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

MKB'S REPLY BRIEF

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

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
Christopher J. Houpt
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
(212) 506-2380

Attorneys for Defendant-Appellant MKB Bank Zrt.

December 6, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

RULES

INTRODUCTION

This is an exceptional case. Plaintiffs and their families were the victims of shocking and horrendous crimes perpetrated by Nazi Germany and its allies.[1] But precisely because the material legacy of those crimes was so extraordinary, in 2000 the United States and Germany created a unique claims-settlement mechanism in the German Foundation Agreement, both to provide compensation to Holocaust victims for looted asset claims like plaintiffs' and to secure broad legal peace. As we will show, plaintiffs are demonstrably wrong in suggesting that there is any doubt about the applicability of the Foundation framework to their claims. As a consequence, the continuation of this litigation is inconsistent with the claims settlement process and will interfere with the United States' foreign relations—as the United States and Germany each has expressly stated. In these exceptional circumstances, immediate review by this Court and reversal of the decision below is imperative.

ARGUMENT

I. THE COURT CAN AND SHOULD REACH THE MERITS.

We recognize, of course, that the Court resolves matters on an interlocutory basis only in very unusual circumstances. But the courts have developed doctrines that allow for interlocutory appeal precisely because consider-

[1] MKB has never contended that genocide is not a violation of international law.

ation of the issues prior to judgment sometimes *is* warranted. Those doctrines govern here.

A. Mandamus.

We begin with mandamus because plaintiffs have so little to say on the subject. Plaintiffs do not take issue with the demonstration in our opening brief and mandamus petition that the grant of mandamus may be proper when appellate jurisdiction is "problematic" but immediate correction of an error committed below nevertheless would advance important interests. *United States v. Vinyard*, 539 F.3d 589, 590 (7th Cir. 2008). They also do not challenge our statement of the circumstances when the grant of mandamus is warranted: when the petitioner demonstrates "irreparable harm" and a "clear right to the relief sought." *In re Sandahl*, 980 F.2d 1118, 1119 (7th Cir. 1992) (emphasis omitted). Instead, their argument against issuance of mandamus reduces to two less ambitious propositions: that "other adequate means" to correct the errors committed below in this case will be available much later in the process; and that, on the merits, MKB's entitlement to relief is not "clear and indisputable." Cons. Resp. in Opp. to Pets. for Writ of Mandamus at 1. Both contentions are wrong.

1. On the first, plaintiffs simply disregard our argument. It doubtless is true that there will be opportunities to revisit the issues presented here at trial or on appeal from final judgment. But as we showed in our opening

brief, those opportunities will come too late to preserve vitally important interests: the United States and Germany each has explained that it is the very *maintenance of the litigation* that interferes with the United States' foreign relations and undermines the policies of the German Foundation Agreement.

The United States stated that view plainly in its Statement of Interest, as we showed in our opening brief (at 7-12, 22-23). As for Germany, it recently informed this Court by letter of its "concern and its substantial policy interest in this case." Letter from Peter Ammon, Ambassador of the Federal Republic to Germany, to US Court of Appeals for the 7th Cir. at 1 (Dec. 1, 2011) ("Amb. Ammon Letter"). As its letter explains, Germany believes that the decision below "runs counter to the German Foundation Agreement's goal of 'legal peace' and to United States foreign policy interests and severely affects the interests of the Federal Republic of Germany regarding the Foundation as exclusive remedy and forum for these claims." *Id*. at 2. Additionally:

> [I]t is the *very maintenance* of this lawsuit which relies on a misinterpretation of US policy interests by the District Court that is in *clear conflict* with the stated policies adopted by the United States and the Federal Republic of Germany for the exclusive remedy of Nazi era claims through the Foundation. The Federal Republic of Germany and the United States have a vital interest that the incorrect interpretation of their interests and intent by the District Court is not allowed to stand.
>
> The Federal Republic of Germany respectfully urges this Court to grant MKB's appeal to correct the misconstruction of the statement of interest filed by the United States Government and to

> end *continuing damage* to US-German relations caused by the maintenance of this lawsuit.

Id. (emphasis added).

In closely analogous circumstances, the courts have recognized that, because of the importance of avoiding trial, claims of immunity from suit may be advanced on an interlocutory basis, even though such claims also could be advanced after final judgment. *See*, *e.g.*, *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996). So too here: continuation of this action will itself cause irreparable injury. Plaintiffs offer no response to this point.

2. As to plaintiffs' second argument against the grant of mandamus, it assumes its conclusion. We show below that MKB has a "*clear* right to the relief sought." *Sandahl*, 980 F.2d at 1119. And because MKB's argument is that the district court lacks jurisdiction over a foreign entity, this case both involves "the court's very power to act" and "raise[s] serious questions about the reach of U.S. law." *In re Hijazi*, 589 F.3d 401, 408, 411 (7th Cir. 2009). In these circumstances, the grant of mandamus is warranted.

B. Pendent Appellate Jurisdiction.

Although the availability of mandamus would make it unnecessary for the Court to definitively resolve the question of appellate jurisdiction, we note that plaintiffs' arguments on this point also are incorrect. Plaintiffs contend that *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), "all but

eliminated pendent jurisdiction." Opp. 16. But that is not true. Post-*Swint* this Court has exercised pendent appellate jurisdiction on repeated occasions (MKB Br. 19 n.6), as has *every* other circuit, as well as the Supreme Court (Appellant's Jurisdictional Reply at 8 n.5, Dkt. #23). They have done so notwithstanding the availability of certification under 28 U.S.C. § 1292(b).

Plaintiffs also argue that this case does not present the sort of "extraordinary circumstances" that justify the exercise of pendent jurisdiction (Opp. 17-18), but it is hard to see what could be more extraordinary than a suit seeking in excess of $75 billion, for claims stemming from World War II, where the United States and Germany each has stated that the very maintenance of the action will injure their foreign relations. The context here makes immediate review far more critical than was the case in the other situations in which pendent appellate jurisdiction has been exercised by this Court, such as a private contractual dispute (*Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 977 (7th Cir. 2010)), and public employment claims (*Beischel v. Stone Bank Sch. Dist.*, 362 F.3d 430, 434 (7th Cir. 2004)).

In addition, the issues we raise here are closely intertwined with the FSIA appeal by MNB. Our personal jurisdiction argument is nearly identical to the contentions of MNB. *See* MNB Br. 32-35, Dkt. #37. Plaintiffs argue that the questions are somehow different (Opp. 67), but they do not appear to

respond to MNB's contentions at all. Likewise, whether the statute of limitations bars the claims against MKB speaks to whether a claim may stand at all against MNB under the FSIA (MNB Br. 7)—an issue over which this Court necessarily has jurisdiction. And although plaintiffs suggest that judicial economy is irrelevant to the pendent jurisdiction inquiry (Opp. 18-19), this Court said otherwise in *Greenwell v. Aztar Indian Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001). Efficiency surely is not a sufficient basis on which to accept an interlocutory appeal, but it is a factor that weighs heavily in the analysis. It favors the exercise of jurisdiction here.

C. Collateral Order Jurisdiction.

Plaintiffs also are wrong with respect to collateral order jurisdiction, for several reasons.

1. Plaintiffs contend that there are "unresolved factual issues concerning the scope of" the German Foundation that make the decision below inconclusive and, for that reason, collateral order review inappropriate. Opp. 8. This assertion is both irrelevant and wrong.

It is irrelevant because the argument for a collateral order appeal is not that the German Foundation Agreement necessarily bars this suit, but rather that the United States and Germany believe that the maintenance of this ac-

tion interferes with their foreign relations.[2] The United States has explained that "[t]he maintenance of the suit against MKB Bank thus runs counter to the German Foundation Agreement's goal of 'legal peace' and to United States foreign policy interests," and thus requested dismissal. SJA 63. Germany, too, has asked this court to "end continuing damage to US-German relations caused by the maintenance of this lawsuit." Amb. Ammon Letter at 2. As we explained, these interests have been, and will continue to be, injured by the decision below.

Plaintiffs' argument is also demonstrably wrong. Plaintiffs are incorrect in suggesting that the Foundation may not "cover Plaintiffs' claims because Plaintiffs do not seek compensation for slave labor and the [German Foundation] only compensates slave laborers." Opp. 8. This point is not debatable. Annex A of the Agreement makes clear that confiscation of bank account claims is covered by the Foundation. Paragraph 6 of that Annex states that persons covered include those "who suffered loss of or damage to property during the National Socialist era as a result of racial persecution directly caused by German companies." SJA 107. It specifically identifies bank accounts as included in the forms of property covered, providing compensation

[2] Plaintiffs do, however, concede that dismissal *is* appropriate if the German Foundation mechanism were available to them: "Clearly, Plaintiffs' eligibility for compensation from the funds provided by these executive agreements would be one such valid legal ground for dismissal in order to prevent double recovery." Opp. 85.

for individuals who had not been eligible under a prior West German arrangement where, "in the case of bank accounts," the property was unidentifiable. *Id*. The U.S. Statement of Interest confirms this point. SJA 63. So, too, does Germany's letter, which states that "claims against MKB Bank are covered by the Foundation." Amb. Ammon Letter at 2. Indeed, in *In re Austrian & German Holocaust Litigation*, 250 F.3d 156 (2d Cir. 2001) (per curiam), the Second Circuit granted mandamus relief in favor of German banks *because* the Foundation applied to them.

Plaintiffs are also wrong to question whether MKB is a German Company within the meaning of the Agreement. Opp. 8 & n.6. The Foundation defines the term "German Company" as including entities that either have headquarters within the 1937 borders of the German Reich or currently within the Federal Republic of Germany. SJA 112 ¶ 1. Bayerische Landesbank indisputably falls within this definition. As to subsidiaries, the Foundation includes any enterprise in which a German company "had a direct or indirect financial participation of at least 25 percent" between 1933 and 2000, when the Agreement entered into force. *Id*. ¶ 2. As the U.S. Statement of Interest explains, "the United States has concluded that [MKB] qualifies as a 'German company,' as defined by Annex C to the German Agreement, 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. Si-

milarly, the German government has explained that, because "MKB Bank is owned by a Germany company, Bayerische Landesbank," it is "covered by the Foundation." Amb. Ammon Letter at 2.

No outstanding questions of fact remain: MKB accountholders could have submitted bank confiscation claims to the German Foundation.[3]

2. For related reasons, plaintiffs are wrong in contending that our appeal is premature (Opp. 6-8) or that the injuries to foreign relations caused by the litigation may be remedied later (Opp. 9-13). The district court conclusively rejected our arguments with respect to personal jurisdiction and the statute of limitations. *Cf. Khorrami v. Rolince*, 539 F.3d 782, 786 (7th Cir. 2008). Denial of a motion to dismiss often is a collateral order. *See Mercado v. Dart*, 604 F.3d 360, 362-63 (7th Cir. 2010). And unlike the situation in *Harris v. Kellogg Brown & Root Services, Inc.*, 618 F.3d 398 (3d Cir. 2010), the issues here were fully adjudicated below.

3. Against this background, an interlocutory appeal is appropriate when a district court denies a motion to dismiss notwithstanding a clear

---

[3] Separately, plaintiffs look to the Supplemental Statement of Interest filed by the U.S. in the *Simon v. Republic of Hungary* litigation to argue that "the government admits plaintiffs are ineligible to recover under the Funds." Opp. 87. That is a misconstruction of the Statement. At no point did the Government suggest that claimants asserting wrongdoing by MKB could not have pursued a claim with the German Foundation. *See* MKB Br. A42-A47. Moreover, that Statement was in the context of the Austrian Agreement which has a territorial limitation; as plaintiffs implicitly concede (Opp. 8), the German Foundation has no such territorial limitation that would exclude plaintiffs' claims here.

statement by the United States that maintenance of the suit will jeopardize the Nation's foreign relations. *See* MKB Br. 22-27.

We have explained why *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), invoked by plaintiffs at Opp. 10, is not to the contrary. *See* MKB Br. 26 n.10. And plaintiffs misinterpret the Governments' briefing in *Doe v. Exxon Mobil* and *Balintulo*, No. 09-2778 (2d Cir. 2009). Opp. 11-12. In both, the United States took the position that we advocate here. To be sure, the parties in *Doe* and *Balintulo* made different arguments for dismissal than we advance here, but the Government's view on the propriety of collateral order jurisdiction was not contingent on party-specific concessions. U.S. *Doe* Br. at 14, 2008 WL 2095734; U.S. *Balintulo* Br. at 11, 2009 WL 7768609. The Government's position was explicit: when it requests dismissal of a suit because of "the adverse consequences on the Nation's foreign relations" (U.S. *Balintulo* Br. at 11, 2009 WL 7768609), or "because the *pendency* of the litigation will adversely affect foreign relations" (U.S. *Doe* Br. at 14, 2008 WL 2095734), failure to dismiss justifies an immediate appeal.

Plaintiffs also are incorrect in suggesting that the Government has not advocated dismissal here. Opp. 11-12. The Government concluded in its Statement of Interest that "United States foreign policy interests counsel in favor of dismissal of all claims against Erste Group and MKB Bank on any valid legal ground(s)." SJA 70. Although plaintiffs maintain that this state-

ment is equivocal, throughout the Statement the Government made clear that "maintenance of the suit against MKB Bank * * * runs counter to * * * United States foreign policy interests" (SJA 63) and 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). There is no ambiguity.

4. Finally, plaintiffs assert (Opp. 10) that no appellate courts have exercised jurisdiction in like circumstances. But that is hardly surprising. The only case of which we are aware (and the only case that plaintiffs cite, Opp. 86) in which a district court failed to dismiss an action following submission by the Government of a Statement of Interest relating to the German Foundation is the district court's order in *In re Austrian & German Bank Holocaust Litigation*, 2001 WL 228107 (S.D.N.Y. Mar. 8, 2001). Two months later, however, the district court reversed course, dismissing the case with certain stipulations. *See In re Austrian & German Holocaust Litig.*, 250 F.3d at 161. And the Second Circuit then *granted mandamus*, ordering that the case be dismissed *without* conditions (*id.* at 161-65) because it is "beyond the authority of the courts to interfere with the Executive Branch's foreign policy judgments." *Id.* at 164. Given that the *only* decision similar to the one below in this case of which we are aware was set aside on mandamus, there has been

no occasion for a court to consider a collateral order appeal in these circumstances.

II. CLAIMS AGAINST MKB MUST BE DISMISSED FOR A LACK OF PERSONAL JURISDICTION.

When plaintiffs reach the merits, their argument that the district court has personal jurisdiction over MKB is wrong in several fundamental respects. It confuses general and specific jurisdiction. It misstates the nature and significance of MKB's contacts with the United States. And it gets the law wrong, in ways that are fatal to plaintiffs' position. No matter how the standard for general jurisdiction is worded—"essentially at home in the forum" (*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)); contacts "sufficiently extensive and pervasive to approximate physical presence" (*Tamburo v. Dworkin*, 601 F.3d 693, 701 (7th Cir. 2010)); "nonresident businesses that are so like resident businesses, insofar as the benefits they derive from [forum] 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 alleged contacts of MKB do not come close.

A. Plaintiffs Misstate The Legal Standards.

At the outset, plaintiffs misstate the controlling legal principles, in several significant ways.

First, plaintiffs are wrong to contend that Fed. R. Civ. P. 4(k)(2) "relaxe[s]" the minimum-contacts inquiry. Opp. 36. As the Rule itself acknowledges, all exercise of jurisdiction by a U.S. court must be "consistent with the United States Constitution." Thus, that Rule "does not"—indeed, it could not—"operate to relax the requirement that the defendant's contacts with the forum be constitutionally sufficient." *Saudi v. Northrup Grumman Corp.*, 427 F.3d 271, 275 (4th Cir. 2005).

Second, plaintiffs misapprehend the controlling burden. Opp. 27-29. Plaintiffs *always* have "the burden of establishing personal jurisdiction." *Tamburo*, 601 F.3d at 700. And where, as here, jurisdictional discovery has occurred, plaintiffs may not rest on the allegations in the complaint; they must point to specific evidence showing that jurisdiction is present. *See Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003). The *prima facie* standard to which plaintiffs cling means only that they are entitled to the benefit of the doubt in "disputes concerning relevant facts presented in the record"—not that they may rely on the banal recitation of *legal conclusions*. *Id.* (quotation omitted).

Third, plaintiffs misunderstand the rules stated by the governing decisions. In our opening brief, we analyzed this Court's decision in *uBid, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 428-29 (7th Cir. 2010), explaining that the "extensive and deliberate" forum contacts and "continuous[] and deliberate[] exploit[ation of] the Illinois market" that this Court found inadequate there for general jurisdiction far exceeded MKB's meager U.S. contacts. MKB Br. 36-38. In response (in the context of responding to OTP), plaintiffs quote at length from the portion of *uBid* that addresses *specific* jurisdiction (Opp. 30), but they ignore the portion of its holding that is relevant here—that "[t]he district court correctly found that GoDaddy is *not* subject to *general* jurisdiction." *uBid*, 623 F.3d at 426 (emphasis added). *See id.* (text plaintiffs quote appears under the heading "[s]pecific [j]urisdiction"). *uBib*'s specific jurisdiction analysis is immaterial here; indeed plaintiffs recognize that they "have never alleged that this Court has specific jurisdiction over MKB." Opp. 36.

Plaintiffs' analysis of *Goodyear*, 131 S. Ct. at 2851, and *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011), equally misses the mark. The Supreme Court held in *Goodyear* that sales into the forum did not create general jurisdiction. 131 S. Ct. at 2855. It quoted *International Shoe*'s observation that "'continuous activity of some sorts within a state' * * * 'is not enough to support the demand that the corporation be amenable to suits un-

related to that activity.'" *Id.* at 2856 (quoting *Int'l Shoe Co. v. Wash.,* 326 U.S. 310, 318 (1945)). And it confirmed in *J. McIntyre* that general jurisdiction exists "only where the defendant can be said to have targeted the forum." *J. McIntyre*, 131 S. Ct. at 2788. Under these holdings, if MKB has done nothing to target or avail itself of the U.S. forum, it is not susceptible to general jurisdiction here.

In arguing to the contrary, plaintiffs contend "the *J. McIntyre* and *Goodyear* decisions are on their face limited to questions as to the jurisdiction of state courts" (Opp. 37) and that "[i]n a state court, general personal jurisdiction is not enough, whereas in a federal court, so long as Rule 4(k)(2) is met, general personal jurisdiction can be sufficient in itself." Opp. 36. This argument is bewildering. *Goodyear* and *J. McIntyre* examined federal due process limitations, which control the minimum contacts analysis for *all* exercises of jurisdiction, in both state court and federal court under Rule 4(k)(2).

Fourth, plaintiffs label "flippant" MKB's assertion that a finding of general jurisdiction would render it subject to suit in Hawaii for a slip-and-fall accident that occurs in Budapest. Opp. 38 n.20. They observe that the particular claim that MKB described is likely to arise under state law and so would not come within Rule 4(k)(2). Yet in this very suit plaintiffs *do* assert common law claims (of which a slip-and-fall is just one variety) against MKB. *See* SJA 43-45. But plaintiffs also miss the more fundamental point. The hy-

pothetical, drawn from this Court's decision in *uBid*, 623 F.3d at 426, illustrates the significance of finding general jurisdiction and highlights the caution with which a court must proceed before finding it. Plaintiffs do not deny that, under their view, there would be no *constitutional* restriction on anyone bringing such a slip-and-fall claim against MKB in any U.S. court.

B. MKB's Alleged U.S. Contacts Are Insufficient For General Jurisdiction.

When plaintiffs do attempt to demonstrate the existence of jurisdiction over MKB, they offer a brief and conclusory account of its U.S. contacts. Opp. 33-34. Each of these is patently insufficient. That plaintiffs have assembled them together in one place does not change the conclusion that, as Judge Becker once noted, "nothing plus nothing times nothing still equals nothing." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1311 (E.D. Pa. 1981), *aff'd in part, rev'd in part, sub nom. In re Japanese Electronic Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd,* 475 U.S. 574 (1986). In making this argument, it bears emphasis that the parties are not arguing about the existence of particular facts; the dispute here concerns the legal significance of undisputed facts.

Accounts with U.S. Addresses. Plaintiffs argue that MKB has over "1,000 U.S. bank accounts." Opp. 33. But plaintiffs offer no response to the demonstration in our opening brief that these actually are accounts opened

and maintained in Hungary that do not constitute a purposeful availment of the U.S. forum. MKB Br. 33-38. Plaintiffs likewise provide no basis to disregard the decisions we identified (MKB Br. 38-41) that have held, in like circumstances, that the listing of an address in the forum by a small fraction of the defendant's customers cannot support general jurisdiction. Without evidence that MKB "purposely sought out these customers," the listing of an address in the forum is not a jurisdictional contact at all. *Lechoslaw v. Bank of Am., N.A.*, 618 F.3d 49, 54 (1st Cir. 2010)[4]; *E.I.C., Inc. v. Bank of Va.*, 166 Cal. Rptr. 317, 320 (Ct. App. 1980) (because banks inevitably have overseas customers, "it would be an absurdity to conclude" that bank "was doing business in each of the home jurisdictions of its depositors").

Correspondent Accounts. Likewise, plaintiffs offer no reason to conclude that the maintenance of MKB's correspondent accounts in New York provides a basis to exercise *general* jurisdiction over it. Because correspondent accounts are used by foreign banks that have "no physical presence" in the jurisdiction (*United States v. Union Bank for Savs. & Inv. (Jordan)*, 487 F.3d 8, 15 (1st Cir. 2007)), the existence of such accounts cannot possibly make those banks "present in the [forum] for essentially all purposes." *uBid*,

[4] Plaintiffs misstate the holding of *Lechoslaw*, in which the court did not "assert[] general jurisdiction." Opp. 29 n.15. The plaintiff there *asserted* general jurisdiction; the court dismissed the case, holding that even if the contacts otherwise would have been sufficient, "there is no evidence that these contacts were purposeful." *Lechoslaw*, 618 F.3d at 55.

623 F.3d at 426. In arguing to the contrary, plaintiffs contend that "MKB's authority only relates to specific and not general jurisdiction." Opp. 34. This is not only wrong (the decisions we cite *do* address general jurisdiction[5]) but also misguided, as the standard for proving specific jurisdiction is significantly *lower* than that for general.

U.S. Contracts. Plaintiffs refer generally to "relationships" with "U.S. vendors and consents to U.S. jurisdiction." Opp. 33. But they offer no response to the demonstration in our opening brief that MKB's limited contracts with U.S. entities do not support general jurisdiction. MKB Br. 43-46.

U.S. Travel. Plaintiffs also state that "MKB had substantial travel into the United States" (Opp. 33), but proffer no basis to conclude that these trips were anything near "continuous and systematic" contacts. Rather, we showed in our opening brief that these visits were the very definition of occasional and episodic. MKB Br. 47. Plaintiffs offer no response.

Bayerische Landesbank's Contacts. In addition to this smattering of contacts, plaintiffs argue that the contacts of MKB's parent, Bayerische

---

[5] *Celton Man Trade, Inc. v. Utex S.A.* addressed New York's "doing business" (*i.e.*, general) jurisdiction standard as well as the "transaction business" (specific) standard. 1986 WL 6788, at *1 (S.D.N.Y. 1986). *See also Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V.*, 701 F.2d 889, 892 (11th Cir. 1983) (citing Florida standard of "operates, conducts, engages in or carries on a business") (quotation omitted); *E.I.C., Inc.*, 166 Cal. Rptr. at 320 ("It would be a distortion of due process to hold that a state acquires general personal jurisdiction * * * merely because the bank has a correspondent relationship").

Landesbank, with the United States should be imputed to MKB. Opp. 34-35. This argument fails on several grounds.

First, the "general rule" is that contacts of an affiliated entity are not imputed to the defendant, subject only to limited exceptions where there is "an unusually high degree of control" or an agency relationship, rendering corporate separateness a mere formality. *Purdue Research Found.*, 338 F.3d at 788 n.17. Plaintiffs fail to even acknowledge this controlling legal standard—much less attempt to demonstrate that their assertions meet it.

Rather than respond to our arguments (MKB Br. 47-49), plaintiffs offer the conclusory statement that "BayernLB clearly controls and dominates the business operations of MKB." Opp. 35. Plaintiffs point to only two bits of evidence to support this conclusion: that representatives of Bayerische Landesbank sit on the MKB board and a statement on MKB's webpage. Neither is sufficient to impute contacts.

That Bayerische Landesbank has four of nine seats on MKB's board hardly supplies a reason to disregard corporate separateness. It is commonplace that "[p]arents of wholly owned subsidiaries necessarily control, direct, and supervise the subsidiaries to some extent." *IDS Life Ins. Co.*, 136 F.3d at 540. "[C]onstitutional due process," however, "requires that personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does

not exercise an unusually high degree of control over the subsidiary." *Cent. States, Se. & Sw. Areas Pension Fund v. Reamer Express World Cup*, 230 F.3d 934, 943 (7th Cir. 2000). And Bayerische Landesbank's holding four seats on the board is not an "unusually high degree of control" over MKB. Indeed, the Ninth Circuit has squarely held that even where a company held a *majority* of seats on an affiliate's board, imputation was not appropriate. *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 589 & n.4 (9th Cir. 1996). *See also Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 857 (5th Cir. 2000); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988) ("overlapping" boards not sufficient for imputation). Plaintiffs have cited no authority, and we are aware of none, that suggests a minority of board seats held by a parent is probative—much less sufficient—for imputation of jurisdictional contacts between entities.

As to the statement on MKB's website (Opp. 34), there is no doubt that MKB has *some* relationship with its parent company; that much is inherent in the parent-subsidiary relationship. But the statement on the website that MKB is a "regional bridge-head" offers no basis to conclude that MKB is a mere agent of Bayerische Landesbank or otherwise dominated by it. That related entities work in conjunction fails to provide any basis for imputation. *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 338-39 (5th Cir. 1999). *See also Gallelli v. Crown Imports, LLC*, 701 F. Supp. 2d 263, 274 (E.D.N.Y.

2010) (public "[s]tatements of global cooperation" do not warrant ignoring the companies' legal separateness). Indeed, even where a subsidiary is formed to sell a parent's products in a forum, that is not enough to impute its contacts to the parent. *See Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293-94 (11th Cir. 2000).[6]

Second, plaintiffs' theory fails as a matter of law. The presence of a subsidiary in the forum could conceivably supply a jurisdictional hook over an absent parent that completely dominates it. *See Purdue Research Found.*, 338 F.3d at 788 n.17. But plaintiffs are attempting the inverse here; they are seeking to impute a *parent's* contacts to an absent *subsidiary*. The Tenth Circuit has squarely rejected this approach, explaining that, because "[t]he dominated corporation does not direct and control its dominating corporate or individual alter ego," it would be "unfair to impute to the dominated corporation the forum contacts of its alter ego." *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1021 (10th Cir. 1990). Plaintiffs offer no reason for this Court to depart from that well-considered view.

---

[6] MKB is not "trying to have it both ways" on personal jurisdiction and the German Foundation Agreement, as plaintiffs assert. Opp. 35. "[C]orporate ownership alone is not sufficient for personal jurisdiction." *Cent. States*, 230 F.3d at 943. In the Agreement, by contrast, the United States and Germany defined "German company" for the purpose of their bilateral agreement to include any company that is at least 25% owned by a German parent. The policies that lie behind these differing standards are themselves quite different.

Third, if, contrary to our contention, the Court *were* to find personal jurisdiction possible based on imputed contacts of Bayerische Landesbank, dismissal would still be necessary because jurisdiction, in that event, would be inappropriate under Rule 4(k)(2). That Rule permits nationwide aggregation of contacts only where defendants are "not subject to jurisdiction in any state's courts of general jurisdiction." Fed. R. Civ. P. 4(k)(2)(A). Although MKB is not subject to personal jurisdiction in any state, Bayerische Landesbank clearly is subject to general jurisdiction in New York, where it has a branch office. Thus, if MKB's position on imputation were rejected and jurisdiction were deemed appropriate based on Bayerische Landesbank's contacts (MKB vigorously disputes that such a finding could be sustained), MKB acknowledges that it would be subject to suit in New York—which would prohibit the use of Rule 4(k)(2) and would require dismissal of this action. *See ISI Int'l, Inc. v. Borden Ladner*, 256 F.3d 548, 552 (7th Cir. 2001).

III. THE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiffs' claims—which they or their predecessors-in-interest have known about for more than sixty years—also are barred by the statute of limitations. This is an issue of fundamental fairness: "[s]tatutes of limitation * * * are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been

lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). These considerations apply with full force here.

Plaintiffs have abandoned any contention that "exigent circumstances" render their claim timely—for good reason, as the fall of communism in Hungary in 1989 defeats any such suggestion.[7] In its place, they offer three other arguments: that international or foreign law controls the statute of limitations here; that equitable tolling applies; and that MKB engaged in a "continuing violation." All are meritless.

A. The ATS Statute Of Limitations Is Ten Years.

Plaintiffs now argue, for the first time, that either international or foreign law controls the statute of limitations. Opp. 69, 72-73. But plaintiffs waived this argument in the district court and, in any event, it is wrong on the merits. A ten-year limitations period applies to ATS claims. MKB Br. 51-52.

1. Plaintiffs never argued in the district court that anything other than the ten-year statute of limitations applies. Below, defendants argued that federal courts must apply the ten-year statute of limitations contained within the Torture Victim Protection Act, 28 U.S.C. § 1350 (note), to ATS claims. *See*

[7] Because plaintiffs "never raised this argument in its briefs," "it is therefore waived." *Quality Oil, Inc. v. Kelley Partners, Inc.*, 657 F.3d 609, 614 (7th Cir. 2011).

Erste Motion to Dismiss at 6, D. Ct. Dkt. #136. Plaintiffs responded that their claims were timely either because this was a continuing violation (Pl. Opp. at 56-57, D. Ct. Dkt. #160) or because equitable tolling applies (*id.* at 57-59). They never suggested that either international law or Hungarian law was relevant. Any such argument, accordingly, is waived here: "A party waives any argument that it does not raise before the district court." *Williams v. REP Corp.*, 302 F.3d 660, 666 (7th Cir. 2002) (quoting *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002)).

2. Moreover, the argument is wrong. As this Court recently held in *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011), although the norms underlying an ATS claim undoubtedly are controlled by international law as a "matter of substance," the "means of enforcing it, which is a matter of procedure or remedy," is a matter of domestic law. That is to say, "[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them." *Id.* at 1020.[8]

---

[8] Plaintiffs themselves acknowledged below as a general matter that, "[w]hile we must look to international law to determine whether a violation of international law has occurred, federal common law provides remedies under the ATS." Pl. Opp. at 8, D. Ct. Dkt. #160. "This is especially true," according to plaintiffs, "when determining remedies and civil liability under international law, as international law says very little about how to enforce international norms, and intentionally leaves domestic implementation, such as rules of civil liability, to the individual States." *Id.* Having advanced this argument below, plaintiffs may not now reverse course and suggest that another aspect of remedy—the statute of limitations—is governed by international or foreign law. Indeed, after arguing in this Court that international

A statute of limitations is precisely the sort of "matter of procedure or remedy" that is determined in ATS cases by reference to *domestic*—not international or foreign—law. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 728-29 (1988). Limitation periods have long been understood to bar a *remedy*. *See Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011). Generally, a "statute of limitations does not extinguish the cause of action upon the running of the limitations period; only the possibility of obtaining a remedy in that forum is gone." *Reinke v. Boden*, 45 F.3d 166, 169 (7th Cir. 1995). Domestic law accordingly controls this question.[9] And plaintiffs do not quarrel with our view that, looking domestically, a ten-year statute of limitations applies. *See Jesner v. Arab Bank, PLC*, 2009 WL 4663865, at *3 (E.D.N.Y. 2009) ("All courts that have decided which statute of limitations to apply to an ATS claim have concluded that the TVPA is the most analogous statute and have applied a 10-year statute of limitations.").[10]

3. To the extent that plaintiffs wish to avail themselves of a Hungarian statute of limitations (Opp. 72-73), they are free to seek remedy in a Hunga-

---

law controls, plaintiffs immediately pivot to equitable tolling, relying ***solely*** on U.S. domestic law in doing so.

[9] It is domestic law that authorizes a civil suit at all in these cases, as nothing in international law establishes private causes of action. *See Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995). In granting plaintiffs the right to sue, domestic law also properly limits *when* suit may be brought.

[10] Plaintiffs do not dispute that the limitation periods for the non-ATS claims are five years. MKB Br. 52.

rian court. Dismissal under the ATS statute of limitations "does not bar a subsequent suit in another jurisdiction," "establish[ing] only that the suit is time-barred in the state of rendition; it says nothing about a suit in the second jurisdiction." *Reinke*, 45 F.3d at 169-70. But plaintiffs have sued in U.S. court, invoking the U.S. ATS and seeking to avail themselves of plaintiff-friendly U.S. judicial procedure; given this decision, they are subject to the U.S. statute of limitations. In light of plaintiffs' choice of forum, it is hardly "remarkable" (Opp. 72) that defendants invoke the protections afforded by U.S. law.

B. Plaintiffs Fail To Plead Facts Sufficient To Support An Equitable Tolling Theory.

As we explained (MKB Br. 54), equitable tolling turns on whether a plaintiff knows about the "*possibility* of a claim." *Mitchell v. Donchin*, 286 F.3d 447, 451 (7th Cir. 2002) (emphasis added). *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). Here, plaintiffs' artfully worded brief does not deny that, as their complaint makes manifest, they have known of a possible claim for many decades. That is fatal to their current suit.

To escape this problem, plaintiffs contend that defendants somehow "misled" them. Opp. 69-71. But "plaintiffs seeking to toll the statute of limitations on various grounds must have included the allegation in their plead-

ings." *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 991 (9th Cir. 2006). *See Montin v. Estate of Johnson*, 636 F.3d 409, 413-15 (8th Cir. 2011); *Wexler v. City of Chicago*, 27 F.3d 570 (table), 1994 WL 268632, at *4 (7th Cir. 1994). On examination, plaintiffs have not done so here. In fact, they do not allege that MKB—or any of the other defendants—has done *anything* with respect to these plaintiffs.

In their brief (at 70), plaintiffs point this Court to six paragraphs in the complaint to establish equitable tolling: ¶¶ 5, 9, 12, 21, 23, and 53.[11] Not a single one mentions MKB. *See* SJA 3, 4, 5, 7, 8, 20. Indeed, none of those paragraphs alleges any wrongful or misleading act by *any* of the named defendants. Needless to say, these allegations cannot establish equitable tolling.

Quite unlike the allegations in this case, the handful of Holocaust-related cases plaintiffs cite in their brief actually did involve concrete allegations of fraudulent concealment against the named defendants. Opp. 70-71. In *Rosner v. United States*, 231 F. Supp. 2d 1202, 1209 (S.D. Fla. 2002), for example, plaintiffs alleged that "the United States Government has * * * continued to wrongfully claim that the property on the Gold Train was unidentifiable and thus unreturnable" and, moreover, that "the Government essen-

[11] Plaintiffs appear to forgo reliance on the tolling allegations actually contained in their complaint (SJA 37-38, ¶ 105). That is for good reason; like the citations to the complaint that are advanced in their brief to this Court, the tolling allegations in the complaint do not allege a single act of concealment by MKB or any other bank that could support tolling.

tially turned a deaf ear to Plaintiffs' repeated requests for information about their property." No comparable allegations have been made here about MKB.

Plaintiffs' mere incantation of the equitable tolling doctrine does not mean it applies. They must allege facts showing *why* tolling could possibly be appropriate, but they have failed to do so. They have not alleged wrongful conduct by any of the defendants. They have not alleged what specific information they lacked, or why they lacked it. And they have pleaded no facts as to why this suit is now possible, rather than decades ago.

C. The Continuing Violation Theory Fails.

The statute of limitations also cannot be avoided by plaintiffs' perfunctory invocation of the continuing violation doctrine at Opp. 71-72. *See* MKB Br. 55-57. The "refusal to undo a violation" is not "a 'fresh act'" that restarts the limitations period. *Pitts v. City of Kankakee*, 267 F.3d 592, 597 (7th Cir. 2001). Plaintiffs' own cases reject a continuing violation theory in similar circumstances. *See Rosner*, 231 F. Supp. 2d at 1207-08 (explaining that *Bodner v. Banque Paribas,* 114 F. Supp. 2d 117 (E.D.N.Y. 2000), is an outlier). But that is all plaintiffs assert here.

Plaintiffs cite *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 891 (2d Cir. 1981), for the proposition that in "international property expropriation cases, a denial of restitution of or compensation for expropriated and/or looted assets has been found to be a continuing violation of in-

ternational law." Opp. 72. But *Banco Nacional de Cuba* said no such thing. The statute of limitations was not at issue in that decision, and the court never invoked the continuing violation doctrine. Moreover, against MKB, plaintiffs assert no claim for expropriation—and they could not, as the banks involved were allegedly private.

And even if there *could* be a new violation upon demand for repayment, plaintiffs have not alleged that they have ever demanded *anything* of MKB (or any other defendant). Thus, even if plaintiffs' suspect theory were accepted, their failure to actually demand anything from defendants renders it unavailable here.

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,

/s/ Tyrone C. Fahner

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

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

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

Attorneys for Appellant - Defendant MKB Bank Zrt.

DATE: December 6, 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 6,999 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 hereby certify that on this 6th day of December 2011, MKB's Reply Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

The following participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system:

Gregory Louis Stelzer
FIGLIULO & SILVERMAN, P.C.
Ten South LaSalle Street, Suite 3600
Chicago, Illinois 60603

Jeffrey A. Leon
FREED & WEISS
111 West Washington Street, Suite 1331
Chicago, Illinois 60602

Anthony A. D'Amato
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
375 East Chicago Avenue
Room 311
Chicago, Illinois 60611

Anthony L. Paccione
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, Illinois 60661-3693

Richard H. Weisberg
CARDOZO LAW SCHOOL
55 Fifth Avenue, Suite 520
New York, New York 10003

Robert James Pavich
PAVICH LAW GROUP
20 South Clark Street, Suite 700
Chicago, Illinois 60603

Alan Kanzer
ALSTON & BIRD LLP
90 Park Avenue
New York, NY 10016

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