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MAREI VON SAHER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

MAREI VON SAHER,

Plaintiff,

vs.

NORTON SIMON MUSEUM OF ART AT PASADENA AND THE NORTON SIMON ART FOUNDATION,

Defendants.

CASE NO. CV 07-2866 JFW (SS)

[1] PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56

[2] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 1, 2016
Time: 1:30 p.m.
Courtroom: 16
Pre-Trial Conf: September 2, 2016
Trial: September 20, 2016
Hon. John F. Walter

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Plaintiff, pursuant to Federal Rule of Civil Procedure 56, hereby moves this Court for an order granting summary judgment in its favor, and against Defendants. Pursuant to this Court's order, oral argument on this motion is scheduled for August 1, 2016, at 1:30 p.m. This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities that follows, Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law, the Declaration of Marei von Saher, the Declaration of Lawrence M. Kaye, Esq. and all of the Exhibits attached thereto, the Notice of Intent to Rely on Dutch, French, German, Soviet and Ukrainian Law pursuant to Fed. R. Civ. P. 44.1, the pleadings and papers on file herein, any reply memorandum that may be filed, and any further evidence and argument as may be presented to the Court prior to or at the hearing on this motion, or subsequent thereto as permitted by the Court.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on May 27, 2016.

Dated: June 13, 2016

Respectfully submitted,

GARTENBERG GELFAND HAYTON LLP

By: /s/ *Edward Gartenberg*
Edward Gartenberg

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I. PRELIMINARY STATEMENT

The parties have completed extensive fact and expert discovery, and both this Court and the Court of Appeals have determined certain legal issues that comprise law of the case. The material facts alleged by Plaintiff are not in dispute and support her claims in this case. They also defeat all of the defenses set forth by Defendants in their First Amended Answer. *See* Kaye Decl., Ex. 2, Dkt. No. 167. Therefore, summary judgment in favor of Plaintiff on all of her claims should be granted.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 provides that a court shall grant summary judgment upon a showing by the movant that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding a summary judgment motion, a district court draws all inferences from the underlying facts in the light most favorable to the non-moving party, and determines whether there is a genuine dispute as to any material fact that would necessitate a trial. *Id*.; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 553 (1986) (*citing United States v. Diebold, Inc*., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176, 177 (1962)).

III. STATEMENT OF FACTS

In the Argument section, *infra*, Plaintiff will set forth in detail the underlying legal determinations established as law of the case in the prior opinions of this Court and the Court of Appeals, as well as the other legal principles that govern the issues in this case, and will refer in detail to the undisputed facts that support her claims and defeat all of the Defendants' defenses, all of which are set forth in Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law ("PSUF"). We summarize here the undisputed historical background of the case and the

recent proceedings.

A. Historical Background

Plaintiff seeks to recover two oil paintings entitled "Adam" and "Eve" by the sixteenth century German artist Lucas Cranach the Elder (the "Cranachs") (PSUF at 1) that are in the possession of Defendants, the Norton Simon Museum of Art at Pasadena and the Norton Simon Art Foundation (collectively, the "Museum"). PSUF at 2. Plaintiff, Marei von Saher ("Marei") is the widow of Edward G. von Saher (formerly Edward J. Goudstikker, "Edo"), and the daughter-in-law of Jacques Goudstikker ("Goudstikker" or "Jacques") and his wife, Désirée ("Dési"). PSUF at 3. Before World War II, Jacques was the principal shareholder of the art gallery, Kunsthandel J. Goudstikker N.V. (the "Goudstikker Gallery") and purchased the Cranachs at a 1931 auction of artworks consigned by the Soviet Union at Lepke auction house in Berlin. PSUF at 4, 5. Upon Jacques's, Dési's and Edo's subsequent deaths, Marei became and remains the sole living heir of the shareholders of the Goudstikker Gallery. PSUF at 6-8.

On May 10, 1940, Nazi troops invaded the Netherlands. Because they were Jewish, Jacques, Dési, and their infant son Edo, were forced to flee for their lives. PSUF at 9, 10. They left behind the Goudstikker Gallery and all of its assets – including some 1,200 valuable artworks, including Rembrandts, Steens, Ruisdaels, van Goghs, and the Cranachs – as well as Oostermeer, the Goudstikkers' residence; Nijenrode, a twelfth-century castle; and Herengracht 458, a seventeenth-century canal building in Amsterdam. PSUF at 10, 11.

Jacques died in a shipboard accident on May 16, 1940 while fleeing the Netherlands. PSUF at 12. Dési continued on, eventually arriving in the U.S. where she became a naturalized citizen on June 9, 1947. PSUF at 13. At the time of his death, Jacques had in his possession a black notebook (the "Blackbook"). The Blackbook contains entries describing artworks in the Goudstikker art

collection. PSUF at 14. The Blackbook lists the Cranachs and indicates that they were purchased by Jacques at the Lepke Auction House and were from the Church of Holy Trinity in Kiev. PSUF at 15.

After Jacques's death, the assets of the Goudstikker Gallery, including the Cranachs, were involuntarily transferred to Nazi Reichsmarschall Hermann Göring and his cohort, Alois Miedl. PSUF at 16.

After World War II, the Allies recovered in Germany the Cranachs, along with hundreds of other artworks taken by Göring from the Goudstikker Gallery. PSUF at 17. In accordance with Allied policy, these artworks were sent to the government of the Netherlands (the "GON"). PSUF at 18. In or about November 1944, the Dutch Government in Exile in London had advised Dési that after liberation one of its primary concerns would be to restore looted works of art to their rightful owners. PSUF at 19. Beginning in 1946, Dési made several trips to the Netherlands in order to arrange the restitution of the Goudstikker property forcibly transferred to Göring and Miedl. PSUF at 20. Although Dési eventually entered into a settlement agreement with the GON in 1952 and recovered some property that had been taken by Miedl, she refused to settle her claims to the artworks taken by Göring. PSUF at 21. The GON therefore retained custody of over 200 such artworks, including the Cranachs. PSUF at 22.

In 1961, George Stroganoff Scherbatoff ("Stroganoff") asserted to the GON that the Cranachs had belonged to his family and asked that the GON transfer them to him, saying that the Dutch State had no legal right, title or interest to, or in, them. PSUF at 23. The GON took the position that Stroganoff had no right to the Cranachs so he offered to purchase them instead. PSUF at 24, 25. The sale was effected in 1966. PSUF at 26.

In or about 1971, the Norton Simon Art Foundation and the Norton Simon Foundation acquired the Cranachs from Stroganoff through his agent, despite

knowing that the Cranachs had been transferred from the Goudstikker Gallery to Reichmarschall Göring. PSUF at 27-29. The Cranachs have been in the possession of the Museum since that time.[1] PSUF at 30. On or about October 25, 2000, Marei discovered that the Cranachs were at the Museum and promptly contacted the Museum. PSUF at 31.

After first learning in 1997 the facts concerning the artworks looted from the Goudstikker Gallery (PSUF at 32), Marei began her attempts to recover her family's looted artworks in the custody of the GON through both administrative and judicial proceedings in 1998. PSUF at 33. In 2001, the GON officially determined that its post-War policies regarding the restoration of Nazi-looted property should be re-examined: "Based on our examination of the documents relating to a great number of post-war claims we must describe the way in which the Netherlands Art Property Foundation generally dealt with the problems of restitution as legalistic, bureaucratic, cold and often even callous." PSUF at 34. Thus, the GON decided that going forward it would review claims for such property based upon a more policy-oriented approach. PSUF at 35. Following this policy change, Plaintiff, through the successor entity to the Goudstikker Gallery, submitted a claim for artworks looted from the Goudstikker Gallery to the State Secretary of the GON's Ministry of Education, Culture and Science, which oversees the GON's restitution policy, and the State Secretary referred the claim to the Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the "Restitutions Committee"). PSUF at 36, 37.

After an intensive review of the historical evidence, the Restitutions

[1] In 1991, the Norton Simon Foundation transferred any interest it had in one of the Cranachs to the Norton Simon Art Foundation. PSUF at 28.

Committee advised the State Secretary to restitute to Plaintiff all of the artworks in the custody of the GON that, like the Cranachs, had been taken from the Goudstikker Gallery by Göring. PSUF at 38. The Restitutions Committee found that the transactions through which Göring and Miedl purported to purchase all of Jacques's artworks were involuntary, forced sales. PSUF 39. Referring to Dési's complaint about unfair treatment at the hands of the Dutch bureaucracy, the Restitutions Committee found that "the authorities responsible for restorations of rights or their agents wrongfully created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily." PSUF at 40. It concluded that Dési did not waive her rights to the Göring looted works. PSUF at 41.

On February 6, 2006, the State Secretary adopted the Restitutions Committee's advice and decided to restitute to Marei the 200 artworks looted by Göring from Goudstikker, and still in the GON's custody. PSUF at 42.

In her report to the President of the House of Representatives of the States General officially conveying her restitution decision, the State Secretary explained her decision further. She stated that the Restitutions Committee based its recommendations on the "extended restitution policy," which was adopted in accordance with the Washington Principles. Following these principles, the Committee decided to "depart from a purely legal approach . . . to choose a more moral policy approach." PSUF at 43.

Even though the Restitutions Committee found that a Dutch Court of Appeals decision in 1999 did not "settle" the restoration of rights issue (PSUF at 44), the State Secretary disagreed and explained that this is the reason "why this case is not included in the current restitution policy." PSUF at 120. She nevertheless concluded that this was a "special" case that justifies a restitution "in keeping with the recommendations of the Committee." PSUF at 45. She

explained the basis of her reasoning: "In this regard I have in particular taken into account the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties as this has been put forward by the Committee in its extensive investigation." PSUF at 46.

In a letter dated March 31, 2006, the Director of Cultural Heritage, writing on behalf of the State Secretary, specifically refused to confirm that the GON had lawfully conveyed title to the Cranachs to Stroganoff, in response to Defendants' counsel's written request dated February 6, 2006. PSUF at 47, 48. On December 20, 2006, the Director of Cultural Heritage, again writing on behalf of the State Secretary, advised Plaintiff's counsel (with a copy to Defendants' counsel) as follows regarding this case: "I confirm to you that the State of the Netherlands is not involved in this dispute. The State is of the opinion that this concerns a dispute between two private parties." PSUF at 49.

B. Recent Proceedings In This Case

In its June 6, 2014 decision, the Court of Appeals for the Ninth Circuit reversed this Court's March 22, 2012 decision, and held that Plaintiff's claims "do not conflict with any federal policy." PSUF at 50. The Court of Appeals reasoned that since the Cranachs were never subject to post-War internal restitution proceedings in the Netherlands, "allowing von Saher's claim to go forward would not disturb the finality of any internal restitution proceedings – appropriate or not – in the Netherlands." Therefore, there could be no conflict between the restitution policy of the United States and any such proceedings. PSUF at 51.

Further, the Court of Appeals held that Plaintiff's claims are "in concert" with federal policy:

> Von Saher is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims . . . . Moreover, allowing her lawsuit to proceed would encourage the Museum, a private entity, to follow the Washington Principles, as the

> Terezin Declaration urged. Perhaps most importantly, this litigation may provide Von Saher an opportunity to achieve a just and fair outcome to rectify the consequences of the forced transaction with Göring during the war.

PSUF at 52. The Court concluded that this is "a dispute between private parties." PSUF at 52.

After remand, in its April 2, 2015 decision (the "April 2 Order"), this Court held Plaintiff's case to be timely under California Code of Civil Procedure §338, as amended. The Court held that under California law, "each time stolen property is transferred to a new possessor, a new tort or act of conversion has occurred" and that "the statute of limitations in an action to recover stolen property begins to run anew against each subsequent purchaser." PSUF at 53. Further, the Court held that "the fact that the statute of limitations may have expired as to an owner's claim against the thief (or prior possessor) is irrelevant. Expiration of the statute of limitations merely extinguishes the owner's right to seek a remedy from the thief or possessor; it does not thereby divest the owner of title." PSUF at 54. "Stolen property remains stolen property, no matter how many years have transpired from the date of the theft." PSUF at 55. "Accordingly, the subsequent purchaser 'has no lawful claim to this property as against the rightful owner.'" PSUF at 55.

This Court also explained the reason for the California legislature's adoption of the amended statute of limitations applicable in this case (PSUF at 56):

> [T]he California Legislature recognized by enacting [§338, as amended,] museums are sophisticated entities that are well-equipped to trace the provenance of the fine art they purchase. After carefully weighing the equities, the Legislature determined that the importance of allowing victims of stolen art an opportunity to pursue their claims supersedes the hardship faced by museums and other sophisticated entities in defending against potentially stale ones.

IV. ARGUMENT

POINT I

PLAINTIFF HAS ESTABLISHED A PRIMA FACIE CASE OF CONVERSION AND REPLEVIN

Plaintiff has established a prima facie case for conversion and replevin, and the burden of proof shifts to Defendants. As demonstrated by the pleadings in this case, there is no dispute between the parties concerning one fundamental fact. Defendants admitted in their First Amended Answer ("FAA") (in which they try to avoid the term "looting"), that "Nazi Reichsmarschall Herman Göring acquired . . . the Cranachs, from the Goudstikker Gallery in an involuntary sale." PSUF at 16. In their response to requests for admissions, Defendants conceded that these were "forced sales" agreed to "under the circumstances of the German invasion of the Netherlands." PSUF at 16. Nazi forced sales are "properly classified as looting or stealing." *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 307 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008).

Conversion of property is a "strict liability" tort and the lack of knowledge of its theft or good or bad faith on the part of the current possessor are irrelevant. *Regent Alliance Ltd. v. Rabizadeh*, 231 Cal. App. 4th 1177, 1181, 180 Cal. Rptr. 3d 610, 612 (App. Ct. 2014). Further, as this Court has recently acknowledged, "[s]tolen property remains stolen property, no matter how many years have transpired from the date of the theft." April 2 Order at 9, Dkt. 119 (*quoting Naftzger v. American Numismatic Society*, 42 Cal. App. 4th 421, 432, 49 Cal. Rptr. 2d 784, 791) (other citations omitted). "Accordingly, the subsequent purchaser 'has no lawful claim to this property as against the rightful owner.'" *Id.* (*quoting Strasberg v. Odyssey Grp., Inc.*, 51 Cal. App. 4th 906, 921, 59 Cal. Rptr. 2d 474, 481 (App. Ct. 1996), Defendants' Fourth and Twentieth Defenses therefore lack

any merit, since even if Defendants purchased the Cranachs in good faith and/or without knowledge of Plaintiff's claims, as there alleged, they would still be liable for conversion and replevin.

The elements of a prima facie case establishing both conversion and replevin claims against Defendants are thus well-established by the undisputed facts. To sustain an action for conversion, the Plaintiff must only establish "(1) the Plaintiff's ownership or right to possession of personal property; (2) the Defendant's disposition of the property in a manner that is inconsistent with the Plaintiff's property rights; and (3) resulting damages." *Regent Alliance*, 231 Cal. App. 4th at 1181, 180 Cal. Rptr. 3d at 612. Defendants admit that Jacques purchased the Cranachs at the Lepke auction. PSUF at 5. As noted above, Defendants also admit that the Cranachs were taken by Göring involuntarily from the Goudstikker Gallery. PSUF at 16. Plaintiff is the sole heir of the shareholders of the Gallery. PSUF at 6-8. Therefore, she has established her prima facie right to their possession. Defendants' purchase and current possession, regardless of any good faith on their part, is prima facie inconsistent with Plaintiff's property rights. It is black letter law that "one who purchases converted goods is himself a converter." Dan B. Dobbs, *The Law of Torts* §66 (2001).

Plaintiff has also established all of the elements of a prima facie claim of replevin, *i.e.*, (1) Plaintiff has "the right to the immediate and exclusive possession" of the property (*Commercial Savs. Bank v. Foster*, 210 Cal. 76, 79 (1930)); and (2) Defendant is in possession of the property. (*California Packing Corp. v. Stone*, 64 Cal. App. 488, 493 (App. Ct. 1923)). "Because the Complaint supports a conversion claim, it also supports a specific recovery remedy." *Adler v. Taylor*, No. CV-04-8472-RGK (FMOX), 2005 WL 4658511, at *3 (C.D. Cal. Feb. 2, 2005), *aff'd*, *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007). Thus, Plaintiff's claims to quiet title to the Cranachs and for declaratory relief that Plaintiff and not

Defendants is the rightful owner of the Cranachs are also established by the undisputed facts.

Having established a prima facie case for her claims, the burden of proof now shifts to the Defendants. As we shall show, summary judgment in favor of Plaintiff is warranted with respect to each of the defenses posited by Defendants, including the fourth and twentieth defenses, which, as shown above, are without merit once a prima facie case of conversion and replevin has been established.

POINT II

PLAINTIFF HAS ESTABLISHED A PRIMA FACIE CLAIM UNDER CAL. PENAL CODE 496 AND THE RECOVERY DOCTRINE DEFENSE IS INAPPLICABLE

In addition to her other claims, Plaintiff has established a prima facie claim under California Penal Code §496, which provides that individuals whose property has been stolen may bring a civil case against possessors who unlawfully withhold the property, and may obtain damages up to three times the value of the stolen goods. Cal. Penal Code §496(c); *see Naftzger*, 42 Cal. App. 4th at 433-34, 49 Cal. Rptr. 2d at 793 (citations to other cases omitted). A recent appraisal shows that the combined value of the Cranachs is currently $150 million. PSUF at 57.

Section 496 imposes a continuing affirmative duty to restore stolen property to its rightful owner upon anyone who withholds property knowing it to be stolen. As explained in Point I, *supra*, there is no dispute between the parties concerning the forced sale by Göring of Goudstikker's artworks, including the Cranachs. PSUF at 16. Property obtained by a forced sale or "extortion" is considered "stolen" under the applicable provisions of §496 and the related definitions in the Penal Code. *See* Penal Code §496(a); §518. *See generally Vineberg*, 529 F. Supp. 2d at 307 (Nazi forced sales are "properly classified as looting or stealing."). Such stolen property remains stolen regardless of how many years have passed since the

original theft or the good faith of any subsequent transferees, including purchasers, of such property. *See* Point I, *supra.*

Even an innocent buyer of stolen property who subsequently learns that the property was stolen, but refuses to return the property, violates §496 based on the continuing duty to restore stolen property to its rightful owner. Though a person is not aware that property is stolen when he first comes into possession of it, if he subsequently learns of its stolen nature and then conceals or withholds it from its true owner, he is guilty of a violation of §496 of the Penal Code. *People v. Scott*, 108 Cal. App. 2d 231 (Dist. Ct. App. 1951); *Goldman v. Sup. Ct. of L.A. Cnty.*, 124 Cal. App. 2d 165 (Dist. Ct. App. 1954); *People v. Scaggs*, 153 Cal. App. 2d 339, 352 (Dist. Ct. App. 1957). The requisite guilty knowledge can be inferred. *People v. Hartridge*, 134 Cal. App. 2d 659 (Dist. Ct. App. 1955).

The only defense (Fourteenth Defense) posited by the Museum to Plaintiff's claim under §496 is the so-called "recovery doctrine," but Defendants misapply the doctrine in this context. The recovery doctrine developed as a response to "sting" cases. *See, e.g., People v. Rojas*, 55 Cal. 2d 252, 258, 10 Cal. Rptr. 465, 469 (1961). In such cases the police observe a theft, catch the thieves, and learn that they were about to proceed to sell the stolen goods to a "fence." To catch the fence, the police direct the thieves to proceed to transfer the goods to the fence under police observation. The recovery doctrine holds that the fence cannot be charged with receipt of stolen goods because the property was no longer stolen as it had been recovered by the police when they caught the thieves. The recovery doctrine applies only when the recaptured goods are "held by the police in trust for, or for the account of, the owner." *Id.*

There is no basis for applying this doctrine to the case at hand, which clearly is not a "sting" case. Indeed, the only court that has ever considered the recovery doctrine in a context similar to the instant case found that the Allies' policy of

external restitution after the War did not lend itself to application of the doctrine because the Allied Forces were not acting as agents of the theft victims. *United States v. Portrait of Wally*, No. 99 Civ. 9940 (MBM), 2002 WL 553532, at *14-15 (S.D.N.Y. Apr. 12, 2002). The Allied Forces' policy of returning seized property to the government of the country of origin rather than trying to restitute it to the true owner flies in the face of the argument that the Allied Forces were acting as agents of the true owners, which is the basis for the recovery doctrine. When the procedures followed by the Allied Forces were made clear, the *Wally* court rescinded its prior decision in *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000), in which it had applied the recovery doctrine because it was based on a misapprehension of the external restitution procedures that were followed by the Allied Forces. *See United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 260 (S.D.N.Y. 2009) (recovery doctrine was inapplicable because the Allied Forces tasked with externally restituting works to their countries of origin "had no legal duty to return seized property to its true owner.")[2]

The recovery doctrine simply does not apply to the facts in this case and judgment in favor of Plaintiff on her §496 claim should be granted.

[2] The Presidential Advisory Commission on Holocaust Assets in the United States, in reaction to the 2000 Wally decision, explained that its extensive research and findings about Allied policies during and after the War militated against application of the recovery doctrine in external restitution cases: "In that case, a federal district court in New York held that U.S. Forces charged with recovering stolen items were acting on behalf of the true owners and that such recovery prohibited continued treatment of the item as stolen property. Nothing in this Commission's research indicates that the U.S. Army was acting on behalf of owners or their heirs." Plunder and Restitution: The U.S. and Holocaust Victims Assets: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report 17 (2000) ("Plunder and Restitution").

POINT III

STROGANOFF HAD NO VALID CLAIM TO THE CRANACHS AND HAD NO TITLE TO TRANSFER TO DEFENDANTS

In their First and Third Defenses, Defendants claim that Stroganoff had a superior claim to the Cranachs over Jacques Goudstikker based either on their having been "wrongfully appropriated from the Stroganoff family prior to their acquisition by Jacques Goudstikker" (apparently by the Soviet Union); or having been acquired by Stroganoff "in good faith" from the Dutch Government, apparently pursuant to Dutch law. Based on the undisputed evidence in this case and Dutch law, neither claim has any merit.

A. The Cranachs Were Never Part Of The Stroganoff Collection

Since litigation began in this case more than nine years ago, Defendants have placed the purported ownership of the Cranachs by the Stroganoff family prior to the Bolshevik Revolution at the center of their arguments. In 2007, when Defendants filed a declaratory judgment action (subsequently stayed) on the same day Plaintiff filed her Complaint, the Norton Simon Art Foundation issued a "Statement" that said, "The story of the Cranach panels in the twentieth century begins with the Stroganoffs[.]" PSUF at 58. But, as explained in detail in Point VII, *infra*, Defendants had no basis for a good-faith belief that the Cranachs belonged to the Stroganoff family and knew that even before Plaintiff learned of her claim. Questions about the paintings' provenance were brought to the attention of Norton Simon himself before they were purchased, and Amy Walsh, a prominent provenance researcher hired by Defendants, eliminated the Stroganoff family from the Cranachs' ownership history in 1998, ultimately concluding that there is "no evidence" that the Cranachs were ever in the Stroganoff collection. *See* pp. 49-52, *infra*. Even worse, Walsh's damaging, non-privileged findings have

been deliberately suppressed during this litigation at the instruction of Defendants' counsel. *See* p. 53, *infra.*

Indeed, Defendants have proffered no evidence in support of their claim that the Stroganoff family ever owned the Cranachs. They have conceded that they "at this time cannot be certain whether Stroganoff's representations [of ownership] were correct." PSUF at 59. They admit that they have no documents dated prior to 1919 stating that the Cranachs belonged to any member of the Stroganoff family. PSUF at 60. Defendants' own research has uncovered no such evidence (*see* pp. 51-52, *infra*), and GON officials repeatedly denied that Stroganoff has any valid claim to the Cranachs (*see* p. 31, *infra*). PSUF at 24. The Chief Historian of the Department of Historical Studies of the Stroganoff Palace in St. Petersburg, Sergey Kuznetsov, who has been researching the Stroganoff family since 1991, has conclusively opined that the Cranachs were never part of the art collections of Serge or Paul Stroganoff. PSUF at 61. When the Senior Curator at the Museum asked him in 2005 to explain how the Stroganoff family had acquired the Cranachs prior to their sale to Goudstikker at the Lepke auction, based on her assumption that the Lepke auction was comprised of Stroganoff artworks, he responded that he had solved this "riddle" through his research of the Stroganoff inventory and learned that a "big part" of the Lepke auction did not in fact include paintings owned by the Stroganoff family. But the Museum chose to ignore him. PSUF at 62. Moreover, in a book about the Lepke auction that was recently published by the Hermitage, the Museum in St. Petersburg that was the guardian of the Stroganoff Palace after the Bolshevik Revolution, the Museum's Director, whose assistance Defendants had sought in this case, specifically stated that the Cranachs "did not have any relationship to the Stroganoffs." PSUF at 63.

The only "evidence" upon which Defendants rely for their theory that the Cranachs were once owned by the Stroganoff family are Stroganoff's own

assertions. Defendants have produced an "oral history" given by Stroganoff in 1973, but Stroganoff's ownership claim in that "history" was more fiction than fact. The "history" was not checked for accuracy and it was not made under oath. PSUF at 64. Its very contents show Stroganoff's ignorance about the family's art collections. For example, he claims that the catalogue for the Lepke auction stated under the picture for every item, including the Cranachs, that it was part of the Stroganoff collection. This is completely false. The catalogue does not say this, and, quite to the contrary, an insert prepared with the catalogue and other sources make it clear that the Cranachs and other artworks included in the auction were not part of the Stroganoff collection. PSUF at 65, 66. Stroganoff also claimed that the involvement of the Soviet government was hidden, but in fact the Soviet government's involvement was set forth on the catalogue cover. PSUF at 5, 65, 66.

The very fact that Stroganoff claimed to own the Cranachs but did not claim other paintings that actually had been a part of the Stroganoff Collection[3] and had been purchased by Jacques Goudstikker from the Lepke auction, is further proof that Stroganoff had no knowledge of what did and did not belong to the Stroganoff collection.

Indeed, Stroganoff even questioned his own ownership of the Cranachs and for good reason, further demonstrating that Stroganoff never owned them in the first place. A French court decision a few months prior to the sale of the Cranachs to Stroganoff by the GON had ruled that Stroganoff had no right of inheritance to property owned by his uncle Count Serge Stroganoff, the ancestor through whom Stroganoff claimed ownership of the Cranachs to the GON. PSUF at 69. Defendants admit the decision of the French court. PSUF at 69. In the provenance

[3]Indeed, two paintings by Pietro Rotari that had in fact been part of the Stroganoff collection before being purchased by Jacques at the 1931 Lepke auction, were restituted by the GON to Marei in 2006. PSUF at 67.

listing later provided to the Museum by Stroganoff's agent, Spencer A. Samuels, however, the story changes and for the first time Stroganoff's great uncle Count Paul Stroganoff, not his uncle Serge, is listed as the prior owner of the Cranachs, thus demonstrating that Stroganoff was well-aware of the French decision's implications. PSUF at 29. The Cranachs' provenance was rewritten to hide the fact that the basis upon which he had previously espoused ownership of the Cranachs was false.

B. Soviet Nationalizations Transferred Title To The Soviet Union

In any event, even if the Stroganoff family had owned the Cranachs and the Soviet Union had nationalized them during the Bolshevik Revolution, the courts have long held that any inquiry into the validity of any such expropriation is barred by the act of state doctrine. *See Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 146 (2d Cir. 2012); *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237, 241 (D. Conn. 2014), *aff'd*, 620 F. App'x 60 (2d Cir. 2015). Indeed, one such case involved the Stroganoff family itself, claiming another artwork sold at the 1931 Lepke auction in Berlin. *See Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 22 (S.D.N.Y. 1976), *citing Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718, a British Court of Appeal decision involving similar facts.

Moreover, German courts at the time of the 1931 Lepke auction had already held that Soviet nationalizations of its own citizens' property provided good title to the Soviet Union, so that even if the Stroganoff family had owned the Cranachs and they were nationalized, Soviet ownership would have been recognized in Germany. PSUF at 70. Thus, a German auction sale on behalf of the Soviet Union to Goudstikker would have passed title to Goudstikker under German law and any claim by Stroganoff would have been rejected. PSUF 165. In fact, one of the very cases in which the German court ruled that the Soviet government's nationalizations gave it good title to sell at an auction, was brought, and lost, by

Olga Scherbatoff, Stroganoff's mother, through whom he claimed his inheritance rights to the Cranachs.[4] PSUF at 71. Under Dutch law, title obtained from a lawful sale in Germany would be given effect in the Netherlands. PSUF 165.

C. The GON Did Not Own The Cranachs And Therefore Could Not Transfer Good Title To Them

The United States and the Netherlands, along with sixteen other nations, were signatories to the London Declaration of January 5, 1943. This Declaration served as a "formal warning to all concerned, and in particular to persons in neutral countries," that the Allies "intend[ed] to do their utmost to defeat the methods of dispossession practised by the Governments with which they [were] at war...." In the Declaration, the Allies specifically reserved the right to invalidate wartime transfers of property "whether such transfers of dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected." As this Declaration shows, it was universally recognized by the Allies that Nazi spoliation was going to be undone. The London Declaration is generally considered to have laid the foundation for the Allies' post-War restitution policy. PSUF at 73-75.

Under that post-War restitution policy, the Allies returned property found in Germany to its country of origin, on the express understanding that the country of origin was responsible for locating the true owners of that property and restituting it to them. PSUF 76. *See* Plunder and Restitution, at 8 ("the recipient government bore the responsibility to locate the rightful owner and to restitute the property

[4] As the Cranachs had been discovered in a church in Kiev, they were nationalized pursuant to various decrees, *e.g.*, the January 19, 1919 Decree of the Interim Worker and Peasant Government of the Ukraine on separation of the Church from the State and the School from the Church, which states in §13: "all the property of the Ukrainian church and religious societies is to be declared nationalized." PSUF at 72.

turned over to it by U.S. authorities"). This was reaffirmed by Secretary of State Clinton in a Press Statement issued by the U.S. Department of State dated January 16, 2013. PSUF at 77. In fact, when property was returned by the Allies, it was required that the country of origin acknowledge a receipt. As many of such receipts expressly provide, the receiving country will keep the objects "as custodians pending the determination of the lawful owners thereof," and the goods "will be returned to their lawful owners."[5] PSUF at 78.

Foreshadowing the London Declaration, on May 13, 1940 – three days after the Nazi invasion – the Dutch government-in-exile promulgated Royal Decree A6, which prohibited the conclusion of agreements with the enemy or enemy subjects without the prior permission of a special commission. PSUF 81. Under Decree A6 any sale to Göring was void, and no ownership interests could have been transferred. PSUF at 166.

Defendants' experts contend that, as the result of a February 5, 1947 decision of that special commission that purported to exempt from A6 all assets returned from Germany, looted assets subject to restitution became "enemy

[5] Beginning some time in 1946, receipts were altered to reflect the possibility of an Allied restitution commission that would make determinations about claims. This commission was never actually created. The receipts that mention it contain language that reinstates the obligations under the prior receipts in the event the commission did not get set up. PSUF at 79. While the Cranachs were returned on a receipt that referred to the envisioned restitution commission, other Goudstikker artworks were returned on receipts that specifically designated the country of origin as custodian. PSUF at 80. There is no basis to believe that the GON was acting as custodian for some of the artworks looted by Göring, but not for others, based on the receipt in use by the Allies at the time. And there is nothing to suggest that the Allied policy that required the restitution by the receiving State to the pre-War victim changed in any respect.

property" owned by the State.[6] There is no basis for this conclusion in the 1947 decision or otherwise. The decision simply reflected the fact that upon the return of the recuperated property to the Netherlands, the initial interest in the invalidity of the legal transactions had come to an end. PSUF 82. But this had no effect on whether or not the assets were eligible for restitution, and the GON continued to act as a custodian of the recuperated assets for the true owner. PSUF at 167.

Subsequent reports of GON committees confirmed that looted assets returned from Germany were not treated as enemy property owned by the State pursuant to E133 but, rather, that the GON, in line with Allied policy, held such assets in custody for the pre-War owners from whom they had been looted. PSUF 89. For example, the Dutch Committee for Recovered Property was set up on December 11, 1946 to study issues relating to recovered property. The report of

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[6] Assets returned from Germany to the Netherlands after WWII consisted of enemy assets (assets previously owned by enemies or enemy states), traitor assets (collaborators), and assets returned to the Netherlands for restitution to their previous Dutch owners. Royal Decree E100, issued in 1944, set forth procedures for restoration of property rights to its true owners. PSUF 83. Pursuant to Royal Decree E133, issued about a month later, enemy assets that were returned to the Netherlands became the property of the State. PSUF at 85. If the sale of property to a Nazi were held to be a valid and binding sale, that property would not belong to the original owner but to the Nazi enemy, and therefore would be declared the property of the State when returned to the Netherlands. But goods eligible for restitution to the true owner (involuntary losses) were not enemy property. PSUF at 86.

The property purchased by Göring from Goudstikker was plainly the result of a forced sale and, therefore, was eligible for restitution. PSUF 87. The GON, however, consistently took the position that the sale of artworks from a Jewish owned gallery to Hermann Göring, against the instruction of Dési Goudstikker and by employees who were given huge bonuses for their collaboration, was a voluntary sale. *See* PSUF at 88. This unfair post-War position taken by the GON was an important basis for the eventual restitution in 2006. *See* PSUF at 40, 42, 43, 46.

that committee expressly rejected the possibility that the GON was the owner of property returned to the Netherlands pursuant to Decree E133, because E133 did not apply to goods that were outside the border or legal sphere of the Netherlands. PSUF at 90. The Executive Committee of the Art Property Foundation then reviewed the report and issued an Opinion on Recovered Works of Art, dated January 5, 1948, in which it concluded that "although a number of schemes have been suggested as possibilities . . . a right of ownership of the State with regard to recovered property does not exist in general." PSUF at 91. If that were not clear enough, in November 1948 the Dutch Minister of Finance came to the conclusion that it would be "unacceptable to the Netherlands" for the GON to claim ownership of restituted goods under Decree E133 because the value of such items would then have to be subtracted from reparations that the Netherlands could claim from Germany.[7] PSUF at 92.

The case of Rebholz v. Het Nederlandse Beheersinstituut ("NBI"), decided by the Judicial Division of the Dutch Council for the Restitution of Rights on November 23, 1953, determined that, even if recuperated property could be considered "enemy property" under E133, the GON would still hold that property as the custodian for the rightful owner. PSUF at 94. In that case, a painting that had been confiscated from its Jewish owner by the Germans was sold at auction to Rebholz, who was a German and who sent the painting to Germany. When the painting was returned to the Netherlands after the War, Rebholz (who lived in the Netherlands) claimed that the GON had wrongfully returned the painting to its

[7] The Minister suggested that it would be better to argue that the GON could obtain title to unclaimable restituted property through the operation of international law. PSUF at 93. The GON, however, never cited any support for that position, and none exists. International law requires restitution to the original owner of any recovered property. PSUF at 168.

former Jewish owner and that it was Rebholz who was the true owner and entitled to the return of the painting. The decision states "that the parties are divided over the question under what title the State had received the painting: as owner - as the NBI and the State claim - or as *detentor*[8] for the owner of the painting." It was conceded that that Decree E133 applied to the painting at the moment it returned to the Netherlands because Rebholz was a citizen of an enemy country living in the Netherlands. It was decided that after the painting was brought to the Netherlands the GON had to return it to the person who turns out to be entitled to it and that, accordingly, "the Foundation, who has to be identified with the State, received the painting as *detentor* for the lawful owner." In other words, despite the fact that Decree E133 applied, the State was considered to be a custodian, not an owner. PSUF at 169.

It is also clear that the GON did not believe it was the owner of the property that had been looted by Göring. In November 1952, almost four months after settlement of Goudstikker's claims regarding the Miedl transaction, the GON considered selling paintings that had been part of the Göring transaction. With respect to those paintings, the head of the Dutch Restoration Payment and Recuperated Property Bureau concluded that if Dési "had not made the reservation in the settlement effected between her and Nederlandse Beheersinstitutut, then the Dutch State would have the full title to these paintings and would be able to sell them." Instead, it was determined that Dési would have to agree to any sale of those paintings that the GON proposed. PSUF at 95. If the GON believed that Dési waived her claim to the Göring works or that it was the owner of those paintings, Dési's permission would not have been necessary. Plainly, the GON knew that Dési maintained all of her rights with regard to those works.

[8] Latin: "one who holds."

In the 1960s, when Stroganoff brought his claim to the GON, there was doubt as to whether the State owned the Cranachs. Indeed, uncertainty over the question of whether the GON had title to the Cranachs played a major role in the deliberations between Stroganoff and the Netherlands. In the eyes of the GON, having Stroganoff purchase the Cranachs would act as an admission that it was the owner, which was desirable because GON was uncertain of its ownership interest. PSUF at 96, 97.

If there was any doubt left, the Restitutions Committee Recommendation issued in 2005 in the Goudstikker case made clear the GON held looted assets returned by the Allies, including the Göring works, in custody for the pre-War owners. PSUF at 98. And finally, when recently restituting looted Göring artworks to Plaintiff, the GON again acknowledged that the works were being held by it "in the custody of the Dutch Government," and did not suggest that it was the owner of the works. PSUF at 99.

Thus, notwithstanding the assertions by Defendants' experts to the contrary, the GON never owned the looted Goudstikker property returned by the Allies, including the Cranachs.

D. Stroganoff Did Not Obtain Title As A Good Faith Purchaser Under Dutch Law

Article 2014 of the Dutch Civil Code and relevant case law in effect at the time provided in §1 that a purchaser of movable property is protected against claims of the original owner of property in cases where the purchaser, acting in good faith, bought the property from a seller who did not have authority to transfer title. PSUF at 170. Where the original owner lost possession involuntarily, pursuant to Art. 2014 §2, that original owner could claim the property back during a period of 30 years after the moment he or she lost possession; but a good faith buyer obtained good title three years after the involuntary loss of possession.

PSUF at 171.

Article 2014 permits someone who does not have good title to transfer good title to a purchaser if the purchaser believed that he acquired ownership (subjective good faith) and that he was reasonably justified in that belief (objective good faith). Stroganoff lacked both subjective and objective good faith and therefore could not have obtained title to the Cranachs from the GON pursuant to Art. 2014. PSUF at 172.

1. Stroganoff Did Not Subjectively Believe That The GON Had Title To Convey To Him As He Believed Himself To Own The Cranachs

A transferee who had openly declared his belief that he rather than the transferor was the true owner before the time of the transfer lacks the subjective good faith belief required by Art. 2014 that he could acquire title from the transferor, *i.e.*, that the transferor had good title to transfer to him. Therefore, the transferee could not obtain good title pursuant to Art. 2014 under such circumstances. PSUF at 173.

In the "notification" that Stroganoff's attorney submitted to the Dutch Government on May 10, 1961, he asserted plainly that "he is the owner of" the Cranachs and asks that the Government turn them over to him. PSUF at 23. Therefore, pursuant to Art. 2014, he did not believe that the GON was the owner of the Cranachs and therefore could not have obtained good title to them pursuant thereto.

2. Stroganoff Could Not Have Objectively Believed In Good Faith That He Was The Owner Of The Cranachs

Since, as we have shown, the GON did not have title to the Cranachs when it purported to sell them to Stroganoff, and Stroganoff claimed that he, not the GON, already owned the Cranachs, he and the GON concocted an artifice by which he

could waive his purported ownership rights toward the GON, so that it could then transfer them back to him in a sale transaction.[9] PSUF at 100, 101. But, for this to work, Stroganoff had to be reasonably justified in his belief that he owned the Cranachs before the waiver, since he can only have believed that he acquired ownership through the 1966 sale if he was justified in believing that the waiver resulted in the acquisition of ownership by the GON.[10] PSUF at 102.

There was no justification for any such belief on the part of Stroganoff, and therefore he was not objectively in good faith when he purchased the Cranachs from the GON. First, as explained above, the Cranachs had never belonged to the Stroganoff family, and if Stroganoff had done any research before making his claim, he would have known that. Among other things, the standard catalogue of the works of Lucas Cranach the Elder that was available at the time shows the Russian State Property (Academy of Science, Kiev) as the prior owner of the Cranachs, and does not include the Stroganoffs in their ownership history. PSUF at 127.

Second, also as indicated above, Stroganoff rewrote his own history of the

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[9]The purported waiver toward the GON was a nullity to begin with. It is not legally possible to waive a right towards another person, as waiving of a right is a unilateral act. Instead, the waiver was nothing more than a purported transfer of ownership by Stroganoff to the GON. PSUF at 174.

[10]Even assuming that Stroganoff had been the previous owner of the Cranachs, his purported waiver to the GON could not have changed the GON's status of possession from detentor to owner or possessor in its own right. Under Dutch law, a detentor cannot unilaterally change its status as detentor. The only two ways in which a detentor can be released from its position as detentor is by permission from its counterparty or contradiction of the right of the counterparty. PSUF at 175. Because Goudstikker's heirs never gave the GON permission to stop detaining the Cranachs for them, and the GON never presented them with a notification to the effect that it intended to keep the paintings for itself, the GON remained detentor, and thus was not entitled to transfer the Cranachs as a result of the waiver.

Cranachs' ownership following a French court decision months before the sale of the Cranachs to Stroganoff found that Stroganoff had no right of inheritance through his uncle Count Serge Stroganoff, the ancestor through whom Stroganoff claimed ownership of the Cranachs in his original "notification" to the GON. PSUF at 69. *See* pp. 15-16, *supra*.

Third, also as explained above, one of the cases in which the German courts ruled that the Soviet Union's nationalizations of property gave it good title to sell such property at auction, was brought, and lost, by Stroganoff's own mother and purported predecessor in interest, Olga Scherbatoff. PSUF at 71. Thus, Stroganoff was not reasonably justified in concluding that the nationalization of the Cranachs, even if they had been previously owned by the Stroganoff family, would not have legally removed any rights to title that he might have otherwise had. PSUF at 103. *See* pp. 16-17, *supra*.

Fourth, Stroganoff had reason to believe that the Goudstikker Gallery had obtained good title to the Cranachs upon Jacques's purchase at the Lepke auction. He was aware that Jacques was a major purchaser at Lepke and that the Cranachs were sold there, as evidenced by his attorney's statement to this effect when he tried unsuccessfully to get the United States Customs Bureau to detain property purchased at the auction. Significantly, the Customs Bureau responded: "The Bureau is unaware of any provision of law which would warrant the detention of the merchandise referred to unless it is brought into the United States illegally." PSUF at 104. Stroganoff never tried to recover the Cranachs from the Goudstikker Gallery, demonstrating that he must have concluded any attempt would be unsuccessful. PSUF at 105. This is further evidence of Stroganoff's lack of objective good faith belief that he owned the Cranachs and was able to transfer them to the GON.

Fifth, when Stroganoff re-wrote the provenance of the Cranachs in

connection with the sale to the Museum, he did not include the GON. PSUF at 29. If Stroganoff really believed that the GON had become the owner of the paintings pursuant to his 1966 waiver, he would have and should have included the GON in the provenance list.

Moreover, the artifice did not succeed for yet another reason. In order for the GON to have acquired good faith title under Art. 2014 from Stroganoff (who had no title to transfer) as a result of the waiver/transfer, the GON would have had to have subjectively and objectively believed that Stroganoff had title to convey to it. PSUF at 176. But the GON clearly had neither the requisite subjective nor objective belief that Stroganoff was the owner. Rather, the GON made it clear that it did not accept Stroganoff's ownership claim, but went along with the waiver simply to help solve the unexpected difficulties that had suddenly manifested themselves the previous day. PSUF at 106.

POINT IV

THE ACT OF STATE DOCTRINE IS INAPPLICABLE TO THE SALE OF THE CRANACHS BY THE GON TO STROGANOFF

In its most recent opinion in this case, the Court of Appeals remanded for further consideration the act of state defense (Sixth Defense) raised by Defendants. *Von Saher v. Norton Simon Museum of Art* ,754 F.3d 712, 727 (9th Cir. 2014). In so doing, the Court of Appeals provided guidelines governing the factual and legal issues pertaining to this defense. A review of these issues, in light of the uncontroverted facts uncovered during discovery, demonstrates that there is no basis for the application of the act of state doctrine as a defense to Marei's claims.

As the Court of Appeals made clear, the only "act" to be analyzed in this context is the transfer of the Cranachs to Stroganoff by the GON in 1966, and the key question is whether this transfer was a sale or a restitution. *Id.* As we explain

in detail below, the documents regarding this transfer found in the files of the Dutch Ministries of Culture and Finance demonstrate, the GON sold the Cranachs to Stroganoff for what the GON thought was fair value, as reflected by the contract of sale signed by both parties. PSUF at 26. Moreover, the GON consistently maintained the position throughout this period that Stroganoff had no right to the Cranachs and therefore never considered, let alone effected, a restitution of the paintings to him. PSUF at 24. In the face of the GON's opposition, Stroganoff changed his position and offered to buy the Cranachs from the GON. PSUF at 25. The GON eventually accepted the offer. No restitution decree or any other official statute, decree, order or resolution issued from the GON in connection with the sale to Stroganoff. PSUF at 107.

A. <u>This Case Does Not Seek To Invalidate An Act Of The GON</u>

But prior to analyzing the nature of the transfer of the Cranachs to Stroganoff, the first inquiry must be whether this Court is being asked to declare the transfer invalid. The Court of Appeals set this forth as a basic tenet of the act of state doctrine: "In every case in which . . . the act of state doctrine appli[es], the relief sought . . . would . . . require[ ] a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *Von Saher*, 754 F.3d at 725 (*citing W.S. Kirkpatrick & Co. v. Env't Tectonics Corp. Int'l*, 493 U.S. 400, 405, 110 S. Ct. 701, 705, 107 L. Ed. 2d 816, 822 (1990)). Regardless of whether the transfer to Stroganoff was a sovereign act for these purposes, the act of state doctrine simply does not come into play because Plaintiff is not seeking to have the transfer declared invalid.

The only issue that must be determined in this case with respect to the transfer to Stroganoff is whether title passed to Stroganoff under Dutch law as a result of the transfer, not whether the transfer itself is valid. Plaintiff is not seeking to invalidate the transfer, *i.e.*, she does not contend that the Cranachs should return

to the custody of the Dutch Government. Rather, since the transfer to Stroganoff was incontestably in the form of a sale (PSUF at 26), the issue is whether Stroganoff acquired title under Dutch law.[11]

Similarly, the court in *Portrait of Wally*, 663 F. Supp. 2d at 248, concluded that the act of state doctrine did not apply where, as here,

> the Court is not being asked to invalidate any action by [a] governmental authority, but only to determine the effect of such action, if any, on [the painting's] ownership. *See Kirkpatrick*, 493 U.S. at 409-10 ("The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.")

In *Wally*, the "acts" considered by the court for this purpose were three "express approvals" issued by ministries of the Austrian government taking possession and then transferring the paintings at issue in that case to an individual other than the claimant. Despite the official nature of these transfers, the Court saw no act of state issue since whether ownership resulted from the transfers was the only issue relating to these transfers, not their validity. *A fortiori*, in this case, where no official decrees of any kind were issued, the act of state doctrine is not applicable. As the Court of Appeals emphasized, the "justification for invoking the act of state doctrine 'depends greatly on the importance of the issue's implications for our foreign policy.'" *Von Saher*, 754 F.3d at 725 (*citing Northrop v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1047 (9th Cir. 1983)). Since the determination of title transfer under Dutch civil law accords all due respect for "the independence" of the GON, the basic reason for application of the act of state

[11] As shown in Point III, *supra*, Stroganoff could not have obtained title pursuant to Dutch law due to his lack of good faith. In any event, the act of state doctrine is not implicated.

doctrine is not implicated. *Id.* (*citing Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 84, 42 L. Ed. 456, 457 (1897)).

B. Since The Transfer To Stroganoff Was A Sale, Not A Restitution, It Was Not An Official Sovereign Act Of The GON

Even if validity of the transfer were at issue here, the act of state doctrine would not apply. As the Court of Appeals held, the key question that would then have to be determined by this Court with respect to the act of state doctrine, is "whether the conveyance to Stroganoff constituted an official act of a sovereign . . . ." *Von Saher*, 754 F.3d at 725-26, *citing Kirkpatrick*, 493 U.S. at 409. *See also Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682, 695 (1976), also cited by the Court of Appeals (*Von Saher*, 754 F.3d at 712), in which the Court had pointed to the fact that "the foreign government had not offered a government 'statute, decree, order, or resolution' showing that the government action was undertaken as a 'sovereign matter.'"[12] These kinds of actions that distinguish a sovereign act of state from private actions like a sales contract are missing in this case.

Applying this analysis, the Court of Appeals determined that the specific question to be resolved with respect to the act of state issue is whether the transfer to Stroganoff constituted a "sale" by the Netherlands or a "return[ ] [of] the Cranachs to Stroganoff to satisfy some sort of restitution claim." *Von Saher*, 754 F.3d at 726. The Court of Appeals found that the "record casts doubt" on the Museum's contention that the transfer satisfied a restitution claim that Stroganoff made, and noted that the deadline for filing an internal restitution claim in the

[12]This is in the portion of *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976) that was held by a majority of the justices, not having to do with the commercial activity exception agreed to by only a plurality.

Netherlands expired on July 1, 1951, well before Stroganoff asserted his claim to the Cranachs. *Id.* at 722. PSUF at 108. Furthermore, the Court of Appeals explained,

> the Restitution of Legal Rights Decree, which governed the Dutch internal restitution process, was established to create 'special rules regarding restitution of legal rights and restoration of rights in connection with the liberalization of the [Netherlands]' following World War II. The Decree included provisions addressing the restitution of wrongful acts committed in enemy territory during the war. To the extent that Stroganoff made a claim of restitution, however, it was based on the allegedly wrongful seizure of the paintings by the Soviet Union before the Soviets sold the Cranachs to Jacques Goudstikker in 1931 – events which predated the war and any wartime seizure of property. Thus, it seems dubious at best to cast Stroganoff's claims as one of internal restitution.

Id. PSUF at 84.

The documents from the GON files reflecting the communications preceding and at the time of the transfer to Stroganoff bear out the Court of Appeals's skepticism about the transfer being anything but a sale. Specifically, the Head of Legislation and Legal Affairs Division reports to the State Secretary that only the "Goudstikker Company" could possibly have a restitution claim to the artworks under the post-War restitution decrees, "and in any case not Mr. Stroganoff." PSUF at 109. Perhaps even more telling is the actual document presented by Stroganoff's attorney comprising his so-called "notification" to the GON regarding his request for the Cranachs. PSUF at 23. This document asks that the GON hand over the claimed artworks or explain its refusal to do so. No restitution or other provisions of Dutch law are cited in the document and it expressly states that it was "issued so that the party notified is informed in a legal manner of the facts and circumstances as described in this notification, as well as interruption of the limitation period." PSUF at 110. Indeed, at his deposition, Defendants' own

expert agreed. Dr. Lars Van Vliet testified that the notification "is an attempt for an amicable solution to the problem and it also stops any limitation period. So this is simply an informal request of returning the object. So we don't really have a formal word for it. It is not a *Dagvaarding* which is the formal word for the document starting legal proceedings." PSUF at 111.

The key document is the contract of sale between the State of the Netherlands and George Stroganoff Scherbatoff, dated July 1966, which provides that the State sells to Stroganoff and that Stroganoff buys from the State three paintings including the Cranachs at a purchase price of 60,000 Dutch Guilders. PSUF at 26. There is no mention of restitution in this document nor did any "statute, decree, order or resolution" officially issue from the GON. *See Alfred Dunhill*, 425 U.S. at 695. It is a contract of sale, plain and simple.

Indeed, GON officials repeatedly denied that Stroganoff had any valid claim. PSUF at 24. In the face of this rejection, Stroganoff offered to buy the Cranachs from the GON. PSUF at 25. The GON itself acknowledged that Stroganoff's offer to purchase the Cranachs at a reasonable price "does not concur" with a claim for restitution. PSUF at 112. As a result, there was no need for legislation to authorize the transfer of the Cranachs to Stroganoff, which would have been required if this were a "settlement" of his claim rather than a sale. PSUF at 107. The lack of legislation demonstrates without question that "private" rather than "public" interests were involved in this sale transaction, the characterizations utilized by the Court of Appeals to distinguish a sale from a restitution. *Von Saher*, 754 F.3d at 726 (*citing Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406-07 (9th Cir. 1983)).

Meanwhile, as the negotiations between Stroganoff and the GON proceeded, an American named W.F.C. Guest, acting on Stroganoff's behalf, tried to get Prince Bernhard, Queen Juliana's husband, involved. But a memorandum

prepared by Guest indicates that Stroganoff did not have a valid legal claim to the artworks he sought, stating instead that his claim was based on "simple justice" and not on the law. PSUF at 113, 114. This was confirmed by the Head of Legislation and Legal Affairs. PSUF at 114. Finally, after further negotiations, the GON and Stroganoff agreed that Stroganoff would purchase the Cranachs and two other paintings. PSUF at 115.

What happened thereafter is further evidence that this was a sale and not a restitution. The GON learned after the sale that the price paid by Stroganoff was substantially lower than the actual market value of the sold paintings and considered nullifying the entire agreement on that basis. PSUF at 116. This demonstrates that it was the Government's intention to sell and realize the market value of the Cranachs without regard to any claim that Stroganoff asserted. There was no official action to restitute the Cranachs to Stroganoff.

The position of the Dutch Government regarding the current lawsuit further demonstrates that no act of state is involved here. In a letter dated February 6, 2006, an attorney representing the Defendants wrote to the Dutch ministers of finance and culture: "the NSAF respectfully requests the Dutch government to confirm that it lawfully conveyed title to the 'Adam' and 'Eve' paintings by Cranach to George Scherbatoff in 1966." PSUF at 47. In response, the Secretary of Education, Culture and Science wrote: "I refrain from an opinion regarding the two pieces of art under the restitution policy." PSUF at 48. When counsel for Plaintiff subsequently inquired as to whether Defendants had been in contact with the GON about this case, the Ministry for Education, Culture and Science responded: "I confirm to you that the State of the Netherlands is not involved in this dispute. The State is of the opinion that this concerns a dispute between two private parties." PSUF at 49. Thus, as the Museum is well aware, the GON has itself answered the inquiry that a court must make in its act of state analysis. When

given the opportunity to take a position or raise concerns about this case, the GON disavowed any interest, emphasizing the dispute was a "private" matter. The GON made clear that it has no concerns that its sovereign acts are implicated in any way.

No public interests are involved here, regardless of whether it was the GON who sold the Cranachs to Stroganoff. As the Court in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979) held, the granting of patents by a governmental entity did not constitute "a considered policy decision by a government to give effect to its political and public interests." *Von Saher*, 754 F.3d at 726 (*citing Clayco*, 712 F.2d at 406-07). "[T]he grant of patents . . . is not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs." *Mannington Mills*, 595 F.2d at 1294. As with the grant of patent rights, the sale to a private citizen of artworks in the government's custody reflect only private rather than political or public interests, and are of no substantial concern to the executive branch. As in *Clayco*, sovereign activity here "merely formed the background to the dispute." *Clayco*, 712 F.2d at 406. The GON's 2006 letter made that clear.

The GON's position is also relevant when one considers the policies behind the act of state doctrine as this Court is required to do. The Court of Appeals emphasized that the act of state doctrine is not an "inflexible and all-encompassing rule." *Von Saher*, 754 F.3d at 725 (*citing Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 84 S. Ct. 923, 940, 11 L. Ed. 2d 804, 823 (1964)). It is instead "'a sort of balancing approach' [that] can be used to determine whether the policies underlying the doctrine justify its application." *Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 350 (C.D. Cal. 1997) (*citing Kirkpatrick*, 493 U.S. at 409). The key question is whether a court's inquiry into the foreign sovereign's acts will interfere with the conduct of foreign policy relations. *Northrop Corp.*, 705 F.2d at 1047. When, as here, the GON has determined that it

has no sovereign interest in this case, there can be no foreign policy concerns.

It is important to consider in this context that in 2006 the GON restituted all of the Goudstikker artworks still in its custody that had been looted by Göring. PSUF at 42. This would have included the Cranachs if they were still in its custody at that time.[13] Thus, any decision by this Court that the Cranachs should be returned would be in accord with actions that the GON has already taken. As stated in *Sabbatino*, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." *Sabbatino*, 376 U.S. at 428. Here, where the foreign sovereign has disclaimed interest in this litigation and the relief sought would conform with the policy of the GON, there is no reason for the Judiciary to defer to the "political branches." *Von Saher*, 754 F.3d at 730-31. Indeed, as the Court of Appeals determined, it is also consistent with United States restitution policy. *Id.* at 722-23.

C. Exceptions To The Act Of State Doctrine Apply In This Case

That should end the matter with respect to the act of state doctrine. But as the Court of Appeals analysis referred to exceptions to the act of state doctrine that might come into play, Plaintiff, in an exercise of caution, will also do so. As shown below, each one of the exceptions to the act of state doctrine to which the Court of Appeals refers applies in this case.

First, with respect to the commercial exception discussed by the Court of Appeals, if such an exception is recognized by the Ninth Circuit, it would clearly apply here. As we have shown above, the transfer of the Cranachs by the GON to Stroganoff was a sale, and, as a result, did not comprise a sovereign act, let alone the exercise of a power "peculiar to sovereigns." *See Von Saher,* 754 F.3d at 726 (*citing Alfred Dunhill*, 425 U.S. at 704). As the District Court of the District of

[13] See n.3, *supra.*

Columbia further explained in the case of *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 339 (D.D. Cir. 2007), the government's purchase of paintings, although "official" in the sense that it was effected by a government employee acting in his official capacity, "was not an action taken by right of sovereignty" because "any private person or entity could have purchased the paintings for display in a public or private museum." The same, of course, can be said for a sale of artworks by the government. Courts have repeatedly held that the key to determining whether an act by the government is an "act of state," is whether it could be effected by a private person; if so, it cannot be considered a sovereign act under the act of state doctrine. *See McKesson Corp. v. Islamic Republic of Iran*, Civ. Action No.82-0220 (RJL), 2009 WL 4250767, at *5 (D.D. Cir. Nov. 23, 2009), *aff'd in part, rev'd in part*, 672 F.3d 1066 (D.D. Cir. 2012); *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 143 (D.D. Cir. 2011), *aff'd in part, rev'd in part*, 714 F.3d 591 (D.D. Cir. 2013)) (the actions challenged by the plaintiffs are commercial acts that "could be committed by any private university or museum"; such "'purely commercial' acts do not require deference under the act of state doctrine").

Second, another exception to the act of state doctrine to which the Court of Appeals referred would apply here even if the GON's sale was deemed to be a sovereign act that would otherwise be subject to the act of state doctrine. As the Court of Appeals explained, the Second Hickenlooper Amendment provides that the act of state doctrine does not apply to a taking or confiscation (1) after January 1, 1959, (2) by an act of state (3) in violation of international law. 22 U.S.C. §2370(e)(2). *Von Saher*, 754 F.3d at 725. If this Court should somehow determine that the transfer of the Cranachs to Stroganoff was not a sale but rather was effected to restitute them to him, then that would constitute a confiscation of Dési's property without compensation in violation of international law, since Dési was not

a Dutch national at the time of the transfer[14] (*see generally, Chuidian v. Phillippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990) and the Cranachs were in the U.S. when this action was commenced[15] (*see Hilsenrath v. Swiss Confederation*, No. C 07-02782 WHA, 2007 WL 3119833, at *6 (N.D. Cal. Oct. 23, 2007)).

The Museum's own research confirmed that there is no evidence that Stroganoff's family ever owned the Cranachs. See Point VII, *infra*. The Dutch Government has ruled officially that the paintings looted by Göring should be restituted to Marei. See Point VI, *infra*. Under these circumstances, if the Government had "restituted" the Cranachs to Stroganoff, it would have wrongfully expropriated them from Dési Goudstikker without compensation in violation of international law,[16] and the Second Hickenlooper Amendment would bar any application of the act of state doctrine. Even if the transfer was a sale by the GON to Stroganoff, it would still have been an expropriation without compensation.

For all these reasons, there is no merit to the Museum's act of state defense and it should be dismissed.

POINT V

SEVERAL DEFENSES HAVE ALREADY BEEN DETERMINED AND REJECTED IN THIS CASE

The law of the case doctrine precludes a court from "reconsidering an issue previously decided by the same court, or a higher court in the identical case."

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[14] PSUF at 13.

[15] PSUF at 30.

[16] 2 Restatement (Third) of the Foreign Relations Law of the United States §712, comment c (1987); *see also*, *Republic of Austria v. Altmann*, 317 F.3d 954, 968 (9th Cir. 2002) (taking of paintings by foreign government could not be valid absent the payment of just compensation); *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 306 (D.D. Cir. 2005) (purchase of paintings by City of Amsterdam without compensation to true owners considered a "taking without compensation" and therefore "violate[d] international law").

Ingle v. Circuit City, 408 F.3d 592, 594 (9th Cir. 2005); *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). Several of the defenses alleged by Defendants have been rejected by prior decisions in this case and therefore should not be relitigated.

A. Seventh And Ninth Defenses: Statute Of Limitations And Due Process/Takings

In the April 2 Order, this Court held that this action is timely under California Code of Civil Procedure §338, as amended, because (1) based on the allegations of the FAC, Plaintiff did not actually discover that the Cranachs were at the Norton Simon Museum until October 25, 2000; (2) she entered into a tolling agreement with Defendants as of September 26, 2003; and (3) she filed her initial complaint on May 1, 2007. These facts are uncontroverted. PSUF at 31, 117, 118. This Court's decision holding this action timely under §338 is therefore law of the case, and Defendants' Seventh Defense must be rejected.

Further, the April 2 Order also defeats Defendants' due process defense, in which Defendants allege that "[t]hrough the expiration of prior statutes of limitation against Defendants and/or their predecessors in interest, Defendants acquired vested property rights in the Cranachs," and that divesting such vested property rights would violate the constitutional due process and takings clauses. This Court expressly held that expiration of the statute of limitations "does not thereby divest the owner of title." April 2 Order at 10, Dkt. 119. Thus, Defendants could not have acquired vested property rights from any such expiration and the predicate for Defendants' due process or takings claim does not exist. *See Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 311-12, 65 S. Ct. 1137, 1141, 89 L. Ed. 1628, 1634 (1945) ("where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action

is barred thereby, restore to the Plaintiff his remedy, and divest the Defendant of the statutory bar"). Defendants' Ninth Defense has already been rejected by this Court.

B. Twelfth And Nineteenth Defenses: Foreign Affairs Doctrine/Conflict Preemption And Political Question

The respective bases of these defenses are that "Plaintiff's claims directly conflict with United States foreign policy" and that "[t]o resolve Plaintiff's claims in her favor would require the Court to undertake such inquiries and resolve them in ways directly contrary to the manner in which they have been resolved by the Executive." The Court of Appeals in this case has expressly held that Plaintiff's claims "do not conflict with any federal policy." *Von Saher*, 754 F.3d at 721. Therefore, the issues raised by Defendants in these defenses have been definitively determined by the Court of Appeals and they comprise law of the case. These defenses must also be rejected.

The Court of Appeals held that since the Cranachs were never subject to post-War internal restitution proceedings in the Netherlands, "allowing von Saher's claim to go forward would not disturb the finality of any internal restitution proceedings – appropriate or not – in the Netherlands." *Id.* at 723. Therefore, there could be no conflict between the restitution policy of the United States and any such proceedings. *Id.* The Court of Appeals based its decision on three facts, each of which is undisputed or indisputable. *Id.*

"(1) Dési chose not to participate in the initial postwar restitution process." Defendants admit that this allegation is true. *See* FAA ¶ 32, PSUF at 119.

"(2) the Dutch Government transferred the Cranachs to Stroganoff before Dési or her heirs could make another claim." *Id.* at 723. It is undisputed that the Cranachs were transferred to Stroganoff by the GON in 1966 (*See, e.g.*, FAA ¶ 40, PSUF at 26) and it is indisputable that the deadline for bringing a restitution claim

had expired on July 1, 1951. *See, e.g.*, the decision of the Court of Appeals of The Hague, cited by the Court of Appeals. PSUF at 108, 120.

"(3) Stroganoff's claim likely was not one of internal restitution . . . ." *Id.* at 723. As was explained in detail in Point IV, *supra*, this conclusion of the Court of Appeals is not only proven by the facts that Stroganoff's claim for the Cranachs was not subject to the post-War restitution procedures and was not asserted before the deadline for such procedures (PSUF at 108), but also by the nature of Stroganoff's claim, which did not purport to commence a restitution or any other proceeding (as conceded by Defendants' own expert) (PSUF at 111) and by the GON's officials' own conclusions that the GON's transfer of the Cranachs to Stroganoff was a sale and not a restitution. PSUF at 24.

Besides concluding that Plaintiff's claims did not conflict with United States policy, the Court of Appeals went further and held that her claims are "in concert" with federal policy:

> Von Saher is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims . . . . Moreover, allowing her lawsuit to proceed would encourage the Museum, a private entity, to follow the Washington Principles, as the Terezin Declaration urged. Perhaps most importantly, this litigation may provide Von Saher an opportunity to achieve a just and fair outcome to rectify the consequences of the forced transaction with Göring during the war. . . . [17]

Von Saher, 754 F.3d at 723.

Having held that there is no conflict with the Executive's conduct of foreign policy and indeed having determined that Plaintiff's claims are consistent with that

[17]As the Court of Appeals emphasized, in the Terezin Declaration, "'[t]he Participating States urge[d] that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress[.]'" *Von Saher*, at 721.

policy, the Court of Appeals concluded that this is "a dispute between private parties." *Id.* at 725. Therefore, the doctrines of conflict preemption and political question – and the defenses setting them forth – are no longer in the case and these defenses should be dismissed.

POINT VI

OFFICIAL DETERMINATIONS ISSUED BY THE GON RESTITUTING GÖRING LOOTED ARTWORKS TO PLAINTIFF CONSTITUTE ACTS OF STATE

Several of Defendants' defenses take issue with, and seek to undermine, the official determination by the GON to restitute 200 works of art to Marei von Saher, including certain official findings that were made that pertain to the issues in this case. By so doing, Defendants are asking this Court to invalidate the GON's determinations and findings. Since these are official sovereign acts of state, to the extent that any of Defendants' defenses challenge these determinations and findings, they must be dismissed.

In 2001, the GON officially determined that its post-War policies regarding the restoration of Nazi-looted property should be re-examined: "Based on our examination of the documents relating to a great number of post-war claims we must describe the way in which the Netherlands Art Property Foundation generally dealt with the problems of restitution as legalistic, bureaucratic, cold and often even callous." PSUF at 34. Thus, it was the Netherlands's own conclusion that its post-War restitution proceedings were not conducted in good faith, and that going forward it would review claims for such property based upon a more policy-oriented approach. Following this policy change, Plaintiff, through the successor entity of the Goudstikker Gallery, submitted a claim for artworks looted from the Goudstikker Gallery to the State Secretary of the GON's Ministry of Education, Culture and Science, which oversees the GON's restitution policy, and the State

Secretary referred the claim to the Restitutions Committee. PSUF at 35-37. These facts are admitted by Defendants (compare FAC, ¶ 63 with FAA, ¶ 63) and are evidenced by official Dutch government records. PSUF at 35-37.

After an intensive review of the historical evidence, the Restitutions Committee advised the State Secretary to restitute to Plaintiff all of the artworks in the custody of the GON that, like the Cranachs, had been taken from the Goudstikker Gallery by Göring. PSUF at 38. The Restitutions Committee found that the transactions through which Göring purported to purchase all of Jacques's artworks comprised an involuntary forced sale. PSUF at 39. Referring to Dési's complaint about unfair treatment at the hands of the Dutch bureaucracy, the Restitutions Committee found that "the authorities responsible for restorations of rights or their agents wrongfully created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily." PSUF at 40. It concluded that Dési did not waive her rights to the Göring looted works. PSUF at 41.

On February 6, 2006, the State Secretary adopted the Restitutions Committee's advice and decided to restitute to Marei 200 artworks looted by Göring from Goudstikker, and still in the GON's custody. PSUF at 42. The State Secretary specifically found that "grounds for restitution exist in this particular case in accordance with the committee's recommendation:"

> In so doing I am especially mindful of the facts and circumstances relating to the involuntary loss of property and the settlement of the case in the early 1950's as highlighted by the committee in its extensive investigation.
>
> . . .
>
> With regard to the 'Göring transaction', the Restitutions Committee concludes that Goudstikker had suffered involuntary loss of possession, since the rights to those works were never waived as they were not covered by the 1952 settlement. Accordingly, it

> recommends that the application for restitution be granted. I hereby adopt this recommendation.

PSUF at 121. It follows that had the Cranachs still been in the custody of the Dutch Government in 2006, they, too, would have been returned to Plaintiff.

In her report to the President of the House of Representatives of the States General officially conveying her restitution decision, the State Secretary explained her decision further. She stated that the Restitution Committee based its recommendations on the "extended restitution policy", which was adopted in accordance with the Washington Principles. Following these principles, the Committee decided to "depart from a purely legal approach . . . to choose a more moral policy approach." PSUF at 43.

Even though the Restitutions Committee found that the Dutch Court of Appeals decision in 1999 did not "settle" the restoration of rights issue (PSUF at 44), the State Secretary disagreed and explained that this is the reason "why this case is not included in the current restitution policy." PSUF at 120. She nevertheless concluded that this was a "special" case that justifies a restitution because of "the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties as this has been put forward by the Committee in its extensive investigation." PSUF at 45-46.

There can be no question but that the State Secretary concluded that the Goudstikker matter had not been dealt with appropriately in the early Fifties. This determination, and the findings of the State Secretary are "official act[s] of a foreign sovereign performed within its own territory." *Von Saher*, 754 F.3d at 725 (*citing Kirkpatrick*, 493 U.S. at 405). First, the decision of the State Secretary was an official "decree, order or resolution showing that the government action was

undertaken as a 'sovereign matter.'" *Id.* at 726 (*citing Alfred Dunhill*, 425 U.S. at 695). Indeed, as a restitution decision, it fits easily into the Court of Appeals' analysis of sovereign activity like restitution constituting "a considered policy decision by a government to give effect to its political and public interests" (*Von Saher*, 754 F.3d at 726, *citing Clayco*, 712 F.2d at 406-07 and *Ricaud v. Am. Metal Co.* 246 U.S. 304, 310, 38 S. Ct. 312, 317, 62 L. Ed. 733, 746 (1918)) as opposed to private interests like a sale (*Von Saher*, 754 F.3d at 726 (*citing Clayco*, 712 F.2d at 406-07)). Therefore, the act of state doctrine applies since the defense interposed would "require[ ] a court in the United States to declare invalid [this] official act of a foreign sovereign performed within its own territory." *Von Saher*, 754 F.3d at 725 (*citing Kirkpatrick*, 493 U.S. at 405).

The State Secretary's actions "cannot become the subject of re-examination and modification in the courts of another." *Ricaud*, 246 U.S. at 310. Indeed, "inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert." *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal.), *aff'd*, 461 F.2d 1261 (9th Cir. 1972). As the Court in *Buttes* emphasized, "'our courts should be even more sensitive to the involvements of a sovereign's action when the sovereign is not a party to the action, and the adjudication as it affects its prestige and dignity partakes of the nature of an ex parte proceeding.'" *Id.* at 111 (citation omitted).

The policy decision by the State Secretary to adopt the factual findings of the Restitutions Committee regardless of the previous Dutch Court of Appeals decision was motivated by her determination that this was a "special case" based on the facts the Restitutions Committee found, including the manner in which the matter had been dealt with by the post-War GON and the fact that Dési never waived her claims. PSUF at 120, 45-46. The motivation of the State Secretary in

this regard cannot be questioned or impugned by Defendants or this Court (*see Clayco*, 712 F.2d at 407 ("This circuit's decisions have similarly limited inquiry which 'would impugn or question the nobility of a foreign nation's motivation'") (*citing Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 607 (9th Cir. 1976)), and the wisdom of her policy and the integrity of her actions cannot be challenged. *See Timberlane*, 549 F.2d at 607.

Indeed, to do otherwise would be directly contrary to U.S. Government policy on restitution, as described in detail by the Court of Appeals. *See Clayco*, 712 F.2d at 407. Specifically, the Court of Appeals held that United States policy on the restitution of Nazi-looted art included "a commitment to respect the finality of 'appropriate actions' taken by foreign nations to facilitate the internal restitution of plundered art" and "a recommendation that every effort be made to remedy the consequences of forced sales." *Von Saher*, 754 F.3d at 721. Any questioning of the conclusions of the Restitutions Committee or the State Secretary that undermined their decisions to restitute the looted artworks to Marei would be directly contrary to the Executive Branch's pronounced policies. *See Id*. at 726 (*citing Clayco*, 712 F.2d at 407).

Nonetheless, in several of its defenses, Defendants ignore the findings and decisions of the Restitutions Committee and the State Secretary and ask this court to rule as if they did not exist or were invalid. To do so flies directly in the face of the act of state doctrine and these defenses should be dismissed on this basis. *Kirkpatrick*, 493 U.S. at 409-10.

The Second, Fifth and Fifteenth Defenses are based on Defendants' allegation that Dési waived her claims to the artworks taken by Göring. The argument that Dési waived her claims to the Göring property has been specifically rejected by the official determinations of the Restitutions Committee and the State Secretary and cannot be challenged under the act of state doctrine. PSUF at 41,

121.

The Eleventh Defense refers to various prior decisions by the GON and seeks to grant them res judicata and/or collateral estoppel effect as well as enforcement through the doctrine of comity. One of the decisions to which Defendants refer is the 2006 letter from the State Secretary, which ruled in favor of Plaintiff on the critical issues involved in this case, and found that Dési had never waived her rights to the artworks taken by Göring. PSUF at 121. Furthermore, that 2006 decision, along with the related investigative report and recommendation of the Restitutions Committee, made findings that took the prior decisions to which Defendants refer, like the 1999 Court of Appeals decision, into consideration. PSUF 38, 41, 42, 120. Nevertheless, the State Secretary, motivated by the new policy adopted by the GON, granted restitution regardless of any prior judgments or rulings. PSUF 43, 35. As an act of state, the State Secretary's motivation cannot be questioned. Therefore, this defense, which seeks to rely on decisions that have been superseded by an act of state, is also of no merit.

The Sixteenth Defense is framed as one of "consent" but it is identical to the preceding defenses alleging waiver and should be rejected on the same bases.

The Seventeenth Defense claims equitable estoppel based on the same allegations of waiver as the prior defenses described above. To the extent that this defense also alleges prejudice resulting from such waiver, it parrots the allegations of the laches defense, to which we respond in detail in Point VII, *infra*.

The Eighteenth Defense again sets forth the same allegations of waiver as above and should similarly be rejected.

By challenging the findings of the Restitutions Committee and the State Secretary, including the determination that Dési never waived her claims for the Göring looted artworks, which included the Cranachs, Defendants in these defenses are seeking to invalidate sovereign acts of state and such defenses must

therefore be dismissed on the basis of the act of state doctrine.

POINT VII

DEFENDANTS HAVE FAILED TO ESTABLISH THEIR LACHES DEFENSE: THERE WAS NO UNREASONABLE DELAY BY PLAINTIFF IN BRINGING HER CLAIM AND DEFENDANTS IGNORED THE TRUE PROVENANCE OF THE CRANACHS

The Eighth Defense alleged in the FAA is laches. Based on Plaintiff's undisputed testimony, there was no unreasonable delay on her part in bringing her claim. Plaintiff learned of the whereabouts of the Cranachs on October 25, 2000, Defendants admitted that they were contacted by her no later than 2001, and the parties entered into a tolling agreement in September 2003. PSUF at 31, 117. Moreover, as established by Defendants' records and testimony elicited at deposition from current and former employees of Defendants, they were on notice at the time they acquired the Cranachs that the second highest ranking Nazi figured prominently in the provenance of the paintings. PSUF at 29. This would have been a red flag to any purchaser, but especially to a sophisticated museum, that the Cranachs had been looted by the Nazis and could be the subject of a restitution claim. In addition, Defendants were aware that the provenance that they had been given by Stroganoff did not match the provenance given in known publications about the Cranachs, thus raising another red flag. PSUF at 125-126. At the very least, Defendants should have taken steps to clarify the provenance of the artworks and if they had, they would have learned that their acquisition was subject to challenge. They instead did nothing until decades later when their research revealed what should have been uncovered before they acquired the works. PSUF at 133, 137-138.

As a result, Defendants cannot establish any prejudice based on any delay on Plaintiff's part in asserting her claim, even if there were such delay. It was

Defendants' own delay and indifference to the facts before them that caused them to acquire stolen property that they knew or should have known could be claimed by the Goudstikker family. Further, by ignoring the fact that they were acquiring stolen property, Defendants have unclean hands and therefore cannot assert the equitable defense of laches. Their defense should be dismissed as a matter of law.

In this diversity action, the equitable defense of laches is governed by California law (*see Admiral Ins. Co. v. Debber*, 442 F. Supp. 2d 958 (E.D. Cal. 2006), *aff'd*, 295 F. App'x 171 (9th Cir. 2008); *San Francisco Bay Area Rapid Transit Dist. v. Gen. Reinsurance Corp.*, No. 14-CV-01866-JSC, 2015 WL 3902336, at *12 (N.D. Cal. June 24, 2015)), and is determined by the court, rather than the jury, even where there are factual disputes to be resolved (*Miller v. Eisenhower Med. Ctr.*, 27 Cal. 3d 614, 624, 166 Cal. Rptr. 826, 832 (1980); *Gerhard v. Stephen*, 68 Cal. 2d 864, 904, 69 Cal. Rptr. 612, 642 (1968); *Conti v. Bd. of Civil Serv. Comm'rs*, 1 Cal. 3d 351, 357-58, 82 Cal. Rptr. 337, 342 (1969)). The elements are well-established: laches "requires unreasonable delay in bringing suit plus either acquiescence in the act about which Plaintiff complains or prejudice to the Defendant resulting from the delay." *Peterson v. Sup. Ct. of L.A. Cnty.*, 31 Cal. 3d 147, 181 Cal. Rptr. 784 (1982); *Conti*, 1 Cal. 3d at 359, 82 Cal. Rptr. at 342.

The burden of proving laches is on Defendants (*see id.*, 1 Cal. 3d at 361, 82 Cal. Rptr. at 344; *Miller*, 27 Cal. 3d at 624, 166 Cal. Rptr. at 832; *see also* 30 Cal. Jur. 3d Equity §53) and they have failed to meet it here. First, their claim that Plaintiff unreasonably delayed bringing a claim for the Cranachs and/or that Plaintiff acquiesced in Defendants' or their predecessors' possession of these artworks seems based on their allegation that Dési waived her claims to the works taken by Göring by failing to file a claim with the GON after the War. But the GON has found that Dési waived none of her claims at that time, in an act of state

that cannot be challenged in this case. *See* Point VI, *supra*.

Plaintiff asserted her claim to the Cranachs shortly after learning that they were in the possession of Defendants, a fact that has not been disputed by Defendants other than in a conclusory fashion. PSUF at 31. Defendants have offered no evidence to show that Plaintiff was even aware of the looting by Göring or her claim to the paintings taken by him before 1997. Nor is there any evidence that Plaintiff was aware that the Cranachs had been sold by the GON until 1998. Marei first learned that the Cranachs were at the Norton Simon Museum on or about October 25, 2000 when she was so advised by a researcher named Konstantin Akinsha. PSUF at 31. The Museum has proffered no evidence to establish anything to the contrary. Therefore, the Museum has failed to meet its burden of establishing the necessary delay or acquiescence necessary to establish laches. Under these circumstances, Defendants have no support for their allegations of unreasonable delay or acquiescence on Plaintiff's part.

Even if the Museum were able to establish undue delay and/or acquiescence on Plaintiff's part, its laches defense must still fail for lack of establishing that it was prejudiced by any such delay. Prejudice may not be presumed by the court, but rather must be "affirmatively demonstrated by the Defendant in order to sustain his burdens of proof and the production of evidence on the issue." *Miller*, 27 Cal. 3d at 624, 166 Cal. Rptr. at 832. "It is not so much a question of the lapse of time as it is to determine whether prejudice has resulted. If the delay has caused no material change *in status quo, ante, i.e.*, no detriment suffered by the party pleading the laches, his plea is in vain." *Conti*, 1 Cal. 3d at 359, 82 Cal. Rptr. at 342 (*quoting Brown v. State Pers. Bd.*, 43 Cal. App. 2d 70, 79 (Dist. Ct. App. 1941) (internal citations removed)); *see also In re Estate of Kampen*, 201 Cal. App. 4th 971, 1001-02, 135 Cal. Rptr. 3d 410, 433-34 (App. Ct. 2011).

The prejudice claimed by the Museum, as alleged in the Eighth Defense, is

as follows: "Defendants had no knowledge or notice that Plaintiff and/or her predecessors in interest would assert claims for relief when Defendants acquired and/or took possession of the Cranachs." As a result, Defendants claim that they were prejudiced in that "(1) Defendants changed their position by acquiring the Cranachs for value and/or by investing resources in the maintenance, restoration, care, and public display of the Cranachs" and "(2) on information and belief, relevant witnesses with information helpful to Defendants' case have died, and documents helpful to Defendants' case have been lost." Defendants have yet to proffer evidence of any lost documents, but most importantly, since they were on notice of the existence of Goudstikker's claim from the time they acquired the Cranachs due to the prominent listing of Göring in the provenance right after Goudstikker, they can hardly claim any prejudice springing from any delay in learning of the claim. PSUF at 29. Moreover, there is no evidence that Defendants relied in any way on any alleged settlement or waiver by Plaintiffs' predecessor in interest when they purchased the Cranachs from Stroganoff. There is not a scrap of evidence to show that Defendants knew or took any steps to learn the history of Désí Goudstikker's thwarted efforts to reclaim property looted by Göring, or had any knowledge as to whether Désí had settled, waived, or explicitly reserved her claims.

Sara Campbell was employed at the Norton Simon Art Foundation, which at the time was called Norton Simon, Inc. Museum of Art, beginning in November 1969 and was therefore employed there before and at the time that the Cranachs were purchased by the Museum on May 11, 1970. PSUF at 122.[18]

Campbell admitted at deposition that the late Norton Simon collected

[18]Campbell was given the official title of curator in 1974 but did not have a title before then. She eventually became Director of Art of the Museum and Trustee of the Foundations. PSUF at 129.

artworks without attention to provenance, and that Defendants did no provenance research on the Cranachs before they were purchased. PSUF at 123. She identified a March 25, 1970 memo from Museum curator Darryl Isley to Norton Simon. PSUF at 124. In this memo, sent to Norton Simon himself *before* Defendants purchased the Cranachs, Isley highlighted the fact that the provenance provided to the Museum by Spencer A. Samuels (the dealer who handled the sale of the Cranachs from Stroganoff), differed from the provenance for the paintings in both the 1932 Max J. Friedläender and Jakob Rosenberg catalogue raisonné of Lucas Cranach the Elder, as well as an article by James A. Schmidt in the art journal *Pantheon* about the Cranachs at the Lepke auction at which Goudstikker purchased them. Isley states that he attached copies of both publications to his memo. PSUF at 125-126. Whereas the provenance provided by Samuels indicated that the Cranachs had been owned by Paul Stroganoff before they were purchased at auction by Goudstikker, neither the catalogue raisonné (PSUF at 127) nor the Schmidt essay (PSUF at 128), both of which were cited by Samuels, show that the Cranachs were ever owned by a member of the Stroganoff family. In fact, the Museum was in contact with Jakob Rosenberg (the surviving author of the Cranach catalogue raisonné) and Dieter Koepplin, who was working with Rosenberg to update the catalogue, but there is no indication that the Museum inquired as to why Stroganoff was not listed as an owner of the Cranachs before the Lepke auction. PSUF at 130. Defendants simply turned a blind eye to the truth. Campbell also testified that she obtained an 1835 catalogue of Stroganoff works from the Portland Art Museum in 2000 and the Cranachs were not included there either. PSUF at 131.

More telling was the fact that the Samuels provenance, as set forth on the invoice to the Museum for the sale of the Cranachs, explicitly included "Hermann Goering" as the Cranachs' owner following ownership by "J. Goudstikker,

Amsterdam". PSUF at 29. Campbell testified that, as a result, there was discussion at the Museum that the Cranachs may have been looted by the Nazis, even though those words were not used in those days. PSUF at 132. Faced with inconsistencies regarding alleged ownership by Stroganoff and a clear indication of Nazi possession directly after Goudstikker, the Museum was on notice that looting had occurred and Goudstikker might have a claim to the Cranachs. At the very least, by failing to do *any* further research in these circumstances, any prejudice to the Museum arising from its acquisition of Nazi-looted artworks was of its own making. *Farahani v. San Diego Cmty. Coll. Dist.*, 175 Cal. App. 4th 1486, 1494, 96 Cal. Rptr. 3d 900, 907 (2009) ("In determining whether a Defendant has sustained its burden of proving laches, the court may consider the extent to which the Defendant is partially responsible for the delay.").

According to Campbell, however, absolutely no further research into the provenance of the Cranachs was conducted by the Museum until the early 1990's, some twenty years later, when Amy Walsh was assigned to do so. PSUF 133. Walsh was retained by the Museum and Foundation as an independent contractor. PSUF at 134. Defendants admit that she "has extensive experience in the field of provenance research" and in the field of Northern European Art and "has authored significant publications" in both fields. PSUF at 135. Walsh testified that she was asked by Gloria Williams, one of the curators of the Museum, to prepare a catalogue of Northern European paintings in the Museum's collection. She began work on the catalogue in 1995. PSUF at 136. As part of her work, Walsh prepared a catalogue entry for the Cranachs. Her conclusion was that there was no evidence that anyone in the Stroganoff family ever owned the Cranachs. PSUF at 137. Indeed, Walsh concluded that the acquisition of the Cranachs from Goudstikker, a Jewish art dealer, by Göring was "problematic." PSUF at 138. The information in her catalogue draft was shared with the Museum. PSUF at 139.

As Walsh explained and then summarized in detail at her deposition, in 1998, she removed any reference to Stroganoff in the provenance listing of the Cranachs in the catalogue entry that she was preparing. PSUF at 140. Although Walsh knew how to contact Spencer Samuels, she never did so. PSUF at 141. In December 2000, she sent Gloria Williams a memo stating that there was no evidence that the Cranachs had come from the Stroganoff collection. PSUF at 142. Just before that, Walsh had sent Williams an email pointing out that Konstantin Akinsha, who wrote an article about the Cranachs and later published an essay about them in the American Association of Museums Guide to Provenance Research, had concluded that there was no evidence that the Cranachs had belonged to the Stroganoff family. PSUF at 143. Finally, when Walsh prepared her "final" draft of the catalogue entry on July 27, 2004, she stated categorically that there was no evidence of any prior Stroganoff ownership. All of this information was provided to the Museum. PSUF at 144.

If Walsh or someone else had been asked to conduct this research at the time of the Cranachs' acquisition 20 years before, the Museum would have learned that critical facts relating to the Cranachs' provenance had been falsely presented by Spencer Samuels, and therefore could have avoided any possible prejudice resulting from its acquisition. The Museum could have tried to contact Dési Goudstikker herself before her death in 1996. Further, Sara Campbell testified that she failed to have any discussions with Spencer Samuels to explain the discrepancies between the provenance he provided on his invoice and the sources to which he referred. PSUF at 145. In light of its own refusal to take any steps to follow up on red flags in the Cranachs' provenance and seek further information when it could have, the Museum cannot now complain that witnesses with information are now dead, prejudicing their position in this case. *Farahani*, 175 Cal. App. 4th at 1494, 96 Cal. Rptr. 3d at 907 (court rejected laches defense and

affirmed lower court's findings that "any prejudice incurred by [the Defendant] was of [its] choosing. . .").

Faced with the instant lawsuit after Walsh had completed her catalogue entry on the Cranachs, the Museum decided to withhold publication of its catalogue (PSUF at 146), apparently for fear of admitting the "problematical" nature of the Cranachs' provenance. By so doing, the Museum continued its decades-long conduct of ignoring the truth about these Nazi-looted artworks. Such misconduct is a classic case of unclean hands, which alone defeats the Museum's equitable laches defense. *See, e.g.*, *Quick v. Pearson*, 186 Cal. App. 4th 371, 380, 112 Cal. Rptr. 3d 62, 69 (App. Ct. 2010), *citations omitted* ("Regarding [the defendant's] attempt to assert the equitable doctrine of laches, a party who seeks equity must also do equity. 'The unclean hands doctrine closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief'").

Finally, the laches defense must be viewed in the context of the legislative adoption of amended §338, which provided, for the first time, that laches may be raised as a defense to actions covered by the statute. Legislative History of California Assembly Bill No. 2765. As this Court explained in the April 2 Order:

> [T]he California Legislature recognized by enacting [§338, as amended], museums are sophisticated entities that are well-equipped to trace the provenance of the fine art they purchase. After carefully weighing the equities, the Legislature determined that the importance of allowing victims of stolen art an opportunity to pursue their claims supersedes the hardship faced by museums and other sophisticated entities in defending against potentially stale ones.

Dkt. 119 at 11.

Especially in light of the Museum's "don't ask, don't tell" approach when they purchased the Cranachs, as detailed above, the equities clearly weigh here in

favor of Plaintiff, as the California legislature recognized in general. *See Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 180, 96 Cal. Rptr. 518, 530 (2000) ("A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute. This principle of equity jurisprudence has been applied in a variety of contexts in which the court is called upon to exercise equitable power."); *Lickiss v. Fin. Indus. Regulatory Auth.*, 208 Cal. App. 4th 1125, 1133-34, 146 Cal. Rptr. 3d 173, 178-79 (App. Ct. 2012) ("in any given context in which the court is prevailed upon to exercise its equitable powers, it should weigh the competing equities bearing on the issue at hand and then grant or deny relief based on the overall balance of these equities."). For all these reasons, Defendants' laches defense should be dismissed.

POINT VIII

ADVERSE POSSESSION OF PERSONAL PROPERTY IS NOT RECOGNIZED IN CALIFORNIA LAW

Defendants' Tenth Defense is grounded on the doctrine of adverse possession. In the April 2 Order, this Court indicated that "California law does not appear to extend the doctrine of adverse possession to personal property." Dkt. 119 at 10 n.7 (*citing San Francisco Credit Clearing House v. C.B. Wells*, 196 Cal. 701, 707-08 (1925)). The Court's decision did not decide this issue, however, and held that Defendants were not precluded from arguing it.

Subsequently, however, in *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-JFW (EX), 2015 WL 9464458, at *6 (C.D. Cal. June 4, 2015), the issue had to be resolved in order for this Court to determine a critical conflicts of law issue necessary to the decision in that case, and this Court expressly held that adverse possession of personal property is inapplicable under California law. That holding should be followed in this case and Defendants'

Tenth Defense should be rejected on that basis. In *Cassirer*, a critical issue in the case was whether Spanish or California law governed the defendant's claim that it acquired good title to the artwork at issue. In determining this choice of law issue, this Court first had to determine whether Spanish law differed from California law regarding the acquisition of personal property by adverse possession or prescription. The Court held that "California has not extended the doctrine of adverse possession to personal property," (*Id.* (*citing San Francisco Credit Clearing House*, 196 Cal. at 707-08; *Soc'y of Cal. Pioneer v. Baker*, 43 Cal. App. 4th 774, 785 n.13, 50 Cal. Rptr. 865, 871 n.13 (App. Ct. 1996)) and therefore that there was a true conflict of laws with Spanish law, which had adopted laws that expressly permit the acquisition of ownership of personal property by adverse possession or acquisitive prescription. *Cassirer*, 2015 WL 9464458, at *6. In light of the *Cassirer* case, Defendants have no basis for urging that adverse possession of personal property can be found in California law.

This Court's holding in *Cassirer* is consistent with the reasoning of the California Supreme Court in *San Francisco Credit Clearing House*, 196 Cal. at 707-08. In that case, the Court held that regardless of whether adverse possession was meant to apply to personal property, "it is very clear that [the law on adverse possession] in nowise modifies or limits the effect of . . . §338, of the Code of Civil Procedure," which provides for the period during which an action may be commenced in conversion or replevin. *Id.* at 707. Since this Court has held that Plaintiff's action is timely under the current version of §338, even if adverse possession could be applied to personal property under California law in certain circumstances, it would not apply where, as here, §338 governs the time period within which this action may be brought.

POINT IX

THE NINTH CIRCUIT HAS RULED THAT §338 DOES NOT VIOLATE THE FIRST AMENDMENT

Defendants' Thirteenth Defense alleges that §338(c)(3) is unconstitutional as "singl[ing] out for disfavored treatment entities like Defendants that engage in protected expression" "without adequate justification" and that consequently, Plaintiff's claims are barred by the constitutional guarantee of free expression. This precise claim was made and rejected by the Ninth Circuit in *Cassirer* and therefore must be rejected in this case as well. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 620-21(9th Cir. 2013)

POINT X

DEFENDANTS' UNCLEAN HANDS DEFENSE LACKS ANY BASIS IN FACT AND DEFENDANTS HAVE FAILED TO DEMONSTRATE ANY PREJUDICE

Defendants recently amended their Answer to include a new defense (Twenty-Second Defense) of "unclean hands," alleging that purported wrongdoing by Plaintiff and Jacques, without showing consequent prejudice to Defendants, should result in the wholesale dismissal of her case. This defense, which lacks both factual underpinning as well as a legal basis, should be rejected.

Playing a distasteful game of "gotcha", Defendants deposed Marei in the apparent hope that she would admit to certain irrelevant facts that would paint an unattractive picture of both her and Jacques Goudstikker, and prejudice her case against her. They then amended their answer based on her deposition testimony. As we shall show, there is no basis for any allegation that Marei or Jacques committed any misconduct in connection with the matters raised in this case. But even if any such misconduct could be shown, it is not enough to dismiss her claims

on the grounds of unclean hands. "The defense of unclean hands does not apply in every instance where the plaintiff has committed some misconduct in connection with the matter in controversy." *Dickson, Carlson & Campillo v. Pole*, 83 Cal. App. 4th 436, 446-47, 99 Cal. Rptr. 2d 678, 685 (App. Ct. 2000). It applies "only where it would be inequitable to grant the Plaintiff any relief. *Id.* Further, "[t]he misconduct must prejudicially affect the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief." *Jade Fashion & Co. v. Harkham Indus.*, 229 Cal. App. 4th 635, 653, 177 Cal. Rptr. 3d 184, 200 (App. Ct. 2014) (*quotations omitted*). "A decision based on bare 'equity' unsupported by established precedent and lacking evidentiary support does not disclose the proper exercise of discretion" by the Court in allowing the unclean hands defense. *Dickson*, 83 Cal. App. 4th at 447, 99 Cal. Rptr. 2d at 685.

Defendants allege four instances of alleged misconduct on the part of either Marei or Jacques. There is no basis in fact for any of them and Defendants do not allege any resulting prejudice.

First, Defendants allege that Jacques knew when he acquired the Cranachs at auction that they "had been stolen from their original owner by the government of the Soviet Union as part of a brutal and repressive program of forcibly expropriating artwork and other property owned by private individuals and religious organizations." Defendants have proffered no evidence that Jacques had any such knowledge. Furthermore, German courts in three cases decided *before* Jacques purchased the Cranachs at the Lepke auction house in Berlin recognized the legitimacy of the Soviet claims to title in the very context of an auction such as the one at which Jacques purchased the Cranachs. PSUF at 70. The validity of the Soviet Union's actions in nationalizing private property at the time of the Bolshevik Revolution has been subsequently acknowledged by the U.S. courts as being matters that are not subject to inquiry under the act of state doctrine, so as to

avoid interference with the Executive's conduct of foreign affairs, which has recognized the legitimacy of the Soviet Union and the validity of its actions. *See Konowaloff*, 702 F.3d at 146; *Yale Univ.*, 5 F. Supp. 3d at 241; *Stroganoff-Scherbatoff*, 420 F. Supp. at 22. Jacques cannot be charged with unclean hands in purchasing artworks when courts both at the time and place where the auctions were held and at the time and place of the instant litigation recognize that the Soviet Union had good title to convey to the property it had nationalized. Moreover, Jacques's purchase and the fact that the Cranachs were nationalized by the Soviet Government have not prejudiced the Museum in any way.

Similarly, the allegation that Marei had unclean hands for the same reason must also fail. Getting her to admit at deposition that she thought the Soviet nationalizations were wrongful and tragic on a personal level may have some dramatic effect in Defendants' view, but it is irrelevant. PSUF at 147. Indeed, numerous artworks in the collection of the National Gallery of Art in Washington, D.C. were obtained by Secretary of the Treasury Andrew Mellon through sales in Germany of property nationalized by the Soviet Union. PSUF at 148. No one could ever successfully claim that the National Gallery does not have good title to those artworks because they were nationalized through sometimes violent means during the Bolveshik Revolution.

The third allegation underlying Defendants' unclean hands defense concerns additional deposition testimony by Marei. She testified that in 1996, when her husband Edo was very ill and after his mother had passed away, he went through Dési's documents superficially and in her presence organized and discarded portions thereof. Marei has no knowledge of what the documents contained. PSUF at 149. In their defense, Defendants characterize this as Plaintiff "participat[ing] in the intentional destruction of Dési's records . . . , imped[ing] the creation of a complete factual record regarding Dési's decisions and actions with

respect to the artwork previously held by the Goudstikker Gallery, including the Cranachs." This is a gross mischaracterization of Marei's testimony: she did not participate in any such destruction and there is no evidence of the subject matter of any of the discarded documents, let alone that they were in any way related to the Goudstikker Gallery or the Cranachs. Further, Marei also testified that Edo never shared with her any of the facts relating to the history of the Gallery or its collection, or Dési's attempts to reclaim her property after the War, so any suggestion that she intentionally destroyed relevant documents makes no sense. PSUF at 150. Indeed, Defendants' own expert admits that Dési and Edo gifted relevant documents to the Amsterdam City Archives, thus preserving them, not destroying them. PSUF at 151. In other words, this alleged example of unclean hands is created out of whole cloth.

Finally, the fourth allegation underlying this defense involves the allegation that Marei's father, a German national at the time, was a member of the Nazi party and served in Germany's armed forces, facts of which Marei testified she was unaware. PSUF at 152. Despite her lack of knowledge, Defendants claim that Plaintiff "misrepresented to the Dutch public . . . that her own German family had not actively participated in the Second World War," and includes "members of the Dutch Government and the Dutch Restitution Commission involved in the decision [to restitute artworks to Marei]" as members of the public, without proferring any evidence that any such submissions to the GON were ever made by Marei.

In any event, any information about Marei's father's role as a German national was irrelevant to the GON's determination that the artworks looted by Göring from the Goudstikker Gallery should be returned to Marei by the GON; the only important fact in this regard was that Marei was the legitimate heir of Dési and Jacques and the shareholders of the Gallery. There is no basis whatsoever for denying the Goudstikker's family's rights to the Cranachs because of the alleged

misconduct of Marei's father unknown to her. Defendants can show no unclean hands on Marei's part and her father's role during the War has no connection to her inherited claims to the looted Cranachs. Importantly, the position of Marei's father during World War II does not prejudice Defendants in any way. "The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties." *Kendall-Jackson Winery, Ltd. v. Sup. Ct. of Stanislaus Cnty.*, 76 Cal. App. 4th 970, 979, 90 Cal. Rptr. 2d 743, 749 (App. Ct. 1999). This transparent attempt by Defendants to throw dirt on Marei's own family, including Jacques's grandchildren, in the hope that it prejudices her attempt to vindicate the claims of her father-in-law, her mother-in-law and her husband should not be countenanced in this case.

For all these reasons, the Twenty-Second Defense should be dismissed in its entirety.

V. CONCLUSION

For all of the foregoing reasons, Plaintiff should be granted summary judgment on all of her claims in this action.

Dated: June 13, 2016

Respectfully submitted,

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