

*In the*  
**United States Court of Appeals**  
*For the*  
**Ninth Circuit**

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MAREI VON SAHER,

*Plaintiff-Appellant,*

v.

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

*Defendants-Appellees.*

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*Appeal from a decision of the United States District Court for the  
Central District of California (Los Angeles), No. CV-07-02866 · Honorable John F. Walter*

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**BRIEF OF APPELLANT**

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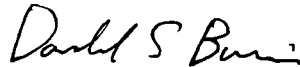
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## REQUEST FOR ORAL ARGUMENT

Pursuant to F.R.A.P., Appellant respectfully requests that oral argument be permitted. Appellant's appeal of the District Court's grant of Defendant's motion to dismiss the complaint in its entirety without oral argument involves novel and fundamental issues of law under the United States Constitution, in particular the constitutionality of Cal. Civ. Proc. Code § 354.3, and whether in the absence of Cal. Civ. Proc. Code § 354.3, Appellant's claim would be time barred under Cal. Civ. Proc. Code § 338. Oral argument will give the Court the opportunity to further explore these issues.

Dated: January 29, 2008

BURRIS, SCHOENBERG & WALDEN, LLP



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Donald S. Burris

## **I. JURISDICTIONAL STATEMENT**

This is an action to recover artwork currently in the possession of a California museum that was previously looted by the Nazis during World War II (“WWII”). Appellant’s complaint was filed in the United States District Court for the Central District of California on May 1, 2007. The District Court has jurisdiction over the subject matter of the claims set forth in the complaint pursuant to federal diversity jurisdiction under Article III, Section 2 and Article I, Section 9 of the United States Constitution, and under 28 U.S.C. § 1332, as the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and there is complete diversity of citizenship between appellant, a citizen of the state of Connecticut, and appellees, who are both citizens of the state of California.

This is an appeal from a final order of the District Court, which dismissed the complaint in its entirety with prejudice and is appealable as a matter of right. *See* 28 U.S.C. § 1291. The order appealed from was dated October 18, 2007 (E.R. 293),<sup>1</sup> and a timely notice of appeal was filed on November 13, 2007. (E.R. 5.)

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<sup>1</sup> References to “E.R. \_\_\_” are to the cited page(s) in Appellant’s Excerpts of Record filed herewith.

## **II. STATEMENT OF ISSUES**

Whether the District Court erred in dismissing appellant's complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for which relief can be granted, with prejudice and without leave to amend.

Whether the District Court erred in finding Cal. Civ. Proc. Code § 354.3 unconstitutional.

Whether the District Court erred in finding that, in the absence of Cal. Civ. Proc. Code § 354.3, appellant's claim would be time-barred under Cal. Civ. Proc. Code § 338.

## **III. STATEMENT OF THE CASE**

### **A. The Nature Of The Case**

This action was brought by appellant, Marei von Saher ("Marei"), to recover an extraordinary pair of life-size paintings entitled "Adam" and "Eve" by the 16<sup>th</sup> Century artist, Lucas Cranach the Elder (the "Cranachs"). (E.R. 277.) The Cranachs are currently on display at the Norton Simon Museum of Art at Pasadena. (E.R. 1.)

Marei is the sole living heir of the noted Jewish art dealer Jacques Goudstikker ("Jacques"). (E.R. 277.) It is undisputed that Jacques purchased the Cranachs at a public auction in Berlin in 1931. (E.R. 279.) It is also undisputed that following the Nazi invasion of the Netherlands in May 1940, the Nazis, led by

Reichsmarschall Hermann Göring (“Göring”) looted Jacques’s art gallery of hundreds of artworks, including the Cranachs. (E.R. 281.)

The Cranachs are now in the possession, custody, or control of the Norton Simon Museum of Art at Pasadena and/or the Norton Simon Art Foundation (collectively, the “Museum”). (E.R. 277.) Marei has demanded that the Cranachs be returned to her and the Museum has refused to do so. (E.R. 283.)

**B. The Course Of The Proceedings**

Marei filed her complaint in this action in the United States District Court for the Central District of California on May 1, 2007 (the “Complaint”). (E.R. 276, 298.) The Complaint sets forth causes of action for replevin, conversion, damages under Cal. Penal Code § 496, a judgment declaring Marei to be the lawful owner of the Cranachs and to quiet title. (E.R. 284-86.) The Complaint alleges that it is timely brought pursuant to Cal. Civ. Proc. Code § 354.3. (E.R. 283.) The Museum also filed a complaint on May 1, 2007, which sought a declaration that it is the rightful owner of the Cranachs. (E.R. 30.) The parties to both actions stipulated to a schedule to answer, move or otherwise respond to the Complaint. (E.R. 272.) By stipulation, so ordered by the Hon. John F. Walter on July 12, 2007, the action brought by the Museum was stayed pending a final, non-appealable order or judgment in the action brought by Marei. (E.R. 29, 295.)

On July 9, 2007, the Museum moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted on the grounds that: (1) the statute of limitations upon which Marei relies - - Cal. Civ. Proc. Code § 354.3 -- is unconstitutional as it contravenes the foreign affairs doctrine; (2) Section 354.3 is unconstitutional as it violates due process; (3) in the absence of Section 354.3, Marei's claims would be time-barred pursuant to Cal. Civ. Proc. Code § 338; 4) Marei's claims are barred by the act of state doctrine; 5) under Dutch law, the Museum acquired valid title to the Cranachs; and 6) Marei did not state a claim under Section 496 of the California Penal Code. (E.R. 2.) Marei filed a timely opposition to the motion on August 20, 2007 (E.R. 295) and the Museum filed a timely reply on September 17, 2007 (E.R. 294). Oral argument on the motion to dismiss was scheduled for October 22, 2007. (E.R. 294.)

**C. The Disposition Below**

On October 18, 2007, only days before the scheduled oral argument on the motion, the District Court cancelled the argument and issued an order granting the Museum's motion to dismiss Marei's Complaint in its entirety with prejudice. (E.R. 1, 293.) The District Court held that Cal. Civ. Proc. Code § 354.3 "intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims," and is therefore unconstitutional,

purportedly based on the Ninth Circuit Court of Appeals' decision in *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003). (E.R. 3-4.) The District Court also held that, in the absence of Section 354.3, Marei's predecessor-in-interest had only three years to bring a claim from the time the Museum acquired the Cranachs in 1971, irrespective of when Marei or her predecessor-in-interest discovered the whereabouts of the Cranachs. (E.R. 4.) The District Court did not reach or address any of the other grounds urged by the Museum for dismissal.

The notice of appeal from the October 18, 2007 order was timely filed on November 13, 2007. (E.R. 5, 293.)

#### **IV. STATEMENT OF FACTS**

On May 10, 1940, Nazi troops invaded and conquered the Netherlands. (E.R. 280.) Because they were Jewish, Jacques, then the foremost Dutch dealer in Old Master paintings, his wife, Desi, and their infant son, Edo, were forced to flee for their lives. (E.R. 280.) Shortly after the invasion, Jacques, Desi, and Edo left the Netherlands with only a few personal effects, leaving everything else behind, including Jacques's art gallery and all of its assets -- among them some 1,200 valuable artworks, including Rembrandts, Steens, Ruisdaels, van Goghs, and the Cranachs -- as well as Oostermeer, the Goudstikkens' residence; Nijenrode, a twelfth-century castle; and Herengracht 458, a seventeenth-century canal building in Amsterdam. (E.R. 280.)

Jacques and his family escaped on a ship traveling to South America. (E.R. 280.) Tragically, Jacques died aboard the ship on May 16, 1940. (E.R. 280.) At the time of his death, Jacques had in his possession a black notebook, which has come to be known by art historians and experts around the world as the “Blackbook.” (E.R. 280.) The Blackbook contained entries describing artworks in the Goudstikker art collection at that time. (E.R. 280.) Desi retrieved the Blackbook and it is currently located in the Goudstikker archives, maintained by the Municipal Archives of Amsterdam. (E.R. 280.) The Blackbook lists the Cranachs and indicates that they were purchased at the Lepke Auction House and were from the Church of Holy Trinity in Kiev. (E.R. 281.)

After Jacques’s death, the Nazis, led by Göring, looted the assets of Jacques’s art gallery through a forced sale to Göring and his agents for a “purchase price” that was far below their actual value and a promise of protection from threatened deportation for Jacques’s mother. (E.R. 45.) The Cranachs were among the artworks Göring personally took and sent to his country estate near Berlin. (E.R. 281.)

After WWII, the Cranachs, along with hundreds of other artworks stolen from Goudstikker’s gallery, were recovered by the Allies and, in accordance with Allied policy, returned to the Netherlands with the expectation that they would be returned to their rightful owner. (E.R. 281.) Although Goudstikker’s widow, Desi,

did recover some works after WWII, the Dutch Government retained over two hundred artworks looted by Göring, including the Cranachs. (E.R. 282.)

In 1961, Georges Stroganoff-Scherbatoff (“Stroganoff”) claimed that the Cranachs had belonged to his family and that the Dutch Government did not have any right, title or interest in them. (E.R. 282.) In fact, the Cranachs came from the Church of the Holy Trinity in Kiev (E.R. 279) and had never been part of the Stroganoff family art collection (E.R. 279). Nevertheless, in 1966 the Dutch Government sold the Cranachs to Stroganoff. (E.R. 282.)

In or about 1971, the Museum acquired the Cranachs either from Stroganoff or from an art dealer working as Stroganoff’s agent. (E.R. 283.) The Cranachs have apparently been in the possession of the Museum since that time. (E.R. 283.) Marei discovered that the Cranachs were on display at the Museum in or about November 2000. (E.R. 283.) Although Marei repeatedly demanded that the Museum return the Cranachs to her, it refused to do so. (E.R. 283.)

In 1998, Marei began her attempts to recover her family’s looted artworks in the custody of the Dutch Government through both administrative and judicial proceedings. (E.R. 48.) In 2001, the Dutch Government made the determination that its post-war policies respecting the restoration of Nazi-looted property had been too formal and bureaucratic, and that going forward it would review claims for such property based upon a more policy-oriented approach. (E.R. 60-61.)

Following this policy change, Marei submitted a claim for artworks looted from Goudstikker's gallery to the State Secretary of the Dutch Government's Ministry for Education, Culture and Science, which oversees the Dutch Government's restitution policy, and the State Secretary referred the claim to the Dutch Advisory Committee on the Assessment for Items of Cultural Value and the Second World War (the "Restitutions Committee"). (E.R. 21, 41, 60.)

After an intensive review of the historical evidence that lasted more than one year, the Restitutions Committee advised the State Secretary to retribute to Marei all of the artworks in the custody of the Dutch Government that, like the Cranachs, had been taken from Goudstikker's gallery by Göring. (E.R. 50-51.) The Restitutions Committee found, and the State Secretary agreed, that the transactions through which Göring and his Nazi collaborators purported to purchase all of Goudstikker's artworks were involuntary, forced sales. (E.R. 22, 45-46, 62.)

On February 6, 2006, the State Secretary accepted this finding, adopted the advice of the Restitutions Committee and decided to retribute some 200 artworks looted by Göring from Goudstikker to Marei. (E.R. 21-22.) The State Secretary specifically found:

that grounds for restitution exist in this particular case in accordance with the committee's recommendation. In so doing I am especially mindful of the facts and circumstances relating to the involuntary loss of property . . . . With regard to the 'Göring transaction',

the Restitutions Committee concludes that Goudstikker had suffered involuntary loss of possession, since the rights to those works were never waived. . . . Accordingly, it recommends that the application for restitution be granted. I hereby adopt this recommendation.

(E.R. 22.) Thus, if the Cranachs had still been in the custody of the Dutch Government in 2006, they, too, would have been returned to Marei.

The California Legislature has recognized the unique nature of both claims for the return of artwork looted during WWII and the roadblocks that make pursuing these claims so difficult. (E.R. 100-01, 106.) The Legislature determined that victims of the Holocaust and their heirs who seek legal redress for the theft of artwork during WWII must engage in detailed investigations, often involving several countries, the translation of foreign historical documents and the input of experts, all of which may take many years to complete. (E.R. 100-01, 106.) Moreover, seeking the return of looted artworks inevitably forces victims of the Nazis to relive the horrors associated with that time period. *See Dan Bar-On, Using Testimonies for Researching and Teaching about the Holocaust -- Importance of Testimonies in Holocaust Education, Dimensions, A Journal of Holocaust Studies, Vol. 17, No. 1, Spring 2003.* Also, many victims did not know where their possessions were located. Even when they discovered the whereabouts of their possessions, victims were thwarted in their attempts to retrieve them by the governments of post-War Europe, like the Netherlands, which were often more

interested in keeping valuable artworks than in returning them to their rightful owners. Holocaust victims and their heirs continue to this day to be thwarted in their efforts to regain their property because present day possessors can resort to technical defenses such as the statute of limitations despite undeniable proof that their possession is the result of an earlier Nazi confiscation.

As a result, in 2002 the California Legislature exercised its traditional role of providing judicial remedies for parties seeking the return of stolen property by unanimously enacting a law (Cal. Civ. Proc. Code § 354.3) extending the statute of limitations for claims for the return of Nazi-looted artwork brought in California against museums or galleries until December 31, 2010. (E.R. 150-51.) This new statute of limitations prevents museums -- which can be expected to know the importance of provenance and are in the best position to discover whether an artwork they are acquiring is among the thousands looted during WWII -- from taking advantage of a technical defense to a meritorious claim for the return of stolen artworks. (E.R. 78-80.)

## **V. SUMMARY OF ARGUMENT**

The District Court erroneously held that Cal. Civ. Proc. Code § 354.3 (California's statute of limitations for Holocaust looted art claims) is facially unconstitutional under the "foreign affairs doctrine" as interpreted by the Ninth Circuit in *Deutsch*.

First, the District Court erred in holding that the Ninth Circuit's decision in *Deutsch*, which examined the constitutionality of Cal. Civ. Proc. Code § 354.6 (California's Holocaust slave labor statute), was relevant and applicable to Section 354.3. As shown in Point VII.A below, the *Deutsch* Court held Section 345.6 unconstitutional because it subjected the nation's war-time enemies to lawsuits to recover for the damages of slave labor and thus directly intruded on the federal government's exclusive power to make and resolve war. Section 354.3 does nothing of the kind. It simply, extends the time to bring garden-variety property claims against museums and galleries currently in possession of Nazi-looted art without regard to their status as wartime enemies or even their existence during WWII. Put simply, Section 354.3 applies to disputes over title to property, which are historically within the purview of state law, and not to disputes seeking reparations from wartime enemies of the U.S. Indeed, in the absence of a federally endorsed mechanism for victims to seek restitution of property stolen during WWII, it has long been the position of the U.S. government that victims may sue in the U.S. courts to retrieve property looted by Nazis.

Second, the District Court's order directly conflicts with *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), in which the Ninth Circuit held that Holocaust survivors' claims brought to recover property stolen during WWII did not fall

within the constitutionally-mandated power of the federal government to conduct foreign affairs, but were properly brought within the jurisdiction of the courts.

Third, the District Court's order erroneously expands the Supreme Court's holding in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) in which a state statute was found to conflict with, and be preempted by, a clearly expressed federal policy to resolve wartime claims. In this case, there is no conflict with any articulated federal policy that would justify invalidating Section 354.3. Accordingly, the District Court's order must be reversed.

Having found Section 354.3's statute of limitations unconstitutional, the District Court instead applied the statute of limitations provided in Cal. Civ. Proc. Code § 338(c) to Marei's claims. In the unlikely event that this Court should uphold the District Court's finding that Section 354.3 is unconstitutional, then the District Court's order with respect to Section 338(c) would have to be addressed. As shown in Point VII.B below, that part of the order is also erroneous and must be reversed because the District Court erred in holding that, in the absence of Section 354.3, Marei's claims would be time barred under the version of Section 338(c) in effect at the time the Museum acquired the Cranachs, irrespective of when she discovered their whereabouts.

The law as developed by the California courts makes clear that under the applicable version of Section 338(c), a cause of action to retrieve stolen property

arises when the true owner discovers the identity of the person or entity in possession of the property and not when the original acquisition by that person or entity occurred. Thus, the District Court misconstrued California law. If there is any doubt as to how California's highest court would rule on this issue, however, the question should be certified in accordance with Rule 8.548 of the California Rules of Court.<sup>2</sup>

## **VI. STANDARD OF REVIEW**

An order of a district court granting a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003); *Madison v. Graham*, 316 F.3d

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<sup>2</sup> The Museum made several additional arguments to the court below, including that Section 354.3 violates the due process clause; that Marei's claims are barred by the act of state doctrine; that the Museum obtained good title to the Cranachs by operation of Dutch law; and that Marei's claims under California's Penal Code should be dismissed. The court below did not reach any of these arguments and there is no basis for this Court to do so now. The argument relating to Cal. Penal Code § 496 would not be fully dispositive of the case, and would not otherwise avoid the need to remand, and therefore should not be taken up by this Court. *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1154 (9th Cir. 2000). While it is Marei's position that Section 354.3 is rationally related to a legitimate legislative purpose and therefore complies with due process, the Museum's arguments based on due process, as well as its arguments on Dutch law and the act of state doctrine were highly dependent on facts outside of Marei's Complaint, including a motion to take judicial notice of documents (E.R. 33) that was contested by Marei, and not ruled on by the court below, and expert declarations (E.R. 293-94, 296), which were also contested and not ruled on. With sufficient development of the record, it will be clear that these additional arguments are also without merit. These issues should be left to the District Court for determination in the first instance. *Id.*

867, 869 (9th Cir. 2002). All well-pleaded allegations of material fact set forth in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Rodriquez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002). To survive a motion to dismiss, a plaintiff need only allege “enough facts to state a claim for relief that is plausible on its face.” *Steelman v. Prudential Ins. Co.*, No. S-06-2746, 2007 WL 2009805, at \*4 (E.D. Cal. July 6, 2007)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. \_\_\_, 127 S. Ct. 1955, 1974 (2007)). The constitutionality of a statute is also reviewed *de novo*. *California Dem. Party v. Jones*, 169 F.3d 646, 647 (9th Cir. 1999).

Where the Court of Appeals is confronted with a question of California state law that could determine the outcome of the case pending before it and there is no controlling precedent from the California Supreme Court, the Court of Appeals may request the California Supreme Court to rule on the issue. Cal. Ct. R. 8.548 (2007). *See Kremen v. Cohen*, 325 F.3d 1035, 1037-38 (9th Cir. 2003).

## VII. ARGUMENT

### A. **Section 354.3 Does Not Implicate The Federal Government’s War Powers Or The Foreign Affairs Doctrine**

The District Court concluded that it was compelled by the Ninth Circuit’s decision in *Deutsch v. Turner* to hold that California’s statute extending the statute of limitations for actions to recover Holocaust-era looted artworks from museums is an unconstitutional interference with the federal government’s foreign relations

power. As shown below, however, the facts and issues in *Deutsch* are so entirely inapposite that the Court's reasoning in that case cannot be applied to Section 354.3, the statute at issue here.<sup>3</sup> Moreover, the District Court's holding is in direct conflict with the Ninth Circuit's holding in *Alperin* that claims for the recovery of property looted during WWII fall outside the constitutional power of the federal political branches to conduct foreign affairs. *Alperin*, 410 F.3d at 558. Finally, the District Court erroneously expanded the Supreme Court's holding in *Garamendi*, which found a California statute to be preempted where it was in conflict with express federal policy.

1. ***Deutsch v. Turner Does Not Apply***

The section of the California Civil Procedure Code at issue in *Deutsch* -- Section 354.6<sup>4</sup> -- provided that WWII slave labor and forced labor victims could bring an action to recover compensation from "any entity or successor in interest thereof, for whom that labor was performed . . ." and that such action "shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010." In *Deutsch*, the Ninth Circuit held Section 354.6 -- the so-called "Slave Labor Act" -- to be unconstitutional because it "intrudes on the federal government's exclusive power

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<sup>3</sup> A copy of Section 354.3 is attached hereto as Exhibit A.

<sup>4</sup> A copy of Section 354.6 is attached hereto as Exhibit B.

to make and resolve war, including the procedure for resolving war claims.” *Deutsch*, 324 F.3d at 712. Section 354.6 is dramatically different from Section 354.3, which provides that any action brought by an owner or heir of an owner of artwork looted during the Holocaust era against a museum or gallery to recover that artwork shall not be dismissed for failure to comply with the applicable statute of limitations if commenced on or before December 31, 2010. None of the bases that led the court to find that Section 354.6 conflicted with the federal government’s “war powers” is raised by Section 354.3.

First, the statute at issue in *Deutsch* specifically applied to actions seeking war reparations against wartime enemies or wrongdoers. Importantly, the *Deutsch* court noted that Section 354.6 subjected foreign nations and enterprises operating in those nations to liability that arose from their one-time status as “wartime enemies of the United States” or “if not themselves our wartime enemies, were operating in enemy territory and presumably . . . with the consent and for the benefit of our wartime enemy.” *Id.* This is in stark contrast to the museums and galleries that are subject to the extended statute of limitations under Section 354.3. Section 354.3 does not apply to defendants because of their acts committed during wartime as Section 354.6 did. *Id.* Section 354.3 merely extends the statute of limitations for claims against museums and galleries currently in possession of artworks that had previously been looted by the Nazis. The statute is not aimed at

“wartime enemies of the United States” or wartime wrongdoers operating in enemy territory. Indeed, in this case it is clear that the Museum was neither. This is a critical difference between Section 354.6 and Section 354.3 in determining if there is a conflict with federal war powers or the conduct of foreign policy.

Second, as the *Deutsch* court noted, Section 354.6 concerned only acts that took place during the years leading up to WWII and during the War itself, but not wrongs committed after the War. *Id.* In contrast, Section 354.3 quite clearly applies to acts -- such as the Museum’s conversion and retention of stolen property -- that occurred well after the end of WWII and cannot be considered wartime acts. Seeking the recovery of stolen artwork from a museum that acquired it long after WWII ended has nothing to do with the resolution of war claims against our former enemies. Rather, such actions are simply title disputes, and deciding the applicable statute of limitations is well within the traditional competence of the states. For example, in 1983 and 1989 California modified its statute of limitations for actions to recover art and other works of historical or scientific importance. *See* Cal. Civ. Proc. Code § 338(c). The California legislature’s right and power to do so is undisputed.

Third, an extremely important factor differentiating the *Deutsch* case from this case is that the Ninth Circuit found that the slave labor claims brought in *Deutsch* were resolved by the various treaties and international agreements by

which the U.S. resolved WWII. *Id.* at 712-715. *See Cruz v. United States*, 387 F. Supp. 2d 1057, 1074 (N.D. Cal. 2005) (“the [*Deutsch*] court reached its conclusion regarding preemption by relying centrally on a series of treaties and executive agreements ending the war and making provisions for reparations and settlement of claims”). In the instant case the District Court did not, and could not, make a determination that claims covered by Section 354.3’s statute of limitations were resolved by any of the treaties or agreements that resolved WWII. Indeed, the decision of the court below entirely ignored this critical aspect of the *Deutsch* decision. (E.R 1.)

Accordingly, *Deutsch* is inapplicable to this case and the District Court’s order should be reversed.

## **2. The *Alperin* Decision Requires Reversal**

Some one and one-half years after the *Deutsch* decision, the Ninth Circuit made it clear that there is a fundamental difference between war reparations claims such as those covered by the statute considered in *Deutsch* and “garden-variety” property claims such as those being pursued by Marei in the instant case. *See Alperin*, 410 F.3d at 548. In *Alperin*, a group of Holocaust survivors brought suit against the Vatican Bank. The *Alperin* plaintiff class consisted of Serbs, Jews and former Soviet citizens who suffered physical, monetary and/or property losses, including as a result of slave labor, brought about by the Croatian Ustasha regime,

which had been supported by the Nazis throughout WWII. The complaint alleged that the Ustasha carried out both genocidal acts and the looting of property, and that the Ustasha transferred its ill-gotten gains to the Vatican Bank at the end of WWII.

In determining whether the plaintiffs' claims were constitutionally committed to the federal political branches' power to resolve war and conduct foreign policy, the Ninth Circuit treated the plaintiffs' complaint as containing two distinct species of claims: "War Objectives Claims" and "Property Claims." *Id.* at 547-48. The War Objectives Claims included claims for compensation and damages for slave and forced labor, torture and murder in furtherance of the war. The *Alperin* Court found that only these War Objectives Claims presented non-justiciable, political questions as they interfere directly with the power, exclusively reserved to the federal executive and legislative branches, to wage and resolve war. *Id.* at 559. For example, the *Alperin* Court found that adjudication of the slave labor claims would require the condemnation of a foreign government for its wartime actions, an exercise of a power exclusively reserved to the executive and legislative branches. *Id.* at 561. These War Objectives Claims were the same types of claims asserted by the plaintiffs in *Deutsch*.

The second type of claims asserted in the *Alperin* case, characterized as the Property Claims, alleged causes of action against the Vatican Bank for conversion,

unjust enrichment and restitution arising out of the Vatican Bank's receipt of proceeds from the war-time looting of "cash, securities, silver, gold, jewelry, businesses, art masterpieces, equipment and intellectual property" by the Nazi or Ustasha regimes. *Id.* at 548. The *Alperin* court found that these "garden-variety" property claims were not constitutionally committed to the federal government pursuant to its exclusive power to resolve war and, therefore, did not implicate the political question doctrine. The Court noted that just because the claims stemmed from WWII atrocities and occurred in a "politically charged context" does not mean they implicated the war powers or foreign affairs powers entrusted exclusively to the federal government. *Id.* at 548, 552. The Court specifically found that adjudication of the Property Claims "will not require the court to make pronouncements on foreign policy." *Id.* at 555.

Marei's claims in this case are Property Claims, not War Objectives Claims. Indeed, Marei's claims are even more distinct from War Objectives Claims than were the Property Claims in *Alperin* because Marei's claims do not allege any wrongdoing by the Museum during wartime. *A fortiori*, if the Property Claims against the Vatican Bank in *Alperin* did not impinge on foreign policy, then neither do Marei's claims against a California museum. Thus, the California statute extending the statute of limitations for those claims does not implicate the foreign policy or war powers of the federal government. Section 354.3, which extends the

statute of limitations for claims to recover artwork looted during the Holocaust era, is consistent with the holding in *Alperin* that “courts have a place in deciding Holocaust-era claims concerning looted assets.” *Id.* at 551. Because the District Court failed to consider and directly contravened the holding in *Alperin*, it should be reversed.<sup>5</sup>

### 3. Section 354.3 Is Constitutional Under *Garamendi*

In *Alperin*, this Court acknowledged that “we emphasized in *Deutsch* that ‘the United States resolved the war against Germany by becoming a party to a number of treaties and international agreements.’ ” *Alperin*, 410 F.3d at 561 (quoting *Deutsch*, 324 F.3d at 712 n.15). The *Alperin* court emphasized that it based its holding that the Property Claims were not exclusively within the power of the federal government to conduct and resolve war on the premise that the claims were not expressly the subject of any treaty or executive agreement. *Id.* at 550. In

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<sup>5</sup> We anticipate that the Museum will attempt to distinguish *Alperin* on the grounds that *Alperin* was decided under the political question doctrine rather than on the basis of the foreign affairs doctrine, but this is a distinction without a difference. The political question doctrine prohibits courts from adjudicating cases regarding the conduct of foreign relations because foreign relations are the province of the executive and legislative branches. *Alperin*, 410 F.3d at 549 (citing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); *United States v. Pink*, 315 U.S. 203, 222-23 (1942)). Likewise, the foreign affairs doctrine prohibits the states from engaging in the conduct of foreign relations, which is vested in the federal government. *Deutsch*, 324 F.3d at 709 (citing *Pink*, 315 U.S. at 233). For either doctrine, the lynchpin is the same. This is demonstrated by *Alperin*’s citations to, *inter alia*, both *Deutsch* and *Garamendi*.

this respect, the Ninth Circuit's decisions in *Deutsch* and *Alperin* are in keeping with the Supreme Court's ruling in *Garamendi*, in which the foreign policy preemption doctrine was applied only where there were clearly expressed statements of federal foreign policy in conflict with the California statute at issue in that case.

*Garamendi* held that California's Holocaust Victim Insurance Relief Act of 1999 (the "HVIRA"), which required any insurer doing business in California to disclose information regarding policies sold in Europe between 1920 and 1945 by the company or any entity related to it, interfered with the federal government's conduct of foreign relations and was, therefore, unconstitutional. The HVIRA was found to directly interfere with the federal government's foreign policy as expressed in executive agreements with former wartime enemies encouraging European governments and companies to volunteer disclosure of policies and settle claims. *Id.* at 421 ("The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of a clear conflict between the policies adopted by the two.").

There is no conflict, however, between federal foreign policy and California's efforts to extend the statute of limitations for Holocaust looted art claims against current possessors. Indeed, the federal government has acknowledged that such claims have been left to the courts to resolve. As the

federal government's Special Envoy for Holocaust Issues has recently stated, there is "no specific role for the federal government in the art restitution process." See J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States Government in Art Restitution*, Conference in Potsdam, Germany (April 23, 2007) (transcript available at <http://www.state.gov/p/eur/rls/rm/83392.htm>). (E.R. 12.) Though the federal government urges those in possession of Nazi-looted art to return the works to their rightful owners, there is no mechanism for achieving this objective and no penalty for failing to do so beyond the "opprobrium of one's peers." *Id.* The claimant always "has the option of turning to the courts." *Id.*

Indeed, the recovery of Nazi-looted art has always been left to the realm of the courts, where cases to recover such art have been heard regularly for years. *Id.* The most notable recent example is, of course, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), which involved a claim directly against a former wartime enemy. In *Altmann*, the Supreme Court actually made it easier for claimants to sue foreign governments for the return of Holocaust-era looted artwork by holding that the Foreign Sovereign Immunities Act applies retroactively. Also notable is *United States v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532 (S.D.N.Y. April 12, 2002) in which the U.S. government is the plaintiff seeking forfeiture of the looted artwork in conjunction with the heirs of the victim. See also *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969); *United States v. One Oil Painting Entitled "Femme*

*en Blanc*” by Pablo Picasso, 362 F. Supp. 2d 1175 (C.D. Cal. 2005); *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006). See generally Michael J. Bazlyer, *Holocaust Justice: The Battle for Restitution in America’s Courts* (2003) at 202-68 (chapter on court cases in the U.S. for the restitution of Holocaust-looted artworks).

As this Court aptly stated in *Alperin*, a private lawsuit “is the only game in town,” *Alperin*, 410 F.3d at 558, for a Holocaust victim to seek the return of looted artworks. Without any evidence of a federal agreement, treaty or policy addressing Nazi-looted art, there is simply no justification for finding that California’s statutory remedies under Section 354.3 conflict with federal foreign relations policy. Thus, the District Court’s decision contravened the holding in *Garamendi*, which was premised on a direct conflict between federal policy and the California statute at issue in that case. See also *Cruz*, 387 F. Supp. 2d at 1057 (holding that Cal. Civ. Proc. Code § 354.7 -- California’s Braceros Statute -- does not violate the foreign affairs doctrine as the federal government has not spoken with respect to the subject at issue).

Although the Supreme Court did strike down a state statute for violating the federal foreign relations power where it did not directly conflict with an express agreement, treaty or policy in *Zschernig v. Miller*, 389 U.S. 429 (1968), the Ninth Circuit has acknowledged that “*Zschernig* has been applied sparingly.” See

*Deutsch*, 324 F.3d at 710. See also *Garamendi*, 539 U.S. at 439 (Ginsberg, J. dissenting) (“we have not relied on *Zschernig* since it was decided and I would not resurrect that decision here”).

In any event, the statute at issue in *Zschernig* bears no resemblance to Section 354.3. The statute at issue in *Zschernig* prohibited inheritance in Oregon by a non-resident alien unless he could show that the inherited property would not be confiscated by the alien’s home country and that Americans could inherit property there on a reciprocal basis. *Garamendi*, 539 U.S. at 430-31. The Court found that since the state statute invited judicial criticism and disparagement of foreign governments, was applied in that fashion by the state courts, and at least one foreign government complained to the State Department about it, *id.* at 437 n.7, the statute had a “more than incidental effect on foreign affairs” and was therefore unconstitutional. *Id.* at 418. Thus, *Zschernig* is completely inapposite to the instant case: Section 354.3 does not compel or even invite criticism of any foreign government. It merely extends the statute of limitations for claims against museums and galleries for certain garden-variety property claims.

The reasoning of the majority’s decision in *Zschernig* was not relied upon by the *Garamendi* court, which found a direct conflict between the state statute at issue and the federal government’s express foreign policy. See *Central Valley Chrysler-Jeep, Inc. v. Goldstone*, No. CVF 04-6663, 2007 WL 4372878, at \*34

(E.D. Cal. Dec. 11, 2007) (“*Zschernig*, together with cases that follow it, including *Garamendi*, hold that a party asserting preemption on the ground of foreign policy preemption must show ‘clear conflict’ between a state law or program and the functioning of some agreement, treaty, or program[.]”). At most, *Garamendi* suggests that there may be a sliding scale such that when a state acts within its traditional competence, there must be a conflict of a substantiality that varies with the strength or traditional importance of the state concern. *See id.* at 420 n.11.

The guiding consideration, according to *Garamendi*, is whether the state law conflicts with the federal government’s foreign policy. *Id.* at 419-21. Section 354.3 does not conflict with federal foreign affairs policy, and therefore cannot have a “more than incidental effect on foreign affairs.” *See id.* at 418. In this case, there is not even an incidental effect. Rather, Section 354.3 is entirely consistent with federal foreign affairs policy, which has always been to permit lawsuits for the recovery of Nazi-looted art.

It has long been the policy of our federal government that victims of Nazi forced transfers may bring private lawsuits in U.S. courts to recover their property. *See Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954). Despite the intervening years, the *Bernstein* case has many similarities to the case at hand. In *Bernstein*, the Jewish plaintiff had been forced to transfer his shipping business and all of its assets to a Nazi appointee in

1937, who then sold these assets to the defendant in 1939. In 1945, Bernstein brought suit in federal court in New York to recover the assets. *Bernstein*, 173 F.2d 71, 73 (2d Cir. 1949). That suit was dismissed as untimely, pursuant to New York's statute of limitations. *Id.* In April 1948, the New York State Legislature enacted a law tolling all statutes of limitations for any type of action against any person or entity arising in countries with which the U.S. or its allies was at war for the entire period of the war. In light of this new statute, which retroactively revived Bernstein's claim, the Second Circuit found his suit was timely. *Id.* at 74. The Second Circuit also found, however, that it was prohibited from adjudicating Bernstein's claim as it would require the court to "pass on the validity of acts of officials of the German government" in violation of the act of state doctrine. *Bernstein*, 210 F.2d at 375. Shortly after this decision, on April 27, 1949, the U.S. State Department issued Press Release No. 296, which makes clear that it is the federal government's policy:

[t]o undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and . . . to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

*Id.* at 376. As a direct result, the Second Circuit amended its earlier decision and permitted the plaintiff's case to proceed. *Id.*

Moreover, neither the Second Circuit nor the State Department in 1949 even suggested that New York's passage of a law to toll the statute of limitations on claims arising in enemy territory during wartime was a usurpation of the federal government's war powers or foreign relations power. Thus, contrary to the District Court's finding that Section 354.3 conflicted with federal policy, California's legislature acted in accordance with the federal government's historical policy on identifiable Nazi-looted property in enacting Section 354.3.

In sum, from *Bernstein* to *Alperin*, Holocaust victims have been bringing garden-variety property actions to recover their Nazi-looted property for over sixty years. Such lawsuits have been held by the executive and the courts to impinge on foreign relations only in those instances where the federal government has, by treaty or other agreement, expressed a contrary policy. The holding of the court below, that Section 354.3 seeks to redress wrongs committed in the course of WWII and therefore necessarily intrudes on the federal government's foreign affairs powers, is an erroneous application of the decision in *Deutsch*, as made clear in *Garamendi* and *Alperin*, and should be reversed.

**B. Even If Section 354.3 Is Unconstitutional, Marei's Claims Would Still Be Timely Under Section 338(c)**

Because the District Court found Section 354.3 unconstitutional, it applied Cal. Civ. Proc. Code § 338(c) -- the statute of limitations generally applicable to actions seeking the return of stolen property -- and found Marei's claims were time

barred. As shown below, the District Court erred in its application of Section 338(c). The application of Section 338(c) to this case, however, need only be addressed on this appeal if the Court affirms the District Court's decision that Section 354.3 is unconstitutional. If Section 354.3 is upheld it would supply the statute of limitations applicable to this case and Section 338(c) becomes irrelevant.

Section 338(c) of the California Civil Procedure Code in effect at the time the Museum obtained possession of the Cranachs in or about 1971, stated in pertinent part: "WITHIN THREE YEARS: . . . . An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property." Effective in 1983, the statute was amended to add the following sentence: "The cause of action in the case of theft . . . of any art or artifact is not deemed to have occurred until the discovery of the whereabouts of the art or artifact by the aggrieved party . . . ." In 1989 the words "art or artifact" were replaced with: "article of historical, interpretive, scientific, or artistic significance."<sup>6</sup>

It appears that the District Court in this case applied Section 338(c) as it existed prior to 1983 and concluded that the three year statute of limitations began

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<sup>6</sup> A copy of Section 338(c), including all amendments, is attached hereto as Exhibit C.

to run as of the date when the Museum acquired the Cranachs. (E.R. 4.) This was an incorrect application of California law.

The only California appellate court that has directly ruled on the issue of when a cause of action for the recovery of stolen items accrues under the pre-1983 version of Section 338(c) held that “the limitations period commenced when the owner discovered the identity of the person in possession of the property.” *Naftzger v. Amer. Numismatic Soc’y*, 42 Cal. App. 4th 421, 433 (1996).<sup>7</sup> The *Naftzger* court specifically found that prior California cases had not addressed the application of Section 338(c) to an action that was brought to recover goods that were originally stolen, as opposed to actions where the converted item was purposefully entrusted to the wrongdoer. *Id.* at 428-29.

Because Marei relied on Section 354.3 to frame her Complaint, the Complaint does not contain any allegations that go to the issue of the accrual of her claims under Section 338(c) in accordance with the decision in *Naftzger*. As noted above, such allegations would only become relevant in the event that Section 354.3

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<sup>7</sup> In *Society of Cal. Pioneers v. Baker*, 43 Cal. App. 4th 774 (1996), a court of co-ordinate jurisdiction, in *dictum*, disagreed with *Naftzger’s* conclusion that the pre-1983 Section 338(c) imposed a discovery rule for accrual of stolen property claims. In *Pioneers* the court found that the post-1983 version of Section 338(c), with its explicit discovery rule, applied in that case and, therefore, the court did not need to rule on the issue of when a claim accrues under the pre-1983 statute. The *Pioneers* court also construed the explicit discovery rule set forth in the post-1983 statute to mean actual or constructive notice. *Id.*

is held unconstitutional. Should this Court reach that conclusion, Marei should be given leave to amend her Complaint to provide her an opportunity to set forth allegations indicating that her claims were timely brought based upon her actual discovery of the whereabouts of the Cranachs and the factual circumstances that caused the very existence of her claim for the Cranachs to remain undiscoverable.

Shortly after Marei filed her Complaint, the question of what rule governs the accrual of pre-1983 claims under Section 338(c) was addressed by the Ninth Circuit in *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007), *cert. denied*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 491 (2007).<sup>8</sup> The *Orkin* court recognized that the California Supreme Court had never confronted the question of when a cause of action accrues under the pre-1983 version of Section 338(c), but predicted that the California Supreme Court would apply a discovery rule as the court in *Naftzger* did. The Ninth Circuit also predicted, however, that -- unlike the *Naftzger* court -- the California Supreme Court would incorporate the principle of constructive notice into the discovery rule. “In other words, under the discovery rule, a cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property.” *Id.* at 741 (emphasis in original).

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<sup>8</sup> Section 354.3 was not applicable in the *Orkin* case as the defendant was not a museum or gallery.

Because Marei relied on Section 354.3, and because her Complaint was filed before this Court's ruling in *Orkin*, her Complaint does not contain any allegations in accordance with the *Orkin* decision that go to the issue of her reasonable diligence and when she reasonably could have discovered her claims. Marei should be permitted to show that she and her predecessors -- victims of the Holocaust and their heirs -- acted reasonably and diligently under the circumstances. *Perez-Encinas v. AmerUs Life Ins. Co.*, 468 F. Supp. 2d 1127, 1134 (N.D. Cal. 2006)(citing *April Enters. v. KTTV*, 147 Cal. App. 3d 805, 826 (1983)). Marei did not sit on her rights. She fought a courageous battle for almost ten years (as her mother-in-law, Desi, did before her) to recover hundreds of looted artworks, and it was the publicity surrounding this effort that led to the discovery of the Cranachs at the Museum in November 2000. After this discovery, she promptly contacted the Museum and over the course of several years entered into a standstill agreement (tolling the statute of limitations as of September 26, 2003) and tried, unsuccessfully, to resolve the case with the Museum, including two failed mediations.

The "unique circumstances surrounding the theft of Holocaust-era artwork" are such that each case dealing with Holocaust looted artworks must be evaluated on a case by case basis in order to determine what actions or inactions were or were not reasonable. (E.R. 97, 103, 108, 135, 259.) In addition, whether a

plaintiff has exercised such reasonable diligence is a question of fact to be decided by the trier of fact. *Deveny v. Entropin, Inc.*, 139 Cal. App. 4th 408, 429 (2006)(quoting *April Enters.*, 147 Cal. App. 3d at 833); *Allen v. Sundean*, 137 Cal. App. 3d 216 (1982)(quoting *Enfield v. Hunt*, 91 Cal. App. 3d 417, 419 (1979)). Courts may resolve the issue of diligence as a matter of law only in those cases where the undisputed facts leave no room for a reasonable difference of opinion. *See Orkin*, 487 F.3d at 378; *In re Software Toolworks Inc. Secs. Litig.*, 50 F.3d 615, 621-22 (9th Cir. 1994). That is not the case here. In any event, the Court should not make that determination until Marei has been given leave to present an amended complaint asserting timeliness under Section 338(c).

This is not the ordinary case where it is alleged that the claim set forth in the complaint was insufficient under the operative legal theory; i.e., where the plaintiff attempted to plead sufficiently but failed. Here, Marei's claims are timely under Section 354.3. In the event that Section 354.3 is found to be unconstitutional, Marei should be given leave to amend the Complaint to set forth facts necessary to allege that her claims are timely pursuant to Section 338(c). Indeed, even in the typical case where the plaintiff had failed to plead sufficiently under its operative legal theory, dismissal with prejudice and without leave to amend would not be appropriate unless it were clear that the complaint could not possibly be saved by amendment. *Holley v. Crank*, 400 F.3d 667, 675 (9th Cir. 2004); *Lilley v.*

*Charren*, 936 F. Supp. 708, 713 (N.D. Cal. 1996). “Where counsel is able to posit possible amendments that would be consistent with the operative complaint and could also possibly state a claim for relief, the complaint should not be dismissed on its face with prejudice.” *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F. 3d 1133, 1137 (9th Cir. 2001). That is clearly the case here.

The court below ignored both *Naftzger* and *Orkin* in concluding that the statute of limitations under Section 338(c) began to run in 1971 without regard to when Marei discovered her claims against the Museum. For this reason the District Court’s holding with respect to Section 338(c) must be reversed. Whether analyzed under the *Naftzger* actual notice standard or the *Orkin* constructive notice standard,<sup>9</sup> Marei could set forth a timely claim under Section 338(c) and should be permitted to amend her Complaint to do so.

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<sup>9</sup> Should the Court at any point have doubt as to whether to apply the discovery standard as set forth in either *Naftzger* or *Orkin*, or should the Court conclude that the choice between actual discovery versus constructive discovery could be dispositive of the case, the Court may certify the question of when a claim accrues under Section 338(c) to the California Supreme Court under Cal. Ct. R. 8.548. See *Kremen*, 325 F.3d at 1037-38.

## VIII. CONCLUSION

For all of the foregoing reasons, Marei respectfully requests that the October 18, 2007 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 29, 2008

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Donald S. Burris, attorney for Appellant MAREI VON SAHER hereby certify under penalty of perjury that this brief complies with Rule 32(c)(2) and Ninth Circuit Rule 40-1. The brief is proportionally spaced, has a typeface of 14 points and contains 8,419 words.

Dated: January 29, 2008

BURRIS, SCHOENBERG & WALDEN, LLP

*Donald S Burris*

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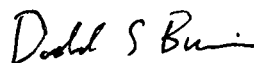
Donald S. Burris

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, plaintiff-appellant states that she does not know of any related cases pending in this Court. The related case, *Norton Simon Art Foundation v. Von Saher*, United States District Court Case Number CV 07-2850, has been stayed pursuant to stipulation, so ordered by the Honorable John F. Walter on July 12, 2007, pending a final non-appealable order or judgment in this case.

Dated: January 29, 2008

BURRIS, SCHOENBERG & WALDEN, LLP



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Donald S. Burris

# **ADDENDUM**



1 of 1 DOCUMENT

DEERING'S CALIFORNIA CODES ANNOTATED  
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\*\*\* THIS SECTION IS CURRENT THROUGH THE 2008 SUPPLEMENT \*\*\*  
(ALL 2007 LEGISLATION)

CODE OF CIVIL PROCEDURE  
Part 2. Of Civil Actions  
Title 2. Time of Commencing Civil Actions  
Chapter 4. General Provisions as to the Time of Commencing Actions

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Code Civ Proc § 354.3 (2007)*

**§ 354.3. Action to recover Holocaust-era artwork**

(a) The following definitions govern the construction of this section:

(1) "Entity" means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.

(2) "Holocaust-era artwork" means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.

(b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution. Section 361 does not apply to this section.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

**HISTORY:**

Added Stats 2002 ch 332 § 2 (AB 1758).

**NOTES:**

**Note**

Stats 2002 ch 332 provides:

SECTION 1. The Legislature finds and declares the following:

(a) In addition to the many atrocities that befell the victims of the Nazi regime, treasured pieces of artwork were wrongfully taken.

(b) Thousands of victims of Nazi persecution, and the heirs of victims of Nazi persecution, are residents of the State of California. Many of these victims and descendants are investigating the whereabouts of artwork that rightfully belonged to their families.

(c) California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to commence an action in court for those pieces of artwork now located in museums and galleries.

(d) Museums are committed to resolving claims for Holocaust-era artwork in an amicable and timely manner, and to undertaking every effort to conduct thorough provenance research to identify artwork that may have been stolen during the Holocaust Era.

(e) Currently, an individual has three years, after discovering the whereabouts of the artwork, to commence an action in court.

(f) Due to the unique circumstances surrounding the theft of Holocaust-era artwork, commencement of an action requires detailed investigation in several countries, involving numerous historical documents and the input of experts.

(g) In order to obtain all necessary data, investigating a prospective action may take several years.

(h) The current three-year statute of limitation, after discovery of the whereabouts of the artwork, is an insufficient amount of time to finance, investigate, and commence an action.

(i) To the extent that the enactment of this act will extend the statute of limitation, that extension of the limitation period is intended to be applied retroactively, irrespective of whether the claims were barred by any applicable statute of limitation under any other provision of law prior to the enactment of this act.

Exhibit B

1 of 1 DOCUMENT

DEERING'S CALIFORNIA CODES ANNOTATED  
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\*\*\* THIS SECTION IS CURRENT THROUGH THE 2008 SUPPLEMENT \*\*\*  
(ALL 2007 LEGISLATION)

CODE OF CIVIL PROCEDURE  
Part 2. Of Civil Actions  
Title 2. Time of Commencing Civil Actions  
Chapter 4. General Provisions as to the Time of Commencing Actions

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Code Civ Proc § 354.6 (2007)*

**§ 354.6. Compensation for slave and forced labor**

(a) As used in this section:

(1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(2) "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation.

(b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

**HISTORY:**

Added Stats 1999 ch 216 § 4 (SB 1245), effective July 28, 1999.

**NOTES:**

Note

Stats 1999 ch 216 provides:

SECTION 1. (a) Thousands of victims of Nazi persecution, and the heirs of victims of Nazi persecution, are residents of the State of California.

(b) These victims of Nazi persecution have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War.

(c) California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War.

(d) To the extent that the statute of limitations applicable to claims for compensation is extended by this act, that extension of the limitations period is intended to be applied retroactively, irrespective of whether the claims were otherwise barred by any applicable statute of limitations under any other provision of law prior to the enactment of this act.

SEC. 2. It is the intent of the Legislature, in addition to the provisions of this act, to enact additional public policy in any other case of proven patterns of slave labor employed by firms presently doing business in California that served as the basis of ill-gotten wealth at the expense of victims who are residents of California.

SEC. 3. The Treasurer, the Public Employees Retirement System, and the State Teacher's Retirement System shall monitor and report to the Legislature on investments of the state and its pension funds in companies doing business in California, and affiliates of those companies, that owe compensation to victims of slave and forced labor from 1929 to 1945.



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(ALL 2007 LEGISLATION)

CODE OF CIVIL PROCEDURE  
Part 2. Of Civil Actions  
Title 2. Time of Commencing Civil Actions  
Chapter 3. The Time of Commencing Actions Other Than For the Recovery of Real Property

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Code Civ Proc § 338 (2007)*

**§ 338. Statutory liability; Injury to property; Fraud or mistake; Bonds of public officials and notaries; Slander of title; False advertising; Pollution violations; Challenge to tax levy; Three years**

Within three years:

- (a) An action upon a liability created by statute, other than a penalty or forfeiture.
- (b) An action for trespass upon or injury to real property.
- (c) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. The cause of action in the case of theft, as defined in *Section 484 of the Penal Code*, of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.
- (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.
- (e) An action upon a bond of a public official except any cause of action based on fraud or embezzlement is not deemed to have accrued until the discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action upon the bond.
- (f)
  - (1) An action against a notary public on his or her bond or in his or her official capacity except that any cause of action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action.
  - (2) Notwithstanding paragraph (1), an action based on malfeasance or misfeasance shall be commenced within one year from discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action or within three years from the performance of the notarial act giving rise to the action, whichever is later.
  - (3) Notwithstanding paragraph (1), an action against a notary public on his or her bond or in his or her official capacity shall be commenced within six years.
- (g) An action for slander of title to real property.
- (h) An action commenced under *Section 17536 of the Business and Professions Code*. The cause of action in that case shall not be deemed to have accrued until the discovery by the aggrieved party, the Attorney General, the district attorney, the county counsel, the city prosecutor, or the city attorney of the facts constituting grounds for commencing the action.

(i) An action commenced under the Porter-Cologne Water Quality Control Act (Division 7 (commencing with *Section 13000*) of the *Water Code*). The cause of action in that case shall not be deemed to have accrued until the discovery by the State Water Resources Control Board or a regional water quality control board of the facts constituting grounds for commencing actions under their jurisdiction.

(j) An action to recover for physical damage to private property under *Section 19 of Article I of the California Constitution*.

(k) An action commenced under Division 26 (commencing with *Section 39000*) of the *Health and Safety Code*. These causes of action shall not be deemed to have accrued until the discovery by the State Air Resources Board or by a district, as defined in *Section 39025 of the Health and Safety Code*, of the facts constituting grounds for commencing the action under its jurisdiction.

(l) An action commenced under *Section 1603.1, 1615, or 5650.1 of the Fish and Game Code*. These causes of action shall not be deemed to have accrued until discovery by the agency bringing the action of the facts constituting the grounds for commencing the action.

(m) An action challenging the validity of the levy upon a parcel of a special tax levied by a local agency on a per parcel basis.

(n) An action commencing under *Section 51.7 of the Civil Code*.

#### **HISTORY:**

Enacted 1872. Amended Stats 1921 ch 183 § 1; Stats 1933 ch 306 § 1; Stats 1935 ch 581 § 1; Stats 1943 ch 1025 § 1; Stats 1949 ch 1540 § 1; Stats 1957 ch 649 § 1; Stats 1972 ch 823 § 2; Stats 1981 ch 247 § 1, effective July 21, 1981, ch 494 § 2; Stats 1982 ch 340 § 1; Stats 1987 ch 1200 § 1, ch 1201 §§ 1, 31 (making 1987 amendment applicable only to actions commenced on or after January 1, 1990); Stats 1988 ch 1186 § 1; Stats 1989 ch 467 § 1; Stats 1990 ch 669 § 1 (AB 4049); Stats 1995 ch 238 § 1 (AB 1174); Stats 1998 ch 342 § 1 (AB 1933); Stats 2005 ch 123 § 2 (AB 378), ch 383 § 1.5 (SB 1110); Stats 2006 ch 538 § 62 (SB 1852), effective January 1, 2007.

#### **NOTES:**

##### **Editor's Notes**

*F & G C § 1603.1* referred to in this section, and relating to disposition of Civil penalties, was repealed in 2003.

#### **Amendments:**

##### **1921 Amendment:**

Added "or injury to" before "real property" in subd 2.

##### **1933 Amendment:**

Substituted "fraud, mistake or conspiracy" for "fraud or mistake" in the first and second sentences of subd 4.

##### **1935 Amendment:**

Substituted "fraud or mistake" for "fraud, mistake or conspiracy" in the first and second sentences of subd 4.

**1943 Amendment:**

Added subd 5.

**1949 Amendment:**

Added subd 6.

**1957 Amendment:**

Added subd 7.

**1972 Amendment:**

Added subd 8.

**1981 Amendment:**

(1) Generally added feminine pronouns and eliminated "such" and "said"; (2) deleted the comma after "any goods" in subd 3; (4) added "is" after "that case" in subd 4; (5) substituted "shall" for "must" after "official capacity" near the end of subd 6; and (7) added subd 9. (As amended by Stats 1981, ch 494, compared to the section as it read prior to 1981. This section was also amended by an earlier chapter, ch 247. See *Gov C § 9605*.)

**1982 Amendment:**

Added the second sentence in subd 3.

**1987 Amendment:**

Added subd 10. (As amended by Stats 1987, ch 1201, compared to the section as it read prior to 1987. This section was also amended by an earlier chapter, ch 1200. See *Gov C § 9605*.)

**1988 Amendment:**

(1) Redesignated former subds 1-10 to be subds (a)-(i); (2) amended subd (i) by deleting (a) "or the provisions of California law relating to hazardous waste control (Chapter 6.5 (commencing with *Section 25100*) of *Division 20 of the Health and Safety Code*)" at the end of the first sentence; (b) "State Department of Health Services, the" after "discovery by the" in the last sentence; and (c) the comma before "or a regional"; and (3) added subd (j).

**1989 Amendment:**

Amended the second sentence of subd (c) by (1) substituting "article" for "art or artifact" both times it appears; and (2) adding "of historical, interpretive, scientific, or artistic significance".

**1990 Amendment:**

Added subd (k).

**1995 Amendment:**

Added subd (l).

**1998 Amendment:**

Added subd (m).

**2005 Amendment:**

(1) Substituted subd designation (f)(1) for former subd designation (f); (2) amended subd (f)(1) by adding "action." at the end of the first sentence; (3) added subd designation (f)(2); (4) substituted "Notwithstanding paragraph (1), an" for "action, provided, that any" in the first paragraph of subd (f)(2); (5) deleted "later." in the last sentence of subd (f)(2); (6) added subd designation (3); (7) substituted "Notwithstanding paragraph (1), an" for "later, and provided further, that any" in the last sentence of present subd (3); (8) substituted "' 1603.1, 1615" for "1603.1" at the beginning of the first sentence in subd (l); and (9) Added subd (n). (As amended Stats 2005 ch 383, compared to the section as it read prior to 2005. This section was also amended by an earlier chapter, ch 123. See *Gov C §9605*.)

**2006 Amendment:**

(1) Substituted "that" for "which" after "law enforcement agency" in subd (c); (2) deleted "to be" after "case is not" in subd (d); (3) deleted "to be" after "embezzlement is not" in subd (e); and (4) substituted "the" for "such an" after "grounds for commencing" in subd (h).

**Historical Derivation:**

Stats 1850 ch 127 § 17.

**Notes**

Stats 1987 ch 1201 provides:

SEC. 31. Section 1 of this act applies only to actions commenced on or after January 1, 1990.

Stats 2005 ch 383 provides:

SEC. 35. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provisions or applications.

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County of Los Angeles )  
)

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