

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RONALD H. MANDOWSKY; SETH B. FELDMAN, as
the Co-Executors of the Estate of Ferdinand Nacher,
Plaintiffs-Appellants,

v.

DRESDNER BANK AG,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF DEFENDANT-APPELLEE

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INTERESTS OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a),
the United States files this brief as amicus curiae in support of defendant-appellee.

This case involves the historic agreement to establish the Foundation
“Remembrance, Responsibility and the Future” to make payments to victims of the
Nazis. The Foundation, which was the product of negotiations among governments
and private entities undertaken with the facilitation of the United States Government,
sought to bring some measure of justice to elderly victims within their remaining

lifetimes. The creators of the Foundation also sought to achieve “all-embracing and enduring legal peace” for German companies for Nazi-era and World War II claims. *See* Appendix (“App.”) 377.

The plaintiffs voluntarily dismissed their complaint in order to seek compensation from the Foundation — the implementation of which was conditioned on the dismissal of this and similar cases pending in U.S. Courts at that time. Dissatisfied with the resolution of their claims by the Foundation, under criteria that were agreed upon in the negotiations leading up to the establishment of the Foundation, the plaintiffs sought to reopen the final judgment under Federal Rule of Civil Procedure 60(b). The district court denied the motion, recognizing correctly that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for Nazi-era claims against German companies. The district court also properly relied on the foreign policy interests of the United States in having U.S. courts give effect to the judgments of foreign courts — here, the judgment of a Berlin District Court in 1993 that the plaintiffs’ claims are barred by a 1956 settlement agreement between Ferdinand Nacher and Dresdner Bank. The United States files this brief as *amicus curiae* to inform this Court of its continuing foreign policy interests in the litigation.

STATEMENT

A. Since the end of World War II, the United States has worked to achieve some measure of justice for victims of the Nazis. No amount of money could truly compensate those individuals for the suffering they experienced. However, the United States has encouraged the German Government to address the consequences of the Nazi era and World War II. Most recently, the United States participated in extensive negotiations, involving the German Government, other foreign Governments, German companies, and numerous representatives of individual victims. Those negotiations led to the creation of a fund capitalized with DM 10 billion in principal to make payments to former slave and forced laborers and others with claims against German companies arising out of Nazi-era wrongdoing. The creation of the fund — the “Foundation” — is described in three documents, including the “Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation ‘Remembrance, Responsibility and the Future’” (the “Foundation Agreement”).¹

¹ The Foundation Agreement was described in detail in the Statement of Interest filed by the United States in the district court, *see* App. 327-390, and was also attached as an exhibit to that filing. App. 430-436. The other two documents describing the Foundation, which were also attached as exhibits to the Statement of Interest, are the Joint Statement signed by all participants in the negotiations, App. 375-390, and the domestic German Foundation law, App. 455-462.

The Foundation was established to make payments to slave and forced laborers and other victims of the Nazi era and World War II, through a speedy, simple, and non-adversarial claims process intended to help aging victims within their lifetimes. The participants in negotiations over the Foundation agreed on detailed criteria for eligibility for payment, as well as precise allocations of Foundation capital to address various types of injuries and payment levels for individual victims. In exchange for funding the Foundation, German companies sought to achieve “all-embracing and enduring legal peace” for claims arising out of the Nazi era and World War II. *See App. 377, 388.* No payments were to be made from the Foundation until final orders of dismissal were entered in all lawsuits against German companies arising out of the Nazi era and World War II and pending at that time in United States courts. *See App. 379.*

In light of the undertaking by the German Government and German companies to establish and fund the Foundation, the President of the United States concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for Nazi-era claims against German companies. *See App. 433; see also App. 434* (United States recognizes “the importance of the objectives of this agreement, including all-embracing and enduring legal peace”). The United States agreed in the Foundation Agreement to inform courts in the United States in which Nazi-era claims were pending of the United States’ foreign policy

with respect to such matters. *See* App. 378. Although the United States took no position in its filings on the merits of the underlying claims or defenses raised, the United States recommended dismissal on any valid legal ground in light of our foreign policy interests. *See* App. 328.

B. The plaintiffs are great-grandnephews of Ignatz Nacher, whose majority ownership in Engelhardt Breweries was allegedly seized in 1934 by Dresdner Bank, acting in affiliation with Nazi Germany. *See In re Nazi Era Cases*, 236 F.R.D. 231, 232 (D.N.J. 2006). Ignatz died in 1939. *See id.* His nephew, Ferdinand Nacher, was subsequently appointed executor of Ignatz's estate. *See id.*

From 1956 onward, Ferdinand Nacher pursued claims to Ignatz's stolen property in the courts of Germany and the United States. *See* 236 F.R.D. at 233. Ferdinand subsequently settled a portion of the claims to the Nacher family property with Dresdner Bank in a West Berlin court. *See id.* The settlement agreement encompassed "all claims of * * * the Ignatz Nacher estate, on the one hand, and the Dresdner Bank * * *, on the other hand," including "the principal claims" as well as "any entitlements to compensation and subsidiary claims that might somehow arise." *See id.*

In 1990, Ferdinand Nacher filed a petition for restitution against Dresdner Bank in Berlin District Court. The Court denied the claims on the grounds that they were barred by the 1956 settlement agreement, rejecting the argument that the

settlement agreement was the product of deceit. *See* 236 F.R.D. at 233. The Court also held that there were no changed circumstances arising out of the reunification of Germany that would support cancellation of the 1956 settlement. *See id.*

Ferdinand Nacher filed this action against Dresdner Bank in New York state court in 1994. *See* 236 F.R.D. at 233.² The case was removed to federal court, and was transferred to the District of New Jersey, where it was consolidated with approximately fifty similar cases. *See id.* Dresdner Bank moved to dismiss the plaintiffs' complaint, asserting that the claims were barred by international comity, *res judicata*, and the political question doctrine, among other grounds. *See id.* at 234.

Before the district court could act on the motion to dismiss, the plaintiffs voluntarily dismissed their lawsuit and pursued claims with the newly established Foundation. *See* 236 F.R.D. at 235. Their claims were rejected by the International Organization for Migration (IOM), one of several partner organizations that handled claims collection and processing for the Foundation. *See id.* The IOM found that the relationship between the claimants and Ignatz Nacher did not meet the Foundation's criteria for eligibility for payment. *See id.*³ The IOM also rejected the claim because

² After Ferdinand Nacher's death in 1996, his grand-nephews were designated co-executors of his estate and were substituted as plaintiffs in this action. *See* 236 F.R.D. at 233.

³ Under the agreed-upon terms for the Foundation, the only individuals who are
(continued...)

the claimants had been eligible to file a claim under a prior German compensation program. *See id.* Finally, the IOM found that the claimants had failed to make the necessary showing that the property losses at issue were “caused in connection with the essential, direct and harm-causing participation of a German enterprise.” *Id.* at 236. The plaintiffs’ subsequent request for reconsideration was denied by the IOM, which affirmed its initial decision. *See id.* at 236.

C. The plaintiffs moved to reopen the final judgment under Federal Rule of Civil Procedure 60(b), asserting that the fact they were denied payment from the Foundation rendered their dismissal “involuntary in all respects.” *See* 236 F.R.D. at 237. The district court denied the motion, reasoning that the plaintiffs had freely chosen dismissal as a matter of litigation strategy; that reopening the judgment would contravene the public interest; and that it would be futile to reopen the case in any event. The district court explained that the court likely would have abstained from entertaining the claims as a matter of international comity, given that the merits of the plaintiffs’ allegations had already been rejected by the Berlin Court in 1993, as well as by the IOM. The court also suggested that the political question doctrine might bar the claims. *See id.* at 240. Finally, the court emphasized that reopening the judgment

³(...continued)
eligible to receive payments are a surviving victim, a surviving spouse or child, the grandchildren or siblings of the victim, or persons named as heirs in the victim’s will. *See* 236 F.R.D. at 235 n.5.

would “undermine the ‘legal peace’ that resulted in the Foundation’s creation and * * * open the proverbial floodgates to relitigation of similar claims.” *Id.* at 242.

On appeal, the plaintiffs argue that the district court abused its discretion in denying the motion to reopen. The plaintiffs’ primary argument appears to be that doctrines such as international comity or the political question doctrine are no longer relevant, because the United States Government has no ongoing foreign policy interests in maintaining the final judgment of dismissal of this lawsuit following implementation of the Foundation. *See* Pl. Br. 18-24.

ARGUMENT

IT WOULD BE IN THE FOREIGN POLICY INTERESTS OF THE UNITED STATES FOR THE FOUNDATION TO BE THE EXCLUSIVE FORUM FOR NAZI-ERA CLAIMS AGAINST GERMAN COMPANIES AND FOR U.S. COURTS TO GIVE EFFECT TO THE 1993 JUDGMENT OF THE BERLIN DISTRICT COURT.

A. In denying the plaintiffs’ motion to reopen the judgment, the district court properly recognized the foreign policy interests of the United States Government, which were set out at length in the Statement of Interest filed in that court. *See* App. 327-354. The Foundation constitutes an example of the successful implementation of the United States Government’s policy goal to obtain some measure of justice for the victims of the Holocaust within their remaining lifetimes. The United States believes that the best means to accomplish this goal is through

dialogue, negotiation, and cooperation between concerned parties, foreign governments, and non-governmental organizations, rather than in litigation.

Although the Foundation Agreement does not constitute a “claims settlement agreement,” *see* App. 333,⁴ it is nonetheless aimed at achieving “all-embracing and enduring legal peace” for German companies with respect to claims arising out of World War II and the Nazi era. To that end, the German Government and German companies insisted that, as a precondition to the Foundation making payments to any victims, all pending litigation in the United States involving such claims against German companies would first have to be dismissed.

⁴ The plaintiffs assert that the United States Treasury Department “t[ook] over” and “settled” their case, *see* Pl. Br. 2, and make repeated references throughout their brief to the United States Government’s “settlement” of their claims. *E.g.*, Pl. Br. 28. These statements are flatly wrong, as is clear from the detailed history of the Foundation set forth in the Statement of Interest filed by the United States. The United States Government did not espouse the claims of its nationals against German companies. Rather, the role of the United States was to facilitate the negotiations leading to the agreement by German companies and the German Government to establish and fund the Foundation. The United States also made an independent commitment, reflected in the Foundation Agreement, to advise U.S. Courts that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy for Nazi-era and World War II claims against German companies. However, that commitment did not constitute a settlement of claims, nor did the Foundation Agreement formally extinguish any claims. Indeed, the Statement of Interest filed by the United States explicitly recognizes that “[t]he United States does not suggest that the[] policy interests described [in the Statement of Interest] in themselves provide an independent legal basis for dismissal.” App. 347.

It would eviscerate one of the primary purposes of the Foundation to permit litigants to reopen dismissed cases following implementation of the Foundation. In establishing and funding the Foundation, German companies and the German Government sought to achieve “legal peace” that was “all-embracing” and “enduring.” App. 432. The United States, in the Foundation Agreement, endorsed that goal as well. *See id.* The parties to the negotiations relating to the Foundation surely did not envision that this “legal peace” would be temporary, or that litigants who were dissatisfied with the resolution of their claims to the Foundation could revive their claims in U.S. Courts. It would be in the foreign policy interests of the United States for the final judgment of dismissal in this litigation to remain in place, and for the Foundation to be the exclusive forum for Nazi-era and World War II claims against German companies.⁵

⁵ The plaintiffs assert that the United States has no continuing foreign policy interests in the judgment of dismissal, relying on a letter sent to this Court by the U.S. Attorney’s Office as supposed evidence of this fact. That letter was sent in response to a letter from this Court indicating that the appeal might be of possible interest to the Government and requesting a notice of appearance. The U.S. Attorney’s Office was not aware of the Statement of Interest filed in the consolidated multi-district litigation, which was not listed on the district court docket in this case. Following a review of that docket, the U.S. Attorney’s Office informed the Court, incorrectly, that the United States would not be participating in the appeal. That unfortunate administrative mistake in no way represents a lack of interest on the part of the United States, which has consistently identified our Government’s foreign policy interests in having the Foundation be the exclusive remedy for Nazi-era and World War II claims against German companies.

(continued...)

The United States' foreign policy interests were properly considered by the district court in determining that the case did not present the type of "extraordinary circumstances" necessary to reopen a voluntary dismissal with prejudice. *See* 236 F.R.D. at 236-238, 241-242; *see also, e.g., Coltec Indus. v. Hobgood*, 280 F.3d 262, 273-274 (3d Cir.), *cert. denied*, 537 U.S. 947 (2002). Although the United States has taken no position on the underlying merits of the legal claims advanced by the parties in this case, *see* App. 352, the United States has explained that its foreign policy interests favor dismissal on any valid legal ground. *See* App. 328. Following the filing of the plaintiffs' Rule 60(b) motion seeking to reopen the final judgment in this litigation, furthermore, the United States confirmed to the district court that the Statement of Interest remained part of the record in this action. *See* App. 322. The foreign policy interests identified in the Statement of Interest are thus properly considered under Rule 60(b) as equitable factors weighing against reopening the final judgment. *See Coltec*, 280 F.3d at 274.

⁵(...continued)

The plaintiffs also assert that the United States Government intended for them to receive payment from the Foundation, relying on a 2003 letter from Stuart Eizenstat. *See* Pl. Br. 8 (citing App. 140). Regardless of whether that letter actually supports the plaintiffs' argument, it was sent after former Deputy Secretary of the Treasury Eizenstat had left public service, and therefore could not represent the position of the United States Government.

In addition, as the district court recognized, the United States' foreign policy interests were properly given weight to the extent they were relevant to the determination whether it would be futile to reopen the final judgment. The district court identified several legal doctrines under which the claims might have been dismissed if permitted to go forward, and under which the United States' foreign policy interests could be relevant. *See* 236 F.R.D. at 238-239.

The Eleventh Circuit, for example, has relied on similar foreign policy interests in dismissing claims against German banks arising out of Nazi-era conduct on the grounds of international comity and *forum non conveniens*. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235-1237 (11th Cir. 2004). In *Ungaro-Benages*, the heir of a victim of the Nazi regime sued two German banks, alleging that they had stolen her family's interest in a manufacturing company through the Nazi program of "Aryanization." Similar to the plaintiffs in this case, the plaintiff in *Ungaro-Benages* asserted that she was unable to recover from the Foundation. The United States filed a statement of interest nearly identical to the one filed below. The Eleventh Circuit held that this statement of interest merited deference, and affirmed dismissal of the case based on "the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative

forum.” *Id.* at 1238; *see also, e.g., American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 420-425 (2003).⁶

B. In addition to the foreign policy interests identified by the United States in the Statement of Interest filed in district court, the United States Government has an independent foreign policy interest in having U.S. Courts give effect to the 1993 decision of the Berlin District Court. This interest also supports the district court’s discretionary refusal to reopen the final judgment based on the conclusion that the court likely would have abstained from entertaining the claims as a matter of international comity.

It is generally in the foreign policy interests of the United States for courts in this country to “defer to proceedings taking place in foreign countries, so long as the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy.” *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) (citations and internal quotation marks omitted). International comity seeks to maintain our relations with

⁶ The district court also held that the United States’ foreign policy interests were relevant under the political question doctrine, suggesting that those interests might render the case non-justiciable under the test set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962). Given the district court’s ruling on international comity — which, as we next explain, was also supported by the United States’ general foreign policy interest in giving force and effect to the judgments of foreign courts — principles of avoidance would weigh against this Court’s consideration of the political question doctrine, which has constitutional dimensions.

foreign governments, by discouraging a U.S. court from second-guessing a foreign government's judicial or administrative resolution of a dispute or otherwise sitting in judgment of the official acts of a foreign government. *See generally Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895).

In this case, as we have noted, a German court determined in 1993 that any claims seeking compensation for Nazi-era wrongs to Ignatz Nacher were barred by the 1956 settlement agreement entered into on behalf of his estate. The German court also rejected the arguments that the settlement agreement was the product of deceit, and that the reunification of Germany voided the settlement agreement or provided an adequate basis for its cancellation. As the district court recognized, in order to consider the merits of the plaintiffs' request "to ignore the Berlin Court's 1993 decision" and to hold that "East German assets * * * were not included" in the 1956 settlement, a court would have "to sit in quasi-appellate review" of the German courts, which had decided those same issues "openly and fairly." 236 F.R.D. at 241.

International comity "creates a strong presumption in favor of recognizing foreign judicial decrees." *Saroop v. Garcia*, 109 F.3d 165, 169 (3d Cir. 1997). Notably, the plaintiffs make no effort to challenge the validity or fairness of the German decision, but simply ignore its impact in arguing that the district court should have granted their motion to reopen final judgment. But permitting claims in a U.S. court to go forward in the face of this German court ruling could cause harm to our

foreign relations, and would undermine the predictability and stability of legal expectations founded upon that ruling and the 1956 settlement agreement. The district court's appropriate exercise of international comity served to "demonstrate[] confidence in the foreign court's ability to adjudicate a dispute fairly and efficiently," and to foster the goals of "international cooperation and * * * cooperation." *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). The United States' foreign policy interests in giving effect to the judgments of foreign courts were properly considered by the district court in invoking the doctrine of international comity as grounds for denying the motion to reopen.

CONCLUSION

For the foregoing reasons, the Court should reject the plaintiffs' attack on the United States' foreign policy interests in having the Foundation be the exclusive remedy for Nazi-era and World War II claims against German Governments, and in having U.S. Courts give force and effect to the 1993 decision of the Berlin District Court.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,590 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch.

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CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I hereby certify that on December 28, 2006, I served the Court and the following counsel of record with an electronic copy of the Brief for Amicus Curiae the United States of America in PDF format. The electronic copy of the brief was scanned with Trend Micro OfficeScan and found to be virus-free. The text of the electronic copy of the brief is identical to the text of the hard copy of the brief. I also caused ten paper copies of the Brief for Amicus Curiae the United States of America to be served on the Court and two paper copies to be served on the following counsel by overnight delivery, postage prepaid:

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