UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMI AMBAR,	
et. al.	
Plaintiffs,	
v.	1:20-cv-03587-CKK
THE FEDERAL REPUBLIC OF GERMANY,	
Defendant.	

DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT THEREOF

Jeffrey Harris, Esq.
Walter E. Diercks, Esq.
Max Riederer von Paar, Esq.
RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, LLP
1250 Connecticut Avenue, N.W., Ste 700
Washington, D.C. 20036

(202) 861-0870/(202) 288-4500
wdiercks@rwdhc.com

Attorneys for Defendant

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MOTION

Defendant, The Federal Republic of Germany, moves for summary judgment, pursuant to Rule 56 Federal Rules of Civil Procedure, on the grounds that:

1. The Court lacks subject matter jurisdiction, as the Foreign Sovereign Immunities Act's (FSIA) so-called Expropriation exception set forth in 28 U.S.C. 1605(a)(3) does not apply to overcome the FSIA's broad grant of immunity to foreign sovereign states. The taking in the instant case is a domestic taking and is therefore not a taking in violation of international law. *Federal Republic of Germany v. Philipp*, 592 U.S. ____, 141 S. Ct. 703 (2021).
2. Plaintiffs received the full compensation to which they were entitled under the controlling Treaty between the Republic of Austria and the German Democratic Republic (GDR) on the settlement of outstanding questions relating to the law of property.
3. This action is barred by the applicable statute of limitations as Plaintiffs received the compensation they were awarded under the Treaty in 2000 and withdrew a separate action to recover the property in 2000. As such, they did not file the instant action until December 2020, well beyond any applicable statute of limitations.
4. There is no genuine dispute as to any material fact as per Fed. R. Civ. P. 56(a).
5. Defendant is entitled to judgment as a matter of law as to Plaintiffs' claim.
6. The Exhibits in support of the Motion for Summary Judgment are as follows:

    Exhibit 1: Statement of undisputed material facts.

    Exhibit 2: Documents supporting undisputed facts 1-19.

Exhibit 3: German 1938 Decree establishing taking in March 1941.

WHEREFORE, as more fully set forth in Defendant's incorporated Memorandum of Law, Defendant prays this Court enter summary judgment for Defendant.

MEMORANDUM OF LAW

In this Memorandum, Defendant The Federal Republic of Germany will demonstrate that it is entitled to summary judgment on three separate and distinct grounds. Each ground is supported by statements of fact about which there is no genuine material issue, and those facts entitle Defendant to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Local Civil Rule 7(h); Statement of Undisputed Material Facts (Ex 1). The three grounds, each of which is discussed *infra.*, are:

1. The property, which is the subject of this action, Lottumstrasse 15, Berlin, was taken by Germany from its owner, Salo Feuerwerk, who was a German national at the time of the taking. As such, this was a domestic taking and not a taking in violation of international law. This Court lacks subject matter jurisdiction under the Expropriation Exception to the broad grant of immunity Germany enjoys under the Foreign Sovereign Immunities Act, as the Expropriation Exception requires that the taking be in violation of international law for the Court to have jurisdiction over Germany.
2. Plaintiffs' claims as to Lottumstrasse 15, Berlin were fully and finally settled by a treaty between the German Democratic Republic and Austria. That treaty extinguished all war-related claims between treaty parties and those subject to the treaty.
3. This action is barred by the applicable statute of limitations, as Plaintiffs' two actions

for compensation and to recover the property were fully resolved in 2000, over twenty years before the filing of this action.

Legal Standard for Summary Judgment

While there are literally hundreds of cases that address the standard required for a court to grant summary judgment, this Court, in a recent case succinctly set out the standard:

> Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The mere existence of some factual dispute is insufficient on its own to bar summary judgment; the dispute must pertain to a "material" fact. *Id.* Accordingly, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Nor may summary judgment be avoided based on just any disagreement as to the relevant facts; the dispute must be "genuine," meaning that there must be sufficient admissible evidence for a reasonable trier of fact to find for the non-movant. *Id.*

Congress v. Gruenberg, No. 19-01453 (CKK), 2022 BL 428627, at *6 (D.D.C. Dec. 1, 2022).

I. The Undisputed Material Facts establish that the taking of Lottumstrasse 15 was a domestic taking which is not a violation of international law and does not fall within the FSIA's expropriation exception.

A domestic taking is a taking where a foreign state takes the rights in property from a national of that country. *Philipp, supra* 141 S. Ct. at 715. The undisputed facts that support the conclusion that the taking of Lottumstrasse 15 from its owner Salo Feuerwerk was a domestic taking are:

1. The property was taken from Salo Feuerwerk on March 5, 1941, by the Gestapo. Undisputed Fact 4 (hereinafter UF).
2. Salo Feuerwerk held a German passport from March 21, 1939, until it expired on December 31, 1940. UF 1, 2.
3. Salo Feuerwerk stated in his will in November 1941, over seven months after the

taking, that he was a German citizen. UF 3.

4. The German Reich stripped Salo Feuerwerk of its German nationality on April 16, 1941, some five weeks after the property was taken. UF 6.

5. Plaintiffs admit that when the property was taken from Salo Feuerwerk, Salo Feuerwerk was not a stateless person. UF 5.

These undisputed facts clearly demonstrate that, after the Anschluss (Germany's annexation of Austria) in 1938, Salo Feuerwerk was a German national, as he applied for and received a German passport. Salo Feuerwerk regarded himself a German citizen and so stated in his will on November 9, 1941. Plaintiffs admit that Salo Feuerwerk was not a stateless person when his property was taken. Salo Feuerwerk's property was taken by the Gestapo on March 5, 1941. Germany regarded Salo Feuerwerk as a German national until it revoked his German nationality on April 16, 1941. So, whether Salo Feuerwerk's statement that he was a German citizen in November 1941 or Germany's position that Salo Feuerwerk lost his nationality by proclamation dated April 16, 1941 is credited, there is no dispute that on March 5, 1941[1] when the property was taken, Salo Feuerwerk was a German national.

The unlikely possibility that Salo Feuerwerk was a stateless person, so as to possibly negate that the taking was a domestic taking, is foreclosed in this case as the Plaintiffs1 admit that Feuerwerk was not a stateless person at the time of the taking.

Germany now turns to the task of demonstrating that based on these undisputed material facts, it is entitled to judgment as a matter of law.

The Supreme Court in *Federal Republic of Germany v. Philipp*, 592 U.S. ____, 141 S.

[1] Or more properly, Plaintiffs deny that Feuerwerk was stateless when the property was taken. (Plaintiffs' response to Request for Admission 3.)

Ct. 703 (2021), unanimously held that the "domestic takings rule" assumes that what a country does to property belonging to its own citizens within its own borders is not the subject of international law. *Philipp,* 141 S. Ct. at 709, citing *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co*., 581 U. S. ___, ___, 137 S. Ct. 1312, 197 L. Ed. 2d 663, 673 (2017) (additional citation omitted). The Supreme Court initially recited the well-known proposition that the FSIA is the sole source of jurisdiction in a U.S. court over a foreign sovereign. *Philipp, supra* 141 S. Ct. at 709. That being the case, if there is no taking in violation of international law of expropriation, there cannot be jurisdiction over a foreign sovereign under the Expropriation Exception to the FSIA's broad grant of immunity to foreign states. *Ibid,* 141 S. Ct. at 715.

The Supreme Court in *Philipp* explained that "the expropriation exception is best read as referencing the international law of expropriation . . ." and that the body of law the Court looks is the "law of property." *Id.*, 141 S. Ct. at 712. The Supreme Court rejected petitioners' argument that the term "taken in violation of international law" incorporates international law writ large. *Id.* The Supreme Court concluded with its holding that:

> We hold that the phrase "rights in property taken in violation of international law," as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule.

Id. 141 S. Ct. at 715.

On August 8th, the Court of Appeals for District of Columbia Circuit issued its 73-page opinion in *Simon v. Republic of Hungary*.[2] The Circuit Court set out its understanding of the

[2] The *Philipp* and *Simon* cases for several years have largely travelled in tandem through the court system.

holding in *Philipp*:

> Generally speaking, the [expropriation] exception has two requirements: (1) the claim must put in issue "rights in property taken in violation of international law," and (2) there must be an adequate connection between the defendant and both the expropriated property and some form of commercial activity in the United States. *Id*. We refer to the latter as the commercial-activity nexus requirement.
>
> With respect to the first requirement, the Supreme Court in *Philipp* held that "the phrase 'rights in property taken in violation of international law,' as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation, and thereby incorporates the domestic takings rule." 141 S. Ct. at 715. Under the domestic takings rule, a foreign sovereign's taking of its own nationals' property is not a violation of the international law of expropriation. *Id.* at 709. *Philipp* thus generally bars plaintiffs who were nationals of the expropriating state at the time of the alleged taking from invoking the expropriation exception. See *id.* at 715.3

Simon v. Republic of Hungary, 77 F. 4th 1077, 1091 (D.C. Cir. 2023), petitions for rehearing and rehearing *en banc* denied October 12, 2023.

Applying the law to the undisputed facts, "the threshold question is: Was the victim of the alleged taking a national of the foreign-state defendant at the time of the taking? If the answer is yes, the domestic takings rule bars application of the FSIA's expropriation exception; if the answer is no, that bar is inapplicable." *See Philipp*, supra 141 S. Ct. at 715, *Simon*, supra 774 F. 4th at 1095.

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[3] *Phillip* and *Simon* require that the plaintiff be a *national* of the expropriating state for the domestic taking rule to apply. The term "national" is understood to include persons with less rights than a citizen. The distinction between a citizen and a national is, perhaps, best illustrated by the citizenship rights that American Samoans do not have as nationals of the United States. As non-citizen U.S. nationals, American Samoans are, among other things, unable to obtain jobs requiring U.S. citizenship; ineligible for federal work-study programs in college; ineligible for firearm permits; unable to obtain a range of travel and immigration visas; and unable to pursue certain immigration relief for their spouses and children that would be available to U.S. citizens. *See, e.g.,* 8 U.S.C. § 1408, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *Koonwaiyou v. Blinken*, 69 F.4th 1004 (9th Cir. 2023), *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021), *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967 (9th Cir. 2003) ("All citizens of the United States are also nationals. However, some nationals are not citizens. Traditionally, only persons born in territories of the United States were non-citizen nationals.").

The Taking

The taking took place on March 5, 1941 (UF 4). On that day the Gestapo notified the Land Registry at the District Court in Berlin, Friedrichstrasse that "the property of the Jew Salo Israel Feuerwerk Berlin N, Lottumstr. 15, recorded in the Land Register of Berlin, Volume 40, p. 1187, **is confiscated.**" UF 4. (emphasis added).

A taking occurs whenever a state denies the owner of a property to benefit from property. At the time of the FSIA's enactment in 1976, the then-current RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) defines a "taking" as conduct intended to, and does, effectively deprive a person of substantially all the benefit of his interest in the property so taken. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 192 (Am. L. Inst. 1965).4

The confiscation of Mr. Feuerwerk's property in Berlin by the Gestapo is the type of conduct that constitutes a taking by the German Reich through one of its institutions, the Gestapo, because the Gestapo's confiscation of the building in March 1941 barred Mr. Feuerwerk from enjoying the economic benefits of his property. The Gestapo, in the March 5, 1941 letter to the Berlin Land Register, notes that the confiscation of the building was subject to the General Decree of the Reich Minister of Justice (Allgemeine Verfügung des Reichsjustizministers) of 30 August 1938, German Judiciary (Deutsche Justiz) 1938, 1408. When the property was seized on March 5, 1941, it became subject to an "absolute prohibition on transfer" under said decree and, as such, confiscation by the Gestapo constitutes a taking. A

[4] As the Restatement in effect when Congress enacted the FSIA, that source bears authoritative weight in interpreting the Act. *Simon*, supra 77 F.4th at 1097 citing *Philipp,* supra 141 S. Ct. at 712 ("[It is] our consistent practice of interpreting the FSIA in keeping with "international law at the time of the FSIA's enactment" and looking to the contemporary Restatement for guidance").

copy of the 1938 decree with certified translation is attached as Exhibit 3.

Mr. Feuerwerk's Nationality at Time of Taking

This Court in *Philipp v. Kulturbesitz,* after reviewing various authorities cited by the parties, concluded that it must look to German law at the time of the alleged taking. *Philipp v. Kulturbesitz,* 628 F. Supp. 3d 10, 26-27 (D.D.C. 2022) ("International law leaves to the states' domestic laws the question of "certain criteria for acquisition and loss of nationality"). *Comparelli v. Republica Bolivariana de Venezuela*, 891 F.3d 1311, 1321 (11th Cir. 2018) citing *Stserba v. Holder*, 646 F.3d 964, 973 (6th Cir. 2011).

This Court used the same argument when it ruled in its earlier memorandum opinion on Germany's motion to dismiss in this case that "the question of whether Mr. Feuerwerk was a German national is a question under German law." ECF Doc 15 at 8, citing The Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, 2, Apr. 12, 1930, 179 U.N.T.S. 89.

This Court also held that, "Following annexation, Germany issued a decree in July 1938 declaring all Austrian citizens to be nationals of Germany retroactive to March 1938, the start of its annexation. Therefore, under German law, Mr. Feuerwerk became a German national in 1938." ECF Doc 15 at 9. Under German law, according to this Court, Mr. Feuerwerk lost his German nationality by decree of the German government on November 25, 1941 ("However, he was denationalized by the 11th Decree issued by Germany on November 25, 1941." *Id.*). The Court then concluded that Mr. Feuerwerk was not a German national at the time of the taking of his property because, according to paragraph 57 of the complaint, the property was not taken until two days after Mr. Feuerwerk was denationalized on November 25, 1941.

However, with discovery now completed, a contrary conclusion is required, as it is now undisputed that the Gestapo confiscated Mr. Feuerwerk's property on March 5, 1941. UF 4. The discovery in this case also has brought to light the fact that Mr. Feuerwerk's German nationality was taken by declaration on April 16, 1941, several weeks after the taking took place in early March of the same year. UF 6.

Although Mr. Feuerwerk resided outside of the German Reich at the time it annexed Austria he expressly accepted German nationality.

This Court in its memorandum opinion on Germany's motion to dismiss discussed, and agreed with, the Second Circuit's decision in *United States ex rel. Schwarzkopf v. UHL. Ambar v. Fed. Republic of Germany,* 596 F. Supp. 3d 76, 84 (D.D.C. 2022). In *United States ex rel. Schwarzkopf v. UHL*, the Second Circuit found that an Austrian citizen who resided outside Austria at the time of the annexation did not become a German citizen under the laws of Germany at that time unless the individual voluntarily accepted German citizenship or otherwise actively claimed it. *United States ex rel. Schwarzkopf v. UHL, 137 F.2d 898 (2d Cir. 1943)* ("In our view an invader cannot under international law impose its nationality upon non-residents of the subjugated country without their consent, express or tacit.")

It is undisputed that Mr. Feuerwerk was not present in Austria at the time of the annexation. It is also an undisputed fact that Mr. Feuerwerk expressly accepted the German nationality as evidenced by the undisputed fact that he applied for and received a German passport on March 21, 1939, and, when the passport expired in September 1939, he renewed it and kept it until its expiration on December 31, 1940. UF 1, 2. In addition to this express acceptance of German nationality, Mr. Feuerwerk also self-identified as German in his last will and testament, executed in November 1941. UF 3.

Thus, the victim of the taking, Salo Feuerwerk, was a German national on the date that the Gestapo seized his property at Lottumstrasse 15, Berlin on March 5, 1941. He remained a German national until Germany's decree of April 16, 1941 stripped him of his German nationality some six weeks after his property was confiscated. UF 6. The answer to the threshold question posed by the Court of Appeals is therefore that Mr. Feuerwerk was a German national on the day that his property was taken. That answer mandates that the domestic taking rule bars application of the FSIA's expropriation exception and this court lacks subject matter jurisdiction in this matter.

Summary judgment should be granted as the undisputed material facts as applied to the law establish that Germany is entitled to judgment as a matter of law.

II. Plaintiffs' claims as to Lottumstrasse 15, Berlin were fully and finally settled by a treaty between the German Democratic Republic and Austria. That treaty extinguished all war-related claims between treaty parties and persons subject to the treaty.

The treaty between the German Democratic Republic and Austria finally and fully settled all outstanding property claims of persons subject to the treaty. Salo Feuerwerk's heir was specifically made subject to the treaty and, as such, once the compensation was paid in accordance with the treaty, all claims were fully and finally settled, and any other claims were extinguished. The undisputed facts that support this conclusion are:

1. A treaty titled the "Treaty between the Republic of Austria and the German Democratic Republic on the settlement of outstanding questions relating to the law of property" (hereinafter the "Treaty") was entered into August 21, 1987. UF 7.
2. The Treaty covered the claims of Ella Ambar. UF 8.

3. The Treaty provided in Article 1 that the German Democratic Republic would pay Austria 136,400,000 Austrian shillings to settle all the property claims which were the subject of the Treaty. UF 9.
4. Article 7 of the Treaty states that upon payment of the amount specified in Article 1 all property claims are settled with finality. UF 10.
5. On January 22, 1988, Austria passed a statute known as the GDR Distribution Statute to govern the distribution of the funds received under the Treaty. UF 11.
6. Ella Ambar was awarded 614,250 Austrian shillings under the GDR Distribution Statute as compensation for taking of Lottumstrasse 15, Berlin from her father Salo Feuerwerk. UF 12.
7. The 614,250 Austrian Shilling award was reduced to 514,434.38 Austrian Schillings in accordance with the GDR Distribution Statute ratio. UF 13.
8. Ella Ambar received 514,434.38 Austrian Schillings under the GDR Distribution Statute. UF 14.
9. Ella Ambar was advised of her right to appeal the amount of the award. UF 15.
10. Ella Ambar, in a document written in her own hand and dated June 6, 2000, declined her right to appeal the award and sent her wiring instructions to the Federal Distribution Board. UF 16.
11. Ella Ambar and her sister Therese Abrahamoff filed a claim under the German Act on the settlement of open property issues “VermG” seeking reversion of Lottumstrasse 15, Berlin. UF 17.

12. On February 15, 2000, at the conclusion of the hearing (referenced in UF 18) on the claim in the Administrative Court Berlin, 25th Chamber, Ella Ambar and Therese Abrahamoff, by their attorney, withdrew their complaint. UF 18.

The cited undisputed facts demonstrate that in 1987 the German Democratic Republic and Austria entered into a treaty titled the "Treaty between the Republic of Austria and the German Democratic Republic on the settlement of outstanding questions relating to the law of property". This Treaty settled with finality all property claims arising out of the war for all property and persons covered by the Treaty. The Treaty specifically covered Salo Feuerwerk's heir, Ella Ambar, by name in a diplomatic note appended to the Treaty. The Treaty set up a fund from which property claims would be paid. The Treaty was administered by Austria which passed a statute known as the GDR Distribution Statute to govern the distribution of funds received under the Treaty. The Treaty provided in its Article 7 that once the settlement fund was paid to Austria all property claims are "definitely settled." The required amount to be paid in accordance with Article 7, 136,400,000 Austrian shillings, was transferred to Austria. Austria distributed that amount on a proportional basis among those claims covered by the Treaty less an amount to cover Austria's expenses under the Treaty. Ella Ambar was awarded 614,250 Austrian shillings under the GDR Distribution Statute as compensation for taking of Lottumstrasse 15, Berlin from her father Salo Feuerwerk. She received a net amount 514,434.38 Austrian Schillings in accordance with the Austrian GDR Distribution Statute ratio to account for expenses. Ella Ambar was notified of her right to appeal the amount of the award. Ella Ambar, in a writing in her own hand, accepted the compensation payment and stated she would not appeal. Thereafter in February 2000 Ella Ambar and her sister Therese Abrahamoff sought reversion of the property under a German law on the settlement of open property issues. At a

hearing on the matter in 2000, when the judge informed the sisters that their claim was likely to be denied, they, by their attorney, withdrew their complaint which was then dismissed.

Based on these undisputed facts Germany is entitled to summary judgment as a matter of law. The Court of Appeals for the District of Columbia Circuit has set out the basic principle "that a state has authority to bargain on behalf of its citizens and, consequently, to bargain away its citizens' civil claims." *Doe v. Exxon Mobil Corp*., 654 F.3d 11, 63 (D.C. Cir. 2011) *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013), *citing* Louis Henkin, *Foreign Affairs And The United States Constitution* 299-300 (2d ed. 1996). Once an international settlement agreement is finalized, the private claim becomes a "claim of the state and is under the state's control. The state may . . . abandon the claim, or settle it." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 902 cmt. i. *Doe v. Exxon Mobil Corp*., 654 F.3d at 63. "This authority to espouse claims does not depend on the consent of the private claimholder, and the fact that a claim has been espoused provides a complete defense for the defendant sovereign in any action by the private individual. Once it has espoused a claim, the sovereign has wide-ranging discretion in disposing of it. It may compromise it, seek to enforce it, or waive it entirely." *Asociacion De Reclamantes, Et Al., v. The United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) *citing* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§205, 213.

In this case the claimholder, Ella Ambar, was specifically made subject to the Treaty. More importantly she accepted the compensation afforded to her by the Treaty and stated she would not appeal. "Except as an agreement might provide otherwise, international claim settlements generally wipe out the underlying private debt, terminating any recourse under

domestic law as well. *See Hwang Geum Joo v. Japan*, 413 F.3d 45, 51 (D.C. Cir. 2005) (citation omitted).

This Treaty does not provide otherwise. On the contrary, the Treaty specifically provides in Article 7 that once the settlement fund was paid to Austria all property claims are finally and fully settled. Since Ella Ambar accepted the compensation provided under the Treaty, her heirs (the Plaintiffs) cannot now be heard to complain that the independent claim they assert survived. In addition, Ella Ambar and her sister sought reversion of the property under a German law in an effort to circumvent the Treaty. At the conclusion of the hearing on their claim, they withdrew the complaint, and the case was dismissed by the German court.

III. This action is barred by the applicable statute of limitations, as Plaintiffs received the compensation they were awarded under the Treaty in 2000 and withdrew a separate action to recover the property in 2000, 20 years before they filed the instant action.

The Federal Republic of Germany also moves for summary judgment because Plaintiffs claims are barred by the applicable statute of limitations. This Court can decide a motion for summary judgment premised on the statute of limitations without first deciding whether it has jurisdiction under the FSIA. Normally the question of jurisdiction must be resolved in the affirmative before a federal court addresses a non-jurisdictional issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). However, as the Court of Appeals for the District of Columbia ""recently explained in *Kaplan v. Central Bank of the Islamic Republic of Iran*, "*Steel Co.*'s rule of priority does not invariably require considering a jurisdictional question before *any* nonjurisdictional issue." 896 F.3d 501, 513 (D.C. Cir. 2018). Instead, "courts may address certain nonjurisdictional, threshold issues" so long as those issues "can occasion a '[d]ismissal short of reaching the merits.'" *Id.* (*quoting Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S.

422, 431, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (alteration in original)). *Matar v. Transp. Sec. Admin.*, 910 F.3d 538, 541 (D.C. Cir. 2018). *Accord*, *Khadr v. United States*, 67 F.4th 413, 418-19 (D.C. Cir. 2023).

Whether a suit has been timely filed under the applicable statute of limitations is a non-jurisdictional threshold question that does not involve any consideration of the merits of the plaintiffs' claims. *Ibid.* Therefore, this Court may proceed directly to consider and decide the question regarding the timeliness of the filing of Plaintiffs' suit, without first addressing whether the Court has jurisdiction under the FSIA, as alleged by Plaintiffs. *Id.*

The undisputed material facts establish that Plaintiffs had knowledge of the alleged taking and have engaged in various activities in Austria and Germany, activities they ended in 2000. After 2000, Plaintiffs remained inactive and did not pursue their claims further until the filing of the complaint in this matter in December 2020.

Plaintiffs' claims are for monetary damages based on the taking of real property located in Germany. When causes of action are brought under 28 U.S.C. 1605 (the exceptions to the FSIA's grant of immunity to foreign states), a foreign-state entity that is subject to suit "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. This provision is a pass-through to the substantive law that would govern a similar suit between private individuals," including the choice-of-law rules that would ordinarily apply in the suit. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S.Ct. 1502, 1508 (2022). District of Columbia choice-of-law rules provide (1) that the forum state's law applies to all procedural matters, and (2) that the statute of limitations is a procedural matter. *Namerdy v. Generaicar*, 217 A.2d 109,113 (D.C. 1966); *Gaudreauv. Am. Promotional Events, Inc.*, 511 F. Supp. 2d 152, 157 (D.D.C. 2007); see also, *Jin v. Ministry of*

State Sec., 254 F. Supp. 2d 61, 68 (D.D.C. 2003); *Nix v. Hoke*, 139 F. Supp. 2d 125, 132 n. 4 (D.D.C. 2001).

The applicable statute of limitations in the District of Columbia in this matter is three years:

> § 12–301. Limitation of time for bringing actions.
>
> [(a)] Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:
>
> (3) for the recovery of damages for an injury to real or personal property— 3 years;

DC Code § 12–301(a)(3) (2022).

The longest possible statute of limitations is 15 years (D.C. Code §12-301(1) – for the recovery of lands, tenements or hereditaments). It is not necessary for the Court to resolve the question of whether the limitations period is three years or 15 years, since the delay in bringing this suit is well in excess of 15 years – longer than any possible applicable District of Columbia statute of limitations. *Peterson v. Saudi Arabia*, 332 F. Supp. 2d 189, 201 (D.D.C. 2004) ("Regardless of which substantive law the Court applies, plaintiff's claims fail independently because they are barred under any applicable statute of limitations; more than sixteen years passed between issuance of the Royal Decree in 1987 and the filing of this action in 2003.").

The undisputed facts that demonstrate this are:

1. Ella Ambar received 514,434.38 Austrian Schillings under the GDR Distribution Statute. (Plaintiff's answer to Interrogatory # 6.) UF 14.

2. Ella Ambar was advised of her right to appeal the amount of the award. (Bates #181 and 183 in Ambar Documents produced by Plaintiff to Defendant.) UF 15.

3. Ella Ambar, in a document written in her own hand and dated June 6, 2000, declined her right to appeal the award and sent her wiring instructions to the Federal Distribution Board. (Bates #184-185 in Ambar Documents produced by Plaintiff to Defendant.) UF 16.

4. Ella Ambar and her sister Therese Abrahamoff filed a claim under the German Act on the settlement of open property issues "VermG" seeking reversion of Lottumstrasse 15, Berlin. (Bates #159 – 172 in Ambar Documents produced by Plaintiff to Defendant.) UF 17.

5. On February 15, 2000, at the conclusion of a hearing in the Administrative Court Berlin, 25th Chamber, Ella Ambar and Therese Abrahamoff, by their attorney, withdrew their complaint and the complaint was dismissed. (Bates #173-176 in Ambar Documents produced by Plaintiff to Defendant.) UF 18.

6. Plaintiffs (heirs to Ella Ambar and her sister Therese Abrahamoff) filed this case in this Court on December 10, 2020. (Docket Entry #1.) UF 19.

The undisputed facts show that there were two proceedings in which the heirs of Salo Feuerwerk sought either compensation for the taking of Lottumstrasse 15, Berlin or reversion of the Lottumstrasse 15, Berlin.

In one of the proceedings, Ella Ambar and her sister Therese Abrahamoff sought reversion of Lottumstrasse 15, Berlin in a court proceeding brought under the German Act on the settlement of open property issues "VermG". At the conclusion of the hearing in the Administrative Court in Berlin, 25th Chamber, Ella Ambar and Therese Abrahamoff, by their attorney, withdrew their complaint and the case was dismissed. This occurred on February 15, 2000.

In the other proceeding, Ella Ambar, Salo Feuerwerk's daughter, received compensation under the Treaty (see II above). She was advised of her right to appeal the amount of the award

but declined to appeal. Rather, she sent her wiring instructions to the Distribution Board to receive the remainder of the amount awarded which she received. Ms. Ambar declined to appeal the award on June 6, 2000.

Plaintiffs in their wisdom decided to wait for 20 years after those events before they filed the instant case on December 10, 2020. This case was therefore filed two decades after the two proceedings set out above were resolved. Plaintiffs' complaint details the legal actions Plaintiffs engaged in until 2000 in Austria and in Germany. Litigation in a foreign country simply showed that plaintiffs could have pursued their claim in the U.S. earlier. *Sea Search Armada v. Republic of Colombia,* 821 F. Supp. 2d 268, 273 (D.D.C. 2011).

Plaintiffs will doubtlessly repeat their arguments and allegations made in the Complaint maintaining that the statute of limitations does not apply in this case or may not be raised by Germany. ECF 1, at ¶ 97 *et. seq*. The arguments in the Complaint are (a) that no limitations period is imposed on criminal prosecutions for the violations of international law, war crimes and crimes against humanity (ECF 1, at ¶ 97); (b) the continuing wrong doctrine extends the limitations period (known as "continuing violation doctrine" in the District of Columbia) (Compl. 98); and (c) the estoppel doctrine (ECF 1, at ¶ 99 and 100).

Argument that no Limitations Period Is Imposed On Criminal Prosecutions For The Violations Of International Law, War Crimes And Crimes Against Humanity Does Not Apply

Plaintiffs claim that no limitations period should be imposed in this matter since no limitation period is imposed on criminal prosecutions for the violations of international law, war crimes and crimes against humanity. ECF 1, at ¶ 97. In support of their statement, Plaintiffs cite the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes

Against Humanity, G.A. Res. 2391 (XXIII), Annex, 23 U.N. GAOR, Supp.; No. 18, at 40, U.N. Doc. A/7218 (1968) ("UN Convention").

The UN Convention is not applicable in this matter. It states in its Art I that no statutory limitation shall apply to "war crimes" or crimes against humanity". As such the UN Convention refers "exclusively to prosecution for crimes" and not civil cases. Note also that the Convention refers exclusively to prosecution for crimes, not to tort liability. *Hoang Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004) (refusing to apply UN Convention in tort case).

The matter at hand is not a prosecution for crimes, indeed, the gravamen of the complaint relates to a taking that allegedly violates international law in accordance with 28 U.S.C. 1605(a)(3). It is worthwhile to repeat at this point that the Supreme Court in *Philipp* explained that "the expropriation exception is best read as referencing the international law of expropriation . . ." and that the body of law the Court looks is the law of property." *Philipp* 141 S. Ct. at 712.

Continuing Violation Doctrine Not Applicable

Courts in the District of Columbia have recognized the continuing violation doctrine as an exception to the general rule that "[a] claim normally accrues when the factual and legal prerequisites for filing suit are in place." *Ctr. For Biological Diversity v. Haaland*, No. 20-573 (EGS), 2023 BL 76069, at *8 (D.D.C. Mar. 8, 2023), citing *Earle v. Dist. Of Columbia*, 707 F.3d 299, 306, 404 U.S. App. D.C. 1 (D.C. Cir. 2012).

The D.C. Circuit recognizes that a continuing violation "is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period, typically because it is only its cumulative impact […] that reveals its illegality." *Keohane v.*

United States, 669 F.3d 325, 329 (D.C. Cir. 2012).; *Earle* 707 F.3d at 306 ("fact of the violation becomes apparent only by dint of the cumulative effect of repeated conduct").

Plaintiffs argue that the continuing violation doctrine applies, because allegedly "Defendant's ongoing failure to return the Building or compensate for the same, constitute deliberate, continuous and ongoing violations of international and domestic law." ECF 1, at ¶ 98.

In the action at hand, the violation was the taking of Mr. Feuerwerk's property by the German Reich in 1941. That injury to Mr. Feuerwerk was permanent, obvious and known. And it occurred in March 1941, the date the Gestapo confiscated the property.

"Under international law, the date of taking is fixed by the date of the expropriation decrees and/or the date of physical seizure, and not by a subsequent date of repudiation of an undertaking to provide compensation." *Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203, 207 (D.C. Cir. 1987), *cert denied*, 486 U.S, 1054 (1988), *citing* Letter from Richard Fairbanks, Assistant Secretary of State for Congressional Relations (Oct. 2, 1981), *reprinted in* S.REP. No. 211, 97th Cong., 1st Sess. 4-5 (1981), *accord*, *Agudas Chasidei Chabad of United States. v. Russian Federation*, 466 F. Supp. 2d 6, 18 (D.D.C. 2006), *reversed on other grounds*, *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008).

The continuing violation doctrine, however, 'is generally thought to be inapposite when an injury is definite, readily discoverable, and accessible in the sense that nothing impedes the injured party from seeking to redress it." *Keohane*, supra 669 F.3d at 329. Plaintiffs' allegations amount not to a separate unlawful act, rather they are the "lingering effect of an unlawful act" which in itself is not a wrongful act. *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (citations omitted). The alleged failure to right a wrong "cannot be a continuing wrong . . . for that is the purpose of any lawsuit and the exception would obliterate the rule." *Earle*, supra 707

F.3d at 306. *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C.Cir.1977); *see also Oppenheim v. Campbell*, 571 F.2d 660, 662 (D.C.Cir.1978) (plaintiff's claim accrues when he is "first harmed").

The continuing violation doctrine is not applicable in this case. Plaintiffs' allegations are merely a thinly veiled attempt to evade the fatal statute of limitations problems they face for their underlying claims. Indeed, in *Rosner v. United States,* the court held that the continuing violation doctrine did not salvage expropriation claims where the plaintiffs attempted to use the doctrine arguing the government's continued failure to return the property constituted a continuous and ongoing violation of law. *Rosner v. United States*, 231 F. Supp. 2d 1202, 1207 (S.D. Fla. 2002); *See also In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027, 1072 (N.D. Ill. 2004), aff'd 471 E3d 754 (7th Cir. 2006), cert. denied *sub nom. Farmer-Paellman v. Brown & Williamson Tobacco Corp*., 128 S.Ct. 92 (2007), cert. denied *sub nom. Hurdle v. R.J. Reynolds Tobacco Corp*., 128 S.Ct. 92 (2007).

No Estoppel

An estoppel argument based on lulling (ECF 1, at ¶ 99) also is not available to overcome the statute of limitations.

The District of Columbia Court of Appeals has set forth the standards for a lulling tolling of the statute of limitations in *Tiger Steel Eng'g, LLC v. Symbion Power, LLC*, 195 A.3d 793, 803 (D.C. 2018):

> In the District of Columbia, "a defendant cannot assert the bar of the statute of limitations[ ] if it appears the defendant has done anything that would tend to lull the plaintiff into inaction, and thereby permit the limitation prescribed by the statute to run." *Daniels*, 100 A.3d at 142 (internal quotation marks and brackets in original omitted). To establish lulling, the plaintiff must show that the defendant engaged in affirmative misconduct; "mere silence or failure to disclose" is generally not enough. Id. (internal quotation marks and alterations in original omitted). In addition, and importantly in this case, "[i]f

> ample time to file suit within the statutory period exists after the circumstances inducing delay have ceased, there is no estoppel against pleading the bar of the statute."

Interdonato v. Interdonato, 521 A.2d 1124, 1135 (D.C. 1987) (internal quotation marks omitted).

Paragraph 99 of the Complaint claims that Germany lulled the Plaintiffs ". . . through a series of legislative enactments, remedial statutes and representations (as discussed at length above) that held out the false promise of providing Plaintiffs with adequate compensation." An examination of the paragraphs of the Complaint preceding paragraph 99 do not discuss any action or inaction by Germany after 2000 which could possibly have lulled the Plaintiffs into inaction. As noted above, the Plaintiffs waited until December 2020 to file the instant suit. Thus, the Plaintiffs had more than ample time to file suit within the statute of limitations, even if the Court were to give any credence to Plaintiffs' claims of lulling through 2000. Therefore, any claim of estoppel based on lulling is without merit. *Interdonato v. Interdonato*, supra 521 A.2d at 1135.

Conclusion

The undisputed material facts establish that the Federal Republic of Germany is entitled to summary judgment as a matter of law on each of three independent bases. Germany has demonstrated that the taking of Salo Feuerwerk's Berlin property was a domestic taking and not a violation of the international law of expropriation. As such, the Court is without subject matter jurisdiction as the FSIA's expropriation exception does not apply so as to negate Germany's immunity. Germany has also demonstrated that plaintiffs' claims for compensation for the taking of the Berlin property were fully and finally settled pursuant to a treaty between the German Democratic Republic and Austria under which Salo Feuerwerk's heir received the compensation awarded under the treaty for the taking. Lastly, Germany has demonstrated that this action is

time barred by the applicable District of Columbia Statute of Limitations, as this action was not filed until 20 years after the last efforts to receive compensation for the taking of the Berlin property were concluded. The Plaintiffs' allegations that the statute of limitations was tolled is without merit.

Summary judgment should be granted on each of the three separate grounds. 1) The Court lacks subject matter jurisdiction as Germany is immune under the FSIA. 2) Plaintiffs have received all the compensation to which they are entitled pursuant to the treaty between the GDR and Austria. 3) Lastly, this action is time barred.

Dated: November 10, 2023

s/ Jeffrey Harris
Jeffrey Harris, Esq. JH2121
Max Riederer von Paar, Esq.
Walter E. Diercks, Esq.

RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, LLP
1250 Connecticut Avenue, N.W., Ste 700
Washington, D.C. 20036
(202) 861-0870
wdiercks@rwdhc.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Electronic Filing.

s/ Walter E. Diercks
Walter E. Diercks

Service List:

Lawrence Marc Zell, Esq.
Noam Schreiber, Esq.
ZELL, ARON & CO.
34 Ben Yehuda Street
15th Floor
Jerusalem 9423001
Israel
(212) 971-1349
Fax: (212) 253-4030
Email: mzell@fandz.com
noam.schreiber@fandz.com