IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Melvin H. ROSEN and Ethel Blaine MILLET, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 01C 6864**
	)	**Hon. Blanche M. Manning**
JAPAN,	)	
Defendant.	)	

PLAINTIFFS' MOTION TO JOIN THE UNITED STATES AS INVOLUNTARY CO-PLAINTIFF UNDER RULE 19

Plaintiffs hereby move this Court to join the United States of America as a co-plaintiff party to this case under Fed. R. Civ. Proc. 19. Inasmuch as the recently proffered Statement of Interest by the United States demonstrates a clear opposition to the plaintiffs' position, we move that the United States be joined as an involuntary co-plaintiff.

Joining the United States as co-plaintiff will compel the United States to act constitutionally in the present case. The Department of Justice's attempt to support Japan is potentially in violation of the Fifth Amendment's Takings Clause. The Department has no constitutional power to spend its money and devote its legal resources in a manner

calculated to undermine the right of private property, a right that antedates the Constitution itself and is preserved inviolately in the Fifth Amendment.

The reason that private property is at stake in the present case is that a legal claim constitutes private property. Dames & Moore v. Regan, 453 I/S/ 654 (1981). The plaintiffs in this case have legal claims for damages against Japan not just because they were injured or killed in a war, but because this particular war of aggression was itself crime and thus the acts committed therein by the armed forces of Japan constitute international torts. Revised Complaint, ¶¶ 37-46.

The plaintiffs have chosen two venues to pursue their claims. The first venue is the present case directly against Japan. The second venue is a case against the United States. Hair v. United States, 52 Fed.Cl. 279 (2002), on appeal to the Court of Appeals for the Federal Circuit, No. 02-5115. Each case references the other.[1] The primary claim is, of course, the present case, Rosen v. Japan. Japan is directly responsible for the plaintiffs' injuries by virtue of illegally initiating and illegally conducting a war of aggression against the United States. The secondary claim, Hair v. United States, is based on the alleged waiver of the plaintiffs' claims against Japan by the United States in the San Francisco Peace Treaty of 1951. If the United States in that peace treaty did in fact take, expropriate, and confiscate the plaintiffs' claims against Japan, and then waived those claims, the United States is obliged under the Fifth Amendment to pay just compensation to the plaintiffs for the value of those claims. In the Court of Federal Claims, the United States moved to dismiss the Complaint on the ground that it was time-

[1] The Hair case was disclosed and described in Rosen. *See* Motion for Appointment of Lead Counsel for Plaintiffs' Class. The Rosen case was disclosed and described in the Hair case, Complaint, ¶ 40, where it was stated: "Any monies actually collected as a result of Rosen v. People of Japan will be set off against the present (secondary) claim against the United States."

barred, thus assuming for the purposes of its motion that the plaintiffs' claims against Japan were in fact taken, expropriated, and confiscated by the Peace Treaty of 1951 and that just compensation was not paid within the six-year period of the Statute of Limitations.

If the Hair case on appeal is affirmed, the Court of Appeals for the Federal Circuit will be holding that in 1951 the United States government, for the first time in its history, acted in bad faith toward American citizens—veterans, no less—by taking their property in violation of the Fifth Amendment without intending to pay just compensation therefor. In short, the Court of Appeals would be ratifying a novel and blatantly unconstitutional act. That outcome would appear unlikely. There is a reasonable chance that Hair will be reversed on the ground that it is not time-barred and sent back for trial in the Court of Federal Claims. But at that point the United States, as a direct result of its proffered Statement of Interest in the present case, will face a dilemma. On the one hand, by endorsing the position it is taking in the present case in its Statement of Interest, it could invite the Court of Federal Claims to order the United States to pay to the plaintiffs the full present value of the claims it waived in the 1951 Treaty (which could amount to several times the estimated cost of the current war in Iraq). On the other hand, the United States might attempt to repudiate the position contained in its Statement of Interest in the present case, and argue in Hair that the plaintiffs retain their primary claims against Japan and that their secondary claims against the United States (for a Fifth Amendment taking) should be put on hold pending the outcome of the plaintiffs' efforts in Rosen.

If the foregoing reasoning is accurate, and if the United States desires to avoid a huge expenditure in an amount dwarfing the estimated cost of the current war in Iraq, the

United States has a compelling interest in seeing that the plaintiffs will prevail in the present litigation. Indeed, the Departments of Justice and State seem blind to the huge potential cost to the United States in placing the financial interests of Japan above the need for compensation of Japan's victims—the American servicemen and servicewomen who in the 1940s saved this country from Japan.

However, we do not rest our argument on policy. Even if the Departments of Justice and State are misguided in attempting to assist the defendant in the present case, joinder of an involuntary co-plaintiff under Rule 19 can only be granted in the interest of just adjudication. Fortunately, the latter interest is clear. The present plaintiffs can only complain now about the likelihood of the United States repudiating its proffered Statement of Interest in the Hair case should it be sent back for trial. We cannot wait for that to happen because it could then be too late for us. The United States might well attempt to repudiate the Statement of Interest it had filed in the present case, arguing instead that the plaintiffs "theoretically" would continue to have a remedy against Japan even if that door was closed to them in Rosen. Yet such a reversal of position on the part of the United States in the future would cause a denial of due process to the plaintiffs in the present. The plaintiff classes in Rosen and Hair are the same, with the exception of a few persons who amount to less than one-tenth of one per cent of the class.[2] The right of these plaintiffs to just adjudication would be thwarted if the United States is taking a position in Rosen that it now knows it most likely would repudiate if Hair goes to trial.

[2] Ethel Blaine Millet is a named party in both cases. The description of the class is the same in both cases. However, a few rare individuals, such as Colonel Melvin H. Rosen, have instructed their attorneys that although they would accept compensation from Japan, they would not accept equivalent compensation from the United States and hence choose not to be party to the Hair case.

Obviously, the corner that the United States is painting itself into by its proffered Statement of Interest can later place the United States in an enormously embarrassing position. But that is precisely what happens in the infrequent cases contemplated by Rule 19 where a person insists on siding with the defendant for self-defeating reasons and thus, in the interests of just adjudication, must be made an involuntary co-plaintiff.

The United States should be joined to this case as an involuntary co-plaintiff in order to avoid a potential miscarriage of justice to the plaintiffs. Doing so will incidentally assist the Departments of Justice and State from otherwise taking a position that could result in severe financial damage to the United States.

WHEREFORE, plaintiffs request that this Court order that the United States be joined as a co-plaintiff party to this case under Fed. R. Civ. Proc. 19.

Respectfully submitted,

_____
David G. Duggan
One of the Attorneys for the Plaintiffs

David G. Duggan
D'Amato, Keegan & Duggan, LLC
140 South Dearborn Street
Suite 1610
Chicago, IL 60603
ARDC No. 03128581
(312) 551-0670 phone
(312) 443-1665 fax

Anthony D'Amato
Room 311

Northwestern Law School
357 E. Chicago Ave.
Chicago, Illinois 60611
(312) 503-8474 phone
(312) 503-1676 fax