

Thus we need not consider the research and scientific and empirical evidence the parties debated regarding the likelihood that antipsychotic medications would restore Grape to competency.¹² We now know that Grape most probably suffers from paranoid schizophrenia, and definitely is responsive to medicinal treatment for such a diagnosis. Further, although we find that Grape did suffer side effects while taking antipsychotic medications, we have limited information on the exact side effects and their severity. Based on the parties' representations and the subsequent District Court finding of Grape's competency to stand trial, we assume that although Grape suffered some side effects, they were not sufficient to "interfere significantly with [his] ability to assist counsel in conducting a trial defense." *Sell*, 539 U.S. at 181, 123 S.Ct. 2174. Therefore, the Government has met its burden by clear and convincing evidence that, if medicated involuntarily, Grape is substantially likely to have his competence restored. For the above reasons, the District Court did not clearly err in coming to the conclusion it did.

IV.

For all of the above reasons, we conclude that, pursuant to *Sell*, the Government has presented sufficiently important interests to forcibly medicate Grape, and that the administration of medication to Grape is substantially likely to render him competent to stand trial, and unlikely to produce side effects that may prevent him from helping prepare for his trial. There-

fore, we will affirm the District Court's order.



Elly GROSS; Roman Neuberger; John Brand, in their individual capacities as thirdparty beneficiaries of the agreements leading to the establishment of the German Foundation "Remembrance, Responsibility and the Future", as representatives of all German Foundation beneficiaries; Sylvia Greenbaum, Appellants in 07-3726

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, and its constituent managing companies; Allianz AG; BASF AG; Bayer AG; BMW AG; Commerzbank AG; Daimlerchrysler AG; Deutsche Bank AG; Degussa-Huells AG; Deutz AG; Dresdner Bank AG; Friedr Krupp AG Hoesch Krupp; Hoechst AG; Rag AG; Robert Bosch GMBH, Siemens AG; Veba AG; Volkswagen AG, sued individually; and as members of the German Foundation Industrial Initiative Barbara Schwartz Lee; Bernard Lee, Appellants in 07-3727.

¹² The debate between the parties in their briefs hinges around the 70% restoration of competence statistic, whether that alone reaches a sufficient likelihood of restoration, and how far under that threshold Grape falls. We find this inconsequential because the tangible evidence garnered from Grape's ac-

tual forcible medication resolves the issue over which the parties disputed—whether the medication plan outlined by Dr. Sarrazin would be substantially likely to restore Grape to competence with limited side effects. The plan did in fact restore Grape to competence with limited side effects.

v.

**Deutsche Bank, AG; Dresdner
Bank, AG.**

Nos. 07-3726, 07-3727.

United States Court of Appeals,
Third Circuit.

Argued Oct. 29, 2008.

Opinion Filed Dec. 10, 2008.

Background: Persons subjected to slave labor by German government during World War II sued German businesses which allegedly had benefited, seeking reparations. Following consolidation of actions, and prior to class action certification, parties were granted permission to dismiss suits with prejudice, 198 F.R.D. 429, as condition of proposed settlement under which payments would be made to victims from newly created fund. Plaintiffs sought to enforce interest obligations contained in joint statement regarding creation of reparation foundation. The United States District Court for the District of New Jersey, 320 F.Supp.2d 235, William G. Bassler, J., granted businesses' motion to dismiss. The Court of Appeals, 456 F.3d 363, reversed and remanded. On remand, the District Court, 499 F.Supp.2d 606, Debevoise, Senior District Judge, granted summary judgment for businesses. Plaintiffs appealed.

Holdings: The Court of Appeals, Michel, Chief Circuit Judge, held that:

- (1) treaty law rather than federal common law controlled issue of existence of private cause of action to enforce interest provision, and
- (2) joint statement did not confer private cause of action for enforcement of interest provision.

Affirmed.

1. Federal Courts ⇨763.1

In Court of Appeals' plenary review on appeal from district court's dismissal of action for failure to state claim, Court applies same legal standard of determining whether plaintiff has stated valid claim, i.e. complaint with enough factual matter, taken as true, to suggest required element. Fed.Rule Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Courts ⇨776

Court of Appeals reviews de novo district court's interpretation of international agreement.

3. Interest ⇨62

Treaties ⇨13

Law of international agreements, not federal common law, controlled issue of whether joint statement between United States and Germany regarding creation of reparation foundation to benefit Holocaust victims conferred private cause of action for enforcement of clause regarding interest payable on foundation funds, even though joint statement was not formal treaty; statement constituted part of an understanding reached among sovereign nations and private parties, namely German corporations, and had meaning only in context of entire accords, which included law of foundation.

4. Treaties ⇨13

To ascertain whether international agreement creates private cause of action, court looks first to text of agreement, as it does when construing statutes; however, court has greater leeway to look beyond words of international agreement.

5. Evidence ⇨39, 46, 48

In construing treaty, public acts and proclamations of foreign governments, and those of their publicly recognized agents, in carrying into effect treaty, are historical and notorious facts of which court can take

regular judicial notice, even though not made exhibits.

6. Interest ⇐62

Treaties ⇐13

Joint statement between United States and Germany regarding creation of reparation foundation to benefit Holocaust victims did not confer private cause of action for enforcement of clause regarding interest payable on foundation funds; statement had purposes other than simply creation of private, bargained-for exchange, including “all-embracing and enduring legal peace” for participating German companies, and statement used language generally consistent with non-binding political document, e.g. “participants” rather than “parties.”

7. Treaties ⇐13

In general, international agreements, even those benefiting private parties, do not create private rights enforceable in domestic courts.

8. Judgment ⇐654, 675(2)

Dismissal of one of two separately docketed but consolidated breach of contract actions, on ground that international agreement sought to be enforced in both actions did not create private cause of action, compelled dismissal of second action as well, even though defendants in second action had moved to dismiss based on different ground, i.e. lack of enforceable contract; cases had proceeded as one, attorneys in second action had had notice of motion to dismiss first action and its ground, and attorneys for both sets of plaintiffs had presented arguments against motion before district court.

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Daniel V. Gsovski, Esquire, Ian Ceresney, Esquire, Herzfeld & Rubin P.C., New York, NY, Attorney for Appellee, Volkswagen AG.

Before McKEE, NYGAARD, and MICHEL,* Circuit Judges.

OPINION OF THE COURT

MICHEL, Chief Circuit Judge.

At issue in this World War II reparations case is whether the Joint Statement of the Berlin Accords constitutes a privately enforceable contract between some of the participants to the Joint Statement. Appellants contend that the defendant German companies owe “interest” on their payments to a reparations fund created by the Berlin Accords. In a prior appeal to our court, we held that the claim presented a justiciable issue not foreclosed by the political question doctrine. Having again considered the allegations of the complaints, we hold that the disputed interest provision of the Joint Statement does not constitute or confer a privately enforceable cause of action on the Appellants, who assert standing as third-party beneficiaries. In so holding, we note the thoroughness of the district court’s analysis and reasoning. Because we agree with Judge Debevoise’s rationale, we adopt it as ours, with some minor points as described herein.

* The Honorable Paul R. Michel, Chief Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

1. Several other cases have also detailed the history of the Berlin Accords and the reparation claims at issue here. *See generally Am.*

I. Background

Because the history and facts of this case are set forth in ample detail in our previous opinion, *Gross v. German Foundation Industrial Initiative*, 456 F.3d 363 (3d Cir.2006) (“*Gross II*”), and the two district court opinions, *Gross v. German Foundation Industrial Initiative*, 499 F.Supp.2d 606 (D.N.J.2007) (“*Gross III*”), and *In re Nazi Era Cases Against German Defendants Litigation*, 320 F.Supp.2d 235(D.N.J.2004) (“*Gross I*”), we do not repeat them here.¹ Rather, we briefly summarize the history and facts, insofar as they aid the present discussion.

The claims here involve reparations for Nazi-era slave labor, forced labor, appropriation of personal property, and dishonored insurance policies. As early as 1998, the United States and German governments, aware of the significance of the claims and the seriousness of the risk posed to the German economy, encouraged negotiations between the plaintiffs and the defendant German corporations. The negotiations involved senior diplomatic executives from both the U.S. and German governments, specifically and respectively former Deputy Secretary of the Treasury Stuart Eizenstat and Count Otto Lambsdorff, chief negotiator for former German Chancellor Gerhard Schroeder. Several German companies came together as the German Foundation Industrial Initiative (“the Initiative”), which acted as the negotiating arm of the German industry. Representing the claimants were plaintiffs’ attorneys who had filed the U.S. civil actions.

After many months of intense negotiations and significant lucubration, on July

Ins. Ass’n v. Garamendi, 539 U.S. 396, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003); *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F.Supp.2d 248 (D.N.J.1999).

17, 2000, a diplomatic agreement, commonly referred to as the Berlin Accords or the Berlin Agreements, was reached as a means of resolving these long-standing claims. Under the agreement, the German Foundation “Remembrance, Responsibility and the Future” (“the Foundation”) was established as the intended, exclusive forum for receiving, processing, and paying reparation claims at issue here. Germany and the German companies each agreed to contribute DM 5 billion to fund the Foundation. The plaintiffs’ lawyers agreed to dismiss with prejudice the numerous pending litigations, so that the victims would receive payment through the Foundation rather than civil actions and that the German companies would achieve “all-embracing and enduring legal peace.”

The Berlin Accords consist of (1) the Joint Statement, (2) the Executive Agreement between the United States and Germany, and (3) the Foundation Law. The Joint Statement—formally titled “The Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation ‘Remembrance, Responsibility and the Future’”—sets forth a goal of the Foundation, which is to “provide dignified payments to hundreds of thousands of survivors and to others who suffered from wrongs during the National Socialist era and World War II.” Joint Statement, pmb. ¶ 12. The Joint Statement commits the German government and German industry to provide DM 10 billion in capitalization. As structured, the Initiative would collect DM 5 billion from individual German companies and then transfer the money to the Foundation. Particularly significant for this case, the last sentence of Paragraph 4(d) of the Joint Statement states:

German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest

earned thereon before and after their delivery to the Foundation will reach at least 100 million DM.

The second document, the Executive Agreement, outlines the U.S. and German governments’ commitments to the Foundation and obligates the United States Executive, in all cases for which it is notified of a claim against a German company arising out of the WWII era, to file a statement of its foreign policy interests with the court in which the claim is pending, stating that United States’ foreign policy interests favor resolution through the Foundation. The third document, the Foundation Law, is codified under German law and establishes the Foundation as the legal entity for processing claims and distributing the DM 10 billion fund.

On May 30, 2001, the German legislature declared “legal peace,” triggering the obligations of the German government and the German companies to each pay DM 5 billion to the Foundation. The German government made timely payment, but the Initiative did not complete payment until December 2001, at which point it had transferred DM 5.1 billion, which included DM 100 million as the “interest” designated in Paragraph 4(d) of the Joint Statement.

Due to the delay in the Initiative’s payment and the differing assertions of what the “interest” provision mandated, several claimants filed suit, attempting to enforce the “interest” provision of the Joint Statement. In June 2002, Elly Gross and others filed their complaint as third-party beneficiaries seeking recovery for breach of contract against the Initiative and against its founding companies. They alleged that the German corporations owed interest in excess of the DM 100 million already paid, based on the Initiative’s financial obligation from and after July 17,

2000, the date the Joint Statement was signed. In July 2003, Bernard and Barbara Schwartz Lee brought a similar breach of contract action against Deutsch Bank AG and Dresdner Bank AG. They allege that the two banks agreed to pay interest earned on their payment from December 14, 1999.

These complaints were assigned to Judge Bassler. The Initiative and the defendant corporations moved to dismiss the complaints pursuant to Federal Rule of Civil Procedure 12(b)(6) and argued, in the alternative, that the claims were nonjusticiable. In a single opinion, the district court held that the claims were not justiciable. *Gross I*, 320 F.Supp.2d at 254. On appeal, we reversed, holding that, while the claims implicated foreign policy issues within the realm of the Executive Branch, the case was nevertheless justiciable. *Gross II*, 456 F.3d at 377–91. We also noted that “[a] court would face at least two questions on the merits of this dispute: (1) is the Joint Statement, or part of the Joint Statement, enforceable as a private contract, and (2) if so, what ‘interest’ obligation, if any, did the parties intend for the German Foundation Industrial Initiative?” *Id.* at 387.

On remand, the cases were reassigned to Judge Debevoise. Among other motions, defendants in the *Gross* case moved to dismiss under Rule 12(b)(6) on the basis that the claims were not privately enforceable. Defendants in the *Schwartz Lee* case moved to dismiss on the basis of a lack an enforceable December 1999 contract. In a single opinion, Judge Debevoise dismissed both complaints, holding that the Joint Statement is not a contract but a political document and thus does not con-

fer a private cause of action on the plaintiffs. *Gross III*, 499 F.Supp.2d at 610. Plaintiffs in both cases timely appealed on September 11, 2007.

II. Standard of Review and Jurisdiction

[1] The district court had diversity jurisdiction under 28 U.S.C. § 1332(a)(2).² We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* the district court’s dismissal of the action under Federal Rule of Civil Procedure 12(b)(6). *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir.2008); *see also In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 461 (3d Cir.2000) (“*De novo* means [that] . . . the court’s inquiry is not limited to or constricted by the . . . record, nor is any deference due the . . . conclusion [under review].” (quotation omitted)). In our plenary review, we apply the same legal standard of determining whether a plaintiff has stated a valid claim, *viz.* “‘a complaint with enough factual matter (taken as true) to suggest’ the required element.” *Phillips*, 515 F.3d at 234 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007)). We must accept the complaint’s allegations as true and draw all reasonable inferences in favor of the non-movant. *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003).

[2] Appellants ask us to determine whether the Joint Statement confers a private cause of action for their breach of contract claim. If it does, then Appellants’ complaints are “a proper exercise of [their] ‘right . . . to seek judicial relief from injuries caused by another’s violation of a legal requirement.’” *See McKesson Corp. v.*

2. *Gross* Appellants also contend that the district court had federal question jurisdiction under 28 U.S.C. § 1331, but they have not briefed the issue. Judge Bassler, held that

the court had diversity jurisdiction only, *see Gross I*, 320 F.Supp.2d at 238–39, and we need not address the issue here.

Islamic Republic of Iran, 539 F.3d 485, 488 (D.C.Cir.2008) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 730 n. 1, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (Powell, J., dissenting)). We review the interpretation of an international agreement *de novo*. *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir.1997); see also *McKesson*, 539 F.3d at 488; *United States v. Al-Hamdi*, 356 F.3d 564, 569 (4th Cir. 2004) (“Interpretation of an international treaty is an issue of law subject to *de novo* review.”).

III. Application of the Law of International Agreements

In setting forth our analysis, we reiterate that we do so only to the extent necessary to supplement the well-reasoned analysis of the district court. Below, we first confirm the district court’s turn to the law of international agreements as providing the legal framework for examining the Joint Statement. Next, applying those principles, we expand on some additional points which warrant further discussion here.

A.

[3] At the outset, Appellants contend that Judge Debevoise erred by applying treaty law as opposed to federal common law. But we do not see merit in this argument. The events leading to the Berlin Accords evince an unprecedented diplomatic effort to create an international agreement establishing a forum for the resolution of certain reparation claims and also to dispose of the pending legal actions.

As Judge Debevoise noted, “July 17, 2000, was the occasion of one of the most remarkable diplomatic achievements since the end of World War II.” *Gross III*, 499 F.Supp.2d at 608. It was on that day that eight sovereign nations, a consortium representing numerous German companies, an

international organization devoted to Nazi-era claims, and U.S. plaintiffs’ attorneys together signed the Joint Statement of the Berlin Accords. Appellants cannot reasonably dispute the significant political nature of the talks leading to the Accords. Granted, one objective was to settle then-pending U.S. litigation between the plaintiffs and the defendant German companies, but we weigh that private aspect of the resolution against the Berlin Accords’ political, diplomatic, and historical significance. The creation of the Berlin Accords was more than a mere settlement; it was a profound expiation by the Federal Republic of Germany and German companies. Indeed, from the start of the negotiations, Deputy Secretary Eizenstat, the lead U.S. negotiator, “was determined that the responsible foreign government [i.e., Germany], not just private companies, would have to be directly involved and directly engaged through a senior official who would be [Eizenstat’s] counterpart.” Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* 215 (2003).

We recognize that the Joint Statement is not a formal treaty; nevertheless, it constitutes part of the understanding reached among sovereign nations and private parties. Negotiations occurred during plenary sessions comprising high-level executives of foreign nations. The signatories of the Joint Statement itself includes the representatives of eight different nations. Further, the Joint Statement has meaning only in the context of the entire Berlin Accords. Indeed, the Joint Statement by itself is incomplete, as it talks of the Foundation, but understanding what the Foundation is requires resort to the Foundation Law. In sum, the Joint Statement appears to be a unique document, the objectives of which are to memorialize the efforts of the diplomatic talks resolving

both political and legal issues. Thus, for at least these reasons, we agree with the district court that the law of international agreements provides the appropriate jurisprudential guidance in the analysis of whether the Joint Statement creates a private cause of action.

B.

[4, 5] To ascertain whether an international agreement creates a private cause of action, we first look to the text of the agreement. See *United States v. Alvarez-Machain*, 504 U.S. 655, 663, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) (“In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.”). At the same time, however, a court has greater leeway to look beyond the words of an international agreement. See, e.g., *Air France v. Saks*, 470 U.S. 392, 397, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985) (“[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.” (*quoting Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32, 63 S.Ct. 672, 87 L.Ed. 877 (1943))). Moreover, “the public acts and proclamations of [foreign] governments, and those of their publicly recognized agents, in carrying into effect th[e] treaties, though not made its in th[e] cause, are historical and notorious facts, of which the court can take regular judicial notice.” *United States v. Reynes*, 50 U.S. (9 How.) 127, 147–48, 13 L.Ed. 74 (1850); see also *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999).

In general, a court’s “role is limited to giving effect to the intent of the [t]reaty parties.” *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185, 102 S.Ct.

2374, 72 L.Ed.2d 765 (1982). Thus, clear language controls unless it “‘effects a result inconsistent with the intent or expectations of its signatories.’” *Id.* at 180 (*quoting Maximov v. United States*, 373 U.S. 49, 54, 83 S.Ct. 1054, 10 L.Ed.2d 184 (1963)). In line with this precedent, and regardless of whether we apply any presumption for or against private enforceability, our duty is to ascertain whether the signatories of the Joint Statement intended to permit a private cause of action against the German companies.

[6] Our examination of the text of the Joint Statement and the entire Berlin Accords supports the district court’s rationale and conclusion. We discern a strong intent on the part of the participants to enter into an agreement that is not enforceable through a private cause of action. First, the Joint Statement, along with the Berlin Accords as a whole, aspires to something other than simply the creation of a private, bargained-for exchange. One specific objective was to send “a conclusive, humanitarian signal, out of a sense of moral responsibility, solidarity and self-respect.” Joint Statement, pmbl. ¶ 5. Another clear purpose was for the German companies to receive “all-embracing and enduring legal peace.” See Executive Agreement, pmbl. ¶ 10, and arts. 2(1), 2(2), 3(1); Joint Statement, pmbl. ¶ 13, and ¶ 4(b); Foundation Law, pmbl. ¶ 6. Even without any presumptive approach, this language strongly connotes an intent not to create a right of private action for only some of the Joint Statement’s participants.

Second, as the district court noted, the Joint Statement uses language that is generally consistent with a non-binding political document. The signatories of the Joint Statement refer to themselves as “participants,” not as “parties.” Joint Statement ¶¶ 1–4. The participants “declare” rather than “agree” or “undertake.” *Id.* ¶ 1. The

title of the document itself suggests a non-binding arrangement. *See* Staff of S. Comm. on Foreign Relations, 106th Cong., Print No. 106–71, *Treaties and Other International Agreements: The Role of the United States Senate* 60 (Comm. Print 2001) (“Joint statements of intent are not binding agreements unless they meet the requirements of legally binding agreements, that is, that the parties intend to be legally bound.”). Each of these textual clues points towards a document without privately enforceable rights.

It is true, as Appellants point out, that some language of the Joint Statement can be read as suggesting binding obligations. For instance, Paragraph 4(d) does use the terms “will” and “shall” when describing the steps that the German companies intend to take. Appellants argue that such language should be read as imposing legally enforceable obligations on the German companies. But these few examples cannot overcome the contrary language indicating a non-binding nature. The Joint Statement contains insufficient rights-granting language to confer on Appellants a private cause of action.

Appellants also rely too much on textual hairsplitting between “shall” and “will,” as used in the Joint Statement. Specifically, Gross argues that “shall” is used with judicially enforceable acts and “will” with unenforceable acts. Thus, their argument goes, things that “will” be done are not privately enforceable, but things that “shall” be done are enforceable. We disagree with the alleged subtlety. For example, Paragraph 4(d) uses both “shall” and “will” in referring to the intended actions of the German companies: “the DM 5 billion contribution of the German companies *shall* be due”; “[t]he German

companies *will* make available reasonable advanced funding”; “German company funds *will* continue to be collected.” Joint Statement ¶ 4(d) (emphases added). The Joint Statement also uses “shall” and “will” interchangeably with the German government and the German companies. *Id.* ¶¶ 4(a), 4(d). Even if a clear difference in meaning exists between “shall” and “will”—and we are not convinced there always is, *see Hewitt v. Helms*, 459 U.S. 460, 471, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) (characterizing “shall,” “will,” and “must” as “language of an unmistakably mandatory character”)—the distinction is not borne out in the Joint Statement’s text.³

Appellants also propose that the district court erred by not severing the last sentence of Paragraph 4(d) from the rest of the Joint Statement. According to their argument, severability permits that sentence to be the grant of private enforceability. Without doubt, treaties and international agreements can include sections that are privately enforceable amidst sections not privately enforceable. *See Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir.2001) (holding that the United States–France Income Tax Treaty’s “exchange of information provisions . . . are severable from the double taxation provisions”); *United States v. Postal*, 589 F.2d 862, 884 n. 35 (5th Cir.1979) (“A treaty need not be wholly self-executing or wholly executory.”); *see also* Restatement (Third) Foreign Relations Law of the United States § 111 cmt. h (1986) (“Some provisions of an international agreement may be self-executing and others non-self-executing.”). And we do not ignore these precedents. The test here is not, however, an overly formalistic application of any

3. We note in passing that Schwartz Lee does not see any distinction between “shall” and “will” and considers both to be mandatory.

Schwartz Lee Appeal Br. 34 (“The words ‘shall’ and ‘will’ indicate the binding nature of the agreement.”).

particular doctrinal rule. Rather, our charge is to remain true to what the participants envisioned as their intended outcome, as shown through interpretative methods discussed above. In this case, the Joint Statement's language does not lend itself to the dichotomous approach urged by Appellants. Excision of a single sentence from the body of the Joint Statement, and from the entire Berlin Accords, invites departure from the participants' intentions.

At oral argument, Appellants' counsel repeated their contention that it would "have been an act of temporary insanity for experienced counsel to have agreed to dismiss sixty cases with prejudice prior to payment, without the existence of a judicially enforceable means of insuring compliance." But we think this assertion is tenuous and overstates the situation. As the district court recognized, Appellants' counsel were not dismissing the actions with only the slim hope or gamble that the German companies might proceed with their payments. Counsel dismissed the complaints, in part, because the Joint Statement had the support and backing of the governments of both the United States and the Federal Republic of Germany. Indeed, but for the actions of President Clinton and Chancellor Schroeder, it is questionable whether the negotiations would have been fruitful. *See Imperfect Justice* 243–58 (describing the critical involvement of President Clinton and Chancellor Schroeder during the negotiations in December 1999). Had the German companies opted to not complete their payments to the Initiative, serious political consequences and executive discomfiture would have resulted.

Moreover, despite Gross's argument to the contrary, the district court did not find that Appellants' only recourse rests exclusively with the German Ministry of Fi-

nance. The assertion runs counter to the undisputed fact that Appellants always retained the option to reopen litigation through Federal Rule of Civil Procedure 60(b). Indeed, Appellants could have utilized that procedure, but, to avoid jeopardizing the entire, politically sensitive resolution and the payment of the DM 10 billion to the victims, claimants declined to move to reopen litigation under Rule 60(b). *See In re Nazi Era Cases Against German Defendants Litig.*, 213 F.Supp.2d 439, 442 (D.N.J.2002). Instead, they asked the court to define and enforce the defendants' "interest" obligation. On July 23, 2002, the district court declined to do so, holding that jurisdiction to enforce the Joint Statement was absent. *Id.* at 450–51. Appellants chose not to appeal that decision. What the district court in the present case concluded was that, given the Foundation's procedure and the option under Rule 60(b), the participants to the Joint Statement exhibited, through the text and structure of the Berlin Accords, an intent not to legally bind other participants by a contractual right enforceable through U.S. litigation. In our view, the district court correctly construed the terms of the Joint Statement and the arduous negotiations leading to the Joint Statement as manifestations of all participants' intentions to implement a non-judicial procedure for resolving further disputes.

C.

Appellants urge us to consider the litigious context in which the Joint Statement was drafted. In this context of settling class action lawsuits, Gross argues, the Joint Statement must be viewed as a quasi-settlement fashioned after a settlement agreement pursuant to Federal Rule of Civil Procedure 23. We are cognizant of the drafting environment, but we remain convinced that the manifested intentions of

the participants were to create a document that set forth the objectives of the negotiations without granting privately enforceable contractual rights, other than any provided by the Foundation Law. If the contextual evidence does anything, it strengthens our belief that the participants to the Joint Statement did not contemplate an agreement which would require further legal wrangling in courts.

To the extent that the district court considered the history of the Berlin Accords, we agree with the court's reliance on the general approach set forth in *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir.1985). Although *Frolova* concerns a formal treaty, the factors listed are just as applicable here in analyzing whether the historical context surrounding the Joint Statement evinces an intent to confer privately enforceable rights.

D.

We also briefly address Gross's position that the Supreme Court has implicitly rejected the district court's approach in assessing the private enforceability of the Joint Statement. Gross relies upon *Medellin v. Texas*, — U.S. —, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008), and its analysis of whether the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, the United Nations Charter, and the International Court of Justice Statute were self-executing treaties. In Appellants' view, *Medellin* does away with any presumption against self-execution of treaties.

An overly strict reliance on the concept of "self-executing" versus "non-self-executing" treaties may be misleading in this case. A self-executing treaty is one which "do[es] not require domestic legislation to give [it] the full force of law." *Renkel v. United States*, 456 F.3d 640, 643 (6th Cir.

2006) (citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984)). By itself, the status of "self-executing" does not answer the question of whether a document creates a private right of enforcement. See Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h (1986) ("Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."); see also *United States v. Li*, 206 F.3d 56, 68 (1st Cir.2000) (*en banc*) ("[T]he self-executing character of a treaty does not by itself establish that the treaty creates private rights."). Thus, even if we were faced with a treaty, *Medellin's* self-execution discussion does not complete the picture.

[7] As we see it, *Medellin* does not undermine the district court's analysis. The Supreme Court recognized that, "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Medellin*, 128 S.Ct. at 1357 n. 3 (quoting Restatement (Third) of Foreign Relations Law of the United States § 907, cmt. a (1986)). We have agreed with this approach, see *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir.1979), as have several of our sister courts. See, e.g., *United States v. Emuegbunam*, 268 F.3d 377, 389–90 (6th Cir. 2001); *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir.2001) ("[A]s a general rule, international agreements, even those benefiting private parties, do not create private rights enforceable in domestic courts."); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir.2001); *United States v. Li*, 206 F.3d 56, 60–61 (1st Cir.2000) (*en*

banc); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir.1992); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C.Cir.1980). Thus, when determining the intent of the Joint Statement's participants, we keep in mind the accepted approach that, "[w]hen no [privately enforceable] right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C.Cir.1984) (Bork, J., concurring).

Again, we emphasize that we do not apply a strict presumption in this case. Rather, we draw from the state of international agreement law to understand better what the text of the Joint Statement teaches about the intentions of the signing participants. Being sophisticated negotiators and litigants, the participants worked not in a vacuum but in the international negotiating arena. International agreement law therefore acts as a useful judicial prism through which to view the textual evidence of the participants' intentions.

E.

Finally, we note that the issue of whether the "interest" provision is a privately enforceable contractual right can be seen from another vantage point, which we believe confirms that the dispute here is not based on a privately enforceable right. Appellants have characterized the present "interest" claim as being completely distinct from a claimant's application for restitutionary funds. Framed as such, the pending lawsuit does not appear to be asking for a larger restitutionary payment for Elly Gross or the other plaintiffs. This seems the right strategy because, if the claim were for an explicit request for a larger restitution-based payment, the case would surely fail. Such a claim would be

covered exclusively by the process set forth in the Foundation Law.

When we look closer, however, and consider the potential result had Appellants been successful, the requested relief reveals itself as a request for increased restitutionary funds for Ms. Gross and the other plaintiffs. As we see it, Appellants' contention is that each plaintiff has not received the appropriate amount of money under plaintiffs' interpretation of the Joint Statement because the German companies have not paid enough "interest." We recognized as much in our prior opinion. See *Gross II*, 456 F.3d at 380 ("It is true that a judgment for the claimants would require payment to the Foundation, translating to increased payments to victims."). Viewing the pending suit from this perspective further confirms the district court's analysis and conclusion that the signing participants of the Joint Statement did not intend for the "interest" provision to confer a privately enforceable contractual right on only some of the signatories.

To the extent Appellants read *Gross II* as effectively deciding the issue before us today, that is error. The issue in *Gross II* was only whether the case was justiciable. Justiciability involves, for the most part, concerns of separation of powers. *Nixon v. United States*, 506 U.S. 224, 252-53, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (Souter, J., concurring) ("[T]he political question doctrine is 'essentially a function of the separation of powers,' existing to restrain courts 'from inappropriate interference in the business of the other branches of Government . . .'" (citation omitted) (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 394, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990))). The question we decide today, on the other hand, is one grounded in the intentions of the signatories to the Joint Statement. See *Sumitomo*, 457 U.S. at 185, 102 S.Ct. 2374 ("Our role is limited to

giving effect to the intent of the [t]reaty parties.”). Thus, a particular claim may be justiciable, in that it is not best reserved for the Executive Branch, but may nevertheless lack a foundational cause of action because that is what the participants contemplated.

IV. Application to *Schwartz Lee* Plaintiffs

[8] The *Schwartz Lee* Appellants dispute the propriety of applying the judgment to dismiss the *Gross* complaint to the *Schwartz Lee* complaint. They contend that the district court could not dismiss their complaint because the defendant banks in the *Schwartz Lee* case (i.e., Deutsche Bank AG and Dresdner Bank AG) never moved to dismiss based on the lack of a private cause of action. Rather, the Banks’ motion to dismiss asserted that no enforceable contract existed between plaintiffs and defendants.

First, we note that the two *Schwartz Lee* plaintiffs are members of the putative class in the *Gross* action. Barbara Schwartz Lee and Bernard Lee both averred that they are beneficiaries of the Foundation. *Schwartz Lee* Compl. 4–5. The putative class in the *Gross* case comprises all beneficiaries of the Foundation. *Gross* Compl. 3. Also, the two defendant banks in *Schwartz Lee* are individually named as defendants in the *Gross* case.

Second, although docketed as separate cases, the two have proceeded as if one. In *Gross I*, Judge Bassler issued a single opinion that temporarily disposed of both actions. On appeal in *Gross II*, we reviewed that dismissal as if the two cases were a single action. Likewise, when remanded to the district court, the litigants continued on a single course with but minor differences in their “interest” calculations. Arguments for the dispositive mo-

tions were heard during a single session before Judge Debevoise on April 17, 2007.

The situation before us does not raise fairness concerns sought to be addressed by the doctrines of issue and claim preclusion. See *Nat’l R.R. Passenger Corp. v. Pa. Pub. Util. Comm’n*, 288 F.3d 519, 525 (3d Cir.2002) (“Th[e] general rule [of collateral estoppel] is subject to a number of equitable exceptions designed to assure that the doctrine is applied in a manner that will serve the twin goals of fairness and efficient use of private and public litigation resources.”). *Schwartz Lee*’s attorneys had notice that the Initiative moved to dismiss the complaint as privately unenforceable. Furthermore, in a letter to the district court dated November 22, 2006, counsel for plaintiffs in both *Gross* and *Schwartz Lee* presented arguments countering the Initiative’s position that the Joint Statement was not privately enforceable. Counsel presented their arguments on the letterhead of Lite DePalma Greenberg & Rivas, LLC, local counsel for both sets of plaintiffs. The letter was signed by 1) Burt Neuborn, counsel for *Gross* plaintiffs; 2) Michael Hausfeld and Agnieszka Fryszman, counsel for *Schwartz Lee* plaintiffs; and 3) Allyn Z. Lite, “Plaintiffs’ Liaison Counsel.” The letter set forth a cogent summary of the plaintiffs’ position without distinguishing between the two cases. From the district court’s perspective, plaintiffs in both cases were aware of and addressed a common basis for dismissal.

Moreover, *Schwartz Lee* has not presented any argument or position overlooked by the district court. Thus, even if we were to vacate the district court’s dismissal of the *Schwartz Lee* complaint, the only logical outcome after remanding would be dismissal. Accordingly, we find no error in the district court’s dismissal of *Schwartz Lee*’s complaint.

V. Conclusion

For the foregoing reasons, we affirm the district court's dismissal of the complaints.



David COZZARELLI; Stephanie Cozzarelli; Frankfurt–Trust Investment Gesellschaft MBH; Carole Swoboda; Robert Swoboda, Plaintiffs–Appellants,

v.

INSPIRE PHARMACEUTICALS INCORPORATED; Christy L. Shaffer, Ph.D.; Gregory L. Mossinghoff; Gary D. Novack, Ph.D., Defendants–Appellees,

and

Deutsche Bank Securities Incorporated; Morgan Stanley & Company, Incorporated; Piper Jaffray & Co.; SG Cowen & Co., LLC, Defendants.

No. 07–1851.

United States Court of Appeals,
Fourth Circuit.

Argued: Oct. 30, 2008.

Decided: Dec. 12, 2008.

Background: Investors filed consolidated class action complaint against biopharmaceutical company and senior officers, alleging violations of federal securities law, arising from allegedly false and misleading statements regarding clinical trial of drug. Defendants filed motion to dismiss. The United States District Court for the Middle District of North Carolina, William L. Osteen, Senior District Judge, 515 F.Supp.2d 631, adopted recommendation of

Russell A. Eliason, United States Magistrate Judge, and granted motion. Investors appealed.

Holdings: The Court of Appeals, Wilkinson, Circuit Judge, held that:

- (1) investors failed to raise “strong inference” of wrongful intent that was necessary to support their securities fraud claims;
- (2) investors’ claims for control person liability and insider trading against company’s senior officers were derivative of their other claims;
- (3) investors could not prevail on claims under Securities Act provisions barring materially false registration statements and misrepresentations in prospectuses and oral communications; and
- (4) district court did not abuse its discretion in denying leave to amend, as amendment would have been futile.

Affirmed.

1. Securities Regulation ⇐60.18

Successful securities fraud plaintiff must show that (1) defendant made a false statement or omission of material fact (2) with scienter (3) upon which the plaintiff justifiably relied (4) that proximately caused the plaintiff’s damages. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

2. Securities Regulation ⇐60.45(1)

To prove mental state of “scienter” that is necessary for successful securities fraud claim, negligence is not enough; plaintiff must show either intentional misconduct or such severe recklessness that danger of misleading investors was either known to defendant or so obvious that defendant must have been aware of it. Securities Exchange Act of 1934, § 10(b),