05-5612-cv

United States Court of Appeals

for the

Second Circuit

DR. THOMAS WEISS, ERNA BIRNBAUM GOTTESMAN and MARTHA BIRNBAUM YOUNGER,

Plaintiffs-Appellants,

– v. –

ASSICURAZIONI GENERALI, S.P.A., a foreign corporation, BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, a foreign corporation, A FOREIGN CORPORATION, a foreign corporation, DOE COMPANY NO. 1, as Successor to Deutscher Lloyd Lebens Versicherung, DOE COMPANY NO. 2, as Successor to Deutscher Lloyd Versicherung, DOE COMPANY NO. 3, as Successor to Moldavia Generali, DOE COMPANY NO. 4, as Successor to Tristi Altalanos Bixtosito Tarsulat and DOE COMPANIES NO. 5-100,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

The decision appealed from, reported at 340 F.Supp.2d 494 (S.D.N.Y. 2004) was rendered by the Honorable Michael B. Mukasey.

JURISDICTIONAL STATEMENT

The Weiss Plaintiffs adopt the jurisdictional statement of the Joint Plaintiffs-Appellants Brief.

ISSUES PRESENTED

1. Whether the District Court erred in dismissing the Weiss Plaintiffs' Florida common law contract, tort, and statutory claims against Generali, a multinational insurer headquartered in Italy that has been licensed to do business in Florida for several decades, that issued policies to Plaintiffs' family members in 1936 in Czechoslovakia payable "wherever the insured makes a demand" and the heirs demanded payment in Florida which Generali denied, based on federal preemption, where there is no (1) federal treaty, statute, or duly promulgated administrative regulation or executive agreement or other action having the force of law creating any conflict with Florida law; (2) no applicable international dispute, crisis, or exercise of the executive branch's authority to conduct foreign affairs; and (3) no participation in the litigation of the United States Government or the Italian Government, either as a party or *amicus curiae*.

2. Whether the District Court erred in denying Plaintiffs' Motion to Amend Pursuant to Federal Rule of Civil Procedure 15(a) to add a count under the Federal Racketeering Influenced and Corrupt Organizations Act, in light of Generali's fraudulent schemes designed to thwart Plaintiffs' claims and mislead policyholders, public officials, and the public about its policies, records, injuries from "nationalization," and its bogus Florida media campaign in 1998.

STATEMENT OF THE CASE AND THE FACTS

I. Procedural History

This action was filed in state court in Miami, Florida in June of 2000 by Dr. Thomas Weiss, individually and as attorney in fact for Martha Birnbaum Younger and Erna Birnbaum Gottesman ("Weiss Plaintiffs"). Dr. Weiss is the only child of two Holocaust survivors who are now deceased. Ms. Younger and Ms. Gottesman are Holocaust survivors (whose father perished at Auschwitz) and are Dr. Weiss's relatives. Plaintiffs' parents purchased life, annuity, and other policies from Generali in the 1930s. The life/annuity policies provided that Generali would pay benefits wherever the insured requested payment. Dr. Weiss, a Florida resident since 1949, demanded payment of the Generali policies in Miami, Florida which Defendants refused. Plaintiffs sued Assicurazioni Generali, S.p.A., Generali-US Branch,

Businessman's Assurance Company of America ("Generali" or "Defendants") for damages resulting from Defendants' refusal to pay and tortious conduct in avoiding payment and misleading policyholders and the public over the next several decades. The case was removed to federal court and transferred by the Judicial Panel on Multidistrict Litigation to the Southern District of New York in December 2000.

In 2002, the district court denied Defendants' motion to dismiss or transfer the case on grounds of *forum non conveniens* in favor of either the Czech Republic or the International Commission for Holocaust Era Insurance Claims (ICHEIC). It held, *inter alia* that ICHEIC, a private, voluntary, non-governmental entity chartered under Swiss law and headquartered in London had failed to perform its stated mission of publishing names and paying claims under "liberal standards of proof," and was an inadequate forum for resolution of Holocaust Survivors' and heirs' insurance claims. However, in 2004 the District Court held that *American Insurance Association v. Garamendi*, 123 S.Ct. 2374 (2003) precluded Holocaust survivors' and heirs' access to U.S. courts to litigate their state law claims against Generali, and Plaintiffs were required to present their claims, if at all, to the ICHEIC, despite its inadequacies. [SPA. 1-18].

The Weiss Plaintiffs moved for Rehearing or to Alter or Amend the Judgment Pursuant to Federal Rule of Civil Procedure 59, which included a Motion

for Leave to Amend the Complaint to add a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO). [A-1874]. The District Court denied all relief under Rule 59 and ordered all plaintiffs to file their notices of appeal no later than September 30, 2005. [SPA- 20-22]. The Weiss Plaintiffs timely filed their notice of appeal on September 29, 2005. [A-2140-43].

II. Allegations in Complaint Regarding Weiss and Birnbaum Families and Generali Insurance Policies and Generali's Conduct

The following facts are alleged in the Weiss Plaintiffs' Complaint, unless otherwise noted.[1]

Weiss and Birnbaum Family Histories

Paul Phillip Weiss was a successful merchant from a landed gentry family in Nodsevlus, Czechoslovakia. In 1937, he purchased a very large life/annuity policy, among other insurance products from Joseph Schreiber, a bonded and licensed insurance agent in Nodsevlus, Czechoslovakia for Generali. [A-310]. His goal was to protect the family assets, which were substantial. One policy was worth Fifty

[1] Some of the facts noted here were filed as Exhibits to Plaintiffs' Response to Generali's Rule 56.1 Statement of Facts [A-1433-1480], the Weiss Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss (Weiss Opp Memo) [A-659-942], the Weiss Plaintiffs' Memorandum in Opposition to Defendants' Second Motion to Dismiss (Weiss Second Opp Memo) [A- 1483-1620], and the Weiss Plaintiffs' Surreply In Opposition to Defendants' Second Motion to Dismiss (Weiss Surreply) [A- 1710-1843].

Thousand U.S. Dollars ($50,000.00) at the time of purchase, and was linked to gold and the American dollar ("New York Dollar Check"). Mr. Weiss prepaid the premium in full. [A-310].

Joseph Birnbaum was a prominent businessman in the nearby town of Sjaljava which was also part of Czechoslovakia between 1918 and 1937. Like Nodsevlus, it later fell under Hungarian sovereignty during WWII. Mr. Birnbaum purchased Generali insurance policies for his wife Dora, and his two daughters, Martha and Erna, which were attached as exhibits to the Weiss Complaint. [A-354-384].

The reason Mr. Weiss bought *Generali* insurance was to protect his assets by moving them out of his troubled country in the event, which tragically came to pass, that his home would be unsafe due to the Nazi terror. Generali was headquartered in Trieste, and promoted its products to Central and Eastern European Jews with the promise that it was a safe haven for their money, with its offices and assets all over the world. [A-306-307]. The Fulop Weisz policy provides, in Article 18, that the insured can receive payment of his policy benefits *anywhere in the world*, at his risk and expense. [A-729]. So do the Joseph Birnbaum policies. [A- 746].

The area that included Nodsevlus and Sjaljava remained relatively safe until April of 1944, when the German Army and the Hungarian police moved in and deported the Jewish residents. Paul Phillip Weiss, his wife Helen Lebowitz Weiss,

and their three children were deported via train to Auschwitz. Helen Weiss and their children did not survive past the first selection by Dr. Mengele; they were gassed upon their arrival. Paul Philip Weiss worked as a slave laborer in concentration camps in Auschwitz, Warsaw, Landbsurg, and Dachau. Although he suffered severe shrapnel injuries and contracted typhus and other ailments, he survived. [A-314-15].

In June of 1945, Paul Phillip Weiss, recovering from his wounds and illness and in need of funds, personally visited Generali's Prague office to collect his annuity and other family policies. Generali insisted that he provide a copy of the policy, which was impossible. [A-1587-88]. Like virtually all of the small number of surviving Jewish former residents of his hometown, Mr. Weiss could not retrieve any of his personal possessions such as insurance policies because the new residents, upon moving into these vacated houses, had destroyed whatever personal articles the Nazis had not confiscated from the Jewish homes. The company refused to honor his policies and demands for payment.

After moving to Florida in 1949, Mr. Weiss continued to suffer from physical ailments and depression. He could never recreate his former business success, and earned a living performing kosher rituals. Like most survivors, Paul Phillip Weiss told his son very little about his horrific experiences during the Holocaust, or his life before 1945. However, in 1984, one year before his death, Mr.

Weiss told his son about the policies he purchased from Generali's local agent "Joseph Schreiber, a bonded insurance agent." Dr. Weiss then requested information about his father's policies from Generali. The company repeatedly denied it had any record of a policy sold to Paul Phillip Weiss, including under alternate spellings of the first and last name, such as "Pavel Felipe," "Weis," and "Weisz." Generali also denied keeping records according to the identity of the agent. Generali also claimed its assets had been nationalized and so its insurance policies were no longer its obligations but those of the successor European governments. [A- 309-336].

Paul Weiss requested that Generali pay his policy proceeds in Miami, Florida after he settled here in 1949. Tom Weiss made the same demand of Generali in the 1980s and 1990s after his father passed away in 1985.[2]

Joseph Birnbaum was deported from Sjaljava and perished at Auschwitz. His daughters Martha and Erna survived the Holocaust. They were first cousins of Helen Lebowitz Weiss. After the war, Martha married and settled in New York City. Erna married and settled in Connecticut, and later moved to Ohio. In 1998, Mrs. Birnbaum and Mrs. Gottesman appointed Dr. Weiss their attorney in fact, he made a

[2] Dr. Thomas Weiss has lived in Florida since 1949 when his parents moved there. [A-315]. Generali has been licensed to do business in Florida since 1977. [A-303]. It filed reports with the Florida Department of Insurance pursuant to Florida's Holocaust Victims Insurance Act in 1998, 1999, and 2000, although Plaintiffs' claim the reports did not comply with the law. [A-339-41].

demand on Generali to pay any policies purchased by Joseph Birnbaum in Miami, Florida. Generali denied that it had any policies of Mr. Weiss or of Mr. Birnbaum. After Dr. Weiss's attorneys informed Generali in 1999 they were in possession of a policy purchased by Mr. Birnbaum, Generali supplied a copy of policy nos. 116777, 116778, and 140569, which were attached to the complaint filed in June 2000.[3] At the time the Complaint was filed in 2000, Mrs. Younger was seventy-eight (78) years old, and Mrs. Gottesman was seventy-five (75) years old.

After decades of Generali denials, the name "Fulop Weisz" finally appeared on the ICHEIC Web Site in the year 2000, after the Complaint was filed. Upon demand by Dr. Weiss's attorney, Generali produced one policy – for 25,000 Czech Crowns – for "Fulop Weisz," from the town of Sevlus. In May of 2001, in connection with its Motion to Dismiss, Generali produced English translations of three (3) policies relevant to the Weiss Plaintiffs – two of the Birnbaum policies, and the Fulop Weisz "25,000 Czech Crown" policy. At that time, Dr. Weiss learned that his father's policy also had a substantial *disability* provision. [A-669, 721-24].

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[3] The complaint attached a copy of a fire/property policy Generali Moldavia sold Mr. Birnbaum. It also attaches a copy of a policy issued by Triesti Altalanos Bixtosito Tarsulat to Josef Birnbaum in 1941, which appears to be an endowment/annuity policy payable in 1951. Exhibit 4. [A-370-384]. ICHEIC's mandate does not include property insurance claims. [A-801].

A. The Weiss Plaintiffs' Complaint

The Weiss Plaintiffs filed their action on June 23, 2000, against the Generali defendants in the State Court of general jurisdiction in Miami-Dade County, Florida. In addition to a claim for breach of the insurance contracts Generali has now admitted it (or its affiliates or subsidiaries) sold Mr. Weiss and Mr. Birnbaum, the Weiss Plaintiffs Complaint describes a number of actions post-contract breach, which are independent wrongs, and which occurred in the years between 1946 and 1999 (and through the present day) and are actionable as torts under Florida law. The Complaint seeks compensatory damages for common law claims including breach of contract, and compensatory and punitive damages for conversion, breach of fiduciary duty, breach of special duty, unjust enrichment, intentional spoliation of evidence, constructive trust, and conspiracy. It also seeks an accounting and a declaratory judgment.

The Weiss Complaint also seeks relief under two Florida statutes, Florida's Holocaust Victims Insurance Act, section 626.9543, Florida Statutes (2000 Supp.),[4] and section 71.011, Florida Statutes (1999), for "Reestablishment of

[4] Under section 626.9543(7) and Rule 4-137.010, Florida Administrative Code, the Generali Defendants were obligated to disclose to the Florida Insurance Commissioner the "number and total value of policies," and other detailed information relating to all unpaid policies in force between 1920 and 1945, but failed to do so. It also failed to apprise the Department of the rejected Weiss

Papers."[5]

The allegations detailing Generali's post-war conduct throughout the world and in the State of Florida to mislead survivors and heirs and deny claimants their rightful proceeds are detailed at paragraphs 67-112 of the Complaint and summarized here. [A-319-336].

(1) Generali fraudulently misrepresented and concealed the true extent of unpaid Holocaust era policies, and its archives and policy information.

Generali claimed in response to policyholders' and public officials' inquiries and public pressure in world-wide advertisements that it had no records of pre-WWII policies. But Generali later admitted that its Trieste archive is so comprehensive that it contains bound volumes listing every policy issued prior to 1938, by year, and by market, in sequentially numbered order, and contemporaneous

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claims. The Act provides a private right of action in Florida for Holocaust victims and heirs such as the Weiss Plaintiffs' for claims against insurers who violate the Act, including treble damages, attorney's fees, costs, and civil penalties, which the Weiss Plaintiffs invoked in Count III. [A-339-341].

[5] Count IV alleges that the Weiss and Birnbaum policies were lost and/or destroyed during and after the Holocaust at a time when the members of the Plaintiffs' families were forcibly taken from their homes and robbed of their possessions and papers. The Complaint alleges that Generali is in possession of one or more of the originals or copies of the Plaintiffs' policies in its corporate archives or archives of its *subsidiaries or reinsurers*, as well as other key policy information. Count IV seeks the equitable remedy of reestablishment of papers, records, and files under section 70.11, Florida Statutes (1999).

annual ledgers calculating the company's in-force insurance obligations, with the accompanying policyholder information, including annual balance sheets for each of its branches. Contrary to its claims, Generali maintained information with the insured's name and birth date, place of issuance, type of insurance, and amount of coverage. [A-320-323].

Generali also denied the existence of a large number of unpaid policies, yet later admitted it failed to pay at least 100,000 policies issued prior to 1938. In fact, Generali sold at least 550,000 policies to 330,000 policyholders, yet only a fraction (fewer than 50,000) of that total was published on the ICHEIC web site prior to the suit or in the subsequent six years. [A-322].

Further, Generali did not publish, because ICHEIC rules do not require, names of *subsidiaries*' customers, even though Generali sold business through over 80 subsidiaries in Europe prior to WWII. [A-698, 838].[6]

Generali also claimed in public that its operations were decentralized, that it lacked comprehensive information about policies sold in branch offices prior to WWII, and that it would be nearly impossible for the company to reconstruct its policy database today. In truth, Generali used IBM Hollerith cards and sorting equipment in its Trieste headquarters in the mid-1930s, and each card had the capacity

[6] Weiss Opp. Memo, page 32 and note 28, and Exhibit G, Tab 6. [A-698].

to hold 80 pieces of information about the customer. That system, according to Generali's promotional materials from the 1930s (which were *re-published on its website in 2003*), enabled the company to manage "not only the central accounting department but also the various insurance branches."[7] [A-1518-1521]. Those punch cards (and/or printouts with the data from the cards) were extant in Generali's headquarters as recently as 1998 and were reportedly used to re-create its customer histories.[8] [A-1519-1520].

(2) Generali fraudulently misrepresented that it could not pay survivors because its assets were "nationalized" after WWII. Contrary to its public representations, Generali removed funds it received from Central European customers

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[7] Weiss Second Opp. Memo, at 34, and Exhibit 1 at 45, 47. This is the same punch card and sorting system that Historian Edwin Black wrote in *IBM and the Holocaust* enabled the Nazis to identify, round up, and seize the assets of European Jews. *Id*., at 34-37. [A-1522].

[8] *See* Marilyn Henry, "A Holocaust paper trail to nowhere?" *Jerusalem Post,* May 12, 1998 ("For each subsidiary, the system generated a ledger covering a single year of activity on the branch's various insurance accounts. The ledgers listed accounts by policy number and indicated the amount of payment on the premiums.").

The Generali web site in 2003 portrayed a picture quite at variance with the company's public stance. On page 45 of the site, Generali had a photo of office workers *sitting in front of Hollerith tabulators*, with the following caption: "Technology. The electrotechnical accounting unit at the Central Head Office in Trieste: it was equipped with Hollerith calculators, which represented state of the art technology in the Thirties." Generali's Web Site, "United to Italy – 1911-1950 – at page 45, 47." Weiss Second Opp. Memo, Exhibit 1, at 45, 47 [A-1565, 1567].

in the 1930s to safe havens such as the United States and other locations in the Western Hemisphere, investing in real estate, corporate stock, and bank accounts. [A- 323-327]. Generali entered into over 100 reinsurance agreements with reinsurers *in the United States* prior to the end of WWII. In 1946, Generali cited its abundant reinsurance arrangements in Western markets and the risks posed to the capitalist system in its successful plea to Military authorities to be removed from the Allied Black List. [A-1525-1535; 1574-1581].[9]

Generali's advertising circulars and even its policies issued in the 1930s describe the company's vast real estate portfolio in safe havens around the world, including in New York City. One impressive example of Generali's 1930s marketing of its worldwide financial network was displayed on Generali's website in 2003. It describes the company's aggressive real estate acquisition program of the 1930s, and its "forceful" display to potential customers of its international might:

> Real estate investment was pursued, to such an extent that the overall worth of Generali's land and buildings amounted to over 700 million in 1939. . . . The strong impetus given to real estate investment in the Thirties was forcefully represented in this poster entitled "Generali City". The poster is a photo-montage that ideally brings

[9] Weiss Second Opp Memo, at 38-48 and Exhibits 2, 3. Reinsurance records, which are comprehensive, have never been investigated much less published by ICHEIC, further evidencing its utter incompetence. [A-699-700].

> together the company's most prestigious buildings in the world.

The purpose of the poster was, in Generali's own words, "as medium of mass communication . . . extensively utilized . . . to promote its products, calling in the most talented artists to design its posters." Weiss Second Opp Memo, Exhibit 1, at 46. [A-1565-1566].

Moreover, after WWII Generali received millions in compensation from various international treaties for its "losses," and was able to recover its "palaces" and real estate in Eastern bloc countries, which it nonetheless continued to portray as a loss."

(3) Generali fraudulently misrepresented that it paid customers in countries where its assets were not nationalized. Generali also deceived the public and this Court by asserting consistently that it paid the claims of Jews and non-Jews in countries in Western Europe that were not nationalized by Communists. But the record shows that in non-Communist countries such as Austria and Greece, Generali failed to pay large numbers of Jews' insurance policies. [A- 327-329].

(4) Generali fraudulently misrepresented that it suffered under Naziism. Generali also deceived the public and policyholders in stating that it suffered under the Nazis, but research shows that Generali actually flourished during WWII, as one of the favored Axis insurers, and that it accumulated some of the most desirable

companies and portfolios throughout Europe during the war thanks to its Axis allegiance. [A-329-333].

(5) Generali discriminated against Jewish policy-holders after the end of WWII contrary to its internationally published statements and its court filings. Generali denied thousands of *Jewish* policyholders' claims due to supposed Soviet bloc nationalizations and currency devaluations. [A-333-336]. However, Generali simultaneously told *non-Jewish* policyholders after WWII in 1945 that expropriations by and currency instability in Socialist nations would "not adversely affect" their policies, and encouraged them to pay all delinquencies to bring their policies current. It told one non-Jewish customer: "The recently published decree of the Soviet Military Administration, relating to the transfer of life insurance from private companies to the new social-law insurance institutions in the Soviet occupation zone, *does not affect foreign insurance companies, nor, consequently, your policy mentioned above*. Thus you do not need to follow up any demands, relating to this, from the said social-law institutions, but you should forward them to us. . . . *Moreover we are ready in principle to issue additional or new life insurance policies, on the old conditions, either to you, or to any others from your circle of acquaintances who are interested,*

on application." (Emphasis supplied) [A-335; A-2017-2019].[10]

(6) Generali carried on a bogus "Holocaust victims rights campaign" in the State of Florida to deceive survivors and the public about Generali's post-war conduct toward its insureds. Generali conducted a bogus statewide campaign in the State of Florida in the summer of 1998 through a front organization called the "Committee for Justice for Holocaust Victims." The so-called Committee sponsored at least two statewide media and direct mail campaigns to mislead Holocaust survivors and divert attention away from Generali's failure to pay tens of thousands of Holocaust victims' policies. For example, one advertisement, while purporting to reflect the views of Holocaust victims, in fact advanced *Generali's* legal position that today's successor European Governments, and by implication *not* Generali, were in fact responsible for the company's unpaid insurance policies. The campaign stopped after the news media reported that the Committee was linked to and controlled by Generali lobbyists and public relations firms. Weiss Second Opp Memo at 54-55, and Exhibits 8, 9. [A-336; A-1541-1542 and A-1606-1611].

SUMMARY OF ARGUMENT

The district court's decision expands the law of "executive preemption"

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[10] The Weiss Plaintiffs' produced this letter to Generali's counsel during the trial proceedings.

beyond any previous precedent in holding that a sub-Cabinet level Executive Branch official can, by simply announcing that litigation against foreign entities "conflicts with foreign policy," preempt ordinary citizens' traditional state law common law and statutory claims against global conglomerates such as Generali. This result is not mandated or supported by *Garamendi* or any of the precedents cited there.

First, there is no act of the President here with the force of law such as the executive agreement which in *Garamendi* created the conflict with the California disclosure statute. Further, there is no foreign policy issue at all because neither the U.S. Government nor the Italian Government has filed a statement of interest or amicus brief opposing Plaintiffs' suits. In *Garamendi*, the U.S. Government filed a Statement of Interest (as required under the U.S.-German Executive Agreement) and the German Government appeared to support the German insurers. Both governments stated that enforcement of California Insurance Commissioner's subpoenas would have imposed conflicting obligations on German insurers because of the provisions of the U.S.-German Executive Agreement committing insurance claims to ICHEIC, which were then imposed on the insurers under German law.

Unlike *Garamendi,* or the other cases cited there and in the decision below, the indispensable elements of "executive preemption" are absent here. These are a federal treaty, statute, or properly promulgated administrative regulation, or

executive agreement which created a conflict with state law; (2) a *bona fide* international dispute, crisis, or other exercise of the executive branch's authority to conduct foreign affairs; and (3) the participation in the litigation of the United States government, either as a party or as an amicus, or the filing of a statement of interest, and/or the participation in the litigation of a foreign government, either as a party or as an amicus. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304 (1936), and *United States v. Pink*, 315 U.S. 203 (1942).

This case is more analogous to *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S.579 (1952), and *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), which limited the ability of the Executive Branch to "make law" and thereby preempt rights and duties conferred by state laws. In *Youngstown*, the Supreme Court held that even the President did not have the authority without Congressional authorization to "make law" and by executive fiat seize the steel mills in violation of the owners' state property rights. In *Barclays*, the Executive Branch policy statements and unenacted legislative proposals opposing California's taxation of international businesses were not sufficient to preempt it. To extend *Garamendi* and hold sub-Cabinet level officials can "make law" and preempt citizens' state law rights would thwart the system of checks and balances enshrined in our constitutional

system.

The Weiss Plaintiffs properly availed themselves of the protections of Florida's common law and matrix of statutes to enforce Generali's contractual obligations as well as to hold it accountable for the outrageous manner in which it treated Plaintiffs' parents and Plaintiffs themselves after the Holocaust. The Florida common law and statutes under which the Weiss Plaintiffs brought this action are facially valid, and protected under the Florida Constitution's historic guarantee of access to courts. The requirement that the executive branch act with proper authority, either flowing from an act of Congress or the Constitution, if it intends to preempt those rights, is part of the U.S. constitutional framework.

Finally, the District Court erred in denying the Weiss Plaintiffs' motion to amend their Complaint to state a claim for violation of the Racketeering Influenced and Corrupt Organization Act (RICO) given Generali's actions, which mirror the conduct of the tobacco industry which was held to constitute a RICO violation in *United States v. Phillip Morris, Inc*., 116 F.Supp.2d 131 (D.D.C. 2000).

Certainly, a reversal here should include an instruction to the court below to permit the requested amendment, which would not prejudice Generali given the fact that the case is not set for trial (and has had very little discovery either).

ARGUMENT

The Weiss Plaintiffs have the right to sue Generali under well-established Florida common law and statutory causes of action for the full range of injuries alleged in the Complaint. The courts of the State of Florida have allowed residents (and even non-residents) to avail themselves of its laws to pursue miscreant corporate actors, including insurers, including foreign insurers, who violate the standards of commercial conduct enshrined in Florida's common law of contracts and torts. These traditional remedies include punitive and treble damages where warranted by the defendants' conduct. Further, the statutory claims asserted by the Weiss Plaintiffs are based on facially valid and duly enacted statutes and are fully enforceable notwithstanding anything in the *Garamend*i decision.

I. The Weiss Complaint Seeks Remedies for Defendants' Contractual Violations and Tortious Conduct Provided Under Well-Established Florida Common and Statutory Law

A. Florida's Constitution Guarantees Access To Courts To Pursue the Claims Pled in the Weiss Complaint.

Florida's common law tradition of access to courts has been enshrined in the State Constitution for over a century. Fla. Const. Art I, Section 21 provides: "The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial, or delay." According to the Florida Supreme Court: "The right to go to court to resolve our disputes is one of our fundamental

rights. With the exception of the State Constitution of 1868, Florida has incorporated an express provision guaranteeing a person's right of access to the courts in each of its constitutions. The history of the provision shows the courts' intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes." *Psychiatric Assoc. v. Siegel*, 610 So.2d 419, 424 (Fla. 1992).[11] Florida courts only tolerate a restriction on one's right of access to courts if the legislature provides "(1) a reasonable alternative remedy or commensurate benefit, or (2) a showing of an overpowering public necessity for the abolishment of the right, and finds that there is no alternative method of meeting such public necessity." *Id*. at 424.

In *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977), the Florida Supreme Court held a "merits-focused pre-suit mediation process" for medical malpractice cases reached the "outer limits of constitutional tolerance." In *Siegel*, the Court held a bond requirement for physicians to sue a medical review board violated the right of access to courts because it was not reasonably related to a permissible legislative goal of preventing frivolous suits, and it was arbitrary and capricious.

Therefore, the dismissal below in favor of ICHEIC, a non-judicial

[11] The constitutions of 1838, 1861, 1865, 1885, and 1968 all included a specific access to courts guarantee. *G.B.B. Investments, Inc. v. Hinterkopf*, 343 So.2d 899, 901 (Fla. 3d DCA 1977).

"process" that operates in secret, is incorporated and headquartered overseas to avoid American public records and open government laws, and that has a documented history of failing to provide claimants with adequate procedural rights, or substantive outcomes, or even to follow the rules by which it is supposed to operate, would contravene long-standing Florida constitutional law. It would never pass muster if attempted by the Florida Legislature. More importantly, it is available to the Weiss Plaintiffs as a matter of constitutional right in the absence of a truly preemptive and properly authorized Federal Government action causing a conflict with Florida's laws.

B. Florida Law Provides for Claims Against Insurers Who Violate Contracts

Florida common law provides a cause of action for insurance policy holders and beneficiaries to secure recovery of benefits owed by insurers but not paid under insurance contracts, including a jury trial. This right is of long-standing in Florida and hardly needs extensive discussion.[12] *Ocean Acc. & Guar. Corp. v. Tucker*, 112 Fla. 401, 403, 150 So. 606, 607 (1933)("insurers, by issuing the policy of insurance, have entered into a contract with the assured, which entitles the latter, after a loss under the policy had occurred, to seek redress in a court of common law,

[12] The transfer of this action from the Southern District of Florida to the Southern District of New York does not change the requirement for this Court to apply Florida law. *Songbyrd, Inc., v. Estate of Grossman*, 206 F.3d 172, 179-80 (2d Cir. 2000).

and there submit for judicial determination all issues of fact between the parties pursuant to the constitutional right to have a jury trial on all such issues."). *See also Prudential Ins. Co. of America v. Prescott*, 130 Fla. 11, 176 So. 875 (1937) (same).

1. Florida Law Provides Remedies in Florida Courts Against Foreign Insurers Who Contract to Pay Insureds in Florida.

Florida courts and Federal courts in Florida have consistently held that Florida is the appropriate forum for litigating claims arising under ambulatory life insurance or endowment contracts which call for payment at the place requested by the insured and a the insured makes the request to be paid in Florida. *Pan American Life Ins. Co. v. Blanco*, 362 F. 2d 167 (5th Cir. 1966)(where company sold Cuban refugees insurance in Cuba and the contract called for insurance payments in the United States and suit was brought in Florida, Florida law, and not the laws of Cuba, determined the method of performance); *DeLara v. Confederation Life Ass'n*, 257 So.2d 42 (Fla. 1971), *cert. denied* 409 U.S. 953 (1972)(same); *Confederation Life Ass'n. v. Vega y Arminan*, 207 So.2d 33 (Fla. 3d DCA 1968)(same); *Recio v. Pan American Life Ins. Co.*, 154 So.2d 197 (Fla. 3d DCA 1963), *cert. denied* 377 U.S. 990, *reh. denied* 379 U.S. 871 (1964). Since the Weiss and Birnbaum agreements call for Generali to send payment to the place requested by the insured, and the Weiss Plaintiffs demanded payment in Florida, Florida law is the place of the contract .

2. The Weiss and Birnbaum Policies Are Identical To Czech Generali Policies U.S. Courts Have Previously Held Were Subject To American State Law Claims.

The tradition of U.S. courts applying state law to *Generali's* Czech issued life and annuity policies extends back to WWII itself. At that time, Generali attempted, unsuccessfully, to avoid its obligations to Jewish refugees from Nazi persecution under policies identical to the Weiss-Birnbaum policies. In *Buxbaum v. Assicurazioni Generali*, 33 N.Y.S. 2d 496 (Sup. Ct. N.Y. 1942), Czech refugee Max Buxbaum sued Generali in the New York Supreme Court to recover the cash value of policies he bought in Prague between 1926 and 1934. The policies contained a provision, article 18, which provided that the insured could receive payment of benefits *either* at the Generali office in Prague, *or* the place the claimant requested the proceeds to be sent. The *Buxbaum* court held this provision required Generali to defend the claim in New York and not the Republic of Czecho-Slovakia. *Id.* It emphasized the fact that Generali had offices throughout the world, including New York City, and was required to make payment anywhere the insured made a demand:

> *Max Buxbaum* testified that at the time the policies were written at Prague he *had in mind the wisdom of securing payments by the company in places other than at*

> *Prague; that he was informed by the defendant's manager that it had offices at various places throughout the world and that the policies could and would be paid at any of those offices. His attention was called to paragraph 18 of the policies above quoted and particularly the second sentence of that paragraph. He was also in possession of a circular of the defendant to the same effect*. . . .

Id., at 498.[13]

The translations of the Fulop Weisz and Joseph Birnbaum policies contain *the very same Article 18* as the Buxbaum policies. All the Weiss Plaintiffs requested that Generali pay their insurance proceeds in the State of Florida. Generali is licensed to do business today in Florida (and has been since 1977), and conducts substantial business in Florida and maintains an office in Miami. Under *Buxbaum*, Florida is the appropriate forum for this litigation. [A-302-303].

3. Florida Law Provides Causes of Action For Exemplary or Punitive Damages for Conduct Independent of the Contractual Breach Constituting An Independent Tort or Statutory Violation.

Florida law also provides a cause of action for exemplary (treble or punitive) damages under a bad faith statute for insurers' intentional tortious conduct

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[13] The record includes some of Generali's promotional materials from that era, some of which were posted on its website in 2003. Plaintiffs' Response to Generali's Rule 56.1 Statement, Exhibits 1,2 and Weiss Second Opp. Memo, Exhibit 1. [A-1443-1455; A-1556-1573].

committed even in connection with a contractual insurance claim. *See, e.g., Aguilar v. Inservices, Inc*., 905 So2d 84 (Fla. 2005) (under the bad faith statute, section 624.155, Florida Statutes, "if an insurance carrier engages in outrageous actions and conduct that constitutes an intentional tortious act" it may be liable for bad faith damages even though such conduct occurs while processing the claim.); *Allstate Idem. Co. v. Ruiz*, 899 So2d 1121 (Fla. 2005)(same); *Vest v. Travelers Ins. Co.*, 753 So.2d 1270 (Fla. 2000). *Opperman v. Nationwide Mut. Fire Ins. Co.,* 515 So.2d 263 (Fla. 5th DCA 1987)(section 624.515 created "first party" bad faith cause of action in Florida). *See also Comptech Intern. Inc. v. Milam Commerce Park, Ltd.*, 753 So2d 1219 (Fla. 1999); *Moransais v. Heathman,* 744 So2d 973 (Fla. 1999). The conduct detailed in paragraphs 67-112 of the Weiss Plaintiffs' Complaint, which is substantiated with record evidence developed and filed in the proceedings below, clearly alleges bad faith against Generali for its treatment of the Weiss Plaintiffs and their families.[14]

4. Florida Law Provides Remedies in Florida Courts for the Weiss Plaintiffs' Tort Claims.

The Weiss Complaint also seeks relief for the common law claims of

[14] The Weiss Plaintiffs complied with Florida's bad faith notice provisions. [A-395; A-402-418].

breach of fiduciary duty, constructive trust, conversion, intentional spoliation of evidence, unjust enrichment, breach of special duty, conspiracy, for an accounting and declaratory judgment under the Holocaust Victims Insurance Act, section 626.9543, Florida Statutes (1999), for reestablishment of papers under section 71.011, Florida Statutes. The factual allegations underlying these claims are spelled out in the Complaint itself, and supported with materials filed below as described in note 1, *supra*. The next two sections address two of these well-established tort claims under Florida law, which provides for punitive or treble damages arising from defendants' intentional misconduct even when the relationship has its origin in a contractual relationship. *See, e.g. Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999)(common law claims) and *Comptech Int'l v. Milam Commerce Park, Ltd.*, 753 So.2d 1219 (Fla. 2000)(statutory claims).

a. Breach of Fiduciary Duty

The Weiss Plaintiffs have pled a cause of action for breach of fiduciary duty. Under Florida law, "[f]iduciary relationships are either expressly or impliedly created. Those expressly created are either by contract, such as principal/agent or attorney/client, or through legal proceedings, such as trustee/beneficiary and guardian/ward." *Capital Bank v. MVB, Inc*., 644 So.2d 515, 518 (Fla. 3d DCA 1994). The Court in *Capital Bank* continues: "Fiduciary relationships implied in law are

premised upon the specific factual situation surrounding the transaction and the relationship of the parties. . . . Courts have found a fiduciary relation implied in law when 'confidence is reposed by one party and a trust accepted by the other.'" *Id*. The court also held: "A fiduciary owes to its beneficiary the duty to refrain from self-dealing, the duty of loyalty, the overall duty to not take unfair advantage and to act in the best interest of the other party, and the duty to disclose material facts." *Id.*[15] *See also Barnett Bank of West Florida v. Hooper*, 498 So.2d 923, 928 (Fla. 1986)*; Dale v. Jennings*, 90 Fla. 234, 244, 107 So. 175 (1925); *Harrell v. Branson*, 344 So. 2d 604, 607 (Fla. 1st DCA), *cert. denied*, 353 So.2d 675 (Fla. 1977).

Florida courts have reinforced that plaintiffs may assert a cause of action for breach of fiduciary duty, and seek and recover punitive damages, even for relationships that were initially created in a written contract. *Invo Florida Inc., v. Somerset Venturer, Inc.,* 751 So. 2d 1263 (Fla. 3d DCA 2000)(breach of fiduciary duty is a well-established tort where facts to be proven are distinct from breach of contract)*; First Equity Corp. of Florida v. Watkins*, 1999 WL 542639, *1 (Fla. 3d DCA 1999)(security brokerage agreement); *Crowell v. Morgan Stanley Dean Witter Services*, 87 F.S.2d 1287 (S.D.Fla. 2000)(denying motion to dismiss claim by

[15] The court found a breach of fiduciary duty even though "the conduct of the bank did not descend to the level of actual fraud." *Id.* Needless to say, the conduct alleged by Generali is fraudulent.

brokerage customer for breach of fiduciary duty); *Performance Paint Yacht Refinishing, Inc., v. Haines*, 190 F.R.D. 699 (S.D.Fla. 1999)(denying motion to dismiss breach of fiduciary duty claim arising from non-compete agreements).

The Complaint alleges that Generali's sale of insurance to the Plaintiffs and duty to protect those assets for the benefit of the insureds, "especially under the circumstances of Europe in the 1930s and 1940s, created a relationship of trust and confidence between the Weiss and Birnbaum family members who bought policies, and Generali and its subsidiaries and affiliates. Generali and its subsidiaries and affiliates aggressively marketed policies to the Weiss family and other Jewish families in the 1930s, exploiting the people's financial insecurity as Nazism and Fascism descended on Europe." [A-306-307; A-345-346].

The Complaint outlines Generali's actions which breached the insurer's fiduciary duty to its insureds, including the Weiss Plaintiffs:

> Generali breached its fiduciary duty by, among other things, (a) failing to identify its insureds and beneficiaries at the end of World War II, and inform them of the existence of the insurance policies' including death benefits, accumulated cash values, and prepaid premiums, as well as the insured's and beneficiaries' entitlement to policy proceeds; (b) refusing to provide its insureds and beneficiaries, including the Plaintiffs' families, with information about the subject insurance policies, prepaid premiums, accumulated cash values, and other policy benefits; (c) concealing information about the insurance policies and proceeds; and in fact engaging in a

> comprehensive effort to withhold such information and actively mislead the Plaintiffs and other insureds and beneficiaries about the true status of Generali's insurance policies; and (d) engaging in various schemes to divert attention from its failure to handle insurance claims in good faith, to conceal the true fate of Holocaust insurance policies, and to minimize or deny insureds and beneficiaries payment of their rightful benefits.

Weiss Complaint, Paragraph 155. [A-346]. Therefore, the Weiss Plaintiffs have alleged a breach of fiduciary duty under Florida law.[16]

b. Constructive Trust

The Weiss Complaint seeks recovery against Generali for constructive trust. Under Florida law, the elements of a constructive trust are: (1) a confidential relationship, by which (2) one acquires an advantage which he should not, in equity and good conscience, retain." *Quinn v. Phipps*, 113 So.2d 419 (Fla. 1927). Florida law also provides that a constructive trust may arise, even in the absence of fraud,

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[16] After the complaint was filed information surfaced that Generali was a mutual insurance company prior to WWII. Weiss Second Opp Memo at 19. If true, these facts would also support a claim for breach of fiduciary duty. *Silverman v. Liberty Mutual Insurance Co*., 2001 WL 810157, *1, *6 (Mass. Super. 2001)(mutual insurance company has a fiduciary duty "to act in good faith to ensure that policyholders, when asked to vote on a proposal that will extinguish their equity rights, are provided with accurate and adequate information on which to base their vote."). The survivors and heirs would be the owners of the company, not supplicants to be buffeted about by stifling obstacles designed to conceal the true paper trail of the victims' money.

where 'there is (1) a confidential relation, (2) a transaction induced by the relation, and (3) a breach of the confidence reposed." *Steigman v. Danese*, 502 So.2d 463 (Fla. 1st DCA 1987). *See also Meltzer v. Estate of Norrie*, 705 So.2d 967 (Fla. 5th DCA 1998)("a constructive trust requires a showing of fraud, undue influence, [or] abuse of confidence or mistake;" *Finkelstein v. Southeast Bank*, 490 So.2d 976, 982 (Fla. 4th DCA 1986)("equity will raise a constructive trust and compel restoration where one, through actual fraud, abuse of confidence, reposed or accepted, or through other questionable means, gains something for himself which in equity and good consciences he should not."), citing *ITT Community Development Cor. v. Barton*, 457 F.S. 224, 230 (5th Dir. 1978). *See also Bender v. Centrust Mortgage Corp*., 51 F.3d 1027 (5th Cir. 1995); *Steigman v. Danese*, 502 So.2d 463 (Fla. 1st DCA 1987).

The Weiss Plaintiffs seek to recover their share of the assets Generali improperly acquired with the Mr. Weiss's and Mr. Birnbaum's money. Under Florida law, although "a constructive trust cannot be imposed on general assets," it is well-settled that "Florida courts will impress property with a constructive trust only if the trust res is specific, identifiable property *or if it can be clearly traced in assets of the defendant which are claimed by the party seeking such relief*." *Bender*, 51 F.3d at 1030. (Emphasis added). The trail from Generali's premium income in Eastern and Central Europe to the real property, bank accounts, corporate stock, and reinsurance

interests is detailed in the Weiss Plaintiffs' complaint, and supported with archival documents. *E.g*. notes 9, 13, *supra.* [A-1525-1535; A-1443-1455; A-1556-1581]. If Generali went through some form of demutualization between WWII and the present, policy holders such as the Weiss Plaintiffs would be entitled to their ownership interests in the entire asset base of Generali, commensurate with their insurance policy interests.[17]

II. Garamendi And The Other Foreign Policy Preemption Cases Do Not Support Dismissal of Plaintiffs' Complaint.

The Weiss Plaintiffs joined the Plaintiffs-Appellants Joint Brief and support the preemption arguments made there distinguishing *Garamendi*, which should terminate the analysis and support a reversal. However, the district court also

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[17] The Weiss Plaintiffs do not concede that the few policies Generali has provided so far represent all of the policies that Generali and its affiliates sold their parents. They requested copies of policies sold to relatives whose names are known to Dr. Weiss such as his father's brothers and sisters who perished in the Holocaust about whom he has no other information such as birthdates and places, as well as those sold to Joseph Birnbaum's brother David Birnbaum. Yet Generali insisted on this centuries old information as a condition of supplying those policies to Dr. Weiss.

One of the entries on the Generali website makes a startling observation. In 1946, after the trauma of WWII, "Generali was able to close, all the way up to 1944, its annual accounts and to convene its shareholders' meetings. All corporate deadlines were regularly met after the end of the conflict, with the convening of the AGM *in 1946, when shareholders approved the 1944 accounts*." (Emphasis supplied). Surely, the plaintiffs are entitled to see how the "shareholders" treated the "accounts" of Generali's Jewish policyholders in the year 1946 - - when it was *clear* that something catastrophic had occurred to a population that happened to represent hundreds of thousands of Generali's "accounts." Weiss Second Opp. Memo, Exhibit 1, at 50-52. [A-1570-1572]. Hence, judicial process is imperative; the ICHEIC stonewall is not acceptable.

relies on other "federal preemption" cases, 340 F.Supp.2d at 502, 504. As the following discussion shows, the other cases relied on by the district court are also materially distinguishable from the facts here. The district court's application of these precedents to dismiss these cases would effect an extension of executive power over citizens' state law rights that cannot be found in the Constitution, is not authorized by Congress, and is not supported by any case or principle of federalism of separation of powers.

The district court made the sweeping statement that due to the Executive Branch's preeminence in foreign affairs, that based on a "policy" announced by the Deputy Treasury Secretary the court was "compelled" to find preemption of Florida's laws, citing numerous prior cases. Although it is difficult to define in one succinct sentence or paragraph a "doctrine" that explains all the cases involving "executive branch foreign policy preemption" of state-determined rights, and while *Garamendi* did not delve into detail to explain the constitutional underpinnings of its decision, it is undeniable that the decision below represents an extension of *Garamendi* far beyond its facts, and that no previous case has found preemption based on naked statements by sub-cabinet officials purporting to invoke foreign policy interests without any Presidential act either with the force of law, or a U.S. Government Statement of Interest and or statement of any kind by a foreign

government.

A. The Executive Agreement Cases Cited Below Do Not Apply

The cases on which *Garamendi* and the district court relied in finding a "preemptive federal policy" contained at least three elements demonstrating a *bona fide* and definitive *foreign policy* interest of the United States Government that conflicted with state law. These elements are (1) a federal treaty, statute, or properly promulgated administrative regulation, or executive agreement – an action with the force of law – which created the conflict with state law;[18] (2) a *bona fide* international dispute, crisis, or other exercise of the executive branch's authority to conduct foreign affairs; and (3) the participation in the litigation of the United States government, either as a party or as an amicus, or the filing of a statement of interest; and/or the participation in the litigation of a foreign government, either as a party or as an *amicus*.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) involved (1) a Congressional resolution giving the President the right to proscribe arms sales to certain countries and provide for criminal penalties for violation of that

[18] According to *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1233, note 9 (11th Cir. 2004), the U.S.-German Executive Agreement at issue in *Garamendi*, is considered "federal law" because it is considered a "treaty" under international law even though it is not a treaty under the U.S. Constitution. The same cannot be said for Deputy Secretary' Eizenstat's missives.

decision; (2) arising out of the state of war in the Chaco region of South America in which the United States held an interest in "contribut[ing] to peace" among countries at war after consultation by the President with other American republics; and (3) the United States Government was a party in the case, a criminal prosecution of a company that violated the President's proscription against selling arms to the warring sides. As Justice Jackson wrote in his *Youngstown* concurrence, *Curtiss-Wright* "involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress." 343 U.S. at 635, note 2.

In *United States v. Pink,* 315 U.S. 203 (1942), the Court held that the United States government's right to recover leftover assets from a nationalized Russian insurance company superseded those of the New York Superintendent of Insurance, based upon (1) an executive agreement between the United States and Russia, which (2) arose out of the United States Government's formal recognition of the government of the Soviet Union, and (3) involved the United States as a plaintiff and relied upon extensive expert testimony which "gave great credence to" the United States' government's position. The Court also cited a statement from the People's Commissariat for Foreign Affairs of the Russian Government and the Commissariat for Justice, which certified the nationalization by that government of the property of

former private enterprises constituted the property of the state.

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court upheld an Executive Agreement and Treasury Department regulations eliminating judgments and claims against Iran reached in settlement of the Iranian hostage crisis. The agreement and regulations were authorized by the Trading with the Enemy Act. The President's and Executive Branch's actions were aimed at resolving claims between the United States and Iran in settlement of the 1979 seizure of the U.S. Embassy and taking of American hostages in Iran, an obvious international crisis. And, the U.S. government was a defendant in the litigation and the Federal Republic of Iran also appeared in the case. And, importantly for this case, the Court in *Dames and Moore* held that its decision was "buttressed by the fact that the means chosen by the President to settle the claims of American nationals *provided an alternative forum, the Claims Tribunal, capable of providing meaningful relief*." 453 U.S. at 686-87. (Emphasis supplied).

In *Garamendi*, all of the three elements from the foregoing cases were present as well. The President entered into an Executive Agreement with the Government of Germany which conflicted with California's insurance disclosure statute. The Agreement was entered into in the service of the President's effort to improve relations with Germany. And, the United States filed a Statement of Interest

stating that the California law interfered with the Executive Agreement because it imposed conflicting duties on German companies. Moreover, the U.S. Government and the German Government appeared as *amici* to express their interest in having the California disclosure law preempted.[19]

There has never been a case holding that lower level federal officials may by edict preclude a private citizen from seeking enforcement of state law remedies against another private citizen in a United States court where *none* of the foregoing three factors were present, as is the case here. That is, there has never been a finding of preemption drawn from a series of negative inferences from the absence of such

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[19] *Garamendi* appears to expand executive authority because it held the President could enter into an executive agreement to protect foreign private companies as opposed to foreign governments, in the broader service of U.S.-German relations. The decision has been criticized in certain respects because the Court did not elaborate on the reasoning and facts underlying the previous preemption cases, and arguably expanded the circumstances where the President can override State law without the involvement of Congress, *e.g*. by acting without statutory authority and not submitting the agreement for ratification as a treaty pursuant to Article VI. *See* Denning and Ramsey, "*American Insurance Association v. Garamendi* and Executive Branch Preemption in Foreign Affairs," 46 WM. & MARY L.REV. 825 (2004)("If the President has a unilateral power to overturn state law, the need to secure Congress's cooperation disappears, . . . as a result, the President's ability to pursue a unilateral foreign policy agenda is enhanced and Congress's role in deciding foreign policy priorities is diminished by the constitutional innovation of executive preemption." *Id.,* at 905.). While such observations and others counsel against further expansion of the executive's authority to preempt state law such as the district court's decision, it is clear that the absence of any Executive action with the force of "law" before this Court and the absence of any foreign policy issue distinguish *Garamendi*, in any event.

defined and traditional sources of law or official international compacts as that recognized by the district court's decision.

The more analogous cases are *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S.579 (1952), and *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994). The Court in *Youngstown* held that unless authorized by Congress or the Constitution, the President did not have the authority to seize the nation's steel mills to avert a labor strike during the Korean War. It held such an action was the making of a "law," which was a power vested in Congress under the Constitution. The Court held: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that it is to be a lawmaker." *Id*., at 587. If President Truman lacked the authority in wartime to seize the steel mills under his combined powers as Commander in Chief and other powers relating to foreign affairs, then the Deputy Secretary of the Department of the Treasury and a State Department sub-sub-cabinet level official perforce do not have the authority to displace established Florida common law and statutory rights by the signing of a letter expressing their hopes and aspirations for the work of the ICHEIC.

In *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), the Court held that various Executive Branch critical statements of "policy" opposing California's taxation of the worldwide operations of foreign corporations doing

business in California lacked the force of law and therefore could not operate to preempt the state law:

> "To support its arguments that California's worldwide combined reporting method impermissibly interferes with the Federal Government's ability to 'speak with one voice' [and to distinguish Container Corp.] Colgate points to a series of Executive Branch actions, statements, and amicus filings . . . . Colgate contends that, taken together, these Executive pronouncements constitute a "clear federal directive proscribing States' use of worldwide combined reporting." . . . Among the items cited were "letters sent by members of the Reagan and Bush administrations to the Governors of California and the Chairman of the Senate Finance Committee, expressing the Federal Government's opposition to worldwide combined reporting," and "Department of Justice *amicus* briefs filed in this Court, arguing that the worldwide combined reporting method violates the dormant Commerce Clause."

Id., at note 30.

The Court addressed the President's "foreign affairs powers" but found that Presidential support for un-enacted legislation outlawing California's tax and other administration statements lacking the force of law were not sufficient to preempt an otherwise valid state law. The Court held: "The Executive Branch actions, press releases, and amicus briefs – on which Colgate here relies are merely precatory. Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally

condoned, use of worldwide combined reporting." *Id*., at 329.[20]

Clearly, *Youngstown* and *Barclays* are far more analogous to the instant case than *Pink*, *Curtiss-Wright,* and *Dames & Moore*, and even closer to this case than *Garamendi*, because there is no action here from the Executive branch with the force of law, and no conflict with any State law either. In fact, there was a much stronger expression of Executive Branch opposition to the California tax in *Barclays* – including proposed legislation under the President's direct authority and an amicus brief in court by the United States – than in this case, where only the hortatory expressions of sub-Cabinet officials, preferring ICHEIC to state litigation, support the idea of preemption. As in *Barclays*, these expressions of "policy" cannot preempt state laws.

B. The United States' Failure to File A Statement of Interest

The District Court held that the "*Garamendi* ruling strongly implies that an executive policy need not be formally embodied in an executive agreement in order for the policy to have juridical effect," and "there is no reason to infer from the mere fact of executive inaction that the policy favoring ICHEIC resolution does not encompass claims against Generali." 340 F.Supp.2d at 506.

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[20] Florida's HVIA, which on its face applies to all insurers doing business in Florida which sold insurance to European Jews between 1933 and 1945, is facially valid and not in conflict with any federal law.

The district court's interpretation of government *inaction* to create a preemptive doctrine that precludes the plaintiffs here from pursuing their judicial remedies is not only not mandated by *Garamendi*, but contrary to the entire preemption doctrine in federal law, which until the decision below required a textual bar, or a definitive expression of Governmental intent to preempt a given field of state regulation or state-created rights based on an executive branch action with the force of law either authorized by Congress or falling within a power expressly authorized by the Constitution or understood to be encompassed by the President's unique foreign affairs powers. *See, e.g. Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000)(President was acting with express Congressional authority, and the state law posed "an obstacle to the accomplishment of Congress's full objectives under the [relevant] federal Act.").

The District Court's conclusion that "if anything, the Executive Branch's decision not to file a statement of interest in this case appears to stem from an unwillingness to act on behalf of a private company absent a government-to-government agreement encompassing claims against the company in question," would seem instead to support Plaintiffs' position, not Generali's. If there is no expressed governmental interest relating to the foreign government whose corporate citizen is seeking protection, how can the traditional "executive primacy in the sphere of foreign

affairs,"340 F.Supp.2d at 502, and 504-06, be invoked to justify preemption of the Plaintiffs' state common law and statutory rights? Without any assertion of foreign policy conflict advanced by the governmental entity whose policy is allegedly being impeded, (or the foreign government as was the case in *Garamendi* for the countries covered by executive agreements) the very basis for application of the principles of the *Garamendi* case would seem to collapse. In *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), the court declined to draw an inference (under the political question doctrine) about federal policy from the failure of the Executive Branch to take a position on the specific controversy before it: "[I]n our system of separation of powers, we should not abdicate the court's Article III responsibility – the resolution of 'cases' and 'controversies' – in favor of the Executive Branch, particularly where, as here, the Executive has declined a long-standing invitation to involve itself in the dispute." It concluded: "It is unclear . . . how courts should construe executive silence. We are not mind readers. And, thus, we cannot discern whether the State Department's decision not to intervene is an implicit endorsement, an objection, or simple indifference. At best, this silence is a neutral factor." *Id*., at 556.

C. ICHEIC's Is Not A Satisfactory Alternative Forum for the Weiss Plaintiffs' Insurance Claims.

After extensive briefing by Plaintiffs, including the submission of

substantial data documenting the inadequacies of ICHEIC, the district court held that, under the *forum non conveniens* doctrine, it was an inadequate forum to which it could consign American citizens for the prosecution of their common law and statutory claims against Generali. *In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig*., 228 F.Supp.2d 348, 356-58 (S.D.N.Y. 2002).[21] When the District Court reversed its decision due to *Garamend*i, it did not retreat from any of its

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[21] *See* Weiss Opp. Memo at 25-39 and Exhibits M-X. [A-863-946]. These flaws include the fact that ICHEIC is a private, voluntary organization, accountable to no governmental entity at all. ICHEIC proceedings are conducted in secret and it is chartered in Switzerland and headquartered in London in order to avoid U.S. public records laws. ICHEIC and Generali have failed to achieve the alleged goals of disseminating policy holder names and of assisting claimants in obtaining satisfactory settlements, concerns voiced by members of Congress in 2000, 2001, and 2003. The protocols for disseminating names are inherently limited. Generali's participation in ICHEIC is voluntary, and the company takes the position that it is not bound by ICHEIC rules. [A-906-907].

No Plaintiffs or Plaintiffs attorneys are members of ICHEIC and they have been denied access to ICHEIC proceedings, while non-survivor organizations purport to represent claimants' interests. Further, the Generali Agreement with ICHEIC was negotiated by such organizations with no legitimate representative capacity, and the "Agreement" is subject to side letters never disclosed to the survivors or even this Court until obtained by the Weiss Plaintiffs and filed with their Opposition Memorandum in 2001. The side deal allows the non-survivor ICHEIC groups to use funds supposedly contributed for insurance claims for "humanitarian purposes" after only six months. [A-940-941]. Such projects have been funded while thousands of survivors wait for their ICHEIC claims to be answered.

In contrast, the Presidential Executive Agreements at issue in *Garamendi* and *Whiteman v. Dorotheum,* 431 F.3d 57 (2d Cir. 2004) were the result of negotiations in which class action lawyers for plaintiffs with claims against German and Austrian companies participated directly.

substantive criticisms of ICHEIC. 340 F.Supp.2d at 505-06 and 508 and note 10.[22]

D. Post-Garamendi Facts Demonstrate Essential Failure of ICHEIC

After the district court's 2002 decision, more facts emerged which the Weiss Plaintiffs submitted in support of their Rule 59 motion demonstrating continued and even more fundamental failures. Not only has ICHEIC been unsatisfactory, it has failed of its essential purpose, i.e. the purpose for which Under Secretary Eizenstat based his statements cited by the Court supporting the idea of ICHEIC as the "exclusive remedy."

Mr. Eizenstat's stated basis for advancing ICHEIC as the "exclusive forum" was that it would allow survivors' and heirs' claims to be processed under "relaxed standards of proof" and "ensure the opening of companies' files:"

The ICHEIC claims process will use relaxed standards of proof in

[22] One authority, Professor Joseph Belth, Professor Emeritus at the Kelley School of Business at Indiana University, who has received numerous awards and special recognition for his many contributions to help the public gain a better understanding of the complex issues presented by the field of insurance over a thirty (30) year academic career, made the following assessment. Professor Belth estimated that the total amount of life insurance unpaid from the Holocaust era in today's dollars exceeds *$200 billion*. [A-842]. Therefore, Generali's share would obviously exceed $100 million – it would exceed several billion. Professor Belth's estimate does not even include other forms of insurance such as property/casualty, medical, pension, hail, maritime, business, fire, business, and agricultural policies.

> *dealing with outstanding claims from the Holocaust era and will ensure the opening of companies' files*, the cross-checking of names with Yad Vashem's records of Holocaust victims, and further research into European archives to find names of potential claimants.

February 16, 2000 Statement on the German Foundation "Remembrance, Responsibility, and the Future," before the Committee on Domestic Affairs of the German Bundestag, Berlin, Germany (Emphasis supplied) [A-2030;].[23]

The documents filed in support of Weiss Plaintiffs' Rule 59 Motion, as well as those filed in support of their Surreply in Opposition to Defendants' Second Motion to Dismiss (Exhibits 12, 13, 14, and 15), demonstrate that those principal elements of the envisioned ICHEIC process (and other ostensible benefits) do not in fact exist. [A-1812-1843; A-1892-2004]. The "relaxed standards of proof" were ignored in a large number of claim denials according to the analysis conducted by Lord Archer on behalf of the ICHEIC Executive Management Committee in 2003.[24] Based on one insurance commissioner's report in October 2004, there is virtually no basis for regulators,

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[23] Deputy Secretary Eizenstat made the same statement before the House Banking Committee, Washington, D.C., February 9, 2000 and the Senate Foreign Relations Committee, April 5, 2000 ("Using relaxed standards of proof in dealing with outstanding claims from the Holocaust era, the ICHEIC process will ensure the opening of companies' files . . . .").

[24] *See* Plaintiffs' Joint Response to Generali's Rule 56.1 Statement of Facts, and Exhibits 3-9; and Weiss Second Opp. Memo at 51-56, and Exhibit10. [A-1456-1482; A-1538-1543; A-1612-1615].

survivors, heirs, or the public to conclude that the situation has improved. [A-1892-1947].[25] That report cites a multitude of other examples of failures – including companies' denials of claims in violation of ICHEIC rules, or denials submitted without providing the information in company files necessary to allow the claimants or the ICHEIC "auditors" to determine whether relaxed standards of proof were applied. Another common failure is that companies violate ICHEIC rules requiring that they provide claimants with "any documents traced in their investigations." They also routinely deny claims by simply saying, even when a claimant believes he or she is a relative a person named on the ICHEIC website, that "the person named in your claim was not the same person." *Id*., at 48. These practices violate ICHEIC rules, and "effectively den[y] the claimant his/her right to appeal." *Id*., at 49. In sum, these practices, along with others cited, make a mockery of the "relaxed standards of proof" promised by Mr. Eizenstat.

In addition, the promised "opening of company records" has been a disappointment if not complete failure. Congressman Henry Waxman detailed the failure of the companies that sold insurance in the heavily Jewish Central and Eastern

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[25] *See The View From Washington State, Work of the International Commission on Holocaust Era Insurance Claims (ICHEIC), The Value of Memory "Discounted" – A Status Report July 2002-October 2004* (filed with Weiss Plaintiffs' Rule 59 Motion), at 3-5, 24, 32-33, 39, and 48-57. [A-1894-1896; 1915; 1923-1924; 1930; 1939-1947].

European countries to make comprehensive disclosures in September 2003.[26] Little has changed, and by the time ICHEIC closed its doors to new claims on December 31, 2003, only a fraction of the names of the purchasers of the policies sold by these companies in the pre-war period were published. As the Washington State Insurance Commissioner stated in its October 2004 Report:

> The deadline for filing claims was December 31, 2003. Despite the terms of the MOU (Memorandum of Understanding), up until the very end of the claims filing period the companies continued to resist releasing and having the names of their policyholders published, in some cases citing European data protection laws. By failing and/or refusing to provide potential claimants with the information they often needed to file initial claims, the companies succeeded in limiting the number of claims and their resultant potential liability. Had the companies released the number of policyholder names that could and should have been published over the entire ICHEIC claims filing period, it is likely the number of claims would have been significantly higher than the present 79,732.

Washington State Report, at 21. According to the Report, Generali had 45,152 names published on the ICHEIC website.[27] This is a fraction of its possible policy holder base, which by its previous statements and regulators' estimates exceeds 550,000. Documents previously supplied to the Court show that over 150,000 Generali names

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[26] See Weiss Surreply, at 12-17, and Exhibits 12-15. [A-1724-1729; 1812-1843].

[27] *See* Weiss Opp. Memo, Exhibit M [A-863-866].

are supposedly in ICHEIC's possession, but over 100,000 were never published. [A-865; 1912].[28]

The Weiss Plaintiffs' Rule 59 materials also included documentation that the Generali Trust Fund, the entity supposedly handling survivors' and heirs' claims for Generali, was *dismissed* from ICHEIC by Chairman Eagleburger for poor performance in the fall of 2004. [A-1976-1993]. Although the Weiss Plaintiffs contend that even a "properly" functioning ICHEIC would not be permitted as an alternative to court litigation under Florida's constitution and federal due process principles, the fact that the Generali Trust Fund performed so poorly in handling Generali claimants'

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[28] ICHEIC's failure to "open up company records" is consistent with a pattern in which other Nazi era records have been suppressed instead of being made public. *See* "Lawmakers, CIA In Dispute Over Nazi Papers," *The New York Times*, January 31, 2005. The CIA's predecessor agency, the Office of Strategic Services (OSS) is the entity that conducted much of the investigation into the looting of Jewish people's assets by the Nazis and their corporate collaborators. Several OSS documents in this record document vast financial thefts by insurers, including records of the cloaking of assets by Generali and other European insurers and reinsurers, including "over one hundred" reinsurers *in the United States.* *See* Weiss Second Opp. Memo, at 53-57, and Exhibit 13. [A-1538-1544; A-1574-1581; [A-1616-1623]. Yet ICHEIC did nothing to obtain reinsurance records from Generali or any insurers.

Now, *subsequent to the filing of the appeals in these cases*, it is reported that *billions of pages of Nazi files that were closed for sixty years will now be opened*. David Stout, "After Resisting for Decades, Germany Agrees to Open Archive of Holocaust Documents," *The New York Times*, April 19, 2006. Such recent revelations should give any American Court pause about consigning survivors' and their families' property rights and dignity, not to mention the morality intended behind Holocaust restitution, to the secret dark corners of Generali's intact archives and the secret confines of the ICHEIC bureaucracy.

claims overwhelmingly condemns the process.[29]

III. The District Court Erred In Not Granting the Weiss Plaintiffs' Leave to Amend.

In their Rule 59 Motion, the Weiss Plaintiffs sought leave pursuant to Fed. R. Civ. P. 15(a) to amend their Complaint to seek civil remedies for Defendants' violations of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Sections 1961-1967. A Motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), is an appropriate vehicle to seek leave to file an amended complaint. *United States v. Portrait of Wally*, 2000 WL 1890403, *1 (S.D.N.Y. 2000). In *Portrait of Wally*, the court held: "Such a motion, and the leave to amend that it implies, generally should be granted absent "good reason to deny the motion." *Id.*, citing *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995). *See also Wight v. Bankamerica Corp.*, 2198 F.3d 79, 91 (2d Cir. 2000)(granting leave

[29] Chairman Eagleburger wrote: "The quality of the Fund's individual claims handling is clearly below ICHEIC standards, and of a nature that ICHEIC has not seen and certainly would not tolerate from any of the insurance companies processing ICHEIC claims." November 1, 2004 Memorandum from Lawrence Eagleburger to ICHEIC Commissioners, Alternates, and Observers, at 4. The faults found by a draft audit by the Israeli Comptroller's office include problems such as "lack of reliability of the Fund's electronic database and record-keeping systems," "lack of work-plan and budget," "time delays on individual claimant files," and "failure to provide adequate financial reports." [A-1976-1984].

to file amended complaint to allege scienter under Rule 9(b) for claims of aiding and abetting breach of fiduciary duty, aiding and abetting fraud, and commercial bad faith, noting that Rule 15(a) "requires that such 'leave shall be freely given when justice so requires.'"). *See also State Teachers Ret. Bd. v. Fluor Corp*., 654 F.2d 843, 856 (2d Cir. 1981)(absent prejudice to defendant, such as motion to amend filed on the eve of trial, motion to amend should be granted freely as justice requires).

The Weiss Plaintiffs' allegations in this case mirror those of the United States Government against several tobacco companies whose widespread pattern of lies and deceit to the public, to regulators, and to their customers, concerning the health impact of their products resulted in massive deaths and injuries to people, which the Court held satisfied the elements of a Federal RICO claim. *United States v. Phillip Morris, Inc*., 116 F.S.2d 131 (D.D.C. 2000).

In *Phillip Morris*, the Court described the Government's allegations which satisfied the RICO elements:

> The Government's Complaint describes in detail what it alleges to be a four-decade long conspiracy, dating from at least 1953, to intentionally and willfully deceive and mislead the American public about, among other things, the harmful nature of tobacco products, the addictive nature of nicotine, and the possibility of manufacturing safer and less addictive tobacco products. *Defendant's conspiratorial activity includes making numerous "false and deceptive statements and concealing documents and research in an attempt to cover up their deceit.*"

116 F.S.2d at 136. (Emphasis supplied).

The Court continued:

> According to the Government, the underlying strategy *Defendants adopted was simple: to deny that smoking caused disease and to consistently maintain that whether smoking caused disease was an 'open question.' . . . To maintain and further this strategy, Defendants issued false and misleading press-releases published false and misleading articles, destroyed and concealed documents which indicated that there was in fact a correlation between smoking and disease, and aggressively targeted children as potential new smokers*.

Id. (Emphasis supplied).

Generali's conduct since WWII mirrors the conduct alleged by the Government against *Phillip Morris* that warranted RICO liability. The defendants in *Phillip Morris* engaged in a public campaign to mislead the public and interested public officials about the dangers of tobacco. They (a) announced the formation of an entity publicized as an objective research body, which it was really a cover for the companies' conspiracy to conceal the truth about smoking's health risks; (b) published [in 1954] a full-page statement that ran in 448 newspapers throughout the U.S. that cited "distinguished authorities" to say "there is no proof that cigarette smoking is one of the causes of lung cancer; (c) placed attorneys in control of the council's research and devised strategies to conceal critical information by improperly invoking the attorney client privilege and work product doctrine; (d) pressured scientists to conceal

or alter the results of their research; (e) entered into "gentleman's agreement" not to perform in-house research on smoking, or development of "safe cigarettes;" (f) made numerous misstatements over the course of the conspiracy about nicotine, denying its addictive nature [though in 1963 one defendant wrote a memo: "we are in the business of selling nicotine, an addictive drug"]; (g) shut down the lab that made findings, killed the lab rats, and threatened researchers with legal action; (h) deliberately withheld from the Surgeon General research on the addictiveness of nicotine; (g) engaged in other acts of deception because the defendants recognize that getting smokers addicted to nicotine is what preserves the market for cigarettes and ensures their profits; (I) employed highly sophisticated technologies to increase th potency of nicotine in their cigarettes; (j) aggressively marketed to juveniles; (k) and consistently made false and misleading statements that their advertising expenditures were directed exclusively at convincing current smokers to switch, not at enticing children.

The parallels to Generali's conduct are clear. For years, Generali deceived and misled its Jewish policy holders about the very existence of any unpaid policies, about the quality of its current records, about the fact that it allegedly could not pay of customers their proper insurance proceeds because of the ruse that Communist expropriations deprived them of their "assets on reserve to pay policies," which was a complete falsehood considering that Generali moved European funds into

safe havens such as real estate, corporate stock, and bank accounts in America and other places. In addition, Generali had ceded and retroceded a substantial portion of its insurance risk from the Continent (i.e. from Jews) to reinsurance companies in the United States. This is a very, very significant revelation because it opens the door to more information about Generali's Jewish policy holders that can identify primary insurance records, and establish a source of additional payment to make the Plaintiff class whole.[30]

Under the Florida causes of action which permit the imposition of punitive or exemplary or treble damages, Generali's consistent pattern of bad faith tactics to deceive and divert policy holders and heirs from pursuing claims, conduct which was both directed at Survivors and heirs in the United States, and which Generali actually committed in the United States, is sufficiently outrageous to support the imposition of punitive, exemplary, and/or treble damages under the relevant laws giving rise to a claim under the Federal RICO law.[31]

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[30] *Garamendi* does not address the extent to which the Executive Branch can preempt Holocaust survivors and their heirs from invoking laws enacted by Congress for civil remedies for a widespread pattern of criminal activity. In any event, that issue can only be adequately addressed once the Plaintiffs amend their complaint and the issues are fully briefed.

[31] Importantly, as Generali's own statements confirm, the company was a Jewish owned company with a predominantly Jewish management and Jewish customer base. Exhibit 4B. These Jewish customers lived in countries with the

CONCLUSION

The Jewish customers that Generali so successfully cultivated in the 1920s and 1930s have become dupes for the company's cynical efforts to cover up its misconduct, even as the company enjoys today the proceeds of the premium dollars it collected years ago. Those customers, European Jews such as Paul Phillip Weiss and Joseph Birnbaum, bought insurance from *Generali* because that respected multinational company marketed "world wide policies" backed by world-wide assets so its customers could receive payment anywhere in the world. Yet after Mr. Weiss managed to survive the Holocaust and emigrate to Florida, and after Mr. Birnbaum's daughters survived and followed other family to the United States, Generali seeks to insulate itself from the full consequences of its conduct by hiding behind European law it believes would protect it from the full financial and legal consequences of its actions.

For all of the reasons discussed above, the District Court erred in dismissing the Weiss Plaintiffs' Complaint against Defendants, and in failing to permit the Weiss Plaintiffs to amend their Complaint to plead a claim under the Federal Racketeering and Corrupt Influenced Organization (RICO) law.

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relatively large Jewish populations such as Poland, Hungary, Czechoslovakia, Romania, not to mention France and Italy.

Respectfully submitted

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Samuel J. Dubbin, P.A.

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