IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Leffer, et al. *Plaintiffs*, v. FEDERAL REPUBLIC OF GERMANY, et al. *Defendants*.	Case No. 19-cv-3529 (CJN)

MOTION OF THE EUROPEAN UNION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, LACK OF PERSONAL JURISDICTION AND FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN GRANTED

Comes now the Defendant, the European Union, by counsel, and moves this Court to:

(1) Dismiss the complaint pursuant to Fed. R. Civ. P 12(b)(1) for lack of subject matter jurisdiction because the European Union is immune from the jurisdiction of the courts of the United States pursuant to 28 U.S.C. 1602, *et. seq.*, the Foreign Sovereign Immunities Act ("the FSIA");

(2) Dismiss the complaint pursuant to Fed. R. Civ. P 12(b)(2) for lack of personal jurisdiction; and

(3) Dismiss the Complaint pursuant Fed. R. Civ. P 12(b)(6) for failure to state a claim for which relief can be granted.

The factual and legal bases for the motion are set out below in the Defendant's Memorandum of Law in Support of the Motion.

MEMORANDUM OF LAW

The Complaint in this matter was filed on December 9, 2019 by Plaintiffs von Prince and Leffer against the Federal Republic of Germany, the Swiss Confederation, the European Union and the Kingdom of Belgium.

This confusing Complaint, as best as can be divined, is that the Free City of Danzig never lost its status because the decision by the Allied Powers to have it administered by Poland came with a the caveat that the administration should last until a peace treaty has been executed and that such peace treaty has never been executed and therefore the administration of the Free City of Danzig should be under the control of the United States until a peace treaty is executed. Plaintiff von Prince, claiming to be an official of the Free City of Danzig, issued official documents of the Free City of Danzig in his supposed capacity as a civilian representative of the Allied Powers that being of the United States, as the principal victorious party in World War II. He alleges that he has been falsely charged, indicted, extradited and imprisoned for issuing these documents. Plaintiff Leffer, claiming to be a representative of the German people, was also indicted and is living in Switzerland due to ongoing alleged politically motivated persecution. Plaintiffs seek a declaratory judgment that the Court has jurisdiction and for damages.

Argument

I. The Complaint should be dismissed for lack of subject matter jurisdiction as the Defendant is immune from prosecution under the FSIA's broad grant of immunity to foreign states and their agencies and instrumentalities. None of the exceptions to that broad grant of immunity applies in this case.

Historically foreign sovereigns and their agencies and instrumentalities had no right to any immunity in the Courts of the United States. *Schooner Exchange v. M'Faddon*, 11 U.S. 166, 3 L.Ed. 287 (1812). However, while not a matter of right, the United States did, as a matter of

grace and comity, waive its right to exercise its jurisdiction over foreign sovereigns in certain cases. *Id.* The Courts historically deferred to the Executive Branch's determination as to whether to exercise or waive jurisdiction in cases involving foreign sovereigns. Until the early 1950s, the Executive Branch requested immunity for foreign sovereigns in all cases. *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 76 L. Ed 2d 81, 103 S. Ct. 1962 (1983). Thereafter the Executive Branch, acting through the Department of State, made inconsistent suggestions to the courts regarding sovereign immunity. In the wake of the resultant confusion and inconsistency Congress acted in 1976 by enacting the FSIA.

The FSIA is the sole source of subject matter jurisdiction against a foreign state and its agencies or instrumentalities. *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99 , 101 , 417 U.S. App. D.C. 257 (D.C. Cir. 2015) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 , 443 , 109 S. Ct. 683 , 102 L. Ed. 2d 818 (1989)); *see also* 28 U.S.C. §§ 1605-1607. The broad grant of immunity is found in 28 U.S.C. 1603 and states:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

As an agency or instrumentality of a foreign state, (see *infra* "A" below) the European Union is immune from suit in the courts of the United States under the provisions of the FSIA. Under the FSIA, a foreign state and its agencies or instrumentalities are presumptively immune from the jurisdiction of the United States courts; unless a specified exception applies (see *infra* "B" below), a federal court lacks subject-matter jurisdiction over a claim against a foreign state and its agencies or instrumentalities. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 123 L. Ed. 2d 47, 113 S. Ct. 1471 (1993).

A. The European Union is regarded as an agency or instrumentality of a foreign state under the FSIA and enjoys the FSIA's broad grant of immunity afforded foreign states and their agencies or instrumentalities.

It is beyond argument that the FSIA's broad grant of immunity applies to the foreign state itself. However the FSIA defines a foreign state more broadly to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . ." 28 U.S.C. 1603(a). The question that relevant herein is whether the European Union is an "agency or instrumentality of a foreign state." [1] An agency or instrumentality of a foreign state is defined in the FSIA thusly:

> An "agency or instrumentality of a foreign state" means any entity —
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof
>
> and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.
>
> 28 USC § 1603(b).

The United States Court of Appeals for the Second Circuit considered the question of whether the European Community (EC), a predecessor of the European Union, [2] was an agency

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[1] **Error! Main Document Only.**The United States recognizes implicitly the status of the EU by maintaining diplomatic relations with the EU (*e.g.* the establishment of the United States Mission to the European Union). In addition, Article 47 of the Treaty on European Union (in its version after the entry into force of the Lisbon Treaty - https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html) provides the EU with legal personality.

[2] Please see Article 1, third subparagraph of the Treaty on European Union:
"(…) The Union shall replace and succeed the European Community."
See also, an encyclopedic entry: "(…) [In] 2009(…) the EU legally replaced the EC as its institutional successor."
Encyclopedia Britannica: European Community, **Matthew J. Gabel**
(https://www.britannica.com/topic/European-Community-European-economic-association)

or instrumentality of a foreign state under the FSIA. *European Cmty. v. RJR Nabisco, Inc*., 764 F.3d 129, 144, 2014 BL 231889, 12 (2d Cir. 2014) *rev'd and remanded on other grounds*, 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016). In *RJR* the Court needed to decide weather the district court had diversity jurisdiction which, in turn, depended on whether the EC was a foreign state under the FSIA. The Court began its analysis by quickly deciding that,

> There is no doubt that the European Community satisfies the first and third elements of the definition of "agency or instrumentality" provided in § 1603(b). It is clear also that the European Community is not a political subdivision of a foreign state. The question is whether the European Community is "an organ of a foreign state." *Id.*

After pointing out that the FSIA does not define "organ" and reviewing several dictionary definitions, the Court stated that the five-factor guide promulgated in *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.2004), was a useful guide for the Court to use in deciding whether the EC was an "organ" of a foreign state. Those factors are:

(1) whether the foreign state created the entity for a national purpose;

(2) whether the foreign state actively supervises

the entity;

(3) whether the foreign state requires the hiring of public employees and pays

their salaries;

(4) whether the entity holds exclusive rights to some right in the [foreign]

country; and

(5) how the entity is treated under foreign state law.

The *RJR* Court examined each if the factors and held that the EC clearly satisfied the first four and possibly the fifth. And because, as the Court stated, "that these factors invite a balancing process, and that an entity can be an organ even if not all of the factors are satisfied"

the Court held that the EC is an organ of a foreign state. Therefore, as an organ of a foreign state, the EC is an agency or instrumentality of a foreign state and in turn fits within the definition of foreign state. As such it is entitled to the FSIA's broad grant of immunity.

Two other courts have considered whether the EC is a sovereign foreign state. The United States Tax Court held that because deductions for payment of fines to governments are not an allowable deduction under the Internal Revenue Code, payments of fines to the EC for price fixing are not deductible. *Guardian Indus. Corp. v. Commissioner,* 143 T.C. 1 (2014). The Tax Court stated that "We believe these holdings to be consistent with a recent opinion of the U.S. Court of Appeals for the Second Circuit, which holds that the EC is an 'agency or instrumentality of a foreign state' for purposes of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. sec. 1603(b) (2006)." (citing *RJR*).

In a 2019 decision by the United State District Court for the District of Columbia, the court accepted that the EC is a foreign sovereign under both the Act of State and Foreign Sovereign Compulsion Doctrines citing *RJR* with the "cf" introductory signal. *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 281, 2019 BL 340752, 13 (D.D.C. 2019).

Therefore, the European Union, as a legal successor to the European Community, is an agency or instrumentality of a foreign state under the FSIA and, as such is entitled to the FSIA's broad grant of immunity unless one of the enumerated exceptions is alleged with the requisite specificity.

B. None of the FSIA's exceptions to its broad grant of immunity apply in this case.

As an agency or instrumentality of a foreign state, the European Union is immune from suit in the courts of the United States under the provisions of the FSIA. Under the FSIA, a foreign state is presumptively immune from the jurisdiction of the United States courts; unless a

specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 123 L. Ed. 2d 47, 113 S. Ct. 1471 (1993).

The exceptions to this broad grant are contained in 28 U.S.C. 1605. These statutory exceptions are the source of the federal district court's subject matter jurisdiction and "if no exception applies, the district court has no jurisdiction." *Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014); *cert. denied*, 2016 U.S. LEXIS 4064, 136 S. Ct. 2504, 195 L. Ed.2d 839 (2016).

> The statute [FSIA] must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity. [citation and fn omitted] At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies -- and in doing so it must apply the detailed federal law standards set forth in the Act.

Verlinden B. V. v. Central Bank of Nigeria, supra 461 U.S. at 483-484.

Section 1605 (28 U.S.C. 1605) contains a list of exceptions to the general grant of immunity. Plaintiffs fail to allege, either explicitly or inferentially, that any of the exceptions apply in this case. The allegation against the European Union is that:

> The European Union is aware that "Germany" has violated the terms and conditions of Mr. von Prince's extradition, thereby violating the Charter of Fundamental Rights of the EU. The EU knows that there are arrest warrants against the plaintiffs, which are based only on the breach of the terms and conditions of Mr. von Prince's extradition, and that they therefore cannot leave Switzerland into the EU because they would otherwise be extradited into "Germany" on the basis of an European arrest warrant. (Complaint para. 84).

With regard to the allegation set out above, plaintiffs allege "the EU Commission and the EU Parliament have been informed and are doing nothing."

Finally, as to the European Union the plaintiffs allege that "The EU is not fulfilling its obligations to the nationals of the Free City of Danzig." (Complaint para. 142).

In totality, these allegations do not allege jurisdiction under the FSIA, the only source of this Court's jurisdiction, and certainly do not allege that any of the exceptions to the FSIA's broad grant of immunity apply. As such, the Court is without jurisdiction and the Complaint against the European Union should be dismissed pursuant to F. R. Civ. P 12(b)(1).

II. The Complaint should be dismissed for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2).

Under the FSIA, personal jurisdiction equals subject matter jurisdiction plus valid service of process. 28 U.S.C. 1330(b); *I.T. Consultants, Inc. v. Islamic Republic of Pak.*, 351 F.3d 1184, 1191 (D.C. Cir. 2003); *Reiss v. Societe Centrale Du Groupe Des Assurances Nationales*, 235 F.3d 738, 746 (2d Cir. 2000); *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991). As demonstrated above, Plaintiffs have failed to establish subject matter jurisdiction by establishing that one of the enumerated statutory exceptions to sovereign immunity applies. Hence, the Complaint fails to establish subject matter jurisdiction, which is the first part of the two-part test for personal jurisdiction under the FSIA. The second prong of the test is that there be valid service which is not addressed herein as no affidavit of service has been filed.3 The Court does not have personal jurisdiction over the Defendants, as it does not have subject matter jurisdiction even if service of process was sufficient. The Court should dismiss the complaint pursuant to Fed R. Civ. P. 12(b)(2).

III. The Court should dismiss the Complaint against the European Union pursuant to Fed R. Civ. P. 12(b)(6) for failure to state a claim for

[3] The EU maintains that valid service of process has not been made. While the EU ordinarily requires strict compliance with the rules regarding service of process, in this case, and this case only, it will overlook this improper service so that the Court can immediately rule on the EU's argument at it is immune under the FSIA.

which relief can be granted.

Even if the Court finds that it has subject matter jurisdiction over the cause of action and personal jurisdiction over the Defendant European Union, it should dismiss the Complaint against the European Union for failure to state a claim for which relief can be granted.

A District Court decision very recently has restated the standards applicable to a Rule 12(b)(6) motion to dismiss. It states in relevant part:

> To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wood v. Moss*, 572 U.S. 744, 757-58, 134 S. Ct. 2056 ,188 L. Ed. 2d 1039 (2014) (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible when the plaintiff pleads factual content that is more than "'merely consistent with' a defendant's liability," and "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 44, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see also Rudder v. Williams*, 666 F.3d 790, 794, 399 U.S. App. D.C. 45 (D.C. Cir. 2012).

Krukas v. AARP,Inc., 376 F. Supp. 3d 1, 14, 2019 BL 90035, 6 (D.D.C. 2019)

The Complaint states that it is a request for a declaratory judgment that the Court has jurisdiction and for damages.

The Declaratory Judgment act provides that "[i]n a case of actual controversy **within its jurisdiction**…any court of the United States…may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought." 28 U.S.C. 2201(a) (emphasis added). It is not necessary to consider the other requirements in order to obtain a declaratory judgment, because a court cannot issue a declaratory judgment unless the case is within its jurisdiction. Hence, a request for a declaratory judgment that the court has jurisdiction is a *non sequitur*. The Complaint, insofar as it seeks a declaratory judgment that the Court has jurisdiction, fails to state a claim for which relief can be

granted because the Court must first have jurisdiction to consider a request for a declaratory judgment and if the Court has jurisdiction then the request for a declaratory judgment is moot.

Assuming *arguendo* that the Court has subject matter and personal jurisdiction over the European Union, the allegations against the EU fail to state a claim for which relief can be granted. The Complaint alleges basically two things as to the EU. First that the EU was aware that Germany violated the terms and conditions of Plaintiff von Prince's extradition and did nothing about it. There is no allegation that the EU violated the terms and conditions of von Prince's extradition (or for that matter, had anything to do with any extradition of von Prince or had a duty to do anything about Germany's extradition of von Prince). There is no allegation at all concerning EU with regard to Plaintiff Leffer. Second, there is an allegation that the EU is not fulfilling its obligations to the nationals of the Free City of Danzig. There are no facts setting out any duty that the EU has to the nationals of the Free City of Danzig, or how the Plaintiffs have been injured by these unspecified obligations. It is alleged, and the Court can certainly take notice, that the former Free City of Danzig is now Gdansk, Poland.

The Court lacks jurisdiction, but even if it had jurisdiction the allegations concerning the EU fail to state a claim for which relief can be granted and the Complaint against the EU should be dismissed pursuant to Fed R. Civ. P. 12(b)(6).

Conclusion

For all the reasons argued above, the Complaint as to European Union should be dismissed as the Court lacks subject matter jurisdiction and personal jurisdiction. Even if the Court had jurisdiction the Complaint should be dismissed against the European Union as it fails to state a claim for which can be granted.

Dated: March 2, 2020 s/ *Jeffrey Harris*
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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2020, I electronically filed the foregoing document and proposed order 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/ *Jeffrey Harris*
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