

**No. 09-17761**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**EMIL ALPERIN, et al.,**

**Plaintiffs-Appellants,**

**vs.**

**THE FRANCISCAN ORDER  
(ORDER OF FRIARS MINOR - OFM), et al.,**

**Defendant-Appellee.**

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**APPELLANTS' REPLY BRIEF**

**Appeal from Final Judgment of the United States District Court,  
Northern District of California, Honorable Maxine M. Chesney  
District Court No. CV-99-04941 MMC**

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**Defendant-Appellee.**

**No. 09-17761**

**D. C. No. CV-99-4941 MMC  
Northern District of California  
San Francisco**

**APPELLANTS' REPLY BRIEF**

**I. INTRODUCTION**

This is a case that has proven problematic for the parties and the district court. The Holocaust survivors seek to hold defendant OFM accountable for the actions accomplished through its long time treasurer and officer, Dominik Mandic, who aided the Ustasha (Croatian Nazis) in laundering loot taken from Holocaust victims. The plaintiffs filed their initial action in 1999 and by 2001 a complete

motion under Rule 12 encompassing most if not all applicable defenses was set for hearing. Instead the defenses have been sequenced and many still remain unheard by the district court – forum non conveniens, personal jurisdiction, failure to state a claim, standing of plaintiffs and improper service of process to name some.

Under these circumstances the case has become attenuated and voluminous. This is opposite to the intent of Rule 12 that indicates usually most grounds for dismissal should be brought simultaneously. See FRCP Rule 12(g)(2). It is simply unfair to plaintiffs that OFM is afforded repeated motions, and the attendant expanded briefing opportunity, while the same court refuses a reasonable request by plaintiffs to amend when it is obvious diversity jurisdiction exists. The appearance is one of bias towards the religious order and abuse of discretion in regards to Holocaust survivors. Unless this matter is expedited every single Holocaust survivor will have died from natural causes before this case is ever heard on its merits.

This Court has before it a Sixth Amended Complaint (6AC ~ Excerpts of Record (ER): 96-150); plaintiffs want to file a Seventh Amended Complaint (7AC ~ ER: 8-59). The district court also appeared to be struggling with a way to dispose of the case by offering a dismissal with leave to file state court claims despite its duty to preserve the case under FRCP Rule 21. In the mean time, the delay serves only to dwindle the number of potential class members.

Defendant OFM has submitted a Respondent's Brief (RB) that impliedly concedes the truth of plaintiffs' contentions in the Opening Brief (AOB) that the district court erred in its order granting OFM's motion to dismiss (ER: 64-75). But OFM then goes on to argue that there are other issues that would allow this court to affirm the dismissal on other grounds not ruled upon by the district court or argued before it (RB: 1-2; 27-55). Some of these grounds, such as personal jurisdiction, also involve disputed issues of fact and are therefore premature.

However, the issue that OFM devotes the most effort to, personal jurisdiction, is one that is particularly inappropriate in this appeal.

Personal jurisdiction often requires that the district court first grant an evidentiary hearing with oral argument in order to ascertain the facts of the matter that are in dispute. It has been several years since the district court has granted oral argument on any issue in this case, and it has yet to hold a hearing to determine the facts of personal jurisdiction. Only limited jurisdictional discovery has been allowed at this point in the proceeding. Thus the issue of personal jurisdiction is not yet ripe for appeal and OFM's briefing on the issue is premature as the record at this point is incomplete.

Plaintiffs raised the following three issues in the AOB: (a) the district court erred in finding no subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332, or 1350 (ER: 75); (b) the district court erred in failing to preserve the plaintiff class

and diversity by dismissing foreign and domestic plaintiffs simultaneously and by failing to consider the jurisdiction saving aspect of 28 U.S.C. §1367 (ER:66-67); (c) the district court abused its discretion by denying appellants' motion for leave to amend and directing them to refile their action in state court (ER: 2-6).

All three of these issues flow from the district court's ruling that found no subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332, 1350, or 1367 (ER: 68-75).

Defendant OFM, however, more or less concedes some or all of these issues and has devoted the majority of its opposition to briefing a fourth issue not ruled upon by the district court – personal jurisdiction. Personal jurisdiction is offered by OFM under the rubric that this Court's inquiry is not limited to those issues decided by the district court and/or appealed by the plaintiffs.

Finally, OFM has glossed over a key fact as plead in the 6AC. OFM incorrectly states the Confraternity of San Girolamo [was] “a separate entity not affiliated with OFM.” (RB: 11 of 65).

OFM has overlooked this portion of the 6AC: “...The recreation of the Confraternity of St. Jerome was therefore specifically condoned by OFM.” (ER: 101, ¶ 6, 1.25-26). In fact a careful reading of paragraph 6 of the 6AC makes it clear that even if the Confraternity was not a regular organ of OFM, it was set up by OFM's Treasurer with the full knowledge and consent of OFM's Minister General to further the joint goals of OFM and the Ustasha. This is rather the

opposite of not being affiliated with OFM.

Plaintiffs, while not questioning the wide scope of this Court to review legal matters, do vigorously object to appellate review of disputed facts which must be heard first by a trier of fact operating under the Federal Rules of Civil Procedure and therefore also request a summary remand for reasons stated *infra* in order that personal jurisdiction may be adjudicated as requested by defendants.

**II. THE DISTRICT COURT ERRED IN FINDING NO SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. §§ 1331 OR 1350.**

*“While every brigand is a robber, every robber is not a brigand.”*

The jurisdictional tests under 28 U.S.C. §§ 1331 and 1350 are identical. Plaintiffs have chosen to focus on aiding and abetting of brigands, the universal enemies of mankind (*hostis humani generis*), as the basis for jurisdiction. See Willard B. Cowles “Universality of Jurisdiction over War Crimes”, 33 Cal. L. Rev. 177, 189, 194 (1945). Brigands are organized bands of land based outlaws often with their own governments. See *Rose v. Himely*, 8 U.S. 241; 1 Bee 327; 4 Cranch 241 (1807) in which the unrecognized government of Santo Domingo was classed as being brigand. See also *Salderondo v. The Nostra Signora Del Camino*, 21 F. Cas. 225; 1 Bee 43 (District Court D. South Carolina, 1794).

Brigands still terrorize portions of the world just as pirates ply the Somali coast and Straits of Malacca today. For example, the famed Indian forest brigand Verepaan was gunned down only in 2004 after terrorizing India's Tamil Nadu province for twenty years:

“Starting his infamous career as an elephant poacher and graduating into a sandalwood smuggler, Veerappan rose to become a challenge to the rule of law and constitutional authority, when he extended his sphere of influence from within an extensive forest area to the doors of important personalities and celebrities.” *M.S.Sivakumar v. The State of Tamil Nadu - Writ Petition No.31495 OF 2004* [2005] INTNHC 83 (High Court of Madras, 2005).

International law and US jurisprudence have made a clear distinction between mere robbers and brigands that the district court failed to appreciate when it ruled that brigandage was mere theft. (ER: 70). Brigandage was a far more serious crime than theft usually carried the death penalty. According to the Supreme Court of the Philippines Islands (which was established by act of the US Congress in 1902): “While every brigand is a robber, every robber is not a brigand.” *United States v. Pedro Maaño*, G.R. No. L-1236 [1903] PHSC 197 (Supreme Court of the Philippine Islands, 1903). Supreme Court of the Philippine Islands cases, while out of circuit, should be persuasive authority since they were a federal court subject to review by the Supreme Court of the United States. See *Fisher, on behalf of Barcelon v. Baker*, 203 U.S. 174; 27 S. Ct. 135 (1906).

The district court found that the Ustasha brigands were mere robbers and the

Franciscan aiders and abettors analogous to white collar criminals without explaining its position adequately. However, one can only reach such a result by closing one's eyes to the underlying genocide that occurred in the killing fields of Bosnia, Croatia, and Krajina between 1941-1945. While this Court in *Alperin I* limited plaintiffs to "garden variety claims" like money laundering, the Court cannot and likely did not mean to engage in Holocaust revisionism by suggesting that the origin of the funds laundered were not the profits of genocide only recently removed from concentration camps. One cannot divorce historic fact from reality.

The genocide of Jews, Serbs, and Roma during the Second World War in Yugoslavia is an established fact. It is also a historic fact that the Ustasha plundered their victims. This amounts to brigandry. Beginning in 1945, plaintiffs firmly alleged that the Ustasha with the active support of OFM, laundered the loot from concentration camps. The district court ruled this was a common white collar crime and not a violation of international law. It is both – just as genocide and war crimes are a form of murder and brigandry and piracy a type of theft.

OFM aided and abetted brigandry. Aiding and abetting brigandry is a crime in US jurisprudence. See *United States v. Asebuque*, G.R. No. L-2786 [1907] PHSC 309 (Philippines Supreme Court 1907). Plagued by both brigands and pirates, the Republic of The Philippines statutorily has held brigandry and piracy

as crimes of co-equal importance. See Presidential decree No. 532 of the Republic of the Philippines, August 8, 1974.

Likewise the Ustasha have been classified as brigands by the California district court that took extended testimony on the methods, organization and operation of the Ustasha only 14 years after their suppression in Yugoslavia:

“It undoubtedly appears from the evidence that during 1941 and 1942, when Yugoslavia was under the occupation by German and Italian troops and civil authority was non-existent, the accused [**Andreas Artukovic, Ustasha Interior Minister**] **was one of the leaders of the band of brigands who terrorized a large portion of Yugoslavia.**” *United States ex rel. Karadzole v. Artukovic*, 170 F. Supp. 383, 388 (S .D. Cal. 1959). [Emphasis added].

Recognizing the historic legal significance of brigandry is not an expansion of the ATCA jurisdiction nor does it conflict with *Alperin I*. Brigands and pirates have always been of concern.

The war objectives clauses of *Alperin I* focused on:

“Defendants knowingly facilitated and aided and abetted the activities of war criminals . . . . Defendants created a 'ratline' or 'pipe-line' to help the war criminals flee from prosecution.”

. . .

“Defendants . . . by assisting the Nazi backed Ustasha Regime in preserving their Treasury for the purpose of continuing a Gov-ernment in Exile . . . and evading justice for genocidal war crimes[,] . . . committed war crimes, crimes against peace and crimes against humanity . . . .”

. . .

“The [Vatican Bank] abused its position as the Papal bank of Vatican City by a clear pattern of violation of diplomatic norms . . . .”

“Serbs, Jews, and the Roma were slaughtered in their villages after unspeakable tortures or burned alive in their churches. . . . Many were used as slave laborers. The remaining people were taken to concentration camps where the majority perished.”

. . .

“Jasenovac Concentration Camp complex . . . was the home of indescribable brutality . . . . Not only were inmates butchered but slave and forced labor was performed for the benefit of the Ustasha regime.” *Alperin I* at 559.

Here we deal only with post war acts by a private party, OFM. *Alperin I* did not rule that all violations of international law occurring after May 1945 were non justiciable nor could it have anticipated the development of the case post 2005.

The focus of this case is different and does not infringe on the scope and deals with disposal of looted property - the one area that the *Alperin I* Court deemed appropriate for adjudication:

“In rejecting the Holocaust Survivors' slave labor claims, we distinguish profits derived from slave labor from those derived from investing seized assets.” *Alperin I* at 561, fn. 18.

While not all robbers are brigands and not all war criminals are brigands - it is logically evident that a brigand can also be both a war criminal and robber. Likewise aiding and abetting a brigand regardless whether that brigand was a war criminal or robber can also be a violation of international law.

### **III. THE DISTRICT COURT ERRED IN FINDING NO SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1332**

This is not a case primarily between foreign plaintiffs and foreign defendants as defendant OFM has implied to this court. In fact, well over half the plaintiffs are US citizens. The claims of the domestic and foreign plaintiffs are in fact identical in theory, only the potential jurisdictional bases differ.

In the main the result of the district court's ruling under 28 U.S.C. § 1332 is simply unjust. It is unjust because if the case were refiled today in state court there would be federal jurisdiction under 28 U.S.C. § 1332(d)(2). It is unjust because defendant waited 8 years before challenging diversity jurisdiction. It is unjust because lacking CAFA (Class Action Fairness Act of 2005) jurisdiction, diversity was plead as an alternative to 28 U.S.C. §§ 1331 and 1350 jurisdiction and was never meant to include foreign plaintiffs:

“This Court has jurisdiction pursuant to 28 USC §1332 in that the amount in controversy as to each claim asserted and sought to be asserted herein by certain plaintiffs exceeds the sum of \$75,000, exclusive of interest and costs **and certain plaintiffs herein are U.S. citizens and thus diverse in state citizenship from defendant OFM.**” ER: 110; ¶ 38. [emphasis added].

It is doubly unjust because the district court could have exercised restraint if it had been so inclined and preserved the class by either permitting bifurcation or simply dismissing foreign plaintiffs pursuant to FRCP Rule 21 and leaving the domestic plaintiffs as plaintiffs requested in their Motion for Reconsideration.

Instead, the district court rewarded defendant for their delay - waiting eight years to bring this defense forward and went out of its way to unfairly punish a class of elderly Holocaust survivors when jurisdiction was readily available by simply dismissing the foreign plaintiffs once the district court determined ATCA jurisdiction was absent.

The district court chose among the harshest sanctions possible when alternatives were possible. While plaintiffs believe a district court might lawfully behave in such a fashion – it should not unless there is good reason such as sanctionable conduct. The district court refused to offer any sound reason for using the harshest remedy possible beyond blaming plaintiffs for pleading alternative jurisdictional grounds for the same torts. This even though it was obvious § 1332 diversity jurisdiction was an alternate theory to be used for domestic plaintiffs only if § 1331 and § 1350 jurisdiction failed.

Plaintiffs plead several overlapping theories of jurisdiction, §§ 1331, 1350 and 1332 and 1367. There is no question that foreign and domestic plaintiffs can overlap in §§ 1331 and 1350 jurisdiction. See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 121-22 (E.D.N.Y. 2000). See also *Hilao v. Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1474 (9<sup>th</sup> Cir. 1994).

Plaintiffs plainly stated in their sur brief to the district court that if the §§ 1331 and 1350 combination was untenable, domestic plaintiffs only could proceed

under § 1332, in essence a request to bifurcate the ruling:

“The Court need not also find it has diversity of citizenship jurisdiction of this case, but, indeed, the U.S. Plaintiffs do satisfy the diversity requirements.” ER: 83; 4 of 12.

Plaintiffs also pointed out to the district court that it had the ability to create subclasses rather than dismiss if the presence of foreign plaintiffs were a problem.

See ER: 89; fn 5 at 10 of 12, citing *Thompson v. Clear Channel Communs., Inc.*

(*In re Live Concert Antitrust Litig.*), 247 F.R.D. 98, 149 (C.D. CA 2007).

Plaintiffs have not waived any right to dismiss foreign plaintiffs pending the outcome of the appeal of the §§ 1331 and 1350 portion of this appeal. Dismissing clients’ claims while they may still be arguably viable is not something counsel should take lightly. However this Court has the ability and positive authority to dismiss dispensable nondiverse parties if the result would be to preserve the case and avoid a waste of judicial resources. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 et seq. (1989). This Circuit has long adopted post judgment use of FRCP Rule 21 to save diversity cases:

“It is now settled in this circuit that practicality prevails over logic and that we may dismiss a dispensable, non-diverse party in order to perfect retroactively the district court's original jurisdiction.”  
*Continental Airlines v. Goodyear Tire & Rubber Company*, 819 F.2d 1519, 1532-1524 (9<sup>th</sup> Cir. 1987).

Thus if this Court finds that the §§ 1331 and 1350 claims are not viable, plaintiffs do affirmatively request that foreign plaintiffs be dismissed without prejudice and

that this matter be remanded in order to proceed under § 1332.

**IV. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER  
THE JURISDICTION SAVING ASPECT OF 28 U.S.C. §1367**

Section 1367 offered the district court a method to sort out these conflicting jurisdictional matters without producing an unjust and judicially uneconomical result. Plaintiffs did cite § 1367 in their sur brief. See ER: 80; 9, 10, 11 of 12. The district court, if it did consider these aspects of § 1367, did not leave a record of doing so in its orders.

**V. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING  
APPELLANTS' MOTION FOR LEAVE TO AMEND**

Plaintiffs believe the district acted unjustly in not fully considering lesser alternatives to complete dismissal and therefore abused its discretion. Plaintiffs were shocked when the district court threw out the entire case with only leave to refile in state court. This makes absolutely no sense from anyone's perspective. In fact, should plaintiffs refile California state claims as directed by the court, the case would promptly be returned to the federal docket under 28 U.S.C. § 1332(d)(2) as the amount in controversy exceeds \$5 million. The underlying claims of accounting, unjust enrichment, repleven and safekeeping, and restitution

would not change. The district court, far from dispensing justice, has dispensed delay and confusion and when confronted – blames plaintiffs thusly:

“Nor could the Court have foreseen that, after nearly a decade of litigation, plaintiffs would seek to dismiss from their complaint fourteen of their number, comprising almost half of the parties who sought relief by the filing of the instant action.”

...

“Plaintiffs’ tactical decision to rely exclusively on their federal-question theories of subject matter jurisdiction and not to request leave to amend, at least in the alternative, to create diversity does not entitle them to reinvent the action in order to have the proverbial second bite after the action has been dismissed.” ER: 5; 4 of 5.

The district court’s rationale assumes tactical decisions that were not plainly evident. Plaintiffs did point out the court could bifurcate; plaintiffs did make it clear diversity jurisdiction was an alternative to §§ 1350 and 1331 and that diversity did not include foreign plaintiffs. FRCP Rule 21 states:

“Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at *any time*, on just terms, add or drop a party. The court may also sever any claim against a party.”  
[Emphasis Added]

Dismissing foreign plaintiffs to preserve diversity does not reinvent an action; it simply narrows the issues and would have made this appeal unnecessary as well as any state court action that may yet be filed. The district court’s sole stated reason for not permitting amendment is that plaintiffs’ did not include the magic words, a “request to amend” in their opposition briefs. This appears to indicate, but for this unintentional omission by counsel, that the district court would have permitted

amendment. Therefore the request fell squarely within the excusable neglect or mistake ambit of FRCP Rule 60(b)(1).

Finally, plaintiffs have not waived their rights under FRCP Rule 21 as defendant contends. (RB: 28 of 66). Rule 21 applies even post judgment and given the circumstances, plaintiffs' attempt to dismiss dispensable foreign plaintiffs was timely and is still timely.

## **VI. PERSONAL JURISDICTION**

The district court completely omitted ruling on the issue of personal jurisdiction, instead focusing on subject matter jurisdiction. (ER: 67; fn 3). While the district court was silent on its reasons for abstention, it should be noted that OFM's motion to dismiss began with a request for an evidentiary hearing on the issue if the court determined that plaintiffs had adequately pled personal jurisdiction. (SER:168; l. 8-9).

The doctrine of judicial estoppel provides that a party may not gain an advantage "by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9<sup>th</sup> Cir. 1996) . But this is exactly what OFM is proposing by seeking summary appellate review of personal jurisdiction after having first

argued to the district court that the matter should be subject to an evidentiary hearing because of the possibility of disputed facts.

While this Court could perhaps order an original evidentiary hearing on personal jurisdiction – it can also remand the matter to the district court. Such a determination of personal jurisdiction encompasses both arguments of fact and law. It is generally the subject of de novo review on the record by the Appellate Courts only when the underlying facts are undisputed and not an issue of first impression as here. See *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 787 (9<sup>th</sup> Cir. 1987); *Lee v. City of Los Angeles*, 250 F.3d 668, 692 (9<sup>th</sup> Cir. 2001).

In its motion to dismiss for lack of personal jurisdiction, defendant OFM specifically requested an evidentiary hearing to resolve any issues of disputed fact. (SER:176-177). This request was not granted because the district court never ruled on the issue of personal jurisdiction. Nor did the district court hold oral argument as would be appropriate where jurisdictional facts are disputed as herein. There are numerous issues of disputed facts despite OFM's partisan attempt to convince this court otherwise. Defendant OFM grudgingly admits such in its Opposition Brief footnote 7 where it improperly attacks the qualifications and testimony of plaintiffs' expert on Roman Catholic orders, Fr. Thomas Doyle. (SER 594-599). And this is just one instance – while OFM may argue that the

deposition of Fr. Jurisich contains nothing to support plaintiff's position and that OFM's own constitutions and bylaws are subject only to their one interpretation, it cannot be denied that this is all disputed by plaintiffs as well as being contradicted by large section of the 6AC.

Likewise OFM's Respondent's Brief miscasts the jurisdictional implications of the Croatian Mission of San Jose through manipulation of facts. And fails to mention altogether the Croatian Custody of Chicago and potential application of 28 U.S.C. § 1391(d). Nonetheless, OFM wants this Court to summarily decide the issue of personal jurisdiction in its favor.

The issue of personal jurisdiction is particularly important as OFM no doubt realizes that plaintiffs may refile this case in state court should it not be remanded to the district court. However, OFM raising the issue anew as an unresolved factual dispute using the appellate process is unfair to plaintiffs who get only a reply brief to dispute the matter and a brief oral argument which must include several other matters.

Further, while personal jurisdiction may be reviewed de novo, there is no undisputed record by the district court to review, and plaintiffs have had no opportunity to dispute facts. But if there are disputed facts, as OFM admits regarding at least the declaration of Fr. Doyle (SER 594-599), the presumption is in plaintiffs' favor since no evidentiary hearing was held. *Murphy v. Schneider*

*Nat'l, Inc.*, 362 F.3d 1133, 1140 (9<sup>th</sup> Cir. 2004).

It appears inconceivable that this Court would take up personal jurisdiction. The process would be unjust to plaintiffs and would not be an economical use of this court's resources.

## VII. FORUM NON CONVENIENS

The district court did not rule on the issue of forum non conveniens although it was briefed by both parties. Therefore, while perhaps within the ambit of this Court to hear, it is irrelevant except as it pertains to the issue of ATCA exhaustion of local remedies.

OFM argues that since there is purportedly no statute of limitations for war crimes in Italy, plaintiffs should swear out criminal charges against some unspecified defendant. OFM ignores the fact that the alleged war crimes occurred in Croatia, not Italy, and that there is not a single Italian citizen as a plaintiff, and that the only witness, William Gowen, is a US citizen living in New York. With all due respect to defendant's expert, Dr. Bassiouni, this remedy is only good for the OFM who would not likely be a defendant in any theoretical Italian action.

OFM's expert acknowledges that no damages would be available for plaintiffs who are mostly American and they would have to retain counsel. No

class action is likewise available. All materials would have to be translated into Italian including the transcripts of the four day deposition of plaintiffs' witness, William Gowen. There is no indication that any similar case involving a private Italian entity charged with war crimes abroad by non Italians has ever been heard in an Italian court.

With no class action, no contingent fee attorneys, no readily identifiable defendant, and likely no possibility of damages, plaintiffs would not fair well in an Italian court.

The federal threshold is one of fairness and equivalence. It is not present here. The only area of equivalence is statute of limitation. In all other aspects, counsel, damages, availability of a defendant – equivalence is severely lacking. The only party to profit from such an arrangement would be OFM.

“In conducting a forum non conveniens analysis, the district court must ‘ensure that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.’” *Wilson v. Island Seas*, 590 F.3d 1264, 1272 (11<sup>th</sup> Cir. 2009).

And like personal jurisdiction, forum non conveniens is better suited to the district court to decide owing to the multitude of factual issues that justice requires be weighed:

“When considering a motion to dismiss for forum non conveniens, the district court must weigh the following private interest factors: ‘the ease of access to sources of proof; compulsory process to obtain the attendance of hostile witnesses, and the cost of transporting friendly

witnesses; other problems that interfere with an expeditious trial . . . ; and the ability to enforce the judgment.”” *Leetsch v. Freedman*, 260 F.3d 1100, 1103-04 (9<sup>th</sup> Cir. 2001) (internal quotation marks, internal citations, and alterations omitted).

The district court also must consider factors affecting the public interest, such as (1) administrative difficulties flowing from court congestion, (2) imposition of jury duty on the people of a community that has no relation to the litigation, (3) local interest in having localized controversies decided at home, and (4) the avoidance of unnecessary problems in conflicts of law. *Vivendi SA v. T-Mobile USA, Inc.*, 586 F.3d 689, 695 (9<sup>th</sup> Cir. 2009).

None of these issues above have been considered by the District Court. The issue is therefore unsuitable for adjudication by this court.

### VIII. CONCLUSION

Plaintiffs are a class of Holocaust survivors and their heirs suing a private entity. The district court has ruled in a manner which is too harsh under the circumstances. At a minimum diversity between US plaintiffs and defendant exists. The presence of the foreign plaintiffs is superfluous unless ATCA jurisdiction is present. At no point were plaintiffs offered even the chance to make an election between diversity and ATCA and 28 U.S.C. § 1331 jurisdiction.

Judicious application of FRCP Rule 21 would have rendered this appeal moot.

There were many ways jurisdiction could have been saved in this case but only one way in which jurisdiction failed. The district court logically should have ruled on ATCA and 28 U.S.C. § 1331 first and finding this lacking moved onto 28 U.S.C. § 1332 diversity jurisdiction as to the domestic plaintiffs as an alternative to § 1331. Plaintiffs clearly stated in their sur brief they were not contending foreign plaintiffs came under diversity. Hence once no ATCA jurisdiction was found, the problem should have been obviated and the case processed under § 1332. To do otherwise acts as an unjust sanction which has been imposed for no apparent reasons in the record.

Plaintiffs simply do not understand, if the foreign plaintiffs are dismissed under § 1350 and there was no claim they came under § 1332, how these same foreign plaintiffs were still present to destroy diversity. The district court, not plaintiffs, destroyed diversity – this is error by the court. The court had a duty to preserve claims, not destroy them by an anomaly of timing. The result was unjust and harsh.

Further, defendant OFM seems to recognize the result was unusual and wants to make what is essentially a motion to dismiss for lack of personal jurisdiction and forum non conveniens through their opposition brief. This is

procedurally incorrect as well. There are disputed facts and an evidentiary hearing is necessary. The federal court system is failing plaintiffs – each and every defense has been sequenced by the district court over the last 10 years, the plaintiff class is elderly, the net result will be that no Holocaust survivor will survive this litigation unless a remedy to speed this case is fashioned by this court. Plaintiffs therefore request this matter be remanded for further proceedings in either 28 U.S.C. §§ 1331 and 1350, 1332 or 1367 with an admonishment that the case be expedited.

Dated: April 21, 2010.

Respectfully submitted,

s/ THOMAS EASTON  
JONATHAN H. LEVY

Attorneys for Plaintiffs Alperin et al.

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C)  
AND CIRCUIT RULE 32-1 FOR CASE NUMBER NO. 08-16060**

I certify that: Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains about 5,000 words, less than 7,000 words.

Dated: April 21, 2010.

Respectfully submitted,  
s/ THOMAS EASTON  
Attorneys for Plaintiffs Alperin et al.

**CERTIFICATE OF SERVICE**

When All Case Participants are Registered  
for the Appellate CM/ECF System

I hereby certify that on April 21, 2010, I electronically filed the foregoing  
APPELLANTS' REPLY BRIEF  
with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature s/ THOMAS EASTON