UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 01-1859-CIV
SEITZ

IRVING ROSNER, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)
	)

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

The United States' opening memorandum in support of its Motion to Dismiss the First Amended Complaint ("Opening Memorandum") explains the history of the Hungarian Gold Train and the justness of the United States' decision to turn over the property it found on the train for use in assisting Jewish and other refugees in post-World War II Europe. The Opening Memorandum also explains why this Article III Court is without subject matter jurisdiction over this lawsuit and why the suit fails to state a claim upon which relief can be granted.

Despite its length,[1] Plaintiffs' Memorandum in Opposition to the United States' Motion to Dismiss ("Opposition") puts forward no evidence that satisfies their burden to prove that they have standing under both constitutional and prudential principles and that their claims are not barred by the applicable statute of limitations. Plaintiffs cannot establish that the property which they are claiming in this lawsuit was on the Gold Train when the U.S. Army took control of the train or that, even if it had been, restituting it to Hungary — as Plaintiffs argue the United States should have done — would have enabled them to regain possession of it. Plaintiffs also cannot demonstrate that they should be permitted to assert rights that, under the theories of liability they have advanced, belong to Hungary; Hungary waived any rights against the United States regarding the Gold Train property through both the 1947 Treaty of Peace and its 1973 Settlement Agreement with the United States. Plaintiffs also cannot demonstrate that equitable principles warrant tolling the six-year statute of limitations (or otherwise suspending the accrual date on their causes of action) until the early 1990s, more than four decades after the events that gave rise to their claims occurred. Likewise, Plaintiffs cannot establish that Congress intended for the Administrative Procedure Act ("APA") to provide

[1] The number of factual assertions and theories in the 71-page Opposition necessitates a rather lengthy reply.

the judicial review they seek of discretionary acts and decisions during the United States' military occupation in post-war Austria. Finally, the First Amended Complaint fails to state a claim upon which relief can be granted for the reasons set forth in the Opening Memorandum and herein.

ISSUES OF FACT

Given that the United States' motion presents a factual challenge to subject matter jurisdiction and that there are a number of facts relevant to the history of the Hungarian Gold Train, it is appropriate to clarify which facts are necessary to the Court's determination of its jurisdiction and which facts serve as background to that issue or relate to the ultimate merits of Plaintiffs' claims.

I. Facts Necessary to Determination of Subject Matter Jurisdiction

A. Whether Property Belonging to Plaintiffs Came into the United States' Possession (For Standing Determination)

It is undisputed that the Gold Train carried Jewish property and most likely carried some property of some Jews who lived in the regions identified by Plaintiffs' expert Gábor Kádár as well as other parts of so-called Greater Hungary, (see Aff. of Gábor Kádár on History of the Hungarian Gold Train ¶¶ 33-34 ["Kádár Aff."] [Ex. 5 to Opening Mem.]). However, it is impossible to know just what was on the train when the United States took control of it. There are numerous breaks in the chain of custody between the time that Plaintiffs relinquished property to Axis Hungarian authorities pursuant to Decree 1600 and the time that the U.S. Army took possession of the Gold Train. Much of the property that Axis Hungary confiscated from Jews never arrived at central collecting points due to bureaucratic disorganization and looting; some of the property that made it to the collecting points was subsequently destroyed by events of war and some was stolen; some of the property actually that was loaded onto the Gold Train was stolen, given away, or was offloaded to make room for train passengers; and train commander Arpad Toldi made off with 44 or more cases of the more valuable pieces of property that had been loaded onto the Gold Train, all before

the Gold Train came into the possession of the U.S. Army near the end of World War II. (See portions of Expert Report of Ronald W. Zweig, Ph.D. ["Zweig Report"], Second Expert Report of Ronald W. Zweig, Ph.D. ["Zweig Rebuttal"], and Dep. of Pls.' Expert Witness Gábor Kádár ["Kádár Dep."] cited in government's Opening Mem. at 5-9.) In addition, much of the Jewish property disappeared by less orderly means, in that it was seized by Hungarian soldiers directly from Plaintiffs' homes or their persons, seized by Nazi soldiers who ransacked deserted houses, or stolen by their non-Jewish neighbors. (See Zweig Report at 9 [Ex. 1A to Opening Mem.].)

As explained below, the testimony of Plaintiffs Elisabeth Bleier, Erwin Deutsch, and Zoltan Weiss, and the auction catalog excerpts on which Plaintiffs rely, do not establish that the property which any Plaintiff is claiming in this lawsuit was on the Gold Train. See infra at 20-23.

B. Whether Any Conduct by the United States Led Plaintiffs to Miss the Applicable Filing Deadline (For Statute of Limitations)

Abandoning many of the allegations of their Amended Complaint, Plaintiffs' Opposition identifies the "deceptive" conduct by the United States that allegedly caused them to miss the filing deadline for this action as the government's handling and disposition of the Gold Train itself (including representations made to representatives of the Hungarian Jewish community, to the Hungarian government, and its decision to give the victim property found on the Gold Train to the Inter-Governmental Committee on Refugees ["IGCR"]). (Opp'n at 47.) While the United States disputes many of the asserted facts related thereto, none is relevant to the question whether Plaintiffs' claims are time-barred. Plaintiffs have failed to identify any causal link between the United States' actions vis a vis the Gold Train and their 40-year delay in filing suit.

As further evidence of "deceptive conduct," Plaintiffs cite the government's routine classification and declassification of World War-II era records and suggest that the declassification of Gold Train documents began only in 1998. It is undisputed that the United States declassified

some documents related to the Gold Train in the late 1990s and early part of 2000 as part of the work of the Nazi War Criminal Records Interagency Working Group ("IWG"). Professor Zweig, a member of the Historians Advisory Panel of the IWG for the National Archives and Record Administration (NARA), estimates that the number of documents relating to the Gold Train declassified as a result of the IWG's efforts "was about half a dozen pages." (Zweig Dep. at 202:2-203:14 [Ex. 1].) However, Plaintiffs' statement that "Zweig informs us that declassification started in 1998" is patently false and is not supported by their cited source: the acknowledgments of Professor Zweig's book, which discuss the IWG's efforts.[2] Plaintiffs' assertion likewise is contrary to the testimony of the Director of the Initial Processing/Declassification Division at NARA that information related to the Gold Train has been declassified and available to the public for at least 20 years. (Decl. of Jeanne Schuable, ¶ 7 [Ex. 4 to Opening Mem.].) By way of example, Ms. Schuable further attests that NARA's Record Group 260, which contains two boxes containing materials specifically related to the Gold Train, was declassified and made available to the public in late 1982.[3] (Id.)

Plaintiffs present no evidence that the United States' classification of documents containing information on the Gold Train contributed to their having missed the applicable filing deadline. In fact, when asked in his deposition, Plaintiffs' primary expert witness, Gábor Kádár, could not

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[2] On the cited pages of his book, Professor Zweig discusses the work of the IWG, which formed as a result of the Nazi War Crimes Disclosures Act of 1998, and states that two documents referenced in his book were declassified in 2001 as a result of the IWG's efforts. See Ronald W. Zweig, *The Gold Train: The Destruction of the Jews and the Looting of Hungary,* i-ix (Penguin Books 2002).

[3] Plaintiffs' only other source as to when the United States began declassifying Gold Train documents is deposition testimony by Mr. Kádár. His testimony on this subject is not credible and constitutes inadmissible hearsay, as he has no first-hand knowledge. (See Kádár Dep. at 244:5-8 ["Q. So the only basis for your belief about when they were declassified is that you were told by your colleagues on the Presidential Commission? A. My colleagues, exactly."].)

identify any recently declassified document by name, let alone one that revealed critical, previously unknown information about the Gold Train. (See Kádár Dep. at 230:9-14 [Ex. 3].)

Lastly, Plaintiffs present no evidence demonstrating, or even suggesting, that a document was classified improperly, and any suggestion that the United States classified documents in order to cover up the facts of its handling the Gold Train is baseless.

C. When Plaintiffs Reasonably Could Have Exercised Due Diligence to Learn about the Gold Train (For Statute of Limitations)

Plaintiffs do not dispute that major newspapers in the United States and abroad in the 1940s published accounts of U.S. involvement with the Gold Train that contain all of the basic information necessary to the accrual of their claims. (See articles at Ex. 8 to Opening Mem.; official copies attached at Ex. 14.) They also do not dispute that representatives of the Hungarian Jewish community had actual, contemporaneous knowledge that the United States found the Gold Train in Austria and that it turned over the property to the IGCR. (See Kádár Rep. at 26-34 [Ex. 3].) Nevertheless, Plaintiffs misconstrue the reason the United States offers this evidence, (Opp'n at 42-46), which is to demonstrate that the information Plaintiffs needed to file their claims has always been publicly available. Contemporaneous newspaper accounts and post-war Jewish leaders are sources of knowledge that Plaintiffs reasonably could have been expected to tap if, at any time, they sought information about their lost property.

Many of Plaintiffs' putative class representatives spent time in Budapest in the years immediately after the War. (See Excerpted Details of Named Plaintiffs' Postwar Years [Excerpts of Plaintiffs' Postwar Years], attached at Appendix A.) And, by the mid 1950s, most of Plaintiffs' putative class representatives had settled in urban areas either in Canada or in the United States, including Miami, Montreal, New York, and Toronto. (See id.) In North America, the Plaintiffs pursued diverse occupations and lived generally prosperous lives. Id. (describing, e.g., careers in

medicine [Joseph Devenyi], chemistry [Peter Drexler], machine design [Michael Fried], and academia [Paul Gottlieb]). Many returned to Hungary to visit over the years, some to visit family and friends who lived there. (See Excerpted Details of Named Plaintiffs' Visits to Hungary [Excerpts of Visits], attached at Appendix B.) Mr. Tomas May has lived his entire life in Budapest. (Dep. of Tomas May, at 7:3-8 [Ex. 22].)

Several Plaintiffs had some contact with or knowledge of events related to the Gold Train prior to the 1990s. (See Excerpted Details of Plaintiffs' Pre-1990 Gold Train Knowledge [Excerpts of Pre-1990s Knowledge], attached at Appendix C.) For example, Mrs. Elisabeth Bleier and her father attended an auction in New York in 1950, where they found a Kiddish cup that had been stolen from Hungary during the war. (Dep. of Elisabeth Bleier, at 49:2-20, 59:23-60:3 [Ex. 22].) Mr. Peter Drexler heard a British Broadcasting Corporation (BBC) radio report on the Gold Train in the1970s, from which he remembers learning that after World War II, a 30-wagon train had been found in Austria "probably in the American sector," loaded with Jewish property "with tremendous value." (Dep. of Peter Drexler, at 44:3-13, 64:16-24 [Ex. 22].) And, when asked when he first heard about the Gold Train, Mr. May responded that he remembers that, sometime between 1945 and 1950, his parents told him about a train that had been found with Jewish belongings or gold items on it. (Dep. of Tomas May, at 34:20 to 37:25 [Ex. 22].)

II. Additional Facts Relevant to Background and Merits of Plaintiffs' Claims

A. Whether the Gold Train Property That Came into U.S. Possession Was Identifiable as to Individual Ownership

The question of whether the property was identifiable as to individual owner turns on whether the Army, between 1945 and 1947, could have identified, as a practical matter, specific items of

property from the Gold Train as belonging to specific individuals.[4] (See Dep. of Elizabeth Barrett White, Ph.D. at 53:9-17 ["White Dep."] [Ex. 2]; accord Dep. of Professor Ronald W. Zweig at 141:15-18, 145:1-4, 149:10-28 & 150:1-3 ["Zweig Dep."] [Ex. 1].) The answer clearly is no. By the time the U.S. Army took control of the Gold Train, Toldi and his men had actively destroyed evidence of individual provenance and broken up much of the jewelry so as to separate stones from settings. (See portions of Zweig Report and Kádár Dep. cited in U.S. Opening Mem. at 6-7.) That individual pieces of jewelry or silverware may have been engraved with initials or even last names does not render those pieces identifiable to specific persons out of the hundreds of thousands of Jews whose property Axis Hungarian authorities had stolen. (See, e.g., White Dep. at 53:2-8 [Ex. 2].[5])

Plaintiffs suggest that if they, or other Jews whose property was taken by Axis Hungary, had had access to the Gold Train property they could have identified any pieces that belonged to them. (Opp'n at 26.) However, as set forth above, the determination of whether property was "identifiable" is made from the perspective of the Army and not the individual. (White Dep. at 53:9-17 [Ex. 2]; accord Zweig Dep. at 141:15-18, 145:1-4, 149:10-28 & 150:1-3 [Ex. 1].) Indeed, it would not make sense for the identifiability determination to be made from the perspective of the individual owner

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[4] There is no dispute that the property on the Gold Train was mostly Jewish in origin, with the exception of art from the Gyor museum and the personal belongings of Axis Hungarian officials and their families who fled Hungary on the train. It is simply not true that "[f]or years the Government claimed it did not know what was on the train, or that there was any proof that Jewish property was on the train," as Plaintiffs assert, (Opp'n at 4.) The deposition of Cody Phillips, a staff curator at the Center for Military History, which Plaintiffs cite, does not support their accusation. The cited deposition excerpt concerns a shipment of property from the train which carried gold of the Hungarian National Bank and which the United States restituted to Hungary, a different train from the train that is the subject of this lawsuit. (See Dep. of R. Cody Phillips at 56:24-25 to 57:1-2 [identifying "shipment No. 20" that is subject of questioning as consisting of "Hungarian National Bank gold"] [Ex. 5].) Mr. Phillips stated that Army documents indicate that the shipment of property from the Hungarian National Bank train included no Jewish property. (Id.)

[5] Dr. White explained, "To go through cases with thousands or tens of thousands of gold rings and to look for initials and then assume that the ring that has WFB on it or WB, as my wedding ring does, belongs to this particular person with those initials or to someone else, it seems to me to be the definition of impracticality." (White Dep. at 53:2-8 [Ex. 2].)

because there was no practical way for individual owners to attempt to identify property from the Gold Train as theirs. (See Zweig Dep. at 149:10-28 & 150:1-3.) It would not have been possible for the Army, given its limited resources, to set up and manage a process whereby the hundreds of thousands of Jews from whom Axis Hungary had confiscated property, or heirs of such Jews, would be able to search through the tons of Gold Train property of which the Army had taken control and make claims for individual pieces that the Army would have had no means of verifying.[6] (See id.; The U.S. Army in Post-War Austria and Hungarian Restitutions, Expert Report of Jeffrey J. Clarke, Ph.D. at 4-5, 8 ["Clarke Expert Rep."] [Ex. 3 to U.S. Opening Mem.].) One could expect substantial fraud in such a process through which impoverished refugees could make claims on a items among the vast quantity of jewelry and other valuables that had been rendered untraceable by Axis Hungary officials. (See Zweig Dep. at 149:10-28 & 150:1-3 [Ex. 1].)

B. Whether Gold Train Property that Came into U.S. Possession was Identifiable as to National Origin

The question of whether the Gold Train property was "identifiable as to national origin" similarly turns on whether the Army practicably could have determined from what country specific items had come. (See White Dep. at 32:17-21 [Ex. 2].) Axis Hungary seized property belonging to Jews of so-called Greater Hungary, which included present-day Hungary plus portions of Romania, Czechoslovakia, and the former Yugoslavia that Hungary had annexed during World War II. (White Decl. ¶ 23 [Ex. 2 to Opening Mem.]; White Dep. 42:21-25 & 43:1-13 [Ex. 2]; accord

[6] To be sure, one individual who may have been Jewish was permitted access to the Salzburg warehouse to search for specific items of property but did not find any of them. (Zweig Dep. at 111:20-28 & 112:1-9 [Ex. 1].) That property had never been part of the Gold Train property. (Mem. of Nov. 5, 1947 granting permission to enter Salzburg warehouse [Ex. 10].) Additionally, two Axis Hungarian officials were allowed to claim personal luggage that had been on the Gold Train. The two were civilians who had traveled on the train and their luggage was labeled with their names. (Zweig Dep at 112:21-28 & 113:1-9.) The victim loot on the train, of course, was in a very different state. See U.S. Opening Mem. at 6-7 (citing Zweig Rep.).

Kádár Aff. ¶ 33 [Ex. to 5 Opening Mem.].) Thus, property from Jews who lived throughout Greater Hungary was likely on the Gold Train. (See id.) After the war, Hungary's borders reduced to their present state, and the annexed territories were returned to the countries of Romania, Czechoslovakia, and the former Yugoslavia. Treaty of Peace with Hungary, Sept. 15, 1947, art. 1, 61 Stat. 2065 ("Treaty of Peace"). Consequently, the property on the Gold Train that came into the United States' possession likely originated from not just Hungary but also from Romania, Czechoslovakia, and the former Yugoslavia. There is no evidence of any way in which the Army could have determined which items came from Hungary and which came from Romania, Czechoslovakia, or the former Yugoslavia. (See White Dep. at 46:7-19 [Ex. 2].) Given that the Gold Train property could not be identified by country of origin, the property could not be restituted to Hungary because such a restitution would not have provided any practical means whereby property from the formerly annexed territories could have been returned to its owners. See infra at 13-15.

Contrary to Plaintiffs' argument, (Opp'n at 25-26), restitutions that the United States made to other countries whose borders had shifted during the war, including Hungary, are not inconsistent with its decision not to restitute the Gold Train property to Hungary.[7] It was appropriate to restitute property to a country whose borders had shifted during the war so long as it could be determined that the assets had come from territory that was encompassed by the country's post-war borders. (See White Dep. at 32:19-21 [Ex. 2].) For example, if property was identifiable as having come from Budapest, it was to be returned to Hungary because the post-war border shift of the annexed territories had no effect on whether the assets could be identified as Hungarian. Likewise, if property

[7] Plaintiffs' assertion that the United States restituted the railcars of the Gold Train to Hungary even though some of the cars had markings of other countries, (Opp'n at 25-26), is unsupported by the excerpt of Professor Zweig's deposition that they cite. In the cited passage, Professor Zweig explained that the United States sent the Hungarians who had been traveling on the Gold Train on two of the Gold Train railcars, which were attached to a "repatriation train" on its way back to Hungary. (Zweig Dep. at 86:12-25 [Ex. 1].)

could be identified as having come from a part of Poland that had been part of Germany during the war, it was to be returned to Poland.

C. Whether the United States Promised Officials of the Axis Hungarian Government That it Would Safeguard Gold Train Property until it Could Be Returned to the Jews from Whom it Was Confiscated

The only evidence supporting Plaintiffs' claim that upon taking control of the Gold Train the United States promised that it would safeguard the property onboard until it could be returned to its Jewish owners is the self-serving statement made by Avar and two of his subordinates during their post-war interrogation by Hungarian authorities. Avar and the subordinates purportedly told the interrogating authorities that U.S. Army officers had made verbal promises to return the property to "those from whom [it was] taken" but refused to put the promises in writing.[8] (Kádár Aff. ¶ 51 [quoting Report of Avar, Mingovits and Biro] [Ex. 5 to Opening Mem.].) Professor Zweig explained that the context in which that statement was made is significant and that, in its context, the statement should be viewed "an attempt by government official[s] to justify [their] guardianship of the material that [Avar had] lost to the Americans, so [they were] inventing all sorts of stories about the whole process." (Zweig Dep. at 74:1-9 [Ex. 1].)

It is also important to observe that Avar and his subordinates were officers of the Axis Hungarian government that had stolen Jews' property. There is no reason to believe that they had the interests of those same Jews in mind when they relinquished custody of the train to the U.S. Army. (See Kádár Dep. at 114:10-12 [stating that he knows of no evidence that Avar was sympathetic to Jews] [Ex. 3].) On the other hand, it is undisputed that Avar and his men were facing desperate circumstances, fending off SS soldiers, Toldi, and other Hungarians who wished to steal

[8] As referenced in the Opening Memorandum and herein, it is highly improbable that the Army personnel who took control of the Gold Train would have had contracting authority that would have empowered them to bind the United States in a contract with an enemy state with which the United States was still at war. See infra at 64; Opening Mem. at 51.

the property, and avoiding bombings and skirmishes with Allied soldiers. (See Am. Compl. ¶¶ 187-88.) Avar and his men were in no position to bargain for anything from the U.S. Army.

D. The United States' Efforts to Safeguard the Gold Train Property

The Expert Report of Dr. Jeffrey Clarke, Chief Historian of the U.S. Army's Center for Military History, explains that following World War II in Europe, the U.S. Army was responsible for providing food, shelter, medicine, and clothing to a staggering number of people in the areas the United States occupied. (Clarke Report at 4-7 [Ex. 3A to Opening Mem.].) In the U.S. occupation zone of Austria (where the U.S. Army took possession of the Gold Train and stored property from the train), there were approximately one million displaced persons in mid-1945 (the time that the Army took the Gold Train and stored the property). (Id. at 4.) In addition to providing basic sustenance to millions of displaced persons and prisoners of war, as occupation authority the Army was responsible for providing all government services. (Id. at 7.) It is against this backdrop that the Army's decisions about how detailed an inventory to take of the Gold Train property,[9] and how many personnel to devote to providing security for the property must be viewed.

Because the Army's resources were stretched thin by all of its responsibilities in post-war Europe and because it had to give greater priority to providing food, shelter, medicine, and clothing, it could assign only a limited number of personnel to safeguard property stored at the Salzburg warehouse. (See id. at 4-8.) Nevertheless, the Army considered managing looted property to be an

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[9] The Army prepared a rough inventory of the Gold Train's contents when it took control of the train and later prepared a more detailed, but not item-by-item, list of the cargo. (E.g., Zweig Dep. at 74:13-28 & 87:8-13 [Ex. 1]; White Dep. at 52:12-19 [Ex. 2].) Given the mass of property and the Army's limited resources, an item-by-item list was not practicable. See Mem. from Property Control Officer Homer Heller to Chief, Property Control Branch of 10/21/45 ["Because of the magnitude of the task a detailed inventory has not been taken, however, a general inventory and history was prepared . . ."] [Ex. 8].) Moreover, the Provisional Handbook for Military Government in Austria ("Provisional Handbook"), which Plaintiffs so frequently cite, did not require it. (Provisional Handbook at 195 § 144(b) [Ex. 6] [providing that detailed inventories were not to be prepared unless there were special circumstances].)

important task, (id. at 8; Zweig Report at 33), and tried, convicted, and sentenced soldiers for theft from the warehouse, (Zweig Report at 33). There is also evidence that the Army increased security measures at the Salzburg warehouse in response to reports of theft. (Property Control Section Monthly Report dated July 1, 1946 ¶ 6 [Ex. 9].)

E. Scope of and Authority for the Requisitioning of Property from the Gold Train

The U.S. Army requisitioned materials seized from enemy nationals, defined as nationals of enemy states, e.g., Axis Hungary, Provisional Handbook for Military Government in Austria, ch. VIII, § IX ¶149(f)(1)(D), to be made available for practical Army uses such as furnishing living quarters of Army personnel. Contrary to Plaintiffs' suggestion, at the end of World War II, there was no provision in international law or U.S. regulations for treating victimized nationals of enemy states differently than other enemy nationals.[10] Accordingly, property from the Gold Train, which the U.S. Army took from armed Axis Hungarian officials, would have been properly available for requisitioning.[11]

The sort of property subject to requisitioning were household items such as cutlery and table cloths, not jewelry or other property of high value. (Zweig Dep. at 126:18-19 [Ex. 1].) Professor Zweig explained that it is likely that only an "insignificant amount" of Gold Train property was requisitioned. (Id. at 126:11-15.) Morever, Plaintiffs identify no evidence that requisitioning continued after a general instructed that it cease in light of evidence that the property had come from Hungarian Jews.

[10] There had been no precedent in modern times for what the Nazis and Hungarians had done to their own citizens.

[11] Notwithstanding that property found on the Gold Train could properly be requisitioned under governing regulations, as the realities of the Holocaust and the origin of certain property became more clear over time, the requisitioning from the Salzburg warehouse was ordered to cease, as "there is evidence that this property belongs to Hungarian Jews." (See Zweig Rep. at 32 [Ex. 1A to Opening Mem].)

F. Why the United States Decided to Turn over Gold Train Property to the IGCR

Plaintiffs' repeated assertion that the United States violated applicable restitution policy and law when it turned over victims' property found on the Gold Train to the IGCR in November 1947 is incorrect. The United States properly determined that the property on the Gold Train could not be restituted to Hungary because it was multi-national in origin and, as the evidence of individual ownership had been destroyed by Axis Hungary, it was not practicably possible to determine what specific items on the train originated from territory where Hungary was the existing government after the war and what items originated from territories that had reverted to Czechoslovakia, Romania or Yugoslavia. As neither the national origin nor the individual ownership of the property on the Gold Train was practicably determinable, the property was not subject to restitution.

In January 1946, the Allied powers decided what reparations Germany would pay to the countries against which it had waged aggressive war. Reparation from Germany, Establishment of Inter-Allied Reparation Agency, and Restitution of Monetary Gold ("Paris Reparation Agreement"), Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. No. 1655. Although historically reparations were paid only to nations, the Allies adopted the United States' proposal that the "nonrepatriable victims of German action" should constitute a separate class eligible for reparation. Id. Article 8 of the Paris Reparation Agreement provided that the reparation to be paid to this class would consist, inter alia, of "all the non-monetary gold found by the Allied Armed Forces in Germany." Id., art. 8.

Although the Paris Reparations Agreement did not define "non-monetary gold," the intention of the provision was to make available valuables that belonged to Nazi victims but were not capable of being restituted. See id. The Five Power Conference, which met in June 1946 to settle arrangements for carrying out Article 8, see Reparation to Nonrepatriable Victims of German Action, June 14, 1946, 61 Stat. 2649, T.I.A.S. No. 1594, also did not define non-monetary gold, thus leaving

each of the occupying powers free to decide how to apply Article 8 to property seized in the area under its control. The United States decided that non-monetary gold should be defined to include all assets that constituted the valuable personal property of victims and that could not be restituted, regardless of whether the assets were gold or where they were found. (See Nov. 7, 1946 decision of State-War-Navy Coordinating Committee on definition of non-monetary gold [Ex. 46 to Pls.' Opp'n].) Pursuant to this decision, the Joint Chiefs of Staff issued the non-monetary gold directive, WX-85682. (See WX-85682 [Ex. 11].) As the property on the Gold Train met the definition of non-monetary gold in this directive, the Army accordingly turned the property over to the IGCR.

Plaintiffs' assertion that the United States' disposition of the Gold Train property violated applicable restitution policy relies instead on policies developed to govern restitutions to ex-enemy nations. (See Supplemental Expert Report and Aff. of Jonathon Petropoulos, Ph.D. at 8-9 ["Petropoulos Supp. Aff."] [Ex. 7 to Opening Mem.].) On November 29, 1945, the Joint Chiefs of Staff issued a directive to the Commanding General of U.S. Forces Austria, which ordered immediate restitution to friendly countries of all "[other] goods, valuables . . , materials, equipment, livestock and other property found in storage or otherwise in bulk form and identified as having been looted or acquired in any way by Germans from United Nations during German occupation." WX 85965 (Nov. 30, 1945), attached as Ex. 13. On March 4, 1946, the United States extended this restitution policy to ex-enemy nations, including Hungary, requiring restitution of "other goods, valuables (excluding gold, securities, and foreign currencies, materials, equipment, livestock and other property found in storage or otherwise in bulk form." WX 99226 ¶ 2.B, attached as Ex. 12. Importantly, restitution pursuant to these policies turned on identification of the national origin of the property in question, as well as on submission by the claimant government of satisfactory proof "that the property in question was acquired by Germany as the result of an act of force or was

removed into Germany or Austria without compensation." Id. Plaintiff's contention that the victims' property found on the Gold Train should have been returned to the Hungarian Government pursuant to WX 99226 is entirely predicated upon the assertion that the property was identifiable as Hungarian in national origin, which it was not. As explained above, the property on the Gold Train likely originated from several nations in addition to Hungary. As the property was not identifiable as to national origin, WX 99226 did not apply.

Because the United States determined that the property found on the Gold Train had belonged to victims of the Holocaust, but that identification of national origin and individual ownership was impracticable, the United States properly turned over the property to the IGCR for the benefit of victims of Nazi persecution pursuant to WX 85682, which stemmed from accepted international policy for reparations to victims, rather than pursuant to WX 99226.

ARGUMENT

I. Plaintiffs Fail to Establish Subject Matter Jurisdiction

The myriad factual assertions and theories set forth in Plaintiffs' Opposition notwithstanding, the jurisdictional issues presented to the Court are straightforward. Have Plaintiffs met their burden of proving that the property on which they base their claims was in fact on the Gold Train when the United States took control of the train? Have Plaintiffs met their burden of proving that they would have recovered their property if the United States had restituted it to Hungary? Have Plaintiffs demonstrated that the Court should permit them to assert rights of Hungary vis-a-vis Gold Train property notwithstanding Hungary's waiver of any such rights? Have Plaintiffs shown that they exercised diligence in seeking information about their lost property and that they relied detrimentally on affirmative representations of the United States that caused them to miss the statutory filing deadline? Did Congress intend for Article III courts to judge, based on international-law standards

and military handbooks and manuals, discretionary acts and decisions concomitant to the U.S. military occupation in Austria? For the reasons set forth below and in the Opening Memorandum, the Court should answer each of these questions in the negative and conclude that Plaintiffs have not satisfied their burden of proving subject matter jurisdiction.

A. Factual Determination for Fed. R. Civ. 12(b)(1)

The United States' challenge to subject matter jurisdiction under Rule 12(b)(1) relies on facts which, for the most part, are undisputed. See supra at 2-6. Any necessary factual findings are well within this Court's authority to make in order to assure itself of its power to hear the case. Morrison v. Amway Corp., 323 F.3d 920, 925 (11th Cir. 2003).

Contrary to Plaintiffs' assertion, (Opp'n at 13-14), this motion does not implicate the narrow exception to this rule for cases in which the facts necessary to sustain jurisdiction also implicate the merits of a cause of action. Id. Jurisdiction is intertwined with the merits of a cause of action "when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." Id. (Garcia v. Copenhaver, Bell & Assoc., 104 F.3d 1256, 1262 [11th Cir. 1997][12]). No such specific overlapping question exists here. Accordingly, the Court may make any factual determination necessary to its consideration of the Rule 12(b)(1) motion.

B. Each Plaintiff Must Establish Standing

Plaintiffs' assertion that "Article III standing for one party and one claim is sufficient to confer jurisdiction," (Pls.' Opp'n at 14), is flatly wrong. It is well-established that each named plaintiff before the Court must establish standing to pursue the claims asserted in the lawsuit. E.g.,

[12] The Garcia court found that because the question whether the defendant is "an employer" is relevant to whether the Age Discrimination Employment Act (ADEA) applies in the first place and also is an element of the substantive cause of action, employer status "is a substantive element of an ADEA claim and intertwined with the question of jurisdiction." Garcia, 104 F.3d at 1262; accord Morrison, 323 F.3d at 929-30 (same as to "employee" status under the Family Leave and Medical Act).

Johnson v. Bd. of Regents of the Univ. of Georgia, 263 F.3d 1234, 1267 n.29 (11th Cir. 2001) (recognizing that Supreme Court clarification of nature of requisite injury for standing "did not alter the requirement that each plaintiff establish additional prerequisites to have standing . . .") (emphasis supplied); Phelps v. Hamilton, 122 F.3d 1309, 1316 (10th Cir. 1997) ("The essence of the standing doctrine is that each plaintiff must allege a personal injury fairly traceable to [the defendant's] allegedly unlawful conduct and likely to redressed by the requested relief.") (emphasis supplied); Estate of Cabello v. Fernandez-Larios, 157 F. Supp.2d 1345, 1353-58, 1369 (S.D. Fla. 2001) (analyzing standing of each plaintiff in case brought by five plaintiffs and dismissing claim of one of five who lacked standing).[13] Here, the Court has already recognized as much. See Rosner v. United States, 231 F. Supp. 2d 1202 1205 n.2 (S.D. Fla. 2002) (requiring Plaintiffs to "demonstrate identifiable property" in order to pursue a claim for an implied-in-fact contract for bailment).

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[13] American Iron & Steel Inst. v. OSHA, 182 F.3d 1261 (11th Cir. 1999), does not support Plaintiffs' contention to the contrary. Because that case involved a challenge to a regulatory standard, there was no need for the court to go through a standing analysis for each plaintiff; so long as one had standing, relief would extend automatically to all plaintiffs if the action were successful. See id. at 1274 n.10 (citing Planned Parenthood of the Atlanta Area, Inc. v. Miller, 934 F.2d 1462, 1465 n. 2 [11th Cir.1991]). Here, by contrast, each Plaintiff is seeking monetary relief. Prado-Steinman v. Bush, 221 F.3d 1266, 1280 (11th Cir. 2000), on which Plaintiffs also rely, addresses standing requirements for class certification and does not address the fundamental principle that each named plaintiff in a lawsuit have standing.

Plaintiffs similarly misapply the doctrine of supplemental jurisdiction under 28 U.S.C. § 1367(a) to this case. (Opp'n at 14-15.) That doctrine's provision for courts to exercise their discretion to consider claims outside their original jurisdiction, 28 U.S.C. § 1367(a), has nothing to do with the requirement of standing, which relates to whether a particular litigant is entitled to have his/her claim decided, e.g., Warth v. Seldin, 422 U.S. 490, 498 (1975). Likewise, supplemental jurisdiction cannot serve to confer jurisdiction that is lacking by virtue of sovereign immunity, which is the case here given the statute of limitations and lack of applicable waiver under the APA and the Little Tucker Act. See, e.g., United States v. Certain Land Situated in City of Detroit, 361 F.3d 305, 308 (6th Cir. 2004) ("[Section 1367] does not constitute a waiver of sovereign immunity."); Wilkerson v. United States, 67 F.3d 112, 119 n.13 (5th Cir. 1995) ("Section 1367(a), however, deals only with the federal courts' power to exercise subject matter jurisdiction over certain claims and does not operate as a waiver of the United States sovereign immunity.").

1. None of the Plaintiffs Has Constitutional Standing

a. Because the Government Presents a Factual Challenge to Standing, Plaintiffs Cannot Rely on Mere Allegations

Plaintiffs argue that the allegations of the First Amended Complaint are sufficient to establish standing. (Opp'n at 17.) But because the government's challenge to standing is factual not facial, Plaintiffs bear the burden of proving facts that support standing. See, e.g., Bischoff v. Osceola Cty., 222 F.3d 874, 878 (11th Cir. 2000) ("The party invoking federal jurisdiction bears the burden of proving standing. Moreover, each element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.'") (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 [1992]).[14] Indeed, the Court has ruled that it will decide the question of jurisdiction before any consideration of the merits of Plaintiffs' claims. Rosner, 231 F. Supp.2d at 1218. Thus, Plaintiffs must prove facts which demonstrate that each is properly before the Court; they cannot rely on mere allegations. See Lujan, 504 U.S. at 561 ("[A]t the final stage [of litigation], those facts [demonstrating standing] (if controverted) must be supported adequately by the evidence adduced at trial.") (internal quotation omitted). That the case is brought as a class action does not alter the obligation of each named Plaintiff to establish standing. Wooden v. Bd. of Regents of the U. Sys. of Ga., 247 F.3d 1262, 1283 n.20 (11th Cir. 2001).

The government's argument is not based on a theory that the Gold Train property which came into U.S. possession "must have been owned by other Hungarian Jews [than the Plaintiffs]," as

[14] Thus Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1223 (11th Cir. 2004), on which Plaintiffs rely, should not be read to suggest that factual allegations are sufficient to confer standing regardless of the stage of the litigation. To do so would conflict directly with well-established precedent. See, e.g., Bennet v. Spear, 520 U.S. 154, 167-68 (1997) (describing varying degrees of evidence for different stages of litigation) (citing Lujan); Bischoff, 222 F.3d at 878 (same). Indeed, Midrash Sephardi did not involve disputed facts that impacted standing. See Midrash Sephardi, Inc., 366 F.3d at 1223-25.

Plaintiffs suggest, (Opp'n at 23). Rather, the government submits that Plaintiffs cannot meet their burden of proving facts that demonstrate the critical standing element of traceability, viz., that the United States bears responsibility for the loss of their property.[15]

b. Plaintiffs Cannot Prove That Their Property Was on Gold Train When the Army Took Control of the Train

Plaintiffs assert that their own testimony "prove[s] their property was in U.S. custody." (Opp'n at 17.) However, the only Plaintiff testimony they submit in support of that claim is from Plaintiffs Elisabeth Bleier, Erwin Deutsch, and Zoltan Weiss. (Id. at 18-19.) Testimony of only three Plaintiffs, even if it were sufficient to establish standing for those three (which it is not, as explained below) cannot satisfy Plaintiffs' burden of establishing that each named Plaintiff has standing. See supra at 17-18. Moreover, the testimony Plaintiffs present on behalf of Mrs. Bleier, Messrs. Deutsch and Weiss does not prove that particular items on the Gold Train when the U.S. Army took it into custody belonged to those Plaintiffs.

Testimony of Mrs. Elisabeth Bleier: Plaintiffs rely on testimony of Mrs. Bleier in which she identifies items displayed in a Parke-Bernet auction catalog as hers. (Opp'n at 18.) But Mrs. Bleier's testimony does not demonstrate that the items were one-of-a-kind or that they came from her or her family as opposed to someone else who owned a similar or identical item. Contrary to Plaintiffs' characterization of Mrs. Bleier's testimony in their brief, she never stated that any of the property she claims in this lawsuit was "handmade" or "hand painted." With regard to what Plaintiffs' brief describes as a "handmade handbag," Mrs. Bleier explained that "everyone who was somebody should have a bag like that." (Dep. of Elisabeth Bleier at 84:9-10 [Ex. 22].) Further, the auction catalog on which Plaintiffs rely describes a gold mesh handbag with a gold-link chain and

[15] As Plaintiffs observe, if the Court concludes that it must resolve factual disputes or make credibility determinations to decide the question of standing, an evidentiary hearing is appropriate. See Bischoff, 222 F.3d at 878.

"set with seventy-eight small old-mine diamonds," having a snap set with "two pear-shaped diamonds," and having a total weight of diamonds of approximately 2.50 carats. (Ex. 8 to Bleier Dep. [page 64 of catalog] [Ex. 15].) Mrs. Bleier described the handbag she owned as "silver, like a silver mesh made, silver and gold mesh" and made no mention of diamonds, (Bleier Dep. at 84:6-8), which appear to have been the distinguishing characteristic of the bag pictured in the auction catalog, (see Ex. 8 to Bleier Dep. [page 64 of catalog]).

Plaintiffs' brief incorrectly describes as "distinctive hand painted jewelry" what was in fact a rug that Mrs. Bleier testified belonged to her mother. (See Bleier Dep. at 90:24-25 [referring to pages 74-75 of catalog, Ex. 8 to Bleier Dep.].) Moreover, Mrs. Bleier described the rug as "[v]ery famous," rather than unique, and the auction catalog does not describe the rug depicted as a one-of-a-kind. (Ex. 8 to Bleier Dep. [page 74-75 of catalog].) Regarding the broach described as belonging to Mrs. Bleier's mother, (Opp'n at 18), Mrs. Bleier stated only, "Yeah I think so [that it was her mother's]." (Bleier Dep. at 85:8 [emphasis supplied].) Lastly, simply because the Kiddish cup that Mrs. Bleier's father retrieved from a New York auction appears to have been on the Gold Train,[16] it does not follow that other property of Mrs. Bleier and her family was on the train when it came into U.S. possession.[17] As discussed in the Opening Memorandum at 5-9 and herein, see supra at 2, much of the property seized from Jews never made it onto the Gold Train, some property was looted, and Toldi took much of the property from the train before it came into U.S. custody.[18] There

[16] Mrs. Bleier obviously cannot base her claims on the Kiddish cup as her father recovered it.

[17] What does follow is that Mrs. Bleier was on notice that she may have been able to trace other of her and her family's property by investigating how the Kiddish cup arrived at the auction. Thus, even if Mrs. Bleier were found to have standing, her claims are untimely. See infra at 43 n.38.

[18] Even if Mrs. Bleier, Mr. Deutsch, and Mr. Weiss could establish that their property came into U.S. custody, their claims are nevertheless outside the Court's jurisdiction and deficient for the other reasons stated in the Opening Memorandum and herein.

is no reason to believe that all of the items seized from Mrs. Bleier and her family were kept together given that Toldi and his men sorted the property by type. There is no evidence that Toldi was at all concerned with keeping pieces from individuals or families together.

Testimony of Messrs. Erwin Deutsch and Zoltan Weiss: Similarly, the testimony of Messrs. Eriwn Deutsch and Zoltan Weiss does not establish that paintings belonging to them or their family members were on the Gold Train. According to Plaintiffs' expert Gábor Kádár, the Gold Train contained "about 100" paintings, mainly from the western Hungarian town of Gyor. (Kádár Dep. at 139:6-9 [Ex. 6 to Opening Mem.]; accord Zweig Report at 40 [Ex. 1A to Opening Mem.].) Mr. Kádár and Professor Zweig agree that the paintings from the museum in Gyor were returned to the museum. (Zweig Report at 40; Kádár Dep. at 141:2-3.) While Professor Zweig believes that this was all of the paintings on the Gold Train, Mr. Kádár believes that some of the 100 or so paintings on the train were not from the museum. (Id.) Plaintiffs have cited a list of 1226 paintings entitled "List of Unidentified Paintings Stored at Residenz-Depot, Salzburg." (See Petropoulos Supp. Aff., Ex. A [Ex. 7 to Opening Mem.].) While there is no evidence as to where these 1226 paintings came from, the research of Professor Zweig and Mr. Kádár makes clear that a very small percentage of the 1226 paintings came from the Gold Train and most, if not all of these, were from the museum at Gyor. The paintings on this list were transferred to the custody of the Austrian government when the United States left Austria, and were later returned to Hungary, with the exception of nine paintings which were apparently lost by the Austrians.[19] (See Petropoulos Dep. 132-34 [Ex. 4].)

Messrs. Deutsch's and Weiss' reliance on entries from the document listing 1226 paintings that were apparently stored in Salzburg does not provide them with standing. First, as noted, it is

[19] None of the paintings that Plaintiffs have identified as similar to ones taken from their families is among the nine paintings that were lost.

clear that the list of paintings at Salzburg is not a list of paintings that were on the Gold Train, and in all likelihood, a very small percentage of these paintings were on the Gold Train (and most, if not all, of these were from a museum). Second, neither Mr. Deutsch (who is from Budapest, Deutsch Dep. at 11-13 [Ex. 22]), nor Mr. Weiss (who is from Szabolcsbaka, in eastern Hungary near the Romanian border, Weiss Dep. at 7-8 [Ex. 22]), could have had their property taken from Gyor (which is in western Hungary near Austria), from which both Professor Zweig and Plaintiffs' expert Gábor Kádár agree the paintings on the Gold Train came, (Zweig Report at 40 [Ex. 1A to Opening Mem.]; Kádár Dep. at 139:6-9 [Ex. 3]). Third, all of the paintings cited by Messrs. Deutsch and Weiss on the Salzburg list were returned to Hungary, (see Petropoulos Dep. at 132-34 [Ex. 4]), which is what Plaintiffs contend should have happened to the Gold Train property. And fourth, Plaintiffs' identifications do not establish a probability that the listed paintings are the ones taken from their families.[20]

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[20] Mr. Deutsch identified a painting described only as an unframed 85 X 50 cm "Portrait of a lady in a green dress," with no artist listed (painting number 28 on the Salzburg list). (See Deutsch Dep. Ex. 2 [Ex. 13].) He opines that this may be the "Lady with dark dress" by the famous artist Fulop Laszlo that was owned by his family (and was framed). (Deutsch Dep. at 21-22, 25 [Ex. 22].) Clearly, there would have been many portraits of ladies in dresses in Europe at that time, and there is no evidence that painting number 28 was actually the painting taken from Mr. Deutsch's family.

Mr. Weiss noted three entries from the Salzburg list, (Weiss Dep. Exs. 8-11 [Ex. 22]), which he identified by comparing it to his own list of his family's lost paintings, (id. Exs. 2, 7 [English translation of part of Exhibit 2] [Exs. 17-18]). (Accord Weiss Dep. at 52, lines 6-8.) However, the descriptions on the Salzburg list do not match the descriptions on Mr. Weiss' list because in each case, the dimensions of the paintings are substantially different. Mr. Weiss' list describes a 120 x 90 cm "Forest" while Salzburg list number 77 describes a painting of vastly different dimensions, 60 x 65 cm, described as "Forest with water drinking deer." (Compare Weiss Dep. Ex. 7 with Weiss Dep. Ex. 8 [attached at Ex. 16].) Mr. Weiss' list describes a 40 x 50 cm "Gobelin," while Salzburg list number 860 describes a very differently sized, 56 x 76 cm, "Gobelin Embroidery: Man and weeping woman at sunset." (Compare Weiss Dep. Ex. 7 with Weiss Dep. Ex. 9 [attached at Ex. 17].) The third entry cited by Mr. Weiss, was identified at his deposition as number 627, but does not appear at 627 on the list attached to Professor Petropoulos' supplemental affidavit. In any case, while the document marked by Plaintiffs as Exhibit 10 to Mr. Weiss' deposition is difficult to read, the marked entry appears once again to have vastly different dimensions (apparently 44 x 22 cm) than the entry on Mr. Weiss' list (60 x 40 cm). (Compare Weiss Dep. Ex. 7 with Weiss Dep. Ex. 10 [attached at Ex. 10].)

* * *

Plaintiffs next argue that even if they themselves cannot identify specific Gold Train property that was in U.S. possession, they can demonstrate standing through the testimony of their expert Gábor Kádár that property from several cities and regions of Hungary was loaded onto the Gold Train. (Opp'n at 19-20). They assert that this testimony shows that they have a "colorable interest in at least some of the property" and, under United States v. Rodriguez-Aguirre, 264 F.3d 1195 (10th Cir. 2001), such a colorable interest is all they have to show to establish standing. Rodriguez-Aguirre, however, involved a facial challenge to standing; thus a "facially colorable interest" was sufficient to withstand the challenge in that case. Id. at 1203-04. Here, the government's challenge to Plaintiffs' standing is factual and Plaintiffs must prove facts that demonstrate standing.

Mr. Kádár's testimony about the origin of the Gold Train property cannot carry Plaintiffs' burden of proof. Mr. Kádár's deposition testimony makes clear that his list of cities and regions is a list of cities and regions from which Gold Train property came, (see Kádár Dep. at 216 [Ex. 3]), and he does not opine that all property taken by the Hungarian government from these places ended up in U.S. custody.[21] Indeed, it is not physically possible that all of the valuables from the parts of Greater Hungary that Mr. Kádár identifies, (Kádár Aff. ¶¶ 33, 65 [Ex. 5 to Opening Mem.]), were on the 24-car Gold Train even before Toldi made off with 44 or more cases of the more valuable

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[21] See, e.g., id. at 40-41 (less valuable items did not make it to Gold Train); id. at 53-54 (only a "minority" of property taken by Hungarian government made it to Gold Train); id. at 87 ("there may have been some freights that did not make it"); id. at 89 (some property was off loaded by Hungarians to make room for fleeing government officials and their families); id. at 176 (United States did not acquire portion of loot that Toldi took); id. at 179-80 ("I cannot say that this necklace was on the Gold Train and this necklace belonged to this Hungarian Jewish owner, of course."). Moreover, according to Mr. Kádár, the majority of property that did make it to the Army could not have been identified by individual owner (id. at 168-69), making it clear that such property could never have been returned to the individual owner. Compare, e.g., Rosner I, 231 F. Supp. 2d at 1205 n.2 (Each Plaintiff must "demonstrate identifiable property" on the Gold Train.) (emphasis supplied).

items.[22] (See Zweig Second Report at 8 [Ex. 1B to Opening Mem.].) Of course, far fewer valuables were on the train when the Americans took possession of it.

As set forth above and in the opening Memorandum, the numerous breaks in the chain of custody between the time that Plaintiffs were despoiled of their property by Axis Hungarian authorities and the time that the U.S. Army took possession of the Gold Train make it impossible to determine whose property was on the train. See supra at 2. Plaintiffs' charge that the government and Professor Zweig "overstate" the impact of the disorganization associated with the collection of the seized Jewish property, the looting, and the effect of Toldi's convoy is without support. But Plaintiffs' own expert Kádár recognizes that, in practice, the Axis Hungarians' collection of seized Jewish property was "very chaotic" in some regions. (Kádár Dep. at 28:6-8 [Ex. 3].) Similarly, Kádár recognizes that there was substantial looting, as well as war-related destruction, of the items that were actually collected.[23] (Id. at 46:19-25 & 47:1 ["Partly they were destroyed by the events of war, partly they were taken by the local population, partly they were looted by the members of the law enforcement or administrative bodies, partly they were taken by the advancing Soviet troops."].) Jewish valuables were also taken by Arrow Cross units and SS units that were trying to escape Hungary. (Id. at 134:8-11.) Regarding Toldi's loot, Plaintiffs recognize that Toldi absconded with at least 44 cases of small, valuable pieces and implicitly acknowledge the standing problem for Plaintiffs asserting claims for items of the type he took, e.g., diamonds, pearls, gold watches gold

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[22] Moreover, Plaintiffs' assertion that the "core of wealth" on the Gold Train came from Budapest, (Opp'n at 26), runs counter to, and thus undercuts, their argument that all of the property of Jews from numerous cities and regions of Hungary was on the train, (id. at 20).

[23] Contrary to Plaintiffs' characterization of Kádár's testimony at pages 21-22 of their brief, Kádár did not state that there was "very little" looting of valuable moveable property. Rather, he testified that during the looting of Jewish residences that occurred after the owners were forced to leave, little jewelry was taken because it generally was safeguarded. (Kádár Dep. at 38:14-25 & 38:2 [Ex. 3].) That testimony did not address the other instances of looting he discussed elsewhere in his deposition, (id. at 46:19-25 & 47:1).

bars, gold coins, gold cigarette cases, gold necklaces, gold chains, (Kádár Aff. ¶¶ 39, 43[24] [Ex. 5 to Opening Mem.]). (Opp'n at 22 ["[F]or Plaintiffs who are claiming anything other than the kinds of valuables that traveled in pine cases with the Toldy convoy, whatever 'valuables' Toldy absconded with are irrelevant to the claim."].) But even for Plaintiffs making claims concerning the silver, china,[25] and other types of property that Toldi did not take, the aforementioned breaks in the chain of custody preclude standing.

Apart from the testimony of the three named Plaintiffs and an expert witness, Plaintiffs have presented nothing to establish that property belonging to them was on the Gold Train when the U.S. Army took over the train. And even as to those three named Plaintiffs and the expert witness, the evidence is simply insufficient to satisfy their burden of proving that their belongings were on the Gold Train when the United States took possession of it.

c. The United States Was under No Deadline to Decide the Property's Disposition

The United States explained in its opening brief that even if Plaintiffs were able to prove that their property was on the Gold Train when it came into U.S. possession, they cannot demonstrate that if the United States had disposed of the property as they now argue it should have – restituted all of it to Hungary – they would have regained possession of any items that belonged to them. (U.S. Opening Mem. at 19-20.) The example of what the Hungarian government did with the Toldi loot restituted by the French is instructive. Communist Hungary denied that the property was Jewish in origin and very little, if any, of the property returned to its Jewish owners. (Id. at 8-9, 19.)

[24] By comparing Kádár's description of the contents of the Gold Train at Brennbergbanya before Toldi took off the 44 cases, (Kádár Aff. ¶ 39 [Ex. 5 to Opening Mem.]), with his description of the contents after Toldi took the cases, (id. ¶ 43), it is possible to determine which cases Toldi took, according to Kádár.

[25] Toldi abandoned two railcars worth of "lesser value" china in Brennbergbanya in order to make room on the train for Axis Hungarian officials and their families who were fleeing the advancing Soviet Army. (Kádár Dep. at 89:14-19 [Ex. 3].)

Plaintiffs argue that if the United States had made a "timely restitution" of the Gold Train property to Hungary they would have benefitted. (Opp'n at 24-25.) According to Plaintiffs, the pre-Communist Hungarian government would have returned the property to its individual owners. (Id.) In short, Plaintiffs contend that the United States should have restituted the property to Hungary before the Communist government came into power. (See id.) But even before the Communists took control of the government in Hungary, the United States had good reason to doubt that restituting the Gold Train property would result in its return to or benefit to Hungarian Jews. Professor Zweig explains that the United States "suspected the Russians themselves had restituted or taken as reparations so much property from Hungary as to almost destroy the Hungarian economy and that any property returned to Hungary would not aid the Hungarian economy but be seized immediately by the Russians." (Zweig Dep. at 111:2-7 [Ex. 1].)

A further problem with Plaintiffs' argument is that the United States was under no obligation, legal or otherwise, to dispose of the Gold Train property any earlier than it did. Plaintiffs identify no regulation or other law that governed the timing of the United States' decision of what to do with the property. They argue that the United States promised Hungary that it would restitute the property. (Opp'n at 24.) The United States disputes that any such promise was made. (See Zweig Second Report at 19-22.) But even if under Plaintiffs' theory there had been a promise, that theory does not suggest a particular time by which the United States promised to give Hungary the property.

Moreover, given the destruction of evidence of individual ownership accomplished by the pro-Nazis, it is doubtful that Hungary would have been able to determine individual owners even if the United States had given the property to it earlier and the Hungarian government had been inclined to return the items to individual Jewish owners. The decision that the United States made

– to turn over the property to the IGCR – allowed for it to be used for the benefit of Jewish victims, including Jewish victims from Hungary and the territories that Axis Hungary had annexed.

d. Plaintiffs from the Annexed Territories Would Not Have Benefitted from a Restitution to Hungary

The Opening Memorandum points out that Plaintiffs from non-Hungarian territories annexed during the war would not have had a practical means of recovering their property if the United States had turned it over to Hungary. (Opening Mem. at 20.) Plaintiffs do not dispute this point. Rather, they contend that post-war border changes were irrelevant to restitution. Aside from having no bearing on the standing problem of Plaintiffs who had lived in the annexed territories (e.g., Mr. Irving Rosner and Mr. Francisc Basch), Plaintiffs' contention is incorrect. Plaintiffs' own expert points out, it was a basic principle of international law that "property should be restored to existing governments of the territories where the property had its situs." (Petropoulos Supp. Aff. ¶ 10(ii) [quoting Roberts Commission] [Ex. 7 to Opening Mem.].) Because Hungary was not the existing government of all the territories from which property on the Gold Train likely originated, U.S. restitution policy did not permit the property to be restituted in its entirety to Hungary. Furthermore, by making it impossible either to identify the individual owners of the property or to distinguish from what country specific property on the Gold Train had originated, Axis Hungarian officials had rendered the property unidentifiable as to national origin or individual ownership. Thus, the Gold Train property was not subject to restitution under U.S. restitution policy.

e. Plaintiffs' Burden of Establishing Standing is not Lessened by the Passage of Time

Any difficulty Plaintiffs have establishing standing due to the passage of time does not provide a basis for lessening their burden of proof. See, e.g., Omaha Indian Tribe v. Jackson, 854 F.2d 1089, 1093 (8th Cir. 1988) (recognizing that "because of the passage of time involved, the party

having the burden of proof inevitably may face insuperable barriers," and upholding district court's dismissal of claims on which plaintiff did not meet its burden of proof). Any such difficulty in Plaintiffs' meeting their burden of proof, like the difficulties attendant to the United States' defense of claims that arose sixty years ago and the Court's ability to make findings regarding such claims, reflects the practical reasons for the statute of limitations. (See Opening Mem. at 31-33.)

f. Plaintiffs Establish No Basis for Application of Spoliation Principles

Absent evidence that the government intentionally destroyed evidence in bad faith, there is no basis for any inference against the United States through principles of spoliation. See Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir.1997) ("In this circuit an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith. Mere negligence in losing or destroying the records is not enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case.") (quotation omitted).[26] Plaintiffs present no evidence of bad faith to support an inference that property belonging to them was on the Gold Train.

In support of their spoliation argument, Plaintiffs assert that "the Government allowed property and lists of property to be lost, degraded, destroyed or sold, at a time when it knew full well that claims were being made by the Hungarian Jews." (Opp'n at 27.) Regarding the decision to turn Gold Train property over to the IGCR, as set forth in the Opening Memorandum and above, that policy decision was eminently reasonable. See supra at 13-15; Opening Mem. at 1-2, 10-11. There

[26] See also Gorelick, Marzen, Solum, Destruction of Evidence, § 2.5 at 38 (1989) (listing the five elements of spoliation inference as: (1) "necessity of demonstrating that an act of destruction has occurred"; (2) "requirement that the destroyed matter be evidence – that is, that it be relevant to the dispute"; (3) "requirement that the act of spoliation be intentional"; (4) "timing of the act – only the inference can be drawn if evidence is destroyed at a time when legal proceedings are pending or reasonably foreseeable"; and (5) "limitation of the inference to destruction by parties or their agents.").

is no evidence that a more just disposition of the property was possible.[27] That U.S. government officials might have recognized that allowing Gold Train property and other non-restitutable victim assets to be used to fund refugee efforts would alleviate somewhat the financial burden on the United States does not suggest a bad faith motive for its handling and disposition of the Gold Train property. There is no evidence that reducing the financial burden was the primary reason behind the decision to adopt a broad definition of Article 8's reference to "non-monetary gold found . . . in Germany" to include non-restitutable victim assets that were not made of gold or that were seized in Austria rather than Germany. (See Ex. 46 to Pls.' Opp'n [section 6 of Mem. adopted by State-War-Navy Coordinating Committee on definition of non-monetary gold, discussing both Department of State's expressed interest in diminishing U.S. financial burden and fact that expanded definition of non-monetary gold would be consistent with purpose of the Article 8 of the Paris Reparations Agreement, viz., to aid victims of Nazi aggression].) Indeed, giving such property to the IGCR allowed it to be used toward refugee efforts across Europe, not just in the refugee programs that the United States was operating in its zone of occupation. Had alleviating the financial burden been the primary objective of the United States vis-a-vis its definition of non-monetary gold, the government could have adopted a narrow definition that confined non-monetary gold to non-restitutable victim assets made of gold that were found in Germany. In that event, all valuable personal property of victims that was not made of gold or was not found in Germany and that could not be restituted because

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[27] For example, there is no reason to believe that the United States would have been able to get the property back to its Jewish owners given the state that it was in when the Army took control of it, viz., rendered unidentifiable as to individual ownership or national origin by officials of Axis Hungary. Evidence that Hungary and representatives of the Hungarian Jewish community had endeavored to have the property returned to Hungary is inapposite; restitution to Hungary was inappropriate because part of the property appeared to have come from Jews of the annexed territories that were no longer part of Hungary after the war. And the United States had good reason to doubt that, even if restitution to Hungary were possible, such a disposition would result in return of Gold Train property either to its individual owners or to the Hungarian Jewish community in general.

neither its ownership nor its national origin could be identified would have reverted to the U.S. military government as the responsible government in the area where it was seized.[28]

Army Captain John Back's reference to papers in Hungarian that were found in an "old steel box" and appeared to him to be lists of names of the owners of some of the Gold Train property, (quoted in Kádár Aff. ¶ 59 [Ex. 5 to Opening Mem.] & Petropoulos Supp. Aff. ¶ 57 [Ex. 7 to Opening Mem.]), supplies no basis for the Court to presume that the lists in fact contained Plaintiffs' names. It is doubtful that those papers actually were names of Jewish owners of Gold Train property. Professor Zweig explains that it is "very unlikely" that the pro-Nazi Hungarian officers would have retained evidence of the property's Jewish ownership such as lists of the owners' names; they had worked hard to render the property itself unidentifiable as to individual provenance, and they had reason to destroy evidence that the Allies might find which would show that the Gold Train cargo had been looted from Holocaust victims. (Zweig Second Report at 16-17 [Ex. 1B to Opening Mem.].) Indeed, Plaintiffs' experts suggest no reason that Toldi and his men would have kept such lists, let alone safeguarded them in a steel box.

Because the American Army personnel who found the papers did not read Hungarian, the statement that the papers were apparently lists of names is nothing more than a mere guess. (Id.) It is more likely that the papers were either (a) lists of names and/or other information about the 213 Hungarian government officials and family members who traveled on the train or (b) records of the

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[28] Similarly, that the government may have sought indemnification from the American Jewish Joint Distribution Committee ("Joint") for any claims that might be made regarding the property, (see Opp'n at 28), does not suggest an ulterior motive given the above-described reasons for its turning over the property to the IGCR and doubt that the "old steel box papers" that the Army found were lists of the names of Jewish owners. Indeed, Plaintiffs' evidence indicates that the United States did not receive the requested indemnification but nevertheless gave the property to the IGCR. (See Exs. 41 & 43 to Walton Decl., cited in Opp'n at 28].)

large number of allocations of clothes and other property that Toldi had made to the train's guards and government officials in lieu of wages.[29] (Id.)

Plaintiffs additionally charge that the government did not inventory the Gold Train property as it was required to do, and suggest that the Court therefore should presume that had an inventory been prepared, it would have enabled Plaintiffs' property to be identified as belonging to them. (Opp'n at 26.) As set forth above, the Army inventoried the property and was not required to do so item-by-item.[30] See supra at 12 n.9. Moreover, given that Toldi and his men had worked to destroy indicia of individual ownership, it is highly doubtful that a detailed inventory would have made individual identification possible.

In sum, Plaintiffs present no evidence that the United States acted in bad faith regarding its inventory of the Gold Train property, its handling of "old steel box papers," or its policy decision to give the property to the IGCR so that it could be used to benefit Jewish and other refugees. Accordingly, there is no basis for any inference against the United States through spoliation principles. See Bashir, 119 F.3d at 931.

2. Plaintiffs Do Not Satisfy the Criteria for Exception to the General Prohibition Against Third-Party Standing

Even if Plaintiffs could establish constitutional standing (which they cannot for the reasons set forth above and in the Opening Memorandum), prudential considerations preclude the Court from exercising jurisdiction because Plaintiffs cannot establish grounds for an exception to the general

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[29] There is good reason to conclude that the sealed envelopes the Army found on the train contained property that Toldi and other Hungarian officials had set aside for themselves and bore their names, rather than names of Jewish owners as Plaintiffs suggest. (See Zweig Second Report at 16-17 [Ex. 1B to Opening Mem.].)

[30] The regulation Plaintiffs cite in footnote 62, (Opp'n at 26), 41 C.F.R. § 128-50.101, is a Department of Justice regulation that concerns personal property seized by the Department of Justice; it has nothing to do with military inventories of property seized from a wartime enemy state.

prohibition against raising a third party's legal rights, Allen v. Wright, 468 U.S. 737, 751 (1984). Specifically, Plaintiffs demonstrate neither alignment of their interests and Hungary's interests vis-a-vis the Gold Train property nor any hindrance to Hungary's ability to assert any interests it thinks has in the property despite the 1947 Treaty of Peace and the 1973 Settlement Agreement between Hungary and the United States.[31]

Contrary to Plaintiffs' argument, (Opp'n at 28-29), because prudential standing principles implicate a court's exercise of jurisdiction, a rule 12(b)(1) motion is a proper vehicle for a challenge to prudential standing. See Allen, 468 U.S. at 748 (reviewing prudential standing issue that came before district court on motion to dismiss); American Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1357-58 (D.C. Cir. 2000) (explaining that D.C. Circuit "treat[s] prudential standing as akin to jurisdiction, an issue we may raise on our own, in part because the doctrine serves the institutional obligations of the federal courts") (internal quotations omitted).

Plaintiffs dispute that third-party standing principles are applicable, and "deny that they are asserting Hungary's rights, rather than their own," in support of their claims against the United States. (Opp'n at 29-30.) Yet the only theories of liability Plaintiffs espouse rely on alleged obligations of the United States to Hungary, viz., that applicable policies and laws required the United States to restitute the Gold Train property to Hungary, (see, e.g., Supp. Petropoulos Aff. ¶¶ 5, 54, 86 [Ex. 7 to Opening Mem.]), and that the United States entered into an implied-in-fact contract for bailment with Hungary for "return" of the property to Hungary, (Am. Compl. ¶¶ 502-09).

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[31] "If both constitutional and prudential objections are raised to standing . . . a court should feel free to deny standing on prudential grounds without first determining the constitutional question." 13A Charles Alan Wright, et al., Federal Practice and Procedure § 3531.15, at 102 (2d ed. Supp. 2004); accord Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 921 n.2 (D.C. Cir. 1989) ("Although [proceeding from constitutional to prudential requirements] is the oft-stated sequence [of standing analysis], the rule of avoidance counsels nonetheless that, where the prudential question is clearly dispositive, we should not reach out to determine the constitutional issue").

Plaintiffs do not allege that they have any right against the United States vis-a-vis the Gold Train property that is independent of alleged rights of Hungary. Because Plaintiffs' theory of recovery rests on alleged rights of Hungary rather than their own rights, Plaintiffs could have standing only as third parties, which is generally prohibited. See Harris v. Evans, 20 F.3d 1118, 1121 (11th Cir. 1994). As set forth in the government's opening memorandum and below, Plaintiffs do not meet the second and third elements of the test for exception to the general rule against third-party standing set forth in Powers v. Ohio, 499 U.S. 400, 410-11 (1974): alignment of interests with the third party and hindrance of the third party's ability to protect its interests.

That many Plaintiffs are citizens or former citizens of Hungary and that Plaintiffs assert claims to property that they maintain is rightfully theirs cannot establish the requisite alignment of interests. Hungary relinquished any interest in the Gold Train property through the 1947 Treaty of Peace and 1973 Settlement Agreement, and agreed in the 1973 Settlement Agreement not to present or support any claims to the property. See infra at 55-61 & U.S. Opening Mem. at 44-50. Hungary's interests vis-a-vis the Gold Train are governed by the 1947 Treaty of Peace and 1973 Settlement Agreement and, by virtue of those agreements, are fundamentally at odds with the interests Plaintiffs attempt to assert in support of their claims.

To be sure, the 1947 Treaty of Peace and 1973 Settlement Agreement present legal barriers to Hungary's asserting any claim regarding the Gold Train. However, those agreements do not present the sort of practical barrier that, as Plaintiffs recognize, (Opp'n at 31 [citing Powers, 499 U.S. at 415]), is the requisite hindrance for third-party-standing purposes. Plaintiffs' attempt to recast these legal barriers as a cost-benefit hindrance is unavailing. See Amato v. Wilentz, 952 F.2d 742, 753 (3d Cir. 1991) (likelihood that third party "was skeptical about the legal merits of the suit or had concerns about costs and risks involved" did not weigh in favor of allowing third-party

standing, but rather indicated that litigant was not able to "adequately advocate[]" third party's interests). As a sovereign state, Hungary would be able to assert a claim regarding the Gold Train property if it thought it had a claim notwithstanding the 1947 and 1973 Agreements.

C. Equitable Principles Do Not Warrant Permitting Plaintiffs' Otherwise Time-Barred Claims to Proceed

1. Compliance with Applicable Statute of Limitations is a Condition of this Court's Jurisdiction

As this Court already has held, Plaintiffs' compliance with the applicable statute of limitations, 28 U.S.C. § 2401(a), must be "strictly observed, and exceptions thereto . . not . . . lightly implied," as compliance is a condition of federal court jurisdiction. Rosner I, 231 F. Supp. 2d at 1206 (internal citations omitted). See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990); Compagnoni v. United States, 173 F.3d 1369, 1370 n. 3 (11th Cir. 1999); Martinez v. United States, 33 F.3d 1295, 1316 (Fed. Cir. 2003). The Court's ruling is consistent with the long-established principle that statutes of limitations for suits against the United States, when established by statute, reflect Congress's decision to waive sovereign immunity only if suit is brought within a particular period of time. Rosner I, 231 F. Supp. 2d at 1206; Irwin, 498 U.S. at 95; Compagnoni, 173 F.3d at 1370 n. 3; Martinez, 33 F.3d at 1316.

Plaintiffs' arguments to the contrary are wholly without merit, and their request that the Court reverse its earlier ruling on this point of law should be rejected. Plaintiffs argue that the Supreme Court's recent decisions in Kontrick v. Ryan, 124 U.S. 906 (2004), United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003), Franconia Assoc. v. United States, 536 U.S. 129 (2002), Scarborough v. Principi, 124 S. Ct. 1856 (2002), and United States v. Cotton, 535 U.S. 625 (2000) plainly demonstrate that, after Irwin, statutes of limitations for suits against the United States are not jurisdictional in nature. They do not.

First, rather than supporting Plaintiffs' argument, the cited cases, and Irwin itself, affirm the fundamental principle that "jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver." White Mountain, 537 U.S. at 465 (examining non-temporal condition on jurisdiction under the Indian Tucker Act) (internal citations omitted); accord Irwin, 498 U.S. at 94 (statute of limitations examined therein is "condition to the waiver of sovereign immunity"), at 96 ("because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants); Franconia Assoc., 536 U.S. at 141 ("a waiver of the sovereign immunity of the United States cannot be implied but must be unequivocally expressed") (internal citations omitted).

Second, contrary to Plaintiffs' suggestion, neither Irwin, nor any subsequent Supreme Court decision, holds that statutorily prescribed statutes of limitation for suits brought against the United States cease to be jurisdictional simply because the rule of equitable tolling applies. Irwin stands for the simple principle that there is a rebuttable presumption that Congress intended for courts to use equitable tolling principles in determining the scope of the waiver of sovereign immunity. 498 U.S. at 95-96. As the Irwin court explained, applying the rule of equitable tolling to suits against the Government amounts to little, if any, broadening of the Congressional waiver. Id. Put another way, application of the doctrine of equitable tolling to a statute of limitations affects the scope of Congress's waiver of sovereign immunity; it does not nullify its jurisdictional nature. As the Eleventh Circuit explained in a post-Irwin decision, "Unlike general statutes of limitation which govern independently existing causes of action between private parties, the timeliness requirement at issue here is not procedural, or 'remedial', but jurisdictional." Vintilla v. United States, 931 F.2d

1444, 1446-47 & n. 1 (11th Cir. 1991) (noting inconsistency in Supreme Court precedent); accord Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1572 n. 2 (Fed. Cir. 1994) ("The language in Irwin that the time limit may be tollable can be reconciled with the cited holdings that these statutes of limitations are jurisdictional. Tolling is not the same as waiving. Presumably, therefore, Irwin merely holds that those time limits, while jurisdictional, can be equitably tolled in certain circumstances.")[32]

Finally, Plaintiffs' reliance on subsequent decisions of the Supreme Court to support its alternative reading of Irwin is misplaced. Nothing in the Supreme Court's discussion or analysis in White Mountain remotely supports Plaintiffs' bald and incorrect assertion that "the generic statute of limitations applicable to claims brought under the Tucker Act is not jurisdictional." Opp'n at 39. In fact, White Mountain does not even address a statute of limitations. See generally 537 U.S. 465. Rather, like Franconia Assoc., White Mountain simply examines the scope of Congress's waiver of sovereign immunity under the Tucker Act. See White Mountain, 537 U.S. at 1132 (interpreting scope of non-temporal waiver of sovereign immunity under the Indian Tucker Act); Franconia Assoc., 536 U.S. at 144-45 (interpreting meaning of "first accrues" in 28 U.S.C. § 2501 so as to determine proper scope of waiver of sovereign immunity).[33] Accordingly, even were this Court to

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[32] Such a clear statement from the Federal Circuit supports this Court's prior ruling that the time limit here is jurisdictional, even if subject to equitable tolling. Plaintiffs' citations to non-conforming decisions by other Circuits are not persuasive.

[33] The Supreme Court's decisions in Cotton, Scarborough, and Kontrick — and language therein limiting the term "jurisdictional" to Article III subject-matter jurisdiction — are also consistent. See Cotton, 535 U.S. at 630-31 (defects in criminal indictment do not deprive court of subject-matter jurisdiction); Scarborough, 124 S. Ct. at 1864 (time limit on attorneys fees application not jurisdictional, because limit relates only to post-judgment proceeding auxiliary to underlying civil action); Kontrick, 124 S. Ct. at 914 ("axiomatic" that court-prescribed time limit not jurisdictional, in that it cannot "create or withdraw federal jurisdiction") (internal citations omitted) (emphasis added).

reconsider its earlier ruling that the applicable statute of limitations is jurisdictional, the same conclusion should be reached.

2. Neither the Equitable Tolling Doctrine nor the Accrual Suspension Rule Justifies Plaintiffs' Late Filing

a. Equitable Tolling

After conducting jurisdictional discovery for more than a year, Plaintiffs have failed to carry their burden to show that principles of equity warrant this Court's tolling of the applicable six-year statute of limitations for more than 40 years. See Justice v. United States, 6 F.3d 1474, 1478 (11th Cir. 1993) (plaintiff bears burden to show equitable tolling is warranted). Remarkably, Plaintiffs have abandoned altogether their contention that they were "induced or tricked by the Government's misconduct into allowing the filing deadline to pass" by failing even to argue that the Court should now apply this test. (See Opp'n at 46 [accusing government of imposing "straitjacket" on doctrine by focusing on test in Opening Memorandum]). They have done so, notwithstanding that that is the very ground on which this Court earlier found that the allegations of Plaintiffs' initial Complaint warranted tolling and permitted the case to go to discovery.[34] See Rosner I, 231 F. Supp. 2d at 1209 ("[t]he allegations of the Complaint satisfy the second Supreme Court test, namely that Plaintiffs were induced or tricked by the Government's misconduct into allowing the filing deadline to pass").

Rather than presenting any evidence to support the allegations underlying the Court's prior ruling (and then presumably arguing that the Supreme Court's second test applies to the facts presented), Plaintiffs state simply that "the conduct of the Government [in its handling of the Gold

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[34] Having relied so heavily on the reasoning of Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 135 (E.D.N.Y. 2000), in their earlier papers, (see Pl. Opp'n to United States' [First] Motion to Dismiss), Plaintiffs fail even to mention the case in their Opposition. The omission is particularly striking, given that this Court cited Bodner as an example of a case in which extraordinary circumstances warranted equitable tolling. See Rosner I, 231 F. Supp. at 1209. While the allegations in Plaintiffs' complaints raise similar equitable considerations to those in Bodner, they are not borne out by the evidence presented.

Train] was deceptive" and ask this Court to toll the statute because "the extraordinary circumstances of the Holocaust warrant equitable tolling." (Opp'n at 47.) That request has no merit and should be denied. See Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999) (whether doctrine of equitable tolling saves cause of action otherwise barred by statute of limitations is question of law); Justice v. United States, 6 F.3d 1474, 1478 (11th Cir. 1993) (same).

As an initial matter, Plaintiffs make the unusual suggestion that this Court should consider the United States' handling of the Gold Train in the post-war years as a basis on which to toll the deadline for filing challenges thereto. Specifically, Plaintiffs argue that the United States engaged in "deceptive conduct," and once again recite the core allegations of their Amended Complaint: that, in 1948, representatives of the Hungarian Jewish community asked the United States to give the personal property it found on the Gold Train to them; that the United States informed these representatives that the Hungarian government was the proper requestor on their behalf; that the United States then promised Hungary that it would return all identifiable looted property to it; and that the United States broke this promise and violated applicable restitution policy when it turned over property found on the Gold Train to the IGCR.[35] (See Opp'n at 48-49.)

Plaintiffs' position is curious indeed. In short, they argue that the very same governmental conduct they challenge on the merits of their claims is the reason they did not file suit for more than 40 years after the events occurred. However, Plaintiffs make no attempt to explain how these actions caused them to delay filing suit, except to say summarily and speculatively that "[b]ut for the Government's possession of the property and its failure to follow governing restitution laws, the

[35] As explained in the Opening Memorandum. at 4-14, and above, supra at 6-15, the United States contests most of Plaintiffs' characterization of the government's handling and disposition of the Gold Train property, including Plaintiffs' assertion that "the Government unilaterally redefined Article 8 to create a legal pretext to immunize itself from takings and other claims over the Hungarian Jews' property," (Opp'n at 48). Even assuming the truth of Plaintiffs' allegations, however, none bears on the question of equitable tolling.

Hungarian Jews would have been able to obtain their property and/or pursue other remedies adequately." (Opp'n at 50.) Even if the named Plaintiffs had no actual knowledge of these events until at least October 1999, they cannot now claim to have relied on the Government's contemporaneous representations or acts regarding the Gold Train. (See also Opening Mem. at 27 n. 23 & 31 n. 23.) Absent some proven causal link between the challenged conduct and Plaintiffs' failure to file their claims in a timely manner, the United States' handling of the Gold Train simply has no bearing on the question of tolling. Raziano v. United States, 999 F.2d 1539, 1542 n. 3 (11th Cir. 1993) (main element for equitable tolling is deception on part of the defendant "which has been, by words or acts, communicated to the plaintiff and has misled the plaintiff"); First Alabama Bank N.A. v. United States, 981 F.2d 1226, 1228 (11th Cir. 1993) (no equitable tolling absent "reasonable reliance" on government acts); see also Frazer v. United States, 288 F.3d 1347, 1353-54 (Fed. Cir. 2002) (assuming that a Tucker Act claim could ever be subject to equitable tolling, it would only be available when the lateness is attributable, at least in part, to misleading governmental action).[36]

Plaintiffs cite only one other instance of what they charge to be "deceptive conduct" by the United States: the government's classification of "documents as secret that might have revealed its role in causing Plaintiffs' injury." (Opp'n at 49.) Notwithstanding the Executive Branch's clear authority to classify information deemed sensitive to the nation's security and foreign affairs, see Department of Navy v. Egan, 484 U.S. 518, 527 (1988), Plaintiffs make the incredible argument that the very presence of information related to the Gold Train in once classified records "is sufficient

[36] Even where the government's challenged conduct directly contributed to plaintiff's failure to file suit in a timely manner, equitable tolling is not necessarily warranted. See, e.g., Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1579-81 (Fed. Cir. 1988) (government's wrongful termination of Indian Tribe's formal status, which led to disbanding of Tribe and its governing council, did not warrant tolling statute of limitations on Tribe's suit challenging termination).

to toll all limitations until the disabling secret classification has been lifted, at the earliest."[37] (Opp'n at 49.) More than three years after filing suit, Plaintiffs have not produced a single piece of evidence in support of their accusation that the United States deliberately classified documents in order to conceal information about the Gold Train. They have not, for example, pointed to any document that — even arguably — was classified improperly. And, again, they have failed to demonstrate how the timing of the government's declassification of World War II-era documents containing information on the Gold Train is in any way related to, let alone caused, their inability to file suit until 2001. Plaintiffs cannot point to a single document the late declassification of which led the Presidential Advisory Commission on Holocaust-Era Assets (Presidential Commission), and thereby Plaintiffs, to learn some previously non-public fact critical to the accrual of their claims. Nor do they cite to any case for the proposition that the subsequent declassification of a properly classified document permitted a claim to proceed against the United States despite the running of the applicable statute of limitations. Accordingly, Plaintiffs have not shown that acts of classifying and declassifying documents containing information on the Gold Train cannot satisfy Plaintiffs' burden to show misleading governmental conduct on which they detrimentally relied in missing the filing deadline and, thus, has no bearing on the question of tolling. See Raziano, 999 F.2d at 1542 n. 3; First Alabama Bank, 981 F.2d at 1228.

Lacking any evidence of governmental misconduct, or even conduct, that contributed to their delay in filing suit, Plaintiffs nevertheless maintain that "the extraordinary circumstances of the Holocaust" merit application of the equitable tolling to this case. (Opp'n at 47.) Equitable tolling can be appropriate when a movant untimely files because of extraordinary circumstances that are

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[37] Plaintiffs' assertion that "the declassification began in 1998," (Opp'n at 49,) is patently false, as is any suggestion that the United States acted improperly in its classification and declassification of records related to the Gold Train. See supra at 3-4.

both beyond his control and unavoidable even with diligence. Sandvik, 177 F.3d. at 1271; Rosner I, 231 F. Supp. 2d at 1209. As demonstrated below, however, the equities presented here do not warrant invocation of such an exceptional remedy. See Irwin, 498 U.S. at 96 (noting that federal courts typically extend equitable relief "only sparingly"); Bost v. Federal Express Corp., 372 F.3d 1233, 1242 (11th Cir. 2004) (noting that equitable tolling an "extraordinary remedy").

That many of the Plaintiffs, and their deceased family members, suffered immeasurably during the Holocaust does not by itself constitute an extraordinary circumstance worthy of permitting this suit to go forward. The law does not permit courts to disregard statutes of limitations established by Congress simply out of sympathy for particular litigants. Raziano, 999 F.2d at 1542. Consistent with this principle, courts have dismissed time-barred suits brought by survivors of the Holocaust, even while acknowledging the tremendous extent of their suffering. See, e.g., Deutsch v. Turner Corp., 324 F.3d 692, 716-18 (9th Cir. 2003) (affirming dismissal of action brought by Holocaust survivor subjected to slave labor during World War II in part because barred by statute of limitations); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 432 n. 3, 461-69 (D.N.J. 1999) (same); Sampson v. Federal Republic of Germany, 975 F. Supp. 1108, 1122-23 (N.D. Ill. 1997) (Williams, J.) (dismissing Holocaust survivor's claims for failure to pay reparations in part because barred by statute of limitations), aff'd 250 F.3d 1145 (7th Cir. 2001).

As this Court has recognized, and the United States acknowledges and regrets, the majority of the Plaintiffs in this lawsuit faced particularly difficult years immediately after World War II. See Rosner I, 231 F. Supp. at 1209. Individual Plaintiffs told remarkable tales of courage and determination when asked in their depositions about the rebuilding of their lives after the War. Yet, these same individuals also told tremendous stories of success, of lives rebuilt in new countries and new cities. (See Excerpts of Plaintiffs' Postwar Years, App. A.) By the late 1950s, most of the

named Plaintiffs had settled in urban areas either in Canada or in the United States, with the majority of them relocating to either New York City or Miami. (See id.) Plaintiffs pursued diverse occupations, raised their children and grandchildren, and generally led prosperous lives. Id. (see, e.g., describing careers in medicine [Mr. Joseph Devenyi], chemistry [Mr. Peter Drexler], machine design [Mr. Michael Fried], and academia [Mr. Paul Gottlieb]). Many spent some portion of the immediate post-war years in Budapest, (see Excerpts of Post-War Years,) and many returned to Hungary to visit over the years, some to visit family. (See Excerpts of Visits [App. B].)

All of the information Plaintiffs needed to file this lawsuit was publicly available and known to at least some members of the Hungarian Jewish community in the 1940s. (See Opening Mem. at 26-32; supra at 5-6.) While Plaintiffs could not necessarily be expected to have looked after their lost property in the years immediately following the war, once settled in their new lives, the law reasonably expects that they would do so long before October 1999.[38] Bost, 372 F.3d at 1242 (equitable tolling inappropriate when plaintiff failed to act with due diligence). Accordingly, even if it were to accept that the challenges Plaintiffs faced in rebuilding their lives after World War II warrant tolling the statute for some period of time until the Plaintiffs could look after their legal rights once more, that period did not extend for more than four decades. See Cada v. Baxter Healthcare, 920 F.3d 446, 452 (7th Cir. 1990) (equitable tolling "gives the plaintiff extra time if he needs it, [but] if he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations").

[38] Plaintiffs, such as Ms. Bleir, who lived in the New York area during the late 1940s might also have learned information about the possible disposition of their lost property as a result of the auction held by the ICGR. For example, Ms. Bleir and her father attended the auction, where they retrieved their lost Kiddish cup, and having done so, reasonably could have inquired about how the origin of the auctioned property. See supra at 6. At the very least, the auction put Ms. Bleier on notice that she may have been able to trace other of her and her family's property by investigating how the Kiddish cup arrived at the auction.

Plaintiffs have cited no precedent — controlling or otherwise — that suggests tolling a statute of limitations for more than 40 years, absent any demonstrated misconduct or affirmative misrepresentation by the government that caused them to miss the filing deadline, and absent any reasonable inquiry on their part into the whereabouts of their lost property. Moreover, in the cases Plaintiffs do cite, courts rely on equitable principles plainly inapplicable to the undisputed facts presented here. Again, here there is no legal barrier that prevented Plaintiffs from filing suit earlier than 2001, as was the case in Young v. United States, 535 U.S. 43 (2002) (tolling statute during period of disability in which plaintiff agency was legally barred from pursuing its claims). Nor have Plaintiffs shown that a government official provided affirmative misinformation about the filing requirements for their claims, as in Ferreiro v. United States, No. 96-4963 (11th Cir. Sept. 30, 1997) (Ex. 46 to Walton Decl., Opp'n) (tolling statute because plaintiff detrimentally relied on incorrect information about legal claim provided by government counsel). Neither have they demonstrated that they acted with due diligence in preserving their legal rights, as did the plaintiffs in Burnett v. New York Cent. R.R., 380 U.S. 424, 434-435 (1965) (tolling statute when plaintiff brought timely action in state court and served the defendant with process, but state action later dismissed for improper venue), and Furnes v. Reeves, 362 F.3d 702, 723-24 (11th Cir. 2004) (tolling statute when plaintiff made "extensive efforts" to locate child who had been abducted by defendant until child was found, thereby also confirming necessity of legal action in United States).[39]

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[39] The cases Plaintiffs cite from other Circuits are likewise unavailing. See Cada, 920 F.3d at 452 (tolling statute until younger employee replaced terminated employee, thus giving rise to claim for age discrimination); Chung v. Department of Justice, 333 F.3d 273, 280 (D.C. Cir. 2003) (tolling may be warranted based on criminal defendant's fear that filing suit against the government prior to sentencing would jeopardize request for leniency); Aleutco Corp. v. United States, 244 F.2d 674, 679-80 (3d Cir. 1957) (finding accrual of action for tortious exercise of dominion over property occurred when government shipped property to third-party, not at time of earlier refusal to ship to plaintiff).

Accordingly, on the facts presented, equitable considerations no longer justify tolling the statute of limitations to permit Plaintiffs' late-filed complaint.[40]

b) Suspension of Accrual Date

For the first time, Plaintiffs now argue in the alternative that the accrual date for their claims against the United States should be suspended until October 1999, when the Presidential Commission issued its Progress Report. (Opp'n at 42-43.) In making this argument, Plaintiffs do not dispute that all of the events on which their claims are based occurred by 1950 — more than 50 years before they filed this lawsuit in May 2001.[41] Nor do they dispute that the critical facts needed to make their claims — that, at the end of World War II, the United States took possession of a train that had come from Hungary loaded in part with the personal property of Jews and did not return the found Jewish property to the Hungarian government, or to them — were disseminated publicly in the 1940s. (See Opening Mem. at 25-32.) Rather, they argue that their claims against the United States could not have accrued until October 1999, because: (1) none of the 24 putative class representatives had actual knowledge of these facts until the late 1990s, and (2) the atrocities suffered by many of the named Plaintiffs during the war, and the difficulties they faced in the years immediately following, were such that they could not reasonably be expected "to have made any inquiry — let alone sufficient inquiry" into the whereabouts of their lost property at any time in the

[40] The United States does not waive any argument that 28 U.S.C. § 2401 is not subject to equitable tolling as a matter of law.

[41] Plaintiffs assert that the "taking" that is the subject of their Fifth Amendment claim, (Am. Compl. at 166 n. 6), the breach that is the subject of their bailment claim, (Am. Compl. at 168), the wrongful act at the core of their illegal exaction claim, (Am. Comp. at 170), and the policy decision at the heart of their international law claims is the physical transfer of Gold Train property to the IGCR in November 1947. Plaintiffs also challenge the Army's handling of the property while in its custody prior to that transfer. (Am. Compl. at 83-104.) As such, all events necessary to their causes of action had occurred by at latest 1949.

ensuing 40-plus years. (Opp'n at 44) (emphasis added). As is demonstrated below, neither reason is an appropriate ground on which to suspend the accrual of a claim.

In order to benefit from the "accrual suspension" rule, Plaintiffs must show either that (1) the United States concealed its acts with the result that Plaintiffs were unaware of their existence, or (2) that their injury was "inherently unknowable" at the accrual date. Martinez v. United States, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (explaining application of rule to Tucker Act claim barred by limitations period in 28 U.S.C. § 2501); Japanese War Notes Claimants Assoc. v. United States, 373 F.2d 356, 359 (Ct. Cl. 1967) (explaining that "an example of the latter would be when defendant delivers the wrong type of fruit tree to plaintiff and the wrong cannot be determined until the tree bears fruit"); see also Urie v. Thompson, 337 U.S. 163, 169 (1949). As discussed above, Plaintiffs have failed to point to any act of concealment by the United States, let alone one that caused Plaintiffs' ignorance of the basic facts underlying their claims, supra at 3-5, and is belied by the United States' public dissemination of the news of its finding and handling of the Gold Train. And, two undisputed facts — that the international media reported on United States involvement with the Gold Train in the 1940s and that some members of the Hungarian Jewish community had actual knowledge of the challenged actions as they unfolded — render untenable any possible suggestion that the events of the Gold Train ever have been "inherently unknowable." (See Opening Mem. at 25-32.) As a result, the named Plaintiffs' lack of actual knowledge of the basic facts underlying their cause of action is not a permissible reason to suspend accrual of their claims. See Japanese War Notes, 373 F.2d at 359 ("[i]gnorance of rights that should be known is not enough" to suspend accrual of statute of limitations).

Plaintiffs' second basis for requesting suspension of the accrual date is similarly deficient, for the reasons discussed in the equitable tolling section above. Supra at 37-44. Again, they argue

that it is unreasonable to expect them to have made any inquiry whatsoever, at any time, into the possible whereabouts of their lost property. Notwithstanding that the law is much less forgiving of those who fail to exercise due diligence in preserving their legal rights, Irwin, 498 U.S. at 458; Bost, 372 F.3d at 1242, Plaintiffs ask to be exempted from this obligation altogether because of the challenges they faced in rebuilding their lives immediately after the War. But, a simple inquiry into the fate of looted Hungarian Jewish property during the War, including a review of newspapers from the immediate post-war years at a public library, would have produced articles about the Gold Train and the information sufficient to assert their claims. It is not unreasonable to expect them to have made such reasonable efforts once settled in their new lives.

As the Supreme Court has explained, "[s]tatutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Burnett, 380 U.S. at 428 (internal citations omitted). Here, on the facts presented, the equitable considerations at play do not warrant permitting Plaintiffs' otherwise time-barred suit to go forward against the United States, whose fair defense is made particularly difficult given the significant passage of time.

D. The APA Does Not Permit Review for the Claims Plaintiffs Assert under It

Plaintiffs do not dispute the lack of Congressional intent for the customary and conventional international law, the Provisional Handbook for Military Government in Austria, and other military handbooks or manuals on which they rely to bind the United States and serve as a basis for review by Article III courts.[42] Absent an indication that Congress intended for a particular standard to

[42] Contrary to Plaintiffs' characterization of Morrison v. United States, 492 F.2d 1219, 1225 & n.8 (Ct. Cl. 1974), (Opp'n at 52 n.96), that case specifically recognizes that the Army Field Manual is not binding upon courts and serves only to "provide authoritative guidance to military personnel."

govern conduct of the United States, that standard may not form the basis for review under the APA.[43] (See Opening Mem. at 37-38 [citing cases].) For the reasons set forth in the government's Opening Memorandum, then, Plaintiffs' APA claims should be dismissed insofar as they rely on standards set by international law and Army handbooks or manuals.[44] (See id. at 37-40.)

Regarding Plaintiffs' APA claims generally, there can be little doubt that the Army's decisions about how many resources to devote to security at the Salzburg warehouse, how many resources to devote to inventorying the property, and the State-War-Navy Coordinating Committee's policy decision to turn over the property to the IGCR – the actions which Plaintiffs challenge under the APA – are the sort of discretionary decisions that courts should not second-guess. (See Opening Mem. at 42-43.) Plaintiffs do not suggest that there exist any meaningful standards against which the Court might judge: the Army's allocation of limited personnel resources between warehouse security and the other pressing responsibilities it had as occupation authority,[45] (see Expert Report of Jeffrey J. Clarke at 8 [Ex. 3A to Opening Mem.]); the detail with which the Army inventoried the property it found on the Gold Train given its limited resources; or the United States' policy decision regarding disposal of victim assets that were unidentifiable as to national origin and individual ownership but were not covered by the Paris Reparations Agreement because they were found in Austria rather than Germany. Given the lack of any such meaningful standards, Plaintiffs' APA

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[43] The government does not argue that a separate cause of action beyond the APA is required for a claim under the APA, as Plaintiffs assert, (Opp'n at 56 n.102). Rather, an indication that Congress intended for the United States to be legally bound by the standard at issue is necessary. (See Opening Mem. at 37-38.)

[44] Plaintiffs do not dispute that the APA supports only claims for non-monetary relief. To the extent Plaintiffs' claims purport to seek monetary relief based on the APA (each cause of action in the First Amended Complaint seeks money damages), they must be dismissed.

[45] See also Mem. from Property Control Officer Homer Heller to Chief, Property Control Branch of 10/21/45 ("Because of the magnitude of the task a detailed inventory has not been taken, however, a general inventory and history was prepared . . .") (copy attached as Ex. 8).

claims should be dismissed as "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). (See Opening Mem. at 41-43.)

With regard to the exception for World War II functions included in the APA as originally enacted, Plaintiffs misconstrue the exception's application to the claims they have asserted under the APA. That exception evidences Congress' intention that courts not review actions that the military took in its capacity as post-World War II occupation authority. The exception covered "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947 . . ." APA, § 2(a)(4), 60 Stat. 237 (1946). Functions that by law expired at the official end of the war, or within "any fixed period thereafter," plainly included functions that the government performed as occupation authority following the war. Plaintiffs do not dispute that the Army acted with regard to the Gold Train property in its capacity as occupation authority, a function that by law was tied to the aftermath of World War II and terminated at the end of the period fixed by the post-war treaty between the Allies and Austria, see Austrian State Treaty, May 15, 1955, art. 20 §§ 1-3, 6 U.S.T. 2369 (1955) (providing for occupation to end on July 27, 1955).

Similarly, good reason exists for the Court to base its determination of whether the APA's military-authority exception applies on examination of the source of authority for the actions which Plaintiffs challenge.[46] The plain language of 5 U.S.C. § 701(b)(1)(G) provides that it covers "military authority" that is exercised in the field either during war or in occupied territory. Military authority was undoubtedly the source of power for the Army's decisions regarding inventory of the Gold Train property, security of the property, and requisitioning of property at the warehouse where the property was stored. As explained in the government's Opening Memorandum, military

[46] As noted in the government's Opening Memorandum, to the extent that the Court's analysis in Rosner I can be read as contrary to this argument, the United States respectfully requests that the Court reconsider that analysis.

authority is the basis on which the United States acts in U.S.-occupied territory.[47] (Opening Mem. at 35-36 [citing Madsen v. Kinsella, 343 U.S. 341, 357 (1952), and Army Field Manual 27-10 ¶ 284 (Rules of Land Warfare)].) Because the United States acted in its capacity as occupation authority when it gave the Gold Train property – property which it had found in its occupied territory – to the IGCR, its act of giving the property to the IGCR likewise was based on military authority.

Plaintiffs' argument that this interpretation is too broad and would result in a blank check on military action exception, (Opp'n at 55-56), is without merit. As the cases Plaintiffs cite demonstrate, there are military actions not taken pursuant to occupation authority that are subject to judicial review. (See cases cited in Opp'n at 51-55.[48])

Lastly, Plaintiffs attempt to recast their APA claims as challenging, at least in part, alleged failure by the United States to take action following the war. (Opp'n at 56.) But a failure to take action cannot logically constitute a "final agency action" under 5 U.S.C. § 704, at least absent evidence that the government had reason to act.[49] See, e.g., Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001). The "failure to act" on which Plaintiffs base their argument is the lack of a U.S. accounting of Gold Train property still in the government's possession. (Opp'n at 56.) Yet they present no evidence, or reason to believe, that any Gold Train property remains in the government's

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[47] Even the Provisional Handbook for Military Government inAustria (April 1945) ("Provisional Handbook"), on which the Plaintiff's Opposition relies so heavily, makes it clear that the occupation government in Austria was military in character. (See, e.g., Provisional Handbook at 7-8 [Ex. 6].)

[48] Macleod v. United States, 229 U.S. 416 (1913) (cited in Opp'n at 53 n.100), was decided before the APA was enacted.

[49] Were it otherwise, the military authority exception would be without effect because a plaintiff could always avoid its application by styling his/her claim as pertaining to the government's failure to revisit actions taken during wartime or in occupied territory once war had ended or the government was no longer an occupation authority.

possession.[50] Plaintiffs' own expert does not believe that it would be possible to arrive at a precise accounting of what was on the Gold Train when the United States took possession of it. (Petropoulos Dep. at 177:5-18 & 178:10-16 [Ex. 4].) Under these circumstances, even if Plaintiffs presented a final agency action for the Court to review, requiring the government to incur the substantial expense that the resource-intensive search Plaintiffs describe would not be warranted.

E. The Little Tucker Act Does Not Provide A Waiver of Sovereign Immunity for Plaintiffs' Claims Based on International Law or Army Manuals or Handbooks

This Court correctly concluded that the Little Tucker Act does not provide jurisdiction for international law claims because such claims are not "'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract.'" Rosner I, 231 F. Supp. 2d at 1210-11 (quoting 28 U.S.C. § 1346(a)(2)); accord Phaidin v. United States, 28 Fed. Cl. 231, 234 (1993). This finding is clearly correct. See, e.g., Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2762-62, 2765 n.19 (2004). As such, they do not fall under the Little Tucker Act.

Similarly, neither the Provisional Handbook nor the Army Field Manual constitutes a source of binding law for which the Tucker Act waives sovereign immunity. As explained in the Opening Memorandum, neither document constitutes an executive regulation. (See Opening Mem. at 39-41; see also infra at 69-70.) Even if they did, they are by no means money-mandating. White Mountain,

[50] The 1956 Army decision to transfer art that may have been on the Gold Train to Austria does not suggest that any Gold Train property is still in the government's possession. To the contrary, it indicates that if the government encountered such property it disposed of it in accordance with applicable law. The transfer of the art to Austria was consistent with the Austrian State Treaty, under which the United States turned over the responsibilities it had as governing authority in U.S.-occupied Austria to the Austrian government in 1955. See Austrian State Treaty, art. 20 §§ 1-2. Disposing of property found in Austria was certainly a responsibility of the governing authority in Austria. By 1956, the Austrian government was that authority.

527 U.S. at 472 (statute creating a Tucker Act right must be reasonably amenable to the reading that it mandates a right of recovery in damages").[51]

II. The First Amended Complaint Fails To State a Claim upon which Relief May Be Granted

A. Rule 12(g) Does Not Protect Plaintiffs from Judicial Review of the First Amended Complaint

While chastising the United States for making what they characterize as "technical" arguments, (Opp'n at 2), Plaintiffs attempt to interpose the most technical of all procedural hurdles, one that would have no substantive effect and would merely waste resources of the parties and the Court and unnecessarily prolong this litigation. While conceding that the United States has not waived any defenses, Plaintiffs contend that Federal Rule of Civil Procedure 12(g) nevertheless prevents the Court from ruling on "any defense . . . that was available to [the United States]" when it filed its first Motion to Dismiss. (Id. at 58.) Plaintiffs do not specify which defenses they claim fall into this category, nor do they explain why the Court should require a separate motion on issues that are fully briefed and dispositive of this litigation and that both parties agree have not been waived. In any event, Rule 12(g) does not bar the Court's consideration of the issues raised in the United States' motion.

First, Rule 12(g) generally does not apply to motions to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Federal Rule 12(g) prohibits a Rule 12 motion on grounds that were available but omitted in a prior Rule 12 motion "except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated." Rule 12(h)(2) includes among defenses that may be subsequently raised, "[a] defense of failure to state a claim upon which relief can be granted."

[51] The United States does not dispute that the Little Tucker Act provides a waiver of sovereign immunity for Fifth Amendment takings and illegal exaction claims and its implied-in-fact contract claim. As discussed below, this Court should dismiss Plaintiffs' Fifth Amendment illegal exaction claim, which is based on an alleged violation of the Fifth Amendment due process clause, on the same grounds it earlier dismissed their Fifth Amendment takings claim. Infra at 68-69.

Reading Rules 12(g) and 12(h)(2) together, "a party who makes a motion under Rule 12 is precluded from raising a similar objection omitted in the first motion unless the motion is based upon a ground set forth in Federal Rule of Civil Procedure 12(h)(2). Rule 12(h)(2) includes a motion to dismiss for failure to state a claim." Schiessle v. Stephens, 525 F. Supp. 763, 766 (N.D. Ill. 1981).

Plaintiffs concede (twice) that Rule 12(h)(2) preserves the United States' arguments that their Amended Complaint fails to state a claim. (Opp'n at 58 n.105; id. at 59 n.106.) Nevertheless, Plaintiffs would have the parties re-brief certain unspecified issues, presumably in a motion for judgment on the pleadings, and force the Court to deal with yet another motion, when all of the relevant legal issues have been briefed and both parties are eager to move this litigation forward as rapidly as a full and fair resolution of the issues permits. Such an absurd result is not compelled by the Federal Rules. See Fed. R. Civ. P. 1 (The Rules of Civil Procedure "shall be construed and administered to secure a just, speedy, and inexpensive determination of every action."). Plaintiffs' proposed interpretation of Rule 12(g) would disserve justice, speed, and efficiency.

Additionally, the filing of an Amended Complaint generally will obviate any application of Rule 12(g) even to arguments (unlike those at issue here) that might otherwise be waived by Rules 12(g) and 12(h)(2). Particularly here, where the Amended Complaint "greatly expands the factual allegations the Plaintiff has made against the Defendant," "the Defendant is entitled to a 'fresh start' in answering Plaintiff's amended complaint." Brown v. E.F. Hutton & Co., 610 F. Supp. 76, 78 (S.D. Fla. 1985) (allowing motion to arbitrate in response to amended complaint although motion was not made as to earlier complaint); see also Mount v. LaSalle Bank Lake View, 926 F. Supp. 759, 763 (N.D. Ill. 1996) (allowing new defenses in motion to dismiss Fourth Amended Complaint even though that complaint was "amended for 'housekeeping' measures" because an "Amended Complaint represents Plaintiffs' [additional] opportunity to properly plead their case [and thus] [t]he

court finds that Defendants deserve similar accommodation in their opportunities to defend against that case”).

At 172 pages and 543 paragraphs, Plaintiffs’ Amended Complaint is well over four times longer than their original complaint, and it adds two new causes of action and 24 new Plaintiffs. Moreover, the Amended Complaint substantially changes Plaintiffs’ legal theories. For example, while the original complaint was based on a theory that “[t]he items on the train were in locked containers with the names and addresses of the owners on the outside,” Rosner I, 231 F. Supp. 2d at 1205, and thus property could and should have been returned to these owners, see Compl. ¶¶ 110, 113, 114, their new theory posits that even though the property was not labeled at the time the Army acquired it, the United States was obligated “to return the property to Hungary,” First Am. Compl. ¶ 504; see also Second Affidavit of Jonathan Petropoulos, ¶¶ 44, 48. The latter theory obviously implicates the foreign relations between the United States and Hungary in a way that the former did not, thus leading to the United States’ invocation of international agreements between the two nations. Additionally, the Amended Complaint alters the nature of both the alleged bailment contract (now based on an alleged agreement between the United States and Hungary rather than the United States and Plaintiffs) and the alleged international law violations (now based on relations between the United States and Hungary) prompting new grounds for the dismissal of those counts. Finally, Plaintiffs have added causes of action alleging illegal exaction and violation of military regulations counts prompting new arguments from the United States.

As this Court has stated: “‘Since the amended pleader chooses to redo his original work, and receives the benefit of this nunc pro tunc treatment, he can hardly be heard to complain that claims filed against him are improper because they should have been asserted in response to his original pleading.’” Brown, 610 F. Supp. at 78 (quoting Joseph Bancroft & Sons Co. v. M. Lowenstein &

Sons, Inc., 50 F.R.D. 415, 419 (D. Del. 1970).[52] This Court should consider all the issues presented in the United States' Motion.

B. Plaintiffs' Claims Are Barred by International Agreements

Plaintiffs' discussion of the relevant international agreements contains little case law and other authoritative citations and, in any event, contains no rebuttal of the applicable precedent (see Opening Br. at 44-50) that demonstrates that Plaintiffs' claims are barred by the 1947 Treaty of Peace with Hungary ("Treaty of Peace") as well as by the 1973 Settlement Agreement between the United States and Hungary.

The standards for construing a treaty are clear and undisputed. "We must be governed by the text–solemnly adopted by the governments of many separate nations." Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989); accord United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we look first to its terms to determine its meaning."). "If the language of the treaty is clear and unambiguous, as with any exercise in statutory construction, our analysis ends there and we apply the words of the treaty as written." United States v. Duarte-Acero, 208 F.3d 1282, 1285 (11th Cir. 2000) (citing Chan, 490 U.S. at 135). Drafting history may be consulted only where the text is ambiguous and, even then, the treaty's "most natural meaning could properly be contradicted only by clear drafting history." Chan, 490 U.S. at 134-35 & n.5. Plaintiffs do not dispute that when interpreting a treaty, courts give substantial deference to the Executive Branch's interpretation. See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999); United States v. Lombera-Camorlinga, 206 F.3d 882, 887 (9th Cir. 2000) (en banc) (deference due to executive branch interpretation of treaty exists where position is taken in litigation

[52] Plaintiffs' contention is particularly inequitable because Plaintiffs themselves seek to re-litigate issues such as whether a non-resident alien with no voluntary connection to the United States may assert a Takings claim and whether an international law claim against the United States for money damages may be maintained. (See, e.g., Opp'n at 69-71 (Takings); id. at 33-37 & n.70 (international law).)

in which government is a party);[53] cf. Kwan v. United States, 272 F.2d 1360, 1362 (Fed. Cir. 2001) ("When the foundation document is an agreement between governments, non-governmental entities can not ordinarily challenge either their interpretation or their implementation.").

1. The Treaty of Peace Bars Plaintiffs' Claims

The Treaty of Peace unambiguously waives "all claims of any description" against the United States and its allies that (1) belong to "the Hungarian Government or Hungarian nationals," and (2) arise "out of actions taken because of the existence of a state of war in Europe after September 1, 1939." Treaty of Peace Art. 32.1.[54] This waiver includes (but is not limited to) claims based on "acts of forces or authorities" of the United States. Id. The claims Plaintiffs assert in this litigation fall within this clear waiver.

First, the claims belong to Hungary (Plaintiffs contend that the United States had a legal duty to return property to the Hungarian government) and (with regard to the majority of Plaintiffs) the claims are being asserted by persons who were Hungarian nationals at the time the Treaty of Peace went into effect. Second, the claims arise directly out of actions taken because of a state of war in Europe after September 1, 1939. As Plaintiffs do not deny, the Army seized the Gold Train only because of the state of war in Europe. (Opp'n at 63.) Indeed, the Army would not have been in

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[53] As noted in the United States Opening Memorandum at 49 n.36, the State Department correctly took the position that the Treaty of Peace barred claims for handling of the Gold Train property nearly four decades ago.

[54] See also id. Arts. 29.1, 29.2 (granting the United States and other allied powers "the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals," and providing that "[t]he liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned [and] [t]he Hungarian owner shall have no rights with respect to such property except those which may be given him by that law").

Austria at all but for the state of war.[55] For that matter, the Gold Train would not have been in Austria, fleeing the advancing Soviet army, but for the war in Europe. And certainly, the United States would not have had motive or ability to use property for the benefit of displaced persons as Plaintiffs allege the United States did, were it not for the state of war in Europe that led to the large number of refugees.

Plaintiffs contend that the alleged United States actions at issue "did not occur 'in Hungarian territory' or as an 'exercise of purported belligerent rights.'" (Opp'n at 63.) But the broad waiver in the Treaty of Peace does not require that the acts take place in Hungary, see S.N.T. Fratelli Gondrand v. United States, 166 Ct. Cl. 473, 479 (1964)[56]; Pauly v. United States, 152 Ct. Cl. 838 (1961) (Treaty of Peace with Hungary barred claim for seizure of civilian horses in Germany), nor that they comprise the exercise of purported belligerent rights, see Neri v. United States, 204 F.2d 867 (2d Cir. 1953) (treaty barred claim based on voluntary towing of vessel after combat had ceased).[57] Rather, as the Treaty text makes clear, claims for acts in Hungary and claims arising out

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[55] It is ironic that Plaintiffs seek to bring claims based on alleged breach of "the law of war" in the handling of the Gold Train property (see Pl. Opp'n at 38) but with regard to the Treaty of Peace, suggest that the Gold Train has nothing to do with the war.

[56] In S.N.T. Fratelli, the court applied identical language from the Treaty of Peace with Italy, which like the Treaty of Peace with Hungary was imposed on the defeated Axis power by the victorious allies. Compare Treaty of Peace with Italy, Art.76.1 with Treaty of Peace with Hungary, Art. 32.1 (identical language except that "Italy" and "Italian" replace "Hungary" and "Hungarian"). The court found that the waiver barred an Italian corporation's claim based on alleged requisitioning in Eritrea because the "treaty waives without geographical restriction, all claims sustained as a consequence of acts of United States or British forces or authorities." 166 Ct. Cl. at 479 (emphasis in original).

Plaintiffs' contention that this court should ignore case law interpreting other treaties with similar or identical language is without merit. (See Opp'n at 66 n.115.) Where, as in these treaties, the language is clear, the negotiating history is not relevant, see supra, and thus identical language should be interpreted identically. Additionally, with regard to the World War II peace treaties with defeated Axis powers, the "one-sided waiver of claims" (Opp'n at 63) is based on the same "negotiating" history, i.e. victory over the Axis powers, and the treaties with Hungary, Italy, Romania, and Bulgaria were even signed on the same day.

[57] See also Hijo v. United States, 194 U.S. 315, 323-24 (1904) (treaty ending Spanish-American war barred claim based on seizure of non-belligerent merchant ship after cessation of hostilities).

of the exercise of belligerent rights are only two subcategories on a non-exhaustive list of claims that fall within the broad category of "all claims of any description" that are extinguished by the Treaty. Plaintiffs cannot deny that their claims fall into another subcategory on that list, as the claims are based on "acts of forces or authorities" of the United States; the securing and handling of the Gold Train property was done by United States forces and the decision to provide the property to the IGCR for the benefit of refugees was made by United States authorities.

Because the treaty text is clear, Plaintiffs' non-textual arguments, (Opp'n at 63-66), are inapposite. See Duarte-Acero, 208 F.3d at 1285. Even if they were relevant, however, they would not support Plaintiffs' position. Plaintiffs suggest that the phrase "Hungarian nationals" should be read to exclude Hungarian Jews because the "Jews of Hungary were not enemies of the Allied Powers." (Opp'n at 63.) This anti-textual reading is wrong for numerous reasons. For one, an individual's personal views or even actions during a war do not affect his or her status under laws relating to war; nationality is what is relevant.[58] Additionally, the purpose of a claims waiver provision is not, as Plaintiffs imply, to punish the defeated nation. Rather, it is to protect the Allies, "to free the United States from any claim resulting from the war and/or occupation," Neri v. United States, 102 F. Supp. 718, 720 (S.D.N.Y. 1951), and to create a state of repose.[59] And third, Plaintiffs no longer contend that the United States' fault was failure to return the Gold Train property to individual owners. They now contend that the United States breached an alleged duty to return the

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[58] E.g., Exec. Order 8785, § 5E (June 14, 1941); Herrera v. United States, 222 U.S. 558, 569 (1912); United States v. Pac. R.R. Co., 120 U.S. 227, 233 (1887); The Rapid, 12 U.S. (8 Cranch) 155, 161 (1814).

[59] The Allies' desire to create a state of repose in which the battles of the time period would not be re-fought in civil suits is demonstrated by Article 30.4 of the Treaty of Peace in which "Hungary waives on its own behalf and on behalf Hungarian nationals all claims against Germany and German nationals outstanding on May 8, 1945, [including] all claims for loss or damage arising during the war." (Emphasis supplied). Obviously, the extinguishment of Hungarian claims against Germany was based neither on military victory nor relative moral fault, but on a desire to eliminate litigation (other than criminal litigation for war crimes) over the acts of militaries.

property to Hungary. As such, they are asserting claims that are derivative of Hungary's alleged right to receive the property, and Hungary's rights were extinguished.

Plaintiffs next contend that applying the plain meaning of Article 32.1 would render Article 27 of the treaty a "cruel nullity." (Opp'n at 64.) This is incorrect. Article 27 provides:

> Hungary undertakes that in all cases where the property, legal rights or interests in Hungary of persons under Hungarian jurisdiction have, since September 1, 1939, been the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons, the said property, legal rights and interests shall be restored together with their accessories or, if restoration is impossible, that fair compensation shall be made therefor.

Treaty of Peace Art. 27.1. Contrary to Plaintiffs' suggestion, Article 27 is complimentary with the claims waiver provision of Article 32. Article 27 required Hungary to make restitution to all of those who, like Plaintiffs, had property stolen during the war because they are Jewish. As the Treaty extinguishes claims against the Allies in Article 32, it provides, in Article 27, a legal right to compensation for all Hungarian Jews (and Jews from occupied areas) by Hungary, the perpetrator of the despoliation.[60] Notably, Hungary's obligation to make "fair compensation" for property stolen exists even if Hungary cannot restore the actual property. Thus, victims of the pro-Nazi Hungarian regime should have been made whole for the thefts by the thief (or, more accurately, its successor).

Plaintiffs claim that Article 20 of the Treaty of Peace supports their contention. In fact, the language they quote is (1) from Article 30, (2) taken out of context, and (3) irrelevant. The clause actually states that "[i]dentifiable property of Hungary and of Hungarian nationals removed by force or duress from Hungarian territory to Germany by German forces or authorities after January 20, 1945, shall be eligible for restitution." Treaty of Peace Art. 30.2. The Gold Train and its contents are not covered by this provision as they were removed by Hungarian, not German, forces to Austria,

[60] As the State Department concluded in 1965: "Hungary waived all claims for the restitution of property by the United States in the peace treaty. If any obligation exists, either moral or legal, it rests upon the forces or authorities who took the property from Hungary." (Opening Mem. Ex. 11.)

not Germany, where they were surrendered to the Army (and the Hungarian forces had rendered the property's ownership unidentifiable).[61]

Finally, Plaintiffs' contention that "neither U.S. nor Hungarian officials at the time the treaty was in the process of adoption thought that it controlled the pending restitution discussions or claims," Pl. Br. at 64-66, is similarly irrelevant. The United States is not contending that Article 32 of the Treaty of Peace prevented the United States from providing the Gold Train property to Hungary or determined what property was eligible for restitution. Rather, Article 32 protects the United States from civil liability to the extent it made any errors in the process of handling the Gold Train property or making decisions about it. Civil liability for such handling and decisions is "extinguished" by the Treaty. Treaty of Peace Art. 32.2.

2. The 1973 Settlement Agreement Bars Plaintiffs' Claims

While the Treaty of Peace barred initial liability for the claims Plaintiffs now assert, even if such liability had existed, it would have been extinguished by settlement by the 1973 Agreement between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, 24 U.S.T. 522. (See Opening Mem. at 49-50.) Despite Plaintiffs' strained reading of the 1973 Agreement, the text of that Agreement makes clear that Hungary settled all claims for "Hungarian property lost as a result of World War II." 1973 Agreement, at Art. 6. It is clear that the Gold Train property was property lost as a result of World War II. See supra. Moreover, for purposes of the 1973 Agreement, Plaintiffs' nationalities are not relevant. Because the Plaintiffs are asserting that the United States should have returned the Gold

[61] Moreover, the next provision of the Treaty states that "[t]he restoration and restitution of Hungarian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany," Treaty of Peace Art. 30.3, demonstrating that even in the case of property taken by Germany, it was the occupying Allies who were given the authority to determine which property to restitute.

Train property to Hungary, they are asserting Hungary's claims which, if they ever existed, were explicitly settled by the 1973 Agreement.

C. This Court Properly Dismissed Plaintiffs' Takings Claim with Prejudice

Plaintiffs have raised their Takings cause of action for the third time. This Court correctly dismissed this claim with prejudice more than two years ago, see Rosner I, 231 F. Supp. 2d at 1212-13 (holding that Plaintiffs' Takings claim was legally deficient), and then denied Plaintiffs' motion for reconsideration, see Rosner v. United States, No. 01-1859-CIV, 2002 WL 3195442, at *1-*3 (S.D. Fla. Nov. 25, 2002) ("Rosner II") (addressing Plaintiffs' reconsideration motion which "reargue[d] many of the points dismissed" in the Court's earlier opinion and finding that Plaintiffs could not assert a Takings claim and that "discovery related to this claim would be pointless"). Plaintiffs nevertheless believe that they can reassert this claim again. (See Opp'n at 69-71.) "This, of course, flies in the face of the plain words of the order, which dismisses [the claim] with prejudice." Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan, __ F.3d __, 2004 WL 1770467, at *11 (7th Cir. Aug. 9, 2004) (emphasis in original). Plaintiffs' position that they may continually reassert a claim that has been dismissed with prejudice conflates "dismissal with prejudice" and "dismissal without prejudice" and threatens re-litigation of the same issues.

The arguments raised by Plaintiffs here are as meritless as their predecessors. The "new" facts Plaintiffs allege have no bearing on the validity of their claims. The fact that the United States undertook to protect persecuted Jews in Europe (hardly a new fact) "does not indicate Plaintiffs' voluntary association with the United States." Rosner II, 2002 WL 3195442, at *2. The fact that the United States allegedly asserted in 1947 that it would not return the property that it allegedly "took" does not change the date of the alleged taking any more than Plaintiffs' rejected argument that their claims accrued in 1999. Id. at *3. And the presence of Plaintiffs Edith Amster, Jonas Stern,

and David Mermelstein (the latter whose connections with the United States at the relevant time were found to be inadequate in Rosner I, see 231 F. Supp. 2d at 1214) does not save the claim. Neither Mrs. Amster nor Mr. Stern can identify any property that was on the Gold Train, (see Amster Dep. at 18-19 [attached at Ex. 22]; Stern Dep. at 84 [attached at Ex. 22]), and Mr. Stern is not even the heir to the property taken from his grandparents and great-uncle by the Hungarian Nazis, (see Opening Mem. at 50 n.37).[62] Mr. Mermelstein came to the United States in 1947, (see Mermelstein Dep. at 18 [attached at Ex. 22]), after the United States took possession of the Gold Train.

Additionally, the legal landscape relevant to Plaintiffs' Takings claim has not changed. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." Zadvydas v. Davis, 533 U.S. 678, 693 (2001). Accordingly, "[t]he Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004). Accord Rosner I, 231 F. Supp. 2d at 1212-14 (citing cases); Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.2d 1412, 1428-29 (11th Cir. 1995) (aliens outside the U.S. have "no First Amendment or Fifth Amendment rights which they can assert").

Plaintiffs now contend that fifty years of settled case law has been impliedly overruled by the Supreme Court's recent opinion in Rasul v. Bush, 124 S. Ct. 2686 (2004). This contention is flatly wrong. Rasul interpreted a statute, which is not at issue here, and expressly did not overrule the holding in Johnson v. Eisentrager, 339 U.S. 763, 783-85 (1950), that constitutional rights, including Fifth Amendment rights, do not obtain for aliens who do not have a substantial voluntary connection with the United States.

[62] Contrary to Plaintiffs' assertion on page 70 n.119 of their brief, Mr. Stern did not testify that he was the legal heir to the property lost by his relatives, nor could he as his mother is still alive.

The Court in Rasul repeatedly emphasized that its decision that aliens held at the U.S. Naval Base at Guantanamo Bay had a right to seek habeas corpus review was based on an interpretation of the habeas statute, 28 U.S.C. § 2241, and not on a reading of the Constitution. The question framed by the Court was "whether the habeas statute confers a right to judicial review" for aliens detained in Guantanamo Bay. 124 S. Ct. at 2693 (emphasis supplied). The Court held "that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." Id. at 2698. The Court distinguished Johnson v. Eisentrager on the grounds that Eisentrager dealt with the "question of the prisoners' constitutional entitlement to habeas corpus" and "had far less to say on the question of petitioners' statutory entitlement to habeas review." Id. at 2693-94 (emphases in original).[63]

Accordingly, the Rasul Court made no effort to revisit Johnson v. Eisentrager's specific rejection of extraterritorial application of the Fifth Amendment, see Eisentrager, 339 U.S. at 785, much less overrule numerous subsequent cases such as those cited above and in Rosner I.[64] Rasul casts no doubt on the established rule that non-citizens who do not have a substantial voluntary connection to the United States may not assert rights under the Constitution.[65]

[63] Accord id. at 2694 (Eisentrager "devoted . . . little attention to question[s] of statutory jurisdiction"); id. at 2694 n.8 (the Eisentrager Court "clearly understood the Court of Appeals' decision to rest on constitutional and not statutory grounds").

[64] Of course, district and circuit courts cannot engage in anticipatory overruling of Supreme Court precedents, see, e.g., State Oil Co. v. Khan, 522 U.S. 3, 20 (1997), and the constitutional holdings of Eisentrager, Zadvydas, and United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) remain good law.

[65] Plaintiffs' quotation of Rasul addresses the point that non-resident aliens are not categorically barred from bringing suit in U.S. courts (see Opp'n at 70-71), a point that has never been disputed in this case and which has no bearing on what substantive legal rights non-resident aliens possess. Indeed, the text highlighted by Plaintiffs, see id., states no new law; it is from Disconto Gessellschaft v. Umbreit, 208 U.S. 570 (1908), a case nearly a century old which received a "cf" cite in Rasul.

Plaintiffs' Takings Claim was properly dismissed. "To hold otherwise would be to invite constitutional claims against the United States government from all over the world, and hence, start a path down a very slippery slope." Rosner I, 231 F. Supp. 2d at 1213.

D. The Claim for Breach of Implied-In-Fact Contract Cannot Succeed

The government recognizes that, as Plaintiffs emphasize, the Court stated in its ruling on the motion to dismiss the original complaint that a decision on Plaintiffs' contract claim was better left for summary judgment. Rosner, 231 F. Supp.2d at 1215. However, the First Amended Complaint's elucidation of Plaintiffs' theory of contract liability reveals that the claim cannot succeed, regardless of any further factual development.

It defies common sense that representatives of the pro-Nazi Axis Hungarian government would have entered into a contract to benefit the Jews from whom that same government stole the property in the first place, as the First Amended Complaint asserts, (Am. Compl. ¶¶ 502-09). Likewise implausible is Plaintiffs' assertion that the U.S. Army officers who seized the Gold Train would have had authority to make and would have made contractual promises on behalf of the United States with representatives of an enemy government who were stranded in U.S. occupied territory. Allowing Plaintiffs' claim to proceed would result only in wasted resources, the Court's and the parties'. The claim should be dismissed now.

E. Plaintiffs' International Law Count Fails To State a Claim

1. Rasul v. Bush Has No Bearing on Plaintiffs' International Law Cause of Action

Plaintiffs' discussion of Rasul v. Bush, (Opp'n at 33-34), is both incorrect and irrelevant. As noted above, supra at 62-63, Rasul v. Bush interpreted a specific statute, 28 U.S.C. § 2241, and found that it provided habeas corpus jurisdiction in that case. That statute is not relevant here. Instead, as is established, this Court does not have jurisdiction over Plaintiffs' international law

claims because there is no waiver of the United States' sovereign immunity for these types of claims. See Rosner I, 231 F. Supp. 2d at 1210 (Alien Tort Statute does not waive sovereign immunity); id. at 1210-11 (Tucker Act does not waive sovereign immunity for international law claims); Opening Mem. at 38-39 (APA does not waive sovereign immunity for Plaintiffs' international law claim).

2. Sosa v. Alvarez-Machain Confirms that Plaintiffs' International Law Count Fails To State a Claim upon which Relief May Be Granted

The Supreme Court's decision in Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), upon which plaintiffs now rely, in fact provides further support for the conclusion that plaintiffs' claims must be dismissed. Plaintiffs invoke that part of the Sosa opinion that construed the Alien Tort Statute, 28 U.S.C. § 1350. That part of the opinion, however, is irrelevant here because, as the Supreme Court has held, and this court has recognized, the ATS does not overcome the sovereign immunity that generally bars claims against the United States or foreign governments.[66] See Argentine Republic v. Amerada Hess, 488 U.S. 428 (1989) (ATS does not abrogate foreign states' sovereign immunity); Rosner I, 231 F. Supp. 2d at 1210. (ATS does not waive United States' sovereign immunity).[67] Nor does Sosa's discussion of what international law violations are cognizable under the ATS's specific grant of jurisdiction have broader implications for the law enforceable under more general grants of jurisdiction that make no reference to customary

[66] Additionally, only an alien may bring a claim under the jurisdictional provisions of 28 U.S.C. § 1350, Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995), and thus – even if the ATS constituted a waiver of the United States' sovereign immunity, which it does not – the claims of the majority of Plaintiffs who were U.S. citizens at the time this suit was filed would still be deficient. Ungaro-Benages v. Dresdner Bank AG, __ F.3d __, 2004 WL 1725591, at *3 n.7 (11th Cir. Aug. 3, 2004).

[67] This construction of the ATS as providing jurisdiction over claims against individuals only is consistent with Congress's decision, when enacting the Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (Mar. 12, 1992) (codified as a note to 28 U.S.C. § 1350) , to make the international law norm against torture enforceable only against individuals while specifically precluding suits against governments. See S. Rep. No. 102-249, at 7 (1991) (TVPA "uses the term 'individual' to make crystal clear that foreign states of their entities cannot be sued under this bill under any circumstances: only individuals may be sued."); H.R. Rep. No. 102-367, at 4 (1991) ("Only 'individuals,' not foreign states, can be sued under the bill.").

international law. See Sosa, 124 S. Ct. at 2765 n.19 (clarifying that the decision is limited to courts' jurisdiction under the ATS and emphasizing that its holding "does not . . . imply that every grant of jurisdiction . . . carries with it an opportunity to develop common law"). Moreover, to the extent plaintiffs seek, in order to benefit from Sosa's ATS holding, to characterize their claims as "torts," it is Sosa's other holding, construing the Federal Tort Claims Act, that is most relevant and, indeed, fatal to those claims. The exclusive avenue for bringing a tort claim against the United States is the FTCA. 28 U.S.C. § 2679; Bieregu v. Ashcroft, 259 F. Supp. 2d 342, 352 (D.N.J. 2003). As the first half of the Sosa opinion makes perfectly clear, the FTCA does not waive the United States' immunity with respect to torts that accrued outside the United States. Sosa, 124 S. Ct. at 2754; see also 28 U.S.C. § 2680(k). Thus, far from supporting jurisdiction over plaintiffs' tort claims for violation of international law, Sosa affirmatively forecloses those claims.

As described, Sosa reinforces the Eleventh Circuit's holding that an individual may not assert claims based on customary international law against the United States for conduct that occurred outside the United States.[68] (See Opening Mem. at 53-54 (quoting Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1511 (11th Cir. 1992)).) This is particularly important here where Plaintiffs challenge decisions regarding the deployment of military resources and relations between the United States and Hungary. As the Sosa court stated, "the potential implications for the foreign relations of the United States of recognizing such causes [of action for violation of international law] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." Id. at 2763.

[68] Plaintiffs' Opposition does not dispute the clearly established point that the Hague Convention does not provide a private right of action. (See Opening Mem. at 53.)

Plaintiffs' claim for breach of customary international law should be dismissed.[69]

F. Plaintiffs' Illegal Exaction Count Fails To State a Claim

Plaintiffs' illegal exaction claim is "that the Government retained their property in violation of the law based on the Constitution (due process and takings), Decree No. 3 and other policies and law in effect in occupied Austria."[70] (Opp'n at 33.)

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[69] Plaintiffs' international law claim fails for the separate and additional reason that their Amended Complaint does not identify a sufficiently definite and universally accepted obligatory norm of customary international law that allegedly has been violated. See Sosa, 124 S. Ct. at 2765; Villeda Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1292 (S.D. Fla. 2003).

The cases cited by Plaintiffs do not establish such a rule of customary international law. Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981), dealt with the far different area of expropriation by a government of real property within its borders. The court discussed the concepts (unrelated to this case) of "Permanent Sovereignty over Natural Resources" and "the right to nationalization [as] an expression of the full permanent sovereignty of the State," and determined that international documents "present[ ] at best a confused and confusing picture as to what the consensus may be as to the responsibilities of an expropriating nation to pay 'appropriate compensation,' and just what that term may mean." Id. at 890-91; see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("There are few issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."). In West v. MultiBanco Comermex, S.A., 807 F.2d 820, 831-32 (9th Cir. 1987), the court found that government action taking dollar denominated accounts and replacing them with pesos at an artificially imposed exchange rate did not violate international law. In Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 426 (6th Cir. 1984), the plaintiff sued based on a treaty (i.e., not customary international law) requiring compensation for expropriation. Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983), is a Fifth Amendment Takings Clause (i.e., not customary international law) case in which the court found that the United States' settlement of the plaintiff's claim against a foreign country did not violate the Takings Clause. Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795), was based on a treaty, not customary international law, and Republica v. De Longchamps, 1 U.S. 111, 116 (1784) was a criminal case (resulting in a fine and imprisonment) based on an attack on a diplomat.

Finally, Plaintiffs' citation to the United States' Brief in the Portrait of Wally case, (see Opp'n at 37), does not support their position for numerous reasons. First, the United States' Wally brief states a rule against the seizure of property by combatants from civilians during wartime. The Gold Train was taken from members of the Axis Hungarian army, an enemy of the United States, i.e., a combatant, thus, making this rule entirely inapplicable. Second, this rule is derived from "treat[ies] and other unambiguous agreement[s]" not from customary international law. Sosa makes clear that treaties, such as the Hague Conventions, that are not "self-executing" cannot support a customary international law cause of action. 124 S. Ct. at 2767. Third, the rule stated in the Wally brief does not provide a substantive cause of action but rather prevents application of the act of state doctrine, a doctrine that is inapplicable here (see Opening Mem. at 54 n.42).

[70] Plaintiffs cannot assert an illegal exaction claim based on the Fifth Amendment's Takings Clause. "Takings and illegal exaction claims are conceptually distinct. Takings claims arise because of a deprivation of property that is authorized by law. . . . Illegal exactions arise when the government requires payment in

Plaintiffs' claim for illegal exaction due to a violation of the Fifth Amendment's Due Process Clause, even if otherwise viable, must be dismissed for the same reasons this Court dismissed Plaintiffs' Fifth Amendment Takings Clause claim: Plaintiffs lack the substantial connections to the United States necessary to assert Constitutional claims against the United States for its seizure and disposition of the Gold Train property. Rosner I, 231 F. Supp. at 1212-14 (dismissing Fifth Amendment Takings Claim with prejudice). For the reasons stated above, supra at 60, Plaintiffs' arguments in support of their request that the Court reconsider its dismissal of their Takings Clause claim plainly are equally unavailing to save their illegal exaction claim based on the Fifth Amendment's Due Process Claim.

Plaintiffs' claim for illegal exaction based on an alleged violation of Decree No. 3 is also baseless. First, as is evident on the face of the Decree, it primarily concerns seizure of property, which is not the conduct Plaintiffs challenge in this lawsuit. (See Decree No. 3 [Opp'n, Ex. 18].) ("All property within the occupied territory of Austria . . . is hereby declared subject to seizure or possession of title . . or otherwise being taken into control by Military Government.") It does not address restitution policy, which Plaintiffs are challenging with their illegal exaction claim.[71] Second, Decree No. 3 — which is simply an announcement to the civilian population of Austria of the U.S. Forces Austria's policies — is neither an executive regulation necessary to invoke this

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violation of the Constitution, a statute, or a regulation." Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed Cl. 284 (2000) (citing Dureiko v. United States, 209 F.3d 1345, 1359 (Fed.Cir. 2000) (takings); Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-1008 (Fed Cir. 1967) (illegal exaction).

[71] Plaintiffs also misconstrue the brief filed by the United States in the Portrait of Wally matter, (Opp'n Ex. 17],) which does not state that Decree No. 3 governs restitution of property to the country of origin. Rather, the government's brief states the general rule that "under [unspecified] military policies and decrees in effect in post-war Austria," property, including the particular painting that is the subject of the lawsuit and which was identifiable both as to owner and national origin, was returned to the country of origin." (See Portrait of Wally Memorandum, 9 [Opp'n Ex. 17]). While the government's brief does not identify the applicable military decrees and policies it references, it does not rely on Decree No. 3 for this statement. Nor could it, as Decree No. 3 does not address restitution policy.

Court's jurisdiction under the Little Tucker Act, nor can it "fairly be interpreted as mandating compensation" for the damage sustained. White Mountain, 537 U.S. at 472.

G. Plaintiffs' Count for Violation of Executive Regulations or Military Rules Fails To State a Claim

As discussed in the United States' Motion at 58-59, Plaintiffs' cause of action for alleged violation of executive regulations or military rules fails to state a claim for two independent reasons. First, the manuals cited by Plaintiffs do not have the force of law and cannot support a cause of action. And second, even military regulations that have the force of law do not support a cause of action by third parties, *i.e.* persons other than the military personnel whose employment rights and duties are governed by the regulations. Plaintiffs' Opposition provides no refutation of either of these bases for dismissal.

As to the first point, the manuals themselves state that they are guides and not binding law. (See Opening Mem. at 39-40, 58.) Such guides do not support a cause of action. See id. (citing Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979) and Schweiker v. Hansen, 450 U.S. 785, 789 (1981)). In response to this point, Plaintiffs cite only Morrison v. United States, 492 F.2d 1219, 1225 & n.8 (Ct. Cl. 1974), for the supposed proposition that the Army Field Manual "contains substantive law." (Opp'n at 52 n.96.) However, the very footnote of Morrison cited by Plaintiffs states that "those provisions of the [Field] Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war." Morrison, 492 F.2d at 1225 n.8 (quoting Army Field Manual 27-10 (July 1956)) (emphasis supplied); see also id. at 1225 ("The purpose of the manual is to provide authoritative guidance to military personnel."). Thus, Morrison, like the authority cited by the

United States, clearly shows that the Army Field Manual is a guide for military personnel and does not itself create binding law.[72] As such, the Field Manual cannot support a private cause of action.[73]

As to the second point, the United States' Motion demonstrates that third parties cannot sue based on alleged violations of military regulations even where those regulations constitute binding law. See Opening Mem. at 58-59 (citing Dreyfus v. Von Finck, 534 F.2d 24, 28-29 (2d Cir. 1976), Tiffany v. United States, 931 F.2d 271, 280-81 (4th Cir. 1991), and Gammill v. United States, 727 F.2d 950, 953 n.4 (10th Cir. 1984)). The six Vietnam War era cases cited by Plaintiffs are not to the contrary. (Opp'n at 51.) Each of these cases involves a suit by a military service member for writ of habeas corpus or mandamus, or for declaratory judgment regarding his service.[74] None of these

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[72] Paragraphs 323, 326, 331, and 345 of the Army Field Manual paraphrase provisions of the Fourth Hague Convention and its Annex. (See Ex. 7.) It is settled law that the Hague Convention does not provide a private right of action. (See Opening Mem. at 53.) Moreover, these paragraphs discuss the seizure of property from private citizens under U.S. occupation, not the seizure of property from an enemy belligerent such as the Axis Hungarian military, making them inapposite to this case.

[73] Plaintiffs do not challenge the United States' assertion that the Provisional Handbook does not create binding law. (See Opening Mem. at 39, 58.) This handbook includes Decree Number 3 cited by Plaintiffs. (See Ex. 6.) Like the rest of the Provisional Handbook, Decree Number 3 provides only guidance and direction to military personnel in the performance of their duties. (Id.)

[74] See Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970) (enlisted man sought habeas corpus or mandamus to get hardship discharge from army); Van Bourg v. Nitze, 388 F.2d 557 (D.C. Cir. 1967) (discharged naval officer sought declaratory judgment action to change nature of discharge); Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970) (army officer sought mandamus to get temporary deferment); Nixon v. Secretary of the Navy, 422 F.2d 934 (2d Cir. 1970) (Navy enlisted man denied declaratory judgment and mandamus to cancel enlistment extension agreement); Schatten v. United States, 419 F.2d 187 (6th Cir. 1969) (marine sought habeas corpus relief claiming that marines' retention of him violated statute); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969) (military reservist sought writ of habeas corpus to prevent his call to active duty and appellate court recommended treating case as mandamus proceeding).

Even in military employment cases, "judicial review is only appropriate where the Secretary's discretion is limited and Congress has established tests and standards against which the court can measure his conduct," Murphy v. United States, 993 F.2d 871, 873 (Fed. Cir. 1993), and a court may only review the decision-making procedures and not the merits of the actual decision, Adkins, 68 F.3d at 1323 ("[A]lthough the merits of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular procedure followed in rendering a military decision may present a judicial controversy.") (emphases in original). If the decision-making procedure is found to violate a statute or properly promulgated regulation, the issue is remanded to the military and the military is required to make the decision again following the proper procedure. Id. at 1327.

cases supports a private right of action for damages or injunctive relief by a third party. Plaintiffs' fifth cause of action should be dismissed.

CONCLUSION

For the foregoing reasons, and those in the Opening Memorandum, the First Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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DATED: August 31, 2004

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2004, true and correct copies of DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT were transmitted electronically and mailed, first class, postage prepaid, to:

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