UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Bruce Berg, as heir to Benjamin Katz, a partner in Firma D. Katz, Plaintiff, v. Kingdom of the Netherlands; Ministry of Education, Culture & Science of the Netherlands; Cultural Heritage Agency of the Netherlands; Museum Het Rembrandthuis, a/k/a Rembrandt House Museum; Museum Boijmans Van Beuningen; Frans Hals Museum; Centraal Museum; Catharijneconvent; Rijksmuseum; Rijksmuseum Twenthe; Dordrechts Museum; Museum de Lakenhal; Museum Gouda; Museum Voor Religieuze Kunst; Bonnefantenmuseum; Het Noordbrabants Museum; Limburgs Museum; Paleis Het Loo; Museum Ons' Lieve Heer Op Solder; Stichting Bijbels Museum; Museum Rotterdam; Museum Het Prinsenhof; Historisch Centrum Het Markiezenhof, Defendants.	)	Civil Action No.: 2:18-cv-3123-BHH **ORDER**

This matter is before the Court on challenges to jurisdiction and to the sufficiency of the First Amended Complaint, which was filed by Plaintiff Bruce Berg, as heir to Benjamin Katz, a partner in Firma D. Katz ("Plaintiff"). Pending before the Court is a motion to dismiss brought collectively by Defendants the Kingdom of the Netherlands; Ministry of Education, Culture & Science of the Netherlands; Cultural Heritage Agency of the Netherlands; Museum Het Rembrandthuis, A/K/A Rembrandt House Museum;

Museum Boijmans van Beuningen; Frans Hals Museum; Centraal Museum; Catharijneconvent; Rijksmuseum; Rijksmuseum Twenthe; Dordrechts Museum; Museum de Lakenhal, Museum Gouda; Museum Voor Religieuze Kunst; Bonnefantenmuseum; Het Noordbrabants Museum; Limburgs Museum; Paleis Het Loo; Museum Ons' Lieve Heer Op Solder; Stichting Bijbels Museum; Museum Rotterdam; Museum Het Prinsenhof; and Historisch Centrum Het Markiezenhof ("Defendants"). For the reasons discussed below, the Court grants Defendants' motion to dismiss.

BACKGROUND

Plaintiff initially filed this action on November 19, 2018, alleging claims for declaratory judgment, conversion, unjust enrichment, and constructive trust, arising from Defendants' alleged taking and retention of certain property in violation of international law. (ECF No. 1.) On May 23, 2019, Plaintiff filed an amended complaint and added a claim for breach of contract. (ECF No. 30.) Plaintiff seeks restitution of a collection of 143 paintings and other works of art ("the Artworks") currently in Defendants' possession. Defendants include the Kingdom of the Netherlands ("the Netherlands"); the Ministry of Education, Culture, and Science of the Netherlands ("the Ministry"); the Cultural Heritage Agency of the Netherlands ("RCE"); and a number of private and public, municipal Dutch museums.

Plaintiff alleges he is heir to Benjamin Katz and that Benjamin, along with his brother Nathan Katz ("Katz Brothers"), formed the partnership of Firma D. Katz in Dieren, the Netherlands, prior to World War II. (*Id.* ¶ 3.) According to Plaintiff, Firma D. Katz owned and operated three art galleries and specialized in the sale of paintings by Dutch "Old Masters." (*Id.*) Plaintiff alleges that following the German invasion of the Netherlands in

May 1940, the Katz Brothers were forced to sell Firma D. Katz's inventory to Nazi agents. (*Id.* ¶¶ 4, 7, 8.) Plaintiff alleges that the Katz Brothers, who were Jewish, "feared deportation to concentration camps, reprisal, or wholesale seizure of their trading stock if they did not acquiesce and sell the Artworks." (*Id.* ¶ 8.)

Plaintiff alleges that following the end of the war, the United States military returned all but two of the Artworks to the Netherlands, and that the Netherlands "agreed by contract to hold those works as custodian until they could be restituted to their original owners." (*Id.* ¶ 11.) Plaintiff further alleges that the Netherlands incorporated the Artworks into the Netherlands Kunstbezit collection ("NK collection"), which is owned by the Ministry. (*Id.*) According to Plaintiff, in the 1940s and 50s, the Katz Brothers, on behalf of Firma D. Katz, submitted claims for restitution for certain paintings not included in the Artworks, and their efforts were met with limited success. (*Id.* ¶ 12.) Plaintiff alleges that "the Dutch government ceased accepting restitution claims in 1951," thereby both "ignor[ing] its agreement with the United States to hold the Artworks as custodian," and "asserting wrongful ownership over [the Artworks]." (*Id.* ¶ 13.) "For the remainder of their lives, the Katz Brothers were unable to request restitution of the Artworks." (*Id.*)

In 2001, the Ministry and the Netherlands began accepting restitution claims "through the newly-established Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War ("Restitution Committee")." (*Id.* ¶ 14.) In the 2010s, certain heirs of the Katz Brothers, including Plaintiff, "submitted two claims for over 180 artworks owned by Firma D. Katz-including the Artworks at issue." (*Id.* ¶ 15.) The Restitution Committee recommended the denial of both

claims, and the Ministry adopted the recommendation; the Ministry also declined to reconsider the Katz heirs' main restitution claim. (*Id*. ¶ 16.)

In his amended complaint, Plaintiff alleges that the Restitution Committee's recommendations to the Ministry:

> were based on a number of internal policies–the Ekkart Recommendations–which have no foundation in law. Chief among these policies is the notion that art galleries–including those owned by Jews–have a goal of selling art, so that "the majority of the transactions, even [by] the Jewish art dealers[,] in principle constituted ordinary sales."

(*Id*. ¶ 17; ECF No. 30-2 at 20.) Plaintiff alleges that "[t]hese policies directly contravene international law as understood by the Allied Forces during World War II." (ECF No. 30 ¶ 17.) Plaintiff further alleges that Firma D. Katz's sales of the Artworks occurred under duress and are void under United States and international law. (*Id*. ¶ 18.) In addition, Plaintiff asserts that Defendants refuse "to restitute the Artworks to Plaintiff and the Katz Brothers' heirs," which refusal, Plaintiff alleges, constitutes "a second taking in violation of international law, following the original sales under duress." (*Id*. ¶ 19.) Finally, Plaintiff alleges: "[b]y violating their custodial agreement to hold the Artworks pending identification of their lawful owner, Defendants have gained at Plaintiff's expense, and as a result of a genocidal taking;" and "[t]o allow Defendants to retain the Artworks–and to profit from their display, in many cases–is unconscionable, violates agreed principles of World War II art restitution, and goes against the weight of both evidence and history." (*Id*. ¶ 20.)

In response, Defendants filed a joint motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, asserting (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; and (4) failure to state a claim upon which

relief can be granted. (ECF No. 37.) Plaintiff filed a response to the motion to dismiss, to which Defendants filed a reply. (ECF Nos. 42 and 45.)

STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a cause of action based on lack of subject-matter jurisdiction. "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Brickwood Contractors, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). Generally, at the motion to dismiss stage, a district court must accept the allegations of the complaint as true and construe all inferences in a plaintiff's favor. However, "[w]here the motion to dismiss is based on a claim of foreign sovereign immunity, which provides protection from suit and not merely a defense to liability, . . . the court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case before trial." *Burnett v. Al Baraka Inv. and Devel. Corp.*, 292 F. Supp. 2d 9, 14 (D.D.C. 2003) (internal citations and quotation marks omitted). To this end, the court must look beyond the parties' pleadings to resolve any factual disputes that are essential to its decision to retain jurisdiction or dismiss the action. *See id.* (citations omitted). If the court lacks subject matter jurisdiction, it has no authority to evaluate whether a plaintiff's complaint fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1997) (instructing that courts should not assume

jurisdiction for the purpose of deciding the merits).

B. Federal Rule of Civil Procedure 12(b)(2)

Under Rule 12(b)(2), the Court may dismiss a case for lack of personal jurisdiction. "[A] defendant must affirmatively raise a personal jurisdiction challenge, but the plaintiff bears the burden of demonstrating personal jurisdiction at every stage following such a challenge." *Grayson v. Anderson*, 816 F.3d 262, 267 (4th Cir. 2016). "The plaintiff's burden in establishing jurisdiction varies according to the posture of a case and the evidence that has been presented to the court." *Id.* at 268. Where the Court addresses the personal jurisdiction question by reviewing the Parties' motions and briefs, affidavits attached to the motion, and the allegations in the amended complaint, Plaintiff "need only make a prima facie showing of personal jurisdiction to survive the jurisdictional challenge." *Id.* (citing *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989)). While the Court must construe all factual allegations in the light most favorable to the nonmoving party, the showing of personal jurisdiction "must be based on specific facts set forth in the record in order to defeat [a] motion to dismiss." *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992). The Court may consider evidence outside the pleadings, such as affidavits and other evidentiary materials, "without converting the motion to dismiss into a motion for summary judgment." *Id.*; *see Grayson*, 816 F.3d at 268 (citing *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 62 (4th Cir. 1993) (explaining that courts may consider affidavits from any party when applying the prima facie standard)). Ultimately, "a plaintiff must establish facts supporting jurisdiction over the defendant by a preponderance of the evidence." *Grayson*, 816 F.3d at 268 (citing *Combs*, 886 F.2d at 676) (noting that

"the burden [is] on the plaintiff ultimately to prove the existence of a ground for jurisdiction by a preponderance of the evidence").

C. Federal Rule of Civil Procedure 12(b)(3)

Under Rule 12(b)(3), a defendant may move to dismiss an action as brought in an improper venue. On such motion, the plaintiff "bears the burden of establishing that venue is proper." *Butler v. Ford Motor Co.*, 724 F. Supp. 2d 575, 586 (D.S.C. 2010). But the plaintiff need "make only a prima facie showing of proper venue in order to survive a motion to dismiss." *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 365-66 (4th Cir. 2012) (citation omitted). Courts must view the facts in the light most favorable to the plaintiff when determining whether plaintiff has made a prima facie showing of proper venue. *Id.*

D. Federal Rule of Civil Procedure 12(b)(6)

Finally, a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) examines the legal sufficiency of the facts alleged on the face of a plaintiff's complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible when the factual content allows the court to reasonably infer that the defendant is liable for the misconduct alleged. *Id.* When considering a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Additionally, under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As the Supreme Court held in *Twombly*, the pleading standard set forth in Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Thus, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

DISCUSSION

Defendants claim that this action must be dismissed because:

> (1) it falls outside the narrow class of suits for which jurisdiction can be had over foreign sovereigns or their agencies or instrumentalities in United States courts, due to the lack of nexus between the relevant property, parties, and commercial activities in the United States; (2) the private and public museums in the Netherlands that are named as defendants have insufficient contacts in the United States to support general jurisdiction; (3) South Carolina is an improper forum under relevant federal venue provisions; (4) Plaintiff's claims, as pleaded, seek relief that would necessarily violate the act of state doctrine by requiring this Court to sit in judgment of the official acts taken by the Netherlands within its own territory; and (5) Plaintiff's claims themselves fail as a matter of law.

(ECF No. 37-1 at 17.)

For the reasons explained below, the Court finds that the Netherlands, the Ministry, and the RCE are entitled to sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611, and that neither the expropriation exception nor the commercial activity exception applies to those

Defendants. With respect to the municipal museums, however, the Court finds that the expropriation exception to sovereign immunity applies, but not the commercial activity exception. Nevertheless, the Court finds that the municipal museums and the private museums lack sufficient contacts in the United States to support the Court's exercise of personal jurisdiction. Likewise, the Court finds that venue is not proper in this District. In addition, the Court finds that, even if it could exercise personal jurisdiction over the museum Defendants without violating their due process rights, and even if venue was appropriate in this District, Plaintiff lacks standing. Specifically as to standing, the Court first finds that Plaintiff has failed to show that he has suffered an invasion of a legally protected interest such that he can pursue his claims on behalf of the now-defunct partnership Firma D. Katz. Second, in light of the Court's finding that the Netherlands, the Ministry, and the RCE are entitled to sovereign immunity, the Court finds that an issue of redressability would preclude Plaintiff from proceeding solely against the museum Defendants. For these reasons, the Court grants Defendants' motion to dismiss.

I. Subject Matter Jurisdiction

A. Foreign Sovereign Immunities Act

The Court begins with the issue of its jurisdiction. Specifically, the Court begins its jurisdictional analysis with the Foreign Sovereign Immunities Act ("FSIA"), heeding the Supreme Court's instruction that a court should decide a foreign sovereign's immunity defense at the threshold of the action, resolving any factual disputes "as near to the outset of the case as is reasonably possible." *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 137 S. Ct. 1312, 1316-17 (2017) (quoting *Verlinden B.V.*

v. Central Bank of Nigeria, 461 U.S. 480, 493-94 (1983)).

The FSIA provides the exclusive basis for obtaining jurisdiction in federal court over a foreign state and its agencies and instrumentalities. *See*, *e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010). A "foreign state shall be immune from the jurisdiction" of both federal and state courts except as provided in the Act. 28 U.S.C. § 1604. The statute sets forth a general premise of immunity from suit in this country, from which exceptions are carved. *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1318, 1320; *accord Universal Trading & Inv. Co., Inc. v. Bureau for Representing Ukrainian Interests in Intern. & Foreign Courts*, 727 F.3d 10, 16 (1st Cir. 2013) (explaining that the FSIA establishes a presumption of foreign sovereign immunity from the jurisdiction of the courts of the United States unless one of its enumerated exceptions to immunity applies). Claims that do not fall within the ambit of an FSIA exception are barred. *Gomez v. Nielsen*, 301 F. Supp. 3d 91, 97 (D.D.C. 2018) (citation omitted). The FSIA is purely jurisdictional in nature and creates no cause of action. *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012), *certiorari denied by Islamic Republic of Iran v. McKesson Corp.*, 568 U.S. 1229 (2013).

1. Categorizing Defendants for Jurisdictional Analysis

As an initial matter, the Parties do not agree on how to categorize certain Defendants for the purposes of the Court's jurisdictional analysis. The amended complaint identifies the Netherlands as a foreign state and lumps together the following Defendants as agencies or instrumentalities of the Netherlands: the Ministry; the RCE; Centraal Museum; Museum de Lakenhal; Paleis Het Loo; Museum Het Prinsenhof; and Historisch

Centrum Het Markiezenhof. The amended complaint also lumps together the following Defendants as private Dutch museums: Museum Het Rembrandthuis; Museum Boijmans van Beuningen; the Frans Hals Museum; Museum Catharijneconvent; the Rijksmuseum; the Rijksmuseum Twenthe; Museum Gouda; Museum Voor Religieuze Kunst; the Bonnefantenmuseum; Het Noordbrabants Museum; the Limburgs Museum; Museum Ons' Lieve Heer op Solder; Stichting Bijbels Museum; Museum Rotterdam; and Dordrechts Museum.

Here, the Parties agree that under the FSIA, the Netherlands is a foreign state and that Defendants Museum de Lakenhal, Historisch Centrum Het Markiezenhof, and Museum Het Prinsenhof, which are municipal musuems, are agencies or instrumentalities of the Netherlands. (ECF No. 42 at 22.) See 28 U.S.C. § 1603(b). The Parties also agree that the Dordrechts Museum is a public, municipal museum that should be categorized as an agency or instrumentality of the Netherlands. Finally, the Parties agree that the following fourteen museum Defendants are private for the purposes of the jurisdictional analysis and therefore are not subject to the FSIA: Museum Het Rembrandthuis; Museum Boijmans van Beuningen; the Frans Hals Museum; Museum Catharijneconvent; the Rijksmuseum; the Rijksmuseum Twenthe; Museum Gouda; Museum Voor Religieuze Kunst; the Bonnefantenmuseum; Het Noordbrabants Museum; the Limburgs Museum; Museum Ons' Lieve Heer op Solder; Stichting Bijbels Museum; and Museum Rotterdam ("Private Museums"). (ECF No. 37-1 at 37 n.17.)

The parties do not agree upon the following: Plaintiff contends that the Ministry and the RCE are agencies or instrumentalities of the Netherlands, not political subdivisions. (ECF No. 42 at 22-23.) In contrast, Defendants assert that the Ministry is a political

subdivision of the Netherlands, and that the RCE is a department within the Ministry and therefore is also a political subdivision of the Netherlands. (ECF Nos. 37-1 at 19; 38 at 3; and 38-5 at 11.) As such, Defendants assert that the Ministry and the RCE "are entitled to the same level of immunity" as the Netherlands under the FSIA. (ECF No. 37-1 at 19.)

In addition, Plaintiff asserts that the Centraal Museum and the Paleis Het Loo are public, municipal museums, but Defendants disagree and assert that these museums are private museums. (ECF Nos. 42 at 21 and 37-1 at 38.)

a. The Ministry and the RCE

The FSIA defines "foreign state" to include a political subdivision, agency, or instrumentality of a foreign state. 28 U.S.C. § 1603(a). An agency or instrumentality of a foreign state is defined as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

Id. at § 1603(b).

The Parties agree that the Court should apply the "core functions" test from *Wye Oak Technology, Inc. v. Republic of Iraq*, 666 F.3d 205, 214 (4th Cir. 2011), to determine if the Ministry and RCE are political subdivisions or agencies or instrumentalities of the Netherlands. (ECF Nos. 37-1 at 36; 42 at 24; and 45 at 13-14.) To begin, "the FSIA applies to the component parts of a foreign state, distinguishing those that are legally separate from the foreign state from those that are not." *Wye Oak*, 666 F.3d at 214. The

court in *Wye Oak* explained that under the FSIA, an agency or instrumentality is "a separate legal person," and is consequently subject to punitive damages and/or attachment of U.S.-based property. *Id.* (citations omitted). By contrast, a political subdivision does not have separate legal personhood. *Id.* (citation omitted).

Here, to determine the nature of an entity, the Court asks whether the core functions of the Ministry and the RCE are predominantly governmental or whether they are commercial. *Id.* (citing *Transaero, Inc. v. La Fuerza Aerea Boliviana*,30 F.3d 148, 151 (D.C. Cir. 1994)). "If the core functions are commercial, courts treat the entity as an agency or instrumentality–legally separate from the foreign state; if the core functions are governmental, courts treat the entity as a mere political subdivision–not legally separate from the foreign state." *Id.* at 214-15.

Defendants assert in their motion that neither the Ministry nor the RCE are "run as distinct economic enterprises," nor are they "run by boards." (ECF No. 37-1 at 36.) For support, Defendants refer to the Declaration of Marijn C.J. Kooij, a coordinating policy advisor at the Ministry. (ECF Nos. 38 at 2 and 38-5 at 3, 10-11.) Defendants assert that "the Ministry is a subdivision of the government," and that the RCE "is essentially a department within the Ministry that manages and administers the Netherlands' cultural property; it is also responsible for Dutch cultural heritage policy development and implementation." (ECF No. 37-1 at 36.) For support, Defendants refer to the following documents: Decree of April 14, 1965, which established the Ministry, (ECF No. 38-1); Decrees of November 4, 1982 and August 22, 1994, which established and reassigned ministerial tasks of the Ministry, (ECF Nos. 38-2 and 38-3); Decree of September 30, 2003, which changed the name of the Ministry, (ECF No. 38-4); and an Order of the Minister of

Education, Culture and Science explaining in pertinent part that "[o]n behalf of the Minsters, the RCE implements legislation on heritage management," and "manages the part of central government's art collection that is not housed in national museums, and aims to make it as accessible as possible." (ECF No. 38-5 at 13-14.) Defendants further assert that "[t]he RCE is not legally separable from the Ministry, and it is directly accountable to the Ministry's Directorate-General for Culture and Media–not an independent board or other entity." (ECF Nos. 37-1 at 36 and 38-5 at 9-11.)

Plaintiff contends in response that even when an entity operates under the title of "Ministry," a court still may find that the entity is in fact an agency of instrumentality under the FSIA, and Plaintiff cites general propositions of governing law, with which neither Defendants nor this Court take issue. (ECF No. 42 at 22-24.) Plaintiff does not, however, provide a reason to dismiss or discredit the documents described above, authenticated by the Kooij Declaration. Rather, Plaintiff argues that the Ministry's core functions are commercial because it mainly invests in and manages property. For support, Plaintiff cites to an English translation of the official website of the Ministry, which reflects that the Ministry sets policy and regulates education, culture, and media and invests in research, the media, and cultural functions. (ECF Nos. 42-3 and 42-4 (explaining that the Ministry has funded artists and international scholarships for students and "provided over € 25 million for museums to acquire new artworks, purchased art itself, sold art," and has funded civic sectors of Dutch society, namely public television and radio stations).) In reply, Defendants contend that "[n]either the Minister nor the Ministry 'invest' in the 'welfare and culture of the Netherlands' to generate a profit–such acts are central to governmental function." (ECF No. 45 at 14.)

After review, the Court finds that the Ministry and RCE are governmental rather than commercial in nature. The record demonstrates that the Ministry exists because of and acts on behalf of and at the direction of the government of the Netherlands. While the Ministry may engage in some commercial transactions, there is no evidence that the commercial transactions occur for the purpose of individual profit, but rather for a civic and political purpose, i.e., the cultural enhancement of Holland's citizens and residents. And, as Defendants note, the Minister reports to the Prime Minister, not to a board of directors. Indeed, the Netherlands has twelve ministries in all, including the Ministry of Defence and Ministry of Finance, along with the Defendant Ministry. Ultimately, the record leaves no doubt that the core function of the Ministry, and thus of RCE, is predominantly governmental. *Cf. Magness v. Russian Federation*, 247 F.3d 609, 613 n.7 (5th Cir. 2001) (determining without engaging in an analysis that the Russian Ministry of Culture is a political subdivision rather than an agency or instrumentality); *Garb v. Republic of Poland*, 440 F.3d 579, 594 (2d. Cir. 2006) (affirming district court's finding that "the Ministry of the Treasury would appear to be an integral part of Poland's political structure, and its core function–to hold and administer the property of the Polish state–is indisputably governmental"); *Transaero v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994) (holding that the Bolivian Air Force was a political subdivision, explaining that "armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state' itself, rather than a separate 'agency or instrumentality' of the state."). Accordingly, the Court treats the Ministry and the RCE as mere political subdivisions of the Netherlands–not legally separate from the foreign state.

b. Centraal Museum and Paleis Het Loo

As previously explained, Plaintiff asserts that the Centraal Museum and the Paleis Het Loo are public, municipal museums, but Defendants disagree and assert that Plaintiff has mislabeled these museums as public. (ECF No. 37-1 at 37.) Plaintiff "accepts that Defendants Centraal Museum and Paleis Het Loo are currently private museums," but contends that for the purpose of this lawsuit, they "are agencies or instrumentalities of the Netherlands, because they had not yet been privatized when the relevant events occurred," and did not "hold themselves out as 'national' museums." (ECF No. 42 at 21.) In support, Plaintiff relies on *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1203-04 (C.D. Cal. 2001), aff'd 317 F.3d 954 (9th Cir. 2002), *aff'd on other grounds, Republic of Austria v. Altmann*, 541 U.S. 577 (2004). Defendants argue that *Altmann* is inapposite because it involved a "taking in violation of international law" by a gallery that was publicly owned at the time of the alleged taking, whereas here, Defendants contend that "none of the museums is alleged to have had any involvement with any purported taking, be it post-war or modern day." (ECF No. 37-1 at 38.) Defendants further contend that Plaintiff "fails to identify the 'relevant events' with regard to either of these museums." (ECF No. 45 at 14.) Defendants explain that at the time the Ministry accepted the Restitution Committee's recommendation to deny restitution as to the Artworks, the Centraal Museum and Paleis Het Loo were private museums; and the amended complaint does not allege that these (or any of the museum Defendants) were involved in "the purported wartime taking by Germany or the alleged 1950s taking by the Dutch government." *Id.*

After review, the Court agrees with Defendants that *Altmann* is distinguishable from

the facts alleged here. Furthermore, without allegations that the Centraal Museum and Paleis Het Loo were in existence as public, municipal museums at the time of the alleged takings, or that they participated in the alleged takings, *Altmann* is not particularly instructive. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003) (holding unequivocally that an entity's status as an instrumentality of a foreign state should be "determined at the time of the filing of the complaint"). Plaintiff provides no other reason to treat the Centraal Museum and Paleis Het Loo as public. Accordingly, given their current, undisputed status as private museums, the Court finds that they are not subject to the FSIA.

2. Foreign State Defendants

Having determined that the Netherlands, the Ministry, the RCE, and the municipal museums (collectively referred to as the "Foreign State Defendants") are subject to the FSIA, the Court next must decide whether an exception to sovereign immunity applies. Plaintiff carries the burden "of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted." *Freund v. Republic of France*, 592 F. Supp. 2d 540, 552-53 (S.D.N.Y. 2008) (quoting *Cabiri v. Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999)); *accord Wye Oak*, 666 F.3d at 212. Once Plaintiff satisfies this burden of production, the burden of persuasion passes to Defendants to show that an exception to the FSIA does not apply. *Freund*, 592 F. Supp. 2d at 552-53 (providing that "the ultimate burden of persuasion remains with the alleged foreign sovereign"); *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013).

Plaintiff asserts that the Foreign State Defendants are not immune from suit under

either the "expropriation exception" or the "commercial activity exception." (ECF No. 30 at 54.) The expropriation exception provides that a foreign state shall not be immune from the jurisdiction of the United States in any case:

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such 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). Next, the commercial activity exception provides that no foreign state shall be immune from the jurisdiction of the United States in any case:

> in which the action 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.

Id. at § 1605(a)(2).

Defendants argue that this action "falls outside the narrow class of suits for which jurisdiction can be had over foreign sovereigns or their agencies or instrumentalities in United States courts, due to the lack of nexus between the relevant property, parties, and commercial activities in the United States." (ECF No. 37-1 at 17.) More specifically, Defendants argue that neither exception applies because:

> Plaintiff fails to allege that any of the Artworks are present in the United States in connection with commercial activities, as he must in order for the FSIA's Expropriation Exception to apply to strip the Netherlands–the owner of the Artworks–of its presumptive sovereign immunity; and because Plaintiff's action is not "based upon" a commercial activity, the FSIA's Commercial Activity Exception does not apply to provide jurisdiction over any sovereign Defendant.

(ECF No. 37-1 at 21). The Court addresses each exception in turn.

a. Expropriation Exception

As explained by the Second Circuit, to establish jurisdiction over the Foreign State Defendants pursuant to the expropriation exception, 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[.]"

Garb v. Republic of Poland, 440 F.3d at 588 (citing 28 U.S.C. § 1605(a)(3)).

The Supreme Court recently clarified that a court can maintain jurisdiction to hear the merits of a case under the expropriation exception only if it finds "that the property in which the party claims to hold rights was indeed 'property taken in violation of international law.'" *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1316. That is, "the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law)"; "[a] good argument to that effect is not sufficient." *Id.* at 1316. Accordingly, for the expropriation exception to apply, Plaintiff must demonstrate, *inter alia*, that at least one of the alleged takings of the Artworks violated international law. *Id.* at 1318-19 (explaining that "[a] nonfrivolous argument" that "property" has been "taken in violation of international law" is insufficient).

Here, the amended complaint asserts the following allegations relevant to the

takings claims:

> a) The Artworks were traded or sold under duress by Firma D. Katz to Nazi agents and officials for no public purpose other than to benefit Hermann Goering, Adolf Hitler, the Nazi regime, or Nazi agents.
>
> b) These takings were discriminatory because Firma D. Katz was a Jewish business. Its only partners–Nathan and Benjamin Katz–were Jews, and therefore belonged to a persecuted group.
>
> c) The Artworks were wrongfully appropriated because they were traded or sold under duress created both by the Nazi invasion of Holland generally and also by specific pressure from Nazi agents and officials.
>
> d) At the end of World War II, United States forces operated collection points, at which Nazi-looted art was gathered and cataloged for return to its country of origin. Agreements ("Collection Point Agreements") were executed with The Netherlands when art passing through these collection points was returned to it. [] Under the Collection Point Agreements, The Netherlands agreed to hold the art "as custodians pending the determination of the lawful owners thereof; [and] that said items will be returned to their lawful owners[.]" [] All but two of the Artworks also passed through these collection points, and The Netherlands executed identical Collection Point Agreements when accepting them.
>
> e) Defendants The Netherlands and The Ministry wrongfully assert ownership over the Artworks, in direct contravention of their Collection Point Agreements with the United States. Defendants have perpetuated the original genocidal taking of the Artworks by failing to return the Artworks to Plaintiff, compensate Plaintiff for the value of the Artworks, and by ignoring their contractual duty as custodians. The Artworks never belonged to Defendants, and Defendants have gained monetarily from their wrongful taking by continuing to possess the Artworks and profit from their display and licensing.
>
> f) Defendants have further perpetuated the original discriminatory taking of the Artworks from Firma D. Katz, and maintained wrongful possession thereof, by denying the Katz heirs and Plaintiff's restitution requests in 2017 via reliance on arbitrary requirements of specific duress and specific ownership documentation. The Collection Point Agreements do not set out such requirements as part of The Netherlands' custodial duty.
>
> g) Since 1945, it has been the policy of the United States of America to undo forced transfers of property to Nazi agents and "to restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such

> property." *Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 201 F.2d 375, 376 (2d Cir. 1954) (citation omitted). Accordingly, United States policy also mandates relieving U.S. courts "from any restraint upon their jurisdiction to pass upon the validity of the acts of Nazi officials."

(ECF No. 30 ¶ 55.) Plaintiff identifies three alleged takings (or expropriations): when Nazi agents and representatives caused the Katz Brothers to sell pieces of the Artworks under duress during World War II; when the Netherlands accepted and maintained possession of the Artworks under the Collection Point Agreements; and when the Netherlands denied the Katz Heirs' request for restitution in 2017. Defendants generally deny that Plaintiff has alleged a taking.

The FSIA does not define the phrase "taken in violation of international law." At least one court has defined it as "'the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law,' including 'takings which are arbitrary or discriminatory in nature.'" *Hulton v. Bayerische Staatsgemaldesammlungen*, 346 F. Supp. 3d 546, 550 (S.D.N.Y. 2018) (quoting *Zappia Middle East Const. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000) (quoting H.R. Rep. No. 94-1487, at 19 (1976)). Additionally, a foreign state, not an individual, must be responsible for the taking for the FSIA to apply. *Zappia*, 215 F.3d at 251. For reasons discussed below, the Court finds that the allegations, when viewed in a light most favorable to Plaintiff, sufficiently assert an expropriation with respect to the first alleged taking but not as to the second and third takings.

As to the first alleged taking--when agents and officers of Nazi Germany acquired ownership of the Artworks under duress–the Court finds that the allegations state a genocidal taking and thereby satisfy the standard of a taking in violation of international law

as set forth in *Helmerich & Payne*, 137 S. Ct. 1312. The Court of Appeals for the District of Columbia has held that seizures of art may constitute "takings of property that are themselves genocide." *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 411-12 (D.C. Cir. 2018) (noting that Congress "f[ound]" that "the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups") (citations omitted) (emphasis in original). Defendants argue only that "Plaintiff cannot satisfy the higher bar imposed by *Helmerich & Payne* by simply citing wartime takings cases with dramatically different facts." (ECF No. 45 at 16-17.) However, as in *Philipp*, Plaintiff alleges here that Nazi agents forced the Katz Brothers to sell Firma D. Katz's inventory to them or face reprisal in the form of "deportation to concentration camps" or "wholesale seizure of their trading stock." (ECF No. 30 ¶¶ 4, 7, 8.) These allegations, considered in the grim context of the Nazis' persecution of Jews during World War II, suffice to show at this juncture that the coerced sale of the Artworks was consistent with the Nazis' pursuit of the Final Solution. *See Philipp*, 894 F.3d at 414 (explaining that "our conclusion rests not on the simple proposition that this case involves a 1935 transaction between the German government and Jewish art dealers, but instead on the heirs' specific-and unchallenged-allegations that the Nazis took the art in this case from these Jewish collectors as part of their effort to 'drive[ ] [Jewish people] out of their ability to make a living'"); *Simon*, 812 F.3d at 143-44, 146 (holding that because the allegations of "systematic, wholesale plunder of Jewish property . . . aimed to deprive Hungarian Jews of the resources needed to survive as a people . . . describe[d] takings of property that are

themselves genocide within the legal definition of the term . . . they 'fit[ ] squarely within the terms of the expropriation exception'"); *see also Altmann*, 142 F. Supp. 2d at 1203 (determining that "the Nazi 'aryanization' of [] art collection by the Nazis is undeniably a taking in violation of international law").

In finding that the sale of the Artworks to the Nazis qualifies as a taking in violation of international law, the Court next considers the commercial activity nexus requirement of § 1605(a)(3), i.e., whether there is an adequate commercial nexus between the United States and Defendants.

As noted earlier, the expropriation exception sets forth as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
> . . .
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such 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).

The expropriation exception's "commercial activity nexus requirement" is comprised of two clauses, and Defendants argue that the first clause permits United States' courts to exercise jurisdiction over a foreign state and that the second clause permits United States' courts to exercise jurisdiction over an agency or instrumentality of a foreign state, but not the foreign state itself. (ECF No. 37-1 at 40.) Plaintiff disagrees and contends that, because the subsection begins with the language "a foreign state," the language that follows is qualifying language and satisfaction of either clause permits a court to exercise

jurisdiction over a foreign state. (ECF No. 42 at 34.)

Both Plaintiff and Defendants find support for their respective positions in decisions from the Circuit Court of the District of Columbia. *Compare de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1107-08 (D.C. Cir. 2017) (holding that "[a] foreign state loses its immunity if the claim against it satisfies the exception by way of the first clause of the commercial-activity nexus requirement; by contrast, an agency or instrumentality loses its immunity if the claim against it satisfies the exception by way of the second clause") *with Agudas Chasidei Chabad*, 528 F.3d at 946-47 (D.C. Cir. 2008) (upholding jurisdiction over Russia based on the commercial activities of Russian agencies and instrumentalities in the United States).

After consideration of the parties' arguments and the relevant law, this Court agrees with Defendants that the D.C. Circuit Court's holding in *de Csepel* reflects settled law in that circuit. *See de Csepel*, 859 F.3d at 1106 (explaining that the court in *Chabad* did not actually consider whether a foreign state loses its immunity simply because its agency or instrumentality satisfies the expropriation exception's second clause); *Simon v. Republic of Hungary*, 812 F.3d 127, 147 (explaining that the commercial-activity nexus requirements differ for claims against the foreign state itself as compared with claims against an agency or instrumentality of the foreign state). Although *de Csepel* is not binding on this Court, the Court finds the *de Csepel* court's reasoning persuasive and notes that *de Csepel* sets forth the most specific analysis of the effect of the two clauses of the commercial-activity nexus

requirement. Thus, the Court elects to follow *de Csepel*.[1] Therefore, the Court finds that the nexus requirement for jurisdiction over foreign states differs from that over agencies and instrumentalities. Specifically, the Court finds that claims against foreign states must satisfy the first nexus requirement–that "such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," and the Court finds that claims against agencies and instrumentalities must satisfy the second nexus requirement–that "such 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." In other words, a foreign state loses its immunity under the expropriation exception "if the claim against it satisfies the exception by way of the first clause of the commercial-activity nexus requirement; by contrast, an agency or instrumentality loses its immunity if the claim against it satisfies the exception by way of the second clause." *de Csepel*, 859 F.3d at 1107; *see also Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 401 (D.C. Cir. 2018) (citing *de Csepel*, 859 F.3d at 1107 cert. denied, 586 U.S. ----, 139 S.Ct. 784 (2019)) (explaining that under § 1605(a)(3), foreign states do "not lose immunity under the expropriation exception unless the allegedly expropriated property is located in the United States"); *Sheafen Kuo v. Gov't of Taiwan*, — F. App'x —, 2020 WL 476956 (2d Cir. Jan. 30, 2020) (applying the more stringent nexus test to a party that was treated as a foreign state and not an agency or instrumentality);

[1] Although Plaintiff is correct that the Central District of California took jurisdiction over a foreign sovereign where the second clause was satisfied, the court there simply assumed it could do so and did not actually address the question before this Court or specifically hold that the second clause can strip a foreign sovereign of its presumptive immunity. *See Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954 (9th Cir. 2002), *amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003), *aff'd*, 541 U.S. 677 (2004).

Garb v. Republic of Poland, 440 F.3d 579, 590 (2d Cir. 2006) (determining that the Polish Ministry of Treasury was not an agency or instrumentality of the Republic of Poland and therefore the less rigorous nexus test did not apply).

Here, only one of the Artworks is alleged to be in the United States, and that painting is housed in a Dutch Government residence in Washington, D.C. (ECF No. 37-1 at 19, 43 (citing ECF No. 32-1 at 7).) Because such use is clearly not in connection with a commercial activity, the Court finds that the expropriation exception does not apply to strip the Netherlands, the Ministry, or the RCE of sovereign immunity.

Next, as to the municipal museums, which the parties agree are agencies or instrumentalities of the Netherlands, the Court considers whether they own or operate any of the Artworks and are engaged in commercial activity in the United States. 28 U.S.C. § 1605(a)(3); *Philipp*, 894 F.3d at 414 (citing *de Csepel*, 859 F.3d at 1007).

As an initial matter, Plaintiff alleges that the municipal museums possess one or more of the Artworks, thereby satisfying the first element of the second clause regarding the operation of the property. (*See* ECF No. 37-1 at 43-44.) Therefore, the critical question appears to be whether the municipal museums are engaged in commercial activity in the United States.

The FSIA defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act," and explains that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). In further explanation, "a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (jure imperii), but not as to those that are private or commercial

in character (jure gestionis)." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993)). The Supreme Court distinguished the two as follows: "a state engages in commercial activity . . . where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'" *Id.* (quoting *Nelson*, 507 U.S. at 360). As the Fourth Circuit noted in reviewing a foreign sovereign's decision as to how to best secure the safety of its leaders, "[o]ne of the main concerns of the immunity framework adopted by the FSIA is to accommodate 'the interests of foreign states in avoiding the embarrassment of defending the propriety of political acts before a foreign court.'" *Id.* (quoting *Broadbent v. Organization of American States*, 628 F.2d 27, 33 (D.C. Cir. 1980)). The Court keeps this guidance in mind as it turns to the question of whether the municipal museums are engaged in commercial activity.

In their motion to dismiss, Defendants argue that "Plaintiff's limited allegations of commercial activity center on general internet activity that is not targeted to citizens in South Carolina or the United States." (ECF No. 37-1 at 44.) In response to Defendants' motion, Plaintiff outlines the allegations of commercial activity as follows[2]:

> Defendant Museum de Lakenhal regularly loans artworks to and borrows artworks from United States museums for exhibition. Museum de Lakenhal maintains a relationship with Getty Images in Seattle, Washington, through which it sells image licenses for photographs of art in its collection. It also solicits and obtains donations and bequests directly from United States citizens, through its website and that of the Netherland-America Foundation. It also targets and enrolls United States residents in its "American Friends of the Museum de Lakenhal" support organization, and solicits subscriptions to

[2] Plaintiff outlines alleged commercial activity related to the Centraal Museum and Paleis Het Loo, but, as previously set forth, the Court finds that these museums are not public and are not subject to the FSIA. Accordingly, the Court omits the commercial-activity allegations related to these two museums.

> its newsletter from Americans.
>
> . . .
>
> Defendant Museum Het Prinsenhof regularly loans art to and borrows art from United States museums, including some of the Artworks at issue. It also sells image licenses online for photographs of art in its collection through Getty Images. And, it sells tickets online to United States patrons and publishes books sold to customers in the United States.
>
> Defendant Historisch Centrum Het Markiezenhof sells museum tickets online in the United States, and solicits subscriptions to its newsletter that reach the United States.

(ECF No. 42 at 31-33 (internal citations omitted).)

After consideration, the Court agrees with Plaintiff that these alleged activities constitute commercial activity in the United States because, putting aside the purpose of the activity, the nature of the activity is commercial. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 313 (D.D.C. 2005) ("[I]f the activity is one in which a private person could engage, it is not entitled to immunity") (citation omitted); *Cassirer*, 616 F.3d at 1032 ("The important thing is that the actions are 'the type of actions by which a private party engages in trade and traffic or commerce'") (citations omitted). *Cf. McKesson*, 672 F.3d at 1074 (listing types of public acts that only a foreign sovereign could engage in: "Iran did not pass a law, issue an edict or decree, or engage in formal governmental action explicitly taking McKesson's property for the benefit of the Iranian public"). Accordingly, the Court finds that Plaintiff has carried his burden to show that the expropriation exception to sovereign immunity applies to the municipal museums.

b. Commercial Activity Exception

In addition to relying on the expropriation exception, Plaintiff also asserts that the

commercial activity exception strips the Foreign State Defendants of sovereign immunity. As previously explained, the commercial activity exception provides that no foreign state shall be immune from the jurisdiction of the United States in any case:

> in which the action 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. § 1605(a)(2). Only one clause need apply. *Wye Oak Tech.*, 666 F.3d at 215.

Here again, commercial activity is defined as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* The commercial activity exception applies only where the "gravamen" of the complaint is "based upon" the referenced commercial allegations. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015).

Defendants argue that none of the three clauses applies because this action is not "based upon" the alleged commercial activity or acts connected with commercial activity. (ECF No. 37-1 at 49.) In response, Plaintiff asserts that the first and second clauses apply and are based on his claims for constructive trust and unjust enrichment, "as those claims are 'based upon' both commercial activity of the foreign state in the United States as well as 'upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere.'" (ECF No. 42 at 38.) Plaintiff refers to the examples of commercial activities listed above in connection with the expropriation exception to support

his claim that the commercial activity exception applies, and he asserts that "[t]he heart of those claims is that the Defendants have gained monetarily from their continued possession and display of many of the Artworks." (*Id*. at 39.) Plaintiff further asserts that his claims for constructive trust and unjust enrichment are "'directed towards' the profits and benefits of Plaintiff's rightful property, and Defendants' continued receipt of those profits and benefits," and that "Defendants' acts in that regard are those which 'actually injured' Plaintiff, and constitute the 'core of [this] suit.'" *Id.* In reply, Defendants contend that the gravamen of the amended complaint is not "based upon" the alleged commercial activities but on the three alleged takings. (ECF No. 45 at 21.)

After consideration, the Court wholly agrees with Defendants that this action is not *based upon* the alleged commercial activity. In *Sachs*, the Supreme Court explained that the Act's "based upon" inquiry "first requires a court to 'identify'[ ] the particular conduct on which the [plaintiff's] action is 'based.'" 136 S. Ct. at 395. The Court further explained that the district court "should identify that 'particular conduct' by looking to the 'basis' or 'foundation' for a claim," i.e., "those elements . . . that, if proven, would entitle a plaintiff to relief." *Id.* Rather than individually analyze each cause of action, a court should "zero[] in on the core of the[] suit," which here is the Dutch sovereign acts that actually injured Plaintiff. *Id.*

Here, the basis for this lawsuit is Plaintiff's alleged property rights in the Artworks and whether the Netherlands and/or the Ministry has wrongfully asserted ownership over the Artworks. Plaintiff cannot recover on the constructive trust and unjust enrichment claims without first prevailing on his claim for declaratory judgment, which asks the Court to recognize him as the owner of the Artworks and to recognize his claim to the Artworks

as superior to any claim the Netherlands or the Ministry could assert. (ECF No. 30 at 229-30.) Therefore, while the amended complaint alleges commercial activity undertaken by certain Defendants that allegedly gives rise to the claims for constructive trust and unjust enrichment, those two claims are merely residual of the bigger issue: whether the Netherlands has denied Plaintiff the right to his property by dismissing the claims for restitution filed by him and his relatives. Stated plainly, the official action taken by the Netherlands to deny the restitution claims is not commercial in nature, precluding application of the first clause, and it did not occur in the United States, precluding application of the second clause. As the essentials of the underlying lawsuit in *Sachs* occurred in Austria for the purposes of § 1602(b), the essentials of this lawsuit occurred in the Netherlands. *See Sachs*, 136 S. Ct. at 397. Accordingly, the Court finds that Plaintiff has not carried his burden of showing that the commercial activity exception applies to strip the Foreign State Defendants of sovereign immunity.

II. Personal Jurisdiction

In their motion to dismiss, Defendants assert that neither the municipal museums nor the private museums are subject to personal jurisdiction in this Court. For the reasons stated below, the Court agrees with Defendants.

As an initial matter, with respect to the municipal museums, the FSIA empowers federal courts to exercise personal jurisdiction when two conditions are met: (1) an exception from jurisdictional immunity established by the FSIA applies; and (2) the sovereign has been served with process in accordance with the FSIA's provisions. 28 U.S.C. § 1330(b). Nevertheless, courts also have recognized that agencies and instrumentalities of a foreign sovereign are presumed to be separate from the sovereign

state and should be afforded constitutional due process rights. *See*, *e.g.*, *Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d 415, 422 (S.D.N.Y. 2000) (citing *Hanil Bank v. PT Bank Negara Indonesia (Persero)*, 148 F.3d 127, 134 (2d Cir. 1998); *GSS Grp. Ltd. v. Republic of Liberia*, 31 F. Supp. 3d 50, 58 (D.D.C. 2014), *aff'd sub nom*, *GSS Grp. Ltd. v. Nat'l Port Auth. of Liberia*, 822 F.3d 598 (D.C. Cir. 2016).

Due process requires that a defendant have sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Personal jurisdiction may be exercised generally or specifically. General jurisdiction is established where the defendant's contacts with the forum state have been "continuous and systematic" so as to support jurisdiction over claims that are unrelated to those continuous and systematic contacts. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). In other words, general jurisdiction may be exercised when the defendant has contacts with the forum state that are "so constant and pervasive as to render it essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (internal quotation marks and alteration omitted). If the defendant does not have sufficient contacts to be at home in the forum, the court may exercise specific jurisdiction if the defendant has continuous and systematic contacts with the forum state and the claims at issue arise from those contacts with the forum state. *See id.* At 126-27; *see also ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711-12 (4th Cir. 2002) (citing *Helicopteros Nacionales*, 466 U.S. at 414). Specific jurisdiction depends upon "(1) the extent to which the defendant has purposefully

availed itself of the privilege of conducting activities in the state; (2) whether the plaintiffs' claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally 'reasonable.'" *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 397 (4th Cir. 2003). Simply stated, the defendant must have "minimum contacts" with the forum. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-76 (1985). However, "the threshold level of minimum contacts to confer general jurisdiction is significantly higher than for specific jurisdiction." *Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft KG, v. Texport, Inc.*, 954 F. Supp. 2d 415, 421 (D.S.C. 2013) (quoting *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997).

Here, the parties disagree as to whether the Plaintiff can show the necessary minimum contacts between the museums (both municipal and private) and South Carolina. Specifically, as to general jurisdiction, Defendants argue that Plaintiff has not alleged continuous and systematic contacts with the District of South Carolina because Plaintiff asserts only that the museums "regularly loan artwork to and borrow artwork from entities in the United States and the District of South Carolina," and "sell tickets or books, license artworks, solicit subscriptions to newsletters, and seek donations, sponsorships, or memberships from individuals . . . in the District of South Carolina." (ECF No. 37-1 at 57.) Defendants assert that "advertising and solicitation activities alone do not constitute the minimum contacts required for general personal jurisdiction." *Id.* Moreover, as to specific jurisdiction, Defendants argue that Plaintiff's allegations of commercial activity are "wholly unrelated to Plaintiff's causes of action." (*Id*. at 59.)

In response, Plaintiff does not appear to argue that specific jurisdiction exists, but asserts for purposes of general jurisdiction that he has alleged "actual sales and purchases of art, tickets, books, and image licenses, and actual artwork loans," and that these allegations constitute more than mere advertising and solicitation. (ECF No. 42 at 43.) Plaintiff also requests time to conduct limited jurisdictional discovery "as to sales of products, books, and tickets, art purchases and sales, donations and bequests, and museum loans in South Carolina, among other pertinent facts." *Id.*

After consideration, the Court finds that none of Plaintiff's allegations suggest that the museums engage in the necessary continuous commercial activities in South Carolina to make them amenable to general jurisdiction here. Stated plainly, the record does not demonstrate that the museums are engaged in the continuous and systematic affiliation with South Carolina necessary to determine that those museums are "fairly regarded as at home" in this state. As the Supreme Court explained in *Goodyear Dunlop Tires Opersations, S.A. v. Brown*, a defendant's "continuous activity of some sorts within a state," is "not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 564 U.S. 915, 926 (2011) *Id.* at 926. Moreover, the *Goodyear* Court reaffirmed that "mere purchases [made in the forum State], even if occurring at regular intervals, are not enough to warrant a State's assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.* at 929 (quoting *Helicopteros Nacionales*, 466 U.S. at 418) (alterations in original). The same principle should apply here. Thus, the Court finds that Plaintiff's allegations of general marketing activity like sales of tickets, books, and the like, as well as artwork loans,

even when conducted regularly, are insufficient to warrant South Carolina's assertion of general jurisdiction over the museums in causes of action not related to that activity. Likewise, even assuming Plaintiff could discover evidence of regular sales and/or art loans in this District, the Court nevertheless believes that such evidence would fall short of demonstrating the continuous and systematic contacts necessary to support the exercise of general jurisdiction over the museum Defendants. In addition, in requesting additional time to conduct limited jurisdictional discovery, it appears that Plaintiff simply seeks to conduct a fishing expedition, and the Court finds that it would be both unduly burdensome and futile to permit jurisdictional discovery in light of other issues in this case. Finally, to the extent Plaintiff does argue that the Court can exercise specific jurisdiction over the museum Defendants, the Court finds not only that the museum Defendants' minimum contacts with South Carolina are insufficient, but also that Plaintiffs' claims do not arise out of any of the museum Defendants' activities directed at South Carolina. Based on the foregoing, the Court finds that it may not exercise personal jurisdiction over Defendants.

III. Venue

The amended complaint asserts that venue in the District of South Carolina is proper under 28 U.S.C. § 1391(f), "because Defendants do business within the District of South Carolina." (ECF No. 30 ¶ 59.) In their motion to dismiss, Defendants assert that venue is not proper as to the Foreign State Defendants or the private museums.

A. Venue as to the Foreign State Defendants

Defendants first assert in their motion that venue is not proper in South Carolina as to any of the Foreign State Defendants because section 1391(f) permits venue in civil

actions against a foreign state only:

> (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated;
>
> (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;
>
> (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or
>
> (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1391(f).

According to Defendants, the first and second clauses are not implicated here. With respect to the third clause, Defendants assert that Plaintiff has not shown that venue is proper in South Carolina as to the municipal museums because none of the museums is licensed to do business here or is doing business here. Finally, Defendants assert that pursuant to the fourth clause, the District of Columbia is the only proper venue for the Netherlands, the Ministry, and the RCE. (ECF No. 37-1 at 62.)

In response, Plaintiff asserts that the municipal museums are "doing business" in South Carolina because they engage in "commercial activity" within the meaning of 28 U.S.C. §§ 1603 and 1605. In addition, Plaintiff asserts that if § 1391(f)(3) is satisfied, then venue is proper as to both an agency or instrumentality *and* the foreign state itself. (ECF No. 42 at 50.) In other words, Plaintiff asserts that 28 U.S.C. § 1391(f)(4) does not make venue mandatory in the District of Columbia with respect to the foreign state.

The Court previously determined that the municipal museums are "engaged in a

commercial activity in the United States" in connection with the expropriation exception to sovereign immunity. 28 U.S.C. § 1605(a)(3). Plaintiff cites *Altmann* for the proposition that this finding necessarily means that the municipal museums are "doing business" in the District of South Carolina for purposes of venue, but the Court is not convinced. In *Altmann*, the court stated that it "can find no authority that suggests that a foreign agency or instrumentality that engages in 'commercial activity' *within a district* is not also 'doing business' *within a district*." 142 F. Supp. 2d at 1215 (emphasis added). Importantly, in considering the expropriation exception, this Court did not determine that the municipal museums were engaging in commercial activity "*within a district*." Rather, the Court considered whether the municipal museums are "engaged in a commercial activity in the United States." Ultimately, the Court found that the municipal museums were engaged in commercial activity in the United States based on Plaintiff's allegations that they loan artworks to and borrow artworks from United States museums; they maintain relationships with Getty Images in Seattle, Washington, to sell image licenses for photographs of art; they solicit and obtain donations from United States citizens through their websites; they sell tickets and books to customers in the United States; and their newsletters reach the United States. The Court finds that these allegations, which support the Court's finding that the municipal museums "engaged in commercial activity in the United States," do not necessarily indicate that the municipal museums are "doing business" within the District of South Carolina for purposes of venue. In fact, after consideration, the Court agrees with Defendants that the complaint's general allegations of *nationwide* solicitation and sales simply do not support a finding that the municipal museums are "doing business" in the

District of South Carolina.

In light of the Court's finding that venue is not proper in South Carolina pursuant to § 1391(3) as to the municipal museums, the Court need not determine whether Plaintiff is correct that § 1391(f)(4) does not mandate venue in the District of Columbia in actions against a foreign state or political subdivision. Even if Plaintiff is correct, the Court has already determined that the Netherlands, the Ministry, and the RCE are entitled to sovereign immunity.

B. Venue as to the Private Museums

In a civil action involving non-sovereign defendants, § 1391(b) provides that venue is proper in:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b). Not one of the private museums "resides" in the District of South Carolina, and the allegations of Plaintiff's complaint do not indicate that a substantial part of the events or omissions giving rise to the claim occurred in the District of South Carolina or that a substantial part of the property is situated in the District of South Carolina. Thus, venue is appropriate in this District as to the private museums only in a district in which any defendant is subject to the Court's personal jurisdiction. Because the Court has already determined that personal jurisdiction is lacking, the Court finds that venue is not proper in

South Carolina as to the private museum Defendants.

IV. Standing[3]

Whether a party has standing to sue in federal court is a question of federal law. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Article III standing, like other bases of jurisdiction, generally must be present at the inception of the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n. 5 (1992). A plaintiff must satisfy three elements to demonstrate standing under Article III. First, the plaintiff must allege that he has suffered an "'injury in fact'-an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. Second, "there must be a causal connection between the injury and the conduct complained of." *Id.* And third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 56.

After consideration of the parties' briefs, the relevant law, and the parties' oral arguments, the Court finds that Plaintiff has failed to demonstrate the first and third elements of standing. First, Plaintiff's complaint fails to sufficiently allege that he has suffered an injury in fact, i.e., the invasion of a legally protected interest. Stated plainly, the allegations of Plaintiff's complaint do not show how he can bring this action "on behalf of the now-defunct partnership Firma D. Katz." (ECF No. 42 at 16.) Plaintiff claims to be an heir to Benjamin Katz, who founded Firma D. Katz, and he asserts in response to Defendants' motion to dismiss that Benjamin Katz's children, including Plaintiff's mother, inherited Benjamin Katz's right to bring a cause of action on behalf of the business "by

[3] Although the Court addresses the issue of standing last in this order, it should not be construed as a less important issue. Rather, the Court recognizes that the issue is fundamental; after all, subject matter jurisdiction does not exist in the absence of constitutional standing.

Dutch universal succession, and passed that right on to their children, including Plaintiff." (*Id.* at 16-17.) Plaintiff further asserts in response to Defendants' motion that there is no probate under Dutch law, and that he does not need to be appointed special administrator because he brings this action on behalf of a partnership and not on behalf of an estate. Essentially, Plaintiff asks this Court to *assume* that he has a legally cognizable interest in a now-dissolved partnership that was founded by Benjamin Katz simply because he is Benjamin's grandson. More is required.

It is clear from the complaint that Firma D. Katz was formed by Nathan and Benjamin Katz under Dutch law and was liquidated after both Nathan and Benjamin died. But the clarity ends there because the complaint does not allege whether Benjamin died with a will or whether Plaintiff's mother died with a will. The complaint does not allege when or where Plaintiff's mother died or indeed any facts to show that Plaintiff's mother in fact inherited an interest in the partnership upon her father's death, under Dutch law or otherwise. Plaintiff's complaint also does not allege that Plaintiff inherited an interest in the partnership upon his mother's death, under Dutch law or otherwise. The complaint does not allege whether anyone else inherited an interest in the partnership upon Benjamin's death (or Nathan's death) or whether other children (or grandchildren) of Benjamin (or Nathan) exist.[4] In summary, Plaintiff simply alleges the legal conclusion that he can bring this suit on behalf of a now-dissolved partnership that was founded by his grandfather, but

[4] The Court also notes that it has serious concerns about Plaintiff's capacity to sue on behalf of any other potential heirs and his assertion that other heirs do not need to be joined in this lawsuit. The Court need not reach these questions in light of the other fundamental defects in this case; the Court simply notes that if Plaintiff is correct and any heir of a partner of Firma D. Katz–no matter how far removed–can sue Defendants at any time on behalf of the now-defunct Firma D. Katz, then Defendants could be subject to multiple actions with potentially conflicting outcomes.

the Court finds that the allegations in Plaintiff's complaint are wholly insufficient to show that Plaintiff has a legally cognizable interest that gives him standing to sue.

Moreover, the Court finds that Plaintiff cannot demonstrate the third element of standing: that it is likely, as opposed to speculative, that a favorable decision would redress the injury. This is because the Court believes the Netherlands and the Ministry are necessary parties to this action involving contested ownership.

Plaintiff alleges throughout his complaint that the Netherlands and the Ministry assert ownership over the Artworks. (*See*, *e.g.*, ECF No. 30 ¶¶ 26 and 50.) Indeed, Plaintiff asserts that it is these Defendants and the RCE alone from which he requested the return of the Artworks and which refused his request. (*Id*. ¶¶ 234-35.) In contrast, the municipal and private museums merely display pieces of the Artworks. (*See id.* ¶¶ 30-49.) Importantly, the Court has determined that it does not have subject matter jurisdiction over the Netherlands, the Ministry, and the RCE because they are entitled to sovereign immunity. This presents a problem because–assuming that the Court's personal jurisdiction and venue analysis is incorrect–Plaintiff still cannot proceed solely against the museum Defendants; in other words, without the Netherlands, the Ministry, and the RCE as Defendants, the Court cannot render an effective ruling regarding the ownership of the Artworks. After all, why would the museums, all of which are Dutch, recognize the ruling as binding when their own government maintains ownership over the Artworks? *Cf. Lujan*, 504 U.S. at 549 ("They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced."). Of course, "[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989).

However, the facts supporting the Netherlands' and the Ministry's entitlement to sovereign immunity were present at the inception of the lawsuit. According to the Court's previous analysis, those Defendants have never been subject to this Court's subject matter jurisdiction with respect to the claims Plaintiff asserts. In other words, jurisdiction over those Defendants did not exist at the time the complaint was filed, and it does not exist now. Therefore, the Court is confronted with an issue of redressability. The Court simply cannot grant Plaintiff the relief he seeks with respect to his claims for declaratory judgment, conversion, unjust enrichment, constructive trust, and breach of contract because each claim rises and falls on the determination of rightful ownership as to the Artworks. In light of the dismissal of the Netherlands, the Ministry, and the RCE on the basis of sovereign immunity, Plaintiff cannot demonstrate that it is likely as opposed to speculative that his injury will be redressed by a favorable decision involving only the museum Defendants.

CONCLUSION

In summary, the Court finds that: (1) the Ministry and the RCE are political subdivisions of the Netherlands–not legally separate from the foreign state; (2) Centraal Museum and Paleis Het Loo are private museums and are not subject to the FSIA; (3) the Netherlands, the Ministry, and RCE are entitled to sovereign immunity under the FSIA and neither the expropriation exception nor the commercial activity exception applies; (4) the expropriation exception does apply to strip the municipal museums of sovereign immunity, but the commercial activity exception does not apply; (5) the public and private museums have insufficient contacts in the United States to support the Court's exercise of personal jurisdiction; (6) venue is not proper in the District of South Carolina; (7) the amended complaint fails to allege sufficient facts to show that Plaintiff has a legally protected interest

such that he can pursue his claims on behalf of the now-defunct partnership Firma D. Katz; and (8) even if the Court could exercise personal jurisdiction over the museum Defendants, and even if venue was proper in this District, in light of the Court's finding that the Netherlands, the Ministry, and the RCE are entitled to sovereign immunity, an issue of redressability would preclude Plaintiff from proceeding solely against the museum Defendants. For these reasons, the Court grants Defendants' motion to dismiss (ECF No. 37) and finds moot Plaintiff's motion for the issuance of a Hague Convention Letter of Request (ECF No. 46).[5]

IT IS SO ORDERED.

/s/Bruce H. Hendricks
The Honorable Bruce Howe Hendricks
United States District Judge

March 6, 2020
Charleston, South Carolina

[5] Based on the Court's findings, the Court need not reach Defendants' arguments related to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Nevertheless, the Court simply notes that in addition to the issues outlined in this order, it appears that the act of state doctrine would bar Plaintiff's claims, because providing Plaintiff with the relief he seeks would necessarily require the Court to invalidate official actions by a foreign sovereign performed in its own territory. *See McKesson Corp. v. Islamic Repub. of Iran*, 672 F.3d 1066, 1073 (D.C. Cir. 2012) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)) (explaining that the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.")