

APPENDIX

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APPENDIX A

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**
Argued October 7, 2021 Decided March 8, 2022
[Filed: March 8, 2022]

No. 20-7047

DAVID L. DE CSEPEL, ET AL.,)
APPELLEES)
)
V.)
)
REPUBLIC OF HUNGARY, A FOREIGN STATE,)
ET AL.,)
APPELLANTS)

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-01261)

No. 20-8001

IN RE: REPUBLIC OF HUNGARY, ET AL.,)
PETITIONERS)

Petition and Cross-Petition for Permission to Appeal
Under 28 U.S.C. § 1292(b) from an Interlocutory
Order of the United States District Court for the

District of Columbia
(No. 1:10-cv-01261)

Thaddeus J. Stauber argued the cause for appellants. With him on the briefs was *Sarah Erickson André*.

Alycia Regan Benenati argued the cause for appellees. With her on the brief were *Sheron Korpus* and *David E. Mills*.

Before: TATEL, PILLARD, and JACKSON*, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge TATEL* and *Circuit Judge PILLARD*.

TATEL and PILLARD, *Circuit Judges*: For the third time, we consider a family's decades-long effort to recover a valuable art collection that the World War II-era Hungarian government and its Nazi collaborators seized during their wholesale plunder of Jewish property during the Holocaust. On remand from our second decision, the district court dismissed the family's claims against the Republic of Hungary and permitted the suit to proceed against the remaining defendants, a Hungarian asset management company, a university, and three art museums. The remaining defendants appeal the district court's denial of sovereign immunity, and the parties also seek our discretionary review of additional issues. For the reasons explained below, we exercise that discretion to review several holdings, and we affirm the district court on those that we review.

* Circuit Judge Jackson was a member of the panel at the time the case was argued but did not participate in this opinion.

I.

We described the background of this case in our earlier opinions, *de Csepel v. Republic of Hungary*, 714 F.3d 591, 594–97 (D.C. Cir. 2013) (*de Csepel I*) and *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1097–99 (D.C. Cir. 2017) (*de Csepel II*). For the reader’s convenience, we repeat it virtually in full. Baron Mór Lipót Herzog was a “passionate Jewish art collector in pre-war Hungary” who assembled a collection of more than two thousand paintings, sculptures, and other artworks. Am. Compl. ¶ 37. Known as the “Herzog Collection,” this body of artwork was “one of Europe’s great private collections of art, and the largest in Hungary,” and included works by renowned artists such as El Greco, Velázquez, Renoir, and Monet. *Id.* Following Herzog’s death in 1934 and his wife’s shortly thereafter, their daughter Erzsébet and two sons István and András inherited the collection. *Id.* ¶ 38.

Then came World War II, and Hungary joined the Axis Powers. In March 1944, Adolf Hitler sent German troops into Hungary, and SS Commander Adolf Eichmann entered the country along with the occupying forces and established headquarters at the Majestic Hotel in Budapest. *Id.* ¶¶ 50, 51 59. During this time, Hungarian Jews were subjected to anti-Semitic laws restricting their economic and cultural participation in Hungarian society and deported to German concentration camps. *Id.* ¶¶ 43, 46, 51. As an integral part of its oppression of Hungarian Jews, “[t]he Hungarian government, including the Hungarian state police, authorized, fully supported and carried out a program of wholesale plunder of Jewish property,

stripping anyone ‘of Jewish origin’ of their assets.” *Id.* ¶ 53. Jews “were required to register all of their property and valuables” in excess of a certain value, and the Hungarian government “inventoried the contents of safes and confiscated cash, jewelry, and other valuables belonging to Jews.” *Id.* ¶ 54. “[P]articularly concerned with the retention of artistic treasures belonging to Jews,” the Hungarian government established “a so-called Commission for the Recording and Safeguarding of Impounded Art Objects of Jews . . . and required Hungarian Jews promptly to register all art objects in their possession.” *Id.* ¶ 55. “These art treasures were sequestered and collected centrally by the Commission for Art Objects,” headed by the director of the Hungarian Museum of Fine Arts. *Id.*

In response to widespread looting of Jewish property, the Herzogs “attempted to save their art works from damage and confiscation by hiding the bulk of [them] in the cellar of one of the family’s factories at Budafok.” *Id.* ¶ 57. Despite these efforts, “the Hungarian government and their Nazi[] collaborators discovered the hiding place” and confiscated the artworks. *Id.* ¶ 58. They were “taken directly to Adolf Eichmann’s headquarters at the Majestic Hotel in Budapest for his inspection,” where he “selected many of the best pieces of the Herzog Collection” for display near Gestapo headquarters and for eventual transport to Germany. *Id.* ¶ 59. “The remainder was handed over by the Hungarian government to the Museum of Fine Arts for safekeeping.” *Id.* After seizure of the collection, a pro-Nazi newspaper ran an article in which the director of the Hungarian Museum of Fine Arts boasted

that the “Herzog collection contains treasures the artistic value of which exceeds that of any similar collection in the country. . . . If the state now takes over these treasures, the Museum of Fine Arts will become a collection ranking just behind Madrid.” *Id.* ¶ 58.

“Fearing for their lives, and stripped of their property and livelihoods, the Herzog family was forced to flee Hungary or face extermination.” *Id.* ¶ 62. Erzsébet Herzog (Erzsébet Weiss de Csepel following her marriage) fled Hungary with her children, first reaching Portugal and eventually settling in the United States, where she became a U.S. citizen in 1952. *Id.* István Herzog was nearly sent to Auschwitz but “escaped after his former sister-in-law’s husband . . . arranged for him to be put in a safe house under the protection of the Spanish Embassy.” *Id.* ¶ 41. “He died in 1966, leaving his estate to his two sons, Stephan and Péter Herzog, and his second wife, Mária Bertalanffy.” *Id.* András Herzog was “sent . . . into forced labor in 1942 and he died on the Eastern Front in 1943.” *Id.* ¶ 40. His daughters, Julia Alice Herzog and Angela Maria Herzog, fled to Argentina and eventually settled in Italy. *Id.* ¶¶ 40, 63.

Following the end of World War II, the Herzog family began a seven-decade effort to reclaim the art collection, including through the Hungarian courts. *de Csepel II*, 859 F.3d at 1098. When those efforts proved unsuccessful, three heirs to the collection — Erzsébet’s son David L. de Csepel, along with András’s daughters Julia Alice and Angela Maria Herzog (collectively, “the family”) — filed suit in U.S. district court. The family brought the suit against the Republic of Hungary, three

art museums — the Budapest Museum of Fine Arts, the Hungarian National Gallery, and the Budapest Museum of Applied Arts — and the Budapest University of Technology and Economics. Compl. ¶¶ 9–13. The family alleges that Defendants’ possession or re-possession of at least forty pieces of the Herzog Collection following World War II “constituted one or more express or implied bailment contracts” and that Defendants’ failure to return the artworks upon demand breached the bailment contracts and constituted conversion and unjust enrichment. Am. Compl. ¶¶ 16, 99–123, 139–142. The family seeks imposition of a constructive trust, an accounting, and a declaration of its ownership of the Herzog Collection, all aimed at either recovering the artwork or obtaining over \$100 million in compensation. *Id.* ¶¶ 124–38 & pt. V.

This dispute first arrived in our court in 2013, and the question before us then was whether the suit was barred by the Foreign Sovereign Immunities Act (“FSIA”). *de Csepel I*, 714 F.3d at 597. “That Act authorizes federal jurisdiction over civil actions against foreign states, as relevant here, only in certain cases involving expropriated property or commercial activity, and only to the extent such jurisdiction is not inconsistent with certain international agreements.” *de Csepel II*, 859 F.3d at 1099 (citing 28 U.S.C. §§ 1604–05). We rejected Defendants’ assertion of sovereign immunity, concluding on the pleadings that the family’s claims satisfied the FSIA’s commercial activity exception and that jurisdiction was not inconsistent with agreements between the United States and Hungary. *de Csepel I*, 714 F.3d at 597–603.

This dispute returned to our court after the district court, following the close of discovery, concluded that, as the evidentiary record had developed, the commercial activity exception did not apply but the action could nonetheless proceed under the FSIA's expropriation exception. *de Csepel II*, 859 F.3d at 1099. We affirmed the district court's conclusion that the expropriation exception applied to "twenty-five or so artworks taken by Hungary during the Holocaust and never returned." *Id.* at 1103. But we remanded for the district court to consider whether the expropriation exception applies to nineteen artworks that were temporarily returned to members of the Herzog family. *Id.* at 1103–04. We instructed the district court to (1) dismiss the Republic of Hungary because it enjoys immunity under the FSIA and (2) "grant the Herzog family leave to amend their complaint in light of the Holocaust Expropriated Art Recovery Act" of 2016 ("HEAR Act"). *Id.* at 1107, 1110.

Back in the district court, the family filed an amended complaint that referenced the HEAR Act and added a new defendant, Hungarian National Asset Management Inc. ("MNV"), which exercises ownership rights over and manages certain Hungarian assets. Am. Compl. ¶¶ 3, 14, 87–98. The district court dismissed the Republic of Hungary in accordance with our directive, and rejected Defendants' arguments that MNV is not a proper party to this suit and that this action may not proceed against the remaining defendants in Hungary's absence. *de Csepel v. Republic of Hungary*, No. 10-cv-01261, 2020 WL 2343405, at *5–6, 10, 17, 33 (D.D.C. May 11, 2020) (*Remand II*). The court retained jurisdiction over five of the nineteen

artworks that were temporarily returned to the Herzog family, holding that the FSIA's expropriation exception applied to these pieces. *Id.* at *19, 35.

Defendants now appeal, seeking dismissal of the family's suit in its entirety. They argue that MNV is shielded by Hungary's sovereign immunity, that the district court violated this court's mandate in *de Csepel II* by allowing amendment of the complaint to add Defendant MNV, that Federal Rule of Civil Procedure 19 bars this action from continuing against the remaining defendants, that the principle of prudential exhaustion requires dismissal of this action, and that the district court lacks jurisdiction regarding the five artworks that were temporarily returned to the family. The family defends the district court's decision but asks that, should we review whether the court properly exercised jurisdiction over the five artworks, we also consider whether the district court erred in dismissing claims to twelve of the other fourteen artworks for lack of jurisdiction.

We have appellate jurisdiction to consider whether MNV is immune from suit under the FSIA. *de Csepel II*, 859 F.3d at 1099 ("It is . . . well settled that denial of a motion to dismiss on the ground of sovereign immunity is 'final' by application of the collateral order doctrine and 'therefore subject to interlocutory review.'" (citation omitted)). Because the district court certified its order for immediate appellate review, we also have discretion to consider Defendants' remaining arguments, and we explain below the extent to which we exercise that discretion and our corresponding dispositions. *See* 28 U.S.C. 1292(b) (permitting an

appellate court to, “in its discretion,” consider an interlocutory appeal where the district judge certifies that the “order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation”); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986) (holding that, where a district court certifies an issue for appeal, the court of appeals “must decide *all* questions of law necessary to the proper disposition of [the] appeal”).

II.

The family’s amended complaint added MNV, a state-owned company that exercises Hungary’s ownership rights over certain governmental assets, including the artworks at issue in this case. Am. Compl. ¶¶ 14, 36. Defendants argue that MNV is entitled to sovereign immunity and that the district court violated this court’s mandate in *de Csepel II* by permitting the family to add MNV to its amended complaint.

The FSIA provides that a foreign state, including any political subdivision, agency, or instrumentality thereof, “shall be immune from the jurisdiction of the courts of the United States” subject to certain exceptions. 28 U.S.C. § 1604; *see id.* § 1603(a). Under the expropriation exception, a foreign sovereign loses its immunity if “rights in property taken in violation of international law are in issue,” and “there is an adequate commercial nexus between the United States and the defendants.” *de Csepel II*, 859 F.3d at 1101 (quoting 28 U.S.C. § 1605(a)(3)). The commercial-

activity nexus requirement is met if (1) the property in issue “is present in the United States in connection with a commercial activity carried on in the United States by the foreign state” or (2) that property “is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.” 28 U.S.C. § 1605(a)(3). As we explained in *de Csepel II*, “[a] *foreign state* loses its immunity if the claim against it satisfies the exception by way of the first clause of the commercial-activity nexus requirement; by contrast, an *agency or instrumentality* loses its immunity if the claim against it satisfies the exception by way of the second clause.” *de Csepel II*, 859 F.3d at 1107 (emphasis added); *Simon v. Republic of Hungary*, 812 F.3d 127, 146 (D.C. Cir. 2016) (holding that the first clause applies to claims against the foreign state itself, whereas the second clause applies to claims against an agency or instrumentality of the foreign state).

The Herzog Collection is located outside the United States, so the family’s claims fall within the expropriation exception only if the Collection is owned or operated by an “agency or instrumentality” of Hungary. *See de Csepel II*, 859 F.3d at 1107 (describing the application of the expropriation exception to an “agency or instrumentality” versus the “foreign state” itself). Defendants do not contest that they are “engaged in a commercial activity in the United States.” *See de Csepel II*, 859 F.3d at 1104. Thus, whether the family may invoke this exception to establish federal jurisdiction over MNV turns on whether MNV is an agency or instrumentality of

Hungary or, rather, the foreign state itself. The family argues that MNV is an agency or instrumentality of Hungary, as evidenced by MNV's commercial functions analogous to those performed by private entities. Defendants argue that MNV is "a 'Political Organ' of the Hungarian State" and, as such, constitutes the foreign state itself. Appellants' Br. 18.

Because the family asserts jurisdiction under the FSIA and Defendants assert the jurisdictional defense of immunity, Defendants bear the burden of proving that the family's allegations do not bring this case within a statutory exception to immunity. *Belize Social Development Ltd. v. Government of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015). And because Defendants "challenge[] the factual basis of the court's jurisdiction, . . . the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Phoenix Consulting Inc. v. Republic on Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). Our review is de novo. *de Csepel II*, 859 F.3d at 1099.

To determine whether MNV is an agency or instrumentality of Hungary or, rather, Hungary itself, we consider whether its "core functions . . . are governmental or commercial." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994). If MNV's core functions are "commercial, the entity is an agency or instrumentality;" if MNV's core functions are "governmental, it is considered the foreign state itself." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003).

Applying this “core functions” test, we have held that Bolivia’s Air Force and Iran’s Ministry of Foreign Affairs are the foreign states themselves rather than agencies or instrumentalities. *Transaero*, 30 F.3d at 153 (Bolivia’s Air Force); *Roeder*, 333 F.3d at 234 (Iran’s Ministry of Foreign Affairs). As we have explained, “[t]he conduct of foreign affairs is an important and indispensable governmental function,” *Roeder*, 333 F.3d at 234–35 (internal quotation marks omitted), and “[t]he powers to declare and wage war are among the necessary concomitants of sovereignty,” *Transaero*, 30 F.3d at 153 (internal quotation marks omitted). Such entities, therefore, “clearly” fall on the “governmental side.” *Roeder*, 333 F.3d at 234.

Although our court has not previously held an entity to be an agency or instrumentality under the core functions test, our colleagues on the district court have held that a South Korean cultural foundation and a Russian library and military archive are state agencies or instrumentalities. See *Smith v. Overseas Korean Cultural Heritage Foundation*, 279 F. Supp. 3d 293, 297 (D.D.C. 2018); *Agudas Chasidei Chabad of United States v. Russian Federation*, 729 F. Supp. 2d 141, 147 (D.D.C. 2010). As the district court has explained, the tasks performed by these entities — the construction and operation of a museum and the reproduction and sale of books and manuscripts — are commercial actions in which private parties regularly engage. *Smith*, 279 F. Supp. 3d at 297 (“building and operating a museum . . . is commercial in nature”); *Agudas*, 729 F. Supp. 2d at 148 (reproducing, selling, and distributing books and manuscripts are “commercial activit[ies]”).

Whether MNV's core functions are governmental or commercial is less clear. Under Hungarian law, MNV exercises the "ownership rights and obligations belonging to the State over state assets entrusted to it." Hungarian Act CVI of 2007 on State Assets ("State Property Act") § 3(1), Joint Appendix (J.A.) 2975. It "prepare[s] and/or execute[s] the decisions of Parliament, the Government and the minister relating to state assets," "keep[s] records on state assets," "inspect[s] the operations involving state assets of the persons, organisations or other users that are in a contractual relationship with [MNV]," and "oversee[s] the fulfilment of obligations set out in the sales contracts." State Property Act § 17(1), J.A. 2977. Unlike entities that conduct foreign affairs or military operations, MNV performs property management functions that private entities also perform. See *Republic of Argentina v. Weltover Inc.*, 504 U.S. 607, 614 (1992) ("[T]he foreign sovereign's actions are commercial within the meaning of the FSIA" when they "are the *type* of actions by which a private party engages in trade and traffic or commerce." (internal quotation marks omitted)). By contrast, a sovereign cannot function without property, and ownership of certain types of property, like public lands, is uniquely governmental. See *id.* (A foreign government's activities are "sovereign" rather than "commercial" when they are activities that "cannot be exercised by a private party." (internal quotation marks omitted)). Given the myriad types of property that can be held privately or as state assets, we cannot conclude that the function of holding and managing property, in and of itself, is "so closely bound up with the structure of the state that [it] must in all cases be considered" a

governmental rather than commercial function. *Transaero*, 30 F.3d at 153. Instead, whether the management of state property is governmental or commercial depends on the type of property at issue.

MNV manages state-owned companies, “movable propert[y],” and real property. Declaration of Dr. Bernadette Somody 5–6, *de Csepel v. Hungary*, No. 10-cv-01261 (D.D.C. Mar. 23, 2018), ECF No. 153-1, J.A. 3234–35. It exercises ownership rights over about 450 companies, including “a major Hungarian energy group,” “the largest gambling service provider in Hungary,” and a “waste management” holding company. *Id.* MNV also manages almost 100,000 state-owned movable properties, including “road vehicles,” “musical instruments,” and “works of art.” *Id.* at 6, J.A. 3235. As for its management of real property, MNV’s “main duty . . . is to provide real estate for the performance of state functions and for meeting public demand.” *Id.* There is nothing inherently sovereign about managing energy, gambling, or waste. Nor are the acts of maintaining and lending road vehicles, musical instruments, or art pieces governmental in nature, even when these items belong to a sovereign. Indeed, our own district court has held that the act of lending art pieces is commercial, noting that “[l]oans between and among museums (both public and private) occur around the world regularly.” *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005). Finally, although providing real estate for state functions appears governmental, providing real estate to “meet[] public demand” is a function routinely performed by private real estate developers. MNV’s core functions, then, are predominantly commercial

rather than governmental. *See Transaero*, 30 F.3d at 151 (The question is “whether the core functions of the foreign entity are predominantly governmental or commercial.”).

Defendants point out that Hungary’s State Property Act provides that “[t]he tasks conferred upon MNV . . . [are] government functions.” Appellants’ Br. 19 (quoting State Property Act § 17(2), J.A. 2977). Although “MNV may engage in certain activities that might be considered ‘commercial’ in nature,” Defendants argue, MNV does so “within the framework of government functions,” as specified by the State Property Act. *Id.* at 19–20 (quoting State Property Act § 17(1)(h), J.A. 2977). But if simply labeling MNV’s activities as “governmental” were sufficient under the core functions test, the test would be highly manipulable; any foreign sovereign wishing to insulate an agency or instrumentality from suit could simply declare that the entity’s functions are “government functions.”

Defendants analogize MNV to the Polish Ministry of Treasury, which the Second Circuit held in *Garb v. Republic of Poland* constituted the Polish state itself rather than an agency or instrumentality of Poland. 440 F.3d 579, 598 (2d Cir. 2006). Defendants’ comparison is unpersuasive. *Garb* held that the Ministry of Treasury’s “core function — to hold and administer the property of the Polish state — [was] indisputably governmental.” *Id.* at 594. Beyond this statement, *Garb* neither indicated what types of property the Ministry managed nor explained why the Ministry’s management of property was governmental

in nature. As noted above, holding and administering property is not *per se* governmental due to the myriad property types that private and public entities alike can hold and manage. Without any indication of the type of property that the Polish Ministry administered, we cannot determine whether that entity is comparable to MNV.

Because MNV's management of companies, movable property, and real property is overwhelmingly commercial in nature, we conclude that MNV is an agency or instrumentality of Hungary rather than the foreign state itself. As such, MNV falls within the FSIA's expropriation exception.

Having concluded that the district court properly exercised jurisdiction over MNV, we turn to Defendants' argument that, by permitting the family to add MNV to its amended complaint, the district court violated our directive in *de Csepel II* to "grant the Herzog family leave to amend their complaint in light of the Holocaust Expropriated Art Recovery Act." *de Csepel II*, 859 F.3d at 1110. Under the law-of-the-case doctrine, courts may not revisit issues already decided "explicitly or by necessary implication" in the same case. *Independent Petroleum Association of America v. Babbitt*, 235 F.3d 588, 597 (D.C. Cir. 2001) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1394 (D.C. Cir. 1996) (en banc)). But, as the district court observed, the issue whether the family could add MNV to the amended complaint was not before us in *de Csepel II*, nor was it decided by necessary implication. *Remand II*, 2020 WL 2343405, at *6. Our decision to allow the family to amend its complaint in one respect did not

preclude the family from amending it in other respects. *Cf. United States v. Kennedy*, 682 F.3d 244, 253–54 (3d Cir. 2012) (holding that where the court of appeals “qualif[ied its] mandate with the term ‘only,’” the district court “ventured beyond the scope of [the] mandate” by considering extraneous issues). Accordingly, the family’s addition of MNV in its amended complaint did not contravene this court’s mandate in *de Csepel II*. As the district court concluded, MNV is a proper party to this suit.

III.

Defendants also challenge the district court’s denial of their Rule 12(b)(7) motion to dismiss for failure to join an indispensable party. *See Remand II*, 2020 WL 2343405, at *12–17 (citing FED. R. CIV. P. 19(a)–(b)). The district court held that even assuming Hungary was a “required” party, it is not indispensable because this suit may proceed “in equity and good conscience” without it. *Id.* “We review the district court’s application of Rule 19(b)’s equity and good conscience test for abuse of discretion, but questions of law that inform a district court’s Rule 19 determination are reviewed *de novo*.” *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 465 (D.C. Cir. 2017) (cleaned up).

We conclude that Hungary qualifies as a required party, but we also affirm the district court’s well-reasoned determination that this action may proceed among the existing parties “in equity and good conscience.” FED. R. CIV. P. 19(b). Hungary’s interests are so aligned with those of the remaining defendants that their participation in the litigation protects Hungary against potential prejudice from the suit

proceeding in its absence. Rule 19 thus does not require that the case be dismissed.

As noted above, we have discretion to review issues beyond the denial of MNV's claim of immunity. We exercise that discretion to consider the district court's Rule 19 determination that this case may proceed in Hungary's absence. This issue involves a controlling question of law because it would require reversal if decided incorrectly. There are no decisions directly on point in our circuit and, because the issue is potentially dispositive of the case, resolving it now could avoid unnecessary burdens of further litigation.

Rule 19 analysis has two steps. We first determine whether an absent party is "required," FED R. CIV. P. 19(a), and, if so, we ask "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." FED R. CIV. P. 19(b).

A party is "required" under Rule 19(a)(1) if it meets either of two conditions:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1).

Hungary's interest in the action fits Rule 19(a)(1)(B)'s general description, as well as the particular risk identified in subclause (B)(i). First, Hungary "claims an interest relating to the subject of the action" because it asserts ownership rights over the disputed artworks and seeks to avoid liability on the family's claims that Hungary unlawfully took them. *See* FED. R. CIV. P. 19(a)(1)(B); Appellants' Br. 34–41. Those interests raise the question whether Hungary is so situated that proceeding in its absence might lead to one of the problems identified in subclause (B)(i) or (ii). Defendants invoke subclause (B)(i), asserting this litigation might "as a practical matter impair or impede [Hungary's] ability to protect the interest[s]" it claims. FED. R. CIV. P. 19(a)(1)(B)(i). Whether Hungary has an interest that might be impaired sounds like but is importantly distinct from a second inquiry, described below, as to whether the remaining parties are positioned to protect Hungary's interests. Rule 19(a) calls for identification of potential prejudice, whereas Rule 19(b) requires weighing of the risk of prejudice with other factors to make an equitable determination whether the case must be dismissed.

We conclude that deciding the tort-based conversion claims in Hungary's absence could impair its ability to protect its asserted interests in the artworks. Generally, under Rule 19 "it is not necessary for all

joint tortfeasors to be named as defendants in a single lawsuit.” *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (per curiam). But Hungary claims a proprietary interest in the same artworks that the family seeks to recover. Because Hungary and the family stake out “opposing, irreconcilable claims to the same” property, resolving this litigation in Hungary’s absence undoubtedly could impede Hungary’s ability to protect its interest in such property. See *Wach v. Byrne, Goldenberg & Hamilton, PLLC*, 910 F. Supp. 2d 162, 169 (D.D.C. 2012) (“[T]he Court easily finds [the absent party] to be a ‘required’ party . . . because Plaintiff and [the absent party] lay opposing, irreconcilable claims to the same portion of the limited settlement proceeds.”); see also *Brown v. Christman*, 126 F.2d 625, 631 n.23 (D.C. Cir. 1942) (“Generally, where the action involves a determination of conflicting interests of beneficiaries in a trust fund, the beneficiaries are held to be necessary parties.”).

The contract-based bailment claims have similar potential to affect Hungary’s interests. The parties contest whether the family’s bailments were with Hungary or with representatives of the Hungarian museums. In either event, Hungary claims ownership of the same artworks that the family seeks to recover. As an absent party, Hungary cannot itself make arguments or present evidence in defense of its ownership claim. Impaired in its ability to protect interests it asserts here, it qualifies as a “required” party for purposes of Rule 19(a).

That raises the question whether the action may “in equity and good conscience” proceed in Hungary’s

absence. FED. R. CIV. P. 19(b). We answer that question based on Rule 19(b)'s four factors:

- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
 - (A) protective provisions in the judgment;
 - (B) shaping the relief; or
 - (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED. R. CIV. P. 19(b). Application of these factors confirms that Hungary is not an indispensable party, so the suit may in equity and good conscience proceed in its absence.

Whether proceeding in Hungary's absence might prejudice Hungary's interests is the core of the parties' Rule 19 dispute. The first Rule 19(b) factor asks whether a party might suffer prejudice not simply from an adverse result, but specifically from the decision being "rendered in [its] absence." The presence of remaining defendants with interests virtually identical to Hungary's obviates any such risk here. Courts recognize that "prejudice to absent parties approaches

the vanishing point” when “the absent and remaining parties’ interests are aligned in all respects,” *American Trucking Ass’n, Inc. v. New York State Thruway Authority*, 795 F.3d 351, 360 (2d Cir. 2015) (internal quotation marks omitted), including in cases in which the absent party is an immune sovereign, *see Gensetix, Inc. v. Board of Regents of University of Texas System*, 966 F.3d 1316, 1326 (Fed. Cir. 2020); *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013). The logic is straightforward: If a party remaining in the case is both capable of and interested in representing the interests of the absent party, the party’s exit or exclusion from the suit exposes it to no additional risk of an adverse decision.

Hungary’s interests are closely aligned with those of the remaining defendants in this litigation, particularly MNV. The allegations and the course of the litigation thus far show that at every stage of the case, and even in related litigation twenty years ago, MNV has made controlling decisions for all defendants, including Hungary. *See Remand II*, 2020 WL 2343405, at *15; Am. Compl. ¶ 36, J.A. 499–500; Deposition of Dr. Zoltán Molnar 27–28, 45–46, *de Csepel v. Hungary*, No. 10-cv-01261 (D.D.C. Mar. 23, 2018), ECF No. 153-24, J.A. 3529–32. Hungary’s State Property Act appears to require that MNV represent Hungary in civil actions involving state property. State Property Act § 17(1)(e); Declaration of Zoltán Novák 51, *de Csepel v. Hungary*, No. 10-cv-01261 (D.D.C. Mar. 23, 2018), ECF No. 148-29, J.A. 2977. MNV is thus “fully able” to “step into [Hungary’s] shoes and protect [Hungary’s] interests.” *Gensetix*, 966 F.3d at 1326. MNV is both “capable of and willing to make [all of

Hungary’s] arguments.” *Alto*, 738 F.3d at 1127 (internal quotation marks omitted).

Defendants assert that Hungary’s interests are distinct insofar as Hungary purports to own the disputed artworks that MNV, the museums, and the university merely possess on its behalf. Appellants’ Br. 48; Reply Br. 17. But Defendants have not identified how that distinction could impair Hungary’s interests. At bottom, both Hungary and the remaining defendants seek the same result: to retain the artwork and avoid any monetary, equitable, or declaratory relief. Defendants thus have “the incentive to make every argument on the merits that the absent [Hungary] would or could make.” *Two Shields v. Wilkinson*, 790 F.3d 791, 799 (8th Cir. 2015) (internal quotation marks omitted).

Defendants nonetheless argue that dismissal is compelled here by *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008). That case was an interpleader action by Merrill Lynch in the face of dueling claims to a brokerage account former President of the Republic of the Philippines Ferdinand Marcos had created with the firm. *Id.* at 857–59. Human rights victims sought to enforce a \$2 billion default judgment against the account, whereas the Philippine government asserted a competing claim that the account comprised Marcos’ unlawful gains from abuse of office that were properly forfeited to the government *ab initio*. *Id.* The sovereign was a “required” party under Rule 19(a), *id.* at 863, so the analysis focused on whether under Rule 19(b) the case could proceed “in equity and good conscience” without it, *id.* at 864. The Court recognized the

importance of a sovereign’s “[c]omity and dignity interests” under international law, especially in suits arising “from events of historical and political significance” for the sovereign. *Id.* at 866. “[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous,” the Court declared, “dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.” *Id.* at 867. That declaration, Defendants assert, spells the end of this case.

Pimentel cannot bear the weight Defendants place on it. *Pimentel* itself reaffirmed that, in assessing the potential for injury, the equitable character of Rule 19(b)’s non-exhaustive list of factors “indicates that the determination whether to proceed will turn upon factors that are case specific.” 553 U.S. at 863–64. Defendants contend that “[b]ecause Hungary (1) is an immune sovereign, (2) has a significant interest in its cultural patrimony, and (3) is a required party, the action *must* be dismissed.” Appellants’ Br. at 45 (emphasis in original). But if the Philippine government’s sovereign interest in the disputed issues were alone dispositive in *Pimentel*, as Defendants assert, the Court would have ended the inquiry there. Instead, it proceeded to weigh each of the Rule 19(b) equitable factors. *Id.* at 865–72.

Importantly, the Court in *Pimentel* examined what, if anything, might protect the Philippines’ interests were the case to proceed in its absence. The key Rule 19(b) factors for that purpose were the first two — potential prejudice, and measures to mitigate it. As to the potential prejudice from proceeding in the

Philippines' absence, the Supreme Court noted that the court of appeals had effectively brushed off any sovereign interest in claims it thought were likely time barred. The Supreme Court deemed that approach impermissible as a matter of law:

[I]t was improper to issue a definitive holding regarding a nonfrivolous, substantive claim made by an absent, required entity that was entitled by its sovereign status to immunity from suit. That privilege is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection.

Id. 868–69. On the second factor — the availability of measures to lessen or avoid the prejudice — the Court determined that there was “no substantial argument” in favor of allowing the “action to proceed,” and noted that “[n]o alternative remedies or forms of relief have been proposed to us or appear to be available.” *Id.* at 870.

Critically, in *Pimentel* no party with interests aligned with the Philippine government's remained in the case to guard against prejudice in its absence. The interests of the remaining defendants — principally the company former President Marcos had created to hold the embezzled funds at issue — were contrary to those of the Philippine government. And even interpleader plaintiff Merrill Lynch had refused an express governmental request to place the money in escrow —

a step that might have mitigated the risk the government faced. *Id.* at 858–59.

The parties’ configuration in this case is very different, and the Rule 19(b) inquiry here comes out the other way. Hungary’s interests are so aligned with those of the remaining defendants that the latter will vigorously protect Hungary’s interests by pressing their own. The district court acknowledged Hungary’s sovereign interests. It spelled out why those interests were not at greater risk in Hungary’s absence. And it identified how relief could be tailored if needed to further reduce any potential prejudice. *Remand II*, 2020 WL 2343405, at *14–17. That is the kind of “case specific” analysis identifying “substantial argument[s]” for allowing the “action to proceed” that *Pimentel* requires. 553 U.S. at 863, 870.

Defendants garner no better support from *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995). There, as in *Pimentel* but unlike here, the interests of the remaining defendants were misaligned with those of the absent sovereign. The Kickapoo Tribe sued the U.S. Secretary of Interior for failing to timely approve a compact it had negotiated with the Governor. *Id.* at 1493–94. At the Secretary’s urging, we dismissed that suit under Rule 19 as unable to proceed in Kansas’s absence.

Just as we acknowledge that Hungary has an interest here, in *Kickapoo* we started from the premise that “the State of Kansas has an interest in the validity of a compact to which it is a party, and this interest would be directly affected by the relief that the Tribe

seeks.” *Id.* at 1495. The problem in *Kickapoo* was that the district court “assumed” that in Kansas’s absence the Governor, who remained a party, “ha[d] the best interests of the State in mind,” so adequately represented Kansas’ interests. *Id.* at 1497. The reality was that the Governor had legally defined interests that diverged from the State’s. Indeed, the Kansas Supreme Court had squarely ruled that, although the Governor could negotiate with the Kickapoo Tribe, he lacked authority to finalize binding compacts on Kansas’s behalf. *Id.* at 1494, 1499. We accordingly held that the district court’s Rule 19(b) analysis, based as it was on “assuming that the Governor could adequately represent the interests of the State in entering the compact[,] was contrary to the controlling state law.” *Id.* at 1498. The mistaken assumption that required reversal in *Kickapoo* is absent here, where Hungarian law confirms that the interests of the government and the remaining defendants are indeed closely aligned.

Finally, Defendants argue that the suit must be dismissed because damages awarded against them would as a practical matter ultimately be paid by Hungary. Even if that prediction is correct, Defendants’ theory runs aground on two shoals.

First, Defendants are not themselves entitled to sovereign immunity. As discussed above, they fulfill commercial functions. *Cf. Transaero*, 30 F.3d at 153 (explaining that entities with commercial core functions are considered agencies or instrumentalities rather than foreign states themselves); *Roeder*, 333 F.3d at 234 (same). Hungarian law treats them as legal entities separate from the Hungarian government, able

to sue and be sued on the same terms as private entities. Somody Decl. at 2, J.A. 3231. As the district court observed, MNV is “not so integral to Hungary’s political structure that it should be considered Hungary’s political subdivision.” *Remand II*, 2020 WL 2343405, at *16 (internal quotation marks omitted), J.A. 4071. Rather, all of the remaining defendants, as agencies or instrumentalities of Hungary, have more limited immunity than the sovereign state itself.

Second, and relatedly, Defendants’ effort to assimilate themselves to Hungary based on their assertion that the government pays their bills contravenes the FSIA. As described above, the expropriation exception has two clauses, separately identifying the circumstances under which a foreign sovereign may be sued and those that would allow suit against a foreign sovereign’s agencies or instrumentalities. 28 U.S.C. 1605(a)(3). The district court explained how that statutory distinction matters here: “If an agency or instrumentality with some budgetary ties to the sovereign could never be sued unless the sovereign itself were also a party, it would be pointless for the FSIA to treat immunity for agencies and instrumentalities differently than for foreign states.” *Remand II*, 2020 WL 2343405, at *17. A “typical government instrumentality” sued under the second clause may, for example, require “appropriations to provide capital or to cover losses,” *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983); *see also*, *e.g.*, *Smith*, 279 F. Supp. 3d at 296–98; *Agudas*, 729 F. Supp. 2d at 146–48, but that prospect does not serve to collapse the distinction the statute reflects.

Contrary to Defendants' assertions, *see* Appellants' Br. 51, the Supreme Court's decision in *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945), respects that distinction. The defendant Secretary of the Navy in that case was the head of a political subdivision of the government — not an agency or instrumentality — so the Court considered a suit against him for payments withheld from the plaintiff, a repeat government contractor, as effectively a suit against the sovereign. The Secretary withheld the disputed payments to recoup unlawfully excessive profits the contractor-plaintiff had received on prior contracts. The plaintiff challenged that withholding as “a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against [the plaintiff's] property.” *Id.* at 373. The Court recognized that a trespass suit against a government official in his individual capacity might not be barred, but that no such case was before it. Rather, the “sole purpose” of the claim against Secretary Forrestal was to force payment “of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt.” *Id.*

This case, by contrast, presents the very category of suit that *Mine Safety* would permit. For the reasons explained above, each of the defendants is an agency or instrumentality, not entitled as was the Secretary of the Navy in *Mine Safety* to partake of the sovereign's immunity. And here, unlike in *Mine Safety*, the allegations that MNV, the museums, and the university are unlawfully withholding the family's artworks do in fact “make out a threatened trespass

against [the family's] property" by MNV, the museums, and the university. *Id.* at 374.

In sum, Hungary's absence from this litigation does not give rise to Rule 19(b) prejudice. Hungary is not likely to suffer because its interests are in complete alignment with those of the remaining defendants. Hungary's sovereign interests must be "accord[ed] proper weight." *Pimentel*, 553 U.S. at 869. But in this case, those interests are not placed at risk due to Hungary's absence. We therefore conclude that this first Rule 19(b) factor cuts in favor of allowing the suit to proceed.

The other Rule 19(b) factors similarly weigh in favor of the suit proceeding. The second factor directs courts to consider ways in which relief might be fashioned to reduce any potential prejudice to the absent or remaining parties. FED. R. CIV. P. 19(b)(2). As the Supreme Court recognized in *Pimentel*, "alternative forms of relief, including the granting of money damages rather than specific performance [and] the use of declaratory judgment," may mitigate prejudice to absent parties, including sovereigns. 553 U.S. at 870. Such mitigation is available here. The district court observed that "limiting plaintiffs' remedies to damages" as necessary could "further reduce[] any prejudice or risk of inconsistent obligations." *Remand II*, 2020 WL 2343405, at *15. We do not prematurely pass on the necessity of any remedial limitation, but merely note that Defendants give no reason to doubt the district court's remedial flexibility.

On the third factor, we conclude that the court could enter "adequate" relief in Hungary's absence. FED. R.

CIV. P. 19(b)(3). Here, adequacy refers not “to satisfaction of [the family’s] claims,” but “to the ‘public stake in settling disputes by wholes, whenever possible.’” *Pimentel*, 553 U.S. at 870 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968)). As explained above, various stages of this litigation have focused on distinct jurisdictional questions relating to the various artworks, but the suit as a whole seeks full resolution of the family’s claims to the relevant artworks. Proceeding with the suit thus promotes “the efficient administration of justice and the avoidance of multiple litigation” in United States courts. *Pimentel*, 553 U.S. at 870 (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 738 (1977)).

Lastly, we consider whether the family would have any opportunity to receive the relief it seeks if this suit were dismissed. FED. R. CIV. P. 19(b)(4). If it could not pursue its claims in a United States court, the family would be remitted to the administrative and judicial processes available in Hungary. We agree with the district court that those efforts likely “would be futile.” *Remand II*, 2020 WL 2343405, at *15. Administrative compensation was not available in Hungary when the family brought this suit, and the Hungarian court that adjudicated the claims of another family member, Martha Nierenberg, “determined that returning the paintings to Nierenberg was made impossible by customs laws protecting cultural patrimony.” *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 170 n.15 (D.D.C. 2016).

We therefore affirm the district court’s denial of the Rule 12(b)(7) motion to dismiss for failure to join a necessary party.

IV.

Defendants further seek our review of the district court’s denial of the Rule 12(b)(6) motion to dismiss for failure to exhaust potential remedies in Hungary, arguing that principles of international comity require prudential exhaustion. In *Simon* and *Philipp*, we held that cases against foreign states under the FSIA are not subject to a prudential exhaustion requirement. *Simon v. Republic of Hungary*, 911 F.3d 1172, 1180–82 (D.C. Cir. 2018); *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 416 (D.C. Cir. 2018). The district court thus correctly determined that, at the time of its decision, “[b]inding Circuit precedent foreclose[d] defendants’ argument that prudential exhaustion bar[red] plaintiffs’ claims.” *Remand II*, 2020 WL 2343405, at *33 (first citing *Simon*, 911 F.3d at 1181; and then citing *Philipp*, 894 F.3d at 415). The Supreme Court has since vacated both of those decisions on other grounds. *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021); *Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021) (per curiam). As a formal matter, that vacatur reopens the issue in this circuit. Because requiring exhaustion would result in the dismissal of the suit, we deem it appropriate to address this issue now. *See* 28 U.S.C. § 1292(b).

We reaffirm our holdings and rationales in *Simon* and *Philipp* that the FSIA does not require prudential exhaustion in suits against foreign states. The FSIA “replac[ed] the old executive-driven, factor-intensive,

loosely common-law-based immunity regime” with a “comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.” *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)). “Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act’s text. Or it must fall.” *Id.* at 141–42. In particular, “[w]hen Congress wanted to require the pursuit of foreign remedies as a predicate to FSIA jurisdiction, it said so explicitly.” *Simon*, 911 F.3d at 1181; *accord Philipp*, 894 F.3d at 415. The terrorism exception, for example, requires a claimant to first “afford[] the foreign state a reasonable opportunity to arbitrate the claim.” 28 U.S.C. § 1605A(a)(2)(A)(iii); *see also id.* § 1350 note § 2(b) (Under the Torture Victim Protection Act, “[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”). The FSIA expropriation exception contains no such exhaustion requirement. *See id.* § 1605(a)(3). It is not our place to add one. We therefore affirm the district court’s denial of the motion to dismiss based on prudential exhaustion.

V.

Both the Defendants and the family also ask us to review now the district court’s determinations asserting or declining jurisdiction over specific artworks. We need not review those fact-bound determinations on this interlocutory appeal. None “involves a controlling question of law as to which there

is substantial ground for difference of opinion” such that immediate appellate review will “materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b).

VI.

For the foregoing reasons, we grant the petition for permission to appeal as to the district court’s determinations that the suit may proceed under Rule 19, that the family may amend its complaint to add MNV as a defendant, and that prudential exhaustion is not required; we deny the petition and conditional cross-petition for permission to appeal as to the district court’s determinations of jurisdiction over individual artworks. We affirm the district court on each of the issues appealed.

So ordered.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

No. 1:10-cv-01261(ESH)

[Filed: May 11, 2020]

DAVID L. de CSEPEL, <i>et al.</i>,)
)
Plaintiffs,)
)
vs.)
)
REPUBLIC OF HUNGARY, <i>et al.</i>,)
)
Defendants.)

MEMORANDUM OPINION

Plaintiffs David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog bring this action to recover artwork they allege is being wrongfully held by the Republic of Hungary, Hungarian National Gallery, Museum of Fine Arts, Museum of Applied Arts, Budapest University of Technology and Economics, and the Hungarian National Asset Management Inc., otherwise known as “MNV” (collectively, “defendants”). Before the Court is defendants’ motion to dismiss. (*See* Mot. to Dismiss, ECF No. 148.)

For the reasons stated herein, the Court will grant defendants' motion in part and deny it in part.

BACKGROUND

I. FACTUAL BACKGROUND¹

“Baron Mór Lipót Herzog was a Jewish Hungarian art collector who amassed a collection of over 2,000 paintings, sculptures, and other pieces of artwork” prior to his death in 1934. *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 148 (D.D.C. 2016). Upon his wife’s death several years later, the collection was divided amongst their three children, Erzsébet (Elizabeth), István and András.² (*See* Am. Compl. ¶ 38, ECF No. 141.)

“During the Holocaust, Hungarian Jews, including the Herzogs, were required to register their art treasuries.” *de Csepel*, 169 F. Supp. 3d at 148. A 1944 decree required Hungarian Jews to register all

¹ The facts relating to this case have been set out in greater detail by this Court in its two prior opinions, *see de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011), and 169 F. Supp. 3d 143 (D.D.C. 2016), as well as by the Court of Appeals in its two opinions, *see* 714 F.3d 591 (D.C. Cir. 2013), and 859 F.3d 1094 (D.C. Cir. 2017). As a result, the Court’s recitation of the facts at this juncture will be brief; additional facts will be recounted as necessary to explain the Court’s decision.

² Plaintiff David de Csepel has been assigned all rights to the works in this action attributable to his grandmother, Elizabeth, and her brother, István. (*See* Am. Compl. ¶¶ 39, 41.) Plaintiffs Angela and Julia Herzog, who now reside in Italy, have full rights to all the works in the action attributable to their father András. (*See id.* ¶ 40.)

valuables in excess of a certain threshold amount. (*See* Am. Compl. ¶ 54.) A subsequent decree “established a so-called Commission for the Recording and Safeguarding of Impounded Art Objects of Jews (the ‘Commission for Art Objects’), and required Hungarian Jews promptly to register all art objects in their possession.” (*Id.* ¶ 55.) This Commission was led by Dénes Csányi, then-Director of the Museum of Fine Arts. (*See id.*)

In an attempt to avoid its confiscation, the Herzog family in 1943 hid much of their collection in the cellar of a family factory in Budafok. (*See id.* ¶ 57.) However, “[d]espite their efforts to prevent the looting of the art, the Hungarian government and their Nazi[] collaborators discovered the hiding place.” (*Id.* ¶ 58.) A 1944 article quoted Csányi as saying that “[t]he Mór Herzog collection contains treasures the artistic value of which exceeds that of any similar collection in the country. . . . If the state now takes over these treasures, the Museum of Fine Arts will become a collection ranking just behind Madrid.” (*Id.*)

The Herzog family scattered, trying to avoid extermination by the Nazis and the Nazi-controlled Hungarian government. In May 1944, Elizabeth and her children fled Hungary, eventually settling in the United States in 1946. (*See id.* ¶ 62.) Elizabeth became a United States citizen on June 23, 1952. (*See id.*) András was sent into forced labor in 1942 and died in 1943, but his wife and children escaped to Italy. (*See id.* ¶¶ 40, 63.) “Hungary attempted to send István Herzog to the infamous Auschwitz death camp[, but h]e escaped after his former sister-in-law’s husband . . .

arranged for him to be put in a safe house under the protection of the Spanish Embassy.” (*Id.* ¶ 41.) He remained in Hungary until his death in 1966. (*See id.*)

In May 1945, German rule in Hungary ended, and a 1947 Peace Treaty between Hungary and the Allies confirmed “that Hungary was to act solely as a custodian or trustee of looted or heirless property [and] under no circumstances could Hungary itself possess any right, title or interest in that property.” (*Id.* ¶ 68.) Nevertheless, while some pieces of the Herzog collection were returned to the siblings or their representatives, many others were not. Moreover, the government sought “substantial fees to cover the cost of recovering the artwork from the countries to which it had been dispersed during the war,” as well as large payments for export licenses to remove paintings from Hungary. (*See id.* ¶ 70.) For example, in lieu of a duty of 40,000 *forints* to repay the cost of repatriating several of András’s pieces from outside the country, the Hungary’s Minister of Finance accepted an artwork entitled “Still Life with Turkey” by Chardin. (*See* Declaration of Irene Scholl-Tatevosyan (“Scholl-Tatevosyan Decl.”) Ex. 5, ECF No. 148-2.) The letter that memorialized that transaction also noted the Herzog siblings’ options should they want to export any of their returned artworks. First, the state had the option to purchase any piece for which its owners requested export permits. (*See id.*) Second, if the state chose not to exercise its option, “40% of the estimated value [of the piece was] payable for the export permit” if Hungary’s National Bank allowed the issuance of a permit at all. (*See id.* (noting some permit requests had been denied).)

Some pieces were returned to the siblings or to their representatives in Hungary but were taken back into governmental custody soon thereafter either as “deposits” with the museums or due to government actions, such as the smuggling prosecution of István’s wife, or payments of tax bills purportedly owed by István or his siblings. (*See* Am. Compl. ¶ 71.) In 1948, the Hungarian police investigated Ilona Kiss, István’s former wife, on the charge of smuggling several artworks out of the country for sale. (*See* Declaration of Jessica Walker (“Walker Decl.”) Ex. G-2, ECF No. 148-15.) According to police reports, Kiss, along with her brother and a third individual, smuggled to Switzerland at least three paintings that had previously belonged to István. (*See id.*) Kiss was indicted in 1949 (*see* Declaration of Irene Tatevosyan (“Tatevosyan Decl.”) Ex. 19, ECF No. 106-3), and in October 1950 fourteen artworks were forfeited and taken into permanent custody by the Museum of Fine Arts as a result of the judgment in that case. (*See* Walker Decl. Ex. G-6.) These works included not only those attributable to István or Kiss, but also several that belonged to András and Elizabeth.

In 1949, Hungary became the Hungarian People’s Republic, and little was known about the Herzog collection until the collapse of Communism in 1989. (*See* Am. Compl. ¶ 74.) However, “[w]ith the opening of Hungary to the West in 1989, the Herzog Heirs started making inquiries and learned that many pieces of the Herzog Collection were being openly exhibited, hanging on the walls of the Hungarian National Gallery and the Museum of Fine Arts.” (*Id.* ¶ 76.) Elizabeth negotiated with the Hungarian government and received seven

pieces (all from lesser-known artists) before her death in 1992. (*See id.* ¶ 77.)

Her daughter, Martha Nierenberg, continued to negotiate on Elizabeth's behalf but ultimately decided to pursue legal remedies against Hungary, filing suit in a Hungarian court in 1999, in what has been referred to as the "Nierenberg Litigation." (*See id.* ¶ 78.) Her complaint identified a number of pieces she alleged belonged to the Herzog siblings, including artworks that belonged to István, András, and her mother, Elizabeth. However, she petitioned the court only for return of ten artworks (later amended to twelve) attributed to Elizabeth. (*See* Scholl-Tatevosyan Decl. Ex. 20, ECF 148-3; *see also* Pls.' Opp. at 13, ECF No. 153.) "To protect the interests of all three Herzog siblings, the heirs of András and István Herzog retained counsel and were brought into the lawsuit at the instruction of the Hungarian court" (*see* Mot. to Dismiss at 6); however, heirs of the other two siblings ultimately declined to participate. During the course of the litigation, Nierenberg received one of the paintings claimed in her petition, Mihály Munkácsy's "Half-Length Portrait of Christ" (also known as "Bust of Christ"), which was accepted by her attorney in Hungary in April 2000, as it could not be taken out of the country. (*See* Scholl-Tatevosyan Decl. Exs. 22-24, ECF No. 148-4.) "The Budapest Municipal Court initially recognized and acknowledged the Herzog Heirs' ownership rights in the paintings at issue" (Am. Compl. ¶ 78.) However, in January 2008, "an appellate court reversed the lower court's decision ordering restitution and rejected the demand" for return of the artworks. (*Id.*)

II. PROCEDURAL HISTORY

Plaintiffs filed this action in 2010 asserting claims based on bailment, conversion, constructive trust, accounting, unjust enrichment, replevin, and declaratory relief. (See Compl., ECF No. 1; *see also* Am. Compl.) They asked for either a return of the artworks or for monetary damages. (See Compl. at 35-36.)

A. First Motion to Dismiss

Defendants filed their initial motion to dismiss on February 15, 2011. (See First Mot. to Dismiss, ECF No. 15.) Defendants claimed plaintiffs' case must be dismissed for several reasons: (1) various treaties and international agreements barred the suit; (2) the Court lacked jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*; (3) *forum non conveniens*; (4) statute of limitations; (5) act of state; and (3) comity, *res judicata*, and collateral estoppel arising from the Nierenberg Litigation. (See First Mot. to Dismiss at ii.)

By memorandum opinion issued on September 1, 2011, this Court granted in part and denied in part defendant's motion. *See de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011). The Court concluded that it had jurisdiction under the FSIA's expropriation exception, *see id.* at 132–33, and that the rest of defendants' defenses were either premature or without merit, with the exception of international comity. Because "the record is devoid of evidence of either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity

of this nation should not allow it full effect,” the Court granted defendants’ motion to dismiss with respect to the eleven pieces of artwork at issue in the Nierenberg Litigation. *Id.* at 145 (internal quotation marks omitted).

Because the Court denied sovereign immunity, that portion of its order was immediately appealable. *See de Csepel v. Republic of Hungary*, 2011 WL 13244741, at *1 n.2 (D.D.C. Nov. 30, 2011). The Court also granted certification on the remaining issues addressed in the Memorandum Opinion, concluding that the statutory criteria for interlocutory appeal under 28 U.S.C. § 1292(b) were met. *Id.* at *2. On April 19, 2013, the Court of Appeals affirmed this Court’s opinion in part and reversed it in part. *See de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013). The Court of Appeals concluded that plaintiffs’ complaint alleged sufficient facts to bring it within the FSIA’s commercial activity exception, *See id.* at 601, and that the FSIA’s treaty exception was not implicated. *See id.* at 603. The Court of Appeals, like this Court, rejected defendants’ remaining defenses as either premature (statute of limitations) or lacking in merit (political question, act of state, and *forum non conveniens*). The Court of Appeals, however, reversed this Court’s decision to accord comity to the Nierenberg decision, concluding that “[t]he complaint’s allegations of due process violations present just the kind of fact-intensive issues inappropriate for resolution on a Rule 12(b)(6) motion.” *Id.* at 607.

B. Renewed Motion to Dismiss

On remand, defendants filed an answer to plaintiffs' complaint (*see* Answer, ECF No. 76), and the parties conducted discovery. On May 14, 2014, defendants filed their second motion to dismiss. (*See* Second Mot. to Dismiss, ECF No. 86.) This motion focused solely on defendants' contention that the Court lacked jurisdiction under the FSIA but was denied without prejudice while discovery continued. *See* 75 F. Supp. 3d 380, 387 (D.D.C. 2014). On May 18, 2015, defendants filed a renewed motion to dismiss again arguing that the Court lacked subject matter jurisdiction under either the FSIA's expropriation exception or its commercial activity exception. (*See* Renewed Mot. to Dismiss, ECF No. 106.)

On March 14, 2016, the Court granted defendants' motion in part and denied it in part. *See de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143 (D.D.C. 2016). The Court concluded that while the FSIA's commercial activity exception did not apply, the expropriation exception did. *See id.* at 163–64. However, the Court dismissed plaintiffs' claims as to two of the artworks listed in the complaint, as “[t]here is no evidence in the record that the two paintings were among the Collection items confiscated during World War II.”³ *Id.* at 165. The Court also rejected defendants'

³ The dismissed pieces were (1) Lucas Cranach the Elder, *The Annunciation to Saint Joachim*, 16(vi) in the complaint; and (2) John Opie, *Portrait of a Lady, half-length, in a White Bonnet*, 16(xiii).

remaining claims regarding subject matter jurisdiction, the FSIA's treaty exception, and exhaustion.

On June 20, 2017, the Court of Appeals again affirmed in part and reversed in part. *See de Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017). It approved this Court's conclusion that the FSIA's expropriation exception applied, as "rights in property taken in violation of international law' are 'in issue' as to those twenty-five or so artworks taken by Hungary during the Holocaust and never returned." *Id.* at 1103. However, it directed this Court on remand to "consider, in the first instance, the Herzog family's claims to those pieces returned by Hungary," which it estimated to be approximately fifteen. *Id.* at 1103-04. And, following the standard announced in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), the Court of Appeals concluded that the Court lacked jurisdiction over Hungary, as the first clause of the commercial-activity nexus requirement of the expropriation exception to the FSIA had not been met in this case. *See de Csepel*, 859 F.3d at 1107 ("Applying *Simon* to the facts of this case, we have jurisdiction through only the second clause of the commercial-activity nexus requirement, meaning that the Republic of Hungary retains its FSIA immunity.").

Lastly, the Court of Appeals directed this Court on remand (1) to consider whether any artworks, other than the two already dismissed by this Court, were taken by Hungary after Elizabeth became a citizen in 1952, *see id.* at 1108; and (2) to allow plaintiffs to amend their complaint to account for the Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR

Act”). *See id.* at 1109. It declined to address defendants’ exhaustion claim as defendants “made no argument that the collateral order doctrine applies to denial of a motion to dismiss on freestanding exhaustion grounds.” *See id.* at 1109.

C. The Instant Motion to Dismiss

This case is now on remand from the Court of Appeals for the second time. Plaintiffs filed an amended complaint on December 18, 2017 (*see* Am. Compl., ECF No. 141), which not only added reference to the HEAR Act, but also added a new defendant, the Hungarian National Asset Management Inc. (“MNV”). (*See id.* ¶ 14.) Moreover, the amended complaint alleges that the “Court has jurisdiction over Hungary pursuant to 28 U.S.C. §1605(a)(3) because MNV is so extensively controlled by Hungary that a relationship of principal and agent exists between Hungary and MNV.” (*Id.* ¶ 36.)

On February 9, 2018, defendants filed the instant motion to dismiss. Defendants’ motion makes the following arguments: (1) MNV is not properly added, it is immune, and its actions cannot be attributed to Hungary for purposes of abrogating the latter’s sovereign immunity; (2) Hungary is a necessary party and thus the case must be dismissed pursuant to Federal Rule of Civil Procedure Rule 19; (3) the Court lacks jurisdiction under the FSIA over certain pieces of art that were returned to the Herzog siblings after the war, or were settled under an agreement concluded between the United States and Hungary in 1973; and (4) as to the pieces over which the Court has

jurisdiction, various other defenses require dismissal under Rule 12(b)(6).

After the motion was fully briefed, plaintiffs requested the case be stayed pending resolution of their petition for a writ of certiorari, which defendants did not oppose. (See Mot. to Stay, ECF No. 158.) Plaintiffs' question to the Supreme Court was whether the Court of Appeals correctly interpreted the FSIA's expropriation exception when it concluded that foreign states and agencies or instrumentalities had to meet different commercial-nexus requirements. See Petition for Cert. at i, Docket No. 17-1165 (Feb. 16, 2018). The case was stayed until January 2019, when plaintiffs' petition was denied by the Supreme Court. (See Joint Status Report at 1, ECF No. 163.) During the stay the Court of Appeals issued two opinions related to issues in this case: *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018), and *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018). The parties submitted supplemental briefing regarding these cases. (See Joint Status Report at 2.) Argument was held on defendants' motion on January 13, 2020, and the parties filed additional supplemental briefing on January 24, 2020. (See ECF Nos. 175, 176.)

ANALYSIS

I. AMENDMENT

In its most recent opinion, the Court of Appeals ordered Hungary dismissed from this litigation after concluding that Hungary's sovereign immunity was not abrogated under the expropriation exception. On remand, plaintiffs filed an amended complaint that,

inter alia, adds MNV as a defendant. Plaintiffs argue that MNV is properly added as an agency or instrumentality of Hungary under the second clause of FSIA's expropriation exception. *See* note 4, *infra*. Furthermore, they contend that MNV "is so extensively controlled by Hungary that a relationship of principal and agent exists between Hungary and MNV," such that MNV's actions can be imputed to Hungary to abrogate *Hungary's* sovereign immunity. (*See* Am. Compl. ¶ 36.) As a result, plaintiffs argue not only that MNV belongs in the case, but also that Hungary should remain as a defendant.

Defendants, on the other hand, argue that MNV is not properly added for two reasons: (1) plaintiffs' amended complaint goes beyond the Court of Appeals' mandate, which only allowed for amendment to add allegations relating to the HEAR Act (*see* Mot. to Dismiss at 10–14); and (2) MNV is properly analyzed as part of the Hungarian state itself, rather than as its agency or instrumentality, so it is immune from suit for the same reason that Hungary was found to be immune. (*See id.* at 15 ("Because MNV's 'core functions' are governmental, not commercial, MNV is part of the 'foreign state' and . . . is, therefore, entitled to the same immunity as Hungary.")) Moreover, defendants contend that even if MNV is properly added as a defendant, its actions cannot be imputed to Hungary, so Hungary remains immune. (*See id.* at 21–22.)

The Court concludes that MNV has been properly added as a defendant, since its addition does not go beyond the Court of Appeals' mandate and is proper under the FSIA, but that MNV's actions cannot be

imputed to Hungary so as to abrogate its immunity. Thus, Hungary is dismissed in accordance with the Court of Appeals' opinion. *See de Csepel*, 859 F.3d at 1110 (“We also instruct the district court to dismiss the Republic of Hungary as a defendant . . .”).

A. The Addition of MNV as a Defendant

Defendants argue that “Plaintiffs’ amendments go beyond the scope of the appellate court’s mandate as Plaintiffs did not seek, nor receive, leave to include a new defendant—a defendant that Plaintiffs admit they learned of years ago.” (Mot. to Dismiss at 12.) “The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority.” *USPS v. Postal Regulatory Comm’n*, 747 F.3d 906, 910 (D.C. Cir. 2014) (quoting *City of Cleveland v. Fed. Power Comm’n*, 561 F.2d 344, 346 (D.C. Cir. 1977)). A district court must “scrupulously avoid implementing the mandate in a manner that exceeds, or limits, the scope of the appellate decision.” *Texas Oil & Gas Corp. v. Hodel*, 654 F. Supp. 319, 323 (D.D.C. 1987). However, “the only issues the reconsideration of which activate the doctrine [of law of the case] are those decided either explicitly or by necessary implication by the higher court.” *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 362 F. Supp. 2d 168, 182 (D.D.C. 2005) (internal quotation marks omitted).

The Court concludes that plaintiffs’ ability to add a new party is not foreclosed by the Court of Appeals’ decision. In *Simpson*, Judge Urbina rejected the argument that the principle of *inclusio unius est exclusio alterius* should apply to allow amendment on

one issue but not another when the other issue was not considered by the appeals court. *See id.* At oral argument before the Court of Appeals in this case there was an exchange between Circuit Judge Tatel and plaintiffs' attorney in which she repeatedly suggested that plaintiffs would like to amend the complaint. While Judge Tatel suggested the amendment would be to amend plaintiffs' complaint to add the newly enacted HEAR Act (*see* Mot. to Dismiss at 13 n.3), his questions focused on whether plaintiffs needed anything from the Court *beyond* leave to amend, rather than suggesting that leave to amend had to be restricted to only one topic. Furthermore, until Hungary was dismissed when the Court of Appeals issued its opinion, there was no need for plaintiffs to consider adding a new party, even one they may have known about since the beginning of the litigation. As the Court of Appeals noted, the Federal Rules of Civil Procedure direct courts to "freely give leave [to amend] when justice so requires." *See de Csepel*, 859 F.3d at 1110 (quoting Fed. R. Civ. P. 15(a)(2)). The Court thus concludes that the Court of Appeals' mandate does not prevent MNV's addition.

B. Whether MNV's Core Functions are Commercial or Governmental

Defendants next argue that, even if plaintiffs are permitted to amend their complaint to add MNV as a defendant, MNV is properly considered a part of Hungary and thus, like Hungary, retains its immunity. (*See* Mot. to Dismiss at 15.) Under the FSIA's expropriation exception, "[a] foreign state loses its immunity if the claim against it satisfies the exception by way of the first clause of the commercial-activity

nexus requirement[, . . . while] an agency or instrumentality loses its immunity if the claim against it satisfies the exception by way of the second clause.” *de Csepel*, 859 F.3d at 1107.⁴ Defendants do not contest plaintiffs’ allegations that MNV, as asset manager for the State of Hungary, “operates” the property at issue in Hungary, and that it also “engage[s] in a commercial activity in the United States.” *See* 28 U.S.C. § 1605(a)(3); (*see also* Am. Compl. ¶ 35). As a result, the only question relevant to determining MNV’s immunity under the FSIA is whether MNV is an “agency or instrumentality” of Hungary or its political subdivision.

⁴The expropriation exception, 28 U.S.C. § 1605(a)(3), provides that a foreign state shall be stripped of its immunity:

[I]n any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state

An agency or instrumentality of a foreign state, on the other hand, is stripped of its immunity:

[I]n any case . . . in which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Id. For a more thorough explanation of the expropriation exception, *see de Csepel*, 859 F.3d at 1101 (explaining the two requirements of the expropriation exception, the “rights in property” requirement and the two clauses of the commercial-nexus requirement).

“Because Section 1603(a) defines ‘foreign state’ as including ‘agencies and instrumentalities,’ the distinction between the two is only relevant in [the] FSIA where explicitly drawn.” *Jacobsen v. Oliver*, 451 F. Supp. 2d 181, 195 (D.D.C. 2006); *see also* 28 U.S.C. § 1603(a) (defining a “foreign state” to “include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)”). An “agency or instrumentality” is any entity:

(1) [W]hich is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

Id. § 1603(b).

When a court is “concerned with the meaning of the statutory terms ‘foreign state’ and ‘agency or instrumentality,’” *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 325 (D.C. Cir. 2005), the Court of Appeals has instructed courts to use the “core functions” test. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994). *Transaero* held that a court must look to “whether the core functions of the foreign entity are predominantly

governmental or commercial” when determining whether it is a “separate legal person” from the foreign state. 30 F.3d at 151. Because “any nation may well find it convenient (as does ours) to give powers of contract and litigation to entities that on any reasonable view must count as part of the state itself,” this categorical approach “winnow[s] the applications” of the definition of agency or instrumentality to just those Congress intended, *i.e.*, primarily public commercial enterprises. *See id.* at 152. While *Transaero*’s test was originally formulated to analyze § 1608’s requirements for service of process, the Court of Appeals has extended it to § 1605(a)(3). *See Crist v. Republic of Turkey*, 107 F.3d 922, 1997 WL 71739, at *2 (D.C. Cir. 1997) (“Notably, section 1603 does provide a different definition of ‘foreign state’ for use in section 1608 as opposed to the rest of the FSIA, and that section 1603 does not similarly establish different definitions of ‘agency or instrumentality’ is even more compelling evidence that ‘agency or instrumentality’ should be read the same in sections 1608 and 1605.”); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003) (applying the *Transaero* test to § 1605).

Applying this test, most courts have concluded that “intelligence and security activities,” for example, will almost always be governmental rather than commercial. *See Jacobsen*, 451 F. Supp. 2d at 197 (citing *Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 102 (D.D.C. 2003), *abrogated on other grounds by Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004)); *see also S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 108 (D.D.C. 2012)

(collecting cases). On the other end of the spectrum, as described in *Transaero*, are entities such as “a state trading corporation, a mining enterprise . . . or a steel company.” 30 F.3d at 152 (quoting H.R. Rep. No. 94-1487, at 15-16 (1976)). In the middle are cases involving cultural and financial institutions.

For example, in *Taylor v. Kingdom of Sweden*, 2019 WL 3536599 (D.D.C. Aug. 2, 2019), Judge Leon concluded that, under *Transaero*’s test, Sweden’s National Museums of World Culture (“NMWC”), a government agency, “is ‘so closely bound up with the structure of the’ Swedish sovereign that it is properly ‘considered as the “foreign state” itself’ under § 1605(a)(3).” *Id.* at *3 (quoting *Transaero*, 30 F.3d at 153). According to *Taylor*, the NMWC’s functions “include the promotion of Sweden’s view of world culture to its own citizens and the international community as well as the country’s ability to share that world view with people and institutions domestically and around the world.” *Id.* And, in *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006), the Second Circuit concluded that Poland’s Ministry of Treasury was not an “agency or instrumentality” for purposes of the FSIA’s takings exception, but an “integral part of Poland’s political structure.” *Id.* at 594 (internal quotation marks omitted).

Focusing on MNV’s structure, the Court finds these cases inapposite. The non-governmental nature of MNV is apparent in light of Hungary’s choice several decades ago to transform its asset manager from a governmental agency into a joint-stock company to take advantage of the benefits of corporate law. (*See*

Declaration of Dr. Bernadette Somody ¶ 17 (quoting the Explanatory Memorandum to the 1992 Act creating MNV's predecessor organization, which said that "[f]or the management of the permanently state-owned entrepreneurial assets it is reasonable to establish a joint stock company *instead of a governmental agency*" (emphasis added)), ECF No. 153-1 ("Somody Decl.") Hungary *used* to manage its assets using a state agency controlled by Parliament. (*See id.*) However, in 1992, it decided to transfer such functions to a joint-stock company, as such a structure would allow the company to more easily obtain loans, issue bonds, and act on the private market. (*See id.*) And Hungary's Constitutional Court has held that, because of this new structure, MNV cannot exempt itself from certain aspects of corporate law, as "the State's roles as the holder of public power and as an owner have to be consequently differentiated in the private sector." (*See id.* ¶ 18 (internal quotation marks omitted).)

Unlike the NMWC in *Taylor*, which was "created by Act of Swedish Parliament as a state agency within the Swedish Ministry of Culture, which is itself a department of the Government of the Kingdom of Sweden," *Taylor*, 2019 WL 3536599, at *3 (internal quotation marks omitted), MNV is a joint-stock company. In other words, it is outside of the hierarchy of the Hungarian government and is instead considered a company, even though it is owned by the government. (*See Somody Decl.* ¶ 16 (noting that MNV is registered on Hungary's "Company Register," and that "company" is defined under Hungarian law as "a legal entity . . . engaging in business operations").) Similarly, in *Garb*, the Second Circuit observed that "all governmental

units beneath the central government—and the Ministry of the Treasury is indisputably one such unit—constitute ‘political subdivisions,’ a category that is not congruent with ‘agencies and instrumentalities.’” 440 F.3d at 596. Indeed, the Second Circuit then went on to compare foreign sovereign immunity to Eleventh Amendment immunity, saying “it is black letter Eleventh Amendment law that the political agencies and departments of states are entitled to the same sovereign immunity as the state.” *Id.* at 597 n.23 (citing *Compagnie Noga D’Importation et D’Exportation S.A. v. Russian Fed’n*, 361 F.3d 676, 688 (2d Cir. 2004)). Like *Taylor*, the result in *Garb* was driven by the entity’s placement in the structure of Poland’s government. But MNV is different. MNV is not a “governmental unit[] beneath the central government” like the Polish Ministry of the Treasury, *id.* at 596, Iran’s Ministry of Foreign Affairs, *see Roeder*, 333 F.3d at 234, or the United States Department of State. *See Transaero*, 30 F.3d at 152. Rather, MNV is a joint-stock company.

To compensate for MNV’s placement outside the governmental hierarchy, defendants ask the Court to blur the distinction between purpose and function. For example, they compare MNV’s functions to that of Poland’s Ministry of Treasury, which also engages in asset management on behalf of a sovereign state and represents the state against financial claims. *See Garb*, 440 F.3d at 595. However, while holding and administering assets for another “is an act that sovereigns may accomplish, . . . it is not an act that *only* a sovereign power can do.” *Smith v. Overseas Korean Cultural Heritage Found.*, 279 F. Supp. 3d 293,

297 (D.D.C. 2018) (emphasis added). And, “[a]lthough [MNV’s] interests and objectives may align with, or be directed by, a foreign state, [the Court] must look to the ‘nature’ of the act, rather than its ‘purpose.’” *Id.* (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)). For example, in *Smith*, Judge McFadden concluded that “building and operating a museum . . . is the type of action by which a private party can engage in commerce,” so the defendant was an agency or instrumentality rather than a foreign state. *Id.*; cf. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005) (concluding that defendant engaged in commercial activities when lending art pieces because private parties may also loan artwork internationally, and “it is the *type* of activity—not its purpose—that must guide the analysis” (emphasis in original)).

In their recently-filed supplemental pleading, defendants cited a case from South Carolina, in which a district court concluded that the core functions of the Ministry of Education, Culture, and Science of the Netherlands, as well as the Cultural Heritage Agency of the Netherlands, were governmental rather than commercial and thus they were both immune under the FSIA. See *Berg v. Kingdom of the Netherlands*, Slip. Op. at 15, Docket No. 18-cv-3123 (BHH) (D.S.C. Mar. 6, 2020); (see also ECF No. 177-1). The district court in that case concluded that “[w]hile the Ministry may engage in some commercial transactions, there is no evidence that the commercial transactions occur for the purpose of individual profit, but rather for a civic and political purpose.” *id.* This analysis blends purpose and function. Cf. *Weltover*, 504 U.S. at 614 (“[T]he question

is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce.” (internal quotation marks omitted)).

Furthermore, MNV’s situation is factually distinguishable from that of the entities in *Berg*. For example, the *Berg* court observed that “the Minister reports to the Prime Minister, not to a board of directors,” and “there is no evidence that the commercial transactions [it engages in] occur for the purpose of individual profit.” *See Berg*, Slip Op. at 15. MNV, on the other hand, has both a Board of Directors and a Board of Supervisors which oversee the organization’s operations; while these Boards are accountable to the Hungarian government, which owns MNV’s single share, they nonetheless are required to run the organization with certain levels of knowledge and expertise. (*See, e.g.*, Declaration of Zoltan Novak Ex. C, Act CVI of 2007 on State Assets at Section 20(3) (“Only Hungarian citizens with a degree from an institute of higher education who have exceptional theoretical or practical professional knowledge related to budgetary, financial and asset-management matters may be appointed chairman or members of the Board of Directors.”), ECF No. 148-29 (“Novak Decl.”).) And while MNV is required to manage the state’s assets in an efficient and value-conserving manner, it also must “ensur[e] the . . . *value-enhancing* use of state assets.” (*See id.* at Section 2(1) (emphasis added); *see also id.* at

Section 22(7) (“MNV Zrt. shall . . . allocate the revenues from the utilisation and sale of the state assets to preserving *and increasing* the value of the . . . assets entrusted to it” (emphasis added)).

The Hungarian Act CVI of 2007 on State Assets provides that “tasks conferred upon MNV . . . shall be recognized as government functions.” (*See id.* at Section 17(2).) However, while managing the sovereign’s property is undoubtedly “essential to the daily functioning and long-term survival of that government,” *Garb*, 440 F.3d at 595 n.19, such an argument focuses on the *purpose* of the act, rather than its nature. *See Smith*, 279 F. Supp. 3d at 297. At their core, MNV’s functions are those that a private entity could engage in as well. Moreover, MNV’s placement outside of the Hungarian government, as a joint-stock company, further emphasizes its commercial, rather than governmental, nature. The Court thus concludes MNV is an “agency or instrumentality” of Hungary, not a political subdivision, and it loses its sovereign immunity pursuant to the second clause of the FSIA’s expropriation exception. *See de Csepel*, 859 F.3d at 1107 (“[A]n agency or instrumentality loses its immunity if the claim against it satisfies the exception by way of the second clause [of the commercial-activity nexus requirement].”).

C. The Addition of Hungary as a Defendant

Finally, defendants argue that, even if the Court can exercise jurisdiction over MNV, MNV’s actions cannot be attributed to Hungary to abrogate *Hungary’s* immunity. (*See* Defs.’ Reply at 9 (“[E]ven if MNV was relegated to agency or instrumentality status, the

theory fails because Hungary is not using MNV to shield itself from liability.” (internal quotation marks omitted)), ECF No. 154.) The Court agrees.

“[A]bsent an agency relationship, the court lacks subject matter jurisdiction over the foreign state for the acts of its instrumentality.” *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 447 (D.C. Cir. 1990). However, “the activities of an agent may be attributed to the principal for jurisdictional purposes.” *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 n.16 (D.C. Cir. 1982) (internal quotation marks omitted), *abrogated on other grounds by In re Papandreou*, 139 F.3d 247, 254 n.4 (D.C. Cir. 1998); *see also TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 325 (D.C. Cir. 2005) (“[T]he presumption of independent status detailed in *Bancec* also applies to the question of subject matter jurisdiction under the FSIA; that is, a foreign state is amenable to suit based upon an exception in the FSIA and the acts of its instrumentality only if the sovereign exerts sufficient control over the instrumentality . . . to create a relationship of principal to agent.” (internal quotation marks and brackets omitted)).

The Supreme Court allowed what amounts to a “piercing of the corporate veil” between an instrumentality and a foreign sovereign in *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 103 S. Ct. 2591 (1983) (“*Bancec*”). Although “government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such,” *id.* at 626-27, this principle is not blindly adhered to when to do so would

cause injustice. *Id.* at 632. According to “internationally recognized equitable principles,” foreign sovereigns cannot “avoid the requirements of international law simply by creating juridical entities whenever the need arises.” *Id.* at 633. To determine when separateness should not be respected, courts apply the so-called “*Bancec* factors”:

- (1) the level of economic control by the government;
- (2) whether the entity’s profits go to the government;
- (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;
- (4) whether the government is the real beneficiary of the entity’s conduct; and
- (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 823 (2018) (internal quotation marks omitted). Later courts have interpreted *Bancec* to allow them to disregard separate juridical status when “the foreign entity is exclusively controlled by the foreign state *or* where recognizing the separateness of that entity and the foreign state would work fraud or injustice.” *Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 435 (D.D.C. 2012) (internal quotation marks omitted) (emphasis added); *see also Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000).

The Court concludes that MNV is properly characterized as a “typical government

instrumentality” rather than one so exclusively controlled by Hungary that it should be deemed the same as the state. *See Bancec*, 462 U.S. at 624. While Hungary undoubtedly has the power to exert substantial control over MNV—which has one share, owned by the government and exercised by the Minister—majority stock ownership or control of the Board of Directors is not, without more, sufficient to satisfy the control prong. *See Transamerica Leasing, Inc.*, 200 F.3d at 849. Furthermore, in other important ways MNV fits comfortably in *Bancec*’s “typical government instrumentality” definition: it is created by statute that prescribes powers and duties; it is managed by a board selected by the government “in a manner consistent with the enabling law”⁵; and it has its own budget, although the money comes from Hungary. *Bancec*, 462 U.S. at 624; *see also DRC, Inc. v. Republic of Honduras*, 71 F. Supp. 3d 201, 216-17 (D.D.C. 2014).

As to *Bancec*’s “fraud or injustice” factor, there is no evidence that Hungary is abusing the presumption of

⁵ As described in the section on whether MNV is commercial or governmental, *supra*, although Hungary’s Minister of Culture has the power to appoint and recall members of MNV’s Board of Directors, he is constrained in who he can pick:

Only Hungarian citizens with a degree from an institute of higher education who have exceptional theoretical or practical professional knowledge related to budgetary, financial and asset-management matters may be appointed chairman or members of the Board of Directors.

(Novak Decl. Ex. C, Act CVI of 2007 on State Assets at Section 20(3).

separateness with its relationship with MNV, a concern that motivated the piercing of the veil that the Supreme Court allowed in *Bancec*. There, for example, treating the instrumentality (a bank) as separate from its sovereign principal (Cuba) “would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of [the U.S. bank’s] assets.” *Bancec*, 462 U.S. at 632. Here, plaintiffs do not suggest that Hungary is using MNV to shield it from liability—Hungary has not transferred ownership of state assets to MNV to thwart litigation, and MNV is not the entity that performed the acts of expropriation about which plaintiffs are suing. See *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep’t of Treasury*, 606 F. Supp. 2d 59, 78 (D.D.C. 2009) (concluding that presumption of separateness should be disregarded when the sovereign is “attempting to use the federal courts as a sword while invoking the Constitution as a shield”).

Moreover, the amended complaint does not seek to hold Hungary liable for the purported unlawful acts of MNV. Rather, it seeks to hold *Hungary* liable for the purported unlawful acts of *Hungary*. If plaintiffs were suing about actions that *MNV* had taken that harmed them, it might be proper for this Court to consider whether “adherence to [Hungary and MNV’s] separate identities would entitle [Hungary] to benefits in United States courts while avoiding its obligations.” *Rubin*, 138 S. Ct. at 823 (internal quotation marks omitted). Here, however, while MNV manages the artwork at

issue for Hungary, it had nothing to do with (and indeed it did not exist) when Hungary undertook the challenged actions. Had plaintiffs alleged *MNV* undertook actions in the United States that might satisfy the first commercial nexus clause, as well as facts sufficient under *Bancec* to impute *MNV*'s actions in the United States to Hungary, a different result might be required. *See Kuo v. Gov't of Taiwan*, 2019 WL 120725, at *3 & n.2 (S.D.N.Y. Jan. 7, 2019).

Allowing plaintiffs to go forward under this theory would also circumvent the Court of Appeals' decision that foreign states and their instrumentalities need to satisfy different clauses of the FSIA's expropriation requirement before their sovereign immunity is waived. *See de Csepel*, 859 F.3d at 1107. The Court of Appeals found that Hungary was immune because the property it took is not located in the United States. *See id.* If this Court were now to conclude that because Hungary controls *MNV*, which engages in commercial activity in the United States, Hungary is *not* immune, this would destroy the distinction recognized by the Court of Appeals between the expropriation exception's commercial nexus requirement for states, as opposed to their instrumentalities. Given the allegations in plaintiffs' complaint, the Court concludes that actions undertaken by *MNV* cannot be used to bring Hungary back into this litigation.

II. RULE 19

Defendants argue that, in light of Hungary's dismissal by the Court of Appeals, the entire action should be dismissed. (*See Mot. to Dismiss* at 22 ("Even if this Court found it could take jurisdiction over *MNV*,

the action cannot go forward because Hungary, the sole owner of the artworks, is immune from this Court's jurisdiction.”.) As explained below, the Court concludes that Hungary is not an indispensable party.

A. Rule and Legal Standard

“Rule 19 of the Federal Rules of Civil Procedure establishes a two-step procedure for determining whether an action must be dismissed because of the absence of a party needed for a just adjudication.” *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1495–96 (D.C. Cir. 1997). First, a court must determine whether the absent party is “necessary.” A party is necessary if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). “If the Court determines that [the absent party] is not required under Rule 19(a), it need not proceed to the second step of the test” *Cronin v. Adam A. Weschler & Son, Inc.*, 904 F. Supp.

2d 37, 41 (D.D.C. 2012). However, if the absent party is necessary and cannot be joined without depriving the court of subject-matter jurisdiction, the action must be dismissed unless “in equity and good conscience, the action should proceed among the existing parties.” Fed. R. Civ. P. 19(b). Factors to consider in deciding whether the action should proceed are:

- (1) the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
 - (A) protective provisions in the judgment;
 - (B) shaping the relief; or
 - (C) other measures;
- (3) whether a judgment rendered in the person’s absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id. 19(b)(1)-(4).

“Courts are generally reluctant to grant Rule 12(b)(7) motions, and dismissal is warranted only when the defect is serious and cannot be cured.” *Cronin*, 904 F. Supp. 2d at 41 (internal quotation marks omitted). Moreover, defendants, as the moving parties, “bear[] the burden to demonstrate that [the] absent party is required under Rule 19.” *Id.*

B. Necessary Party

Defendants argue that Hungary is necessary to both plaintiffs' tort and contract claims. (See Mot. to Dismiss at 24 (“Hungary is a party to the purported bailments—Plaintiffs allege their predecessors entered into bailments with Hungary’s legal representatives.”); see also *id.* (“Only Hungary is alleged to have taken the artworks ‘in violation of international law’ and converted them.”).) While “Rule 19 does not require the joinder of joint tortfeasors,” *Cronin*, 904 F. Supp. 2d at 41, “in actions involving contractual rights, courts have frequently found that the parties to a contract are required parties within the meaning of Rule 19.” *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 390 (D.D.C. 2017) (citing *Ward v. Deavers*, 203 F.2d 72, 75 (D.C. Cir. 1953)).

At the outset, with one exception discussed below, even if one were to assume *arguendo* that in the absence of Hungary, the remaining parties cannot turn over the artworks, as they claim only to display and manage them on behalf of Hungary, a court is not required to be able to provide *all* forms of relief in order to provide sufficiently complete relief to the parties for purposes of Rule 19. See *Ward*, 203 F.2d at 75–76 (concluding that, without the absent party, contract rescission could not be ordered, but the case could still go forward against the remaining defendants for damages). And, plaintiffs have sufficiently alleged that the remaining defendants may be liable, at the very least, for monetary relief.

As a matter of law, defendants are incorrect that “neither MNV nor the museum defendants are joint

tortfeasors” because only Hungary purports to own the artworks. (See Mot. to Dismiss at 24.) Under District of Columbia law, “[a] defendant will be liable for conversion if the plaintiff shows that the defendant *participated* in (1) an unlawful exercise, (2) of ownership, dominion, or control, (3) over the personal property of another, (4) in denial or repudiation of that person’s rights thereto.” *Gov’t of Rwanda v. Rwanda Working Grp.*, 227 F. Supp. 2d 45, 62 (D.D.C. 2002) (emphasis added); *see also Mac’Avoy v. The Smithsonian Inst.*, 757 F. Supp. 60, 67 (D.D.C. 1991) (“The acquisition of the property is immaterial to a claim in replevin or conversion. The essence of the actions is the wrongful *withholding* of the property in question.” (emphasis added)). Therefore, the remaining defendants may be determined to be converters even though they only purport to display or manage the property on behalf of Hungary. *See* Dan B. Dobbs *et al.*, *The Law of Torts* § 61 (“[T]he defendant who exercises significant control over the property is a converter even though he himself gains nothing from the property or his control over it.”); *see also Dodd v. Pearson*, 279 F. Supp. 101, 104 (D.D.C. 1968) (“It is well settled, . . . that a person who receives and uses the property of another that has been wrongfully obtained, knowing that it was so obtained, is likewise guilty of conversion and liable for damages.”), *rev’d in part on other grounds*, 410 F.2d 701 (D.C. Cir. 1969).

Second, plaintiffs allege that many of the bailments were actually entered into with representatives of the museums, so that Hungary may not be the only party,

or even a party at all, to some of the bailments.⁶ Plaintiffs point to the 2004 *Sigray* decision of a Hungarian court, in which the Hungarian National Museum, as the sole defendant, was ordered to return a painting to the plaintiffs. (See Supp. Declaration of Dr. Mark Peto Ex. A, ECF No. 175-1 (“*Sigray* Decision”).) According to the *Sigray* court, if there was a bailment between the plaintiff and the museum, the Hungarian State is not required to take any action prior to the museum releasing it, as “when the [artwork] is returned, there is . . . no alienation of property, only the return of possession.” (*Id.*) Looking to the *Sigray* decision, the Court can *See* no reason why any similar claims by plaintiffs cannot go forward without Hungary’s presence, at least to the extent

⁶ For example, in May 1950, a lawyer representing Elizabeth, Dr. Emil Oppler, “offer[ed]” several paintings belonging to the family “for deposit with the Museum of Fine Arts.” (See Walker Decl. Ex. B-3, ECF No. 148-10.) Defendants claim in supplemental briefing that Elizabeth was in fact required to hand over such artwork under the Legislative Decree No. 13 of 1949, and that the National Center for Museums and Monuments, to which the letter was addressed, was a political subdivision of Hungary. (See Defs.’ Supp. Reply Br. at 1-2, ECF No. 176 (“Defs.’ 2020 Reply”).) However, the Decree only *permitted* the government to require artwork be handed over (see Supp. Declaration of Zoltan Novak Ex. 1 at Art. 10, ECF No. 176-3), and defendants provide no proof that such a hand-over was ordered. At this stage the Court considers plaintiffs’ evidence sufficient to state a claim for bailment, and it need not resolve whether there was a breach of a bailment for which the remaining defendants may be liable.

plaintiffs prove that bailments exist between their predecessors and any of the remaining defendants.⁷

The conclusion that the remaining defendants may be liable for damages or even in some cases for the return of the artwork is not altered by the Hungarian case cited by defendants in their motion to dismiss. (See Mot. to Dismiss at 26 (citing Novak Decl. Ex. F, ECF No. 148-30).) In that case, a claimant sued a private company and MNV for rights it claimed it had to use a government-owned property, alleging that the contracts for use between the private-company defendant and MNV were invalid under Hungarian law

⁷ In *Sigray*, the court found a law requiring the permission of the minister to alienate state property inapplicable, as “[t]he court determined that a bailment agreement had been concluded between the plaintiffs’ predecessor and the defendant,” meaning that “in this instance **no alienation of property takes place.**” (See *Sigray* Decision (emphasis in original).) Defendants argue that the *Sigray* case is inapposite because new laws on state property have been passed since the decision was published (see Defs.’ 2020 Reply at 8–9); however, defendants do not explain how, if at all, these laws abrogate the principle at the heart of the decision, which is that “[u]nder [a] bailment agreement, no transfer of ownership or alienation of property takes place; the chattel remains in the ownership of the bailor, and only *possession* of the chattel is transferred to the bailee.” (See *Sigray* Decision (emphasis added).)

Moreover, the *Sigray* decision does not become irrelevant merely because in this case, unlike in *Sigray*, the defendant museums dispute the existence of a bailment. (See *id.*) The *Sigray* court “determined that a bailment agreement had been concluded between the plaintiffs’ predecessor and the defendant.” (*Id.*) If plaintiffs prove the existence of any bailments here, defendants will only have possession and not ownership and thus they can return the art.

and that the private-company defendant had no right to terminate the claimant's use of the property. (*See* Novak Decl. Ex. F at 3.) The Metropolitan Court of Appeals concluded that "the court of first instance is required to call upon the claimant to involve the Hungarian State in the lawsuit[,] . . . failing which the proceedings should be stayed. (*See id.* at 9.) But from the outset, neither the claimant nor the defendants in that case disputed that the property at issue was owned by Hungary, and the only claims in the case were contract-based. (*See id.* at 1.) This differs from the instant case in two important ways: here, many of the claims are conversion-based, and joint tortfeasors generally need not be joined. Moreover, plaintiffs may be able to prove that bailment agreements existed with the defendants, therefore undercutting Hungary's claim of ownership of the property.

Nevertheless, even if the remaining defendants can provide some relief—monetary or otherwise—Hungary may still be a required party under the definition of one "claim[ing] an interest relating to the subject of the action" whose interest may be impeded. Fed. R. Civ. P. 19(a)(1)(B)(i); *see also Wach v. Byrne, Goldenberg & Hamilton, PLLC*, 910 F. Supp. 2d 162, 169 n.5 (D.D.C. 2012) ("Notwithstanding a determination of complete relief, a party may still be necessary under subsection (a)(1)(B)." (internal alterations omitted) (quoting *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir. 1996))). Judge Kollar-Kotelly described "legally protected interest" as "exclud[ing] only those claimed interests that are 'patently frivolous.'" *See Wach*, 910 F. Supp. 2d at 170 (quoting *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999)). And as in *Wach*,

plaintiffs and Hungary “lay opposing, irreconcilable claims to the same [pieces of artwork].” *Id.* at 169.

In *Wach*, Judge Kollar-Kotelly went on to conclude under Rule 19(b) that because, *inter alia*, the absent party’s interests were not protected by the remaining defendant, the absent party was indispensable. *Id.* at 172. This contrasts with an earlier decision of this Court where, at the Rule 19(a) stage, it decided that the absent parties’ interests were not even “impede[d]” because they were adequately represented by the remaining defendant. *See FDIC v. Bank of New York*, 479 F. Supp. 2d 1, 10 (D.D.C. 2007). Whether an interest is “practically impeded” and whether interests are adequately protected undoubtedly overlap, and thus can be considered under either Rule 19(a) or 19(b). *See Capital Med. Ctr., LLC v. Amerigroup Maryland, Inc.*, 677 F. Supp. 2d 188, 194 n.9 (D.D.C. 2010) (“Evaluation of the first Rule 19(b) factor overlaps considerably with the Rule 19(a) analysis.” (internal quotation marks omitted)).

For this reason, courts often simply assume that an absent party meets the standard under Rule 19(a)(1)(B) and instead focus on the 19(b) factors. *See, e.g., Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968) (disposing of first step inquiry with the observation that there was “at least the possibility that a judgment might impede [the absent party’s] ability to protect his interest”); *see also* Federal Practice & Procedure (Wright & Miller) § 1604 (“Rule 19(a) reflects an affirmative policy of bringing all interested persons before the court, whereas the object of Rule 19(b) is to determine whether it is possible to go

forward with an action despite the nonjoinder of someone whose presence is desirable but not feasible.”). While Hungary’s presence may be desirable in this case, the Rule 19(b) factors are more illuminating, as they guide the Court’s conclusion that continuation of the litigation, even without Hungary, is appropriate.

C. Indispensable Party

Because Hungary cannot be joined due to its sovereign immunity, the Court moves to the Rule’s second step, whether “in equity and good conscience, the action should proceed.” Fed. R. Civ. P. 19(b). The Court concludes that it should.

In arguing that Hungary is indispensable, defendants ask the Court to place dispositive weight on Hungary’s sovereign immunity. (*See* Mot. to Dismiss at 28 (“Because Hungary, a required party, is entitled to sovereign immunity, the action can be dismissed ‘without consideration of any additional factors.’ (quoting *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995))).) It is true that the Rule 19(b) inquiry in a case involving an absent sovereign may be somewhat “circumscribed,” for “immunity may be viewed as one of those interests ‘compelling by themselves.’” *Kickapoo*, 43 F.3d at 1497, 1496 (quoting *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986)). And, the Supreme Court has held that “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action *must* be ordered where there is a potential for injury to the interests of the

absent sovereign.” *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (emphasis added).

However, in contrast to the sovereign in *Pimentel*, Hungary’s interests are adequately protected in this case by the remaining defendants. “[P]rejudice to absent parties approaches the vanishing point when the remaining parties are represented by the same counsel, and when the absent and remaining parties’ interests are aligned in all respects.” See *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 134 (2d Cir. 2013). This is precisely the case here, particularly with the addition of MNV as a defendant—as plaintiffs observe, “MNV is Hungary’s agent with respect to the artworks at issue, and has represented Hungary in this action from day one.” (See Pls.’ Opp. at 35.) Defendants have cited no differences in interests between themselves and Hungary; indeed, all defendants are represented by the same legal team as Hungary was prior to its dismissal, a key point in the prejudice analysis. See *Am. Trucking Ass’n, Inc. v. N.Y. State Thruway Auth.*, 795 F.3d 351, 360 (2d Cir. 2015) (noting that defendant and absent party would be represented by same attorney, suggesting their interests must be “aligned in all respects” (internal quotation marks omitted)). In many cases in which the absent sovereign was deemed indispensable, by contrast, the sovereign’s interests were often only partially aligned with other defendants. See, e.g., *Two Shields v. Wilkinson*, 790 F.3d 791, 799 (8th Cir. 2015) (noting that remaining defendants “have strong incentives to characterize any breach as resulting solely from the government’s independent action and judgment” in order to reduce their own liability); see

also *Kickapoo*, 43 F.3d at 1498; *Detroit Int’l Bridge Co. v. Gov’t of Canada*, 192 F. Supp. 3d 54, 69 (D.D.C. 2016). In this case the remaining defendants and Hungary are not only aligned, they “share a ‘precisely’ identical interest in the subject matter of the litigation,” *i.e.*, that Hungary and its agencies and instrumentalities continue their possession of the artwork and pay no damages. *See Wach*, 910 F. Supp. 2d at 171.

The remaining factors also weigh in plaintiffs’ favor. As discussed above, the Court concludes that limiting plaintiffs’ remedies to damages to the extent defendants claim Hungarian law forbids them from alienating artwork without permission of the Hungarian government further reduces any prejudice or risk of inconsistent obligations. Plaintiffs do not claim that an action limited in such a way—to damages, rather than injunctive or declaratory relief—would be inadequate. (*See Pls.’ Opp.* at 35–36 (“Even if Hungary were prejudiced [by an order to return the paintings in its absence], this Court could limit Plaintiffs’ remedy to damages against the remaining Defendants, which would result in no prejudice to Hungary.”).) And, this Court has previously observed that requiring plaintiffs to litigate in Hungary, defendants’ proposed alternative forum, would be futile. *See de Csepel*, 169 F. Supp. 3d at 169 n.15 (“[T]he Court finds that plaintiffs have adequately shown that further efforts to seek a remedy in Hungary would have likely proved futile.”).⁸

⁸ Of course, in a case involving sovereign immunity this last factor is of limited probative value. *See Wichita & Affiliated Tribes*, 788

In briefing submitted after oral argument, defendants raised a new argument why Hungary is a necessary party—“[b]ecause a money judgment against the Museum Defendants alone could not be enforced without violating Hungary’s recognized sovereign immunity (as any enforcement would necessarily implicate Hungarian state funds) Hungary is an indispensable party and the action cannot go forward.” (See Defs.’ Supp. Reply Br. at 10, ECF No. 176 (“Defs.’ 2020 Reply”).) This is a novel argument, particularly within the context of FSIA actions. However, even assuming that any and all damages ordered against the remaining defendants would be paid out of Hungary’s treasury,⁹ the Court concludes that this action may nonetheless continue.

Prior cases in which dismissal was ordered because the federal government was immune yet faced potential monetary liability are distinguishable. Defendants cite *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945), in which the Supreme Court concluded that the suit against the Under Secretary of the Navy was

F.2d at 777 (“Although we are sensitive to the problem of dismissing an action where there is no alternative forum, we think the result is less troublesome in this case than in some others. . . . [T]he dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.”).

⁹ Although defendants claim that in the absence of Hungary, they cannot pay damages (see Declaration of David Kratchowill ¶ 7, ECF No. 154-1; see also Defs.’ 2020 Reply at 9-10), this proposition is contested by plaintiffs. (See Supp. Declaration of Dr. Mark Peto at 4-5, ECF No. 175-1.)

“essentially one designed to reach money which the government owns,” meaning that the federal government was a necessary party. *Id.* at 375. However, the plaintiff in *Mine Safety* was effectively suing the Secretary in his official capacity, and as a result, was suing the sovereign. Having determined that MNV is not so integral to Hungary’s political structure that it should be considered Hungary’s “political subdivision,” a conclusion already reached for the other remaining defendants, *see de Csepel*, 169 F. Supp. 3d at 167 (“[D]efendants have already admitted that the museums and university holding all of the art are agencies or instrumentalities.”), the Court will not reverse course and collapse the distinction here.

Other cases where the federal government has been deemed indispensable based on the potential for outlay of its funds, such as *Weeks v. Housing Auth. of Opp, Alabama*, 292 F.R.D. 689 (M.D. Ala. 2013), lack the identity of interest present in this case. In *Weeks*, the district court concluded that the Department of Housing and Urban Development (“HUD”) was an indispensable party because all the defendant’s “funds and operating expenditures are subject to [its] oversight and approval,” and it informed the defendant “that it would not approve any payments” to the plaintiff, who had been terminated from defendant’s employment. *Id.* at 691. However, the local Housing Authority in *Weeks* did not have the same identity of interest with HUD as defendants have with Hungary, even if both receive all their funds from the absent sovereign entity. Defendants here are represented by the same attorneys as Hungary and are agencies and instrumentalities *of the state* itself. In contrast, the

Housing Authority in *Weeks* had a contributions contract with HUD by which HUD paid its expenses, but the two clearly had different priorities. *See id.* at 691 (noting that the defendant “tried to negotiate further with HUD” prior to litigation to avoid terminating plaintiff in the first place). This case, by contrast, is more like *American Trucking*, in which the Second Circuit concluded that New York was not an essential party even though “as a practical matter, a defeat for the [remaining defendant, the New York State Thruway Authority,] may have downstream effects that cost the State money.” *American Trucking*, 795 F.3d at 359. Although the effect on Hungary of a judgment adverse to defendants would be more direct than any potential effects of an adverse judgment on New York, which had no legal obligation to pay the defendant’s liabilities, *see id.* at 358, this is a difference in degree, rather than in kind. As the Court there aptly observed, “having reserved and retained the benefits of corporate separation for all other purposes, [remaining defendants and absent parties] may not pierce their own arrangements to accommodate litigation strategy.” *Id.* at 359.

Moreover, implicit in the structure of the FSIA is the proposition that a foreign state’s agency or instrumentality may be sued even when the foreign state remains immune. For example, as has been clarified by the Court of Appeals, the FSIA’s expropriation exception lays out two different commercial-nexus standards—one that abrogates immunity for foreign states, and one for agencies and instrumentalities. *See de Csepel*, 859 F.3d at 1107 (“hold[ing] that a foreign state retains its immunity

unless the first clause of the commercial-activity nexus requirement is met”). Agencies and instrumentalities are *often* fully- or partially-funded by their foreign state. *See Bancec*, 462 U.S. at 624 (describing how a “typical government instrumentality” may require “appropriations to provide capital or to cover losses”); (*see also* Pls.’ Supp. Reply Br. at 3, ECF No. 175 (“Pls.’ 2020 Reply”). And even partial funding would “implicate” the sovereign’s funds in some way. But under the test proposed by defendants, this fact would necessarily render the foreign state an indispensable party. (*See* Defs.’ 2020 Reply at 10.) If an agency or instrumentality with some budgetary ties to the sovereign could never be sued unless the sovereign itself were also a party, it would be pointless for the FSIA to treat immunity for agencies and instrumentalities differently than for foreign states. Defendants’ *per se* rule is thus in tension with the FSIA’s mandate, as articulated by the Court of Appeals, that agencies and instrumentalities can be sued even when foreign states—which may fund their budgets, in whole or in part—cannot. This conclusion is further bolstered by the FSIA provision § 1606:

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.

(*See* Pls.’ 2020 Reply at 3 (quoting 28 U.S.C. § 1606).) Again, this demonstrates that agencies and

instrumentalities and foreign sovereigns,¹⁰ which may at times lose immunity when the other does not, cannot use their budgetary connections to circumvent the different ways the FSIA may treat them.¹¹

For all the above-described reasons, the Court concludes that Hungary is not an indispensable party under Rule 19(b). The case may proceed in its absence.

III. JURISDICTION

A. Legal Standard

“The jurisdiction of the district court . . . is governed by the FSIA itself: A foreign state is immune from suit in both federal and state courts, 28 U.S.C. § 1604,

¹⁰ As discussed above, 28 U.S.C. § 1603(a) defines a foreign state to include an agency or instrumentality.

¹¹ The Court is also not persuaded by the district court decision in South Carolina, discussed above, *see* section II.B, *supra*, in which the district court observed that it “believes the Netherlands and the Ministry are necessary parties to this action involving contested ownership,” because without their presence in the litigation it “cannot render an effective ruling regarding the ownership of the Artworks.” *See Berg*, Slip Op. at 41. Before making this remark, the court had already concluded that the action must be dismissed due to a lack of personal jurisdiction over remaining defendants, *see id.* at 31, and because of improper venue. *See id.* at 38-39. As a result, the court’s standing analysis—which included its offhand observation regarding the Netherlands’ “necessary” status—was mere dicta. Moreover, the district court reached this conclusion while deciding whether plaintiffs had *standing* to press their claims. *See id.* at 41 (concluding that without Netherlands or the Ministry, plaintiffs had not established redressability). Rule 19 was not mentioned, let alone analyzed.

unless the case comes within an express exception in the FSIA, *id.* § 1605.” *Price v. Socialist People’s Libyan Arab Jamahiriya*, 389 F.3d 192, 196 (D.C. Cir. 2004); *see also Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (“If no exception applies, a foreign sovereign’s immunity under the FSIA is complete: The district court lacks subject matter jurisdiction over the plaintiff’s case” (internal citations omitted)).

While generally the Court is to assume all facts as true at the motion to dismiss stage, “[w]hen a foreign sovereign disputes the fact(s) upon which the district court’s subject matter jurisdiction depend(s), the court ‘must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss.’” *Price*, 389 F.3d at 197 (quoting *Phoenix Consulting*, 216 F.3d at 40). For example, under the expropriation exception, “federal courts can maintain jurisdiction to hear the merits of a case only if they find that the property in which the party claims to hold rights was indeed ‘property taken in violation of international law.’” *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017).

Plaintiffs must produce evidence to show the absence of immunity based on an FSIA exception. *See Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 42 (D.D.C. 2000). However, “[i]n accordance with the restrictive view of sovereign immunity reflected in the FSIA, the burden of proof in establishing the inapplicability of these exceptions is upon the party claiming immunity.” *Transamerican S.S. Corp. v.*

Somali Democratic Republic, 767 F.2d 998, 1002 (D.C. Cir. 1985). As a result, “defendant[s] bear[] the burden of proving that the plaintiff’s allegations do not bring its case within a statutory exception to immunity.” *Phoenix Consulting*, 216 F.3d at 40; *see also Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) (same).

B. The Court of Appeals’ Remand

In its most recent opinion, the Court of Appeals approved this Court’s use of the FSIA’s expropriation exception as to the remaining defendants (excluding Hungary), which satisfied the second clause of the exception, relating to an agency or instrumentality of a foreign state. *See* 28 U.S.C. § 1605(a)(3). It then directed this Court to address several specific issues on remand.

First, the Court of Appeals determined that “most of [plaintiffs’] claims do in fact involve a tight legal, factual, and temporal connection to Hungary’s expropriation of the collection.” *de Csepel*, 859 F.3d at 1102. Indeed, the Circuit noted defendants’ concession that “some twenty-five pieces of art were *never* returned to the family” by Hungary. *See id.* (emphasis added). It thus “conclude[d] that ‘rights in property taken in violation of international law’ are ‘in issue’ as to those twenty-five or so artworks taken by Hungary during the Holocaust and never returned.” *Id.* at 1103. Therefore, the Court has jurisdiction under the FSIA’s expropriation exception over these undisputed wartime takings. The twenty-three pieces that defendants have conceded were never returned and over which the Court has jurisdiction pursuant to the Court of

Appeals' decision are listed in Appendix A, attached hereto.¹²

However, the Court of Appeals also noted that “some fifteen pieces of the Herzog collection were physically returned to family members, and others were legally released to the family on paper (though the family disputes whether they were ever actually returned to their physical custody).” *Id.* (internal quotation marks and brackets omitted). As to these pieces, the Circuit instructed the Court to “determine[] whether the temporary return of the art severed the connection between Hungary’s current possession and its Holocaust-era seizure.” *Id.* For, “if Hungary returned the artworks free and clear to the family and then lawfully repossessed them, a claim for their return would not satisfy the expropriation exception.” *Id.* at 1104. However, if the subsequent re-taking was “sufficiently intertwined with the Holocaust-era taking, or if the pieces were retaken in a new violation of international law,” the expropriation exception would be satisfied despite the temporary return. *See id.* Defendants argue that nineteen pieces, listed in Appendix B, were returned to the Herzog siblings after World War II, and that sixteen of those were subsequently repossessed. The Court analyzes below whether post-World War II actions caused these

¹² Upon further review of the record, it is apparent that jurisdiction has been established as to twenty-*three* (not twenty-five) pieces of artwork. (*Compare* Scholl-Tatevosyan Decl. Ex. 1, ECF No. 148-2 (listing all forty-two artworks in the amended complaint) *with* Ex. 2 (listing nineteen pieces allegedly returned to Herzog siblings).)

nineteen artworks to enter defendants' possession lawfully.

Second, the Court of Appeals instructed the Court to determine if the 1973 Agreement between Hungary and the United States that settled certain claims of American citizens barred claims to pieces attributable to Elizabeth because of the treaty exception to the FSIA.¹³ *See* Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, March 6, 1973, 24 U.S.T. 522 (the "1973 Agreement"). The Court will discuss the claims settlement process in greater detail below, *see* Section III.D.1, *infra*, but for now, the claims process can be briefly summarized as follows: American citizens whose property was taken by Hungary up to the day the 1973 Agreement was signed on March 6, 1973, were able to make claims under two claims settlement processes, one in the 1950's and one in the 1970's. While the first process allowed claimants to retain rights to the unpaid balance of their claims, the 1973 Agreement purported to settle *all* covered claims by American citizens and discharge them completely. According to the Court of Appeals, this Court must determine whether "Hungary did take some of the art from [Elizabeth] *after* she

¹³ The FSIA provides that the abrogation of sovereign immunity under its exceptions is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." *See* 28 U.S.C. § 1604. Therefore, "if there is a conflict between the FSIA and . . . [a pre-existing international] agreement regarding the availability of a judicial remedy against a contracting state, the agreement prevails." *de Csepel*, 714 F.3d at 601 (internal quotation marks omitted).

became a [U.S.] citizen,” as “the 1973 agreement could not have extinguished claims in any work of art taken from [her] before she became a citizen in 1952.” *de Csepel*, 859 F.3d at 1108 (emphasis added). However, claims relating to pieces taken between June 23, 1952, when she became a U.S. citizen, and 1973 would be barred by the 1973 Agreement in accordance with the FSIA’s treaty exception.¹⁴ Again, this review is limited to those nineteen pieces defendants argue were returned. *See id.* (ordering the Court to review if pieces were taken from Elizabeth after she became a citizen “as part of its review of the artwork returned and retaken by Hungary”).

The Court addresses each of these jurisdictional issues—allegedly returned and repossessed artworks, *see* Section III.C, *infra*, and pieces possibly barred by the 1973 Agreement between Hungary and the United States, *see* Section III.D, *infra*. As to the nineteen pieces, Appendix B lists the artworks and designates the ones over which the Court has concluded that it retains jurisdiction.

¹⁴ This Court had previously concluded that two of the forty-four pieces of artwork in the complaint— Lucas Cranach’s *Joachim with the Angel* and John Opie’s *Portrait of an Old Lady*—were not take in violation of international law. *See de Csepel*, 169 F. Supp. 3d at 167. As found by this Court, the Opie was acquired from a third-party donor in 1963, and the Cranach was seized by Hungary’s communist government in 1952 from the home of a former attorney for the Herzog family in connection with the prosecution of an individual (Ferenc Kelemen) who allegedly violated Hungarian registration laws and hid the painting to keep it safe for Elizabeth. *See id.* at 165-66; *see also* 859 F.3d at 1108.

C. Returned and Repossessed Artworks

Defendants' first jurisdictional argument is that nineteen pieces listed in the amended complaint were not taken in violation of international law for purpose of the FSIA's expropriation exception. (*See* Mot. to Dismiss at 34.) According to defendants, "Hungary returned the artworks free and clear to the family and then lawfully repossessed them, [so] a claim for their return would not satisfy the expropriation exception." *de Csepel*, 859 F.3d at 1104.

The nineteen pieces allegedly returned and repossessed can be split into four categories: (1) ten pieces that were part of the forfeiture order in the smuggling case against Illona Kiss, István's former wife (the "Kiss Forfeiture"); (2) three that were not explicitly part of the Kiss Forfeiture, but which defendants argue were taken "in connection with" it; (3) two that defendants argue were returned to plaintiffs and never re-possessed by Hungary; and (4) four for which plaintiffs contest the return itself. Beyond the four pieces in category (4) whose return plaintiffs dispute, plaintiffs argue that, even if a piece had been returned, all subsequent re-takings were "in violation of international law."

While plaintiffs are correct that "[a] taking violates international law if: (1) it was not for a public purpose; (2) it was discriminatory; or (3) no just compensation was provided for the property taken" (*see* Pls.' Opp. at 40 (quoting *de Csepel*, 808 F. Supp. 2d at 128)), they fail to address an additional requirement—for a taking to constitute an expropriation in violation of international law, it must also be of the property of a

national of another state because otherwise it would be blocked by what is referred to as the “domestic takings rule.” See Restatement (Third) of the Foreign Relations Law of the United States § 712 (“A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a *national of another state . . .*” (emphasis added)). “The domestic takings rule means that, as a general matter, a plaintiff bringing an expropriation claim involving an intrastate taking cannot establish jurisdiction under the FSIA’s expropriation exception because the taking does not violate international law.” See *Simon*, 812 F.3d at 144-45. In cases arising out of takings from Jewish people during World War II, the domestic takings rule has not been applied because the genocide perpetrated by Germany and other Nazi-affiliated governments constitutes the predicate violation of international law. See *id.* at 144 (“The domestic takings rule has no application in the unique circumstances of this case, in which, unlike in most cases involving expropriations in violation of international law, *genocide* constitutes the pertinent international-law violation.”). For that reason, the Court of Appeals instructed this Court to determine on remand whether the new, post-World War II takings were “sufficiently intertwined with the Holocaust-era taking.” See *de Csepel*, 859 F.3d at 1104. Whether the later re-possession is “sufficiently intertwined” with the Holocaust will therefore guide the Court’s analysis, as any “basic international-law expropriation claim[s],” *Simon*, 812 F.3d at 145, severed from the Holocaust,

will largely be barred by the domestic takings rule and will not constitute violations of international law.¹⁵

1. Kiss Forfeiture

Ten of the returned and repossessed pieces were taken as part of a smuggling prosecution against Ilona Kiss, István's former wife and one-time guardian. István "gifted" much of his art to her in 1944 in an attempt to avoid its confiscation, as she was not Jewish and thus not subject to the registration laws. (*See* Pls.' Opp at 6; *see also* Walker Decl. Ex. R-2, ECF No. 148-26.) A police report written during the investigation described how in 1948 Ms. Kiss, along with several others, smuggled three artworks out of Hungary for sale in Switzerland. (*See* Walker Decl. Ex. R-2.) As a result of this investigation, the Hungarian government impounded a number of artworks belonging to the Herzog family—some belonging to István, but also several belonging to Elizabeth and András. Following Kiss' conviction, fourteen pieces belonging to the Herzog family were taken into state ownership by the Museum of Fine Arts on October 6, 1950, and were inventoried on October 18, 1950. (*See* Declaration of Alycia Regan Benenati ("Benenati Decl.") Ex. 12, ECF No. 153-15; *see also* Walker Decl. Ex. K-7, ECF No. 148-19.) Ten artworks on this list of

¹⁵ Thus, in 1952, when Elizabeth became an American citizen, and, for pieces attributed to András, in 1959, when his first daughter became an Italian citizen (*see* Pls.' Opp. at 5), the domestic takings rule would cease to apply, and a taking meeting plaintiffs' criteria (for example, one made without compensation) *would* constitute a taking in violation of international law unless barred by the FSIA's treaty exception. *See* note 13, *supra*.

fourteen are part of the nineteen pieces the Court of Appeals directed this Court to assess for jurisdictional purposes.¹⁶

Plaintiffs argue that “[t]he underlying criminal proceedings against Ilona Kiss were predicated on an invalid Holocaust-era agreement that Ilona Kiss and István Herzog entered into to attempt to shield István Herzog’s property from Nazi confiscation,” and thus, any takings associated with it must be viewed as intertwined with the earlier, Holocaust-era takings. (See Pls.’ Opp. at 43.) However, given that the Kiss

¹⁶ The ten pieces included in the Kiss Forfeiture (that also belong to the group of nineteen returned pieces) are:

- (1) Barthel Bruyn, *Portrait of Petrus von Clapis, half-length, in a blue coat with fur collar*, 17(i) in the amended complaint;
- (2) Gustave Courbet, *The Spring (Artist and Model)*, 17(v);
- (3) Pseudo Pier Francesco Fiorentino, *The Madonna and Child with the Infant Saint John, Saint Catherine and Angels*, 17(ix);
- (4) Domenikos Theotokopoulos, El Greco, *The Holy Family with Saint Anne*, 17(x);
- (5) Augustin Theodule Ribot, *Still Life with a Chicken, a Bottle of Wine, Asparagus, Artichoke, Tomatoes and other Vegetables, on a Table*, 17(xv);
- (6) Sir Anthony Van Dyck, *Portrait of Margaret of Lothringen*, 17(xvii);
- (7) Alvise Vivarini or Giovanni Battista da Udine, *Madonna and Child with Saints John the Baptist and a male Saint*, 17(xviii);
- (8) Francisco de Zurbarán, *Saint Andrew*, 17(xix);
- (9) *A Terracotta Group of the Virgin and Child*, Italian, 15th Century, 17(xxi); and
- (10) József Borsos, *Portrait of the Architect Mátyás Zitterbarth*, 18(i).

prosecution was for smuggling and was undertaken by Hungary's communist government after the fall in 1945 of the German-controlled, Fascist regime and the repeal in March 1945 of the World War II-era discriminatory laws, the Court cannot agree. The ten pieces were returned prior to their forfeiture, so their taking in 1950 due to a criminal proceeding "severed the connection between Hungary's current possession and its Holocaust-era seizure." *See de Csepel*, 859 F.3d at 1103.

However, the October 1950 forfeiture order does not close the chapter on the Kiss Forfeiture. On March 20, 1951, Dr. Oltványi, then-director of the Museum of Fine Arts, wrote a letter memorializing his conversation with a representative of the Herzog family, Henrik Lorant, in which he stated that Mr. Lorant had informed him that several pieces had been "included in the criminal attachment [in the Kiss Forfeiture] by mistake."¹⁷ (*See* Tatevosyan Decl. Ex. 63, ECF No. 106-6.) Furthermore, he "request[ed] commencement of the procedure for terminating the criminal attachment." (*Id.*) The five pieces listed in this "mistake letter" comprise the pieces attributed to Elizabeth and András that had previously been included in the Kiss Forfeiture.¹⁸ Neither plaintiffs nor

¹⁷ Another letter written by a Herzog representative, Dr. Emil Oppler, on May 3, 1950, refers to these pieces, among others, as having been taken by the police "for the clarification of their legal status." (*See* Walker Decl. Ex. B-3.)

¹⁸ The five pieces included in the Kiss Forfeiture and also in this "mistake letter" are:

defendants have provided any further proof as to whether the criminal attachment was in fact terminated; however, at this stage, and given the burden of proof, the Court cannot conclude that these pieces were taken as a result of the Kiss Forfeiture and, therefore, cannot conclude that they passed to the state in 1950.

However, all five of these artworks are still in defendants' possession, so they must have been taken again at some later time. And as noted, the pieces are attributable to András or Elizabeth, who either themselves (Elizabeth) or their heirs (András) eventually became non-Hungarian citizens. *See* note 15, *supra*. Therefore, these later takings of the five paintings will need to be analyzed to see if they constitute separate violations of international law.

Defendants have presented some evidence regarding the one piece that is attributable to András—József Borsos's *Portrait of the Architect Mátyás Zitterbarth*. (*See* Walker Decl. Ex. D, ECF No. 148-12.) Although there is no information regarding the

(1) Barthel Bruyn the Elder, *Portrait of Petrus von Clapis, half-length, in a blue coat with fur collar*, 17(i) in the amended complaint;

(2) Pseudo Pier Francesco Fiorentino, *The Madonna and Child, with the Infant Saint John, Saint Catherine and Angels*, 17(ix);

(3) Domenikos Theotokopoulos, El Greco, *The Holy Family with Saint Anne*, 17(x);

(4) Sir Anthony Van Dyck, *Portrait of Margaret of Lothringen*, 17(xvii); and

(5) József Borsos, *Portrait of the Architect Mátyás Zitterbarth*, 18(i).

painting's whereabouts after the Kiss Forfeiture, the next mention of this painting was in a letter dated December 11, 1973, in which the Hungarian Ministry of Culture asserted that it, along with the other pieces listed in the Kiss Forfeiture, "insofar [as] they have not already passed into the ownership of the State," have become state property. (See Scholl-Tatevosyan Decl. Ex. 37, ECF No. 148-5.) By 1973, András's daughters were Italian citizens, and they received no compensation for the painting's taking; as a result, the taking of this artwork is an expropriation in violation of international law over which the Court has jurisdiction. As to the four pieces attributable to Elizabeth that were listed in the March 20, 1951 "mistake letter," it appears likely that any taking would have occurred after she became a U.S. citizen in June 1952 and would thereby implicate the 1973 Agreement, which is discussed below. See Section III.D, *infra*.

2. Kiss Forfeiture "In Connection With" Pieces

Defendants next argue that three pieces "were handed over to Hungary in 1950, all in connection with the Kiss smuggling action" (Mot. to Dismiss at 37)—(1) Alonso Cano, *Portrait of Don Balthasar Carlos (1629-1646), Standing full-length, in a Landscape*, 17(ii) in the amended complaint; (2) Giovanni Pedrini, called Giampietro, *Christ Carrying the Cross*, 17(xiii); and (3) Mihály Munkácsy, *In the Studio*, 18(iv). While all three pieces were indeed offered to the defendants in May 1950, pursuant to a letter written by Elizabeth's representative, Dr. Emil Oppler (see Walker

Decl. Ex. B-3, ECF No. 148-10), there is no evidence to suggest that these three pieces were taken “in connection with” the Kiss Forfeiture. The letter recognized that several pieces were already in the custody of the Financial Police, but these three were not included with those pieces that were in the possession of the police. (*See id.*) As to these three pieces, as well as several others not at issue here, Dr. Oppler offered the paintings “for deposit . . . while maintaining the ownership title to the deposit.” (*Id.*) Dr. Oppler’s offer was made with reference to Legislative Decree No. 13/1949, which allowed the government to order certain collections of national interest be transferred to governmental custody for safekeeping. (*See* Defs.’ 2020 Reply at 2 (“This law, which explicitly applies to ‘private collections of national interest,’ states that the ‘Minister of Religion and Public Education may order the transfer of the private collection into a public collection’ to keep a collection secure or intact.” (quoting Legislative Decree No. 13 of 1949 on Museums and Monuments at Art. 10)).) However, given that the letter purports only to bail the collection temporarily, and there is no other evidence that Dr. Oppler was ordered to surrender the works, the Court concludes that the May 1950 letter does not itself indicate that Hungary “took” the pieces in connection with the Kiss Forfeiture.

Defendants cite a document from June 1958 listing certain pieces from the deposit stock of the Old Masters Gallery “to be inventoried,” *i.e.*, added to the Museum of Fine Art’s core inventory. (*See* Walker Decl. Ex. B-5.) Included on this list is *Christ Carrying the Cross* by an Italian painter, with the same dimensions as were

listed for the Giovanni Pedrini in the amended complaint. (*Compare id. and Am. Compl.* ¶ 17(xiii).) Given that it was returned before 1950, kept by a private individual, and then offered back to the government in 1950, any “taking” that occurred by 1958 of the *Christ Carrying the Cross* was “severed . . . [from] its Holocaust-era seizure.” *See de Csepel*, 859 F.3d at 1103. Defendants have thus met their burden that the expropriation exception does not apply.

The remaining two pieces—Munkácsy’s *In the Studio* and Cano’s *Portrait of Don Balthasar Carlos*—present a different analysis. While both came into defendants’ possession in 1950 pursuant to the Oppler letter, there is no proof that they were “taken” by the Hungarian government into its possession until much later. Given that both pieces belong to Elizabeth, their taking after 1952 could constitute a separate violation of international law unless the 1973 Agreement applies. As a result, the Court will analyze these pieces under the 1973 Agreement before deciding whether has jurisdiction over them. *See Section III.D, infra.*

3. Pieces Defendants Claim Not to Possess

Defendants claim not to be in possession of several artworks listed in the amended complaint, two of which must be analyzed here—(1) *Four ancient Egyptian sculptures, statues, and steles*, 17(xxxi); and (2) Lajos Deák Ébner, *Fair in Szolnok City*, 18(v).¹⁹ Plaintiffs

¹⁹ The Court need not address the other three pieces defendants claim not to be in possession of: (1) *Terracotta Group of the Virgin*

conceded at oral argument that they have no evidence to rebut defendants' evidence that Ébner's *Fair in Szolnok City* was returned to the Herzog siblings after the war and was never repossessed by defendants. (See Jan. 13, 2020 Tr. at 115:13-17, ECF No. 174.) Claims relating to this piece are therefore dismissed for lack of jurisdiction. However, as to the *Four Ancient Egyptian sculptures, statues, and steles*, not only does defendants' evidence of return relates to, at most, two of the four pieces (see Walker Decl. Ex. T, ECF No. 148-28), but plaintiffs also contest defendants' assumption that the returned pieces are the same as those confiscated during World War II. (See Benenati Decl. Ex. 23 at 3, ECF No. 153-26.) The Court agrees that a document memorializing the receipt of "1 Egyptian stone tablet" and "1 Egyptian inscribed tablet" (see Walker Decl. Ex. T-1), without more, is not sufficient to demonstrate a return of the pieces described in 17(xxxi). As a result, defendants have not "severed the connection between Hungary's current possession and its Holocaust-era seizure." See *de Csepel*, 859 F.3d at 1103. The Court thus concludes that defendants have not met their burden to demonstrate that the expropriation exception

and Child, Italian, 15th century, 17(xxi) in the amended complaint; (2) *Four ancient silver coins*, 17(xxxiii); and (3) *Seventy-Eight Pieces: Ancient Cameos, Intaglios, Other Carved Stones and Semi-Precious Stones*, 17(xxxiv), which defendants noted for the first time at oral argument might also not be in their possession. (See Jan. 13, 2020 Tr. at 119:10-14, ECF No. 174.) *The Terracotta Group* was part of the Kiss Forfeiture and, as noted above, its taking was not intertwined with the Holocaust-era takings. See Section III.C.1, *supra*. The other two pieces are undisputed wartime takings (see Appendix A), so the Court need not address them for purposes of jurisdiction.

does not apply to the artwork listed in 17(xxxi) of the amended complaint.

4. Disputed-Return Artworks

Plaintiffs raise factual disputes as to four of defendants' alleged returns: (1) *Virgin of the Annunciation*, Austrian, circa 1400, 17(xxv) in the amended complaint; (2) Károly Ferenczy, *Landscape with a Fenced Enclosure (Houses in Fernezely with Sheepfold) 1912*, 20(i); (3) Giovanni Santi *Christ with a Fly*, also known as *Christ the Dolorous, Christ with a Fly*, 17(xvi); and (4) *A Painted Stucco Bust*, after Jacopo della Quercia, 17(xx). As to the first and fourth, the Court concludes that defendants have failed to demonstrate that the expropriation exception does not apply, as they have not shown that the pieces were in fact returned "free and clear." *See de Csepel*, 859 F.3d at 1104. As to the second and third, the Court concludes that plaintiffs cannot rely on the expropriation exception.

Plaintiffs argue that the *Virgin of the Annunciation* was not returned in 1947, and that a statue closely resembling it in description is listed as part of the Museum of Fine Art's deposit inventory. (*See Pls.' Opp.* at 40.) The amended complaint describes this piece as an Austrian statue circa 1400, made of limestone, and approximately 90 centimeters tall. (*See Am. Compl.* ¶ 17(xxv).) Defendants cite a letter dated January 25, 1947, from Elizabeth's representative, saying he took possession of a "Female Saint" stone sculpture, as evidence that the piece in the complaint was returned after the war. (*See Walker Decl. Ex. C-1, ECF No. 148-11.*) A list of the pieces on deposit with the

Museum of Fine Arts in 1958 includes a “Saint Woman,” purportedly from a 15th-century German master, made of chalk (a variety of limestone) and 90 centimeters tall. (*See id.* at Ex. C-4; *see also* Benenati Decl. Ex. 23.) It is listed as acquired from the “Government Commissioner’s Office.” (*See* Walker Decl. Ex. C-4.) Plaintiffs seem to agree that the piece listed on the deposit register is the one described in the complaint, but dispute that the “Female Saint” returned in 1947 is the same piece. (*See* Benenati Decl. Ex. 23.) The Court concludes that such a sparse description as “Female Saint” is not sufficient to show that the statue was in fact returned, particularly when there is no further evidence of its possession by the Herzog siblings *or* of its bailment back to defendants. And, the piece’s current placement in the “deposit” catalog casts doubts on defendants’ representations of ownership.²⁰ The Court will therefore retain jurisdiction over claims related to this artwork.

²⁰ As the name suggests, pieces that are on “deposit” with the museums, as opposed to in their “core” inventory, do not belong to the museums but are merely on loan, for example from a private collection. (*See* Benenati Decl. Ex. 13, Deposition of Samuel Balász, at 33:17-19 (“Q: So if an artwork is a deposit, it is not owned by the state? A: Yes.”), ECF No. 153-16.) This different status between core and deposit pieces is reflected in how the two are treated under Hungarian law. For example, core pieces “are subject to restricted marketability” and cannot be alienated without government permission (*see* Novak Decl. Ex. E, Act CXL of 1997 on Museological Institutions, Public Library Services and Public Culture at Section 38(1), ECF No. 148-30), because they are government property. This restriction does not apply to pieces that are on deposit.

Plaintiffs claim that “[t]here is also a dispute of fact as to whether . . . [Ferenczy’s *Landscape*] was returned in 1947 and sold.” (See Pls.’ Opp. at 41.) However, it is clear from a letter from January 25, 1947, that a representative of the Herzog family took possession of the painting (see Walker Decl. Ex. E-1, ECF No. 148-13), and a subsequent letter in June 1948 indicates that the same representative “sold . . . [the Ferenczy *Landscape*] through professor Elemer Varju.” (See *id.* at E-2.) Contrary to plaintiffs’ contention (see Pls.’ Opp. at 41), the exhibit relied on by defendants specifies which paintings were sold. (See Walker Decl. Ex. E-2.) Although in light of this sale it is odd that a 1958 Museum of Fine Arts document lists the piece as deposited by the Herzogs (see Benenati Decl. Ex. 25, ECF No. 153-28), the piece is no longer on deposit and the Court sees no reason to disregard the record evidence attesting to the release of the painting to a Herzog representative and its subsequent sale. Any later repossession by the Hungarian government of the painting was thus “severed . . . [from] its Holocaust-era seizure.” See *de Csepel*, 859 F.3d at 1103.

Plaintiffs take issue with defendants’ contention that Giovanni Santi’s *Christ with a Fly* “was actually returned in 1947.” (Pls.’ Opp. at 41.) A memorandum dated June 25, 1947, described the Santi being released to Mrs. István Herzog as István’s guardian. (See Walker Decl. Ex. R-1.) And, a November 1948 report of the Hungarian State Police’s Economy Policy Department says that in the summer of 1947, Mrs. István Herzog transferred her guardianship to Dr. Odon Berzsenyi, “at the same time handing over” several paintings belonging to István, including the

Santi. (*See id.* at Ex. R-2.) The painting entered state possession by sometime in 1948, when it was listed among pieces that a Hungarian ministry had placed “at the disposal of the Museum of Fine Arts, as a temporary deposit.” (*See* Benenati Decl. Ex. 26, ECF No. 153-29.) Then, as of January 1949, the piece had been seized to secure tax debts. (*See* Walker Decl. Ex. R-3.) Again, however, the evidence suggests that the painting was returned and, indeed, transferred freely between István’s two guardians. Deeming this return “free and clear” is not inconsistent with the painting’s repossession by the Hungarian government, on deposit or otherwise, approximately one year later. And, there is no basis to infer that the repossession by the communist Hungarian government in 1948 or 1949 was “intertwined” with the earlier, Holocaust-era taking.

Lastly, plaintiffs argue that *A Painted Stucco Bust*, after Jacopo della Quercia, was not “actually ‘legally returned and physically released’ in 1948 as Defendants claim.” (Pls.’ Opp. at 41.) The Court agrees that it is unclear whether the bust was returned “free and clear” to the Herzog family. Although defendants contend that the bust was returned to the Herzog family on April 15, 1948 (*see* Walker Decl. Ex. Q-2, ECF No. 148-25), an “acknowledgment of receipt” from Dr. Jeszenszky, a Hungarian government official, states that the Hungarian government received the piece “for safeguarding” the *exact same day*. (*See id.* at Ex. Q-3.) Since there does not appear to be any time between the piece’s purported return to the Herzogs and its immediate repossession by the government, there is a lack of evidence that the return was “free and clear” such that it “severed the connection between Hungary’s

current possession and its Holocaust-era seizure.” *See de Csepel*, 859 F.3d at 1103-04. The Court concludes defendants have not met their burden as to *A Painted Stucco Bust*, and thus, the Court will retain jurisdiction over this piece.

Because the defendants have demonstrated that two pieces were returned “free and clear,” their repossessions were sufficiently separate from the Holocaust-era takings and thus not “in violation of international law.” Claims related to these pieces will be dismissed. Claims as to the *Virgin of the Annunciation* and *A Painted Stucco Bust*, however, are subject to the Court’s jurisdiction pursuant to the FSIA’s expropriation exception.

6. Conclusion as to Returned Pieces

The Court of Appeals instructed this Court to “review . . . the artwork returned and retaken by Hungary.” *See de Csepel*, 859 F.3d at 1108. Defendants alleged that nineteen pieces were returned to the Herzog siblings or their representatives, and that sixteen of those were subsequently retaken. After reviewing the evidence, the Court has concluded that the expropriation exception applies to at least four of the group of nineteen. For the following three pieces, the takings were “sufficiently intertwined with the Holocaust-era taking,” *See de Csepel*, 859 F.3d at 1104:

- (1) *A Painted Stucco Bust*, after Jacopo della Quercia, 17(xx) in the amended complaint;
- (2) *The Virgin of the Annunciation*, Austrian, circa 1400, 17(xxv); and

(3) *Four Ancient Egyptian Sculptures, Statues, and Steles*, 17(xxxi);

And as to one piece—József Borsos, *Portrait of the Architect Mátyás Zitterbarth*, 18(i)—the Court concludes it was “retaken in a new violation of international law” and thus the expropriation exception applies. *See id.*

As to nine other pieces, defendants have demonstrated that they were returned and re-taken (if re-taken at all) in a way that “severed the connection between Hungary’s current possession and its Holocaust-era seizure.” *Id.* at 1103. The Court therefore lacks jurisdiction over these pieces:

(1) Gustave Courbet, *The Spring (Artist and Model)*, 17(v);

(2) Giovanni Pedrini, called Giampietro, *Christ Carrying the Cross*, 17(xiii);

(3) Augustin Theodule Ribot, *Still Life with a Chicken, a Bottle of Wine, Asparagus, Artichoke, Tomatoes and other Vegetables, on a Table*, 17(xv);

(4) Giovanni Santi, *The Dead Christ with Two Angels*, also known as *Christ the Dolorous, Christ with a Fly*, 17(xvi);

(5) Alvise Vivarini or Giovanni Battista da Udine, *Madonna and Child with Saints John the Baptist and a male Saint*, 17(xviii);

(6) Francisco de Zurbarán, *Saint Andrew*, 17(xix);

(7) *A Terracotta Group of the Virgin and Child*, Italian, 15th century, 17(xxi);

(8) Lajos Deák Ébner, *Fair in Szolnok City*, 18(v); and

(9) Károly Ferenczy, *Landscape with a Fenced Enclosure (Houses in Fernezely with Sheepfold)*, 20(i).

Lastly, as to the remaining six pieces—all of which belong to Elizabeth—the Court finds that while defendants have adequately demonstrated their return, their later repossession must still be analyzed to determine whether claims related to them are subsumed by the 1973 Agreement and are thereby covered by the FSIA’s treaty exception. *See* note 13, *supra*. Those pieces are:

(1) Barthel Bruyn the Elder, *Portrait of Petrus von Clapis, half-length, in a blue coat with fur collar*, 17(i);

(2) Alonso Cano, *Portrait of Don Balthasar Carlos (1629-1646), Standing full-length, in a Landscape*, 17(ii);

(3) Pseudo Pier Francesco Fiorentino, *The Madonna and Child, with the Infant Saint John, Saint Catherine and Angels*, 17(ix);

(4) Domenikos Theotokopoulos, El Greco, *The Holy Family with Saint Anne*, 17(x);

(5) Sir Anthony Van Dyck, *Portrait of Margaret of Lothringen*, 17(xvii); and

(6) Mihály Munkácsy, *In the Studio*, 18(iv).

D. 1973 AGREEMENT

Defendants argue that “[t]he documentary evidence makes clear that [Elizabeth] sought and received compensation for property that she affirmatively claimed was taken from her *after* she became a U.S. citizen,” and as a result, the Court lacks jurisdiction over her claims that were settled pursuant to the 1973 Agreement between the United States and Hungary. (See Mot. to Dismiss at 31 (emphasis in original).) Plaintiffs respond that the 1973 Agreement does not apply, for defendants fail to point to any evidence that defendants took any of the artworks at issue after Elizabeth became a citizen in June 1952 and before March 6, 1973, when the 1973 Agreement was signed, and second, the United States cannot espouse claims that arose when an individual was not yet an American citizen. (See Pls.’ Opp. at 37.)

Throughout these proceedings, this Court has consistently held that the 1973 Agreement does not bar claims except for those takings from Elizabeth between 1952 and 1973. The Court of Appeals agreed and directed this Court on remand to determine whether any of the returned artworks were taken from Elizabeth after June 1952. *See de Csepel*, 859 F.3d at 1108 (“Although, as the district court explained, the 1973 agreement could not have extinguished claims in any work of art taken from Erzsébet before she became a citizen in 1952, the remaining defendants insist that Hungary did take some of the art from Erzsébet after she became a citizen.” (internal citation omitted)); *see also id.* (“[W]e think it best to leave it to the district

court to address this issue in the first instance as part of its review of the artwork returned and retaken by Hungary.”).

As noted in Section III.C, *supra*, there are six pieces attributable to Elizabeth that may have been taken during the relevant time period covered by the 1973 Agreement. In accordance with the Court of Appeals’ mandate, the Court will analyze only those six pieces, which were returned by Hungary post-war. Elizabeth’s remaining pieces are undisputed wartime takings and thus could not have been settled by the 1973 Agreement, as will be further explained below.²¹ See Section III.D.1, *infra* (explaining the claims process).

²¹ For example, defendants contend that the 1973 Agreement subsumed Elizabeth’s claims to two pieces—József Borsos, *Girls with Flowers (The Three Graces)*, 17(xxxii) in the amended complaint, and Károly Brocky, *Bacchanale*, 18(ii)—although they were never raised to either the United States or Hungary. (See Mot. to Dismiss at 33 (citing art. 6(1) of the 1973 Agreement (settling all claims of U.S. nationals, whether they were brought to Hungary’s attention or not)).) As the Court of Appeals limited this Court’s jurisdictional review to those pieces returned to the Herzog siblings after the war (*see* Appendix B), this argument must fail, for both pieces are undisputedly wartime takings (*see* Appendix A), and thus, they could not be settled by the 1973 Agreement, which requires that claimants be U.S. nationals at the time they suffered their losses. *See de Csepel*, 808 F. Supp. 2d at 133 (“Both Hungary and the United States expressly recognized the inherent limitations on espousal authority during negotiations of the 1973 Agreement.”); *see also de Csepel*, 859 F.3d at 1108 (citing this Court’s opinion for the proposition that “the 1973 agreement could not have extinguished claims in any work of art taken from Erzsébet before she became a [U.S.] citizen in 1952”).

1. The Claims Process

The International Claims Settlement Act of 1949 established a process by which American citizens could receive compensation from the United States government for losses caused by certain foreign governments during certain periods of time. *See* International Claims Settlement Act of 1949, 22 U.S.C. § 1621 *et seq.*; (*see also* Scholl-Tatevosyan Decl. Ex. 40 at 13 (“These programs have involved claims of U.S. nationals for losses in specific foreign countries as a result of the nationalization or other taking of property during specific periods of time by the governments of those countries.”).) The Foreign Claims Settlement Commission (“FCSC”), which replaced the International Claims Commission by amendment of the Act in 1954, decides whether evidence submitted in support of claims for compensation under the Act establishes the requisite elements. (*See* Scholl-Tatevosyan Decl. Ex. 40 at 1; *see also id.* at 3 (describing those elements as “United States nationality, ownership, value and the date and circumstances of the asserted loss”).) The FCSC determination is “final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise.” 22 U.S.C. §1641m.

The First Hungarian Claims Program, which was completed on August 9, 1959, and funded by “the vesting and liquidation of enemy assets which had been blocked by the United States during World War II” (*see* Scholl-Tatevosyan Decl. Ex. 40 at 17), provided

compensation for American citizens for losses suffered before August 9, 1955. *See* 22 U.S.C. § 1641b(2).

The Second Hungarian Claims Program came into existence following the conclusion of an executive agreement between the United States and Hungary on March 6, 1973. *See* Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, March 6, 1973, 24 U.S.T. 522 (the "1973 Agreement"). The 1973 Agreement provided that, in exchange for the sum of \$18,900,000, the government of the United States "shall discharge the Government of the Hungarian People's Republic and Hungarian nationals from their obligations to the Government of the United States and its nationals in respect of all claims referred to in Article 2 of [the] Agreement." *See* 1973 Agreement at Art. 6(1). Article 2 listed as discharged and settled any claims that, *inter alia*, related to "property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation, or other taking on or before the date of this Agreement." *See id.* at Art 2(1). The Second Program was completed on May 16, 1977, and authorized the FCSC to determine claims for losses after August 9, 1955, up through the date the 1973 Agreement was signed on March 6, 1973. (*See* Scholl-Tatevosyan Decl. Ex. 40 at 19.) The FCSC "was also authorized to adjudicate certain claims which should have been filed in the first Hungarian Claims Program, but were not, due to an administrative error." (*Id.*) While funds from the Second Program could be used to pay pre-1955 claims, it could only do so once post-1955 claims and

previously-unfiled claims were funded to the same level as claims had been under the First Program. *See* 22 U.S.C. § 1641i(a)(7).

Under the 1973 Agreement once Hungary paid the \$18,900,000 as provided for in Article 1, “the Government of the United States will consider as finally settled all claims for which compensation is provided under Article 1, whether or not they have been brought to the attention of the Government of the Hungarian People’s Republic.” *See* 1973 Agreement at Art. 6(1). Moreover, the Agreement provided that “[t]he distribution of [the \$18.9 million] . . . falls within the exclusive competence of the Government of the United States in accordance with its legislation, without any responsibility arising therefrom for the Government of the Hungarian People’s Republic.” *See id.* at Art. 5. As a result, the 1973 Agreement settled *all* claims of U.S. citizens against Hungary in their entirety and required U.S. citizens to deal with the United States government (not Hungary) to the extent they required compensation. Both the United States and Hungary understood that to be deemed a “national of the United States,” an individual had to have been a U.S. citizen at the time the loss was suffered. (*See* Benenati Decl. Ex. 22, Deposition of Dr. István Kiss, at 32:14-17 (“The prime principle applied in this agreement was that the person whose claim was submitted should be or should have been an American citizen at the time of suffering the damage . . .”), ECF No. 110-7); *see also de Csepel*, 808 F. Supp. 2d at 133 (“Both Hungary and the United States expressly recognized the inherent limitations on espousal authority during negotiations of the 1973 Agreement.”).

2. Elizabeth's Claims

The evidence is clear as to the artworks that were included in Elizabeth's 1959 claim to the FCSC, as well as the compensation she received. In 1959 she received \$457,290.80 for real and personal property she asserted was taken from her by the Hungarian government after she became a U.S. citizen and before August 9, 1955. (See Scholl-Tatevosyan Decl. Ex. 34.) This total included \$210,000 for art in which she claimed a full or a one-third interest along with her two siblings.²² (See

²² Of the twelve pieces which she claimed were taken by Hungary in 1954, eleven are included in the amended complaint:

- (1) Barthel Bruyn the Elder, *Portrait of Petrus von Clapis, half-length, in a blue coat with fur collar*, 17(i) in the amended complaint;
- (2) Alonso Cano, *Portrait of Don Balthasar Carlos (1629-1646), Standing full-length, in a Landscape*, 17(ii);
- (3) Gustave Courbet, *Le Chateau de Blonay (neige), (The Chateau of Blonay (snow))*, 17(iv);
- (4) Pseudo Pier Francesco Fiorentino, *The Madonna and Child, with the Infant Saint John, Saint Catherine and Angels*, 17(ix);
- (5) Domenikos Theotokopoulos, El Greco, *The Holy Family with Saint Anne*, 17(x);
- (6) Bernardino Licinio da Pordenone, *Portrait of a Lady, half-length, in a Black Robe, Holding a Book*, 17(xiv);
- (7) Augustin Theodule Ribot, *Still Life with a Chicken, a Bottle of Wine, Asparagus, Artichoke, Tomatoes and other Vegetables, on a Table*, 17(xv);
- (8) Sir Anthony Van Dyck, *Portrait of Margaret of Lothringen*, 17(xvii);
- (9) Alvise Vivarini or Giovanni Battista da Udine, *Madonna and Child with Saints John the Baptist and a male Saint*, 17(xviii);

Scholl-Tatevosyan Decl. Ex. 33.) She claimed that the art was taken on May 12, 1954, the date of passage of Hungary's 1954 Museum Decree (*see id.*), which allowed the Hungarian government to nationalize art with no apparent owner or when the owner had fled the country without permission. (*See* Declaration of Orsolya Banki Ex. C, Legislative Decree No. 13 of 1954 at Sec. 9(1), ECF No. 13-2.) It appears now that Elizabeth's claim that her art was taken on May 12, 1954, pursuant to the Museum Decree, was made in error.²³ (*See* Pls.' 2020 Reply at 7 ("Elizabeth's claim was predicated on the erroneous belief that her art had

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- (10) Mihály Munkácsy, "*La Visite*" (*The Afternoon Visit*), 18(iii); and
(11) Mihály Munkácsy, *In the Studio*, 18(iv).

²³ It is unclear when Elizabeth or her heirs understood that the pieces that she claimed compensation for in 1959 had not in fact been taken or placed in the state's ownership under the 1954 Museum Decree. From the record, it appears that as late as 2000, Hungary was still claiming that at least some of the artwork at issue in the Nierenberg litigation was acquired as either "abandoned goods" or "marked as having an unknown owner and thus were acquired through legal regulation." (*See* Scholl-Tatevosyan Decl. Ex. 48 at 21, ECF No. 148-6.) In October 2000, the Metropolitan Court concluded that the state had *not* gained ownership of the art in this way (*see id.* at 35), and this conclusion carried through to the Metropolitan Court of Appeals' final decision in 2008, which agreed with the lower court's determination that the 1954 Museum Decree did not apply to Elizabeth's paintings, except for one. (*See* Scholl-Tatevosyan Decl. Ex. 26 at 3 (court concluded that the state could not establish ownership pursuant to the 1954 Museum Decree "because the plaintiff's legal predecessor emigrated with permission"), ECF No. 148-4; *see also id.* at 14 (concluding that as to the Opie, the conditions of the 1954 Museum Decree were met).)

been nationalized pursuant to the 1954 Museum Decree”); *see also* Defs.’ 2020 Reply at 6 (“Early in the course of the 1973 Agreement negotiations, the Hungarian delegation rejected the claims advanced by the United States on behalf of Erzsébet on the grounds that, while the artworks had been placed in a public collection and would not be returned, they may not have been formally ‘nationalized.’”).) She was paid \$210,000 based on the assessments of an art dealer and an employee of the Smithsonian Institute that the amount represented her “total interest” in the claimed works. (*See* Scholl-Tatevosyan Decl. Ex. 33.) Nevertheless, the FCSC’s decision provided that “[p]ayment of any part of this award shall not be construed to have divested the claimant herein, or the Government of the United States on her behalf, of any rights against the Government of Hungary for the unpaid balance of the claim, if any.” (*See* Scholl-Tatevosyan Decl. Ex. 34.)

After the conclusion of the 1973 Agreement, Elizabeth made another claim, which was adjudicated in 1977. This claim contained none of the art listed in the 1959 decision. (*See* Scholl-Tatevosyan Decl. Ex. 16 (1977 FCSC decision).) Rather, it covered only property taken after 1955. (*See* Scholl-Tatevosyan Decl. Ex. 17 (citing Section 303(5) of the International Claims Settlement Act of 1949, which provided for compensation for losses after August 9, 1955).) The claimed property consisted of several pieces of real estate, as well as the two paintings, Lucas Cranach’s *Joachim with the Angel* and John Opie’s *Portrait of an Old Lady*, which have already been dismissed from this case. *See de Csepel*, 169 F. Supp. 3d at 167; *see also*

note 14, *supra*. The decision provided for payment of \$33,000 for the Cranach and the Opie and \$31,000 for real property, plus interest. (See Scholl-Tatevosyan Decl. Exs. 16, 17.) While defendants claim that Elizabeth also received additional money for the pieces listed in her 1959 claim under the 1973 Agreement (*see* Defs.’ 2020 Reply at 3), there is no evidence to support such a finding.²⁴

3. Pieces Settled Under 1973 Agreement

The Court concludes that five of the nineteen returned pieces were taken by Hungary after Elizabeth became a U.S. citizen in June 1952 and before 1973, and thus claims related to them must be dismissed for lack of jurisdiction due to the FSIA’s treaty exception. *See* note 13, *supra*. These pieces are:

- (1) Barthel Bruyn the Elder, *Portrait of Petrus Von Clapis, half-length, in a blue coat with fur collar*, 17(i) in the amended complaint;
- (2) Alonso Cano, *Portrait of Don Balthasar Carlos (1629-1646), Standing full-length, in a Landscape*, 17(ii);

²⁴ Defendants point to Martha Nierenberg’s comment that although she found no evidence of further payment, “her mother, as all other claimants, must have received USD 1,000 and 37% of the amount determined by the Foreign Claims Settlement Commission.” (*See* Scholl-Tatevosyan Decl. Ex. 49 at 9, ECF No. 148-6.) However, as discussed below, *see* Section III.D.3, the pertinent question is not whether Elizabeth was paid more money for those pieces under the 1973 Agreement—it is whether the pieces described in the FCSC decision were actually taken by the Hungarian government, and if so, *when*.

(3) Pseudo Pier Francesco Fiorentino, *The Madonna and Child, with the Infant Saint John, Saint Catherine and Angels*, 17(ix);

(4) Domenikos Theotokopoulos, El Greco, *The Holy Family with Saint Anne*, 17(x); and

(5) Sir Anthony Van Dyck, *Portrait of Margaret of Lothringen*, 17(xvii).

On May 10, 1966, Hungary's Financial Institutions Authority wrote a letter to the Museum of Fine Arts asking the museum to assess "whether [certain artworks] in fact came into the possession of one of our public collections and, if they did, whether they are still there, otherwise what ha[s] happened to them." (*See* Scholl-Tatevosyan Decl. Ex. 38.) This letter listed—as part of a longer list containing all pieces claimed by Elizabeth in her 1959 FCSC claim—the five above-named pieces. In September 1966, a letter was written by the Director of the Museum of Fine Arts to the Ministry of Cultural Affairs stating that "of the artworks listed by the Financial Institutions Authority, 10 pictures that once comprised the property of the Herzog family are now the property of the Museum of Fine Arts." (*See* Walker Decl. Ex. L-6, ECF No. 148-20.) Included in that list of ten were the five paintings. This letter explained that the pieces had entered the property of the state as a result of the Kiss Forfeiture order. (*See id.*) While a number of the pieces in that list had never been mentioned in connection with the Kiss Forfeiture, and at least four on them were included in Dr. Oltványi's 1951 "mistake letter," the question is not whether Hungary accurately described *how* it obtained possession. Rather, the question is *when* the pieces

were taken, and what that means for plaintiffs' claims in the lawsuit given the September 1966 letter's affirmation that the Hungarian government considered these pieces to be "the property of the Museum of Fine Arts." (*See id.*)

Hungarian documents from the time period directly following the enactment of the 1973 Agreement also corroborate the state's ownership of the five pieces. A letter dated March 14, 1973 (eight days after the signing of the Agreement), referenced the May 1966 letter and said that "[t]he scope of the claims settlement agreement includes . . . paintings that formerly belonged to the Weiss de Csepel family as listed in our letter of May 10, 1966." (*See Scholl-Tatevosyan Decl. Ex. 39.*) This underscores the conclusion that, regardless of *exactly* when the pieces were taken, the Hungarian government considered them to be state property at least by the time the 1973 Agreement was signed, if not before. The Hungarian government reiterated this position in a December 11, 1973 letter to the Minister of Culture, wherein these five paintings, as well as others, were listed as belonging to the state based on the 1973 Agreement. (*See Scholl-Tatevosyan Decl. Ex. 37.*) This is consistent with the ledger presented to the Hungarian government by the United States in conjunction with the negotiation of the 1973 Agreement. (*See Scholl-Tatevosyan Decl. Ex. 36.*) This ledger contained a list of Americans with claims and made a specific reference to the \$457,290.80 that was paid to Elizabeth in 1959 (which included \$210,000 for the twelve paintings). *See Section III.D.2, supra.*

Whether the Hungarian government agreed with Elizabeth's representation in 1959 that her pieces were taken pursuant to the 1954 Museum Decree, or whether her representation was incorrect, is simply not relevant to the outcome of plaintiffs' claims. For example, the September 1966 letter—which post-dated the 1973 Agreement negotiations cited by plaintiffs in which the Hungarian negotiators appeared to reject Elizabeth's claims (*see* Benenati Decl. Ex. E at 239, ECF No. 22-7)—stated that Elizabeth's pieces were taken as a result of the Kiss Forfeiture. (*See* Walker Decl. Ex. L-6.) If the pieces had in fact become state property as a result of the Kiss Forfeiture, they would not be covered by the 1973 Agreement, as that pre-dated her U.S. citizenship. The Court would still need to dismiss claims related to these pieces, however, because the Kiss Forfeiture was not sufficiently “intertwined” with the Holocaust-era taking to constitute a taking in violation of international law. *See* Section III.C.1, *supra*. And, if the 1966 letter itself constituted a taking by declaring the pieces “state property,” they would be covered by the 1973 Agreement. Because Elizabeth's claims to these pieces must fail either way, the Court need not determine exactly when the pieces were taken.

Moreover, plaintiffs may be correct that Elizabeth received no additional compensation for the settlement of these claims pursuant to the 1973 Agreement (or the nationalization of her pieces sometime in the late 1950's or 1960's). But this is immaterial under the text of the 1973 Agreement, which provides that once Hungary pays the \$18,900,000, it is discharged from *all* claims, whether or not they were presented to

Hungary. *See* 1973 Agreement at Art. 6(1). Under the Agreement, the United States government was solely responsible for distributing money to potential claimants. *See id.* at Art. 5. Therefore, if Elizabeth did not receive any additional money after the signing of the 1973 Agreement, she would have to take that up with the United States government, not Hungary. Furthermore, even though the Court does not doubt that Elizabeth made her 1959 claim in good faith, she likely received funds for pieces that were in fact taken before 1952. Whether Elizabeth received from the FCSC more or less than she was entitled to is beyond the Court's purview, since by statute, it cannot review the FCSC's decisions. *See* 22 U.S.C. §1641m. And, since the Hungarian and U.S. negotiations included these same pieces under the umbrella of the 1973 Agreement, the Court has no jurisdiction over these pieces due the FSIA's treaty exception. *See* 28 U.S.C. § 1604; *see also* note 13, *supra*.

However, for one piece not discussed in the September 1966 letter—Munkácsy's *In the Studio*—the Court will retain jurisdiction. The painting was deposited with the Museum of Fine Arts in the 1950's. (*See* Walker Decl. Ex. P-5, ECF No. 148-24.) While it was listed in the May 10, 1966 letter asking whether certain pieces belonged to the state, the September 1966 letter failed to include it in the list of the Herzog pieces that "are now the property of the Museum of Fine Arts." (Compare Scholl-Tatevosyan Decl. Ex. 38 *with* Walker Decl. Ex. L-6.) Defendants provided no further information about the painting's whereabouts after the 1950's deposit until March 14, 1973, when a Hungarian government official wrote that "[t]he works

of art in question [including the Munkácsy]—should they have not yet passed into Hungarian state ownership—have become property of the Hungarian State by virtue of the claims settlement agreement.” (See Scholl-Tatevosyan Decl. Ex. 39; see also Scholl-Tatevosyan Decl. Ex. 37 (listing the 12 pieces claimed by Elizabeth “including two paintings by Munkácsy” as among those now in state ownership).) However, *In the Studio* is still listed by defendants as “on deposit.” (See Scholl-Tatevosyan Decl. Ex. 1); see also note 20, *supra*. This suggests that the piece may not actually have been taken in 1973, as indicated by the March and December 1973 letters. And, any taking after 1973 would be a taking in violation of international law *not* settled by the 1973 Agreement. As a result, the Court will retain jurisdiction over claims related to this piece, as defendants have not met their burden to demonstrate that the expropriation exception does not apply.

VI. MOTION TO DISMISS

A. Legal Standard

“Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However, “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a

formulaic recitation of the elements of a cause of action will not do.” *Id.* (internal quotation marks, brackets, and citations omitted). A plaintiff’s allegations must be facially plausible, which requires that “the plaintiff plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

“When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 679. If the facts alleged in the complaint taken as true fail to state a claim upon which relief could be granted, under Rule 12(b)(6) a court must dismiss the case. *See Am. Chemistry Council, Inc. v. U.S. Dep’t of Health & Human Servs.*, 922 F. Supp. 2d 56, 61 (D.D.C. 2013).

In addition to their jurisdictional challenge as to the 19 pieces of allegedly returned artwork (*see* Appendix B), defendants renew their arguments as to four issues raised in their previous motions to dismiss—act of state, international comity, exhaustion, and statute of limitations. These arguments were all rejected by this Court or the Court of Appeals. *See, e.g., de Csepel*, 808 F. Supp. 2d at 142-43 (declining to address statute of limitations at motion to dismiss stage, rejecting act of state); *see also de Csepel*, 714 F.3d at 604 (same); *see also id.* at 608 (concluding that international comity should not be decided on a motion to dismiss); *de Csepel*, 169 F. Supp. 3d at 168-69 (rejecting exhaustion). Defendants now argue that since fact discovery is over, the Court should revisit its rulings in

view of the facts that have come to light through discovery. But, as explained below, the Court is still unwilling to decide many of these fact-intensive issues within the context of a motion to dismiss.

B. Act of State Doctrine

Defendants argue that “[t]he 1950 Confiscation Order [from the Kiss Forfeiture] is an ‘act of state’ that memorializes a legitimate confiscation allowed by the pre-war, non-biased Act No XI of 1929,” and thus should not be reviewed by the Court. (*See* Mot. to Dismiss at 40.) “The act of state doctrine ‘precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.’” *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)).

Defendants’ act of state argument requires little attention in light of the conclusion of Section III.C.6, *supra*, that the Court lacks jurisdiction over nine of the eleven pieces from the amended complaint that were also included in the Kiss Forfeiture. As a result, defendants’ argument is moot as to those nine pieces. Moreover, as the Court found that Dr. Oltványi’s 1951 “mistake letter” meant that József Borsos, *Portrait of the Architect Mátyás Zitterbarth*, 18(i) in the amended complaint, was *not* in fact taken by the Kiss Forfeiture, the only remaining piece the 1950 Order could apply to is El Greco’s *The Espolio*, 17(viii). However, defendants have conceded that this piece was a wartime taking by Hungary in its alliance with Nazi Germany and *never* returned to the Herzog siblings. The piece’s subsequent

inclusion in the Kiss Forfeiture is therefore irrelevant, as it did not change the painting's status as art initially expropriated and taken into ownership by the World War II-era Hungarian government in cooperation with the Nazis. Therefore, the act of state doctrine does not apply to El Greco's *The Espolio*.

C. International Comity

Defendants argue that “the principles of international comity warrant recognition of the 2008 Hungarian Judgment [in the Nierenberg litigation], and this Court should reject Plaintiffs’ demand to re-litigate ownership of . . . artworks adjudicated in that action.” (See Mot. to Dismiss at 46.) In its first opinion, the Court dismissed claims relating to any artworks litigated in the Nierenberg action, concluding that “the record is devoid of evidence of ‘either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.’” *de Csepel*, 808 F. Supp. 2d at 145 (quoting *Hilton v. Guyot*, 159 U.S. 113, 202 (1895)). However, the Court of Appeals reversed, “[b]ecause nothing in the complaint contradicts the family’s claims of due process violations, [so] dismissal at this stage [is] inappropriate.” *de Csepel*, 714 F.3d at 608. Defendants contend that the Court can now decide to accord comity to the judgment despite plaintiffs’ allegations because, “as is clear from all of the materials filed in the Nierenberg proceedings, Ms. Nierenberg was afforded significant due process rights in Hungary.” (See Mot. to Dismiss at 44.)

1. Nierenberg Litigation

Martha Nierenberg filed her suit in Hungary in 1999 and listed in her complaint a number of works owned by her mother, Elizabeth, and her uncles István and András. (See Scholl-Tatevosyan Decl. Ex. 20.) She petitioned for the return of twelve pieces belonging to Elizabeth. Nine of those twelve are in the amended complaint.²⁵ Another two listed in the petition, Lucas Cranach's *Joachim with the Angel* and John Opie's *Portrait of an Old Lady*, have already been dismissed from this case. See *de Csepel*, 169 F. Supp. 3d at 167.

²⁵ Those nine pieces are:

- (1) Barthel Bruyn the Elder, *Portrait of Petrus von Clapis, half-length, in a blue coat with fur collar*, 17(i) in the amended complaint;
- (2) Alonso Cano, *Portrait of Don Balthasar Carlos (1629-1646), Standing full-length, in a Landscape*, 17(ii);
- (3) Gustave Courbet, *Le Chateau de Blonay (neige), (The Chateau of Blonay (snow))*, 17(iv);
- (4) Pseudo Pier Francesco Fiorentino, *The Madonna and Child, with the Infant Saint John, Saint Catherine and Angels*, 17(ix);
- (5) Domenikos Theotokopoulos, El Greco, *The Holy Family with Saint Anne*, 17(x);
- (6) Sir Anthony Van Dyck, *Portrait of Margaret of Lothringen*, 17(xvii);
- (7) Károly Brocky, *Bacchanale*, 18(ii);
- (8) Mihály Munkácsy, *"La Visite" (The Afternoon Visit)*, 18(iii); and
- (9) Mihály Munkácsy, *In the Studio*, 18(iv).

The Court notes that numbers (1), (2), (4), (5), and (6) in this list have already been dismissed for lack of jurisdiction. As a result, whether comity is accorded to the Nierenberg decision only affects claims as to four pieces (numbers (3), (7), (8), and (9)).

The last of the twelve, Munkácsy's *Bust of Christ*, was returned to Nierenberg while the case was ongoing. (See Scholl-Tatevosyan Decl. Exs. 22-24.)

The pieces listed in Nierenberg's complaint as attributable to András and István include at least eighteen pieces included in the amended complaint. (See Scholl-Tatevosyan Decl. Ex. 20.) However, as András and István's heirs declined to participate in the Nierenberg Litigation (see Scholl-Tatevosyan Decl. Ex. 27 (letter from Julia Alice and Maria Angela declining to participate)), the Hungarian court did not render any decision with regard to those pieces, and thus, defendants do not argue they should be dismissed from the case on the ground of comity. (See Mot. to Dismiss at 46 ("[T]he principles of international comity warrant recognition of the 2008 Hungarian Judgment, and this Court should reject Plaintiffs' demand to re-litigate ownership of . . . artworks *adjudicated* in that action." (emphasis added)).)

"On October 20, 2000 the Budapest Metropolitan Court ordered that all paintings except one be returned to Martha." (See Pls.' Opp. at 14; see also Scholl-Tatevosyan Decl. Ex. 47 at 35 (describing judgment requiring return of all pieces except John Opie's *Portrait of an Old Lady*, which it found was acquired by the state).) In November 2002, Hungary's Supreme Court vacated the Metropolitan Court's judgment primarily on the basis that Nierenberg had not proven that she, as opposed to the heirs of the other siblings, owned all the claimed paintings. (See *id.* at 36-38 (describing 2002 judgment).)

In 2005, the Metropolitan Court concluded that Nierenberg was entitled to only one painting, El Greco's *Holy Family*. (*See id.* at 63.) This judgment was once again appealed, and on January 10, 2008, Nierenberg's claim was rejected in its entirety by the Metropolitan Court of Appeals. (*See id.* at 67 (describing 2008 decision); *see also* Scholl-Tatevosyan Decl. Ex. 26 (2008 decision).) The Hungarian court concluded that the defendants had acquired ownership to all the claimed paintings by, *inter alia*, uscupation (*i.e.*, adverse possession), a criminal decision (*i.e.*, the Kiss Forfeiture), and international claims settlement (*i.e.*, Elizabeth's 1959 claim and the 1973 Agreement). (*See* Scholl-Tatevosyan Decl. Ex. 48 at 68-69.)

2. Analysis

“Comity’ summarizes in a brief word a complex and elusive concept—the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum.” *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). However, “the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.” *Id.* The application of comity “varies according to the factual circumstances surrounding each claim for its recognition,” *id.*; the presence of such “fact-intensive issues” often makes the defense “inappropriate for resolution on a Rule 12(b)(6) motion.” *de Csepel*, 714 F.3d at 607.

Defendants contend that since fact discovery is closed and “the factual record [is] now well developed,” but “the FAC makes no new allegations regarding the

Hungarian proceedings,” it is appropriate to dismiss claims related to artworks adjudicated in the Nierenberg Litigation. (*See* Mot. to Dismiss at 44.) It is true that plaintiffs’ allegations regarding the Nierenberg proceedings have not been fleshed out since the end of fact discovery. (*See* Am. Compl. ¶ 78 (alleging only that the Hungarian proceedings “were not conducted in accordance with internationally recognized standards of due process or in accordance with international law”).) And, defendants, referring to a voluminous record relating to the Nierenberg Litigation, describe myriad due process rights they claim Martha Nierenberg was afforded during the litigation in Hungary. (*See* Mot. to Dismiss at 44–46.) But, defendants base their argument that the Nierenberg proceedings “were . . . conducted in accordance with internationally recognized standards of due process [and] in accordance with international law” (*see* Mot. to Dismiss at 44 (internal quotation marks omitted)), on a summary docket they created to describe the proceedings. (*See* Scholl-Tatevosyan Decl. Exs. 47-49.) This docket includes citations to “thousands of pages of motions, briefs, expert opinions, petitions, orders [and] judgments.” (*See* Mot. to Dismiss at 44.) This is certainly not the type of evidence the Court is expected to wade through at the motion to dismiss stage, when plaintiffs’ complaint is presumed to be true.

Moreover, plaintiffs argue that “while fact discovery has concluded, expert discovery has not even commenced,” and that the issue of comity should not be decided at this stage. (*See* Pls.’ Opp. at 48.) Contrary to defendants’ position (*see* Defs.’ Reply at 22), expert

testimony comparing the Hungarian court system to the U.S. common law judicial system could well be relevant. Moreover, the Court has already stated that resolution of non-jurisdictional factual issues would need to wait for summary judgment. (*See* Oct. 26, 2017 Tr. at 11:11-12, ECF No. 140.) And, the Court of Appeals observed that allegations of due process violations present “just the kind of fact-intensive issues that are inappropriate for resolution on a Rule 12(b)(6) motion,” and therefore, “are properly addressed at summary judgment or trial.” *See de Csepel*, 714 F.3d at 607, 608. The Court therefore declines to revisit the issue of comity at this stage.

D. Exhaustion

Defendants also revive their argument that claims for which plaintiffs did not exhaust their remedies in Hungary should be dismissed. They expanded upon this argument in their supplemental briefing, which argued that despite the Court of Appeals’ subsequent opinions in *Simon* and *Philipp*, this Court could grant the motion to dismiss on prudential exhaustion grounds, as those actions “are factually and procedural[ly] distinct from this action.” (*See* Defs.’ Supp. Br. at 1, ECF No. 166.) The Court cannot agree.

Binding Circuit precedent forecloses defendants’ argument that prudential exhaustion bars plaintiffs’ claims. In *Philipp*, the Court of Appeals observed that “although courts once decided on a case-by-case basis whether to grant foreign states immunity as matter of international comity, Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime

with the FSIA’s comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.” *Philipp*, 894 F.3d at 415 (internal quotation marks and brackets omitted). As again explained by the Circuit several months later in *Simon*, this means that under the FSIA, there is no requirement of prudential exhaustion in cases against foreign states. *See Simon*, 911 F.3d at 1181 (“When Congress wanted to require the pursuit of foreign remedies as a predicate to FSIA jurisdiction, it said so explicitly.”). Although defendants suggest that these cases are procedurally different and thus need not be applied here, there is no suggestion in *Philipp* or *Simon* that their conclusions were so limited; on the contrary, they observed that “controlling circuit and Supreme Court precedent give *no* quarter to [the defendants’] theory of judicial immunity wrapped in exhaustion clothing.” *See id.* (emphasis added). Given this binding precedent, plaintiffs do not need to exhaust their remedies in Hungary prior to bringing suit here.

E. Statute of Limitations

Defendants also argue that plaintiffs’ claims are not timely. In particular, they argue that “[b]ecause Plaintiffs could have brought timely claims within six years of learning of the artworks’ location but failed to do so, the HEAR Act does not apply to retroactively extend the statute of limitations for claims to non-exhausted artworks,” and without the HEAR Act, all other claims are barred by the District’s three-year statute of limitations. (*See Mot. to Dismiss* at 54 (internal quotation marks omitted).)

The Holocaust Expropriated Art Recovery Act of 2016, commonly referred to as the “HEAR Act,” was passed in recognition of “[t]he unique and horrific circumstances of World War II and the Holocaust[, which makes] statutes of limitations especially burdensome to the victims and their heirs.” *See* P.L. 114-308, 130 Stat. 1524, Sec. 2(6). As “[t]hose seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide,” they are often unable to complete the process within the time constraints of existing statutes of limitations. *See id.* To provide some relief to those undergoing this process, Congress provided that “[n]otwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, . . . a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced,” at the latest, six years after “actual discovery” by the claimant of his possessory interest in a work and of the work’s location. *See id.* at Sec. 5(a).

This default six-year statute of limitations may be modified in two other potential circumstances—for “preexisting” or “stale” claims. A “preexisting” claim is one that the claimant already knew about, but which was barred even before the passage of the Act or which is not yet barred. *See id.* at Section 5(c). Under the Act, unless the preexisting claim also fits within the ambit of Section 5(e), it “shall be deemed to have been actually discovered on the date of enactment of this Act.” *See id.* This revival of preexisting claims is meant to combat, for example, the unfair situation where

“claims expired before World War II even ended.” *See id.* at Sec. 2(6). However, some preexisting claims may also be considered “stale,” defined as where:

- (1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after January 1, 1999; and
- (2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.

See id. at Sec. 5(e). Stale claims are *not* revived by the HEAR Act.

Plaintiffs’ claims are based in two theories: conversion and bailment. Under DC law, conversion claims accrue as soon as the defendant acquires the property unlawfully and must be brought within three years. *See Sea Search Armada v. Republic of Colombia*, 821 F. Supp. 2d 268, 273 (D.D.C. 2011); *see also Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 335 (D.D.C. 2007) (“[W]hen the defendant did not acquire the property lawfully in the first instance, the claim accrues immediately . . .”). Plaintiffs’ conversion claims qualify as preexisting claims that will be revived by the HEAR Act, as claims arising from paintings taken during World War II would have expired long before the Herzog siblings or their successors had the ability to bring them.

The same three-year statute of limitations also applies to plaintiffs’ bailment claims. *See de Csepel*, 714

F.3d at 603. However, a bailment claim only accrues “when the plaintiff demands the return of the property and the defendant refuses, or when the defendant takes some action that a reasonable person would understand to be either an act of conversion or inconsistent with a bailment.” *Malewicz*, 517 F. Supp. 2d at 335. While defendants argue (as they did in previous motions to dismiss) that plaintiffs’ claims accrued as early as 1999 (*see* Mot. to Dismiss at 54), the Court of Appeals concluded in its first opinion that “nothing in the complaint indicates that the family’s claims did in fact accrue in 1999 when Martha Nierenberg filed suit in the Hungarian court.” *See de Csepel*, 714 F.3d at 603. This is because “although litigation is often filed in response to refusal of a demand, it can also serve as a vehicle for increasing pressure to settle during ongoing negotiations.” *Id.* at 604. For that reason, the Court of Appeals concluded that “at the motion to dismiss stage, we look only at the complaint, in which we see nothing that conflicts with the family’s allegation that their bailment claims accrued in January 2008.” *Id.* If such facts are ultimately proven, plaintiffs’ bailment claims would be timely even *without* the HEAR Act, as the complaint was filed in 2010.

As this Court stated in its earlier opinion, “[m]otions to dismiss ‘based on a limitations defense are disfavored because resolution generally requires the development of a record and the adjudication of factual issues.’” *See de Csepel*, 808 F. Supp. 2d at 139 (quoting *Malewicz*, 517 F. Supp. 2d at 335). For instance, “[a]lthough what constitutes the accrual of a cause of action is a question of law, determining when

accrual occurs in a specific case is a question of fact.” *Lee v. Wolfson*, 265 F. Supp. 2d 14, 19 (D.D.C. 2003) (internal quotation marks and brackets omitted). So even if plaintiffs must rely on the HEAR Act with respect to their bailment claims, there are a host of factual issues that must be resolved regarding when plaintiffs (or their predecessors) may have learned about their claims or might have been able to bring them.²⁶

As a result, the Court will not revisit its earlier ruling. It will decline to resolve defendants’ statute of limitations defense as to plaintiffs’ bailment claims. The Court, however, concludes that plaintiffs’ conversion claims are revived by the HEAR Act as “preexisting claims.”

²⁶ Moreover, the Court has not even begun to “wade into . . . equitable-tolling waters,” *see de Csepel*, 714 F.3d at 603, as it has previously suggested may be appropriate given plaintiffs’ allegations that “for years, Hungary actively misled the Herzog Heirs into believing that it accepted their ownership rights to the Herzog Collection, was giving their claims serious consideration, and repeatedly advised them that it would reach a favorable decision, at which time they could decide if any further action would be required.” *See de Csepel*, 808 F. Supp. 2d at 141 (quoting Compl. ¶ 94.) As the Supreme Court has stated, “where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass,” *Young v. United States*, 535 U.S. 43, 50 (2002) (internal quotation marks omitted), the application of equitable tolling may be warranted. Moreover, in previous motions as in the current motion to dismiss, “defendants allege[d] that plaintiffs were *required* to exhaust their remedies in Hungary prior to filing suit here, a fact that, if anything, supports plaintiffs’ plea for equitable tolling.” *See de Csepel*, 808 F. Supp. 2d at 142 (emphasis in original) (internal citation omitted).

CONCLUSION

For the foregoing reasons, the Court will grant defendants' motion to dismiss in part and deny it in part. A separate Order accompanies this Memorandum Opinion.

[SEAL] /s/ Ellen S. Huvelle
ELLEN S. HUVELLE
United States District Judge

Date: May 11, 2020

APPENDIX A

Undisputed wartime takings for which the Court of Appeals approved jurisdiction

<u>Art Piece</u>	<u>FAC ¶</u>	<u>Owner</u>
(1) Camille Corot, <i>Portrait of a Woman (Lady with a Marguerite (Daisy))</i>	17(iii)	András
(2) Gustave Courbet, <i>Le Chateau de Blonay (neige), (The Chateau of Blonay (snow))</i>	17(iv)	Erzsébet
(3) Domenikos Theotokopoulos, El Greco, <i>Saint Andrew</i>	17(vi)	András
(4) Domenikos Theotokopoulos, El Greco, <i>The Espolio</i> , also known as <i>El Expolio, The Disrobing of Christ</i>	17(vii)	István
(5) Domenikos Theotokopoulos, El Greco, <i>The Agony in the Garden</i> , also known as <i>Christ on the Mount of Olives</i>	17(viii)	András
(6) Polidoro Da Lanciano, <i>Christ and the Woman Taken in Adultery</i>	17(xi)	András

(7) Eugenio Lucas Padilla (Eugenio Velázquez), <i>The Revolution (8 May 1808)</i>	17(xii)	András
(8) Bernardino Licinio da Pordenone, <i>Portrait of a Lady, half-length, in a Black Robe, Holding a Book</i>	17(xiv)	András
(9) <i>Figure of Saint Agnes</i> , Schwarzwald Sculptor, German, circa 1430	17(xxii)	András
(10) <i>Figure of Saint Catherine of Alexandria</i> , German, early 16 th century	17(xxiii)	András
(11) <i>Figure of Saint Barbara</i> , German, early 16 th century	17(xxiv)	András
(12) <i>A Carved Bust of a Prophet</i> , South German, probably workshop of Erasmus Grasser, circa 1500	17(xxvi)	András
(13) <i>The Virgin and Child</i> , Florentine, circa 1540	17(xxvii)	András
(14) <i>The Nativity</i> , Anonymous, 14 th century	17(xxviii)	András

(15) <i>A Greek Marble Hero Relief, showing the Deceased at a Funerary Banquet, Greek, 4th century BC</i>	17(xxix)	András
(16) <i>One Hundred and Seventy-Seven Items of Ancient Gold Jewels and Coins</i>	17(xxx)	András
(17) József Borsos, <i>Girls with Garlands of Flowers (The Three Graces)</i>	17(xxxii)	Erzsébet
(18) <i>Four ancient silver coins</i>	17(xxxiii)	András
(19) <i>Seventy-Eight Pieces: Ancient Cameos, Intaglios, Other Carved Stones and Semi-Precious Stones</i>	17(xxxiv)	András
(20) Károly Brocky, <i>Bacchanale</i>	18(ii)	Erzsébet
(21) Mihály Munkácsy, <i>“La Visite” (The Afternoon Visit)</i>	18(iii)	Erzsébet
(22) <i>“Meuron a Paris” Musical Clock, 18th century</i>	19(i)	András
(23) Sebastianus Hann, <i>Jewelry Bowl</i>	19(ii)	András

APPENDIX B

Artworks for which the Court was directed to address jurisdiction

<u>Artwork</u>	<u>FAC ¶</u>	<u>Owner</u>	<u>Juris- diction</u>
(1) Barthel Bruyn the Elder, <i>Portrait of Petrus von Clapis, half-length, in a blue coat with fur collar</i>	17(i)	Erzsébet	No
(2) Alonso Cano, <i>Portrait of Don Balthasar Carlos (1629- 1646), Standing full-length, in a Landscape</i>	17(ii)	Erzsébet	No
(3) Gustave Courbet, <i>The Spring (Artist and Model)</i>	17(v)	István	No

(4) Pseudo Pier Francesco Fiorentino, <i>The Madonna and Child, with the Infant Saint John, Saint Catherine and Angels</i>	17(ix)	Erzsébet	No
(5) Domenikos Theotokopoulos, El Greco, <i>The Holy Family with Saint Anne</i>	17(x)	Erzsébet	No
(6) Giovanni Pedrini, called Giampietro, <i>Christ Carrying the Cross</i>	17(xiii)	András	No
(7) Augustin Theodule Ribot, <i>Still Life with a Chicken, a Bottle of Wine, Asparagus, Artichoke, Tomatoes and other Vegetables, on a Table</i>	17(xv)	István	No

(8) Giovanni Santi, <i>The Dead Christ with Two Angels</i> , also known as <i>Christ the Dolorous, Christ with a Fly</i>	17(xvi)	István	No
(9) Sir Anthony Van Dyck, <i>Portrait of Margaret of Lothringen</i>	17(xvii)	Erzsébet	No
(10) Alvise Vivarini or Giovanni Battista da Udine, <i>Madonna and Child with Saint John the Baptist and a male Saint</i>	17(xviii)	István	No
(11) Francisco de Zurbarán, <i>Saint Andrew</i>	17(xix)	István	No
(12) <i>A Painted Stucco Bust Representing Prudence</i> , After Jacopo della Quercia	17(xx)	István	Yes

(13) <i>A Terracotta Group of the Virgin and Child</i> , Italian, 15 th Century	17(xxi)	István	No
(14) <i>The Virgin of the Annunciation</i> , Austrian, circa 1400	17(xxv)	András	Yes
(15) <i>Four Ancient Egyptian Sculptures, Statues, and Steles</i>	17(xxxi)	András	Yes
(16) József Borsos, <i>Portrait of the Architect Mátyás Zitterbarth</i>	18(i)	András	Yes
(17) Mihály Munkácsy, <i>In the Studio</i>	18(iv)	Erzsébet	Yes
(18) Lajos Deák Ébner, <i>Fair in Szolnok City</i>	18(v)	András	No
(19) Károly Ferenczy, <i>Landscape with a Fenced Enclosure (Houses in Fernezely with Sheepfold) 1912</i>	20(i)	András	No

APPENDIX C

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

No. 1:10-cv-01261(ESH)

[Filed: May 11, 2020]

DAVID L. de CSEPEL, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 REPUBLIC OF HUNGARY, *et al.*,)
)
 Defendants.)

ORDER

Upon consideration of defendants' Motion to Dismiss (ECF No. 148, Feb. 9, 2018), it is hereby

ORDERED that defendants' motion to dismiss for failure to join a necessary party, under Federal Rule of Civil Procedure 12(b)(7), is **DENIED**; it is further

ORDERED that defendants' motion to dismiss for lack of subject matter jurisdiction, under Rule 12(b)(1), is **GRANTED** as to the following fourteen (14) pieces in Appendix B:

- (1) Barthel Bruyn the Elder, *Portrait of Petrus von Clapis, half-length, in a blue coat with fur collar*, 17(i);
- (2) Alonso Cano, *Portrait of Don Balthasar Carlos (1629-1646), Standing full-length, in a Landscape*, 17(ii);
- (3) Gustave Courbet, *The Spring (Artist and Model)*, 17(v);
- (4) Pseudo Pier Francesco Fiorentino, *The Madonna and Child, with the Infant Saint John, Saint Catherine and Angels*, 17(ix);
- (5) Domenikos Theotokopoulos, El Greco, *The Holy Family with Saint Anne*, 17(x);
- (6) Giovanni Pedrini, called Giampietro, *Christ Carrying the Cross*, 17(xiii);
- (7) Augustin Theodule Ribot, *Still Life with a Chicken, a Bottle of Wine, Asparagus, Artichoke, Tomatoes and other Vegetables, on a Table*, 17(xv);
- (8) Giovanni Santi, *The Dead Christ with Two Angels*, also known as *Christ the Dolorous, Christ with a Fly*, 17(xvi);
- (9) Sir Anthony Van Dyck, *Portrait of Margaret of Lothringen*, 17(xvii);
- (10) Alvise Vivarini or Giovanni Battista da Udine, *Madonna and Child with Saints John the Baptist and Jerome*, 17(xviii);

(11) Francisco de Zurbarán, *Saint Andrew*, 17(xix);

(12) *A Terracotta Group of the Virgin and Child*, Italian, 15th Century 17(xxi);

(13) Lajos Deák Ébner, *Fair in Szolnok City*, 18(v); and

(14) Károly Ferenczy, *Landscape with a Fenced Enclosure (Houses in Fernezely with Sheepfold)*, 20(i);

and **DENIED** as to the following five (5) pieces from Appendix B:

(1) *A Painted Stucco Bust Representing Prudence*, after Jacopo della Quercia, 17(xx);

(2) *The Virgin of the Annunciation*, Austrian, circa 1400, 17(xxv); and

(3) *Four Ancient Egyptian Sculptures, Statues, and Steles*, 17(xxxi);

(4) József Borsos, *Portrait of the Architect Mátyás Zitterbarth*, 18(i);

(5) Mihály Munkácsy, *In the Studio*, 18(iv);

and **DENIED** as to all twenty-three (23) pieces in Appendix A, as the Court of Appeals already concluded that this Court had jurisdiction over them. *See de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1103 (D.C. Cir. 2017) (concluding that “rights in property taken in violation of international law’ are ‘in issue’ as to those . . . artworks taken by Hungary during the Holocaust and never returned”); it is further

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ORDERED that defendants' motion to dismiss for failure to state a claim upon which relief can be granted, under Rule 12(b)(6), is **DENIED** with prejudice as to exhaustion and act of state, and **DENIED** without prejudice as to international comity and the statute of limitations; and it is further

ORDERED that the parties shall file a joint status report setting forth a proposed schedule for conducting any outstanding discovery and for any further proceedings on **June 8, 2020, at 12:00 p.m.**

SO ORDERED.

[SEAL] /s/ Ellen S. Huvelle
ELLEN S. HUVELLE
United States District Judge

Date: May 11, 2020

APPENDIX D

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

No. 1:10-cv-01261(ESH)

[Filed: July 27, 2020]

DAVID L. de CSEPEL, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 REPUBLIC OF HUNGARY, *et al.*,)
)
 Defendants.)

MEMORANDUM OPINION AND ORDER

On May 11, 2020, the Court granted in part and denied in part defendants' motion to dismiss. (*See* Order, ECF No. 179.) Before the Court are the parties' cross-motions, pursuant to 28 U.S.C. § 1292(b), to certify the Order for immediate appellate review. (*See* Mem. of Law in Support of Defs.' Mot. for Certification, ECF No. 185-1 ("Defs.' Mot."); Mem. of Law in Support of Pls.' Cross-Mot. for Certification, ECF No. 186-1 ("Pls.' Cross-Mot.") For the reasons stated herein, both parties' motions are granted in part.

BACKGROUND

As noted in the Court's most recent opinion, the facts surrounding this case have been set out in great detail in both this Court's and the Court of Appeals' prior opinions. *See de Csepel v. Republic of Hungary*, 2020 WL 2343405, at *1 n.1 (D.D.C. May 11, 2020); *see also* 859 F.3d 1094 (D.C. Cir. 2017); 714 F.3d 591 (D.C. Cir. 2013); 169 F. Supp. 3d 143 (D.D.C. 2016); 808 F. Supp. 2d 113 (D.D.C. 2011). It is assumed that since these opinions exhaustively describe this longstanding litigation, it is unnecessary to provide any further background information.

The Court's most recent opinion addressed defendants' fourth motion to dismiss. The Court concluded that although Hungary is no longer a defendant, the case against the remaining defendants (including Magyar Nemzeti Vagyonkezelő Zrt ("MNV"), which was recently added and which the Court determined was not immune under the FSIA) could go forward, and the Court had jurisdiction over twenty-eight of the forty-two pieces of art listed in the amended complaint. *See de Csepel*, 2020 WL 2343405, at *5, 12, 35. Furthermore, the Court either rejected or declined to consider defendants' non-jurisdictional arguments at the motion to dismiss stage. *See id.* at *30. Defendants have already filed a notice of appeal as to the parts of the Order that under the Foreign Sovereign Immunities Act ("FSIA") are immediately appealable.¹ (*See* Notice of Appeal, ECF No. 181.)

¹The parties disagree about what parts of the Order that includes. Defendants assert that the FSIA makes the following three issues

Defendants now ask the Court to certify that the Order “involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). Specifically, in addition to the appeal of MNV’s status under the FSIA, which both parties agree defendants may do as a matter of right, defendants seek certification to appeal the following: (1) whether Hungary is an indispensable party under Rule 19; (2) whether the five artworks returned after the Holocaust and subsequently re-possessioned were “taken in violation of international law” such that the Court has jurisdiction over them under the FSIA’s expropriation exception; (3) whether plaintiffs’ inclusion of additional defendant MNV in the amended complaint went beyond the Court of Appeals’ mandate; and (4) whether the issue of domestic exhaustion is decided by binding Court of Appeals’ precedent. (*See* Defs.’ Mot. at 1.) While plaintiffs oppose

immediately and unconditionally appealable: (1) whether MNV is a political subdivision of Hungary or an agency or instrumentality subject to the Court’s jurisdiction under the expropriation exception; (2) whether the Court should exercise jurisdiction over the remaining defendants notwithstanding the Court of Appeals’ decision to dismiss Hungary from the case; and (3) whether the five artworks returned after the Holocaust and subsequently re-possessioned were actually taken in “violation of international law” and therefore subject to this Court’s jurisdiction. (*See* Defs.’ Mot. at 1.) Plaintiffs, on the other hand, argue that the first question is appealable as a matter of right, and they do not oppose certification of the third question. (*See* Pls.’ Cross-Mot. at 1-2 & n.1.) Defendants state that, due to this disagreement, they bring this § 1292(b) motion “in an abundance of caution.” (*See* Defs.’ Mot. at 1.)

certification on all issues but the second, *see* note 1, *supra*, if defendants' motion is granted, they cross-move for certification based on the following issue: (1) whether thirteen of the fourteen artworks returned after the Holocaust and subsequently re-possessioned were, contrary to this Court's conclusion, "taken in violation of international law" such that the Court has jurisdiction over them under the FSIA's expropriation exception. (*See* Pls.' Cross-Mot. at 2 n.1.)

ANALYSIS

Pursuant to 28 U.S.C. § 1292(b), there are three criteria that must be satisfied before a district court may certify an order for interlocutory appeal: "(1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation." *APCC Servs., Inc. v. Sprint Commc'ns Co., L.P.*, 297 F. Supp. 2d 90, 95 (D.D.C. 2003); *see also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986); *Vila v. Inter-American Investment, Corp.*, 596 F. Supp. 2d 28, 30 (D.D.C. 2009). "A party seeking certification pursuant to § 1292(b) must meet a high standard to overcome the strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *Air Transport Ass'n of Am., Inc. v. U.S. Dep't of Agriculture*, 317 F. Supp. 3d 385, 393 (D.D.C. 2018) (internal quotation marks omitted). Since the defendants have the right to appeal this Court's decision that MNV is subject to suit under the FSIA, the Court concludes that it should also certify a second

issue that meets § 1292(b)'s criteria—whether this case should be dismissed because Hungary is an indispensable party under Rule 19.²

I. CONTROLLING QUESTION OF LAW

“Under § 1292(b), a controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources.” *APCC Servs., Inc.*, 297 F. Supp. 2d at 95-96 (internal quotation marks omitted). “The resolution of an issue need not necessarily terminate an action in order to be ‘controlling’” *Id.* at 96 (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990)).

This prong is easily met, for reversal of the Court's decision with respect to the Rule 19 issue—*i.e.*, a determination that Hungary is an indispensable party to this litigation—would necessarily result in termination of the case, since the Court of Appeals has ruled that Hungary may not be joined due to its

² Although both parties talk about certification of “issues” for appeal, the Court of Appeals' review is not limited to the issues this Court identifies as satisfying the § 1292(b) criteria. *See Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986) (“Section 1292(b) explicitly provides . . . that the appeal is from an *order* of the district court, not from the particular question that the district court found controlling. We are therefore called upon to decide an appeal, not a single question of law. Accordingly, we must decide *all* questions of law necessary to the proper disposition of [an] appeal.” (emphases in original)). Nevertheless, the Court considers all issues raised by the parties when discussing the § 1292(b) criteria.

sovereign immunity. *See de Csepel*, 859 F.3d at 1107 (concluding that, as the Court only has “jurisdiction through . . . the second clause of the commercial-activity nexus requirement[,] . . . the Republic of Hungary retains its FSIA immunity”). While a district court’s decision on a Rule 19 motion is normally reviewed for abuse of discretion, *see Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995), the issues presented by this Rule 19 decision are primarily legal, rather than factual, in nature. *See de Csepel*, 2020 WL 2343405, at *15 (concluding that there was no prejudice to the absent sovereign because of adequate representation by the remaining defendants even if the budgets of the remaining defendants are funded exclusively by Hungary). Therefore, the Court concludes that this issue presents “a controlling question of law” and meets the first criteria for interlocutory appeal under § 1292(b).

As to the domestic exhaustion issue, this too involves a controlling question of law, at least as to the many pieces of artwork that belonged to István and András. While a ruling that domestic exhaustion may be required would not dispose of the entire case, most of the pieces remaining after the most recent Order are attributable to István and András, who, unlike Elizabeth, did not attempt to litigate their ownership rights in Hungary. *See de Csepel*, 2020 WL 2343405, at *35 (listing the pieces over which the Court has jurisdiction and their owners). Determining that this is an impediment to their claims would thus “materially affect the course of litigation with resulting savings of the court’s [and] the parties’ resources” by drastically

decreasing the number of pieces at issue. *See APCC Servs., Inc.*, 297 F. Supp. 2d at 95-96.

Whether the Court incorrectly interpreted the scope of the Court of Appeals' mandate constitutes a controlling question of law as well, given that "a higher court's decision binds the lower court's consideration on remand of issues decided on appeal." *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 362 F. Supp. 2d 168, 182 (D.D.C. 2005). Whether the decision to add MNV was beyond the Court of Appeals' mandate would not automatically terminate the case, but it might change the analysis on the Rule 19 issue, *see de Csepel*, 2020 WL 2343405, at *15 (noting that remaining defendants protected Hungary's interests "particularly with the addition of MNV as a defendant"), which, as noted above, is a controlling question of law.

In contrast, a determination as to whether certain pieces of artwork returned after the Holocaust and retaken by defendants were "taken in violation of international law" involves a legal question, but it is not controlling. The parties disagree with the Court's determinations about when particular pieces were in fact "taken" for purposes of the expropriation exception of the FSIA. (*See, e.g.*, Defs.' Mot. at 14-15.) But determinations about the circumstances surrounding the taking of each piece of artwork will not "materially affect the course of the litigation," especially given the fact that claims relating to an additional twenty-eight pieces are not subject to appeal. *See de Csepel*, 859 F.3d at 1102 ("The district court found, and Hungary concedes, that some twenty-five pieces of art were

never returned to the family.”). Thus, the Court concludes that questions about when and whether artworks were “taken in violation of international law” are not controlling for purposes of § 1292(b).

II. SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

“A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits.” *See APCC Servs., Inc.*, 297 F. Supp. 2d at 97 (citing *City Stores Co. v. Lerner Shops of D.C., Inc.*, 410 F.2d 1010, 1012 (D.C. Cir. 1969)). “A substantial ground for dispute also exists where a court’s challenged decision conflicts with decisions of several other courts.” *Id.* at 97-98 (citing *Pub. Interest Research Group v. Hercules, Inc.*, 830 F. Supp. 1549, 1556 (D.N.J. 1993)).

The Court has no trouble concluding that its Rule 19 conclusion satisfies this criterion. The Court concluded that Hungary was not an indispensable party to this litigation, despite the fact that it had been dismissed on sovereign immunity grounds, because the remaining defendants would represent its interests. *See de Csepel*, 2020 WL 2343405, at *15. Even in light of defendants’ assertion that Hungary would be necessarily prejudiced given that the budgets of all remaining defendants come exclusively from Hungary’s treasury, the Court concluded that the case could go forward against the remaining defendants. *See id.* at *16. The Court remains convinced that its decision is correct given that Hungary and the remaining defendants “share a ‘precisely’ identical interest in the

subject matter of the litigation.” *See id.* at *15 (quoting *Wach v. Byrne, Goldenberg & Hamilton, PLLC*, 910 F. Supp. 2d 162, 171 (D.D.C. 2012)). However, the Court has been unable to find any authority that addresses a similar situation. In particular, there appears to be no case law that addresses the interaction between Rule 19, the financial dependence of many foreign agencies and instrumentalities on their foreign states, and the FSIA’s clear distinction between agencies and instrumentalities and foreign states under the expropriation exception. *See id.* at *17 (“If an agency or instrumentality with some budgetary ties to the sovereign could never be sued unless the sovereign itself were also a party, it would be pointless for the FSIA to treat immunity for agencies and instrumentalities differently than for foreign states.”). For this reason, the Court concludes that the Order presents at least one issue for which there is the possibility of a substantial ground for a difference of opinion.

However, the other issues that that may raise a controlling question of law do not present a substantial ground for a difference of opinion. Although the Supreme Court has granted the petitions for certiorari in the cases which form the basis of this Court’s opinion on domestic exhaustion, *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018), and *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), the Court does not see why this development would cause the Court of Appeals to reverse their decisions in *Simon* and *Philipp* unless the Supreme Court were to reverse the Circuit opinions. Of course, the Court recognizes that § 1292(b) certifies an entire

order, *not* particular issues, *see Doe 1 v. Howard Univ.*, 2019 WL 4860717, at *5 n.4 (D.D.C. Oct. 1, 2019) (“[T]he Court of Appeals will have jurisdiction over the entire order and is not restricted to the question certified by this court.”), but in the absence of a reversal by the Supreme Court, there is no reason for the Court of Appeals to address the issue of exhaustion since it is more than likely that it will be decided definitively by the Supreme Court.

Moreover, defendants have provided no reason why there is a substantial ground for difference of opinion on the question of whether the Court exceeded the Court of Appeals’ mandate. It is well-settled that for the mandate rule to apply, “the issue must actually have been decided either expressly or by necessary implication on . . . appeal.” *Maggard v. O’Connell*, 703 F.2d 1284, 1289 (D.C. Cir. 1983) (internal quotation marks omitted). Moreover, to determine what was actually or necessarily decided, “it is necessary to rehearse the procedural posture of the case” at the time of appeal. *See id.* Given that Hungary had not yet been dismissed and no Rule 19 issue had been raised at the time of oral argument, it is unsurprising that plaintiffs did not ask for leave to amend to add a new defendant. It is thus evident that defendants “simply disagree with this Court’s construction of the mandate and its interpretation of the relevant case law.” (*See* Pls.’ Cross-Mot. at 14.) This is insufficient to raise a substantial ground for difference of opinion and to render an issue immediately appealable under § 1292(b).

III. MATERIALLY ADVANCE LITIGATION

Lastly, under § 1292(b) an order’s immediate appeal must “materially advance the ultimate termination of the litigation.” *See* 28 U.S.C. § 1292(b). “[I]n order to show that an interlocutory appeal would materially advance the ultimate termination of the litigation, . . . a movant must show that reversal of the court’s order on appeal would hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense.” *Government of Guam v. United States*, 2019 WL 1003606, at *4 (D.D.C. Feb. 28, 2019) (internal quotations, citations, and brackets omitted).

Immediate review of the Court’s Rule 19 ruling would materially advance this litigation. Proceedings following the resolution of this most recent motion “threaten to endure for several years,” *id.* at *6 (internal quotation marks omitted), and, indeed, the parties in this case have already been through several rounds of motions to dismiss and subsequent appeals to the Court of Appeals over the last decade. The question of whether Hungary is an indispensable party could, if the decision were to be reversed, lead to the termination of the litigation. Addressing this issue now, as opposed to waiting for the conclusion of the litigation, which could be several years down the road, would necessarily save the parties (and the Court) from much needless expense and wasted time. Thus, the Order meets the final prong of § 1292(b). *See id.* at *7 (“A reversal of this Court’s Order on appeal would therefore bring this litigation to a close, which

obviously meets the standard of materially advancing the ultimate termination of the litigation.” (internal quotation marks and brackets omitted)).

CONCLUSION

Accordingly, and for the reasons stated above, it is hereby

ORDERED that defendants’ motion for certification of the May 11, 2020 Order is **GRANTED IN PART**; it is further

ORDERED that plaintiffs’ cross-motion for certification is **GRANTED IN PART**; and it is further

ORDERED that the May 11, 2020 Order (ECF No. 179) is **AMENDED** to add the following statement:

And it is further

ORDERED that this Order is certified for immediate appellate review because the Court’s Rule 19 determination involves “a controlling question of law as to which there is substantial ground for difference of opinion” and because “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b).

[SEAL] /s/ Ellen S. Huvelle
ELLEN S. HUVELLE
United States District Judge

Date: July 27, 2020

APPENDIX E

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

September Term, 2021

1:10-cv-01261-ESH

[Filed: May 10, 2022]

No. 20-7047

David L. De Csepel, et al.,)
)
Appellees)
)
v.)
)
Republic of Hungary, a foreign state, et al.,)
)
Appellants)

No. 20-8001

In re: Republic of Hungary, et al.,)
)
Petitioners)

154a

BEFORE: Tatel, Pillard, and Jackson*, Circuit
Judges

ORDER

Upon consideration of appellants/petitioners' petition for panel rehearing filed on April 7, 2022, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* Circuit Judge Jackson did not participate in this matter.

APPENDIX F

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

September Term, 2021

1:10-cv-01261-ESH

[Filed: May 10, 2022]

No. 20-7047

David L. De Csepel, et al.,)
)
Appellees)
)
v.)
)
Republic of Hungary, a foreign state, et al.,)
)
Appellants)

No. 20-8001

In re: Republic of Hungary, et al.,)
)
Petitioners)

BEFORE: Srinivasan, Chief Judge; Henderson,
Rogers, Tatel, Millett, Pillard, Wilkins,

156a

Katsas, Rao, Walker and Jackson*,
Circuit Judges

ORDER

Upon consideration of appellants/petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

* Circuit Judge Jackson did not participate in this matter.