THOMAS EASTON CSB #109218
LAW OFFICE OF THOMAS EASTON
967 Sunset Dr
Springfield OR 97477
Tel/Fax: 541-746-1335
tom.easton@comcast.net

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

WINDLE TURLEY TX.SB #20304000
LAW OFFICES OF WINDLE TURLEY, P.C.
1000 Turley Law Center
6440 N. Central Expressway
Dallas TX 75206
Tel: 214-691-4025
Fax: 214-361-5802
windle@wturley.com
Attorneys for Plaintiffs and the Class

Of Counsel:
K. LEE BOYD CSB #189496
Pepperdine University Law School
24255 Pacific Coast Highway
Malibu CA 90263
Tel: 710-506-7684
Lee.Boyd@pepperdine.edu

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**EMIL ALPERIN, et al.,**

**Plaintiffs,**

**v.**

**VATICAN BANK, et al.,**

**Defendants.**

---

**NO. C99-4941 MMC (EDL)**

**PLAINTIFFS' RESPONSE TO DEFENDANT IOR'S SUPPLEMENTAL BRIEF REGARDING *BELL ATLANTIC CORP. v. TWOMBLY***

## TABLE OF AUTHORITIES



## RULES



## OTHER AUTHORITIES

Plaintiffs' disagree with Vatican Bank's (IOR) assessment that the facts of the complaint are implausible and should be dismissed pursuant to the Sherman antitrust conspiracy case *Bell Atlantic Corp. v. Twombly*. Plaintiffs contend that *Twombly* has no particular application in *Alperin* but agree with *Twombly's* general proposition that a plausible complaint should lead to discovery even if there are doubts by the Court as to the ultimate outcome of the case. Nor does IOR specifically address the declaratory relief sought by plaintiffs for violations of international law (4AC ¶¶ 198-201) which involves a different analysis than property issues.

The *Twombly* court found an antitrust conspiracy complaint must be plausible with regards to an allegation of parallel conduct which lacks facts of any agreement between parties. *Twombly* *4-5. The plausibility test defined in *Twombly* is:

> "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly* at *4.

Thus IOR argues the facts contained in the entire 201 paragraph *Alperin* Fourth Amended Complaint (4AC) are so implausible ~ not just improbable ~ that there is no expectation discovery would reveal any evidence to support the allegations. That interpretation is nonsense.

IOR selectively dissects the facts in *Alperin* by attacking a small sample piecemeal and labeling them "speculative." Applying *Twombly* requires a more holistic approach and not just a myopic reading of a few paragraphs mislabeled "key" and taken out of context. In *Twombly*, the Supreme Court praised the trial court for going beyond the truncated pleadings and using Fed.R.of Evid. 201 to get a better understanding of the flawed complaint. *Twombly* at *10.

IOR focuses only on the 4AC's ¶¶ 41, 42, 154 by tarring them as "formulaic" and therefore bereft of plausibility under *Twombly*. The 4AC's ¶¶ 41, 42, 154, deal with origins of the Ustasha Treasury and its retention and conversion by defendants. IOR ignores the greater bulk of pertinent facts in the 4AC, *e.g.* ¶¶ 19, 22, 43, 88-90, 103-4, 116-7, 122-3 (origins of Ustasha Treasury), 4AC¶¶ 35, 37, 39, 146-8, 150 n4, 155, 157, 158, 160, 163, 165, 166 (retention and outflow of laundered funds from IOR), and ¶¶ 92, 142, 159 (conversion by IOR).

*Twombly* cannot change Fed.R.Civ.Proc. Rule 8(a)(2) requiring only a short and plain statement of the claim ~ only Congress can do that. In *Twombly* certiorari was granted to determine the ". . . [P]roper standard for pleading an antitrust conspiracy through allegations of parallel conduct." *Twombly* at *3 citing *Twombly* 126 S. Ct. 2965 (2006). The net effect of *Twombly* was the overruling of a statement in *Conley v. Gibson*, 355 U.S. 41 (1957), that a complaint should not be dismissed for failure to state a claim unless it appeared beyond doubt that a plaintiff could prove no set of facts that would entitle him to relief. Plaintiffs, however, have not relied in their briefs on that aspect of *Conley*.

Instead, plaintiffs cited to *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) that:

> "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim but require only a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

An approach specifically endorsed by *Twombly* at *11.

IOR improperly disputes facts in the 4AC. First, IOR posits there is no connection between the plaintiffs and the Ustasha Treasury. Plaintiffs, correctly termed "Holocaust Survivors" by the 9th Circuit, have plead in the 4AC's ¶¶19, 22, 43, 88-90, 103-4, 116-7, 122-3, that the origin of the Ustasha Treasury was property looted from victims of the Ustasha and that declaratory relief and an accounting is required to determine the scope, amount, disbursements, and remainder of the Ustasha Treasury that was laundered by IOR and OFM. The US State Department finding on the Ustasha Treasury supports plaintiffs' analysis in the previously cited and submitted State Department Report on the Ustasha Treasury authored by Under Secretary Eizenstat and clarified in his Congressional testimony:

> "The Ustasha regime in Nazi Germany's wartime puppet state of Croatia systematically and mercilessly robbed, murdered, or deported its Serbian, Sinti-Romany, and Jewish populations. Gold and other valuables of the victims became a part of the Ustasha treasury, which may have been as much as $80 million.[1]"

---

[1]Testimony of Under Secretary of State Stuart Eizenstat to the House Banking Committee, June 4, 1998 [http://financialservices.house.gov/banking/6498eiz.htm].

Secondly, IOR takes issue with the deposit or, as it terms "retention," of the Ustasha Treasury by IOR. IOR dismisses the 10 truck convoy delivering a portion of the Treasury to San Girolamo for deposit at the IOR (4AC ¶154) by relegating it to a footnote while parsing the remainder of the 4AC ¶154 to suit its argument. The 4AC's ¶154, as understood by plaintiffs in the context of the entire complaint, plainly means a 10 truck convoy holding a portion of the Ustasha Treasury was delivered by Colonel Babic to OFM agents at San Girolamo in 1946 (4AC ¶¶85, 143-145) and then deposited by OFM at the Vatican Bank. Any other interpretation is merely playing with words:

> "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end." *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200 (1938).

While IOR has subjectively declared the 4AC's ¶154 "key" it must still be read in conjunction with ¶¶17, 85, 143-145, which connect defendants IOR and OFM. To do otherwise would permit a defendant to simply ignore any facts in the complaint not to its liking while arguing the remainder are insufficient. The details provided meet the Twombly standard of plausibility ~ there is no doubt left as to the actions of the principals OFM and IOR and their respective roles in the physical deposit of the Treasury.

Finally, IOR disputes the post deposit conversion of the Ustasha Treasury by IOR. But again numerous details are provided by plaintiffs at the 4AC's ¶¶35, 37, 39, 146-8, 150 n4, 155, 157, 158, 160, 163, 165, 166, including names, approximate time frames, accounts, locations, and recipients. *Alperin* does not allege any conspiracy, as in *Twombly*. The case is based on the Eizenstat Report findings. The Ustasha are a historic fact, genocide occurred, and funds were laundered post war by defendants ~ the *res* in *Alperin* is not speculative, it existed and may still exist. Plaintiffs therefore request the Court deny IOR's motion to dismiss.

August 21, 2007.

Respectfully submitted,

_____
WINDLE TURLEY

_____
JONATHAN LEVY

_____
THOMAS EASTON
Attorneys of Record For Alperin Plaintiffs