APPENDIX

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19-1262-cv
Pablo Star Ltd. v. Welsh Gov't

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2019

Argued: February 5, 2020 Decided: June 8, 2020

Docket No. 19-1262-cv

PABLO STAR LTD., PABLO STAR MEDIA LTD.,

Plaintiffs-Appellees,

— v. —

THE WELSH GOVERNMENT,

Defendant-Appellant,

GRACENOTE, DBA Tribune Media Service, PITTSBURGH POST-GAZETTE, E.W. SCRIPPS, CO., COLORADO NEWS FEED, TRAVEL SQUIRE, RICHMOND TIMES DISPATCH, MIAMI HERALD MEDIA CO., VISIT WALES, TRIBUNE CONTENT AGENCY, LLC, JOURNAL MEDIA GROUP, INC., TREASURE COAST NEWSPAPERS, JOHN DOES 1-10,

Defendants.

B e f o r e:

POOLER, LYNCH, and PARK, *Circuit Judges*.

Defendant-Appellant the Welsh Government appeals the denial by the United States District Court for the Southern District of New York (Oetken, *J.*) of its motion to dismiss on the ground of sovereign immunity. It argues that the commercial-activity exception of the Foreign Sovereign Immunities Act does not apply to its conduct promoting Welsh culture and tourism in New York because the promotion of tourism is an inherently governmental activity and because its conduct did not have the requisite substantial contact with the United States to trigger the exception under the Act. We disagree, and accordingly AFFIRM the decision of the district court.

NATHANIEL KLEINMAN (Kevin McCulloch, *on the brief*), The McCulloch Law Firm, PLLC, New York, N.Y., *for Plaintiffs-Appellees.*

RICHARD J. OPARIL, Arnall Golden Gregory LLP, Washington, D.C., *for Defendant-Appellant*.

GERARD E. LYNCH, *Circuit Judge*:

The Foreign Sovereign Immunities Act ("FSIA") provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," subject to several enumerated exceptions. 28 U.S.C. § 1604. The exception at issue in this case is the "commercial activity" exception, specifically its first clause, which states that "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in

which the action is based upon a commercial activity carried on in the United States by the foreign state." *Id.* § 1605(a)(2). To trigger the exception, the commercial activity must have "substantial contact with the United States." *Id.* § 1603(e).

The United States District Court for the Southern District of New York (J. Paul Oetken, *J.*) denied the Welsh Government's motion to dismiss on the ground of sovereign immunity, holding that the commercial-activity exception applies. The Welsh Government challenges the district court's conclusions on both prongs of the relevant exception. First, it argues that its promotion in the United States of tourism to Wales was not commercial, but rather governmental, in nature. Second, it asserts that, even if its conduct was commercial, it did not have the requisite substantial contact with the United States. As explained below, we find that the Welsh Government did engage in commercial activity in publicizing Wales-themed events in New York, and we further find that the Welsh Government's activity had substantial contact with the United States. We therefore AFFIRM the district court's denial of the Welsh Government's motion.

BACKGROUND

The facts relating to the jurisdictional issue of sovereign immunity are drawn from the record compiled by the district court on the Welsh Government's motion to dismiss, and are for the most part undisputed. The facts regarding the merits of the claims are drawn from the complaint and are taken as true, though we occasionally note instances in which the facts are in dispute.

This case concerns claims for copyright infringement brought by Plaintiffs-Appellees Pablo Star Ltd. ("Pablo Star") and Pablo Star Media Ltd.[1] Pablo Star, which is registered under the laws of Ireland and the United Kingdom, alleges that it owns copyrights in two photographs of the Welsh poet Dylan Thomas and his wife, Caitlin Macnamara. Thomas, who is famous for such works as "Do not go gentle into that good night" and "A Child's Christmas in Wales," spent considerable time in New York in the early 1950s, and died there in 1953. The

[1] Plaintiff Pablo Star Media Ltd. was dissolved in 2018. The district court correctly found that its dissolution "does nothing to rebut the standing of at least one Plaintiff to proceed in this action," which "is sufficient to satisfy Article III's case-or-controversy requirement." *Pablo Star Ltd. v. Welsh Gov't*, 378 F. Supp. 3d 300, 314 (S.D.N.Y. 2019), quoting *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). For clarity and simplicity, we use the term "Pablo Star" to refer only to Pablo Star Ltd. in the remainder of this opinion.

first photograph, "Just Married," pictured the couple after their wedding in 1937; the second, "Penard," shows them playing croquet.

Vernon Watkins took the two photographs. Upon Watkins's death in 1967, his widow, Gwen Watkins, inherited the copyrights in the photos. In August 2011, Gwen Watkins assigned the copyrights to Pablo Star. Pablo Star then registered the copyrights with the United States Copyright Office, and was issued certificates of registration for both works in 2012.[2]

The Welsh Government is a political subdivision of the United Kingdom. The devolved Welsh Government has authority to promote the well-being of Wales, including its culture, economic development, and tourism. *See* Government of Wales Act 2006, c. 32, §§ 60-61. Under its statutory authority pursuant to the Government of Wales Act, the Welsh Department of Economy, Skills and Natural Resources is charged with promoting tourism to Wales.

After its formation in 2006, the Welsh Government began using Dylan Thomas's likeness, including the "Just Married" and "Penard" photographs, to

[2] Pablo Star's ownership of the copyrights is disputed. The Welsh Government has contended that Jeff Towns of "Dylan's Bookstore" acquired the rights to exploit the copyrights from Gwen Watkins prior to the assignment to Pablo Star, and that the Welsh Government has a license to use the photographs.

promote tourism to Wales. The allegedly infringing materials at issue in this case include a map and brochure entitled "Dylan Thomas Walking Tour of Greenwich Village, New York," which displayed the "Just Married" photograph with a copyright notice beneath stating "Copyright Jeff Towns/Dylan's Bookstore." The walking tour was a collaboration of the Welsh Government and the Thomas family and was run by New York Fun Tours, which charged $25 per ticket for the tour. The Welsh Government also had a page on its website, wales.com, entitled "Discovering the Welsh in America." That page in turn contained a link to a PDF copy of a booklet called "Welsh in America 2010," information about a display exhibition that could be borrowed from the Welsh Government in New York at no cost, and a link to New York Fun Tours' web page regarding its Dylan Thomas walking tours, which would be held on Sundays starting on March 6, 2011. The "Welsh in America" web page featured the "Just Married" photograph with the "Copyright Jeff Towns" notation. All of this material was created before Pablo Star's copyright registration in "Just Married" and "Penard."[3]

[3] The complaint alleges that both photographs have been used by the Welsh Government "as part of their advertising, tourism, and promotional campaign." Second Amended Complaint, ¶ 90. In contrast to the detailed information about the use of the "Just Married" photo, however, there are no further details about the alleged use of "Penard."

In 2012, after Pablo Star had registered its copyrights in the two photographs, it discovered that the Welsh Government was using the "Just Married" photograph of Dylan Thomas without its permission. Pablo Star notified the Welsh Government of the unauthorized use and demanded in writing that it cease and desist from using the photograph. Pablo Star alleges that, despite its assurance that it would comply, the Welsh Government continued to use the photograph, including by providing copies to U.S. media companies (the media defendants in the underlying action) for use in articles about Dylan Thomas that promoted tourism to Wales.

In 2013, the Welsh Government developed a new tourism strategy and published a three-year action plan. The strategy and action plan focused on domestic tourism, but also encouraged tourism from Germany, Ireland, the United States, and Canada. As part of its motion to dismiss, the Welsh Government proffered an affidavit from Rob Holt, the Welsh Government's Deputy Director of Tourism Development and Major Events, attesting that the strategy and action plan were developed in Wales and that the computer servers for the Welsh Government's work are maintained in the United Kingdom.

Pablo Star filed its initial complaint on February 18, 2015, alleging copyright infringement by the Welsh Government. After several years of procedural skirmishing not relevant here,[4] the Welsh Government moved to dismiss Pablo Star's second amended complaint under Fed. R. Civ. P. 12(b)(1), asserting sovereign immunity under the FSIA. On March 29, 2019, the district court denied the motion to dismiss and ordered the Welsh Government to file an answer. *Pablo Star Ltd.*, 378 F. Supp. 3d at 314. The Welsh Government timely filed this interlocutory appeal on April 29, 2019.[5]

[4] The procedural history of the case can be traced through a number of opinions issued by the district court between 2016 and 2018. *See*, *e.g.*, *Pablo Star Ltd. v. Welsh Gov't*, 170 F. Supp. 3d 597 (S.D.N.Y. 2016); *Pablo Star Ltd. v. Welsh Gov't*, 2016 WL 2745849 (S.D.N.Y. 2016); *Pablo Star Ltd. v. Tribune Content Agency, LLC*, 2017 WL 902140 (S.D.N.Y. 2017); *Pablo Star Ltd. v. Welsh Gov't*, 2018 WL 2041715 (S.D.N.Y. 2018).

[5] We have appellate jurisdiction under the collateral-order doctrine, which "allows an immediate appeal from an order denying immunity under the FSIA." *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 153 (2d Cir. 2007) (internal quotation marks omitted). We review a district court's decision concerning subject matter jurisdiction under the FSIA for clear error as to factual findings and *de novo* as to legal conclusions. *Id*.

DISCUSSION

I. The FSIA

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 174-75 (2d Cir. 2010), quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

A defendant seeking sovereign immunity bears the burden of establishing a prima facie case that it is a foreign sovereign. *Anglo-Iberia*, 600 F.3d at 175. Here, it is undisputed that the Welsh Government, as a subdivision of the United Kingdom, is a foreign state within the meaning of the Act, and is presumptively entitled to sovereign immunity. *See Pablo Star*, 170 F. Supp. 3d at 602; *see also* 28 U.S.C. § 1603(a); Government of Wales Act, c. 32, § A1 ("[T]he Welsh Government ... [is] a permanent part of the United Kingdom's constitutional arrangements.").

Once the defendant makes that showing, the burden shifts to the plaintiff to make an initial showing that an enumerated exception to sovereign immunity applies. *Anglo-Iberia*, 600 F.3d at 175. Determining whether that burden is met involves a review of the allegations in the complaint and any undisputed facts, and resolution by the district court of any disputed issues of fact. *Id.* The district court may look to evidence outside the pleadings and may hold an evidentiary hearing, if one is warranted, in determining facts relevant to jurisdiction. *Id.* Once the plaintiff has met its initial burden of production, the defendant bears the burden of proving, by a preponderance of the evidence, that the alleged exception does not apply. *Id.* In other words, the ultimate burden of persuasion remains on the party seeking sovereign immunity. *Id.*

II. The Commercial-Activity Exception

The FSIA's commercial-activity exception abrogates sovereign immunity in cases in which the action is:

> based [i] upon a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). In this case, only the first clause of the commercial-activity exception is at issue.

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). As the Supreme Court has noted, this definition "leaves the critical term 'commercial' largely undefined." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992). Of particular significance to this case, "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). A "commercial activity carried on in the United States by a foreign state" is defined as "commercial activity carried on by such state and having substantial contact with the United States." *Id.* § 1603(e).

The district court concluded both that the acts of the Welsh Government on which the claims in this case are based constituted commercial activity and that that activity had substantial contact with the United States. The Welsh Government challenges both conclusions.

III. Analysis

A. The Welsh Government Engaged in Commercial Activity.

We begin by identifying the particular conduct on which Pablo Star's action is "based" under the FSIA. *Nelson*, 507 U.S. at 356. For purposes of the commercial-activity exception, the relevant "activity" on which the claims are based is the Welsh Government's use of the photographs in question in promoting Wales-related tourist activities, specifically, on its wales.com web page; in the "Welsh in America 2010" booklet, the "Welsh in America" exhibition available from the Welsh Government in New York, and the "Dylan Thomas Walking Tour of Greenwich Village, New York" brochure; and in providing the photographs to media companies for publication in articles about Wales and Dylan Thomas.

Whether an activity is deemed "commercial" under the FSIA depends on its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), where "purpose" is "the *reason* why the foreign state engages in the activity" and "nature" is "the *outward form* of the conduct that the foreign state performs or agrees to perform," *Nelson*, 507 U.S. at 361 (second emphasis added).

The Supreme Court has elaborated on that standard in two principal cases. In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court explained that in applying the nature-versus-purpose analysis, "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" 504 U.S. at 614 (internal citation omitted) (emphasis in original). The *Weltover* Court gave the example that "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is 'commercial' activity, [notwithstanding that the purchases are designed to support the sovereign function of national defense,] because private companies can similarly use sales contracts to acquire goods." *Id.* at 614-15. Thus, in *Weltover*, the Argentine government's sale of bonds constituted commercial activity, because borrowing funds through the bond market is an activity regularly conducted by private companies as well as by governments, notwithstanding that the funds raised would be used to support sovereign governmental programs. *Id.* at 615-17.

In the same vein, the Court stated in *Saudi Arabia v. Nelson* that a foreign state engages in commercial activity "where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." 507 U.S. at 360 (internal quotation marks omitted). Thus, in that case, the Kingdom of Saudi Arabia enjoyed immunity from a lawsuit alleging that the plaintiff was unlawfully detained and tortured in retaliation for reporting safety violations at the Saudi hospital where he worked. However reprehensible the conduct alleged, the exercise – including the abuse – of the police powers of detention and punishment are uniquely sovereign activities. *Id.* at 361.

This is a standard more easily stated than applied, however, and its application may sometimes depend on the level of generality at which the conduct is viewed. Separating the "nature" from the "purpose" of an activity may require a nuanced examination of the context of the acts involved. In this case, for example, the narrowest possible characterization of the challenged actions — printing and distributing copies of photographs, or "engaging in copyright infringement" — plainly describes "powers that can [ ] be exercised by private citizens, as distinct from [ ] powers peculiar to sovereigns." *Nelson*, 507

U.S. at 360 (internal quotation marks omitted). Literally anyone can do those things, and such actions are regularly performed by private parties. But without some understanding of context, that is not much help in distinguishing sovereign from commercial conduct. And indeed, such a narrow approach would have pointed in a different direction in the very case from which the formulation is drawn. It might be entirely reasonable to characterize the actions to which Nelson was subjected as "locking someone in a room, depriving him of food, and severely beating him," or simply as "kidnapping and aggravated assault" — and indeed, Nelson so characterized them. Those are activities in which criminals who are private citizens engage with regrettable frequency, and are not actions that only the agents of sovereign states can perform. But that would ignore the context in which the events took place. The involvement of agents of the state security services was an important part of defining the activity being assessed.[6]

[6] Indeed, in an opinion concurring in the judgment, Justice White suggested that "had the hospital retaliated against Nelson by hiring thugs to do the job, I assume the majority—no longer able to describe this conduct as 'a foreign state's exercise of the power of its police,' *ante*, at [361]—would consent to calling it 'commercial.' For, in such circumstances, the state-run hospital would be operating as any private participant in the marketplace and respondents' action would be based on the operation by Saudi Arabia's agents of a commercial business." 507 U.S. at 366.

On the other hand, a very broad characterization of the activity that forms the basis of the claim would tend to conflate the act with its purpose. Here, for example, the Welsh Government asserts that it was acting to promote Welsh culture and tourism pursuant to its statutory mandate under the Government of Wales Act 2006, and thus that it was acting as a sovereign government. That may be a reasonable way to describe the Welsh Government's actions here, but that description characterizes those actions in terms of their broad purposes as much as their "outward form." Like the Argentine government in *Weltover*, the Welsh Government's actions here are not undertaken from "a profit motive," but rather with the goal of enhancing the image of the country and the prosperity of its citizens — legitimate purposes for a sovereign to pursue.

Those, however, are the purposes or *reasons* for the Welsh Government's actions, and not what it did to accomplish its goals. The means by which it pursued its goals was the publication, on-line and in print, of what are essentially advertising materials. As Pablo Star argues, that is an activity that could be, and in fact regularly is, performed by private-sector businesses. The district court agreed, holding that "[t]he Welsh Government's use of these photos is an eminently familiar manifestation of the manner in which any number of private

travel agents or guides have been alleged to have used another's copyrighted materials to supplement their own products or services." *Pablo Star*, 378 F. Supp. 3d at 309-10.

We agree as well. Indeed, even if the broader characterization "promoting tourism" is used, that does not distinguish the activity from functions regularly undertaken by private entities. Airlines, travel agents, hotels, operators of theme parks, and sponsors of arts festivals, to name but a few, regularly endeavor to promote tourism to particular locations. Nor is that private activity always limited to the promotion of the particular entity's own goods or services. Airlines, travel agents, and hotels commonly promote the entertainment or cultural opportunities available in particular cities or countries, which they do not own and from which they do not directly profit. All that distinguishes their advertising from that of the Welsh Government here is that their ultimate purpose is indeed profit — the airline hopes that if you are excited by its television commercial about the pleasures to be had at a destination to which it flies, you may be motivated to buy a ticket on one of its flights — while the Welsh Government's reasons for promoting particular touristic activities is not. But, as *Weltover* makes clear, the lack of a profit motive is irrelevant to the determination

of whether the activity is "commercial" for purposes of the FSIA. *Weltover*, 504 U.S. at 614.

In arguing that "promoting tourism" is inherently sovereign and non-commercial, the Welsh Government relies heavily on our decision in *Kato v. Ishihara*, 360 F.3d 106 (2d Cir. 2004). The plaintiff in *Kato* was a Japanese citizen employed by the Tokyo Metropolitan Government ("TMG") in its New York office. She brought a sexual harassment suit against TMG and the Tokyo governor, alleging sex discrimination and retaliation in the course of her employment in violation of Title VII of the Civil Rights Act of 1964. We agreed with TMG's argument that it was immune from suit under the FSIA.

TMG performed actions that were superficially similar to those typically undertaken by private parties. For example, TMG engaged in "product promotion for Japanese companies, general business development assistance, participation in trade shows on behalf of the companies to promote those companies' products for sale, and leasing office space to those companies for their business development." 360 F.3d at 111 (internal quotation marks omitted). However, this Court found that "[a]lthough a private Japanese business might engage in these activities on its own behalf—for example, by sending its

representatives to trade shows in the United States to promote its products—such a business would not typically undertake the promotion of other Japanese businesses, or the promotion of Japanese business interests in general." *Id.* at 112. Thus, "the fact that a government instrumentality like TMG is engaged in *the promotion of commerce* does not mean that the instrumentality is thereby engaged in *commerce*." *Id.* (emphasis in original).

The Welsh Government seizes on the Court's language in *Kato* to argue that it too was performing quintessentially governmental functions. Specifically, it says that it was acting pursuant to its statutory authority granted by the government of the United Kingdom to promote the well-being of Wales, including by promoting economic development, tourism, and culture abroad.

The Welsh Government takes *Kato*'s language out of its factual context, however. First, the Welsh Government here engaged in promotional activities "on its own behalf," *id*. at 112, rather than on behalf of third parties. In addition, TMG's actions promoting Japanese business interests abroad were not the conduct on which Kato's action was "based." Instead, Kato's claimed injury was based on TMG's alleged harassing and retaliatory conduct. That activity was a part of TMG's personnel practices. Our inquiry in *Kato* was thus directed to

assessing whether the plaintiff was a *bona fide* public servant rather than toward deciding whether activities such as those of the Welsh Government here are properly characterized as "commercial."

Nelson established the importance of a sufficient "nexus" between a defendant's conduct and the injuries alleged. 507 U.S. at 355. In *Nelson*, a Saudi government hospital recruited and hired Nelson as a monitoring systems engineer. *Id.* at 351-52. When Nelson discovered and reported safety defects that endangered patients' lives to hospital officials and a Saudi government commission, he was arrested and tortured by government agents. *Id.* at 352-53. In evaluating Saudi Arabia's assertion of sovereign immunity, the Supreme Court reasoned that, while the Saudi defendants recruited Nelson, signed an employment contract with him, and subsequently employed him, these activities (which could be considered commercial) were not the basis for his lawsuit. Instead, his lawsuit sought damages for defendants' wrongful arrest, imprisonment, and torture, and that conduct "fails to qualify as 'commercial activity' within the meaning of the [FSIA]." *Id.* at 358. Thus, because there was no sufficient "nexus" between Nelson's injuries and the government hospital's commercial activity, the commercial-activity exception did not apply and Saudi Arabia was entitled to sovereign immunity.

Similarly, in *Kato*, the plaintiff's alleged injuries were not based on TMG's promotion of Japanese business interests abroad but on TMG's alleged harassing and retaliatory conduct as an employer of civil servants. Indeed, the *Kato* Court based its decision in part on the fact that Kato was a civil servant and that the FSIA's legislative history identified employment of civil service personnel as an example of governmental activity. *Kato*, 360 F.3d at 111, citing H.R. Rep. No. 94-1487, at 16, *reprinted in* U.S.C.C.A.N. at 6615. Our statement that "an agency of a foreign government is not involved in 'commercial activity' under the FSIA when it provides general business development assistance," 360 F.3d at 114, was thus in the context of determining whether the plaintiff was properly characterized as a civil servant. Because the promotion of a country's commercial activities is a legitimate function of government, she was.

Pablo Star's argument does not depend on any claim that the employees of the Welsh Government who engaged in the challenged activity here were part of a commercial, rather than governmental, operation. Here, unlike in *Nelson* and *Kato*, Pablo Star's alleged injuries are based directly on the Welsh Government's allegedly commercial conduct, specifically the unauthorized use of photographs in promotional websites and printed materials advertising tourism related to

Wales. And, as the district court reasoned in its opinion below, private travel agents, publishers of guidebooks, and airline companies can and do use photographs to promote tourism to various destinations around the world. If any of those institutions had used Pablo Star's copyrighted photos to promote the Dylan Thomas Walking Tour of Greenwich Village (for which New York Fun Tours, apparently a for-profit enterprise, charged admission), it would have been a proper defendant in a copyright infringement action. Every aspect of the Welsh Government's *conduct* that forms the basis of Pablo Star's claim could have been done by a private party for commercial gain. Thus, unlike the exercise of state police power in *Nelson*, 507 U.S. at 361, there is nothing quintessentially governmental about using a photograph in a printed brochure or on a web page or distributing the photograph to newspaper outlets to advertise or promote travel and tourism to a particular location. The fact that this activity was done by a government body pursuant to its statutory authority in order to promote tourism, rather than to make a profit, goes to the activity's purpose rather than its "outward form." *Nelson*, 507 U.S. at 361. *See also Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 291 (S.D.N.Y. 2001) ("[W]hile the *purpose* of publishing the diary may have been governmental (disseminating

information about Jordan and encouraging tourism), the *nature* of the activity (publishing and selling books) is clearly commercial." (emphasis in original)). We therefore conclude that the activity on which Pablo Star's claims are based is commercial activity.

B. The Welsh Government's Conduct Had Substantial Contact with the United States.

Having found that the Welsh Government engaged in commercial activity, we move on to the second step of the inquiry: whether the commercial activity was carried on in the United States. To qualify, the commercial activity must have "substantial contact with the United States." 28 U.S.C. § 1603(e).

Exactly what constitutes "substantial contact" for purposes of the FSIA is poorly defined. "Congress left it to the courts to define the contours of 'substantial contact' between a foreign state's commercial activity and the United States. However, it is clear that Congress intended a tighter nexus than the 'minimum contacts' standard for due process." *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1019 (2d Cir. 1991) (internal citation omitted). In *Shapiro*, we concluded that Bolivia's issuance of promissory notes to a Delaware corporation doing business principally in New York City, which were then placed in escrow with a

Washington, D.C. law firm, satisfied the "substantial contact" standard. *Id.* We stated that "[w]e know of no theory that would cause us to read the FSIA to allow a foreign state to issue bearer notes to an intermediary in the United States and then to deny that it was engaged in commercial activity as defined in the FSIA. The very presence of such highly transferable instruments, whether or not the initial holder successfully discounts them in the country, suffices to satisfy the 'substantial contact' requirement of the statute." *Id.*

The district court below held that the substantial contact requirement was satisfied in this case because it found that the Welsh Government played an active role in the United States in the development and distribution in New York of promotional materials that included plaintiffs' photographs, including by contracting with private businesses located in New York City to publish, print, display, and distribute the allegedly infringing materials. *Pablo Star*, 378 F. Supp. 3d at 313.

The Welsh Government argues that all relevant activity took place in Wales or the United Kingdom. For example, the Welsh Government's tourism strategy and action plan to promote tourism were formulated in Wales and all electronic storage and distribution of the photographs occurred from computers and

servers located in the United Kingdom. Joint App'x at A-313. In response to the district court's emphasis on the fact that it was the "Welsh Government *in New York*" that engaged in commercial activity, *Pablo Star*, 378 F. Supp. 3d at 313 (emphasis in original), the Welsh Government says that all of its offices in the United States were located in the United Kingdom's embassies and consulates, Joint App'x at A-312, and that, under the Vienna Convention on Consular Relations, having an office at a foreign embassy or consulate does not provide a proper basis to invoke the commercial-activity exception. *See* Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (Apr. 24, 1963), Art. 5(b), Art. 43 ("Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.").

We agree with the district court that the Welsh Government's commercial activity utilizing Pablo Star's copyrighted photographs had substantial contact with the United States. The point here is not whether the Welsh Government maintained an office in New York, or whether that office was located in a consulate or a commercial office building. The Welsh Government's conduct in New York reached beyond the confines of its consular office. The very title of its

New York campaign was "The Welsh *in America*" (emphasis added). The Government provided a 14-panel exhibition on the history of the Welsh in America for display in American venues. The Welsh Government distributed the Dylan Thomas photographs to American media companies, which printed stories containing one or both photographs in local newspapers in cities including Pittsburgh, Richmond, and Miami. And, most persuasively, the Dylan Thomas Walking Tour of Greenwich Village was organized by New York Fun Tours in cooperation with the Welsh Government, and the Welsh Government provided a map and brochure for the tour (featuring the "Just Married" photograph) that could have been useful only if distributed for use in New York. *See Pablo Star*, 378 F. Supp. 3d at 312. Some or all of those materials were printed by New York companies under contract with the Welsh Government. Taken together, this evidence clearly demonstrates that the Welsh Government's commercial activity had substantial contact with the United States.

CONCLUSION

For the reasons stated above, we conclude that Pablo Star's lawsuit is "based . . . upon a commercial activity carried on in the United States," 28 U.S.C. § 1605(a)(2), and therefore falls within an exception to the immunity recognized by the FSIA. We have considered the Welsh Government's remaining arguments and have found them to be without merit. We therefore AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PABLO STAR LTD., *et al.*,
Plaintiffs,

-v-

THE WELSH GOVERNMENT, *et al.*,
Defendants.

15-CV-1167 (JPO)

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Plaintiffs Pablo Star Ltd. and Pablo Star Media Ltd., two related companies organized and registered under the laws of Ireland and the United Kingdom, own the copyrights to two photographs depicting the poet Dylan Thomas. Plaintiffs have sued Defendants the Welsh Government, Tribune Content Agency, LLC ("TCA"), and certain John Does for having allegedly infringed their copyrights in these two photographs in violation of the Copyright Act, 17 U.S.C. §§ 101 *et seq.* (Dkt. No. 99 ("SAC").) Before the Court now is the Welsh Government's motion to dismiss Plaintiffs' claims asserted against it in the operative Second Amended Complaint. (Dkt. No. 105.) For the reasons that follow, the motion is denied.

I. Background

Familiarity with the background of this dispute is presumed based on this Court's prior opinions addressing the Welsh Government's earlier-filed motion to dismiss, *see Pablo Star Ltd. v. Welsh Gov't*, 170 F. Supp. 3d 597 (S.D.N.Y. 2016), Plaintiffs' motion for reconsideration of the Court's opinion granting in part and denying in part that motion to dismiss, *see Pablo Star Ltd. v. Welsh Gov't*, No. 15 Civ. 1167, 2016 WL 2745849 (S.D.N.Y. May 11, 2016), and Plaintiffs' motion for leave to file a Second Amended Complaint against the Welsh Government, *see Pablo Star Ltd. v. Welsh Gov't*, No. 15 Civ. 1167, 2018 WL 2041715 (S.D.N.Y. May 1,

2018). The Court details below only those aspects of this case's facts and procedural history most relevant to the instant motion.

On February 18, 2015, Plaintiffs commenced this action against the Welsh Government and various media companies for infringement of Plaintiffs' copyrights in two photographs depicting the poet Dylan Thomas. (Dkt. No. 1.) The nub of Plaintiffs' claims against the Welsh Government is that it has "published, displayed, distributed, and otherwise used unauthorized copies of Plaintiff[s'] copyrighted photographs to in [sic] advertisements, publications, and other promotional materials directed at and specifically targeted towards New York residents," all with the purpose of increasing tourism to Wales. (Dkt. No. 1 ¶¶ 11–13; *see also* Dkt. No. 26 ¶¶ 29–30 (similar allegations in Plaintiffs' First Amended Complaint).)

By an Opinion and Order dated March 16, 2016, this Court granted the Welsh Government's motion to dismiss all claims asserted against it in Plaintiffs' First Amended Complaint on the grounds of improper service and improper venue. (Dkt. No. 53.) With respect to venue, the Court held in relevant part that Plaintiffs had not alleged facts sufficient to justify venue in this district because they had

> not alleged that *any* of the specific conduct at issue occurred in this district, let alone a "substantial part" of it. Neither Plaintiffs nor the Welsh Government reside in the United States. The only concrete infringing materials that Plaintiffs can identify are materials that were available online. But the fact that an infringing material is accessible via the internet in a jurisdiction is hardly sufficient to conclude that this infringement *occurred* in this district for the purposes of venue. Indeed, all of the Welsh Government's relevant conduct—including the creation and maintenance of the websites at issue—appears to have occurred abroad. On this basis, the Court cannot conclude that a substantial part of the events giving rise to this claim occurred in New York.

(Dkt. No. 53 at 16 (internal citations and footnotes omitted).) Plaintiffs then moved for reconsideration of that decision (Dkt. No. 58), and the Court denied that motion on May 11, 2016 (Dkt. No. 65).

Plaintiffs subsequently moved for leave to replead their allegations against the Welsh Government (Dkt. No. 73), attaching to their motion a proposed new pleading that is now the operative Second Amended Complaint (*compare* Dkt. No. 75-1, *with* Dkt. No. 99). Defendant TCA filed an opposition to Plaintiffs' motion for leave to replead, asserting in substance that granting Plaintiffs leave to replead would be futile because this district remained an improper venue for Plaintiffs' claims against the Welsh Government. (Dkt. No. 78.) The Court disagreed. By an Opinion and Order dated May 1, 2018, the Court granted Plaintiffs leave to file the Second Amended Complaint, holding that Plaintiffs' new "allegations, taken as true, plausibly establish[ed] that the Welsh Government undertook significant actions in this district that [were] material to its allegedly unauthorized copying of Plaintiffs' photographs." (Dkt. No. 96 at 5.) Among "Plaintiffs' factual allegations [relevant to that conclusion] include[d] the following:

> The Welsh Government has a permanent presence in New York and maintains offices in New York City. The Welsh Government created infringing "promotional materials" such as "advertisements, brochures, pamphlets, [and] New York City walking tour maps," which included unauthorized copies of Plaintiffs' photographs. In addition, the Welsh Government created display panels for an exhibition called "*Welsh in America*," which made unauthorized use of Plaintiffs' photographs. Prior to creating these materials, the Welsh Government drafted a report detailing its strategies to promote tourism to Wales, and identified the United States as one of its key target markets.
>
> Moreover, Plaintiffs allege, on information and belief, that "the Welsh Government distributed and loaned out copies" of the infringing promotional materials from its offices in New York City, and loaned out and "publicly displayed the infringing panels of the *Welsh in America* exhibition in New York City."

(Dkt. No. 96 at 4–5 (citing SAC ¶¶ 16, 18, 22–23; 27–29; 32–34; Dkt. Nos. 75-2, 75-3) (footnotes omitted).) In response to TAC's contention that the Court had previously rejected similar arguments when denying Plaintiffs' motion for reconsideration, the Court explained that "unlike at the motion-for-reconsideration stage, the Court . . . [was required to] draw all

inferences in favor of Plaintiffs" in connection with their motion to replead, and concluded that "any deficiencies addressed in the Court's opinion on reconsideration ha[d] been remedied by the plausible information-and-belief allegations of the" Second Amended Complaint. (Dkt. No. 96 at 6 n.5.) Finally, the Court also declined to address TAC's one-sentence suggestion that the Welsh Government might be immune from suit on the basis of sovereign immunity, explaining that the "Welsh Government will be free to raise any immunity defense on its own behalf in response to the SAC." (Dkt. No. 96 at 7 n.6.)

Plaintiffs filed the operative Second Amended Complaint on May 8, 2018. (Dkt. No. 99.) The Welsh Government has now filed a motion to dismiss Plaintiffs' newly repleaded claims against it pursuant to Federal Rule of Civil Procedure 12(b)(1), asserting that it is immune from suit on the basis of sovereign immunity. (Dkt. Nos. 105, 106 at 1.)

II. Legal Standard

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, "is the sole source for subject matter jurisdiction over any action against a foreign state," *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 154 (2d Cir. 2007) (quoting *Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999)). The FSIA provides that "a foreign state or an 'agency or instrumentality of a foreign state[]' is immune from federal court jurisdiction unless a specific exception to the FSIA applies." *Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek*, 600 F.3d 171, 175 (2d Cir. 2010) (quoting 28 U.S.C. § 1603(b)).

"When [a] defendant claims immunity under the FSIA," that defendant must first "present[] a *prima facie* case that it is a foreign sovereign." *Figueroa v. Ministry of Foreign Affairs of Swed.*, 222 F. Supp. 3d 304, 307 (S.D.N.Y. 2016) (second quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993)). "Once the defendant presents a prima facie case that it is a foreign state [within the meaning of the FSIA], 'the plaintiff [then] has the

burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted.'" *Kensington*, 505 F.3d at 153 (quoting *Cabiri*, 165 F.3d at 196). Once a Plaintiff has satisfied this burden, "the defendant must show that the alleged exception does *not* apply by a preponderance of the evidence." *Anglo-Iberia*, 600 F.3d at 175 (emphasis added) (internal quotation marks omitted). "The ultimate burden of persuasion remains with the alleged foreign sovereign." *Kensington*, 505 F.3d at 153 (quoting *Cabiri*, 165 F.3d at 196).

"Determining whether [a plaintiff's] burden is met involves a review of the allegations in the complaint, the undisputed facts, if any, placed before the court by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—resolution of disputed issues of facts." *Anglo-Iberia*, 600 F.3d at 175 (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 80 (2d Cir. 2008)). Accordingly, when considering a motion to dismiss for lack of subject matter jurisdiction on the basis of sovereign immunity, "the Court generally must accept the material factual allegations in the complaint as true, but does not draw all reasonable inferences in the plaintiff's favor. [And] where jurisdictional facts are disputed, the Court has the power and the obligation to consider matters outside the pleadings, such as affidavits, documents, and testimony, to determine whether jurisdiction exists." *Figueroa*, 222 F. Supp. 3d at 307 (internal citations omitted). Finally, because "foreign sovereign immunity's basic objective [is] to free a foreign sovereign from *suit*, . . . court[s] should normally resolve those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1317 (2017).

III. Discussion

A. Sovereign Immunity

The Welsh Government moves to dismiss Plaintiffs' claims against it pursuant to Rule 12(b)(1) on the basis of sovereign immunity. (Dkt. Nos. 105, 106 at 1.) In support of its motion, the Welsh Government submits various exhibits and affidavits. (*See, e.g.*, Dkt. Nos. 106-2–106-4, 107–09.) Plaintiffs, in contrast, do not present to the Court any new evidence in opposing the instant motion.[1] (*See generally* Dkt. No. 119.) Still, as the Court recently explained in granting Plaintiffs leave to replead, Plaintiffs' factual allegations in the Second Amended Complaint, including some of the same allegations that the Court held to be sufficient to establish venue in this district, are also supported in part by a number of exhibits attached to Plaintiffs' pleading. (*See* Dkt. No. 96 at 4 (citing Dkt. Nos. 75-2, 75-3); *see also* Dkt. Nos. 99-1–99-14 (exhibits to Plaintiffs' Second Amended Complaint).) To the extent that any of Plaintiffs' factual allegations in the Second Amended Complaint are both supported by evidence attached to the Second Amended Complaint and unrebutted by the Welsh Government's evidence, they are properly considered in connection with Plaintiffs' burden of production. *See Anglo-Iberia*, 600 F.3d at 175. The Court turns now to consider that evidence.

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[1] Plaintiffs contend that "[i]n an FSIA case," courts will grant a motion to dismiss for lack of subjection matter jurisdiction only where a pleading is "wholly insubstantial or frivolous," and that in doing so courts "must accept as true all of the factual allegations set out in plaintiffs' complaint, draw inferences from those allegations in the light most favorable to plaintiffs, and construe the complaint liberally." (Dkt. No. 119 at 4 (citations and internal quotation marks omitted).) Plaintiffs are incorrect. The legal standard governing the instant motion to dismiss is that outlined by the Court above. *See supra* Section II. In fact, the Supreme Court just two terms ago expressly addressed and rejected the propriety of a legal standard akin to that articulated by Plaintiffs here. *See Bolivarian Republic of Venez.*, 137 S. Ct. at 1324 ("Simply making a nonfrivolous argument [that an FSIA exception applies] is not sufficient. . . . If a decision about the matter requires resolution of factual disputes, the court will have to resolve those disputes.").

As an initial matter, the Welsh Government has made a *prima facie* showing that it is a political subdivision of a foreign state within the meaning of the FSIA. (*See* Dkt. No. 121 at 2 (citing Gov't of Wales Act § A1 ("[T]he Welsh Government . . . [is] a permanent part of the United Kingdom's constitutional arrangements."))[2].) Accordingly, "the burden [now] falls on [Plaintiffs] to establish by a preponderance of the evidence that an exception under the FSIA permits jurisdiction over [the Welsh Government]." *Swarna v. Al-Awadi*, 622 F.3d 123, 143 (2d Cir. 2010). Plaintiffs contend that three of the general exceptions to foreign sovereign immunity that are outlined in § 1605(a)(2) of the FSIA permit them to sue the Welsh Government for the alleged acts of copyright infringement at issue in this suit: (1) the commercial activity exception (Dkt. No. 119 at 5–11); (2) the noncommercial tort exception (Dkt. No. 119 at 11–17); and (3) the expropriation exception (Dkt. No. 119 at 17–18). The Court addresses only the commercial activity exception, concluding both that Plaintiffs have met their burden of production with respect to the that exception to sovereign immunity, and that the Welsh Government has failed to demonstrate by a preponderance of the evidence that this exception does not apply here.

Among the FSIA's "[g]eneral exceptions to the jurisdictional immunity of a foreign state" is what is commonly referred to as the "commercial activity" exception. 28 U.S.C. § 1605(a)(2). This exception provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based [i] upon a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

[2] Available at http://www.legislation.gov.uk/ukpga/2006/32/section/A1.

Id. As the text of the statute makes plain, all three prongs of the exception require a plaintiff to show some form of (1) a "commercial activity" carried on by or of the foreign state (2) a nexus between that activity and the basis of the plaintiff's claims, and (3) a geographic connection with the United States.

The FSIA provides that a "commercial activity" may be "either a regular course of commercial conduct or a particular commercial transaction or act," and instructs courts that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* § 1603(d). In addition, the FSIA defines "commercial activity carried on in the United States by a foreign state" as a "commercial activity carried on by such state and having substantial contact with the United States." *Id.* § 1603(e). Describing these tautological definitions as somewhat "obtuse," the Supreme Court has provided lower courts with some necessary clarification regarding the meaning of "commercial activity." *See Saudi Arabia v. Nelson*, 507 U.S. 349, 358–59 (1993). Recognizing that the FSIA codified the preexisting "so-called 'restrictive' theory of foreign sovereign immunity," *id.* at 359 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992)), the Supreme Court explained that "a state engages in commercial activity under the restrictive theory where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns," *id.* at 360 (internal quotation marks omitted). In other words, "a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts 'in the manner of a private player within' the market." *Id*. (quoting *Weltover*, 504 U.S. at 614). Under the "commercial activity" inquiry, it matters "not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives." *Weltover*, 504 U.S. at 614. Instead, courts ask whether "the

particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Nelson*, 507 U.S. at 360–61 (quoting *Weltover*, 504 U.S. at 614).

Section 1605(a)(2) further provides that in order to be eligible for the commercial activity exception to the FSIA's general grant of sovereign immunity, a plaintiff's claim must also be "*based upon*" the relevant "commercial activity," or, under the second and third prongs of the exception, based upon an act performed in connection with that commercial activity. 28 U.S.C. § 1605(a)(2) (emphasis added). The Supreme Court has explained that determining whether a plaintiff's claim is "based upon" a commercial activity requires courts to "look[] to the 'basis' or 'foundation' for a claim," or to "the 'gravamen of the complaint.'" *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015) (quoting *Nelson*, 507 U.S. at 357). Doing so "first requires a court to 'identify[] the particular conduct on which the [plaintiff's] action is "based."'" *Id.* (alterations in original) (quoting *Nelson*, 507 U.S. at 356). Courts then must consider the "'degree of closeness' [that] exist[s] between the commercial activity and the gravamen of the plaintiff's complaint." *Kensington*, 505 F.3d at 156 (quoting *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006)). For a claim to be "based upon" a commercial activity, there must be a "a *significant nexus* . . . between the commercial activity in this country upon which the exception is based and a plaintiff's cause of action." *Id.* at 155 (quoting *Reiss v. Société Centrale Du Groupe Des Assurances Nationales*, 235 F.3d 738, 747 (2d Cir. 2000)) (omission in original). This requisite "degree of closeness . . . is *considerably greater* than common law causation requirements." *Id.* at 156 (internal quotation marks omitted).

Here, the Court begins, as it must, "by identifying the particular conduct on which [Plaintiffs'] action is 'based' for purposes of the [FSIA]." *Nelson*, 507 U.S. at 356. The Court

not long ago conducted a similar inquiry into "the essence of Plaintiffs' claims for copyright infringement," doing so in the context of considering the propriety of venue for Plaintiffs' claims in this district. (Dkt. No. 96 at 3.) The Court at that time described the "essence" of Plaintiffs' claims in the Second Amended Complaint as consisting of "the Welsh Government's unauthorized use of the two photographs as part of its campaign to promote tourism to Wales," and more specifically, "the Welsh [G]overnment's alleged unauthorized copying" of Plaintiffs' photographs in violation of 17 U.S.C. § 106. (Dkt. No. 96 at 3–4.) The Court sees no reason why these alleged acts do not also constitute the "'basis' or 'foundation' for [Plaintiffs'] claim," or "the 'gravamen of [their] complaint,'" for purposes of the FSIA. *OBB*, 136 S. Ct. at 395 (quoting *Nelson*, 507 U.S. at 357). Accordingly, the Court determines that the acts that Plaintiffs' copyright claims are "based upon" in this case are the Welsh Government's alleged unauthorized copying and distribution of Plaintiffs' copyrighted photographs.

The Court now asks whether Plaintiffs have demonstrated that the Welsh Government's alleged acts of copying and distribution qualify as "commercial activit[ies]" within the meaning of the FSIA. The Court concludes that they do. The exhibits attached to Plaintiffs' Second Amended Complaint demonstrate that the types of conduct the Welsh Government is alleged to have engaged in are "the *type*[*s*] of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 504 U.S. at 614 (quoting Black's Law Dictionary 270 (6th ed. 1990)).

The copies of Plaintiffs' photo that are reproduced in Plaintiffs' exhibits are generally part of the Welsh Government's issuance of promotional materials for Welsh-themed activities and travel. (*See, e.g.*, Dkt. No. 99-1 ("Dylan Thomas Walking Tour of Greenwich Village, New York" map published by the Welsh Government, which uses one of Plaintiffs' photographs); Dkt. No. 99-2 ("Discovering the Welsh in America" article published by the Welsh Government,

which uses one of Plaintiffs' photographs); Dkt. No. 99-6–99-9 (copies of articles published by various United States media outlets promoting tourism to Wales and using the same infringing photographs included as part of the Welsh Government's publications)[3].) The Welsh Government's use of these photos is an eminently familiar manifestation of the manner in which any number of private travel agents or guides have been alleged to have used another's copyrighted materials to supplement their own products or services. *See, e.g.*, *Beasley v. John Wiley & Sons, Inc.*, 56 F. Supp. 3d 937 (N.D. Ill. 2014) (copyright infringement suit premised on private publisher's unauthorized copying and use of plaintiff's copyrighted pictures of Chicago in a travel book); *Burch v. Nyarko*, No. 06 Civ. 7022, 2007 WL 2191615 (S.D.N.Y. July 31, 2007) (Gorenstein, Mag. J.) (copyright infringement suit premised on private publisher's unauthorized copying and use of plaintiff's copyrighted pictures of Ghana on a travel website); *Feder v. Videotrip Corp.*, 697 F. Supp. 1165 (D. Colo. 1988) (copyright infringement suit premised on private publisher's unauthorized copying and use of plaintiff's copyrighted travel guides in a travel video). Here too, Plaintiffs' exhibits confirm that the Welsh Government

[3] Plaintiffs allege on information and belief that the Welsh Government provided these United States news outlets with the infringing copies of Plaintiffs' photo as part of their efforts to encourage tourism to Wales. (*See, e.g.*, SAC ¶¶ 47–48.) The contents of these articles corroborate Plaintiffs' allegations: The articles not only favorably depict and encourage travel to Wales, but also link directly to the website for Visit Wales (*see, e.g.*, 99-7 at 6–7), which according to a Welsh Government official is "an administrative division of the Welsh Government charged with carrying out the Government's policy to promote tourism to Wales" (Dkt. No. 107 ¶ 5). Plaintiffs also attach to their Second Amended Complaint a "Framework Action Plan" from the Welsh Government in which it resolved to "[r]e-launch websites for US and German markets providing [them with] tailored content." (Dkt. No. 99-14 at 6.) A Welsh official has confirmed that the Government of Wales does license images for purposes of tourism promotion (Dkt. No. 107 ¶ 8), and the Welsh Government offers no evidence to rebut Plaintiffs' allegations that the Welsh Government did in fact provide United States news outlets with infringing copies of Plaintiffs' photos. The Court concludes that Plaintiffs have produced evidence sufficient to corroborate their allegations that the United States news articles appended to the Second Amended Complaint were published in coordination with the Welsh Government.

distributed copies of Plaintiffs' photos in a form largely indistinguishable from the form in which private parties also distributed copies of Plaintiffs' photo. (*Compare* Dkt. No. 99-2 *with* Dkt. Nos. 99-6–99-9.) This evidence confirms that Plaintiffs' suit against the Welsh Government arises from the latter's exercise of "powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns," *Nelson*, 507 U.S. at 360 (internal quotation marks omitted), and that Plaintiffs' suit is therefore "based upon . . . commercial activit[ies]" within the meaning of 28 U.S.C. § 1605(a)(2).

In moving to dismiss Plaintiffs' Second Amended Complaint, the Welsh Government points to unrebutted evidence showing that "the Welsh Government did not use the photographs for profit[,] but [instead used them] to carry out its public mission to encourage economic development, culture, and tourism in Wales," evidence the Welsh Government contends demonstrates that any alleged copying was done in connection with a uniquely sovereign objective (*i.e.*, promoting tourism) insufficient to constitute "commercial activity." (*See* Dkt. No. 106 at 12–14.) But the Welsh Government's evidence of the *purposes* behind its copying and distributing of Plaintiffs' photos, however persuasive, is tangential to the Court's inquiry. That is because courts considering whether a government's conduct is a "commercial activity [as defined by the FSIA] . . . 'ask not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives[,] but rather whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce.'" *Swarna*, 622 F.3d at 147 (quoting *Anglo-Iberia*, 600 F.3d at 177). Because Plaintiffs' evidence shows that the Welsh Government's acts of copying and distributing Plaintiffs' photos were of the sort a private

person might also engage in, the Court need not (and indeed must not) inquire further into the purposes behind that copying.

At least one other court in this district has rejected similar arguments made by foreign entities seeking to evade copyright claims brought against them pursuant to the FSIA's commercial activity exception. In *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277 (S.D.N.Y. 2001) (Lynch, J.), the court rejected an assertion of sovereign immunity raised by copyright-infringement defendants who were officials of a Jordanian governmental body, *id.* at 290. The *Leutwyler* defendants were accused of "furnishing photos taken by [the plaintiff] for use in the *Jordan Diary*, a publication that ha[d] been sold in the United States" in order to promote tourism to Jordan. *Id.* at 283, 291. Declining to consider the Jordanian defendants' alleged purposes of encouraging tourism in selling copies of the "diary," Judge Lynch explained that even if "the *purpose* of publishing the diary may have been governmental (disseminating information about Jordan and encouraging tourism), the *nature* of the activity (publishing and selling books) is clearly commercial." *Id.* Accordingly, the court concluded that the plaintiff "had sustained his burden of demonstrating that the [otherwise-immune Jordanian defendants had] engaged in certain 'commercial activity,' as that term is defined in § 1603(e), that could give rise to subject matter jurisdiction under the FSIA." *Id.* For the reasons explored above, this Court similarly concludes that the Welsh Government's alleged copying and distribution of Plaintiffs' copyrighted photos in connection with its promotional materials was a "commercial activity" as that term is used in the context of the FSIA—irrespective of the purposes underlying the Welsh Government's copying of those photos.

Finally, even with Plaintiffs having shown that their suit is "based upon a commercial activity carried on . . . by the" Welsh Government, Plaintiffs still must show that this conduct

was "carried on *in the United States*" in order to overcome the Welsh Government's assertion of sovereign immunity.[4] 28 U.S.C. § 1605(a)(2) (emphasis added). To do so, Plaintiffs are required to produce evidence showing that the Welsh Government's alleged commercial activities had "substantial contact with the United States." 28 U.S.C. § 1603(e).

In granting Plaintiffs leave to replead, the Court concluded that Plaintiffs' allegations, "taken as true, plausibly establish[ed] that the Welsh Government undertook significant actions in this district that are material to its allegedly unauthorized copying of Plaintiffs' photographs." (Dkt. No. 96 at 5.) But unlike at the motion-to-replead stage, the Court can no longer "draw all reasonable inferences in [Plaintiffs'] favor" in connection with the instant Rule 12(b)(1) motion to dismiss. *Figueroa*, 222 F. Supp. 3d at 307. Instead, because "jurisdictional facts are [now] disputed, the Court has the power and the obligation to consider matters outside the pleadings, such as affidavits, documents, and testimony, to determine whether jurisdiction exists." *Id.* Accordingly, the Court considers the extent to which the Second Amended Complaint's attached exhibits are sufficient to carry Plaintiffs' evidentiary burden of showing that the Welsh Government's commercial activities were "carried on in the United States," 28 U.S.C. § 1605(a)(2), particularly in light of the evidence now presented by the Welsh Government.

The Court concludes that Plaintiffs' evidence is sufficient to carry their burden. Most relevant to the Court's conclusion in this regard are the exhibits attached to Plaintiffs' Second

[4] Alternatively, Plaintiffs could make a showing under the statute's second and third prongs that their suit is "based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). But as the Court concludes that Plaintiffs have met their burden of showing that the commercial activities upon which their action is based were "carried on in the United States by the" Welsh Government, *id.*, the Court need not address these alternative bases for rejecting the Welsh Government's assertion of sovereign immunity.

Amended Complaint in which the Welsh Government itself represents that at least some of the infringing materials at issue in this suit were "developed by the Welsh Government in New York" and were available to order "for distribution free-of-charge . . . from the Welsh Government in New York." (*See* Dkt. No. 99-2 at 2–3.) Buttressing this conclusion is Plaintiffs' evidence showing that some of the Welsh Government's infringing materials were also published in the United States by United States news outlets in furtherance of the Welsh Government's attempts to promote tourism to Wales. (Dkt. Nos. 99-6–99-9.)

The most persuasive evidence submitted by the Welsh Government in support of its attempts to rebut this conclusion is the affidavit of Rob Holt, the Deputy Director of Tourism Development and Major Events of the Department of Economy, Skills and Natural Resources for the Welsh Government.[5] (Dkt. No. 107 ¶ 2.) Holt confirms that the Welsh Government does maintain an office in New York. (Dkt. No. 107 ¶ 3.) But Holt represents that the Welsh Government's activities in furtherance of its promotion of tourism and culture are conducted entirely from Wales (Dkt. No. 107 ¶ 6), and that the computer servers that host the webpages appended to Plaintiffs' Second Amended Complaint are also located in Wales (Dkt. No. 107 ¶ 7; *see also* Dkt. No. 99-4). Holt further represents that the Welsh Government never offered copies

[5] The other evidence the Welsh Government submits in disputing the applicability of the commercial activity exception is irrelevant to the Court's disposition of this question. The Welsh Government's remaining evidence relates either to the locus of Plaintiffs' alleged injury (*see, e.g.*, Dkt. No. 106-4), or to the purposes underlying the Welsh Government's promotion of tourism (*see, e.g.*, Dkt. Nos. 106-2–106-3, 107 at 4–31). The former category of evidence would be relevant to only the tortious act exception to the FSIA's general grant of sovereign immunity, *see* 18 U.S.C. § 1605(a)(5), and, for reasons already explored, the latter category of evidence does not shed any light on the commercial character of the Welsh Government's activities, because such a character "shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose," *id.* § 1603(d). Given that all that is left for the Court to determine is the question of whether this "action is based upon commercial activity carried on *in the United States* by a foreign state," *id.* § 1605(a)(2) (emphasis added), the Court need consider these categories of evidence no further.

of Plaintiffs' photos for sale or distributed them for profit, and that the Welsh Government expressly forbade its licensees from using Plaintiffs' photographs for "promotion of non-tourism related, non-inward investment related or commercial products." (Dkt. No. 107 ¶¶ 8–9; *see also* Dkt. No. 107 at 32.)

Many of Holt's representations are immaterial to the Court's inquiry at this stage: It does not matter whether Wales distributed copies of the photograph for sale or for profit, or only for purposes of promoting tourism. Instead, it matters only where the relevant copies of Plaintiffs' photos were made and distributed. In that respect, Holt's affidavit is conspicuous for what it fails to say. This is particularly true with respect to Holt's failure to call into questions Plaintiffs' allegations regarding some of the particular activities the "Welsh Government has engaged in and undertaken . . . in this District," which is of course located in the United States. (*See* Dkt. No. 99 ¶¶ 22–25.) As already discussed, Plaintiffs support these allegations with documentary evidence in the form of a walking tour mapped onto New York City streets (Dkt. No. 99-1), a map that would presumably be useful only if distributed in a manner that had "substantial contact with the United States," 28 U.S.C. 1603(e). These allegations are further supported by an exhibit consisting of a webpage published by the Welsh Government that includes copies of Plaintiffs' photos alongside an offer of sale of tickets to "the Official Dylan Thomas Walking Tour of New York," a tour the Welsh Government then describes as "a collaboration of the Welsh Government *in New York* and the family of Dylan Thomas." (Dkt. No. 99-2 (emphasis added).) In addition, that website explains that copies of the infringing materials are available to order "for distribution free-of-charge . . . from the Welsh Government *in New York*." (*Id.* (emphasis added).) Finally, that same website also confirms that the "Dylan Thomas Walking Tour of Greenwich Village" that is attached to Plaintiffs' Second Amended Complaint (Dkt. No. 99-1)

"was [also] developed by the Welsh Assembly Government *in New York*" (Dkt. No. 99-2 at 2 (emphasis added)).

Holt's affidavit fails to rebut what the exhibits to Plaintiffs' Second Amended Complaint persuasively demonstrate: that "the Welsh Government *in New York*" played an active role in the development and distribution of the promotional materials which included copies of Plaintiffs' photographs. (*Id.*) Moreover, Plaintiffs' other exhibits also corroborate Plaintiffs' allegation that "the Welsh Government contracted with private businesses located in New York City to publish, print, display, and distribute the Infringing Promotional Materials, including the infringing walk tour maps and infringing *Welsh in America* display panels." (Dkt. No. 99 ¶ 25; *see also, e.g.*, Dkt. Nos. 99-6–99-9 (evidence of Welsh Government's coordination with other United States news outlets).) Taken together, all of this evidence persuasively demonstrates that the Welsh Government's "commercial activity . . . [had] substantial contact with the United States." 28 U.S.C. § 1603(e).

In summary, the Court concludes that Plaintiffs have produced evidence that establishes that their claims are "based upon a commercial activity carried on in the United States by [a] foreign state," 28 U.S.C. §1605(a)(2), and that the Welsh Government has not carried its burden of "show[ing] that the alleged [commercial activity] exception does not apply [to its conduct] by a preponderance of the evidence." *Anglo-Iberia*, 600 F.3d at 175.

B. The Welsh Government's Remaining Contentions

1. International Comity

The Welsh Government briefly suggests that the doctrine of international comity calls for the dismissal of Plaintiffs' claims. (See Dkt. No. 106 at 14.)

The Second Circuit has described the doctrine of comity as "'amorphous' and 'fuzzy,'" and it has counseled that "even where the doctrine clearly applies[,] it 'is not an imperative

obligation of courts but rather is a discretionary rule of practice, convenience, and expediency.'" *Royal and Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006) (quoting *JP Morgan Chase Bank v. Altos Hornos De Mexico, S.A. DE C.V.*, 412 F.3d 418, 423 (2d Cir. 2005)). Among other things, the rule of "comity requires that the parties and issues in both litigations [be] the same or sufficiently similar, such that the doctrine of *res judicata* can be asserted." *Herbstein v. Bruetman*, 743 F. Supp. 184, 189 (S.D.N.Y. 1990). "[S]ince comity is an affirmative defense, [the party invoking comity] carrie[s] the burden of proving that comity [is] appropriate." *Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993).

In support of its suggestion that comity should dictate the outcome of the parties' dispute here, the Welsh Government submits to the Court a copy of a judgment issued by an Irish court that dismissed some claims raised by Pablo Star Media Ltd. against the Welsh Government. (*See* Dkt. No. 107 at 33.) But it is entirely unclear from that Irish judgment whether Pablo Star Ltd. was also a party to that suit, or whether Plaintiffs' claims failed because of a jurisdictional bar sufficiently similar to that at issue here to warrant *res judicata*. (*Id*.; *see also* Dkt. No. 107 at 41 (suggesting the possibility of Plaintiffs obtaining jurisdiction for their claims against the Welsh Government in another United Kingdom court).) The Welsh Government's passing suggestion that international comity warrants dismissal of Plaintiffs' claims before this Court is insufficient to carry its "burden of proving that comity [is] appropriate" in this case. *Allstate Life Ins. Co.*, 994 F.2d at 999.

2. Pablo Star Media Ltd.'s Dissolution

The Welsh Government presents for the first time in its reply brief evidence demonstrating that one of the Plaintiffs, namely Pablo Star Media Ltd., has been dissolved and may lack standing to proceed in this matter. (Dkt. Nos. 121 at 1, 121-1 ¶ 4, 121-1 at 3–4.) The Court notes that this evidence does nothing to rebut the standing of at least one Plaintiff to

proceed in this action. (*See* Dkt. No. 99 ¶¶ 9–10 (alleging that the action's other Plaintiff, Pablo Star Ltd., retains an independent right to pursue claims at issue in this suit).) Because "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* 547 U.S. 47, 52 n.2 (2006), and because courts "ordinarily will not consider issues raised for the first time in a reply brief," *McBride v. BIC Consumer Prod. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir. 2009), the Court declines to address the Welsh Government's belated contention regarding Pablo Star Media Ltd.'s dissolution. The Welsh Government is free to raise this issue again at a later stage of this case.

3. Plaintiffs' Berne Convention Claims

Finally, the Welsh Government moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all of Plaintiffs' claims brought under the Berne Convention. (Dkt. No. 106 at 1, 16–17.) However, Plaintiffs disclaim any attempt to state independent claims under the Berne Convention, and explain that their allegations regarding the Berne Convention are relevant only to their attempts to demonstrate a violation of international law sufficient to trigger the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3). (Dkt. No. 119 at 17–18; *see also* SAC ¶ 102.) Because Plaintiffs have disclaimed any attempt to state a claim in this action under the Berne Convention, the Welsh Government's Rule 12(b)(6) motion to dismiss Plaintiffs' claims brought under the Berne Convention is denied as moot.

IV. Conclusion

For the foregoing reasons, the Welsh Government's motion to dismiss is DENIED. The Welsh Government is directed to file an answer to the Second Amended Complaint within 21 days of the date of this Opinion.

The Clerk of Court is directed to close the motion at Docket Number 105.

SO ORDERED.

Dated: March 29, 2019
New York, New York

J. PAUL OETKEN
United States District Judge