

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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VEKUII RUKORO, Paramount Chief of the Ovaherero  
People and Representative of the Ovaherero Traditional  
Authority; JOHANNES ISAACK, Chief and  
Chairman of the Nama Traditional Authorities Association;  
THE ASSOCIATION OF THE OVAHERERO GENOCIDE  
IN THE USA INC.; and BARNABAS VERA A KATUUO,  
Individually and as an Officer of The Association of the  
Ovaherero Genocide in the USA, Inc., on behalf  
of themselves and all other Ovaherero and Nama indigenous  
peoples,

Civ. No. 17-00062-LTS

Plaintiffs,

-against-

FEDERAL REPUBLIC OF GERMANY,

Defendant.

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X  
**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL DECLARATION OF MICHAEL J. LOCKMAN OR, IN THE  
ALTERNATIVE, PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND  
AMENDED COMPLAINT**

PLEASE TAKE NOTICE, that upon the annexed Declaration of Kenneth F. McCallion, dated October 25, 2018 ("McCallion Declaration"), and upon all the pleadings and proceedings herein, Plaintiffs shall and hereby do move before the Honorable Laura Taylor Swain, United States District Judge, for this motion to be heard on a date and at a time to be determined by the Court, at the United States Courthouse for the Southern District of New York, 500 Pearl Street, New York, New York 10007, for the following relief:

- (1) For leave to file the accompanying Supplemental Declaration of Michael J. Lockman, dated October 21, 2018, with exhibits thereto ("Lockman Supplemental Declaration"), in opposition to Germany's Motion to Dismiss (see Exhibit 1 to the

accompanying McCallion Declaration); or

- (2) In the alternative, leave to file the accompanying Second Amended Complaint (filed with a redlined version showing the proposed changes and additions to Plaintiffs' Amended Complaint), copies of which are attached to the accompanying McCallion Declaration as Exhibits 2-A and 2-B, which incorporates additional factual assertions based upon Plaintiffs' continuing research and investigation, as substantially set forth in the accompanying Lockman Supplemental Declaration.

### **Discussion**

As set forth in the accompanying McCallion Declaration, Plaintiffs believe that the Lockman Supplemental Declaration sets out important facts concerning the jurisdictional issues before this Court, especially where in Germany the Ovaherero and Nama human remains were located prior to their sale and transport to the American Museum of Natural History ("AMNH"), and as to how those human remains now located at the AMNH relate to Germany's commercial activities in this country and elsewhere. Specifically, as explained by Lockman, after Luschan's death in February 1924, "[t]he Teaching Collection was then sold to the AMNH, and, based on the available evidence, the purchase price was paid on the AMNH's behalf by the New York philanthropist Felix Warburg." Lockman Supp. Decl. at ¶ 31. This transaction's commercial nature was confirmed by a notice from the National Park Service ("NPS"): "Felix Warburg purchased these remains from Professor von Luschan and, in 1924, donated them to the [AMNH]." *Id.* at ¶¶ 31-32.<sup>1</sup> In addition, Lockman also provides new source material from

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<sup>1</sup> Although the NPS Notice is inaccurate to the extent that it represents that Luschan himself sold the Collection to Warburg (on behalf of the AMNH), since Luschan had died earlier in 1924, it does confirm the commercial ("sale") nature of the transaction, for an amount that we know was \$41,500 based upon the Accession Records, *See* Doc. No. 45-2, Declaration of Barnabas Veraa Katuuo, at ¶ 8 and Exhibits 1 and 2.

experts Beate Kunst and Ulrich Creutz, who confirmed the commercial nature of the transaction by writing that, upon Luschan's death in February 1924, "although Emma von Luschan wanted to keep her husband's Teaching Collection as heir, she did not receive a positive decision [and] the objects were eventually sold in the U.S." *Id.* at ¶ 31.

At oral argument, the Court inquired "how [Plaintiffs] connected [the human remains] with the commercial activity of Germany in this country?" and "[h]ow is it business?" *Trans. of Argument* at 15, 17 (July 31, 2018). Plaintiffs' counsel responded to the Court's inquiry based upon the evidence available to Plaintiffs at that time; however, Plaintiffs now have additional relevant information on these issues based upon their continuing research, which Plaintiffs strongly believe should be incorporated in the record and considered by the Court.

The Lockman Supplemental Declaration strongly supports Plaintiffs' allegation in the Amended Complaint that the sale and shipment of the Teaching Collection from the Museum of Ethnology to the AMNH in New York was a commercial transaction for the sum of \$41,500, and that the human remains are here in connection with many commercial activities having substantial contact with the United States within the meaning of 28 U.S.C. § 1603(a)(3). *See Lockman Supp. Decl.* at ¶ 32. Further, the Lockman Supplemental Declaration provides additional evidence as to how Germany's ongoing "commercial activities" related to Ovaherero and Nama human remains, in the areas of bone maintenance, repatriation, and scientific and cultural disentanglements, still having substantial contact with the United States. *See id.* at ¶¶ 37-40.

Leave to file a supplemental declaration "rests entirely on the court's discretion." *Marsh v. Johnson*, 263 F. Supp. 2d 49, 53-54 (D.D.C. 2003) (admitting supplemental declarations given the broad inquiry on a motion to dismiss for lack of subject matter jurisdiction); *Paduano v.*

*Express Scripts, Inc.*, 55 F. Supp. 3d 400, 411 (E.D.N.Y. 2014) (permitting filing of late supplemental declaration “in its discretion”); *Dial A Car, Inc. v. Transp., Inc.*, 1994 WL 902774, at \*1 (D.D.C. Sept. 8, 1994) (decision to consider “supplemental material . . . in connection with a motion to dismiss” is “wholly within the discretion of the court”) (Friedman, J.) *aff’d*, 82 F.3d 484, 489 & n.4 (D.C. Cir. 1996). Because the subject matter jurisdiction inquiry goes to the court’s power of adjudication, and thus is a broad inquiry, in which Court has “considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction,” *APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003), in the absence of prejudice, leave to file a supplemental declaration of facts going directly to the question of subject matter jurisdiction should be freely given. *See Marsh*, 263 F. Supp. 2d at 53–54.

Leave to file a Second Amended Complaint -- which Plaintiffs are seeking only in the alternative -- is also, of course, a matter completely within the Court’s sound discretion.

#### **Certification**

Plaintiffs’ counsel certifies that counsel for the parties have made a good-faith effort over the past week to informally resolve the issues raised in this motion. Counsel for the parties have exchanged letters dated October 25, 2018 and October 29, 2018, and Plaintiffs’ counsel has provided defendant’s counsel with copies of the Lockman Supplemental Declaration, with exhibits, the proposed Second Amended Complaint (in both redlined and “clean copy” format), and a draft of Plaintiffs’ motion papers. Counsel for the parties have also communicated by email and, on October 31, 2018, conducted a telephonic “meet and confer” conference in an attempt to resolve the issues informally. However, they have been unable to informally resolve the issues raised in this motion.

Dated: New York, New York  
October 31, 2018

McCALLION & ASSOCIATES LLP

*/s/ Kenneth F. McCallion*

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