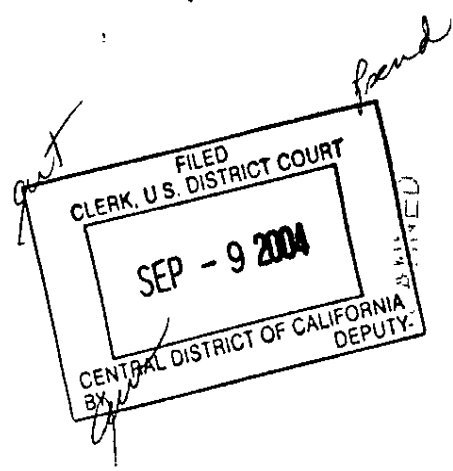
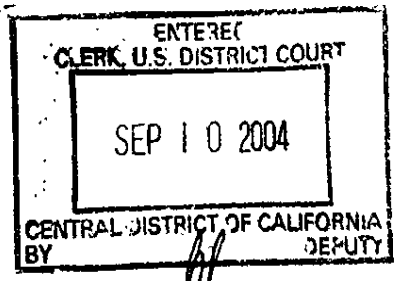


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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MARIA V. ALTMANN,
Plaintiff,

CV 00-8913 FMC (AIJx)

vs.

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS**

REPUBLIC OF AUSTRIA, et al.
Defendants.

This matter is before the Court on the Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b) for lack jurisdiction over the subject matter and over the person under the doctrine of sovereign immunity and pursuant to the Foreign Sovereign Immunities Act ("FSIA") (docket #73). The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for September 13, 2004, is removed from the Court's calendar. For the reasons set forth below, the Court denies the Motion. The alternative Motion for Reconsideration is also denied.

1 **I. Background**

2 The factual background and the procedural history of this action are
3 well known to the Court and to the parties. For that reason, they are only
4 briefly summarized here. SIGNED

5 The present dispute centers on ownership rights to six paintings that
6 are currently in the possession of the Republic of Austria (“the Republic”)
7 and/or the Austrian Gallery (“the Gallery”). Plaintiff seeks recovery of these
8 paintings that were owned by her family before they were stolen by the Nazis
9 in the early 1940s in Austria.

10 The present Motion requires the Court to determine whether Plaintiff’s
11 claim under the expropriation exception to the FSIA may proceed, or whether
12 it must be dismissed. Ultimately, the Court concludes that the claim may
13 proceed.

14 **II. Jurisdiction Pursuant to the Foreign Sovereign Immunities Act**

15 As noted in a previous order of this Court, jurisdiction over Defendants
16 must be based on the FSIA. The FSIA is the sole basis for jurisdiction over a
17 foreign state and its agencies and instrumentalities. *Argentine Republic v.*
18 *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683 (1989). Under
19 the FSIA, foreign states are presumed to be immune from the jurisdiction of
20 the United States courts unless one of the FSIA’s exceptions applies. 28
21 U.S.C. § 1604.

22 At issue in the present Motion is the expropriation exception to the
23 FSIA:

- 24 (a) A foreign state shall not be immune from the jurisdiction of
25 courts of the United States or of the States in any case . . . (3) in
26 which rights in property taken in violation of international law
are in issue and that property or any property exchanged for such

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1 property is present in the United States in connection with a
2 commercial activity carried on in the United States by the foreign
3 state; or that property or any property exchanged for such
4 property is owned or operated by an agency or instrumentality of
5 the foreign state and that agency or instrumentality is engaged in
6 a commercial activity in the United States

7 28 U.S.C. § 1605(a)(3).

8 **III. Procedural History**

9 This case has been remanded to this Court after appeal to the Ninth
10 Circuit and review by the United States Supreme Court. *See Altmann v.*
11 *Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001); *Altmann v. Republic*
12 *of Austria*, 317 F.3d 954 (9th Cir. 2002); *Republic of Austria v. Altmann*, 124 S.
13 Ct. 2240 (2004).

14 **A. The District Court Opinion**

15 On May 4, 2001, this Court issued an order discussing whether
16 Plaintiff's expropriation exception claim could be maintained under the FSIA.
17 Concluding that Plaintiff could maintain her claim, the Court denied
18 Austria's Motion to Dismiss.

19 The district court order noted that there are three distinct requirements
20 of the expropriation exception: "First, there must be property taken in
21 violation of international law . . . Second, the property must be owned or
22 operated by an agency of or instrumentality of a foreign state Finally, the
23 agency or instrumentality must be engaged in commercial activity in the
24 United States." 142 F. Supp. 2d at 1202 (internal quotation marks omitted).

1 In examining the first requirement,¹ this Court noted that in order to be
2 a *valid* taking, three elements must be met: “First, the taking must serve a
3 public purpose; second, aliens must not be discriminated against or singled
4 out for regulation by the state; and third, payment of just compensation must
5 be made.” *Id.*

6 This Court then went on to examine the taking alleged by Plaintiff, and
7 found that none of the three requirements necessary to make the taking valid
8 had been met. *Id.* at 1202-03. Based on its discussion, the district court
9 concluded that Plaintiff “made out a substantial and non-frivolous claim that
10 these works of art were taken in violation of international law.” *Id.* at 1203.

11 The Court then examined an argument made by Austria. *Id.* Austria
12 argued that Plaintiff was required to exhaust her domestic remedies — the
13 remedies available to her in Austria — before filing suit in this forum. *Id.*
14 The Court agreed, but held that Plaintiff’s compliance with this requirement
15 was excused because the domestic remedies were inadequate. *Id.* at 1203,
16 1209-10.

17 **B. The Ninth Circuit Opinion**

18 Austria filed an appeal of the district court’s order. The Ninth Circuit
19 also examined whether Plaintiff stated a substantial and nonfrivolous claim
20 under the expropriation exception. 317 F.3d at 968. The Ninth Circuit
21 examined the same three elements as did the district court: public purpose;
22 discrimination of aliens; just compensation. *Id.* Examining these three
23 elements, the Ninth Circuit concluded that Plaintiff’s allegations stated a
24 claim under the expropriation exception. *Id.* The Ninth Circuit
25 unequivocally stated: “The facts of record . . . show that the Klimt paintings

26 ¹ The other two requirements are not at issue in the present Motion.

1 have been wrongfully and discriminatorily appropriated in violation of
2 international law.” *Id.*

3 The Ninth Circuit did not, in connection with the expropriation
4 exception, consider Austria’s argument regarding the exhaustion of remedies.
5 *Id.* at 967-68. Elsewhere, in a discussion of the district court’s holding
6 regarding the *forum non conveniens* issue, the Ninth Circuit held that, contrary
7 to the district court’s holding, Austria was not an inadequate forum. *Id.* at
8 973.

9 C. The Supreme Court Decision

10 The Supreme Court granted certiorari, and affirmed the district court’s
11 decision in a 6-3 decision. 124 S. Ct. 2240. The Supreme Court did not
12 consider the issue of whether Plaintiff’s allegations stated a claim under the
13 expropriation exception of the FSIA.²

14
15 _____
16 ² The Supreme Court’s review was limited to Question 1 as set forth in the Petition for
17 Certiorari. *Republic of Austria v. Altmann*, 124 S.Ct. 46 (Mem)(2003). Question 1 presented the
18 following issue:

19 1. Does the expropriation exception of the Foreign Sovereign Immunities
20 Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), afford jurisdiction over claims
21 against foreign states based on conduct that occurred before the United States
22 adopted the restrictive theory of sovereign immunity in 1952?

23 Pet. for Writ of Cert., 2003 WL 22428418 (June 27, 2003). The Supreme Court declined to hear
24 the issue presented in Question 2:

25 2. Can jurisdiction over a foreign state or its agency or instrumentality
26 be asserted under the FSIA's expropriation exception when due process
minimum contacts requirements have not been met, *there has been no violation
of international law because the claimant failed to exhaust her legal remedies
in the foreign state*, and the activity that is the basis for jurisdiction is the
limited, non-commercial promotion of a not-for-profit national museum?

Id. (emphasis added).

1 open by an appellate court, it must be brought before the district court to
2 decide. Defendants cite *Hughes Aircraft* in support of this proposition. In
3 *Hughes Aircraft*, an earlier Ninth Circuit decision in the same case decided the
4 question of whether jurisdiction was proper under 31 U.S.C. § 3730(e)(4)(A)
5 (False Claims Act), but did not explicitly or implicitly decide whether
6 jurisdiction was proper under another subsection, § 3730(b)(5). *Hughes*
7 *Aircraft*, 243 F.3d at 1186. The present case is distinguishable. Here, the
8 Ninth Circuit held that Plaintiff's allegations were sufficient to assert her
9 claim pursuant to the expropriation exception to the FSIA, 28 U.S.C. §
10 1605(a)(3). With the present Motion, Defendants ask the Court dismiss the
11 very same expropriation exception claim — not a different subsection or
12 different statute — that the Ninth Circuit held to be sufficient.

13 Neither Justice Breyer's concurring opinion in *Altmann*, nor other
14 recent Supreme Court authority cited by Defendants, persuades the Court that
15 a contrary result should be reached.

16 Justice Breyer's concurring opinion is mere dictum. As noted above,
17 the Supreme Court explicitly declined to consider the question regarding
18 exhaustion of remedies. Even if the opinion were not dictum on an issue the
19 Court refused to consider, it is not the opinion of the Court, and it is therefore
20 not binding.

21 Defendants also rely on *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).
22 In *Sosa*, the Court considered whether the plaintiff's claim fell within the
23 "foreign country" exception to the Federal Tort Claims Act. In its discussion,
24 the Court suggested that it would one day consider the issue of whether a
25 plaintiff must exhaust her domestic and, possibly, international remedies,
26 before filing an action in a foreign state:

For example, the European Commission argues as amicus curiae
that basic principles of international law require that before

1 asserting a claim in a foreign forum, the claimant must have
2 exhausted any remedies available in the domestic legal system,
3 and perhaps in other fora such as international claims tribunals.

4 . . . We would certainly consider this requirement in an
5 appropriate case.

6 *Id.* at 2766 n.21. This passage cannot be read as the pronouncement of the
7 Supreme Court that the requirement of exhaustion of remedies is to be
8 imposed on plaintiff asserting a claim pursuant to the FSIA's expropriation
9 exception. To the contrary, the Supreme Court merely notes that it would
10 consider such an argument in an appropriate case.

11 The Motion to Dismiss is denied.

12 **V. Alternative Motion**

13 Alternatively, Defendants move for reconsideration pursuant to the
14 Court's Local Rule 7-18. Defendants correctly note that reconsideration is
15 appropriate where "the emergence of new material facts or a change in law
16 occur[s] after the Court has rendered its decision." *Id.* However, for the same
17 reasons the Court has denied the Motion to Dismiss, the Court denies the
18 Motion for Reconsideration as well.

19 **VI. Objections to Evidence**

20 Defendants object to much of the Schoenberg Declaration. The Court
21 has not considered the Declaration, and therefore does not rule on the
22 objections thereto.

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VII. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss is **DENIED.**

DATED: September 8, 2004

Florence Marie Cooper
FLORENCE-MARIE COOPER, Judge
United States District Court

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