IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIUS H. SCHOEPS, BRITT-MARIE ENHOERNING, and FLORENCE VON KESSELSTATT,

Plaintiffs,

v.

FREISTAAT BAYERN, or FREE STATE OF BAVARIA, A STATE OF THE FEDERAL REPUBLIC OF GERMANY,

Defendant.

13 Civ 2048 (JSR)
ECF CASE

OPPOSITION OF THE PLAINTIFF MENDELSSOHN HEIRS TO MOTION OF BAVARIA TO DISMISS THE SECOND AMENDED COMPLAINT FOR LACK FOR SUBJECT MATTER JURISDICTION

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I. Introduction and Summary of the Mendelssohn Heirs' Position

Bavaria cannot sustain its evidentiary burden of showing that its acquisition of *Madame Soler* (Painting) in New York (NY) in the Spring of 1964 at the apartment/gallery of celebrated collector and dealer Justin Thannhauser (JT) was not "commercial activity" under the FSIA that excepted its conduct from sovereign immunity. The accompanying affidavit of Plaintiff's expert witness – Dr. Jonathan Petropoulos – along with its many exhibits confirm that in acquiring the Painting Bavaria proactively invoked the international NY art market, exploited NY and US investigative resources, came to a complete agreement in NY with JT on all material terms of their contract, and that the parties substantially performed their contract in NY. On these indisputable facts Bavaria is liable to the Plaintiffs as would be any private commercial actor: any other conclusion would wreck havoc upon the NY art market, sabotage the acute governmental interest of NY in policing this market for corruption, and undermine Congress' objective in enacting the FSIA.

II. Statement of Facts

The Second Amended Complaint Explains Why By Acquiring *Madame Soler* as an Ordinary Commercial Actor in the International New York Art Market Bavaria Forfeited its Sovereign Immunity

On or about November 12, 2013, the Mendelssohn Heirs (MH) filed their Second Amended Complaint (SAC) in this proceeding explaining why Bavaria had forfeited its sovereign immunity in acquiring the Painting at the apartment/gallery of celebrated New York (NY) art dealer and collector Justin K. Thannhauser (JT) in the Spring of 1964. SAC at ¶¶ 4, 40. The MH based their contention that Bavaria had obtained the Painting in NY from JT upon two prior acknowledgements. The first – a letter dated 31 March 2010 denying their claim – related in a chronological narrative: " * ***1964: Purchase of Picasso's Madame Soler for 1.6 million***

DM…in the knowledge of the Mendelssohn provenance at Justin K. Thannhauser's in New York ." On October 17, 2011 Bavaria issued a press release entitled *Statement of the General Director of the Bavarian State Paintings Collection on the Purchase of ''Madame Soler'' by Pablo Picasso* (Statement)[1] stating that ***"[t]he sale took place at the Jewish art dealer's, Justin K. Thannhauser (1892-1976***), in New York."(Emphasis and italics supplied)[2]

The SAC elaborates why Bavaria's acquisition of the Painting satisfies the requirements of the FSIA. *See generally* SAC ¶¶ 37-69 at pages 13-29.

Bavaria's Motion to Dismiss Seeks – for the First Time Since 1964 -- to Detach Bavaria's Acquisition of the Painting From Any Important New York Contact or Nexus

For the first time since 1964 Bavaria now seeks to marginalize its commercial activities in NY concerning its purchase of the Painting – in a cynical attempt to defeat jurisdiction in this case. Bavaria now maintains that "[t]he only activity of Bavaria in the United States in connection with its purchase of the Painting consisted of an initial meeting in New York between Thannhauser and the incoming Director General of the Collections, Dr. Halldor Soehner...in the spring of 1964." [3] The Memorandum challenges the veracity of the SAC in this regard, and trivializes the location of their meeting: "[w]hile Soehner and Thannhauser evidently met on one occasion in New York (apparently at Thannhauser's Manhattan residence) between April and June 1964 while Soehner was present in the United States, that is where the truth of Plaintiff's allegations ends." *Id.* at 6. Accordingly – Bavaria maintains – the claims of the MH to recover the Painting "are not 'based upon' any alleged commercial activity of Bavaria in the United States, as required to support

[1] A copy of the Statement is appended as Exhibit 12 to the SAC and as Exhibit 16 to the Petropoulos Affidavit (P. Aff.)
[2] Statement at 1.
[3] Free State of Bavaria's Memorandum of Law in Support of Its Motion to Dismiss the Second Amended Complaint For Lack of Subject Matter Jurisdiction Under the FSIA (Memorandum) at 3.

jurisdiction." *Id.* at 2. Nor, says Bavaria, did it in fact "engage in commercial activity 'having substantial contact with the United States' in connection with the acquisition of *Madame Soler*." *Id*. at 3. Rather, Bavaria alleges, JT sold Bavaria the Painting in Europe while "acting as a commission agent for the actual seller, a Leichtenstein entity named "Establissement Les Beaux Arts" ("EBA")". *Id*. at 3. EBA remains shadowy at best, and may never have legally existed. (Petropoulos Aff. (P.Aff) at ¶¶ 54-62.)

The Affidavit of the Plaintiffs' Expert Witness – Dr. Jonathan Petropoulos – and Accompanying Exhibits Show that Bavaria Reached Agreement with New York Art Dealer Justin K. Thannhauser on All Material Terms for the Purchase of *Madame Soler* at His Manhattan Gallery/Apartment and that the Contract Was Substantially Performed in New York

Bavaria's Plight: It Had No Quality Modern Artworks

Long before Bavaria acquired *Madame Soler* from JT in NY in the Spring of 1964, it "had been planning how to acquire several preeminent modern artworks on a limited budget. The prices for elite modern artworks had been rising both steadily and dramatically….and rarely did such high quality works appear on the international market". (P.Aff. at ¶ 13) On May 12, 1959 the General Director of the BSTGS – Kurt Martin – wrote the Bavarian State Ministry of Education and Culture (Ministry) a letter admonishing that if Bavaria soon did not acquire at least a couple of premier modern artworks, Munich would forfeit its reputation as cultural center. *Id*. at ¶¶15-19 and Exhibit (Exh.) 2. Martin underscored that Bavaria lacked the financial resources to obtain the quality of modern artworks that would fulfill this need, and intimated that the only viable opportunities lay in the US – and in NY in particular – where museums proliferated and US tax policy encouraged wealthy collectors to make charitable donations. *Id.* at ¶ 18.

Bavaria's 'White Knight' – the Hard Charging Ex-Nazi Halldor Soehner

In 1963 Martin (b. 1899) was reaching the mandatory retirement age when the BSTGS designated as its next director a hyper-aggressive 44 year old ex-Nazi named Halldor Soehner. P.Aff. at ¶ 20. Soehner's professional qualifications for this elite position were thin. *Id.* at ¶ 21. Soehner had joined the Nazi Party on January 10, 1941, "that is…when it became clear that this was a ruthless criminal regime bent on the genocide of the Jewish people and world conquest. Soehner's Nazi Party official number was 8285179." *Id*. at ¶ 21 and Exh. 4. An April 25, 1968 obituary for the intense Soehner described him as committed compulsively to expanding the art collection of the BSTGS and willing to use any available means to achieve this goal: "***Soehner was obsessed with his goals and sometimes this obsession carried him too far…There was not a means that he did not use***." (Emphasis and italics supplied) *Id*. at ¶ 22 and Exh. 5. "While driven, Soehner apparently also was a shrewd, resourceful, and personable negotiator..." *Id*. at ¶ 23. The obituary identified Soehner's acquisition of *Madame Soler* and the Degas painting from Thannhauser as career highlights. *Id.*

The Quest

In October 1963 the outgoing director Martin wrote a letter to the Ministry asking that it approve a trip that he had helped arrange for Soehner to visit the US to study US museums practices and to make connections with prominent US galleries, dealers and private collectors. P. Aff. at ¶ 24 and Exh. 6. Through this trip –Martin's letter envisioned – Soehner would "visit a series of museums, private collectors, and dealers, and by doing so, make discoveries that will enhance the scholarly catalogues of the Pinakothek." *Id.* The Ministry approved a three month trip. *Id.* "Given the declared and urgent agenda of outgoing Director Martin to obtain modern artworks at affordable prices – and Soehner's all-consuming commitment to his goal – there can

be little doubt that Soehner embarked on this trip to the U.S. and New York with this objective in mind." P. Aff. at ¶ 25.

From March 10—June 10, 1964 Soehner traveled to the US and visited approximately 50 museums in 16 cities. P. Aff. at ¶ 27. An article by former Nazi art looter Erhard Gopel in the December 23, 1964 edition of the *Suddeuthsche Zeitung* relates that on this trip Soehner "***scoured*** the American continent in search of an early picture by Picasso" making a visit, ultimately "to the over seventy year old Justin K. Thannhauser in New York." (Emphasis and italics added) A report that Soehner submitted about his trip upon his return identifies each museum that he visited, and relates that 20 were in NY, including The Museum of Modern Art, The Solomon R. Guggenheim Museum (the Guggenheim) and the Jewish Museum . *Id*. at ¶ 27 and Exh. 8. Soehner's report identifies NY as the world's epicenter of modern art, and lauds especially the Guggenheim's impressive resources. *Id.*at par 28.

"New York, N.Y."

That NY alone would offer Soehner his only opportunity to acquire a quality modern artwork at a price that the BSTGS could afford was more than foreseeable. As Soehner had observed, NY was the world's center for modern art. That NY – along with London – have had the premier art markets since World War II is common knowledge. Moreover, "[i]n 1963 – and amid much public fanfare – Thannhauser had taken advantage of the favorable US tax laws encouraging charitable contributions of artworks to museums" that Martin had discussed in his May 12, 1959 letter "by announcing that he would donate his spectacular private modern art collection to the Guggenheim." P. Aff. at ¶ 30 and Exh. 7, an October 24, 1963 *New York Times* front page article describing JTs gift of ***34 Picasso artworks*** to the Guggenheim. So "[n]o place other than New York would have afforded Soehner and the BSTGS a remotely comparable opportunity and

Soehner knew it." *Id.* at ¶ 38. And "by steeping himself for weeks in the New York art community, and at the Guggenheim in particular, Soehner all but surely recognized that Thannhauser – and Thannhauser alone – provided the key to realizing the BSTGS' ambitions." *Id*. at ¶ 30.

The Deal

Sometime between March 20 and May 28 1964 Soehner visited the gallery/apartment of JT to make his best pitch on behalf of the BSTGS to acquire a prestigious modern artwork. P. Aff. at ¶ 33 and Exh.10.The P.Aff. describes comprehensively the follow-up correspondence between Soehner and JT regarding their meeting, as well as the multitude of Bavaria's own documents that confirm – beyond any reasonable doubt – that Soehner and JT reached all material terms of a bargain and contract for the BSTGS to buy both *Madame Soler* and a Degas painting while Soehner was at JT's apartment/gallery. (Contract) P. Aff. at ¶¶ 33-53 and related Exhs. Beyond doubt, both *Madame Soler* and the Degas painting were then at JT's and Soehner viewed them at this time. *Id*. at ¶ 36. In a November 11, 1964 letter to the Ministry seeking funding to buy both paintings, Soehner recounted the particulars of his meeting with JT and how they had reached agreement on all material terms of the Contract – including the prices that BSTGS would pay for both paintings P. Aff. at ¶ 37 and Exh. 13. In a self-serving manner Soehner heralded that he had found the two opportunities not on the international market -- but rather in the private collection of JT at his Manhattan apartment -- whereupon Soehner had persuaded JT to "remember his home town (Munich) and to sell two of his paintings, ***whose quality is so unusually high that their like is no longer encountered on the art market*"** to the BSTGS. (Emphasis and italics added) . Soehner reported that he and JT had agreed to prices for both paintings (1.6 million DM for *Madame Soler)*. (Id. at ¶ 37, and quoting Exh. 13). Accordingly,

"Soehner – with his apparently unrivaled energy, personal ambition and dedication to the goal of expanding the collections of the BSTGS – had ferreted out just such an opportunity in the vey bosom of the New York City fines arts community: the gallery apartment of the celebrated dealer and private collector Justin K. Thannhauser." *Id.* at ¶ 38.

Bavaria has conceded that JT made Soehner aware that Mendelssohn-Bartholdy once had owned the Painting while Soehner was in NY. P.Aff. at ¶ 49(b) and Exhibit 17. Conspicuously absent, however, from any reported narrative of this bargain is any indication that Soehner asked JT the questions that the circumstances demanded: when, from whom, under what circumstances, and at what price did JT acquire *Madame Soler*? P. Aff. at ¶¶ 40-41.

The Scam

The P. Aff. relates the extensive evidence – both direct and circumstantial – why the eleventh hour attempt of JT to introduce EBA of Vaduz, Leichtenstein (a notorious tax fraud haven) into the transaction as a putative seller was almost certainly a contrivance to evade US and NY taxes. P. Aff. at ¶¶ 54-62. Ultimately, Bavaria balked at wiring the agreed purchase price of 1.6 million DM to EBA in Vaduz: so Thannhauser agreed to accept a check made payable to him personally, drawn on the Bavarian State Bank, and mailed to JT at his NY address. P. Aff. at ¶¶ 60-62 and Exh. Nos. 31 and 32. This transaction confirms that to the extent that EBA existed other than as a Vaduz bank account with JT as an undisclosed owner, JT controlled EBA absolutely. *Id*. at 62.

Concealing an Inconvenient Truth:
Paul von Mendelssohn-Bartholdy's Past Ownership of *Madame Soler*

By late December 1964 JT had sent Soehner and the BSTGS ***two written provenances*** for *Madame Soler* that expressly identified Mendelssohn- Bartholdy as a former owner. P. Aff. at ¶¶ 64-65 and Exhs. 33-34. But rather than investigate the history and circumstances of

Mendelssohn-Bartholdy's past ownership, Bavaria instead immediately expunged his name from the provenance. A fictive provenance – relating that the Thannhauser family had owned the Painting exclusively and continuously since approximately 1909 – appeared in two contemporaneous Munich newspaper articles dated December 22, 1964 (P. Aff. ¶ 65 and Exh. 35) and January 16, 1965 (P.Aff. ¶ 66 and Exh. 36). These articles were a prelude to Bavaria's exclusion in 1966 of Mendelssohn-Bartholdy's name from the provenance of the Painting as published in a prominent Picasso catalogue raisonne. P. Aff. at ¶ 67. Bavaria thereby erased "all recorded evidence of Mendelssohn-Bartholdy's past ownership or that insinuated the Painting as a possible casualty of Nazi policies to dispossess Jews." *Id.*

III. Argument

A. The Mendelssohn Heirs Have Established that Bavaria Is Not Entitled to Sovereign Immunity under the FSIA

1. The Purpose of the FSIA Is To Make Foreign Sovereigns Like Bavaria Liable For Their Commercial Activities to the Same Degree and Extent as Private Individuals

Section 1606 of the FSIA prescribes that when foreign sovereigns do not enjoy immunity, they shall be liable to the same degree as private parties under similar circumstances: "[a]s to any claim for relief to which a foreign state is not entitled to immunity…the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances…"[4] The legislative history of the FSIA punctuates this point: "[s]ection 1606 makes clear that if the foreign state …is not entitled to immunity from jurisdiction, liability exits as it would for a private party under like circumstances."[5]

[4] 28 U.S.C. § 1606.
[5] H.R REP. 94-1487, H.R. Rep. 1487, 94th Cong. 2nd. Sess. 1976, 1976 U.S.C.CA.N. 6604, 6621 ("Legislative History" or "Report").

Consistent with § 1606, "[t]he primary purpose of the FSIA is to provide litigants access to the courts against foreign states acting as private players in the marketplace"[6], and "[o]nce a nation steps into the marketplace, it must be governed by the rules of the marketplace. It should not make any difference whether the nation is a seller or buyer." [7]

To accomplish this objective, § 1605(a) (2) prescribes three instances when the commercial activities of a sovereign will render it liable to the same extent as private individuals acting in a similar manner. These are when the foreign sovereign: (1) carries on commercial activity in the US that has a "substantial contact with the United States"[8]; (2) performs an act in the US relating to the commercial activity of the foreign sovereign elsewhere; or (3) commits an act outside the US in relation to foreign commercial activity that has a direct effect in the US, and the claim of the plaintiff is "based upon" any of these three activities.[9] Courts give these

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[6] Aaron Bernay, *Finding the Nexus: Measuring Jurisdiction Under the First Clause of the Commercial Activity Exception to the Foreign Sovereign Immunities Act*, 77 U. Cinn.L.Rev. 1581, 1603 (2013).

[7] 1 Ved. Nanda & David Pansius, "Litigation of International Disputes in U.S. Courts § 3.8 (2d. ed. 2012).

[8] As noted, *infra*, § 1605(a)(2) prescribes liability for a foreign sovereigns when "an action is based upon a commercial activity carried on in the United States by the foreign state". Section 1603(3e) – Definitions states that this phrase means "commercial activity carried on by such state and having ***substantial contact*** with the United States." (Emphasis and italics supplied).

[9] 28 U.S.C. 1605 (a)(2) prescribes in relevant part as follows:

> (a) A foreign state shall not be immune form the jurisdiction of courts of the United States ...in any case—
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state

three exceptions a "flexible construction, designed to address the overall question whether the act, in some form or fashion, does concern the United States. ***The criteria are to be interpreted broadly and flexibly to fulfill the general intent of the FSIA to deny immunity to sovereigns for their private acts***." (Emphasis and italics supplied)[10] "Viewed differently, the three components of the commercial exception parallel traditional test for subject matter jurisdiction…" and "[i]f the claim has sufficient US contacts to satisfy jurisdictional requirements, one or more of the three commercial exceptions components should apply." [11]Moreover, the pliable and overlapping character of these three exceptions "makes it not at all improbable that a suit could be brought under more than one clause." *Texas Trading & Milling Corp. v Federal Republic of Nigeria*, 647 F.2d 300, 311 n. 30 (2d. Cir. 1981), *cert. denied* 454 U.S. 1148 (1982).

Quality and Quantity of Contacts by Foreign Sovereign Key

Courts essentially focus upon the relationship between the relevant "commercial activity" of the foreign sovereign and the extent to which the claim of the plaintiff is "based upon" this activity, and also consider whether the commercial activity at issue has a "substantial contact" with the US. In the final analysis, courts consider both the ***quantity*** and ***quality*** of the contacts of the foreign sovereign from which the particular claim arises in determining whether the exceptions apply: "[r]egardless of form, the central question involves the amount and quality (of) substantial contracts necessary to invoke jurisdiction under § 1605(a)(2)."[12].

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elsewhere and that act causes a direct effect in the United States.

[10] 1 Nanda and Pansius, *supra* note 7 at § 3.5.
[11] *Ibid*.
[12] Bernay, *supra* note 6 at 1587.

2. Relevant Choice of Law Principles Designate the Substantive Law of New York as Governing All Issues in this Proceeding Including Whether Jurisdiction Exists Under the FSIA

As the Supreme Court observed in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n. 11 (1983), because § 1606 of the FSIA requires that "a foreign state be liable in the same manner and to the same extent as a private individual in like circumstances", "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." To achieve this goal, the U.S. Court of Appeals for the Second Circuit has held that the FSIA entails that courts apply the choice of law rules of the forum. *Barkanic v. General Administration of Civil Aviation of the People's Republic of China,* 923 F.2d 957, 959-960 (2d. Cir. 1991), observing that "[t]he goal of applying identical substantive law to foreign states and private individuals… cannot be achieved unless a federal court utilizes the same choice of law analysis in FSIA cases as it would apply if all the parties to the action were private", and invoking New York's choice of law principles – governmental interest analysis – in a wrongful death action. *Id*. at 961-964.[13]

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[13] In *Karaha Boda Company L.L.C., v. Perusahaan PertamBangan Minyak Dan Gas Bumi Negara ("Pertamina),* 311 F.3d 70, 85 (2d. Cir. 2002), the court observed that in *"Barkanic*, we explained that in FSIA cases, we use the forum's state's choice of law rules to resolve "*all* issues" **except** jurisdictional ones."(Italics original, emphasis supplied). But the alternative application of federal choice of law rules – which like NY also are based upon interest analysis and the Restatement (Second) Conflict of Laws (1987)—represents a distinction without a difference in this context. "Many courts conclude that there is no meaningful difference between federal common law choice of law rules and the pertinent forum state choice of law rules, at least as regards the matter at issue and decline to take a formal position on this issue." 2 V. Nanda & D. Pansius, *supra* note at § 7A:19. Moreover, "[a]s a general rule, federal choice of law rules as applied in FSIA cases will employ the law of the place where an alleged tort occurred unless another state has a more significant relationship to the tort and to the parties." *Ibid*. As discussed, *infra,* the overarching governmental interest of NY in prescribing its distinctive substantive law of conversion to redress the refractory NY City international art market – which the courts both in *Solomon R.. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426, 430-432 (N.Y. Ct. App. 1991), and *Bakalar v. Vavra,* 619 F.3d 136, 140-146 (2d. Cir. 2010) have

Accordingly NY choice of law rules – based upon governmental interest analysis – govern all questions in this proceeding.

3. Bavaria's Acquisition of *Madame Soler* in New York From Thannhauser – And Its Extensive Preparatory Investigation for an Affordable Artwork -- Constitutes "Commercial Activity" Having "Substantial Contact" to New York and the U.S.

a. Bavaria's Acquisition of the Painting in New York and Preliminary Investigation Represent Both "Commercial Activity" as Well as a "Regular Course of Commercial Conduct" Within the Meaning of the FSIA

In *Weltover v. Republic of Argentina* the Court explained that the acts of a foreign state are "commercial" within the meaning of the FSIA rather than governmental when a private party could perform them: "[w]hen a foreign government acts, not as a regulator of a market but in the manner of a private player with in it, the foreign sovereign's actions are "commercial with in the meaning of the FSIA." "The issue is whether the particular actions that the foreign sovereign performs (whatever the motive behind them) are the type of actions by which a private party engages in trade or commerce." Therefore, "purchasing cement for public works projects" is commercial activity. Texas *Trading, supra* page 10 at 310. So, too, is buying a Picasso painting for a public collection.

b. Bavaria's Commercial Activities in New York Have "Substantial Contact" With the U.S. Within the Meaning of the FSIA

There can be no doubt but that by 'scouring" the US and NY art markets for many weeks in an attempt to acquire suitable modern artworks – and then negotiating in full the terms of contract to buy *Madame Soler* and the Degas painting at the NY apartment/gallery of JT - the commercial

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punctuated – make clear that the substantive NY law governs ***all questions*** in this proceeding, including whether jurisdiction exists under the FSIA.
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activity of Bavaria had "substantial contact" with the U.S within the meaning of the FSIA. This conclusion is evident for several reasons.

First, "[f]or an act to have substantial contact with the United States, it need not occur entirely within the United States." 1 V. Nanda and D. Pansius, supra n. 7 at § 3:10. Indeed, Congress expressly contemplated that the term "substantial contact" – like Bavaria's acquisition of the Painting in NY -- includes both "commercial transactions performed in whole or in part in the United States" as well as "import-export transactions involving sales to, or purchases from, concerns in the United States." As the House Report relates, "[t]his definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States…" House Report at 6615. In addition, Congress vested courts with "considerable discretion to determine whether a particular commercial activity has been performed in whole or in part in the United States." [14] As discussed, *infra*, the acute governmental interests of NY in preserving the commercial integrity of the international NY art market – and to prevent it from becoming a haven for stolen art traffickers – coupled with the outrageous misconduct of Bavaria that the P. Aff. elaborates, reinforce the conclusion that Bavaria's acquisition of the Painting in NY was commercial conduct "performed in whole or in part" in the US.

Second, courts consistently have ruled that the "substantial contact" requirement is fulfilled whenever significant contractual bargaining or the formation of a contract occurs in the US. This principle applies especially when – as with Bavaria in this proceeding – the foreign sovereign ***proactively*** enters a U.S. market by making a contractual offer. *See*, *e.g.* *Universal Trading &*

[14] V. Nanda & D. Pansius, *supra* n. 7 at § 3:10.

Investment Co. v. Bureau for Representing Ukrainian Interests in International and Foreign Courts, 727 F.3d 10, 25 (1st Cir. 2013), "we may look to where the unilateral contract was offered since it was the offer that in fact established a nexus or link between the Ukrainian defendants …and UTICo, ***and it was through that offer that the foreign sovereign engaged in commerce and officially entered the market place in the United States***." (Emphasis and italics supplied); *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1113 (S.D.N.Y. 1982), "[w]here, as here, the commercial activity in question centers on the formation of a contract, the United States will be found to have had a substantial contact with that activity if substantial contractual negotiations occurred here…or if substantial aspects of the contract were to be performed here…" ; *Morgan Equipment Co. v. Novokrivorogsky State Ore Mining and Processing Enterprise*, 57 F.Supp.2d 863, 872 (N.D. Cal. 1998) quoting *Gibbons*, *supra*. *Also see* *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. App. 1988), "[i]t would seem then a contractual arrangement, one part of which is to be performed in the United States, constitutes a substantial contact with the United States." The P. Aff. – along with Bavaria's own documents – confirm that Bavaria negotiated all material terms of the Contract in NY, and substantially performed the Contract there as well.

Third, "substantial contact" occurs when the activities of the foreign sovereign in the US give rise to some duty of care that the sovereign owes the plaintiff, and the sovereign breaches this duty. *See generally* V. Nanda and D. Pansius, *supra* note7 at § 3:10, n.6 citing *inter alia* *Barkanic*, (" purchase of tickets from U.S. travel agency sufficient nexus to support claim").[15] Bavaria breached two duties it owed the MH. *See* discussion *infra* at 16.

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[15] As discussed, *infra*, courts also have ruled that when a foreign sovereign breaches abroad a duty that it incurred in the US as a result of its commercial activity in the US, this breach

Finally – but most consequentially – courts find a "substantial contact" with the US all the more readily when the defendant's conduct implicates important US governmental interests. For example, in *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1019-20 (2d. Cir. 1991), the court ruled that by introducing negotiable promissory notes in to the US Bolivia had engaged in commercial activity having a "substantial contact with the United States" because this action affected an important US governmental interest in regulating financial markets: "[t]he issue… is the ***nature of the activity*** engaged in by Bolivia, namely, raising capital by introducing negotiable promissory notes into the United States…The United States has a strong interest in capital raising activities within its borders…" (Emphasis and italics supplied.)

Correspondingly – and as noted -- both the US and NY have a pronounced interest in preserving the commercial integrity of the international NY art market. By proactively entering the NY art market to buy an invaluable painting after exploiting NY and US investigative resources, making an offer to purchase this painting without conducting the reasonable inquiries that both the circumstances and law demanded, and concluding a deal with the seller (JT) on all material terms of their bargain, Bavaria more than satisfied the "substantial contact" requirement of the FSIA.

4. Incontrovertible Facts Confirm that Bavaria is Liable to the Same Degree as a Private Party Under Each the Three Commercial Activity Exceptions of § 1605(a) (2)

a. The Claims of the MH Are "Based Upon" the Commercial Activities that Bavaria Carried On in NY within the Meaning of the First Clause of § 1605(a)(2)

The claims of the MH are "based upon" the commercial activity of Bavaria in NY within the meaning of the FSIA for two reasons. First because its commercial activities in NY in acquiring

establishes jurisdiction under the first clause of § 1605(a)(2), as the legal claim of the plaintiff is sufficiently "based upon" this US commercial activity.

the Painting to the exclusion of the ownership rights of the MH and without investigating its background supply essential legal elements to all of their claims – most conspicuously for conversion.

In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the Court interpreted the phrase "based upon" to require "something more than a mere connection with, or relation to" the commercial activity of a foreign sovereign. *Id.* at 358. The Court held that claims that an American hospital worker brought against Saudi Arabia alleging that he was tortured and otherwise mistreated in Saudi Arabia as a putative reprisal for reporting work-related hazards were not "based upon" the defendant sovereign's recruitment of the plaintiff in the U.S. The Court said, rather, that the term "based upon" – which the legislative history of the FSIA did not illuminate – means necessarily that a specific element of the plaintiff's claim must derive from the commercial activity of the foreign sovereign in the U.S.: "the phase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." [16]*Id.* at 357. The Court explained that the plaintiff's tort claims alleging abuse and mistreatment

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[16] Courts have employed somewhat varying language to describe the relationship between the commercial activity of the foreign sovereign and the claim of a plaintiff that *Nelson* contemplates. The claims of the MH more than satisfy each formulation. [The prescribed formulations appear in bold for the Court's convenience]. *See, e.g. Atkinson v. Inter-American Development Bank,* 156 F.3d 1335, 1343, (D.C. Cir. 1998), describing elements of a claim that "**relate(s) to** a commercial activity" of the defendant; *Doe v. Holy See*, 557 F.3d 1066, 1093 (9th Cir. 2009),"'[t]he commercial activity must do more than *lead* to the injuries plaintiff suffered"; it must be **'involved in proving'** one of the elements of plaintiff's cause of action.'" (Citations omitted)(Italics original*); In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999*, 392 F. Supp.2d 461, 468 (E.D.N.Y. 2005), depicting claims that are "**intertwined**" with the commercial conduct of the defendant. This Court also has invoked varying language to describe this relationship. *See, e.g., Lantheus Medical Imaging, Inc. v. Zurich American Insurance Co*., 841 F. Supp.2d 769, 785 (S.D.N.Y. 2012), focusing upon "the foreign sovereign's activity **giving rise to** the U.S. litigant's cause of action; *Virtual Countries, Inc. v. Republic of South Africa*, 148 F. Supp.2d 256, 263 (S.D.2001) , describing a claim that "**flow(s) directly**" from the commercial activity of the defendant.

were not "based upon" the commercial activities of the defendant in the U.S. in recruiting him for employment in Saudi Arabia: "[t]hose torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit." *Id.*at 358.

The tort claims at issue in *Nelson* contrast sharply with the claims of the MH heirs for conversion and otherwise to recover the Painting. Unlike *Nelson*, the claim of the MH for conversion is anchored inextricably upon the commercial activities of Bavaria in NY in acquiring the Painting. As the court observed in *Technomarine, SA v. Jacob time, Inc*., 2012 WL 5278539 at 11 (S.D.N.Y.) at 24, 2012) at 11, "[u]nder New York law '[c]onversion is the unauthorized assumption and exercise of the ***right*** of ownership over goods belonging to another to the exclusion of the owner's rights".. and "the plaintiff must make a demand for the return of such goods and be refused before the plaintiff may bring a conversion action." (Emphasis and italics added) Moreover, "[i]t is not necessary that physical possession be taken by the converter; any wrongful exercise of dominion and control is a conversion."[17] The claims of the MH for conversion is premised directly – and inescapably – upon the commercial activities of Bavaria in NY in assuming – or in preparing to assume -- putative legal interest in the Painting to the exclusion of their ownership rights. Bavaria:

1) scoured" the NY City art market for a suitable opportunity to acquire a modern artwork, exploiting in the most purposeful and cynical manner both the public and private resources of the unique NY art market before identifying its best (and likely only) opportunity at the apartment/gallery of NY modern art luminary JT;

2) by admission of its agent in the transaction (Soehner), negotiated all material terms and conditions of a contract to buy the Painting while at JT's residence in NY -- with the Painting

[17] Lee Kreindler, *et. al*., 14 N.Y. Prac.-Torts § 2:12 (Conversion) (2013).

there to view -- and thereby **acquired a putative legal interest in the Painting, arrogating a putative right of ownership to the Painting to the exclusion of the superior rights of the MH heirs within the meaning of *Technomarine;***

3) received shipment of the Painting from NY – postponed only by a minor digression through Switzerland in an apparent ruse to defraud the US and NY of capital gains taxes on the sale of the Painting;

4) paid JT for the Painting by check made out to him personally -- (and not his contrivance EBA) -- and sent to his residence in NY;

5) frustrated core and long standing governmental interests of NY to protect the ownership rights of theft victims (the MH) in converted property sold in the NY art market by declining to ask the questions that the circumstances demanded, thereby breaching a key legal duty that NY law imposes upon prospective buyers.

Accordingly, the claims of the MH to recover the Painting – unlike the mere recruitment of the plaintiff in the US at issue in *Nelson* -- are grounded upon the commercial activities of Bavaria in obtaining a putative ownership interest in the Painting to the exclusion of their own superior ownership rights. In *Nelson*, ***none of the sovereign defendant's commercial activities in the U.S. (mere recruitment of plaintiff as an employee) injured plaintiff directly***. By contrast, Bavaria's negotiation of all material terms of a contract to acquire the Painting in NY in violation of the superior ownership rights of the MH -- and its breach of the duties that it owed them under NY law to take reasonable precautions against acquiring their stolen or converted property – form the very gravamen of their claims for conversion and otherwise to recover the Painting.

Second, the claims of the MH "based upon" the commercial activity of Bavaria in NY for the related reason that by so acquiring the Painting Bavaria incurred two legal duties to the MH that

are integral to their claims – and both of which Bavaria has breached. The first duty – which NY courts long have underscored [18] -- was to investigate reasonably the conspicuously problematic background of the Painting before acquiring it in derogation of the ownership rights of the MH. The second duty that Bavaria immediately incurred in NY as a result of its commercial activities was to return the Painting to the MH upon their demand. Bavaria neglected both duties -- and their violation provides both the factual and legal foundation for the claims of the MH are "based upon" the commercial activities of a foreign sovereign when these activities create a legal duty in the US that the foreign sovereign breaches, regardless whether the breach and related injury occurred elsewhere. [19]

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[18] See, e.g. *Menzel v. List*, 246 N.E.2d 742, 745 (N.Y. Ct. App. 1969), rebuking an art dealer who sold a Nazi-era artwork to a client for failing to ensure that the dealer first had obtained good title, and holding the dealer liable for the painting's appreciated value.

[19] *See, e.g.*, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) , observing that "a usual element of a plaintiff's case is showing that a defendant owed him or her some duty. If the duty arose from commercial acts in the Untied States, then United States courts have jurisdiction, ***even if the acts that breached the duty all occurred elsewhere***." (Emphasis and italics supplied). In *Nazarian v. Compagnie Nationale Air France,* 989 F. Supp504, 508 (S.D.N.Y. 1998), this Court applied the principle stated in *Santos* to sustain a claim for negligence that passengers on an Air France flight brought against the air line alleging various injuries resulting from wrongful detention. The court ruled that the plaintiffs' claim for negligence was grounded in the commercial activities of Air France in the U.S. in selling the passengers tickets, which activity created a duty to the plaintiffs that Air France had breached. Observing that proof of "commercial activity" under § 1605(a)(2) "[g]enerally…comes in the form of some duty owned to the plaintiff as a result of defendant's commercial activities in the United States" (*Id.*at 508), the court ruled that ""[b]y selling its tickets to the Nazarians in New York, Air France created a duty of reasonable care in providing safe passage" which it had breached aboard. (*Id.* at 509).

Correspondingly -- and as noted -- by securing a contractual right to purchase the Painting from JT in NY and contemporaneously asserting a possessory interest in the Painting to the exclusion of the superior ownership rights of the MH in NY – Bavaria incurred duties to the MH to take affirmative precautions to avoid acquiring their stolen or contraband property, and to return the Painting to them upon request. See *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E. 2d 426, 430-432. (N.Y. App. 1991). As both *Santos* and *Nazarian* confirm, that Bavaria breached the duty to return the Painting in Munich rather than in NY in no way attenuates the nexus of the claims of the MH to NY.

b. The Claims of the MH Are "Based Upon" an "Act' that Bavaria Performed in NY in Conjunction with Commercial Activity that It Conducts Elsewhere within the Meaning of the Second Clause of § 1605(a)(2)

Bavaria's commercial activities in acquiring the Painting in NY also constitute an "act" in conjunction with commercial activity that it conducts elsewhere within meaning of the second clause of § 1605(a) (2), which the claims of the MH similarly are "based upon" within the meaning of the FSIA. The House Report on this section relates that Congress intended ***expressly*** to provide an exception to sovereign immunity when a claim arises out of a commercial or other act in the US that pertains to commercial activity that the foreign sovereign conducts abroad:"[i]t has seemed advisable to provide ***expressly*** for the case where a claim arises out of a specific act in the United States which is ***commercial*** or private in nature and which relates to a commercial activity abroad. H.R. REP. No. 1487, 94th Cong. 2d Sess. at 19 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6618. (Emphasis and italics supplied). The Report relates, however, that "the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action." *Ibid.*

The claims of the MH for conversion and otherwise to recover the Painting beyond doubt satisfy this second clause as Congress expressly envisioned. Their claims are based upon the "commercial act" of Bavaria in acquiring the Painting in NY, and thereby asserting a possessory interest in it to the exclusion of their superior ownership rights. Bavaria thereby established both the factual and legal predicates for their conversion claim. But courts – including the Second Circuit Court of Appeals – have interpreted this provision mistakenly to require that the predicate act of the foreign sovereign in this context be (somehow) "***non commercial***". *See, e.g. Anglo-Iberia Underwriting Management Company v. P.T. Jamostek (Persero),* 600F.3d 171, 176 n.3 (2d. Cir. 2010) relating that "the second clause of the 'commercial activity exception 'is generally understood to apply to ***non-***

commercial acts in the United States that relate to commercial acts abroad." (Citations omitted, emphasis and italics supplied).[20] Because the FSIA embodies important foreign policy judgments of Congress and the President about when and under what circumstances foreign sovereigns can be sued – and the US Constitution delegates no foreign policy authority or power to the federal judiciary – it may behoove federal courts to rectify an error that improperly denies judicial access to persons injured by the commercial acts of foreign sovereigns in the US.

c. Bavaria's Wrongful Denial of the Claim of the MH to Recover *Madame Soler* Had Multiple "Direct Effects" in NY and in the US Within the Meaning of the Third Clause of § 1605(a)(2)

By refusing the demand of the MH to return the Painting Bavaria induced many "direct effects" in the US within the meaning of the FSIA that far surpass the requirements that courts have imposed for so ascertaining. [The M.H. enumerate these many effects at ¶ 69 of the SAC and will not repeat them here.] Most importantly, however, by denying the claim of the MH to return the Painting, Bavaria completed the legal requirements for an action in conversion under the distinctive demand and refusal law of NY, as well as for their other claims. When the conduct of a foreign sovereign abroad substantiates the requirements for a legal claim under the relevant US law, the "direct effect" requirement is satisfied.

In *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), the Court explained that a "direct effect" under the FSIA need not be "substantial" or even "foreseeable". *Id*. at 618. Nor must the plaintiffs sustain or 'feel' the direct effect in the US: "[w]e expressly stated in *Verlinden* (461 U.S. at 489) that the FSIA permits a 'foreign plaintiff to sue a foreign sovereign in the

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[20] In *Strata Heights International Corporation et.al. v. Petroleo Brailero, S.A.,* 67 Fed. Appx. 247, 2003 WL 21145663 at 3 n.7 (5th Cir. 2003), the court explained how this anomaly crept into the relevant jurisprudence under the second clause of § 1605(a)(2) when the court in *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998) misapplied *Nelson*, *supra*, and "may have read a distinction into the statute that neither Congress or the Supreme Court intended."

courts of the United States, provided the substantive requirements of the Act are satisfied." 504 U.S. at 619. Rather – and as the court stated in *Gosain v. State Bank of India*, 414 Fed. Appx. 311, 2011 WL 181517 (2d. Cir 2011) – courts have held that an effect is "direct" within the meaning of the FSIA "'if it follows as an immediate consequence of the defendant's activity' and is 'legally significant'". (Citations omitted).

These requirements are fulfilled when the conduct of a foreign sovereign abroad establishes the elements of a legal claim that the plaintiffs are entitled to prosecute in the US.. For example in *United States Fidelity and Guaranty Company v. Brasperto Oil Services*, 199 F.3d 94, 98-99 (2d. Cir. 1999) , two US sureties sued under a performance bond and indemnity contract that they had entered into on behalf of a Brazilian contractor (Petrobas) after Petrobas had declared its co-obligors in default under the primary (construction) contract. By so doing, Petrobas precipitated the plaintiffs' claims for indemnification in the US. The court ruled that this decision had the "direct effect" in the US of giving rise to the claims of the plaintiffs under their indemnification agreement, which was governed by NY law and invoked the jurisdiction of the U.S. District Court for the Southern District of New York:

> Plaintiffs alleged, and the district court found, that Petrobas made the decision to declare its co-defendants in default…The acts triggered plaintiffs obligations under the …performance bonds and thus had the "direct effect" in the United States of giving rise to plaintiffs' claims for indemnification. The indemnity agreements require payment in the United States, are governed by New York law, and invoke the jurisdiction of the United States District Court for the Southern District of New York.

199 F.2d at 98-99.

The legislative history of the FSIA also expressly relates that Congress contemplated a direct effect whenever – under section 18 of the Restatement (Second) Foreign Relations Law of

the United States (1965) -- conduct abroad causes a tort to be committed in the US.[21] Section 18 prescribes in relevant part that "[a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory" when "the conduct and its effect are generally recognized as constituent element of a …tort under the law of states that have reasonably developed legal systems…" Indeed the *Lubell* decision – and NY's distinctive demand and refusal rule for conversion which *Lubell* relates proactively protects the commercial integrity of the international NYart market – depend implicitly upon this principle. 569 N.E.2d at 429-432. *Lubell* observed that "illicit dealing in stolen merchandise is an industry all its own" in the international NY art market (*Id*. at 426), and that the demand and refusal rule "placing the burden of investigating the provenance of a work of art on the potential purchaser" best safeguards NY's "worldwide reputation as a preeminent cultural center." *Ibid*. *Lubell* necessarily contemplates, then, that not infrequently will former owners of converted or stolen artwork sold in the international NY market make demands upon foreign buyers for the return of their property, and the refusal of such demands abroad will trigger a claim for conversion in NY.

Bavaria's denial of the claim of the MH had a "direct effect" within the meaning of these authorities. Just as the decision of Petrobas in *Brasperto* triggered the claims of the sureties for indemnification in a NY court, so, too, did Bavaria's denial of the claim of the MH establish a similar legal claim on their behalf under NY law, and which also invokes the jurisdiction of this

[21] Report, supra note 5 at 6617 relating that the third clause of the FSIA "would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with the principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)."

Court. The legislative history of the "direct effect" requirement validates this jurisdictional predicate, as does the controlling *Lubell* decision.

Finally, the MH have satisfied the "direct effect" test for the common sense reason that the court in *Texas Trading & Milling Corp v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2.Cir. 1981) related. The court said that the essential question in all FSIA cases is whether –under the particular facts and circumstances – the commercial activity of the foreign sovereign had sufficient contact with the US so that "Congress would have wanted an American court to hear the case…No rigid parsing of § 1605((a)(2) should lose sight of that purpose." There can be no doubt that Congress similarly intended that this Court – under the facts and circumstances that the SAC alleges and which the accompanying P. Aff. and Bavaria's own documents confirm – adjudicate the merits of the claim of the MH to recover *Madame Soler*.

B. Bavaria Has Failed to Sustain Its Evidentiary Burden of Proving that It Is Entitled to Sovereign Immunity

The overwhelming evidence that the MH have marshaled confirming that Bavaria acquired *Madame Soler* in the NY art market precludes it from satisfying its evidentiary burden to establish that it is entitled to immunity. *See, e.g. Peterson v. Islamic Republic,* 627 F.3d 1117, 1125 (9th Cir.2010), observing that if the plaintiff in an FSIA case discharges its initial burden of production regarding an exception to immunity "jurisdiction exists unless the defendant demonstrates by a ***preponderance of the evidence*** that the claimed exception does not apply." (Emphasis and italics supplied); *Robinson v. Government of Malaysia*, 269 F.3d 133, 141 n.8 (2d. Cir. 2001), "the defendant must show that the alleged exception does not exist by a preponderance of the evidence." Bavaria's inability in this regard would not be cured were the Court to credit its fictive narrative that JT was acting merely as an agent for EBA in NY. Bavaria still invoked the NY art market to the same extent, NY law would govern the transaction, and all

three commercial activity exceptions of § 1605(a)(2) would still be satisfied for the same reasons. Soehner's November 11, 1964 memo—along with all other supporting evidence - so confirms.

C. Crediting Bavaria's Spurious Argument that It Is Entitled to Sovereign Immunity Would Make a Mockery of NY's Acute Governmental Interest in Preserving the Commercial Integrity of the International NY Art Market

Validating Bavaria's specious arguments would turn *Lubell* on its ear, and confer license upon foreign sovereigns, their political subdivisions, agencies, and instrumentalities to wreck havoc upon the NY art market. Would Congress intend this result?

IV. Conclusion

For the foregoing reasons, the Court should deny the motion of Bavaria to dismiss this proceeding for lack of subject matter jurisdiction, and adjudicate the merits of the claim of the MH to recover *Madame Soler*.

DATED: December 10, 2013.

By: ______s/________

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