IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

FRED WESTFIELD, IN HIS CAPACITY AS ADMINISTRATOR DE BONIS NON ADMINISTRATIS OF THE ESTATE OF AN ALIEN, WALTER WESTFELD, AND FRED WESTFIELD, ERICH WESTFIELD, HANNAH KAHN, LINDA PLAUT, JEANNE REES, AND ROSIE SEGAL AS EXECUTOR OF THE ESTATE OF MARTIN SEGAL	)	**Civil Action No. 3-09-0204**
	)	**JUDGE CAMPBELL**
	)	**MAGISTRATE JUDGE BRYANT**
Plaintiffs,	)	
v.	)	
FEDERAL REPUBLIC OF GERMANY	)	
Defendant.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs hereby submit their Response in Opposition to Defendant's Motion to Dismiss, which is based on two grounds – (1) lack of subject matter jurisdiction due to foreign state immunity under Fed. R. Civ. Proc. 12(b)(1), and (2) failure to state a claim upon which relief can be granted due to the expiration of the statute of limitations under Fed. R. Civ. Proc. 12(b)(6). Contrary to Defendant's contentions, this Court: (1) clearly has subject matter jurisdiction under 28 U.S.C. §1605(a)(2), the commercial activity exception to the Foreign Sovereign Immunities Act (hereinafter referred to as the "FSIA") and (2) the statute of limitations clearly does not bar the claims[1] upon which relief is sought in Plaintiffs' Complaint.

[1] Plaintiffs' Complaint, originally filed in Tennessee Chancery Court, states three causes of action—conversion, equitable accounting and imposition of constructive trust due to unconscionable acts by Defendant in obtaining Walter Westfeld's assets. Defendant maintains that the latter two causes of action are only remedies and not causes of action. Plaintiffs disagree. However, at this stage of the proceeding, whether there is one cause or three, the same issue is before the Court- whether an exception to foreign sovereign immunity applies. This Response primarily addresses the conversion cause of action, because that is the only one addressed by Defendant.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs are Fred Westfield, a Vanderbilt University Professor Emeritus of Economics, who was appointed by the Seventh Circuit Court for Davidson County, Tennessee (Probate Division) on February 12, 2008, as Administrator *de bonis non administrates* Due to Newly Discovered Property of the Estate of Walter Westfeld (Comp., ¶1 & Exh. 1) and six individuals who were determined to be the heirs of Walter Westfeld. (Comp., ¶1 & Exh. 1)

Walter Westfeld himself was a distinguished art dealer and collector who was a citizen of Germany and a resident of Wuppertal, near Düsseldorf, Germany. (Comp., ¶¶11, 13) Mr. Westfeld was also Jewish. (Comp., ¶12) Following the rise to power in Germany of Hitler and the Nazi party, Walter Westfeld, like other Jews, was deprived of many civil rights. The Nuremburg Law Reserving Citizenship for Subjects of German Blood, September 15, 1935, R.G. B. vol. 1, p. 1145, stripped all Jews, including Walter Westfeld, of their German citizenship. (Comp., ¶12) As a result of a series of decrees the following year, notably the decree of February, 1936, BA, R4311/1238c, B1.17, Reichministerium für Völksaufklarüng und Propoganda (RMVP) Rundschreiben, Feb. 1936, Jews, including Walter Westfeld, were explicitly prohibited from dealing in art. (Comp., ¶12)

With no means to earn a livelihood, and with essentially no civil rights in Germany, the Westfelds made plans to depart for Nashville, Tennessee, where one brother, Robert Westfeld, an American citizen, had lived for some time. (Comp., ¶¶3, 13) On *Kristalnacht*, November 9, 1938, Jewish homes, enterprises, and synagogues were burned throughout Germany. Jews were hunted down and killed and their valuables taken or destroyed. (Comp., ¶2) Whereas the other brothers still in Germany, Dietrich and Max, fled and were barely able to escape with their families and little else, Walter stayed behind. (Comp., ¶¶3, 15)

Walter stayed in Germany in order to smuggle out as many valuable works of art, cash, and other items, such as jewelry, as he could before departing. (Comp., ¶¶13-15) In this endeavor, he had the assistance of several persons, including one Robert Lebel, an art dealer in Paris, France, and a network of persons in Amsterdam, Netherlands. (Comp., ¶29) Although these arrangements were necessarily secret and still remain shrouded in mystery, a number of works of art and other valuables were successfully smuggled out as part of the ongoing plan. (Comp., ¶¶29-30)

As part of this plan, $40,000 cash arrived in Nashville and was delivered to Walter Westfeld's brother, Robert. This money was to be used to support the members of the Westfeld family who were settling in Nashville—with Robert residing on Richland Avenue. (Comp., ¶¶3, 13, 28) In a second instance, a valuable painting, *Portrait of a Man and Woman in an Interior*, by the noted Dutch Master, Eglon van der Neer, was also successfully transferred to the United States. The precise path this painting took is still subject to investigation, but instead of arriving in Nashville, it was sold to the Boston Museum of Fine Arts, where it still hangs, albeit with a notice acknowledging its uncertain provenance and its ownership at one time by Walter Westfeld. (Comp., ¶¶16, 30)

Again, Walter Westfeld's objective was to flee Germany and join his family in Nashville. (Comp., ¶¶13, 14) Prepositioned paintings in Paris and Amsterdam, as well as remaining works of art in Germany, would be sold or smuggled out so as to afford resources for the family to live on in Nashville. (Comp., ¶¶13-15) Unfortunately, Walter Westfeld's plans and ongoing activities were uncovered by Nazi officials. (Comp., ¶¶16-17) Meanwhile, he was unable to obtain a visa admitting him to the United States before his passport expired. (Comp., ¶15)

Trapped in Germany, he was arrested on trumped-up currency charges and fined Reichmarks 300,000 for currency violations. He was imprisoned on November 15, 1938 (Comp., ¶17) and ultimately sentenced to 3 ½ years. (Comp., ¶22) While in prison, Mr. Westfeld was subjected to harsh interrogation, with his interrogators seeking to ascertain the whereabouts of a number of valuable works of art. (Comp., ¶24) On May 13, 1952, a Regional Court in Düsseldorf, Germany ordered that the 1938 sentence, imprisoning and fining Walter Westfeld, was "null and void." (Comp., ¶23) But while Defendant has held the sentence and fine "null and void," it has yet to return the works of art or their monetary equivalent that flowed into German coffers from the auction of Walter Westfield's property.

After imprisonment for several years and in a desperately weakened state, Walter Westfeld was sent by transport to Theresienstadt Concentration Camp northwest of Prague in the current Czech Republic. From there, he was sent to Auschwitz Concentration Camp in Oswiecim, Poland in 1943. (¶2) Although a German court after World War II officially declared his date of death as May 8, 1945, that date was almost certainly chosen because it was the last day of the war in Europe. (Comp., ¶2) On information and belief, his actual date of death is early 1943, shortly after his arrival at Auschwitz, a well-known site where Jews were gassed and cremated en masse immediately upon their arrival. (Comp., ¶2)

Following the end of World War II, Walter Westfeld's brothers made efforts to locate his works of art. They corresponded with Robert Lebel in Paris, France, and made other efforts to obtain information from him, including meeting with him on several occasions. They also made efforts to obtain information through members of the network in Amsterdam, the Netherlands, with whom they corresponded and met. (Comp., ¶29) These efforts led to others, but all efforts to identify what items Walter Westfeld had owned and what particular items had left his

possession proved fruitless. (Comp., ¶29) The brothers knew that their brother, Walter, was an art dealer and collector, but they did not know and could not establish which works of art he had owned, which works of art he had dealt with exclusively as an agent or bailee, and which works of art he had smuggled out of Germany. (Comp., ¶29)

In 2004, while searching the Internet for information about Walter Westfeld, his nephew, Fred Westfield, discovered that the Boston Museum of Fine Arts was seeking information about Walter Westfeld and the uncertain provenance of the Eglon van der Neer painting that was in its collection of Dutch Masters. (Comp. ¶30) Fred Westfield sent an e-mail to the Museum on November 12, 2004, initiating an ongoing e-mail correspondence with the archivist, Victoria Reed. (Comp., ¶¶30-31) Ms. Reed informed him that on December 12-13, 1939, the German auction house, Lempertz, had conducted a compulsory auction of works of art of Walter Westfeld on behalf of the German government and that there might be a catalogue of paintings once owned by him and auctioned by Lempertz. (Comp., ¶31)

Lempertz was unforthcoming as to a catalogue. It claimed that all records had been destroyed by Allied bombing during World War II and that there were no copies of the catalogue. (Comp., ¶32) *See also Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008) (confirming a similar account of a compelled auction at Lempertz and the lack of a catalogue in connection with Max Stern, who, unlike Walter Westfeld, survived, emigrated to Canada, and became one of that country's most influential art collectors). Independent efforts by Ms. Reed, however, eventually resulted in her locating and reproducing a copy of the catalogue that she forwarded to Fred Westfield. (Comp., ¶33) Although in poor condition, the copy of the catalogue is readable and includes pictures of many of the works of art. The copy originally sent by Ms. Reed was also missing several pages. These were eventually located and transmitted to

Fred Westfield by Ms. Reed. A complete copy of the catalogue is attached as Exhibit 2 of the Complaint. It identifies and describes over 500 individual works of art and tapestries that were owned by Walter Westfeld.

Recent scholarship, records, and court decisions have all confirmed that the Nazis utilized various legal formalities to gain control of artwork belonging to Jews. (Comp., ¶¶17, 20) In fact, these were all contrivances to place a legal veneer over what was a thriving art enterprise in which art once owned by Jews was bought and sold through art dealers in the private market for the benefit of the German government, the Nazi Party, and individual Nazi officials. (Comp., ¶¶17, 20) This commercial activity was conducted within Germany, as well as in occupied territories. *See, e.g., Republic of Austria v. Altmann,* 41 U.S. 677, 682 (2004); *Altmann v. Republic of Austria*, 317 F.3d 954, 959 (9th Cir. 2002); *Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008); *Menzel v. List*, 267 N.Y.S.2d 804, 813-16 (N.Y. Sup. Ct. 1966) (pursuant to L.R. 7.01(e), unreported and non-Tennessee cases are attached as collective Exhibit 1). In the case of Walter Westfeld, a fine was imposed on him and, as he was barred from carrying on his trade (Comp., ¶¶12, 13) and was imprisoned (Comp., ¶22), he lacked the resources to pay that fine. His works of art, identified and located by the Nazis in large part after brutal interrogations, were seized to satisfy the "fine." (Comp., ¶¶19, 22, 24)

At approximately the same time that Fred Westfield obtained the auction catalogue, he also learned of a book published in Germany in 2005. The book, written in German by Herbert Schmidt, is entitled *Der Elendsweg der Düsseldorfer Juden, Chronologie des Schrecken, 1933-1945*. This book, which has still not been translated into English, contains several pages about Walter Westfeld and reveals his Gestapo interrogation, based on transcripts read by the author. This previously unpublished information discloses that prior to his deportation, Walter Westfeld

was questioned about the location of an El Greco painting that was being considered for Hitler's private collection. The book also discloses the competition of art auction houses to attract the business of the Nazis, who were selling Walter Westfeld's works in their possession after he had been sent "to the East" for extermination. Indeed, Schmidt's account reveals that the Nazis were displeased with the services of the Eugen Pongs auction house and proposed working through Lempertz instead. (Comp., ¶¶25, 35)

Immediately upon obtaining the complete Lempertz catalogue and the relevant segments of the book by Schmidt, Fred Westfield took steps to bring this lawsuit by seeking appointment as Administrator *de bonis non administrates* Due to Newly Discovered Property of the Estate of Walter Westfeld. He knew that the other heirs would have to be notified, but did not know who all of the others were or where they lived. Thus, he was required to trace the other heirs and seek their approval for his appointment. (Comp., ¶40) He also was required to bring the matter to the attention of the heirs of Emilie Scheulen. Ms. Scheulen had been a housekeeper of Walter Westfeld in Gerrmany and her heirs claimed to be the heirs of the estate of Walter Westfeld. (Comp., ¶41)

The conflict over appointment of an administrator and the identity of Walter Westfeld's heirs was litigated in the Seventh Circuit Court for Davidson County, Tennessee (Probate Division). The parties were represented by independent Nashville legal counsel. Motions were filed and argument presented in open court. Subsequently, by an Agreed Order dated February 12, 2008, Fred Westfield was designated administrator *de bonis non administratis* Due to Newly Discovered Property of the Estate of Walter Westfeld. The individual Plaintiffs in the present lawsuit were designated the ***sole*** heirs of Walter Westfeld. (Comp., ¶41)

Following the issuance of the state court's Order, Plaintiffs acted promptly, in conjunction with their legal counsel, to explore the myriad and complex facts and legal issues associated with this lawsuit, including immensely difficult questions regarding service of process. Fred Westfield subsequently filed the Complaint in this lawsuit on October 3, 2008, in the Davidson County Chancery Court, less than eight months after his appointment as administrator. That Complaint, now before this Court, asserts three causes of action—conversion, equitable accounting,[2] and imposition of a constructive trust due to unconscionable conduct with respect to Walter Westfeld's property.[3] Initially, Defendant refused to accept service delivered in accordance with the Hague Convention on the Service of Process, and Plaintiffs were, therefore, compelled to seek the assistance of the United States State Department in effecting service of process. This was accomplished by United States diplomats in Berlin, Germany. Following service of process, Defendant removed the lawsuit to Federal District Court and filed its pending Motion to Dismiss.

[2] Defendant asserts that equitable accounting cannot be a separate cause of action, but is only a remedy. This is not correct. The cause of action has a venerable history and is grounded in federal courts' equity jurisdiction. *See,e.g., Kirby v. Lake Shore & M.S.R. Co.*, 120 U.S. 130 (1887); *Coffman v. Breeze Corp.*, 323 U.S. 316, 322 (1945); *Fechteler v. Palm Bros. & Co.*, 133 F. 462, 464-65 (6th Cir. 1904).

[3] Defendant asserts that a constructive trust is a remedy and not a cause of action. Defendant misapprehends Plaintiffs' cause of action. True, the actual constructive trust itself is a remedy. *See, e.g., Thompson v. Am. Gen. Life & Acc. Ins. Co.*, 404 F. Supp. 2d 1023, 1029 n. 2 (M.D. Tenn. 2005). However, Tennessee courts will impose this remedy in the exercise of their equity jurisdiction when the plaintiff alleges and proves that defendant has obtained an interest in plaintiff's property by inequitable means. *See Sanders v. Forcum-Lannom, Inc.*, 475 S.W. 2d 172, 174 (Tenn. 1972) ("It is the well established rule in this State that a constructive trust arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy."). This is the gravamen of Plaintiffs' cause of action, which seeks imposition of a constructive trust based on Defendant's unconscionable conduct. (Comp., ¶46)

LAW AND ARGUMENT

I. ON A MOTION TO DISMISS, ALL ALLEGATIONS MUST BE TAKEN AS TRUE.

Defendant's Motion to Dismiss constitutes a *facial* attack on Plaintiffs' Complaint, inasmuch as Defendant states that "there are no facts or legal theories pled by Plaintiff [sic] which would permit this action to proceed against the FRG in Tennessee …" When there is a Rule 12(b)(1) facial attack and subject matter jurisdiction is based on an exception to the FSIA, "courts simply look to the general standards for evaluating motions to dismiss pursuant to Rule 12(b)(1) and take the factual allegations of plaintiffs as true." *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009). "'If those allegations establish federal claims, jurisdiction exists.'" *Id.* (citing *Gentek Bldg. Prods. v. Sherwin-Williams Claims*, 491 F.3d 320, 330 (6th Cir. 2007)).

The general standards for evaluating a motion to dismiss pursuant to Rule 12(b)(1) also require taking the factual allegations of Plaintiffs' Complaint as true. They require as well that the Court view the pleadings in a light most favorable to Plaintiffs. *See Rossborough Mfg. Co. v. Trimble*, 301 F. 3d 482, 489 (6th Cir. 2002). In considering whether to dismiss a complaint under Rule 12 (b)(1), a "court must construe broadly and liberally the allegations of plaintiff's pleadings." *Lorain Div., Kohring Co. v. Walldorff*, 522 F. Supp. 408, 409 (E.D. Tenn. 1981). A facial attack in a motion to dismiss for lack of subject matter jurisdiction brought pursuant to Rule 12(b)(1) tests *only* the legal sufficiency of a pleading. *See O'Bryan*, 556 F.3d at 376; *Gentek Bldg. Prods. Inc. v. The Sherwin-Williams Co.*, 491 F. 3d 300, 330 (6th Cir. 2007). Indeed, it is assessed in the same manner as a motion to dismiss under Rule 12(b)(6). *See Tennessee Protection & Advocacy Inc. v. Board of Educ. Putnam Co.*, 24 F. Supp. 2d 808, 812 (M.D. Tenn. 1998). Like Rule 12(b)(6) motions, Rule 12(b)(1) motions are "viewed with disfavor and rarely granted." *Smith v. Gusman*, No. 06-4121, 2007 Westlaw 2407304, *4 (E.D.

La. Aug. 20, 2007). *See also Johnsrud v.Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (with respect to Rule 12(b)(1) motion, "summary disposition on the merits is disfavored").

The recent decision of the United States Court of Appeals for the Sixth Circuit in *O'Bryan v. Holy See*, 556 F.3d at 375-76, confirms that the above principles unquestionably apply with respect to a motion to dismiss a lawsuit in which the court's jurisdiction is based on an exception to foreign sovereign immunity under the FSIA. *O'Bryan* involved a suit against the Vatican, with subject matter jurisdiction asserted under one of the exceptions to sovereign immunity set forth in the FSIA. The Vatican moved to dismiss, arguing *inter alia*, that special burden-shifting rules under the FSIA required more than the standard allegations in a complaint to withstand a motion to dismiss. The Court of Appeals rejected this argument and affirmed the District Court's holding, which had rejected the Vatican's argument. The Court of Appeals held that

> If the foreign state makes [the "foreign state"] showing, the burden of production shifts to the plaintiffs to show, *either by the allegations in the complaint* or by extrinsic evidence, that at least one of the FSIA exceptions applies. Once the plaintiff offers evidence that an exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply.

O'Bryan v. Holy See, 556 F.3d at 376 (quoting *Doe v. Holy See*, 434 F. Supp. 2d 925 (D. Or. 2006)) (internal citations and quotation marks omitted) (emphasis added)

The reliance in *O'Bryan* on *Doe v. Holy See* is especially significant. Since the Sixth Circuit's decision in February of this year, the Ninth Circuit has affirmed *Doe v. See*. *See Doe v. See*, 557 F.3d 1066 (9th Cir. 2009). In its opinion, the Ninth Circuit reiterates the position of the Sixth Circuit that "a motion to dismiss for lack of jurisdiction under the FSIA is no different from any other motion to dismiss on the pleadings for lack of jurisdiction, and we apply the same standards in evaluating its merits." *Id*. at 1073.

The standard for evaluating the sufficiency of the allegations of a complaint is notice pleading. As the Ninth Circuit explains: "Moreover, we have never held that anything other than our usual notice pleading standard applies to complaints that allege an exception to foreign sovereign immunity. Under notice pleading rules, we require only 'a short and plain statement' of the grounds for jurisdiction and the claim for relief." *Id*. at 1073-74.

As the United States Supreme Court has made clear most recently, "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombley*, 550 U.S. 544, 570 (2007).[4] *See also United States ex rel. Bledsoe v. Community Health Sys., Inc.*, 501 F. 3d 493, 502 (6th Cir 2007)("Under general pleading standards, the facts alleged in the complaint need not be detailed…).

Notwithstanding the foregoing unambiguous authority, Defendant cites the principle that "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005). Defendant cites this authority, but then does not describe with any precision how it applies to Plaintiffs' Complaint.

Even the most cursory review of Plaintiffs' Complaint reveals a precise delineation of facts satisfying each of the elements necessary to fit within an exception to foreign sovereign immunity as well as for each of the causes of action set forth in the Complaint. Instead of "conclusory allegations or legal conclusions," the Complaint consists of more than thirty-five paragraphs of detailed factual allegations running no less than twelve typed pages in support of these elements. In addition, the Complaint cross-references to an attached Exhibit 2, which is the

[4] Defendant cites *Twombly* for the proposition that mere legal conclusions will not suffice. As discussed, this has nothing to do with Plaintiffs' Complaint, which sets forth more than 35 paragraphs of detailed factual allegations. Defendant also cites a decision from the Middle District as additional authority that cites *Twombly*. However, the case, *Permobile v. American Express Travel*, 571 F. Supp. 2d 825, 832 (M.D. Tenn. 2008), has nothing to do with *Twombly* or the standard to be applied to pleadings.

copy of the Lempertz catalogue of the items of works of art of Walter Westfeld alleged to have been seized by the Nazis and entrusted to Lempertz for auction in 1939. Each item claimed to be a work of art of Walter Westfeld auctioned by the Nazi government is numbered and identified. Detailed references are also made to the actual transcript of the interrogation of Walter Westfeld by Nazi agents in which the commercial interest of the German government in Walter Westfeld's works of art is clearly established. Plaintiffs respectfully submit that these allegations are remarkably concrete and compelling and by no stretch could be characterized as conclusory. They easily satisfy the notice pleading standard as well as any higher standard that might be imposed.

II. PLAINTIFFS' COMPLAINT CLEARLY ESTABLISHES THAT THIS COURT HAS SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. §1605(A)(2), THE COMMERCIAL ACTIVITY EXCEPTION OF THE FSIA

A foreign government may be sued in the courts of the United States if one of the exceptions to foreign state immunity set forth in 28 U.S.C. §1605 is satisfied. Although Defendant alleges that Plaintiffs have failed to specify which exception applies, this is a clear misstatement. Paragraph 6 of the Complaint is devoted soley to this issue and declares in no uncertain terms: "Specifically, the German government is not entitled to immunity because its actions fall within the exception to foreign state immunity under the Foreign Sovereign Immunities Act (hereinafter referred to as "FSIA") set forth in 28 U.S.C. §1605(a)(2), which provides, in relevant part, that: 'A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the states in any case … upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.'"

Defendant argues in its Memorandum of Law, nevertheless, that there are two reasons why the commercial activity exception cannot be satisfied based on the facts alleged – first, the alleged conversion of Walter Westfeld's art collection was not "private commercial activity" and, second, even if it was private commercial activity, it had "no direct effect in the United States." Contrary to Defendant's contentions, the facts alleged clearly establish that the commercial activity and direct effects elements of the commercial activity exception have been satisfied.[5]

A. There Was "An Act Outside the Territory of the United States in Connection with a Commercial Activity of the Foreign State Elsewhere"

The "commercial activity" exception to foreign state immunity can be satisfied by satisfying the elements of any one of the three clauses set forth in 28 U.S.C. §1605(a)(2). The first clause of 28 U.S.C. §1605(a)(2) allows a suit in which the complained of " action is based upon commercial activity carried on in the United States by the foreign state." The second clause of 28 U.S.C. §1605(a)(2) allows a suit if there is "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." The third clause of 28 U.S.C. §1605(a)(2) allows a suit against a foreign state if there is "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere." This third clause is the one under which Plaintiffs seek relief in the present case. (Comp., ¶6).

[5] Defendant also asserts that this Court does not have personal jurisdiction over Defendant, although it reserves its right to contest this issue until a later date. Defendant argues that the presence of an honorary consul in Tennessee is not a sufficient contact with Tennessee under minimum contacts theory. Plaintiffs disagree. Also, Defendant has overlooked that the minimum contacts standard for personal jurisdiction of a state court over a foreign sovereign is different than for federal courts. Now that this lawsuit is in federal court, the "area relevant to determination of minimum contacts for purposes of personal jurisdiction is the entire United States." *Anotine v. Atlas Turner, Inc.*, 66 F. 3d 105, 111 (6th Cir. 1995). Furthermore, minimum contacts analysis may not even be relevant. Under 28 U.S.C. §1330(b), as long as one of the exceptions to foreign sovereign immunity under the FSIA applies and there has been proper service of process, the federal court has personal jurisdiction. *See, e.g., Proctor & Gamble Celluose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 650 n.2 (W.D. Tenn. 1998).

In their Complaint, Plaintiffs clearly establish the applicability of this exception. Plaintiffs allege in ¶6 that the "acts" were the conversion of Walter Westfeld's specific works of art and tapestries through seizure and sale, first in the 1938-1939 time period and second in the 1943-44 time period. The acts took place in Germany and possibly other locations in occupied Europe. The acts were in connection with commercial activity by Nazi Germany. That commercial activity was routine participation in sales and purchases in the private art market in order to make profit and build collections just as private persons do who are engaged in the art market.

1. The "Act" Need Not Be One in Which a Private Person Could Engage.

Defendant's principal contention appears to be that the "seizure of private property by the German police and the subsequent forced sale in 1939 is clearly not an activity in which a private person can or customarily could engage … The abuse of its police and prosecutorial power by the former German government constituted a foreign state's exercise of police power which is uniquely sovereign in nature." (Def. Mem. of Law p. 17)

Contrary to Defendant's argument, however, the statute clearly does not require the "act" to be a commercial activity. It only requires an act "in connection with" a commercial activity. *See O'Bryan*, 556 F.3d at 378 ("there must be a connection between the [commercial] activity and the act complained of in the lawsuit.") The "act" can be a sovereign's act. There is no limitation in the statute in this regard.

In *Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997), the Federal Republic of Nigeria argued in support of its motion to dismiss that its acts "consisted primarily of imposing and collecting taxes, issuing governmental decrees, and collecting money for the performance of official governmental acts, and that such acts are sovereign, not commercial."

Id. at 725. The Ninth Circuit Court of Appeals agreed with the characterization of the acts but disagreed with the conclusion. The Court held: "Such acts *are* sovereign. But the FSIA does not require that every act by the foreign state be commercial for the third clause of the commercial activity exception to apply. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 n.10 (9th Cir. 1992). Rather, its activities must merely be made *'in connection with'* a commercial activity. 28 U.S.C. §1605(a)(2)." (emphasis added)

The Court of Appeals in *Adler* relied on the seminal Supreme Court decision in Republic of *Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). In *Weltover*, certain bonds had been issued by the Republic of Argentina. At a later date, by presidential decree, the maturity dates on the bonds were extended. The Supreme Court held unanimously that the third clause of the commercial activity exception applied, including the requirement that there be an "act." As the Court of Appeals in *Adler* explained: "The Supreme Court's decision in *Weltover* provides an example … A presidential decree is clearly not commercial activity. But the issuance of the bonds was, and the decree was an act made 'in connection with' that activity. The third clause of the commercial activity exception applied."

Indeed, in *Weltover*, the Supreme Court explicitly rejected the contention by Argentina that "a court must nonetheless fully consider the *context* of a transaction in order to determine whether it is 'commercial.'" Argentina argued that the Court of Appeals had "erred by defining the relevant conduct in what Argentina considers an overly generalized, acontexual manner and by essentially adopting a *per se* rule that all 'issuance of debt instruments' is 'commercial.'" While not deciding the per se rule issue, the Supreme Court did state that "it seems to us that even in full context, there is nothing about the issuance of these Bonds (except perhaps its purpose) that is not analogous to a private commercial transaction." *Id*. at 615-16. Again, this

statement was made in the context of a presidential decree putting off payment, which was the act complained of and was an act that only a sovereign could take.

In addition to the Supreme Court's unanimous decision in *Republic of Argentina v. Weltover* and the Ninth Circuit's decision in *Adler v. Federal Republic of Nigeria*, other federal courts have reached the same determination with respect to the "act" requirement of the third clause of the commercial activity exception. Several of these courts have emphasized that not all of the acts by the sovereign need to be commercial in nature. Thus, in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 n.10 (9th Cir. 1992), the Court of Appeals confronted a situation in which Argentina was operating for profit a hotel it had seized from a couple at the time of the Argentine military coup. Argentina argued that the commercial activity exception did not apply in that the act of seizure of a hotel was a sovereign act. The Ninth Circuit court of appeals held that "Argentina's initial seizure of INOSA through a 'judicial intervention,' which the Sidermans allege to have been nothing more than a sham for expropriation, similarly may constitute commercial activity … We note that the commercial activity exception does not require that *every* act alleged be commercial in nature." *See also Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985) ("The [Somali government] Agency does not seriously dispute the finding that its detention of the ship and demand for payment were 'commercial activit[ies] of the foreign state elsewhere.").

Defendant cites the Supreme Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993), as support for its contention that the "[e]xercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce." However, Defendant's reliance on *Nelson* is misplaced and fails to distinguish the separate clauses set forth in 28 U.S.C. §1605(a)(2). As the Supreme Court in *Nelson* makes abundantly clear, its

upholding of Saudi Arabia's claim of sovereign immunity was made under the *first* clause of 28 U.S.C. §1605(a)(2), which provides that the action must be "based upon a commercial activity …" The Court went to great lengths to distinguish this first clause from the second and third clauses of 28 U.S.C. §1605(a)(2), which use the "in connection with" language, rather than the "based upon" language. Indeed, the Supreme Court emphasized that the use of different language in different clauses so closely situated to each other in the text of a statute means an intent to assign very different meaning:

> Earlier, see n. 3, *supra*, we noted that §1605(a)(2) contains two clauses following the one at issue here [which requires an act to be "based upon a commercial activity"]. The second allows for jurisdiction where a suit "is based … upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," and the third speaks in like terms, allowing for jurisdiction where an action is based … upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that causes a direct effect in the United States." Distinctions among descriptions juxtaposed against each other are naturally understood to be significant … and Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than *a mere connection with, or relation to*, commercial activity.

Id. at 358 (emphasis added). However, even with respect to the first clause, the Supreme Court states that it does "not mean to suggest that [it] necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both commercial and sovereign elements" under the first clause. *Id.* n.4.

Based on the foregoing compelling authority, the acts taken by the Nazi government of Germany in fining Walter Westfeld and seizing his works of art in satisfaction of the fine, even if in and of themselves sovereign acts, do not prevent satisfaction of the commercial activity exception to foreign state immunity under 28 U.S.C. §1605(a)(2). All that is required is that the

act be "in connection" with commercial activity" of the sovereign and/or that the sovereign's activities be a mix of both sovereign and commercial acts.

2. Even if the "Act" Must be One in Which a Private Person Can Engage, That Requirement is Satisfied

Even if the "act" complained of must also be one that a private person could engage in, despite all of the previously cited authorities to the contrary, this requirement is satisfied in the present case. There are at least three reasons for this. First, there was no strictly sovereign act inasmuch as the fine imposed on Walter Westfeld was part of a sentence declared null and void. Second, the dispossessory acts with respect to Walter Westfeld's works of art and tapestries was a seizure and not an expropriation. As such, it was an act of a type in which a private person can engage. Third, the dispossessory acts of the Nazi government have been consistently denied recognition as those of a sovereign.

a. There is No Strictly Sovereign Act as the Fine Imposed Was Declared by Defendant to be "Null and Void"

Defendant contends that the seizure and sale of Walter Westfeld's private property was the abuse of "its police and prosecutorial power" by the German government, which is uniquely sovereign in nature.(Def. Mem. of Law p. 18) However, as a legal matter, those powers must be regarded as never having occurred. The reason is that on May 13, 1952, Defendant declared the sentence imposed on Walter Westfeld in 1938 to be "null and void." (Comp., ¶23)

When a judgment of a court is declared "null and void" it is deemed to have no legal existence. *See, e.g., Carter v. Allen*, 631 N.E. 2d 503, 507 (Ind. Ct. App. 1994) ("It is as if it never existed."); *Sandler v. Tarr*, 345 F. Supp. 612, 621 (D. Md. 1971); *Donald v. Scott*, 67 F. 854, 855 (C.C.S.C. 1895); *Downs v. Hubbard*, 123 U.S. 189, 207 (1887); *Re Barker-Fowler Elec. Co.*, 141 B.R. 929 (Bankr. W.D. Mich. 1992). It is regarded as never having taken place.

See, e.g., City of Kenosha v. Jensen, 516 N.W. 2d 4, 7 (Wis. Ct. App. 1994) (The "judgment having no force or effect, it is as if it never took place."); *People ex rel Hunter v. Seay*, 200 N.Y.S. 531, 535 (N.Y. App. Div. 1923)(if sheriff's sale is deemed "null and void," it is considered "as though it never took place"); *Thompson v. Thompson*, 162 N.Y.S. 929, 930 (N.Y. Sup. Ct. 1917); *Sanford v. Sanford*, 28 Conn. 6 (Conn. 1859) (the entry on the record is "expunged").

Inasmuch as the sentence never existed, all acts predicated on the ruling are also deemed without legal existence. *See, e.g., Carter*, 631 N.E. 2d at 507 ("In addition, all subsequent actions predicated on that ruling 'are tainted by its nullity and are similarly without affect.'"); *Morrison v. Bestler*, 387 S.E. 2d 753, 756 (Va. 1990) ("any subsequent proceeding based on such a defective judgment is void and a nullity").

Based on the foregoing, any official act by the German government in seizing Walter Westfeld's property and selling it never occurred. The record has been, in effect, expunged. The matter must be considered as if the German government now holds private property that fortuitously came into its possession through commercial dealings in the private art market, rather than in consequence of certain official acts. Any other approach would be giving legal recognition to actions that do not exist, never took place, and have been expunged from the record.

This Court should refuse to recognize the existence of such "sovereign" acts for another reason. Defendant, arguing now that these are "sovereign" acts, was the very one to declare them null and void. Having previously taken the position that the actions taken were not the valid acts of a sovereign and had no effect or existence, it should not now be permitted to argue that such acts have a legal effect beneficial to Defendant. Moreover, though determined to be void in

Germany, it also has no effect here. *See, e.g., Team Design v. Gottlieb*, 104 S.W. 3d 512, 525 (Tenn. Ct. App. 2002) ("A void judgment lacks validity anywhere…").

b. The Dispossessory Acts of Defendant with Respect to Walter Westfeld's Works of Art and Tapestries Were Seizures, a Type of Action in Which a Private Person Can Engage

Defendant contends that the "acts" that are complained of by Plaintiffs, the seizure and sale of Walter Westfeld's property, which were done in connection with German government's commercial activity in the art market, must also be acts in which a private person can engage. Even if this clearly incorrect standard is applied in this case, Plaintiffs easily meet it.

In classifying an act, the *nature* of the act and not its *purpose* must be considered. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Thus, the fact that the sovereign is acting to fulfill uniquely sovereign objectives is not relevant. For example, the *issuance* of bonds by the Republic of Argentina in *Weltover*, even if having an exclusively sovereign purpose, was not uniquely sovereign in *nature*. The Supreme Court explained that the issuance of bonds is the "type" of action in which a private party can engage. *Id.* at 615.

In the present case, Plaintiffs allege that the Nazi Government seized Walter Westfeld's property to satisfy an obligation owed, the Reichmarks 300,000 fine. The question is whether the seizure and sale of property to satisfy a claim is of a *nature* that is exclusively public, one in which only a sovereign can engage. The answer, plainly, is that the ability to seize property of an obligor in order to satisfy a creditor's claim is not an act of a purely sovereign nature. For hundreds of years, under the common law and by statute, a secured creditor, for example, has had the right to seize collateral upon default without judicial process or the approval of state officials, as long as the seizure is done peaceably. *See* 5 Rich. 2, ch. 8 (1381); 8 Hen. 6, ch. 9 (1429). *See generally* William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND 4-6

(Clarendon 1768); Robert S. Schoshinski, AMERICAN LAW OF LANDLORD AND TENANT §6:5 (1980).

In response to the argument that these self-help remedies involve state action because the state sanctions them, courts have consistently held that the self-help remedy available to private creditors involves purely the acts of a private party and does not involve state action. *See, e.g., Gary v. Darnell*, 525 F.2d 741 (6th Cir. 1974); *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. 1974); *Kinch v. Chrysler Credit Corp.*, 367 F. Supp. 436 (E.D. Tenn. 1973).

Furthermore, Tennessee authorizes by statute a self-help remedy without the need for judicial intervention. Tennessee Code Annotated §47-9-610 specifies that, following seizure of property, the secured creditor "may sell, lease, license or otherwise dispose of any or all of the collateral …" T.C.A. §47-9-610. This is precisely what Defendant did, seize the property and sell it.

Numerous other self-help remedies involving seizure are also available to private parties. For example, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), the Supreme Court upheld a New York statute permitting a warehouseman with a lien to convert the lien to title. The Uniform Computer Information Transactions Act (UCITA) §816 permits a software maker to disable the use of licensed software if a license fee has not been paid. Such action is effectively a seizure of the software, which is no longer usable by the consumer. This action can be taken without court involvement or any other sort of state involvement. A common law right of private persons to self-help through unilateral computer software deactivation has also been recognized. *See, e.g., American Computer Tr. Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473 (D. Minn. 1991). In the realm of landlord-tenant law, a property owner is entitled to expel a wrongful possessor of his land, or to reclaim goods or for the distraint of a chattel of the

tenant in satisfaction of rent. *See* RESTATEMENT (SECOND) OF TORTS §§185, 198-99, 273. *See also* U.C.C. §2A-525 (lessor may seize leased personal property upon default and may do so "without judicial process").

The fact that a government's claims against debtor property is not uniquely sovereign in nature is further supported by the fact that the government is not necessarily even given priority over private creditors. Thus, the federal government must generally adhere to the common law principle "first in time is first in line." See 26 U.S.C. §6323(a)(with respect to federal tax liens). It is also commonly true of other claims by the United States and may even be the case when the competing private creditor has only an unsecured claim. *See, e.g., Marshall v. New York*, 254 U.S. 380, 384 (1920) (Brandeis, J.). *See generally U.S. v. Estate of Romani*, 523 U.S. 519 (1998).

As the foregoing demonstrates, the seizure of Walter Westfeld's works of art and tapestries to satisfy his outstanding obligation was not in the nature of a peculiarly sovereign act. Thus, even assuming the "act" under the commercial activity exception is also required to be of a *nature* that is not peculiarly sovereign and of a *type* in which a private person can engage, the acts alleged in the Complaint satisfy the requirement.

c. <u>The Dispossession of Private Property by the Nazi Government Was Not the Act of a Sovereign</u>

Further, the acts of the German government, whether regarded as seizures or expropriations, were not in the nature of sovereign acts, however sovereign they might formally appear. The federal judicial and executive branches of the United States have consistently held that the "acts" of the Nazi government in dispossessing persons of property are not entitled to respect as the acts of a sovereign and are *sui generis.*

For example, in *Altman v. Republic of Austria*, 142 F. Supp. 2d 1187, 1202-03 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954, 968 (9th Cir. 2002), *aff'd* 541 U.S. 677 (2004), the federal district court considered whether the Nazis' taking of Gustav Klimt paintings from a Jewish collector were expropriations deserving of sovereign immunity under the expropriation exception to the FSIA. The court explained that international law requires that, in order for the sovereign act to be recognized, the expropriation must be in furtherance of a public purpose. It then held that, based on the allegations of the complaint, "the taking was not for public purpose; instead, some of the art was distributed to the collections of Hitler, Göring, and Dr. Fürher. Other art was sold for the benefit of the Nazi party." 142 F. Supp. 2d at 1202-03. *See also Altmann v. Republic of Austria*, 317 F.3d at 968 (9th Cir. 2002).

The Plaintiffs allege in their Complaint a similar set of facts with respect to Walter Westfeld's works of art. Specifically, the Complaint alleges that "the entire scheme was conceived to maximize profit for the government and/or Nazi officials." (Comp.,¶20) The Complaint alleges further that an account of Walter Westfeld's interrogation by the Gestapo reveals "interest was expressed by his interrogators in adding an El Greco painting owned by Walter Westfeld to Hitler's private collection in Linz, Austria." (Comp.,¶24) The Complaint also alleges that "the goal [of the seizure and sale] was to raise substantial liquid funds on sale for the government and *party officials*, as well as to build public and *officials'* art collections. (Comp.,¶6.b.) (emphasis added)

In *Altmann*, the district court went on to declare that "Nazi Germany is not recognized as a valid foreign sovereign." 142 F. Supp. at 1200. This echoes other judicial opinions. *See, e.g., Vineberg v. Bissonnette*, 529 F. Supp. 300, 307 (D.R.I. 2007) (the acts of the Nazis in taking art works of Jews for auction constituted "looting or stealing"); *Weiss v. Lustig*, 58 N.Y.S. 2d 547,

549 (N.Y. Sup. Ct. 1945) ("This court, however, may take judicial notice of the fact that we are not dealing with the laws of a sovereign state, but with a country overrun by bandits, who were issuing their own decrees. To recognize these decrees as the laws of a sovereign state, would do violence to every fundamental principle of human justice."); *Menzel*, 267 N.Y.S.2d at 818 (detailing the intricate relationships between the German government, the Nazi Party, and Nazi officials, and concluding, with respect to the Act of State Doctrine that "in the case of acts of Nazis, American courts might examine the official acts of another state.").

Perhaps, the most critical decision in this regard is *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2d Cir. 1954). In prior decisions, the Second Circuit had held that the acts of the Nazi regime could not be questioned because they were the acts of a foreign sovereign. Following these decisions, the Second Circuit Court of Appeals was asked to amend its decisions on the basis of a letter from Jack B. Tate, Acting Legal Advisor, Department of State, setting forth the Executive Branch's policy vis-a-vis property dispossessions by Nazi Germany. On the basis of this letter, the Court of Appeals in *Bernstein* amended its earlier decisions and advised the district court that it could proceed with the trial. The Tate Letter was published as the official position of the United States in State Department Press Release No. 296 on April 27, 1949 and is entitled: "Jurisdiction of United States Courts re Suits for Identifiable Property Involved in Nazi Forced Transfers." It states, *inter alia*: "3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in German[sic], is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." The Tate Letter has never been repudiated and remains in effect. The history of the *Bernstein* litigation

makes clear that neither the federal courts nor the federal executive treat the dispossessory "acts" of the Nazi regime as if they were the acts of a sovereign states, but rather regard them as the acts of nonsovereign thieves and bandits.

3. The German Government Engaged in "Commercial Activity" with Respect to Walter Westfeld's Works of Art and Tapestries

In addition to an "act," that act must be in connection with commercial activity. Under 28 U.S.C. §1603(d), "commercial activity" for purposes of the FSIA is defined as "either a regular course of commercial conduct or a particular commercial transaction or act." As previously explained, the fact that the foreign government is not acting with a profit motive or that its aim is to fulfill a uniquely sovereign function is irrelevant. This is because "the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' 28 U.S.C. §1603(d) …" *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992). Thus, "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.* Addressing the Argentine, government-issued bonds, the Supreme Court in *Weltover* concluded that they were clearly of a commercial character. Specifically, they were "garden-variety debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income." *Id. See also Keller v. Central Bank of Nigeria*, 277 F.3d 811, 816 (6th Cir. 2002) (denying motion to dismiss complaint and finding commercial activity exception applicable).

Applying the standards set forth by the United States Supreme Court in *Weltover* and reiterated by the Sixth Circuit in *Keller*, the German government here was clearly engaged in commercial activity with respect to the works of art owned by Walter Westfeld. The Complaint states in ¶6.b. that the "commercial activity" was "the sale of the converted works by the German

government on the private art market through private auction houses." Subparagraph 6.b. proceeds to allege that this was part of an "integrated policy" designed to "raise substantial liquid funds on sale for government and party officials, as well as to build public and officials' art collections." The Complaint further alleges that the works of art were sold at auction via the private auction house, Lempertz. (Comp., ¶¶17-18) The German government pursued "its well-documented practice during this period of active participation as seller and purchaser on the open market of Jewish-owned art." (Comp., ¶20) Through this active participation in the private market, the German government was able to cover other expenses, reinvest in art, retain profits or provide them to Nazi officials. (Comp., ¶20)

As the Complaint makes clear, the *nature* of these activities, of which the sale of Walter Westfeld's works of art and tapestries is a part, is the same "as that of prominent private participants in art markets around the world." (Comp., ¶20) Auction houses competed to gain the business of the German government, just as they would for major collectors. (Comp., ¶21) The German government retained auction houses based on satisfaction with their performance. Specifically, with regard to an El Greco painting, agents of the German government expressed dissatisfaction with the marketing by one auction house, Eugen Pongs, and decided to move the painting to Lempertz for auction. As the Complaint alleges: "In this regard, the conduct of the German government was not unlike that of any seller of artwork who would expect a gallery or auction house to act in a timely manner with considerable effort in achieving a sale and obtaining payment for the seller at the best price. If dissatisfied with one gallery or auction house, the seller would seek out the services of another gallery or auction house promising superior service and more timely sales." (Comp., ¶25) The German government also retained experts to advise them on the management of the collection. (Comp., ¶21)

As the foregoing makes clear, the *nature* of the German government's activity was "commercial activity." Private persons can also sell and buy art. Private persons also use proceeds from art sales to benefit themselves, including re-investing the profits in new works of art to be added to their collections for both public viewing and private gratification. Private persons typically negotiate and contract with galleries or auction houses to market their works and also buy through them. Private persons typically retain experts to advise them on managing their collections. If a private collector is dissatisfied with the efforts of a gallery or auction house on his/her behalf, the collector may move the works of art to a different gallery or auction house to deal in the private market for the collector.

In all, hundreds of works of art and tapestries owned by Walter Westfeld were sold through Lempertz in 1939 and again during the period 1943-44. (Comp., ¶¶18-25) However, even if only a single sale had been made, this would have sufficed to satisfy the "commercial activity" requirement. H.R. Rep. 94-1487, at 16, *reprinted* in 1976 U.S.C.C.A.N. at 6615, explains that the definition of "commercial activity" under 28 U.S.C. §1603(d) includes "a single contract, if of the same character as a contract which might be made by a private person." *See also S & Davis Intern., Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1302 (11th Cir. 2002); *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 724-25 (9th Cir. 1997).

The Sixth Circuit's recent decision in *O'Bryan v. Holy See*, 556 F. 3d 361 (6th Cir. 2009) amplifies upon the commercial activity exception. It emphasizes that in addition to the question of the *nature* of the activities, consideration must be given to the gravamen of the claim to determine whether it is truly commercial or whether the plaintiff is just using "creative nomenclature as a semantic ploy." Relying on language in *Doe v. Holy See*, 434 F. Supp. 2d 925, 942 (D.Or. 2006), the *O'Bryan* court then enumerates claims that at their "core" are

"commercial." The very first one enumerated is "property damage." 556 F. 3d at 380. Property damage, as well as the other listed, are contrasted with the gravamen of the claim in both *O'Brien* and *Doe*—sexual abuse. Indisputably, the gravamen of the claim in the present case is "property damage," specifically the conversion of Walter Westfeld's property by the German government.

Just as there can be no question that the gravamen of the claim is property damage, there is also no doubt that there is an act—conversion by seizure and auction-- "in connection with" commercial activity. This 'connection" between the "act" and the "commercial activities" is substantial. The Complaint alleges that the "conversion and sale were part of an integrated policy in which Jews were deprived of their artwork on fabricated grounds to appear as if the government was just enforcing laws, the goal being to raise substantial liquid funds on sale for the government and party officials as well as to build public and officials' art collections." (Comp., ¶6.b.)The actions of the German government were "part of a well-conceived policy of profiting from Jewish owned works of art and property generally first by compelling their sale on the private market and keeping the profit." (Comp., ¶17)

4. The Acts of the Nazi Government Were Not an "Expropriation" Covered by 28 U.S.C. §1605(a)(3)

In its Memorandum of Law, Defendant repeatedly describes the actions of the German government with respect to Walter Westfeld's works of art and tapestries as an "expropriation" or a "confiscation." However, nowhere in the Plaintiffs' Complaint are the terms "expropriation" or "confiscation" used. The reason for this is that there was ***no*** expropriation or confiscation. Rather, there was a "seizure" of Walter Westfeld's property by the Nazi Government in order to satisfy a fine of Reichmarks 300,000 that had been imposed. (Comp., ¶22)

The distinction between an expropriation or confiscation on the one hand and a seizure of property to satisfy a fine is a critical one that has long been recognized in our own jurisprudence. *Compare* U.S. Const. Fifth Amendment (requiring just compensation for a taking) and U.S. Const. Eighth Amendment (allowing fines that are not "excessive"). An expropriation (also known as a confiscation) is a taking of a particular property, rather than the sale of property simply to derive value. An expropriation imposes a disproportional burden on one person for a public use. Under our own constitutional system, the person suffering the disproportionate burden is entitled to just compensation via the Fifth Amendment. On the other hand, a fine is imposed for violation of law. Essentially, a person has to return to the society benefits derived in violation of the social compact. To require just compensation in the cases of a fine or a tax would defeat their very purposes. *See Austin v. U.S.*, 509 U.S. 602, 613-14 (1992) (upholding the constitutionality of civil penalties); 1 WILLIAM BLACKSTONE COMMENTARIES **138, 299, 2 WILLIAM BLACKSTONE COMMENTARIES *11; Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1299-1301 (2002). In 1938, a fine of Reichmarks 300,000 was imposed on Walter Westfeld for unauthorized currency dealings. He did not have the resources to pay the fine. Accordingly, many of his works of art and tapestries were seized and put up for auction at Lempertz Auction House. The proceeds of the auction were used to pay off the fine. But even if no fine had been owed, the seizure of his property would be a forfeiture or penalty imposed on account of his alleged currency dealings and would not constitute an expropriation.

Since an expropriation has not, in fact, been alleged in this case, the Defendant's reliance on *Rong v. Liaoning Province Gov't*, 452 F.3d 883 (D.C. Cir. 2006), *Armorrortu v. Republic of Peru*, 570 F. Supp. 2d 916, 923 (S.D. Tex. 2008), and *Garb v. Republic of Poland*, 440 F. 3d

579 (2d Cir. 2006) are inapposite and misplaced. In *Rong*, a Working Committee headed by the Assistant to the Governor of Liaoning Province, China "declared that all equity interests held in the name of [a foundation, including, but not limited to plaintiff's interest] … were state assets …" 452 F.3d at 886. This action by the Province was clearly an expropriation, not a fine or forfeiture imposed on a particular individual on account of his misconduct. Similarly, in *Amorrortu v. Republic of Peru*, 570 F. Supp. 2d 916 (S.D. Tex. 2008), the plaintiff actually alleged that his assets had been confiscated and destroyed. This is absolutely not the basis of the claim being made in the present lawsuit. In *Garb*, the Court's action was based on post-W.W. II Polish expropriatory legislation nationalizing "deserted,' "abandoned," and "post-German" property. The Court expressly defined the term "'expropriation' to include acts 'against individual property' that are carried out 'on a wide scale and impersonally' and are commonly referred to as a 'nationalization.'" 440 F.3d at 586 n.7. The dispossession of Walter Westfeld's property was particular to Walter Westfeld and based on an Order addressed specifically to his alleged violation of the law. Accordingly, it was not an "expropriation" as defined in *Garb*, and that case is, therefore inapposite.

Nevertheless, Defendant's efforts to persuade the Court that this case involves an expropriation is not limited to reliance on these cases. Defendant actually devotes three pages of its memorandum of law to the expropriation exception to foreign sovereign immunity, 28 U.S.C. §1605(a)(3), and concludes that Plaintiffs' allegations do not qualify for this exception to sovereign immunity. These three pages should be ignored by the Court. Plaintiffs, in fact, do not allege anywhere in their Complaint that they are basing subject matter jurisdiction in this lawsuit on the expropriation exception of 28 U.S.C. §1605(a)(3). Defendant's suggestion to the contrary is a complete red herring.

Defendant also states that it must address the expropriation exception because "Plaintiff fails to clearly identify which exception to sovereign immunity Plaintiff claims is applicable to the Federal Complaint." (Def. Mem. of Law p. 15) This is another red herring and is obviously incorrect. Paragraph 6 of Plaintiffs' Complaint explicitly states that subject matter jurisdiction is based on the commercial activity exception.

5. Even if There was an "Expropriation," the Commercial Activity Exception Affords this Court Subject Matter Jurisdiction.

Assuming there was an expropriation, Defendant argues that allowing an expropriation to be an "act" under the commercial activity exception will swallow up the distinct expropriation exception to foreign sovereign immunity set forth in 28 U.S.C. §1605(a)(3). (See Def. Mem. of Law p. 5) Defendant places much reliance on *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006) for this proposition. In *Garb*, the Court expressed concern that allowing an expropriation to constitute the predicate "act" under the commercial activity exception of 28 U.S.C. §1605(a)(2) would swallow up the distinct expropriation exception to foreign sovereign immunity set forth in 28 U.S.C. §1605(a)(3).

In fact, the Court's opinion does not lay down a per se rule that no expropriation can serve as the predicate "act" for application of the commercial activity exception. The court cites favorably to *Hanil Bank v. Pt. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 131 (2d Cir. 1998), and *Adler v. Federal Republic of Nigeria*, 107 F. 3d 720, for the proposition that there is *not* a per se rule, but rather that there must be a "substantive connection" or a "causal link" between the act and the commercial activity. 440 F. 3d at 587.

Garb's concern, therefore, is with those cases in which there is an "attenuated" link between an expropriation and the commercial activity. *Id.* at 587. It is not pertinent to the present lawsuit. As has been carefully delineated in the Complaint and examined in this

Response, the connection between the act complained of, the conversion of Walter Westfeld's works of art and tapestries, and the German government's commercial activity via dealings in the private art market with respect to those particular items, is a substantial one and was part of an integrated scheme. The steps were planned before hand and followed in quick succession. The seizing of the property was central to the conduct of a particular commercial enterprise which received much attention by the German Government and its individual officials. *See supra* II.A.3.

B. <u>The Seizure of Walter Westfeld's Property Had a Direct Effect in the United States</u>

In order for the third clause of the commercial activity exception to apply, the act must have a "direct effect" in the United States. In its Memorandum of Law, Defendant argues that the direct effect requirement has not been satisfied for several reasons. The Defendant gives as reasons – the act did not occur in the United States, no action took place in the United States by the Nazi government, the act was not based on commercial activities in the United States, and the denial of resources to Walter Westfeld's heirs in the United States at best constituted "indirect injurious consequences." In support of its argument Defendant cites to a number of authorities from the D.C. and Second Circuit as authority. It also relies on a number of cases involving personal injuries. (Def. Mem. of Law pp. 21-22)

Defendant's contentions are completely without foundation both in law and fact. To begin with, the "act" that serves as a predicate for the commercial activity exception does not have to occur in the United States. In fact, the statute requires that it *must* occur "outside the territory of the United States" in order for the exception to sovereign immunity to apply. 28 U.S.C. §1605(a)(2). There is simply no authority to the contrary. The above-quoted language also makes clear that there is no requirement that the foreign government take any action in the

United States. There is also nothing in the statute or the case law requiring commercial activities to occur in the United States for there to be a "direct effect" in the United States.

Defendant's almost exclusive reliance on opinions involving *personal* injuries is also misplaced and these opinions are clearly not on point. The basis for subject matter jurisdiction in this matter is the commercial activity exception, with the act being the conversion of *property.*[6] The question whether lingering effects of a personal injury suffered abroad is a direct effect in the United States is not at all pertinent. Thus, in *Strach v. Casino Windsor*, 351 F. Supp. 2d 641, 643 (E.D. Mich. 2004), the district court did not even consider the significant Sixth Circuit precedents on direct effect when *property* is involved, declaring instead that with respect to the lingering effects of personal injuries, "[t]here is no Sixth Circuit case law on point."

The remaining contention made by Defendant, that Plaintiffs have suffered only "indirect injurious consequences," also lacks merit and should be rejected by the Court. Defendant maintains that the acts of the Nazi regime did not have a direct effect in the United States, but all of the authorities it places primary reliance upon in reaching this legal conclusion adhere to an approach that has been repudiated in no uncertain terms by the Sixth Circuit Court of Appeals.[7]

The position of the Sixth Circuit with respect to the meaning of "direct effect" was set forth in the landmark decision, *Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002). In *Keller*, the Sixth Circuit Court of Appeals rejected the approach taken by the authorities Defendant relies upon, most notably the Second Circuit decision in *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993).

---

[6] As stated, above, almost all of the cases cited by Defendant in support of it argument involve *personal* injury. *See Reers v. Deutsche Bahn AG*, 320 F. Supp. 2d 140, 149 (S.D.N.Y. 2004); *Strach v. Windsor*, 351 F. Supp. 2d 641, 643 (E.D. Mich. 2004); *Martin v. Rep. of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987); *Zernicek v. Brown & Root, Inc*, 826 F. 2d 415, 418-19 (5th Cir. 1987).

[7] The cases cited include *Antares Aircraft L.P. v. Fed. Rep. of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993); *Zedan v. Kingdom of Saudi Arabia*, 849 F. 2d 1511, 1514 (D.C. Cir. 1988); *Texas Trading & Milling Corp. v. Fed. Rep. of Nigeria*, 647 F. 2d 300, 312 n. 5[sic] (2d Cir. 1981); *Lempert v. Rep. of Kazakhstan*, 223 F. Supp. 2d 200, 204 (S.D.C. 2002); *Fickling v. Commonwealth of Australia*, 775 F. Supp. 66, 71 n. 2 (E.D.N.Y. 1991).

Keller relied heavily on the Supreme Court's prior decision in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). In *Weltover*, the Supreme Court explained that an effect is direct if it follows "as an immediate consequence of the defendant's … activity." Thus, when Argentina unilaterally rescheduled its bonds, thereby depriving bondholders of their property, there was a direct effect in the United States because "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id*. at 619. The Supreme Court categorically rejected attempts by certain federal courts to engraft a requirement that an "act" be "substantial" and "foreseeable" in order to be direct. For the Court, the direct effect requirement is satisfied as long as jurisdiction is not "predicated on purely trivial effects in the United States." *Id*. at 618. The fact that a foreign party "with no other connections to the United States" has suffered loss at the hands of a foreign government also does not bar suit in the courts of the United States." *Id*.

In *Keller*, the Sixth Circuit also rejected the position of the Second Circuit (and the D.C. Circuit) that a plaintiff must show that "'a legally significant act' occurred in the United States." An example of "a legally significant act," according to the *Keller* court, would be a failure to make payment *when the contract designates a place in the United States as the place of performance*." 277 F.3d at 817 (emphasis added). *See also American Telecom Co., L.L.C. v. Republic of Lebanon*, 501 F. 3d 534 (6th Cir. 2007) (reaffirming that the Sixth Circuit has "renounced any legally-significant-act test").

This "legally significant act" test was rejected prior to *Keller* by the Fifth Circuit Court of Appeals in *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998).[8] It

[8] Defendant's citation to *Zernicek v. Brown & Root, Inc*, 826 F. 2d 415, 418-19 (5th Cir. 1987) is unpersuasive, as it predates the decision in *Voest-Alpine*, which altered the position of the Fifth Circuit. In addition, that case involved a claim for personal injuries.

emphasized that in "*Weltover*, the Supreme Court expressly admonished the circuit courts not to add 'any unexpressed requirement[s] to the third clause'. … The legally significant act requirement is unexpressed in the third clause and, thus, has been renounced in *Weltover*." *Id*. at 894. In *Keller*, the Sixth Circuit endorsed the above-quoted language in *Voest-Alpine*, stating: "We agree that the addition of unexpressed requirements to the statute is unnecessary, and we decline to adopt the 'legally significant acts' test." 277 F.3d at 818. This important holding distinguishes the Sixth Circuit position from the authorities cited by Defendant, which require, for example, that nonreceipt of a payment is not a direct effect unless there was a legally significant act such as a payment clause in a contract requiring payment in the United States. As *Voest-Alpine* makes clear, "a financial loss incurred in the United States by an American plaintiff" satisfies the direct effect requirement, even if there is no legally significant act requiring payment in the United States. 142 F. 3d at 894. The rejected approach of the Second and D.C. Circuits has the effect of imposing *de facto* a "forseeability" or "substantiality" test, which the Supreme Court explicitly rejected in *Weltover*. It also effectively undermines the distinctiveness of the third clause of the commercial activity exception and converts it into the second clause, which, unlike the third clause, requires an act "performed in the United States." *Id.* at 895.

In *Keller*, the defendants agreed to pay but failed to transmit funds to the United States. The court found that this failure to pay had a direct effect in the United States. Likewise, ¶6.c.i. of the Complaint here alleges that the direct effect of the seizure and auction was that "[v]aluable assets intended for immediate transfer to the United States by Walter Westfeld did not reach the United States." This allegation is reinforced by ¶6.c.ii. of the Complaint, which states that Walter Westfeld's family members in the United States, notably Nashville, "were denied the

benefit of property and the proceeds from their sale that were intended to be used for their benefit."

Indeed, Walter Westfeld made repeated efforts to remove his vast collection to the United States. (Comp., ¶13) Initially, as part of his ongoing efforts, he was able to smuggle out approximately $40,000, a large sum at the time, to his brother, Robert, in Nashville. (*Id*.) He planned to sell works of art once in the United States to raise funds to finance his needs "and those of other members of the Westfeld family," beyond the original $40,000. (Pls. Comp., ¶14) The Nazi officials were fully aware of these plans, as is revealed in their interrogations of him detailed in Herbert Schmidt's 2005 book, *Der Elendsweg der Düsseldorfer Juden, Chronologie des Schrecken, 1933-1945*. (Comp., ¶35)

The seizure and sale of the works of art and tapestries by the German government prevented these assets from arriving in the United States where they would have directly benefited Nashvillians. This is not mere speculation. As previously stated, $40,000 had already been successfully transferred to Walter's brother Robert in Nashville. Had the works of art and tapestries arrived, they would have provided the resources that could have cured the impoverished state in which the brothers and their families lived through the war years and thereafter.[9] (Comp., ¶29)

The court in *Weltover* also required that for an effect to be "direct," it must be "an immediate consequence of the defendant's activity." In *Weltover*, the nonreceipt of a scheduled bond payment in New York was a direct effect and, apparently, an immediate consequence. In *Keller*, the failure "to transmit the promised funds to an account in a Cleveland bank" was a

[9] The direct effect must also not be trivial. *Republic of Argentina v. Weltover*, 504 U.S. 607, 618 (1992). Based on the brothers' immediate and ongoing need for resources, the interference with the shipment of Walter Westfeld's collection to the United States, as well as his transfer of cash, had a more than trivial effect on domiciliaries of Nashville, Tennessee.

direct effect having immediate consequence. In the present case, the seizure and auction of works of art interrupted and prevented their intended shipment to the United States as part of an overall plan to provide for Walter Westfeld and his brothers domiciled and residing there. In all these instances the consequences were immediate. Specifically, persons in the United States were denied financial resources they anticipated receiving.

Weltover, Keller and the present case can be distinguished from ones in which there is no intentional plan to transfer assets directly and presently to the United States. Indeed, this is the precise distinction drawn in *American Telecom Co., LLC v. Republic of Lebanon*, 501 F.3d 534 (6th Cir. 2007). In *American Telecom*, the plaintiff, American Telecom, was disqualified from a list of bidders in the country of Lebanon. There had been no commitment to pay American Telecom anything. Had it won the bid, the eventual payments under the contract would have been deposited in an account in Lebanon. In contrast, the seizure of Walter Westfeld's property had the immediate consequence of preventing the effectuation of the ongoing effort to ship assets to the United States. Thus, the acts of Defendant clearly had a direct effect in the United States.

III. PLAINTIFF'S COMPLAINT IS NOT BARRED BY THE STATUTE OF LIMITATIONS

Defendant also seeks dismissal of Plaintiffs' claim for conversion under Fed. R. Civ. Proc. 12(b)(6) on the ground that the claim is barred by the applicable statute of limitations. Defendant argues that the three-year statute of limitations for conversion of personal property, Tenn. Code Ann. 28-3-105(2) has run. This is plainly incorrect. Tennessee law has long adhered to the rule that, "where the cause of action accrues after the death of the person entitled, or during his disability or incapacity to sue, and such disability or incapacity continues until death, the statute does not begin to run until the grant of administration upon such person's

estate, for until then there is no person in being capable of suing." TENNESSEE JURISPRUDENCE, EXECUTORS AND ADMINISTRATORS §87. Statute of Limitations (2004).

The leading precedent from which this principle is derived in *Thurman v. Shelton*, 18 Tenn. 383 (1837). In that case, a suit was brought challenging a deed and bill of sale 18 years after their execution. The Tennessee Supreme Court rejected the statute of limitations argument. It held that a suit challenging the deed and bill of sale could be brought 18 years later because there was no proper person to bring the suit before then. At the time of the execution of the deed and bill of sale, and thereafter for the remainder of his life, the transferor was insane and, thus, was not legally capable of bringing suit. After his death, there could be no suit until an administrator of his estate was appointed, because only an administrator has the authority and legal title with respect to personal property of a decedent. The heirs have no such rights. *See id. See also Union Planters Nat'l Bank & Tr. Co. v. Beeler*, 112 S.W. 2d 11, 12 (Tenn. 1938); *First Nat'l Bank v. Howard*, 302 S.W. 2d 516, 518-19 (Tenn. Ct. App. 1957); *Newman v. Schwerin*, 61 F. 865, 868-69 (6th Cir. 1894). As the Court explained in *Thurman:*

> "When Ralph Shelton died, the law cast the right to his personal property on no one till letters of administration were granted on his estate…It is a well-settled principle of law that before the statute of limitations can operate as a bar to the recovery of property there must not only have been an adverse holding for the time prescribed by the statute, but there must have been some person in existence capable of suing for the recovery, and not within the savings of the statute. *Letters of administration were obtained on the estate of Ralph Shelton by James Bledsoe, one of the complainants, within three years before the filing of this bill, and the statute of limitations is no bar to a recovery by him of the personal estate of his intestate in the hands of the defendants."*

(Emphasis added.)

This holding in *Thurman v. Shelton* has been cited with approval by the Tennessee Supreme Court, the Sixth Circuit Court of Appeals, and other courts around the country. *See,*

e.g., Brown v. Brown, 82 Tenn. 253 (1884); *Fowlkes v. Fowlkes*, 56 Tenn. 829 (1876); *Hudson Motor Car Co. v. Hertz*, 121 F. 2d 326, 331 (6th Cir. 1941) (statute of limitations did not begin to run until administrator appointed because "the period of limitation for enforcement of a claim does not begin to run until there is someone in existence capable of enforcing the claim" and under Virginia law only the administrator could bring the action); *Collier v. Goessling*, 160 F. 604, 611 (6th Cir. 1908) ("To start the running of a statute of limitation there must be some one capable of suing, some one subject to be sued, and a tribunal open for such suits."); *Northern Pac. Ry. Co. v. U.S.*, 277 F. 2d 615, 624 (10th Cir. 1960); *Judge of Probate v. Bowker*, 170 N.E. 451, 500 (Mass. 1930) (statute of limitations did not begin to run until trustee necessary to bring suit was appointed).

In the present case, no administrator was appointed until Fred Westfield was appointed Administrator *de bonis non administratis* Due to Newly Discovered Property on February 12, 2008. (Comp., ¶¶1, 41) Inasmuch as the Complaint in this action was filed in state Chancery Court less than *eight months* later on October 3, 2008, well within the three-year statute of limitations period for conversions of personal property, Defendant's Rule 12(b)(6) motion to dismiss should be denied.

1. <u>The Statute of Limitations Did Not Begin to Run Prior to Walter Westfeld's Death Because There was No Tribunal Open for Such Suits</u>

In *Thurman*, the transferor was insane and thus was legally incapable of bringing suit during his remaining lifetime following the conversion of property. Walter Westfeld was not insane. However, in order for the statute of limitations to begin running, there must be a "tribunal open for such suits." *Collier v. Goessling*, 160 F. 604, 611 (6th Cir. 1908). *See also Yancy v. Yancy*, 52 Tenn. 353 (1871)(closing of courts during Civil War tolled the statute). Walter Westfeld had no tribunal in which to bring a lawsuit prior to his death in 1943. He was arrested

and fined before any conviction, held in prison without any access to courts or to due process, tortured, and then sent off to a concentration camp where he was exterminated. (Comp., ¶¶17, 22).

Moreover, in Nazi Germany, Jews were denied a legitimate tribunal in which to pursue their legal rights. Walter Westfeld, along with other Jews, essentially had no legal rights and were formally stripped of any legal personality. *See, e.g.*, American Jewish Committee, THE JEWS IN NAZI GERMANY: A HANDBOOK OF FACTS REGARDING THE PRESENT SITUATION 35-36, 94 (1933) (reporting on a statement in the official Nazi newspaper, Völkischer Beobachter as early as April 3, 1933, that "members of the Jewish race are forbidden to enter courts" in Königsberg, Prussia);[10] Diemut Majer, NON-GERMANS UNDER THE THIRD REICH: THE NAZI JUDICIAL AND ADMINISTRATIVE SYSTEM IN GERMANY AND OCCUPIED EASTERN EUROPE WITH SPECIAL REGARD TO OCCUPIED POLAND 1939-1945, 49-55 (trans. Peter Hill et al. 2003) (detailing denial of legal personality to Jews and other "aliens" by the German Supreme Court, as well as other measures under German law to deny such persons legal status and adequate remedies under the law).[11] *See also* Eric A. Johnson, NAZI TERROR: THE GESTAPO, JEWS, AND ORDINARY CITIZENS 529 & nn. 20-22 (2000) (explaining how tribunals had no actual authority, with the real power resting with the Gestapo).[12] *See generally* Ingo Muller, HITLER'S JUSTICE IN THE THIRD REICH (trans. Deborah Lucas Schneider 1991). In short, Walter Westfeld's particular treatment at the hands of the German government as well as his very status as a Jew guaranteed

[10] This source is available at: http://books.google.com/books?id=isOYkUuf3gQC&pg=PP1&dq=the+jews+in+nazi+germany&ei=QO0WSuOiDIbikwS7pOTgAg

[11] This source is available at: http://books.google.com/books?id=J_BCNrHG9K8C&printsec=frontcover&dq=NON-GERMANS+UNDER+THE+THIRD+REICH:+THE+NAZI+JUDICIAL+AND+ADMINISTRATIVE+SYSTEM+IN+GERMANY+AND+OCCUPIED+EASTERN+EUROPE+WITH+SPECIAL+REGARD+TO+OCCUPIED+POLAND&ei=Z-4WSoyiAZDmkASC1ow8

[12] This source is available at: http://books.google.com/books?id=evpzeLsllYsC&printsec=frontcover&dq=Nazi+Terror:+The+Gestapo,+Jews,+and+Ordinary+Citizens&ei=vfEWSurjD4GulATck_mwCQ

that there would be no tribunal open to him to pursue his legal remedies. In fact, as a Jew, he fundamentally had no legal remedies.

2. The Statute of Limitations Also Did Not Begin to Run Prior to Walter Westfeld's Death Because A "Paramount Authority" Thwarted Any Prospect of Bringing Suit

In addition to the requirement that there be a tribunal open for such suits, the statute of limitations does not begin to run so long as a "paramount authority," that is, a sovereign or its agents, thwarts a putative plaintiff's efforts to pursue his legal remedy or instills in that putative plaintiff a legitimate fear of retribution or retaliation. As stated in *Davis v. Wilson*, 349 F. Supp. 905, 906 (E.D.Tenn. 1972*), aff'd*, 471 F. 2d 653 (6th Cir. 1972), "there is a broad rule that, whenever some paramount authority prevents a person from exercising his legal remedy, the time during which he is thus prevented is not counted against him in determining whether the statute of limitations has barred his right." *See also Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218 (1870); *Grisson v. Henderson County*, 869 F. 2d 1490 (Table) (6th Cir. 1989) (fear of retribution by government officials, if established, is equitable basis for tolling of statute of limitations); *Ross v. U.S.*, 574 F. Supp. 536, 542 (S.D.N.Y. 1983) (fear of retaliation by state sufficient to toll statute of limitations); *Mergenthaler v. Asbestos Corp. of Am.*, 500 A. 2d 1357, 1363-64 (Del. Super. Ct. 1988); *Ostrer v. Aronwald*, 434 F. Supp. 379, 388-89 (S.D.N.Y. 1977); *Application of United States Authorizing the Interception*, 413 F. Supp. 1321, 1335 (E.D. Pa. 1976).

The Nazi government indisputably exercised paramount authority over Walter Westfeld. He could not possibly have filed a suit seeking recovery from the German government. Even without attempting to file suit, he was stripped of his citizenship, officially denied any legal personality, tortured and humiliated by the state, and eventually sent to be gassed at Auschwitz. (Comp., ¶¶12, 24, 44). There can hardly be a more striking example of the exercise of the

paramount authority of the state creating conditions impeding a putative plaintiff from seeking a legal remedy. For this reason as well, the statute of limitations did not begin to run during Walter Westfield's lifetime and not until an administrator was appointed.

3. Even if the Statute of Limitations Period Has Expired It Should be Extended on Equitable Estoppel Grounds

Even if this Court concluded that the prescribed period for bringing this lawsuit has terminated under the formal terms of the statute of limitations, the Court should, nevertheless, apply the doctrine of equitable estoppel to extend the statute of limitations, as is permitted under Tennessee law. In *Fahrner v. SW Mfg., Inc.*, 48 S.W. 3d 141 (Tenn. 2001), the Tennessee Supreme Court explained that equitable estoppel will be applied to extend the statute of limitations if the defendant "allegedly prevented [the plaintiff] from filing suit in time." *Id*. at 146. This is the case, even if the defendant's alleged misconduct "did not prevent the plaintiff from learning he was injured." Moreover, there is "a well-settled rule that a party, by its conduct, may be estopped to rely on the statute of limitations." *Sparks v. Metropolitan Gov't of Nashville and Davidson Co.*, 771 S.W.2d 430, 432 (Tenn. Ct. App. 1989).

The Defendant, the Federal Republic of Germany, which "regards itself as identical to the [Third] Reich and claims its property," *Kunstsammlungen zu Weimar v. Elicofen*, 536 F. Supp. 829, 852 n. 22 (E.D.N.Y. 1981),[13] actively took steps that prevented Walter Westfeld and, then, his estate, from bringing suit in a timely manner. It imprisoned Walter Westfeld, who, as owner of the property, was the one person who could most reliably identify which of his assets had been seized and auctioned. (Comp., ¶17) Defendant also compelled through threat of force Walter

[13] Defendant takes umbrage at the equation by the Plaintiffs of Nazi Germany and the Federal Republic of Germany. (Def. Mem. of Law, p. 3 n.11) Defendant must surely know that the Constitution of the Federal Republic approved in 1949 stated in its Preamble that the Federal Republic regards itself as "identical" to the Reich. This very point was addressed in *Elicofen.* Indeed the Federal Republic took this stance in the face of arguments by certain international legal scholars that Defendant had to be the successor to and not identical to the Third Reich. *See, e.g.*, Josef L. Kunz, *Identity of States under International Law*, 49 Am. J. Int'l L. 68, 74-75 (1955).

Westfeld's relatives to flee the country without any resources, thereby inhibiting their ability, physically and financially, to obtain information as to the identity of the works of art and tapestries owned by him, and to determine those works of art and tapestries that actually had been converted by Defendant. (Comp., ¶¶2, 3, 12) After vicious interrogations, torture, and humiliation, Defendant sent Walter Westfeld away to Theresienstadt and then to Auschwitz, where he was exterminated, thereby eliminating once and for all the only reliable source for identifying all of the property that the Defendant had converted. (Comp., ¶¶2, 44) No inventory of the assets taken from Walter Westfeld was maintained by Defendant and ever provided to the administrator of his estate or to his heirs. Defendant further vastly complicated discovery by initiating W.W. II in Europe. This ultimately resulted in Allied bombing that destroyed original records maintained at Lempertz Auction House. (Comp., ¶32)

Based on the foregoing, Defendant should not now be permitted to plead the statute of limitations as an affirmative defense, when the very conduct of Defendant vastly complicated Plaintiffs' efforts to commence a lawsuit in a timely manner. Equitable estoppel requires that Defendant's extraordinary misconduct not be transformed into a shield, allowing it to reap the benefit of delays brought about by that extraordinary misconduct. *See Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009) (defendant, museum, barred from invoking laches if it knew artworks were converted by Nazis, since it did not have "clean hands") With no assistance of Defendant, information in the form of the Lempertz catalogue and the interrogation transcripts have come to light. Where much of the information necessary for bringing this lawsuit only came to light recently and could not readily have been discovered earlier, the Court should eschew an undue adherence to the limitations period prescribed by statute and exercise its equitable powers, as permitted under Tennessee law.

4. A Rule 12(b)(6) Motion to Dismiss for Failure to State A Claim Is Disfavored and Rarely Granted.

Finally, in evaluating Defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, only the legal *sufficiency* of the Complaint is to be tested. *See In re York*, 291 Bankr. 806, 818 (E.D. Tenn. 2003). In considering whether to dismiss a complaint, a court must presume that all well-pleaded allegations are true, resolve all doubts and inferences in the favor of plaintiffs, and view the pleading in the light most favorable to them. *See Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 319 (6th Cir. 1999). Moreover, given that a Rule 12(b)(6) motion allows for the summary termination of a case on its merits very early in the proceedings, there is a powerful presumption against dismissing a complaint for its failure to state a cognizable claim for relief. *See Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1496 (10th Cir. 1995); *Austin Oil & Gas Inc. v. Stream*, 764 F.2d 381, 386 (5th Cir. 1985). Such motions are "disfavored and rarely granted." *Nuchols v. Berrong*, 141 Fed. Appx. 451, *2 (6th Cir. 2005); *Welch v. Mason and Dixon Lines, Inc.*, 507 F. Supp. 1064, 1066 (E.D.Tenn. 1978).

CONCLUSION

This Court has subject matter jurisdiction of this lawsuit pursuant to 28 U.S.C. §1605(a)(2), the commercial activity exception of the Foreign Sovereign Immunities Act. Plaintiffs have demonstrated that all the elements applicable to the third clause of that exception have been satisfied. In determining whether this is, in fact, the case, the Court must accept the allegations of Plaintiffs' Complaint as true.

Furthermore, the statute of limitations does not bar the present lawsuit. Under Tennessee law, the cause of action did not accrue and the statute of limitations did not begin to run until Fred Westfield was appointed administrator *de bonis non administratis* Due to Newly Discovered Property on February 12, 2008.

Accordingly, Plaintiffs respectfully request that Defendant's motion to dismiss be denied.

Respectfully submitted,

/s Overton Thompson III
Overton Thompson III
Kathryn Hannen Walker
BASS, BERRY & SIMS PLC
315 Deaderick St., Suite 2700
Nashville, TN 37238-3001
Telephone: (615) 742-6200
Facsimile: (615) 742-6293
othompson@bassberry.com
kwalker@bassberry.com

Jeffrey Schoenblum
Vanderbilt University Law School
131 213 21st Ave. South
Nashville, TN 37203

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2009 a copy of the foregoing was filed electronically with the Courts electronic filing system. Notice of this filing will be sent by operation of the Court's electronic filing system to:

William S. Walton
James A. Beakes, III
Miller & Martin PLLC
1200 One Nashville Place
150 Fourth Avenue, North
Nashville, Tennessee 37219
Telephone: (615) 244-9270
Fax: (615) 256-8197
bwalton@millermartin.com
jbeakes@millermartin.com

Max Riederer von Paar
Rubin, Winston, Diercks, Harris & Cooke, LLP
1155 Connecticut Ave., NW, 6th Floor
Washington, D.C. 20036
Telephone: 202-861-0870
Mriederer@gmail.com

/s Overton Thompson III

7833717.2