Nos. 11-2353, 11-2386, 11-2387, 11-2875, 11-2940, 11-2946

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HOLOCAUST VICTIMS OF BANK THEFT,
Plaintiffs - Appellees

v.

OTP BANK, MKB BANK ZRT, sued as MKB BAYERISCHE LANDESBANK, MAGYAR NEMZETI BANK, and ERSTE GROUP BANK AG,
Defendants - Appellants

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

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Nos: 11-2353, 11-2386, 11-2387, 11-2875, 11-2940, 11-2946

Short Caption: *Holocaust Victims of Bank Theft v. OTP Bank*

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

MKB Bank Zrt.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP

(3) If the party or amicus is a corporation:

(i) identify all its parent corporations, if any:

(ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Bayerische Landesbank Girozentrale and PSK Beteilgungsverwaltung GMBH

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INTRODUCTION

Plaintiffs in this case have sued MKB Bank Zrt ("MKB") (along with other banks operating in Hungary), alleging that MKB's predecessors converted the assets of Jewish account holders during World War II. The Holocaust-related events recounted in the complaint are undeniably tragic. But the horrible nature of those events cannot obscure the reality that plaintiffs' claims against MKB are baseless and that, in any event, it is the policy of the United States that claims such as those asserted here not be the subject of litigation in U.S. courts.

In permitting this suit to proceed, the district court committed several fundamental errors. It erred at the outset in asserting its authority over MKB, a foreign entity that has only the most fortuitous and episodic of contacts with the United States. This Court's holdings, and very recent decisions of the Supreme Court, show beyond doubt that such contacts are insufficient to establish general jurisdiction over MKB, which plaintiffs concede is necessary for the maintenance of their suit.

Additionally, because it is plain from the face of the complaint that plaintiffs (or plaintiffs' predecessors in interest) have been aware of these claims for more than *65* years – and for more than *20* years since the fall of the Iron Curtain – the suit cannot possibly survive application of the statute of limitations. The claims also suffer from other fundamental defects that are

addressed in detail by MKB's co-defendants/appellants in their briefs. The district court should have dismissed this case against MKB on the pleadings.

Its failure to do so is a matter of considerable importance that will have baleful effects reaching far beyond the parties to this case. Over a decade ago, the United States and Germany agreed that several classes of persons who suffered injury during the Holocaust at the hands of German-owned companies should seek compensation from the German Foundation – an entity that Germany created specifically for that purpose – and *not* through U.S. litigation. One such class was bank account holders who had their assets converted or confiscated by banks, including those (like MKB) that were owned by German companies at any time between 1937 and 2000. But plaintiffs do not contend that they ever asked the German Foundation – or MKB directly – for compensation. The United States filed a Statement of Interest in the district court, asking that court to dismiss this action on any valid ground because the very maintenance of the suit interferes with U.S.-German relations and broader U.S. foreign policy. The district court disregarded the Government's submission.

Although the district court did not enter final judgment, this Court has the authority to correct the errors committed below. The Court may exercise pendent appellate jurisdiction because the issues in MKB's appeal are intertwined with those presented by co-defendant Magyar Nemzeti Bank

("MNB"), an instrumentality of the Republic of Hungary that may appeal as of right the denial of its motion to dismiss the complaint on sovereign immunity grounds. In addition, the decision below is properly treated as an immediately appealable collateral order. But if the Court has doubts about the existence of appellate jurisdiction over MKB's appeal, it should set aside the district court's decision through issuance of a writ of mandamus: the error committed below – in which the district court disregarded recent and controlling rulings of the Supreme Court, in the process improperly exercising its authority over a foreign defendant that is absent from the jurisdiction for claims that are indisputably time-barred – is patent, fundamental, and will cause irremediable injury to the foreign relations of the United States. Immediate intervention by this Court is warranted.

JURISDICTIONAL STATEMENT

As addressed below and more fully in briefs filed by MKB's co-defendants/appellants, MKB's position is that the district court lacked subject matter jurisdiction over this suit.

As for appellate jurisdiction, the district court entered its order on May 18, 2011 (A1-A16),[1] and denied reconsideration on August 11, 2011 (A17-A32). MKB filed timely notices of appeal on June 17, 2011 (D. Ct. Dkt. #214),

[1] "A" denotes the appendix bound with this brief pursuant to Circuit Rule 30. "SJA" refers to the Stipulated Joint Appendix. Finally, "D. Ct. Dkt." references the corresponding docket entry in the trial court, No. 10-cv-1884 (N.D. Ill.).

and August 15, 2011 (D. Ct. Dkt. #253). Noting that final judgment had not been entered by the district court, this Court directed MKB to submit a memorandum addressing appellate jurisdiction. Dkt. #2 (June 21, 2011 Order). After receiving briefs on this question from all parties, the Court deferred the question of appellate jurisdiction to briefing on the merits. Dkt. #25 (Aug. 2, 2011 Order).

Although no final order has been entered below, two exceptions to the final order rule allow this Court to exercise jurisdiction. The Court may review the decision below through an exercise of pendent appellate jurisdiction. And because the very maintenance of these claims against MKB threatens adverse consequences with respect to U.S. foreign relations, interlocutory review is appropriate pursuant to the collateral order doctrine. Additionally, if the Court has doubts about the existence of appellate jurisdiction, it may and should resolve the case under its mandamus authority; issuance of a writ of mandamus plainly is warranted here and would avoid the necessity of resolving disputed questions regarding jurisdiction. We address these points in detail below.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in concluding that defendant MKB is subject to general jurisdiction in the United States.

2. Whether the district court erred in concluding that plaintiffs' allegations, which relate to conduct that occurred more than six decades ago, could avoid dismissal on the basis of the statute of limitations.[2]

STATEMENT OF THE CASE

On March 25, 2010 – 65 years after the end of World War II, 20 years after the fall of the Iron Curtain, and 10 years after the conclusion of the applicable agreement between the United States and Germany – plaintiffs filed a purported class action against several banks with operations in Hungary. D. Ct. Dkt. #1. On January 20, 2011, plaintiffs filed a Corrected First Amended Complaint. SJA 1-47. Plaintiffs allege that, in the course of World War II, Hungarian banks confiscated assets from Hungarian Jews. They further assert that the defendant banks are liable for this conduct, including via successor liability theories.

On May 18, 2011, the district court denied defendants' motions to dismiss. A1-A16. On August 11, 2011, the court denied MKB's motion for reconsideration or certification for interlocutory appeal. A17-A32. MKB now pursues both an appeal and mandamus.

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[2] Additionally, MKB associates itself with the arguments of its co-defendants that the district court lacks subject matter jurisdiction, that plaintiffs fail to state a claim for which relief may be granted, that the act of state doctrine bars the suit, that the action is barred by treaty, and that the political question doctrine forecloses plaintiffs' claims. But to avoid duplicating arguments advanced by other appellants in the consolidated appeals, as this Court ordered, MKB addresses only the personal jurisdiction and statute of limitations arguments in this brief.

STATEMENT OF FACTS

A. Factual Background.

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." SJA 38.[3] Five named plaintiffs assert claims against MKB. Each claims to be the heir of someone who had an account at Pesti Magyar Kereskedelmi Bank ("PMB"). SJA 4-8.[4] They allege that PMB was later absorbed and merged into MKB. SJA 16. They further allege that PMB misappropriated those funds during World War II. SJA 26-37. Altogether, the class seeks an award of $2 billion dollars, plus interest compounded annually since 1944. SJA 46. In all, they demand $75 billion. D. Ct. Dkt. #31, ¶ 2.

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[3] Plaintiffs currently assert claims against four banks: MKB, MNB, Erste Group Bank ("Erste"), and OTP Bank ("OTP"). 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 that has operations in Hungary. And MKB is a Hungarian bank that is majority owned by Bayerische Landesbank, a German company. A fifth bank – Credit Anstalt Bank – was voluntarily dismissed by plaintiffs.

[4] As a representative example, plaintiff Judith Berkovits alleges that "[h]er father, Istvan Acs, was a textile engineer and had a partnership with her grandfather, Bela Acs, in a wholesale textile business, behind the Budapest Opera House. Their bank accounts were in the Pesti Magyar Kereskedelmi Bank in Budapest, which was later absorbed and merged into MKB Bayerische Landesbank. The plaintiff is heir to her father and grandfather." SJA 4-5.

Plaintiffs allege six causes of action: genocide, aiding and abetting genocide, bailment, conversion, constructive trust, and accounting. SJA 41-46. Against MNB, the sovereign bank, plaintiffs assert a taking of property in violation of international law, a claim that falls within an exception to the immunity generally provided foreign sovereigns by the FSIA. SJA 19-22. The foreign plaintiffs assert subject matter jurisdiction pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. SJA 22-24. 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. SJA 25-26. Plaintiffs also seek to add state-law claims via supplemental jurisdiction under 28 U.S.C. § 1367. SJA 25.

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 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 point is made expressly in the agreement between the United States and Germany that led to creation of the Foundation, and which provides that 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." Agreement concerning the Foundation "Remembrance, Responsibility and the Future," art. 1(1), 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).

After the German Parliament enacted legislation establishing the German Foundation in July 2000, it was capitalized by the German government and German companies with 10 billion German Marks (valued in September 2003 at $5.7 billion). At the same time, the United States and Germany signed an Executive Agreement relating to the Foundation. Under this German Foundation 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." German Foundation Agreement, arts. 2(1) & 3.1 (SJA104). *See also Garamendi*, 539 U.S. at 405-06.[5]

Between 2001 and 2007, the Foundation paid approximately 4.4 billion Euros of compensation to more than 1.66 million individuals from almost 100 countries. *See* Michael Kansen et al., "Final Report on the Compensation Programs Carried Out by the 'Remembrance, Responsibility and Future' Foundation," *in A Mutual Responsibility and a Moral Obligation* 87 (2009). In particular, the Foundation provided for property losses that stemmed from "Aryanization," "the term used by the Nazis to denote the transfer of huge amounts of wealth to the state, to businesses, and to private individuals." *Id.* at 129. As recognized by the Foundation, the claims it addressed included the confiscation of bank accounts. *See* SJA 107. Stuart Eizenstat, who led the U.S. delegation that negotiated the Foundation, made clear that claims relating to confiscated bank accounts fall within the agreement. *See* SJA 75, 77, 81, 83. Although, if the plaintiffs' allegations are correct, they were eligible for compensation through the Foundation, there is no indication in the complaint that they ever filed such claims.

[5] "The German Foundation pact has served as a model for similar agreements with Austria and France, and the United States Government continues to pursue comparable agreements with other countries." *Garamendi*, 539 U.S. at 408.

C. Statement of Interest of the United States.

Pursuant to its obligations arising under the German Foundation Agreement, the United States filed a Statement of Interest before the district court in this case, urging the court to dismiss the claims against MKB (as well as Erste, to which the Austrian counterpart of the German agreement applied). *See* SJA 48-70. The United States declared that, although MKB is a Hungarian bank, it "qualifies as a 'German company'" for purposes of the Foundation "because MKB Bank was during the relevant time period (and still is) more than 25% owned by a German parent company (Bayerische Landesbank)." SJA 63. As a consequence, the Government stated that "[t]he maintenance of the suit against MKB Bank * * * 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." SJA 64 (capitalization omitted).

As the Government explained in the Statement of Interest, "[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." SJA 65 (emphasis added).

- "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." SJA 66.
- "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." SJA 68.
- "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.*

In addition, the Government explained that litigation like this may undermine its ability to reach agreements with other European governments. The Government quoted the statement of Douglas Davidson, the Department of State's Special Envoy for Holocaust Issues:

> The United States' view is that its long-standing, and ongoing, pursuit of cooperative compensation arrangements with [Germany, Austria] and other governments has achieved justice for the greatest numbers of Holocaust victims, survivors and heirs. Going forward, the United States is focusing its efforts in this regard on the new democracies of Central and Eastern Europe where the preponderance of Europe's Jewish population once lived. It is important to these ongoing efforts that the United States fully perform its obligations *by supporting efforts to achieve dismissal of (i.e., "legal peace" for) all claims against [Austrian and German] companies covered by the [respective agreements]*.

SJA 69 (emphasis added).

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)." SJA 69. The Government thus requested dismissal of this suit to further "United States foreign policy interests." SJA 70.

D. Proceedings Below.

1. MKB and the other defendants moved to dismiss the complaint on several grounds, including that the court lacks both personal and subject matter jurisdiction, the claims are barred by the statue of limitations, plaintiffs fail to state a claim, treaties bar the claims, and the political question doctrine precludes this action. But notwithstanding the Government's submission requesting the district court to dismiss the suit on any valid legal

ground, on May 18, 2011, the court rejected defendants' motions to dismiss in their entirety. A1-A16. With respect to personal jurisdiction, the district court stated simply that "[p]laintiffs have shown that OTP and MKB have extensive continuous and systematic general business contacts that would subject them to general personal jurisdiction." A8. The court did not explain the basis for this determination.

Turning to the statutes of limitations, the district court opined that "[p]laintiffs have not pled facts that establish that their claims are untimely. In addition, there are factual issues regarding potential tolling under the equitable tolling doctrines that cannot be assessed at the pleadings stage." A10. The court did not address defendants' contention that the complaint is untimely on its face, nor did the court identify what additional facts could justify tolling the limitations period.

On June 17, 2011, MKB filed a notice of appeal. D. Ct. Dkt. #214. That action is No. 11-2386 in this Court. Co-defendant OTP also filed an appeal, No. 11-2353, as did co-defendant MNB, No. 11-2387. On August 2, 2011, the Court issued an order consolidating these appeals for briefing and disposition. Dkt. #25.

2. Meanwhile, on June 6, 2011, MKB filed a motion before the district court requesting that it reconsider its decision with respect to personal jurisdiction or, in the alternative, that it clarify its order or certify its order for in-

terlocutory review pursuant to 28 U.S.C. § 1292(b). *See* D. Ct. Dkts. #184 & 186. The district court denied this motion on August 11, 2011. A17-A32. Although the court stated that it believed U.S. courts could assert general jurisdiction over MKB pursuant to Fed. R. Civ. P. 4(k)(2), it again identified no contacts that would establish such jurisdiction. A18-A22.

In addition, although the district court had not addressed the U.S. Statement of Interest in its initial decision, on reconsideration the court found that "unresolved factual issues as to the Statement of Interest still remained, such as whether the existing Executive Agreements or Treaties would be applicable to all Defendants and whether the Plaintiffs would be eligible for the funds under the existing Executive Agreements or Treaties." A22. In response to this ruling, the Government *sua sponte* made a supplemental filing in the district court, declaring that "the United States disagrees with that characterization of its interest" (A42) and stating that the court below "misconstrued" the Statement of Interest (A44). As the Government explained, "[t]he interests of the United States were not and are not contingent on whether the particular plaintiffs in a given case can or could have recovered from" one of the compensation funds. A44-A45. The district court, however, took no action to modify or correct its decision after receipt of the Government's statement.

MKB filed a notice of appeal from this decision on August 15, 2011. D. Ct. Dkt. #253. This Court docketed that appeal as No. 11-2875, and it was consolidated with the previously consolidated appeals on August 18, 2011.

STANDARD OF REVIEW

This Court reviews a district court's decision on a motion to dismiss *de novo*. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010); *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001). In particular, the Court "review[s] questions of personal jurisdiction *de novo*." *Illinois v. Hemi Group LLC*, 622 F.3d 754, 756 (7th Cir. 2010). Similarly, statute of limitations issues are reviewed *de novo*. *Logan v. Wilkins*, 644 F.3d 577, 581 (7th Cir. 2011).

SUMMARY OF ARGUMENT

The claims in this case are extraordinary: plaintiffs have brought suit in Illinois against a European bank that never has engaged in business in the United States, seeking to impose liability for acts that took place in Hungary more than six decades ago. These claims could have been presented to the German Foundation, but plainly are not suitable for resolution in a U.S. court – as the United States has stated forcefully in this very litigation. The district court's refusal to dismiss the claims against MKB was wrong and should be set aside by this Court.

A. This Court has the authority to resolve MKB's appeal notwithstanding the lack of a final judgment below. The Court may exercise pendent appellate jurisdiction because MKB's claims are closely intertwined with the arguments advanced by MNB as of right in *its* appeal from the denial of its motion to dismiss the complaint on sovereign immunity grounds. The Court also should treat the decision below as an appealable collateral order because delaying review until entry of final judgment would imperil a significant public interest – the U.S. foreign policy imperatives implemented by the German Foundation Agreement. And some of these same considerations show that, wholly apart from the existence of appellate jurisdiction, it would be appropriate for the Court to exercise its mandamus authority: the district court's order is a clearly erroneous usurpation of judicial authority that, if not corrected immediately, will cause irremediable injury to the Nation's foreign relations.

B. The district court lacked personal jurisdiction over MKB. A court may exercise general jurisdiction over the defendant – as the district court sought to do here – only when the defendant's contacts with the forum "are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum." *Goodyear Dunlop Tire Ops., S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). That test is not remotely satisfied here. MKB does not advertise for or solicit customers, or otherwise transact business of any sort, in the

United States. Its only contacts with this country are isolated, fortuitous, and attenuated. So far as we are aware, no court has ever held such contacts sufficient to establish personal jurisdiction.

C. The claims against MKB also are barred by the controlling five- or ten-year statutes of limitations. Here, plaintiffs have pled themselves out of court: the complaint shows that their claims arose, and that plaintiffs or their predecessors in interest were aware of those claims, more than 65 years ago. There could be no basis for equitable tolling. The complaint itself recognizes that the only plausible impediment to the commencement of suit after the end of World War II – the existence of a Communist regime in Hungary – came to an end in 1989. These ancient claims, which could have been (but were not) presented to the German Foundation notwithstanding the passage of time, should be dismissed.

ARGUMENT

I. THIS COURT MAY DECIDE THIS APPEAL.

As a preliminary matter, the Court has the authority to decide this appeal. There are two bases upon which it may exercise appellate jurisdiction: as a matter of pendent appellate jurisdiction or under the collateral order doctrine. Additionally, the Court may avoid grappling with the question of jurisdiction by granting a writ of mandamus – an outcome that is warranted

because the court below plainly exceeded its authority in a manner that, if not promptly corrected by this Court, will cause irreparable injury.

A. Pendent Appellate Jurisdiction.

To begin with, the Court has jurisdiction over MKB's appeal pursuant to the doctrine of pendent appellate jurisdiction. Because the district court denied the motion of MNB, an instrumentality of the Republic of Hungary, to dismiss on foreign sovereign immunity grounds, MNB may appeal pursuant to the collateral order doctrine. As this appeal arises from the same district court order as does MNB's, involves the same factual allegations, and raises overlapping questions of law, this Court can, and should, exercise pendent appellate jurisdiction here.

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)). Under this doctrine, a party may link its interlocutory appeal not only to its own appeal of other issues that are independently appealable, but also to a related appeal being advanced by another litigant. *Greenwell v. Aztar Indian Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001). As this Court has explained, application of the doctrine is justified in such circumstances when "the exercise of pendent jurisdiction serve[s] broad-

er purposes of efficiency and consistent resolution of the case." *Jones v. Info-Cure Corp.*, 310 F.3d 529, 536 (7th Cir. 2002).

In *Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997), the Supreme Court expressly held that a court may exercise "pendent appellate jurisdiction" to address issues that are "inextricably intertwined" with other issues that are themselves appealable. Since that decision, this Court has found pendent appellate jurisdiction to exist with some frequency.[6] So has every other circuit, each of which has employed pendent jurisdiction following the Supreme Court's decision in *Clinton*. *See* Dkt. #23 at 8 n.5 (Appellant's Jurisdictional Reply).

2. Pendent appellate jurisdiction is appropriate here. The questions presented in MKB's appeal are closely intertwined with those presented by MNB. They involve essentially the same claims by plaintiffs, arise from precisely the same underlying facts, and present related (and in some cases identical) defenses. Moreover, the district court rejected the defenses of both banks simultaneously, in a single order. These overlapping issues may be addressed together.

For example, plaintiffs assert that MNB may be sued under the "takings" exception of the FSIA (28 U.S.C. § 1605(a)(3)), which requires, in part,

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[6] *See, e.g.*, *Research Automation,* 626 F.3d at 977; *Montano*, 375 F.3d at 599; *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, 699 (7th Cir. 2003); *Greenwell*, 268 F.3d at 491.

that the taking occurred in violation of "international law." MNB responds that there was no violation of international law. The other defendants, including MKB, make exactly the same argument.

In addition, and also as part of its FISA appeal, MNB contends that it lacks sufficient commercial nexus to the United States for a claim to be maintained against it; this requirement derives from the FSIA "takings" exception, which applies only when the sovereign is "engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). As MNB explains, this analysis is essentially a personal jurisdiction requirement and turns on the same minimum contacts analysis that is relevant to MKB's denial of personal jurisdiction. For example, MNB argues, as does MKB, that its association with correspondent banks in this country is insufficient to establish general jurisdiction.

Finally, the background this Court will consider in resolving the appeals, the plaintiffs' factual allegations against all of the defendants, and the bases for the district court's denial of the defendants' motions all substantially overlap. Thus, to the extent that MNB possesses a right to appeal via its foreign sovereign immunity defense, the issues raised by MKB may be deemed pendent to that interlocutory appeal.

Indeed, the claims here are more "closely entwined" than were those in other cases in which this and other appellate courts have found jurisdiction.

Thus, the 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. *See also Greenwell*, 268 F.3d at 489-91 (separate medical malpractice and indemnity claims sufficiently "entwined" to support pendent appellate jurisdiction because there were common facts and "overlap" between the issues); *Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567, 570-71 (5th Cir. 2001) (court employed pendent jurisdiction to entertain a cross appeal stemming "from the same underlying lawsuit and involv[ing] overlapping issues of law and fact" as did the principal appeal).

3. Beyond the formal requisites for the exercise of pendent appellate jurisdiction, 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). This case implicates U.S. foreign policies interests to such a significant degree that the United States sought dismissal of the suit and complained that the district court misunderstood its Statement of Interest, surely a "compelling reason" to decide the appeal now. 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; "this is one of

those cases in which allowing an interlocutory appeal prevents rather than produces piecemeal appeals." *Greenwell*, 268 F.3d at 491.

B. Collateral Order Jurisdiction.

Jurisdiction also may be exercised under the collateral order doctrine. "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, 545-46 (1949)). The order denying MKB's motion to dismiss falls into this category.

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)" (SJA 48) because "maintenance of the suit against MKB Bank * * * runs counter to the German Foundation Agreement's goal of 'legal peace' and to United States foreign policy interests." SJA 63. When the United States requests that a district court dismiss claims because the very maintenance of a suit will have adverse foreign policy consequences, a district court's refusal to so dismiss an action will qualify as a collateral order subject to immediate appeal. Indeed, in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 791 (7th Cir. 2011), this Court recently recognized that district court de-

cisions that have "foreign-policy implications" may present precisely the sort of issue that are appropriate for collateral order review.

1. All criteria necessary for a collateral order appeal are present in this case because the district court's decision is "conclusive," "resolve[s] important questions separate from the merits," and is "effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus.,* 130 S. Ct. at 605 (quotation omitted).

First, the district court's decision in this case conclusively determines that the lawsuit will proceed to the detriment of U.S. foreign relations. It requires the parties to enter into discovery and guarantees that the litigation will go forward, likely for years. "There are simply no further steps that can be taken in the District Court" to preserve the relevant interest at stake (*Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (quotation omitted)) – which is, very simply, that there not be legal proceedings that undercut U.S. foreign relations.[7]

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[7] That some of the issues could be addressed *again* later in the litigation is irrelevant. 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. 299, 307 (1996). 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.* It is no different here, where the district court's decision to "den[y] in their entirety" (A16) defendants' motions to dismiss is immediately appealable on

Second, the order implicates a consideration apart from the merits of the claim – the interest in avoiding interference with U.S. foreign policy. Notably, plaintiffs did not contest this point when earlier seeking dismissal of the appeal for lack of jurisdiction. *See* Dkt. #22 (Appellees' Res. Mem. to Appellants' Jurisdictional Mem. (July 12, 2011)). That was for good reason. Not only is this foreign policy concern "conceptually distinct from the merits" of the underlying action (*Mitchell*, 472 U.S. at 527-28), but vindication of that interest will benefit the United States and Germany, not MKB.[8] And nothing about this appeal requires resolution of the underlying allegations – that is, whether defendants actually did the things that plaintiffs contend. *See Al-Quraishi v. L-3 Servs., Inc.*, 2011 WL 4382115, at *3 (4th Cir. Sept. 21, 2011) (explaining that "the disputed questions are collateral to resolution on the merits" where separate issues may resolve the case, "accept[ing] as true the plaintiffs' allegations").

Third, the interest at stake here cannot be protected through an appeal from final judgment. "[T]he decisive consideration is whether delaying review

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this record, even if the same arguments may be asserted again at summary judgment.

[8] The Court has squarely rejected the contention that "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. *Mitchell*, 472 U.S. 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.*

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 v. Hallock*, 546 U.S. 345, 352-53 (2006)). U.S. foreign policy interests surely implicate values of this sort. And those interests would 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 assured by the United States in the German Foundation Agreement. On that point, the views of the United States expressed in the court below must be given substantial weight "as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Austria v. Altmann,* 541 U.S. 677, 702 (2004).[9]

2. The Government itself has previously argued that the collateral order doctrine provides appellate jurisdiction in circumstances closely related to those here. In an amicus brief before the Supreme Court, the United States

[9] A recent decision of the Fourth Circuit also accords with this result. In *Al-Quraishi*, plaintiffs sued a military contractor on state-law claims, asserting that the contractor's employees assisted illegal interrogations in Iraq. The district court denied a motion to dismiss and the defendants took an interlocutory appeal. 2011 WL 4382115, at *1-*2. The Fourth Circuit reversed and ordered the case dismissed because the state-law claims were preempted by federal law. *Id.* at *2. The appeal was cognizable pursuant to the collateral order doctrine insofar as "[a]llowing the case to proceed would allow judicial scrutiny of military policies and practices in a way that could not be remedied in an appeal from the final judgment." *Id.* at *3. Here, the interest in an interlocutory appeal is even greater, for the United States itself has identified maintenance of this suit as contrary to the Nation's foreign policy interests.

argued that, "[w]hen the Executive explicitly seeks dismissal [on political question grounds] 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 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.*[10]

The United States reiterated this position in pending litigation in the Second Circuit involving companies that did business in South Africa, stating that collateral order jurisdiction exists when a district court denies a defendant's motion to dismiss "despite the fact that the Executive Branch explicitly sought dismissal of the suit on th[e] ground" that continued litigation would have adverse consequences for U.S. foreign policy. Br. for United States as

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[10] In *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 349 (D.C. Cir. 2007), the D.C. Circuit declined to assert collateral order jurisdiction over a motion to dismiss premised on political question grounds. The Government advised the Supreme Court not to grant review because the United States had not sought dismissal of the suit and *Doe* accordingly "did not decide" whether a collateral order appeal lies where the United States asked the district court to dismiss an action to avoid injury to U.S. foreign policy – as it did here. U.S. *Doe* Br. at 15, 2008 WL 2095734. 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 in several other settings. *See*, *e.g.*, *Bank of Am., N.A. v. Veluchamy*, 643 F.3d 185, 188 (7th Cir. 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).

Amicus Curiae Supporting Appellees at 11, *Balintulo v. Daimler AG*, No. 09-2778 (2d Cir. Nov. 30, 2009), 2009 WL 7768609.[11] 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 on any valid legal grounds." SJA 69. In this case, where the Government seeks dismissal of the suit to advance the United States' foreign policy interests, immediate appeal is available under the Government's understanding of the collateral order doctrine.

C. Mandamus.

Finally, if the Court has doubts about the existence of appellate jurisdiction, it should reach the merits of the issues raised here via its mandamus authority; contemporaneously with the filing of this brief, MKB has filed a separate petition for mandamus, which it has related to this action. This Court has recognized repeatedly that mandamus may provide an alternative to interlocutory appellate jurisdiction. In *United States v. Vinyard*, 539 F.3d 589, 590 (7th Cir. 2008), for example, the Court found that the exercise of interlocutory appellate jurisdiction was "problematic," but nonetheless concluded that "a writ of *mandamus* should issue." The Court has similarly used mandamus on other occasions where interlocutory review was otherwise un-

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

available. *See*, *e.g.*, *In re United States*, 345 F.3d 450, 452-54 (7th Cir. 2003); *In re Balsimo*, 68 F.3d 185, 187 (7th Cir. 1995); *In re Sandahl*, 980 F.2d 1118, 1119 (7th Cir. 1992); *Maloney v. Plunkett*, 854 F.2d 152, 154 (7th Cir. 1988). So have other courts. *See*, *e.g.*, *S.E.C. v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010); *United States v. Fei Ye*, 436 F.3d 1117 (9th Cir. 2006).

Mandamus is available when a petitioner shows "*irreparable* harm (or, what amounts to the same thing, the lack of an adequate remedy by way of direct appeal or otherwise) and a *clear* right to the relief sought." *In re Sandahl*, 980 F.2d at 1119. *See also In re Balsimo*, 68 F.3d at 186 ("*Any* order is subject to challenge by asking for a writ of mandamus if the order both imposes irreparable harm and can be shown to be so clearly wrong as to constitute a usurpative act by the judge.").[12]

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[12] This Court has used slightly varying formulations of the mandamus test in other cases. *See*, *e.g.*, *United States v. Lapi*, 458 F.3d 555, 561 (7th Cir. 2006) (mandamus available where an order is "effectively unreviewable at the end of the case," would "inflict irreparable harm," and 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") (quotations and alterations omitted). As *Sandahl*, 980 F.2d at 1119, explains, however, in this context "effectively unreviewable" and "irreparable harm" "amount to the same thing." *See also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995) ("the challenged order not be *effectively* reviewable at the end of the case—in other words, that it inflict *irreparable* harm").

This approach accords with the view of other circuits, which find that mandamus is appropriate when no other adequate remedy is available. *See*, *e.g.*, *United States v. Higdon*, 638 F.3d 233, 245 (3d Cir. 2011); *In re United States*, 397 F.3d 274, 282 (5th Cir. 2005) (per curiam); *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002).

That test is satisfied here. For the reasons described above, the district court's decision inflicts irreparable harm that cannot be remedied on appeal, as the United States itself has represented that the very maintenance of the suit will damage U.S.-German relations. And mandamus is particularly appropriate where the mandamus petition addresses "the court's very power to act" or "raise[s] serious questions about the reach of U.S. law." *In re Hijazi*, 589 F.3d 401, 408, 411 (7th Cir. 2009). The petition in this case does both: there are compelling reasons to believe that the district court lacked jurisdiction over MKB, a foreign company that has no operations in the United States and is not subject to U.S. law, for claims that allegedly arose more than 65 years before the compliant was filed.

Additionally, as this last point suggests and as we demonstrate below, mandamus is warranted because several aspects of the district court's decision are patently erroneous. The fundamental "lack of any legal justification" for crucial portions of the decision demonstrate the requisite clear entitlement to relief. *See United States v. Lapi*, 458 F.3d 555, 561 (7th Cir. 2006). In combination, these considerations warrant the grant of mandamus.

II. MKB IS NOT SUBJECT TO GENERAL JURISDICTION IN THE UNITED STATES.

It is fundamental that, under the Due Process Clause, a court may exercise personal jurisdiction over a defendant only if that defendant has suffi-

cient "minimum contacts" with the forum. This jurisdiction may fall into one of two categories: "specific jurisdiction," which may exist when the plaintiff's injury arises out of the defendant's activities in the forum (and which surely is not present in this case); and "general jurisdiction," which exists when the defendant's presence in the forum is so pervasive that the defendant is treated as present there for all purposes. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). Here, the court below found that MKB is subject to *general* jurisdiction in any federal court in the United States based on its nationwide contacts, pursuant to Fed. R. Civ. P. 4(k)(2). A8, A17.[13] But even if all of plaintiffs' jurisdictional allegations could be proven true, they are woefully inadequate to satisfy the threshold due process limitations on the exercise of general jurisdiction.

A. Occasional And Fortuitous Contacts With The Forum Are Not Sufficient To Establish General Jurisdiction.

"A court may assert general jurisdiction over foreign * * * corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 131 S. Ct. at 2851. "The threshold for general ju-

[13] Rule 4(k)(2) permits nationwide aggregation of contacts to determine personal jurisdiction over foreign defendants for federal causes of action, but it does not relax the due process standard that is applied to those contacts. *See Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 941 (7th Cir. 2000).

risdiction is high; the [defendant's] contacts [with the forum] must be sufficiently extensive and pervasive to approximate physical presence." *Tamburo v. Dworkin*, 601 F.3d 693, 701 (7th Cir.), *cert. denied,* 131 S. Ct. 567 (2010); *see also uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 426 (7th Cir. 2010) ("This is a demanding standard that requires the defendant to have such extensive contacts with the state that it can be treated as present in the state for essentially all purposes."). The standard "picks out those nonresident businesses that are so like resident businesses, insofar as the benefits they derive from state services are concerned, that it would give them an undeserved competitive advantage if they could escape having to defend their actions in the local courts." *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 540–41 (7th Cir. 1998).

The test for general jurisdiction is qualitative and requires more than just counting forum contacts. Rather, the court must determine whether the defendant has "purposefully availed himself of the privilege of conducting activities in the forum state, invoking the benefits and protections of its laws." *Int'l Med. Group, Inc. v. Am. Arbitration Ass'n*, 312 F.3d 833, 846 (7th Cir. 2002). Conversely, "those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) ("A corpo-

ration's 'obvious intent to exercise its due process rights'" by avoiding contact with the forum "should not be disregarded lightly."). "'[R]andom, fortuitous, or attenuated contacts,'" no matter how numerous, do not establish the minimum contacts necessary to create general jurisdiction, nor does "'the unilateral activity of another party or a third person.'" *be2 LLC v. Ivanov*, 642 F.3d 555, 558 (7th Cir. 2011) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

That is a strict standard in all circumstances. But the Supreme Court has "admonished courts" that, even beyond the usual demanding test for general jurisdiction, a thumb must be placed on the scale against the assertion of jurisdiction when the defendant is not American. In such circumstances, the court must conduct "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case," considering among other things "the Federal interest in Government's foreign relations policies." *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987).

B. MKB Lacks Sufficient Contacts With The United States To Establish General Jurisdiction.

The district court's application of these rules to MKB (and to OTP) consisted of a single sentence that merely restated the legal standard: "OTP and MKB have extensive continuous and systematic general business contacts that would subject them to general personal jurisdiction." A8. The court did

not cite any allegations in plaintiffs' complaint or any evidence in the record to support this conclusion.[14] In fact, as a clear matter of law, none of the MKB contacts alleged by plaintiffs comes close to showing that MKB is "essentially at home in the forum." Those asserted contacts include: bank accounts for which the accountholder had given MKB a U.S. mailing address; correspondent accounts with New York banks; contracts with U.S. companies; business and other trips by MKB employees to the United States; and the New York branch office of MKB's parent, Bayerische Landesbank.

1. *MKB's Customer Accounts Are Not Jurisdictional Contacts.*

a. The first set of alleged contacts is the maintenance, in Hungary, of bank accounts on behalf of customers who have given MKB mailing addresses in the United States. D. Ct. Dkt. #160 at 72 ("Pl. MTD Opp."). Even after discovery, plaintiffs do not dispute MKB's representation that it does not advertise for or solicit customers in the United States. In fact, plaintiffs do not allege that MKB targets the U.S. market in any way. Nor do they allege that MKB does anything in the United States to service the "U.S. accountholders." Instead, plaintiffs allege only that between 1,300 and 1,550

[14] The district court permitted limited discovery relating to personal jurisdiction. Pursuant to that discovery, MKB answered interrogatories. Without putting the interrogatory responses, or any other evidence, into the district court record, plaintiffs relied on some of this material in their opposition to the motion to dismiss. For the limited purposes of this appeal, MKB is content to assume the veracity of those assertions, because they fail as a legal matter to establish personal jurisdiction.

MKB accountholders – of MKB's total 397,000 accounts (A35) – have given the bank mailing addresses in the United States. Plaintiffs do not allege that any of those accounts were opened anywhere other than Hungary.

Without any evidence that MKB purposely availed itself of the privilege of conducting activities in the United States, these accounts are irrelevant unless their numbers alone imply that MKB was "essentially at home in the forum State." *Goodyear*, 131 S. Ct. at 2851. *See id.* at 2855 (lower court's reliance on product sales into forum "elided the essential difference between case-specific and all-purpose (general) jurisdiction"). The miniscule figures support no such inference. U.S. customers account for only 0.34% of MKB's accounts. Such contacts can hardly be characterized as "systematic," "pervasive," or "extensive." And that MKB serves, for example, Hungarian expatriates in the United States, or Americans who travel to or do business in Hungary, does not imply that MKB has targeted the U.S. market or generally operates in the United States. Rather, those customers are a consequence of MKB's doing business in Hungary.

b. Other decisions have found general jurisdiction lacking despite considerably greater commerce with the forum. In the recent *Goodyear* decision, a unanimous Supreme Court held that "tens of thousands" of sales, of products that are "typically custom ordered" by customers in the forum, are "an inadequate basis for the exercise of general jurisdiction." 131 S. Ct. at 2851–

52. The same day, in *J. McIntyre Machinery*, the Court held that sales into the forum are sufficient to support even *specific* jurisdiction "only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State," even when the claims arise out of those sales. 131 S. Ct. at 2788 (plurality op.); *see also id.* at 2792 (Breyer, J., concurring in judgment) (plaintiff must show "a specific effort by the [defendant] to sell in [the forum]"). It is undeniable that there was no such targeting of the U.S. market by MKB.

When MKB called *Goodyear* to the district court's attention, the court dismissed the decision with the conclusory statement that *Goodyear* was "not on point." A25. But the court gave no explanation for *why* that is so beyond a reference to the surreply that plaintiffs filed on reconsideration, in which they asserted that *Goodyear* did not address general jurisdiction. *See* D. Ct. Dkt. #247 at 1 ("Neither of the two June 2011 Supreme Court cases MKB cited in its reply [*Goodyear* and *J. McIntyre*] considers whether a court may exercise general personal jurisdiction"). That, however, is simply false. *See Goodyear*, 131 S. Ct. at 2853 ("We granted certiorari to decide whether the

general jurisdiction the North Carolina courts asserted over petitioners is consistent with the Due Process Clause of the Fourteenth Amendment.").[15]

Likewise, in *uBID*, this Court disapproved the exercise of jurisdiction over a defendant whose forum contacts were vastly greater than is alleged here. There, plaintiff uBID (an Illinois-based company) sued GoDaddy, an Arizona company that registers website domain names. uBID contended that GoDaddy violated the Anti-Cybersquatting Consumer Protection Act and sought general jurisdiction over GoDaddy. 623 F.3d at 423. Among other things, the Court found that:

- The defendant's "contacts [with Illinois] are extensive and deliberate" (*id*. at 426);
- The defendant "has continuously and deliberately exploited the Illinois market for domain name registration and has profited handsomely from it" (*id.* at 433);
- The defendant's contacts included "the marketing and sale of registrations for Internet domain names, as well as contracts with many Illinois customers and the hosting of websites accessible from Illinois" (*id.* at 426); "Illinois residents encounter GoDaddy's ads on television, on

[15] It is not evident why the district court believed that *Goodyear* is not relevant here. Rule 4(k)(2) itself requires that "exercising jurisdiction is consistent with the United States Constitution and laws." Fed. R. Civ. P. 4(k)(2)(B).

the Internet, and on billboards at Wrigley Field and the United Center, among many others" (*id.* at 433);

- The defendant "has aired many television advertisements on national networks, including six straight years of Super Bowl ads. It has engaged in extensive venue advertising and celebrity and sports sponsorships" (*id.* at 427), and it was "easy to infer" that that its nationwide marketing was "intended to reach * * * the 13 million potential customers in the nation's fifth most populous state" (*id.* at 428); and
- "Illinois consumers * * * have flocked to GoDaddy by the *hundreds of thousands* and have sent *many millions of dollars* to the company each year" (*id.* at 427) (emphasis added).

Despite all of that, this Court held that "GoDaddy's contacts with Illinois do not satisfy this [general jurisdiction] standard." *Id.* at 426. The Court concluded that, "[a]lthough its contacts are extensive and deliberate, they are limited to the marketing and sale of registrations for Internet domain names, as well as contracts with many Illinois customers and the hosting of websites accessible from Illinois." *Id.* Accordingly, "[i]t would be unfair to require GoDaddy to answer in Illinois for *any* conceivable claim that *any* conceivable plaintiff might have against it." *Id.* (emphasis added). "Imagine," the Court explained, "an Illinois visitor to GoDaddy's headquarters in Arizona who slipped, fell, and then sued for the injury, or a GoDaddy employee who

worked in Arizona, was fired, moved to Illinois, and then sued for wrongful termination." *Id*. Because "[t]here is no reason for GoDaddy to expect, as it goes about its business of selling domain names in Illinois, that it is thereby exposing itself to such lawsuits in Illinois," the exercise of general jurisdiction would exceed constitutional limits. *Id*.

MKB's U.S. contacts are far less substantial than were GoDaddy's contacts with Ilinois. Not one of this Court's observations about GoDaddy could apply to MKB: it does not market to the United States, does not "exploit" the U.S. market, and certainly does not have hundreds of thousands of U.S. customers or millions of dollars of annual revenue from the United States. If GoDaddy can "go[] about its business of selling domain names in Illinois" without creating jurisdiction there, then MKB, which does *not* sell any goods or services in the United States and has contact with only those U.S. residents who choose to open accounts in Hungary, cannot be subject to jurisdiction in this country. If the hundreds of thousands of customers in *uBID* and the tens of thousands of sales in *Goodyear* were not enough, the 1,550 or fewer accounts here – which, in contrast with the transactions in those cases, did not involve sales into the forum jurisdiction at all – are far too slender a reed upon which to rest a finding of general jurisdiction.

c. At least two other circuits and a state appellate court have recognized that the request by a minute fraction of a bank's customers that ac-

count statements be sent to the forum are precisely that sort of "random, fortuitous" contact that cannot support the exercise of general jurisdiction. The First Circuit, in *Lechoslaw v. Bank of America, N.A.*, held that "a Polish bank with all of its branches in Poland" that requires "[a]ll customers * * * to open their accounts at a bank branch in Poland" is not subject to jurisdiction in the United States simply because it has several dozen U.S. accountholders, absent "evidence" that the bank "purposely sought out these customers, such that the bank could reasonably foresee the need to invoke the protections and benefits of the forum." 618 F.3d 49, 54 (1st Cir. 2010). The Sixth Circuit, in *Harris v. Lloyds TSB Bank, PLC*, likewise found the fact that some "account holders have [domestic] addresses is merely fortuitous" because the defendant bank "markets and sells its accounts in" a foreign country. 281 F. App'x 489, 493 (6th Cir. 2008). The number of forum customers was immaterial because

> any bank statements sent to Tennessee would have been sent there because the customers listed the account address as Tennessee, not because Lloyds chose to create continuous and substantial consequences in Tennessee. The relationship of these account holders is best characterized as "unilateral," because Lloyds did not direct contacts at Tennessee.

Id.; *see also E.I.C., Inc. v. Bank of Va.*, 166 Cal. Rptr. 317, 320 (Ct. App. 1980) ("Undoubtedly a bank the size of Bank of Virginia has depositors who reside throughout the country and overseas, and it would be an absurdity to con-

clude from this that the bank was doing business in each of the home jurisdictions of its depositors.").

These decisions are consistent with the principle that "in order to confer general jurisdiction a defendant must have a business presence *in* [the forum]. It is not enough that a corporation do business *with*" the forum. *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 611 (5th Cir. 2008) (citation omitted); *see also Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 718 (5th Cir. 1999) ("the totality of the contacts suggests that Telmex conducted a great deal of business with Texas, but virtually none in Texas"). If MKB could not be subject to suit in the United States on a claim relating to one of the U.S.-address accounts, it necessarily follows that those accounts may not be the basis for general jurisdiction on the unrelated claims here.

Indeed, in another recent decision that considered whether a defendant was subject to *specific* jurisdiction in Illinois for operating a website that attracted a handful of Illinois customers, this Court explained that "[o]ur inquiry boils down to this: has [the defendant] purposely exploited the Illinois market?" *be2 LLC*, 642 F.3d at 558; *id.* at 559 (defendant must have "in some way *target[ed]* the forum state's market"). The purposeful availment requirement, the Court explained, ensures "'that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts or of the unilateral activity of another party or a third person.'" *Id.* at

558 (quoting *Burger King*, 471 U.S. at 475). The Court concluded that user accounts set up by Illinois residents "are attenuated contacts that could not give rise to personal jurisdiction without offending traditional notions of fair play and substantial justice." *Id.* at 559. Precisely the same conclusion applies here.

2. *MKB's New York Correspondent Accounts Are Not Jurisdictional Contacts.*

Plaintiffs also pointed to correspondent accounts that MKB holds at several New York banks. Pl. MTD Opp. 72-73. Courts routinely and consistently have rejected the presence of such accounts as a basis for general jurisdiction. *See, e.g.*, *Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V.*, 701 F.2d 889, 892 (11th Cir. 1983); *Celton Man Trade, Inc. v. Utex, S.A.*, 1986 WL 6788, at *4 (S.D.N.Y. 1986) ("It is also well settled that the existence of a correspondent banking relationship between a foreign bank and a New York correspondent bank does not subject the foreign bank to jurisdiction here."); *E.I.C.*, 166 Cal. Rptr. at 320 ("It would be a distortion of due process to hold that a state acquires general personal jurisdiction over an out-of-state bank * * * merely because the bank has a correspondent relation-

ship with a bank within the state"); *Nemetsky v. Banque de Developpement de La Republique du Niger*, 401 N.E.2d 388, 388 (N.Y. 1979).[16]

As the First Circuit has observed, the need to maintain correspondent accounts in fact suggests that the foreign bank does *not* do business in the United States: "Interbank accounts, also known as correspondent accounts, are used by foreign banks to offer services to their customers in jurisdictions where the banks have *no physical presence*, and otherwise to facilitate transactions involving such jurisdictions." *United States v. Union Bank for Savs. & Inv. (Jordan)*, 487 F.3d 8, 15 (1st Cir. 2007) (emphasis added).

Plaintiffs also rely on a certification made by MKB pursuant to the PATRIOT Act, designating an agent for service of process for the limited purpose of receiving documents served by the United States in relation to financial crime and terrorist financing. Pl. MTD Opp. 73. Because that certification is required for any foreign bank with a U.S. correspondent account, treating it as a basis for jurisdiction would abrogate all of the prior cases on correspondent accounts:

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[16] The Supreme Court reached the same conclusion before the "minimum contacts" standard was announced in *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Addressing a New Orleans bank that "had what would popularly be called a large New York business," with "transactions [that] were varied, important and extensive," the Court found jurisdiction lacking because the business was conducted through New York correspondents and "[t]hey, not the [New Orleans bank], were doing its business in New York." *Bank of Am. v. Whitney Cent. Nat'l Bank*, 261 U.S. 171, 173 (1923).

> If these PATRIOT Act certifications were sufficient minimum contacts to satisfy due process, every foreign bank that opens a correspondent account in the United States would be subject to jurisdiction. Clearly, that is not the case. Moreover, the fact that these PATRIOT Act certifications require foreign banks to designate a proxy to accept service of process of subpoenas by the U.S. government does not indicate that Defendants should reasonably foresee being haled into a U.S. court, especially not [for claims that are unrelated to the accounts].

Tamam v. Fransabank, 677 F. Supp. 2d 720, 732 (S.D.N.Y. 2010); *see also* 31 C.F.R. § 1010.630 (2011) (bank must designate agent for service of process solely "for records regarding each such account").

3. *Purchases From American-Headquartered Companies Are Not Jurisdictional Contacts.*

The third alleged contact is that MKB has entered into contracts that somehow relate to the United States. Pl. MTD Opp. 72-73. These allegations are both legally and factually defective. As a legal matter, holding that a handful of contracts with U.S. firms could subject a foreigner to general jurisdiction would dramatically lower the due process standard. In *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 603 n.12 (7th Cir. 1979), this Court warned that "the possibility of discouraging interstate transactions underscores the potential for unfairness in asserting jurisdiction over an out-of-state defendant who has no relationship with the forum state other than some of the effects of a contract he has entered into." Indeed, this Court has held that "an out-of-state party's contract with an in-

state party is alone not enough to establish the requisite minimum contacts," *even for specific jurisdiction*. *RAR, Inc. v. Turner Diesel, Inc.*, 107 F.3d 1272, 1277 (7th Cir. 1997); *see also Citadel Group Ltd. v. Wash. Reg'l Med. Ctr.*, 536 F.3d 757, 761 (7th Cir. 2008) (same). If a contract with a forum resident cannot establish jurisdiction for a case relating directly to that contract, then it certainly cannot create jurisdiction over all claims against the defendant. *See Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003) ("[T]he constitutional requirement for general jurisdiction is 'considerably more stringent' than that required for specific jurisdiction.").

Prior decisions confirm that to be so. This Court's decision in *Purdue Research Foundation* addressed a claim of general jurisdiction based on in-forum purchases. The Court held that "a collaborative effort with a single Indiana-based corporation," which included "several confidentiality agreements * * * and * * * a few visits to Indiana in furtherance of these agreements," was "simply insufficient to satisfy the demanding [general jurisdiction] standard set forth by the Supreme Court of the United States in *Helicopteros*." *Purdue Research Found.,* 338 F.3d at 788 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)). *Helicopteros* itself was a suit against a helicopter transportation company that had purchased "80% of its fleet" of helicopters from a Texas company over a seven-year period, negotiated and executed the contracts in Texas, received payment from a Texas

bank, and sent employees to Texas for training and technical consulting. 466 U.S. at 411. The Court held that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.* at 418; *see also Johnston*, 523 F.3d at 614 ("[R]eceiving services from [forum] vendors in this sense is not a significant contact."); *Access Telecom*, 197 F.3d at 717 n.6 (defendant "paying for services that were provided by corporations in [the forum state] or the U.S. * * * add[s] little to the issue"). MKB's contracts, even in the aggregate, are nowhere near the level even of those found insufficient in *Helicopteros*.

And as a factual matter, the contracts relied upon by plaintiffs do not show that MKB had any material presence in the United States. Two check-clearing contracts, with JPMorgan and First Union Bank, allow the clearing of checks written in U.S. dollars. Pl. MTD Opp. 72. These clearing services are just another aspect of the correspondent relationships discussed above and add nothing to the analysis.

Plaintiffs also note that "MKB has an ongoing software licensing agreement with Euronet USA Inc." and unspecified "contract[s] with Super Derivatives, Inc." and MasterCard Worldwide. Pl. MTD Opp. 72-73. Euronet does business in Europe (as its name indicates), including "[o]wn[ing] and operate[ing] transaction processing centers in Hungary, Greece, Serbia, India,

Pakistan and China." *See* http://www.euronetworldwide.com/media_-relations/company_overview.cfm. Plaintiffs imply that Super Derivatives, Inc. is an American company, but they presented neither evidence nor allegations to that effect. *Id.* Mastercard Worldwide is headquartered in New York (Pl. MTD Opp. 73), but it also has an office in Budapest. *See* http://www.-mastercard.com/us/company/en/ourcompany/global_locations.html. Most significantly, plaintiffs do not contend that any of these contracts is relevant to anything other than MKB's Hungarian banking business. Thus, these contracts are examples of U.S. companies transacting business in Hungary, not of MKB doing business in this country. *See Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co.*, 18 F.3d 389, 395 (7th Cir. 1994).

Plaintiffs also point to forum selection or consent-to-jurisdiction clauses in two contracts. Pl. MTD Opp. 74. Both apply only to disputes over those contracts, which this case is not. Plaintiffs cannot cite a single decision even considering such clauses relevant to general jurisdiction. The only case that they did cite below (*id.* at 68), *Vangura Kitchen Tops, Inc. v. C & C North America, Inc.*, held that "[t]he mere existence of a forum selection clause in [an unrelated contract] * * * *does not* suffice to give Minnesota general jurisdiction." 2008 WL 4540186, at *9 (W.D. Pa. Oct. 7, 2008) (emphasis added).

4. *Miscellaneous Trips Do Not Establish General Jurisdiction.*

Plaintiffs next point to 41 trips to "various business conferences" in the United States by MKB employees over four years. Pl. MTD Opp. 73. Such occasional and episodic visits are the antithesis of the "continuous and systematic" contacts that due process requires. This Court has warned against attaching unexpected jurisdictional effects to just such isolated transactions: "Unless their contacts are continuous and systematic enough to rise to the level of general jurisdiction, individuals and corporations must be able to conduct interstate business confident that transactions in one context will not come back to haunt them unexpectedly in another." *RAR*, 107 F.3d at 1278. It would be a crippling precedent for this Court to hold that every trip to the United States for an IT trade show could subject a foreign company to U.S. jurisdiction. Neither the plaintiffs nor the district court cited any authority to the contrary, and this Court should accord these trips no significance.

5. *BayernLB's Contacts May Not Be Imputed To MKB.*

Finally, plaintiffs also argued below that MKB's parent, Bayerische Landesbank ("BayernLB") has a branch office in New York.[17] Pl. MTD Opp. 74-75. This seems to have been an oblique way of arguing that the contacts of MKB's parent, BayernLB, including its New York branch office, should be

[17] Although plaintiffs sued "MKB Bayerische Landesbank" (SJA 1), there is no such entity. MKB Bank Zrt. ("MKB") is currently defending itself in this action. Bayern LB – a German bank that is the parent of MKB – is not party to this suit.

imputed to MKB. But "as a general rule, the jurisdictional contacts of a subsidiary corporation are not imputed to the parent." *Purdue Research Found.*, 338 F.3d at 788 n.17. "[W]here corporate formalities are substantially observed and the parent does not dominate the subsidiary, a parent and a subsidiary are two separate entities and the acts of one cannot be attributed to the other." *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944-45 (7th Cir. 2000) (no imputation where parent "maintained separate books, records, financial statements, and tax returns" and did not "exercise[] day-to-day management control over [subsidiary]"); *see also Purdue Research Found.*, 338 F.3d at 788 n.17 (imputation requires "an unusually high degree of control" or that the subsidiary's "corporate existence is simply a formality"). Thus, in *Goodyear*, the Supreme Court found jurisdiction absent even though the foreign defendant distributed its own products into the United States through a U.S.-incorporated affiliate. 131 S. Ct. at 2852.

Plaintiffs have not presented any evidence or allegation that MKB and BayernLB disregarded corporate formalities or that BayernLB dominates MKB. Their only allegations below were that "MKB's Board of Supervisors is controlled and dominated by BayernLB executives," who hold four of nine seats on the Board. They also alleged that "MKB considers itself BayernLB's agent or department in Central and Eastern Europe," based on the statement

on a website that MKB "represents the BayernLB bank group as a regional bridge-head in the realization of its new CEE expansion strategy." Pl. MTD Opp. 74-77. From those allegations alone, plaintiffs argue that "BayernLB clearly controls and dominates the business operations of MKB." *Id.* at 75.

Even assuming all this to be true, however, it is clear that necessary incidents of ownership, such as a parent's representation on the subsidiary's board or the implementation of group-wide strategy, do not warrant imputation of jurisdictional contacts. *See IDS Life Ins. Co.*, 136 F.3d at 540 ("Parents of wholly owned subsidiaries necessarily control, direct, and supervise the subsidiaries to some extent."); *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984) ("The officers of any corporation that owns the stock of another necessarily exercise a considerable degree of control over the subsidiary corporation and the discharge of that supervision alone is not enough to subject the parent to New York jurisdiction."). Moreover, plaintiffs cannot show that MKB is a "department" of Bayern LB because "[s]tatements of global cooperation among a parent and its subsidiaries do not support a finding of the pervasive control necessary to support" that a subsidiary is "a mere department" of the parent. *Gallelli v. Crown Imports, LLC*, 701 F. Supp. 2d 263, 274 (E.D.N.Y. 2010). Imputing contacts from parent to subsidiary based on such minimal allegations would swallow the rule that imputation is allowed only in extraordinary circumstances.

* * *

General jurisdiction over a foreign defendant is appropriate only when a defendants' contacts are "so extensive [as] to be tantamount to being constructively present in the state to such a degree that it would be fundamentally fair to require it to answer in [any federal] court in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world." *Purdue Research Found.*, 338 F.3d at 787. In the district court's view, if a Hungarian citizen tripped on the sidewalk in front of MKB's Budapest headquarters, he could sue MKB in the District of Hawaii.

With respect, that proposition cannot be correct. In its initial decision, the district provided absolutely no reason to justify its conclusion that "Plaintiffs have shown that OTP and MKB have extensive continuous and systematic general business contacts that would subject them to general personal jurisdiction." A8. In fact, the court failed to mention either "general jurisdiction" or Rule 4(k)(2) in this decision, instead quoting *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, PA*, 623 F.3d 440 (7th Cir. 2010), a *specific* jurisdiction case. A7-A8. On reconsideration, though the court stated that it "clearly" had applied the proper standards in its initial decision (A19), it still did not identify a single factual allegation that supported its ruling. A19, A25. Against this background, the district court's lack of jurisdiction is so apparent that MKB has demonstrated the

"*clear* right to relief sought" necessary to establish that a writ of mandamus should be granted. *In re Sandahl*, 980 F.2d at 1119.

III. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE COMPLAINT PURSUANT TO THE STATUTE OF LIMITATIONS.

The district court also erred in refusing to dismiss the complaint for failure to satisfy the statute of limitations. Plaintiffs' claims are more than 65 years old. And it is plain from the face of the complaint that plaintiffs or their predecessors were aware of the claims *at the time they occurred*. Against this background, there are no facts that could render plaintiffs' claims timely.

In reaching the contrary conclusion, the district court opined that plaintiffs "have not pled facts that establish that their claims are untimely," and that, in any event, "there are factual issues regarding potential tolling under the equitable tolling doctrines that cannot be assessed at the pleadings stage." A10. But that is not so: the complaint itself shows that the claims are untimely, and it is impossible to imagine any remotely plausible set of facts that could lead to tolling of the limitations period. Here, too, the district court's error is so fundamental that mandamus is warranted.

A. Plaintiffs' Claims Are Untimely.

The appropriate statute of limitations for a claim brought under the Alien Tort Statute is ten years, as the ten-year period provided by the Torture Victim Protection Act is the most analogous – and thus applicable – ex-

press limitations period. *See*, *e.g.*, *Jean v. Dorelien*, 431 F.3d 776, 778-79 (11th Cir. 2005); *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004).[18] Plaintiffs did not argue to the contrary below.

The limitations period for plaintiffs' state law claims is even shorter: Under Illinois law, all of them have a five-year limitations period. The five-year period for bailment claims is set by statute. *See* 735 Ill. Comp. Stat. 5/13-205 (catch-all statute of limitations); *Meeker v. Summers*, 388 N.E.2d 920, 921 (Ill. App. Ct. 1979). The same statute applies to conversion claims. *Haddad's of Ill., Inc. v. Credit Union 1 Credit Union*, 678 N.E.2d 322, 3224 (Ill. App. Ct. 1997). Constructive trust and accounting claims likewise must be brought within five years. *Hagney v. Lopeman*, 590 N.E.2d 466, 468 (Ill. 1992) (constructive trust); *In re Estate of Krevchena*, 614 N.E.2d 74, 77 (Ill. App. Ct. 1993) (accounting).

Given these limitations periods, plaintiffs' claims are untimely on the face of the complaint. Plaintiffs allege that Hungarian banks froze, spoliated, and centralized their accounts in 1944. SJA 29. They also assert that the spoliation began in 1939 and was extended by decree in 1944. SJA 29-30. And plaintiffs allege that in 1945, after the conclusion of World War II, "a number of survivors of the Holocaust and heirs of victims went to banks to retrieve

[18] MKB denies that U.S. plaintiffs have any cause of action under federal common law. But if they did, these claims would be subject to the same limitations period.

assets that had been kept in safe deposit boxes. But when the boxes were opened they proved to be empty." SJA 31. Moreover, "[v]irtually all of the individual claimants who have attempted to recover their money and valuables were informed that these assets no longer existed." *Id*. Thus, plaintiffs allege that the acts of which they complain occurred in the mid-1940s and earlier, and that plaintiffs were aware of their asserted injuries no later than shortly after the end of World War II.

The district court erred, accordingly, in failing to dismiss the complaint at this juncture. There can be no doubt that it is appropriate to consider statute of limitations issues on a Rule 12(b)(6) motion to dismiss. Although "[d]ismissing a complaint as untimely at the pleading stage is an unusual step, since a complaint need not anticipate and overcome affirmative defenses, such as statute of limitations," "dismissal is appropriate when the plaintiff pleads himself out of court by alleging facts sufficient to establish the complaint's tardiness." *Cancer Found., Inc. v. Cerberus Capital Mgmt., LP*, 559 F.3d 671, 674-75 (7th Cir. 2009). This Court, therefore, has held complaints properly dismissed for failure to satisfy the statute of limitations on a 12(b)(6) motion. *See*, *e.g.*, *Hollander v. Brown*, 457 F.3d 688, 691 n.1 (7th Cir. 2006). *See also Van Tu*, 364 F.3d at 1199-1200 (affirming dismissal of untimely ATS claims). That is the proper outcome here; given the facts

pleaded in the complaint, there is nothing plaintiffs can say that would render their claims timely.

B. The Equitable Tolling Doctrine Provides No Relief.

Plaintiffs cannot extend the statute of limitation via equitable tolling. Plaintiffs affirmatively pleaded that they (or their predecessors) were aware of the claims at the time they accrued. The relevant decrees, they argue, were "tacked up on Jewish residences." SJA 33. Plaintiffs allege that they – or their relatives – attempted to retrieve deposited assets at the conclusion of World War II, but the funds were not returned by the banks. SJA 31. Plaintiffs or their predecessors in interest have thus been aware of the factual circumstances resulting in the claims here for over 65 years.

"This Circuit has repeatedly emphasized that the application of equitable tolling turns on whether a reasonable person would be aware of the *possibility* of a claim." *Mitchell v. Donchin*, 286 F.3d 447, 451 (7th Cir. 2002) (emphasis added; quotation omitted). *See also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (equitable tolling is available only where, "despite all due diligence," a plaintiff "is unable to obtain vital information bearing on the *existence* of his claim" (emphasis added)). The lynchpin of the analysis is not the plaintiff's possession of detailed information with respect to the particulars of his or her claim, but whether the plaintiff knew that a claim *possibly* could exist. *See Chakonas v. City of Chicago*, 42 F.3d 1132,

1135-36 (7th Cir. 1994). Measured against this standard, there could be no basis for tolling here.

Plaintiffs cannot argue that they were unaware of the *amount* of their claims, as a plaintiff's lack of knowledge about the scope of a claim cannot form the basis for tolling. *See Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 268 (7th Cir. 1995). Nor can plaintiffs suggest that the limitations period should be tolled because they could not have brought suit during the existence of a Communist government in Hungary: Plaintiffs plead in the complaint that, "[i]n 1989, the post-Communist government unexpectedly re-privatized the banks." SJA 32. More than 20 years have elapsed since Communist rule ended in Hungary and the banks were re-privatized. No unpleaded or undiscovered facts could make these claims timely.

C. There Is No Continuing Violation.

Plaintiffs cannot escape dismissal by alleging that defendants committed a continuing violation of law. SJA 37. Plaintiffs' claims stem from the alleged conversion of accounts on deposit in the 1940s. But an injury that "is the natural consequence" of a "discrete act" occurring in the past cannot be deemed a continuing violation (*Savory v. Lyons*, 469 F.3d 667, 673 (7th Cir. 2006)); "under federal law, the continuing violation doctrine does not save an otherwise untimely suit when 'a single event gives rise to continuing inju-

ries.'" *Clark v. City of Braidwood*, 318 F.3d 764, 767 (7th Cir. 2003). That, however, is all plaintiffs have alleged here.

Even if plaintiffs alleged that they demanded payment from MKB and that payment was refused (to be clear, they do not), refusal of subsequent demands for repayment does not create new unlawful acts that renew the limitations period. Refusal of payment is simply a consequence of the original alleged wrongful act. But "[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Diliberti v. United States*, 817 F.2d 1259, 1264 (7th Cir. 1987) (quotation omitted).

In the context of discrimination, for example, the "principle" is "by now well established, that the refusal to undo a violation is not a 'fresh act' of discrimination * * * but instead is a persisting effect of past discrimination that does not affect the running of the statute of limitations." *Pitts v. City of Kankakee*, 267 F.3d 592, 597 (7th Cir. 2001). This same approach is taken consistently throughout the law. Thus, in antitrust suits, the continuing violation theory is unavailable "because acts that simply reflect or implement a prior refusal to deal or acts that are merely unabated inertial consequences (of a single act) do not restart the statute of limitations." *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 270 (8th Cir. 2004) (quotation omit-

ted).[19] *See also Cowell v. Palmer Twp.*, 263 F.3d 286, 293 (3d Cir. 2001) ("Neither was the Township's refusal to remove the lien an affirmative act of a continuing violation."). Were the law as plaintiffs suggest, statutes of limitations would be eviscerated for *any* claim could be made timely based on little more than a refused demand for payment. That is not the law.

* * *

Accordingly, plaintiffs' claims against MKB are barred by the statute of limitations and must be dismissed. Plaintiffs knew of the existence of their claims 65 years ago. They do not allege any relevant information or circumstances that could possibly render their claims timely. The district curt's cursory treatment of this issue so far departs from the governing standard that issuance of a writ of mandamus is appropriate.

[19] Interpreting an analogous Illinois law claim, this Court concluded that there is no continuing violation for a conversion claim. *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 447 (7th Cir. 2005). Each act was a separate wrong creating "a valid cause of action for conversion." *Id.* at 443.

CONCLUSION

This Court should take appellate jurisdiction over this appeal and reverse the district court's decision. In the alternative, the Court should issue a writ of mandamus compelling the district court to dismiss the claims against MKB.

Respectfully submitted,

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DATE: October 3, 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 13,923 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 3rd day of October 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*
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