

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

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

Rail Cargo Hungaria Zrt. (“RCH”), an indirectly owned subsidiary of the Republic of Austria, hereby moves this Court to vacate the entry of default and to dismiss the first amended complaint (the “Complaint”) against it for the reasons set forth in the accompanying Memorandum of Law and accompanying Declarations, summarized as follows:

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. As set forth in more detail in the accompanying Memorandum of Law and accompanying Declarations, after the default was entered, RCA consulted independent Austrian counsel, who informed RCA of the need to defend this action. RCH then retained Alston & Bird LLP (“A&B”) to represent RCH in this law suit. 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 to the Memorandum of Law 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. Indeed, as set forth in the accompanying Memorandum of Law and accompanying Declarations, the Complaint should be dismissed with prejudice because:

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.

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. 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.

RCH also adopts and joins in the arguments of its co-defendants that this case should be dismissed based on the political question grounds raised by co-defendants, and because the District of Columbia is not an appropriate venue under the doctrine of *forum non conveniens*. Furthermore, although factual issues are not appropriate for resolution on a motion to dismiss, RCH notes that its lack of successorship liability is an additional meritorious defense satisfying the test for vacating an entry of default. 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. As explained in the Memorandum of Law and the accompanying Declarations, RCH did not assume any Holocaust-related liabilities of MÁV. 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.

Moreover, as RCH has noted in its Verified Answer of Rail Cargo Hungaria to First Amended Class Action Complaint, the Court lacks subject matter jurisdiction of all or some of plaintiffs' claims. Although 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, this is because the litigation is at an early stage and Hungarian law will govern most, if not all, of plaintiffs' claims.

#### CONCLUSION

For the foregoing reasons, as more fully discussed in the accompanying Memorandum of Law and Declarations, RCH's motion to vacate the entry of default and to dismiss the Complaint should be granted and the Complaint should be dismissed with prejudice.

Dated: June 28, 2011

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of June, 2011, I will electronically file the foregoing **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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I further certify that on this 28<sup>th</sup> day of June, 2011, I will mail the foregoing **Motion to Set Aside the Entry of Default and to Dismiss the Complaint** to the following counsel of record appearing in the case, via United Parcel Service:

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