia*, 3 A.3d 300, 305 (D.C. 2010) (holding that issue preclusion could not be asserted against a party who was not a party in the previous case). In fact, there is no overlap at all between the parties in the two cases. Further, each of the defendants in the Bank Case has sought reconsideration and/or interlocutory review of the Memorandum Opinion from the Seventh Circuit.

The Court should not follow the Memorandum Opinion because (i) it fails to identify, other than in conclusory terms, the “factual issues” on which the court grounds its holding that the motions are premature, (ii) disregards, without discussion, leading decisions from other circuits, on the ground that they are not “controlling precedents”, and (iii) not only pays no deference to a SOI filed by the United States that urges dismissal on the ground that the pendency of the action impairs the foreign policy of the United States, but does so *sub silentio*: the Memorandum Opinion does not even refer to the fact that a SOI was filed, let alone explain why the court does not defer to the Executive Branch’s views in the field of foreign affairs.

CONCLUSION

For the foregoing reasons, RCH's motion to vacate the entry of default and to dismiss the Complaint should be granted with prejudice.

Dated: June 28, 2011

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSALIE SIMON, et al.,

Plaintiffs,

v.

REPUBLIC OF HUNGARY, et al.,

Defendants.

Civil Action No. 10-01770 (BAH)

Judge Beryl A. Howell

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2011, I will electronically file the foregoing **Memorandum in Support of Motion to Set Aside the Entry of Default and to Dismiss the Complaint** with the Clerk of Court using the CM/ECF system, which will then notify the following counsel of record appearing in the case:

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