UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KAREN SCALIN, JOSIANE PIQUARD, and ROLAND CHERRIER, Plaintiffs, v. SOCIÉTÉ NATIONALE DES CHEMINS DE FER FRANÇAIS, Defendant.	Case No. 15-cv-3362 District Judge Andrea R. Wood Magistrate Judge Maria Valdez

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] to set forth the interests of the United States with respect to claims brought in this case against Société Nationale des Chemins de Fer Français ("SNCF" or "Defendant"). On multiple occasions, the United States has expressed strong support for dismissal of Holocaust-related claims in U.S. courts in favor of resolution of those claims through mechanisms established through dialogue, negotiation, and cooperation, and, for the reasons set forth below, the United States likewise supports dismissal of the claims against SNCF in this litigation.

BACKGROUND

A. United States policy on Holocaust claims

The policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era has consistently been

[1] 28 U.S.C. § 517 provides that: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

motivated by the twin concerns of justice and urgency. *See* Declaration of Stuart E. Eizenstat ("Eizenstat Decl.," attached as Exhibit A) ¶¶ 3, 30.[2] Of course, no amount of money could provide compensation for the suffering that the victims of Nazi-era atrocities endured. Nevertheless, the moral imperative has been and continues to be to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes. *Id.* ¶ 3. Today, more than 70 years after the Holocaust, the survivors are elderly and are dying at an accelerated rate. *Id.* ¶ 30. The United States therefore believes that concerned parties, foreign governments, and non-governmental organizations should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation. *Id.* ¶ 3.

The framework in place in France for compensating Holocaust deportees, which includes a pension program, an orphans program, and a compensation commissions, along with a new claims program established pursuant to a December 2014 Executive Agreement is consistent with, and is in part the result of, this United States policy. *Id.* ¶¶ 29-31. This Statement of Interest sets forth the history and creation of these programs, a description of the operation of the compensation commission, a summary of the benefits available, and the United States' interests with respect to this litigation.

B. Background on relevant French Holocaust reparations initiatives

Following World War II, the French Government established a program to seek to address the wrongs suffered by Holocaust victims deported from France during the war. In 1948, the French government enabled persons who were deported from France during the Holocaust who were French nationals or residents of France as of September 1, 1939 to acquire the status of "political deportees" and receive compensation in the form of pensions. The deportees' surviving

[2] The United States maintains this policy in the current administration.

spouses were also eligible for survivor pensions in some circumstances. *See* Compensation and Restitution for Holocaust Victims in France, http://holocaust-compensation-france.memorialdelashoah.org/en/index_engl.html.

Decades later, in 1995, President Jacques Chirac of France publicly recognized France's unremitting debt to the victims of the German occupation and the Vichy regime in France, and pledged that the French Government would make efforts to address all remaining vestiges of that period. *Id.* ¶ 6. One of those efforts was the creation, in January 1997, of the Study Mission on the Spoliation of Jews in France, known as the "Mattéoli Mission," the aim of which was to study the conditions under which property belonging to Jews in France was confiscated by the occupying Nazi forces and Vichy authorities during the period 1940-1944. *Id.* ¶ 6.

In April 2000, the Mattéoli Mission issued a 3,000-page report detailing various types of property spoliation that occurred and attempting to quantify the extent of such spoliation. *See* Summary of the Work by the Study Mission on the Spoliation of Jews in France ("Mattéoli Report"), www.info-france-usa.org/wchea/matteoli.pdf. The Mattéoli Mission made several recommendations for addressing these deprivations, one of which is particularly relevant here: the creation of a commission to hear claims by individuals who lost property or are heirs to those who lost property that was never restituted, regardless of the nationality of those victims or their heirs.[3] *Id.* ¶ 7. That commission, the Commission for the Compensation of the Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force During the Occupation (known by its French acronym "CIVS"), was established by a decree of the French Government in September 1999. *Id.*

[3] This recommendation was actually part 4 of an earlier, interim report of the Mattéoli Mission. *See* Mattéoli Report at 6.

Also in 2000, the French government created a program for orphans, under which all individuals who were minors at the time of the deportations and lost a parent who was deported and died during the Holocaust are eligible for a pension or lump sum payment, regardless of nationality. *See* Compensation and Restitution for Holocaust Victims in France, http://holocaust-compensation-france.memorialdelashoah.org/en/index_engl.html.

C. Operation of the CIVS

The program arising from these efforts by France to bring some measure of justice to Holocaust survivors and their families most relevant to this litigation, which involve property claims, is the CIVS. The CIVS investigates and considers all claims by any person for damages following spoliation of property resulting from anti-Semitic legislation enforced during the Occupation by either the occupying authorities or the Vichy government. *See* The CIVS: Scope: Types of spoliation available for reparation, restitution and compensation, http://www.civs.gouv.fr/article116.html. It does so based on relaxed standards of proof. Eizenstat Decl. ¶ 20. It can recognize as sufficient to authorize payment any of various standards of evidence, including not only proof but also presumptions, indications, and even the "intimate conviction" of the Commission. *Id*. Claimants can be represented by counsel or others at every stage of the process, and need not personally appear. *Id*.

Once the CIVS determines that an award should be made, it refers that award to the Secretary General of the French Government. *See* The CIVS: Scope: Types of spoliation available for reparation, restitution and compensation, http://www.civs.gouv.fr/article116.html. There is no monetary limit on such awards. Eizenstat Decl. ¶ 20.

The CIVS has an appeals process. *Id*. ¶ 22. Claimants whose claims are decided by a panel of commission members are entitled to appeal to the full commission, while those whose claims are decided in the first instance by the full commission are entitled to seek reconsideration

of such decisions, in each case on the basis of new facts, new evidence, or material error. *Id.* These internal appeals are in addition to whatever administrative and judicial appeals may exist under French law. *Id.* Michel Jeannoutot, the Chairman of CIVS, has stated that claimants may appeal to a French court of competent jurisdiction and that some appeals have been determined to be admissible. *See* Decl. of Michel Jeannoutot, ECF No. 19-3, ¶ 50.

The CIVS issues regular public reports that detail its activity as well as the criteria established through Commission decisions and the procedures for processing claims. *Id.* ¶ 23. The CIVS welcomes representatives of Holocaust victims and the United States Government for exchanges of information. *Id.* In addition, the CIVS undertook a program to publicize world-wide its existence and the availability of its claims procedure and to make its forms and application procedures easily available to claimants at no cost to them. *Id.* ¶ 19. It has also cooperated with organizations representing victims to ensure that potential claimants have knowledge of and access to the CIVS. *Id.* It also has set up offices or contact centers in the United States and other countries to allow claimants to contact the CIVS and make their claims without travel to France. *Id.*

A key point regarding the CIVS is that all persons, or descendants of persons, who were victims of material or financial spoliation that occurred during the Occupation, regardless of his or her current nationality or country of residence, are eligible to apply for restitution. *See* The CIVS: Opening a case file, www.civs.gouv.fr/article50.html. Moreover, Mr. Jeannoutot has represented that the jurisdiction of CIVS extends to claims for any property seized in the context of deportations undertaken by SNCF. *See* Supp. Decl. of Michel Jeannoutot, ECF No. 56-1, ¶ 10.

D. The 2014 Executive Agreement

The United States recently reaffirmed its support for French efforts to compensate Holocaust victims and their families, including the specific efforts to address wrongs suffered in

connection with the deportations from France. In December 2014, the United States and France signed an Executive Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs ("2014 Executive Agreement," attached as Ex. B) designed to expand upon the French pension program providing compensation to surviving Holocaust deportees and surviving spouses of deportees, but which was available only to French nationals and nationals of countries with relevant international agreements with France. Pursuant to the 2014 Executive Agreement, France has provided the United States with a $60 million lump-sum payment to administer a program to cover U.S. citizens and other foreign nationals who are not eligible to receive compensation under the French pension program.[4] *Id*. at art. 4(1).

The 2014 Executive Agreement specifically notes that France has instituted "extensive measures to restore the property of and to provide compensation for" Holocaust victims, including "a pension program designed to address the wrongs suffered by Holocaust victims deported from France and a specific program for orphans." *Id*. at Preamble. It also recognizes that "the Government of the French Republic remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs." *Id*. The Agreement further reflects the two nations' shared desire to provide compensation for victims and their families in "an amicable, extra-judicial and non-contentious manner" and to secure "an enduring legal peace." *Id*. It recognizes that "France, having agreed to provide fair and equitable compensation to [certain Holocaust deportation victims] under this Agreement, should not be asked or expected to satisfy further claims in

[4] The new program thus provides compensation for Holocaust deportation to individuals who were deported from France and were alive as of November 1, 2015, spouses of such deportees who were alive as of November 1, 2015, and estates of persons in either category who died between 1948 and November 1, 2015.

connection with deportations from France during the Second World War before any court or other body of the United States of America or elsewhere," and it notes "the Parties' intent that this Agreement should, to the greatest extent possible, secure for France an enduring legal peace regarding any claims or initiatives related to the deportation of Holocaust victims from France." *Id*.

The objectives and obligations set forth in the 2014 Executive Agreement underscore the continuing commitment of France to provide compensation for and resolve Holocaust-related claims, the United States' interest in seeking a resolution of such claims outside of judicial proceedings in the United States, as well as the recognition by both countries that the CIVS, the French deportation compensation programs, and the program for Americans created by the Agreement are the exclusive mechanisms through which Holocaust deportation claims against France can best be resolved.

E. Prior litigation against SNCF in U.S. courts

This is not the first lawsuit against SNCF in U.S. courts based on its conduct in deporting Holocaust victims from France during World War II. In 2006, a group of Holocaust survivors and heirs, including nationals of the United States, France, and other countries, filed suit on behalf of themselves and a putative class against France, SNCF, and a French national bank known as the Caisse des Dépôts et Consignations (CDC). *See Freund v. Repub. of France*, (S.D.N.Y. 06-cv-1637). The *Freund* suit focused its claims on alleged takings of personal property from individuals while in holding or transit camps and during the deportations. Plaintiffs alleged that confiscated property had been sold and that all of the proceeds from such sales were held by the CDC, and plaintiffs asserted that the court had subject matter jurisdiction under the FSIA's "takings" exception to immunity, 28 U.S.C. 1605(a)(3). *Freund v. Repub. of France*, (S.D.N.Y. 06-cv-1637), Compl. ¶¶ 9, 20, 22, 57. The district court dismissed the case for lack of jurisdiction

under the FSIA and found that, "even if jurisdiction were proper, the case presents serious justiciability issues that make abstention appropriate." *Freund v. Repub. of France*, 592 F. Supp. 2d 540, 545 (S.D.N.Y. 2008). With respect to the claims against SNCF, the district court concluded that plaintiffs had failed to properly allege that taken property or "property exchanged for such property," is "owned or operated" by SNCF within the meaning of the FSIA's takings exception. *Id.* at 559. In particular, the court noted that plaintiffs' conclusory allegations that SNCF had retained and converted deportees' property and "derivative profits," failed to satisfy their "burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted." *Id.* at 559-61 (citing *Cabiri v. Repub. of Ghana*, 165 F.3d 193, 196 (2d Cir. 1993)). The court further explained that, even if it had jurisdiction, abstention would be appropriate based on principles of international comity, because eligible plaintiffs had an adequate and alternative forum in France through the CIVS and exceptional circumstances were present warranting abstention. *Id.* at 579-81. The Second Circuit affirmed this dismissal on sovereign immunity grounds, noting that the complaint contained "no specific allegation that SNCF itself currently possesses the stolen property or any derivative property," and in fact "the complaint itself runs counter to the possibility that the stolen property (or any derivative property) remains lodged with SNCF," because it alleged that CDC, not SNCF, received funds from sales and auctions of the property in question. *Freund v. Société Nationale des Chemins de Fer Français*, 391 F. App'x 939, 941 (2d Cir. 2010).

F. The instant litigation

The instant action before the Court, like the *Freund* action, asserts claims against SNCF for alleged takings of personal property from deportees during World War II. Specifically, Plaintiffs allege that SNCF "individually took, and in concert with the Nazis, aided and abetted and conspired to take, the [personal p]roperty of Plaintiffs, in violation of international law . . . for

no public purpose and without just compensation." Compl., ECF No. 1, ¶ 32. According to Plaintiffs, this taking was "an integral part of the genocide against the Jews during the War." *Id.* ¶ 33. The three named Plaintiffs are relatives of Holocaust victims who were deported from France on SNCF trains and died at Auschwitz. *Id.* ¶¶ 16-18. Plaintiffs assert that they "believe" that their relatives had property taken from them by SNCF at the time of their deportation, *id.* ¶¶ 16-18, and purport to bring suit on behalf of "all those individuals transported by SNCF from camp to camp in France or from France to the Nazi death and slave labor camps during World War II, and their heirs and beneficiaries," *id.* ¶ 19. Plaintiffs base their claims on alleged violations of international law, conversion of stolen property, and unjust enrichment. *Id.* ¶¶ 31-45. Plaintiffs contend that the Court has jurisdiction to hear the case pursuant to the takings exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3). *Id.* ¶ 25.

DISCUSSION

The United States supports dismissal of this action on four bases: (A) *forum non conveniens* grounds, (B) principles of international comity, (C) failure to exhaust domestic remedies, and (D) lack of subject matter jurisdiction under the FSIA. In the judgment of the United States, each basis constitutes an independent and valid justification for dismissing the present lawsuit.[5]

A. The United States supports dismissal of Plaintiffs' claims based on *forum non conveniens* grounds because the CIVS constitutes an available alternative forum

Plaintiffs have available to them an alternative forum in which to adjudicate their claims, and the public and private interests in their claims weigh in favor of utilizing that forum. For this

[5] The Court has the discretion to address these issues in any order. *See Sinochem Int'l Co v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) ("[A] court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.").

reason, the United States supports dismissal of Plaintiffs' claims on *forum non conveniens* grounds. A district court has discretion to dismiss a case on these grounds where an alternative forum has jurisdiction to hear the case, and where the court "determines that there are strong reasons for believing [the case] should be litigated in the courts of another, normally a foreign, jurisdiction." *Fischer v. Magyar*, 777 F.3d 847, 852 (7th Cir. 2015), *cert denied sub nom Fischer v. Magyar Ilamyasutak Z.R.T.*, 135 S. Ct. 2817 (2015) (citation omitted). In undertaking this analysis, courts consider factors pertaining to the private interests of the litigants, such as the ease of access to sources of proof, the availability and costs of obtaining witnesses, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981). Courts also consider factors related to the public interest, including "administrative difficulties flowing from court congestion," the "local interest in having localized controversies decided at home," and "the avoidance of unnecessary problems in conflict of laws or in the application of foreign law." *Id.* The focus of the inquiry "is the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Fischer*, 777 F.3d at 866. Where an alternative forum would have jurisdiction over the case, the district court may dismiss on *forum non conveniens* grounds "if trial in the plaintiff's chosen forum would be more oppressive to the defendant than it would be convenient to the plaintiff or if the forum otherwise creates administrative and legal problems that render it inappropriate." *Id.* (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 429 (2007)).

Although a defendant invoking *forum non conveniens* ordinarily "bears a heavy burden in opposing" a plaintiff's chosen forum, that burden "applies with less force" where the plaintiff's choice is not his or her home forum. *Sinochem*, 549 U.S. at 425 (noting the assumption that the selection of a non-home forum is "less reasonable") (citation omitted). When assessing whether a

foreign state's courts provide an adequate alternative forum, "American courts have understandably been quite reluctant to declare another forum inadequate." *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 355 (S.D.N.Y. 2002). "Such deference to the legal processes of foreign nations extends even to nonjudicial forums that are part of the administrative apparatus of sovereign states." *Id.*

The CIVS program created by the French Government constitutes an adequate forum for the Plaintiffs to adjudicate the claims they have asserted in this litigation. Claims brought in the CIVS are evaluated under relaxed standards of proof and paid expeditiously. *See* Eizenstat Decl. ¶ 20. Claimants are permitted to have representatives assist them, and are also assisted by the French Government if they live outside France and by victims' organizations. *Id.* ¶¶ 19-20. Claimants are also entitled to appeal adverse decisions. *Id.* ¶ 22. In addition, the CIVS issues regular public reports as part of its commitment to operate in a transparent manner. *Id.* ¶ 23. The CIVS has thus been able to make speedy, dignified payments to many deserving victims and is designed to provide comprehensive relief to a broader class of victims than would be possible in United States judicial proceedings. *Id.* ¶ 31. For all of these reasons, the CIVS provides Holocaust victims and their families, such as the Plaintiffs here, with an adequate remedy for takings claims brought against SNCF. *See Freund*, 592 F. Supp. 2d at 579-80.

The CIVS, moreover, constitutes an available forum for Plaintiffs' claims because it "permits eligible Plaintiffs who were victimized by French anti-Semitic legislation to file claims relating to material spoliations based on actions by SNCF." *See id.* at 580. Moreover, CIVS Chairman Michel Jeannoutot has clearly represented that the CIVS will exercise jurisdiction over the claims brought by Plaintiffs in this lawsuit, stating that "if items of the relatives of the [P]laintiffs were seized during the boarding of deportation trains or on these trains in French territory, the CIVS is willing and competent to entertain these claims," including claims pertaining

to "spoliations during arrests, transfers and internment," and will "recommend compensation to which the claimant may be entitled." Supp. Decl. of Michel Jeannoutot, ECF No. 56-1, ¶ 10. Such representations are sufficient to establish the CIVS as an available alternative forum here. *See Freund*, 592 F. Supp. 2d at 580 (relying on representations from CIVS Chairman to conclude that the CIVS is available to hear spoliation claims against SNCF). In these circumstances, the commitment of France to process the very claims at issue in this case supports dismissal on *forum non conveniens* grounds.

The public and private interests in this case also weigh in favor of Plaintiffs' adjudicating their claims in the CIVS. With respect to the private interest, the conduct that forms the basis of Plaintiffs' claims occurred overseas, and the majority of the evidence and witnesses is thus also likely to be located abroad. *See Fischer*, 777 F.3d at 870 (concluding that private interest weighed in favor of adjudicating claims in Hungary based in part on the fact that "Hungary is where much of the evidence and surviving witnesses are located" (citation omitted)); *Freund*, 592 F. Supp. 2d at 581 (noting the "undeniably strong connection" between claims against SNCF and France). SNCF is a French-owned railway, and two of the three named plaintiffs are citizens and residents of France; as French citizens, their preference to litigate in the United States is entitled to less weight. *See Sinochem*, 549 U.S. at 425. As for the public interest, France "has invested a substantial amount of time, efforts, and money in the CIVS process and looks to that system as the exclusive means of adjudicating Holocaust-related claims." *Freund*, 592 F. Supp. 2d at 580-81 (further noting that "the French government has made it clear that it believes France should be the sole forum for the adjudication of spoliation claims [brought against SNCF]"). More recently, France affirmed that it "remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs." *See* 2014 Executive Agreement at Preamble. As set forth above, the

United States consistently has supported France's efforts to provide a redress process and compensation for victims in a manner that serves the vital interest of compensating Holocaust victims more quickly and efficiently than the litigation process. *See* Eizenstat Decl. ¶¶ 36, 38. Given the weight of both the public and private interests in favor of adjudicating Plaintiffs' claims in France, dismissal of this case based on *forum non conveniens* grounds is warranted.

B. Principles of international comity support dismissal of Plaintiffs' suit

Similar considerations militate in favor of dismissal based on principles of international comity. "International comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Mujica v. AirScan Inc.*, 771 F.3d 580, 597 (9th Cir. 2014) (citation omitted). International comity seeks to maintain our relations with foreign governments by discouraging a U.S. court from second guessing a foreign government's judicial or administrative resolution of a dispute, or by otherwise sitting in judgment of the official acts of a foreign government. *See generally Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). As such, comity "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Mujica*, 771 F.3d at 599 (citation omitted); *see also Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (describing comity as "an abstention doctrine: A federal court has jurisdiction but defers to the judgment of the alternative forum").

Comity principles may be applied prospectively where, as here, there is no parallel action pending in the foreign state but the interests of the United States, the foreign government, and the international community all weigh in favor of U.S. courts abstaining from exercising jurisdiction. *See Ungaro-Benages*, 379 F.3d at 1238. In so doing, "courts evaluate several factors, including

the strength of the United States' interest in using a foreign forum, the strength of the foreign government's interests, and the adequacy of the alternative forum."[6] *Id*. Multiple courts have relied on comity to dismiss Holocaust-era claims brought against foreign sovereigns in U.S. courts, including the similar claims advanced against SNCF in *Freund*. *See, e.g.*, *Ungaro-Benages*, 379 F.3d at 1238-41 (affirming dismissal of Holocaust-related expropriation claims against German banks in light of the United States and Germany's shared interest in having claims resolved using claims process established by the two countries via international agreement); *Freund*, 592 F. Supp. 2d at 580-82 (concluding that, for spoliation claims brought against SNCF, "the circumstances of this case justify abstention based on comity principles" and having plaintiffs pursue their domestic remedies in France).

Principles of comity similarly favor dismissal of Plaintiffs' claims in this case. For the reasons discussed in the preceding section, the United States has determined that the CIVS is an adequate alternative forum in which Plaintiffs should bring their claims. *See Ungaro-Benages*, 379 F.3d at 1238-39 ("Our determination of the adequacy of the alternative forum is informed by *forum non conveniens* analysis."). The interests of the United States and France also weigh in favor of dismissal. As a general matter, the United States consistently has maintained "that foreign courts generally should resolve disputes arising in foreign countries, where such courts reasonably have jurisdiction and are capable of resolving them fairly." *Mujica*, 771 F.3d at 609 (citation and internal brackets omitted). More specifically, the United States consistently has

[6] Likewise, under principles of prescriptive comity—which involve limiting the reach of U.S. laws in light of conflict with a foreign state's legislative, judicial, or executive acts—courts consider several factors, including the likelihood that the exercise of jurisdiction by a U.S. court would conflict with regulation by a foreign country, the respective interests of the United States and the foreign country, and the links between the United States and the parties and claims in a case. *See, e.g.*, Restatement (Third) of Foreign Relations Law § 403(2); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (Scalia, J., dissenting) (describing prescriptive comity as "the respect sovereign nations afford each other by limiting the reach of their laws").

supported French efforts to establish a comprehensive system of broad-ranging administrative fora, including the CIVS, in which to adjudicate the claims of Holocaust victims and their families. And most recently, the 2014 Executive Agreement entered into by France and the United States further demonstrates the countries' intent to secure an "enduring legal peace" for claims related to the deportation of Holocaust victims from France. *See* 2014 Executive Agreement, at Preamble. In that document, the French Republic agreed to pay the United States $60 million, which the United States would use to provide compensation to certain Holocaust victims "not covered" by existing French programs. *See* 2014 Executive Agreement, at art. 4(2), (3). The French Republic also expressed its continued "commit[ment] to provid[e] compensation for the wrongs suffered by Holocaust victims deported from France through [administrative] measures to individuals who are eligible under French programs." *Id*. at Preamble. The 2014 Executive Agreement thus reflects France's willingness to consider claims such as those asserted in this case in the CIVS and the United States and France's joint understanding that parties who are eligible to assert claims through programs established by France should seek relief in the French administrative fora rather than in U.S. courts.

The United States' interest in having Plaintiffs avail themselves of the available administrative forum is especially strong in this case, where all or most of the parties to the dispute are French and the conduct giving rise to the claim occurred in France. *See Mujica*, 771 F.3d at 603 (considering the location of the conduct in question, the nationality of the parties, and the foreign policy interests of the United States as part of the comity analysis). Accordingly, comity supports requiring Plaintiffs to pursue their claims in the CIVS, which was established by the French government, with the support of the United States, "to address exactly these types of claims from the Nazi era." *See Ungaro-Benages*, 379 F.3d at 1240-41.

C. Plaintiffs should be required to exhaust the remedies available to them in France

For similar reasons, Plaintiffs should be required to pursue the remedies available to them in France before proceeding with litigation in U.S. courts. Although the FSIA itself does not require exhaustion, a district court retains the authority to require plaintiffs to exhaust their domestic remedies as a prudential matter. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (observing that exhaustion of domestic remedies, including pursuing claims in international claims tribunals, is one principle "limiting the availability of relief in the federal courts for violations of customary international law," which should be considered "in an appropriate case"). Indeed, "international law favors giving a state accused of taking property in violation of international law an opportunity to redress by its own means, within the framework of its own legal system before the same alleged taking may be aired in foreign courts." *Fischer*, 777 F.3d at 855. Accordingly, "[s]o long as [P]laintiffs might get a fair shake in a domestic forum, international law expects [P]laintiffs at least to attempt to seek a remedy there first." *Id.* at 858.

Plaintiffs have not pursued the claims at issue in this case in the CIVS, which the French Government has made clear is an available forum for adjudication of their takings claims, as noted above. Nor have Plaintiffs "show[n] convincingly that such remedies are clearly a sham or inadequate or that their application is unreasonably prolonged." *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 681 (7th Cir. 2012). Instead, it has been established that the CIVS would exercise jurisdiction over Plaintiffs' claims if they were brought in that forum. *See* Supp. Jeannoutot Decl. ¶ 10. Given the United States' longstanding and recently renewed support for resolving Holocaust-era claims involving France exclusively through the existing mechanisms described above, France "should first have the opportunity to address [Plaintiffs' claims], by its own means and under its own legal system, before a U.S. court steps in to resolve claims against a

part of the [French] national government for these actions taken in [France] so long ago." *See Abelesz*, 692 F.3d at 682.

D. The takings exception to the FSIA is not a basis for jurisdiction in this case

Dismissal is also warranted for lack of subject matter jurisdiction under the FSIA. That statute provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in U.S. courts. *Argentine Repub. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, a foreign sovereign and its agencies and instrumentalities are immune from suit in the United States unless a specific statutory exception applies. 28 U.S.C. § 1604; *Samantar v. Yousuf*, 560 U.S. 305, 313-14 (2010).

Plaintiffs contend that the Court has jurisdiction over this case because SNCF is not immune under the takings exception in the statute. That exception states that a foreign state, or its agencies or instrumentalities, will not enjoy immunity where

> 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; or that property or 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.

28 U.S.C. § 1605(a)(3). In other words, "the expropriation exception defeats sovereign immunity where (1) rights in property are in issue; (2) the property was taken; (3) the taking was in violation of international law; and (4) at least one of the two nexus requirements is satisfied." *Abelesz*, 692 F.3d at 671 (citing *Zappia Middle E. Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000)).

In this case, Plaintiffs have failed to establish the fourth element of the exception, the nexus requirement. The FSIA sets forth two possible nexus requirements: (1) that the taken "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," or (2) that the taken "property or 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." 28 U.S.C. § 1605(a)(3). Plaintiffs here have not alleged that property taken from the deportees, or any property exchanged for that property, is present in the United States, so only the second nexus requirement is at issue. Yet Plaintiffs have not property plead that requirement, as they have failed to properly allege that they or their family members had specific property that was taken by government authorities and that SNCF still owns or operates any such property or property exchanged for such property.

While the Seventh Circuit has taken the position that the pleading standard for the elements of the takings exception is not "demanding," it has made clear that a complaint asserting such claims, which are analogous to claims for conversion of property, must allege the date and place of the conversion as well as a description of the property.[7] *See Abelesz*, 692 F.3d at 687

[7] The United States recognizes that the pleading standard set forth in *Abelesz* is binding on this Court, does not contest that standard here and, indeed, contends that this standard has not been satisfied here. The United States notes, however, that other circuit courts have employed pleading standards more demanding than that applied by the *Abelesz* court in cases brought under the FSIA's takings exception. *See, e.g., Agudas Chasidei Chabad of U.S. v. Russian Fed*'n, 528 F.3d 934, 940-41 (D.C. Cir. 2008) (holding that, in response to a challenge from a sovereign defendant, a plaintiff seeking to establish jurisdiction pursuant to the takings exception must "present adequate supporting evidence" for his or her jurisdictional allegations relevant to the nexus requirement); *Freund v. Société Nationale des Chemins de Fer Français*, 391 F. App'x 939, 940 (2d Cir. 2010) (noting that, "[u]nder the FSIA, once the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." (internal brackets omitted)).

The United States believes that this heightened standard is appropriate where, as here, a plaintiff is pleading jurisdictional facts relevant to 1605(a)(3)'s nexus requirement, consistent with the approach courts generally take in assessing motions to dismiss for lack of subject matter jurisdiction under the FSIA. A heightened standard in these cases is especially appropriate given the "widely recognized" observation by courts "that the FSIA's immunity provisions aim to protect foreign sovereign from the burden of litigation, including the cost and aggravation of discovery." *See Rubin v. The Islamic Repub. of Iran*, 637 F.3d 783, 795 (7th Cir. 2011); *see also*

(describing § 1605(a)(3) pleading standard as requiring an allegation that "[o]n *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property consisted of *describe*." (quoting Form 15 from the Federal Rules of Civil Procedure)); *see also Crist v. Repub. of Turkey*, 995 F. Supp. 5, 11 (D.D.C. 1998) (holding that a complaint must include allegations about "the location and description of the allegedly dispossessed property" in order to satisfy § 1605(a)(3)). The complaint must also contain an "allegation of the value of the property." *Id.* Here, Plaintiffs' allegations fall short of meeting this standard. Plaintiffs define "property" to mean "any and all personal property, including cash, securities, silver, gold, jewelry, artwork, musical instruments, clothing, and equipment that was illegally, improperly, and coercively taken from the ownership or control of an individual during [a] [d]eportation." Compl. ¶ 3. Plaintiffs also make categorical assertions about all Holocaust deportees, alleging that, in general, SNCF confiscated their property and either converted it for the railway's own benefit or "turned it over to the Nazis in exchange for other [p]roperty." *Id.* ¶ 10.

Here, Plaintiffs make no allegations about the property that was purportedly taken from their family members by governmental authorities. The most specific allegation is that they "believe" that their relatives, like all deportees, had property with them when they boarded the train and that such property was taken. *Id.* ¶ 16 (Plaintiff Scalin "believes that her grandparents, like all the victims, had Property with them and that Property was taken."); ¶ 17 (Plaintiff Piquard "believes that her mother and [her grandmother, two aunts, and other relatives] had Property that was taken from them during their deportation."); ¶ 18 (Plaintiff Cherrier "believes his

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Segni v. Commercial Office of Spain, 816 F.2d 344, 347 (7th Cir. 1987) ("A foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity.").

grandparents had Property taken from them during the deportation.").[8] But while these allegations may be based on sincerely held beliefs, the pleading standard for purposes of a takings claim in this Court requires more, including information about the location and date of the alleged takings, a description of what property was purportedly taken from Plaintiffs' relatives, and an estimate of the value of the property. *See Abelesz*, 692 F.3d at 687. Absent this information about the property that was allegedly taken in the first instance, it is not possible to conclude that SNCF still retains such property or any property exchanged for such property. This being the case, Plaintiffs have not met the pleading standard for the § 1605(a)(3) nexus requirement.[9]

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[8] By contrast, the complaint at issue in *Abelesz* contained these essential details. *See Victims of the Hungarian Holocaust v. The Hungarian State Railways*, No. 1:10-cv-868 (N.D. Ill. Sept. 14, 2011), ¶ 1 (alleging that the plaintiff's family was ordered to leave behind "seven backpacks and two suitcases," and that railway workers forced plaintiff to hand over "all items of value, including money, expensive stones and jewels they had tried to hide in their clothing"); ¶ 3 (further alleging that the plaintiff's mother was deported by the railway and that, upon return, the family's "jewelry, silver, rugs, [and] furniture" had all been removed from their apartment leased from the railway).

[9] In arguing that they have satisfied the nexus requirement, Plaintiffs contend that SNCF converted some of the (unspecified) confiscated property for its own benefit and also greatly benefitted from its arrangement with the Nazis, including by receiving from the Nazis either monetary payment or "good will" in exchange for (unspecified) confiscated property. Comp. ¶¶ 10, 12-13. They further allege that the revenues received from the Nazis "helped enrich SNCF, and remain as part of its post-war operating capital," *id.* ¶ 13, though the Complaint provides no further details about the derivative property SNCF purportedly still possesses.

Even if Plaintiffs had in their Complaint properly identified the property that was allegedly taken, the United States believes that Plaintiffs' sparse allegations concerning what property SNCF continues to own today would be insufficient to invoke the takings exception, which requires a demonstration of current ownership of taken or derivative property by a foreign sovereign. *See* 28 U.S.C. § 1605(a)(3) (excepting immunity where a foreign sovereign takes property in violation of international law and "that property or property exchanged for such property *is* owned or operated" by the sovereign in the United States" (emphasis added)). Indeed, some courts have required at the pleading stage a showing that the expropriated or derivative property is identifiable and established to be in the possession of a foreign sovereign. *See Simon v. Rep. of Hungary*, 37 F. Supp. 3d 381, 408 (D.D.C. 2014) (observing, in dicta, that allegations that the Hungarian railway co-mingled with its general revenues funds exchanged for expropriated property were insufficient because of the "diffuse nature of any remaining proceeds"); *Crist*, 995 F. Supp. at 11 (rejecting, as insufficient, "[p]laintiffs' mere allegation that the proceeds derived from their real property located in Cyprus are now somehow connected to some unidentified

CONCLUSION

The administrative fora created by the French government to redress Holocaust-era claims, including the CIVS, provide benefits to the public interest that reach beyond the scope of any single litigation. These fora, moreover, are the product of international negotiations and agreements that highlight the advantages for all concerned for when legal and moral claims of Nazi-era victims are dealt with through dialogue, negotiation, and cooperation, instead of prolonged litigation and controversy. The policy of the United States is that these fora present the best opportunity to provide Holocaust victims redress as quickly as possible. For all the reasons set forth herein, the United States supports dismissal of Plaintiffs' complaint.

Dated: December 18, 2015

Respectfully submitted,

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commercial activity conducted by the Republic of Turkey in the United States"). Nonetheless, the United States recognizes that the Seventh Circuit appeared to consider sufficient allegations regarding present-day ownership similar to those in Plaintiffs' complaint, *see Abelesz*, 692 F.3d at 688, although the allegations relating to the nexus requirement in that case also included allegations that the railway presently retained ownership of specific real property that had been leased to the deportees. In any event, the United States does not rest its conclusion that the pleading standard has not been met in this case on a challenge to this aspect of *Abelesz*.

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.5(b), I, Nathan M. Swinton, an attorney, certify that on December 18, 2015, I caused copies of the Statement of Interest of the United States of America to be served via the Court's electronic filing system upon all counsel with appearances of record.

/s/ Nathan M. Swinton