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-Yeghiayan

APPELLANT'S JURISDICTION REPLY

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.

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INTRODUCTION

Jurisdiction is appropriate via two independent theories.[1]

First, collateral order jurisdiction exists because the United States has asked for dismissal of this suit, explaining that its very maintenance interferes with U.S. foreign policy. The language of the Statement of Interest is unambiguous and warrants immediate review, as the Government itself has argued in multiple other matters. Plaintiffs cannot wish away the clear implications of this Statement. To be sure, such interlocutory jurisdiction is novel, because the United States infrequently asks courts to dismiss cases based on foreign relations. And it is even more unusual for a district court to flatly disregard the foreign policy consequences stressed by the Government. But that has happened here.

Second, jurisdiction is appropriate as pendent to MNB's appeal. Contrary to plaintiffs' argument, pendent appellate jurisdiction is a settled doctrine, approved by the Supreme Court and employed by *every* circuit.

I. COLLATERAL ORDER JURISDICTION.

Plaintiffs misapprehend our argument with respect to collateral order jurisdiction. They appear to view our argument as turning solely on the political question defense. Opp. 3-5. That is incorrect.

A collateral order appeal is appropriate here *not* because (or not solely because) the district court declined to accept the political question defense; it is appro-

[1] Plaintiffs' Opposition is heavy on rhetoric, leveling multiple serious accusations against us. It suggests we have violated our "duty of candor," engaged in "mischaracterization[s]," and should be subject to sanctions. Opp. 1-2 & n.1. As we will show, none of these contentions are true.

priate because the United States determined that the maintenance of this suit against MKB jeopardizes important foreign policy interests, and thus asked the district court to dismiss the suit on *any* valid basis. These consequences—as plaintiffs have conceded—make the order below collateral to the merits. The district court's failure to dismiss warrants immediate review.

1. The U.S. Statement of Interest makes plain that "maintenance of the suit against MKB Bank * * * runs counter to the German Foundation Agreement's goal of 'legal peace' and to United Sates foreign policy interests." Dkt. #151 at 16. Accordingly "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). The Government thus determined that "United States foreign policy interests counsel in favor of dismissal of all claims against * * * MKB Bank on any valid legal ground(s)." *Id.* at 23. The Statement is neither vague nor speculative: the Government believes continuation of this lawsuit against MKB risks adverse foreign policy consequences. Plaintiffs' protestations to the contrary are incorrect. Opp. 14-15.[2]

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[2] Plaintiffs challenge whether the German Foundation applies to MKB. Opp. 6-7. This contention is both wrong and irrelevant. It is irrelevant because the operative issue here is not whether the German Foundation bars the claim; it is whether U.S. foreign policy will be adversely affected by maintenance of this suit. The Executive has concluded that it will, and that determination deserves substantial deference. *See Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) (the State Department's opinion with respect to the "implications of exercising jurisdiction over *particular*" litigants "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy").

And plaintiffs' argument is wrong. As the Government concluded, there is no dispute that MKB was and is owned by a German company, and thus within the ambit of the Foundation. Statement of Interest, Dkt. #151 at 16. Moreover, the Executive Agreement between the United States and Germany specifically encompasses claims relating to "damage to or loss of property, including banking assets." *Id.* at 63 (Exec. Agreement Annex B). The dis-

It is these consequences that justify an interlocutory appeal on "any valid legal ground" that could warrant dismissal. Because maintenance of this suit risks repercussions extending far beyond the private parties here, an interlocutory appeal is necessary to review the district court's decision. MKB is not contending here that the U.S. Statement of Interest is itself a basis on which to *dismiss* the action, although it has significant bearing on the argument that the case should be dismissed on political question grounds. *Cf. First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (plurality op.) ("where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts"). But the Government's representation that the case should be dismissed to avoid interference with U.S. foreign policy does warrant interlocutory review.

That is precisely the position taken by the Government in other matters. *See* 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"); 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. Thus, when "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" supports a collateral order appeal. U.S. *Doe* Br. at 14. Plaintiffs' contention that "the U.S. for-

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trict court made no findings to the contrary (indeed, it did not address the Statement at all), and the plaintiffs did not request discovery on these asserted issues.

eign policy interests expressed in the Statement of Interest * * * alone is insufficient to justify the exercise appellate jurisdiction" (Opp. 13) is without any warrant or basis. To the contrary, when the Government asks a court to dismiss a suit in favor of national interests, an interlocutory appeal is appropriate if a court disagrees.[3]

2. As we explained in our opening submission, all criteria for the invocation of the collateral order doctrine are satisfied here. Opening Br. 11-13. The district court's order is conclusive, the injury it inflicts is collateral to the ultimate ruling on the merits, and its effects are unreviewable.

First, the district court's decision on the motion to dismiss is undoubtedly conclusive of the relevant issue—whether the suit may proceed notwithstanding countervailing policy interests. Because of these concerns, the United States asked the district court to dismiss the claims against MKB "on any legal ground(s)." Dkt. #151 at 23. The court did not do so. That decision on the Rule 12(b)(6) motion to dismiss is conclusive and dispositive; absent an appeal, the suit will proceed.[4]

As plaintiffs point out, the district court left open the possibility of revisiting certain grounds for dismissing the suit later in the litigation. Opp. 3-4. That observation, however, is irrelevant. The court conclusively denied the motion to dismiss in its entirety. In the context of qualified immunity, a defendant may take an interlocutory appeal from a district court's denial of a motion to dismiss, even though the argument may be renewed at summary judgment. *See Behrens v. Pelletier*, 516 U.S.

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[3] *Harris v. Kellogg Brown & Root Servs., Inc.*, 618 F.3d 398 (3d Cir. 2010), is thus inapposite to our contention here, as the Government did not request dismissal of the case.

[4] As we have noted, MKB's petition for reconsideration for the lack of personal jurisdiction is pending. That issue remains in the district court until the petition has been resolved.

299, 307 (1996) ("an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary judgment stage is a 'final' judgment subject to immediate appeal"). The Supreme Court expressly rejected the view that an argument renewable at summary judgment is not conclusive for purposes of the collateral order doctrine, because that "would logically bar *any* appeal at the motion-to-dismiss stage where there is a possibility of presenting an immunity defense on summary judgment." *Id.* at 307. It is no different here, where the district court's decision to "den[y] in their entirety" (Dkt. #176 at 16) defendants' motions to dismiss is immediately appealable on this record, even if the same arguments may be asserted again at summary judgment. Plaintiffs' contentions (Opp. 5) would be relevant if the district court had requested additional briefing or otherwise deferred its ruling *on the motion to dismiss*. The court did not; its order decided an "abstract issue of law" that is appealable. *Behrens*, 516 U.S. at 313 (alteration omitted).

Second, the foreign policy consequences of the ruling below are collateral to the merits; continuation of the litigation, however the case is resolved after further proceedings in the district court, will interfere with U.S. foreign policy. *See* Opening Br. 12. Plaintiffs do not argue to the contrary.

Third, those consequences cannot be remedied through an appeal of a final judgment. Therefore, "delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (quoting *Will v. Hallock*, 546 U.S. 345, 352-53 (2006)). *See also* U.S. *Doe* Br., 2008 WL 2095734, at *12-14.

Plaintiffs make the unsupported and unsupportable suggestion that U.S. "foreign policy interest[s]" are not a "particular value of a high order that would be destroyed if it were not vindicated before trial." Opp. 11 (quotations omitted). When a suit's maintenance will jeopardize or imperil U.S. interests, the bell may not be un-rung after trial. *Cf. First Nat'l City Bank*, 406 U.S. at 765 (plurality op.) ("the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government"). The damage to U.S.-German relations cannot be remedied after years of litigation against a German-owned company.

Plaintiffs' reliance on *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 353 (D.C. Cir. 2007), is misplaced. As the Government explained in *Doe*, it did not seek dismissal of that action. U.S. *Doe* Br., 2008 WL 2095734, at *15; *see* Opening Br. 13 n.4. That is a material and controlling distinction between *Doe* and this case.[5]

3. MKB's motion to dismiss is therefore properly before this Court. In merits briefing, MKB will present several substantial grounds to dismiss this suit, as the Government, in its Statement of Interest, has requested. To focus on just one ground here as a prelude, the claims are barred by the ten-year statute of limitations. *See Jama v. United States I.N.S.*, 343 F. Supp. 2d 338, 365-66 (D.N.J. 2004). There are no conceivable facts that could make these claims—which allegedly accrued more than sixty years ago—timely.

Plaintiffs offer two theories to escape the otherwise applicable ten-year sta-

[5] Moreover, plaintiffs ignore our contention that *Doe*'s narrow view of the collateral order jurisdiction is irreconcilable with the approach taken by this Court. *See* Opening Br. 13 n.4.

tute of limitations: that property expropriation in violation of international law constitutes a continuing violation and that "extraordinary circumstances" trigger equitable tolling. Dkt. #160 at 56-59. Both theories are insubstantial.

There is no continuing violation here. Plaintiffs assert that assets were stolen or wrongfully retained by MKB. Thus there are only, at most, continuing *injuries*, not continuing *violations*. *See Clark v. City of Braidwood*, 318 F.3d 764, 767 (7th Cir. 2003) ("the continuing violation doctrine does not save an otherwise untimely suit when a single event gives rise to continuing injuries" (quotation omitted)).

Nor can there be equitable tolling. Plaintiffs admit that they learned of the alleged claims during or shortly after World War II. CFAC ¶ 5, 82-83. And to the extent that the existence of a Communist government in Hungary could have tolled the limitations period, plaintiffs admit that Communism fell in Hungary in 1989, at which time banks were re-privatized. CFAC ¶ 87. Because no conceivable set of facts, consistent with the allegations of the complaint, could make this case timely, it must be dismissed now. *See Jones v. Gen. Elec. Co.*, 87 F.3d 209, 211 (7th 1996).

II. PENDENT APPELLATE JURISDICTION.

Apart from the collateral order doctrine, pendent appellate jurisdiction provides a separate basis for this Court to resolve the claims in this suit.[6]

1. Plaintiffs suggest that pendent appellate jurisdiction is "nearly deceased" (Opp. 16), but the rumors of death have been greatly exaggerated. Plaintiffs are

[6] MKB recognizes that this Court has requested briefing with respect to its jurisdiction to hear MNB's appeal. MKB is confident that the district court's denial of the sovereign immunity defense permits an appeal at this juncture. But the relationship between the MNB and MKB appeals further suggests consolidating all appeals for full briefing.

flatly wrong to suggest that *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995), "gutted the pendant jurisdiction doctrine." Opp. 16. As the Court itself recognized, it did no such thing; it did not "definitively * * * settle * * * whether or when" pendent jurisdiction is available. It merely held such jurisdiction lacking where an unappealable order was neither "inextricably intertwined" with nor "necessary to ensure meaningful review" of the appealable one. *Id.* at 51. Any doubt was put to rest two years later when, in *Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997), the Supreme Court expressly embraced pendent appellate jurisdiction for issues that are "inextricably intertwined." This Court has utilized pendent appellate jurisdiction with frequency since.[7] Moreover, *every* circuit has employed pendent jurisdiction, doing so in cases far more quotidian than suits against the President.[8]

In *Greenwell*, for example, the plaintiff brought medical malpractice and

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[7] *See, e.g.*, *Research Automation, Inc. v. Schrader-Bridgeport Int'l*, 626 F.3d 973, 977 (7th Cir. 2010); *Montano v. City of Chicago*, 375 F.3d 593 (7th Cir. 2004); *Beischel v. Stone Bank Sch. Dist.*, 362 F.3d 430, 434 (7th Cir. 2004); *Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694 (7th Cir. 2003); *Greenwell v. Aztar Ind. Gaming Corp.*, 268 F.3d 486 (7th Cir. 2001).

[8] *See*, *e.g.*, **First Circuit:** *Lopez v. Massachusetts*, 588 F.3d 69, 82 (1st Cir 2009); *Nieves-Márquez v. Puerto Rico,* 353 F.3d 108, 123 (1st Cir. 2003); **Second Circuit:** *Luna v. Pico*, 356 F.3d 481, 487 (2nd Cir. 2004); *Pathways, Inc. v. Dunne*, 329 F.3d 108, 113 (2nd Cir. 2003); *In re Stoltz*, 197 F.3d 625, 629 (2d Cir. 1999); **Third Circuit:** *CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc.*, 381 F.3d 131, 136 (3rd Cir. 2004); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 594-95 (3d Cir. 2004); *In re Diet Drugs,* 282 F.3d 220, 230 n.5 (3d Cir. 2002); **Fourth Circuit:** *Altman v. City of High Point*, 330 F.3d 194, 207 n.10 (4th Cir. 2003); **Fifth Circuit:** *Comstock Oil & Gas Inc. v. Alabama. & Coushatta Indian Tribes*, 261 F.3d 567, 571 (5th Cir. 2001); **Sixth Circuit:** *Harvey v. Campbell County, Tenn.*, 2011 WL 1789955, *2 (6th Cir. 2011); **Eighth Circuit:** *Doe v. Flaherty*, 623 F.3d 577, 586 (8th Cir. 2010); **Ninth Circuit:** *Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1134-35 (9th Cir. 2005); *Streit v. County of Los Angeles,* 236 F.3d 552, 559 (9th Cir. 2001); **Tenth Circuit:** *Green v. Post*, 574 F.3d 1294, 1310 (10th Cir. 2009); *Timpanogos Tribe v. Conway,* 286 F.3d 1195, 1200 (10th Cir. 2002); **Eleventh Circuit:** *Hudson v. Hall*, 231 F.3d 1289, 1294 (11th Cir. 2000); *Bryant v. Jones,* 575 F.3d 1281, 1301 (11th Cir. 2009); **D.C. Circuit:** *National R.R. Passenger Corp. v. ExpressTrak, L.L.C.*, 330 F.3d 523, 527-29 (D.C. Cir. 2003); *Twelve John Does v. District of Columbia,* 117 F.3d 571, 574-75 (D.C. Cir. 1997); **Federal Circuit:** *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 846-47 (Fed. Cir. 2008).

fraud claims against Aztar, which in turn impleaded doctors on an indemnity theory. 268 F.3d at 489-90. The district court dismissed, without prejudice, the malpractice and indemnity claims. After it had been made final under Fed. R. Civ. P. 54(b), Aztar appealed the dismissal of its indemnity claim against the doctors. *Id*. at 490. The plaintiff then appealed the dismissal of the medical malpractice via pendent appellate jurisdiction. *Id*. at 491. This Court took jurisdiction, finding the two—entirely separate—claims sufficiently "entwined" because of the common facts and "overlap" between the issues. *Id*. Similarly, in *Montano*, this Court held an order appealable because it was entwined with an entirely separate order, given overlap in the underlying facts. 375 F.3d at 600. And in *Comstock Oil & Gas Inc.*, 261 F.3d at 570-71, the Fifth Circuit employed pendent jurisdiction to entertain a cross appeal of a party's separate contentions that "stem from the same underlying lawsuit and involve overlapping issues of law and fact."

2. MKB fits comfortably within the scope of pendent appellate jurisdiction. Its claims are far more entwined than those in *Greenwell*, *Montano*, or *Comstock*.

International law. As we explained, MNB will contest whether the allegations state a violation of international law, and that claim is closely entwined with MKB's argument on the merits. Plaintiffs' own complaint belies their contention that the international law question in MNB's sovereign immunity defense is separate from the issue confronting MKB. After asserting their FSIA argument, plaintiffs contend that those very same "facts establish subject matter jurisdiction over" MKB. CFAC ¶ 54. Indeed, plaintiffs allege that the actions of the non-sovereign

banks, including MKB, "violated international law ***in the same way*** that [MNB] violated it—by taking, looting, and confiscating the property and assets of their customers." *Id*. (emphasis added). If MNB is correct that there was no violation of international law, there is no liability against MKB, either.

Hungarian Treaty. Additionally, plaintiffs entirely misapprehend our invocation of the 1973 Claims Settlement Agreement between the United States and Hungary. MKB has always contended that this Agreement, quite apart from the German Foundation, bars the claims here. In its briefing before the district court, MKB expressly adopted the argument presented by MNB. Dkt. #114 at 11. This Court's resolution of that issue for MNB will apply identically to MKB.

Statute of limitations. Finally, MKB's argument with respect to the statute of limitations is also necessarily entwined with MNB's appeal. As noted, plaintiffs have offered two theories as to why their claims are not barred: that a violation of international law constitutes either a continuing violation or an "extraordinary circumstance." Dkt. #160 at 56-59. Both assertions are closely tied to the sovereign immunity defense, which will consider whether any such violation has occurred.

3. The justifications for exercising pendent appellate jurisdiction are unusually compelling here. Plaintiffs flatly ignore our explanation that the adverse foreign relations implications of this case justify immediate review. Opening Br. 17. And, contrary to plaintiffs' contention, judicial efficiency is indeed a reason that separately supports an interlocutory appeal. *See Greenwell*, 268 F.3d at 491 (pendent jurisdiction appropriate to prevent "piecemeal appeals").

CONCLUSION

For the foregoing reasons, this Court possesses jurisdiction. However, if any question with respect to jurisdiction remains, the appropriate course is to defer a decision until full briefing by the parties on all theories, including any petition for mandamus and MNB's briefing with respect to sovereign immunity.

Respectfully submitted,

/s/ Tyrone C. Fahner

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

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

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 15, 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 3,180 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 15th 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