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OPINIONS AND ORDERS

REHEARING ORDER

OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (MAY 29, 2024)

[PUBLISH]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUAN CARLOS EMDEN;
NICOLAS EMDEN; MICHEL EMDEN,

Plaintiffs—Appellants,

v.

THE MUSEUM OF FINE ARTS, HOUSTON,

Defendant—Appellee.

No. 23-20224

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-3348

Before: SMITH, HAYNES, and
DOUGLAS, Circuit Judges.

JERRY E. SMITH, *Circuit Judge*:

In the years leading up to World War II, the Nazis' persecution of European Jews forced Max Emden to sell his three Bernardo Bellotto replica paintings. After the war, the Monuments Men found

those paintings in a salt mine in Austria and began the restitution process.[1] One was shipped to the Netherlands to fulfill a claim forwarded by the Dutch Art Property Foundation (the "SNK") from a gallery in Amsterdam. But the SNK omitted one key detail: Bernard Bellotto had not painted the gallery's version.

Failing to recognize that it had received the wrong painting, the SNK adjudicated the competing claims of the gallery and of a former Netherlands resident. It determined that the latter's claim was stronger and shipped the painting to him in the United States. The painting eventually made its way to the Museum of Fine Arts in Houston (the "Museum"), where it resides.

Plaintiffs—Juan Carlos Emden, Nicolas Emden, and Michel Emden (collectively, the "Emdens")—are Max Emden's heirs, seeking to recover the painting. The district court dismissed their claim because of the act of state doctrine, reasoning that any evaluation would require it to question an action of the Dutch government—a foreign state. It would, and that is precisely what the act of state doctrine prohibits, so we affirm the dismissal.

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[1] The Monuments Men were a group of "scholar soldiers"—museum curators, art historians and professors, librarians, architects, and artists who were also U.S. military officers—acting to facilitate the restitution of art stolen by the Nazis.

I

A. Pre- and Intra-War

The dispute centers on two paintings—one owned by Max Emden and one by Hugo Moser—recovered from the Nazis after World War II.

1. Emden

Emden owned three paintings by Bernardo Bellotto, including a c. 1764 replica of Belloto's *The Marketplace at Pirna*. Because Bellotto had painted Emden's replica himself, it is known in art parlance as a "By Bellotto."

As they ascended to power, the Nazis persecuted and restricted Jews throughout Germany, pursuing even those non-residents who merely owned businesses or property there. Facing Nazi-induced financial distress, Emden was forced to part with his three paintings, selling them—at below-market prices—to an art dealer, who immediately resold them to the *Reichskanzlei* (Reich Chancellery) for inclusion in the *Führermuseum*.

2. Moser

Moser was a German art dealer and collector who purchased a replica of *The Marketplace at Pirna* in 1928. Though his copy was originally sold as a "By Bellotto," an unknown artist—not Bellotto—had painted it. Moser's copy is therefore known, in art parlance, as an "After Bellotto."

Moser fled Germany for the Netherlands when the Nazis came to power in 1933, bringing his After Bellotto *Pirna* with him. Several years later, just

ahead of the Nazi invasion, he fled the Netherlands, leaving the painting with an art restorer in Amsterdam. The painting then made its way to the Goudstikker Gallery, from which a Nazi art dealer purchased it for Hitler's *Führermuseum* in 1942.

B. Post-War

In 1945, the Monuments Men found Emden's three Bellotto paintings in a salt mine in Austria. Six months later, they recovered Moser's After Bellotto *Pirna* from a storage facility. The Monuments Men transferred all four paintings to the Munich Central Collecting Point ("MCCP") and analyzed each painting, attempting to ascertain each's artist, subject matter, and condition.

Under official American policy, the Monuments Men returned "readily identifiable" art to claimants through their respective allied governments.[2] In the Netherlands, those claims were received and processed by the SNK—a foundation created by the Dutch government. Though the SNK served as a repository for returned artwork, the Dutch government never decreed that the SNK owned the artworks in its possession.[3]

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[2] For a detailed recap of the United States's post-war restitution processes, *see Von Saher v. Norton Simon Museum of Art at Pasadena* (*Von Saher I*), 592 F.3d 954, 957–58, 962–63 (9th Cir. 2010).

[3] According to the Emdens, "[a]t the outset, the SNK's post-war creation was as a foundation to serve as a repository for returned artwork with no authority to transfer the works, and it operated outside existing government Ministries and departments." The First Amended Complaint also alleges an abbreviated, but troubled, history of the SNK, including the

After receiving a claim from the Goudstikker Gallery for the After Bellotto *Pirna*, the SNK submitted a request to the MCCP. Crucially, though, the SNK's request did not specify which version of the painting the Gallery had claimed. Instead, it merely referred to the *Pirna* as one "*by*" Bellotto. With only one By Bellotto *Pirna* at the MCCP, the Monuments Men responded to the SNK's request by shipping Emden's painting.

Upon its arrival in the Netherlands, Dutch Lieutenant Colonel Vorenkamp signed a custody receipt confirming its delivery to the SNK.[4] But, before it could restitute the painting to the Gallery, the SNK received a conflicting claim from Moser. After adjudicating the conflict in Moser's favor, the SNK shipped him what it believed was the After Bellotto *Pirna*—which was, in actuality, Emden's By Bellotto *Pirna*.[5]

It was not until 1949 that the Monuments Men discovered their error—they had sent Emden's By Bellotto *Pirna* to fulfill a claim for Moser's After Bellotto *Pirna*. The Monuments Men requested the Netherlands to return the painting, but it was too late: The painting was no longer in the SNK's custody,

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arrest of its head for fraud and grifting, a serious lack of expertise, and a "downright chaotic" administration.

[4] That receipt conditioned the delivery of the painting on the Netherlands's agreeing to restore any object that had been delivered to it by mistake.

[5] In 1952, Moser sold the By Bellotto *Pirna* to the American collector Samuel Kress, who, a year later, loaned the By Bellotto *Pirna* to the Museum, converting the loan into a donation in 1961.

and the Dutch government had begun winding down the entire foundation. So, the request went unfulfilled.

C. Modern Restitution Efforts

In recent years, the Emdens have attempted to restitute all three Bel-lotto paintings.

In 2019, the German Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property (the "Commission"), reviewed the Emdens' claim for restitution of the other two Bellotto paintings. The Commission's detailed ruling was unequivocal: The Nazis had caused Emden's financial hardship, forcing him to sell the paintings. Additionally, the Commission concluded that the Monuments Men had erroneously restituted Emden's By Bellotto *Pirna* to the Netherlands.

Perceiving the Commission's conclusion as confirming Max Emden's ownership of the painting at the Museum, the Emdens sued the Museum. The district court dismissed their first complaint without prejudice, relying on the act of state doctrine.[6] Though their amended complaint attributed more of the errors to the SNK than to the Dutch government, the court again applied the act of state doctrine, this time dismissing with prejudice.[7]

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[6] *See generally Emden v. Museum of Fine Arts, Hous.*, No. 4:21-CV-3348, 2022 WL 1307085 (S.D. Tex. May 2, 2022).

[7] *See generally Emden v. Museum of Fine Arts, Hous.*, No. 4:21-CV-3348, 2023 WL 3571973 (S.D. Tex. Apr. 24, 2023).

II

A. Standard of Review

We review a Federal Rule of Civil Procedure 12(b)(6) dismissal under the act of state doctrine *de novo*. *Spectrum Stores, Inc. v. Citgo Petro. Corp.*, 632 F.3d 938, 948 (5th Cir. 2011) (citing *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008)). "In undertaking this review, we take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff.'" *Id.* (quoting *Lane*, 529 F.3d at 557).[8] Still, the plaintiff must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). Upon a party's providing notice of an issue concerning the laws of a foreign state, we "may consider any relevant material or source"— including those "not submitted by a party"—about that foreign state's laws. FED. R. CIV. P. 44.1; *see also Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999).

B. Act of State Doctrine

A judicial creation rooted in separation-of-powers principles, the act of state doctrine bars American courts from "sit[ting] in judgment on the acts of the government of another [state], done within its own

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[8] Though we may not consider other materials beyond the pleadings, we may examine "any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citation omitted).

territory."[9] It "limits, for prudential rather than jurisdictional reasons, the adjudication in American courts of the validity of a foreign sovereign's public acts."[10] The doctrine "is a vital rule of judicial abstention in the field of foreign relations."[11] That is because "juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government."[12]

The act of state doctrine applies "even if the defendant is a private party, not an instrumentality of a foreign state, and even if the suit is not based specifically on a sovereign act."[13] When applicable, it "provides . . . a substantive defense on the merits."[14]

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[9] Spectrum Stores, 632 F.3d at 954 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)); *see also W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964), superseded in part by 22 U.S.C. § 2370(e)(2); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309 (1918); *see generally* GEORGE A. BERMANN & DONALD E. CHILDRESS, TRANSNATIONAL LITIG. IN A NUTSHELL 179–93 (2d ed. 2021); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 441 (AM. L. INST. 2024).

[10] *Walter Fuller Aircraft Sales, Inc. v. Republic of Phil.*, 965 F.2d 1375, 1387 (5th Cir. 1992) (citing *W.S. Kirkpatrick*, 493 U.S. at 404); *see also Banco Nacional*, 376 U.S. at 418 (quoting *Ricaud*, 246 U.S. at 309) (The act of state doctrine "does not deprive the courts of jurisdiction once acquired over a case."); *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004).

[11] *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 55–56 (5th Cir. 1979).

[12] *Spectrum Stores*, 632 F.3d at 954 (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972)).

[13] *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 796 (5th Cir. 2017) (quoting *Callejo v. Bancomer, S.A.*,

III

The Emdens contend that the By Bellotto *Pirna* belongs to them because Moser never obtained good title to it. Passing judgment on the merits of that claim requires us first to resolve whether the act of state doctrine applies. Specifically, we must determine whether the SNK's transmission of the painting was an act of the Dutch government.[15]

According to the Emdens, the act of state doctrine does not apply for four reasons: *First*, there was no act of state because the SNK believed it was restituting the After Bellotto *Pirna*. *Second*, the SNK illegitimately, and therefore, necessarily, unofficially delivered the By Bellotto *Pirna* to Moser. *Third*, U.S. and Dutch foreign policy favors restituting stolen art. *Fourth*, the Dutch government's acts did not occur exclusively within its territorial boundaries.

We reject each of those theories. *First*, the SNK's shipping of the misidentified painting is an act of state. *Second*, the foundation had sufficient governmental trappings—and has been recognized as an official actor—such that we cannot call its actions unofficial. *Third*, the prudential concerns laid out in *Banco Nacional* tilt in favor of finding an implied negative foreign relations impact. *Fourth*, all the actions necessary to transfer the painting to Moser

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764 F.2d 1101, 1113 (5th Cir. 1985)).

[14] *Spectrum Stores*, 632 F.3d at 949 (quoting *Altmann*, 541 U.S. at 700).

[15] That the Netherlands is not a party to the suit is of no moment. *See supra* note 13 and accompanying main text.

occurred within the Netherlands. Therefore, the district court properly applied the act of state doctrine.

A. Whether There Was an Act of State

The SNK knew only that it had a replica of Bellotto's *Marketplace at Pirna*. Ignorant of whether the copy was a By Bellotto or an After Bellotto, the SNK unknowingly assumed it was the latter when adjudicating its ownership and shipping the painting to Moser. Therefore, the Emdens aver, the SNK did not undertake any action with respect to the By Bellotto *Pirna*.

The district court, rejecting that contention, explained that "the Dutch government['s] *mis*identif[ying] the painting does not undermine the Act of State doctrine's relevance to the present matter" because any ruling still must ask "whether the [foreign] government's conveyance should be 'undone or disregarded.'"[16]

On appeal, the Emdens maintain that the misidentification precluded any action by the SNK on the By Bellotto *Pirna*. Relying on several in- and out-of-circuit cases, they submit that the act of state doctrine bars only the review of an act's *validity*—not its *effect*.

The Emdens primarily rely on *Geophysical Service* for the proposition that our court evaluates the "effect" of an action separately from its "validity." In that case, a Canadian company sued its Texas-based

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16 2022 WL 1307085, at *5–6 (quoting *W.S. Kirkpatrick*, 493 U.S. at 407) (cleaned up); *see also id.* (citing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303–04 (1918); *Ricaud*, 246 U.S. at 310).

competitor, alleging violations of U.S. copyright law by, *inter alia*, importing copies of the company's seismic line data. 850 F.3d at 788–89. But the competitor received that data from a Canadian agency that was authorized, under Canadian law, "to release it to members of the public upon specific request." *Id.* at 788. In defense, the competitor asserted that the "first-sale doctrine" applied and that the act of state doctrine prevented judicial inquiry into whether its copy was "lawfully made." *Id.* at 793; 17 U.S.C. § 109. The district court agreed, reasoning that any finding to the contrary would have the effect of "deciding that a foreign government acted unlawfully." 850 F.3d at 796.

We reversed, clarifying that the doctrine did not bar review of issues *collateral to* an act of state. "[E]ven if . . . the copies were not 'lawfully made under [U.S. copyright law],' that . . . determination [would] not speak to the validity of the Canadian government's actions . . . . " *Id.* at 797. Nor would that determination speak to the legal effectiveness of the agency's transmitting that data to third parties. Instead, it would resolve only questions of liability arising from that third party's *using* the data in a way that violates U.S. copyright law. In short, the Canadian agency—by distributing copies of the seismic data—did not purport to insulate the recipients of those copies from liability under U.S. copyright law. So, holding a recipient liable for copyright infringement would resolve only the "effect" of the Canadian agency's act in the United States and would not question its validity.

The Emdens interpret *Geophysical Service* as going further, though. In their view, it adopts *United States v. Portrait of Wally*, 663 F. Supp. 2d 232

(S.D.N.Y. 2009), in full, such that we can, and must, review any effect of an act of state. *See Geophysical Serv.*, 850 F.3d at 797.

In *Portrait of Wally*, the New York district court traced a detailed history of that painting's provenance—one not unlike the By Bellotto *Pirna*'s. Bondi, a European Jew, allegedly sold the painting under duress in the prelude to World War II. 663 F. Supp. 2d at 237–39. The U.S. government later recovered the painting and transferred it to the Austrian Federal Office for the Preservation of Historical Monuments ("BDA"). *Id.* at 240.[17] Subsequently, the BDA erroneously restituted *Wally* to the claimant for a different piece of art, entitled *Portrait of his Wife*. *Id.* at 241. Later that same year, an Austrian national gallery bought *Wally* under the name *Portrait of a Woman*. *Id.*

Four years later, a collector bought *Wally*, under its actual name, from the national gallery and later sold his collection to the Leopold Museum in Vienna. *Id.* at 243–45.[18] In 1996, the Leopold loaned *Wally* to the Museum of Modern Art in the United States. *Id.* at 246. After the exhibit ended—but before the Museum of Modern Art shipped *Wally* back—the United States brought a forfeiture action against the painting. *Id.*

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[17] Like the SNK faced difficulties in differentiating between the After and By Bel-lotto *Pirna*s, the BDA struggled to tell *Wally* apart from the painter's *Portrait of his Wife*. *See Portrait of Wally*, 663 F. Supp. 2d at 240–42.

[18] As part of its act of state defense, the Leopold alleged that the Austrian government had to approve both the national gallery's purchase and sale of *Wally*. *Id.* at 248.

The district court rejected the act of state defense, offering three rationales. *First*, it held that it was "not being asked to *invalidate* any action by an Austrian governmental authority, but only to determine the effect of such action, if any, on *Wally*'s ownership." *Id.* at 248 (citing *W.S. Kirkpatrick*, 493 U.S. at 409–10). *Second*, it cast doubt on any claims that the "approvals" were official acts as "the [Leopold] has submitted nothing to show that the BDA, the Austrian Ministry of Finance, or the Austrian Federal Ministry of Education had any authority to dispose of artwork other than through the Restitution Commissions." *Id.* (cleaned up). *Third*, "and perhaps most importantly, the [Leopold had] offer[ed] nothing to alter [the] determination [made in an earlier denial of the motion to dismiss] that the balance of interests favors adjudication of this action."[19]

If *Portrait of Wally* bound us, the Emdens would be correct—the act of state doctrine would not bar an inquiry into whether the Museum had converted the By Bellotto *Pirna*. But we and the Emdens read *Geophysical Service* differently. True, as part of its discussion of the act of state doctrine, *Geophysical Service* noted that *Portrait of Wally*'s holding was "persuasive" and even analogized to it. 850 F.3d at 797. Yet that does not end the matter. Similarity as

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[19] *Id.* (citing *United States v. Portrait of Wally, A Painting By Egon Schiele*, No. 99 CIV. 9940, 2002 WL 553532, at *9 (S.D.N.Y. Apr. 12, 2002) ("An inquiry into the BDA's shipment of a painting under the post-war Austria regime would not impinge upon the executive's preeminence in foreign relations, particularly where the restoration of ownership has always been a professed goal of Austrian law and where it is the executive branch itself that brings this forfeiture action . . . . ")).

to outcome is in no way an endorsement of the *ratio decidendi* underlying *Portrait of Wally*. *Geophysical Service*'s analogy merely assumed, without deciding, that the New York district court's "considering the rightful ownership of the portrait" would not "invalidate any action by [the foreign governmental authority]." *Id.* (cleaned up). On the other hand, in this case, we could consider whether the Emdens are the rightful owners only by calling into question the validity of the Dutch government's actions when the SNK sent the painting to Moser. That we may not do so is confirmed by precedent in our own circuit, our sister circuits, and the Supreme Court.

In *Walter Fuller Aircraft Sales*, the act of state doctrine did not bar us from resolving an ownership dispute over a jet aircraft—even though the defendants were foreign governments. 965 F.2d at 1388. We so ruled because the case "ha[d] nothing to do with title to the aircraft, but [wa]s instead a damages action arising from a contract breach." *Id.* So there was no need to "adjudicate the validity of any of the public acts" of the defendant governments. *Id.* Indeed, as *Walter Fuller* explained, "all the public acts and decisions cited by the defendants may be valid and yet the [government party] still may have breached the contract." *Id.*

In *Celestin v. Caribbean Air Mail, Inc.*, 30 F.4th 133 (2d Cir. 2022), the court similarly reversed the dismissal of an antitrust claim related to price-fixing for remittances and phone calls between the United States and Haiti. The act of state doctrine did not apply because "no official act of Haiti must be deemed invalid for liability to attach under federal law." *Id.*

at 135; *see also id.* at 142–43 (citing *W.S. Kirkpatrick*, 493 U.S. at 405–06).

The act of state doctrine did not bar review in *Walter Fuller* and *Celestin* because the issues presented were collateral to the validity or legal effect of the foreign state act. At issue in *Celestin* was the unlawful motivation behind the foreign state action—not its validity. *Id.* at 144.[20] Similarly, *Walter Fuller* dealt with the enforcement of the terms of a valid contract—not the question of whether the parties, one of which was a foreign state actor, had the capacity to enter that contract in the first place. *See* 965 F.2d at 1388. So, as in *Geophysical Service*, the act of state doctrine did not bar review.

But those claims are quite different from the Emdens'. The act of restitution legally established the owner and possessor of the By Bellotto *Pirna*. The SNK could not have sent the painting without concurrently determining its rightful owner. Thus, any evaluation of the *effect* of the SNK's act intrinsically implicates its *validity*.

The decision in *W.S. Kirkpatrick* puts the final nail into the coffin of the Emdens' theory. Per the Supreme Court, the act of state doctrine applies "when a court *must decide*—that is, when the outcome of the case turns upon—the *effect* of official action by a foreign sovereign." 493 U.S. at 406 (second emphasis

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[20] *See also* 30 F.4th at 140 (declining to apply the act of state doctrine even after "assum[ing] that a foreign state's official acts executed within that state's territory are valid in that they have the legal effects—like transfers of title, assumptions or repudiations of contractual obligations, and grants of public authority—that they purport to have").

added). That is fundamentally incompatible with the reasoning underlying *Portrait of Wally*. So, like the district court, we decline to adopt the *ratio decidendi* of *Portrait of Wally*.

The SNK shipped the By Bellotto *Pirna* to Moser. Any adjudication of the shipping's effect on the painting's ownership would call into question the validity of that act.

The Emdens' first claim fails.

B. Whether the Act Was Official

The Emdens next assert that, even if the SNK "acted" by delivering the By Bellotto *Pirna* to Moser, the SNK lacked state-granted legitimacy, making its act unofficial: Not only did the Dutch government never give the SNK official authority to transfer any paintings, but also the SNK arose from a morass of laws and found legal clarity only in those cases it appealed to the courts and official ministries.

Further, the Emdens assert, the Dutch State Secretary for Education, Culture, and Science has since renounced the SNK, calling it "not a decision-making body" and explaining that the Dutch government only considers "a restitution case settled if the claim for restitution has consciously and deliberately resulted in a settlement or if the claimant has waived the claim for restitution."

The Museum responds to the alleged renunciation by averring that those attributed statements are conclusory and unsupported, a position the district court found compelling. 2023 WL 3571973, at *2. We concur. The Emdens' pleadings lack sufficient support to assert plausibly that the Dutch government has

renounced the SNK. *See Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

1. The Dutch Royal Decrees and the Von Saher Trilogy

As for the SNK's alleged illegitimacy, we turn to our sister court's thorough analysis of Dutch Royal Decrees E100 and E133 in the *Von Saher* trilogy to refute that position.

At the end of World War II, the Dutch government issued Royal Decrees E100 and E133: Royal Decree E100 "established a Council for Restoration of Rights ('the Council'), with broad and exclusive authority to declare null and void, modify, or revive 'any legal relations that originated or were modified during enemy occupation of the [Netherlands].'" *Von Saher v. Norton Simon Museum of Art at Pasadena* (*Von Saher III*), 897 F.3d 1141, 1144 (9th Cir. 2018) (alteration in original). "The Council had the exclusive power to order the return of property and to restore property rights to the original Dutch owners." *Id.* Royal Decree E133 permitted the Netherlands to "expropriate enemy assets in order to compensate the Netherlands for losses it suffered during World War II" and "automatically passe[d]" enemy property "in ownership to the State . . . . " *Id.* at 1145.

Combined, those two decrees created a system by which the Dutch government automatically expropriated Dutch property stolen by the Nazis under E133 and then undid that expropriation and revested rights in the original owner or his/her heir(s) under E100.[21] Until its dissolution, the SNK handled

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[21] *See* Lars van Vliet, The Dutch Postwar Restoration of Rights

the restitution process under these decrees. *See Von Saher v. Norton Simon Museum of Art at Pasadena* (*Von Saher II*), 754 F.3d 712, 717–18 (9th Cir. 2014).

In the *Von Saher* trilogy, the Ninth Circuit thrice ruled on a dispute like the one before us. Von Saher was the only surviving heir of Jacques Goudstikker. *Von Saher I*, 592 F.3d at 959. The Norton Simon Museum had obtained a diptych painted by Lucas Cranach the Elder, which Von Saher asserted had been looted by the Nazis from Goudstikker's collection. *Id.* Then, after the war, the Allies sent the diptych to the MCCP, and it was returned to the Netherlands. *Id.* But "after restitution proceedings in the Netherlands, the Dutch government delivered the two paintings to" another claimant in the 1960s. *Id*.

In *Von Saher III*, the court affirmed the summary judgment for the museum on act-of-state grounds. 897 F.3d at 1156. The court focused its analysis on "whether the conveyance constituted an official act of the sovereign." 897 F.3d at 1149 (cleaned up). As it explained, "the Netherlands passed Royal Decrees E133, to expropriate enemy property, and E100, to administer a system through which Dutch nationals filed claims to restore title to lost or looted artworks." *Id.*

Then, the court confirmed that "[e]xpropriation of private property is a uniquely sovereign act." *Id.* at 1150. It further agreed with the Norton Simon Museum's contention that the "Netherlands considered itself the lawful owner of the works sold to [Nazi

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Regime Regarding Movable Property, 87 LEGAL HIST. REV. 651, 651 (2019).

Reichsmarschall Hermann Goering] and acted as their true owner" when it "agree[d] to convey them to" the latter claimant. *Id.* (cleaned up). "Considered holistically, the administration of E100 and E133, the settlement with [V]on Saher's family, and the conveyance of the Cranachs to [the latter claimant] in consideration of his restitution claim constitute an official act of state . . . . " *Id.* at 1151.[22]

There is no reason to reach any different conclusion here. The SNK effectuated E100 and E133 until its dissolution, meaning that its "administration of [those decrees] . . . and the conveyance of the [By Bellotto *Pirna*] to [Moser] in consideration of his restitution claim constitute[d] an official act of state . . . . " *Id.* That the court in *Von Saher III* had additional grounds on which it could support its decision that the restitution was an official act, *see supra* note 22, and that the ultimate restitution process it described occurred after the SNK folded has no impact on our analysis.[23] The SNK was the *de facto* arm of the Dutch government handling restitution, and both

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[22] The Ninth Circuit also considered the impact of the Dutch Court of Appeals's 1999 refusal to restore Von Saher's rights to the paintings, 897 F.3d at 1151, and the Dutch government's 2004 "binding decision on [the] restitution claim that . . . concluded that the [V]on Saher claim was 'settled' by the 1999 'final decision' of the Court of Appeals," *id.* at 1153 (emphasis omitted).

[23] Similarly, that the *Von Saher* trilogy never dealt with any issues of mistaken identity—the latter claimant and Von Saher both asserted ownership over the same piece of art and the Dutch government ruled on that same piece of art—does not affect its analysis of the Royal Decrees.

expropriation and restitution are expressly governmental actions.[24]

The Emdens instead point to *Von Saher III*'s discussion of the Dutch government's 2001 Restitution Committee, contending that we should adopt that analysis alone and hold that the SNK's determination was similarly unofficial. *See id.* at 1152–53. But their comparison is inapt.

The Dutch government did change its approach to restitution in 2001. *Id.* at 1152. But

> the new restitution policy was not an official pronouncement that the previous Dutch policy was however invalid. Nor was the new policy established to re-examine old cases. Far from it, the new policy categorically did not apply to "settled cases," defined as those in which "either the claim for restitution resulted in a conscious and deliberate settlement or the claimant expressly renounced his claim for restitution."

Id. The new committee merely recommended to the State Secretary actions to take on new restitution claims. *Id.* Von Saher claimed that such recommendations were subsequent acts of state, but the Ninth Circuit disagreed: They were purely advisory, which meant they were not acts of state. *Id.* at 1153 (citations omitted).

Contrary to the Emdens' claims, that new approach to restitution has no impact on our review of the SNK's actions here. Once the SNK decided to

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[24] *See Von Saher III*, 897 F.3d at 1150 (citing *Oetjen*, 246 U.S. at 303); *id.* at 1154.

ship the By Bellotto *Pirna*, it did so. It did not need the Dutch State Secretary to approve its decision. Thus, the SNK's decisions were not advisory; they were executory.

2. Alternate Grounds

Even if we chose not to rely on *Von Saher III* and the Royal Decrees, we would still affirm.

The district court ruled that a sentence from the Short General History portion of the 1998 "Origins Unknown report" on the SNK indicated that it was an official actor because it had been "set up by [both] the Ministry of Education, Arts[,] and Sciences and the [M]inistry of Finance." 2023 WL 3571973, at *3.[25] The Emdens respond by suggesting that the historical context of the SNK—namely, that it was a "separate organization" from the Ministries and that it was not funded by them—demonstrates that the district court erred. Further, they contend that the court gave improperly short shrift to the First Amended Complaint's allegations.

But the Origins Unknown report includes not only the "set up" phrase. It also details how the SNK

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[25] The Origins Unknown project was created by the Dutch government "to trace the original owners of the artwork in [the Dutch government's] custody." *Von Saher II*, 754 F.3d at 717; *see generally* EKKART COMM., ORIGINS UNKNOWN REPORT ON THE PILOT STUDY INTO THE PROVENANCE OF WORKS OF ART RECOVERED FROM GERMANY AND CURRENTLY UNDER THE CUSTODIANSHIP OF THE STATE OF THE NETHERLANDS (Apr. 1998). The Emdens quoted the report in their amended complaint, and the museum attached it to the motion to dismiss, making the district court's and our consideration of the entire document proper. *See Lone Star Fund V*, 594 F.3d at 387.

worked within the Dutch government's post-war restitution program. A body set up by the government, operating within it, and exercising governmental powers—even if not funded by it—is best categorized as an official actor. The SNK meets those criteria.

The pleadings further support that understanding. They state that the SNK was *the* restitution agency for the Netherlands: It could request allegedly Dutch art from the MCCP; the foundation's representative was a Dutch military officer, and he signed off on behalf of the government; and the SNK submitted Dutch Declaration Form 7056—an official Dutch government form—to claim paintings from the MCCP. Set up as it was and exercising its powers as it did, the SNK was an official actor.[26]

The Emdens' second claim fails.

C. Whether There Would Be a Negative Impact on Foreign Relations

The Emdens contend, third, that the consensus between U.S. and Dutch foreign policies supports our not applying the act of state doctrine. They point to the U.S. government's advocating for the return of looted art to victims, and, more broadly, to the U.S.'s and Netherlands's embrace of the Washington Prin-

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[26] We make that determination, of course, for the sake of this case only. We do not claim competence to evaluate the legal structure of a foreign government if such is disputed.

Even accepting, *arguendo*, that the Dutch government has disavowed the SNK in some way, the Emdens lack sufficient citations to suggest that the SNK was not an official actor in the 1940s. If they care to do so, they likely must pursue such a claim in the Netherlands.

ciples.[27] Thus, they contend, even if the SNK performed an official act in shipping the By Bellotto *Pirna*, "the policies underlying the . . . doctrine may not justify its application."[28]

The Museum offers two rebuttals. First, it points to the Dutch government's modern-day process for revoking post-war restitution decisions. In its telling, the failure to use that process suggests that government's implicit endorsement of the SNK's restitution decision. Second, the Museum contends the policies underlying the act of state doctrine explicated in *Banco Nacional*, and quoted in *Von Saher III*, support applying the doctrine. Those policy considerations are

> (1) The greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.
>
> (2) The less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. (3) The balance of

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[27] *See* U.S. DEPARTMENT OF STATE, WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART (1998), https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.

[28] *Von Saher III*, 897 F.3d at 1155 (quoting *W.S. Kirkpatrick*, 493 U.S. at 409); *see also Geophysical Serv.*, 850 F.3d at 797 ("We are unable to see . . . how passing on TGS's first sale defense will 'imperil the amicable relations between governments and vex the peace of nations.'" (quoting *Jimenez v. Aristeguieta*, 311 F.2d 547, 558 (5th Cir. 1962))).

> relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence.[29]

In *Von Saher III*, all three policy considerations weighed in favor of applying the act of state doctrine: There was no "identified . . . international consensus regarding the *invalidity* of the Dutch post-war restitution procedures," and "the State Department and Solicitor General's Office confirmed . . . that upholding the Dutch government's actions is important for U.S. foreign policy." *Id.* at 1155. Further, the Dutch government had "been in continuous existence since the relevant acts of state." *Id.* at 1156.

Here, the second consideration may tilt slightly against applying the act of state doctrine. Still, the other two outweigh the second. So, the policy considerations encourage the application of the doctrine.

As was true in *Von Saher III*, the Emdens have not alleged any form of codification concerning the area of law. But, they contend the respective governments have reached a semblance of a consensus on international restitution law with the Washington Principles: The United States has called out American museums for blocking restitution through the use of affirmative defenses in contravention of the Washington Principles;[30] the Dutch government has joined the

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29 *Von Saher III*, 897 F.3d at 1155 (quoting *Banco Nacional*, 376 U.S. at 428) (cleaned up).

30 U.S. policy includes the following tenets:

> (1) a commitment to respect the finality of 'appropriate actions' taken by foreign nations to facilitate the internal restitution of plundered art;

United States in adopting the Washington Principles; and the Dutch government has even changed the Dutch art restitution policy to favor museums over individual victims no longer. We read those allegations together to assert that our foreign relations will be immune from, if not benefited by, a review for consistency with the Washington Principles.

Still, consensus regarding the Washington Principles does not equate to consensus casting doubt on the Dutch post-war restitution process. The closest the Emdens come to making such an allegation is where they describe the United States as having "criticized as contrary to the Washington Principles the Dutch government's restitution analysis for *adding in a new* 'balancing' test." First Am. Compl. ¶ 79 (emphasis added). In other words, even assuming that the restitution decisions may not have been "just and fair solutions" under the Washington Principles, the Emdens have still not shown that they were invalid at the time they were made.

We turn to the second consideration. Read charitably, *but see supra* note 26, the Emdens claim that

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(2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of prewar owners and their heirs; (3) the encouragement of prewar owners and their heirs to come forward and claim art that has not been restituted; (4) concerted efforts to achieve expeditious, just and fair outcomes when heirs claim ownership to looted art; (5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and (6) a recommendation that every effort be made to remedy the consequences of forced sales.

the Dutch government has disavowed the SNK and its restitution proceedings. Thus, the Emdens' claim may differ from Von Saher's claim in that upholding the Dutch government's actions is "[*un*]important for U.S. foreign policy." 897 F.3d at 1155. Whether the Emdens have sufficiently pleaded that fact, though, is irrelevant. The Dutch government still exists, so, as in *Von Saher III*, the third factor tilts towards our applying the act of state doctrine.

Therefore, though the United States and the Netherlands have expressed a desire to restitute stolen art properly, the policy justifications underlying the act of state doctrine still justify our applying it here. The Emdens have pleaded little-to-no codification concerning, or consensus regarding, the validity of the SNK's decisions; the Dutch government still exists; and the Dutch have not sought to disclaim the SNK's actions regarding the By Bellotto *Pirna* nor proceeded through the Netherlands's alternative recovery process for wrongly restituted art. We conclude that adjudicating the Emdens' claim could create a negative impact on foreign relations, even if a limited one. And that is exactly what the act of state doctrine prohibits.

The Emdens' third claim fails.

D. Whether the Act Was Extraterritorial

Fourth, the Emdens assert that the Dutch government did not act *solely within* the Netherlands. The By Bellotto *Pirna* moved from Austria to the MCCP, to the Netherlands, to the United States—all, the Emdens claim, in a single transaction. Because the act of state doctrine applies only to a sovereign's "act within its own boundaries," *Ricaud*, 264 U.S. at 310,

they contend that the multi-national nature of the transaction prevents the doctrine's application.

True, the act of state doctrine includes a territoriality requirement. American courts may, where otherwise proper, sit in judgment on acts of foreign governments that occurred in the United States. *See Geophysical Serv.*, 850 F.3d at 796 (citing *W.S. Kirkpatrick*, 493 U.S. at 405). But that is not what happened here. The sole extraterritorial action was the ultimate delivery of the By Bellotto *Pirna* to Moser. Even if we focus only on the shipment of the painting—not the adjudication of the competing claims—the shipping occurred in the Netherlands. Therefore, the territoriality requirement is met.

The Emdens cite *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021 (5th Cir. 1972), to contend that the act of state doctrine does not bar claims where the property sought is sited in the United States. That case focused on whether Cuba's expropriation of a beer and "malta" company's assets included its United States trademark. 462 F.2d at 1023. We ruled that the act of state doctrine did not bar our review of that expropriation because "trademarks registered in this country are generally deemed to have a local identity—and situs—apart from the foreign manufacturer." *Id.* at 1026 (internal quotation marks and citation omitted).

But those facts make the Emdens' claims entirely distinguishable. The "act" here occurred purely in the Netherlands because the "act" was the shipping of the By Bellotto. In other words, the conveyance "c[a]me to complete fruition" in the Netherlands. *Id.* at 1028. Thus, the Emdens' claim is more like the expropriation of sugar that occurred in *Banco Nacional*

than like the transfer of the trademark in *Maltina*. *Compare Maltina*, 462 F.2d at 1028, *with Banco Nacional*, 376 U.S. at 413–15.

The Emdens' fourth claim fails.

IV

Alternatively, the Emdens ask us to reverse the dismissal of their Declaratory Judgment Action alleging Texas state law claims. They contend that, even if the act of state doctrine prevents their recovery of the By Bellotto *Pirna*, they still should be able to pursue declaratory relief.

But their request shows exactly why we must affirm the district court's ruling on this too. The Emdens request a declaration that they are the "sole, joint owners of the" By Bellotto *Pirna* and that the Museum's possession constitutes conversion and theft under Texas state law. If we allowed that claim to go forward, and if the Emdens prevailed, the declaratory judgment would inherently cast doubt on the validity of the Dutch government's actions. Worse, it would undercut our application of the act of state doctrine while leaving the Emdens without recompense.

The Emdens' fifth claim fails.

* * * * *

The most straightforward and charitable reading of the Emdens' complaint inevitably requires a ruling by a U.S. court that the Dutch government invalidly sent Moser the By Bellotto *Pirna*. The Emdens may be right: The Monuments Men may have improperly sent the By Bellotto *Pirna* to the SNK; the SNK may have unjustifiably sent Moser the By Bellotto *Pirna*

even though he had a claim to only the After Bellotto *Pirna*; and the Museum may be violating the Washington Principles by refusing to return the painting to the Emdens.

But, per the act of state doctrine, it is not our job to call into question the decisions of foreign nations. As pleaded, the SNK's shipping Moser the By Bellotto *Pirna* is an official act of the Dutch government. The validity and legal effect of that act is one that we may not dispute.

The judgment of dismissal is AFFIRMED.

MEMORANDUM & ORDER, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS (SIGNED APRIL 20, 2023, ENTERED APRIL 24, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUAN CARLOS EMDEN ET AL,

Plaintiffs,

v.

THE MUSEUM OF FINE ARTS, HOUSTON,

Defendant.

Civil Action No. 4:21-CV-3348

Before: Keith P. ELLISON,
United States District Judge.

MEMORANDUM & ORDER

Pending before the Court is Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Plaintiffs' Motion to Disqualify. (ECF Nos. 45, 49). The Court held a hearing on Defendant's Motion to Dismiss on February 23, 2023. At that hearing, the Court took the Motion under advisement. After considering the Motion, the Parties' briefs, oral arguments, and all applicable law, the Court now determines

that Defendant's Motion (ECF No. 45) should be GRANTED WITH PREJUDICE and provides this Memorandum & Order to document its rulings and reasoning.

I. BACKGROUND

The factual background of the dispute is set forth in the Memorandum and Order (ECF No. 38) issued by this Court on May 2, 2022. The extensive discussion in the May 2022 Order will not be repeated here, but is incorporated by reference. The Court acknowledges that the Plaintiffs' First Amended Complaint attributes the restitution of the painting to the Netherlands Art Property Foundation ("SNK"), rather than the Dutch government.

II. LEGAL STANDARD

a. Motion to Dismiss

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, a court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must

contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

In determining whether to grant a motion to dismiss, a court cannot look beyond the pleadings. *Peacock v. AARP, Inc.*, 181 F. Supp. 3d 430, 434 (S.D. Tex. 2016) (citing *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999)). However, when the motion to dismiss contains exhibits that are referenced in the plaintiff's complaint and central to the pleadings, they are part of the pleadings, and the court may consider them in ruling on the motion. *Johnson v. Bowe*, 856 F. App'x 487, 490-92 (5th Cir. 2021); *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). A plaintiff is under no obligation to attach to her complaint documents upon which her action is based, but a defendant may introduce certain pertinent documents if the plaintiff failed to do so. *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n. 3 (1st Cir.1991) (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1327 at 762–63 (2d ed.1990)).

When a party presents "matters outside the pleadings" with a Rule 12(b)(6) motion to dismiss, the Court has discretion to accept or to exclude the evidence for purposes of the motion to dismiss. *Isquith ex rel. Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 194 n. 3 (5th Cir.1988). However, per Fed. R. Civ. P. 12(d), if documents outside of the pleadings are placed before a district court, and not excluded, the court must convert the defendant's 12(b)(6) motion to one for summary judgment and afford the plaintiff an opportunity to submit additional evidentiary mate-

rial of his or her own. *Carter v. Stanton*, 405 U.S. 669, 671 (1972) (per curiam).

b. The Act of State Doctrine

Under the Act of State doctrine, "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The doctrine is grounded in the principle that "juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972). The doctrine thus overlaps in many respects with the political question doctrine, as it is rooted in constitutional separation-of-powers concerns. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). It recognizes "'the thoroughly sound principle that on occasion individual litigants may have to forgo decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of [United States] foreign policy.'" *Callejo v. Bancomer*, 764 F.2d 1101, 1113 (5th Cir. 1985) (quoting *First Nat'l City Bank*, 406 U.S. at 769).

"For Act of State [] purposes, the relevant acts are not merely those of the named defendants, but *any* governmental acts whose validity would be called into question by adjudication of the suit." *Callejo*, 764 F.2d at 1115, 1116 (emphasis added). The burden lies on the proponent of the doctrine to establish the factual predicate for the doctrine's application. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976).

As described previously, Plaintiffs claim that the Dutch government's receipt and subsequent restitution to Hugo Moser of "The Marketplace at Pirna" was the result of a clerical error by the Dutch. (ECF No. 45 at ¶ 7). Therefore, Plaintiffs contend that the Dutch government's conveyance of the painting to Hugo Moser was of no effect because Mr. Moser did not have a true right of ownership or possession in the painting; it follows then, that Mr. Moser could not pass good title to the Kress Foundation, and the Foundation could not pass good title on to Defendant. (ECF No. 45 at ¶ 100). Defendant claims that Plaintiffs' asserted ownership claims explicitly depend on this Court's invalidation of the Dutch government's official action when it restituted "The Marketplace at Pirna" to Hugo Moser; as such, the Act of State would prevent such invalidation by this Court.

III. DISCUSSION

The question before the Court is whether Plaintiffs have sufficiently plead facts to establish that the SNK is a different entity from the Dutch government, which results in Plaintiffs' claims no longer implicating the Act of State doctrine.

a. SNK & The Dutch Government

With these principles in mind, the Court turns to Plaintiffs' arguments. First, Plaintiffs allege that there is no reason to invalidate the actions of the Dutch government because the Dutch government made a decision only about the "After Bellotto" and not the "The Marketplace at Pirna." However, the Court already rejected this argument in its decision on the first Motion to Dismiss stating, "[P]laintiffs'

allegation that the Dutch government misidentified the painting does not undermine the Act of State doctrine's relevance to the present matter, particularly where plaintiffs do not allege that the Dutch agree about the claimed misidentification." (ECF No 38 at 11-12).

Second, Plaintiffs argue that the transfer of the Emden 1025 Pirna did not constitute an "official act" because the SNK lacked authority to bind the Dutch government and as a result could not make "official acts." In their FAC, Plaintiffs allege that "according to the actual Dutch government, any decision by the SNK regarding what is believed to be the 'After Bellotto' was not an official act of the Netherlands." (ECF No. 42 at 15). Plaintiffs further attempt to differentiate the SNK from the Dutch Government by arguing that the organization was merely an extra-governmental body (ECF No. 52 at 22). Although Plaintiffs argue that they have pleaded sufficient facts "to plausibly show that the SNK did not wield the power of the Dutch government thus did not engage in any official acts by mistakenly transferring the Emden 1025 Pirna," they have provided no citations for these assertions. *Id.* at 23.

Third, Plaintiffs allege that the SNK had "no authority to transfer the works, and it operated outside existing government ministries and departments." (ECF No. 42 at 16). Again, Plaintiffs provide no citation for this assertion. Moreover, Plaintiffs' assertion directly contradicts the source material, which describes how the Netherlands Art Property Foundation (SNK) was "set up by the Ministry of Education, Arts and Sciences and the ministry of Finance . . . [which was responsible for] namely the

tracing of artworks which had been shipped off to Germany, and the custodianship and, where possible, return of the recovered objects to the rightful owners." (ECF No. 46 at 13-14). Additionally, Plaintiffs attempt to delegitimize the 1946 restitution decision by arguing that the SNK lacked actual authority and engaged in bureaucratic misdeeds and mismanagement. However, these arguments ultimately fail as they do not rise above mere conclusionary allegations. *Keane v. Fox Television Stations, Inc.*, 297 F. Supp. 2d 921, 925 (S.D. Tex. 2004) (courts "are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint"), aff'd, 129 F. App'x 874 (5th Cir. 2005).

For the above reasons, the Court finds that the SNK was a part of the Dutch government. Therefore, the Act of State doctrine prevents adjudication of the Plaintiffs' claims.

b. Laches and Statute of Limitations

The Court does not reach the laches and statute of limitations arguments as they are mooted by the Court's finding regarding the Act of State Doctrine.

c. Plaintiffs' Objection to Admission of Evidence

Plaintiffs object to the admission of (1) the parties' 2006-2007 communications sent to the Museum of Fine Arts and (2) Defendant's exhibits 2-7 and 9-12.

As articulated above, documents that a defendant attaches to a motion to dismiss are considered part of the pleadings *if they are referred to in the plaintiff's*

complaint and are central to her claim. *Collins v. Morgan Stanley Dean Witter* 224 F.3d 496, 498–99 (5th Cir. 2000) (emphasis added). When a party presents "matters outside the pleadings" with a Rule 12(b)(6) motion to dismiss, the Court has discretion to accept or to exclude the evidence for purposes of the motion to dismiss. *Isquith ex rel. Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 194 n. 3 (5th Cir.1988). However, per Fed. R. Civ. P. 12(d), if documents outside of the pleadings are placed before a district court, and not excluded, the court must convert the defendant's 12(b)(6) motion to one for summary judgment and afford the plaintiff an opportunity to submit additional evidentiary material of his or her own. *Carter v. Stanton*, 405 U.S. 669, 671 (1972) (per curiam).

Plaintiffs did not refer to the evidence to which they object in their complaint; therefore, the Court has not considered and will not consider such evidence at the motion to dismiss stage.

IV. CONCLUSION

The Court must note that it feels enormous sympathy for Plaintiffs. To lose valuable personal property with strong family connection is always an occasion for anguish. To suffer such a loss as a consequence, however remote, of Nazi influence is a tragedy. Nonetheless, the law is clear and the Court cannot displace it.

For the foregoing reasons, Defendant's Motion to Dismiss is GRANTED. Therefore, Plaintiffs' Motion to Disqualify (ECF No. 49) is DENIED WITH PREJUDICE AS MOOT.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 20th day of April, 2023.

/s/ Keith P. Ellison
United States District Judge

MEMORANDUM & ORDER, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS (MAY 2, 2022)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUAN CARLOS EMDEN ET AL,

Plaintiffs,

v.

THE MUSEUM OF FINE ARTS, HOUSTON,

Defendant.

Civil Action No. 4:21-CV-3348

Before: Keith P. ELLISON,
United States District Judge.

MEMORANDUM & ORDER

The Court held a hearing on Defendant's Motion to Dismiss (doc. 13) on March 24, 2022. At that hearing, the Court took the Motion under advisement. The Court now GRANTS Defendant's Motion to Dismiss without prejudice and provides this Memorandum & Order to document its rulings and reasoning.

I. FACTUAL BACKGROUND[1]

This controversy centers around two paintings. The first is "The Marketplace at Pirna" by Bernardo Bellotto, currently owned by the Houston Museum of Fine Arts (MFA). The second is "After Bellotto" painted by an unknown Bellotto imitator. The second is relevant only because plaintiffs claim that it caused confusion that renders invalid the MFA's title to "The Marketplace at Pirna." Two other Bellotto paintings once owned by plaintiffs' relative, Dr. Max Emden, are mentioned briefly to provide context, but those two Bellottos are not at issue here.

A. "The Marketplace at Pirna"

In 1753, Bernardo Bellotto painted "The Marketplace at Pirna" as a royal commission for Augustus III who was the king of Poland and the elector of Saxony. (Doc. 1 at ¶15). In the late 1700s, "The Marketplace at Pirna" was acquired by Leipzig art collector Gottfried Winckler, who marked it with inventory number 1025 on its bottom right-hand corner. (Doc. 1 at ¶18). By 1930, Dr. Max Emden, a German Jewish merchant and grandfather to the Emden plaintiff-heirs, owned the painting, along with two other Bellotto paintings. (*Id*.). But on June 30, 1938, Dr. Emden—under Nazi-orchestrated economic duress—sold "The Marketplace at Pirna", as well as his two other Bellotto paintings, to Nazi art dealer Karl Haberstock. (*Id*. at ¶23). The very same day, Haberstock sold all three Bellottos to the Reich

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[1] These facts are taken from the plaintiffs' Complaint and reflect plaintiffs' view of the matter, as is appropriate at the motion to dismiss stage.

Chancellery as they were intended for Hitler's *Führer-museum* in Linz, Austria. (*Id.*). Dr. Emden died two years later in June 1940. (*Id.*).

In May of 1945, "The Marketplace at Pirna" was found by the Monuments Men and Women in an Austrian salt mine. (*Id.* at ¶33). The Monuments Men and Women were a group of mostly American and British museum curators, art historians, librarians, architects, and artists tasked with preserving the artistic and cultural achievements of western civilization from the destruction of war and theft by the Nazis. (*Id.* at ¶31). In June of 1945, "The Marketplace at Pirna" was moved by the Monuments Men and Women to the Munich Central Collecting Point (MCCP) to be held there pending return to its rightful owner. (*Id.* at ¶34).

B. "After Bellotto"

In 1928, Hugo Moser, a German art dealer and collector, purchased "After Bellotto", a work by an unknown imitator of Bernardo Bellotto's "The Marketplace at Pirna." (*Id.* at ¶28). Artists of the late 1700s and 1800s regularly copied Bellotto's urban landscape scenes in his style because his original works of art became even more popular and valuable after his death. (*Id.*) In 1933, when the Nazis came to power, Moser fled Germany for the Netherlands; and when the Nazi invasion of the Netherlands became imminent, he fled to the United States, leaving his painting in the care of an art restorer in Amsterdam. (*Id.* at ¶29).

Without Moser's permission or knowledge, Moser's brother-in-law then took "After Bellotto" from the art restorer and sold it to a dealer called Douwes Fine

Art. (*Id.* at ¶37). And Douwes Fine Art then sold the painting to the Amsterdam-based Goudstikker Gallery where it was purchased by Nazi art dealer Maria Almas-Dietrich. (*Id.* at ¶29-30). Moser was not compensated for any of these sales. (*Id.* at ¶37). At war's end, "After Bellotto" was found in a storage facility containing dozens of other works of art owned by Almas-Dietrich. (*Id.* at ¶30). And in November of 1945, the painting was moved to the MCCP to be held there pending return to its rightful owner, since works owned by Almas-Dietrich were presumed to be stolen. (*Id.* at ¶31).

C. The Alleged Mix-Up

In March 1946, Dutch officials filed Dutch Declaration Form 7056, alerting the Monuments Men and Women that they sought a Bernardo Bellotto painting called "The Marketplace at Pirna" which the Goudstikker Gallery claimed it had sold to Nazi dealer Maria Almas-Dietrich. (*Id.* at ¶35). The Dutch Declaration Form complied with the requirements of the Netherlands Art Property Foundation (Dutch: Stichting Nederlands Kunstbezit or "SNK"), the Dutch government agency that dealt with post-WWII restitution. (*Id.*) However, plaintiffs claim that the Dutch government's Declaration Form contained a clerical error, because the Goudstikker Gallery had never owned "The Marketplace at Pirna" by Bellotto; instead, the Goudstikker had allegedly owned the near-identical "After Bellotto"—rendered by an unknown artist *in the style* of Bellotto. (*Id.*) Nevertheless, in April 1946, pursuant to external restitution policies and Dutch Declaration Form 7056, the Monuments Men and Women sent Bellotto's "The Marketplace at Pirna" to the Netherlands. (*Id.* at ¶35).

In May of 1948, German art dealer Hugo Moser wrote to the Dutch officials stating that he was the true owner of "After Bellotto" (by an unknown artist in the style of Bellotto), which he had purchased in 1928 then left in Amsterdam when he fled Nazi occupation in 1940. (*Id.* at ¶37). The Dutch government then allegedly compounded its initial mistake by restituting "The Marketplace at Pirna"—instead of "After Bellotto"—to Hugo Moser. (*Id.* at ¶39).

In 1949, the Monuments Men discovered that they may have mistakenly given over "The Marketplace at Pirna" to the Dutch government. (*Id.*). Therefore, they wrote a letter ("The Munsing Letter") to Dutch officials suggesting that their conveyance to the Dutch had been in error. (*Id.*) However, the Dutch government declined to return the painting as they had already restituted it to Hugo Moser. (*Id.*).

In 1952, Hugo Moser sold "The Marketplace at Pirna" to American collector Samuel H. Kress. (*Id.* at ¶40). In doing so, plaintiffs allege that Moser presented Kress with a completely fabricated provenance, omitting key information about where, when, and from whom he had purchased the painting. (*Id.* at ¶41). In 1953, Samuel H. Kress, through the Kress Foundation, placed "The Marketplace at Pirna" on long term loan with the MFA. (*Id.* at ¶42). And in 1961, the Kress Foundation converted the loan to an outright donation of the painting to the MFA. (*Id.*).

In 2019, the German Advisory Commission on the restitution of stolen war art ("the Commission") determined that Dr. Emden was a victim of the "systematic destruction of people's economic livelihoods by the Third Reich as a tool of National Socialist racial policy." (*Id.* at ¶45). Therefore, the

Commission recommended that Mr. Emden's two Bellotto paintings that had been turned over to the new German government by the Monuments Men and Women be restituted to plaintiffs as the sole heirs of Dr. Emden. (*Id.*).[2] The German government accepted the recommendation of the Commission and immediately returned both Bellotto paintings to the Emden heirs. (*Id.*). The Commission noted that the third Emden Bellotto, "The Marketplace at Pirna" at issue in this case, "was of the same origin [and] was erroneously restituted to the Netherlands after 1945 and is now considered lost." (*Id.*).

Thus, according to plaintiffs, but for the erroneous restitution of "The Marketplace at Pirna" to the Netherlands in 1946, and its subsequent restitution to Hugo Moser, "all three Emden Bellottos would have been together in Germany. (*Id.* at ¶46). And all three would have been returned to the Emden Heirs in accordance with the German Advisory Commission's findings and recommendation." (*Id.*)

In summer of 2021, researchers for the Monuments Men and Women Foundation discovered and analyzed a 1930 photo of "The Marketplace at Pirna," identifying a unique distinguishing fingerprint in the form of a "1025" marking. (*Id.* at ¶47). Said marking concretely distinguished the MFA-owned "The Marketplace at Pirna" from all imitations. (*Id.*) When presented with this finding in June of 2021, the MFA

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[2] As already mentioned, Mr. Emden owned three Bellotto paintings in total; all of them were sold to Nazi dealer Karl Haberstock, and two of them were subsequently restituted to Germany. But only one of his paintings—"The Marketplace at Pirna" which was restituted to the Netherlands—is at issue in this case.

unequivocally refused restitution of "The Marketplace at Pirna." (*Id*. at ¶48). Plaintiffs filed their Complaint on October 12, 2021, seeking declaratory relief and alleging conversion and a violation of the Texas Theft Liabilities Act for unlawful appropriation of property. (*Id*. at 58-80).

II. DISCUSSION

A. Legal Standard

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, a court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly,* 550 U.S. at 570).

In determining whether to grant a motion to dismiss, a court cannot look beyond the pleadings. *Peacock v. AARP, Inc.*, 181 F. Supp. 3d 430, 434 (S.D. Tex. 2016) (citing *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999)). However, when the motion to

dismiss contains exhibits that are referenced in the plaintiff's complaint and central to the pleadings, they are part of the pleadings, and the court may consider them in ruling on the motion. *Johnson v. Bowe*, 856 F. App'x 487, 490-92 (5th Cir. 2021); *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). A plaintiff is under no obligation to attach to her complaint documents upon which her action is based, but a defendant may introduce certain pertinent documents if the plaintiff failed to do so. *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n. 3 (1st Cir.1991) (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1327 at 762–63 (2d ed.1990)).

When a party presents "matters outside the pleadings" with a Rule 12(b)(6) motion to dismiss, the Court has discretion to accept or to exclude the evidence for purposes of the motion to dismiss. *Isquith ex rel. Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 194 n. 3 (5th Cir.1988). However, per Fed. R. Civ. P. 12(d), if documents outside of the pleadings are placed before a district court, and not excluded, the court must convert the defendant's 12(b)(6) motion to one for summary judgment and afford the plaintiff an opportunity to submit additional evidentiary material of his or her own. *Carter v. Stanton*, 405 U.S. 669, 671 (1972) (per curiam).

B. Analysis

1. The Act of State Doctrine

Under the Act of State doctrine, "the courts of one country will not sit in judgment on the acts of the government of another, done within its own

territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The doctrine is grounded in the principle that "juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972). The doctrine thus overlaps in many respects with the political question doctrine, as it is rooted in constitutional separation-of-powers concerns. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). It recognizes "'the thoroughly sound principle that on occasion individual litigants may have to forgo decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of [United States] foreign policy.'" *Callejo v. Bancomer*, 764 F.2d 1101, 1113 (5th Cir. 1985) (quoting *First Nat'l City Bank*, 406 U.S. at 769).

"For Act of State [ ] purposes, the relevant acts are not merely those of the named defendants, but *any* governmental acts whose validity would be called into question by adjudication of the suit." *Callejo*, 764 F.2d at 1115, 1116 (emphasis added). The burden lies on the proponent of the doctrine to establish the factual predicate for the doctrine's application. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976).

As described previously, plaintiffs claim that the Dutch government's receipt and subsequent restitution to Hugo Moser of "The Marketplace at Pirna" was the result of a clerical error by the Dutch. (Doc. 1 at ¶46.) Therefore, plaintiffs contend that the Dutch government's conveyance of the painting to Hugo Moser was of no effect because Mr. Moser did not

have a true right of ownership or possession in the painting; it follows then, that Mr. Moser could not pass good title to the Kress Foundation, and the Foundation could not pass good title on to defendant. (Doc. 1 at ¶63). Defendant claims that plaintiffs' asserted ownership claims explicitly depend on this Court's invalidation of the Dutch government's official action when it restituted "The Marketplace at Pirna" to Hugo Moser; as such, the Act of State would prevent such invalidation by this Court.

i. Portrait of Wally

Plaintiffs offer *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009) as authority for the proposition that (1) there is a difference between "invalidating" the Dutch government's restitution of the painting and "determining its effect" on present ownership rights; and that (2) the Netherlands' restitution of "The Marketplace at Pirna" to Mr. Hugo Moser does not qualify as an "official act" for purposes of the Act of State doctrine. However, as the Court discusses in detail below, the "invalidation" versus "determination of effect" distinction does not apply to quiet title actions where the court is asked to nullify a foreign nation's conveyances. And *Wally*'s "official act" factual predicates differ from the present matter in several dispositive ways, thus making the Ninth Circuit's holding in the factually-similar case *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141 (9th Cir. 2018), far more apt persuasive authority.

In *Wally*, the controversy surrounded the proper ownership of a painting ("the *Wally*"), originally owned by a Jewish art collector and forcefully acquired by a

Nazi dealer named Friedrich Welz. The parties disagreed about which Jewish art collector had owned the painting before its forceful acquisition: defendant Leopold Museum claimed the *Wally* had belonged to a Jewish dentist named Heinrich Rieger who sold it under duress to Mr. Welz; plaintiff heirs claimed that the painting had belonged to a Jewish gallery owner named Lea Bondi Jaray until Mr. Welz stole it from her. *Wally*, 663 F. Supp. at 236, 239-40.

After the war, U.S. forces gained possession of the *Wally*, among other works of art owned by Nazi dealer Friedrich Welz. *Id.* at 240. Counsel for Mr. Rieger's heirs wrote to the U.S. forces and to the Austrian government asking for the restitution of several paintings, but failing to mention the *Wally* by name, even though the letter mentioned other desired paintings by name. *Id.* The U.S. forces then released several paintings to the Austrian government to be held pending the determination of their ownership. *Id.* Eventually, the Austrian government restituted the *Wally* to the Rieger heirs, assuming it was part of the Rieger collection. *Id.* However, during this conveyance, the Austrian government never specifically referred to or identified the *Wally*. *Id.*

Later, the Rieger heirs negotiated a sale of the Rieger collection to the Belvedere, a national gallery owned by the Austrian government; the sale included the *Wally*, which again, was never explicitly referenced. *Id.* at 242. Years later, an Austrian citizen named Rudolph Leopold bought the *Wally* from the Belvedere, donating it to the newly established Austrian Leopold Museum in 1994. *Id.* at 245. The Leopold Museum loaned the *Wally*, along with other paintings, to the New York Museum of Modern Art ("MoMA") in

1997. *Id*. at 246. After the MoMA exhibition had closed and the *Wally* was soon to be on its way back to Austria, the U.S. Government initiated a forfeiture action on behalf of the Bondi estate, alleging that the Leopold Museum imported and/or intended to export the *Wally*, while knowing that it was stolen from the Bondi estate. *Id*. at 246.

The *Wally* court began by holding that "[a]s a threshold matter, the Court is not being asked to *invalidate* any action by an Austrian governmental authority, but only to determine the effect of such action, if any, on *Wally*'s ownership." *Wally*, 663 F.Supp. at 248. In support of this holding, the *Wally* court cited *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Intern*. 493 U.S. 400 (1990), in which the Supreme Court held that "[t]he Act of State doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id*. at 409-10. Plaintiffs claim that in the present matter, as in *Wally*, the Court's determination regarding the effect of government action on ownership does not *invalidate* said government action, and thus does not implicate the Act of State doctrine.

However, even assuming sufficient factual similarity between *Wally* and the present matter—at least where the Court is being asked to determine proper ownership of a painting notwithstanding putative governmental action—we run into an issue. The *Wally* court's attempt to distinguish between "invalidation" and mere "determination of the effect" of a governmental action is directly contradicted by

the facts of *W.S. Kirkpatrick*; there, the Supreme Court found it dispositive that, while plaintiff alleged that Nigerian government officials had unlawfully accepted bribes in exchange for a government contract awarded to defendant, plaintiff " . . . was not trying to undo or disregard the governmental action, but only to obtain damages from private parties who had procured [the unlawful government contract]." *Id.* at 407.

In contrast, *Wally* and the present matter ask the Court to determine whether a foreign government passed on good title to subsequent owners—i.e., whether the government's conveyance should be "undo[ne] or disregard[ed]." *Id.* On this point, the Supreme Court has long held that the Act of State doctrine applies to quiet title actions that require the court to nullify a foreign nation's official conveyances. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–04 (1918); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918)). Here, where the Emden plaintiffs ask this Court to render ineffective the Dutch government's restitution of "The Marketplace at Pirna" to Mr. Hugo Moser and thus invalidate the Museum of Fine Art's subsequent ownership claims, the Act of State Doctrine is implicated.

As a second basis for the inapplicability of the Act of State doctrine, the *Wally* Court pointed out that no official act of state seemed be in play because (1) the *Wally* was never legally transferred to the Rieger heirs pursuant to an official Austrian government determination of the painting's ownership; and (2) the Austrian government did not utilize Restitution Commission proceedings to dispose of *Wally*. 663 F.Supp. at 248. As already mentioned, the *Wally* was

lumped together with the larger Rieger collection even though the Rieger heirs never explicitly claimed it in restitution proceedings. Thus, the *Wally* court held, the Austrian government's acquisition of the Rieger collection could not fairly be characterized as official state action determining the *Wally's* proper ownership, as the *Wally* was never even individually acknowledged during the transaction. *United States v. Portrait of Wally, A Painting By Egon Schiele*, No. 99 CIV. 9940 (MBM), 2002 WL 553532, at *8 (S.D.N.Y. Apr. 12, 2002).

Further, because the Austrian government sidestepped authorized Restitution Commission proceedings when it bought the *Wally* from the Rieger heirs then exchanged the *Wally* for one of Mr. Leopold's paintings, the court held that such acts were not "official acts" implicating the Act of State doctrine. *See id*. ("The court is notably not being asked to review a decision by a Restitution Commission regarding the restitution of Wally.")

Here, where "The Marketplace at Pirna" was specifically requested by the Dutch government, then restituted to Hugo Moser per the Dutch Restitution Commission's determination of its ownership, the Act of State doctrine is implicated; indeed, plaintiffs' allegation that the Dutch government *mis*identified the painting does not undermine the Act of State doctrine's relevance to the present matter, particularly where plaintiffs do not allege that the Dutch agree about the claimed misidentification.

Finally, the *Wally* court found it "most important[ ]" that the balance of interests favored adjudication of the claim. *Id*. at 248. The court reiterated, "the Act of State doctrine is intended to prevent

courts from inquiring into the validity of foreign acts where doing so would 'embarrass or hinder the executive in its conduct of foreign relations' and this concern is not implicated here, where both the executive branch actively seeks adjudication of its claim and Austrian law favors restoration of ownership." *Id*. at 248. As already mentioned, the *Wally* forfeiture action was brought by the U.S. Government on behalf of the Bondi estate; clearly, the executive branch was not concerned about the effect that its legal action would have on its conduct of foreign relations with Austria. The U.S. government is not a party to the present matter, and certainly has not indicated that application of the Act of State doctrine would not embarrass or hinder it in its conduct of foreign relations with the Netherlands.

For the above reasons, the Court finds *United States v. Portrait of Wally* to be inapposite. It now turns to *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141 (9th Cir. 2018).

ii. Von Saher

In *Von Saher*, plaintiff was the only living heir of a Jewish Dutch art dealer who was the victim of a forced sale of artworks to the Nazis. *Id*. at 1144. After the defeat of the Nazis, the artworks were restituted to the Dutch government by allied forces. *Id*. In 1949, plaintiff's family members declined to seek restitution of the stolen art, releasing any claim they had to the artworks. *Id*. at 1145. Therefore, in 1960, the Dutch government sold the artworks to a claimant named George Stroganoff-Sherbatoff ("Stroganoff") who claimed they had actually been stolen from him by the Soviets; the Dutch sold the works to Stroganoff

on the condition that he would agree to drop his claims of restitution. *Id*. at 1147.

In the 1990s, plaintiff-heir Von Saher began seeking restitution of the artwork sold by the Dutch to Stroganoff (and later given to the Norton Simon Museum of Art in Pasadena) alleging, as the Emden plaintiffs do now, that the Dutch government erred by delivering the artwork to the wrong claimant. *Id*. at 1146. Seeking to recover the paintings, Von Saher sought declaratory relief and alleged conversion and various other causes of action, as do the Emden plaintiffs. *Id*. The matter went before the Ninth Circuit three times, twice on appeal of the lower court's grant of defendant's motions to dismiss (in 2010 and 2014), and the third and final time on appeal of the lower court's grant of defendant's motion for summary judgment (in 2018). The Court will refer to the Ninth Circuit's 2018 ruling as "*Von Saher*" and to its 2014 ruling as "*Von Saher II*". The 2010 ruling is not relevant to the present matter, as it does not touch on the Act of State doctrine.

One of the most important factual predicates for the Ninth Circuit's holding in *Von Saher* is the fact that the Dutch sale of the paintings to Mr. Stroganoff was pursuant to Dutch restitution proceedings. This factual predicate was so crucial that the *Von Saher II* court remanded the matter for further discovery on that point alone. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 726 (9th Cir. 2014) ("If on remand, the Museum can show that the Netherlands returned the [paintings] to Stroganoff to satisfy some sort of restitution claim, that act could constitute a considered policy decision by a government to give effect to its political and public interests . . . and

so [would be] . . . the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs.") (internal citations omitted).

Ultimately, discovery led the Ninth Circuit to conclude that the sale from the Dutch government to Stroganoff was indeed "a part of the Dutch government's sovereign restitution process" and thus qualified as an "official act of the sovereign." *Von Saher*, 897 F.3d at 1149 ("[e]xpropriation of private property is a uniquely sovereign act."); *see, e.g.*, *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (applying the Act of State doctrine to governmental seizures of property). Here, no such discovery is needed as it is undisputed that Mr. Moser received "The Marketplace at Pirna" pursuant to the Dutch government's sovereign restitution process.

Having found that the conveyance to Stroganoff was an official act within the Act of State doctrine's definition, the Ninth Circuit then simply followed Supreme Court precedent which holds that the Act of State doctrine applies to quiet title actions that require the court to nullify a foreign nation's official conveyances. *Von Saher*, 897 F.3d at 1149 (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–04 (1918); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918)). Applying the precedent, the Ninth Circuit panel wrote,

> Von Saher's recovery hinges on whether she—not the Museum—holds good title to the paintings. The Museum's defense, in turn, depends on its having received good title from Stroganoff, who forfeited his own restitution claim to the paintings when he bought them from the Netherlands in 1966.

> It is therefore a necessary condition of Von Saher's success that the Dutch government's conveyance of the paintings to Stroganoff be deemed legally inoperative.

Id. at 1149.

Similarly, the Emden heirs' recovery hinges on whether they—not the Museum of Fine Arts—hold good title to the paintings. The Museum's defense, in turn, depends upon it having received good title from Samuel H. Kress, who bought the painting from Hugo Moser, who received it as restitution from the Netherlands in 1948. It is therefore a necessary condition of the Emden heirs' success that the Dutch government's conveyance of "The Marketplace at Pirna" to Moser be deemed legally inoperative.

iii. Exceptions to the Act of State doctrine

Although there are exceptions to the Act of State doctrine, they do not apply here. First, as the Court has already discussed in detail, the Dutch government's restitution of "The Marketplace at Pirna" was a sovereign act. The exception for "purely commercial acts" therefore does not apply. *See Von Saher II*, 897 F.3d at 1154 (recognizing that "expropriation, claims processing, and government restitution schemes are not the province of private citizens"). Nor does the exception known as the "Second Hickenlooper Amendment," codified at 22 U.S.C. § 2370(e)(2). That exception applies only where there has been a "confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law[.]" 22 U.S.C. § 2370(e)(2). Here, the only alleged taking, which was not by defendant, occurred in 1938

during Emden's forced sale to a Nazi art dealer. Thus, this exception does not apply either.

iv. Policy Considerations

Even where "the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the Act of State doctrine may not justify its application." *W.S. Kirkpatrick Co. v. Environ. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). The Supreme Court laid out three such underlying policies in *Banco Nacional de Cuba v. Sabbatin*o, 376 U.S. 398, 428 (1964): "[1][T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . . [2][T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. [3]The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence."

First, "no one has identified an international consensus regarding the *invalidity* of the Dutch post-war restitution procedures." *Von Saher*, 897 F.3d at 1155. If anything, the U.S. State Department and Office of the Solicitor General expressed in their amicus brief in *Von Saher* that post-war restitution proceedings in the Netherlands were "bona fide." *See Von Saher II*, 754 F.3d at 729–30 (Wardlaw, J., dissenting).

Second, the State Department and Solicitor General's Office confirmed in their *Von Saher* amicus brief that upholding the Dutch government's restitution proceedings is important for U.S. foreign policy:

> When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, *the United States has a substantial interest in respecting the outcome of the nation's proceedings.*

Von Saher, 897 F.3d at 1155 (emphasis added). This position makes practical sense. Reaching into the Dutch government's post-war restitution system would require sensitive political judgments that would undermine international comity. *See W.S. Kirkpatrick*, 493 U.S. at 408 (underscoring that "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations" are policies behind the doctrine).

Third, the Dutch government still exists.

Therefore, policy considerations weigh in favor of invocation of the Act of State doctrine in this matter.

2. Laches and Statute of Limitations

The Court does not reach the laches and statute of limitations arguments as they are mooted by the Court's finding regarding the Act of State Doctrine.

3. Plaintiff's Objections to Admission of Evidence

Plaintiffs object to the admission of (1) plaintiff counsel's 2006 and 2007 demand letters sent to the Museum of Fine Arts and (2) portions of defendants'

exhibit 10, as appended to defendants reply in support of motion to dismiss.

As articulated above, documents that a defendant attaches to a motion to dismiss are considered part of the pleadings *if they are referred to in the plaintiff's complaint and are central to her claim*. *Collins v. Morgan Stanley Dean Witter* 224 F.3d 496, 498–99 (5th Cir. 2000) (emphasis added). When a party presents "matters outside the pleadings" with a Rule 12(b)(6) motion to dismiss, the Court has discretion to accept or to exclude the evidence for purposes of the motion to dismiss. *Isquith ex rel. Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 194 n. 3 (5th Cir.1988). However, per Fed. R. Civ. P. 12(d), if documents outside of the pleadings are placed before a district court, and not excluded, the court must convert the defendant's 12(b)(6) motion to one for summary judgment and afford the plaintiff an opportunity to submit additional evidentiary material of his or her own. *Carter v. Stanton*, 405 U.S. 669, 671 (1972) (per curiam).

Plaintiffs did not refer to the evidence to which they object in their complaint; therefore, the Court has not considered and will not consider such evidence at the motion to dismiss stage.

III. CONCLUSION

For the reasons set forth above and those stated on the record at the March 24, 2022, hearing, the Court GRANTS defendant's Motion to Dismiss without prejudice.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 2nd day of May, 2022.

/s/ Keith P. Ellison
United States District Judge

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JUNE 25, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUAN CARLOS EMDEN;
NICOLAS EMDEN; MICHEL EMDEN,

Plaintiffs—Appellants,

v.

THE MUSEUM OF FINE ARTS, HOUSTON,

Defendant—Appellee.

No. 23-20224

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-3348

Before: SMITH, HAYNES, and
DOUGLAS, Circuit Judges.

ON PETITION FOR REHEARING AND REHEARING EN BANC

PER CURIAM:

The petition for rehearing is DENIED. Because no member of the panel or judge in regular active

service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.