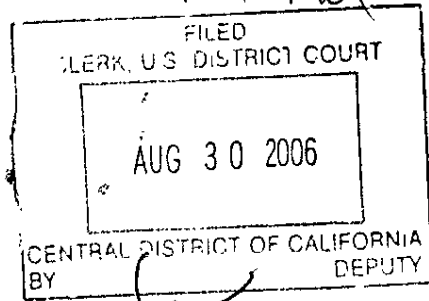


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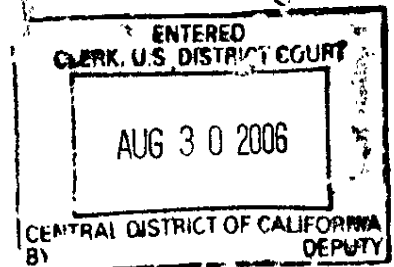


UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 CLAUDE CASSIRER,  
12 Plaintiff,  
13 v.  
14 KINGDOM OF SPAIN, et al.,  
15 Defendants.

Case No. CV 05-3459-GAF (CTx)

MEMORANDUM AND ORDER  
REGARDING DEFENDANTS' MOTIONS  
TO DISMISS



I.

INTRODUCTION & BACKGROUND

A. THE LAWSUIT

In the present lawsuit, Plaintiff, the grandson of Lilly Cassirer Neubauer, seeks to recover from the Kingdom of Spain ("Spain") and the Thyssen-Bornemisza Collection Foundation (the "Foundation"), a painting by Camille Pissaro (the "Painting") that the Nazis extorted from his grandmother in 1939 as a condition to issuing her an exit visa. After World War II, the painting changed hands several times, ultimately ending up in the hands of Baron Thyssen-Bornemisza, one of the

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1 world's foremost art collectors. In 1988, when the Baron loaned his collection,  
2 including the Painting, to Spain under contract, Spain spent millions of dollars to  
3 refurbish a state-owned palace, the Villahermosa, and provided it at no charge as the  
4 home for the Thyssen-Bornemisza Museum (the "Museum") where the collection was  
5 displayed. (Compl. ¶¶ 29-30). Spain paid the Baron \$50 million for a ten-year lease  
6 of the collection, but in 1993 paid an additional \$327 million to enable the Foundation  
7 to purchase the entire collection. (Id.)

8 Plaintiff claims that he first learned in 2000 that the Foundation was in  
9 possession of the Painting, which he contends was the first information he had  
10 regarding its whereabouts since it was taken in 1939. (Id. ¶ 31). In 2001, he  
11 petitioned Spain's then Minister of Education, Culture and Sports, Pilar del Castillo  
12 Vera, for the Painting's return. Plaintiff's request was refused. (Id. ¶ 32). In July  
13 2003, five United States Congressmen wrote to Minister del Castillo Vera requesting  
14 that Spain and the Foundation return the Painting to Cassirer, its rightful owner. (Id. ¶  
15 33). When del Castillo Vera again refused, Plaintiff filed suit in this Court seeking  
16 recovery of the Painting and a variety of other remedies. Plaintiff has never  
17 attempted to obtain the Painting through judicial proceedings initiated in Spain.

#### 18 **B. THE MOTIONS TO DISMISS**

19 Defendants now move under Fed. R. Civ. P. ("Rule") 12(b) to dismiss this  
20 lawsuit on various procedural grounds. They contend: (1) on the basis of the Foreign  
21 Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§ 1602, et seq., that this Court lacks  
22 subject matter jurisdiction over the dispute; (2) under International Shoe Co. v.  
23 Washington, 326 U.S. 310 (1945), and its progeny, that this Court lacks personal  
24 jurisdiction over Defendants; and (3) that the Central District of California is not the  
25 proper venue for the lawsuit. Spain also moves under Rule 12(b)(6) for dismissal for  
26 failure to state a claim. The parties have submitted detailed memoranda and a  
27 substantial volume of evidence in support of and in opposition to each of Defendants'  
28 motions, which the Court has read and considered. In the interests of brevity and

1 expedition, the Court will confine itself to a relatively brief discussion of the issues and  
2 their resolution, since all parties have clearly indicated that those on the losing side  
3 wish to present these issues to the Ninth Circuit Court of Appeals as soon as  
4 possible. In that regard, the Court is persuaded that this "order involves a controlling  
5 question of law as to which there is substantial ground for difference of opinion and  
6 that an immediate appeal from the order may materially advance the ultimate  
7 termination of the litigation." 28 U.S.C. § 1292(b). Therefore, the Court hereby  
8 **CERTIFIES** this matter for interlocutory appeal.

9 **C. THE ISSUE PRESENTED**

10 Although Defendants raise a number of questions subsidiary to the principal  
11 issue before the Court, the fundamental question for resolution is whether this Court  
12 may properly assert jurisdiction over the present dispute under the "expropriation" or  
13 "takings" exception to the FSIA for cases involving property expropriated in violation of  
14 international law. 28 U.S.C. § 1605(a)(3).

15 **II.**

16 **DISCUSSION**

17 Sovereigns are ordinarily immune from suit in the United States, 28 U.S.C. §  
18 1604, unless the lawsuit against them falls into one of the statutorily created  
19 exceptions to sovereign immunity. Here, Plaintiff contends that this Court has subject  
20 matter jurisdiction on the basis of the exception established in 28 U.S.C. § 1605(a)(3),  
21 which provides in relevant part that a foreign state **or** its instrumentality is not immune  
22 from suit in any case

23 in which rights in property taken in violation of international law are in issue  
24 and . . . **that property** or any property exchanged for such property **is owned**  
25 **or operated by an agency or instrumentality of the foreign state and** that  
26 agency or instrumentality is **engaged in a commercial activity in the United**  
27 **States.**

1 28 U.S.C. § 1605(a)(3) (emphases added); 28 U.S.C. § 1603(a) (defining "foreign  
2 state" to include its agency or instrumentality). Several preliminary issues must be  
3 addressed before the Court comes to the principal issue to be decided. These are  
4 (1) does this lawsuit present a case or controversy within the meaning of Article III of  
5 the United States Constitution; (2) is the Foundation an agency or instrumentality of  
6 Spain; (3) must Plaintiff exhaust judicial remedies in the courts of the foreign state in  
7 possession of the property as a condition to pursuing his claim in this Court; (4) was  
8 the Painting taken by a "sovereign;" and (5) was the Painting taken from a citizen of  
9 the expropriating state such that the expropriation exception does not apply.

10 **A. THE PRELIMINARY ISSUES**

11 **1. CASE OR CONTROVERSY**

12 Citing to Allen v. Wright, 468 U.S. 737, 750 (1984), Spain contends that the  
13 current dispute does not present a "case or controversy" and therefore fails to meet  
14 the minimum requirement of Article III for the exercise of federal jurisdiction because  
15 Spain did not cause Plaintiff any injury that is "fairly traceable" to its actions, and a  
16 judgment will not redress Plaintiff's injury. See Bennett v. Spear, 520 U.S. 154, 162  
17 (1997). But this argument begs the question of whether this Court may properly  
18 entertain an action to force Spain to disgorge the painting even though Spain was not  
19 involved in the illegal expropriation. On that subject, the Court has already been  
20 presented with and decided the issue of whether the phrase "taken in violation of  
21 international law" limited the Court's exercise of jurisdiction to sovereigns that had  
22 been involved in the initial taking. The Court concluded that the language of the  
23 statute contains no such limitation, and the logic of the few decisions that have  
24 decided the question teaches that no such limitation should be implied. (See  
25 generally Order Granting Mot. for Jurisdictional Discovery, Apr. 27, 2006).

26 Moreover, Defendants have not disputed that del Castillo Vera was presented  
27 with and denied Cassirer's requests that Spain return the Painting to him, (Compl. ¶¶  
28 32-33), which creates a factual dispute as to whether Cassirer or the Foundation

owns the Painting. (8/14/06 Hearing Tr. at 38-39). Thus, whether or not Cassirer can ultimately establish an interest in the Painting, whether he can establish that his interest is superior to that of Spain and the Foundation, and whether he can establish a legal basis for vindicating that interest are all matters that must be left for another day. But the fact that such issues must be resolved tends to prove, rather than disprove, the existence of a case or controversy in the present circumstances. Accordingly, under the statute as construed by this Court, a case or controversy arising under federal law is presented and Article III does not preclude the Court from exercising jurisdiction over the case.

## 2. AGENCY OR INSTRUMENTALITY

The FSIA defines an "agency or instrumentality" of a foreign state as follows:

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof,

or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). An "agency or instrumentality" of the foreign sovereign, as distinct from the sovereign itself, engages in "core functions" that are predominantly commercial rather than governmental. See Garb v. Republic of Poland, 440 F.3d 579, 591 (2d Cir. 2006) (citing Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 151 (D.C. Cir. 1994) ("[I]mmunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.") (citations and quotation marks omitted)).

Spain half-heartedly argues that the Foundation is not an agency or instrumentality of the Spanish government, but even the Foundation disagrees. (See

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1 Foundation Mot. at 3). Here the Court is presented with unrebutted allegations that;  
2 (1) Spain arranged and was a party to the contract for the original loan of the  
3 collection that included the Painting and Spain paid the \$50 million lease price for the  
4 Thyssen-Bornemisza collection; (2) Spain later paid the \$327 million to fund the  
5 purchase of the Baron's entire collection; (3) Spain provided the facility, the  
6 Villahermosa palace, to be used as the Museum to house the collection; (4) Spain  
7 paid the cost of refurbishing that facility; (5) two-thirds of the Foundation's directors  
8 "must" be representatives of Spain, appointed by the Spanish government and freely  
9 removable through royal decree; and (6) many of Spain's governmental ministers  
10 serve as directors on the Foundation's board. (Compl. ¶¶ 9(a)-(d), 29-30). The Court  
11 therefore concludes that the property in dispute is owned by an agency or  
12 instrumentality of Spain.

13 **3. EXHAUSTION OF JUDICIAL REMEDIES**

14 Defendants argue that, to take advantage of the FSIA exception to immunity,  
15 Plaintiff must exhaust his judicial remedies in the foreign state where the property is  
16 located. Spain relies heavily on a comment made by Justice Breyer in a concurring  
17 opinion in Republic of Austria v. Altmann, 541 U.S. 677, 714 (2004), regarding the  
18 possibility that an exhaustion requirement "may" exist. However, the majority  
19 decision, which states the rule in the case, includes no holding that the statute  
20 requires exhaustion.

21 Of greater importance on this issue is the plain language of Section  
22 1605(a)(3), which contains no exhaustion-of-foreign-remedies requirement. In fact,  
23 FSIA's Section 1605(a)(7)(B)(I), which incorporates a requirement that any claim  
24 thereunder first be pursued through arbitration before that exception applies, strongly  
25 suggests that the absence of a similar exhaustion requirement in the expropriation  
26 exception reflects the intent of Congress *not* to include an exhaustion requirement in  
27 Section 1605(a)(3). See Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan  
28 Ass'n, 840 F.2d 653, 663 (9th Cir. 1988) ("Where Congress has carefully employed a

1 term in one place and excluded it in another, it should not be implied where  
2 excluded.”). The Court therefore concludes that an exhaustion requirement should  
3 not be implied where Congress created no such obligation as a condition to the  
4 exercise of subject matter jurisdiction under the expropriation exception to sovereign  
5 immunity.

#### 6 4. TAKING BY A SOVEREIGN

7 The last two threshold issues more narrowly address the “taken in violation of  
8 international law” element of the FSIA expropriation exception.

9 Spain contends that since a Munich art dealer named Jakob Scheidwimmer  
10 was the one who allegedly demanded the Painting from Lilly Cassirer (the original  
11 owner), and Scheidwimmer was *not* an agent of the German government, that a  
12 “sovereign” did not take the Painting. (Spain Mot. at 11-12). The Court disagrees.  
13 While Spain is correct that “[t]he term ‘taken’ . . . clearly refers to acts of a sovereign,  
14 not a private enterprise, that deprive a plaintiff of property without adequate  
15 compensation,” Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247,  
16 251 (2d Cir. 2000), here, however, Plaintiff has both alleged that Scheidwimmer was  
17 an agent of the controlling Nazi party, (Compl. ¶ 23), and provided compelling expert  
18 evidence to that effect, (Petropoulos Decl., Ex. B [Expert Opinion Report]  
19 (Scheidwimmer was a “member of the Nazi Party, implemented state policies and can  
20 be viewed as an agent of the state”)). See Altmann, 541 U.S. at 697 (“A Nazi lawyer .  
21 . . took possession of the six Klimts.”).<sup>1</sup> Moreover, Defendants have not argued that  
22 the approximate \$360 at 1939 exchange rates constituted just compensation,  
23 especially when, as Plaintiffs allege and Defendants have not refuted, Ms. Cassirer  
24 would never be permitted to withdraw the funds since they were paid into a blocked  
25 bank account. (Compl. ¶ 23). Apparently unable to rebut this evidence, Spain

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27  
28 <sup>1</sup> The Court concludes that at this stage Mr. Petropoulos's testimony on these issues of German history, National Socialism, art looting and the Holocaust cannot be disregarded. (Petropoulos Decl. ¶ 1; id., Ex. A [Petropoulos Curriculum Vitae]); see also Fed. R. Evid. 702.

1 contends that this evidence is improperly beyond the scope of the pleadings. (Spain,  
2 Reply at 7). However, since the Court granted jurisdictional discovery to resolve  
3 issues such as these, the evidence may properly be considered for purposes of  
4 determining FSIA jurisdiction. Adler v. Fed. Republic of Nig., 107 F.3d 720, 728 (9th  
5 Cir. 1997) ("A district court may properly look beyond the complaint's jurisdictional  
6 allegations and view whatever evidence has been submitted to determine whether in  
7 fact subject matter jurisdiction exists.") (citations and quotation marks omitted);  
8 Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 305-06 (D.D.C. 2005) ("[T]he  
9 court must look beyond the parties' pleadings to resolve any factual disputes that are  
10 essential to its decision to retain jurisdiction or dismiss the action."). In any event,  
11 either based on a review of the evidence or strictly viewing the un rebutted allegation  
12 in the Complaint, Scheidwimmer can be considered as an agent of the Nazi German  
13 regime and the Court concludes that the taking of Ms. Cassirer's Painting was indeed  
14 by a sovereign.

15 **5. TAKING FROM A NON-CITIZEN**

16 Finally, Spain contends that even if Scheidwimmer was an agent of Germany  
17 in taking the Painting, the taking was not "in violation of international law" since Ms.  
18 Cassirer was a German national and such a taking does not implicate violations of  
19 international law. While correct on the law, the Court disagrees with Spain's factual  
20 premise.

21 The Court agrees that in order "[t]o fall into this exception, the plaintiff cannot  
22 be a citizen of the defendant country at the time of the expropriation, because  
23 expropriation by a sovereign state of the property of its own nationals does not  
24 implicate settled principles of international law." Altmann, 317 F.3d 654, 968 (9th Cir.  
25 1998), aff'd, 541 U.S. 677 (citations and quotation marks omitted); Siderman de Blake  
26 v. Republic of Arg., 965 F.2d 699, 711 (9th Cir. 1992) ("Siderman"); Chuidian v.  
27 Philippine Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990). However, once again  
28 Plaintiff provides compelling evidence that Ms. Cassirer was not a German citizen at

1 the time of Nazi Germany's taking of the Painting since, according to the Nazis'  
2 citizenship laws at that time, "[a] Jew cannot be a citizen of the Reich." (Pl.'s Request  
3 for Judicial Notice ("RFJN"), Exs., A, B & C [The New Social Order - Reich Citizenship  
4 Laws] Art. 4(1)).<sup>2</sup> Moreover, the law provided that "[a] citizen of the Reich is that  
5 subject only who is of German or kindred blood." (*Id.* at Art. 2). Spain's Reply brief  
6 completely fails to address this argument and the Court concludes that since  
7 Germany itself did not consider Ms. Cassirer to be a citizen, Ms. Cassirer's alleged  
8 German "citizenship" at the time of the taking does not preclude the application of the  
9 expropriation exception in this case.

#### 10 **B. PERSONAL JURISDICTION AND DUE PROCESS**

11 Although it may seem odd to address personal jurisdiction before discussing  
12 subject matter jurisdiction, the two issues are intertwined in this case and the Court  
13 may properly address personal jurisdiction first. Anderman v. Fed. Republic of  
14 Austria, 256 F. Supp. 2d 1098, 1104 (C.D. Cal. 2003) ("[A] court may determine  
15 whether it has personal jurisdiction over a party before proceeding to determine  
16 whether it has subject-matter jurisdiction."). 28 U.S.C. § 1330(b), in clear language,  
17 states:

18 Personal jurisdiction over a foreign state ***shall exist*** as to every claim for relief  
19 over which the district courts have jurisdiction under subsection (a) where  
20 service has been made under section 1608 of this Title.

21 (emphasis added). Subsection (a) states that the district courts have jurisdiction over  
22 any action against a foreign state in any case where the foreign state is not entitled to  
23 immunity. In short, if the Court has subject matter jurisdiction over a foreign  
24 sovereign or its instrumentality, and properly serves that entity under 28 U.S.C. §

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25  
26  
27 <sup>2</sup> The Court hereby takes judicial notice of these authoritative statements of law under the Nazi  
28 German regime. McGhee v. Arabian Am. Oil Co., 871 F.2d 1412, 1424 (9th Cir. 1989) ("[T]he  
court is permitted to take judicial notice of authoritative statements of foreign law."); Fed. R. Civ.  
P. 44.1.

1 1608, then personal jurisdiction follows as a matter of law under Section 1330(b).<sup>3</sup> As  
2 one district court recently explained:

3 Unlike most statutes, the FSIA contains a specific provision for personal  
4 jurisdiction, conditioning it on effective service of process and the existence of  
5 subject matter jurisdiction. Ordinarily, statutes do not contain requirements for  
6 personal jurisdiction. The reason is obvious: the sole source for personal  
7 jurisdiction over a *person* is the Constitution. A statute may not provide for  
8 personal jurisdiction where the Constitution forbids it. By providing for  
9 personal jurisdiction in the FSIA, Congress implicitly endorsed the view that  
10 the Constitution does not limit a court's jurisdiction in personam over foreign  
11 states.

12 Rux v. Republic of Sudan, No. 2:04cv428, 2005 U.S. Dist. LEXIS 36575, at \*66 (E.D.  
13 Va. Aug. 26, 2005) (emphasis added). While not expressly determining that foreign  
14 states are "persons" for purposes of due process, the Supreme Court has explained:

15 personal jurisdiction, like subject-matter jurisdiction, exists only when one of  
16 the exceptions to foreign sovereign immunity in §§ 1605-1607 applies.

17 [Citation.] Congress' intention to enact a comprehensive statutory scheme is  
18 also supported by the inclusion in the FSIA of provisions for venue, 28 U.S.C.  
19 § 1391(f), removal, § 1441(d), and attachment and execution, §§ 1609-1611.  
20 Our conclusion here is supported by the FSIA's legislative history. See, e.g.,  
21 H.R. Rep. No. 94-1487, p. 12 (1976) (H.R. Rep.); S. Rep. No. 94-1310, pp.  
22 11-12 (1976) (S. Rep.) (FSIA "sets forth the sole and exclusive standards to  
23 be used in resolving questions of sovereign immunity raised by sovereign  
24 states before Federal and State courts in the United States," and "prescribes .  
25 . . the jurisdiction of U.S. district courts in cases involving foreign states.").

26  
27  
28 <sup>3</sup> Neither Defendant contends that service of process was improper or otherwise ineffective  
under 28 U.S.C. § 1608.

1 Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 435 n.3 (1989);  
2 see also Hilao v. Estate of Marcos (In re Estate of Marcos Human Rights Litig.), 94  
3 F.3d 539, 545-46 (9th Cir. 1996). However, since most recently the Supreme Court  
4 and this Circuit have sidestepped the issue by “[a]ssuming, without deciding, that a  
5 foreign state is a ‘person’ for purposes of the Due Process Clause,” Republic of Arg.  
6 v. Weltover, Inc., 504 U.S. 607, 619 (1992) (“Weltover”); see also Altmann, 317 F.3d  
7 at 970; Theo. H. Davies & Co. v. Republic of the Marshall Islands, 174 F.3d 969, 975  
8 n.3 (9th Cir. 1998), the question of whether a foreign state is a “person” remains  
9 unsettled.

10 At the hearing, Defendants indicated that they agreed with the Court’s  
11 conclusion that if subject matter jurisdiction exists through the Section 1605(a)(3)  
12 exception to sovereign immunity, then personal jurisdiction follows. However,  
13 Defendants concede this point only because it dovetails with their claim that the  
14 requirements of due process, as articulated in International Shoe and its progeny,  
15 have been subsumed in the subject matter jurisdiction analysis. On that basis,  
16 Defendants argue that the Court must assess whether the sovereign’s commercial  
17 contacts with the United States are so continuous and systematic as to give rise to  
18 general jurisdiction or whether the sovereign’s commercial activities in the United  
19 States with respect to the expropriated property give rise to specific jurisdiction in this  
20 case. Stated in a different way, Defendants contend that they are “persons” under  
21 the Due Process Clause, which would then mandate that the Court undertake a  
22 “minimum contacts” analysis of the elements of the FSIA exception to sovereign  
23 immunity.

24 The Court disagrees. The Court recognizes that, in a number of decisions,  
25 including decisions in this Circuit, courts when confronted with the issue have  
26 “assum[ed] without deciding” that foreign sovereigns are “persons” under the Due  
27 Process Clause of the Constitution. See, e.g., Weltover, 504 U.S. at 619; Altmann,  
28 317 F.3d at 970. Older cases predating Weltover and Altmann have also held in

1 FSIA cases that, even if the foreign sovereign is not entitled to immunity, the exercise  
2 of personal jurisdiction must comport with the Due Process Clause. E.g., Olsen v.  
3 Gov't of Mexico, 729 F.2d 641, 648 (9th Cir. 1984); Siderman, 965 F.2d at 705 n.4  
4 (noting in dictum **one month before Weltover** that “the exercise of personal  
5 jurisdiction also must comport with the constitutional requirement of due process”).  
6 Thus, “[t]he Ninth Circuit has since retreated from this [previous conclusion] by  
7 following the Weltover court’s lead in assuming without deciding that due process was  
8 satisfied.” Altmann, 142 F. Supp. 2d 1187, 1207 (C.D. Cal. 2001), aff’d, 317 F.3d 654  
9 (9th Cir. 1998), aff’d, 541 U.S. 677 (2004). Moreover, in Altmann, the Supreme Court  
10 recently reiterated that Congress intended to resolve difficulties regarding the scope  
11 of federal jurisdiction over foreign sovereigns “by enacting the FSIA, a  
12 **comprehensive statute** containing a ‘set of legal standards governing claims of  
13 immunity in every civil action against a foreign state **or its political subdivisions,**  
14 **agencies, or instrumentalities.**” 541 U.S. at 691 (emphases added). The Court  
15 noted that FSIA itself “contains venue and removal provisions” and that “it prescribes  
16 the procedures for obtaining personal jurisdiction over a foreign state [in] § 1330(b).”  
17 Id.

18 That comprehensive statute provides in plain language that subject matter  
19 jurisdiction over a case confers personal jurisdiction over the sovereign so long as the  
20 defendant is properly served. In other words, “under the FSIA, ‘subject matter  
21 jurisdiction plus service of process equals personal jurisdiction’” and the “Due Process  
22 Clause imposes no limitation on a court’s exercise of personal jurisdiction over a  
23 foreign state.” Abur v. Republic of Sudan, No. 02-1188 (JDB), 2006 U.S. Dist. LEXIS  
24 49432, at \*13 & n.11 (D.D.C. July 10, 2006) (quoting Practical Concepts, Inc. v.  
25 Republic of Bolivia, 811 F.2d 1543, 1548 n.11 (D.C. Cir. 1987)). Nothing in the Act  
26 suggests that a minimum contacts analysis must be conducted or that foreign  
27 sovereigns should be viewed as “persons” for purposes of a due process analysis.

1 Explaining why a court need look no further than the FSIA's statutory mandate, Judge  
2 Cooper, in the Altmann District Court decision, wrote:

3           The personal jurisdiction requirement recognizes an individual liberty  
4 interest that is conferred by the Due Process Clause. Insurance Corp. of  
5 Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703, 102 S. Ct.  
6 2099, 72 L. Ed. 2d 492 (1982). The personal jurisdiction requirement  
7 represents a restriction on judicial power not as a matter of sovereignty, but as  
8 a matter of individual liberty. Id. It would be illogical to grant this personal  
9 liberty interest to foreign states when it has not been granted to federal, state  
10 or local governments of the United States. Flatow[ v. Islamic Republic of  
11 Iran, 999 F. Supp. 1, 21 (D.D.C. 1998)]. Accordingly, this Court holds that a  
12 foreign state is not a 'person' under the Due Process Clause of the United  
13 States Constitution.

14           The previously-cited House Report's language is unambiguous -- it  
15 states that in personam jurisdiction has been addressed within the  
16 requirements of the statute; the FSIA does not grant a liberty interest for the  
17 purposes of substantive due process analysis. H.R. Rep. No. 1487, 94th  
18 Cong., 2d Sess., reprinted in 1976 U.S. Code & Admin. News at 6611-12.  
19 This Court joins with the Flatow court's observation that foreign sovereign  
20 immunity, both under the common law and now under the FSIA, has always  
21 been a matter of grace and comity rather than a matter of right under United  
22 States law. Verlinden[ B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983)],  
23 citing Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287  
24 (1812). Where neither the Constitution nor Congress grants a right, it is  
25 inappropriate to invent and perpetuate it by judicial fiat.

26 142 F. Supp. 2d at 1208; see also Price v. Socialist People's Libyan Arab Jamahiriya,  
27 294 F.3d 82, 96-100 (D.C. Cir. 2002) (detailing why and holding that foreign states  
28

1 should not be considered “persons” protected by the Fifth Amendment); Rux, 2005  
2 U.S. Dist. LEXIS 36575, at \*54.

3 The Court agrees with the reasoning of these courts and, based on the  
4 foregoing, concludes that the question of personal jurisdiction in this case turns on  
5 whether or not the Court has subject matter jurisdiction, and that the answer to that  
6 question is a matter not of constitutional law but of statutory construction.

7 Accordingly, given the current posture of this case, the Court must determine the  
8 meaning of the statutory requirement that a foreign instrumentality be engaged “in a  
9 commercial activity in the United States” as a condition to applying the illegal  
10 expropriation exception to sovereign immunity.

11 **C. SUBJECT MATTER JURISDICTION**

12 The expropriation exception to sovereign immunity set forth in 28 U.S.C. §  
13 1605(a)(3) applies in situations where the following four conjunctive elements are  
14 present:

- 15 (1) that rights in property[] are at issue,
- 16 (2) that the property was “taken,”
- 17 (3) that the taking was in violation of international law, and
- 18 (4)(a) “that property . . . is owned or operated by an agency or instrumentality  
19 of the foreign state and that agency or instrumentality is ***engaged in a***  
20 ***commercial activity in the United States***”

21 Garb, 440 F.3d at 588 (emphasis added). The first and second prongs of this test are  
22 settled since there is no dispute that the Painting was taken from Ms. Cassirer. This  
23 leaves the Court with the remaining two elements to analyze.

24 **1. “IN VIOLATION OF INTERNATIONAL LAW”**

25 As noted above, the Court has already determined that the Complaint alleges  
26 that property was taken in violation of international law and that the statutory  
27 exception permits suits to be brought against foreign sovereigns even if the  
28 sovereign, like Spain in this case, had no involvement in the initial illegal taking. In

1 addition, and as also articulated above, the element does not fail on the grounds that  
2 the Painting was taken by Scheidwimmer or because it was taken from Ms. Cassirer  
3 who was not considered a citizen by the government that took the property.

4 According to Spain, however, this "in violation of international law" element is  
5 nonetheless not satisfied since the alleged extortion of the Painting by an official  
6 appraiser and agent of the Nazi government in exchange for an exit visa out of  
7 Germany (and her life) and \$360 that Ms. Cassirer would never see since it was  
8 deposited into a blocked bank account does not constitute a violation of international  
9 law.<sup>4</sup>

10 To make this point, Spain relies heavily on Sosa v. Alvarez-Machain, 542 U.S.  
11 692 (2004), a case in which the DEA hired Mexican nationals to abduct a Mexican  
12 doctor, who had been indicted for the murder and torture of a DEA agent, and to  
13 deliver him to the custody of federal agents in the United States. After the doctor  
14 prevailed in the criminal case, he sued the United States and several individuals in  
15 federal court for, among other things, false arrest and detention. Construing the  
16 Federal Tort Claims Act and the Alien Tort Statute, the Supreme Court held that "a  
17 single illegal detention of less than a day, followed by the transfer of custody to lawful  
18 authorities and a prompt arraignment, violates no norm of customary international law  
19 so well defined as to support the creation of a federal remedy." Id. at 738. Spain  
20 (though not the Foundation) suggests that this case has articulated a new standard  
21 for assessing what it means to violate international law, and that the Siderman test is  
22 no longer controlling.

23 The argument is unpersuasive because neither the Alien Tort Statute nor the  
24 Federal Tort Claims Act are at issue, and nothing in those statutes or their  
25 construction provides any help in construing the provisions of Section 1605(a)(3).  
26 Moreover, Sosa focused exclusively on those circumstances under which a detention

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27  
28 <sup>4</sup> At the hearing the Foundation indicated that it takes no position on whether the initial taking of the Painting violated international law.

1 constitutes a violation of international law, since those questions are not resolved by  
2 statute. But here the Court is dealing with a statute where Congress has expressly  
3 provided for jurisdiction over claims arising from "property taken in violation of  
4 international law." 28 U.S.C. § 1605(a)(3). Sosa provides no guidance in determining  
5 the meaning of that phrase.

6 FSIA cases, on the other hand, have examined the meaning of the phrase  
7 and, drawing from the Restatement of Foreign Relations law, have held that "[i]f a  
8 taking violates any one of the [following] proscriptions, it violates international law."  
9 Siderman, 965 F.2d at 712. These proscriptions include "injury resulting from: (1) a  
10 taking by the state of the property of a national of another state that[:] (a) is not for a  
11 public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just  
12 compensation . . . ." Id.; Altmann, 317 F.3d at 968 ("[T]he Klimt paintings have been  
13 wrongfully and discriminatorily appropriated in violation of international law."); see also  
14 West v. Multibanco Comermex, S.A., 807 F.2d 820, 831 (9th Cir. 1987); Greenpeace,  
15 Inc. (U.S.A.) v. France, 946 F. Supp. 773, 783 (C.D. Cal. 1996).

16 Looking to this standard, the Court concludes that the taking was  
17 discriminatory and without just compensation. Indeed, the Nazis stripped the Jews of  
18 their citizenship and took their property, including the Painting in this case. The \$360  
19 provided for the Painting now allegedly worth many millions of dollars was not just  
20 compensation, especially when the payment is viewed in conjunction with the  
21 allegation that Ms. Cassirer could never even withdraw the funds since they were paid  
22 into a blocked bank account, thereby effectively receiving nothing for the Painting. In  
23 any event, "[a]t th[is] jurisdictional stage, we need not decide whether the taking  
24 actually violated international law; as long as a 'claim is substantial and non-frivolous,  
25 it provides a sufficient basis for the exercise of our jurisdiction.'" Siderman, 965 F.2d  
26 at 711 (citation omitted); Altmann, 317 F.3d at 958-59 (finding the plaintiff's  
27 allegations, which arise from very similar facts, to satisfy the jurisdictional  
28

1 requirement); Greenpeace, Inc. (U.S.A.), 946 F. Supp. at 782. The Court is more  
 2 than satisfied that, at this point, Plaintiff has made the required showing.

3 **2. "ENGAGED IN A COMMERCIAL ACTIVITY IN THE UNITED STATES"**

4 The final question presented in the jurisdictional analysis is whether Spain  
 5 and/or the Foundation are engaged in "a commercial activity in the United States"  
 6 within the meaning of the statute, in which case the expropriation exception applies  
 7 and the litigation may proceed in this Court. The Court concludes that this element is  
 8 also satisfied as to both Defendants.

9 The statute defines commercial activity as follows:

10 A 'commercial activity' means either a regular course of commercial conduct  
 11 or a particular commercial transaction or act. The commercial character of an  
 12 activity shall be determined by reference to the nature of the course of  
 13 conduct or particular transaction or act, rather than by reference to its  
 14 purpose.

15 28 U.S.C. § 1603(d).<sup>5</sup> Case law further explains that, regardless of the motive behind  
 16 a particular activity, that activity is "commercial" if it is the type through which a private  
 17 party engages in trade or commerce. Weltover, 504 U.S. at 614; Tei Yan Sun v.  
 18 Taiwan, 201 F.3d 1105, 1107 (9th Cir. 2000); Malewicz, 362 F. Supp. 2d at 313.

19 Thus, the establishment of a tariff would be a sovereign act because private parties  
 20 do not regulate foreign trade, but contracting to purchase boots for an army would be  
 21 a "commercial activity" because it is the type of conduct in which private parties may  
 22 engage. Altmann, 142 F. Supp. 2d at 1204.

23 The statutory language imposes no requirement that the commercial activity  
 24 relate in any way to the illegally expropriated property. Nor does it even suggest that

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25  
 26 <sup>5</sup> Subsection (e), which defines "commercial activity carried on in the United States by a foreign  
 27 state," relates to the exception set forth in 28 U.S.C. § 1605(a)(2) and a disjunctive prong of 28  
 28 U.S.C. § 1605(a)(3) which requires property to be present in the United States. As to those  
 provisions, 28 U.S.C. § 1603(e) requires commercial activity "carried on by such state and  
 having substantial contact with the United States." Subsection (e)'s requirements, however, are  
 not at issue here.

1 the exception applies only where the foreign sovereign is engaged in continuous and  
2 systematic commercial activity within the United States. On the contrary, Section  
3 1603(d) defines "commercial activity" to include *either* a regular course of conduct *or*  
4 a particular transaction or act. And despite the contention of Defendants, the Court  
5 is not limited to a consideration of the foreign instrumentality's commercial activities  
6 that occur entirely within the United States. The legislative history cited by  
7 Defendants that supposedly supports such a limitation suggests otherwise:

8 As paragraph (d) of section 1603 indicates, a commercial activity carried on in  
9 the United States by a foreign state would include not only a commercial  
10 transaction performed and executed in its entirety in the United States, but  
11 also a commercial transaction or act having a 'substantial contact' with the  
12 United States. This definition includes cases based on commercial  
13 transactions performed in whole or in part in the United States, import-export  
14 transactions involving sales to, or purchases from, concerns in the United  
15 States, business torts occurring in the United States (cf. Sec. 1605(a)(5)), and  
16 an indebtedness incurred by a foreign state which negotiates or executes a  
17 loan agreement in the United States, or which receives financing from a  
18 private or public lending institution located in the United States -- for example,  
19 loans, guarantees or insurance provided by the Export-Import Bank of the  
20 United States.

21 H.R. Rep. No. 94-1498 at 17, as reprinted in 1976 U.S.C.C.A.N. at 6615-16.

22 Case law supports the Court's conclusion that limited commercial activity is  
23 sufficient to bring this case within the expropriation exception to sovereign immunity.  
24 For example, on this question of "commercial activity," the Ninth Circuit in Altmann  
25 explained:

26 Because Appellants profit from the Klimt paintings in the United States, by  
27 authoring, promoting, and distributing books and other publications exploiting  
28 these very paintings, these actions are sufficient to constitute 'commercial

1 activity' for the purpose of satisfying the FSIA, as well as the predicates for  
 2 personal jurisdiction.  
 3 317 F.3d at 959. The court explained that these commercial contacts "**far exceed**  
 4 that which we[re] found sufficient to justify applying § 1605(a)(3) in Siderman." Id. at  
 5 969 (emphasis added). The court noted that "[t]he key commercial behavior of the  
 6 Gallery here is not its operation of the museum exhibition in Austria, however, but its  
 7 publication and marketing of that exhibition and the books [such as *Klimt's Women*] in  
 8 the United States." Id. Moreover, it was the activity of selling the books, and not the  
 9 appearance of the particular paintings in the books, that warranted the exercise of  
 10 jurisdiction. Thus, while three of the Klimt paintings were not featured in *Klimt's*  
 11 *Women*, which was published in English and distributed in the United States, the  
 12 court found jurisdiction to exist over the dispute as to all six paintings.

13 While the contacts in Altmann far exceeded the minimum commercial  
 14 contacts sufficient to warrant the exercise of jurisdiction, Siderman found jurisdiction  
 15 in a case that involved a much lower level of "commercial activity." In Siderman the  
 16 plaintiffs, a Jewish family residing in Argentina in the 1970s, were persecuted,  
 17 tortured, harassed, and forced to leave the country by an anti-semitic military junta  
 18 that seized control of the government. After one member of the family was severely  
 19 tortured over a period of several days, he was told to leave the country or he and his  
 20 family members would be killed. The family quickly gathered what they could, made  
 21 arrangements to have someone oversee their family business, which included the  
 22 Hotel Gran Corona in Tucuman, Argentina, and fled to the United States. Thereafter,  
 23 the Argentine dictatorship altered the family's real property records to show that the  
 24 Sidermans had owned not 127,000 acres, but 127 acres of land in the province and  
 25 ultimately seized the family business through a sham judicial proceeding. Some  
 26 years later, the family, one of whom was a United States citizen, brought suit in  
 27 federal court asserting, among other things, that the court had subject matter  
 28 jurisdiction under the expropriation exception to the FSIA. Siderman, 965 F.2d at

1 703. As to that exception, the Ninth Circuit noted that Argentina had undertaken  
2 operation of the Hotel Gran Corona, that is solicited and entertained American guests  
3 at the hotel, and accepted their credit cards and traveler's checks in payment for the  
4 costs of lodging. This was enough for jurisdictional purposes "to show that Argentina  
5 is engaged in **a commercial activity** in the United States." Id. at 712 (emphasis  
6 added). This was the only commercial contact the court relied on in concluding that  
7 the plaintiffs properly had alleged facts to invoke the expropriation exception. Even  
8 though the court "emphasize[d] the preliminary nature" of the holding, pending further  
9 development of the factual record, it was sufficient to satisfy the plaintiff's initial  
10 burden. Id. at 712-13. Here, however, Defendants have been permitted to rebut  
11 Plaintiff's allegations of jurisdiction, and their attempts to argue that the Foundation's  
12 or Spain's contacts are strictly sovereign are unpersuasive and simply unsupported  
13 given the case law on this point.<sup>6</sup>

14 The Court concludes that while the commercial activity presented in this case  
15 falls somewhere below what was found to "far exceed[]" the threshold in Altmann, it is  
16 sufficient at this point to invoke the expropriation exception. That is, after reviewing  
17 the evidence from the grant of jurisdictional discovery, the Court finds the following  
18 commercial activity in this case.

19  
20  
21  
22  
23  
24 <sup>6</sup> Notably, the Siderman court also found the following contacts sufficient to satisfy Section  
25 1603(e)'s more rigorous "substantial contact with the United States," 28 U.S.C. § 1603(e), which  
is a heavier burden than what Plaintiff here carries under 28 U.S.C. § 1603(d):

26 Argentina advertises the Hotel Gran Corona in the United States and solicits American  
27 guests through its U.S. agent, Aerolinas Argentinas, the national airline of Argentina.  
They have alleged further that numerous Americans have stayed at the Hotel, which  
28 accepts all the major American credit cards, including Mastercard, Visa, and American  
Express.

Siderman, 965 F.2d at 709.

1                   **a. The Foundation's Purchases and Sales in the United States<sup>7</sup>**

2                   The Foundation has engaged in commercial transactions in the United States  
3 both as a purchaser and a seller. For example, as a buyer, it has entered into media  
4 licensing agreements with United States museums (e.g., Maxon Decl., Ex. A  
5 [Compendium of the Foundation's Commercial Purchases] at Bates 0125-28, 0168-  
6 70, 0174-75), and has entered into dozens, if not hundreds of transactions with  
7 United States businesses to purchase posters, post cards, and related materials.  
8 (See generally e.g. id., Ex. A [Compendium of the Foundation's Commercial  
9 Purchases]). Likewise, the Foundation has used its credit card in the United States  
10 to purchase books from Amazon.com and book stores in New York and California.  
11 (See, e.g., id. at Bates 0442, 0476). As particularly ironic examples, the Foundation  
12 purchased through Amazon.com The Lost Museum: The Nazi Conspiracy to Steal the  
13 World's Greatest Works of Art, (Maxon Decl., Ex. A [Compendium of the Foundation's  
14 Commercial Purchases]; id. at Bates 0442), purchased the art book "Abe 566 Pissarro  
15 [sic]" from Warren Art Books in New Jersey, (id. at Bates 0512), and from the  
16 American Association of Museums in Washington, DC purchased a volume on  
17 Museum Policy and Procedure for Nazi Era Issues, (id. at Bates 0471).

18                   As a seller, the Foundation has sold to United States residents and business  
19 posters and books, and has licensed the reproduction of images to various United  
20 States businesses. (Id., Ex. C [Compendium of the Foundation's Commercial Sales]  
21 at Bates 0677 (Receipt for sale of Pissarro poster to individual residing in Wichita,  
22 Kansas)). Even more important is ***a purchase by an individual in the Central***  
23 ***District of California of a poster of the Pissarro Painting charged to her***  
24 ***American Express credit card.*** (Id., Ex. C [Request and Sale of Pissarro Poster] at

25 \_\_\_\_\_  
26 <sup>7</sup> The Court briefly notes that if the Foundation – an alleged agency and instrumentality of Spain  
27 – has sufficient commercial contacts to satisfy "a commercial activity" as set forth at the end of  
28 28 U.S.C. § 1605(a)(3), then those contacts are also sufficient to hold Spain to answer under  
this exception because a foreign ***state*** is not immune is when a foreign state's agency or  
instrumentality is engaged in "a commercial activity."

1 Bates 584-85; see also id. at Bates 709 (Receipt for sale from Foundation of Pissarro  
2 poster to individual residing in Winston-Salem, North Carolina)). The Foundation  
3 communicated with American purchasers through e-mail communications (e.g., id. at  
4 Bates 0713, 0715), and sold copies of its Thyssen-Bornemisza Collection Guide. (Id.  
5 at Bates 0715.) Finally, while it is difficult definitively to confirm based on the  
6 submitted evidence, Plaintiff alleges that several catalogues and publications  
7 containing copies of the Painting were also sold by the Museum. (Id. at Bates 0671,  
8 0705, 0721; Opp. to Foundation Mot. at 14 n.4).

9 Indeed, the Foundation admits that “in limited circumstances, [it] has worked  
10 with entities in the United States to provide goods or products to be sold in the  
11 Museum gift shop [and] from time to time[] has ***paid citizens of the United States to***  
12 ***write essays for [its exhibition] catalogs.***” (Maxon Decl., Ex. B [Response to  
13 Interrogatories] No. 3 (emphasis added)). Moreover, the Foundation admits that the  
14 “Museum’s gift shop sells items to any visitors, and has . . . shipped items [to] the  
15 United States.” (Id.).

16 **b. The Foundation’s Retention of Services in the United States**

17 The Foundation has commissioned services for its Museum by individuals in  
18 the United States, such as the purchase of an essay for one of its exhibitions, (e.g.,  
19 id., Ex. D [Compendium of the Foundation’s Purchased Services] at Bates 0273), and  
20 the solicitation, recruitment, and invitation of an individual at the Institute of Fine Arts  
21 in New York to lecture at the Foundation’s Museum, (id. at Bates 0366-70). Indeed,  
22 there is evidence of several other such recruitments and speaking engagements in  
23 exchange for the Foundation’s payment to these individuals.

1                   **c. The Foundation's Granting Permission for Filming in the**  
2                   **Museum which Resulted in Iberia Airlines Featuring a Video and**  
3                   **Discussion About the Painting on Flights between the United**  
4                   **States and Spain**

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5                   There is undisputed evidence that the Foundation gave permission to  
6 Transvision, a video production company, to film a program in the Museum. (7/6/06  
7 Henestrosa Decl. ¶ 14). As a result of that granted access, an "Artemario" in-flight  
8 program on the Spanish Iberia Airlines flights between Spain and the United States  
9 features the precise Camille Pissarro Painting at issue herein. (Lee Rappaport Decl.  
10 ¶ 4; John Rappaport Decl. ¶ 4). The in-flight program depicts the Painting, which is  
11 identified by the painter, Camille Pissarro, in the Foundation's Museum and the DVD  
12 contains a lengthy five-minute explanation of the Painting, its history, its location in  
13 the Museum, and discussion about Pissarro himself. (Not. of Lodging, Ex. F  
14 [Programa Iberia In & Out – Pissarro]).

15                   Iberia Airlines maintains that while there is no formal agreement or contract  
16 with the Foundation or Museum, these entities "are aware that the programs are aired  
17 on [its] intercontinental flights." (Maxson Decl., Ex. I [E-mail Communication with  
18 Iberia Airlines] at p. 676). As a result, several tens – if not hundreds – of thousands  
19 of airline passengers viewed the Pissarro presentation on at least 200 flights between  
20 the United States, which no doubt serves as a powerful marketing tool to entice U.S.  
21 tourists aboard these Iberia flights to visit the Foundation's museum while visiting  
22 Spain. (Maxson Decl., Ex. J [E-mail Communication from Iberia Airlines]). There is  
23 evidence that over 34 artworks from the Museum's collection – including the Painting  
24 itself – have each been the subject of an "Artemario" program on Iberia Airlines.  
25 (Pollan Decl. ¶¶ 3-4).

1                   **d. Marketing and Commercial Promotion in the United States**

2                   The Foundation has regularly advertised several of its exhibitions in  
3 internationally distributed art magazines, including those circulated in the United  
4 States. (Maxson Decl., Ex. L [The Museum's Advertising Contacts] at Bates 0001-  
5 02). Moreover, there is evidence that exposition notices were also sent to other  
6 international news publications such as Newsweek and Time Magazine, and that the  
7 Foundation advertises in the New Yorker. (Id. at Bates 0042). Many of these notices  
8 were also sent to Spain's various tourism offices located throughout the United  
9 States, including in Beverly Hills, California. (Id. at Bates 0038-39). The Foundation  
10 admits that it mails its Museum bulletin entitled "Perspectives" to addresses  
11 throughout the world, including 55 in the United States, and two in the Central District  
12 of California. (7/6/06 Henestrosa Decl. ¶ 10).

13                   In addition, while it is unclear who paid for the advertisements and the  
14 Foundation denies having done so, (8/14/06 Hearing Tr. at 12-13), several  
15 advertisements of the Foundation's Museum were taken out in the New York Times.  
16 The advertisements provided the location of local tourist offices in the United States,  
17 their contact information along with Iberia's contact information, and the  
18 advertisements mention the Museum itself and encourage visitors to visit Spain and  
19 these tourist attractions there. (Maxson Decl, Ex. S [11/10/03 New York Times  
20 Advertisement] at p. 905-07). Specifically, the advertisements state: "If you love art  
21 and culture, Madrid is your destination. . . . [A] unique itinerary [] takes you from El  
22 Prado to the Thyssen-Bornemisza [Museum]. . . Come and experience their genius."  
23 (Id.). These contacts only reinforce a finding of a commercial activity.

24                   **e. Other Non-Sovereign Commercial Activities in the United States**

25                   While the Foundation has never loaned the Painting to a museum in the  
26 United States, (Henestrosa Mot. Decl. ¶ 17), the Foundation has borrowed and  
27 borrows artworks from individuals and institutions in the United States. (Id. ¶ 16). In  
28 fact, some agreements even charged the Foundation a fee for the loans, albeit a

1 nominal \$200. (See, e.g., Maxson Decl., Ex. Q [Compendium of Borrowers' Loan  
2 Agreements] at Bates 1159). This evidence exists, even in the face of Henestroza's  
3 declaration that "[t]he Foundation does not receive payment for the loan of its  
4 artworks or pay to borrow artworks from others." (Henestroza Mot. Decl. ¶ 16). Many  
5 of the artworks borrowed by Spain fetched hundreds of thousands of visitors a year.  
6 (Maxson Decl., Ex. Q [Compendium of Borrowers' Loan Agreements] at Bates 2050-  
7 51). While Henestroza maintains that these "exchanges are reciprocal educational  
8 and cultural activities designed to promote the international understanding and  
9 appreciation of art," (Henestroza Mot. Decl. ¶ 16), as the Court has already explained,  
10 the purpose is not relevant in assessing commercial activity. Altmann, 317 F.3d at  
11 969. Indeed, the Malewicz court held that the loan of paintings to museums in the  
12 United States – albeit the same paintings that were at issue there – constituted a  
13 commercial activity since "[t]here is nothing 'sovereign' about the act of lending art  
14 pieces, even though the pieces themselves might belong to a sovereign." Malewicz,  
15 362 F. Supp. 2d at 314. The Court explained that "because the international loan of  
16 artworks between museums can and does occur with potential sales of the works  
17 contemplated by the parties (which is undoubtedly 'commerce' in the traditional  
18 sense), and because it is the type of activity – not its purpose – that must guide the  
19 analysis," the city's argument that the "exchange of artworks between not-for-profit  
20 organizations in different countries" was not commerce must fail. Id.

21 The Foundation has also loaned many of its artworks to institutions in the  
22 United States and similarly charged nominal, administrative fees associated with the  
23 loans. (See, e.g., Maxson Decl., Ex. R [Compendium of the Foundation's Loan of  
24 Artwork] at Bates 0955 (Foundation Loan to the Metropolitan Museum of Art)).

25 Other commercial activities exist. Through the Museum's website,  
26 www.museothyssen.org, U.S. citizens may sign up for newsletters, view the  
27 Foundation's collection – including the Pissarro Painting – and purchase advance  
28

1 admission tickets through links to third-party vendors. (Henestrosa Mot. Decl. ¶¶ 14-  
2 15).

3 Finally, as they relate directly to Spain, the Foundation's motion and  
4 Henestrosa's declaration assert that "none of the tourism offices' materials depict,  
5 mention, or feature the Painting." (Foundation Mot. at 10; Henestrosa Mot. Decl. ¶  
6 12). However, the Court's review of the record reveals that at least one Museum  
7 brochure distributed by Spain's Beverly Hills tourism office mentions Pissarro by  
8 name. (Paxson Decl., Ex. M [Brochures] at Bates 0015-18, Defs.' Bates 725-28;  
9 Cabanas Decl. ¶ 6). Moreover, as recently as this month the New Yorker magazine,  
10 in a "special advertising section," featured the Museum itself and a discussion of the  
11 Baron's collection. (8/17/06 Hall Decl., Exs. A [7/31/06 New Yorker Magazine] & B  
12 [8/7/06 - 8/14/06 New Yorker Magazine]).

#### 13 f. Conclusion re: Commercial Activity

14 The Court concludes that Defendants have engaged such numerous  
15 commercial contacts with the United States that the "commercial activity" element of  
16 the expropriated property exception is easily established. While Altmann had more  
17 direct publications in the U.S. of at least some of the paintings at issue, here there are  
18 sales to United States residents of reproductions of the Painting, (e.g., Maxson Decl.,  
19 Ex. C [Request and Sale of Pissarro Poster] at Bates 0584-85; see also id. at Bates  
20 0709), and hundreds of other contacts involving the purchase and sale of  
21 merchandise as described above, some of which are directly related to Pissarro and  
22 even the Painting itself. The Court's conclusion is consistent with the legislative  
23 history of the FSIA, which explains that "[p]aragraph (c) of section 1603 defines the  
24 term 'commercial activity' as including a broad spectrum of endeavor, **from an**  
25 **individual commercial transaction or act** to a regular course of commercial  
26 conduct." H.R. Rep. No. 94-1498 at 16, as reprinted in 1976 U.S.C.C.A.N. at 6614  
27 (emphasis added). As such, the evidence submitted is more than sufficient to support  
28 Plaintiff's contention that there exists "a commercial activity" for purposes of 28 U.S.C.

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1 § 1605(a)(3). See Adler, 107 F.3d at 725 (for purposes of 28 U.S.C. § 1605(a)(2),  
 2 Nigeria engaged in commercial activity within the meaning of section 1603(d) by  
 3 entering into “an agreement” for the assignment of a contract in exchange for  
 4 consideration).

5 **g. The Policy Question**

6 In the end, Defendants argue against the Court’s conclusion through  
 7 predictions of doom and gloom if the statute is not construed more narrowly. The  
 8 Court’s ruling, they say, will convert the federal district courts into international courts  
 9 of claim for those seeking recovery of property looted by the Nazi regime. The  
 10 argument contains several flaws.

11 First, the issue now before the Court is not about jurisdiction over all illegally  
 12 expropriated property but rather about such property that is in the hands of a foreign  
 13 sovereign. The statutory limits placed on the exercise of jurisdiction – that the  
 14 property have been taken in violation of international law, that it be in the hands of a  
 15 foreign sovereign, and that the sovereign be engaged in a commercial activity in the  
 16 United States – suggest that the number of such cases is likely to be small. The  
 17 Court finds more traction on this supposed slippery slope than do Defendants. But  
 18 even if the statute opens the courthouse up to a large volume of international  
 19 litigation, that result flows directly from the language of the statute, which reflects  
 20 Congressional policy. For the Court to construe the statute to mean something other  
 21 than the meaning suggested by its text would be to substitute the Court’s policy  
 22 determination for that of Congress. Policy questions, especially in an area that  
 23 involves foreign relations, should be decided by the political branches of government.  
 24 See Patsy v. Bd. of Regents, 457 U.S. 496, 513 (1982) (exhaustion context)  
 25 (superseded on other grounds) (“The very difficulty of these policy considerations,  
 26 and Congress’ superior institutional competence to pursue this debate, suggest that  
 27 legislative not judicial solutions are preferable.”). Thus, this Court believes “[a]s  
 28 judges, of course, we must apply statutes as written, not as they should have been

1 written with the benefit of hindsight." Gardenhire v. IRS (In re Gardenhire), 209 F.3d  
2 1145, 1152 (9th Cir. 2000) (policy decisions should be left to Congress). If  
3 experience teaches that the statute as written overburdens the Court with suits  
4 brought against foreign sovereigns under the expropriation exception, then Congress,  
5 with the benefit of that experience, can amend or re-write the statute. The Court  
6 doubts that this will be necessary.

7 Thus, while this case presents the Court with the novel situation where the  
8 foreign sovereign has had no role in the illegal taking of the property in dispute and its  
9 commercial activities in the United States have only occasionally related to that  
10 property, the Court concludes that the statute confers jurisdiction over the subject  
11 matter of the lawsuit. Since Plaintiff "offers evidence that an FSIA exception to  
12 immunity applies, the party claiming immunity bears the burden of proving by a  
13 preponderance of the evidence that the exception does not apply." Siderman, 965  
14 F.2d at 708; accord Randolph v. Budget Rent-A-Car, 97 F.3d 319, 324 (9th Cir.  
15 1996). The Court holds that Plaintiff has satisfied this burden and Defendants have  
16 not rebutted this presumption, and therefore there exists a substantial, nonfrivolous  
17 basis for this Court's exercise of subject matter jurisdiction under 28 U.S.C. §  
18 1605(a)(3) of the FSIA.

#### 19 D. VENUE

20 Pursuant to the FSIA statute:

21 A civil action against a foreign state . . . may be brought . . . (3) in any judicial  
22 district in which the agency or instrumentality is licensed to do business or *is*  
23 **doing business**, if the action is brought against an agency or instrumentality  
24 of a foreign state as defined in section 1603(b) of this title [28 USCS §  
25 1603(b)]; or (4) in the United States District Court for the District of Columbia if  
26 the action is brought against a foreign state or political subdivision thereof.  
27 28 U.S.C. § 1391(f) (emphasis added); see also Altmann, 317 F.3d at 972. Despite  
28 Defendants' arguments to the contrary, venue in this District is proper pursuant to this

1 section since Defendants are "doing business" in this District and the finding that  
2 Defendants are engaged in "a commercial activity" in the United States is sufficient to  
3 satisfy the FSIA's venue provision. (Compl. ¶ 13); Altmann, 142 F. Supp. 2d at 1215  
4 aff'd, 317 F.3d at 971-72 (venue in the Central District is proper as to both the foreign  
5 state defendant and its alleged agent and instrumentality). Here, the commercial  
6 activity contacts aside, two residents of this District viewed the Pissarro "Artemario"  
7 program on the Iberia Airlines flight, a local resident ordered and purchased a copy of  
8 the Pissarro Painting from the Museum, which was charged to the U.S. resident's  
9 American Express card and shipped to this District, (Maxson Decl., Ex. C [Request  
10 and Sale of Pissarro Poster] at Bates 0584-85), and the Foundation sends its bulletin  
11 "Perspectives" to at least two residents of the District, (7/6/06 Henestrosa Decl. ¶ 10).  
12 Thus, the Foundation's claims that it is not "doing business" in the Central District are  
13 unfounded. (See Foundation Mot. at 14). Altmann's reasoning is persuasive:

14 Because the publications and advertisements of the Austrian Gallery that form  
15 the basis for jurisdiction under the FSIA have been distributed in the Central  
16 District of California, we hold that the Austrian Gallery, an agency or  
17 instrumentality of Austria, is 'doing business' in the district and that venue is  
18 therefore proper in the Central District under § 1391(f)(3).

19 317 F.3d at 972. The Court holds that venue in this District is proper in this case as  
20 well.

21 **E. SPAIN'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

22 The final issue is Spain's motion to dismiss under Rule 12(b)(6). Spain claims  
23 that Plaintiff fails to allege that Spain has done anything improper and it is not alleged  
24 that "Spain is currently an owner or possessor of the Painting." (Spain Mot. at 18).

25 Given the foregoing analysis, Spain cannot prevail on this motion. First, as to  
26 the declaratory relief action, Plaintiff has alleged a "case or controversy" against  
27 Spain since it is alleged – and in fact admitted by the Foundation – that the  
28 Foundation is an agent or instrumentality of the Spanish government, and that the

1 Foundation possesses and purports to own the Painting which Plaintiff claims is  
 2 rightfully his.

3 Second, Plaintiff's claim for a constructive trust requires: "(1) the existence of  
 4 res (property or some interest in property); (2) the right of the complaining party to  
 5 that res; and (3) some wrongful acquisition **or detention of the res by another party**  
 6 who is not entitled to it." In re Real Estate Assocs. P'ship Litig., 223 F. Supp. 2d  
 7 1109, 1140 (C.D. Cal. 2002) (emphasis added). Spain's own cited case makes clear  
 8 that wrongful detention of the res by another party is sufficient for purposes of the  
 9 imposition of a constructive trust. As such, Spain's argument fails given the  
 10 allegations in the Complaint.

11 Third, Plaintiff asserts a claim for conversion, which is defined as "the  
 12 wrongful exercise of dominion over the property of another." Burlesci v. Petersen, 68  
 13 Cal. App. 4th 1062, 1066 (Ct. App. 1998). "The elements of a conversion claim are:  
 14 (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's  
 15 conversion by a wrongful act or disposition of property rights; and (3) damages." Id.  
 16 Spain contends that Plaintiff has not alleged that Spain exercises any dominion or  
 17 control over the Painting. This slight distinction, however, is immaterial since the  
 18 Complaint clearly alleges – and the Foundation admits – that the Foundation is an  
 19 agent or instrumentality of Spain. Moreover, Spain's actions directly contradict its  
 20 argument since at this point it is undisputed that in 2001 Plaintiff asked Spain's then  
 21 Minister of Education, Culture and Sports, Pilar del Castillo Vera, for the Painting's  
 22 return and the request was refused. (Compl. ¶ 32). Thus, at this stage the  
 23 allegations and factual assertions are sufficient to support a claim that Spain  
 24 exercises dominion and control over the Foundation and hence the Painting.

25 Finally, Plaintiff asserts a claim for possession of the Painting, which is  
 26 essentially a claim for replevin under the common law term. "In federal courts,  
 27 replevin is a remedy specifically approved by rule, as governed by the appropriate  
 28 state law." Adler v. Taylor, No. CV 04-8472 (RGK), 2005 U.S. Dist. LEXIS 5862, at \*8

1 (C.D. Cal. Feb. 2, 2005). "For specific recovery, Plaintiff[] only need show (1) a right  
2 to possession of the property, and (2) [the defendant's] wrongful possession." Id. at  
3 \*9 (citations omitted). Replevin is simply a remedy for conversion and when a  
4 complaint "supports a conversion claim, it also supports a specific recovery remedy."  
5 Id. Therefore, because the Court concludes that Plaintiff has stated a claim for  
6 conversion, Plaintiff's request for replevin also survives. Thus, Spain's motion to  
7 dismiss for failure to state a claim is **DENIED**.


8 **III.**

9 **CONCLUSION**

10 The Court concludes that Plaintiff properly has alleged and supported with  
11 jurisdictional discovery a "non-frivolous" claim that the expropriation exception to the  
12 FSIA applies such that this Court has subject matter jurisdiction over the case as to  
13 both Defendants. Moreover, the Court has personal jurisdiction over both Defendants  
14 under the express terms of the FSIA, 28 U.S.C. § 1330(b). In addition, following  
15 controlling authority from this Circuit, the Court holds that venue in this District is  
16 proper. Finally, and largely based on the foregoing analysis, Plaintiff's causes of  
17 action do not fail to state a claim for relief against Spain. Therefore, Defendants'  
18 motions are **DENIED**, and given the controlling questions of law presented for which  
19 there is substantial ground for difference of opinion, this Order is hereby **CERTIFIED**  
20 for appeal pursuant to 28 U.S.C. § 1292(b).

21  
22 **IT IS SO ORDERED.**

23  
24 DATED: August 30, 2006

25  
26   
27 Judge Gary Allen Fees  
28 United States District Court