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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MAREI VON SAHER,

Plaintiff,

vs.

NORTON SIMON MUSEUM OF ART AT PASADENA, et al.,

Defendants.

Case No. 07-2866 JFW (SSx)

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date:	August 1, 2016
Time:	1:30 p.m.
Courtroom:	16
Pre-Trial Conf.:	September 2, 2016
Trial:	September 20, 2016
Judge:	Hon. John F. Walter

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I. INTRODUCTION

Plaintiff's motion confirms that this case is ripe for summary judgment—but only for the Norton Simon, not for Plaintiff. The facts developed by the parties provide a clear and largely undisputed account of the linchpin events at issue in this litigation, particularly regarding proceedings instituted by Plaintiff and the Goudstikker Firm over decades. But those facts refute, rather than support, the theory of ownership driving Plaintiff's motion. They refute her contention that the Goudstikker Firm's post-war restitution efforts and her failed 1998 petition based on the Cranachs have no effect on her current claims. They refute her contention that despite the Firm's meticulous documentation of its decision not to seek restoration of property sold to Göring, the Firm "never waived [its] claims for the Goring looted artworks, which included the Cranachs" (Pl.'s Mot. 45). And they refute her contention that even after the Firm left the Göring works unclaimed and allowed its restitution remedy to lapse, the Dutch State never became "the owner of the property that had been looted by Goring," including the Cranachs. Pl.'s Mot. 21.

On each of these points, the evidence adduced in discovery shows that Plaintiff's factual account is wholly revisionist, and that her claims fail as a matter of law. The evidence confirms, instead, what the United States said three years ago: "the Dutch government has afforded petitioner and her predecessor adequate opportunity to press their claims, both after the war and more recently." Br. of U.S. as Amicus Curiae, 2011 WL 2134984, at *19 (U.S. Amicus Br.). Despite the availability of Dutch restitution, the Firm did not file a claim seeking to restore its rights in the paintings sold to Göring within the prescribed period. As a result, the Dutch government acquired and exercised ownership and dominion over these works, including the Cranachs. Nor was that result surprising to the Firm; as the Dutch Court of Appeals has explained, the Firm "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Goring transaction" (DSGD ¶ 408), seeking restitution only for the sale of

property to Miedl.

By this lawsuit, Plaintiff seeks to cast aside the Goudstikker Firm's considered restitution strategy, some 50 years later, and obtain relief unavailable to it: reclaiming the Cranachs and keeping the money paid for them. To this end, she asks this Court to undercut the Dutch government's exercise of sovereign power in resolving her predecessor's claim and the later claim of ownership by Stroganoff. She asks to relitigate a restitution claim Plaintiff unsuccessfully filed to obtain relief *for the Cranachs*. And if this were not enough, her collateral attack *seeks $450 million in damages* from the non-profit institution that purchased them during the decades when Plaintiff's predecessors stood pat. No legal system with any connection to this case allows that sort of relitigation and forum arbitrage: not U.S. law, not international law, not Dutch law. It should come as no surprise, then, that Plaintiff's claims are not triable, but rather barred as a matter of law:

The Norton Simon Has Title. Plaintiff concedes that enemy property recovered from the Nazis and returned to the Netherlands after World War II became State property by expropriation under Royal Decree E133. Pl.'s Mot. 19. That is dispositive: Because the Firm did not file a claim with the Council for the Restoration of Rights to restore its rights in the artwork sold to Göring, including the Cranachs, prior to the July 1, 1951 deadline, the Cranachs remained State property under Dutch law. *This is true regardless of the reasons the Firm decided not to file*. Alternatively, by failing to challenge the Göring transaction, the Firm gave the State a power to dispose of the Göring works under Dutch and international law. The result is that the Norton Simon acquired valid title via George Stroganoff, and that Plaintiff has no claim whatsoever against the Norton Simon.

The Firm's Waiver. The Goudstikker Firm's own words and actions make clear that the Firm pursued a strategy of selective restitution in Dutch post-war proceedings. It successfully pressed to unwind the sale of real and personal property to Miedl, while leaving to stand the sale of artworks to Göring and retaining the

money he paid. The evidence uniformly confirms that the Firm's decision was "conscious and well considered," for it was advised by a team of eminent Dutch lawyers and a leading art dealer, and the Firm had successfully obtained a ruling from the Council that the Göring transaction was involuntary. By deciding against invoking the Netherlands' *bona fide* restitution scheme to obtain relief for the Cranachs, and by taking concrete steps to abandon the claim, the Firm waived any right to relief for the Cranachs and ratified the Göring transaction.

The Act of State Doctrine. The sovereign acts taken by the Netherlands with respect to the Cranachs constitute acts of state, and operate as rules of decision establishing the Norton Simon's valid title. These include (1) the State's handling of the Cranachs, culminating in their expropriation by the State; (2) the State's conveyance to Stroganoff in settlement of his claims; and (3) the 1999 decision by the Court of Appeal, sitting as successor to the Council, rejecting Plaintiff's request for restoration of rights *specifically including the Cranachs*. Plaintiff cannot establish title to the Cranachs unless the Court reviews and invalidates each of these sovereign acts, making them independent bars to her claims here.

Plaintiff attempts to argue that *other* purported actions by the Dutch State require judgment in her favor. We are told that the Dutch government would support the return of the Cranachs because it returned other artworks still in its possession in 2006. As Plaintiff would have it, that action was based upon "findings" about Dutch restitution that are on par with, and negate, the Court of Appeal's decision rejecting the Firm's restitution claims. But the "findings" Plaintiff invokes are not official Dutch actions at all, and the decision returning the other paintings—the one act of the State she *does* cite—actually *validates* the State's prior actions with respect to her claims. The Dutch government decided to return the paintings it still possessed *ex gratia*, acknowledging that even contemporary Dutch restitution policy would have afforded this Plaintiff no relief. In doing so, it expressly *agreed with* the Court of Appeals that Plaintiff's claims already "ha[d]

been settled." DSGD ¶ 420. The "findings" Plaintiff touts were made by advisory bodies, and rejected by the State Secretary who wields the power to bind the State.

The foregoing defenses alone foreclose summary judgment for Plaintiff, and support entry of summary judgment for the Norton Simon. But the undisputed facts also establish that Plaintiff's claims are barred by foreign affairs preemption; that the statute of limitations operates to vest title in the Norton Simon and bar Plaintiff's damages claims; and that the decades Plaintiff's predecessors waited to try and revive this claim make this a textbook laches case. And even if the Court rejects all of these grounds, Plaintiff is still not entitled to summary judgment because there are at least triable issues on every ground she advances for judgment in her favor.

II. LEGAL STANDARDS

The parties agree this matter is ripe for summary judgment. There are threshold questions of law, particularly of foreign law, that the Court can resolve on summary judgment. *See In re Grand Jury Proc.*, 40 F.3d 959, 964 (9th Cir. 1994); *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-JFW (Ex), 2015 WL 9464458 (C.D. Cal. June 4, 2015); Fed. R. Civ. P. 44.1. In that respect, this case closely parallels *Cassirer*, where the Court considered competing Spanish law experts and applied Spanish law to uphold the Foundation's claim of ownership of paintings originally sold to the Nazis under duress. 2015 WL 9464458, at *14-*16. Here, the parties agree the Court should apply Dutch law to determine whether the Dutch State obtained ownership of the Cranachs following World War II. *See* Pls.' Mot. 17-26; Defs.' Mot. 27-28. Any dispute between the parties or their experts on Dutch law "does not create a genuine issue of material fact." *United States v. BCCI Holdings (Luxembourg), S.A.*, 977 F. Supp. 1, 6 (D.D.C. 1997).

Summary judgment is proper for the Norton Simon on the ground that it has title *as well as* on a number of other grounds, the facts of which are undisputed: (1) act of state, *see Tchacosh Co., Ltd. v. Rockwell Int'l Corp.*, 766 F.2d 1333 1334 (9th Cir. 1985); (2) preemption, *see Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d

1010, 1014-17 (9th Cir. 2000); (3) adverse possession, *see Cassirer*, 2015 WL 9464458 at *9; (4) laches (Pl.'s Mot. 47); and (5) statute of limitations, *see Aragon v. Federated Dep't Stores, Inc.*, 750 F.2d 1447, 1450 (9th Cir. 1985). These same grounds require denial of Plaintiff's motion. Even if the Court rejects *all* of the Norton Simon's grounds for judgment as a matter of law, Plaintiff's motion still fails because there are triable issues as to her prima facie case and as to the Norton Simon's additional defenses. *Cassirer*, 2015 WL 9464458 at *3 (citation omitted).

III. ARGUMENT

A. The Norton Simon's Good Title Precludes Judgment in Plaintiff's Favor and Entitles the Norton Simon to Summary Judgment

The Norton Simon has title to the Cranachs as a matter of law, and that forecloses summary judgment in Plaintiff's favor. Plaintiff concedes that her conversion claim requires proof of ownership, and that replevin, or "specific recovery," is merely a conversion remedy. (Pl.'s Mot. 9.) The Norton Simon's valid title means that neither she nor her predecessor had title at the time of the alleged conversion, *i.e.*, when the Norton Simon acquired the Cranachs, which is a required element of her claim. *See Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 233 (2014). The Norton Simon's title also precludes Plaintiff from prevailing under Section 496 of the Penal Code. *Finton Constr., Inc. v. Bidna & Keys, APLC*, 238 Cal. App. 4th 200, 213 (2015).

1. The Dutch State Had Title Under Decrees E133 and E100

The Norton Simon's motion explains how the Dutch State acquired title under Decrees E133 and E100. *See* Defs.' Mot. 8-11, 29-34. Plaintiff's motion confirms the four basic steps of how this happened:

1. *Sale to the Enemy*: Plaintiff acknowledges that the Goudstikker Firm sold and transferred the Cranachs, under duress, to Göring during the war. Pl.'s Mot. 3; DSGD ¶¶ 16, 208.

2. *Initial Voidness and Subsequent Ratification*: Plaintiff agrees that Decree

A6 initially rendered the Göring sale automatically void, unless a commission ("CORVO") later revoked that invalidity. Pl.'s Mot. 18; DSGD ¶¶ 166, 210-211. As Plaintiff further acknowledges, in February 1947 CORVO did just that: it "exempt[ed] from A6 all assets returned from Germany" (Pl.'s Mot. 18) and "sanction[ed] all acts and agreements" to the extent they involved those recuperated assets. DSGD ¶ 212. It is undisputed that the Cranachs were recuperated to the Netherlands from Germany after World War II. Pl.'s Mot. 3; DSGD ¶¶ 17-18. CORVO's 1947 decision had the effect of "declaring the [Göring] agreement … effective" (DSGD ¶ 211) as to the Cranachs, meaning the Cranachs belonged to Göring subject to a timely claim under E100. DSGD ¶¶ 236, 280.

3. *Automatic Expropriation under E133*: CORVO's ratification of the Göring sale brought the Cranachs within the automatic expropriation of Decree E133. That was the whole purpose of CORVO's order. DSGD ¶¶ 212-215. Indeed, Plaintiff agrees that "[p]ursuant to Royal Decree E133, … enemy assets that were returned to the Netherlands became the property of the State." Pl.'s Mot. 19 n.6. Because the Cranachs belonged to Göring, and because Göring was an "enemy" under E133 (DSGD ¶ 209), the Cranachs automatically and immediately passed in ownership to the Dutch State. DSGD ¶¶ 244, 293, 300.

4. *No Nullification under E100*: Plaintiff agrees that even after CORVO's decision, the Cranachs were potentially "eligible for restitution" under Decree E100, which "set forth procedures for restoration of property rights." Pl.'s Mot. 19 & n.19. CORVO's 1947 decision contemplated that former Dutch owners could still request nullification of the ratified transactions on a case-by-case basis under E100. DSGD ¶ 215. E100 created the Council for the Restoration of Rights and gave it the *exclusive* authority to annul wartime transactions and restore property rights that had been lost through such transactions.[1] DSGD ¶ 301. The State's ownership of the

[1] The sale could not be annulled for duress under ordinary Dutch civil law or in

Cranachs under E133 was subject to the Firm's right under E100, until the deadline of July 1, 1951, to petition the Council for nullification of the Göring transaction and restitution of Cranachs. DSGD ¶ 216, 302. Had the Firm done so, the Cranachs would have ceased to be "enemy property" and so ceased to be subject to E133. *Id*. But the Firm never did. The Firm petitioned the Council to restore rights to a dollhouse and the Miedl property. DSGD ¶¶ 219, 268. But it did not request restoration of rights as to the Göring transaction before the July 1, 1951 deadline, and its belated request in 1998 was rejected by the Council. DSGD ¶ 207. Since the Göring sale was never nullified and the Firm's rights in the Cranachs were never restored, the Cranachs remained "enemy assets" automatically expropriated by the State under E133. DSGD ¶ 224. The Firm's failure to obtain restoration of rights under E100 ensured the State's ownership, *irrespective of the reasons for its failure*.

None of Plaintiff's arguments can avoid this application of mostly uncontested law to undisputed facts. *First*, Plaintiff argues that recuperated goods were not enemy property under E133 so long as they were potentially "eligible for restitution" to a former owner; recuperated property would become enemy property and "be declared the property of the State" only "[i]f the sale of property to a Nazi were held to be a valid and binding sale." Pl.'s Mot. 19 n.6. This argument gets Dutch law backwards: As Plaintiff's expert admits, Dutch law obligated the *former owner* to get a decision *annulling* the sale under E100 in order to reclaim the recuperated asset. DSGD ¶¶ 225- 228. The law did not obligate the Dutch State to seek orders validating those sales; E100 contained no mechanism for the State to do so. As Plaintiff's own experts admitted, the State's expropriation of enemy property was "automatic," without the need for individual determinations. DSGD ¶ 293.

That is central to E100's structure. E100 gave the Council the power to

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ordinary Dutch courts, as the Dutch Supreme Court held and Plaintiff's experts concede. DSGD ¶¶ 230-231. Nor could a claim to replevy the Cranachs be brought in ordinary Dutch courts, as Plaintiff's expert concedes. DSGD ¶¶ 232-233.

restore rights lost through wartime transactions, including those entered "under coercion, threat or improper influencing by or on behalf of the enemy." DSGD ¶ 238. The Council could "declare" such transactions "totally or partially null and void" and "revive partially or wholly" the rights lost through them. DSGD ¶ 237. But only a decision of the Council could make that happen. Contrary to Plaintiff's position that the Firm presumptively retained title to the Cranachs, under E100's plain text, it qualified as an "owner" only *after* an act of dispossession had been "declared totally or partially null and void." DSGD ¶ 239. Unless and until that happened, property potentially "eligible for restitution" remained enemy property.

The Council's decision in *Rebholz* confirms this. Rebholz, an enemy, alleged that the State had improperly returned a painting recuperated from Germany to Kohn, a former owner who had lost the painting through Nazi confiscation. The painting was potentially *eligible* for restitution, but Kohn had not actually obtained restoration of his rights under E100. DSGD ¶ 240. The Council held the painting "belonged" to the estate of the enemy, Rebholz, "as she had acquired ownership of it through purchase"; as enemy property, the painting should have been given "to the NBI," the State entity designated by E133, "as manager of Ms. Rebholz's estate." DSGD ¶ 243. That followed directly from article 10 of E133, which provided that enemy property, "*the ownership of which has been transferred to the State as a result of the provision in Article 3*, will be managed by the [NBI] for the benefit of the State." DSGD ¶ 246. Unless and until the Council restored Kohn's rights under E100, the State was *wrong* to treat "the *original* owner Kohn as the rightholder to the painting"; rather, "the State should have referred Kohn to the Proceedings of Decree E 100 and should have left it to the Council for the Restoration of Rights to decide whether Kohn would receive restoration of rights regarding the painting." DSGD ¶ 243. This squarely refutes Plaintiff's argument that former owners like the Firm presumptively retained title to recuperated property that remained "eligible for restitution."

Second, Plaintiff advances a theory that the Dutch government "act[ed] as custodian of the recuperated assets for the true owner." But she fails to ground the imposition of this custodianship in any Dutch law. Untethered to any statutory or other legal framework, Plaintiff infers an obligation without limits: She asserts that the State "continued to act as a custodian" *forever*, regardless of whether the "true owner" complied with the deadlines or other requirements that the government established in E100 and E133. Pl.'s Mot. 19. Neither E100 nor E133 says anything about the State acting as permanent custodian. And no other system for handling the recovery of lost or stolen property makes the government a perpetual custodian to hold property in trust for eternity in case a former owner or her heir appears. Other legal systems, including the U.S. and other Allies' own post-war restitution systems, DSGD ¶ 257, instead sensibly set deadlines for claiming property. *Cf.* 21 U.S.C. § 853(n); Cal. Penal Code § 1411(a); Cal. Civ. Code §§ 2080.1-2080.2. Plaintiff's own expert admits that a government's restitution duties for recovered looted property do not last indefinitely. DSGD ¶ 256. The Dutch government, too, set clear deadlines. So even if Plaintiff were correct that "goods eligible for restitution" were not enemy property, the Cranachs ceased to be "eligible for restitution" at the Firm's request when E100's deadline expired on July 1, 1951. DSGD ¶ 216. From that point forward there was no possibility that the Firm could seek restitution or otherwise recover the Cranachs. DSGD ¶¶ 216, 226-233.

Third, Plaintiff misreads the Council's decision in the *Rebholz* case as supporting her theory that the State was a permanent custodian of recuperated enemy property. As the Norton Simon has explained (Defs.' Mot. 32-33), that reading of *Rebholz* is demonstrably wrong. In its initial decision, the Council explicitly held that the State was the owner of all of Rebholz's assets as enemy property under article 3 of E133, and that the NBI managed those assets under article 10. DSGD ¶ 241. Rebholz requested reconsideration. Rebholz's argument was not that the State lacked ownership under E133. In fact, she "accept[ed]" that

as long as she was an enemy, the painting was "deemed to be subject to the forfeiture or transfer of ownership [to the State], pursuant to article 3 of [E133]." DSGD ¶ 242. Rather, Rebholz argued that she had at least a contingent interest in the painting because she had filed a petition to change her enemy status. *Id*. The Council agreed, holding that the State should have "releas[ed] [the painting] to the NBI as manager of Mrs. Rebholtz's estate," DSGD ¶ 243, as article 10 directs for property that has passed in ownership to the State. DSGD ¶ 246.

Plaintiff acknowledges *Rebholz*'s holding that "Decree E133 applied to the [recuperated painting] at the moment it returned to the Netherlands," Pl.'s Mot. 20-21, because Rebholz was an enemy and the painting "belonged" to her estate "as she had acquired ownership of it through purchase." DSGD ¶ 243. The painting therefore became Dutch State property under (1) the plain text of article 3 of Decree E133 ("[p]roperty, belonging to an enemy state or to an enemy national, automatically passes in ownership to the State") and (2) the Dutch Supreme Court decision of 1955 confirming that plain meaning. DSGD ¶¶ 244-245.

Plaintiff's theory that the State remained custodian rests on a portion of the second *Rebholz* decision that had nothing to do with E133. If Rebholz succeeded in removing her status as enemy, the State's ownership *under E133* would be defeased in her particular case. That would not be the case if the State owned the painting on grounds *other than E133*. The State accordingly argued that two decrees promulgated by the Allied governments in Germany, Law 52 and Law 63, *independently* made the State owner. The Council disagreed, holding that *these two laws* were aimed at returning recuperated goods to the State in order to "secure their return to the estate of the person that *may be shown to have a right to them*, which is why the [State] received the painting as custodian for the rightholder." DSGD ¶ 247 . The Council did *not* reverse its prior, unchallenged ruling that ownership passed to the State under Decree E133 as long as Rebholz was not de-enemized.

Fourth, Plaintiff grounds her "custodian" argument in language from

"receipts" signed by U.S. and Dutch officials for *other* artwork. Pl.'s Mot. 18. But as Plaintiff acknowledges (*id.* n.5), that language did not appear in the receipt for the Cranachs (or for any other artwork received after 1946).[2] And language in such paperwork can hardly override Dutch restitution and reparations statutes.

Fifth, Plaintiff cites documents where Dutch officials debated different theories of the State's ownership. This internal debate does not control Dutch law, which exists in statutes and court decisions, and many other documents not cited by Plaintiff confirmed that the State was owner under E133. DSGD ¶ 250. Further, as Plaintiff's expert admitted, no Dutch official ever expressed the view that the Firm owned the Cranachs or that the State was holding them as a custodian following the July 1951 deadline. DSGD ¶ 253. Plaintiff's sources do not show the contrary.

For example, Plaintiff points to a November 1948 memo by the Minister of Finance stating that it would be better to base the State's ownership of unclaimed recuperated assets on international law because it would enable the Netherlands to claim more reparations from Germany. Pl.'s Mot. 20 & n.7; DSGD ¶¶ 93, 252. The Minister clearly believed that the State owned unclaimed recuperated artworks like the Cranachs; he merely concluded it would be more advantageous to the State to rest that conclusion on an alternative ground (addressed *infra* Part III.A.3). *Id.*

Plaintiff asserts that when "Stroganoff brought his claim" in the 1960s, "there was doubt" whether the State owned the Cranachs. Pl.'s Mot. 22. But every Dutch official who analyzed the question in connection with Stroganoff's claim concluded that the State was owner. DSGD ¶ 253. The Restitutions Committee's references to "custodianship" or "custody" in its 2005 and 2013 recommendations, Pl.'s Mot. 22, are of no weight because that advisory Committee has no power to make law,

[2] Plaintiff suggests that the receipt for the Cranachs "contains language that reinstates the obligations under the prior receipts" in the event that an Allied restitution commission was not created. Pl.'s Mot. 18 n.5. That suggestion is groundless. The receipt has no such language and Plaintiff's expert acknowledged that he had simply made up this argument. DSGD ¶¶ 248-249.

DSGD ¶ 255, and was not applying E100 or E133; the 2013 recommendation concerned paintings returned to the Netherlands *in 2012*, meaning they had not been subject to expropriation under E133. DSGD ¶¶ 99, 303.

Plaintiff cites a report by a "Dutch Committee for Recovered Property," which states that it "seems highly contestable" that E133 would apply to goods located outside of the borders of the Netherlands when it was enacted. Pl.'s Mot. 20; DSGD ¶¶ 90, 304. But Plaintiff *admits* that reasoning is wrong. She and her experts concede what *Rebholz* held: E133 applied to enemy assets returned to the Netherlands after the War from the moment they re-entered Dutch territory. Pl.'s Mot. 20; DSGD ¶ 251. In any event, the Report suggests that the State "received [recuperated] goods as owner" under public international law. DSGD ¶ 304.

In short, the Dutch State's internal discussions of various legal theories of *why* it owned unclaimed recuperated property simply confirm that it *did* own unclaimed recuperated property, including the Cranachs.

2. The Dutch State Had a Power to Dispose of the Cranachs Under E100 and Conferred Title on Stroganoff

Even assuming that the Dutch State did not become owner of the Cranachs under E133, it still had a power of disposal—*i.e.*, a power to convey ownership—under article 113(2) of E100. Article 113(2) states: "If the owner has not come forward within a period to be further determined by Us [later set to end on September 30, 1950], items that have not yet been sold shall be sold …." Defs.' Mot. 9, 34-35; DSGD ¶¶ 258-260. The State exercised that power when it sold the Cranachs to Stroganoff in settlement of his claims. DSGD ¶ 261. Thus, Stroganoff obtained title to the Cranachs, and the Norton Simon in turn became owner when it purchased them. Defs.' Mot. 35-36; *see also* Cal. Com. Code § 2403 ("A purchaser of goods acquires all title which his transferor had or had power to transfer….").

The Norton Simon's expert Dr. van Vliet explained this. DSGD ¶¶ 260-261. And Plaintiff's experts *concede* the key issues: (1) a seller with a power of disposal

can transfer ownership of a good to a buyer; (2) a statute can grant even a mere custodian a power of disposal; and (3) article 113(2) of E100 applied to the Cranachs. DSGD ¶¶ 262-264. Article 113(2) plainly gives the Dutch government the right to sell unclaimed artworks after September 30, 1950. That right to sell necessarily implies a power to transfer ownership, just as Dutch law recognizes that a secured creditor's statutory right to sell collateral securing a defaulted debt implies a power to transfer ownership; otherwise, the right to sell would be meaningless. DSGD ¶ 265. Because Plaintiff fails to address this basis for the Norton Simon's title, she has not shown that she has title to the Cranachs over the Norton Simon.

3. International Law Gave the Dutch State Title or a Power to Dispose

International law also provides a basis for the Norton Simon's title, refuting Plaintiff's contention that the Dutch State held the Cranachs as a permanent custodian and precluding summary judgment in her favor. After World War II, the Allies restituted looted property to its country of origin and not directly to original owners. DSGD ¶¶ 379-381. There is no dispute that this practice was consistent with international law. DSGD ¶ 381. It is also true that international law empowered the recipient governments to set a deadline to file restitution claims, require a former owner to repay any consideration received, and to decline to restitute property to a former owner who failed to comply with these conditions. DSGD ¶¶ 382, 383.

Further, there is no dispute that under international law a government may dispose of property whose former owner has not complied with conditions for restitution. DSGD ¶¶ 384, 388. The practice of nations confirms this. DSGD ¶ 384. Following World War II, the U.S. enacted Military Government Law No. 59 to govern restitution in its occupation zone in post-war Germany. Law 59 set a 1949 deadline for filing claims that was shorter than E100's 1951 deadline. DSGD ¶ 385. Where former owners failed to file claims by the 1949 deadline "all right, title and

interest to the claim and to the restitutable property became vested by operation of law" in a third party appointed by the U.S. government. *Advisory Opinion No. 1*, 1 Court of Restitution Appeals Reports 489, 492 (Aug. 4, 1950); DSGD ¶ 387. The former owner "lost his right to restitution … when the vesting of the claim in the successor organization took place" and was "forever barred from making any claim for the restitution of such property." *Id.*

Under international law, the Netherlands had the same power to take or confer title to unclaimed recuperated property. DSGD ¶ 384. Plaintiff fails to grapple with these international law principles beyond a single sentence in a footnote: "International law requires restitution to the original owner of any recovered property." Pl.'s Mot. 20 n. 7. This unqualified statement is directly contradicted by her expert's testimony that "international law allows states [to] set deadlines. If no person would come forwards to claim property, in that specific situation the state could obtain title and presumably transfer title." DSGD ¶ 388.

4. The Firm Waived and Abandoned Its Rights, Giving the Dutch State Title

The foregoing grounds for Dutch ownership and dominion over the Cranachs make clear that the Norton Simon acquired valid title as a matter of law. On these issues, the dispositive undisputed fact is that the Firm did not file a claim to restore its rights in the Göring artworks before the July 1, 1951 deadline under E100. Any dispute on *why* the Firm did not file a claim does not alter the legal conclusion.

But, as the Norton Simon has explained, the undisputed facts provide another, *independent* ground for summary judgment: that the Firm knowingly waived and abandoned its rights in the Cranachs and other Göring artworks through: (1) its formal announcement of waiver in November 1949 and related conduct; and (2) its additional waiver of rights in the August 1, 1952 settlement agreement. *See* Defs.' Mot. 12-19, 38-43. The Court does not need to determine those undisputed facts to dispose of this case, but they, too, are dispositive:

In 1946, Desi Goudstikker, Jacques's widow and Plaintiff's mother-in-law, returned to the Netherlands and she, along with the eminent Dutch lawyer Max Meyer and a Dutch banker, Ernst Lemberger, Jr., became the Firm's directors. DSGD ¶ 398. The Firm's advisors also included skilled lawyers (one became a future Minister of Justice) and a leading art dealer. DSGD ¶ 399.

The Firm filed a claim for restitution of a dollhouse that had been sold by Miedl to a third party. In April 1949, the Council concluded that the Miedl and Göring transactions were involuntary, making it very likely the Firm could obtain restitution for the Göring transaction. DSGD ¶¶ 219-222. Yet, on November 10, 1949, Meyer wrote to representatives of the Dutch State to "confirm to you that [the Goudstikker Firm] waives requesting restoration of rights regarding goods acquired by Göring." DSGD ¶ 273. Meyer later explained that the Firm had decided to "direct the course of events in such a manner as to prevent the inclusion of the Göring transaction in the restoration of rights," and to "maneuver very carefully" to achieve that goal, because it concluded that the Firm would be better off leaving the transaction in place and keeping the money that Göring had paid. DSGD ¶ 400. Desi's second husband and legal advisor, A.E.D. von Saher, wrote that the Firm "considered to also conduct legal redress with respect to the Göring contract. Mr. Meyer and Mr. Lemberger strongly advised against this." DSGD ¶ 401.

Indeed, when the Dutch government urged the Firm to preserve its rights before the July 1, 1951 deadline, the Firm filed a claim to annul the Miedl transaction only; it did not seek to annul the Göring transaction. DSGD ¶¶ 268, 305. Nor did the Firm come forward to claim the Göring objects before the September 1950 date by which the State announced it would begin selling unclaimed property, or object when, from 1950 to 1952, the Dutch State exercised its authority under E100 and sold Göring artworks at public auctions. DSGD ¶¶ 258-259, 274.

Because these words and conduct manifest a waiver and abandonment of rights, and because that waiver was further confirmed by the August 1, 1952

settlement agreement, the Dutch State became the owner of the Cranachs and transferred title to Stroganoff and the Norton Simon. Defs.' Mot. 38-43. The same evidence supports a defense of estoppel, *Schafer v. City of Los Angeles*, 237 Cal. App. 4th 1250, 1261 (2015) (estoppel applies where party "apprised of the facts" acts "intend[ing] that his conduct shall be acted upon" or so "that the party asserting the estoppel has a right to believe it was so intended"), and proves that the Firm ratified the Göring transaction and consented to the Dutch State's assertion of dominion over the Cranachs, *see supra* Part III.F.1.[3]

The Norton Simon's evidence consists of the words and deeds of the Firm and its agents, which on their face refute Plaintiff's allegation that it would have been "futile" for the Firm to seek restitution of the Göring artworks. (FAC ¶ 32.) Plaintiff does not offer any evidence of her own. Instead, she relies entirely on cherry-picking rhetoric from various advisory bodies charged with making recommendations to the Dutch State a half century later, arguing that these are an act of the state that bars the Norton Simon's waiver, abandonment, estoppel, and consent defenses. Pl.'s Mot. 44-45. That is incorrect, as addressed *infra* Part III.B.4, which suffices to deny Plaintiff's motion as to these defenses.

Although she does not argue for summary judgment on this basis, Plaintiff points elsewhere in her brief to a November 1952 letter she incorrectly argues is proof that the Dutch State "knew" that the Firm had maintained all of its rights in the Göring artworks. Pl.'s Mot. 21. On its face, however, the letter has nothing to do with the Göring artworks. The letter refers only to the so-called meta-paintings that the Firm had co-owned with others at the time of the sale to Miedl and Göring. DSGD ¶ 266. In its restitution negotiations with the State, the Firm had always told the government that "the meta-paintings were not part of the transaction with

[3] For the same reasons the Norton Simon has been prejudiced for purposes of laches (*see infra* Part III.D.2), it has "rel[ied] upon" the Firm's "conduct to [it]s injury" for purposes of its estoppel defense. *Schafer*, 237 Cal. App. 4th at 1261.

Göring." DSGD ¶ 267. As a consequence, unlike the Cranachs and other Göring artworks, the meta-paintings were included in the Firm's 1951 petition for restoration of rights in the Miedl transaction. DSGD ¶ 268.

The August 1, 1952 settlement agreement was intended to terminate this petition. DSGD ¶ 269. But the settlement agreement was not immediately effective. Under Article V, if Miedl challenged the settlement agreement, it would take effect only if and when upheld. DSGD ¶ 270. If the agreement was not upheld, the Firm's pending claim as to the Miedl property (including the meta-paintings) would revive and the parties would "reassume all their rights." *Id*. Miedl did challenge the settlement and his appeal took two years to resolve. DSGD ¶ 271. Accordingly, the August 1, 1952 Settlement Agreement did not become effective—and Plaintiff's restoration of rights claim was not dismissed—until 1954. *Id*. In November 1952, with Miedl's appeal of the settlement and the Firm's petition still pending, Dutch officials considered it risky to sell meta-paintings without the Firm's consent. DSGD ¶¶ 266, 272. But none of this had anything to do with the Cranachs and other Göring works. The Firm had already waived its rights as to these works even before the settlement and had no petition for restoration of rights in them pending. DSGD ¶ 273. That is why the Dutch government had already been selling them since 1950. DSGD ¶¶ 207, 274.

5. The Norton Simon Acquired Title By Adverse Possession

The Norton Simon also acquired title through adverse possession under Civil Code Section 1007. As the Norton Simon's motion explains, the statutory text, history and basic interpretive canons all demonstrate that the Legislature intended to codify the common law rule prevailing in 1872 (and today) that the running of the statute of limitations confers title to personal property. Defs.' Mot. 58-59. Plaintiff concedes that this Court expressly reserved the adverse possession question in this case. Pl.'s Mot. 54; Dkt. 119 at 10, n.7. But Plaintiff does not address how to interpret Section 1007. Instead, Plaintiff argues that this Court in *Cassirer* resolved

the issue once and for all. That is wrong.

This Court's statement in *Cassirer* that "California has not extended the doctrine of adverse possession to personal property" was not determinative of whether California law conflicted with Spanish law under California's governmental interest test; as this Court noted, such a conflict would have existed even if California recognized adverse possession of personal property. *Cassirer*, 2015 WL 9464458, at *6 & n.7. Moreover, the cases that this Court cited did not reach the question of whether the running of the statute of limitations confers title to personal property because the statute had not run in those cases. *See Soc'y of Cal. Pioneers v. Baker*, 43 Cal. App. 4th 774, 785 n. 13 (1996); *San Francisco Credit Clearing House v. Wells*, 196 Cal. 701, 708 (1925).

Accordingly, this Court must predict how a California court would interpret the statute if that question was squarely presented to it. *See In re Kekauoha-Alisa*, 674 F.3d 1083, 1087-1088 (9th Cir. 2012) (interpreting state statute as matter of first impression under state law). Plaintiff fails to offer any interpretation of Section 1007 contradicting the leading commentator's conclusion that the statute "establish[es] the right to acquire title to personal property by adverse possession." 13 Witkin, Summary of Cal. Law (10th ed. 2005) Pers. Prop., § 123, p. 139.

Plaintiff also does not address whether the pre-amendment, three-year statute of limitations, Cal. Civ. P. Code § 338(c)(1), ran, vesting title in the Norton Simon under Section 1007. As the Norton Simon explains (Defs.' Mot. 55-6, 60), the answer is yes. The catalogue raisonné for Cranach's work listed the Norton Simon as early as 1978 and the Cranachs have been on public display at the Norton Simon for decades. DSGD ¶ 332, 402. This put Plaintiff and her predecessor on inquiry notice more than three years, indeed, decades before the Legislature extended the statute of limitations. *See Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007).

Whether Plaintiff's claim is timely under the amended version of § 338 does not matter. Pl.'s Mot. 55. Rather, what matters is that the *original* three-year

statute, Cal. Civ. P. Code § 338(c)(1), ran, vesting title in the Norton Simon, before the Legislature extended it. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 619-20 (9th Cir. 2013). Applying the extended statute retroactively to deprive the Norton Simon of vested title would violate Due Process. *Id.*; *see also Campbell v. Holt*, 115 U.S. 620, 623 (1885). The Norton Simon's Due Process defense is not only alive (*contra* Pl.'s Mot. 37-38) but dispositive.

B. The Act of State Doctrine Mandates Judgment for the Norton Simon, Not Plaintiff

Plaintiff's motion also confirms that the act of state doctrine requires judgment for the Norton Simon. Plaintiff's claim that she owns the Cranachs runs squarely into three sovereign acts of the Dutch government: (1) its exercise of dominion over the Cranachs, as recuperated artworks, in the 1950s; (2) its transfer of ownership to Stroganoff; and (3) the 1999 decision by the Dutch Court of Appeals, sitting as Council for the Restoration of Rights, that rejected Plaintiff's claims for restoration of rights that sought relief specifically for the Cranachs.

Plaintiff tries to evade the effect of these sovereign acts with various statements by advisory committees in the Netherlands in the 2000s that she says were supervening acts of state. That is flatly wrong. In 2001, the Netherlands adopted a new restitution policy for artwork in its possession based on considerations other than the law of E100. DSGD ¶ 35. The policy expressly excluded artwork, like the Cranachs, possessed by third parties as well as claims that had already been "settled." DSGD ¶ 413. The State of the Netherlands never purported to abrogate the 1999 Court of Appeal decision rejecting the Firm's legal rights to the Cranachs or any other prior act of state regarding them.

Plaintiff's argument to the contrary misleadingly paraphrases committees that were not empowered to speak for the State in proceedings that had nothing to do with the Cranachs. For example, Plaintiff cites a 2001 statement that "the Netherlands Art Property Foundation [SNK] generally dealt with the problems of

restitution as legalistic, bureaucratic, cold and often even callous." Pl.'s Mot 40. That is from a report by an advisory panel, the Ekkart Committee, tasked with making *non-binding recommendations* to the government about restitution policy. DSGD ¶ 410. Plaintiff would have this mean that "it was the Netherlands' own conclusion that its post-War restitution proceedings were not conducted in good faith." Pl.'s Mot 39. *But the Dutch government never said that.* It is just counsel's argument, and contrary to Plaintiff's expert's testimony that he has "no doubt whatsoever" that Dutch government officials "acted in good faith" despite the view expressed "decades later" that "the process might have been cold." DSGD ¶ 391.

Plaintiff also points to the State Secretary's 2006 decision to return *other paintings* pursuant to a new policy, saying that "the State Secretary concluded that the Goudstikker matter had not been dealt with appropriately in the early Fifties." Pl.'s Mot. 42. *But the Dutch government never said that.* Nor did it say other things she attributes to the Restitutions Committee, another panel formed to make *non-binding recommendations* to the government. DSGD ¶ 416. In fact, the Secretary rejected that Committee's reasoning, concluding that Goudstikker's restoration of rights had "been settled," and that The Hague Court of Appeal had given "a final decision in this case." DSGD ¶ 420. That Court's conclusion was that "[t]he Netherlands created an adequately guaranteed procedure for handling applications for the restoration of rights." DSGD ¶ 406. That act of state, and two others, entitle the Norton Simon to summary judgment. The government's return of other paintings *ex gratia* did not affect those dispositive sovereign acts.

1. The 1999 Decision Operates to Bar Plaintiff's Claim of Title

The general principles governing the act of state doctrine are by now clear. The doctrine forbids American courts to "sit in judgment on the acts of the government of another, done within its own territory," *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), and treats such actions as "a rule of decision for the courts of this country." *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918); *accord Von*

Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712, 725 (9th Cir. 2014) ("*Von Saher II*"). The doctrine applies when (1) there is an "official act of a foreign sovereign performed within its own territory"; and (2) "the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990).

The 1999 decision by the Dutch Court of Appeals meets both these elements. The decision arose from a 1998 petition filed by Plaintiff with the Dutch Minister of Education, Culture, and Science seeking return of the Göring artworks still in Dutch hands. DSGD ¶ 282. In the petition, Plaintiff directly accused the state of "implementing the [1950s] restoration of rights to obstruct Ms. Goudstikker's rights and to appropriate an art collection that did not belong to it." *Id.* The Minister rejected the petition in a March 1998 decision, finding that "directly after the war, redress was handled with all due care, even by today's standards," and that "Mrs. Goudstikker knowingly and consistently decided not to petition for redress for the Göring transaction because she preferred to keep the money for financial and practical reasons." DSGD ¶ 403.

Plaintiff appealed that decision to the Court of Appeals for The Hague, and filed an original claim, under E100, for restoration of rights to the Göring works. In her petition, Plaintiff sought return of the paintings still in the Dutch State's possession, and specifically sought return of "the purchase sum" received by the Dutch government for any Göring works it "sold … in the interim." DSGD ¶ 404. Plaintiff attached a list of paintings that specifically identified the Cranachs as *the only "paintings exchanged or sold*." DSGD ¶ 405.

The Court of Appeal rejected the Firm's appeal and its original claims, in its capacity as the successor to the Council for the Restoration of Rights, the agency established by Dutch law to exercise exclusive power over restitution in the 1950s. The Court reasoned that "nearly 50 years have now elapsed since the last moment

that an application for the restoration of rights could be submitted," and that there were "no grounds in this case for *ex officio* application of the restoration of rights with respect to the Goring transaction." DSGD ¶ 407. The Court determined that the Firm "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Goring transaction." DSGD ¶ 408.

This decision constitutes an "official act of a foreign sovereign performed within its own territory." *Kirkpatrick*, 493 U.S. at 405. The Court, as successor to the Council, declined to exercise its discretionary power to order restoration of rights on its own initiative (*ex officio*) after the deadline for claims had lapsed. The Dutch State had expressly and exclusively entrusted that power to the Council when it enacted E100. DSGD ¶ 301. *Cf. Doe v. Qi*, 349 F. Supp. 2d 1258, 1294 (N.D. Cal. 2004) ("Enactment or issuance of a 'statute, decree, order or resolution' by the government is one way in which the state exercises its sovereign power.") An official decision made by the agency tasked with administering a nation's laws and policy is unquestionably an act of state, for it "acts in the public interest." *Int'l Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981). That the agency decision involves "political and public interests" as weighty as wartime restitution only underscores its sovereign nature. *See Clayco Petrol. Corp. v. Occidental Petrol. Corp.*, 712 F.2d 404, 406-07 (9th Cir. 1983).

Because the Dutch Court of Appeals was standing in the shoes of the Council, its actions take on the character of that body. Under E100, the Council exercised executive as well as quasi-judicial powers. DSGD ¶ 301. Such agency actions fall squarely within the act of state doctrine, for "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers." *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff'd,* 168 U.S. 250. But even if the decision had been issued by the Court in its purely judicial capacity, it would still carry the force of a sovereign action. "While a foreign court judgment arising out of private litigation is generally not an act of

state, it can be when it gives effect to the public interest of the foreign government." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1226 (9th Cir. 2006) (en banc) (Ferguson, J. concurring); *In re Philippine Nat'l Bank*, 397 F.3d 768 (9th Cir. 2005). The Court's exercise of power under an exclusive and comprehensive remedial framework for wartime transactions "gives effect to" critical "public interest[s]" of the Netherlands.

Plaintiff's litigation positions, along with the undisputed facts, make equally clear that the relief she seeks would require this Court to set the 1999 decision at naught. *See Kirkpatrick*, 493 U.S. at 405. Plaintiff claims sole ownership of the Cranachs and demands their return. Such a judgment would directly undermine the Court of Appeal's decision not to restore the Firm's rights with respect to the very paintings Plaintiff seeks here, leaving her predecessor with no such rights.

2. Plaintiff's Claims Are Independently Barred by the Dutch State's Restitution Proceedings and its Attendant Exercise of Ownership Over Unclaimed Works

The 1950s Dutch restitution proceedings that the Court of Appeals validated are themselves acts of state, and independently operate to bar Plaintiff's claims.

The undisputed facts establish that the Dutch government exercised ownership and dominion over the Cranachs, and that it did so in the context of administering the nation's post-war restitution scheme. DSGD ¶ 422. As explained above, Decree E100 allowed claimants to petition to unwind forced transactions and recover their property until July 1, 1951. Following that date, the Dutch government decided, all unclaimed recuperated property was uncontestably State property under E133 or international law. *Id*. This integrated framework of laws reflected and carried out critical policy judgments about how to remedy the wrongs suffered by Dutch civilians and the society as a whole. Among other things, forced transactions by the Nazis often harmed the Dutch people as a whole because they were made with worthless Reichsmarks. DSGD ¶ 421.

The adoption and administration of this scheme was a core sovereign act, *see*

Clayco, 712 F.2d at 406; *Underhill*, 168 U.S. at 252, and the Firm invoked these procedures in pursuing its selective restitution strategy, including its waiver. The Dutch State's subsequent exercise of dominion and ownership over the recuperated Göring works that went unclaimed is bound up with the Dutch restitution scheme and equally sovereign in character. On that point, Plaintiff can interpose no serious objection, given her insistence that Soviet "nationalization" constitutes an act of state. Pl.'s Mot. 16. In stark contrast to the forced nationalization by the Soviets that Plaintiff defends, the Dutch government's action is comparable to an act of escheatment, where the government takes ownership of unclaimed property. *E.g.*, Cal. Gov. Code § 68064.1. And it has long been settled that "when a foreign government … has the parties and the *res* before it and acts in such a manner as to change the relationship between the parties touching the *res*, it would be an affront to such foreign government for courts of the United States to hold that such act was a nullity." *Tchacosh Co.*, 766 F.2d at 1337-38. While Plaintiff insists that the Dutch government never legally became the owner of the Göring works (Pl's. Mot. 17-22), there is no triable issue of fact as to how the Dutch government *treated* those works: it treated them as Dutch State property. DSGD ¶ 422. Receiving looted property returned by an ally; establishing and overseeing an internal restitution scheme; and asserting ownership over "art treasures" that went unclaimed are all actions unique to a sovereign. *Tchacosh Co.*, 766 F.2d at 1337-38.

Plaintiff's claims would require this Court to review and invalidate the Dutch government's post-World War II restitution proceedings and related assertion of ownership over the Cranachs. Her claim of title to the works stands in direct contradiction to the claim and exercise of ownership by the Dutch State in the same works. Plaintiff's own complaint highlights the conflict in averring that "the Dutch Government did not have title to the Cranachs in 1966 when it purported to convey the works to Stroganoff." (FAC ¶ 43.) By her lawsuit, Plaintiff also necessarily challenges the restitution scheme and proceedings that culminated in Dutch

ownership, incorrectly averring that the Dutch government "made it difficult for Jews like Desi to recover their property" (FAC ¶ 24), and pressed for "the most beneficial result for the Government" (*id.* ¶ 30). Plaintiff's attempt to now invalidate Dutch restitution and its result in order to pursue restitution in a new forum is just the sort of sovereign second-guessing the act of state doctrine forbids.

3. The Dutch Government's Transfer of the Cranachs to Stroganoff Independently Bars Plaintiff's Claims

The sole act of state involving the Cranachs that Plaintiff attempts to address is the Dutch government's 1966 transfer of the Cranachs to Stroganoff. Far from supporting summary judgment for Plaintiff, the undisputed facts establish that the transfer is yet another act of state that must be treated as a rule of decision here.

(a) The Transfer Meets the Core Elements of the Act of State Doctrine

Plaintiff, again, does not seriously dispute the facts on the transfer, even if she draws the wrong inferences from them. In 1961, George Stroganoff notified the Dutch government "that he [wa]s the owner" of artworks sold at the 1931 Lepke auction, including the Cranachs, Rembrandt's *Titus in Monk's Clothes*, and a painting by Petrus Christus. DSGD ¶ 443. Stroganoff inquired "whether or not the [Dutch State] [wa]s willing to return the paintings." DSGD ¶ 444. In May 1965, amidst negotiations between Stroganoff and the Dutch government, Stroganoff's lawyer proposed that Stroganoff potentially forgo his claim to the Rembrandt if his claims for the Cranachs and the Petrus Christus were "met to a certain degree." DSGD ¶ 445. In conveying this proposal to the Minister of Education, Arts, and Sciences, the State's lawyer suggested that "it might be worth considering whether or not it would be possible to settle the case by means of an amicable agreement." DSGD ¶ 446. Stroganoff then confirmed that he would abandon his claims to the valuable Rembrandt if the State would allow him to "buy back" the Cranachs "at a price to be determined," taking into account the special circumstances of the case.

DSGD ¶ 447. The State's lawyer characterized this as a "simple and elegant solution" to Stroganoff's claims. DSGD ¶ 448. The government initially rejected this proposal on the grounds that the Cranachs were an "especially important" part of Dutch cultural patrimony, and that the sale of National Collection works "takes place in exceptional cases, actually only if the interest of the country requires such sale." DSGD ¶ 449. The State, however, ultimately agreed to Stroganoff's settlement proposal. DSGD ¶ 115.

These undisputed facts make clear that the transfer to Stroganoff constituted a "considered policy decision by a government to give effect to its political and public interests." *Von Saher II*, 754 F.3d at 726 (citing *Clayco*, 712 F.2d at 406-07). The Dutch government treated the Cranachs as State property, and they were part of the Dutch National Collection. After balancing competing policies surrounding these "exceptional" circumstances, the State transferred them in settlement of a private party's claims to multiple works, including a Rembrandt, in the National Collection.

(b) The Transfer Cannot be Compared to a Private Sale

Plaintiff insists that the transfer was merely a commercial "sale" (Pls.' Mot. 30), but the very documents Plaintiff cites show this was no open-market purchase. The Dutch Minister of Culture explained that the government sells works from the National Collection "only if the interest of the country requires such sale." (DSGD ¶ 449.) Stroganoff did not make a mere offer to buy the Cranachs, and the State "did not act as a trader or merchant." *FTE v. Spirits Int'l, B.V.*, 809 F.3d 737, 745 (2d Cir. 2016). The Dutch government only allowed the Cranachs to be sold as part of an "amicable agreement" (DSGD ¶ 446) resolving all of Stroganoff's claims, not just to the Cranachs but also to the Rembrandt and the Petrus Christus.

The fact that the settlement of Stroganoff's claims involved a sale, and was memorialized in a "bill of sale" (Pl.'s Mot. 31), "does not render the transfer itself a commercial transaction." *FTE*, 809 F.3d at 745. The property at issue (recuperated paintings); its significance to the Dutch State and polity (artworks in the National

Collection); the demand leading to the sale (a claim of ownership); and the level of review the settlement received (multiple cabinet Ministers) are all undisputed and give the transfer the stamp of sovereign power. That is unchanged by the internal Dutch debate as to the merits of Stroganoff's claim (Pl.'s Mot. 30-31), which goes only to the State's motivation and risk assessment. Nor does it matter that Stroganoff presented his claim in an "'informal request of returning the object'" (Pl.'s Mot. 31 (quoting Van Vliet testimony)). What matters is that Stroganoff asserted his ownership rights to the Cranachs and sought their return, and that the sale grew out of negotiations over this claim and others. Those essential facts are not in dispute, as they are reflected in Plaintiff's own complaint. (FAC ¶¶ 39-40.)

Citing *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009), Plaintiff insists she "is not seeking to have the transfer declared invalid" but only "the *result* of the transfer" (Pl.'s Mot. 27). In *Wally*, however, the balance of interests disfavored application of the act of state doctrine because "the executive branch actively [sought] adjudication of its claim" for seizure of the artwork "and Austrian law [favored] restoration of ownership." *Id.* at 248. Neither circumstance is true here. Far from affirmatively challenging the foreign restitution scheme, after conducting research, the United States has specifically concluded that the Netherlands conducted "bona fide restitution proceedings," and expressly indicated that Plaintiff's lawsuit raises serious act of state doctrine and international comity concerns. U.S. Amicus Br. at 19-20. And while Plaintiff insists that she, like the United States in *Wally*, is seeking only to "determine the effect of [State] action," 663 F. Supp. 2d at 248, the undisputed facts demonstrate otherwise. Plaintiff directly challenges the Dutch government's sale to Stroganoff in settlement of his claim; she insists the State had acted "wrongfully." (FAC ¶¶ 40, 43.) Indeed, Plaintiff concedes that the State's transfer (even if characterized as a sale) inherently entailed an "expropriation," Pl.'s Br. 34, a quintessential act of state. If Plaintiff is right that Soviet expropriation was an act of state, Pl.'s Mot. 16, surely this was, too.

In any event, the whole purpose of the doctrine is to avoid embroiling United States courts in "decid[ing] … the *effect* of official action by a foreign sovereign." *Kirkpatrick*, 493 U.S. at 406 (emphasis added). That is just what Plaintiff's claims require, for their driving premise is that the Dutch State "did not have title to the Cranachs in 1966 when it purported to convey the works to Stroganoff." (FAC ¶ 43.) On Plaintiff's theory, the transfer was ineffective to pass title—*viz.*, to sell the Cranachs to Stroganoff. That point is underscored by Plaintiff's (erroneous) arguments about what motivated the Dutch government to settle Stroganoff's claims. The act of state doctrine bars courts from reviewing the "authenticity and motivation of the acts of foreign sovereigns." *Clayco*, 712 F.2d at 408.

(c) No Exception Applies

Because the Stroganoff transfer bears the hallmarks of sovereign action, the existence of any commercial exception (Pl.'s Mot. 34) is academic here. The Ninth Circuit has "not yet decided whether to adopt a commercial exception," *Von Saher II*, 754 F.3d 727, and its principal support is a Supreme Court plurality opinion suggesting a possible exception "for 'purely commercial acts'" involving no "'powers peculiar to sovereigns'." *Von Saher II*, at 726-27 (citation omitted). Other Circuits and several district courts in this Circuit have declined to recognize the exception, *e.g.*, *FTE*, 809 F.3d at 744; *In re Transpacific Passenger Air Transp. Antitrust Litig.*, 2011 WL 1753738, at *18 n.16 (N.D. Cal. May 9, 2011). But even assuming the commercial exception exists, it is inapplicable because the Dutch government's transfer of paintings to Stroganoff entailed expropriation, a "power[] peculiar to sovereigns" that could not be "exercised by private citizens," *Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976), and was undertaken for uniquely public purposes that distinguish it from a mere open market transaction.

Plaintiff's reliance on the so-called "Hickenlooper Amendment" (Pl.'s Mot. 35-36) is equally meritless. That Amendment negates the act of state doctrine when "a claim of title or other rights to property is asserted by any party ... based upon (or

traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law." 22 U.S.C. § 2370(e)(2). The Amendment does not apply here for several reasons.

First, the Dutch State's expropriation had already occurred by 1952 when the Dutch State asserted ownership, as Plaintiff's expert concedes. DSGD ¶ 422.

Second, Plaintiff's own expert concedes that the Dutch government's transfer did not violate international law. He testified that "international law allows states [to] set deadlines. If no person would come forward[] to claim property, in that specific situation the state could obtain title and presumably transfer title." DSGD ¶ 388. The United States did the same thing in occupied Germany and Plaintiff's international law expert "would not say that U.S. practice in the application of Military Law 59 was in violation of international law." DSGD ¶ 423.

Third, the expropriation was not without compensation. *Contra* Pls.' Br. at 35-36 & n. 36. The Firm was not entitled both to compensation for the Cranachs *and* return of the purchase price that it refused to return to the State as E100 required. DSGD ¶ 454. Plaintiff's own expert agrees that a rule against such "double-dipping" is consistent with international law. DSGD ¶ 383.

Fourth, "expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law." *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990) *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010). In 1966, any claim to the Cranachs belonged to the Firm, a Dutch company. Indeed, Plaintiff brought the Firm out of dissolution in the 1990s to pursue claims in its name. DSGD ¶ 424. Only after she filed this case did she assign the Firm's claims to herself. *Id.*[4]

[4] The same result follows even if claims belonged to Desi personally at the time of the July 22, 1966 Stroganoff transfer, because the statute granting Desi Dutch nationality was enacted on July 14, 1966, before the transfer. DSGD ¶ 425.

4. The Dutch Government's *Ex Gratia* Decision to Return Works Still in its Possession in 2006 is Inapposite

Even as Plaintiff elides acts of the Dutch State that specifically concern the Cranachs, she asks the Court to give dispositive weight to Dutch pronouncements that, on their face, do not purport to be sovereign actions and have nothing to do with the Cranachs. Under Plaintiff's theory, the denial of her claims would necessarily "undermine[] the official determination by [the Netherlands] to restitute 200 works of art, including official findings that were made that pertain to the issues in this case." Pl.'s Mot. 40. But the restitution decision was specifically limited to works in the Dutch government's possession, and rested on grounds inapposite to the Cranachs for multiple reasons: (1) the decision was an act of pure discretion, outside Dutch restitution policy; (2) that policy itself excluded recuperated works that, like the Cranachs, were in the hands of private parties; and (3) the decision left intact both the decision and the reasoning of the 1999 Dutch Court of Appeals decision rejecting Plaintiff's claims to the Göring works, including the Cranachs.[5]

Advisory Committees. The facts surrounding the Dutch government's return of the 206 works are undisputed. In the late 1990s, the Dutch government established the Ekkart Committee to investigate the recuperated artworks in the National Collection and make "recommendations to the Minister of Education, Culture and Science on the government's restitution policy." DSGD ¶ 410. In 2001, the Ekkart Committee recommended a new policy. DSGD ¶ 411.

In November 2001, the Minister issued a decree responding to these recommendations and adopting a scheme eschewing "a purely legal approach" in

[5] Plaintiff's act of state position is her only basis for dismissing the Norton Simon's defenses of release, abandonment, consent, res judicata, collateral estoppel, equitable estoppel, and waiver. Since her act of state position is legally incorrect, these defenses remain viable. Even if Plaintiff is right about the implications of the State Secretary's 2006 decision on whether the Firm waived its rights in the 1952 settlement agreement, the Norton Simon's waiver and abandonment defenses remain viable because they also are based on conduct *before* that settlement.

favor of "a more policy-oriented approach." DSGD ¶ 412. This scheme gave priority "to moral rather than strictly legal arguments," but did not allow claimants to reopen "settled" cases." DSGD ¶ 413. The decree established a second advisory committee, the Restitutions Committee, "whose task [was] to advise the Minister, at his request, on decisions to be taken concerning applications for the restitution of items of cultural value." DSGD ¶ 414. The Minister had no obligation to follow that advice. As to recuperated properties that were no longer in the possession of the Dutch State, the Minister could only refer a dispute if both the claimant and the current owner "have jointly asked the Minister to do so." DSGD ¶ 415.

In 2004, the Firm made a request under this new policy for the return of all former Goudstikker paintings in the Dutch State's possession. DSGD ¶ 36. The Restitutions Committee produced an extensive report which summarized how the Firm succeeded in its deliberate strategy of selective restitution, DSGD ¶ 417:

> On 10 November 1949, after two years of negotiating the restoration of rights, Old Goudstikker *formally* announced that it would only apply for the restoration of rights in respect of the Miedl transaction. Old Goudstikker wanted to exclude the Göring transaction − i.e., the goods recovered from Germany and put in the custody of the SNK − from the restoration of rights. However, the NBI initially could not agree to this preference. … The NBI deemed it unfair to allow the preference for a partial restoration of rights that, according to the NBI, was advantageous for Old Goudstikker. However, the NBI eventually agreed to the application for the restoration of rights for the Miedl transaction alone.

The Restitutions Committee ultimately recommended that the Dutch government return the paintings in its possession that had been sold to Göring. DSGD ¶ 418. Concluding that the 1952 Settlement Agreement waived rights only as to the Miedl transaction and not the Göring transaction, the Committee recommended that the Goudstikker Firm's claim to the Göring works should not be considered "settled." *Id.* In arriving at this conclusion, the Committee stressed that the new restitution policy required it "to issue a recommendation based more on policy than strict legality" (DSGD ¶ 419).

State Action. The State Secretary issued her decision on Plaintiff's claim in February 2006. DSGD ¶ 420. While adopting the Committee's recommended result, she expressly disagreed with its reasoning:

> Unlike the Restitution Committee I am of the opinion that in this case it is a matter of restoration of rights which has been settled. In 1999, The Hague Court of Appeal in its capacity as Restoration of Rights Court gave a final decision in this case. This is why this case is not included in the current restitution policy.

Id. The State Secretary nevertheless decided to return the Göring artworks to Plaintiff, based in part on the "manner in which the matter was dealt with in the early Fifties." DSGD ¶ 46. The Secretary *did not* disturb third party rights; *did not* say that the post-war restitution process was unfair or improper; and *did not* adopt the Restitutions Committee's "findings" or "conclusions." In both her decision announced to Parliament and in her explanatory letter to Plaintiff, she adopted only the bottom-line "recommendation" to return certain artworks. DSGD ¶ 121.

As a threshold matter, the State Secretary's decision was part of a process expressly limited to artworks "in the possession of the State of the Netherlands" and that was not intended to (and by design could not) disturb past transfers to third parties. DSGD ¶ 415. Claims for recuperated artworks in the hands of private parties could only be referred to the Restitutions Committee if the parties "have jointly asked the Minister."[6] *Id.* The State Secretary found the Firm's claims were not even "included in the current restitution policy," and made a purely discretionary and *ex gratia* decision to return them anyway. That reinforces that the State was acting only as to artworks in its own possession and not attempting to upset the settled rights of third parties. This alone refutes Plaintiff's suggestion that

[6] The 2006 letters exchanged between counsel for the Norton Simon and the Dutch State (Pl.'s Mot. 6) confirm this. The State took the position "that the State of the Netherlands is not involved in this dispute. The State is of the opinion that this concerns a dispute between two private parties." DGSG ¶ 49. That accords fully with the new scheme's limitations, since Plaintiff and the Norton Simon have not "jointly asked" the Minister to refer their dispute to the Restitutions Committee.

the State Secretary's decision addresses the Cranachs, such that denial of her claims here would "invalidate sovereign acts of state." Pl.'s Mot. 45.

The text of the State Secretary's decision makes equally clear that it leaves standing the 1999 decision of the Court of Appeals rejecting Plaintiff's claim for restoration of rights in the Göring works, including the Cranachs. The State Secretary expressly invoked that Court's "final decision," in "its capacity as Restoration of Rights Court," in determining that Plaintiff's case had been "settled." DSGD ¶ 420. The State Secretary returned the paintings not by restoring the Firm's *rights* to the Göring works—which had been finally resolved against the Firm as a legal matter—but *ex gratia*. In this respect, Plaintiff is flatly wrong in suggesting that the State Secretary "found that Desi had never waived her rights to the artworks taken by Goring." Pl.'s Mot. 45. The State Secretary disagreed with the Restitutions Committee on this point and concluded that this case was a "settled" one under the government's policy, DSGD ¶ 420, which defined those as cases where "either the claim for restitution resulted in a conscious and deliberate settlement or the claimant expressly renounced his claim for restitution." DSGD ¶ 452. By validating the Court of Appeal's final decision, the State Secretary necessarily left standing its determination that the Firm "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Goring transaction." DSGD ¶ 408. The Court of Appeal's 1999 decision, in marked contrast to the State Secretary's 2006 decision, specifically addressed Plaintiff's claim to the Cranachs.

Plaintiff attempts to recast the State Secretary's 2006 decision, and to expand her reasoning, by conflating it with the Restitution Committee's report and recommendations. Plaintiff points to the Restitution Committee's statement that Dutch officials in the 1950s "'wrongfully created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily'" (Pl.'s Mot. 41), one of the considerations that led the Committee to deem Plaintiff's claim to the

Göring works "not settled." But that finding is nowhere to be found in the State Secretary's decision. What *is* clear, as noted, is the Secretary's validation of the 1999 Court of Appeals decision refusing to grant Plaintiff restoration of rights, which expressly rejected the Firm's challenge to the 1950s proceedings. The Court found that the Firm "was free—no matter what position as taken by the SNK, the NBI, or any other agency of the State involved in this matter at any time after the war—to have submitted an application for restoration of rights with the Council." DSGD ¶ 409. It was based upon this determination, and the Court's determination that "[t]he Netherlands created an adequately guaranteed procedure" that the Court rejected her claim. DSGD ¶ 406.

This gets to a more fundamental defect in Plaintiff's theory. The "findings" she seeks to clad in sovereign armor, and to use against the 1999 Court of Appeals decision, are not even acts of state. The Restitutions Committee is a non-binding advisory body with no decision-making authority. *Cf. W.S. Kirkpatrick & Co.*, 493 U.S. at 405 (act of state doctrine applies to "*official* act of a foreign sovereign") (emphasis added). As the Decree establishing the Committee makes clear, its power is limited to "advis[ing] the Minister, at his request, on decisions to be taken concerning applications for the restitution of items of cultural value." Indeed, Plaintiff's own expert admitted that the Restitutions Committee was an "advisory body" that made "non-binding recommendations" to the Secretary. DGSG ¶ 416. It is the State Secretary who wields the power to act, and she exercised that power *outside* Dutch policy to return the 206 works.

Plaintiff also improperly invokes the Ekkart Committee's determination that the SNK "generally" approached restitution in a "legalistic, bureaucratic, cold and often even callous" way. Pl.'s Mot. 40. First, that does not connote bad faith, as Plaintiff's own expert concedes. DGSG ¶ 391. Second, it is not specific to this case. Third, like the Restitutions Committee, the Ekkart Committee lacked the authority under Dutch law to take any action binding the State with respect to

restitution. It was charged with issuing "*recommendations* to the Minister of Education, Culture and Science on the government's restitution policy." DGSG ¶ 410. And while the State Secretary believed "the manner in which the matter was dealt with in the early Fifties" was a factor supporting the discretionary return of the works still held by the government (DGSG ¶ 46), she specifically declined to depart from the Court of Appeal's determination that "[t]he Netherlands created an adequately guaranteed procedure." DGSG ¶¶ 406, 420. As Plaintiff's own expert has recognized, the Dutch government applied its restitution laws "in good faith" even if it did so in a strict, legal way. DGSG ¶ 391. The government simply "wanted to apply the laws in the same way to all the people no matter how much they suffered" because "everyone had suffered during the war." DGSG ¶ 426.

C. U.S. Restitution Policy Preempts All of Plaintiff's Claims

Plaintiff also is not entitled to summary judgment because the Norton Simon's preemption defense warrants judgment in *its favor*. *See* Defs.' Mot. 50-53. According to the Circuit, federal policy is that the U.S. has a "continuing interest in respecting the finality of 'appropriate actions' taken in a foreign nation to restitute Nazi-confiscated art," i.e., when the artwork was "subject to postwar internal restitution proceedings." *Von Saher II*, 754 F.3d at 721-722.[7]

Invoking the law of the case, Plaintiff contends that the Circuit has "definitively determined" that her claims do not conflict with this federal policy. Pl.'s Mot. 38-40. That is wrong. The Circuit did not find any facts in reversing this Court's dismissal on preemption grounds; its decision was based on the assumed truth of Plaintiff's allegations in her Complaint. *Von Saher II*, 754 F.3d at 722. When the Circuit reverses a decision granting a motion to dismiss, on summary judgment following remand, the district court is free to reconsider the same question based on "significant new evidence." *Hagood v. Sonoma County Water Agency*, 81

[7] As explained in its motion (Defs.' Mot. 50, n.10), the Norton Simon reserves its objections to the Circuit's reformulation of U.S. policy on recovered art.

F.3d 1465, 1473 (9th Cir. 1996); *see also Mortimer v. Baca*, 594 F.3d 714, 721 (9th Cir. 2010). Here, the evidence disproves Plaintiff's allegations that the Circuit assumed to be true: "the Cranachs were never subject to postwar internal restitution proceedings in the Netherlands." *Von Saher II*, 754 F.3d at 721.

The Cranachs were subject to postwar internal restitution proceedings in the 1990s. The Circuit credited Plaintiff's allegations that the Firm's 1998 claims were limited to former Firm artworks that the State possessed, which "necessarily exclude[d] the Cranachs." 754 F.3d at 722 n.1. But as noted, Plaintiff specifically amended the Firm's 1998 petition to add a request for compensation for artworks that the government had sold, and the Cranachs were the only paintings on the Firm's list of such artworks. DSGD ¶¶ 372-373. The Dutch Court rejected that request as successor to the Council and U.S. foreign policy demands respect for that official decision not to restore the Firm's rights to the Cranachs. DSGD ¶ 374.

Second, the Cranachs also were subject to internal restitution proceedings immediately after World War II. The Ninth Circuit reached the opposite conclusion "[b]ased on [Plaintiff's] allegations" that "Desi chose not to participate in the initial postwar restitution process" and that "she could not achieve a successful result in a sham restitution proceeding." *Von Saher II*, 754 F.3d at 722-723. But discovery has revealed that Dutch restitution shared key features with restitution laws that the U.S. adopted for occupied Germany, DSGD ¶ 375, and the Firm participated in this *bona fide* process as to the works sold to Göring: It obtained a ruling from the Council that the Göring transaction was involuntary, and then expressly notified the Dutch government it was waiving restoration of rights in the Göring transaction. DSGD ¶¶ 219, 222-223, 273. U.S. foreign policy demands respect for an affirmative waiver *during* restitution proceedings no less than a decision *following* proceedings.

D. <u>The Passage of Time Bars Plaintiff's Claims</u>

1. The Statute of Limitations Bars Plaintiff's Damages Claims

The Norton Simon's motion explains that Plaintiff's damages claims are time-

barred under Cal. Civ. Proc. Code § 338(c)(1), the three-year statute of limitations for "[a]n action for taking, detaining, or injuring goods or chattels." Plaintiff does not address that issue at all. Plaintiff instead argues that this Court's decision that her claims would be timely under the amended statute of limitations for "an action for the specific recovery of a work of fine art brought against a museum," Cal. Civ. Proc. Code § 338(c)(3), is the law of the case. That is wrong.

"For the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in [the] previous disposition." *United States v. Jingles*, 702 F.3d 494, 499 (9th Cir. 2012) (quotation marks omitted). This Court has not expressly applied § 338(c)(1) to Plaintiff's damages claims, and the case history precludes any necessary implication that the Court has decided that issue. The Norton Simon argued in its second motion to dismiss that the amended statute of limitations, Cal. Civ. Proc. Code § 338(c)(3), "does not purport to revive Plaintiff's damages claims" because it applies "*only* to 'an action for the specific recovery of a work of fine art.'" Dkt. 76 at 37 (quoting § 338(c)(3)). This Court did not address that argument in its March 22, 2012 order dismissing Plaintiff's claims on preemption grounds. Dkt. 88. On remand after the Ninth Circuit's reversal, the Norton Simon sought leave to renew in its motion as to arguments that the Court had not addressed in its March 22, 2012 order, including that "[a]mended CCP § 338 at most revives Plaintiffs replevin claim." Dkt. 102 at 6. The Court agreed that the Norton Simon was "entitled to a ruling on the issues that were not resolved in its March 22, 2012 order," including the argument that "amended CCP § 338 at most revives Plaintiff's replevin claim." Dkt. 105 at 2. The Court, however, "advised [the Norton Simon] that the Court has tentatively concluded that many of the issues raised in their Motion to Dismiss are more appropriately resolved on a motion for summary judgment." *Id.* at 2, n. 1. Heeding that advice, the Norton Simon "limited [its] motion to a single issue," namely, that "Plaintiff's claims are untimely under AB 2765—the statute *Plaintiff contends* governs the timeliness of her claims—on

the face of her complaint." Dkt. 112 at 8-9 (emphasis added). In rejecting the argument (Dkt. 118), this Court did not address the separate argument that "[t]he Legislature's amendment of the statute as to specific recovery left the pre-existing statute intact for other kinds of claims" (Defs.' Mot. 55).[8]

On the merits, Plaintiff does not offer any competing interpretation of the amended statute as against the Norton Simon's reading that it applies only to claims seeking the remedy of "specific recovery" referenced in the statute. In fact, Plaintiff herself describes her replevin claim as seeking a "specific recovery remedy." (Pl.'s Mot. 9:24.) This confirms the amended statute's plain meaning: the Legislature extended the statute of limitations only for specific recovery claims and left intact the original, three-year statute of limitations for claims seeking other kinds of relief. Plaintiff also does not and cannot argue that her damages claims are timely under the three-year statute. As explained above (*supra* at 18), under § 338(c)(1), Plaintiff's damages claims accrued decades ago based on the catalogue raisonné and the public display of the Cranachs. *See Orkin*, 487 F.3d at 741. *Cf. Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010).

2. Laches Bars Plaintiff's Claims for Specific Recovery

In providing Plaintiff with an extended statute of limitations for her claims for specific recovery, the California Legislature expressly preserved the Norton Simon's laches defense. *See* Cal. Civ. P Code § 338(c)(5). The parties agree (Pl.'s Mot. 47) that laches is for the Court and applies where there is (1) "unreasonable delay" in pursuing a claim and (2) "prejudice to the defendant resulting from the delay." *In re Estate of Kampen,* 201 Cal. App. 4th 971, 997 (2011). Since the undisputed facts prove both elements here, summary judgment is proper for the Norton Simon.

As to delay, Plaintiff improperly focuses entirely on her own conduct (Pl.'s

[8] The Norton Simon preserves for further appellate review its arguments that Plaintiff's claims are untimely under Cal. Civ. Proc. Code § 338(c)(3) and that § 338(c)(3) violates the First Amendment. *Contra Cassirer*, 737 F.3d at 620-621.

Mot. 48), ignoring that "Plaintiff stands in the shoes of her predecessors in interest" (Dkt. 119). Unreasonable delay "focuses not only on efforts by the party to the action, but also on efforts by the party's family," *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 303 (S.D.N.Y. 2011) (internal quotation marks omitted); and courts apply laches where the plaintiff's "ancestors were not diligent in pursuing their claims to" a painting, *id.* at 306; *see also Lind v. Baker*, 48 Cal. App. 2d 234, 248 (1941) (laches applied to delay by "plaintiffs and their predecessors").

In this case, Plaintiff and her predecessors' nearly five-decade delay was unreasonable. *See Shiotani v. Walters*, 2012 WL 6621279, at *6 (S.D.N.Y. Dec. 3, 2012) (twenty-five year delay in filing claim for artwork was unreasonable). Plaintiff's argument that Desi Goudstikker did not "waive" her claim is beside the point, as laches turns on whether Desi delayed in *asserting* a claim. *Magic Kitchen LLC v. Good Things Int'l Ltd.*, 153 Cal. App. 4th 1144, 1157 (2007) (laches involves a "delay in *asserting* a right or a claim") (emphasis added). She and the Firm plainly belonged, for they never filed a claim under E100, never objected to the State's sale of former Firm works, and never did anything to locate the Cranachs despite the fact that the catalogue raisonné has listed their location as the Norton Simon since 1978, DSGD ¶¶ 207, 389-390, 402. *See Orkin*, 487 F.3d at 741.

This unreasonable delay has manifestly prejudiced the NSF, "result[ing] in deceased witnesses, faded memories, lost documents, and hearsay testimony of questionable value." *Bakalar*, 819 F. Supp. 2d at 306; *see also Getty v. Getty*, 187 Cal. App. 3d 1159, 1170 (1986) ("prejudice results from the death of important witnesses"). As the Norton Simon explains in its motion (Defs.' Mot. 57), every witness with personal knowledge about the key issues died during the delay. DSGD ¶¶ 427, 435-442. No participant in relevant events is alive to confirm the Firm's deliberate waiver, nor can Stroganoff or Norton Simon take the stand to rebut Plaintiff's characterizations of their subjective beliefs and charges of bad faith.

Finally, Plaintiff is wrong that equity bars the Norton Simon from relying on

a laches defense. Pl.'s Mot. 49-54. Plaintiff misreads *Farahani v. San Diego Community College District*, 175 Cal. App. 4th 1486, 1494 (2009). In that case, the Court precluded the defendant from raising a laches defense where the plaintiff's delay in filing an appeal was due to the defendant's "own illegal actions terminating [the plaintiff] without a hearing and expressly informing him that he had no right to an appeal." *Id.* at 1495. The Norton Simon, however, did not tell Plaintiff or her predecessors not to file a claim under E100 or prevent their investigation; it has displayed the Cranachs in public for decades.

Plaintiff also argues that the Norton Simon cannot take advantage of laches because it did not sufficiently investigate the provenance of the Cranachs when it acquired them in 1971 or thereafter. This is both legally and factually baseless. Pl.'s Mot. 47, 53. Plaintiff has not identified any case law for the proposition that a Plaintiff who has unreasonably delayed investigating and asserting her own claim can avoid laches by shifting fault to the defendant for not anticipating the claim. That would flip laches, which focuses on Plaintiff's inaction, directly on its head.

Regardless, the undisputed facts show that the Norton Simon acted properly. While the Court does not have to resolve these issues to grant the Norton Simon's motion on other grounds, it is clear that, contrary to Plaintiff's insinuations, the Norton Simon acted in a forthright manner from the beginning.

By 1967, Simon, a Jewish businessman, had acquired a major art collection, some of which he lent to the Los Angeles County Museum of Art. DSGD ¶ 326. Simon directed research and acquisition for his collection in a "very hands-on" manner and employed only a small staff of bookkeepers, administrators, and assistants. DSGD ¶ 327. In offering the Cranachs to Simon, Stroganoff's dealer, Spencer Samuels, emphasized the paintings' strong connection to the Stroganoff family, providing Simon with a document entitled "The Stroganoff Cranachs" that discussed the paintings' confiscation by the Bolsheviks, their subsequent purchase by Göring and recuperation to the Netherlands, and their eventual transfer to

Stroganoff in 1966 "after several years of contention and discussion." DSGD ¶ 330. Simon's staff recalled discussing "how interesting the history was, that we were buying the work from the family who originally owned it." DSGD ¶ 450. The Norton Simon "understood that it was George Stroganoff and his mother" who owned the Cranachs, that George "was the legal heir," and that Stroganoff "rightfully received [the Cranachs] back again after the war." DSGD ¶ 331.

Plaintiff asserts that the Norton Simon's counsel "deliberately suppressed" the findings of a provenance researcher working on a Norton Simon catalogue (Pl.'s Mot. 13-14), but cites no evidence for that accusation. There is none. The Norton Simon contracted with scholar Amy Walsh to compile a catalogue of the Norton Simon's Northern European paintings. DSGD ¶¶ 134, 136. Walsh's draft entry for the Cranachs stated that there was no evidence that the Cranachs were part of the Stroganoff family's collection. DSGD ¶ 137. Walsh, however, explained that she "can't definitively say [the Cranachs] were never in any Stroganoff collection because I don't know where they were [before 1919]" DSGD ¶ 333, a point echoed by Plaintiff's own expert, Kuznetsov, who admitted that the Stroganoffs had a number of palaces, DSGD ¶ 334. As the Norton Simon's Sara Campbell explained: "we had always believed that the pictures were part of the Stroganoff collection, and that Commander Stroganoff rightfully received them back after the war .... And saying that there's no evidence ... doesn't say that it never happened." DSGD ¶ 451.

Plaintiff cites no evidence for her claim that the Norton Simon withheld publication of the catalogue "for fear of admitting the 'problematical' nature of the Cranachs' provenance." Pl.'s Mot. 53. She actually cites testimony refuting this implication. Togneri explained that the Norton Simon did not want to publish an "incredibly expensive" catalogue intended to remain in print for 75 years if litigation might potentially change the proper chain of title for the Cranachs: it "was wanting to be cautious … not put out a catalogue that may be out of date immediately upon its printing, depending upon the outcome of the litigation." DSGD ¶ 146.

And Walsh testified that the Norton Simon did not try to influence or suppress her conclusions. DSGD ¶ 346. In fact, the Norton Simon *cooperated* with Walsh in publishing a case study about the Cranachs' provenance in the *American Association of Museums Guide to Provenance Research* authored by Konstantin Akinsha, a historian *whom Plaintiff retained as a consultant*. DSGD ¶¶ 339-342. Akinsha's case study opines that the Cranachs were looted from a church in Kiev and not the Stroganoffs but also notes that neither Samuels nor Norton Simon "could have known that *Adam* and *Eve* had never been part of the Stroganoff collection in the first place."[9] DSGD ¶ 343. Far from suppressing the story, the Norton Simon provided images of the Cranachs for the case study without requesting any changes to its text. DSGD ¶ 345.

The equities in this case cut in favor of the Norton Simon. "[N]o principle is more firmly settled than that equity will not come to the aid of one who, through his own delay and own fault, has lost the remedy which the law has provided." *Shive v. Barrow*, 88 Cal. App. 2d 838, 844 (1948); *see also S. Beverly Wilshire Jewelry & Loan v. Superior Court*, 121 Cal. App. 4th 74, 78 (2004) (applying Cal. Civil Code § 3543). Given that Plaintiff's predecessor waived its claim to the Cranachs and was dilatory *for decades*, it would be inequitable to force the Norton Simon to defend itself without the benefit of so many witnesses. Plaintiff's destruction of documents (*infra* Part III.H.2) only exacerbates the prejudice.

E. If the Court Rejects All of the Foregoing Bases for the Norton Simon's Title, There Are Triable Issues on Other Bases As Well

Each of the foregoing arguments would entitle the Norton Simon, not Plaintiff, to summary judgment. If the Court rejects all of these arguments, Plaintiff still is not entitled to summary judgment because there are triable issues on three other grounds for the Norton Simon's title that would be fatal to all of Plaintiff's

[9] Akinsha's case study also states that the works sold to Göring "became property of the state of the Netherlands" after Desi "dropped her claim" for them. DSGD ¶ 344.

claims: (1) whether George Stroganoff acquired title as a good faith purchaser; (2) whether the Norton Simon acquired title based on its own good faith; and (3) whether the Norton Simon acquired the Cranachs from their true owner.

1. Stroganoff Was A Good Faith Purchaser

Plaintiff concedes that Dutch law governs whether Stroganoff acquired title as a good faith purchaser. Under Dutch law, a purchaser gets good title from a seller that has no title to transfer if he acquires goods for value and in good faith that was both subjectively genuine and objectively reasonable. DSGD ¶ 275. Because Dutch law presumes a purchaser's good faith, it is *Plaintiff's* burden to *disprove* Stroganoff's good faith. DSGD ¶ 276. The undisputed facts show that Plaintiff cannot meet her burden.

Plaintiff's own expert admits that it would be "impossible" for Plaintiff to prove Stroganoff's lack of subjective good faith under Dutch law. DSGD ¶ 277. And for good reason. As he admitted, there "cannot be any evidence proving what [Stroganoff] thought at that moment or believed," *id.*, including because Stroganoff passed away before Plaintiff or her predecessor asserted their rights.

Plaintiff's attempt to argue around these admissions gets both the facts and the law wrong. Plaintiff asserts that Stroganoff was not a good faith purchaser because he believed that he owned the Cranachs when the good faith purchaser rule supposedly required him to believe that the seller, the State, was the owner. Pl.'s Mot. 23. That is not the law. Good faith exists if the buyer genuinely and reasonably believes that no third party's rights are being violated and that he is the owner at the end of the transaction. DSGD ¶ 278.[10] That usually amounts to believing that the seller is the owner, but not always. *Id.* There is no evidence that Stroganoff believed that the Firm or any other third party was the true owner.

[10] *Cf.* U.C.C. § 1-201(b)(9) ("'Buyer in ordinary course of business' means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods ….").

Even on Plaintiff's incorrect view that a purchaser must believe the seller is the owner, Plaintiff admits that Stroganoff first transferred whatever rights he had in the Cranachs to the State and that the State thereafter "transferr[ed] [those rights] back to him," along with any rights the State independently held, when it sold the Cranachs to Stroganoff. Pl.'s Mot.23-24 & n.9; *see also* DSGD ¶ 279. If he initially believed himself the owner, at the time of the sale, following his transfer to the State, Stroganoff necessarily believed the State was the owner. DSGD ¶ 281.

Stroganoff's good faith also was objectively reasonable. DSGD ¶ 287. Even taking as given Plaintiff's incorrect premise that Dutch law requires the good faith belief that "the transferor had good title," Pl.'s Mot. 23, Stroganoff clearly would have been justified in believing that the State was the owner. It is undisputed that Dutch officials in the 1960s concluded that the State, and not the Firm, owned the Cranachs. DSGD ¶ 253. In fact, *Plaintiff and her Dutch lawyers* shared that view in January 1998, after conducting extensive historical research. DSGD ¶ 282. They later changed their minds, but there is again no evidence or reason to believe that Stroganoff should have known better than Plaintiff and her legal team or the State. DSGD ¶ 283. Moreover, the Norton Simon's Dutch legal experts have opined that the State owned the Cranachs or at least had the statutory power to transfer ownership. DSGD ¶ 284. Although Plaintiff's expert now disagrees, he would not call that position "unreasonable." DSGD ¶ 285.

Plaintiff tries to evade this conclusion by saying that Dutch law requires digging even deeper into Stroganoff's mind. She says the relevant standard is whether Stroganoff's subjective *reasons* for believing that the State was the owner also must be objectively reasonable. Pl.'s Mot. 24. That is not the law. According to her own expert, the "objectively justified" prong tests the reasonableness of Stroganoff's *conclusion*, *i.e.*, whether he "should know that the possessor [here, the State] was not the owner." DSGD ¶ 429. And for good reason: Plaintiff's expert concedes that Stroganoff's subjective reasoning is unknowable. DSGD ¶ 277.

Regardless, even if the objective prong were directed at Stroganoff's *reasons* for believing that the State was the owner, there is at least a triable issue about whether Stroganoff would have been objectively reasonable in believing that he was the owner and transferred his rights to the State before the sale. As mentioned above, a case study by Plaintiff's expert consultant, Akinsha, concludes that, because the Soviet government supposedly "manufactured" the Cranachs' Stroganoff provenance, "[n]either Samuels nor Simon could have known that Adam and Eve had never been part of the Stroganoff collection in the first place," and "[e]ven Prince George Stroganoff-Scherbatoff had only the evidence of the 1931 sale." DSGD ¶ 286. The Norton Simon's expert Dr. van Vliet similarly opines that it would have been objectively reasonable under Dutch law for Stroganoff to have believed that he owned the Cranachs, DSGD ¶ 288, including because of the auction catalogue and his mother's protest of the auction. DSGD ¶ 289-291.[11]

Plaintiff argues that "if Stroganoff had done any research" he would have realized that his family never owned the Cranachs. Pl.'s Mot. 24. But Plaintiff's own Stroganoff expert takes the view that Stroganoff "made a mistake" about the Cranachs because his exile left him "cut off" from "information about his family's art collection." DSGD ¶ 294. Plaintiff points to a catalogue raisonnés (DSGD ¶ 127), but it says nothing about the painting's provenance before it became "Russian State Property (Academy of Science, Kiev)" as of 1931, and thus does nothing to disprove Stroganoff ownership prior to Soviet looting.

Plaintiff's other evidence does not support the inference that Stroganoff's good faith was unreasonable, much less establish this as a matter of law. Plaintiff points to a 1966 decision by a French court of first instance applying Soviet

[11] Plaintiff argues that a supposed "insert prepared with the catalogue" makes clear that the Cranachs and some other artworks included in the auction were not part of the Stroganoff collection. Pl.'s Mot. 15. But Plaintiff has no evidence that this document (Kaye Decl. Ex. 66) was "an insert prepared with the catalogue"; rather, the evidence shows that this separate document was not bound with the catalogue and does not appear in many copies of the catalogue. DSGD ¶¶ 66, 292.

legislation eliminating the Stroganoffs' special inheritance rights and concluding that George did not inherit rights in other paintings sold at the Lepke auction. DSGD ¶¶ 69, 295; Pl.'s Mot. 15. That decision under French law on novel legal questions hardly precluded a reasonable belief that a Dutch court would reach an opposite conclusion or that the decision would be reversed on appeal.[12] DSGD ¶¶ 295-297. Plaintiff also suggests, based on a single document from 1970, that Stroganoff changed his inheritance story after this ruling in order to "hide" that his original story had been disproven and to omit the Dutch State's role. Pl.'s Mot. 15, 24-26; DGSG ¶ 29. But Stroganoff is not alive to explain the document, which merely highlights the prejudice from Plaintiff's decades-long delay, and why laches must apply. The document does not support Plaintiff's inferences, and other documents Stroganoff provided to Norton Simon continue to discuss the inheritance story and the Dutch government involvement that Plaintiff claims Stroganoff covered up. DSGD ¶¶ 298-299.

Finally, the Court can safely ignore Plaintiff's argument that the *Dutch State* could not have acquired ownership rights from Stroganoff because it was not a good faith purchaser and was stuck being a "detentor" (custodian) forever. Pl.'s Mot. 24 n.10, 26. It is undisputed that if *Stroganoff* was a good faith purchaser, then under Dutch law he obtained good title *even if* the Dutch State itself was not an owner. DSGD ¶ 275. That is the whole point of the good faith purchaser rule.

2. The Norton Simon Was a Good Faith Purchaser

There are also triable issues as to the Norton Simon's good faith and lack of knowledge about any alleged conversion. Plaintiff is wrong when she asserts that these issues are not material because "even if Defendants purchased the Cranachs in good faith and/or without knowledge of Plaintiff's claims … they would still be

[12] For the same reason, Plaintiff's argument that that Stroganoff should have been aware of a decision by a *German trial court* allowing Soviet seizure auctions to go forward cannot prove Stroganoff's bad faith. Pl.'s Mot. 25.

liable for conversion." Pls.' Mot. 9. Plaintiff's conversion and replevin claims are wholly derivative of the Firm's forced sale to Göring. Under both E100 and California law, forced sales are voidable, not void. *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919 (2016); *California Standard Fin. Corp. v. Cornelius Cole, Ltd.*, 9 Cal. App. 2d 573, 578 (1935); Cal. Civ. Code § 1566. As explained above, the Göring sale was no longer voidable by the time the Norton Simon acquired the Cranachs. But even assuming it was, "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value." Cal. Com. Code § 2403(1); *see also* 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 716. As set forth above, the record contains ample evidence creating a triable issue on the Norton Simon's good faith and lack of knowledge (*supra* at 40-42).

3. Stroganoff Claimed the Cranachs

Plaintiff also is wrong that the Norton Simon has "proffered no evidence in support of [its] claim that the Stroganoff family ever owned the Cranachs." Pl.'s Mot. 14. Stroganoff gave an oral history in 1973 in which he discussed his family's claim to the Cranachs. DSGD ¶ 64. Stroganoff also made claims for the Cranachs to the U.S. government in 1931, the year of the Lepke auction, and to the Dutch government in the 1960s. DSGD ¶ 431. This more than suffices for a triable issue.

Plaintiff contends that Stroganoff's oral history was "more fiction than fact" because it contains supposed errors and was "not checked for accuracy and it was not made under oath." Pls.' Mot. 15. To begin with, Plaintiff's attempt to cross-examine Stroganoff many years after his death underscores why laches bars Plaintiff's claims. In any event, Plaintiff has failed to disprove Stroganoff's oral history as a matter of law, as she must to win summary judgment.

Stroganoff acquired the Cranachs in 1966. DSGD ¶ 26. Stroganoff explained in the oral history that he and his family were aware in 1931 that the Soviets brought "about 100 paintings and about 200 other pieces, furniture and things like that" to be sold at auction. DSGD ¶ 320. He recalled that the auction catalogue was titled

"Stroganoff Collection Leningrad," and contained an engraving of his "great-great-grandfather," Alexander Stroganoff, and a "history of the family and the collection, with photographs of the exterior and interior of the house." DSGD ¶ 321. Stroganoff and his mother, Olga, wanted to challenge the auction in the German courts, but were told that they would have to deposit half the collection's value as a bond. DSGD ¶ 322. Because Stroganoff and his mother, living in exile, "didn't even have one fiftieth of the value," they instead sent a letter of protest which was read at the auction, so that "buyers had no excuse for not knowing that they were buying something . . . illegal." DSGD ¶ 323-324. Stroganoff recalled that the Lepke auction included the Cranachs – "'Adam and Eve,' very famous ones, and very good ones" – as well as paintings by Dutch artists such as Ruysdael, Van Dyck, and Rembrandt. DSGD ¶ 325. Stroganoff's recollection is confirmed by copies of the actual Lepke "Stroganoff Collection" auction catalogue. DSGD ¶ 289.

Stroganoff's own words preclude summary judgment in Plaintiff's favor. Plaintiff's own Stroganoff historian never considered Stroganoff's oral history or his claims to the U.S. or Dutch government because his "goal" was "to demonstrate that the Cranachs did not belong to the Stroganoff family." DSGD ¶ 335.

F. Plaintiff Has Not Proven Her Prima Facie Case of Conversion or Replevin as a Matter of Law

As explained above, the Norton Simon, not Plaintiff, has title to the Cranachs. Accordingly, Plaintiff not only has not proven, but *cannot* prove, her *prima facie* case because each of her claims requires proof of title. If the Court rejects *all grounds* for the Norton Simon's title, Plaintiff still is not entitled to summary judgment on her *prima facie* case for the following reasons, many of which also require summary judgment in the Norton Simon's favor instead.

1. Plaintiff Has Not Met, and Could Not Meet, Her Burden to Prove the Absence of Consent

Plaintiff has not proven her *prima facie* case as a matter of law because "[a]

plaintiff in a conversion action must also prove that it did not consent to the defendant's exercise of dominion." *Bank of New York v. Fremont Gen. Corp*., 523 F.3d 902, 914 (9th Cir. 2008) (citing *Farrington v. A. Teichert & Son*, 59 Cal. App. 2d 468, 474 (1943)). *See also Tavernier v. Maes*, 242 Cal. App. 2d 532, 552 (1966). Indeed, "the law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." *Farrington*, 59 Cal. App. at 474.

Under these principles, and as explained in the Norton Simon's own motion, the Firm ratified the Göring sale, and consented to the State's possession and disposition of the Cranachs, through words and conduct *even before the 1952 Settlement Agreement*. Indeed, the same words and conduct by which the Firm waived and/or abandoned its rights under Dutch law (*supra* Part III.A.4) constitute ratification under California law: Meyer's November 1949 letter, Meyer's and A.E.D. von Saher's memoranda detailing the Firm's selective restitution strategy, the Firm's failure to protest auctions of its former work, and its failure to file a claim under E100 knowing that the Council had found Göring sale involuntary and that the State would sell unclaimed artwork. *Cf. Farrington*, 59 Cal. App. 2d at 473-474 (ratification by plaintiff who "expressly stated" he had no objection to alleged conversion and "[a]t no time … ever d[id] anything to avoid the consequences").

The Firm's failure timely to annul the Göring transaction also constitutes a ratification. *See Matteson v. Bank of Italy*, 97 Cal. App. 643, 649 (1929) (plaintiff's "lack of reasonable diligence" in "prosecuting her claim" gave rise to inference "that she acquiesced" in alleged conversion). A sale under duress is voidable but subject to ratification by the parties. *Yvanova*, 62 Cal. 4th at 930; *Cornelius Cole*, 9 Cal. App. 2d at 578; Cal. Civ. Code § 1566. A buyer who refuses to rescind a contract or return its consideration ratifies the contract because she loses the ability to dispute its effectiveness: where a party who "took actions inconsistent with unwinding the contract" waits even two years to rescind it, she has "affirmed the transaction," and

her "right to rescind it is gone." *DM Residential Fund II v. First Tennessee Bank Nat. Ass'n*, 813 F.3d 876, 878 (9th Cir. 2015).[13]

Having affirmed the Göring sale by consciously waiving its right to annul it, the Firm lost the ability to prove that the sale was a conversion. *See Bank of New York*, 523 F.3d at 914; *Farrington*, 59 Cal. App. at 474. Plaintiff therefore cannot prove that the Norton Simon bought converted property, either. At a minimum, there is a triable issue on ratification.

2. Plaintiff's Claims Are Derivative of a Sale that She Can No Longer Annul

Plaintiff also has not proven her *prima facie* case because her conversion claim is wholly derivative of a sale to Göring that the governing law considers effective. Plaintiff argues that Göring took the Cranachs in a forced sale, and "one who purchases converted goods is himself a converter." Pl.'s Mot. 8-9. Plaintiff ignores her burden to address choice of law, *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App. 4th 1436, 1465 (2007), relying entirely on a single case applying Rhode Island law.[14] In fact, Dutch law governs the effectiveness of the Göring sale because it took place in the Netherlands, which has a strong interest in applying the wartime decrees it enacted specifically to determine the legal effect of transactions during the Nazi occupation. Defs.' Mot. 27-28. And California law, which accords with Dutch law, governs the impact of that sale on Plaintiff's conversion claim.

It is undisputed that, under Dutch law, E100 was the Firm's exclusive

[13] *See also Golem v. Fahey*, 191 Cal. App. 2d 474, 477 (1961) (party that "failed to rescind" voidable contract "within a reasonable time thereafter and failed to comply with any of the provisions of Civil Code § 1691 … cannot now seek relief"); *Neet v. Holmes*, 25 Cal. 2d 447, 458 (1944) ("Waiver of a right to rescind will be presumed against a party who, having full knowledge of the circumstances which would warrant him in rescinding, nevertheless accepts and retains benefits accruing to him under the contract."); *Toomey*, 13 Cal.2d at 320 (enforcing contract secured by threats of violence that plaintiff waited 10 years to avoid); Cal. Civ. Code § 1693.

[14] The parties in that case did not dispute that Rhode Island law applied and the Court did "not engage in an extensive choice of law analysis." *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 305 (D.R.I. 2007).

recourse to annul the Göring transaction and reclaim the Göring artworks; claims under ordinary Dutch civil law could not be brought. DSGD ¶ 231. Under E100, and following the CORVO decision, the Göring transaction was voidable rather than void: it remained effective unless and until the Firm obtained an order from the Council annulling it and returned to the State any consideration received. After the July 1, 1951 deadline, the Firm had no right to annul the transaction and have its rights restored. DSGD ¶ 216. As the decision of the Court of Appeal in The Hague makes clear, the Göring sale can no longer be annulled under E100 and the Firm's rights in the Cranachs have not been and cannot be restored as a matter of Dutch law. DSGD ¶ 407.

California law is in accord. Forced sales are voidable, not void. *Yvanova*, 365 P.3d 845; *Cornelius Cole*, 9 Cal. App. 2d at 578; Cal. Civ. Code § 1566. "A voidable act takes its full and proper legal effect unless and until it is disputed and set aside by some tribunal entitled so to do." *Depner v. Joseph Zukin Blouses*, 13 Cal. App. 2d 124, 127 (1936). And a party must "promptly" rescind a voidable sale, restoring to the other party "everything of value which he has received from him under the contract." Cal. Civ. Code § 1691. *See also Le Gault v. Erickson*, 70 Cal. App. 4th 369, 374 (1999); *Toomey v. Toomey*, 13 Cal. 2d 317, 320 (1939).

These black-letter principles are fatal to Plaintiff's wholly derivative conversion claim: the Norton Simon cannot be liable for conversion based on a sale that the law treats as effective. *See Evarts v. Beaton*, 113 Vt. 151 (1943). In *Evarts*, the plaintiff agreed to buy Jersey and Guernsey cows that the defendant claimed to own. The plaintiff paid with a note and the defendant delivered the Jerseys but never delivered the Guernseys because he did not own them. Seven years later, the plaintiff sued the defendant for converting the bank note on the ground that "he had obtained this money by fraud." *Id.* at 153. The court held there was no conversion because it was "obvious that rescission was a necessary condition precedent to the bringing of this [conversion] action." *Id.* at 154. As under E100 and California law,

"this right of rescission must be exercised within a reasonable time after the discovery of the fraud" and "could only be exercised by restoring or offering to restore what they had received under the contract, i.e., the six Jersey cows." *Id.* Since the plaintiff had failed to do so, he had no action in conversion. Just so here.

3. California Law Does Not Recognize a Conversion Claim Based on the Plaintiff's Theft

Plaintiff also cannot prove her *prima facie* case because California law will not recognize a claim for conversion or replevin premised on unlawful conduct. *See Wong v. Tenneco, Inc.*, 39 Cal. 3d 126, 134 (1985); *Suttori v. Peckham*, 48 Cal. App. 88, 91 (1920); *Lee On v. Long*, 37 Cal. 2d 499, 502-503 (1951).

Plaintiff admits that the Soviets confiscated the Cranachs from Trinity Church in Kiev as part of "a campaign of closing and liquidating churches and monasteries, during which representatives of museums confiscated artistic valuables from the churches and monasteries…." DSGD ¶ 306. She relies on an article stating that the "commissioner for the requisitioning valuable arts from churches" took the Cranachs "without any of the formalities usual in these circumstances." DSGD ¶ 307. The undisputed facts show that this seizure was part of the Bolsheviks' systematic effort to destroy religious institutions and loot them of their property, imprisoning and slaughtering clergy. DSGD ¶ 308. That campaign extended to the Ukraine, where, among other things, the Soviets converted a monastery into an anti-religious museum where the Cranachs were displayed. DSGD ¶ 432.

The only logical inference from the undisputed facts is that Jacques Goudstikker, one of Europe's leading art dealers, knew of the Cranachs' unlawful origins. DSGD ¶ 317. The Dutch press reported extensively on "radical confiscations" of church property. DSGD ¶ 318. His own mentor wrote in 1925 that "[w]e need hardly tell our readers that the Bolshevist war against the ancient Russian religion is increasing in its intensity." DSGD ¶ 433. And in 1931, just months after the Lepke auction, referring to artwork sold by the Soviet Union, he

told a Dutch magazine that "financial and political catastrophes sometimes give opportunity" to acquire "previously unattainable" works. DSGD ¶ 319.

Indeed, the circumstances of the 1931 Lepke auction clearly indicated that the Soviets were selling stolen property. Lepke's first auction of artwork for the Soviets in November 1928 provoked numerous lawsuits by émigré aristocrats, as well as an international media firestorm that made the front page of *The New York Times*. DSGD ¶ 311. Presaging Jacques Goudstikker's comments, the Dutch newspaper *De Telegraaf* reported that "w[h]en an old work of art suddenly appears on the market, the underlying history is often a tragic one" and asked whether the 1928 auction "also hid[] a string of tragedies"? DSGD ¶ 310. And the Stroganoff family's protest letter was read at the auction. DSGD ¶¶ 316, 322. At a minimum, this evidence creates a triable issue about whether Jacques Goudstikker unlawfully bought the Cranachs knowing they were stolen.

4. Plaintiff's Title is Defective

Plaintiff's title also is defective. Plaintiff assumes that German law applies to the 1931 sale, but fails to offer any reasoned argument on that score. *Frontier Oil Corp.*, 153 Cal. App. 4th at 1465. This makes California law controlling, and a thief cannot acquire title to stolen property in California. Dkt. 119 at 8-9. [15]

Even if German law applied, the Firm did not acquire title because the Soviet confiscation violated German public policy. Plaintiff's expert, Kurt Siehr, concedes that German courts would recognize Soviet title to confiscated property only if consistent with German public policy. DSGD ¶ 348. Siehr's own writings explain that the West Berlin Court of Appeal has refused to recognize tax officials' confiscation of an antique clock for resale in West Germany to raise foreign currency for imports because doing so would contravene property rights recognized

[15] Alternatively, the Netherlands has a strong interest in the validity of the sale to a Dutch art dealership. It is undisputed that law would not recognize a Soviet confiscation without compensation. DSGD ¶ 356.

in the Basic Law, Germany's constitution. DSGD ¶ 349.[16] The same result follows *a fortiori* where the Soviet Union confiscated the Cranachs from a church in Kiev and sold them abroad to fund arms imports. DSGD ¶ 351. Giving effect to that seizure would violate the express "guarantee[]" for "[p]roperty rights and other rights of religious societies" in the German Constitution in effect in 1931. DSGD ¶ 352. Professor Siehr disagrees based on three decisions regarding Soviet auctions by German courts of first instance in the 1920s. DSGD ¶ 353. But Siehr did not consider the later decision of the Court of Appeal discussed in his writings. DSGD ¶ 354. Nor did Siehr consider any post-war treatises that cast doubt on his views, despite acknowledging these sources' importance in German law. DSGD ¶ 355.

Plaintiff also argues that the act of state doctrine requires the conclusion that the Soviet Union passed title to Jacques at the 1931 auction. Pl.'s Mot. 16. This Court should not even reach that issue because the Dutch State's good title and its own sovereign acts, among other things, dispose of this case. If, as Plaintiff urges, the act of state doctrine does not apply to the Dutch State's *bona fide* restitution proceedings, the doctrine surely must not apply to Soviet expropriation.

G. The Norton Simon, Not Plaintiff, is Entitled to Summary Judgment on the Section 496 Claim

Plaintiff contends that the Norton Simon is liable under Penal Code § 496(c) for nearly half a billion dollars in damages because it has withheld the Cranachs from her. Pl.'s Mot. 10. In fact, the undisputed evidence shows that Plaintiff cannot meet her burden and the Norton Simon is entitled to judgment as a matter of law.

1. Plaintiff Does Not Own the Cranachs

As a threshold matter, as Plaintiff acknowledges, she must own the Cranachs to prevail on her § 496 claim. Pl.'s Mot. 10-11 (defendant violates § 496 by

[16] The Federal Constitutional Court reversed on the separate ground that the seizure of the clock to satisfy a tax lien was not an expropriation. DSGD ¶ 349. It did not disturb the Court of Appeal's reasoning on the recognition issue relevant here.

withholding stolen property "from the owner"); *Finton Constr.*, 238 Cal. App. 4th at 213. Because Plaintiff cannot establish the threshold element of ownership for the myriad reasons set forth above and in the Norton Simon's own motion, the Court should deny her request for summary judgment on her § 496 claim.

2. The Cranachs Are No Longer Stolen Property

Even if Plaintiff could establish that she owns the Cranachs, she cannot establish that the paintings remain "stolen" property within the meaning of § 496. The statute applies to "property that has been stolen or that has been obtained in any manner constituting theft or extortion." Penal Code § 496(a). Because the Firm's words and conduct ratified the Göring sale, that sale became legally effective (*see supra* Part III.F.1), and cannot not qualify as "theft or extortion" under § 496.

Plaintiff's § 496 claim is barred also because it is fundamentally inconsistent with her theory of ownership. Her theory is that the Dutch government acted as a perpetual "custodian for the rightful owner" and was charged with a duty to return restituted property to its former owner even when that former owner declined to request such relief. Pl.'s Mot. 18, 20-21. If Plaintiff is right about this, her § 496 claim is necessarily barred by the recovery doctrine. Once the authorities recover stolen property, such property "no longer has the status of stolen goods" because it is held "in trust for, or for the account of, the owner." *People v. Rojas*, 55 Cal. 2d 252, 257-58 (1961); *Felker v. Arkansas*, 492 S.W.2d 442, 446 (Ark. 1973); *United States v. Cawley*, 255 F.2d 338, 339 (3d Cir. 1958).

Relying on *Wally*, 663 F. Supp. 2d 232, Plaintiff contends that the recovery doctrine does not apply here because the *Allied forces* that recovered property in Germany were not acting as agents for the true owners. Pl.'s Mot. 10. By focusing only on the role the *Allies* played, Plaintiff fails entirely to address the role of the *Dutch government,* which she herself contends held restituted artworks, "including the Goring works, in custody for the pre-War owners." DSGD ¶¶ 76, 98. *Wally* also is distinguishable because it involved restitution in Austria, which "held a

unique position" as "both a victim and a victimizer." DSGD ¶ 393. "[M]any" Austrian restitution officials "had served in the German Reich," and Austrian control over restitution "impeded the return of assets to victims." DSGD ¶¶ 394-395. By contrast, Plaintiff's expert has "no doubt whatsoever" that Dutch government officials "acted in good faith." DSGD ¶ 391. And another of her experts agreed that the Dutch government did not administer E100 in an anti-Semitic way. DSGD ¶ 392.

Plaintiff contends that the doctrine is limited to "sting" cases in which the authorities recover property and then allow the property to be sold to a target of their investigation. Pl.'s Mot. 11. But nothing in these cases turns on the identity of the authorities' buyer. Rather, the cases turn on whether the property could be considered stolen after it the authorities had recovered it. *See Rojas*, 55 Cal. 2d at 258; *Cawley*, 255 F.2d at 340 ("The only question for resolution by this court is whether at the time defendant purchased the goods they had lost their character as stolen goods by reason of their previous recovery by the postal inspectors.").

If, on the other hand, Plaintiff is *wrong* about her theory of ownership and the Dutch government instead became the owner of the Cranachs, then her claim is still barred by the recovery doctrine. *Wally*, 663 F. Supp. 2d at 259 (recovery doctrine applies when owner recovers goods).[17]

3. Plaintiff Cannot Satisfy the Knowledge Element of § 496

Even if the Cranachs were stolen property, the undisputed facts do not establish that the Norton Simon knew it. Plaintiff appears to contend that the Norton Simon gained "knowledge" that the Cranachs were stolen when she demanded their return. But when the ownership of the property is in genuine dispute and is being actively litigated, a defendant cannot be charged with

[17] In addition, Plaintiff's § 496 claim would be barred because the Norton Simon would not have "withheld" the Cranachs from their true owner (*see supra*, Part III.G..1).

"knowingly" withholding or receiving stolen property under § 496. *See Finton Constr., Inc.*, 238 Cal. App. 4th at 213. At a minimum, as demonstrated by this opposition and the Norton Simon's own motion, the Norton Simon has a reasonable belief that it is the true owner of the Cranachs and that the Cranachs ceased to be stolen property. As such, Plaintiff cannot demonstrate that the Norton Simon "knows" the Cranachs are stolen and the Norton Simon, not Plaintiff, is entitled to summary judgment on her § 496 claim.

H. The Norton Simon's Unclean Hands Defenses Are Viable

Plaintiff also is not entitled to summary judgment because the Norton Simon's unclean hands defense remains viable. *See Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612, 620 (1992) (unclean hands is defense to conversion). "Whether the doctrine of unclean hands applies is a question of fact." *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970, 978 (1999). Plaintiff has testified that it is "immoral" not to return "every looted painting." DSGD ¶ 347. Yet Plaintiff finds it "distasteful" for the Norton Simon to raise questions about her and her predecessor's own conduct related to this case. Pl.'s Mot 56.

The unclean hands doctrine was tailor-made for this double standard. "The 'clean hands' rule is of ancient origin" and "is the most important rule affecting the administration of justice." *In re Marriage of Boswell*, 225 Cal. App. 4th 1172, 1175 (2014). Unclean hands is "an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of his claim. It is available to protect the court from having its powers used to bring about an inequitable result in the litigation before it." *Kendall-Jackson Winery, Ltd.*, 76 Cal. App. 4th at 985.

Plaintiff intimates that unclean hands requires some independent showing of "prejudice." Pl.'s Mot. 57. But a "plaintiff's misconduct" is of "a prejudicial nature" for purposes of unclean hands when "it would be unfair to grant h[er] the relief [s]he seeks in court." *Bank of Am., N.A. v. Roberts*, 217 Cal. App. 4th 1386,

1400 (2013). The limitation is that the plaintiff's misconduct "must relate directly to the cause at issue." *Kendall-Jackson Winery, Ltd.*, 76 Cal. App. 4th at 979.

1. Plaintiff's Claims Depend on Soviet Looting

Plaintiff appears with unclean hands because she asserts that the Nazis' forced sale deprives the Norton Simon of title while resting her own title on Soviet looting that she has called "horrible" and "wrong." DSGD ¶ 434. Plaintiff insists that the "wrongful" and "tragic" Soviet confiscations are "irrelevant." Pl.'s Mot. 58. But she herself argues that "by ignoring the fact that they were acquiring stolen property, Defendants have unclean hands…." Pl.'s Mot. 47.

The evidence summarized above shows that Plaintiff is wrong that the Norton Simon has "proffered no evidence that Jacques" Goudstikker knew that the Cranachs were stolen. Pl.'s Mot. 57; *supra* at 52-53. The Dutch press extensively reported on the Soviets' confiscations of church treasures and his own interview just months after the auction shows that he knew how the Soviets got the art they were selling. DSGD ¶ 319. Goudstikker clearly had no compunction about buying stolen property: Jacques purchased works that Plaintiff admits were from the Stroganoff family collection, DSGD ¶ 67, despite obvious signs that the Soviets had seized the family's property. Plaintiff accepted two of these works from the Dutch government in 2006. *Id*. Rather than return them to the Stroganoff family, Plaintiff toured them in an exhibition entitled, "Reclaimed: Paintings from the Collection of *Jacques Goudstikker*." DSGD ¶ 357. Apparently this was an exception to Plaintiff's rule that "every looted painting should be returned." DSGD ¶ 347.

Finally, the act of state doctrine underscores rather than absolves Plaintiff's (Pl.'s Mot. 57-58) inequitable position. Plaintiff cannot fairly cry foul over a Dutch expropriation that took away the Firm's property after the Firm declined to use the available claims process when the Firm obtained the property through a Soviet expropriation carried out with machine guns.

2. Plaintiff Participated in the Destruction of Documents

Plaintiff also appears with unclean hands because she participated in the destruction of papers kept by Desi Goudstikker, a key participant in relevant events. *See Hynix Semiconductor Inc. v. Rambus, Inc.*, 591 F. Supp. 2d 1038, 1060 (N.D. Cal. 2006), *vacated on other grounds by* 645 F.3d 1336 (Fed. Cir. 2011). Plaintiff tries to parse her testimony into an absence of any clear admission that she did the burning. Pl.'s Mot. 58-59. Far more telling is that Plaintiff has not denied this document destruction in her sworn declaration supporting her motion. DSGD ¶ 358.

Plaintiff's assurance that she "has no knowledge of what the documents contained" (Pl.'s Mot. 58) is, of course, precisely the point. Once "spoliation is shown, the burden of proof logically shifts to the guilty party to show that no prejudice resulted from the spoliation. The reason is that it is in a much better position to show what was destroyed and should not be able to benefit from its wrongdoing." *Hynix Semiconductor Inc.*, 591 F. Supp. 2d at 1060. Plaintiff cannot sustain this burden with her speculation that the burned papers could not have been relevant because Desi donated other records to Dutch archives. Pl.'s Mot. 59. Desi's surviving statements suggest she agreed with the Norton Simon that the Firm had no rights to the Cranachs after the 1950s proceedings. DSGD ¶ 359.

3. Plaintiff Misrepresented Her Family's Past

Plaintiff also appears with unclean hands because she concealed her family's past. Plaintiff denigrates this defense as irrelevant (Pl.'s Mot. 60), but, as recorded in a 1998 book by her paid consultant, Pieter den Hollander, she recognized that her family's past is relevant to claims arising out of the Nazi occupation of the Netherlands (DSGD ¶¶ 360, 368):

> In a way, it's ironic. Here I am, a German national in America, widow of a Dutch citizen, with a claim against the State of the Netherlands …. If I think about what my people did to the Dutch during the war, I feel very guilty. Even though my family did not actively participate in the war, as far as I know.

The truth, however, is that Plaintiff's father, by his own statement, joined the Nazi party in 1935. DSGD ¶¶ 361-362. That was hardly common; even at the end of World War II, only 10 percent of Germans were party members. DSGD ¶ 363. After fighting at Stalingrad, Plaintiff's father applied for a job at the Reich Ministry of Enlightenment and Propaganda run by Joseph Goebbels, submitting a sworn declaration of pure Aryan blood under the Nuremberg Laws. DSGD ¶¶ 364-365.

Plaintiff's claim that she did not know any of this is not credible. Plaintiff did know that her father played for Nazi Germany's national soccer team in the 1930s, which he cited as a credential in his job application. DSGD ¶ 453. And Plaintiff's representation that her "family did not actively participate in the war" was removed from the version of den Hollander's book published in 2007, after the 2006 Restitutions Committee proceeding and Plaintiff filed this case.[18] DSGD ¶ 370. The Norton Simon's researcher located proof of Plaintiff's father's Nazi past using only his name and birth date. DSGD ¶ 366.

The truth matters. Plaintiff herself acknowledged its relevance. DSGD ¶ 360. And her expert, Gerard Aalders, who spent many years trying to prove that a Dutch royal was a member of the Nazi party, testified that Nazi party membership could be "very, very, very bad" for a person's image in the Dutch public and concealing it would be "really shocking." DSGD ¶ 371. Plaintiff cannot seriously deny that her father's Nazi past would have been relevant to the Dutch government's 2006 moral, policy determination of whether to return paintings in its national collection *ex gratis* because of their connection to a forced sale by Hermann Göring. DSGD ¶ 412. Having misrepresented the truth on that issue, equity does not permit Plaintiff to rely on the 2006 proceedings.

IV. CONCLUSION

Plaintiff's motion for summary judgment should be denied.

[18] Plaintiff maintained a close relationship with Den Hollander for years, and discussed asking Steven Spielberg to make a film about her life. DSGD ¶ 369.

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