No. 11-2386

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HOLOCAUST VICTIMS OF BANK THEFT,
Plaintiffs - Appellees

v.

MKB BANK ZRT, sued as
MKB BAYERISCHE LANDESBANK et al.,
Defendant - Appellant

On Appeal from an Order of the
United States District Court for the Northern District of Illinois
Docket No. 1:10-cv-01884

The Honorable Samuel Der-Yeghiyan

APPELLANT'S JURISDICTIONAL MEMORANDUM

Marc R. Cohen
MAYER BROWN INTERNATIONAL LLP
201 Bishopsgate
London EC2m 3AF
United Kingdom
+44 (20) 3130-3000

Tyrone C. Fahner
Counsel of Record
Michele L. Odorizzi
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, Illinois 60606
(312) 701-0600

Mark G. Hanchet
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
(212) 506-2380

Charles A. Rothfeld
Paul W. Hughes
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Attorneys for Defendant-Appellant MKB Bank Zrt.

July 1, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Defendant-appellant MKB Bank Zrt. (sued as "MKB Bayerische Landesbank") ("MKB") files this memorandum in response to the Court's order of June 21, 2011, directing MKB to show "why this appeal should not be dismissed for lack of jurisdiction."

This case is a purported class action against certain banks that do business in Hungary, including MKB, a German-owned bank with operations in Hungary. Plaintiffs assert claims of genocide and unlawful takings during World War II – claims that arose more than six decades ago. The defendants moved to dismiss the claims on a number of grounds. In addition, the United States submitted a Statement of Interest to the district court, declaring that dismissal of the claims against MKB "would be in the foreign policy interest of the United States." *See* Dkt. #151. But the district court denied the motion to dismiss, simply ignoring the submission of the U.S. government. MKB then took this appeal.

Although final judgment has not yet been entered below, this Court has jurisdiction over MKB's appeal for two reasons. *First*, the collateral order doctrine gives the Court jurisdiction to entertain an appeal from the district court's refusal to dismiss an action, maintenance of which would interfere with the foreign policy interests of the United States. That is the case here. As the Government explained below, continuation of this suit would interfere with the very purpose of the German Foundation, a fund created by Germany at the urging of the United States both to provide remedies for victims of the Holocaust and to bring legal peace for German

companies. When litigation will have such a disruptive effect on U.S. foreign policy goals, and when the United States seeks dismissal of the suit for that reason, denial of a motion to dismiss is a collateral order that is subject to immediate appeal. Indeed, the Government has taken precisely that position before the Supreme Court and other courts of appeals.

Second, this Court can, and should, exercise pendent appellate jurisdiction here. One of MKB's codefendants – defendant Magyar Nemzeti Bank ("MNB") – is a state-owned institution that has taken an appeal from the district court's decision to assert its sovereign immunity. *See* No. 11-2345. There is no doubt that this Court has jurisdiction to reach the merits of that appeal. *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 789 (7th Cir. 2011) (holding that foreign sovereign immunity decisions are immediately appealable). Because MKB's appeal is intertwined with MNB's, with MKB presenting arguments that in certain respects are identical to those advanced by MNB, this Court may exercise pendent appellate jurisdiction over MKB's appeal.

The Court thus possesses jurisdiction to entertain this appeal. If there is any doubt on the question, however, principles of sound judicial management suggest that the Court should consolidate this appeal with that of MNB and then defer a decision with respect to jurisdiction over MKB's appeal for consideration along with the merits, a step frequently taken by the Court. Such a course is especially appropriate in this case because consideration of the merits will shed considerable light on the theories of interlocutory appellate jurisdiction advanced by MKB.

BACKGROUND

A. The Allegations Against Banks Operating In Hungary.

This case is a massive purported class action against banks (or their alleged predecessors) that were in business during World War II in Hungary. Plaintiffs initially filed this action on March 25, 2010, and then filed a Corrected First Amended Complaint ("CFAC") on January 20, 2011. *See* Dkt. #99.

Plaintiffs, who collectively call themselves the "Holocaust Victims of Bank Theft," seek to represent "[a]ll persons of Jewish descent, and heirs and assigns of such persons, who had deposited funds or assets into Defendants [sic] banks and/or their predecessors prior to 1945 and have been unable to access or withdraw those funds or assets." CFAC ¶ 108. Plaintiffs seek an award of $2 billion dollars, plus interest compounded annually since 1944. *Id.* at 44. In all, they demand $75 billion. Dkt. #31 ¶ 2.

After dismissing one defendant voluntarily, plaintiffs assert claims against four banks: MKB, MNB, Erste Group Bank ("Erste"), and OTP Bank ("OTP"). *See* Dkt. #158. MNB is the national bank of Hungary, and thus is a foreign sovereign instrumentality as defined by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602. OTP, a Hungarian bank, is headquartered in Budapest. Erste is an Austrian bank, with operations in Hungary. And MKB is majority owned by Bayerische Landesbank – a German entity.

Plaintiffs assert six claims: genocide, aiding and abetting genocide, bailment, conversion, constructive trust, and accounting. They allege subject-matter jurisdiction against defendants through a hodge-podge of theories. Against MNB, the sove-

reign bank, plaintiffs assert a taking of property in violation of international law, which is cognizable in a U.S. court against a sovereign under an exception to the FSIA. Against all defendants, the foreign plaintiffs assert subject matter jurisdiction pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. The domestic plaintiffs argue that federal common law incorporates customary international law, that the banks violated that law, and thus that subject matter jurisdiction exists under 28 U.S.C. § 1331. Plaintiffs also seek to add state-law claims via supplemental jurisdiction under 28 U.S.C. § 1367.

B. The German Foundation.

Although plaintiffs assert their claims in a U.S. court, it is the position of the United States that the German Foundation, which was jointly conceived of and implemented by the U.S. and German governments to provide redress for victims of Nazi-era Germany, should "'be the exclusive remedy and forum' for all Holocaust-era claims against German companies." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 406 n.2 (2003). The Foundation was capitalized by the German government and German companies with 10 billion German Marks (valued in September 2003 at $5.7 billion). The Foundation is "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." Art. 1(1), Agreement concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G., 39 I.L.M. 1298 ("German Foundation Agreement"). *See generally Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1231-32 (11th Cir. 2004) (discussing the German Foundation).

The German Parliament enacted legislation establishing the Foundation in July 2000. At the same time, the United States and Germany signed an Executive Agreement relating to the Foundation. Under this agreement, "to foster all-embracing and enduring legal peace," the U.S. government committed to "inform its courts through a Statement of Interest * * * that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies [as defined by the agreement] and that dismissal of such cases would be in its foreign policy interest." Arts. 2(1) & 3.1, German Foundation Agreement.

C. The Statement of Interest of the United States.

Pursuant to its obligations arising under the German Foundation Agreement, the United States filed just such a Statement of Interest before the district court in this case, urging the court to dismiss the claims against MKB (as well as Erste). *See* Statement of Interest of the United States of America, Dkt. #151. The United States declared that, although MKB is Hungarian, it "qualifies as a 'German company' as defined by" the relevant Executive Agreement "because MKB Bank was during the relevant time period (and still is) more than 25% owned by a German parent company (Bayerische Landesbank)." *Id*. at 16. As a consequence, the Government stated that "[t]he maintenance of the suit against MKB Bank thus runs counter to the German Foundation Agreement's goal of 'legal peace' and to United States foreign policy interests." *Id*. The Government concluded that "dismissal of the claims against * * * MKB Bank in this action would be in the foreign policy interest of the United States." *Id*. at 17 (capitalization omitted).

As the Government explained below, "[t]here are at least four reasons why * * * the President of the United States concluded that it would be in the United States' foreign policy interests for the [German Foundation] to be the exclusive forum and remedy for all Nazi-era property claims against German * * * companies." U.S. Statement of Interest at 18.

- "First, it is an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era (who are elderly and are dying at an accelerated rate) in their lifetimes" and "the United States believes the best way to accomplish this goal is through negotiation and cooperation." *Id.*
- "Second, establishment of * * * the German Fund served to strengthen the ties between the United States and our democratic alli[e]s and trading partners, Austria and Germany." *Id.* at 19.
- "Third, the German Foundation * * * furthered the United States' interest in maintaining good relations with Israel and with Western, Central, and Eastern European nations, from which many of those who suffered during the Nazi era and World War II come." *Id.* at 21.
- "And, fourth, the German Foundation * * * [is] the fulfillment of a half-century effort to complete the task of bringing a measure of justice to victims of the Nazi era." *Id.*

The Government determined that "[t]hese United States foreign policy interests are enduring and apply to this litigation." *Id.* Accordingly, although the United States

"takes no position on the underlying legal merits of the claims and defenses advanced by the parties in this case, it would be in the foreign policy interests of the United States for the claims against * * * MKB Bank to be dismissed on any valid legal ground(s)." *Id*. at 22. The Government thus requested dismissal of this suit to further "United States foreign policy interests." *Id*. at 23.

D. Proceedings Below.

Notwithstanding the Government's submission, the district court rejected all defendants' motions to dismiss, failing even to mention the existence of the Government's statement of interest, let alone the Government's view that dismissal would further the foreign policy interests of the United States. Dkt. #176 ("Op."). The arguments for dismissal rejected by the district court included:

Subject matter jurisdiction. With respect to subject matter jurisdiction, the court declined to follow *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *petition for cert. filed* (U.S. June 6, 2011) (No. 10-1491, 10A1006), which held that corporations are not subject to liability under customary international law. If *Kiobel* is correct, there would be no federal jurisdiction over any of plaintiffs' claims. The court also did not so much as consider the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States" (*Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quotation omitted)) and even asserted a contrary rule.

Statute of limitations. The court also declined to adjudicate questions regarding the statute of limitations, finding that plaintiffs "have not pled facts that estab-

lish that their claims are untimely" and that "there are factual issues regarding potential tolling under the equitable tolling doctrines that cannot be assessed at the pleading stage." Op. at 10. The court offered no basis to believe that claims arising more than six decades ago and known to plaintiffs at that time could be timely.

Political question doctrine. The court rejected the argument that foreign policy considerations required dismissal of the suit under the political question doctrine, reasoning that the applicability of the doctrine "raises factual issues not properly adjudicated at the motion to dismiss stage of the proceedings." Op. at 11. In doing so, the court did not address decisions holding that such questions are properly dealt with via a motion to dismiss. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979-80 (9th Cir. 2007); *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005).

Personal jurisdiction. The court rejected the argument made by both MKB and OTP that it lacked personal jurisdiction over each defendant. Op. at 7-8. Although plaintiffs claimed that the court had general jurisdiction over MKB, they failed to identify *any* contact MKB had with Illinois, let alone the kind of systematic and continuous contacts necessary to conclude that a defendant is generally subject to suit in this State.[1]

Immunity and related arguments. The court rejected the contention that the *forum non conveniens* doctrine favored dismissal of this action in deference to Hungarian courts. Op. at 8-10. The district court likewise rejected MNB's argument that

[1] The district court denied MNB's and OTP's request to certify its entire order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Dkt. #191 & #199. Erste sought reconsideration and, in the alternative, certification, a request that is still pending before the court. Dkt. #206. MKB similarly sought reconsideration and, in the alternative, certification of the personal jurisdiction question, a motion that is also still pending. Dkt. #184.

sovereign immunity barred the claims asserted against it, as well as the argument that the suit challenged a non-justiciable act of state. *Id*. at 12-14.

The defendants brought separate, but related, appeals. As noted above, MNB filed an appeal from the denial of its motion to dismiss under the FSIA, which has been docketed as No. 11-2387. In this appeal, MKB challenges the district court's decision with respect to the political question doctrine, the statute of limitations, and subject matter jurisdiction. OTP has pursued an appeal in No. 11-2353.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

A. Collateral Order Jurisdiction.

This Court has jurisdiction to review "final decisions" pursuant to 28 U.S.C. § 1291. "Although 'final decisions' typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). A decision of the district court is deemed "collateral" and thus subject to immediate appeal where the decision (1) is "conclusive," (2) "resolve[s] important questions separate from the merits," and (3) is "effectively unreviewable on appeal from the final judgment in the underlying action." *Id*. at 605 (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995)).

That test is satisfied here. The United States has declared it "important" to the foreign policy interests of the nation that the claims against MKB be dismissed "on any valid legal ground(s)." U.S. Statement of Interest at 1. The district court's

refusal to dismiss the claims in this case on such grounds manifestly preclude the achievement of "legal peace," may adversely affect relations between the United States and Germany, will interfere with efforts to provide a comprehensive settlement of Nazi-era property claims, and therefore leave a "substantial public interest" "imperil[ed]." *Will v. Hallock*, 546 U.S. 345, 353 (2006). That harm, moreover, cannot be undone after the entry of final judgment because it is the simple fact of continued litigation that *itself* threatens to adversely affect the foreign policy of the United States. In these circumstances, immediate appeal is appropriate.

1. Application of the collateral order doctrine in the circumstances of this case accords with its other traditional uses. As the Supreme Court has explained, collateral order appeal is appropriate where "some particular value of a high order was marshaled in support of the interest in avoiding trial," with examples including the need for "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." *Will*, 546 U.S. at 352-53. The Supreme Court has identified several types of orders that implicate values of this kind, including claims of foreign sovereign immunity (*Republic of Austria v. Altmann,* 541 U.S. 677, 681 (2004)), qualified immunity (*Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)), immunity provided by the Westfall Act (*Osborn v. Haley,* 549 U.S. 225 (2007)), and Presidential immunity (*Nixon v. Fitzgerald*, 457 U.S. 731 (1982)).[2]

[2] Certain constitutional entitlements to be free from the burden of litigation also may be vindicated by interlocutory collateral appeal, such as a non-consenting State's Eleventh

An interlocutory appeal on a dispositive motion in a case the very maintenance of which will imperil foreign policy interests necessarily fits within this framework. The concern here is not a "mere avoidance of a trial" (*Will*, 546 U.S. at 353), but rather the United States' interest in fulfilling its obligations to Germany and in supporting the German Foundation, which will be significantly undercut if trial goes forward. Like the other interests supporting collateral order appeal, the foreign policy values that the United States seeks to preserve through dismissal of the action would be "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526.

2. It therefore is no surprise that the three-part test of the collateral order doctrine is satisfied in cases where a district court order has negative foreign policy consequences, particularly when the United States has requested dismissal of the proceeding. Indeed, in *Rubin*, 637 F.3d at 791, this Court recently recognized that district court decisions that have "foreign-policy implications" present precisely the sort of issue that may be appropriate for collateral order review.

First, the district court's decision in such a case is conclusive. Given its resolution of the motion to dismiss, the parties will be required to enter into discovery and the litigation will proceed, likely for several years. As a result, "there are simply no further steps that can be taken in the District Court" to preserve the relevant interest at stake (*Mitchell*, 472 U.S. at 527 (quotation & alteration omitted)) –

Amendment immunity from suit (*Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-47 (1993), a criminal defendant's right to be free from double jeopardy (*Abney v. United States*, 431 U.S. 651, 660 (1977)), and a Member of Congress's right under the Speech or Debate Clause to be free from certain criminal proceedings (*Helstoski v. Meanor*, 442 U.S. 500, 508 (1979)).

which is, very simply, that there *not be* legal proceedings that undercut U.S. foreign relations.

Second, the order implicates a consideration apart from the merits of the claim – the interest in avoiding interference with U.S. foreign policy. Here, not only is this interest "conceptually distinct from the merits" of the underlying action (*Mitchell*, 472 U.S. at 527-28), but vindication of that interest will primarily benefit the United States, not MKB.[3]

Third, the interest at stake here cannot be protected through an appeal from final judgment. "[T]he decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk*, 130 S. Ct. at 605 (quoting *Will*, 546 U.S. at 352-53). U.S. foreign policy interests surely implicate values of this sort. And those interests would indeed be imperiled by delay: Simply put, "[a]n appeal after judgment would come too late to protect" (*Segni v. Commercial Office of Spain*, 816 F.2d 344, 345 (7th Cir. 1987)) the United States' interest in promoting the integrity of the German Foundation and the legal peace sought by Germany and agreed to by the United States in the Executive Agreement. On that point, the views of the United States expressed in the court below must be given substantial weight "as the

[3] Although in analyzing a collateral issue a reviewing court must sometimes "consider the plaintiff's factual allegations," the underlying issue is still "separate from the merits of the underlying action for purposes of the *Cohen* test." *Mitchell*, 472 U.S. at 528-29. The Court has squarely rejected the contention "any factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability," as that would negate collateral appeals asserting any form of immunity or double jeopardy. *Id.* at 529 n.10. "[T]he fact that an issue is outcome determinative does not mean that it is not 'collateral' for purposes of the *Cohen* test." *Id.*

considered judgment of the Executive on a particular question of foreign policy." *Altmann*, 541 U.S. at 702. *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) ("[T]here is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.").

3. The United States itself has embraced this view of the collateral order doctrine. In an amicus brief before the Supreme Court, the United States argued that "[w]hen the Executive explicitly seeks dismissal because the *pendency* of the litigation will adversely affect foreign relations, a district court's refusal to defer to that determination would satisfy the third prong of the collateral order doctrine." Br. for the United States as Amicus Curiae at 14, *Exxon Mobil Corp. v. Doe*, 554 U.S. 909 (2008) (No. 07-81), 2008 WL 2095734 ("U.S. *Doe* Brief"). This is because, in such cases, "the very import" of a political question defense "will be lost if the suit proceeds to discovery and trial." *Id.*[4]

[4] In *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 349 (D.C. Cir. 2007), the D.C. Circuit had declined to assert collateral order jurisdiction over a motion to dismiss premised on political question grounds. When the would-be appellant sought certiorari, the Supreme Court invited the United States to submit its views. The United States responded that the government had not sought dismissal of the suit and that *Doe* accordingly "did not decide" whether a collateral order appeal lies where, as here, the United States has asked the district court to dismiss an action, citing foreign policy concerns. U.S. *Doe* Br., 2008 WL 2095734, at *15. We note that the D.C. Circuit in *Doe* did appear to deem a "right not to stand trial" a prerequisite to application of the collateral order doctrine. *Doe*, 473 F.3d at 351. If that is the D.C. Circuit's view, however, it cannot be reconciled with decisions of this Court, which have applied the collateral order doctrine where the appellant did not assert a right not to stand trial. *See*, *e.g.*, *Bank of Am., N.A. v. Veluchamy*, 2011 WL 2417102, at *2 (7th Cir. June 16, 2011); *SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 330-31 (7th Cir. 2010); *Gautreaux v. Chicago Housing Auth.*, 491 F.3d 649, 654 (7th Cir. 2007).

The United States reiterated this position in pending litigation in the Second Circuit involving companies that did in business in South Africa. The United States there explained that :

> [W]hen a defendant seeks appellate review of a district court's order denying a motion to dismiss a suit predicated on the adverse consequences on the Nation's foreign relations, the court of appeals has jurisdiction under the collateral order doctrine only if the district court denied defendant's motion despite the fact that the Executive Branch explicitly sought dismissal of the suit on that ground.

Br. for the United States as Amicus Curiae Supporting Appellees at 11, *Balintulo v. Daimler AG*, No. 09-2778 (2d Cir. Nov. 30, 2009), 2009 WL 7768609.[5] Here, MKB seeks appellate review on just such a basis, pointing to the Government's declaration that "it would be in the foreign policy interests of the United States for the claims against * * * MKB Bank to be dismissed * * *." U.S. Statement of Interest at 22. Thus, this case fits well within the Government's position as to the appropriate contours of the collateral order doctrine with respect to decisions that impinge on U.S. foreign relations.

4. This conclusion also accords with a holding of the Second Circuit. In *767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000), a landlord brought suit against successor states to the then-former Socialist Federal Republic of Yugoslavia, seeking to recover on the defunct state's debt. The district court decided to abstain, at least temporarily, from resolving the matter given the underlying political questions, staying

[5] As in *Doe* (and unlike this case) the Government took the position that it had not asked the district court in *Balintulo* to dismiss the action. The Second Circuit has yet to decide the case.

the case. On the landlord's appeal, the Second Circuit concluded that it had jurisdiction over the stay order because "it put the litigants effectively out of court" and the "order was based on a determination that this case would require resolution of non-justiciable political questions." *Id.* at 159. On the second ground, the Second Circuit found that "[t]his holding 'conclusively determines an issue that is separate from the merits,' and is therefore also appealable under the collateral order doctrine." *Id.* The same reasoning should control here.

B. Pendent Appellate Jurisdiction.

In addition, the doctrine of pendant appellate jurisdiction provides an independent basis upon which the Court may entertain this appeal. As we have explained (*supra* at 8-9), the district court denied the motion to dismiss by MNB – an instrumentality of the Republic of Hungary – on the basis of foreign sovereign immunity. It is unquestionable that MNB may take an immediate appeal from that decision regarding immunity. *See Rubin*, 637 F.3d at 789. Pendent appellate jurisdiction permits the Court to entertain an appeal that is intertwined with a matter for which it possesses an independent source of jurisdiction. And this appeal is intertwined with MNB's in just such a manner. In such a setting, the Court can, and should, exercise appellate jurisdiction.

1. Pendent appellate jurisdiction permits review of "an otherwise unappealable interlocutory order if it is 'inextricably intertwined with an appealable one.'" *Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 977 (7th Cir. 2010) (quoting *Montano v. City of Chicago*, 375 F.3d 593, 599 (7th Cir. 2004)). Through pendent jurisdiction, a party may link its interlocutory appeal to an appeal

being advanced by another litigant. *Greenwell v. Aztar Indian Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001). This Court has exercised pendent appellate jurisdiction with some frequency. *See*, *e.g.*, *Research Automation,* 626 F.3d at 977; *Montano*, 375 F.3d at 599-600; *Beischel v. Stone Bank Sch. Dist.*, 362 F.3d 430, 433-34 (7th Cir. 2004); *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 700 (7th Cir. 2003); *Greenwell*, 268 F.3d at 491; *Illinois* ex rel. *Hartigan v. Peters*, 861 F.2d 164, 166 (7th Cir. 1988). So, too, have other circuits. *Greenwell*, 268 F.3d at 491 (listing cases). And the Supreme Court itself has approved, and exercised, pendent appellate jurisdiction. *Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997).

2. This case is a clear one for application of the doctrine. MKB's appeal stems from precisely the same district court decision as does MNB's, demonstrating that the appeals are closely intertwined. This Court has entertained pendent jurisdiction over appeals from related but *separate* orders. *See*, *e.g.*, *Research Automation*, 626 F.3d at 977; *Montano*, 375 F.3d at 599-600. That the appeals in this litigation stem from the *same* order therefore counsels strongly in favor of pendent jurisdiction here. And that is especially so because there is no meaningful way to unwind the issues in this appeal from those involving MNB. The claims against the defendants involve the same factual allegations, the same record, the same legal framework, and the same district court decision. Reviewing the entire order below is thus justified.

Moreover, several of the issues presented by MNB's argument for foreign sovereign immunity are either identical to, or closely entwined with, issues presented

in this appeal by MKB. For example, plaintiffs assert that MNB's conduct is exempt from FSIA protections because, in part, MNB "violat[ed] international law." CFAC ¶ 53. *Exactly* the same question – whether there was a violation of customary international law – is at issue with respect to MKB's (and the other banks') contention that the district court lacked subject matter jurisdiction. *See* CFAC ¶¶ 56-64 & 66-67. MNB's argument with respect to immunity, therefore, involves (in part) the same arguments that MKB will raise here. The claims "are the head and tail of the same coin," justifying pendent appellate jurisdiction. *Hartigan*, 861 F.2d at 166.

In addition, MNB contends that a treaty between the United States and Hungary bars the claim against it, informing part of its sovereign immunity defense. *See* MNB Mot. to Dismiss at 29-31, Dkt. #147. MKB adopted this identical argument in *its* motion to dismiss. *See* MKB Mot. to Dismiss at 11, Dkt. #114. That, too, makes the exercise of pendent jurisdiction appropriate. *See Research Automation*, 626 F.3d at 977.

3. Not only are the formal requisites for the exercise of pendent appellate jurisdiction present here; powerful prudential considerations offer "compelling reasons for not deferring the appeal * * * to the end of the lawsuit." *Montano*, 375 F.3d at 599 (quotation omitted). As discussed above, this case implicates U.S. foreign policies interests to such a significant degree that the United States has asked for dismissal of the suit. This alone is a "compelling reason" to decide the appeal at this juncture.

The use of pendent appellate jurisdiction also will be more efficient for the parties and the judicial system by resolving several issues at this early stage. Because the issues presented in this appeal constitute discrete legal questions that are intimately related to those the Court will necessarily confront in the MNB appeal, "this is one of those cases in which allowing an interlocutory appeal prevents rather than produces piecemeal appeals." *Greenwell*, 268 F.3d at 491. Likewise, pendent jurisdiction here would "serve[] the broader purpose[] of * * * consistent resolution of the case." *Jones v. InfoCure Corp.*, 310 F.3d 529, 536 (7th Cir. 2002).

II. THE COURT MAY DEFER RESOLVING THE QUESTION OF JURISDICTION.

For the foregoing reasons, we submit that the Court has jurisdiction over this interlocutory appeal. But to the extent that any question remains on that point, we respectfully request that the Court consolidate all of the appeals arising out of the decision below and then defer consideration of the jurisdictional question until merits briefing. The Court frequently takes that course when there is doubt on the jurisdictional question. *See*, *e.g.*, *Veluchamy*, 2011 WL 2417102, at *2; *Rubin*, 637 F.3d at 789-95; *Jones v. Clark*, 630 F.3d 677, 679 (7th Cir. 2011); *Wealth Mgmt.*, 628 F.3d at 330; *United States v. Approx. 81,454 Cans of Baby Formula*, 560 F.3d 638, 640 (7th Cir. 2009); *Sallenger v. Oakes*, 473 F.3d 731, 739 (7th Cir. 2007); *United States v. Lapi*, 458 F.3d 555, 560-61 (7th Cir. 2006); *United States v. Segal*, 432 F.3d 767, 774-75 (7th Cir. 2005); *Montano*, 375 F.3d at 601; *United States v. Rinaldi*, 351 F.3d 285, 288 (7th Cir. 2003); *Fid. Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 310 F.3d 537, 540 (7th Cir. 2002).

Doing so makes particular sense here because MKB will soon file a separate mandamus petition, which it will seek to consolidate with this appeal. *See United States v. Vinyard*, 539 F.3d 589, 590-91 (7th Cir. 2008) (deferring question of interlocutory jurisdiction for merits briefing and consolidating appeal with mandamus petition). Because this Court necessarily will address several elements of the district court's order via MNB's appeal and MKB's forthcoming mandamus petition, it would work a considerable efficiency for the Court and the parties were the actions consolidated.[6] This would permit the Court to view the full range of issues in play, with the parties having briefed the intersection of the various jurisdictional theories and the merits.

This is particularly true with respect to pendent appellate jurisdiction. As we have explained, the Court has jurisdiction over issues in this appeal that are "intertwined" with those presented by MNB. It will be difficult to determine with certainty the degree of overlap between the issues raised here and those brought by MNB prior to MNB's briefing on the merits. Deferring resolution of the jurisdictional question would thus best position the Court to resolve the jurisdictional question.

---

[6] There is considerable overlap between the test that applies in deciding whether mandamus is appropriate and the test for determining whether an order can be appealed under the collateral order doctrine. Mandamus is available where (1) a challenged order is "effectively unreviewable at the end of the case," (2) the order would "inflict irreparable harm," and (3) the order "so far exceed[s] the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous." *Lapi*, 458 F.3d at 561 (quotation & alterations omitted). The first two criteria are identical to considerations at issue under the collateral order doctrine. And the third goes to the merits of the case, which of course also would be addressed by the parties if the Court defers resolution of the jurisdictional question to the merits.

CONCLUSION

For the foregoing reasons, this Court possesses jurisdiction over the present appeal. To the extent any question could remain, however, the Court should defer adjudication of the jurisdictional issues to the adjudication of the merits of the related appeals.

Respectfully submitted,

Marc R. Cohen
MAYER BROWN INTERNATIONAL LLP
201 Bishopsgate
London EC2m 3AF
United Kingdom
+44 (20) 3130-3000

Tyrone C. Fahner
Counsel of Record
Michele L. Odorizzi
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, Illinois 60606-4637
(312) 701-0600

Mark G. Hanchet
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
(212) 506-2380

Charles A. Rothfeld
Paul W. Hughes
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000 (phone)

Attorneys for Appellant - Defendant MKB Bank Zrt.

DATE: July 1, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for appellant MKB Bank Zrt. certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,522 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as modified by Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6).

/s/ Paul W. Hughes

CERTIFICATE OF SERVICE

I certify that on this 1st day of July 2011, I served the foregoing Appellant's Brief Regarding Appellate Jurisdiction via the Court's ECF system upon Counsel for Appellees.

/s/ *Paul W. Hughes*
Paul W. Hughes