No. 08-16060

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMIL ALPERIN, et al.,

Plaintiffs-Appellants,

vs.

VATICAN BANK, aka "INSTITUTE OF RELIGIOUS WORKS" or "ISTITUTO PER LE OPERE DI RELIGIONE" (IOR); et al.,

Defendant-Appellee.

APPELLANTS' OPENING 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

THOMAS EASTON
CSB #109218
967 Sunset Dr
Springfield, Oregon 97477
Tel/Fax: 541-746-1335
easton3535@gmail.com

WINDLE TURLEY
TX.SB #20304000
TURLEY LAW FIRM
1000 Turley Law Center
6440 N. Central Expressway
Dallas, Texas 75206
Tel: 214-691-4025
Fax: 214-361-5802
turley@wturley.com

JONATHAN H. LEVY
CSB #158032
37 Royale Pointe Dr
Hilton Head, South Carolina 29926
Tel/Fax: 202-318-2406
jonlevy@hargray.com

Attorneys for Plaintiffs-Appellants

1/23/2009

CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. Plaintiff Jasenovac Research Institute is a Michigan non profit corporate entity and has no parent corporation, subsidiaries or affiliates that have issued shares to the public. The other organizational plaintiffs are foreign non governmental organizations and have no parent corporations, subsidiaries or affiliates that have issued shares to the public.

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UNITED STATES COURT OF APPEALS

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EMIL ALPERIN, et al., **Plaintiffs-Appellants,** **v.** **VATICAN BANK, aka “INSTITUTE OF RELIGIOUS WORKS” or “ISTITUTO PER LE OPERE DI RELIGIONE” (IOR); et al.,** **Defendant-Appellee.**	**No. 08-16060** **D. C. No. CV-99-4941 MMC** **Northern District of California** **San Francisco**

APPELLANTS’ OPENING BRIEF

I. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The court below had jurisdiction to entertain this matter because all claims brought herein related to alleged violations of the United States Constitution and various federal statutes, including 28 U.S.C. §§ 1331 and 1332, 28 U.S.C. §

1605(a)(3), 28 U.S.C. § 1350, and 28 U.S.C. 1367.

B. This Court's Jurisdiction

The Ninth Circuit Court of Appeals has jurisdiction to entertain this appeal pursuant to 28 U.S.C. § 1291.

C. Final Order

This appeal is from a final order or judgment rendered on April 7, 2008 (CR 351) that disposes of this defendant IOR' claims.

D. Timeliness

Plaintiff filed a timely Notice of Appeal on April 8, 2008 (CR 352).

II. STATEMENT OF THE ISSUES

A. The District Court erred in finding the Vatican Bank (IOR) a sovereign organ of the Holy See as IOR failed to make a prima facia case in its facial attack.

B. The District Court erred in its analysis of the Foreign Sovereign Immunities as the facts of the complaint establish exceptions.

III. STATEMENT OF THE CASE

This is an action brought against defendants for an accounting, conversion, unjust enrichment, restitution, and violations of international law.

Plaintiffs consist of both individual and organizational plaintiffs, as well as

a purported class of all Serbs, Jews, Roma, and former Soviet Union citizens and their heirs and beneficiaries who suffered monetary and/or property losses caused by the Independent State of Croatia (NDH) during the period from April 1941 through May 1945. (*See* CR 262, Fourth Amended Complaint (4AC) ¶¶ 1, 45-73.)

The defendants are the appellee Vatican Bank (IOR) and the Order of Friars Minor (OFM). (*See* CR 262, ¶¶ 74-85.)

IV. STATEMENT OF FACTS

The impetus for this lawsuit was a 1998 document authored by the US State Department Undersecretary Stuart Eizenstat, *The Fate of the Wartime Ustasha Treasury* in which much of the basis for this lawsuit is outlined. (CR 100.) Prior to the Eizenstat report, little was known about the Ustasha Treasury or the involvement of elements of the Roman Catholic Church, IOR, and OFM with it.

According to plaintiffs, defendants "accepted, concealed, hypothecated, laundered, retained, converted and profited from assets looted by the Ustasha Regime during April1941 through May 1945 and deposited in, or converted, concealed, hypothecated, trafficked, credited, pledged, exchanged, laundered or liquidated through, the IOR, and OFM after the demise of the NDH in May 1945." (*See* CR 262, ¶ 8.)

Specifically, plaintiffs allege that their property was taken by the Ustasha

Regime and added to the Ustasha Treasury. (*See id.* ¶¶ 41-44.) Plaintiffs allege that "[m]ore than 200 million Swiss francs" from the Ustasha Treasury were "transferred to Vatican City and the College of San Girolamo Degli Illirici and then to the IOR for conversion." (*See id.* ¶ 154.)

Plaintiffs further allege that a portion of the Ustasha Treasury was "transferred, credited, and exchanged into the IOR's gold trading program" in the United States. (*See id.* ¶ 39.) Plaintiffs allege that IOR deposited gold from the Ustasha Treasury in the Federal Reserve Bank in New York and the Republic Bank of New York through the 1960's. (*See id.* ¶¶ 37, 166.) And that the Vatican Bank conducts commercial operations in the United States and California through servicing its American based account holders and maintaining correspondent banking accounts with other banks in the United States. (*See id.* ¶¶ 75-76.)

Plaintiffs also allege that "[f]unds from the Ustasha Treasury laundered by IOR were used to set up the publishing and commercial activities of the Croatian Publishing House Croatia and the Croatian Historical Institute . . . and to expand the existing operations of the Danica newspaper, the Croatian Franciscan Custody of the Holy Name, the Franciscan Printery, the Croatian Almanac, and the Croatian Catholic Messenger newspaper, all in Chicago under the direction of OFM." (*See id.* ¶ 35.)

Plaintiffs claim that IOR "profited from Ustasha Treasury transactions

involving banks in various European and South American countries" and enhanced its position "as a post war gold trader on both public and private markets. (*See id.* ¶¶ 162, 165.) Plaintiffs also maintain that IOR still retains some of their property. (*See id.* ¶¶ 42, 44, 191.)

V. SUMMARY OF ARGUMENT

Defendant made a facial attack on the pleadings which was acknowledged and treated as such by the District Court:

> ". . . Here, IOR has submitted declarations in support of its argument that it is a foreign sovereign, but it has not submitted extrinsic evidence with respect to whether it falls within any of the FSIA's exceptions to sovereign immunity. Plaintiffs have not submitted any evidence in opposition, and have treated IOR's motion as a facial attack, arguing that the allegations are sufficient on their face to establish jurisdiction under the FSIA's exceptions. IOR likewise characterizes its motion as a facial attack, and makes no argument that plaintiffs are required to respond with evidence to satisfy their burden of establishing jurisdiction. (*See* Motion at 1:7-10.) Because IOR's extrinsic evidence is limited to the issue of its status as a foreign sovereign, and because the parties have not argued the issue, the Court will assume plaintiffs are not required to respond with extrinsic evidence to survive the motion, and, accordingly, will analyze the sufficiency of the complaint on its face." CR 335, fn 1.

In evaluating a facial attack to jurisdiction, the court must accept as true the factual allegations in plaintiff's complaint. *Miranda v. Reno*, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001.)

The District Count erroneously found IOR was a sovereign organ and that

no exceptions to the Foreign Sovereign Immunities Act were applicable.

VI. ARGUMENT

A. Standard of Review

The existence of sovereign immunity and subject matter jurisdiction under the Foreign Sovereign Immunity Act (FSIA) are questions of law that this Court reviews *de novo*. *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080; 1086 (9th Cir. 2007); *Park v. Shin*, 313 F.3d 1138, 1141 (9th Cir. 2002.) The defendant has the burden of making a *prima facie* case of sovereign immunity. *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 306-307 (9th Cir. 1997.)

Dismissal was inappropriate because the evidence on record was legally and factually insufficient to establish the IOR is an organ of The Holy See.

District Court interpretations of foreign law are subject to *de novo* review by the Appellate Court. *Trans Container Services (BASEL) A.G. v Security Forwarders*, *Inc.*, 752 F2d 483, 486 (9th Cir. 1985); *Grimm v. Commissioner*, 894 F2d 1165, 1166 (10th Cir. 1990.)

> "Under Fed. R. Civ. P. 44.1, the determination of foreign law in the federal courts is a question of law to be resolved by reference to any relevant information, including that provided by expert witnesses. Consequently, we exercise plenary review on this question, and are not confined to information available to or considered by the district court." *Grupo Protexa, S.A. v. All Am. Marine Slip*, 20 F.3d 1224, 1239 (3rd Cir. 1994.)

The Court of Appeals must independently satisfy itself that the trial judge correctly decided that foreign law was applicable to controversy and that she relied on correct law in applying foreign law. *Trans Container Services (BASEL) A.G. v Security Forwarders, Inc.* 752 F2d 483, 486 (9th Cir. 1985.) The propriety of the Rule 44.1 expert's testimony is subject to review as well as its content. *Jinro America v. Secure Investments*, 266 F.3d 993, 1001-1002 (9th Cir. 2001.)

The IOR argued it was an agent or instrumentality of the Holy See in 1999 under U.S.C. § 1603(b)(2) and submitted the declaration of Settimio Caridi under Fed. R. Civ. P. Rule 44.1 in favor of that proposition. (CR 273.) Plaintiffs objected to the Caridi Declaration's omission of translations as well as omission of any extracts of much of the material referred to therein. *Alperin v. Vatican Bank*, 2006 U.S. Dist. LEXIS 42902, *12-13 (N.D. CA. 2006.) See also footnote 6 to the District Court's Order. (CR 335.) The District Court erroneously found IOR was a sovereign organ based only on the materials submitted by IOR. (CR 335, 9:11.)

The operative date for FSIA jurisdictional analysis was the status of the Vatican Bank in 1999. *Austria v. Altmann*, 541 U.S. 677, 159 L.Ed.2d 1, 124 S.Ct. 2240 (2004.) Caridi asserted the IOR was created in 1990 by citing its Chirograph establishing it as a public juridic personage in that year. But Caridi referenced materials of an earlier vintage without clear explanation as to how this could possibly apply to the sovereignty of an institution allegedly established in its

present form only in 1990. (CR 273, 17, 31.)

The District Court used the tests of *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640 (9th Cir. 2003) and *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 1996 U.S. App. LEXIS 22068, *8 (9th Cir. 1996) which enumerated several factors to consider in determining if an entity is a sovereign organ: creation, purpose, independence, financial support, employment policies, and state law. (CR 335, 5:11 et seq.)

B. Origin of IOR

In *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640 (9th Cir. 2003) and *Corporacion Mexicana de Servicios Maritimos* there was an unambiguous legislative and/or presidential creation of the entities involved.

IOR's origins in contrast are shrouded by mysterious predecessor organizations (CR 262, 4AC.) See generally *Banco Ambrosiano SPA v. Ansbacher,* ILRM 699 (1987) for the activities of an immediate predecessor, also called IOR, which was involved in distinctly non-pietical financial intrigues involving dubious offshore corporations and banking scandals:

> "The Instituto per la Opere di Religione (hereinafter referred to as ' IOR') was one of the most important and largest shareholders in BASPA [Banco Ambrosiano SPA] and was a substantial shareholder in BAOL. ¶ In addition IOR directly or indirectly controlled, inter alia, the following companies: ¶ Manic SA Luxembourg Belrosa SA

> Panama ¶ Erin SA Panama Starfield SA Panama ¶ Bellatrix SA Panama UTC United Trading Corporation, Panama ¶ Through Roberto Calvi, there was a close working relationship between BASPA and the companies controlled by it, and the IOR and companies controlled by it, and loans were frequently granted by members of the Ambrosiano Group, particularly BAA, to companies controlled by IOR. ¶ Though there was a large board of directors of BASPA, it would appear from the evidence that Roberto Calvi had what amounted to a completely free hand in connection with the administration of the bank's business." *Banco Ambrosiano SPA v. Ansbacher,* ILRM 699, p. 2.

Likewise the activities of the 1946 vintage IOR which was laundering Axis loot, including gold teeth and wedding rings as averred in the 4AC (CR 262, 46, 90, 122) and are clearly not charitable.

The District Court accepted Caridi's statement on IOR's origins as valid:

> "As the governing ("competent") authority of the Holy See, the Pope authorizes the creation of new juridic persons on Vatican City State territory. On March 1, 1990, Pope John Paul II issued a chirograph1 ("Chirograph") and internal governing regulations ("Statuto") giving the IOR its present form as a public juridic person." CR 273, 32.

Thus IOR was re-created in 1990 as a "new juridic person."

All six of Caridi's unattached and untranslated specific authorities dealing with IOR's juridic status themselves predate the establishment of the IOR in 1990, with none later than 1988, and so must refer to the predecessor IOR. (CR 273, 31.)

The District Court also found the canon law juridic status of the IOR to be a significant designation bearing on sovereignty (CR 335, 5:15); but that assumption

has no foundation in American law. The Holy See has argued that canon law juridic entities are independent of The Holy See. *Doe v. Holy See,* 434 F. Supp. 2D 925, 934 et seq. (D.C. OR 2006.) In American legal practice canon law public juridic persons are usually not sovereign: Catholic Health Ministries, a public juridic person of the Roman Catholic Church is not sovereign. *Saeemodarae v. Mercy Health Services*, 456 F. Supp. 2d 1021, 1027 (N.D. IA. 2006.) Likewise all Roman Catholic parishes and dioceses in the United States are public juridic persons under canon law but are not sovereign. *Tort Claimants Comm. v. Roman Catholic Archbishop In re Roman Catholic Archbishop*, 335 B.R. 842, 865 (B.R.C. OR. 2005.) IOR's non sovereign co-defendant, the Franciscan Order of Friars Minor (OFM), and its subdivisions, as well as the College of San Girolamo, are all also described by Caridi as juridic persons. (CR 273, 58 et seq.)

Caridi alleges the IOR Chirograph was not a law or part of a legislative scheme but instead is characterized as a "special law" authorized by the 1988 Apostolic Constitution of the Roman Catholic Church known as *Pastor Bonus*[1] art. 25, 2. (CR 273, 32-33.)

The relevant sections of *Pastor Bonus* state:

> Council of Cardinals for the Study of Organizational
> and Economic Questions of the Apostolic See

[1] http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus-index_en.html

> Art. 24 - The Council of Cardinals for the Study of Organizational and Economic Questions of the Apostolic See consists of fifteen cardinals who head particular Churches from various parts of the world and are appointed by the Supreme Pontiff for a five-year term of office.
>
> Art. 25-1 The Council is convened by the cardinal secretary of state, usually twice a year, to consider those economic and organizational questions which relate to the administration of the Holy See, with the assistance, as needed, of experts in these affairs.
>
> Art. 25-2. The Council also considers the activities of the special institute which is *erected and located* within the State of Vatican City in order to safeguard and administer economic goods placed in its care with the purpose of supporting works of religion and charity. This institute is governed by a special law.

Caridi opined the wording "special institute" in *Pastor Bonus* Art. 25-2 applied to the 1990 IOR. (CR 273, 39.) This is a factual impossibility as the 1988 law predates the 1990 Chirograph by two years. The wording of *Pastor Bonus* is in the present tense and presumptively refers to an existing special institute and that special institute therefore cannot be the same as an IOR established only in 1990.

C. Purpose of IOR

Next the District Court examined the IOR's purpose. (CR 273, 6:4 et seq.) The IOR does appear to carry out some state functions but the record cannot be read to indicate only the exclusive or even the majority of the duties of the IOR are carried out on behalf of The Holy See. (CR 273, 36-7; 55.)

This is unlike *EIE Guam* in which the Japanese government created the RCC expressly to perform a public function – the purchase of failed financial institutions. *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640 (9th Cir. 2003.)

Autonomous pious and charitable purposes are not the equivalent of specific state projects as in *EIE Guam* (reorganization of failed banks) and *Corporacion Mexicana de Servicios Maritimos* (operations of the Mexican oil monopoly). The extent and overall scope of the IOR's undertakings that are distinctly sovereign are not evident. The canon law juridic persons and orders who seemingly make up the bulk of IOR's depositors are not sovereign nor logically are their purposes. (CR 273, 37.) One IOR depositor was the infamous Monitor Ecclesiasticus Foundation which laundered $55 million dollars looted from US insurance companies in 1999. *Dale v. Colagiovanni*, 443 F.3d 425, 426-427 (5th Cir. 2006); *Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 834-835 (S.D. Miss. 2004.)

While it may be tempting to draw the inference that the IOR is a Vatican Central Bank, this assumption is not supported by Caridi. The Holy See by contrast does control two other institutions dedicated by statute solely to its financial operations: The Administration of the Patrimony of the Apostolic See and The Prefecture for the Economic Affairs of the Holy See, which are both mentioned by name in *Pastor Bonus* (1988) (CR 273, ¶ 49):

> "Art. 172 - It is the function of the Administration of the Patrimony of the Apostolic See to administer the properties owned by the Holy See in order to provide the funds necessary for the Roman Curia to function."
>
> "Art. 175 - The Extraordinary Section (of the Administration of the Patrimony of the Apostolic See) administers its own moveable goods and acts as a guardian for moveable goods entrusted to it by other institutes of the Holy See."
>
> "Art. 176 - The Prefecture for the Economic Affairs of the Holy See has the function of supervising and governing the temporal goods of the administrations that are dependent on the Holy See, or of which the Holy See has charge, whatever the autonomy these administrations may happen to enjoy."

Therefore the finding that the IOR serves more than a nominal state purpose cannot be deemed persuasive as to sovereign organ status.

D. Independence

The third factor examined by the District Court was the independence of the IOR from the Holy See. (CR 335, 7:5 et seq.) It is true there is an IOR Cardinal's Commission of five high ranking churchmen appointed by the sovereign that meets biannually. (CR 335, 42-3.) But the bank officers are not clergymen and they are the ones in actual control of day to day operations and audits. (CR 335, 46; 48.) Further there is a Prelate, a Directorate and Oversight Council which are not appointed by the sovereign. (CR 335, 44-46.)

Based on the material submitted by IOR it is not conclusive that the

Cardinal's Commission, which meets only twice a year and is composed of clergy and not bankers, controls the IOR or is an advisory or regulatory body. A facial attack on the pleadings based on foreign law cannot without the provision of actual facts prove whether the Cardinals perform in practice the necessary active supervisory role or not. *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460-61 (9th Cir. 1995.) Since it was incumbent upon IOR to prove its case, this ambiguity must be resolved in plaintiffs' favor.

E. Financial Support

The District Court found the IOR derived its financial support from the Holy See but the record does not support this finding. (CR 335, 8:6-7.) While the District Court acknowledged that *California v. NRG Energy, Inc*., 391 F.3d 1011, 1026 (9th Cir. 2004) found no organ status where an entity received no financial support from its government, the meager information offered by IOR does not merit a finding of sovereign financial support. The Court admits IOR was silent as to the original funding of the 1990 IOR (CR 335, 8:6-7) but nonetheless extrapolates that Holy See funds were involved at some unspecified point. IOR submitted no evidence save a bare statement without citation to any source for the District Court to consider. (CR 273, 33.)

The District Court however did find Holy See does not compensate the IOR

for its losses. (CR 335, 8:8.) Therefore the District Court erred in finding the IOR derived its financial support from the Holy See.

F. Employment Policies

The District Court found that no evidence was presented by IOR on this issue (CR 335, 8:16-17.) Any inference therefore must be drawn in plaintiffs' favor that IOR employees are not Holy See public servants or compensated by the Holy See.

G. Obligations and Privileges under Foreign Law

The District Court found that the IOR performs some banking procedures for the Holy See (CR 335, 9:1) but does not enjoy immunity from suit in Vatican City. (CR 335, 9:2.) The IOR is immune from suit in Italy (CR 335, 9:3) but that immunity is a unique aspect of the 1929 bilateral Lateran Treaty between Italy and The Holy See. *Treaty of the Lateran,* Feb. 11, 1929, Amended 1985, 24 I.L.M. 1591; (1985.) The history of the Lateran Treaty is complex but essentially ended a decades old dispute between Italy and the Vatican regarding Italian seizure of the Papal States in the middle of the 19th Century. The District Court erred in extending the provisions of a 1929 bilateral treaty to this case.

H. Conclusion of Sovereignty Was Error

The District Court found that IOR is a sovereign organ yet the evidence is insufficient to meet the tests of *EIE Guam* or *Corporacion Mexicana de Servicios Maritimos.* In order to reach a conclusion of sovereign organ status, the District Court has had to stretch inferences in IOR's favor beyond the four corners of the Caridi declaration and the record. This "stretching" of Rule 44.1 foreign legal opinion cannot supply the facts necessary to overcome the inferences that must be made in plaintiffs' favor in a facial attack on the pleadings.

IOR freely chose not to submit declarations from the IOR, the Holy See, the Vatican City government, or the Council of Cardinals for the Study of Organizational and Economic Questions of the Apostolic See. The IOR chose not to submit extracts or translations of significant materials utilized by Caridi though the usual method for presenting foreign law is expert testimony accompanied by extracts ands translations from foreign legal materials. *Jinro Am. Inc. v. Secure Invs., Inc*., 266 F.3d 993, 1000 (9th Cir. 2001); *Guardian Industries v. United States*, 65 Fed. Cl. 50, 53 (U.S. Claims 2005); "It appears fairly universal that 'written or oral expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is proved.'" *Turkey v. OKS*, 146 F.R.D. 24, 27 (Mass. 1993); *Universe Sales Co. v. Silver Castle*, 182 F.3d 1036, 1038 (9th Cir. 1999) (expert testimony and excerpts of foreign law is basic way to

prove foreign law.)

The burden of proof as to organ status belongs to IOR. It has not met its burden of proof. The only result can be in plaintiffs' favor as facts contrary to the complaint cannot be created or inferred where no basis exists in the record.

I. Commercial Activity Exception: 28 U.S.C. § 1605(a)(2)

The District Court erred in its analysis of the first and third prongs of the commercial activity exception when it found that money laundering of the Ustasha Treasury and dealing in looted Axis gold by IOR did not qualify as a commercial activity in the United States because (1) it occurred mainly outside the United States and (2) there was no direct effect in the United States. (CR 335, 9:19 et seq.)

Plaintiffs disagree and contend the complaint states facts to the contrary. (CR 262, 34-37, 152-160.) IOR transferred looted gold and funds to the United States for pecuniary gain and to support the agenda of the exiled Ustasha in the United States. (CR 262, 34-37, 152-160.) These alleged facts cannot be disputed in a facial attack on the pleadings.

Money laundering can be transnational in nature, initiated in one country and finished in another. United Nations Convention Against Transnational Organized Crime (Convention), Nov. 15, 2000, 2225 U. N. T. S. 209 (Treaty No.

I-39574), which has been adopted by the United States and 146 other countries. Cited in *United States v. Santos*, 128 S. Ct. 2020, 2036; 170 L. Ed. 2d 912 932; *Nnazmi Ranci v. Attorney General of the United States*, 540 F.3d 165 (3rd Cir. 2008.)

Money laundering and trafficking in stolen property does not respect borders – the Ustasha Treasury traveled from Croatia to Austria to Italy to the Vatican Bank and to its final destination in the United States. (CR 262, 35-37, 152-160.) Similar fact patterns have been found to fall under the first prong of the commercial activity exception. Transfer of millions of dollars involving bank accounts in Mexico, Nigeria, the Cayman Islands, and the United States under a contract for illegal services were within the commercial activity exception. *Adler v. Nigeria*, 219 F.3d 869, 874-875 (9th Cir. 2000.) Money laundering of funds from the United States to Macao has been held sufficient to meet the commercial activity exception. *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 424 (S.D. N.Y. 2007.)

> "The Supreme Court and the Court of Appeals have made it clear that criminal activity that is commercial in nature, such as money laundering, is not beyond the reach of the commercial activity exception." *Kensington International v. Societe Nationale Des Petroles Du Congo*, 2006 U.S. Dist. LEXIS 14264, *41-2 (S.D. N.Y. 2006.)

As to the third prong of the Commercial Activity exception, the District

Court has similarly erred when it found no significant direct effect in the United States. (CR 335, 12:6 et seq.) The money laundering occurred both within and without the United States for specific purposes, pecuniary gain and to promote the Ustasha agenda, and therefore was legally significant and not a mere collateral effect. (CR 262, 34-37, 142-147, 154-160.)

The District Court ruled that plaintiffs had not properly set forth a scheme whereby the 1946 IOR was a private player (CR 262, 11:20-21.) The IOR received a clandestine deposit by the Ustasha and their Franciscan proxies – a 10 truck convoy in 1946 to the Confraternity of San Girolamo and onto the Vatican Bank. (CR 262, 154.) Knowingly dealing in Axis gold, including gold teeth, could have served no legitimate state purpose and certainly not the pious and charitable ones attributed to the IOR. Indeed the exact status, private or sovereign, of the pre 1990 IOR is unknown save for plaintiffs' contention that it was non sovereign. (CR 262, 31.)

It is well established that illegal activities by even sovereign entities can be commercial in nature. *Adler v Nigeria*, 219 F.3d 869, 875 (9th Cir 2000.) IOR has submitted no evidence, nor can it by its facial attack, that the Holy See's policy was to conceal Axis concentration camp gold for a state purpose.

The District Court also took issue with the lapse of time between the initial conversion in 1946 and first reported money laundering activities in the United

States in 1952. (CR 335, 12:14-15.) Plaintiffs contend that the time factor is not attenuated given the reasonable explanation that Fr. Dominik Mandic upon leaving Rome in 1952 for Chicago reestablished his money laundering activities in Chicago. (CR 262, 146.)

The District Court also noted that IOR gold trading activities in the United States involved a lapse of 15 years from the date of conversion. (CR 335, 12:16-18.) But that is not what the 4AC alleged – it stated US gold trading by IOR of the Ustasha funds "continued through the 1960's." (CR 262, 166.) However the gold deposits in the United States occurred prior to the 1960's. (CR 262, 39, 94, 160.) Thus the 1960's were the ending date of known gold trading activities, not the beginning.

While a "direct effect" in the United States must follow as an immediate consequence of the sovereign defendant's activity there is no exact rule as to timing. *Argentina v. Weltover*, 504 U.S. 607, 618, 119 L. Ed. 2d 394, 112 S. Ct. 2160 (1992.) Thus an ongoing plot to launder and utilize the Ustasha Treasury and support the Ustasha agenda in exile was a direct result of the initial conversion of the Ustasha treasury in 1946. This is quite unlike *Princz v. Germany* which unsuccessfully invoked the commercial activity exception by citing allegations of lingering personal injuries and remote connections to wartime events. *Princz v. Germany,* 26 F.3d 1166, 1172-1173 (D.C. Cir. 1994.)

J. International Taking Exception

The District Court found that international taking exception - § 1605(a)(3) does not apply for two reasons:

1. Under the first clause of 1605(a)(3) Plaintiffs cannot identify their property or property exchanged for it is present in the United States in connection with a commercial activity;

2. Under the second clause of 1605(a)(3) Plaintiffs failed to allege IOR is involved in a commercial activity in the United States.

The first issue is one unique to Axis concentration camp gold which is why plaintiffs' primary remedy is an accounting. (CR 262, 186-189.) The District Court faulted plaintiffs for not being able to identify if their gold – gold teeth, eyeglass frames, wedding rings, coins were present in the United States or exchanged for property in the United States. (but see CR 262, 90.)

The District Court's ruling is overly harsh. Holocaust survivors and their heirs would seemingly have an impossible task – how to identify their personal property in the Ustasha horde of gold which was accumulated 1941-1945 and then converted and laundered thereafter by IOR. But gold itself is a fungible asset.

> "Gold, like currency, is a fungible store of value, but this fungibility does not preclude finding that plaintiff has title to and rights to possess a given, identified quantity of gold or currency." *Stan Lee Trading, Inc. v. Holtz*, 649 F. Supp. 577, 580 (C.D. CA 1986.)

> "The term 'fungible goods' defines goods of which each particle is identical with every other particle, such as grain and oil. 1 Williston, Sales (rev. ed. 1948), §§ 155-159. This right of the several owners, to separate ownerships of fungible goods, is the subject of sale. Ownership by several persons may exist in property of an undetermined amount, confused in one mass, even though 'the aliquot share of each owner can be determined only by the measurement of the whole mass. Ibid., § 155.'" *Mississippi State Tax Commission v. Columbia Gulf Transmission Company*, 249 Miss. 88, 102; 161 So. 2d 173, 178 (1964.)

As the tortfeasor who converted and hypothecated the gold (CR 262, 5,) the IOR is equitably estopped from reaping the benefits of its alleged wrongdoing. IOR knowingly commingled the plaintiffs' gold to conceal its identity (CR 262, 5.) It is common knowledge that Holocaust victim gold - dental gold, eyeglass frames, rings, jewelry - was often melted down and commingled at some point. *United States v. Wittje*, 422 F.3d 479, 483 (7th Cir. 2005); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 251 (D.N.J. 1999.)

Identification of commingled gold is a factual not a legal issue and therefore not within the scope of a facial attack on the pleadings. *Banque de France v. Equitable Trust*, 60 F.2d 703, 706 (2nd Cir. 1932.) Plaintiffs have not made mere bare assertions but have identified IOR gold accounts at the Federal Reserve Bank and Republic Bank of New York which would be available to an accounting (CR 262, ¶166.) The District Court, however, chose to disregard the gold fungibility and commingling issue which plaintiffs contend must be resolved in their favor at

this stage of the proceedings.

As to the second clause of § 1605(a)(3) the District Court correctly required ongoing commercial transactions in the United States but erred by ignoring IOR's non gold related business in the United States. (CR 335, 13:16-17.) Thus the second clause requires only that (1) IOR retained plaintiffs' property and (2) there be ongoing commercial activities by the IOR in the United States even if those activities are unrelated to the Ustasha Treasury itself. *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 948 (D.C. Cir. 2008.)

The District Court admitted that plaintiffs had satisfied the property retention requirement of the second clause of § 1605(a)(3) (CR 335, 14:15-17.) But then it found no ongoing commercial activity by IOR in the United States (CR 335, 15:1-3) despite the facts alleged in the 4AC:

> "The Vatican Bank conducts commercial operations in the United States and California through servicing its American based account holders in the United States and California and maintaining correspondent banking accounts with other banks including Bank of America, Banca Nazionale de Lavoro, JP Morgan, Republic Bank of New York and Chase Manhattan."
>
> "The Vatican Bank engages in for-profit merchant banking transactions in the United States, California, and elsewhere through its investments and transactions including dealings in gold."CR 262, 75-76.

A commercial banking operation by a sovereign organ is sufficient to constitute commercial activity in the United States. *First City, Texas-Houston,*

N.A. v. Rafidain Bank, 281 F.3d 48, 53 (2d Cir. 2001.) The District Court erred because plaintiffs plainly alleged ongoing commercial banking activities by the IOR in the United States.

VII. CONCLUSION

The District Court's decision erred as the defendant failed to meet its burden of proof on the issue of sovereignty. *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 306-307 (9th Cir. 1997.) The District Court erred because it did not take into account that in a facial attack on the pleadings, even in a case involving sovereign immunity, the well-pleaded allegations of the complaint are true and the factual inquiry limited to the four corners of the complaint. *Samco Global Arms, Inc. v. Arita*, 395 F.3d 1212, fn 4 (11th Cir. 2005.)

In particular the District Court's findings were not adequately supported by the factual record and/or law as follows: (1) it took into consideration pre 1990 foreign law and authorities submitted by IOR without first acknowledging the pre 1990 status of the IOR as primarily commercial; (2) finding of the legal significance of IOR's status as a canon law juridic person is not in accord with US case law which generally disregards this distinction; (3) it did not take into consideration that while IOR depositors have typically been affiliated with the Roman Catholic Church they are not usually sovereign *per se* themselves; (4) the degree of day to day versus regulatory control exercised by the IOR Cardinals'

Commission is unclear on the record; (5) the finding that the 1990 IOR was originally funded by the Holy See is unsupported by the record or any facts; (6) it did not draw a negative inference against IOR even though no evidence of IOR's employment practices were submitted; and (7) application of the 1929 Lateran Treaty is inappropriate given the specific purpose of the treaty was to settle a long standing geopolitical dispute between Italy and the Vatican. Therefore, the case for IOR sovereignty was not adequately supported by the record and the facts of the complaint should stand - the IOR is not a sovereign organ.

Even if the IOR is arguably sovereign, the commercial activity and/or international takings exceptions to the Foreign Sovereign Immunities Act should have applied. In particular the District Court failed to take into consideration or interpret the following well plead facts that place the complaint well within the ambit of these two exceptions: (1) the laundering of the Ustasha Treasury by IOR was transnational, included the United States, and was not situated solely in Vatican City; (2) promotion of the Ustasha agenda in Chicago in connection with the money laundering in the United States did have a direct effect in the United States; (3) the IOR's activities in regards to the Ustasha Treasury promoted no known sovereign purpose on the record; (4) dealing in concentration camp gold is *prima facie* non-pietical; (5) there is no adequate legal authority cited to support the District Court finding that the time between the initial clandestine conversion

of the Ustasha Treasury in 1946 and subsequent direct effect in the United States is too attenuated; (6) it ignored the issue of concealment and hypothecation of concentration camp gold by IOR which caused the gold to become commingled and hence fungible; (7) it overlooked that the complaint states the IOR is currently engaging in commercial banking activities in the United States. Therefore both the international takings and commercial activity exceptions to the Foreign Sovereign Immunities Act applied based on the facts contained the complaint.

> "The Holocaust Survivors' most straightforward claims involve identifiable personal property for which federal statutes, common law, state law, and well-established case law provide concrete legal bases for courts to reach a reasoned decision." *Alperin v. Vatican Bank*, 410 F.3d 532, 553 (9th Cir. 2005.)

Likewise the facts of these claims control in a facial attack on the pleadings and those findings of the District Court not in accord with the facts should be found in error. This case should be reversed and remanded to the District Court for further proceedings.

Dated: January 23, 2009. Respectfully submitted,

____________s/__________________
THOMAS EASTON
WINDLE TURLEY
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 5,300 words and less than 14,000 words.

Dated: January 23, 2009. Respectfully submitted,

s/ THOMAS EASTON
WINDLE TURLEY
JONATHAN H. LEVY
Attorneys for Plaintiffs Alperin et al.

NINTH CIRCUIT LOCAL RULE 28-2.6 STATEMENT

This case has been previously before this Court, *Alperin v. Vatican Bank,* 410 F.3d 532 (9th Cir. 2005) (No. 03-15208).

In addition, the case against IOR's co-defendant OFM, continues in the District Court, Northern District of California, No. CV-99-4941 MMC.

CERTIFICATE OF SERVICE
When All Case Participants are Registered
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I hereby certify that on January 23, 2009, I electronically filed the foregoing
APPELLANTS' OPENING 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