

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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 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,

Plaintiffs,

-against-

FEDERAL REPUBLIC OF GERMANY,

Defendant.

Civ. No. 17-00062-LTS

**DECLARATION OF
KENNETH F. McCALLION**

KENNETH F. McCALLION, an attorney duly admitted to the practice of law in this Court, declares as follows under penalties of perjury:

1. I am the principal attorney with the law firm of McCallion & Associates, LLP, co-counsel for Plaintiffs in the above-captioned action. I submit this Declaration in support of Plaintiffs' motion for leave to file a Supplemental Declaration of Michael J. Lockman in opposition to Defendant's motion to dismiss, with exhibits (a copy of which is attached hereto as Exhibit 1), or, alternatively, for leave to file a Second Amended Complaint (a copy of which is attached hereto as Exhibit 2, along with a redlined version comparing it to the Amended Complaint).

2. As set forth in Plaintiffs' Amended Complaint, Plaintiffs first became aware in September 2017 that the American Museum of Natural History ("AMNH") was in possession of Ovaherero and Nama human remains as part of a collection assembled by Felix von Luschan ("Luschan"), the Director of Anthropology of the Royal Museum of Ethnology in Berlin during the relevant time period. See Amended Complaint ("AC"), Dkt. 38, at ¶¶ 297-298.

3. Based upon Plaintiffs' continuing investigation of the facts and circumstances surrounding the acquisition by the AMNH of this collection ("the Teaching Collection"), and as of February 14, 2018, the date that Plaintiffs filed their Amended Complaint, Plaintiffs had the good faith belief that "Felix Warburg, the German-born New York banker, donated the money for the transfer of the collection from Berlin to New York." See AC at ¶ 299. As set forth in the accompanying proffered Supplemental Declaration of Michael J. Lockman, Plaintiffs' continued research of this matter subsequent to the filing of the Amended Complaint and the oral argument on July 31, 2018 of Germany's motion to dismiss has further confirmed that Felix Warburg did, in fact, provide the funds for the purchase and acquisition of the Teaching Collection by the AMNH. See Lockman Supp. Decl. at ¶ 31.

4. However, based upon Plaintiffs' continuing research, the Teaching Collection was not acquired by the AMNH from Luschan's widow, as alleged in paragraph 299 of the Amended Complaint, but that, rather, Luschan's Teaching Collection was transferred to the AMNH in 1924 from the Royal Museum of Ethnology itself, not Luschan's widow, as part of a commercial transaction. See Lockman Supp. Decl. at ¶¶ 5 and 31-32. Moreover, it was Luschan's Teaching Collection maintained at the Royal Museum in Berlin that was the subject of numerous commercial transactions involving the purchase and sale of skulls, bones and other human

remains, while the other primary collection maintained by the Royal Museum relied upon charitable gifts and donations. *Id.* at ¶ 5.

5. Further, substantial evidence has been uncovered that this commercial transaction involving Luschan's Teaching Collection was part of Germany's ongoing commercial activity in the purchase and sale of human remains from South West Africa and elsewhere to Germany and then to the United States, as well as the purchase and acquisition of human remains of Native American indigenous peoples and African-Americans in the United States to Germany and elsewhere. *Id.* at ¶¶ 7-14. As further detailed in the Lockman Supplemental Declaration, extensive German government resources were deployed to assist with the massive collection of human remains for commercial use and research, as graphically depicted in photographic reproductions of German soldiers loading Ovaherero skulls into crates at a concentration camp for transport to Germany. *Id.* at ¶ 15 and Exhibit B. Luschan and other German agents actively purchased and traded human remains obtained in the United States, including human remains of Mohawk people from New York State (*Id.* at ¶ 24). The AMNH and other U.S. Museums, including the Smithsonian, bought, sold and traded human remains with the Royal Museum in Berlin on a regular basis (*Id.* at ¶¶ 25-26), and the German Consulate in New York was used as a shipping transit point for some of the commercially acquired remains being shipped from the U.S. to Germany. *Id.* at ¶ 30. Numerous studies of the human remains of Ovaherero and Nama victims of the 1904-1908 genocide were also published and maintained at the Columbia University library, the AMNH library collection, and other institutions located in New York. *Id.* at ¶ 21.

6. Plaintiffs, therefore, believe that the accompanying 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 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 ¶¶ 31-32.¹

7. In addition, Lockman also provides new source material from 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.

8. The Lockman Supplemental Declaration also 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

¹ 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* Dkt. 45-2, Declaration of Barnabas Veraa Katuuu, at ¶ 8 and Exhibits 1 and 2.

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.

9. In short, Plaintiffs' continuing research has uncovered additional critical evidence relating both to the facts and circumstances surrounding the AMNH's acquisition of Luschan's Teaching Collection, but also further information regarding the larger context of Germany's commercial activities in the purchase, sale and study of human remains involving not only South West Africa and Germany, but also New York and other regions of the United States.

10. Accordingly, the Lockman Supplemental Declaration thus responds to the questions raised by the Court at oral argument, *i.e.*, "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). Since Plaintiffs now have additional relevant information on these issues based upon their continuing research, they strongly believe this information should be made a part of the motion record and considered by the Court.

WHEREFORE, it is respectfully requested that the Court grant Plaintiffs' motion for leave to file the accompanying Supplemental Declaration of Michael J. Lockman or, alternatively, leave to file the accompanying proposed Second Amended Complaint.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 25, 2018 at New York, New York.

Kenneth F. McCallion

/s/
KENNETH F. McCALLION