Docket No. 12-55733

In the

United States Court of Appeals

for the

Ninth Circuit

MAREI VON SAHER,

Plaintiff-Appellant,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA
and NORTON SIMON ART FOUNDATION,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Central District of California, No. 07-CV-02866-JFW-JTL · Honorable John F. Walter

REPLY BRIEF OF APPELLANT

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I. PRELIMINARY STATEMENT

The District Court erroneously held that the common law claims asserted by Appellant, Marei von Saher ("Marei"), for the return of artworks looted by Nazi Reichsmarschall Hermann Göring during World War II, are preempted by U.S. policy because they were the subject of bona fide restitution proceedings in the Netherlands. The District Court based this infirm holding solely on the factual assertions made by the U.S. in its brief as Amicus Curiae (the "S.G.'s Brief") submitted in connection with Marei's petition for certiorari in earlier proceedings that addressed the constitutionality of Cal. Code Civ. Proc. ("CCP") §354.3 (E.R. 7-9),[1] which is no longer an issue before this Court. But no court on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) can accept the assertion by anyone, including the U.S. Government, that the paintings at issue here (the "Cranachs") were subject to bona fide restitution proceedings in the Netherlands without conducting a thorough hearing of that factual issue on the merits. And as we show below, on that hearing, Marei will demonstrate that the factual assertions in the S.G.'s Brief relied on by the District Court fly in the face of what has been expressly acknowledged by the Dutch Government.

Marei is the daughter-in-law and sole heir of the Dutch art dealer

[1] References to "E.R. __" are to the cited page(s) in Appellant's Excerpts of Record filed herewith. "AAB" refers to the cited page(s) in Appellees' Answering Brief. "AOB" refers to cited page(s) in Appellant's Opening Brief.

Jacques Goudstikker and his wife, Dési, whose artworks and other property were looted by the Nazis. Dési complained after the War that she was not treated fairly by the Dutch bureaucracy, and the Dutch Government subsequently admitted that it had treated Goudstikker's heirs wrongfully, characterizing their losses as a voluntary sale to Nazi officials. (E.R. 174.) More importantly, unfair treatment was not merely Dési's complaint, but a recognized post-War Dutch policy, as acknowledged by the Chair of the Dutch Restitutions Committee (the "R.C.") as recently as November 27, 2012:

> But as far as the Netherlands is concerned, it is important to state that in... the year 2000, the Dutch Government acknowledged that after the War the system of righting injustices was implemented in a formal, bureaucratic, and unsympathetic way in the Netherlands.

Willibrord Davids, Chair, Restitutions Committee, Address at the International Symposium "Fair and Just Solutions?" at the Peace Palace, The Hague (Nov. 27, 2012), available at http://vimeopro.com/restitutiecommissie/symposium.

According to the Presidential Advisory Commission on Holocaust Assets in the U.S., when the Allies discovered looted art in the possession of the Nazis, and returned that art to its country of origin, "the United States assumed that its western allies to which it restituted looted assets would return those assets to their rightful individual owners (or the heirs of those owners)." (E.R. 390.) But the actions of the Dutch Government immediately after the War were not

calculated to return items to their Jewish owners and, therefore, were contrary to the U.S. policy.

Put simply, "Jewish former owners received no support from the Dutch State. They had to fight a harsh, uncertain legal struggle for every item of property they had lost." Wouter Veraart, *Contrasting legal concepts of restitution in France and the Netherlands (1943-1952)*, *in* The Post-war Restitution of Property Rights in Europe 21, 30 (Wouter Veraart & Laurens Winkel eds., 2012).

> In the post-war period (1945-1952), the Dutch Minister of Finance, Lieftinck, got a strong hold on the non-judicial divisions of the Council of Restoration. He used the restitution machinery mainly to pursue the financial interests of the Dutch State (in order to reconstruct the economy), even if this policy conflicted with the interests of the dispossessed Jewish community.

Id. at 26.

Indeed, contrary to Dutch law, the post-War Dutch Government's practice was to treat property that had been forcibly sold to the Nazis as enemy property that could be held by the Dutch State, rather than as property taken in a void sale and therefore still belonging to the original owner. Herman C.F. Schoordijk, *The Goudstikker Case*, *in* The Post-war Restitution of Property Rights in Europe 109, 112 (Wouter Veraart & Laurens Winkel eds., 2012). The Dutch Government has recognized its prior unfair treatment, and therefore determined in 2006 to restitute to Marei all Goudstikker artworks taken by Göring still in its custody.

II. ARGUMENT

A. THERE WERE NO RESTITUTION PROCEEDINGS REGARDING THE CRANACHS IN THE NETHERLANDS

1. The 1952 Agreement Did Not Settle The Claims To The Artworks Looted By Göring And Dési Retained Her Rights To Those Works

There is no restitution proceeding from the 1950's that a court would have to examine in order to determine the merits of Marei's claims to the Cranachs. Although Dési entered into an agreement with the Dutch Government in 1952 with regard to property taken by the Nazi collaborator Aloïs Miedl, the Dutch Government has acknowledged that agreement did not waive Dési's rights to artworks looted by Göring, which included the Cranachs.[2] (E.R. 196.) As the R.C. observed, the Dutch Government specifically sought a waiver of rights to the Göring works, but it was removed from the final draft. (E.R. 174-75.) In short, the records from the 1950's show that Dési did not "forgo" the claim to the Göring works as the Museum suggested (AAB 30), but made a "conscious and well considered decision" (E.R. 160) to retain her rights to that portion of the artworks. Nor did Dési bring a restitution proceeding with regard to the Göring works. (E.R. 160, 174-75.)

[2] Neither the Museum nor the S.G. can dispute the interpretation of the 1952 agreement on which Marei and the Dutch Government concur, given that they were neither parties to nor third-party beneficiaries of that agreement. Even though Marei concurs with the Dutch Government's interpretation of the agreement, she maintains that Dési entered into it under duress.

2. There Were No Restitution Proceedings In Connection With Stroganoff's Claims To The Cranachs

Notwithstanding that the Complaint and the FAC specifically allege that the Cranachs were "wrongfully delivered... to Stroganoff as part of a sale transaction" (E.R. 837)[3] and make no reference of any kind to "restitution proceedings" in connection with Stroganoff's claim, the Museum (AAB 47-48), the S.G. (E.R. 514), and this Court (*Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 959 (9th Cir. 2010) ("*Von Saher I*")) have all stated that the Dutch Government held restitution proceedings in response to Stroganoff's claim. This is untrue, as can be shown by tracing these statements to their source. Neither the Complaint nor the District Court's 2007 decision refer to such proceedings. The assertion was first incorporated into the "facts" of this case in this Court's prior decision (*Von Saher I* at 959), where it spontaneously appeared even though this Court is not a fact finder and, on a 12(b)(6) motion to dismiss, must view the allegations of the Complaint in a light most favorable to the plaintiff.

[3] The Museum asserts that the FAC "notes [the Dutch] government returned the Cranachs in response to a claim filed by Stroganoff." (AAB 47.) But this is blatantly false. There is no such statement in the FAC, and Marei has argued (and, indeed, submitted documents that show) the Cranachs were not from the Stroganoff collection. (E.R. 837; Kaye Decl. at 14, *Von Saher v. Norton Simon Museum of Art*, No. 2:07-cv-02866-JFW-JTL (C.D. Cal. Aug. 20, 2007), ECF No. 34.) Property cannot be "returned" to someone who never owned it.

This "fact" infected the record, spreading like a virus. It led this Court to conclude there were restitution proceedings that would have to be reviewed. ("[I]n this case, the parties contest the provenance of the Cranachs. In order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts." *Von Saher I* at 967.) It also became part of the underpinning of the S.G.'s argument that there were good-faith restitution proceedings that the U.S. should respect – a position that, in turn, led the District Court to dismiss the case a second time (E.R. 9) – and of the Museum's assertion that "[t]he United States, the district court, and this Court *all* warned that this lawsuit would necessarily require the courts to review The Netherlands' internal restitution proceedings." (AAB 46) (internal citations omitted). We submit that this Court should correct that mistake and remand the case for actual findings of fact.

Although many documents created by the Dutch Government in connection with the Goudstikker restitution proceedings (including an agreement, a court decision, a recommendation and two administrative decisions) have been submitted and considered in this case, the Museum has not produced or suggested it can produce anything showing that the Dutch Government held restitution proceedings or made a formal restitution decision in connection with Stroganoff's

alleged claim. And it cannot do so because, as alleged in the FAC, the Cranachs were *sold* to Stroganoff, not restituted. (E.R. 837.)

It is easy to understand why there are no such documents. The Museum has provided a copy of "Decree E-100" (E.R. 34-105), which was enacted by the Dutch Government in 1944 to govern the post-War restitution of legal rights. As indicated on its face, this decree covered the restitution of legal rights in the Netherlands that had been disrupted by WWII and the Nazi occupation. (*See, e.g.*, E.R. 39-42.) It was not meant to provide restitution proceedings for property nationalized decades earlier in the aftermath of the Russian Revolution.

3. The Cranachs Were Not Covered In The Contemporary Restitution Proceedings

In December 2005, the R.C. rendered its advice (the "R.C.'s Advice") on Marei's 2004 application for the restitution of artworks in the custody of the Dutch Government. It was the third time she had submitted her claim to the Dutch Government. The prior two requests – the first in 1998 made to the Dutch State Secretary for Education, Culture and Science (the "State Secretary") and the second, an appeal of that decision to the Court of The Hague decided in 1999 – were rejected. In February 2006, however, the State Secretary adopted the R.C.'s Advice and decided to restitute **all** of the artworks in the government's custody that had been looted by Göring from Goudstikker (the "2006 Decision"). Had the

Cranachs still been in the government's custody, they too would have been restituted.[4]

The Museum obviously foresaw that it would want to rely on the 1998 and 1999 decisions and understood that a decision to restitute the Göring works would fatally undermine its position. Therefore, on the same day the 2006 Decision was announced, the Museum's Dutch attorney sent a letter seeking, "written confirmation" from the State Secretary that the Museum "received a legally valid title to two works and that the earlier decision of [her] predecessor, State Secretary of Culture, Aad Nuis, from 1998 as well as the judgment of the Court of the Hague regarding this point are not reversed." (E.R. 23.) The State Secretary responded that the Cranachs were not covered by the 2006 Decision, and **specifically refused to provide the Museum with the assurances it sought**. *Id.*

There are two obvious reasons why the State Secretary could not provide those assurances. First, the Dutch Government acknowledged in 2000 that "the system of righting injustices was implemented in a formal, bureaucratic, and unsympathetic way" (*see supra* p. 2), and changed the premises on which the government responded to restitution requests. The R.C.'s recommendation to

[4] The R.C.'s Advice and the 2006 Decision discussed certain artworks from the Goudstikker Collection that were looted by Göring and returned to the Netherlands by the Allies that were no longer in the government's custody. (E.R. 177, 195-97.) Thus, the S.G.'s statement that "the State Secretary did not address paintings, like the Cranachs, that were no longer in the government's possession" (E.R. 518) is false.

restitute 200 looted artworks to Marei noted the changed landscape in discussing the 1999 decision by the Court of The Hague (the "1999 Decision") and found that "generally accepted new insights" rendered its holding inapplicable. (E.R. 175.) It was the government's acknowledgment of these new insights in 2000 that led to the creation of the R.C. and the opportunity for Marei to have her claim reheard and reevaluated. Second, the prior State Secretary's 1998 decision (the "1998 Decision") was based on arguments that the R.C. found were factually incorrect. For example, it cannot be true, as determined by the prior State Secretary in 1998, that the 1952 agreement settled the Göring claims, and also be true, as found in 2005-06 after a more thorough investigation, that the 1952 agreement did not waive or settle Désí's claims to the Göring works. Thus, even if the 1998 and 1999 decisions were not explicitly overruled, they were certainly superseded.

Even though the Dutch Government specifically declined the Museum's request to support its argument about the 1998 and 1999 decisions, the Museum continues to put it forward, as did the S.G. They suggest that, because the initial 1998 submission to the State Secretary included a request for compensation for artworks that had been sold, it covered the Cranachs.[5] (AAB 11, E.R. 515.)

[5] The S.G.'s formulation of this point is mistaken. The S.G.'s Brief states, "Petitioner's claim thus included the Cranachs, which had been sold to Stroganoff in 1966 in settlement of his claim" (E.R. 515), and adds a citation to page 282 of the 2008 Excerpts of Record, implying that something in that record supports the assertion that the Cranachs were included in the claim. But the page cited is from

But as the State Secretary noted in 1998 (E.R. 139) and the Court of The Hague noted in 1999 (E.R. 155-56), the 1997 policy under which Marei's 1998 claim was submitted provided only for claims to artworks still in the Dutch Government's custody. There was no provision for damage claims (nor is there under the R.C.'s current guidelines (E.R. 108-13)), so everything requested beyond the return of specific artworks was additional relief outside of the Dutch Government's policy. Indeed, neither the State Secretary's 1998 Decision nor the 1999 Decision even addressed the request for damages. Neither the Museum nor the S.G. cites any instance in which the Dutch Government has compensated individuals for artworks that were sold, effectively confirming that there is no avenue for relief in the Netherlands and that Marei's only option is to seek to recover the Cranachs from the Museum.

B. THE GOVERNMENT'S ASSUMPTIONS REGARDING THE FACTS ARE NOT A STATEMENT OF POLICY

In this case, the District Court held, and the Museum spends half of its Answering Brief contending, that it is the express policy of the U.S. Government that the Cranachs were previously the subject of a bona fide restitution proceeding in the Netherlands, and therefore, Marei's lawsuit to recover them is preempted by the foreign affairs doctrine. But repeatedly saying that a statement of fact is a

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the Complaint, and makes no reference to either the 1998 claim or to a purported "settlement" of Stroganoff's claim.

statement of policy does not make it so. Indeed, the Museum falsely states that Marei has argued that "the Government's policy statements are 'directly contradicted by [the] FAC'" (AAB 37), when Marei said only that the factual assumptions were contradicted.

1. <u>What Is The Policy?</u>

The relevant policy was explicitly set forth in the S.G.'s Brief:

> The court of appeals erred in dismissing the external restitution policy as irrelevant to this case because it "ended" on September 15, 1948—the deadline set by the United States for filing restitution claims…. The United States established a deadline to ensure prompt submission of claims and achieve finality in the wartime restitution process. The United States has a continuing interest in that finality **when appropriate actions have been taken by a foreign government concerning the internal restitution** of art that was externally restituted to it by the United States following World War II.
>
> * * * *
>
> **The United States does not contend that the fact that the Cranachs were returned to the Dutch government pursuant to the external restitution policy would be sufficient of its own force to bar litigation if, for example, the Cranachs had not been subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands.**

(E.R. 528) (emphasis added) (internal citations omitted).

Thus, the policy is that if an artwork taken by the Nazis was returned to its country of origin and made the subject of (or was potentially the subject of) a bona fide internal restitution proceeding, then the U.S. has "a continuing interest"

in the "finality" of such proceeding. The implication in the S.G.'s Brief that Dési "settled" her claims in 1952 (E.R. 528) and that she had the opportunity to participate in a good-faith restitution proceeding is simply wrong (*see supra* pp. 1-3), and this Court need not – indeed cannot – accept this incorrect statement merely because it is made by the U.S. Government, which has no independent knowledge of the facts at issue here.

It is the Museum that misstates U.S. policy when it claims that agreements entered into by the U.S. Government with other nations to address the shortcomings of post-War external restitution do not allow for litigation of restitution claims in U.S. courts. Indeed, the Museum has the temerity to claim that the U.S. policy is to "encourage resort to alternative dispute resolution," and uses as an example the process adopted in the Netherlands in 2000 that resulted in the restitution of 200 artworks to Marei. (AAB 15.)

In fact, the State Department has said that the U.S. Government has been unable to provide an alternative dispute mechanism here. Only last November the State Department's Special Envoy for Holocaust Issues said: "This vision of an American art spoliation commission has, unfortunately, proven easier to describe than to realize.... Unfortunately, our study has revealed many impediments to realizing a workable model for such a commission in the United States." Douglas Davidson, Address at the International Symposium on

Alternatives to Litigation in Nazi-Looted Art Disputes at The Hague (Nov. 27, 2012), available at http://www.state.gov/p/eur/rls/rm/2012/201790.htm. The Special Envoy reiterated that in the U.S. the parties in a Nazi-looted art case are left with the "option of turning to the courts." *Id.*

2. Good Faith Is A Quintessential Issue Of Fact

The Museum argues that the determination of whether "bona fide internal restitution proceedings" relating to the Cranachs occurred in the Netherlands is a policy decision for the U.S. Government to make. But this is absurd.[6] It is black letter law that "good faith" or "bona fides" is a question of fact. *United States v. McIntyre*, 582 F.2d 1221, 1225 (9th Cir. 1978) ("good faith was a question of fact"); *NLRB v. Deutsch Co.*, 265 F.2d 473, 482 (9th Cir. 1959) (whether company bargained in good faith was "manifestly a question of fact");

[6] Neither the Museum nor the S.G.'s Brief can point to a single instance among the myriad of Holocaust restitution litigations in this country where the U.S. Government opined on the bona fides of post-War restitution proceedings, or the lack thereof. The Museum entirely misrepresents the findings of the court in *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009), a case where the U.S. Government itself brought a claim for the restitution of Nazi loot that the Austrian Government failed to return to its rightful owner. The Museum says that "[u]nlike The Netherlands, Austria was *not* included in the external restitution policy," and *Wally* is therefore distinguishable from this case. (AAB 28.) In fact, the *Wally* court **rejected** the argument that external restitution did not apply to the painting at issue there. "It is undisputed that Germany 'incorporated Austria into Germany' in the Anschluss; therefore property need not have left Austria to have been seized by Germany and thus require restitution to Austria after the War." *Id.*, 663 F. Supp. 2d at 239 n.4. There is no difference between external restitution to Austria and external restitution to any other country.

In re Dumlao, No. 09-50815, 2011 WL 4501402, at *6 (Bankr. 9th Cir. Aug. 5, 2011) ("Good faith is a question of fact").

The Museum's attempt to equate the factual determination of good faith with a diplomatic determination like political recognition falls flat. (AAB 36) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964)). Courts regularly determine issues of good faith; they do not determine whether to recognize foreign governments.

The Museum also blatantly misuses *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). In *Sarei*, the State Department submitted a Statement of Interest stating that continued adjudication of that lawsuit would "risk a potentially serious adverse impact on the [Bougainville] peace process." *Id.* at 1181. The district court deferred, **but noted that it could not take judicial notice of the facts underlying that position**. *Id.* at 1182. More importantly, the Ninth Circuit specifically noted that the Statement of Interest, rather than setting forth a policy, was the State Department's "factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation." *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1081 n.8 (9th Cir. 2006) (quoting *Envtl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1062 (3d Cir. 1988)). While such a statement should be accorded deference or "serious weight," it does not control a determination of preclusion under the political question doctrine. *Id.* at 1081.

Neither the S.G.'s Brief in this case, nor the Statement of Interest in *Sarei* explicitly stated that the case should be dismissed. To the contrary, the S.G.'s Brief concluded that this case could continue. And while the State Department's opinion of the facts might usually be entitled to the District Court's consideration were it based on any actual findings of fact,[7] it remains the role of the District Court (or jury) to make factual determinations on a full record.

C. THE S.G.'S BRIEF STATED THAT THIS CASE CAN GO FORWARD UNDER THE GENERALLY APPLICABLE STATUTE OF LIMITATIONS

Despite the prolixity of its Answering Brief, the Museum does not explain how the U.S. Government's policy could bar Marei's common law claims under the foreign affairs preemption doctrine when the S.G.'s Brief clearly stated that no grant of certiorari to consider preemption was required because the case could proceed under the generally applicable statute of limitations for stolen property claims:

> [T]he court of appeals' preemption holding may not be decisive even in this very case, because that court remanded to determine whether petitioner's claim is timely under another California statute of limitations for actions to recover personal property.... It is thus possible that on remand petitioner's action will be deemed timely.

[7] In this case, the S.G.'s Brief did not express concern about U.S. relations with the Netherlands or convey a statement from a political counterpart in the Netherlands. Thus, unlike *Sarei*, where the Government at least had knowledge of the fact at issue (interference with the peace process), it has none here, so there is no basis for any deference. (*See* AOB 26-27.)

> Two courts of appeals have held that application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities.

(E.R. 532-33) (citing *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 12-13 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 1612 (2011); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 578-79 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1511 (2011)).

The S.G.'s conclusion that the adjudication of Marei's common law claims could proceed is consistent with this Court's decision in *Von Saher I*. Both this Court and the S.G.'s Brief specifically noted that they were only confronting the issue of whether state legislation was preempted. This Court also noted, however, that it had the power to adjudicate Holocaust-era property claims:

> Our holding that the judiciary has the power to adjudicate Holocaust-era property claims does not mean that states have the power to provide legislative remedies for these claims. Here, the relevant question is whether the power to wage and resolve war, including the power to **legislate** restitution and reparation claims, is one that has been exclusively reserved to the national government by the Constitution.

Von Saher I at 967 (emphasis added) (citing *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005)). Plainly, this Court determined that, although a state statute

specifically referring to Holocaust restitution may be preempted,[8] common law claims for replevin and conversion are not.

But the Museum would like to have its cake and eat it too. On page 28 of its Answering Brief, the Museum writes: "The sole issue before the Supreme Court was whether to review this Court's Opinion upholding the facial invalidation of Section 354.3." Yet the Museum maintains that the policy in the S.G.'s Brief is applicable not only to the preemption of §354.3, but also to any common law claim to recover the Cranachs.

The Museum maintains that the S.G.'s statement that "the preemption holding may not be dispositive," meant only that it was "*possible*" that the action could be timely in the absence of §354.3. (AAB 28-29.) This begs the question of why timeliness would be an issue if it was the U.S. Government's **policy** that the entire action is barred by the foreign affairs preemption doctrine. If the S.G. had intended that the policy enunciated in its brief would preclude all of Marei's claims, then not only would it have said so, but it would have been disingenuous for it to suggest that the Supreme Court need not consider the foreign affairs preemption doctrine because the case could otherwise proceed.

The Museum's attempt to distinguish *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007) fails. That *Exxon Mobil* addressed the political question

[8] Marei does not concede that the Ninth Circuit's prior decision about the constitutionality of §354.3 was correct.

doctrine rather than the foreign affairs doctrine is unimportant. What is important is that, exactly as in this case, the State Department weighed in on the issue at hand, but **did not** indicate that the case had to be dismissed, and **did** specifically refer to the future of the case, thus indicating that the State Department did not intend that its statement would lead to dismissal.

D. THE ISSUE IN THIS CASE IS TITLE UNDER DUTCH LAW AND NOT WHETHER DUTCH PROCEEDINGS SHOULD BE OVERTURNED

The Museum has led the District Court, this Court and the State Department to believe that to decide this case a U.S. court must overturn, or at the very least pass judgment on the good faith of, Dutch proceedings. This in turn led to the unjustified conclusion that the foreign affairs doctrine is implicated here. But this case will not require any court to overturn or pass judgment on a foreign country's prior restitution decisions. It only involves the legal question of whether Goudstikker was divested of title to the Cranachs.

The Museum conflates two separate arguments, and makes Marei look like she is contradicting herself:

> According to Plaintiff, her action "does not involve foreign affairs," and this Court "need not opine on the propriety of Dutch court or administrative decisions." Plaintiff cannot take these positions seriously, for she contradicts them elsewhere in the same brief. She argues that "[a] court (or jury, as fact finder).... *must* be able to review prior proceedings in the country of origin." That is because Plaintiff believes "whether the Cranachs were

> the subject of bona fide restitution proceedings in the Netherlands *is a critical factual determination that must be made in this case*."

(AAB 32-33) (internal citations omitted).

But this is patently false. Marei has consistently said, since the Museum first brought its motion to dismiss in 2007, that this case can and should be decided without any effect on foreign affairs and certainly without delving into the bona fides of any Dutch proceedings or court decisions, much less overturning those decisions. It is only the District Court's acceptance of baseless arguments about the S.G.'s Brief that compelled Marei to argue, alternatively, that a California court must make any factual determination relating to bona fide restitution proceedings if the S.G.'s intent was to state a policy applicable to common law claims, rather than simply to address a statute that, on its face, pertained to Holocaust claims.

Marei has repeatedly stated that a U.S. court must only determine the legal effect of the prior events in this case's factual history to determine if Goudstikker's heirs were ever divested of title to the Cranachs. That analysis neither involves overturning the Dutch Government's acts nor weighing the Dutch Government's good faith or its decisions. The analysis only requires application of the Dutch law to the historical facts: the looting, Dési's 1952 refusal to waive her rights, the sale to Stroganoff, Dutch decisions in 1998 and 1999, and the final

restitution in 2006. None of these acts needs to be overturned; the U.S. court need only determine their legal effect under Dutch law.

Analyzing the meaning and effect of foreign court or administrative decisions on a U.S. case is a familiar procedure, and Fed. R. Civ. P. 44.1 provides a mechanism for the court to apply Dutch law to determine the legal effect of the various events related to the question of title, which is the only real issue here. The court can take evidence and hear expert testimony about the meaning and effect of Dutch cases and codes, and determine whether Goudstikker was ever divested of title to the Cranachs. No decisions of foreign governments will have to be overturned as a result of this process. (*See* AOB 41-45.)

That is why *Zivotofsky v. Clinton*, 132 S. Ct 1421 (2012), is precisely on point. The Museum attempts to distinguish *Zivotofsky* because it involved "[t]he justiciability of a foreign policy dispute among the federal Political Branches" and "no issue of preemption at all." (AAB 32.) But the Museum misses the point. In *Zivotofsky*, the State Department, the district court and the circuit court all incorrectly concluded that the courts could not hear the plaintiff's case because it presented a non-justiciable political question. This was because the State Department, defendant and both courts incorrectly framed the issue and, therefore, concluded that adjudicating the case would require a ruling recognizing Jerusalem as being within Israel. The Supreme Court reversed, finding that the

case merely called for a court to either apply existing law or find that law unconstitutional, both "familiar judicial exercise[s]." *Id.*, 132 S. Ct. at 1425, 1427.

Similarly, the Museum has argued here, and the courts have agreed, that this case will require courts to question and perhaps overturn prior decisions made by the Dutch Government. But this is incorrect. (*See supra* Section II.A.) These prior decisions **need only be applied in accordance with Dutch law** to determine if title passed. Analyzing and applying prior case law is what courts do, and there is no foreign policy reason why a U.S. court cannot analyze and apply a foreign court or administrative decision. Put simply, the question is not: "Were the Dutch decisions wrong?" The question is: "Did title pass?" A U.S. court can and should adjudicate that question.

E. THIS COURT SHOULD NOT CONSIDER ARGUMENTS NOT DECIDED BY THE COURT BELOW, BUT IF IT DOES, THOSE ARGUMENTS HAVE NO MERIT

Marei is pleased to learn that the Museum does not intend to rely on *Cassirer v. Thyssen Bornemisza Collection Foundation*, No. 2:05-CV-03459-GAF-E (C.D. Cal. May 24, 2012), and argue that CCP §338(c)(3) is preempted by the foreign affairs doctrine. Because the Museum waived that argument on this appeal, the Court may disregard Section VIII.D of Appellant's Brief.

The Museum does, however, ask the Court to hold that this case is barred either by the act of state doctrine or by the statute of limitations, even

though the District Court did not reach these issues. Yet at footnote 6 of its Answering Brief, the Museum takes the position that issues not reached by the District Court are "not before this Court on appeal." (AAB 55.) The Museum cannot have it both ways. Indeed, as Marei noted (AOB 45) she did not address the arguments made by the Museum but not ruled on by the District Court because appellate courts generally will not consider issues that were not considered by the trial court. *See* Goelz & Watts, *Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice* 7:19 (The Rutter Group 2012). Because the District Court's ruling did not address act of state or timeliness, this Court should not either. It should remand for consideration below. If the Court, however, chooses to review these arguments, it should find them meritless.

1. The Act of State Doctrine Cannot Be Invoked As A Defense Here

(a) Marei's Claims Do Not Challenge Any Decisions Of The Dutch Government

The Museum argues that the act of state doctrine is applicable because "the Court would have to invalidate... three actions [by the Dutch Government]." (AAB 46) (emphasis removed). But, as explained above, this is not so. (*See supra* Section II.A.) Marei is not requesting that the Court invalidate any decision of the Dutch Government; she is merely asking that the question of title to the Cranachs be resolved by examining Dutch law.

For example, Marei does not seek to invalidate the Dutch Government's decision to sell the Cranachs to Stroganoff. She only asks that a U.S. court determine the effect of the sale **pursuant to Dutch law**, i.e., did it convey good title? Abstention under the act of state doctrine is not required where "the Court is not being asked to **invalidate** any action by [a]... governmental authority, but only to determine the effect of such action, if any, on... ownership." *Wally*, 663 F. Supp. 2d at 248 (emphasis added). *See W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 409 (1990) ("The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

Because the Cranachs were sold to Stroganoff, the only issue is whether Stroganoff acquired title as a good faith purchaser under article 2014 of the Dutch Civil Code then in effect. Under Dutch law, to be in good faith, a purchaser must believe that the seller has good title to convey. Stroganoff had no such belief, and therefore, was not acting in good faith. (E.R. 17.) The focus is on Stroganoff, not the Dutch Government. Applying Dutch law where a key issue is the transfer of artworks within the Netherlands could hardly interfere with the conduct of U.S. foreign relations with the Netherlands. On the contrary, it shows respect for the Dutch Government and its laws.

Furthermore, courts have acknowledged that the act of state doctrine may not be applicable where a purely commercial act by the foreign government, like the sale to Stroganoff, is at issue. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976); *De Csepel v. Republic of Hungary*, No. 10–1261 (ESH), 2011 WL 3855862, at *23 (D.D.C. Sept. 1, 2011). *C.f.*, *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 339 (D.D.C. 2007) ("[T]he... acquisition of... paintings... was not the type of sovereign act that receives protection under the act of state doctrine.").

(b) The "Second Hickenlooper Amendment" Prevents The Application Of The Act Of State Doctrine

Under the terms of the Second Hickenlooper Amendment (22 U.S.C. §2370(e)(2)), the act of state doctrine is inapplicable here. The facts of this case fit squarely within that statute, which lays out the criteria under which courts are barred from invoking the act of state doctrine: (1) the Dutch Government's transfer of the Cranachs to Stroganoff occurred on or after January 1, 1959 (E.R. 837); (2) the transfer was a wrongful expropriation of property in violation of international law because it was a taking without compensation from an American citizen (E.R. 836, 837-38); and (3) the Cranachs were in the U.S. when this action to recover them was filed (E.R. 825).

The Museum, however, argues that, because the Dutch Government was granted custody of looted artworks after WWII, there was no taking in

violation of international law when the Cranachs were sold to Stroganoff because "a state divesting itself of property is the very opposite of nationalizing them [sic]." (AAB 55) (emphasis removed). But this assumes that the "state [was] divesting **itself** of property." (AAB 55) (emphasis added). As alleged in the FAC (E.R. 837), the Dutch Government sold property to which Dési had deliberately retained her claims, refusing to waive them and give title to the Dutch Government as it had requested. (E.R. 835-36.) Moreover, Dési was an American citizen at the time the sale occurred. (E.R. 836.) "International law requires that a taking of property of a foreign national... be compensated.... [and] that compensation must also be 'just.'" 2 *Restatement (Third) of the Foreign Relations Law of the United States* §712, comment c (1987). *See also Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002).

In a futile attempt to place the taking before January 1, 1959, the Museum argues that the taking occurred in 1952, when Dési signed an agreement with the Dutch Government. (AAB 54-55.) As the facts show, however, the 1952 agreement did not cover the claims to paintings, like the Cranachs, that had been taken by Göring. This was the R.C.'s pivotal finding. (E.R. 172.) (*See supra* Section II.A.1.) The Museum's absurd suggestion is that the taking of the Cranachs was effected not when they were clandestinely sold without Dési's authorization, or payment of compensation to her, but rather, when Dési and the

Dutch Government entered into an agreement that did not apply to the Cranachs.

(c) The Act Of State Doctrine Is Discretionary

The act of state doctrine is not an "inflexible and all-encompassing rule" (*Sabbatino*, 376 U.S. at 428), but rather "'a sort of balancing approach' [that] can be used to determine whether the policies underlying the doctrine justify its application." *Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 350 (C.D. Cal. 1997) (citing *Kirkpatrick*, 493 U.S. at 409). The key question is whether a court's inquiry into the foreign sovereign's acts will interfere with the conduct of foreign relations. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1047 (9th Cir. 1983).

The Dutch Government has clearly answered that question: it said that the issues in this case raise no concerns for U.S. foreign relations with the Netherlands. In a letter dated December 20, 2006, the Dutch Ministry wrote: "I confirm to you that the State of the Netherlands is not involved in this dispute. The State is of the opinion that this concerns a dispute between two private parties." (E.R. 28.) The Museum attempts to dismiss this letter and the earlier one from March 2006 (E.R. 23) as reflective of "The Netherlands' decision not to offer... a damages or restitution claim for transferred works like the Cranachs" (AAB 52), but in reality the Dutch Government has already answered the inquiry that a court must make in its act of state analysis: when given the opportunity to raise concerns

about this case, the Dutch Government disavowed any interest, emphasizing the dispute was a "private" matter.

Indeed, a decision that the Cranachs should be returned would validate actions that the Dutch Government took in 2006. Here, where the foreign sovereign has disclaimed interest in this litigation and the relief sought would conform to, rather than conflict with, the policy of the Netherlands, there is no reason for the Judiciary to defer to the "political branches." *See Sabbatino*, 376 U.S. at 428.

2. Marei's Claims Are Not Time-Barred

In 2010 a unanimous California Legislature amended the statute of limitations applicable to actions for the recovery of stolen art. (E.R. 569-73.) Under amended §338(c)(3), the limitations period begins to run only when the actual claimant has actual knowledge of both the identity and whereabouts of the stolen property. The only claimant here, Marei, acted in a timely fashion because she did not have actual knowledge of the whereabouts of the Cranachs until about October 25, 2000, and she then contacted the Museum and brought a timely claim (E.R. 840-41.) Thus, the Museum's argument that Dési knew the Cranachs were in the custody of the Dutch Government in the 1940's or 1950's is irrelevant because Dési is not the claimant here, and the Dutch Government's custody did not convey title.

The Museum's argument that an assignment of a claim will not restart a statute of limitations, and its attempt to rely upon cases applying statutes of limitations other than §338(c)(3), cannot save it from the plain language of §338(c)(3). The California Legislature plainly intended that this particular statute of limitations apply to current claimants, not their predecessors.

In any event, Dési had no cause to bring an action for conversion or replevin of the Cranachs. She did not know the Dutch Government sold the Cranachs to Stroganoff, and despite the many extraneous documents the Museum relies upon, not one indicates that the Dutch Government gave notice to Dési that the Cranachs were sold to Stroganoff or even that it publicized the Dutch Government's sale of the Cranachs. (E.R. 837.)

III. CONCLUSION

For all of the foregoing reasons, Marei respectfully requests that the March 22, 2012 Order of the District Court dismissing her case be reversed and that the case be remanded so that adjudication of her claims may proceed.

Dated: January 14, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Darlene Fairman, attorney for Appellant MAREI VON SAHER, hereby certify under penalty of perjury that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1. The brief is proportionally spaced, has a typeface of 14 points and contains 6,997 words.

Dated: January 14, 2013

HERRICK, FEINSTEIN LLP

s/ Darlene Fairman
Darlene Fairman

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore