UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LÉONE MEYER,

Plaintiff,

-against-

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, DAVID L. BOREN IN HIS INDIVIDUAL CAPACITY, DAVID L. BOREN IN HIS CAPACITY AS THE PRESIDENT OF THE UNIVERSITY OF OKLAHOMA, THE UNIVERSITY OF OKLAHOMA FOUNDATION, INC., DAVID FINDLAY GALLERIES, INC., WALLY FINDLAY GALLERIES (NEW YORK), INC., WALLY FINDLAY GALLERIES INTERNATIONAL DEVELOPMENT CORP., DFG ART CORP. FINDLAY ART CONSIGNMENTS, INC., FINDLAY GALLERIES, INC., THE AMERICAN ALLIANCE OF MUSEUMS, THE ASSOCIATION OF ART MUSEUM DIRECTORS,

Defendants.

13 Civ. 3128 (CM)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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INTRODUCTION

Defendants the Board of Regents of the University of Oklahoma ("Board"), David L. Boren in his individual and official capacity as the President of the University of Oklahoma ("President Boren"), and the University of Oklahoma Foundation, Inc. ("Foundation") (collectively the "Oklahoma Parties"), by and through their attorneys, hereby respectfully submit this Memorandum of Law in support of their Motion to Dismiss Plaintiff Léone Meyer's adverse ownership claims to a Camille Pissaro painting entitled *Bergére reentrant des moutons* (Shepherdess Bringing in Sheep), 1886, oil on canvas, 18 1/4 in. x. 15 in. (the "Painting"), which is owned by the Foundation.

Aside from the factual defects, Plaintiff's First Amended Complaint ("FAC") does nothing to remedy the legal defects identified in the Motion to Dismiss Plaintiff's initial Complaint. While Plaintiff has added some new (but inconsequential) alleged facts and two new causes of action, Plaintiff still cannot demonstrate that this Court has personal jurisdiction over the Oklahoma Parties, all of whom are residents and/or citizens of the state of Oklahoma. None of Plaintiff's new allegations demonstrate that any of the Oklahoma Parties conduct sufficient business within the state of New York for this Court to exercise personal jurisdiction. Furthermore, Plaintiff cannot allege a single fact demonstrating that the Oklahoma Parties were involved in the prior 1950s Swiss judicial proceedings regarding the Painting or the 1956 transaction referenced in the FAC – the only Painting-related event to occur in New York. Moreover, none of Plaintiff's allegations against the Oklahoma Parties concerning jurisdiction have any connection to Plaintiff's claims.

The Oklahoma Parties also contend that this Court lacks subject matter jurisdiction over Plaintiff's claims against the Board and President Boren. The Board is an arm of the state of Oklahoma and Plaintiff has sued President Boren in his official capacity as an agent of the state of Oklahoma. As the state is afforded immunity from suit in federal court and Plaintiff failed to allege waiver of this privilege, the Board and President Boren are entitled to Eleventh Amendment immunity from Plaintiff's claims.

Further, Plaintiff's claims are barred by the Oklahoma Government Tort Claims Act ("OGTCA") which provides the sole basis for the State of Oklahoma's limited waiver of its Eleventh Amendment immunity. Even if Plaintiff's claims were allowed under the OGTCA, Plaintiff has not alleged facts demonstrating that she complied with the OGTCA in order to properly bring claims against the state of Oklahoma or its instrumentalities and agents.

Plaintiff also fails to state a claim from which relief can be granted because Plaintiff's claims are barred by the statutes of limitations and the doctrine of laches. New York requires that claims for conversion or replevin be brought within three years after a demand and refusal, and Oklahoma requires that such claims be brought within two years from when a plaintiff could bring a cause of action. Taken as true, the allegations in the FAC demonstrate that prior to 1956, Plaintiff's father demanded the return of the Painting from its previous owners. After the owners refused, Plaintiff's father filed a lawsuit in Switzerland to recover possession of the Painting. After a full and fair hearing, the Swiss courts denied Plaintiff's father's claim, as the Painting's then-owner was determined to have owned the Painting in good faith. Plaintiff's father declined a post-verdict settlement offer from the Painting's then-owner. Plaintiff now brings this action in New York after decades of inaction. Moreover, the Swiss verdict bars Plaintiff's claims under the doctrines of claim preclusion, res judicata, and international comity.

Finally, venue is not appropriate in New York. The event which Plaintiff claims constitutes a "substantial part" of the events giving rise to her claim is the alleged 1956 purchase of the Painting by non-parties, to whom no residency or citizenship is ascribed, from the collection of a Dutch art dealer through a New York gallery that is no longer in existence. This transaction does not satisfy the "substantial part" requirement of 28 U.S.C. section 1391(b) because almost all of the alleged events giving rise to Plaintiff's claims – the alleged taking of the Painting from Plaintiff's family in France during World War II and the subsequent Swiss lawsuit – took place *outside of New York*. Plaintiff is not a citizen of New York, the Defendants who presently own and possess the Painting are not citizens of New York or subject to this Court's personal or subject matter jurisdiction, and the Painting has been in Oklahoma for more

than five decades. The Oklahoma Parties' only alleged "acts" are accepting the Painting in Oklahoma and placing it on public display. In addition, this case presents questions of Oklahoma state law and statutory interpretation. Lastly, the David Findlay Gallery, Jr. Inc. – the only New York defendant to have made an appearance in this action – has been voluntarily dismissed, and the original David Findlay Gallery involved in the 1956 transaction is no longer a viable entity. As New York has little, if any, connection to this case, Plaintiff's FAC should be dismissed for improper venue.

SUMMARY OF FACTS

I. Overview of Plaintiff's New Allegations

The FAC names Defendant David L. Boren, President of the University of Oklahoma, in his official and individual capacity. Plaintiff, however, has not alleged any new conduct concerning President Boren and has agreed to dismiss President Boren in his individual capacity. Plaintiff attempts to support her claim that this Court has personal jurisdiction by alleging that the University of Oklahoma ("University") (a) issued bonds using New York financial services, (b) allows its students to study at New York University, and (c) recruits students from New York. FAC ¶25. Plaintiff also alleges that the Foundation has deposited funds with the Bank of New York for limited purposes. FAC ¶27. As explained below, none of these allegations establish personal jurisdiction over the University or Foundation. Plaintiff does not allege any facts to demonstrate that this Court has personal jurisdiction over President Boren.

Plaintiff also alleges additional causes of action against two new defendants, the American Alliance of Museums ("AAM") and the Association of Art Museum Directors ("AAMD") (collectively, the "Association Defendants"). FAC ¶¶ 22-23. According to Plaintiff, the Association Defendants failed to somehow punish the University for not following certain art collection guidelines. Plaintiff claims to be an "intended beneficiary" of alleged agreements between the University and the Association Defendants and on that basis, asserts "breach of contract" claims and asks this Court to force the Association Defendants to "reprimand, suspend, or expel" the Fred Jones, Jr. Museum of Art at the University from their associations. *See* FAC

¶¶145, 161. The Association Defendants are private trade associations that have nothing to do with this lawsuit. The University does not have any contract with the only Association Defendant located in New York (the AAMD). Purcell Decl. ¶ 8.[1] Plaintiff cannot state a claim for breach of contract because Plaintiff is not an intended beneficiary of any agreement between the University and the Association Defendants. Moreover, the guidelines on which Plaintiff bases her claims are not part of the alleged accreditation agreement and are non-binding.

II. Summary of Plaintiff's Allegations

Plaintiff Léone Meyer, a French citizen and resident of Paris, France, is the daughter or Raoul Meyer and Yvonne Bader. FAC ¶11.[2] Raoul Meyer was a wealthy French businessman of Jewish descent and Yvonne Bader was the daughter of Théophile Bader, the founder of "Group Galeries Lafayette," a high-end department store in France that the Meyers co-owned with the Heilbronn family. FAC ¶3, 11.

Théophile Bader purchased the Painting from a French art collector sometime prior to 1940. FAC ¶32. Yvonne Bader inherited the Painting when her father's collection was subdivided between his two daughters, Yvonne Bader (Plaintiff's mother) and Paulette Heilbronn. FAC ¶32. After Yvonne inherited the Painting it became part of her husband Raoul's collection of Impressionist paintings. FAC ¶¶2, 32.

[1] On January 29, 2014, Plaintiff's counsel was advised during a meet and confer telephone conference by counsel for the Oklahoma Parties that (a) the University never signed a contract with AAMD and is not a member of AAMD, and (b) that AAM's own policies do not allow its participation in legal proceedings brought against museums by third parties. Plaintiff's counsel agreed (a) that the cited AAM/AAMD guidelines are voluntary and are not grounds to compel action, and (b) to dismiss President Boren in his individual capacity. As of the filing of this motion, the Association Defendants have not been served with the FAC and Plaintiff's counsel has not responded to AAM/AAMD's counsel's offer to meet and confer to discuss the factual defects of Plaintiff's allegations and AAM/AAMD policies and procedures.

[2] Plaintiff fails to allege that she is the sole heir to the Painting, and therefore the real party in interest, or that all necessary parties are before this Court, or that her predecessors maintained their interest in the Painting at the time of their deaths.

In February 1941, the Meyer and Heilbronn families were informed that their artworks were seized by Nazi forces pursuant to anti-Jewish laws. FAC ¶35. Nazi forces transported the Meyer and Heilbronn artworks (including the Painting) to the Einsatzstab Reichsleiter Rosenberg ("ERR") depot at the Louvre Museum in Paris for processing along with other Jewish treasures. FAC ¶35, 37. The Painting left Paris sometime in or about 1945 and was transported to Switzerland by Léon de Sépibus. FAC ¶39, 50, 55.

Later, Mr. Meyer recovered many of his Nazi-seized artworks through the *Commission de Récupération Artistique* ("CRA"), a special Commission formed by the French government after World War II to locate and return artworks looted during the Nazi occupation of France. FAC ¶41. Mr. Meyer was unable, however, to recover the Painting. FAC ¶41.

Mr. Meyer located the Painting in 1951. FAC ¶53. At that time, the Painting was in the possession of André Maus in Geneva, Switzerland. FAC ¶53. Mr. Maus had purchased the Painting from Christoph Bernoulli, a Swiss art dealer who acquired the Painting from Mr. de Sépibus in 1946. FAC ¶52. Shortly after Mr. Meyer located the Painting, Mr. Bernoulli regained possession of the Painting from Mr. Maus. FAC ¶53.

On learning the location of the Painting, Mr. Meyer contacted Mr. Bernoulli in 1952 and attempted to negotiate its return to him. FAC ¶55. On January 8, 1953, Mr. Meyer brought a lawsuit against Mr. Bernoulli in Basel, Switzerland, demanding the return of the Painting. Oklahoma Parties' Motion for Judicial Notice of Documents and Facts ("Motion for Judicial Notice"), Decl. of L. Stein, Exh. A ("Swiss Verdict and Judgment").[3] On July 25, 1953, the Swiss court returned a verdict in favor of Mr. Bernoulli, dismissing Mr. Meyer's claims. Swiss Verdict and Judgment; FAC ¶57. After the lawsuit's conclusion, Mr. Bernoulli reiterated his ownership of the Painting and offered to sell it to Mr. Meyer. Mr. Meyer refused. FAC ¶ 58; Motion for Judicial Notice of Documents and Facts, Dkt. No. 27, Stein Decl., Exhs. B, C

[3] As explained in the Motion for Judicial Notice, this court can take judicial notice of the publically available Swiss verdict. *See* Motion for Judicial Notice, filed concurrently with this Motion.

("Bernoulli Letters").[4] Mr. Meyer lost track of the Painting after the judgment. FAC ¶59. Plaintiff does make any specific allegations regarding any efforts by her or her predecessors to recover the Painting between 1960 and 1994. FAC ¶¶89-90.

The Painting was exhibited at the David Findlay Galleries in New York as part of a one month exhibition titled, "French Paintings of the XIXth and XXth Centuries" from November 15, 1956, through December 15, 1956. FAC ¶62. At that time, the Painting was owned by E.J. van Wisselingh & Co., an art dealer in Holland. FAC ¶62. According to Plaintiff, Mr. Meyer was unaware that the Painting had been exhibited in New York. FAC ¶62. Shortly after the exhibition closed, Aaron and Clara Weitzenhoffer purchased the Painting from E.J. van Wisselingh & Co. through the David Findlay Galleries on January 16, 1957. FAC ¶62.

On March 26, 2012, Plaintiff learned from a blog entry by Marc Masurovsky that the Painting was on display in the Fred Jones, Jr. Museum of Art at the University of Oklahoma. FAC ¶100. The Painting was part of a large bequest by the estate of Aaron and Clara Weitzenhoffer in 2000. FAC ¶87. On December 12, 2012, Plaintiff contacted the University of Oklahoma, claimed that she was the rightful owner of the Painting, and demanded that it be returned to her. FAC ¶101. On January 18, 2013, President Boren responded to Plaintiff's request, informing her that the Painting is in the custody of the Foundation, not the University of Oklahoma. FAC ¶101. Plaintiff filed this action without any further communication or follow up with the Oklahoma Parties.

III. Procedural History

Plaintiff filed this action on May 9, 2013, alleging five causes of action for: (1) conversion, (2) replevin, (3) constructive trust, (4) declaratory relief, and (5) restitution based on unjust enrichment. Docket No. 1. On December 6, 2013, Plaintiff filed a "Notice of Voluntary Dismissal," requesting that the Court dismiss with prejudice defendant David Findlay Jr., Inc.

[4] These publically available documents may be properly considered by this Court because they are incorporated by reference (as negotiations) in the FAC. *See Tarshis v. Reise Org.*, 211 F.3d 30, 39 (2d Cir. 2000).

Dkt. No. 22. On December 6, 2013, the Oklahoma Parties filed their Motion to Dismiss Plaintiff's Complaint and Request for Judicial Notice. Dkt. No. 27. On January 10, 2014, Plaintiff filed her FAC against the Oklahoma Parties and DFG Art Corp., David Findlay Galleries, Inc., Wally Findlay Galleries (New York), Inc., Wally Findlay Galleries International Development Corp., Findlay Art Consignments, Inc., Findlay Galleries, Inc.,[5] and the Association Defendants.

ANALYSIS

I. LEGAL STANDARDS

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(1)

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id*. In evaluating a Rule 12(b)(1) motion challenging the court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits. *See Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 948 F.2d 90, 96 (2d Cir. 1991). This Court reviews the complaints and affidavits in a light most favorable to Plaintiffs, *see id*., but "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it," *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

B. Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(2)

A party may move to dismiss a complaint pursuant to Rule 12(b)(2) when the opposing party's complaint fails to allege sufficient facts showing that the court has personal jurisdiction

[5] Plaintiff's FAC alleges that Defendants the Wally Findlay Galleries (New York), Inc., Wally Findlay Galleries International Development Corp., Findlay Art Consignments, Inc., and Findlay Galleries, Inc. have been dismissed without prejudice. *See* FAC ¶¶17-21.

over the defendants. *See* Fed. R. Civ. Proc. 12(b)(2); *see also PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997).

The plaintiff bears the burden of proving personal jurisdiction over each defendant by a preponderance of the evidence. *See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp*., 84 F.3d 560, 566-67 (2d Cir. 1996). A court is obligated to dismiss an action against a defendant over whom it lacks personal jurisdiction. *See* Fed. R. Civ. Proc. 12(b)(2); *Hutton v. Priddy's Auction Galleries, Inc.*, 275 F. Supp. 2d 428, 435 (S.D.N.Y. 2003).

C. Motion to Dismiss for Improper Venue Pursuant to Federal Rule of Civil Procedure 12(b)(3)

Plaintiff has the burden of pleading proper venue to survive a motion to dismiss under Rule 12(b)(3). *See Cold Spring Harbor Lab. v. Ropes & Gray LLP*, 762 F. Supp. 2d 543, 551 (E.D.N.Y. 2011). "[I]mproper venue constitutes an independent ground for dismissing an action." *German Educ. Tel. Network, Ltd. v. Oregon Pub. Broad. Co.*, 569 F. Supp. 1529, 1533 (S.D.N.Y. 1983). This Court may consider facts outside of the pleadings on a Rule 12(b)(3) motion. *See TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370, 375 n.3 (S.D.N.Y. 2010). If a court relies on pleadings and affidavits, the plaintiff must make a *prima facie* showing of venue. *See Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005). It is within the court's discretion to dismiss an action where the plaintiff has failed to make a *prima facie* showing that venue is proper. *See Minnette v. Time Warner*, 997 F.2d 1023, 1026 (2d Cir. 1993).

D. Motion to Dismiss for Failure to State a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed where a plaintiff's allegations fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). To avoid dismissal, it is incumbent on a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Allegations that demonstrate only the "mere possibility of misconduct" are insufficient. *Ashcroft*

v. Iqbal, 556 U.S. 662, 678 (2009). While a court must accept as true the facts alleged in the complaint, a court need not accept as true legal conclusions asserted in the complaint. *See id.*

II. ARGUMENT

A. Because This Court Lacks Personal Jurisdiction over Each of the Oklahoma Parties and Plaintiff's Claims Must be Dismissed

In a diversity action, a court is required to look to the law of the forum to resolve the question of personal jurisdiction over an out-of-state party. *See Arrowsmith v. United Press Int'l*, 320 F.2d 219, 231 (2d Cir. 1963) (en banc). Under New York law, to determine whether personal jurisdiction over a nonresident defendant exists, the court must engage in a two-step analysis. First, the court must determine whether New York's general or long arm jurisdiction statutes allow the court to assert personal jurisdiction over the nonresident defendant. *See LaMarca v. Pak-Mor Mfg. Co.*, 713 N.Y. 2d 210, 214 (2000). Second, if New York's long arm statute allows for jurisdiction, the court must conduct a Federal due process analysis to determine whether the assertion of jurisdiction offends the Due Process Clause of the Fourteenth Amendment. *See id.* Accordingly, this Court must first determine whether personal jurisdiction exists – if at all – over the Oklahoma Parties under New York Civil Practice Law and Rules ("CPLS") section 301 (New York's general jurisdiction statute) or section 302 (New York's long-arm statute).

Pursuant to CPLR section 301, "a court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." An out-of-state defendant will be subject to personal jurisdiction under section 301 if it is "present or doing business" in New York. *Hamilton v. Garlock, Inc.*, 31 F. Supp. 2d 351, 354 (S.D.N.Y. 1999). If it is established that a defendant is doing business and thereby "present" in New York, the defendant may be subject to the court's jurisdiction with respect to any cause of action. *See China Nat'l Chartering Corp. v. Pactrans Air & Sea, Inc.*, 882 F. Supp. 2d 579, 599 (S.D.N.Y. 2012). To satisfy section 302, there must be a "strong nexus between the plaintiff's cause of action and the defendant's in state conduct." *Welsh v. Servicemaster Corp.*, 930 F. Supp. 908, 910 (S.D.N.Y.

1996); *see also International Shoe Co. v. Washington*, 326 U.S. 310, 318 (recognizing that a corporation's "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.") As discussed below, none of the Oklahoma Parties are "doing business" in New York sufficient for this Court to invoke general jurisdiction under CPLR section 301, nor is there any connection between the Oklahoma Parties' alleged conduct in the state and Plaintiff's claims to obtain jurisdiction under section 302.

1. There is no basis for CPLR section 301 jurisdiction over the University or Foundation

An out-of-state defendant is present and "doing business" in New York only if "engaged in such a continuous and systematic course of 'doing business' [in New York] as to warrant a finding of its 'presence' in this jurisdiction." *Simonson v. Int'l Bank*, 14 N.Y.2d 281, 285 (N.Y. 1964); *see also Aquascutum of London, Inc. v. S.S. Amer. Champion*, 426 F.2d 205, 211 (2d Cir. 1970). Mere solicitation of business within New York is not enough to find general jurisdiction over an out of state defendant. *See Aquascutum*, 426 F.2d at 211. Thus, beyond solicitation, Plaintiff must demonstrate that the Oklahoma Parties each engaged in "continuous, permanent, and substantial activity in New York" to establish personal jurisdiction under CPLR section 301. *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990) (to assert general jurisdiction under section 301, "New York law requires that the defendant be present in New York 'not occasionally or casually, but with a fair measure of permanence and continuity").

The Supreme Court recently announced sharp limitations on when a court can assert personal jurisdiction over a foreign defendant. In *Daimler AG v. Bauman, et al.*, 571 U.S. __, 134 S.Ct. 746 (2014), the Court examined the issue of when a foreign defendant's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . *on causes of action arising from dealings entirely distinct from those activities*." *Id.* at 761 (emphasis in original). Twenty-two residents of Argentina brought suit against Daimler Chrysler

Aktiengesellschaft ("Daimler AG") and its subsidiary, Mercedes Benz USA, in the California district court for events that allegedly took place during Argentina's 1976-1983 "Dirty War." *Id*. at 750-51. The Court explained that the inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' the question is whether that corporation's 'affiliations with the State are so 'continuous and systematic' *as to render [it] essentially at home in the forum State.*" *Id*. (emphasis added). The Court concluded that neither Mercedes Benz USA nor its parent, Daimler AG, were "at home in California" by virtue of their conduct throughout California. *Id*. at 761. The Court cautioned that to hold otherwise would be an "exorbitant exercise[] of all-purpose jurisdiction [and] would scarcely permit out-of-state defendants 'to structure their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id*. at 762. In light of *Daimler AG*, neither the University nor the Foundation has sufficient contacts with New York to subject them to this Court's personal jurisdiction.

a. There are no grounds to assert section 301 jurisdiction over the University

To assert jurisdiction over the Board, and thereby the University, Plaintiff relies on (1) alleged bond issuances using "New York services," between 2010 and 2013, FAC ¶25, (2) an exchange program with New York University, FAC ¶25, and (3) the recruitment and travel of student athletes in New York,[6] FAC ¶25. These contacts are not sufficient to subject the University to New York's general jurisdiction. *See Daimler AG*,134 S.Ct. 746, 761 (overturning California's finding of general jurisdiction over a foreign corporation that had multiple California-based facilities, employees, and was the largest supplier of luxury vehicles in California). The University does not (a) receive service of process in New York, (b) file income taxes in New York, (c) have any New York employees, (d) maintain offices in New York, (e)

[6] Plaintiff also alleges that the University is subject to New York jurisdiction because it is a member of the AAMD, which is located in New York. FAC ¶26. The University is not a member of the AAMD. Purcell Decl. ¶__.

own or lease property, (f) maintain bank accounts in New York, (g) maintain a New York telephone number, (h) is not incorporated in New York, and (i) does not otherwise conduct or solicit business in New York. Purcell Decl. ¶¶ 3-7.

Activities that are typical of nationally prominent universities, such as the recruitment of students, fundraising, or the receipt of money from New York residents, do not subject the University to jurisdiction under section 301. *See, e.g., Daniel v. Am. Bd. of Emergency Med.*, 988 F. Supp. 127, 209-210 (W.D.N.Y. 1997)[7]; *Farahmand v. Dalhousie Univ.*, No. 11787 (2009), 2011 WL 103539, at *3 (N.Y. Sup. Ct. Jan 3, 2011) (out-of-state university that does not have any campuses in New York, is not authorized to do business in New York, has no offices or academic facilities in New York, does not own or rent property in New York, and does not employ individuals in New York was not subject to section 301 jurisdiction); *see also Gehling v. St. George's Sch. of Med., Ltd.*, 773 F.2d 539, 541-43 (3d Cir. 1985); *see also American Univ. Sys. v. American Univ.*, 858 F. Supp. 2d 705, 713-714 (N.D. Tex. 2012); *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 230 (D.D.C. 2007); *Schere v. Curators of the Univ. of Missouri & Law Sch. Admissions Council*, 152 F. Supp. 2d 1278, 1282 (D. Kan. 2001); *Gallant v. Trustees of Columbia Univ. in City of New York*, 111 F. Supp. 2d 638, 640 (E.D. Penn. 2000); *Park v. Oxford Univ.*, 35 F. Supp. 2d 1165, 1167 (N.D. Cal. 1997).

The use of New York financial services firms, such as investment banking firms and underwriters, would not subject the University to jurisdiction under section 301. *See Daniel*, 988 F. Supp. at 223; *Bush v. Stern Bros. & Co.*, 524 F. Supp. 12, 13-14 (S.D.N.Y. 1981); *Stark Carpet Corp. v. M-Geough Robinson, Inc.*, 481 F. Supp. 449, 506 (S.D.N.Y. 1980). To do so could subject almost every American company to New York's jurisdiction. *See, e.g., Schenker v.*

[7] In *Kingsepp v. Wesleyan Univ.*, 763 F. Supp. 22 (S.D.N.Y. 1991), this court asserted personal jurisdiction under section 301 over Dartmouth University. *See id.* at 27. Dartmouth visited over forty schools in one year to solicit students, owned real property in the state, maintained at least two bank accounts in New York with a balance of over $14 million, and issued bonds in New York. *Id*. at 27. Unlike Dartmouth, however, the University does not own real estate or lease property in New York, does not maintain any bank accounts in New York, and is not alleged to have visited forty different schools to solicit students. Thus, *Kingsepp* is readily distinguishable.

Assicurazioni Generali S.P.A., Consol., No. 98 Civ. 9186 (MBM), 2002 WL 1560788, at *5 (S.D.N.Y.2002) (finding that Swiss defendant that owned at least three New York bank accounts was not subject to jurisdiction because "investing money in New York alone cannot be considered a form of 'doing business' for the purpose of § 301 . . . 'if it were, then almost every company in the country would be subject to New York's jurisdiction"); *see also Alexander & Alexander Servs., Inc. v. Lloyd's Syndicate 317*, 925 F.2d 44, 46-47 (2d Cir. 1991) (finding that a foreign corporation that maintained a $9.4 billion New York trust account containing income derived from New York underwriting activities did not subject the corporation to section 301 jurisdiction).

Moreover, recruiting students from New York, the third most populous state, does not amount to the University maintaining a "presence" in New York for purposes of jurisdiction under section 301. *See, e.g., Daniel*, 988 F. Supp. at 209-210 (holding that an out of state medical college that participated in bond offerings, solicited and derived charitable contributions and payments from New York residents, participated in accreditation of New York medical facilities and recruited New York residents was not subject to section 301 jurisdiction). Further, universities across the country should be encouraged to allow their students to study at prominent New York universities, such as NYU, not penalized by exposing themselves to section 301 jurisdiction.

There is no basis to find personal jurisdiction over the University under section 301. To do so would be an "exorbitant exercise[] of all-purpose jurisdiction" that could render practically every national university in the country subject to New York's general jurisdiction. *See, e.g., Daimler AG*, 134 S. Ct. at 762.

b. There are no grounds to assert section 301 jurisdiction over the Foundation

Plaintiff alleges that the Foundation keeps a bank account with the Bank of New York for "pooled, non-alternative investment funds" and receives donations, dues and grants from residents of New York. FAC ¶27. This is insufficient for this Court to assert general jurisdiction

over the Foundation. Like the University, the Foundation does not (a) receive service of process in New York, (b) file income taxes in New York, (c) have any New York employees, (d) maintain offices in New York, (e) own or lease property, (f) maintain a New York telephone number, (g) is not incorporated in New York, and (h) does not otherwise conduct or solicit business in New York. Patton Decl. ¶ 3-7.

Owning a New York bank account alone does not subject one to jurisdiction under section 301. *See Grove Valve & Regulator Co., Inc. v. Iranian Oil Servs., Ltd.*, 87 F.R.D. 93, 95 (S.D.N.Y. 1980) ("New York courts have consistently held . . . that maintenance of local bank accounts does not, without more, amount to "doing business" in the state."); *Semi-Conductor Materials, Inc. v. Citibank Int'l PLC*, 969 F. Supp. 243, 245-46 (S.D.N.Y. 1997).[8] The fact that the Foundation receives donations and contributions from New York residents and maintains a limited purpose account with a New York based bank is not enough for the Court to assert general jurisdiction. *See Krepps v. Reiner*, 414 F. Supp. 2d 403, 409 (S.D.N.Y. 2006) (foreign defendant was not engaged in a "continuous and systematic course of business" in New York just because it raised funds from New York residents and had a bank account in New York); *see also Nelson v. Mass. Gen. Hosp.*, No. 04-CV-5382 (CM) 2007 WL 2781241, *24-25 (S.D.N.Y. 2007) (finding that out-of-state defendant that raised $51,366,783 in New York donations did not subject defendant to New York jurisdiction under section 301); *see also Daniel*, 988 F. Supp. at 218. Because there is no basis for this Court to assert section 301 jurisdiction over the Foundation or University, Plaintiff's claims should be dismissed.

[8] In *United Rope Distributors Inc. v. Kimberly Line*, 785 F. Supp. 446 (S.D.N.Y. 1992), this court asserted section 301 jurisdiction over a foreign defendant because it maintained a New York bank account. *See id.* at 450. Unlike the Foundation, however, that corporation used its New York account to handle its finances. *Id.* There, the court emphasized that by using a New York bank for *all* of its financial affairs, the corporation purposefully invoked the "benefits and protections of New York's laws." *Id.* Here, the Foundation allegedly uses a Bank of New York account (the nationally dominant custody bank among institutional investors) for a limited purpose, "pooled, non-alternative investment funds." FAC ¶27. Thus, *United Rope* does not control.

2. There is no basis for personal jurisdiction under CPLR section 302, New York's Long-Arm Statute

"Unlike [CPLR] Section 301, which confers personal jurisdiction over an out-of-state defendant for any cause of action, [CPLR] Section 302 requires that the cause of action 'arise from' the defendant's . . . transaction of business within New York." *Zibiz Corp. v. FCN Tech. Solutions*, 777 F. Supp. 2d 408, 420 (E.D.N.Y. 2011); *see also McGowan v. Smith*, 52 N.Y.2d 268, 272 ("Essential to the maintenance of a suit against a nondomiciliary under CPLR 302(a)(1) is the existence of some *articulable nexus between the business transacted and the cause of action sued upon*.") (emphasis added).

Here, Plaintiff cannot establish "long arm" jurisdiction over the Oklahoma Parties because there is no connection between her claims and the Oklahoma Parties' alleged conduct in New York. All of the Oklahoma Parties' alleged acts related to Plaintiff's claims took place in Oklahoma, not New York. FAC ¶¶87-88, 101. Plaintiff does not assert that the Oklahoma Parties had anything to do with the World War II era events, the 1950's Swiss proceeding or negotiation, or the 1956 sale. The only alleged transaction that occurred in New York – the brief exhibition and sale of the Painting in 1956 – did not involve the Oklahoma Parties or have anything to do with their alleged activities in New York. *See* FAC ¶62. Therefore, Plaintiff's attempt to allege jurisdiction over the Oklahoma Parties under CPLR § 302(a) fails. *See Welsh*, 930 F. Supp. at 910 (finding no basis for long arm jurisdiction where defendant's alleged activity in New York had no connection to plaintiff's injuries which occurred in Connecticut); *see also Daimler AG*, 134 S.Ct. at 762.

Where there is a basis for applying long arm jurisdiction, a Court should consider a federal due process analysis to determine whether jurisdiction is appropriate over the Oklahoma Parties. *See Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997); *see also LaMarca*, 95

N.Y.2d at 214. Because Plaintiff has failed to meet her burden of satisfying personal jurisdiction under New York law, a due process analysis is not necessary.[9]

B. This Court Lacks Subject Matter Jurisdiction over Plaintiff's Tort Claims against the Board and President Boren

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal of a claim where the federal court "lacks jurisdiction over the subject matter." *Ford v. D.C. 37 Union Local*, 579 F.3d 187, 188 (2d Cir. 2009) (citation omitted). Under Rule 12(b)(1) even "a facially sufficient complaint may be dismissed for lack of subject matter jurisdiction if the asserted basis for jurisdiction is not sufficient." *Frisone v. Pepsico Inc.*, 369 F. Supp. 2d 464, 469 (S.D.N.Y. 2005).

This Court lacks subject matter jurisdiction over Plaintiff's tort claims against the Board and President Boren because they are immune from suit in federal court under the Eleventh Amendment to the United States Constitution.

1. Immunity is afforded to the States and their instrumentalities

The Eleventh Amendment provides an unconsenting State with immunity from suit brought in federal courts "by her own citizens as well as citizens of another state." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). This immunity extends to a State's created instrumentalities. *Daniel*, 988 F. Supp. at 151; *see also McGinty v. New York*, 251 F.3d 84, 95 (2d Cir. 2001). A state that has not waived its Eleventh Amendment immunity and consented to

[9] By asking this Court to determine the Painting's ownership, Plaintiff is essentially bringing a declaratory action and asking the Court to review and unwind the Swiss Verdict and Judgment. The Federal Declaratory Judgment Act (which more properly provides the jurisdictional basis for the relief Plaintiff seeks) allows a plaintiff to bring an action requesting that a court determine the ownership of property within its jurisdiction. *See* 28 U.S.C. §§ 2201-02 (stating that a district court may declare the rights of an interested party in an actual controversy within its jurisdiction); *see also, e.g.*, 28 U.S.C. § 1655 (stating that a district court may issue an order to clear title to personal property located within its jurisdiction where any defendant cannot be served within the state); *see also Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006) (determining an artwork's lawful owner in a declaratory action); *Detroit Inst.of Art, et al. v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. March 31, 2007). Here, the Painting is not "within this Court's jurisdiction."

a court's jurisdiction may not be sued by private individuals in federal court. *See Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

The Eleventh Amendment provides that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Garrett*, 531 U.S. at 363. The Amendment is "rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity," *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 236 (2d Cir. 2006), and it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the sovereign's] consent," *id.* (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996)).

a. The Board is an arm of the State of Oklahoma and is entitled to immunity

To determine whether an entity such as the University of Oklahoma constitutes an arm of the state, and is therefore immune from suit under the Eleventh Amendment, a court will evaluate: (1) the degree of control and supervision over the entity by the state, including the state's ability to appoint and remove officers or directors, (2) the state's ability to approve or disapprove the entity's actions, including the entity's ability to raise revenue for its own purposes, (3) the financial independence of the entity from the state, (4) whether the state is responsible for the entity's obligations and liabilities, and (5) the character of the entity's functions. *See Daniel*, 988 F. Supp. at 151-52.

Oklahoma is a state and, therefore, can claim immunity from suit under the Eleventh Amendment. *See Edelman*, 415 U.S. at 662-63. The U.S. Court of Appeals for the Tenth Circuit determined conclusively that Oklahoma's constitution and statutory scheme provide that the Board is an arm of the state of Oklahoma and afforded Eleventh Amendment immunity. *See Cornforth v. Univ. of Oklahoma Bd. of Regents*, 263 F.3d 1129, 1131 n.1 (10th Cir. 2001);

Hensel v. Office of Chief Admin. Hearing Officer, 38 F.3d 505, 508 (10th Cir. 1994) ("We have recognized that under Oklahoma law, the Board of Regents of the University is an arm of the state and that a suit against the University is a suit against the Board of Regents."); *Seibert v. State of Oklahoma, ex rel., the Univ. of Oklahoma Health Scis. Ctr*, 867 F.2d 591, 594 (10th Cir. 1989); *see also* Okla. Const. Art. XIII, XIII-A, XIII-B; 70 Okla. Stat. §§ 3301-05 (2013).

Even if this Court were to apply an independent analysis, applying the factors above, it is clear that the Board is an arm of the state and immune from suit. The state exercises a high degree of control over the Board through the Governor of Oklahoma appointing each of its members. *See* Okla. Const. Art. XIII-8. As a member of the Oklahoma State System of Higher Education, the Board is financially dependent on the Oklahoma State Legislature to fund its budget, which the Board allocates to meet all of the obligations and liabilities of the University of Oklahoma. *See* Okla. Const. Art. XIII-A-1, 3; 70 Okla. Stat. § 3305. Moreover, the sole purpose of the Board is to govern and supervise the University of Oklahoma, which is a state university. *See* Okla. Const. Art. XIII-8; 70 Okla. Stat. § 3301. Therefore, the Board is an arm of the state of Oklahoma and presumptively immune from suit in federal court.

b. The Board has not waived its Eleventh Amendment immunity from suit in federal court

Plaintiff does not allege that the Board waived its Eleventh Amendment immunity. Oklahoma's Government Tort Claims Act ("OGTCA") contains a limited waiver of sovereign immunity by rendering the state potentially liable for torts committed by its employees while acting within the scope of their employment. *See* 51 Okla. Stat. 153(A). The OGTCA does not, however, constitute a blanket waiver of Oklahoma's sovereign immunity. 51 Okla. Stat. 152.1(A) ("The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution."). The OGTCA provides the exclusive means for an injured plaintiff to recover tort damages from the state of Oklahoma. *See* 51 Okl. St. § 153(B).

The FAC does not allege causes of action that fall within the OGTCA's limited waiver of immunity. Plaintiff offers no allegations which would render the Board, an arm of the state, liable for the torts of conversion or replevin, or Plaintiff's claims for constructive trust, unjust enrichment, and restitution. Therefore, the Board is immune from Plaintiff's tort claims under the Eleventh Amendment because it has not waived its presumptive Eleventh Amendment immunity.

c. Plaintiff's tort claims should be dismissed because she failed to exhaust her administrative remedies under the OGTCA

The Board enjoys all privileges, exemptions, and immunities of the OGTCA. *See Carswell v. Okla. State Univ.*, 995 P.2d 1118, 1123 (Okla. 1999) ("The Tort Claims Act immunizes the state, its political subdivisions and all their employees acting within the scope of employment except to the extent waived by the Act.") Even if Plaintiff's tort claims fell within the OGTCA, Plaintiff's tort claims should be dismissed because she did not, and cannot, allege facts which demonstrate actual or substantial compliance with the notice and claim provisions of the OGTCA. *See Willborn v. City of Tulsa*, 721 P.2d 803, 805 (Okla. 1986). The OGTCA provides specific notice procedures for bringing a claim against the state of Oklahoma. *See* 51 Okla. Stat. §§ 156, 157; *see also Davis v. Bd. of Regents*, 25 P.3d 308, 311 (Okla. Civ. App. 2001). "Any person having a claim against the state . . . within the scope of [the OGTCA] shall present a claim to the state for any appropriate relief including the award of money damages." *Morales v. City of Okla. City ex rel. Okla. City Police Dep't*, 230 P.3d 869, 873 n.3 (Okla. 2010) (citing 51 Okl. St. § 156(A)). The claim must be filed with the Office of Management and Enterprise Services within one year of the date of loss, who will then notify the Attorney General and the state agency concerned. *See* 51 Okl. St. § 156(B)-(C). A plaintiff may not initiate suit against the state unless a properly submitted claim has been denied in whole or in part. *See* 51 Okl. St. § 157(A). A plaintiff has 180 days upon the denial of the claim to bring a claim against the state. *See Floyd v. Quinton Pub. Schs.*, 438 F. Supp. 2d 1318, 1319 (E.D. Okla. 2006).

Plaintiff alleges no facts indicating that she followed this precedence by submitting a claim pursuant to the OGTCA. Rather, Plaintiff demanded the return of the Painting directly from the University of Oklahoma on December 12, 2012. FAC ¶101. President Boren responded to Plaintiff on January 18, 2013, informing Plaintiff that the Painting was in the custody of the Foundation. FAC ¶101. Plaintiff does not allege that she attempted to follow the necessary procedures of the OGCTA before filing her FAC.[10] In fact, Plaintiff does not allege that she attempted to contact the Foundation after learning that it possessed the Painting. Therefore, should the Court find the OGTCA relevant, Plaintiff's claims should be dismissed because she did not comply with the OGTCA such that the Board's immunity could be deemed waived.

2. President Boren is entitled to the same protections and immunities as the Board

Plaintiff named President Boren as a defendant in his official capacity as the President of the University of Oklahoma. FAC ¶¶13-14. Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In fact, by suing President Boren in his official capacity, Plaintiff has merely alleged another form of pleading an action against the state of Oklahoma. *See Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 690 n.55 (1978). As Plaintiff has not alleged any facts showing that President Boren "violated [Plaintiff's] clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, 457 U.S. at 818, President Boren is immune.

[10] Plaintiff allegedly learned on March 26, 2012, that the Painting was on display at the University, FAC ¶100, which is now outside the permissible one year statute of limitation for submitting a claim under the OGTCA, 51 Okla. Stat. § 156(B).

C. Plaintiff's Claims Fail to Satisfy Federal Rule of Civil Procedure 12(b)(6)

1. Plaintiff's claims are time barred

"Where the dates in a complaint show that an action is barred by a statute of limitations, a defendant may raise the affirmative defense in a pre-answer motion to dismiss. Such a motion is properly treated as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted . . . ." *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989). Under New York law, a three year statute of limitations applies to actions for conversion and replevin. *See* CPLR § 214(3); *see also De Weerth v. Baldinger*, 658 F. Supp. 688, 694 (S.D.N.Y. 1987). The New York statute of limitations begins to run after a demand is made to return the property and that demand is refused. *See Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 482 (S.D.N.Y. 2010). The statute of limitations in Oklahoma for conversion or replevin claims is two years. *See* 12 Okla. Stat. § 95. Oklahoma's statute of limitations begins to run when, in the exercise of due diligence, a claimant knew or should have known of the existence of the claim. *See In re 1973 John Deere 4030 Tractor*, 816 P.2d 1126, 1134 (Okla. 1991). The defense of laches bars a plaintiff's claim where (1) the plaintiff was aware of the claim, (2) the plaintiff inexcusably delayed in taking action, and (3) the delay prejudiced the defendant. *See Bakalar v. Vavra*, 819 F. Supp. 2d 293, 303 (S.D.N.Y. 2011).

Here, Plaintiff's complaint is time-barred on its face by New York and Oklahoma's statutes of limitations and the doctrine of laches because Plaintiff's father, Raoul Meyer, demanded the return of the Painting from Christoph Bernoulli in or about 1953. *See* FAC ¶55, 57. That demand was refused and on January 8, 1953, Raoul Meyer filed a lawsuit in Basel, Switzerland, to recover possession of the painting from Bernoulli. Swiss Verdict and Judgment; FAC ¶57. On July 25, 1953, the Swiss court returned a verdict in favor of Bernoulli, dismissing Mr. Meyer's claims. Swiss Verdict and Judgment; FAC ¶57. Mr. Bernoulli reiterated his refusal of Mr. Meyer's demand in his post-verdict offer to sell the Painting to Mr. Meyer. Bernoulli Letters; FAC ¶58. The statute of limitations does not restart by virtue of the Painting changing ownership. The Oklahoma Parties are prejudiced by Plaintiff attempting to re-litigate the same

claims fifty years later – particularly as the FAC makes no allegations that either Plaintiff or her predecessors did anything between 1960 and 1994 to alert the art market or general public of her alleged ownership claim.[11] *See, e.g.*, *Cordova v. Folgueras y Rijos*, 227 U.S. 375, 377 (1913) (noting heir inherits predecessor's rights). Therefore, the FAC is time barred on its face and must be dismissed. *See* CPLR § 214(3); 12 Okla. Stat. § 95; *Bakalar*, 819 F. Supp. 2d at 303.

2. Plaintiff's claims are barred by principles of *res judicata*, collateral estoppel, and international comity

a. Plaintiff's claims are barred by *res judicata*

The doctrine of *res judicata*, provides that a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Under *res judicata*, defendants must demonstrate that: "(1) the prior action was adjudicated on the merits, (2) the prior action involved those in privity with Plaintiff, and (3) the claims raised in this action were, or could have been, raised in the prior action." *Monahan v. New York City Dept. of Corr.*, 214 F.3d 275, 284 (2d Cir. 2000).

Here, (1) Plaintiff's father, Raoul Meyer, filed a lawsuit in Switzerland alleging claims identical to Plaintiff's, *see* Swiss Verdict and Judgment, (2) Plaintiff is privy to her father's claims, and (3) the Swiss court dismissed Plaintiff's father's claims. *Id*. Thus, Plaintiff's claims are barred by principles of *res judicata* and must be dismissed.

[11] Plaintiff asserts that an inquiry regarding the Painting was made to the German Government in 1960 through the Office des Biens et Intérêts Privés ("OBIP") (Office of Private Goods and Interests). FAC ¶89. Plaintiff did not, however, take any affirmative action until 1994. Following the liberation of Paris in 1944, Mr. Meyer submitted a claim to the CRA to recover artworks seized from him by the Nazis in 1941. FAC ¶42. Mr. Meyer recovered numerous paintings from the CRA between 1946 and 1949 as the result of this claim. FAC ¶41. The CRA later transferred this claim to the OBIP and, according to Plaintiff, "[i]n that regard, [OBIP] received claims from Meyer for all artworks not retrieved or found after 1945, under claim no. 32058." FAC ¶42. Thus, the only affirmative act by Plaintiff or her predecessors to recover the Painting between 1953 and 1994 was Mr. Meyer's 1944 claim to the CRA.

b. Plaintiff's claims are barred by collateral estoppel

"Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (footnote omitted). Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action were the same." *Leather v. Eyck*, 180 F.3d 420, 425 (2d Cir. 1999). The U.S. Court of Appeals for the Second Circuit set forth the following factors to determine whether to apply the doctrine of collateral estoppel:

> (1) the issues of both proceedings must be identical, (2) the relevant issues [must have been] actually litigated and decided in the prior proceeding, (3) there must have been "full and fair opportunity" for the litigation of the issues in the prior proceeding, and (4) the issues [must have been] necessary to support a valid and final judgment on the merits.

Central Hudson Gas & Elec. Co. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995).

In bringing this case, (1) Plaintiff is attempting to litigate the same issue decided by the Swiss Verdict and Judgment, the Painting's ownership, (2) Plaintiff does not allege that her father did not have a full and fair opportunity to litigate his claims in the Swiss courts, and (3) the Swiss Verdict and Judgment support a valid and final judgment on the merits. Therefore, Plaintiff's claims are precluded by collateral estoppel.

c. Plaintiff's claims are barred by international comity

Unlike domestic judgments, foreign judgments are not automatically entitled to preclusive effect in United States courts. *See Hilton v. Guyot*, 159 U.S. 113, 202 (1895). Instead, "the theory often used to account for the res judicata effects of foreign judgments is that of comity." *In re Arbitration Between Int'l Bechtel Co. & Dep't of Civ. Aviation of the Gov't of Dubai*, 300 F. Supp. 2d 112, 117 (D.D.C. 2004). Under the doctrine of international comity a court should not review the judgment of a foreign court where the plaintiff was afforded "an

opportunity for a full and fair trial abroad before a court of competent jurisdiction . . . and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect . . . ." *Hilton*, 159 U.S. at 202. Courts have found that "Swiss courts are a fair and reasonable forum for resolution of disputes." *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1460 (S.D.N.Y. 1990); *see also Schertenleib v. Traum*, 589 F.2d 1156, 1164-66 (2d Cir.1978) (finding that Switzerland provides an alternate forum under doctrine of forum non conveniens).

This Court should afford comity to the Swiss Verdict and Judgment because Plaintiff does not allege any facts indicating that her father, Raoul Meyer, was not afforded an opportunity for a "full and fair trial abroad before a court of competent jurisdiction . . . and there is nothing to show either prejudice in the [Swiss] court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of [Switzerland] should not allow [the Swiss Verdict and Judgment] full effect . . . ." *Id.* Plaintiff should not be allowed to bring the same claims more than fifty years later in this Court. Because Plaintiff's privies already litigated claims identical to Plaintiff's in a Swiss court, this Court should apply principles of international comity and recognize Plaintiff's claims as barred.

3. Plaintiff fails to allege facts sufficient to state a claim for breach of contract

To state a breach of contract claim under New York law, Plaintiff must allege (a) the existence of a contract, (b) a breach of the contract, and (c) damages resulting from the breach. *Wolff v. Rare Medium, Inc.*, 210 F. Supp. 2d 490, 494 (S.D.N.Y. 2002). Plaintiff claims to be the third-party beneficiary of alleged contracts between the University and Association Defendants. FAC ¶¶9-10. None of the Oklahoma Parties have a membership agreement with the AAMD. Purcell Decl. ¶8; Patton Decl. ¶8. Therefore, Plaintiff's breach of contract claims related to the AAMD should be dismissed for failure to state a claim. *See Wolff*, 210 F. Supp. 2d at 494.

Plaintiff's remaining claim based on the alleged accreditation agreement ("Agreement") between the University and AAM fails because Plaintiff cannot demonstrate that she is an intended beneficiary of the Agreement. Moreover, Plaintiff does not, and cannot, cite to a single term of the Agreement that any party allegedly breached. Plaintiff cites only to voluntary guidelines that are outside the four corners of the alleged Agreement. Lastly, Plaintiff does not allege facts demonstrating that specific performance is appropriate and has failed to exhaust any potential methods of recourse available to her before filing suit. In fact, Plaintiff's sole purpose for including the breach of contract claims in the Amended Complaint is to create a basis for personal jurisdiction over the Oklahoma Parties. Plaintiff's breach of contract claims should be dismissed.

a. Plaintiff is not an intended beneficiary of the accreditation agreement

The Agreement does not give Plaintiff any enforceable rights. "It is ancient law in New York that to succeed on a third party beneficiary theory, a non-party must be the intended beneficiary of the contract, not an incidental beneficiary to whom no duty is owed." *Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 251 (2d Cir. 2006). "[A] third-party is an intended beneficiary only if [(a)] 'no one other than the third-party can recover if the promisor breaches the contract' or [(b)] the contract language should otherwise clearly evidence 'an intent to permit enforcement by the third-party." *Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc.*, 651 F. Supp. 2d 155, 173 (S.D.N.Y. 2009). New York courts may "look to surrounding circumstances 'where appropriate' to determine whether a plaintiff is an intended third-party beneficiary . . . [however] such circumstances cannot give rise to third-party beneficiary status '*absent some indication in the actual agreement of the parties' intent.*" *Air Atlanta Aero Eng'g Ltd. v. SP Aircraft-Owner I, LLC*, 637 F. Supp. 2d 185, 194 (S.D.N.Y. 2009) (emphasis added).

Plaintiff fails the first prong of the *Abu Dhabi* test because either the University or AAM could enforce the terms of the Agreement to receive its benefits. *See Abu Dhabi*, 651 F. Supp.

2d at 185. Indeed, the benefit of the Agreement is receiving the "mark of distinction as a validation of a museum's operations." FAC ¶143. Any alleged benefit received by Plaintiff is incidental. Plaintiff has failed to allege anything in the Agreement indicating otherwise.

Plaintiff fails the second prong because she cannot identify *any language in the Agreement* indicating that she is an intended beneficiary. Plaintiff points only to alleged guidelines that are outside the Agreement, not terms of the Agreement. Moreover, courts have declined to construe accreditation agreements as creating enforceable third-party rights. *Cruz Berrios v. Accreditation Council for Graduate Med. Educ.*, 218 F. Supp 2d 140, 143 (D.P.R. 2002) (finding no contract or quasi-contract between student and accreditation organization); *Ambrose v. New England Ass'n of Schs. & Colls., Inc.*, 252 F.3d 488, 495 (finding that no cause of action exists for negligent accreditation). Instead, courts afford deference to accrediting associations to determine their own rules of accreditation "in light of special expertise in determining professional competency requirements." *Cruz*, 218 F. Supp. 2d at 413.

Plaintiff has no enforceable rights under the Agreement, her breach of contract claims should be dismissed.

b. Plaintiff's breach of contract claim fails because she has failed to allege facts to state a claim for breach of contract

In addition to alleging the existence of a contract, Plaintiff must "identify the specific provision of the contract that was breached as a result of the acts at issue." *Wolff*, 210 F. Supp. 2d at 494. Absent any ambiguity in the contract's terms, a court should not look beyond the "four corners of the instrument" to determine the parties' intent. *British Int'l. Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 342 F.3d 78, 82 (2d Cir. 2003). Here, Plaintiff has failed to identify *any language of the accreditation agreement* or identify what provision of the accreditation agreement was breached. Plaintiff relies only on non-binding guidelines that are outside the alleged Agreement. Plaintiff's reliance on these voluntary guidelines to determine the parties' intent is inappropriate because she has not alleged any ambiguity in the Agreement to allow the Court to look beyond the "four corners" of the Agreement. *See Seguros*, 342 F.3d at 82.

Moreover, even if the guidelines were somehow part of the Agreement, which they are not, they are *permissive*, not mandatory. *See Toledo Museum of Art*, 477 F. Supp. 2d at 808 (finding that AAM guidelines "were not intended to create legal obligations or mandatory rules"). For example, Plaintiff alleges that according the AAM's Unlawful Appropriation Standards, museums "*should* take all reasonable steps to resolve Nazi-era provenance . . . *should* make serious efforts to allocate the time and funding to conduct research . . . [and] *should* take prudent and necessary steps to resolve the status of an object." FAC ¶140; *see also* fn. 1 (Plaintiff's counsel agrees the alleged guidelines are permissive, not mandatory). Such language is permissive, not mandatory. *See, e.g., Slue v. New York Univ. Med. Ctr.*, 409 F. Supp. 2d 349, 359 (S.D.N.Y. 2006).

In addition, Plaintiff fails to allege facts that she has suffered damages as a result of the Oklahoma Parties' conduct or to justify her request that the Court order the extraordinary remedy of specific performance. *Barton Group, Inc. v. NCR Corp.*, 796 F. Supp. 2d 473, 502 (S.D.N.Y. 2011) (a party requesting specific performance "must demonstrate that remedies at law are incomplete and inadequate to accomplish substantial justice"). Plaintiff faults the Oklahoma Parties for possessing the Painting and placing it on public display in Oklahoma. However, it was the University's act of putting the Painting on public display that enabled Plaintiff to learn the whereabouts of the Painting after nearly five decades. Plaintiff also does not allege facts indicating that remedies at law are inadequate or incomplete. Moreover, Plaintiff has failed to allege that she attempted to exhaust *any* methods for recourse available through AAM, or even contact AAM prior to bringing her claims. Thus, Plaintiff's breach of contract claims fail.

D. Venue is Improper and Plaintiff's FAC Must be Dismissed

Finally, the Oklahoma Parties move to dismiss Plaintiff's FAC pursuant to Federal Rule of Civil Procedure 12(b)(3) on the ground that venue is improper in this district. Plaintiff relies on 28 U.S.C. § 1391(b)(2)-(3). In pertinent part, the statute provides that an action may be brought in:

> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b)(2)-(3). This Circuit recognized that,

> [F]or venue to be proper, significant events or omissions material to the plaintiff's claim must have occurred in the district in question, even if other material events occurred elsewhere. It would be error, for instance, to treat the venue statute's "substantial part" test as mirroring the minimum contacts test employed in personal jurisdiction inquiries.

Id. Venue must be strictly construed. *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005). Here, venue is not proper under Section 1391(b)(2)-(3) because (1) a substantial part of the events giving rise to Plaintiff's claims did not take place within this district, (2) the property that Plaintiff attempts to recover is situated in Oklahoma, *not* New York, (3) no current defendant is subject to personal jurisdiction in this district, and (4) all parties alleged to possess and/or own the Painting are in Oklahoma.

Plaintiff alleges that the Painting was exhibited at the David Findlay Galleries in New York in 1956 for one month between November 15, 1956, and December 15, 1956. FAC ¶62. At the time, the Painting was owned by E.J. van Wisselingh & Co., an art dealer based in Holland. FAC ¶62. Shortly after the exhibition, the Painting was sold to Aaron M. and Clara Weitzenhoffer, the invoice was dated January 16, 1957. FAC ¶67. These events do not represent a "substantial part of the events or omissions giving rise" to Plaintiff's claim.

The most substantial events or omissions (in the United States) giving rise to Plaintiff's claims against the Oklahoma Parties took place in Oklahoma. The Oklahoma Parties allegedly took possession of the Painting in Oklahoma when "the estate of Aron M. and Clara Weitzenhoffer made a significant bequest to Defendant University of Oklahoma's Fred Jones, Jr. Museum of Art, which included [the Painting]." FAC ¶87. The Oklahoma Parties in Oklahoma allegedly "failed to perform any meaningful investigation into the title or perform any provenance research of [the Painting] . . . ." FAC ¶88. The Painting that is the subject of this litigation is located in Oklahoma. FAC ¶¶15, 101. Further, Plaintiff has voluntarily dismissed

the only Findley gallery defendant to have appeared with a connection to New York. Notice of Voluntary Dismissal, Dkt. No. 22 Finally, application of Oklahoma substantive law, *not* New York law, is relevant to the Court's analysis of whether the Board or President Boren are immune from suit under the Eleventh Amendment.

Because venue is improper in this district, the court should dismiss Plaintiff's complaint.

E. The AAM Guidelines, the AAMD Guidelines, the Washington Principles, and the Holocaust Victims Redress Act Do Not Create an Enforceable Private Right of Action

Plaintiff claims that the Oklahoma Parties are "bound" by the AAM and the AAMD Guidelines. FAC ¶86. Privately drafted guidelines, such as those of the AAMD and AAM, do not create enforceable law from which a party may bring a cause of action. *See Toledo Art Museum*, 477 F. Supp. 2d at 808; *see also Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) (holding that only Congress through statute can create a private right of action); *see also Mertz v. Mertz*, 271 N.Y. 466, 470 (N.Y. 1936).

Plaintiff also references the Washington Principles in noting that "pre-War owners and their heirs should be encouraged to come forward to make known their claims to art that was confiscated by the Nazis and not subsequently restituted." FAC ¶85. The Washington Principles are "non-binding" and encourage the just, fair, and expeditious resolution of Plaintiff's claims. Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), available at http://www.state.gov/p/eur/rt/hlcst/122038.htm. The Washington Principles do not create a private cause of action or support Plaintiff's claims.

The only statute referenced in the FAC is the Holocaust Victims Redress Act (Pub. L. No. 105-158, § 202, 112 Stat. 15, 17-18 (1998)). FAC ¶85. This Act, however, does not create a private cause of action. *See Orkin v. Taylor*, 487 F.3d 734, 739 (9th Cir. 2007) ("The plain text of the Holocaust Victims Redress Act leaves little doubt that Congress did not intend to create a private right of action."). Rather, courts consistently apply state law to claims governing World War II related art claims. *See, e.g.*, *Dunbar v. Segar-Thomschitz*, 615 F.3d 574, 577-78 (5th Cir. 2010) (holding that the Terezin Declaration, a document promulgated at the Prague Holocaust

Era Assets Conference recommending that participating countries, including the United States, implement programs to address Nazi-confiscated real property, "is a legally non-binding document" and does not create federal common law). Therefore, none of the guidelines or statutes in Plaintiff's FAC create a private right of action or otherwise support Plaintiff's claims.

While noting the voluntary nature of the referenced guidelines and the Washington Principles – the Oklahoma Parties recognize the tragic history associated with such claims as those made by Plaintiff. Plaintiff has chosen to file this legal action in a foreign jurisdiction to which the Oklahoma Parties are not subject and without more than an initial letter outside the requisite procedures for notifying an Oklahoma state entity of a claim against it. In addition, Plaintiff's FAC contains factually incorrect jurisdictional allegations and unsubstantiated causes of action, both of which the Oklahoma Parties and AAM/AAMD's legal counsel have in good faith advised (or attempted to advise) Plaintiff's counsel before bringing this motion. While the Oklahoma Parties have and will continue to investigate and review Plaintiff's claims in the appropriate fashion, this court is not the proper forum or venue for this action.

CONCLUSION

For the foregoing reasons, the Oklahoma Parties respectfully request that the Court grant this Motion and dismiss Plaintiff's claims against the Oklahoma Parties.

Dated: February 7, 2014

Respectfully Submitted,

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