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

FRED WESTFIELD, IN HIS CAPACITY AS ADMINISTRATOR DE BONIS NON ADMINISTRATOR OF WALTER WESTFIELD, *et. al.*	)	
Plaintiffs,	)	**3:09cv204** **U.S. District Court**
v.	)	**Docket Number 08-2202-I** **(State Court Docket Number)**
FEDERAL REPUBLIC OF GERMANY	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW SUPPORTING MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12

INTRODUCTION

This is an action for conversion of art work. This matter is currently before the Court to consider the motion to dismiss filed pursuant to Rule 12(b)(1) and Rule 12(b)(6), Fed. R. Civ. P. by the Federal Republic of Germany (referred to hereafter as "FRG" or "Defendant"). Defendant is a foreign state. Defendant respectfully submits that this Court lacks subject matter jurisdiction over this dispute. The Federal Republic of Germany is immune from the jurisdiction of the courts of the United States pursuant to 28 U.S.C. § 1602, *et. seq.,* the Foreign Sovereign Immunities Act ("FSIA").[1] Plaintiff filed this action more than seventy (70) years after the property that is the subject of the lawsuit was allegedly converted.[2] Defendant also respectfully submits that the Federal Complaint fails to state a cause of action against FRG upon which relief

[1] Sovereign immunity is an immunity from trial, not just a defense to liability on the merits. *See O'Bryan v. Holy See*, 556 F.3d 361, 372 (6th Cir. 2009).

[2] Plaintiff does not allege that Defendant possesses the art collection at the present time.

may be granted due to the expiration of the statute of limitations on Plaintiff's claims in this case.[3]

Plaintiff,[4] a Tennessee resident, has sued a sovereign foreign state, the Federal Republic of Germany, for wrongful confiscation and conversion of an art collection[5], which once belonged to a German citizen, Walter Westfield (identified as an ancestor of Plaintiff)[6], prior to the outbreak of World War II in Europe.[7] Although Plaintiff alludes to certain pieces of art work in his allegations, the specific art work from Walter Westfield's collection, which allegedly was converted, is never identified.

Plaintiff, representing the heirs of the now deceased brothers of Walter Westfield, contends that Plaintiff has been deprived of a possible inheritance of Walter Westfield's art

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[3] The FRG objects to the exercise of any jurisdiction over Defendant in this case. Because it is respectfully submitted that this Court lacks subject matter jurisdiction, Defendant reserves it right to contest personal jurisdiction and venue in this case at a future date, if necessary. The sole contact with Plaintiff, identified in the Federal Complaint, between the FRG and the Middle District of Tennessee is the presence of a largely ceremonial "honorary consul" in Nashville who promotes good relations between the United States and the FRG. *See Federal Complaint*, ¶ 7. The allegations of Plaintiff's Federal Complaint, however, have nothing to do with Germany's alleged contacts with this jurisdiction. There is no allegation of any contact between the FRG and the State of Tennessee concerning the subject matter of Plaintiff's Complaint. Defendant objects to the exercise of subject matter jurisdiction. However, Defendant observes that the presence of an uncompensated honorary consul in the area in 2008 is clearly insufficient to establish either general or specific jurisdiction over the FRG. Exercising such jurisdiction offends traditional notions of fair play and substantial justice. *See Neal v. Janssen,* 270 F.3d 328, 331 (6th Cir. 2001) (citations omitted). Although not necessary to address the issue at the present time, Defendant notes its objection to the exercise of personal jurisdiction over the FRG in this case and notes its objection to such jurisdiction to insure that such issue is not waived.

[4] This action is brought by Fred Westfield, individually and as "administrator of *de bonis non administratis* of the Estate of an alien, Walter Westfield." *See Federal Complaint*, ¶ 1. Plaintiff represents the descendants of Robert Westfield, Dietrich Westfield, and Max Westfield. Robert, Dietrich and Max Westfield were the then living surviving brothers of Walter Westfield at the time of Walter Westfield's official death on May 8, 1945. *See Federal Complaint*, ¶¶ 1, 3.

[5] The "Summary of Allegations" described in the Complaint alleges that Plaintiff seeks recovery "on the basis of the seizure and conversion of the extraordinary art and tapestry collection of Walter Westfield by the Nazi regime and its officials in Germany."

[6] There is no allegation that Walter Westfield ever lived in or visited Tennessee. There is no allegation that Walter Westfield ever owned personal or real property in the State of Tennessee.

[7] According to the Complaint, Walter Westfield was arrested on November 15, 1938. *See Federal Complaint*, ¶ 17. The Plaintiff contends that the collection of artwork and tapestries seized by the former German government was sold at auction on December 12-13, 1939. *See Federal Complaint*, ¶ 17

collection because Plaintiff's own parents (all of whom have been deceased for almost thirty years) might have received the art collection upon the death of Walter Westfield.[8] Plaintiff contends that the heirs are entitled to "recovery of damages" on the basis of the illegal seizure and conversion of Walter Westfield's art and tapestry collection by the former German government in 1938.[9]

Although the artwork and tapestries confiscated in 1938, and sold in 1939, are not identified, it is clear that the alleged confiscation occurred in pre-World War II Germany. It is also clear that the auction of Walter Westfield's property occurred in Germany in 1939.[10] Plaintiffs contend that the property was seized and subsequently sold as a result of the then existing "typical practice" and "well conceived policy" by the former German government[11] to

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[8] Plaintiffs are the descendants of Robert Westfield, Dietrich Westfield, and Max Westfield. Robert, Dietrich, and Max Westfield were the then living, surviving brothers of Walter Westfield at the time of Walter Westfield's official death on May 8, 1945. The lead Plaintiff, Fred Westfield, is one of the children of Dietrich Westfield.

[9] Plaintiff's Federal Complaint purports to have "three" causes of action: conversion, "imposition of a constructive trust" and "equitable accounting." In fact, however, Defendant respectfully submits that Plaintiff has alleged but one "cause of action" in his Federal Complaint - conversion. Although referenced as "causes of action" in the Plaintiff's Federal Complaint, imposition of a trust and equitable accounting in the context of the Plaintiff's pleading recites the potential remedies which Plaintiff seeks for the underlying conversion of the property, rather than an independent cause of action. Regardless of how the Plaintiff's pleading is construed, Plaintiff's allegations are barred by the doctrine of sovereign immunity.

[10] *See Federal Complaint*, ¶¶ 17-19.

[11] Plaintiffs have sued the Federal Republic of Germany as "the successor to the criminal Nazi government that ruled Germany from 1933 to 1945." *See Federal Complaint, ¶* 4. This sweeping allegation and general equation of two governments separated in time by more than seventy plus (70+) years is inappropriate and completely at odds with historical fact. Nazi Germany and the Third Reich are the common English names for Germany under the regime of National Socialist German Workers Party. The Nazi party established a totalitarian dictatorship that existed from 1933 until 1945 that bears no resemblance to the FRG. Indeed, the authoritarian policies and illegal actions of the former German government have long been repudiated and denounced by the FRG. Moreover, following World War II, the FRG enacted numerous laws and entered into numerous treaties to compensate victims financially for the events of 1933-1945, including those who had lost property. For example, under these laws and treaties, the post World War II German government paid close to DM 100 billion directly and indirectly to such victims. *See, e.g., In re: Nazi Era German Cases Against German Defendants Litigation,* 213 F. Supp. 2d 439, 445-46 (D.N.J. 2002) (noting that in 2001, the FRG had paid $5.1 billion to a newly established foundation benefiting Nazi victims); *Burger-Fischer v. Degussa AG,* 65 F. Supp. 2d. 248, 270-71 (D.N.J. 1999) (listing amounts paid by the post World War II German government under various laws and treaties benefiting Nazi victims). Plaintiff does not allege that he, nor any of his ancestors (the now deceased brothers of Walter Westfield) attempted to exhaust remedies available in Germany to seek financial compensation for their claimed financial losses.

seize Jewish-owned art.[12] Notably, Plaintiff does not allege that Plaintiff was unaware that Walter Westfield's art collection had been confiscated by the former government of Germany during the 1939-1943 era - decades before Plaintiff decided to bring this time-barred action.

Plaintiff presents no allegation that Walter Westfield ever visited the United States. There is no allegation that Walter Westfield ever owned any property in the United States. There is no allegation that Walter Westfield ever conducted business in the United States. There is no allegation that Walter Westfield had any personal connection with the United States. Plaintiff's only reference to the United States with respect to Walter Westfield is that Walter Westfield's brothers (now deceased) all lived in the United States after 1940, and that they might have inherited the art collection belonging to Walter Westfield. Plaintiff never alleges that Plaintiff, or Plaintiff's ancestors, ever had any actual ownership interest in Walter Westfield's art collection at the time the art collection was confiscated by the former German government in 1938.[13]

Despite the sympathetic loss suffered by Plaintiff, and Plaintiff's moral ire against such wrongs by the former German government against Walter Westfield over seventy (70) years ago, the capacity of the United States courts to exercise jurisdiction over the Federal Republic of Germany depends upon a legal inquiry narrowly circumscribed by statute. It is well settled that

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[12] *See Federal Complaint*, ¶ 17.

[13] At most, even reviewing Plaintiff's allegations liberally, Plaintiff's now deceased ancestors potentially had an unfulfilled and contingent expectancy interest in Walter Westfield's art collection. Plaintiff's own claim is one generation removed from that contingency interest. Some of the individuals named as plaintiffs in this action are at least two generations removed from Walter Westfield.

the only source of subject matter jurisdiction over a foreign sovereign in the courts of the United States is the FSIA. *See Garb v. Republic of Poland,* 440 F.3d 579, 581 (2d Cir. 2006).[14]

Defendant respectfully submits that the FRG is immune from being sued in a Tennessee court pursuant to the provisions of the FSIA. Defendant also maintains that Plaintiff's action fails to state a cause of action upon which relief may be granted because the action is barred by the statute of limitations.

As discussed below, there are no facts or legal theories pled by Plaintiff which permit this action to proceed against the FRG in Tennessee.

PROCEDURAL HISTORY

Plaintiff originally filed this lawsuit in the Chancery Court for Davidson County (Nashville), Tennessee on October 3, 2008. On March 2, 2009, the FRG removed this action from state court to Federal court pursuant to 28 U.S.C.A §§ 1330, 1331, 1441(d), & 1602, *et. seq.* (Docket Entry # 1). For easier reference, the present complaint (removed from state court to federal court) will sometimes be referred to hereafter as "the Federal Complaint."

Prior to filing their original action in the Davidson County Chancery Court, however, Plaintiff filed a Probate Petition (referred to hereafter as "Probate Petition") and an Amended Petition (referred to hereafter as "Amended Probate Petition") in the Davidson County Seventh Circuit Court in the case styled *In re: Estate of Walter Westfield,* Davidson County Circuit Court (Probate Division), Case number 07P140, containing many of the same allegations by Plaintiff in Plaintiff's Federal Complaint. The probate proceedings concern the same property that is the

[14] Addressing an equally sympathetic case brought against the Republic of Poland arising from the mistreatment of Jews in post World War II Poland, the Second Circuit Court of Appeals observed, that "strong moral claims are not easily converted into successful causes of action (citations omitted). . . . Despite the severe injuries asserted by plaintiffs, the capacity of the United States to exercise jurisdiction over plaintiff's claims hinges on a legal inquiry narrowly circumscribed by statute. It is well settled that the only source of subject matter jurisdiction over a foreign sovereign in the courts of the United States is the Foreign Sovereign Immunities Act of 1976." *Garb*, 440 F.3d at 581.

subject of Plaintiff's Federal Complaint. Indeed, Plaintiff's probate proceedings are referenced in paragraph 41 of Plaintiff's Federal Complaint. By separate motion, Defendant has requested the Court to consider taking judicial notice of the pleadings that Plaintiff admittedly filed in the Davidson County public probate proceedings related to the same property that is the subject of Plaintiff's Federal Complaint.[15]

FACTUAL ALLEGATIONS OF THE PLAINTIFF

Facts As Alleged by Plaintiff in the Federal Complaint Concerning the Loss of Property Caused by the Former German Government

According to the Federal Complaint, Walter Westfield ("Westfield") was a renowned German art dealer. He was arrested in November of 1938 for alleged violation of German currency exchange laws. *See Federal Complaint* ¶¶ 11, 17. Westfield was imprisoned and his property was seized by the former German government. See *id.*, ¶ 17. His art and tapestry collection was subsequently auctioned off in December 1939 by the private auction house Lempertz in Cologne, Germany.[16] The auction was ordered by the District Attorney's office in Düsseldorf, Germany. *See id.*, ¶ 17.[17]

Westfield was subsequently convicted and sentenced to prison for three and one half (3 ½) years and was fined Reichmarks 300,000 because of the purported currency violation. *See id.*, ¶ 22. The proceeds of the auction at the time of Mr. Westfield's arrest were used to pay his

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[15] Courts may consider matters outside the pleadings in ruling on a motion to dismiss if those matters are integral to the complaint, matters of public record, or otherwise appropriate for the taking of judicial notice. *See*, *e.g.*, *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003); *In re: Direct General Corp. Secs. Litig.*, 398 F. Supp. 2d 888, 893 (M.D. Tenn. 2005).

[16] The Lempertz auction house is a well known international auction house which has existed since 1845. Lempertz continues in operation at the present time. *See Federal Complaint*, ¶ 18; *see also*, www.lempertz.com, (last visited Apr. 6, 2009). Plaintiff did not identify Lempertz as a defendant in this action.

[17] According to the Complaint, a catalog was printed for the sale. Attached as Exhibits 2 & 3 to the Complaint are purported copies of the catalog. *See Federal Complaint*, ¶ 19. However, the copies of Exhibits 2 & 3 to the Complaint, which were filed by Plaintiff originally in the Chancery Court for Davidson County, Tennessee, are largely illegible. ¶

fine. *See id.* On May 13, 1952, the German Regional Court Düsseldorf declared Mr. Westfield's earlier sentence by the Regional Court in Düsseldorf in 1940 to be "null and void." *See id.*, ¶ 23.

Westfield was interrogated in order to identify the location of other art work not previously auctioned in 1939. One account of Westfield's interrogation[18] indicates that art work not previously sold in 1939 was sold in late 1942-43 by the German government. *See id.*, ¶ 26. Westfield died before the latter sale during 1942-1943. *See id.*

In 2004, Fred Westfield, a nephew of Walter Westfield, was searching the Internet for the name Walter Westfield. He noticed that the Boston Museum of Fine Arts had posted information about the uncertain provenance of a painting and the museum sought to identify the descendants of Walter Westfield. The museum determined that Walter Westfield had purchased the property circa 1937 from Robert Lebel, a Parisian art dealer. *See id.*, ¶ 29.

Notably, the brothers of Walter Westfield (now all deceased) corresponded with the same Robert Lebel following the end of World War II. The brothers suspected that Walter Westfield had entrusted certain of his artworks to Lebel. However, the brothers did not receive helpful responses from Lebel or associates of Walter Westfield in Amsterdam. *See id.*

On November 12, 2004, Plaintiff emailed the museum. Plaintiff subsequently exchanged emails with the archivist at the museum to determine if there was a record of the location of other paintings once owned by Walter Westfield. *See id.*, ¶ 30. The museum indicated that it did not know the specific items of art which were at issue in the 1939 auction. The Lempertz auction house apparently located a catalog of the items which were auctioned at some later date. The

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[18] Plaintiff apparently recounts these alleged events based upon a book published in Germany entitled *Der Elendsweg der Düsseldorf Juden: Chronologie des Schrecken, 1933-1945. See id.*, ¶ 35.

catalog contained several missing pages identifying art work auctioned in 1939. The museum later sent Plaintiff a copy of the catalog. *See id.*, ¶ 33.[19]

Plaintiff alleged in his Tennessee probate proceedings that Plaintiff developed a close and cooperative relationship with an archivist at the museum and "provided her with documents and correspondence, which his father, Dietrich, consistent with his practices as a member of the German bar, had retained and then passed on to [Plaintiff]." *See Amended Probate Petition, ¶* 14. As a result of Plaintiff's assistance, the museum archivist and others were able to gain more information about the "fate of Walter Westfield's art collection." *See id.*

Facts Already Alleged by Plaintiff in the Davidson County, Tennessee Probate Petition Concerning the Same Loss of Property Caused by the Former Government of Germany (But Omitted from the Allegations in the Federal Complaint Against the Federal Republic of Germany)

In passing, Plaintiff's Federal Complaint references that upon learning of these identified paintings "taken by the German government," Plaintiff contacted "other heirs and claimants of the estate of Walter Westfield to seek their approval for appointment as administrator *de bonis non administratis* with a beneficial interest" in the estate. *See Federal Complaint*, ¶ 40. Plaintiff also alleges that "the heirs of a housekeeper of Walter Westfield also claimed to be the heirs of the estate of Walter Westfield" *See id.*, ¶ 41. Plaintiff's Federal Complaint further recites that by "Order of the Seventh Circuit Court for Davidson County, Tennessee," on February 12, 2008, Plaintiff was appointed "administrator *de bonis non administratis*, and he along with Hannah Kahn, Erich Westfield, Linda Plaut, Jeanne Rees, and Rosie Segal, as executrix of the estate of

[19] The copy of the catalog was apparently attached as Exhibit 2 to the Federal Complaint. However, the copy attached by Plaintiff is largely illegible. It is unclear from the allegations whether Plaintiff maintains that this auction only involved art work owned by Walter Westfield or whether the auction also involved artwork belonging to other people.

Martin Segal, were declared by the Court to be the heirs at law of Walter Westfield." *See id.*, ¶ 41.

Plaintiff's Federal Complaint somewhat overstates the breadth of the Davidson County Circuit's Order (which apparently was entered without a hearing), it minimizes Plaintiff's own allegations about "the other heirs" which Plaintiff presented in state court, and omits relevant information alleged by Plaintiff in the state proceedings concerning the same property that is the subject of Plaintiff's Federal Complaint. Such allegations are relevant to Defendant's position that Plaintiff's Federal Complaint fails to state a claim upon which may be granted due to the expiration of the statute of limitations.

Plaintiff's own allegations in Tennessee's state probate court are significant in reviewing the present motion to dismiss, as well as the legitimacy of Plaintiff's standing to bring such allegations. Accordingly, Defendant has filed a certified copy of Plaintiff's Tennessee Probate Petition and Plaintiff's Tennessee Amended Probate Petition. Defendant has also filed the Order of February 12, 2008, in the case of *In re: Estate of Walter Westfield*, Davidson County Circuit Court (Probate Division), Case number 07P140, referenced in paragraph 41 of Plaintiff's Federal Complaint.[20] Because Plaintiff referenced and relied upon such matters in Plaintiff's Federal Complaint, Defendant has moved by separate motion to have this Court to take judicial notice of

[20] Defendant was not a party to the probate proceedings. The probate Order (which apparently involved no hearing) is cited and relied upon by Plaintiff in paragraph 41 of the Federal Complaint. The Order is unusual in two respects. First, the [Agreed] Order carefully references that Plaintiff and those whom he represents are determined to be the sole legal heirs of the *Tennessee* estate of Walter Westfield, which includes any and all property with a situs in *Tennessee,* as well as any and all claims of the estate of Walter Westfield that can be brought in state or federal courts within the state of *Tennessee.* *See* Order, filed on February 12, 2008, *In re: Estate of Walter Westfield.* It undisputed that Walter Westfield was never in the State of Tennessee and did not own any real or personal property in the state of Tennessee. Secondly, and more disturbingly, Plaintiff's submitted, and the Court entered without explanation or justification as generally required by Tennessee law before any public record is sealed, a "confidential settlement agreement with the heirs of Emilie Scheulen. . . ."

such pleadings by Plaintiff concerning the same subject matter.[21] Plaintiff pled the additional factual allegations in the Tennessee probate proceedings concerning this property which are relevant to the issues currently before this Court. *See Federal Complaint*, ¶ 41.

According to the original Tennessee Probate Petition, Walter Westfield died in Auschwitz at Oswiecim, Poland shortly after December 12, 1942. *See Probate Petition*, ¶ 11. A German Court in Düsseldorf, Germany, the Amtsgericht, by order dated August 1, 1948, declared Walter Westfield officially dead as of May 8, 1945, the date of the official end of World War II in Europe. *See id.*; *see also Probate Petition*,¶ 3 (Exhibit 1 to Probate Petition, Affidavit of Heirship of Fred Westfield, ¶ 3).

Walter Westfield was survived by three brothers at the time of his death: Dietrich Westfield, Robert Westfield, and Max Westfield. Robert Westfield immigrated from Germany to the United States by 1910. Robert Westfield died in 1968 in Nashville, Tennessee. Dietrich Westfield was a lawyer and "was a distinguished member of the Bar in Germany prior to World War II."[22] Dietrich Westfield died in Nashville in 1967. Max Westfield was a "well known artist." Max Westfield died in Nashville in 1971. Dietrich Westfield and Max Westfield left Germany and joined Robert Westfield in Nashville in 1940. *See Amended Probate Petition,* ¶ 4.

The lead Plaintiff, Fred Westfield, is a retired Professor Emeritus of Economics at Vanderbilt University. He is the nephew of Walter Westfield and son of Dietrich Westfield. *See*

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[21] Plaintiff refers to the probate proceeding in his Federal Complaint. The general rule is that courts are prohibited from considering matters outside the pleadings in ruling on a motion to dismiss and must confine their analysis to the four corners of the complaint. However, courts may consider other materials if those materials are integral to the complaint, matters of public record, or otherwise appropriate for the taking of judicial notice. *In Re: Direct General Corp. Secs. Litig.*, 389 F. Supp. 2d 888, 893 (M.D. Tenn. 2005) (citing *In re: Unumprovident Corp. Secs. Litig.*, 396 F. Supp. 2d 858, 875 (E.D. Tenn. 2005)). In the present case, the other materials are referenced by Plaintiff's Federal Complaint, they are matters of public record, and it is otherwise appropriate to take judicial notice that these documents where filed by Plaintiff concerning the same property that is the subject of Plaintiff's Federal Complaint.

[22] Dietrich Westfield was made an honorary member of the Tennessee Bar in the 1940s. *See Amended Probate Petition,* ¶ 36.

Probate Petition, ¶ 3 (Exhibit 1 to Probate Petition, Affidavit of Heirship of Fred Westfield). Plaintiff is aware that other persons have sought to locate and recover Walter Westfield's art work in Germany and possibly elsewhere in Europe on the basis that they are heirs of Walter Westfield. Such persons are relatives of Emilie Scheulen. *See Amended Probate Petition*, ¶ 20.[23]

Dietrich Westfield knew about the claims of Scheulen, and a possible will of his brother Walter Westfield, as early as 1948. According to the Amended Probate Petition, Dietrich Westfield wrote Scheuelen's attorney on October 17, 1948, setting forth his legal analysis as to why the Westfield brothers believed themselves to be the legal heirs of Walter Westfield, and if the will of Walter Westfield was valid, why Scheulen was only entitled to "certain bequests." *See id.*, ¶ 36.

On November 10, 1949, a purported will of Walter Westfield, and an estate proceeding, was opened in a German court in Düsseldorf.[24] The will appointed Dietrich Westfield as executor of Walter Westfield's estate. *See id.*, ¶ 25. "By a document dated November 12, 1949," the surviving brothers of Walter Westfield "were sent notice" that the alleged will had been allegedly probated, and provided the brothers with ninety days to respond as to whether they wanted to serve as executor." *See id.*, ¶ 32. Although they admittedly had notice of these matters, the Amended Probate Petition states that the brothers did not want to return to Germany to challenge a German citizen in a German court, and did not have the financial resources to do so. *See id.*[25]

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[23] Plaintiff's Federal Complaint does not refer to Ms. Scheulen by name. Rather, Ms. Scheulen is apparently the "housekeeper" to whom Plaintiff refers in paragraph 41 of the Federal Complaint.

[24] It is clear from the other allegations of the Amended Probate Petition that Dietrich Westfield had corresponded with the attorney for Ms. Scheulen concerning this will by October 17, 1948. *See Amended Probate Petition,* ¶ 36.

[25] The Amended Probate Petition recites that the will provided that the brothers were to "see to it that Ms. Scheulen can live debt free and not in alms." It also provides that she is to receive artwork recovered by the executor from

On March 21, 1950, a German court issued a certificate of heirship (Erbschein) for Emilie Scheulen stating that she was the sole heir of Walter Westfield. She subsequently obtained another order from a German court declaring her to be the spouse of Walter Westfield. *See id.*, ¶ 20. A marriage license was issued on July 10, 1956, purporting to recognize Scheulen's marriage to Walter Westfield. *See id.*, ¶ 25.[26]

Ms. Scheulen's original Petition for Probate, dated December 13, 1957, and an Amended Petition for Probate, was apparently filed with the County Court for Davidson County, Tennessee. *See id.*, ¶ 38. In 1958, Scheulen "initiated legal proceedings in Nashville" to recover the balance of a sum she claimed was owed by Robert Westfield as part of the money left to her by Walter Westfield. Plaintiff also contends that Scheulen, apparently in 1958, "specifically

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Robert Lebel, the Parisian art dealer and from Mr. Saloman, an Amsterdam businessman, with whom certain items were apparently entrusted. Further, Walter Westfield expressed the wish and intent that Ms. Scheulen be provided with a limited sum received by the brothers as an inheritance from their mother following her death in 1939. *See Amended Probate Petition*, ¶ 35. (emphasis added). Plaintiff's Federal Complaint acknowledges that the brothers communicated with "Lebel and associates of Walter Westfield in Amsterdam" following the end of World War II about Walter Westfield's art collection. *See Federal Complaint*, ¶ 29.

[26] Plaintiff's Amended Petition in the Tennessee Probate proceedings attacks and seemingly ridicules both the recognition of a common law relationship between Scheulen and Walter Westfield and the issuance of a posthumous certificate of marriage by the German courts during the 1950s. It is debatable whether Tennessee courts have jurisdiction to question the validity of the proceedings by the German court in the 1950s. For example, Tennessee courts generally will not re-litigate a will which has already been recognized in a foreign state. *See*, *e.g.*, *Robertson v. Robertson,* 270 S.W.2d 641, 642 (Tenn. 1954). Moreover the seeming scorn for such action in post World War II Europe as expressed by Plaintiff's probate pleadings is not convincing.

The destruction caused by World War II, as is the case with other wars, often necessitates post-war legislative and judicial action to address the legal status of citizens and property rights following such wars. The events in post World War II Germany are not unique, and countries often must fashion legal remedies to address such matters. Our own courts and legislatures have addressed matters involving missing legal documentation during the course of American history. The events following the Civil War provide a representative example of the efforts of the courts to address the legal issues raised by war. For example, more than 100,000 African American men served in the United States Army during the American Civil War, the majority of whom had once been slaves. Slaves did not possess legal documentation, like a marriage certificate, which was originally necessary in order to file a widow's pension claim following the Civil War. The granting of post war widows pensions to formerly enslaved women was difficult because such marriages were often not considered legal. Eventually, the United States Congress, aware that slave couples had lived together, authorized guidelines allowing former slave wives to receive pensions. A Congressional Act of June 6, 1866 required no "other evidence of marriage than proof, satisfactory to the Commissioner of Pensions, that the parties have habitually recognized each as man and wife, and lived together as such." *See*, *e.g.*, *From Slave Women to Free Women: The National Archives and Black Women's History in the Civil War Era,* Noralee Frankel, Federal Records and African American History (Summer 1997, Vol. 29, No.2) (referencing the Civil Rights Act of 1866 (14 Stat. 27)).

filed a petition for probate in the County Court of Davidson County seeking to have the alleged German will probated here, although no such probate was granted in Davidson County, Tennessee of the German will." *See id.*, ¶ 41.

LAW AND ARGUMENT

I. The Federal Complaint Should be Dismissed for Lack of Subject Matter Jurisdiction.

A. Appropriate Standard of Review for Consideration of Defendant's Motion to Dismiss Pursuant to Rule 12(b)(1) for Lack of Subject Matter Jurisdiction.

The appropriate standard for reviewing a motion Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction turns upon the nature of the motion. Where, as here, the Rule 12(b)(1) motion attacks the Plaintiff's complaint on its face, the court will consider the well pled factual allegations of the complaint as true. *See O'Bryan v. Holy See*, 556 F.3d 361, 375 (6th Cir. 2009); *RMI Titanium Co. v. Westinghouse Elec. Co*, 78 F.3d 1125, 1134 (6th Cir. 1996). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *O'Bryan*, 556 F.3d at 376 (citing *Mezibov v. Allen,* 411 F.3d 712, 716 (6th Cir. 2005)). Generally, where subject matter jurisdiction is properly challenged by way of motion filed pursuant to Rule 12(b)(1), the plaintiff has the general burden of proving subject matter jurisdiction. *See*, *e.g.*, *Moir v. Greater Cleveland Reg'l Transit Auth.,* 895 F.2d 266, 269 (6th Cir. 1990); *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986).

However, the Sixth Circuit Court of Appeals has observed that applying such Rule 12(b)(1) standards "to the FSIA context is complicated by [the] FSIA's burden shifting process." *See O'Bryan*, 556 F.3d at 376.

In this analysis, this Court should first consider if Defendant is a foreign state and thus eligible for immunity pursuant to the FSIA. If the Court answers that question in the affirmative,

it must decide whether Plaintiff in his pleading established the existence of a valid exception to the immunity granted to Defendant by the FSIA..

B. The Foreign Sovereign Immunity Act Bars this Action Against Defendant.

The FSIA is the sole source of subject mater jurisdiction against a foreign state. *See Am. Telecom Co., L.L.C. v. Rep. of Lebanon.*, 501 F.3d 534, 538 (6th Cir. 2007); *see also O'Bryan*, 556 F.3d at 374 (*citing Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989)).[27] The broad grant of immunity is codified at 28 U.S.C. § 1603, and states:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

In the present case, it is undisputed that the FRG is a foreign state. Plaintiff acknowledges that Defendant is a foreign state and that Walter Westfield's property was seized by the former German government pursuant to public policy and public practice. *See Federal Complaint*, ¶¶ 4, 17. As a foreign state, Defendant is immune from suit in the courts of the United States under the provisions of FSIA. The Supreme Court has also cautioned that, under the FSIA, a foreign state is presumptively immune from the jurisdiction of United States courts. Unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("Commercial exception" in the FSIA held not to provide jurisdiction over claims involving alleged Saudi

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[27] Historically foreign sovereigns and their agencies and instrumentalities had no right to any immunity in the Courts of the United States. *See Schooner Exchange v. M'Faddon*, 11 U.S. 166, 3 L.Ed. 287 (1812). However, while not a matter of right, the United States did, as a matter of comity, waive its right to exercise its jurisdiction over foreign sovereigns in certain cases. *See id.* Moreover, the Courts traditionally deferred to the Executive Branch's determination as to whether to exercise or waive jurisdiction in cases involving foreign sovereigns. Until the early 1950s, the Executive Branch requested immunity for foreign sovereigns in all cases. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Thereafter, the Executive Branch, acting through the Department of State, made inconsistent suggestions to the courts regarding sovereign immunity. Due to the inconsistency of this policy, Congress enacted the Foreign Sovereign Immunities Act, 28 U.S.C. 1601, *et. seq.* ("FSIA") in 1976.

Arabian detention and torture of employee of Saudi hospital who had been recruited in United States).

1. No Valid Exception to the Immunity Granted by the FSIA Applies to this Case.

It is undisputed that the Defendant is a foreign sovereign, and, thus, the burden is upon Plaintiff to establish that a valid exception applies to the provisions of FSIA which allows his claims to proceed. *See O'Bryan,* 556 F.3d at 376. The Court should consider the factual allegations of Plaintiff's complaint to determine the existence of a valid exception to FSIA immunity. *See id.* at 375-76. Ultimately, the application of the immunity provision of FSIA is question of law. *See Commercial Bank of Kuwait v. Rafidain Bank,* 15 F.3d 238, 241 (2d Cir. 1994).

Plaintiff, apparently recognizing that this action is barred by the provisions of the FSIA, attempts, in a conclusory manner, to fashion a valid "exception" to the statute. As discussed below, Plaintiff's allegations constitute legal argument and conclusions, not facts. Plaintiff's Federal Complaint broadly claims that "Defendant is not entitled to immunity under 28 U.S.C.§1605-1607 or 'any applicable international agreement.'" *See Federal Complaint*, ¶ 5. Section 1605 of the FSIA describes the general exceptions to the jurisdictional immunity of a foreign state.

Although Plaintiff has the burden of establishing the existence of a valid exception to the FSIA, Plaintiff fails to clearly identify which exception to sovereign immunity Plaintiff claims is applicable to the Federal Complaint. Plaintiff's suggestion that Defendant is not immune due to "any applicable international agreement" is no more than a bark without a bite. No "applicable international agreement" is identified in the Federal Complaint which would exempt Plaintiff's claims from the provisions of the FSIA.

The two exceptions which have possible application to Plaintiff's claims are codified at 28 U.S.C.A.§1605(a)(2) (the commercial activity exception) and 28 U.S.C.A.§1605(a)(3) (the taking of property exception). Plaintiff appears to rely most heavily upon the "commercial activity" exception of 28 U.S.C.A. §1605(a)(2) and peppers the Federal Complaint with conclusory allegations of "commercial activities" as a basis for removing immunity from the FRG. *See Federal Complaint*, ¶ 6 (a-c).

As discussed below, neither exception to the application of the FSIA applies to the alleged facts of this case.

a. The "Commercial Activity" Exception Is Not Applicable

The "commercial activity" exception to foreign sovereign immunity applies to an action which "is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C.A. § 1605(a)(2). The former German government was not involved in a commercial activity concerning these events. Similarly, even if one were to assume that the government action of confiscating property constituted "commercial activity," such confiscation of property in pre-World War II Germany did not have any "direct effect" in the United States.

1. Alleged Conversion of Art Collection not Private Commercial Activity

The "commercial activity" exception of the FSIA applies in cases involving essentially private commercial activities of foreign sovereigns that have a direct impact within the United States. *See O'Bryan*, 556 F.3d at 374 (citing *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994)).

Plaintiff's identifies as "commercial activity" the alleged conversion of Walter Westfield's art collection by the former German government and the later sale of the property "for a profit." *See Federal Complaint*, ¶ 6(b). The war-time action of the former German government, during the period 1939-1943 does not, however, constitute a commercial activity for the purposes of creating an exception to immunity granted by the FSIA. "Commercial activity" is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

The Sixth Circuit has noted that if the activities in question are not private, but sovereign in nature, then the commercial activity exception will not apply. *See O'Bryan*, 556 F.3d at 379-80. Consistent with the restrictive view of sovereign immunity codified in the FSIA, an activity is commercial if it is of a type that a private person would and could customarily engage in for profit without regard to its ultimate purpose. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108 n.6 (5th Cir. 1985).

Plaintiff's contention that the government confiscation of property (as part of a government policy) is converted to "commercial activity" for the purposes of removing sovereign immunity because (a) it results in a profit and/or (b) a private auction house conducts the public sale, is not convincing. For example, any seizure of a citizen's property potentially could be "profitable" since it would provide the government with property which it did not otherwise have possession. However, such action does not remove the fact that the act of confiscation remains a government action. Similarly, the use of a private auction house does not render the action "commercial activity" for the purposes of the FSIA. It is not unusual for

governments to retain the services of private auctioneers to conduct auctions of property seized by the government.[28] Use of a private auctioneer does not alter the essential character of government action.

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 intentional conduct alleged by Plaintiff does not qualify as "commercial activity." The activities carried out by a sovereign's law enforcement agencies, by their nature, are not activities or actions which a private party is permitted to engage.

The abuse of its police and prosecutorial power by the former German government constituted a foreign state's exercise of policing power which is uniquely sovereign in nature. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) ("Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce") (internal citations omitted).[29] The confiscation and expropriation of an art collection are not actions of a nature that a private person would, or could, engage in for profit. *See*, *e.g.*, *Rong v. Liaoning Prov. Gov't*, 452 F.3d 883, 889-91 (D.C. Cir. 2006); *Amorrortu v. Rep. of Peru*, 570 F. Supp. 2d 916, 923 (S.D. Tex. 2008).

Thus, the actions by the former German government do not constitute commercial activity and the "commercial activity" exception does not apply.

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[28] Even today, the United States government periodically conducts auctions of personalty and real property seized during the enforcement federal law. The retention of a private auctioneer for such sales does not alter the essential fact that the property was seized and sold as a part of government action.

[29] As the Supreme Court observed in *Nelson,* "the conduct boils down to abuse of the power by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." *Id.* at 361.

2. No Direct Effect in the United States

Even if one were to find that the seizure of property by a foreign state constitutes a "commercial activity," Plaintiff's Federal Complaint should be dismissed because the requisite jurisdictional nexus with United States required under 28 U.S.C. § 1605(a)(2) does not exist. The act of the former German government did not occur in the United States nor did it have any direct effect in the United States. *See Federal Complaint, ¶* 6(a). Indeed, no action took place or was performed by the former German government in the United States and the action is not based upon "commercial activity carried on in the United States." 28 U.S.C.A. §1605(a)(2). Thus, the potentially available alternative under the "commercial activity" exception is the provision that provides that immunity may be removed for "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a *direct* effect in the United States." 28 U.S.C.A.§1605(a)(2) (emphasis added). Plaintiff's reliance upon this exception is misplaced.

Plaintiff argues erroneously that the "commercial activity" exception applies because the art collection confiscated in Germany by the former German government from a German resident in 1938 "could not reach the United States" and, therefore, be the subject of a possible future inheritance by Plaintiff (and those whom he represents). Plaintiffs and their families maintain that they were deprived of a potential and contingent inheritance which they might have received at some point after their own parents died (more than thirty years ago). Plaintiff's position that the 1938 seizure of property by the former German government belonging to a German citizen (and over which Plaintiff never had any actual ownership interest) had "direct effect" in the United States is tenuous. *See Federal Complaint*, ¶ 8. Assuming *arguendo* that

Plaintiffs actually have standing to assert such claims, the damages they suffered are indirect at best.[30]

Plaintiffs' allegations that they were denied a potential inheritance is far afield from establishing a factual basis for the "direct effect" required for the "commercial exception" to remove immunity from a foreign state. Title 28 U.S.C.A. § 1605(2)(b) requires a "direct effect." The effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity." *Rep. of Argentina. v. Weltover, Inc.*, 504 U.S. 607, 618 (U.S. 1992); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) (recognizing that Congress "enact[ed] substantive provisions [of the FSIA] requiring some form of substantial contact with the United States" in order to avoid turning U.S. courts "into small international courts of claims, open to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world") (internal quotations and citations omitted); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 817 (6th Cir. 2002).[31] A direct effect is one which has no intervening element, but rather flows in a straight line without deviation or interruption. *See Upton v. Empire of Iran,* 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd mem.* 607 F.2d. 494 (D.C. Cir. 1979).

Indirect injurious consequences within the United States of an out-of-state act are clearly not sufficient contacts to satisfy the "direct effect" requirement of 28 U.S.C.A. § 1605(a)(2). *See*

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[30] Evidence exists that the "other heirs" referred to in paragraph 41 of the Federal Complaint (and with whom Plaintiff apparently have entered into a sealed "confidential settlement" in Tennessee in 2008) already filed a claim in Germany for the property losses for Walter Westfield's art collection. As such, Plaintiff's present standing is questionable. Similarly, the FRG disputes the ability of a Tennessee court to disregard the ruling of a German court during the 1950s addressing the rights of German citizens concerning German property located in Germany.

[31] Plaintiff's interpretation of "direct effect" is far more expansive than is intended by the FSIA and well beyond the interpretation of the term "direct effect" allowed by numerous courts. For example, if Plaintiff is correct (which he is not), FSIA would permit *any* American citizen to sue a foreign government in the United States if they allege that the foreign government illegally interfered or confiscated property in the foreign country belonging to a *relative* of the American citizen. Under Plaintiff's interpretation, the American citizen may allege the American citizen "would have inherited the property at some time in the future" and that the denial of this potential and contingent inheritance had an economic consequence in the United States. Plaintiff's allegations, while sympathetic, do not establish a "direct effect" or an immediate impact necessary to remove the sovereign immunity of Defendant under the FSIA.

Strach v. Windsor, 351 F. Supp. 2d 641, 643 (E.D. Mich. 2004) (rejecting an argument that an injury suffered abroad which causes damages to be suffered in the United States triggers the "direct effect" exception to the FSIA); *see also Lempert v. Rep. of Kazakstan*, 223 F. Supp. 2d 200, 204 (D.D.C. 2002) (refusal to pay for services performed by an American plaintiff usually does not meet the "direct effect" requirement); *Martin v. South Africa,* 836 F.2d 91, 95 (2d Cir. 1987) (no "direct effect" where South African government allegedly caused permanent disability to American citizen who did not return to the United States until more than a year later); *Antares Aircraft L.P. v. Fed. Rep. of Nigeria,* 999 F.2d 33, 36 (2d Cir. 1993) (lingering effects of personal injury suffered overseas is not sufficient to satisfy "direct effect" requirement of FSIA).

Numerous courts have considered (and rejected) similar arguments to those now advanced by Plaintiff. For example, in *Reers v. Deutsche Bahn AG*, 320 F. Supp. 2d 140, 149 (S.D.N.Y. 2004), the court considered claim involving personal injuries and loss of life caused by a train accident in France. Citing the Second Circuit Court of Appeals decision in *Texas Trading & Milling Corp. v. Fed. Rep. of Nigeria*, 647 F.2d 300, 312 n.5 (2d Cir. 1981), the *Reers* court observed that personal injuries have a direct effect but when such an injury occurs outside the United States, the direct effect is also located outside the United States. *See also Martin v. Rep. of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987). Courts applying the FSIA have uniformly rejected arguments that personal injuries suffered overseas produces a direct effect in the United States when the person returns home. *See*, *e.g.*, *Zedan v. Kingdom of Saudi Arabia,* 849 F.2d. 1511, 1514 (D.C. Cir. 1988); *Martin*, 836 F.2d at 95; *Zernick v. Brown & Root, Inc.* 826 F.2d. 415, 418-419 (5th Cir. 1987).

Plaintiff's argument that a "direct effect" exists for the purposes of removing immunity is without merit. Here, the Plaintiff argues that there was a "direct effect" due to the loss of

property that occurred outside the United States that always belonged to another person, Walter Westfield. Plaintiff, nor Plaintiff's immediate ancestors, can claim an ownership interest in such property at the time of the seizure.

The immediate direct effect, the loss of property, occurred outside the United States. Plaintiff's claim that they are not able to enjoy the economic benefit of property (over which they never had an ownership interest) is not adequate to establish the factual basis for a "direct effect" of an alleged commercial activity occurred outside of the United States. At best, the effect suffered by Plaintiff is indirect, even assuming that Plaintiff has proper standing to bring the lawsuit. *See Fickling v. Commonwealth of Australia*, 775 F. Supp. 66, 71 n.2 (E.D.N.Y. 1991) ("Indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the 'direct effect' requirement of section 1605(a)(2).") (internal citations omitted).

The allegations of Plaintiff's Federal Complaint do not establish a factual basis for the "commercial activity" exception of 28 U.S.C. 1605(a)(2), to apply to this action.

b. The "Taking" Exception Is Not Applicable

Plaintiff does not argue or otherwise plead that the "taking" exception of 28 U.S.C.A. § 1605(a)(3) should apply. However, Plaintiff refers to the "conversion" of Walter Westfield's property, and seeks damages for such loss. *See Federal Complaint* ¶¶ 42, *et. seq.* Accordingly, the FRG will address the inapplicability of this exception as well.

To establish subject matter jurisdiction pursuant to the "takings" exception of the FSIA, a plaintiff must demonstrate each of four elements

(1) that rights in property are at issue,

(2) that the property was "taken",

(3) that the taking was in violation of international law, and either

(4)(a) that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or

(4)(b) that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3); see also *Garb v. Rep. of Poland*, 440 F.3d at 588; *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000).

Plaintiff's pleading fails to establish factual foundation that any taking in 1938 violated international law and it fails to establish that the property is in the United States in connection with a commercial activity carried on in the United States by the FRG, or that the property is owned or operated by and agency or instrumentality of the FRG which is engaged in a commercial activity in the United States.

a. There Was No Violation of International Law Nor is Such a Violation Alleged

United States courts have long recognized that the expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law. *See Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1396-98 (5th Cir. 1985); *Yang Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 101 (D.D.C. 2005). Moreover, "confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law." *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966); *United States v. Belmont*, 301 U.S. 324, 332 (1937).

Walter Westfield was a German citizen and his property was confiscated by the former German government. Although Plaintiff alleges that German Jews lost their citizenship in the German Reich in 1936, *Federal Complaint* ¶ 12, Plaintiff fails to point out that the highest court

in the Federal Republic of Germany subsequently ruled that the laws which caused the loss of citizenship for German Jews were void *ab initio*, because these laws constituted such a flagrant violation of the fundamental principals of justice that they must be considered void *ab initio*, and finding otherwise would validate the former German government's actions and its discrimination of Jewish German citizens. *See* German Federal Constitutional Court (Bundesverfassungsgericht) BverfGE 23, 98, 106 - 2 BvR 557/62 - (Feb 14, 1968).[32] As such, the laws could not be interpreted as not depriving a Jewish German of his German citizenship. *See id.*

b. Plaintiff's Pleading Does Not Meet Requirement of Fourth Element of Taking Exception.

Even if Plaintiff had pled the "taking" exception, and even if Plaintiff had pled an alleged violation of international law, the "taking" exception of 28 U.S.C.A. § 1603(a)(3) does not apply. Plaintiff's Federal Complaint does not satisfy the fourth element of the "taking" exception. Plaintiff has not alleged, and can not allege, that the property at issue is either (a) "present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or (b) "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

Indeed, Plaintiffs do not claim that Walter Westfield's art collection is present in the United States. *See Federal Complaint*, ¶ 16 ("Walter Westfield was unsuccessful in removing the vast bulk of his…collection from occupied Europe"). The only painting Plaintiff identified

[32] The Federal Constitutional Court (the "Bundesverfassungsgericht" or "BVerfG") reviews the law and decisions of other courts, including other Federal Courts, when challenged on constitutional grounds. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 437 (D.N.J. 1999).

as a piece of art once belonging to Walter Westfield (which is currently in the United States in the Boston Museum of Fine Art), was smuggled to the United States and is not alleged to be related to the taking by the former German government.[33] Similarly, this painting is clearly not present in the United States "in connection with a commercial activity" undertaken by Defendant.

Plaintiff fails to plead any facts alleging the extent to which Plaintiff maintains that any such art work is, or has been under the control of Defendant, in the United States. Even if one were to interpret Plaintiff's pleading as alleging that the taken art collection is operated or owned by former German government (or subsequently the FRG), Plaintiff's pleading is legally insufficient. The Federal Republic of Germany is not an agency of the foreign state, but is the foreign state itself. *See*, *e.g.*, *Garb*, 440 F.3d at 589.

The actions of Federal Republic of Germany are the actions of a foreign sovereign. The FSIA expressly provides immunity from such actions when brought against a foreign state or its agencies or instrumentalities, and this Court lacks subject matter jurisdiction over this action.

B. Plaintiff's Federal Complaint is Barred by the Statute of Limitations

1. Appropriate Standard of Review for Consideration of Defendant's Motion to Dismiss Pursuant to Rule 12 (b) (6) Due to the Expiration of the Statute of Limitations

Defendant also moves to dismiss the Complaint for the failure to state a claim upon which relief may be granted for conversion under Tennessee law. Consideration of this argument is only necessary should the Court determine that this action is not barred by the FSIA. As discussed below, the statute of limitations for Plaintiff's claims have long expired.

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[33] Plaintiff's Complaint is unclear whether Plaintiff claims an ownership interest in the painting which, according to Plaintiff, is "on public display." *See Federal Complaint*, ¶ 16.

Plaintiff seeks money for the confiscation by the former German government of the property of Walter Westfield - which, according to Plaintiff's allegations, occurred 1938. The last sale of this property occurred, according to the Plaintiff's own allegations, not later than 1942-1943. Plaintiff's own allegations further concede that it was known that the property was seized by the former German government and auctioned not later than 1942-1943. Plaintiff represents the heirs of the three brothers of Walter Westfield. Plaintiff (and those whom Plaintiff represents in this action) admittedly derive any alleged rights from the (now deceased) siblings of Walter Westfield.

There is no allegation contained in the Federal Complaint (or the Plaintiff's Tennessee probate pleadings) which suggest that these now deceased siblings of Walter Westfield were (1) unaware of the taking of the Walter Westfield's art collection by the former German government in the late 1930s or (2) that they were unaware that the property had been sold by the former German government during the time period of 1939-1943. To the contrary, Plaintiff's pleadings support the opposite conclusion -- that the siblings not only were aware of the taking of the artwork belonging to Walter Westfield by the former German government, but sought recovery of the items owned by Walter Westfield by the mid 1940s and 1950s.

These individuals knew well before the expiration of the statute of limitations for conversion that the artwork and tapestries of Walter Westfield had been confiscated and sold by the former German government during the 1939-1943 time period. Plaintiff does *not* contend that Plaintiff "only recently discovered" that Walter Westfield's art collection was confiscated by the former German government before World War II. Nonetheless, in an unpersuasive attempt to spare this case from the statute of limitations, Plaintiff seemingly wishes to contend that he

only more recently found out more names of the pieces of art which were included in the 1938 seizure of the art collection.

However, as demonstrated below, Plaintiff has long known (and does not deny that he and his family have long known) of the likely date of the seizure in pre-World War II Germany, and that the art collection was confiscated by the former German government. Indeed, Plaintiff has known the same facts upon which his current Federal Complaint is based well before he communicated with the Boston Museum of Fine Arts in November 2004. Moreover, *even if* one were to assume that November, 2004 is the first occasion when Plaintiff first learned of the seizure of the art collection by the former German government in 1938,[34] this action is time barred. The Defendant respectfully submits that the Plaintiff's own allegations establish that Plaintiff's claims are time barred.

In considering a motion to dismiss under Rule 12(b)(6), the Court will accept as true the facts as the plaintiff has pled them. *See Brainard v. Vasser,* 561 F. Supp. 2d 922 (M.D. Tenn. 2008) (citing *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002) and *Performance Contracting v. Seaboard Sur. Co.*, 163 F.3d 366, 369 (6th Cir. 1998)). However, "the factual allegations, assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action: they must show entitlement to relief." *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir. 2007) (*citing Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1966 (2007)). As stated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

[34] Based upon the pleadings, Defendant respectfully submits that such an assumption would be unreasonable.

A plaintiff's "obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions." *Id.* Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.*[35] Although Rule 8, Fed. R. Civ. P., allows for a liberal system of notice pleading, a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Permobile v. American Express Travel,* 571 F. Supp. 2d 825, 832 (M.D. Tenn. 2008) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007)).

The basis for bringing this action—that Walter Westfield's art collection was illegally seized by the former the former German government and sold at auction-has been known for decades. Plaintiff's conversion claim is clearly bared by the applicable statute of limitations.

2. Plaintiff's Federal Complaint Fails to State a Claim Upon Which Relief May Be Granted As Such Claims Are Barred by the Applicable Statute of Limitations

Although Defendant respectfully submits that this action should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, the allegations also establish that Plaintiff's claims for conversion are time barred by the applicable statute of limitations. Accordingly, the Federal Complaint may also be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.[36]

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[35] *Twombly* is important because in it the Supreme Court abrogated the "no set of facts" standard that emanated from *Conley v. Gibson*, 355 U.S. 41 (1957). *See Twombly*, 127 S.Ct. at 1969 ("The phrase ['no set of facts'] is best forgotten as an incomplete negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations of the complaint.").

[36] Other aspects of Plaintiff's Federal Complaint are also subject to dismissal for failure to state a claim upon which relief may be granted. For example, Plaintiff includes a claim for "exemplary damages." Even where a foreign state is not entitled to immunity under the FSIA, the statute provides that "a foreign state . . . shall not be liable for punitive damages." 28 U.S.C.A.§1606.

Like other Rule 12(b)(6) motions to dismiss, a motion to dismiss on statute of limitations grounds should be granted "when the statement of the claim affirmatively shows that the plaintiff can prove no set of facts that would entitle him to relief." *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (citing *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1369 (6th Cir. 1975)).

As discussed above, Plaintiff's claims are based on actions against personal property and conversion. The applicable statute of limitations in Tennessee in this matter is three years:[37]

> The following actions shall be commenced within three (3) years from the accruing of the cause of action:

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[37] Plaintiff apparently contends that this action involves Tennessee law for the tort of conversion. *See Federal Complaint*, ¶ 8. For the purposes of this argument only, Defendant assumes the application of Tennessee regarding the statute of limitations to Plaintiff's conversion claim. The application of foreign law to Plaintiff's substantive claim is not currently before the Court. However, Tennessee law arguably may be applied by the Court in determining the statute of limitations governing Plaintiff's conversion claim. For example, the Sixth Circuit has held that the procedural law of the forum state generally applies, including the statute of limitations governing a party's claim. *See*, *e.g.*, *Spence v. Miles Laboratories, Inc.*, 37 F.3d 1185, 1188 (6th Cir. 1994); *Electric Power Bd. of Chattanooga v. Monsanto Co.*, 879 F.2d 1368, 1375 (6th Cir. 1989).

Notably, the law is well established that statutes of limitation are favored in Tennessee. As stated by Tennessee Court of Appeals:

> The courts *favor* statutes of limitations (citations omitted). Their purpose is to ensure fairness by preventing undue delay in bringing suit after a cause of action has accrued (citations omitted).

Pac. Eastern Corp. v. Gulf Life Ins. Co., 902 S.W.2d 946, 955 (Tenn. Ct. App. 1995) (internal citations omitted) (emphasis added).

Statutes of limitation rest upon the premise that "the right to be free of state claims in time comes to prevail over the right to prosecute them." *See R. R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944). As Plaintiff's present Federal Complaint now illustrates, delayed claims almost always unfairly prejudice defendants who must defend against claims arising out of events long after witness memories have faded and evidence has long become unavailable. *See U.S. v. Kubrick*, 444 U.S. 111, 117 (1979). Tennessee's appellate courts have emphasized that the statutes limiting the time for bringing lawsuits are enacted for the repose of society. *See Cherry v. Williams*, 36 S.W.3d 78, 83 (Tenn. Ct. App. 2000) (affirming dismissal of legal malpractice action based upon the statute of limitations). As observed by the Tennessee Court of Appeals, "the peace of society requires [that] rights shall be enforced in a reasonable time and that they shall be barred if they are not." *Cherry,* 36 S.W.3d at 83 (quoting *Peck v. Bullard*, 21 Tenn. (2 Hum) 41, 45 (1840)).

Bringing a conversion claim almost three quarters of century after the events occurred against a government (which is not the same government that existed in 1939-1943) is not reasonable, particularly where it has long been known that Walter Westfield's art collection was confiscated in 1938 and the it has long been known that such seizure occurred the hands of the former German government.

(1) Actions for injuries to personal or real property;

(2) Actions for the detention or conversion of personal property; and

(3) Civil actions based upon the alleged violation of any Federal or state statute creating monetary liability for personal services rendered, or liquidated damages or other recovery therefore, when no other time of limitation is fixed by the statute creating such liability.

Tenn. Code Ann. § 28-3-105.

Under Tennessee law, a conversion is the "appropriation of the thing to the party's own use and benefit by the exercise of dominion over it, in defiance of plaintiff's right." *General Elec. Credit Corp. v. Kelly & Dearling Aviation,* 765 S.W.2d 750 (Tenn. Ct. App. 1988). The tort of conversion is complete once the defendant has taken, detained or disposed of the property for an unreasonable length of time." *Id.* The injury to Walter Westfield for the conversion of his personal property took place between 1938 to 1943. *See Federal Complaint*, ¶ 17. Assuming the application of Tennessee law, the conversion was complete upon the confiscation of the art work by the former German government in 1938 – seventy one (71) years ago.

In Tennessee, a claim for conversion of personal property must be filed within three years after the cause of action accrues. *See* Tenn. Code Ann. § 28-3-105; *Levine v. March*, 266 S.W.3d 426, 435 (Tenn. Ct. App. 2007). Tennessee law dictates that "a cause of action accrues either when the wrongful act occurs or when the plaintiff discovers, or in the exercise of reasonable care and diligence should have discovered, that *it has suffered an injury* and *the cause of the injury.*" *See Levine*, 266 S.W.3d at 435 (emphasis added). The *Levine* court observed that, "[u]nder the discovery rule, the statute of limitations is tolled only during the period of time when the plaintiff has no actual knowledge of the injury and, as a reasonable person, would not be placed on inquiry notice. *Id.* However, the discovery rule does not permit a plaintiff to delay

filing suit until all the injurious effects or consequences of the alleged tortious conduct are fully known.

3. Plaintiff (and Plaintiff's Ancestors From Whom Plaintiff Derives His Status) Knew of the Injury and Cause of Injury Long Ago

The "injury" occurred originally in 1938 when this property was confiscated from Walter Westfield. At that time, Westfield's art collection was seized and subsequently sold at public auction. At no point does Plaintiff contend that Plaintiff (or his ancestors for that matter) have been unaware of the confiscation of the property until recently nor does he contend that they were unaware of the circumstances of the confiscation of the art collection.

Plaintiff (and those whom he represents) derive their potential property rights entirely as contingent beneficiaries of their own parents (the now deceased brothers of Walter Westfield). Allowing Plaintiff the benefit of the doubt, the intestate rights of Plaintiff's ancestors were first triggered on August 1, 1948. This was the date (according to the probate proceedings) when it was officially declared that Walter Westfield's date of death should be considered to be May 8, 1945 (the official end of World War II in Europe). At least one brother (and we can likely conclude all three Westfield brothers, Max, Robert, and Dietrich), knew of Walter Westfield's death by October, 1948.

Indeed, in their Amended Probate Petition, Plaintiff alleges that his father, Dietrich (a German lawyer) was corresponding with the German lawyer for Emilie Scheulen—person who claimed to be the spouse of Walter Westfield and the primary beneficiary of his will. Plaintiff alleges that Dietrich Westfield was "setting forth a legal analysis" concerning the respective rights of those who might inherit from Walter Westfield in 1948. In 1949, Plaintiff's parents admittedly had notice of the probate proceedings of the will of Walter Westfield in Germany. Fifty one (51) years ago, in 1958, according to the Tennessee probate pleadings, the Westfield

brothers were engaged in litigation in Tennessee with Emilie Scheulen over Walter Westfield's estate.

Similarly, according to the amended probate pleadings, the Westfield brothers (from whom Plaintiff and the other heirs derive their status), were, by the mid 1940s, searching for the artwork in Europe and checking with individuals such as Robert Lebel in Paris and others in Amsterdam. It is unreasonable to argue (and indeed Plaintiff does not even claim) that the Westfield brothers were unaware (a) that the art collection had been confiscated by the former German government and (b) that the events had occurred prior to 1940. Similarly, a cursory review of the Federal Complaint reveals that Plaintiff does not claim or suggest that he was not aware of the injury (i.e. the confiscation of the art collection) and source of the injury (i.e. the actions of the former government of Germany) well before the expiration of the statute of limitations.

Plaintiff, and those from whom he derives his status to bring this action, knew or should or reasonably should have discovered Walter Westfield's injury and the cause of that injury more than fifty years ago--during mid-20th century. Plaintiff seemingly wishes to rely instead upon a claim that he did not know the precise identity of "all of the works" which had been taken in 1938 until more recently. For example, in paragraph 30 of the Federal Complaint, Plaintiff states that in 2004 he noticed that the Boston Museum of Fine Arts was seeking descendants of Walter Westfield, who, the Museum had determined, had purchased the painting *Portrait of a Man and a Woman in an Interior*, by the 17th Century Dutch Master Eglon van der Neer, from Robert Lebel, a Parisian art dealer.

Plaintiff then sent an email to the Museum on November 12, 2004 (presumably indentifying himself as a descendant of Walter Westfield and inquiring about this piece).

Thereafter, Plaintiff exchanged emails with the museum archivist, Victoria Reed, who indicated that there might be some record of the paintings once owned by Walter Westfield. Sometime later, Ms. Reed located a catalog believed to list certain pieces of artwork once owned by Walter Westfield.[38]

Even assuming that Plaintiff and his relatives knew nothing about the fact that Walter Westfield's art collection had been confiscated in 1938 in pre-World War II Germany by the former German government until Mr. Westfield began his exchange with the Boston Museum of Fine Art on November 12, 2004, the statute of limitations expired before this action was filed. Plaintiff did not file this lawsuit for conversion until October of 2008. At the very latest, by November 12, 2004, Westfield was on notice of the loss of the art collection at the hands of the former German government and Plaintiff should have acted by the close of 2007 (three years from the date of the email).

The discovery rule applies a "reasonable person" standard, not, as Plaintiff might suggest, a subjective standard based upon when Plaintiff contends he "discovered" "precisely" each of the works of art which allegedly had been taken. Tennessee's Supreme Court has specifically stated that the "the discovery rule does not permit a plaintiff to delay filing suit until all the injurious effects or consequence of the alleged tortuous conduct are fully known." *Levine v. March,* 266 S.W.2d at p. 436.

While the events described by the Federal Complaint are sympathetic, the events have been long known by the Westfield family—suggesting to the Court that Plaintiff (and Plaintiff's ancestors) did not know or reasonably were not placed on inquiry as to the fate of the art collection is not reasonable and it is at odds with the actions of the Westfields for the last half

[38] The allegation does not state that all the works in the catalog were owned by Walter Westfield or allege that all of contents of the catalog were the subject of the 1938 confiscation of the art collection.

century. They have long known of seizure of the art collection and that it was seized from Walter Westfield in 1938. Any contention that Plaintiff did not know of each piece of art contained in the collection misses the mark. Plaintiff knew that the art collection had been taken, how, and by whom.

Even today, Plaintiff's Federal Complaint fails to identify any specific items which Plaintiff maintain was in the collection. Instead, Plaintiff recounts instead events long known and seeks general damages for an "art collection" - facts which were well established and well known before the expiration of the statute of limitations.

In reality, Defendant respectfully submits that Plaintiff knew or had reason to know of the injuries against Walter Westfield's personal property no later than the mid 1950s and certainly more than three years before the filing of this lawsuit. This claim is time barred and should be dismissed.

CONCLUSION

The Federal Republic of Germany is immune from this action pursuant to the FSIA. All the actions alleged herein are the governmental actions of a sovereign state and are entitled to the protection afforded by the FSIA. The Plaintiff has failed to allege any exception to the general grant of immunity contained in the FSIA. It is respectfully submitted that this Court lacks subject matter jurisdiction over the Federal Republic of Germany.

Even, assuming *arguendo*, that this Court has subject matter jurisdiction over the Federal Republic of Germany, the Complaint should be dismissed for failure to state a claim upon which relief can be granted as this action is time barred and should be dismissed.

Accordingly, Defendant respectfully requests that Plaintiff's Federal Complaint be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2009, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the court's electronic filing system to the following parties:

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