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From: Kapla, Robert
Sent: Tuesday, January 5, 2021 5:34 PM
Subject: Select filings from US lawsuits

Attached are select documents from the lawsuits filed in the US District Courts for the District of Columbia and the Southern District of Florida:

1. **Defendant Republic of Angola's Memorandum of Points and Authorities in Support of Motion to Dismiss (Dec. 2018)**. In Argument II, starting at page 19, the defendant argues why Angola, not DC, is the adequate forum for the dispute.

2. **Declaration in Support of the Republic of Angola's Motion to Dismiss the Complaint (Dec. 2018)**. In this declaration, filed in support of the Defendant's Motion immediately above, the Deputy Attorney General of Angola describes the scope and status of affiliated legal proceedings in Angola.

3. **Memorandum of Opinion from the Chief Judge of the DC District Court dismissing the lawsuit with prejudice (July 2019)**. In his decision, the Judge found the plaintiff failed to prove it owned the assets alleged to have been expropriated, did not demonstrate the alleged property was taken in violation of international law, failed to prove the conduct alleged was attributable to the Republic of Angola, and did not prove the US court had jurisdiction over the Republic of Angola.

4. **Report and Recommendations on Defendant's [Angola's] Motion to Dismiss (Aug. 2020)**. The District Judge in the second lawsuit (filed in the US District Court for the Southern District of Florida) referred Angola's motion to dismiss to the Magistrate Judge assigned to the case for a report and recommendations. In that report and recommendations, the Magistrate Judge recommended the District Court Judge grant Angola's motion to dismiss for lack of jurisdiction. This case is fully briefed and awaits a decision by the District Court Judge.

The third lawsuit, also filed in the Southern District of Florida, was stayed (i.e., suspended) in November 2020 pending the District Court's decision in the second case, noted immediately above.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AFRICA GROWTH CORPORATION, Plaintiff, v. REPUBLIC OF ANGOLA, *et al.*, Defendants.	Civil Action No. 17-2469 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION

The plaintiff, Africa Growth Corporation ("AFGC"), a U.S.-based, publicly-listed corporation which, through its subsidiaries, builds and manages apartments in Angola's capital city, Luanda, instituted this suit against three Angolan government officials and the Republic of Angola to recover damages for an alleged series of brazen fraudulent actions culminating in the outright seizure and occupation of AFGC's properties by the three individual defendants: Angolan Army General António Francisco Andrade ("General Andrade"), his son, Angolan Army Captain Miguel Kenehele Andrade ("Captain Andrade"), and daughter, Angolan State Prosecutor Natasha Andrade Santos ("Prosecutor Andrade") (collectively, "Andrade Defendants").[1] Angola has filed a Motion to Dismiss, ECF No. 42, for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), arguing that it is immune from suit pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*[2] AFGC

[1] AFGC initially sought to bring claims against two additional individuals, Francisco Higino Lopes Carneiro and João Maria de Sousa, but claims as to these individuals were voluntarily dismissed. *See* Pl.'s Response to Order to Show Cause at 7, ECF No. 41 (requesting dismissal); Minute Order (Jan. 8, 2019).

[2] Angola also argues that dismissal is proper under the doctrine of *forum non conveniens*, for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), and by application of the act of state doctrine, but these additional bases for dismissal are not addressed since the case is resolved on alternative jurisdictional grounds. *See Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) ("In order to preserve the full scope of [sovereign] immunity, the district court must make the 'critical preliminary determination' of its own jurisdiction as

subsequently filed a Motion for Voluntary Dismissal Without Prejudice ("Mot. Vol. Dismissal"), ECF No. 67, to dismiss only the claims against Angola, claiming that Angola and AFGC had "negotiated and freely entered into a settlement of all claims," *id.* at 1, for alleged breach of which AFGC has brought a separate action against Angola in the Southern District of Florida, *see* Mot. Vol. Dismissal, Ex. A, Complaint, *Africa Growth Corporation v. Republic of Angola*, Case No. 1:19-cv-21995-KMW (S.D. Fla. May 16, 2019), ECF No. 67-2. For the reasons set forth below, Angola's motion to dismiss for lack of subject matter jurisdiction is granted, and AFGC's motion for voluntary dismissal without prejudice is denied as moot.[3]

I. BACKGROUND

The factual allegations central to this case were outlined in the Court's Memorandum Opinion denying the plaintiff's Motion for Default Judgment, ECF No. 23, and granting Angola's Motion to Set Aside Default, ECF No. 28, *see Africa Growth Corporation v. Republic of Angola* (*AFGC I*), No. 17-cv-2469 (BAH), 2018 WL 6329453 (D.D.C. Dec. 3, 2018), and thus is only briefly summarized here.

AFGC operates in Angola through a series of subsidiaries incorporated in countries other than the United States.[4] The Angolan apartment buildings named Isha 1, Isha 2, Isha 2.5, and

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early in the litigation as possible; to defer the question is to 'frustrate the significance and benefit of entitlement to immunity from suit.'" (quoting *Foremost-McKesson v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990))); *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) ("[T]he act of state doctrine . . . should not be reached if this case is in fact beyond the proper jurisdiction of [the] Court by reason of the FSIA.").

[3] AFGC's Opposition to Angola's Motion to Dismiss "respectfully asks that the Court consider ordering limited jurisdictional discovery vis-à-vis AFGC and Angola for the purpose of further verifying and establishing allegations through proof, which shall enable the Court to make its determination regarding the exceptions to sovereign immunity and resulting jurisdiction under the FSIA." Pl.'s Opp'n Def.'s Mot. Dismiss ("Pl.'s Opp'n") at 32, ECF No. 44. Jurisdictional discovery in this context is appropriate "'only to verify allegations of specific facts crucial to an immunity determination.'" *Nyambal v. IMF*, 772 F.3d 277, 281 (D.C. Cir. 2014) (quoting *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998)). Here, however, "even assuming that [Angola] engaged in all of the conduct alleged in the complaint, the [FSIA exceptions] would not apply," *Mwani v. Bin Laden*, 417 F.3d 1, 17 (D.C. Cir. 2005), rendering the requested opportunity for discovery futile.

[4] AFGC owns the Bermuda company Africa International Capital Ltd. ("AIC"), which in turn owns the British Virgin Islands company, ADV Holding Ltd. ("ADV"), which in turn owns the Angolan company AGPV

Pina, Compl. ¶¶ 27–29, ECF No. 1, allegedly seized by the Andrade Defendants, are owned and operated by AFGC's Angolan subsidiaries, *see AFGC I*, 2018 WL 6329453, at *1. Allegedly, "[u]nder color of his official position within the Angolan government," Compl. ¶ 41, the individual defendant General Andrade used both threats of violence, *id.* ¶¶ 41–45, and fraudulent Powers of Attorney, *id.* ¶ 35, to appoint himself as the director and General Manager of AFGC's three Angolan subsidiaries, AGPV, Illico, and Maximilio, in August 2017, *id.* ¶ 49. The individual defendant Prosecutor Andrade allegedly used her official position as a prosecutor to bring "a patently frivolous, false, baseless, and abusive criminal claim against various AFGC representatives," *id.* ¶ 62, "stat[ed] that she would have [an AFGC representative] killed," *id.* ¶ 63, and "facilitated the fraudulent transfer of the surface rights to [AFGC's properties] into her own name by personally appearing at the Angolan Property Registry and ordering that the change be made by and through a transfer of title," *id.* ¶ 97. The defendant Captain Andrade allegedly "threatened the safety of" AFGC's accountants in Angola, *id.* ¶ 108, instructing them "to send all the corporate records" to the Andrade Defendants' "personal accountant," *id.* ¶ 106, and "sent a false and defamatory complaint against AFGC to the Chairman of the SEC," *id.* ¶¶ 67–68, "aimed at discrediting and undermining AFGC and its shareholders with respect to its investment in Angola," *id.* ¶ 146(b). Thus, with limited exception, all of the conduct alleged in the complaint took place in Angola, all of the individual defendants are Angolan nationals residing in Angola, and all of the disputed property is located in Angola.

Lda. ("AGPV"), which is the parent company of two other Angolan companies, Illico Lda. ("Illico") and Maximilio Lda. ("Maximilio"). Pl.'s Opp'n at 3 n.3.

II. LEGAL STANDARD

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of demonstrating the court's subject matter jurisdiction over his claim. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). "'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Indeed, federal courts are "forbidden . . . from acting beyond our authority," *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008), and, therefore, have "an affirmative obligation 'to consider whether the constitutional and statutory authority exist for us to hear each dispute,'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (quoting *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 196 (D.C. Cir. 1992)). Absent subject matter jurisdiction over a case, the court must dismiss it. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506–07 (2006); FED. R. CIV. P. 12(h)(3).

When considering a motion to dismiss under Rule 12(b)(1), the court must accept as true all uncontroverted material factual allegations contained in the complaint and "'construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged' and upon such facts determine jurisdictional questions." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)). The court need not accept inferences drawn by the plaintiff, however, if those inferences are unsupported by facts alleged in the complaint or amount merely to legal conclusions. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

In evaluating subject matter jurisdiction, the court, when necessary, may "undertake an independent investigation to assure itself of its own subject matter jurisdiction," *Settles v. U.S.*

Parole Comm'n, 429 F.3d 1098, 1107 (D.C. Cir. 2005) (quoting *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987)), and consider "facts developed in the record beyond the complaint," *id.* *See also Herbert*, 974 F.2d at 197 (concluding that in disposing of motion to dismiss for lack of subject matter jurisdiction, "where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."). To do so, "the district court may consider materials outside the pleadings." *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *see also Belhas v. Ya'Alon*, 515 F.3d 1279, 1281 (D.C. Cir. 2008) (examining materials outside the pleadings in ruling on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction); *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (noting that courts may consider materials outside the pleadings in ruling on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction).

B. The Foreign Sovereign Immunities Act

Under the FSIA, a foreign state and its political subdivisions, agencies, and instrumentalities are presumed to be immune from the jurisdiction of the United States courts. *See TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 299 (D.C. Cir. 2005) (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993)); *see also* 28 U.S.C. § 1604. The "presumption is overcome only if the plaintiff shows that one of the exceptions to immunity provided in 28 U.S.C. §§ 1605–07 applies." *TMR Energy*, 411 F.3d at 299.

The FSIA's commercial activity exception sets out, in three separate clauses, three circumstances under which a foreign state is not "immune from the jurisdiction of courts of the United States," 28 U.S.C. § 1605(a)—when "the action is based upon" (1) "a commercial activity carried on in the United States by the foreign state," (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or (3) "an act

outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States," *id.* § 1605(a)(2). "[C]ommercial activity" is "a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). An activity's "commercial character" is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than . . . to its purpose." *Id.* A foreign state's acts are "commercial" within the FSIA's meaning "when a foreign government acts, not as regulator of a market, but in the manner of a private player within that market." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). In other words, "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Id.* (emphasis in original) (citation and internal quotation marks omitted). The Supreme Court has explained that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *see also Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) ("[A] court's jurisdiction under the Foreign Sovereign Immunities Act turns on the 'gravamen,' or 'essentials,' of the plaintiff's suit." (quoting *Sachs*, 136 S. Ct. at 395–97)).

The FSIA's expropriation exception requires that "(1) 'rights in property are at issue;' (2) 'those rights were taken in violation of international law;' and (3) 'a jurisdictional nexus [exists] between the expropriation and the United States.'" *Nemariam v. Federal Democratic Republic of Ethopia*, 491 F.3d 470, 475 (D.C. Cir. 2007) (alteration in original) (quoting *Peterson v. Royal Kingdom of Saudi Arabia*, 332 F. Supp. 2d 189, 196–97 (D.D.C. 2004), *aff'd*, 416 F.3d 83 (D.C.

Cir. 2005)). The necessary "jurisdictional nexus is established if: (a) the property 'is present in the United States in connection with a commercial activity carried on in the United States by the foreign state' or (b) the property 'is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in engaged in a commercial activity in the United States.'" *Id.* at 475 (quoting 28 U.S.C. § 1605(a)(3)).

III. DISCUSSION

AFGC argues that both the "commercial activity" and the "expropriation" exceptions to sovereign immunity under the FSIA apply to this case. Neither exception, however, is supportable here.

A. The Commercial Activity Exception Is Inapplicable

The FSIA's commercial activity exception abrogates sovereign immunity where an "action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). "The [FSIA's] 'based upon' inquiry . . . first requires a court to 'identify the particular conduct on which the plaintiff's action is 'based.'" *Sachs*, 136 S. Ct. at 395 (quoting *Nelson*, 507 U.S. at 356). Identifying the "'particular conduct'" means "looking to the 'basis' or 'foundation' for a claim, 'those elements . . . that, if proven, would entitle a plaintiff to relief,' and 'the gravamen of the complaint.'" *Id.* (ellipsis in original) (quoting *Nelson*, 507 U.S. at 357). Even where an action is properly based upon commercial activity of the foreign state abroad, the plaintiff must further show that the act caused a "direct effect in the United States," 28 U.S.C. § 1605(a)(2), meaning the effect "follows 'as an immediate consequence of the defendant's . . . activity.'" *Weltover*, 504 U.S. at 618 (ellipsis in original); *see also id.* at 619 (holding that Argentina's unilateral rescheduling of the maturity dates for

bonds it issued, where New York was "the place of performance for Argentina's ultimate contractual obligations," had a direct effect in the United States for purposes of the FSIA).

1. *AFGC's Claims Are Not "Based Upon" Commercial Activity*

The gravamen of the instant claims against Angola is that Angola "permitted the [Andrade Defendants] to utilize their official title[s] and rank[s] to effect the unlawful taking of [AFGC's assets]," Compl. ¶ 130, and that "AFGC has been denied fair and due process of law in Angola in its attempts to bring the [Andrade Defendants] to justice and in its attempts to recover [its assets]," *id.* ¶ 135. At bottom, AFGC wishes for Angola to enforce the rule of law: to prosecute the Andrade Defendants' misdeeds and to make the corporate entity whole again. Even taken as true, these allegations fail to satisfy the commercial activity exception, as they "describe abuses of official power for corrupt ends that could not be undertaken by private parties in a marketplace." *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 111 (D.D.C. 2012); *see also Nelson*, 507 U.S. at 362 ("[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such." (alteration in original) (quoting Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y. B Int'l L. 220, 225 (1952))).

Stretching the commercial activity exception to fit its jurisdictional needs, AFGC emphasizes the commercial "nature" of this suit in broad strokes, describing the action as "based upon activities undertaken in furtherance of securing the ownership, possession, use, enjoyment, and ability to derive economic value from a commercial enterprise," Pl.'s Opp'n at 10, and as about "[o]wnership of real property, and the operation, maintenance and leasing thereof, and generation of revenue," *id.*, "activities that are commercial in nature," *id.* Yet, the fact that the asset allegedly taken is "a commercial enterprise," *id.*, is entirely beside the point. "The key inquiry in determining whether particular conduct constitutes commercial activity is not to ask

whether its purpose is to obtain money, but rather whether it is 'the sort of action by which private parties can engage in commerce.'" *Mwani v. bin Laden*, 417 F.3d 1, 17 (D.C. Cir. 2005) (quoting *Nelson*, 507 U.S. at 362); *see also Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) ("Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity."). Here, the *conduct* for which AFGC seeks to hold Angola liable is for failure to regulate effectively the exercise of government agents' power and to provide "due process of law," Compl. ¶ 135, which is quintessentially sovereign conduct not falling within the commercial activity exception. *See Nelson*, 507 U.S. at 362 ("Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce.").

None of the cases cited by AFGC support a finding that the commercial activity exception applies. Oddly, AFGC cites to *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), without mentioning that the Supreme Court in *Nelson* and *Sachs* subsequently limited *Siderman*'s "overbroad interpretation of 'based upon,'" *de Csepel v. Republic of Hungary* (*de Csepel I*), 169 F. Supp. 3d 143, 158 n.5 (D.D.C. 2016) (citing *Nelson,* 507 U.S. at 356–63 and *Sachs*, 136 S. Ct. at 395–97)), raising significant question about the continued precedential value of that case. *See also Odhiambo v. Republic of Kenya*, 930 F. Supp. 2d 17, 30 n.5 (D.D.C. 2013) ("[*Siderman*] was decided before the Court defined the term 'based upon' in *Nelson*."). Indeed, in *Siderman,* "Argentina's expropriation of [a] hotel was commercial activity where [the] government generated revenue from U.S. tourists and also paid for advertising in the United States," Pl.'s Opp'n at 9 n.4, but post-*Nelson*, this activity would not satisfy the commercial activity exception because the 'gravamen' of *Siderman*'s claims were "that their family business was stolen from them by the military junta that took over the

Argentine government in 1976," *Siderman*, 965 F.2d at 723. As the D.C. Circuit more recently, post-*Nelson*, explained, a plaintiff "cannot transform the initial expropriation into commercial activity," because otherwise "almost any subsequent disposition of expropriated property could allow the sovereign to be haled into a federal court under FSIA." *Rong v. Liaoning Province Government*, 452 F.3d 883, 889–90 (D.C. Cir. 2006).

AFGC also relies on *Nnaka v. Federal Republic of Nigeria*, 238 F. Supp. 3d 17, 27–28 (D.D.C. 2017), as "concluding [that a] foreign state's retainer agreement with [a] U.S. attorney was [the] type of commercial action a private party could perform and constituted commercial activity within the meaning of the FSIA," Pl.'s Opp'n at 9–10. This case is wholly inapposite. In *Nnaka*, the commercial activity exception applied because "the gravamen of the suit," as stated "loudly and clearly" by the plaintiff, was that, contrary to the alleged terms of the retainer agreement, "Nigeria wronged Nnaka and caused him great injury in 2014 when its then-Attorney General told the U.S. government by letter that Nnaka did not have authority to represent Nigeria in the U.S. government's pending asset forfeiture action." *Nnaka*, 238 F. Supp. 3d at 28. Thus, the crux of the claims in *Nnaka* was breach of contract, unjust enrichment, and related claims arising out of the plaintiff's direct contract with Nigeria, where, by contrast, here, AFGC seeks to hold Angola liable for failure of due process in the taking of its property—acts which are not commercial in nature.

2. *Angola Did Not Cause a "Direct Effect" in the United States*

AFGC argues that "specific commercial activities undertaken by Angola and/or the Andrade Defendants" have had a direct effect in the United States, "includ[ing], without limitation," Captain Andrade sending a letter "with false allegations" to the SEC, sending the same letter to U.S.-based institutional investors to harm AFGC's "ongoing capital raising efforts," advertising and marketing rental units to U.S. customers, and by their overall conduct,

harming AFGC stock and bond holders. Pl.'s Opp'n at 12, 13 n.7. These alleged acts, however, do not amount to a 'direct effect' in the United States. First, any losses AFGC stock and bond holders in the United States suffered are clearly insufficient to meet the "direct effect" prong of the expropriation exception. *See Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1184 (D.C. Cir. 2013) ("If a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity would in large part eviscerate the FSIA's provision of immunity for foreign states." (quoting *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 34 (2nd Cir. 1993))). Similarly, AFGC cannot rely on "reputational harm" from Captain Andrade's letter to the SEC and U.S. investors to show a direct effect in the United States. *See id.* at 1183–84 ("[R]eputational harm '(assuming it is not too speculative to be considered an effect at all) is too remote and attenuated to satisfy the 'direct effect' requirement of the FSIA.'" (quoting *Weltover*, 504 U.S. at 618)). Finally, AFGC does not explain how the marketing of rental units "to US customers via the website booking.com," Pl.'s Opp'n at 12, would be legally sufficient to constitute a direct effect in the United States, nor could it, because, as discussed *supra*, the marketing of the allegedly seized properties is not the act forming the "gravamen of the suit" upon which AFGC's action is based. Instead, the underlying illegality of, and ineffective recompense for, the seizure forms the basis of the suit. *See Weltover*, 504 U.S. at 618 ("[A]n effect is 'direct' if it follows as an immediate consequence of the defendant's . . . activity." (ellipsis in original) (citation and internal quotation marks omitted)).

B. The Expropriation Exception is Inapplicable

AFGC's reliance on the expropriation exception fares no better. Not only has AFGC failed to show the requisite jurisdictional nexus with the United States, AFGC has also failed to show the requisite taking in violation of international law.

1. *There Is No Jurisdictional Nexus with the United States*

In order for jurisdiction to exist under the expropriation exception to the FSIA, "property taken in violation of international law" must have a "jurisdictional nexus" with the United States. Either (1) the "property taken or any property exchanged for such property *is present in the United States in connection with a commercial activity* carried on in the United States by the foreign state;" or (2) the "property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in commercial activity in the United States." 28 U.S.C. 1605(a)(3) (emphasis added); *see also Schubarth v. Federal Republic of Germany*, 891 F.3d 392, 401 (D.C. Cir. 2018); *de Csepel v. Republic of Hungary* (*de Csepel II*), 859 F.3d 1094, 1101 (D.C. Cir. 2017); *Simon v. Republic of Hungary*, 812 F.3d 127, 141–42 (D.C. Cir. 2016). AFGC asserts that the first jurisdictional nexus applies in this case, citing attenuated reasons that fail to persuade and have no legal authority.

AFGC posits that Angola has taken "property" "present in the United States" in satisfaction of the jurisdictional nexus requirement by allegedly playing a role in the seizure of assets *in Angola* that constitute "nearly all of the assets and profits of a US corporation." Pl.'s Opp'n at 19. In so doing, AFGC reasons that Angola has "assumed the role of owners and shareholders of AFGC," thus effectively taking over a U.S. corporation "factually present in the United States." *Id.* As support, AFGC offers no evidence that the FSIA was ever intended to operate in this roundabout way, nor any legal precedent, or even scholarship, to support such an expansive view of a U.S. nexus. Adopting AFGC's approach would, for example, seemingly permit plaintiffs the world over to establish jurisdiction in U.S. courts for foreign sovereigns' local expropriations simply by incorporating a parent company in the United States, regardless of whether any of the actual property at issue, or property exchanged for such property, is or ever

was present in the United States. This approach, at bottom, attempts to substitute the location of incorporation of the parent company for the location of property taken, and is wholly inconsistent with the plain text of the FSIA.

AFGC further avers that the jurisdictional nexus requirement has been satisfied (1) by Angola having "offered and marketed sovereign bonds to qualified institutional buyers in the United States," which bonds Angola will repay with "the proceeds of AFGC's expropriated property," *id.*; and (2) by the appearance of "rental advertisements of units" allegedly seized by Angola "on the website booking.com," which website is owned by a Delaware corporation and "specif[ies] that all rental transactions will occur in US dollars," indicating, according to the plaintiff, "that the units are being marketed to US customers," *id.* AFGC failed to assert these facts regarding Angolan bonds or booking.com listings in its complaint, and thus they need not be assumed to be true for purposes of deciding the defendant's motion to dismiss.

At the same time, "[a]lthough 'the District Court may in appropriate cases dispose of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the complaint standing alone,' 'where necessary, the court may consider the complaint supplemented by undisputed facts evidence in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal for Underground Expansion*, 333 F.3d at 198 (quoting *Herbert*, 974 F.2d at 197).[5] Angola disputes these newly proffered factual assertions as

[5] AFGC "requests leave to replead certain facts and allegations in accordance with Rule 15(a)," if "the Court finds it necessary for AFGC to plead previously undisclosed factual developments in this case that surfaced after the filing of the Complaint." Pl.'s Opp'n at 32. Setting aside that this request is not properly made since AFGC has filed no motion to amend the complaint "accompanied by an original of the proposed pleading as amended," D.D.C. Local Civil Rule 7(i), the allegations sought to be plead, namely, Angola's marketing of bond offering to U.S. investors and the marketing of AFGC's properties "for rental in the United States," Pl.'s Opp'n at 32, would not create jurisdiction under either the commercial activity or the expropriation exceptions of the FSIA, and therefore amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (suggesting that denial of a motion to amend is not an abuse of discretion where amendment would be futile); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (same).

"baseless" and "cryptic." *See* Def.'s Reply at 13–14. Indeed, these proffered allegations, turn, at best, on speculation about future events. AFGC does not allege that these forms of "property taken or any property exchanged for such property [are]" currently present in the United States, 28 U.S.C. § 1605(a)(3), as the FSIA requires. Thus, consideration of these disputed facts for purposes of the jurisdictional nexus requirement would be inappropriate, and even if considered, they would be insufficient to meet the statutory requirement that property be located in the United States.

2. *AFGC's Property Was Not Taken in Violation of International Law*

The parties also dispute whether AFGC's property was taken in violation of international law, as is required by the expropriation exception. AFGC concedes that it does not itself own the properties that were allegedly seized since those properties are held by foreign subsidiaries, three levels removed from AFGC. *See* Pl.'s Opp'n at 3. As the D.C. Circuit has made clear, the "domestic-takings rule bars" a U.S. parent company "from basing an expropriation claim on [a state's] seizure of" property owned by its local subsidiary. *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela* (*Helmerich IV*), 743 F. App'x 442, 453 (D.C. Cir. 2018). This is so because the expropriation exception's plain language requires a taking "in violation of international law," 28 U.S.C. § 1605(a)(3), and international law prohibits only the taking of "'the property of *a national of another state*,' unlike the property of its own national, without compensation," *Helmerich IV*, 743 F. App'x at 453 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 712(1)(c)). Accordingly, "the proper place" for a foreign subsidiary "to assert its property rights" is in the foreign nation's own courts. *Id.* at 448.

One caveat to this rule is where the domestic takings is so severe as to constitute a taking of the entire foreign subsidiary, for example, by "commendeer[ing] all of [the subsidiary's] on-the-ground operations, leaving [it] with nothing but a nominal right to compensation that has

proven worthless in [the foreign sovereign's] courts." *Id.* at 455. In such a situation, the expropriated subsidiary corporation is itself the "property," which, having been taken from its parent company, violates international law. *See id.* at 455 (citing *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.* (*Helmerich III*), 137 S.Ct. 1312, 1318 (2017) (quoting 28 U.S.C. § 1605(a)(3))).

AFGC claims that, "similar to the facts in *Helmerich*," it has lost "control over the AFGC Angolan Subsidiaries that own and control the Angolan real and tangible property and the bank accounts associated with these entities," Pl.'s Opp'n at 17, thereby satisfying the requirement to have suffered some loss of property in violation of international law. This reasoning breaks down, however, because AFGC does not itself own the local Angolan subsidiaries, which instead are owned by the British Virgin Islands company ADV, which is owned by the Bermuda company AIC. Thus, the parent company that allegedly lost "ownership and control" of the local subsidiaries is not AFGC, but rather other AFGC subsidiaries incorporated in other jurisdictions. These foreign shareholders—not AFGC—suffered "the indirect expropriation of a shareholder's direct rights." *Helmerich IV*, 743 F. App'x at 454.

C. AFGC Has Not Pled Facts Attributing the Alleged Takings to Angola

In addition to the dispositive shortcomings explained *supra*, the conduct alleged by AFGC is simply not attributable to the sovereign nation of Angola, and thus reliance on the FSIA to establish jurisdiction fails for another reason. As previously explained in this case, natural persons cannot be "agenc[ies] or instrumentalit[ies]" under the FSIA, *see AFGC I*, 2018 WL 6329453, at *4 (citing *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010)), and AFGC has sued the Andrade Defendants in their personal capacities, *see* Compl. at 2–3. "'Officers sued in their personal capacity come to court as individuals,' . . . and the real party in interest is the individual, not the sovereign." *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017) (quoting *Hafer v. Melo*, 502

U.S. 21, 27 (1991)). *See also Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 29 (D.D.C. 2007) ("When an officer is sued in his official capacity, it is usually as a means of suing the sovereign indirectly; where an officer is sued in his personal capacity, it seeks to hold him personally liable.") (citing *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985)).

To hold Angola liable for the alleged acts of the Andrade Defendants, AFGC must plead the elements of an agency relationship. *See Kaiser Group Intern., Inc. v. World Bank*, 420 F. App'x 2, 5 (D.C. Cir. 2011) (affirming district court's dismissal for lack of subject matter jurisdiction because plaintiff had not pled an agency relationship making actions attributable to defendant World Bank); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 447 (D.C. Cir. 1990) ("[T]he *plaintiff* bears the burden of asserting facts sufficient to withstand a motion to dismiss regarding the agency relationship." (emphasis in original)). As relevant here, AFGC must plead that Angola manifested a desire for the Andrade Defendants to act on its behalf. *See* Restatement (Third) of Agency § 1.01.

While the complaint labels the Andrade Defendants as the "Angolan Government Illegal Agents," Compl. at 2–3, AFGC alleges no facts tending to establish an agency relationship between Angola and the Andrade Defendants. After Angola challenged AFGC's characterization of the Andrade Defendants as agents of Angola, *see* Def.'s Mem. Supp. Mot. Dismiss ("Def.'s Mem.") at 12–13, ECF No. 42-1 (asserting that the Andrade Defendants' "acts are not attributable to Angola"); Decl. of Eduarda Rodrigues Neto, Angolan Deputy Attorney General ("Neto Decl.") ¶¶ 4–6, 10–13, ECF No. 42-3 (describing actions taken by Angola against the Andrade Defendants for their conduct, including the criminal prosecution of General Andrade and penalizing Prosecutor Andrade in a disciplinary action), AFGC had a burden of production to "present adequate supporting evidence" upon which the Court could conclude that

an agency relationship existed, *see Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008); *see also Owens v. Republic of Sudan*, 864 F.3d 751, 784 (D.C. Cir. 2017); *Simon*, 812 F.3d at 147. AFGC has not done so. Thus, the Andrade Defendants' alleged conduct—the taking of AFGC's property through fraud and force—is not attributable to Angola for purposes of deciding Angola's motion to dismiss for lack of subject matter jurisdiction and cannot form the basis for abrogating Angola's immunity under the FSIA.

D. AFGC Has Not Established Personal Jurisdiction over the Individual Defendants

Finally, although neither Angola's motion to dismiss, nor AFGC's motion to dismiss voluntarily, the claims against Angola address the jurisdictional bases for the claims against the Andrade Defendants, the Court must assure itself that personal jurisdiction may be exercised over these individual defendants before any default judgment against them may be granted. *See Mwani*, 417 F.3d at 6 ("[A] court should satisfy itself that it has personal jurisdiction before entering judgment against an absent defendant."). AFGC originally served these individuals according to the procedure for service set out in the FSIA, but, as explained in the Court's earlier Memorandum Opinion, natural persons cannot be "agenc[ies] or instrumentalit[ies]" under the FSIA, *see AFGC I,* 2018 WL 6329453, at *4 (citing *Samantar,* 560 U.S. at 319), and AFGC was therefore required to serve the individual defendants according to the procedure set out in Fed. R. Civ. P. 4(f) for service on individuals in foreign countries, *id.* AFGC subsequently completed service of process on the individual defendants pursuant to Fed. R. Civ. P. 4(f)(2)(C)(ii). *See* Return of Service, ECF No. 62. After the period for filing an answer expired, AFGC filed an Affidavit for Default, ECF No. 65, and an Entry of Default, ECF No. 66, was docketed on April 18, 2019.

Proper service of process is, however, but one component of establishing personal jurisdiction, and on December 3, 2018, AFGC was directed to show cause as to why the instant claims against the individual defendants should not be dismissed for lack of personal jurisdiction. *See* Order (Dec. 3, 2018), ECF No. 37. Plaintiff's Response to Order to Show Cause ("Resp. Show Cause Order"), ECF No. 41, was wholly inadequate. AFGC states that personal jurisdiction is valid under the District of Columbia's long-arm statute, D.C. Code § 13-423(a)(1), or, alternatively, Fed. R. Civ. P. 4(k)(2), which provides that for claims arising "under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws," *see* Pl.'s Resp. Show Cause Order at 5, but AFGC makes little effort to demonstrate why these bases for personal jurisdiction apply.

To establish general personal jurisdiction over an out-of-state defendant, a plaintiff must show that "each Defendant's contacts with the forum are 'continuous and systematic,' . . . such that due process is not offended by allowing a United States court to hale the defendant into the forum 'over any matter involving the defendant.'" *Allen v. Russian Fed'n*, 522 F. Supp. 2d 167, 192–93 (D.D.C. 2007) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415–16 (1984) and *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 108 (D.D.C. 2005)). By contrast, when asserting "specific jurisdiction over an out-of-state defendant who has not consented to suit there," due process "is satisfied if the defendant has 'purposefully directed his activities at residents of the forum,' . . . 'and the litigation results from alleged injuries that 'arise out of or relate to' those activities.'" *Mwani*, 417 F.3d at 12 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Though not entirely clear, in citing to D.C. Code § 13-423(a)(1) and claiming that the Andrade Defendants "purposefully directed at this District" the "marketing of short-term residential rentals," Pl.'s Resp. Order Show Cause at 6, AFGC seemingly intends to argue that a finding of specific personal jurisdiction would be proper. It would not. To establish personal jurisdiction under D.C. Code § 13-423, or to satisfy constitutional due process for specific personal jurisdiction, the alleged injuries must "arise out of or relate to" the jurisdiction-specific activities. *See Mwani*, 417 F.3d at 12; *Johnson-Tanner v. First Cash Financial Services, Inc.*, 239 F. Supp. 2d 34, 37 (D.D.C. 2003) ("[D.C. Code Section 13-423(a)(1)] allows for jurisdiction to the fullest extent permissible under the Due Process Clause of the United States Constitution." (citing *Crane v. New York Zoological Soc'y*, 894 F.2d 454, 455 (D.C. Cir. 1990))). Clearly, AFGC's alleged injuries with respect to its subsidiaries' real properties in Angola did not "arise out of" the Andrade Defendants' alleged conduct in the United States. *Cf. Dove v. United States*, No. 86-cv-0065, 1987 WL 18739, at *3 (D.D.C. Oct. 9, 1987) ("An act within the district will not confer jurisdiction if it is of 'minimal significance' to the transaction as a whole."); *Mitchell Energy Corp. v. Mary Helen Coal Co.*, 524 F. Supp. 558, 564 (D.D.C. 1981) ("Exchange of letters and telephone communications with a party in the District of Columbia alone is not considered a jurisdictionally significant contact by District of Columbia courts."). Accordingly, AFGC has not pled facts that could establish personal jurisdiction over the Andrade Defendants and claims against them must be dismissed.

E. AFGC's Motion for Voluntary Dismissal Without Prejudice

The parties disagree as a legal matter whether AFGC's motion to dismiss claims against Angola voluntarily without prejudice should be considered without first adjudicating Angola's motion to dismiss for lack for subject matter jurisdiction, *see* Def.'s Opp'n Pl.'s Mot. Voluntary Dismissal ("Def.'s Opp'n Vol. Dismissal") at 8–11, ECF No. 69; Pl.'s Reply Supp. Pl.'s Mot.

Voluntary Dismissal ("Pl.'s Reply Vol. Dismissal") at 4–7, ECF No. 71, especially where the question of a foreign sovereign's immunity from suit is at issue, *see* Def.'s Opp'n Vol. Dismissal at 10. This aspect of the parties' dispute, however, is now moot and AFGC's motion to dismiss voluntarily without prejudice claims against Angola is denied as moot. Absent subject matter jurisdiction, the claims against Angola must be dismissed with prejudice.

IV. CONCLUSION

AFGC warns that "[d]ismissal of AFGC's claims before this Court will result in nothing short of AFGC's rights remaining unprotected and unenforced and its damages remaining uncompensated." Pl.'s Opp'n at 7. Any deficiency in the rule of law in Angola is regrettable, but AFGC's alleged losses in Angola do nothing to confer subject matter jurisdiction upon this Court. Therefore, for the foregoing reasons, Angola's Motion to Dismiss, ECF No. 42, is granted with prejudice. In addition, the claims against the individual defendants António Francisco Andrade, Miguel Kenehele Andrade, and Natasha Andrade Santos are dismissed, without prejudice, for lack of personal jurisdiction; and the plaintiff's Motion for Voluntary Dismissal, ECF No. 67, is denied as moot.

An Order consistent with this Memorandum Opinion will be filed contemporaneously.

Date: July 19, 2019

BERYL A. HOWELL
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Africa Growth Corporation, Plaintiff, v. Republic of Angola, *et al.*, Defendants.	Civil Action No. 1:17-cv-2469 (BAH)

DEFENDANT REPUBLIC OF ANGOLA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiff Africa Growth Corporation ("AGC") has put before this Court a dispute between Angolan companies and individuals that has taken place wholly in Angola, concerns ownership of immovable property located in Angola, and is the subject of pending court actions in Angola. It involves, in particular, the claims of Angolan corporate entities in which AGC purports to hold indirect interests, and the alleged actions by three Angolan individuals – Defendant Antonio Francisco Andrade and his alleged children, Defendants Miguel Kenehele Andrade and Natasha Andrade Santos (collectively, the "Andrades" or the "Andrade Defendants") – in furtherance of competing claims to title and possession of certain apartment buildings in Luanda, Angola.

Despite the dispute's private nature, AGC seeks to manufacture a claim against the Republic of Angola ("Angola") by alleging that Angola somehow committed an "expropriation" of the disputed property. AGC tries to augment that baseless contention by asserting a hodgepodge of equally meritless claims against Angola, including RICO, conspiracy, tortious interference with contract, defamation, conversion, and unjust enrichment claims. *See* D.E. 1 ¶¶ 123-85. AGC asserts these claims even though Angola is never alleged to have obtained ownership or possession of the property, which at all relevant times remained with either the Andrades or AGC's purported Angolan indirect subsidiaries. Far from Angola's expropriation of the property, the Angolan courts have ordered that the property be restored to AGC's purported Angolan indirect subsidiaries. The Angolan police executed that court order by evicting the Andrades. Indeed, the Angolan Attorney-General's Office is prosecuting the Andrades for the allegedly fraudulent acts that form the basis of the Complaint.

As demonstrated below, the claims against Angola must be dismissed. First, AGC fails to establish any exception to Angola's immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA"). Both on the face of AGC's Complaint and as a factual

matter, the two FSIA exceptions to immunity on which AGC relies – the commercial activity exception in § 1605(a)(2) and the expropriation exception in § 1605(a)(3) – are inapplicable. Second, even if the Court had jurisdiction, which it does not, dismissal is warranted under the doctrine of *forum non conveniens* in favor of litigation in Angola. Third, dismissal is required under the act of state doctrine and because the Complaint fails to adequately plead any claims against Angola.

BACKGROUND

According to the Complaint, AGC purports to hold indirect interests via a chain of BVI and Bermuda subsidiaries in three Angolan corporate entities – AGPV Lda ("AGPV"), Maximilio Lda ("Maximilio"), and Illico Lda ("Illico") (collectively, the "Angolan indirect subsidiaries").[1] It further asserts that these Angolan indirect subsidiaries hold title to three apartment buildings referred to as Isha I, Isha 2, and Pina, and a fourth building referred to as Isha 2.5, which AGC refers to as the "AFGC Assets." Docket Entry ("D.E.") 1 ¶¶ 27, 29-30.

AGC asserts that the Andrades unlawfully obtained possession of the apartment buildings and wrongfully diverted rental income owed to its purported Angolan indirect subsidiaries pursuant to rental contracts those subsidiaries had entered into with tenants. *See id.* ¶¶ 35-50, 54-55, 69-75. AGC claims the Andrades accomplished this by securing Defendant Antonio Francisco Andrade's appointment as "director and *Gerente* [manager]" of the Angolan indirect

[1] Plaintiff's Schedule 14C filing with the Securities and Exchange Commission, dated December 12, 2016, explains that it entered into a merger agreement on April 25, 2016 with Africa International Capital Ltd. ("AIC"), a Bermuda corporation (Ex. 1 at 2). Under the terms of that agreement, the current status of which is not clear, Plaintiff was to own 100% of AIC, which in turn was identified as a 100% owner of ADV Holding Ltd., a British Virgin Islands entity, which in turn supposedly holds a 100% interest in AGPV, an Angola entity, which in turn allegedly holds 100% interests in both Illico and Maximilio (Ex. 1 at 18).

subsidiaries, *id.* ¶¶ 35-36, 49, through "fraudulently prepare[d] Powers of Attorney," *id.* ¶ 35, and that he then engaged in self-dealing through the commission of additional fraudulent acts. *See, e.g., id.* ¶¶ 40-50, 71. AGC also alleges that Defendant Natasha Andrade Santos used "forged and fraudulent … supporting documentation" to obtain the transfer of surface rights allegedly held by one of the Angolan indirect subsidiaries, *id.* ¶ 99; *see also id.* ¶¶ 97-98, and that she "use[d] her official title [as a prosecutor] to engage in an abuse of power to harm AFGC and convert the AFGC Assets," *id.* at 15.

The Complaint faults Angola's administrative agencies for supposedly being insufficiently responsive to the concerns of AGC's Angolan indirect subsidiaries. The Complaint asserts, for instance, that Angola's corporate registry, the *Guichet Unico de Empresa* ("GUE"), "improperly register[ed] the appointment of" Defendant Antonio Francisco Andrade, *id.* ¶ 113, and did not accede to a request to cancel the registration, *id.* ¶ 114, but instead required "a more lengthy and formal implementation process to enable the change in directorship and management." *Id.* ¶ 115. The GUE is also alleged to have wrongfully refused certain requests for information about corporate records. *See id.* ¶¶ 105, 162(d). AGC likewise claims that Angola's Property Registry was "forced" by Defendant Natasha Andrade Santos to "make [a] change in title" to certain of the properties at issue. *Id.* ¶ 101.[2]

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[2] The Complaint also accuses the GUE of working with the Andrades, *see* D.E. 1 ¶¶ 49-50, although no specific facts are asserted to attempt to substantiate that charge. In addition, the Complaint vaguely asserts that Angola somehow "permitted" the Andrades "to utilize their official title and rank to effect the unlawful taking of AFGC Assets," *id.* ¶ 130, and "granted license and official imprimatur … over the unlawful seizure of the AFGC Assets" by the Andrades. *Id.* ¶ 116; *see id.* ¶ 120. Again, no specific facts are alleged in connection with those conclusory allegations.

AGC makes similar claims regarding Angola's law enforcement agencies, which, in its view, have been insufficiently aggressive in acting against the Andrades, thereby allegedly enabling them "to remain in physical possession and control of the AFGC Assets." *Id.* ¶¶ 58, 60. AGC advances these allegations at the same time it concedes that the Angolan police twice accompanied its representatives to "the site of the AFGC Assets" so they could "demand[] that" the Andrades "vacate the AFGC Assets." *Id.* ¶¶ 52, 54. AGC further complains that the Angolan Attorney General's office – the *Procuradoria-Geral da Republica* (the "PGR") – allegedly took "no action," *id.* ¶ 87, on its complaints.

In fact, AGC's purported Angolan indirect subsidiaries obtained from the Angolan courts and law enforcement authorities the relief they sought. On September 12, 2017, Illico and AGPV filed a "formal request for an Injunction" with the Civil and Administrative Chamber of the Provincial Court of Luanda (the "Luanda Court") "for the purposes of regaining possession of" the properties at issue. *Id.* ¶ 92. The action named as defendants Defendant Antonio Francisco Andrade and a company he is alleged to control, Ausral (Angola) Sociedade de Comércio e Representação Comercias, Lda. ("Ausral"). D.E. 23-2 Ex. E at 51, ¶ III.[3] Angola was *not* named as a defendant even though it is amenable to suit. Declaration of Eduarda Rodrigues Neto ¶ 14. Nor did Illico and AGPV otherwise suggest Angola is responsible for the Andrades' take-over of the disputed property. *See* D.E. 23-2 Ex. E.

The Complaint criticizes Angola's courts for having allegedly failed to act with sufficient dispatch in response to Illico's and AGPV's injunction request, *id.* ¶ 96, which it attempts to characterize as a "refus[al] to take action," *id.* ¶¶ 142(a)-(b), 81, 136, and a "deni[al]" of "fair

[3] All references to page numbers in previously-filed documents refer to the CM/ECF annotation at the top of the page, rather than the page number indicated on the bottom of a particular filing.

and due process of law." *Id.* ¶ 135. However, the Luanda Court rendered its decision shortly after Illico and AGPV filed their injunction action. On November 23, 2017, it granted the requested injunction, ordering that Illico and AGPV be provisionally restored possession of the property. D.E. 23-2 Ex. E at 58, § V. On December 17, 2017, the Luanda Court further ordered "court officials … [to] full[y] enforce[e] [the Luanda Court's] decision." D.E. 23-2 Ex. G at 78.

On January 31, 2018, the Luanda Court gave effect to these orders by issuing an Order for Procedure for the Provisional Return of Possession in favor of Illico and AGPV. Rodrigues Neto Decl. Ex. 1. Angolan court officials, aided by the Angolan police, enforced the provisional repossession order that same day by evicting Defendant Antonio Francisco Andrade. Rodrigues Neto Decl. Ex. 2.

On November 1, 2018, AGPV filed a complaint with the Angolan Criminal Investigation Service, alleging that Defendant Antonio Francisco Andrade was no longer complying with the Luanda Court's repossession order. Rodrigues Neto Decl. Ex. 6 at 1. The same day, the Criminal Investigation Service made a report to the criminal prosecutor's office, which opened a criminal case against Defendant Antonio Francisco Andrade and ordered an urgent search and seizure warrant of the disputed property. *Id.* at 2.

In accordance with the criminal prosecutor's order, on November 1 and 2, 2018, the Angolan police executed a search and seizure of the disputed property. D.E. 35-1 at 21-22. The police recovered four keys to the property, which were delivered to AGPV's representative. *Id.* at 23. Defendant Antonio Francisco Andrade is currently being criminally prosecuted for disobeying and resisting a court order, and for entering property that does not belong to him. Rodrigues Neto Decl. ¶ 12.

In parallel with their action for provisional repossession, Illico and AGPV filed a Lawsuit for Maintaining and Restoring Possession, seeking a final adjudication of rightful possession of the disputed property. The action named the Andrades and Ausral as defendants. *Id.* ¶ 7; Ex. 3. Angola was *not* named as a defendant. The action remains pending. *Id.* ¶ 7.

The Andrades are also the subjects of separate criminal proceedings stemming from their alleged actions in connection with the property dispute. Specifically, Defendant Antonio Francisco Andrade is being prosecuted for falsification of documents, *id.* Exs. 4 and 5; and Defendant Natasha Andrade is being prosecuted for misuse of authority and abuse of trust. *Id.* Defendant Natasha Andrade has also been disciplined and fined by the Attorney-General's Office for having abused her position as a prosecutor. *Id.* ¶ 13, Ex. 7.

ARGUMENT

I. This Court Lacks Jurisdiction Over AGC's Claims Against Angola

The FSIA provides the sole basis for obtaining jurisdiction over a foreign sovereign in the federal and state courts of the United States. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989)); *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339, 344 (D.C. Cir. 2018). Section 1604 of the FSIA states the bedrock presumption of foreign sovereign immunity:

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

The jurisdictional immunity in § 1604 is unqualified; if none of the specific exceptions in §§ 1605-1607 applies, there is no subject-matter jurisdiction. *Amerada Hess*, 488 U.S. at 434-39; *Belize Soc. Dev., Ltd. v. Government of Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015). Moreover, personal jurisdiction over a foreign sovereign will exist only if there is subject-matter

jurisdiction and service of process has been effected in accordance with § 1608(a) of the FSIA. 28 U.S.C. § 1330(b); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). For present purposes, only § 1605 sets forth exceptions to immunity where the foreign sovereign is a defendant.[4]

Angola is indisputably a foreign state under § 1603(a) of the FSIA. D.E. 1 ¶ 7. AGC invokes two exceptions to Angola's sovereign immunity – the third clause of the "commercial activity" exception in § 1605(a)(2) of the FSIA and the "expropriation" exception in § 1605(a)(3). D.E 1 ¶¶ 20-22.

The FSIA establishes a burden-shifting framework to determine whether Angola is immune from suit. *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). Under this framework, a foreign sovereign such as Angola is entitled to a presumption of immunity. *Owens v. Republic of Sudan*, 864 F.3d 751, 784 (D.C. Cir. 2017). The "plaintiff bears an initial burden of production to show an exception to immunity… applies." *Id.* The foreign sovereign then may "challenge either the legal sufficiency or the factual underpinning of an exception [to sovereign immunity]." *Phoenix Consulting*, 216 F.3d at 40.

In resolving a facial attack, "the district court should take [AGC's] allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff." *Id.* To determine a factual attack, the court does not "assum[e] the truth of the facts alleged by the plaintiff," but "[i]nstead, the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to

[4] Section 1606 of the FSIA covers only the quantum of damages that may be awarded against a foreign sovereign, and § 1607 concerns counterclaims against foreign sovereigns that have initiated lawsuits in the U.S. courts. Neither applies in this action.

dismiss." *Id.* Once a factual attack is mounted, a plaintiff has the "burden of production" to "support[] its claim that" one or more of the "FSIA exception[s] applies." *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015) (internal quotations omitted). If the plaintiff cannot produce evidence supporting that claim, then the Court is without subject-matter jurisdiction. *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 892 F. Supp. 2d 219, 234 (D.D.C. 2012), *aff'd* 734 F.3d 1175, 1183 (D.C. Cir. 2013). If, however, it does, the defendant ultimately has the burden to "establish the absence of the factual basis [for jurisdiction] by a preponderance of the evidence." *Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008).

The Complaint must be dismissed under either standard. AGC's jurisdictional allegations are so defective that the Court may "resolve the issues presented here solely on the basis of the allegations in the complaint," *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venez.*, Nos. 13-7169, 13-7170, 14-7008, 2018 U.S. App. LEXIS 22209, at *2-3 (D.C. Cir. Aug. 7, 2018) (internal quotations omitted), and find that AGC fails to allege that an exception to Angola's sovereign immunity applies. Although this alone requires dismissal, for the sake of completeness Angola also shows that the Complaint cannot survive a factual challenge.

A. The Commercial Activity Exception Does Not Apply

AGC relies on the third clause of the commercial activity exception in § 1605(a)(2) of the FSIA, which permits courts to exercise jurisdiction over a foreign sovereign where –

> the action is based … upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). In determining whether claims against a foreign state fall under this (or any other) prong of the commercial activity exception, a court must determine whether the

"action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015). In making that determination, the Court must "zero[] in on the core of [Plaintiffs'] suit." *Id.*

Fatally for AGC, its claims are not "based upon" any "act… in connection with a commercial activity of" Angola "that cause[d] a direct effect in the United States." This is so for the following three reasons, each of which separately and independently defeats AGC's attempt to establish the Court's jurisdiction.

1. AGC's Claims Against Angola Are Not Based Upon Any Act In Connection With A Commercial Activity

Zeroing in on the core of Plaintiff's suit, it is clear that the gravamen of the Complaint is that property in Angola was allegedly taken from AGC's alleged Angolan indirect subsidiaries and that Angolan law enforcement officials, courts, and government agencies were insufficiently responsive to AGC's efforts to address the alleged taking. These alleged acts and activities, however, are not commercial; they are all sovereign in nature. For that reason alone, AGC fails to establish that the commercial activity exception applies.

The character of an act is determined by its nature, not its purpose. 28 U.S.C. § 1603(d) (defining "commercial activity"); *Nelson*, 507 U.S. at 356 (citing 28 U.S.C. § 1603(d)); *de Csepel v. Republic of Hungary*, 714 F.3d 591, 599 (D.C. Cir. 2013) ("we assess '[t]he commercial character of an activity… by reference to the nature of the… particular transaction or act, rather than by reference to its purpose'") (citing 28 U.S.C. § 1603(d)).[5] The Supreme Court has thus established that "a state engages in commercial activity" only in those limited circumstances where it "exercises… powers that can also be exercised by private citizens, as

[5] AGC agrees. *See* D.E. 23-1 at 35.

distinct from those powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360 (internal quotation marks omitted) (quoting *Weltover*, 504 U.S. at 614).[6]

The foregoing principles preclude AGC's attempt to rely on the alleged expropriation as a commercial activity, *see* D.E. 1 ¶¶ 20(a), 21(a). It has long been settled that expropriation is "a quintessentially sovereign act," not a commercial one. *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 890 (D.C. Cir. 2006); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-31 (1964) (recognizing the governmental nature of the power to take property); *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1327-28 (11th Cir. 2003); *Haven v. Rzeczpospolita Polska*, 215 F.3d 727, 736 (7th Cir. 2000).

AGC likewise cannot claim as commercial the alleged acts of Angola's law enforcement and regulatory officials, or courts, that AGC alleges contributed to the supposed expropriation. The thrust of these allegations is that Angolan administrative and law enforcement agencies were insufficiently responsive to AGC's purported Angolan indirect subsidiaries' concerns and took actions that negatively impacted those subsidiaries. Those alleged acts are all indisputably sovereign in nature, and AGC does not even attempt to characterize them as "commercial." *See, e.g.*, D.E. 1 ¶¶ 50, 58, 60, 87, 101, 105, 113-15, 162. Corporate and property registrations cannot be carried out by private actors in the marketplace; they can only be effected by a State acting in its sovereign capacity. *See, e.g., S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 112 (D.D.C. 2012) ("processing corporate-registration documents… are not the types of activities engaged in… by private players in a commercial market"); *Honduras Aircraft Registry, Ltd. v.*

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[6] For instance, "'[s]uch acts as legislation … or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such.'" *Nelson*, 507 U.S. at 362 (quoting H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y. B INT'L L. 220, 225 (1952)).

Government of Honduras, 129 F.3d 543, 547-49 (11th Cir. 1997) ("registration of aircraft are powers peculiar to sovereigns"). Likewise, decisions by courts and law enforcement agencies with respect to whether – or when – to take actions falling under their purview are matters of judicial and prosecutorial discretion and the exercise of police powers. Such decisions are sovereign acts, not "the sort of action by which private parties can engage in commerce." *Nelson*, 507 U.S. 349, 362 (1993).

AGC is not helped by insinuating that Angola's governmental institutions somehow acted improperly. As this Court has ruled, "abuse[] of official power for corrupt ends" does not convert governmental acts into "commercial" ones for purposes of the commercial activity exception because such abuses can "not be undertaken by private parties in a marketplace." *Finpol*, 854 F. Supp. 2d at 111. "Even if [such] acts and activities… touch the commercial realm, the acts can only be described as sovereign, and not commercial, acts for purposes of the FSIA." *Id.* (citing *Nelson*, 507 U.S. at 358 n.4).

The Court can end its inquiry on AGC's reliance on the commercial activity exception here. AGC's failure to allege a commercial activity constituting the gravamen of its Complaint by itself forecloses the application of the exception. *Sachs*, 136 S. Ct. at 395 (holding the exception does not apply if the gravamen of the complaint is not a commercial activity) (citing *Nelson*, 507 U.S. at 356-58). But application of the commercial activity exception is also foreclosed for the following two independent reasons.

2. AGC's Claims Are Not Based Upon Any Act Or Commercial Activity By Angola

Analysis of the "core" or "gravamen" of the Complaint also shows that AGC's allegations of wrongful commercial conduct do not constitute actions by *Angola* at all. They concern the supposed "commercial activities" and "acts" of the *Andrades* with regard to the

property that AGC alleges they took from AGC's purported Angolan indirect subsidiaries. *See, e.g.*, D.E. 1 ¶ 21(b); *see also id.* ¶ 21(a) (the alleged commercial activity of taking and operating the Angolan properties was taken "for the benefit of the Angolan Government Illegal Agents [*i.e.*, the Andrades, *see id.* at 2-3] and *their* commercial endeavors") (emphasis added).[7] Likewise, the Complaint alleges that Defendant *Miguel Andrade* sent and "published" the allegedly defamatory letter to the Securities and Exchange Commission, purportedly causing financial losses to AGC in the United States. *Id.* ¶¶ 67-68, 170-74. None of these acts can be attributed to Angola, both as a matter of law and as a matter of fact.

a. The Complaint Does Not Establish That The Acts Of The Andrades Are Attributable To Angola

To begin with, the Andrades' acts are not official acts of Angola. As this Court has already properly ruled, the Andrades are not "agenc[ies] or instrumentalit[ies]" of Angola. D.E. 38 at 8-9; *Samantar v. Yousuf*, 560 U.S. 305, 315-16 (2010) (individuals cannot be agencies or instrumentalities of a foreign state). Moreover, unlike Defendants de Sousa and Carneiro, who are sued in their "official capacit[ies]," the Andrade Defendants are *not* sued in an official capacity, D.E. 1 at 2-3, and as a result their acts are not attributable to Angola. *See Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 29 (D.D.C. 2007) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985)) ("When an officer is sued in his official capacity, it is usually as a means of suing the sovereign indirectly; where an officer is sued in his personal capacity, it seeks to hold him personally liable").

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[7] *See also* D.E. 1 Ex. A (characterizing the dispute as "an informal tortious interference… perpetrated by one or more *private individuals* and a local security firm") (emphasis added); D.E. 23-1 at 9, 36 (identifying the acts and commercial activities upon which the suit is based as comprising "[o]wnership of real property, and the operation, maintenance and leasing thereof, and generation of revenue" and attributing all of those acts to the Andrades).

Further, insofar as AGC may be suggesting that the Andrade Defendants acted pursuant to some form of agency relationship with Angola, *see* D.E. 1 at 3 (referring to the Andrades as "Angola Government Illegal Agents"), ¶ 129 (the Andrades are "agents of a sovereign nation"), the Complaint comes nowhere close to pleading they are Angola's agents. To do so, AGC would have had to "assert[] facts" establishing that the Andrades were, in fact, Angola's agents. *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 447 (D.C. Cir. 1990). That requires AGC to have alleged that (1) Angola "manifest[ed] a desire for the [Andrade Defendants] to act on [Angola's] behalf"; (2) the Andrade Defendants "consent[ed] to act on [Angola's] behalf"; and (3) Angola had "the right to exercise control over the [Andrade Defendants] with respect to matters entrusted to [them]." *Kaiser Grp. Int'l, Inc. v. World Bank*, 420 Fed. App'x 2, 5 (D.C. Cir. 2011). AGC must also have alleged that, insofar as the complained-of conduct fell within the scope of the alleged agency relationship, Angola itself "engaged in the wrongful conduct, either deliberately or permissively, as a matter of policy or custom." *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 18 (D.D.C. 1998).

The Complaint, however, does not plead any such facts. AGC thus proffers no basis for concluding that any of the alleged acts of the Andrades are attributable to Angola. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 85 (D.C. Cir. 2002) (holding that conclusory allegations "are not adequate to bring [a] case within the statutory exceptions to foreign sovereign immunity").

b. As A Matter Of Fact, The Andrades Were Not Acting Within The Scope of Any Official Duties Or As Agents

Regardless, any argument that the Andrades acted pursuant to an agency relationship with Angola is belied by the measures that Angola has taken in response to their actions. These include the injunctive relief that the Luanda Court rendered in favor of AGC's purported

Angolan indirect subsidiaries, and the enforcement of those orders by the Angolan police. *See* Rodrigues Neto Decl. ¶¶ 3-6, Exs. 1, 2, and 6; D.E. 35-1 Ex. 1; D.E. 23-2 Exs. E and G. They also include the criminal prosecutions and disciplinary actions that Angola has pursued against the Andrades for, *inter alia*, falsifying documents, abusing power, disobeying and resisting a court order, and entering property unlawfully. *See* Rodrigues Neto Decl. ¶¶ 8-13, Exs. 4, 5, 6 and 7.

3. There Was No Act Of Angola That Caused A Direct Effect In The United States

AGC's attempt to rely upon the third prong of the commercial activity exception also fails because even assuming *arguendo* that its claims against Angola could be properly characterized as based on an act in connection with a commercial activity in Angola, none of those alleged acts caused a direct effect in the United States.

An "effect is 'direct' if it follows 'as an immediate consequence of the defendant's… activity.'" *Weltover*, 504 U.S. at 618. An effect cannot be considered "direct" when it is "the result of some intervening event." *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 38 (D.C. Cir. 2014).

The putative direct effect in the United States that AGC attributes to Angola is the alleged "monetary losses" it claims to have suffered here. *See* D.E. 1 ¶ 21(a). This Court has ruled, however, that "[a] financial loss in the United States, when all the acts giving rise to the claim occurred outside this country, is insufficient to show the 'direct effect' in the United States that [the] FSIA requires." *BPA Int'l, Inc. v. Sweden*, 281 F. Supp. 2d 73, 81 (D.D.C. 2003); *see also Allen v. Russian Federation*, 522 F. Supp. 2d 167, 189 (D.D.C. 2007) (finding that "a 'mere financial loss' to United States residents, without more, is not a 'direct effect' in the United States") (quoting *Rong*, 452 F.3d at 891 (Henderson, J., concurring)); *Atl. Tele-Network Inc. v.*

Inter-Am. Dev. Bank, 251 F. Supp. 2d 126, 134 (D.D.C. 2003) (to show a "direct effect" there must be a contractual clause mandating the fulfilment of commercial obligation in the United States); *Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993) ("the fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception").[8]

In summary, the Complaint fails to allege any commercial activity at all, or any commercial activity attributable to Angola, or any "direct effect" in the United States. As a result, there is no basis for the application of the commercial activity exception.

B. The Expropriation Exception Does Not Apply

AGC likewise cannot establish jurisdiction under the expropriation exception in § 1605(a)(3) of the FSIA. That section provides that foreign states are not immune in cases in which

> rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

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[8] Recognizing it cannot sustain the argument that financial losses constitute a direct effect, AGC's Opposition to Angola's Set Aside Motion posited that the direct effect was "reputational harm." *Id.* at 24. The D.C. Circuit, however, has ruled that "reputational harm… is too remote and attenuated to satisfy the 'direct effect' requirement of the FSIA." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183-84 (D.C. Cir. 2013) (internal quotations omitted).

Under the plain language of this exception, a plaintiff must sufficiently allege (a) that rights in property taken in violation of international law are in issue and (b) that a jurisdictional nexus exists. The Complaint fails on both scores.

1. No Rights In Property Taken In Violation Of International Law Are In Issue

AGC's claims do not involve rights in property taken in violation of international law, as required by § 1605(a)(3). To adequately plead that this element of the expropriation exception applies, AGC's factual allegations must "make out a legally valid claim and not merely a non-frivolous one – that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law)." *Helmerich & Payne*, 2018 U.S. App. LEXIS 22209, at *10 (quoting *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017)) (internal quotation marks omitted). AGC has not done so.

In its Complaint, AGC defines the property at issue as the "three buildings" referred to as Isha I, Isha 2, and Pina, and a fourth building referred to as Isha 2.5. D.E. 1 ¶ 29. It is these properties that AGC alleges were expropriated and, therefore, that its claims "involve rights in property." D.E. 1 ¶¶ 21(b), 127-37.

AGC does not claim to have title to those assets, however. Rather, it avers that title is held by the Angolan companies in which it purports to have indirect interests via intermediate BVI, Bermuda, and Angolan corporate subsidiaries. *See, e.g.*, D.E. 1 ¶¶ 27-31. This precludes AGC from sustaining a claim for a taking in violation of international law. As the D.C. Circuit has ruled, "the domestic-takings rule bars" a U.S. parent company "from basing an expropriation claim on [a state's] seizure of" property owned by its local subsidiary. *Helmerich & Payne*,

2018 U.S. App. LEXIS 22209, at *30.[9] The D.C. Circuit's ruling also forecloses the argument that AGC's alleged ownership of the Angolan indirect subsidiaries converts the alleged taking into an international law violation: a plaintiff may only assert an expropriation claim for "seizure of *its own* property." *Id.* (emphasis in original). Here, AGC concedes that the four allegedly taken buildings are owned by its Angolan indirect subsidiaries, not by it. *See* D.E. 1 ¶¶ 27-30.[10]

In any event, even if AGC had alleged that its own property was seized (which it does not), the claim would still fail. Seizure of property can qualify as a taking in violation of international law only if done by a sovereign. *See Zappia Middle East Contr. Co v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000) (the term "taken" as used in international law "clearly refers to acts of a sovereign"); RESTATEMENT OF THE LAW OF FOREIGN RELATIONS 3d § 712 (indicating that only a state can be liable for a taking). The buildings at issue, however, were allegedly taken by private individuals — the Andrades — not Angola. There is no allegation that Angola ever possessed or controlled them. Indeed, it was Angola's courts and law enforcement agencies that restored the property to AGC's purported subsidiaries.

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[9] AGC acknowledges this in its Opposition to Angola's Motion to Set Aside the Clerk's Default. D.E. 33 at 19 n.5.

[10] AGC's Opposition to Angola's set-aside motion posited that it was not the buildings owned by its alleged Angolan indirect subsidiaries that were expropriated, but rather that it suffered the "complete deprivation of the AFGC Angolan Subsidiaries." D.E. 33 at 19 n.5. As Angola explained in that proceeding, *see* D.E. 35 at 8-11, that argument fails as well because AGC does not purport to own the "AFGC Angolan Subsidiaries." International law does not protect indirect rights. It only "protects the '*direct rights*' shareholders enjoy in connection with corporate ownership." *Helmerich & Payne*, 2018 U.S. App. LEXIS 22209, at *31 (quoting *The Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5) at 36, ¶ 47) (emphasis added). The company with "direct rights" in Maximilio and Illico is AGPV; the company with "direct rights" in AGPV is ADV Holding Ltd, a British Virgin Islands company. *See* D.E. 28-2 at 19. Accordingly, even if Angola had expropriated the Angolan indirect subsidiaries themselves, which it did not, AGC would not be able to "make out a legally valid claim," *Helmerich & Payne*, 2018 U.S. App. LEXIS 22209, at *10, that its "direct rights" were expropriated.

2. There Is No Jurisdictional Nexus With The United States

Even assuming *arguendo* that AGC itself owned the real property at issue and that those properties were, in fact, expropriated in violation of international law by Angola (none of which is true), AGC would still be unable to avail itself of the expropriation exception to sovereign immunity. Where a claim is asserted against the foreign state itself, § 1605(a)(3) requires the plaintiff to establish the first jurisdictional nexus, *i.e.*, that the "property [allegedly taken] or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." That is the only basis upon which a court may exercise jurisdiction over a foreign state under the expropriation exception. *Schubarth v. Federal Republic of Germany*, 891 F.3d 392, 401 (D.C. Cir. 2018) ("'A foreign state loses its immunity if the claim against it satisfies the exception by way of the first clause of the [expropriation exception's] commercial-activity nexus requirement.'") (citing *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1107 (D.C. Cir. 2017)); *de Csepel*, 859 F.3d at 1107 ("claims against foreign states must satisfy the first nexus requirement" of the expropriation exception); *Simon v. Republic of Hungary*, 812 F.3d 127, 146 (D.C. Cir. 2016) (same).[11]

AGC makes no attempt to allege that the first nexus clause's requirements are satisfied. Nor could it. The requirement that the property be "present in the United States" necessitates physical presence. *de Csepel*, 859 F.3d at 1106. Plainly, that is not the case with regard to the property that AGC claims was expropriated, all of which consists of immovable property in Angola. Nor does AGC make any allegation that "any property exchanged for" the allegedly

[11] AGC concedes that it is the first nexus requirement that applies to its claims. *See* D.E. 33 at 20-21 (citing *de Csepel*, 859 F.3d at 1107).

expropriated immovable property in Angola "is present in the United States in connection with a commercial activity carried on in the United States by" Angola. *Schubarth v. Federal Republic of Germany*, 220 F. Supp. 3d 111, 114 (D.D.C. 2016), *aff'd in part, rev'd in part*, 891 F.3d 392 (holding that "clause [1] is inapplicable" where immovable "expropriated property (or property exchanged for it) is [not] 'present in the United States'") (citing 28 U.S.C. § 1605(a)(3)).

In sum, the Complaint meets none of the elements required for application of the expropriation exception. In the absence of any exception to Angola's sovereign immunity, AGC's claims against it must be dismissed in their entirety.

II. In The Alternative, The Complaint Must Be Dismissed Because The District Of Columbia Is An Inconvenient Forum

The Complaint's allegations leave no doubt that this case concerns a local property dispute in Angola. As AGC would have it, its claims implicate questions of Angolan corporate, property, and administrative law in respect of property situated in Angola that is allegedly owned by Angolan entities. The key players – AGC's alleged Angolan indirect subsidiaries, the Andrade Defendants, and, insofar as they might be relevant, Angolan government officials – are all located in Angola. For these reasons, the District of Columbia is not a convenient forum for AGC's claims.

Accordingly, even if the Court had jurisdiction over AGC's claims against Angola, which it does not, the Court should nonetheless dismiss the action under the doctrine of *forum non conveniens*. In deciding whether to dismiss a lawsuit on *forum non conveniens* grounds, the Court must "determine whether [(1)] an adequate alternative forum for the dispute is available, and if so, whether a balancing of the [(2)] private and [(3)] public interest factors strongly favors dismissal." *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 137-38 (D.D.C. 2011) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 244 n.22, 255 (1981)). Under each of these

three factors, Angola is clearly the more appropriate forum for AGC's claims against Angola. "[A] strong tilt towards [Angola] in [either] the private interest factors or the public interest factors counsels towards dismissal." *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 26-27 (D.D.C. 2008), *aff'd* 616 F.3d 568 (D.C. Cir. 2010). Here, both sets of factors tilt decidedly towards Angola, which is an adequate forum.

A. Angola Is An Adequate Forum

Angola is an adequate alternative forum for AGC's claims. "Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper Aircraft Co.*, 454 U.S. at 254 n.22. Angola is "amenable to suit in the courts of Angola." Rodrigues Neto Decl. ¶ 14. The availability of Angola as a forum is underscored by the fact that AGC's alleged Angolan indirect subsidiaries have filed two separate civil actions in the Angolan courts regarding their dispute with the Andrades. The first action – a request for an injunction against Defendant Antonio Francisco Andrade and his company Ausral – was granted and enforced. *Id.* ¶¶ 3-6, 10-11; Exs. 1, 2, and 6; D.E. 35-1 Ex. 1. The second action, against the Andrade Defendants and Ausral, seeks the permanent restoration of possession of the properties at issue. Rodrigues Neto Decl. ¶ 7; Ex. 3. That action is proceeding apace, *id.* ¶ 3, and there is no suggestion that the Angolan court is incapable of adjudicating the alleged Angolan indirect subsidiaries' claims.

B. The Private Interest Factors Weigh In Favor of Dismissal

Each of the private interest *forum non conveniens* factors favors dismissal. Those factors are: "(1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) cost of attendance of witnesses; (4) enforceability of a judgment, if obtained; and (5) other practical problems that make trial of a case easy, expeditious

and inexpensive." *de Csepel*, 808 F. Supp. 2d at 138-39 (internal quotations and citations omitted).

Factor (1) weighs heavily in favor of dismissal. "Because [AGC's] claims arose out of actions occurring in [Angola], access to sources of proof would be much easier if the case were heard in [Angola] rather than Washington, D.C." *BPA Int'l*, 281 F. Supp. 2d at 86. Further, not only would all or most of the sources of proof (documentary and testimonial) relevant to AGC's fact-intensive claims be located in Angola, they are likely to be in the Portuguese language. Because "many of the witnesses and much of the evidence would need to be translated from" Portuguese, "the administrative difficulties of trying the case in the District of Columbia weigh in favor of dismissal." *Irwin v. WWF, Inc.*, 448 F. Supp. 2d 29, 36 (D.D.C. 2006). *See also MBI Grp., Inc.*, 558 F. Supp. 2d at 33 ("The need for translation would add a substantial overlay of cost to this proceeding, in addition to consuming large amounts of time and effort that might be unnecessary in Cameroon"); *Simon v. Republic of Hungary*, 277 F. Supp. 3d 42, 64-65 (D.D.C. 2017) ("When documentary evidence is in a language other than English (and that other language is used in the alternative court), the cost of having to translate the documents (as well as trial or deposition testimony) into English if the case were retained militates in favor of dismissal.") (quoting 17 MOORE'S FEDERAL PRACTICE—CIVIL § 111.74)).

Factors (2) and (3) also demonstrate that Angola is the more appropriate forum. Because "[m]any, if not most, of the potential witnesses and much of the evidence will likely be located in [Angola]," they are "likely… beyond the reach of this Court's compulsory process." *BPA Int'l*, 281 F. Supp. 2d at 86. *See also MBI Grp., Inc.*, 558 F. Supp. 2d at 33; *Irwin*, 448 F. Supp. 2d at 35 ("The availability of process for unwilling witnesses is also a primary concern to the Court…. [T]here is no evidence that any of these potential witnesses reside in the United States.

None of these individuals are subject to subpoena power of this or any other United States court, and none can be compelled to attend trial"). Witnesses in Angola, such as the Andrades and others with personal knowledge of the alleged wrongdoings with regard to the properties, can be compelled to give evidence in a civil process in Angola. Rodrigues Neto Decl. ¶ 15. The only witnesses who may be outside of Angola are AGC's own personnel, who would presumably not need to be compelled to give evidence supporting AGC's claims in Angola. In addition, due to travel and translation logistics, it would be less costly for most witnesses to attend trial and give evidence in Angola, further favoring dismissal on *forum non conveniens* grounds. *See MBI Grp., Inc.*, 558 F. Supp. 2d at 33 (cost of travel from Cameroon and translation from French weighed in favor of dismissal); *Irwin*, 448 F. Supp. 2d at 35 ("the cost of bringing witnesses to Washington, D.C. [from Gabon] would be significant").

Factor (4) likewise favors litigating in Angola. An Angolan court is overwhelmingly more likely to be able to enforce effectively any relief granted regarding this dispute, particularly because it has jurisdiction over Angola, the five individual Defendants, and the immovable property at issue and can actually monitor and supervise the situation on the ground. *Accord Fluoroware, Inc. v. Dainichi Shoji K.K.*, 999 F. Supp. 1265, 1273 (D. Minn. 1997) (citing *McDonald's Corp. v. Bukele*, 960 F. Supp. 1311, 1319 (N.D. Ill. 1997)) (factor (4) favors dismissal where alternative forum would need to be involved in enforcement).

Finally, with respect to factor (5), litigating this claim in Angola would remove "[an]other practical problem[]" for the conduct of this litigation. *de Csepel*, 808 F. Supp. 2d at 138. AGC's claims are brought not only against Angola but five individual Defendants residing in Angola. There is virtually no indication in the Complaint that this Court has personal jurisdiction over any of them. *See* D.E. 38 at 8-10. But suit could be brought against them in

Angola, strongly favoring that forum. *See Simon*, 277 F. Supp. 3d at 65 (private interest factors weigh in favor of dismissal where a "jurisdictional defect would not be present in" the alternative forum). It would be unquestionably easier, more expeditious and less expensive for an Angolan court to manage AGC's claims in this litigation than this Court.

C. The Public Interest Factors Weigh In Favor of Dismissal

The public interest factors also counsel in favor or dismissing this action. Those factors, as relevant to this case, are: "(1) administrative difficulties caused by foreign litigation congesting local court dockets; (2) local interest in having localized controversies decided at home; … and ([3]) avoiding unnecessary problems in choice-of-law and the application of foreign law." *Irwin*, 448 F. Supp. 2d at 35. All factors point to Angola.

With respect to factor (1), "[t]he administrative difficulties of trying this case 'in a forum thousands of miles away from the majority of witnesses and the evidence are obvious.'" *Id.* at 35-36 (quoting *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 879 (5th Cir. 1987)). Here, those "difficulties [would] manifest themselves especially in the need for extensive translation of documents and testimony, as well as the lack of an adequate means to compel the participation of unwilling witnesses." *MBI Grp., Inc.*, 558 F. Supp. 2d at 34.

The public interest factors' tilt towards dismissal is reinforced by factor (2), Angola's "interest in having localized controversies decided at home." *de Csepel*, 808 F. Supp. 2d at 139. Nothing could be more "localized" or of greater concern to Angola than a dispute over real property and alleged government malfeasance there. *See MBI Grp., Inc.*, 558 F. Supp. 2d at 34-35 (because the "dispute concern[ed] an agreement to build … housing projects" in Cameroon and involved allegations of corruption against the Cameroonian government, dismissal was "plainly" warranted in favor of Cameroon). The fact that AGC is incorporated in Nevada does not outweigh the public interest factors favoring Angola. Any putative interest of the United

States "in seeing domestic companies made whole for injuries" allegedly "sustained abroad" is outweighed by Angola's "superior interest" in a matter involving allegations of governmental wrongdoing in connection with a local project, "as well as the district court's unfamiliarity with [Angolan] law." *MBI Grp., Inc.*, 616 F.3d at 576.

Factor (3) also "weighs heavily in favor of dismissal" because the Court "lack[s] … familiarity with [Angolan] law," *MBI Grp., Inc.*, 558 F. Supp. 2d at 35, which is particularly relevant to AGC's core claims regarding possessory rights in the properties and the Andrades' allegedly wrongful conduct in allegedly taking over that property and the board of directors of AGC's alleged Angolan indirect subsidiaries. *See also Piper Aircraft Co.*, 454 U.S. at 260 ("the need to apply foreign law point[s] towards dismissal"). As the court noted in *MBI Grp., Inc.*, "[a] proceeding before this Court applying [Angolan] law would require the testimony of several legal experts familiar with that body of law. And the testimony of those experts would likely have to be translated from [Portuguese] into English as well." 558 F. Supp. 2d at 35. "[T]he Court's analysis of foreign law issues will be impeded by its inability to work directly from the original Portuguese-language… legal sources." *Croesus EMTR Master Fund L.P. v. Brazil*, 212 F. Supp. 2d 30, 41 (D.D.C. 2002).

For all of the foregoing reasons, the public and private interests uniformly favor dismissal of AGC's claims, so they can be brought and litigated in the more convenient and adequate forum – Angola.

III. AGC's Claims Against Angola Must Be Dismissed Under Rule 12(b)(6)

The Complaint must also be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible only when

"the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* AGC's allegations fail that test. They are insufficient to sustain entitlement to relief for any acts allegedly taken by Angola on any theory of liability pled in the Complaint.

A. AGC Fails To State A Claim For Relief Against Angola Because All Of Angola's Allegedly Wrongful Acts Are Acts Of State

As a threshold matter, ruling on AGC's claims would require this Court "to declare invalid the official act[s] of [Angola] performed within its own territory." *W. S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). The claims are thus barred by the act of state doctrine, under which courts in the United States must "refrain from deciding a case when the outcome turns upon the legality or illegality… of official action by a foreign sovereign performed within its own territory." *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 55 (D.D.C. 2000) (quoting *Riggs Nat'l Corp. & Subsidiaries v. Commissioner of IRS*, 163 F.3d 1363, 1367 (D.C. Cir. 1999)).

To the extent that AGC's Complaint could be interpreted as alleging expropriation claims against Angola, which it cannot, that conduct undeniably would be an act of state. *Sabbatino*, 376 U.S. at 428 (a taking is an act of state). The same is true of AGC's claims that Angolan law enforcement officials, courts, and government agencies were insufficiently responsive to AGC. *See* D.E. 1 ¶¶ 58, 60, 87. Likewise, AGC's claims that Angola's corporate registry supposedly "improperly register[ed] the appointment of" Defendant Antonio Francisco Andrade as a manager of one of the Angolan subsidiaries. *id.* ¶ 113, and that the property registry wrongfully registered a change in title to the disputed properties, *id.* ¶¶ 101, 128, are paradigmatic acts of state. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976) (acts of state are "done… in the exercise of governmental authority"); *Sabbatino*, 376 U.S. at 445 n.3 (an act

of state is "any governmental act in which the sovereign's interest *qua* sovereign is involved. The expression 'act of State' usually denotes an executive or administrative exercise of sovereign power by an independent State or potentate, or by its or his duly authorized agents or officers") (internal quotations omitted); *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1073 (D.C. Cir. 2012) (an act of state is "conduct that is by nature distinctly sovereign"); *Nnaka v. Fed. Republic of Nig.*, 238 F. Supp. 3d 17, 32 (D.D.C. 2017) (law enforcement decisions are acts of state).

The Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), could not save AGC's expropriation claim from dismissal. Although the amendment "overrides the judicially developed doctrine of act of state" by "requiring federal courts to examine the merits of controversies involving expropriation claims," *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 477 n.7 (D.C. Cir. 2007), it applies only to expropriation "claim[s] of title or other rights to property… in violation of the principles of international law." 22 U.S.C. § 2370(e)(2). The Amendment does not apply here for two reasons.

First, "the property at issue is not located in the United States," but in Angola. *Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 99 (D.D.C. 2005) (citing *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 327 (5th Cir. 1982)). Congress, however, "intended [the Second Hickenlooper Amendment] to be limited to cases involving claims of title with respect to American owned property nationalized by a foreign government in violation of international law, when the property or its assets were subsequently located in the United States." *Compania de Gas de Nuevo Laredo*, 686 F.2d at 327 (citing *Banco Nacional de Cuba v. First National City Bank of New York*, 431 F.2d 394 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972)). *See also Empresa Cubana Exportadora De Azucar y Sus Derivados v. Lamborn &*

Co., 652 F.2d 231, 237 (2d Cir. 1981); RESTATEMENT OF THE LAW OF FOREIGN RELATIONS 3d § 444 cmt. e.[12]

Second, no property was taken in violation of international law. According to AGC's own case, the allegedly expropriated property belonged to its Angolan indirect subsidiaries, not AGC itself. As the D.C. Circuit has ruled, a "foreign sovereign's expropriation of its own national's property does not violate international law." *Simon*, 812 F.3d at 144 (internal quotations omitted). The act of state doctrine therefore squarely applies to AGC's claim for expropriation. *Rong*, 362 F. Supp. 2d at 99 (holding "the Hickenlooper Amendment is not applicable" to plaintiff's expropriation claim because there was "no violation of international law").

B. AGC Has Failed To Plead The Elements Of Any Of Its Claims Against Angola

AGC's claims must also be dismissed because the Complaint's allegations do not allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Expropriation Claim (Count I). AGC has not alleged that Angola expropriated its property. Although the Complaint alleges that the Andrades took the property of AGC's alleged Angolan indirect subsidiaries, it does not plead any facts that could support a conclusion that the Andrades were acting within the scope of any official authority or were Angola's agents. Moreover, the property allegedly taken by the Andrades was not AGC's property; it belonged to

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[12] In *Ramirez de Arellano v. Weinberger*, the D.C. Circuit rejected the "suggestion that the word 'property' in [22 U.S.C. § 2370(c)(2)] must invariably be limited to expropriated personal property located in the United States." 745 F.2d 1500, 1541 n.180 (D.C. Cir. 1984). The Supreme Court vacated the Court of Appeals' decision, *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985), and this Court has since cited approvingly to contrary authority outside of this Circuit, *see Rong*, 362 F. Supp. 2d at 99.

Angolan companies in which AGC purports to hold only indirect interests. As a result, AGC cannot assert a claim for expropriation. *Helmerich & Payne*, 2018 U.S. App. LEXIS 22209, at *30 (corporate parent can only allege "seizure of *its own* property"). In any event, even if AGC could have asserted an expropriation claim, such a taking would not have been a violation of international law. *Simon*, 812 F.3d at 144.

Claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (Counts II and III).[13] To adequately plead a violation of 18 U.S.C. § 1962(c) (Count II), AGC must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering." *Feld Entm't Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 308 (D.D.C. 2012) (quoting *Western Assocs. Ltd. P'ship v. Market Square Assocs.*, 235 F.3d 629, 633 (D.C. Cir. 2001)). AGC has not alleged facts sufficient to establish any of the elements of a violation of § 1962(c).

The Complaint fails to allege the first two elements of its RICO § 1962(c) claim, which require it to allege the existence and conduct of an ongoing enterprise. In its Complaint, AGC alleges that Angola and the other Defendants "collectively make up an enterprise by 'association in fact.'" D.E. 1 ¶ 140. To maintain that allegation, however, AGC must plead facts demonstrating the hallmarks of an "associated-in-fact" enterprise: (1) a common purpose among the participants, (2) organization, and (3) continuity. *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999) (citing *United States v. Perholtz*, 842 F.3d 343 (D.C. Cir. 1988)). *See also*

[13] In addition to asserting violations of RICO, AGC makes common law claims under District of Columbia law against Angola. For the purposes of this motion only, Angola assumes that RICO and District of Columbia law apply to AGC's claims. Angola reserves its rights to argue that the law applicable to AGC's claims is not U.S. federal or District of Columbia law, but Angolan or other law.

United States v. Turkette, 452 U.S. 576, 583 (1981) (an associated-in-fact enterprise is an "ongoing organization" with "various associates [that] function as a continuing unit").

The Complaint's allegations do not suggest that Angola and the other Defendants acted as a structured, ongoing organization with a common purpose, as is required to sustain a claim of an "associated-in-fact" enterprise. AGC "never explains how the several groups of Defendants associated or operated together, or were otherwise organized into an enterprise with a shared decision-making infrastructure." *Doe v. State of Israel*, 400 F. Supp. 2d 86, 120 (D.D.C. 2005). Indeed, beyond conclusorily alleging the existence of a conspiracy to take possession of the properties of AGC's alleged Angolan indirect subsidiaries, the Complaint identifies no common purpose that Angola shared with the other Defendants. It is also devoid of any allegations about the alleged conspiracy's "shared decision-making infrastructure." *Id.* Nor does AGC even attempt to allege that an enterprise existed before, or continued after, the alleged actions taken in connection with the seizure of AGC's purported Angolan indirect subsidiaries' property. *See Richardson*, 167 F.3d at 625 (plaintiff must allege continuity). Thus, even if AGC's allegations are taken as true, they do not establish the existence or conduct of a RICO enterprise.

AGC likewise fails to adequately plead the third and fourth elements of a § 1962(c) claim. AGC's main problem is that its allegations reveal its RICO claim to be based on a single scheme, D.E. 1 ¶¶ 73, 141(c), 143(a), 143(c), 145, 154, 162(c), with a single injury, *id.* ¶¶ 24, 150, and, in AGC's telling, few victims, *id.* It is "'virtually impossible'" to plead a RICO claim adequately by "alleg[ing] only a single scheme, a single injury, and few victims." Such allegations will rarely suffice to establish a "'pattern of racketeering activity.'" *Western Assocs.*, 235 F.3d at 634. And they do not here, as AGC has failed to allege facts showing the existence

of an open-ended pattern of racketeering activity, which is what it accuses Angola of engaging in, *see* D.E. 1 ¶ 151.

An open-ended pattern of racketeering activity is established by "past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243, 253 (1989). To plead an open-ended pattern of racketeering activity, the allegations must suggest "far more than a hypothetical possibility of further predicate acts." *Pyramid Security, Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1119 (D.C. Cir. 1991). The plaintiff must show "defendants, together or separately, will again engage in RICO-violating conduct." *Edmonson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1264 (D.C. Cir. 1995). And "[t]o satisfy this requirement, [P]laintiff[] must show 'that the predicate [offenses] are a regular way of conducting [Angola's] ongoing legitimate business.'" *Lopez v. Council on American-Islamic Rels. Action Network, Inc.*, 657 F. Supp. 2d 104, 114 n.7 (D.D.C. 2009) (quoting *H.J. Inc.*, 492 U.S. at 243 (1989)); *see also Edison Elec. Inst. v. Henwood*, 832 F. Supp. 413, 418 (D.D.C. 1993) (same).

AGC has not alleged that the predicate acts to the RICO violation "[a]re part of [Angola's] regular way of doing business." *Id.* (quotation omitted). Indeed, AGC alleges *no* predicate acts of Angola. *See, e.g.*, D.E. 1 ¶ 146. The only predicate acts it has alleged are those of the Andrades, *id.* which it is suing in their individual capacity, *id.* at 2-3. Although its Complaint identifies a few acts of the two other individual Defendant, none of those acts are identified as predicate acts. *Id.* ¶ 146. AGC, thus, fails to allege a "pattern of racketeering activity" in which Angola took part.

AGC also fails to allege a claim under 18 U.S.C. § 1962(d) (Count III). The required elements for a claim under that section are that "(1) two or more people agreed to commit a

subsection (c) offense, and (2) a defendant agreed to further that endeavor." *RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1047-48 (D.C. Cir. 2012); D.E. 33 at 24-25. Because AGC fails to plead a violation under 18 U.S.C. § 1962(c), however, it also fails to allege a claim under § 1962(d). *Salinas v. United States*, 522 U.S. 52, 65 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense."); *see also Greenpeace, Inc. v. Dow Chem. Co.*, 808 F. Supp. 2d 262, 274 (D.D.C. 2011) ("Because [plaintiff] fails to state a claim under § 1962(c), its conspiracy claims under 18 U.S.C. 1962(d) must likewise fail.").

Moreover, to state a claim under § 1962(d), AGC must allege that Angola, at the very least, "adopt[ed] the goal of furthering or facilitating the criminal endeavor." *RSM Prod. Corp.*, 682 F.3d at 1048. AGC does not plead any facts that render plausible its conclusory allegation that Angola "agreed to the overall objective of the conspiracy and willfully became a member of the conspiracy," D.E. 1 ¶ 157, or that it even adopted the goal of the conspiracy. Ultimately, the Complaint does nothing more than rehearse a "formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555, which is insufficient to sustain a RICO conspiracy claim. *RSM Prod. Corp.*, 682 F.3d at 1052 (holding "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality").

Conspiracy to Commit Fraud and Conversion Claim (Count IV). "The elements of conspiracy to commit fraud are: 1) an agreement between two or more persons; 2) to participate in an unlawful act; and 3) an injury caused by an unlawful overt act performed by one of the parties to the agreement, and in furtherance of the common scheme." *McWilliams Ballard, Inc. v. Level 2 Dev.*, 697 F. Supp. 2d 101, 109 (D.D.C. 2010). Angola, however, is not alleged to have entered into an agreement with anyone to commit fraud. And, while AGC has alleged

injuries caused by certain fraudulent acts committed by the Andrade Defendants, it has not proffered a theory suggesting that these acts were committed pursuant to a common scheme between Angola and the Andrades. AGC's conclusory allegations do not constitute a facially plausible claim that Angola knowingly entered into such a conspiracy; therefore, it has failed to allege a claim of conspiracy against Angola. *Twombly*, 550 U.S. at 570.

Further, conspiracy to commit fraud must be pled with particularity. Fed. R. Civ. P. 9(b); *Sturdza v. U.A.E.*, 281 F.3d 1287, 1306 (D.C. Cir. 2002) (citing *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985)) ("In actions alleging conspiracy to defraud or conceal, the particularity requirements of Rule 9(b) must be met."). "[A] pleading subject to Rule 9(b) scrutiny may not rest on information and belief, but must include an allegation that the necessary information lies within the opponent's control, accompanied by a statement of the facts on which the pleader bases his claim." *Antoine v. U.S. Bank Nat'l Ass'n*, 547 F. Supp. 2d 30, 36 (D.D.C. 2008). AGC has not pointed to any facts showing that Angola entered into an agreement to commit fraud. Nor has it identified the "content" of any false misrepresentations" or any "misrepresented fact" made by Angola. *Id.* at 35.

Tortious Interference with Contract Claim (Count V). Under the law of the District of Columbia, tortious interference with contract "has four elements: (1) existence of a contract, (2) knowledge of the contract (3) intentional procurement of its breach by the defendant, and (4) damages resulting from the breach." *Sturdza*, 281 F.3d at 1305 (internal quotations and citations omitted).

AGC is not itself a party to the lease agreements with tenants at the disputed properties that were allegedly interfered with; according to AGC's allegations, those leases appear to be held by Illico, one of AGC's alleged Angolan indirect subsidiaries. *See* D.E. 1 ¶ 31 ("rental

incomes were deposited into Illico's local bank accounts"). Accordingly, AGC fails to allege facts to support the required elements, which require "interfere[nce] with a contract between the *plaintiff* and some third party." *Wiggins v. District Cablevision*, 853 F. Supp. 484, 495 (D.D.C. 1994) (emphasis added).

With respect to the third element, there is no plausible reading of the Complaint under which the Court could conclude that Angola intended to cause the breach of a contract. Even if the Complaint's allegations had ascribed to Angola some "general intent to interfere," which they do not, that would not be "enough; there must be a 'strong showing of intent' in order to make a prima facie case for tortious interference." *Williams v. Fannie Mae*, Case No. 05-cv-1483-JDB, 2006 U.S. Dist. LEXIS 42911, at *28-29 (D.D.C. June 26, 2006) (quoting *Bennett Enters. v. Domino's Pizza*, 45 F.3d 493, 499 (D.C. Cir. 1995)).

Defamation Claim (Count VI). To state a claim for defamation under District of Columbia law, AGC must allege "(1) that [it] was the subject of a false and defamatory statement; (2) that the statement was published to a third party; (3) that publishing the statement was at least negligent; and (4) that the plaintiff suffered either actual or legal harm." *Farah v. Esquire Magazine*, 736 F.3d 528, 533-34 (D.C. Cir. 2013) (citations omitted). AGC fails to plead these elements.

The second element "requires a defendant to have 'published or knowingly participated in publishing the defamation.'" *Zimmerman v. Al Jazeera America, LLC*, 246 F. Supp. 3d 257, 273 (D.D.C. 2017) (quoting *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985)) (emphasis omitted). AGC's defamation claim, however, is based solely on the asserted publication of a statement by Defendant Miguel Andrade that was allegedly done "on behalf of the" Andrades. D.E. 1 ¶¶ 171-173. Angola is not alleged to have played any role in the alleged publication.

Further, AGC has not made any allegations that could permit a finding that the third element is satisfied, which requires that publishing the statement be at least negligent. *Esquire Magazine*, 736 F.3d at 533. In addition to the absence of any allegation that Angola participated in the alleged publication, AGC makes no allegation that Angola acted negligently. *Id.*

Conversion Claim (Count VII). A claim for conversion under District of Columbia law must allege "(1) the unlawful exercise, (2) of ownership, dominion, or control, (3) of another's personal property, (4) in denial or repudiation of that person's property rights." *Government of Rwanda v. Rwanda Working Grp.*, 227 F. Supp. 2d 45, 62 (D.D.C. 2002).

AGC cannot satisfy these elements. Because AGC itself does not own the allegedly converted property, it does not have any "property rights" that could be converted. *See Curaflex Health Servs. v. Bruni, P.C.*, 877 F. Supp. 30, 32 (D.D.C. 1995) ("One may be liable for conversion to a person who is in possession of property or who has the right to immediate possession of the property.") (citing RESTATEMENT OF TORTS 2d §§ 224A, 225).

Moreover, the Andrades – not Angola – are alleged to have owned, dominated, or controlled the relevant property. *See* D.E. 1 ¶¶ 40, 50, 77, 146(c), 161(b), 187, 189. Angola is not plausibly accused of having engaged in "unlawful exercise of ownership, dominion, or control."

Unjust Enrichment Claim (Count VIII). To allege unjust enrichment, AGC must show that "(1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *News World Communications, Inc. v. Thompsen*, 878 A.2d 1218, 1222 (D.C. 2005). AGC has not alleged that it conferred any benefit on Angola, or that Angola retained any such benefit. AGC therefore fails to state a claim for unjust enrichment.

Request for a Constructive Trust (Count X). A required element to establish a constructive trust against a wrongdoer is the existence of "specific property acquired by the wrongdoer." *Stewart v. O'Malley*, Case No. 97-cv-184, 1998 U.S. Dist. LEXIS 940, at *14 (D.D.C. Jan. 21, 1998)). AGC has identified no "specific property acquired by" Angola. As a result, there are no grounds for establishing a constructive trust based on any actions by Angola, and no such claim may be asserted against it.

CONCLUSION

For the foregoing reasons, the Complaint's claims against Angola should be dismissed with prejudice.

Dated: December 21, 2018

Respectfully submitted,

REPUBLIC OF ANGOLA

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on December 21, 2018.

/s/ *Janis H. Brennan*
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TRIBUNAL DISTRITAL FEDERAL DOS ESTADOS UNIDOS DA AMÉRICA
(UNITED STATES DISTRICT COURT)
PARA O DISTRITO DE COLUMBIA

Africa Growth Corporation, Autor, contra República de Angola, *et al.*, Réus.	Acção Cível N.º 1:17-cv-2469 (BAH)

DECLARAÇÃO EM APOIO À MOÇÃO DA REPÚBLICA DE ANGOLA PARA INDEFERIR A ACUSAÇÃO

Eu, EDUARDA PASSOS DE CARVALHO RODRIGUES NETO, declaro neste instrumento o seguinte:

1. Eu sou Sub-Procuradora-Geral da República de Angola e estou no exercício do cargo desde Junho de 2006. Faço esta declaração em apoio à moção de Angola para indeferir a Acusação no processo acima mencionado. A minha declaração é feita com base no meu entendimento pessoal dos assuntos apresentados a seguir:

I. Litígio em Angola

2. Duas acções foram apresentadas perante a Sala do Cível e Administrativo do Tribunal Provincial de Luanda ("Tribunal de Luanda") em relação aos complexos habitacionais objecto da acção para expropriação apresentada pela Africa Growth Corporation ao Tribunal Distrital dos Estados Unidos no Distrito de Columbia (o "imóvel objeto da lide").

A. Processo n.º 2911/17-B

3. Em 12 de Setembro de 2017, a Illico - Comércio e Prestação de Serviços, Lda. ("Illico") e a AGPV, Lda. ("AGPV") iniciaram o processo de número 2911/17-B, uma acção *ex*

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parte perante o Tribunal de Luanda. A acção constituiu António Francisco Andrade e Ausral (Angola) - Sociedade de Comércio e Representações Comerciais, Lda. ("Ausral") como réus. De acordo com os artigos 399° e ss. do Código de Processo Civil Angolano, requereu-se que o Tribunal de Luanda ordenasse como medida liminar que a Illico e a AGPV obtivessem a restituição provisória de posse do imóvel objeto da lide.

4. Em 23 de Novembro de 2017, o Tribunal de Luanda concedeu a providência cautelar de restituição. Uma cópia e a tradução da sentença estão anexadas como Documento E à Declaração de Brenton Kuss de 14 de Março de 2018 (D.E. 23-2).

5. Em 19 de Dezembro de 2017, o Tribunal de Luanda ordenou aos oficiais de justiça que cumprissem a decisão de restituição provisória da posse. Uma cópia e a tradução do despacho estão anexadas como Documento G à Declaração de Brenton Kuss de 14 de Março de 2018 (D.E. 23-2).

6. Em 31 de Janeiro de 2018, os oficiais de justiça, com o apoio da polícia angolana, cumpriram a decisão de restituição provisória da posse ao efectivar a evicção de António Francisco Andrade dos complexos habitacionais. Anexada a esta declaração como Documento 1 está o Mandado de Diligência de Restituição Provisória de Posse, e como Documento 2, o Auto de Diligência, com as traduções certificadas para inglês dos dois documentos.

B. Processo n.° 3218/17-C

7. Em 29 de Dezembro de 2017, a Illico e a AGPV iniciaram o Processo n.° 3218/17-C perante a 4.ª Secção da Sala do Cível e Administrativo do Tribunal Provincial de Luanda. A acção, que pleiteia uma decisão final de quem seja o possuidor legítimo do imóvel objeto da lide, constituiu como réus António Francisco Andrade, Miguel Kenehele de Sousa Andrade, Natasha Sulaia e Santos Andrade Santos e Ausral. Anexada a esta declaração como

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Documento 3 está uma cópia da Acção de Manutenção e Restituição de Posse que a Illico e a AGPV apresentaram em 29 de Dezembro de 2017, com uma tradução certificada para inglês. O Processo n.º 3218/17-C corre os seus trâmites e portanto, permanece pendente até a presente data.

II. Processos penais em Angola

A. Processo Penal n.º 33/2017

8. Em 15 de Agosto de 2017, a AGPV, a Illico e a Maximílio Lda. apresentaram à Procuradoria-Geral de Angola uma queixa crime contra António Andrade e Natasha Andrade. A queixa crime e a sua tradução certificada para inglês, estão anexadas a esta declaração como Documento 4.

9. Logo após, em resposta à queixa crime, a Procuradoria-Geral da República instaurou um processo-crime. A investigação segue os seus os seus trâmites até a presente data. Anexada a esta declaração como Documento 5 está uma certidão que atesta a existência do processo-crime.

B. Processo Penal n.º 5647/018-LG

10. Em 1 de Novembro de 2018, um representante da AGPV, o Sr. Ildefonso Machado Francisco Massango, fez uma queixa crime ao Serviço de Investigação Criminal, alegando que António Andrade desobedeceu a decisão do Tribunal de Luanda no Processo n.º 2911/17-B. No mesmo dia, o Serviço de Investigação Criminal fez um relatório à Procuradoria-Geral da República, que ordenou a abertura de um processo crime e emitiu uma ordem de urgência de busca e apreensão ao imóvel objeto da lide. Uma cópia do relatório do Serviço de Investigação Criminal, e uma cópia do mandado do Procurador, junto com traduções certificadas delas para inglês, estão anexadas a esta declaração como Documento 6.

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11. De acordo com o mandado do Procurador, em 1 e 2 de Novembro de 2018, a polícia angolana executou uma busca e apreensão ao imóvel objeto da lideem litigio. A polícia recuperou quatro chaves do imóvel objeto da lide. Na sequência, as chaves foram entregues ao Sr. Massango. Os relatórios e o recibo de entrega da polícia estão anexados como Documento 1 à minha Declaração de 8 de Novembro de 2018.

12. O Sr. António Andrade está a ser acusado penalmente por desobedecer e resistir a uma ordem judicial e por ocupar uma posse que não lhe pertence.

III. Acção disciplinar contra a Natasha Andrade

13. Como Procuradora da República, Natasha Andrade está sujeita aos processos internos disciplinares da Procuradoria Geral da República, que são conduzidos pelo Conselho Superior da Magistratura do Ministério Público. Em 24 de Novembro de 2017, o Conselho Superior iniciou um processo disciplinar contra ela. Documento 7 em página 3. Durante o processo disciplinar, os seus poderes como Procuradora foram suspensos. Em 21 de Agosto de 2018, o Conselho Superior decidiu punir e sancionar a Sr.ª Andrade. Uma cópia da decisão da abertura da investigação disciplinar e a decisão da punição contra ela estão anexadas a esta declaração como Documento 7, junto com as traduções certificadas para inglês.

IV. Questões processuais em Angola

14. Angola está passível de ser processada nos tribunais de Angola e uma reivindicação de expropriação pode ser apresentada contra ela. Mas nenhuma acção foi instaurada em Angola contra o Estado Angolano sobre o imóvel objeto da lide.

15. Testemunhas localizadas em Angola podem ser compelidas a dar testemunho em processos judiciais angolanos. Da mesma forma, os tribunais angolanos podem exigir a produção de documentos localizados em Angola.

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Declaro sob pena de perjúrio conforme as leis dos Estados Unidos da América e da República de Angola que o acima descrito é verdadeiro e fiel. Assinado em 19 de Dezembro de 2018, em Luanda, Angola.

EDUARDA RODRIGUES NETO

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STATE OF CALIFORNIA
)
)
)
COUNTY OF SAN FRANCISCO) ss

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Portuguese into English of the attached Declaration in Support of the Republic of Angola's Motion to Dismiss the Complaint, dated December 19, 2018.

Kurt Shulenberger, Senior Managing Editor
Geotext Translations, Inc.

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California, County of San Francisco
Subscribed and sworn to (or affirmed) before me on this 20th day of December, 2018, by Kurt Shulenberger, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature: Bradley Rhymer

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Africa Growth Corporation, Plaintiff, v. Republic of Angola, *et al.*, Defendants.	Civil Action No. 1:17-cv-2469 (BAH)

DECLARATION IN SUPPORT OF THE REPUBLIC OF ANGOLA'S MOTION TO DISMISS THE COMPLAINT

I, EDUARDA PASSOS DE CARVALHO RODRIGUES NETO, hereby declare as follows:

1. I am the Deputy Attorney General of the Republic of Angola, and I have held this position since June 2006. I make this declaration in support of Angola's Motion to Dismiss the Complaint in the above-captioned matter. My declaration is made on the basis of my personal knowledge of the matters set forth below.

I. Litigation in Angola

2. Two actions have been filed before the Civil and Administrative Chamber of the Provincial Court of Luanda ("Luanda Court") regarding the housing complexes that are the subject of the claim for expropriation that Africa Growth Corporation has asserted before the U.S. District Court for the District of Columbia (the "disputed real-estate property").

A. Case No. 2911/17-B

3. On September 12, 2017, Illico – Comércio e Prestação de Serviços, Ltda. ("Illico") and AGPV, Ltda. ("AGPV") commenced case number 2911/17-B, an *ex parte* action

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before the Luanda Court. The action named António Francisco Andrade and Ausral (Angola) – Sociedade de Comércio e Representações Comerciais, Limitada ("Ausral") as the defendants. It requested, pursuant to articles 399 *et seq.* of Angola's Code of Civil Procedure, that the Luanda Court order, as a provisional remedy, that Illico and AGPV be restored possession of the disputed real-estate property on a provisional basis.

4. On November 23, 2017, the Luanda Court granted the request for provisional repossession [*providência cautelar de restituição*]. A copy and translation of the order [*sentença*] is attached as Exhibit E to the March 14, 2018 Declaration of Brenton Kuss (D.E. 23-2).

5. On December 19, 2017, the Luanda Court ordered court officials to enforce the provisional repossession [*restituição*] order. A copy and translation of the order [*despacho*] is attached as Exhibit G to the March 14, 2018 Declaration of Brenton Kuss (D.E. 23-2).

6. On January 31, 2018, court officials, aided by the Angolan police, enforced the provisional repossession order by evicting António Francisco Andrade from the housing complexes. Attached hereto as Exhibit 1 is the Order for Procedure for the Provisional Return of Possession [*Mandado de Diligência de Restituição Provisória de Posse*] and, as Exhibit 2, the Record of that Procedure [*Auto de Diligência*], along with certified English translations of both.

B. Case No. 3218/17-C

7. On December 29, 2017, Illico and AGPV commenced Case No. 3218/17-C before the 4th Section of the Luanda Provincial Court's Civil and Administrative Chamber. The action, which seeks a final adjudication of who is the lawful possessor of the disputed real-estate property, named as defendants António Francisco Andrade, Miguel Kenehele de Sousa

Andrade, Natasha Sulaia e Santos Andrade Santos, and Ausral. Attached hereto as Exhibit 3 is a copy of the Lawsuit for Maintaining and Restoring Possession that Illico and AGPV filed on December 29, 2017, along with a certified English translation. Case No. 3218/17-C is ongoing and still remains pending as of today's date.

II. Criminal Prosecutions in Angola

A. Criminal Case No. 33/2017

8. On August 15, 2017, AGPV, Illico and Maximílio Lda. filed with the Attorney-General of Angola a criminal complaint [*queixa crime*] against António Andrade and Natasha Andrade. The criminal complaint, and a certified English translation thereof, are attached hereto as Exhibit 4.

9. Shortly thereafter, in response to the criminal complaint, the Attorney General's Office [*Procuradoria-Geral da República*] initiated a criminal proceeding [*processo-crime*]. The investigation is still ongoing as of today's date. Attached hereto as Exhibit 5 is a certificate attesting to the existence of the criminal proceeding.

B. Criminal Case No. 5647/018-LG

10. On November 1, 2018, a representative of AGPV, Mr. Ildefonso Machado Francisco Massango, made a criminal complaint to the Criminal Investigation Service, alleging that António Andrade disobeyed the Luanda Court's order in Case No. 2911/17-B. That same day, the Criminal Investigation Service made a report to the Attorney General's Office, which ordered the opening of a criminal case and ordered an urgent search and seizure warrant of the disputed real-estate property. A copy of the Criminal Investigation Service's report and a copy of the Prosecutor's order, along with certified English translations of each, are attached hereto as Exhibit 6.

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11. In accordance with the Prosecutor's order, on November 1 and 2, 2018, the Angolan police executed a search and seizure of the disputed real-estate property at issue. The police recovered four keys to the disputed real-estate property. The keys were subsequently delivered to Mr. Massango. The police reports and delivery receipt are attached as Exhibit 1 to my Declaration of November 8, 2018.

12. António Andrade is being criminally prosecuted for disobeying and resisting a court order, and for occupying a property that does not belong to him.

III. Disciplinary action against Natasha Andrade

13. As a Federal Prosecutor [*Procuradora da República*], Natasha Andrade is subject to the internal disciplinary processes of the Attorney General's Office, which are conducted by the Superior Council of the Public Prosecutor's Office. On November 24, 2017, the Superior Council commenced a disciplinary proceeding against her. Exhibit 7 on page 3. During the pendency of the disciplinary proceeding, her powers as Prosecutor were suspended. On August 21, 2018, the Superior Council disciplined and fined Ms. Andrade. A copy of the decision to open the disciplinary investigation, and the decision disciplining her, are attached hereto as Exhibit 7, along with certified English translations.

IV. Procedural Issues in Angola

14. Angola is amenable to suit in the courts of Angola, and a claim of expropriation can be asserted against it. But no lawsuit has been filed in Angola against the Angolan State regarding the disputed real-estate property.

15. Witnesses located in Angola can be compelled to give testimony in Angolan court proceedings. Likewise, Angolan courts can require the production of documents located in Angola.

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I declare, under the penalty of perjury under the laws of the United States of America and the Republic of Angola, that the foregoing is true and correct. Executed this 19th day of December, 2018, in Luanda, Angola.

[signature]_____

EDUARDA RODRIGUES NETO

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-21995-Civ-WILLIAMS/TORRES

AFRICA GROWTH CORPORATION,

Plaintiff,

v.

REPUBLIC OF ANGOLA,

Defendant.

_____/

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on the Republic of Angola's ("Defendant" or "Angola") motion to dismiss against Africa Growth Corporation ("Plaintiff" or "Africa Growth") on the basis that this case lacks jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* [D.E. 51]. Plaintiff responded to Defendant's motion on April 30, 2020 [D.E. 59] to which Defendant replied on June 1, 2020. [D.E. 60]. Therefore, Defendant's motion is now ripe for disposition. After careful consideration of the motion, response, reply, relevant authority, and for the reasons discussed above, Defendant's motion to dismiss should be **GRANTED** for lack of subject matter jurisdiction and the case Closed.[1]

[1] On July 28, 2020, the Honorable Kathleen Williams referred Defendant's motion to dismiss to the undersigned Magistrate Judge for disposition. [D.E. 79].

I. BACKGROUND

Plaintiff filed this action on May 16, 2019 [D.E. 1], alleging breach of contract and unjust enrichment. The facts of this case relate to an attempt to resolve a long-running dispute in connection with Defendant's seizure and expropriation of assets and real property. Plaintiff originally sued Defendant in the District of Columbia for damages, together with five Angolan individuals. The complaint specifically alleged claims relating to the alleged unlawful seizure and expropriation of apartment buildings in Luanda, Angola, over which Plaintiff held enforceable property interests. Defendant moved to dismiss that case, in part, on the basis that the action lacked subject matter jurisdiction under the FSIA.

Before that motion was adjudicated, as Plaintiff alleges in this complaint filed in the Southern District of Florida, on February 12, 2019, the parties met in Lisbon, Portugal to try to settle the case. Plaintiff claims that they orally negotiated a final resolution of all claims and issues between the parties. The agreement provided that Angola would pay Plaintiff $47.5 million dollars via a wire transfer to Plaintiff's lawyers, due in 15 days, in exchange for the release of rights and claims to real property that Defendant expropriated. Plaintiff claims that, during the negotiations, Defendant represented that the agreement had the personal approval and support of Angolan President Joao Lourenco. However, when the time came for Defendant to make the required payment as consideration, Plaintiff alleges that Defendant failed to wire any funds to a Florida bank account and that Defendant breached the settlement agreement. Plaintiff therefore seeks

the immediate enforcement of the agreement, including compensatory damages, prejudgment interest, and costs.

But Plaintiff did not seek that relief in the District of Columbia as one would expect. Instead, it is undisputed that, even after the alleged wire transfer was never made and Defendant breached, Plaintiff only moved to dismiss the case several months later without seeking relief for the alleged breach. That court decided, however, to dismiss the case on July 19, 2019, pursuant to the pending motion to dismiss. The court held that the action was indeed barred under the FSIA. But Plaintiff claims that that is inconsequential because it had the right to "elect its remedies" from the purported oral agreement and sue in this District. And this Florida action is predicated entirely on the alleged breach of the settlement agreement, rather than the underlying claim of expropriation of assets at issue in the District of Columbia. Plaintiff thus concludes that the earlier action is immaterial to the resolution of this case, and hence the Court need not take note of the fact that the Plaintiff's original complaint was dismissed.

Defendant, not surprisingly, has a different view. On August 30, 2019, Defendant moved to dismiss Plaintiff's complaint on the basis (1) that Plaintiff's unjust enrichment claim was barred under *res judicata*, (2) that the Court lacked jurisdiction under the FSIA, (3) that the Court lacked personal jurisdiction, (4) that venue was improper, and (5) that Plaintiff's complaint failed to state a claim. Plaintiff subsequently filed a motion for leave to amend and the Court granted that motion on February 25, 2020. [D.E. 48]. The amended complaint differs from the

original in that it revised the unjust enrichment count, seeks additional compensatory damages, and includes other facts in support of Plaintiff's reliance on the commercial activity exception to the FSIA.

II. ANALYSIS

On March 10, 2020, Defendant filed a renewed motion to dismiss Plaintiff's amended complaint. [D.E. 51]. Defendant does not dispute the factual allegations in the pleading. Instead, Defendant accepts the allegations as true and contends that the amended complaint fails on its face to establish jurisdiction under the FSIA. Defendant also argues that venue does not exist in this District and that, if all else fails, the amended complaint should still be dismissed because it failed to state a plausible claim for breach of contract and unjust enrichment under the law that governs the case.

Plaintiff opposes each of Defendant's arguments. Plaintiff claims that the Court has subject matter jurisdiction under the commercial activity exception of the FSIA because the parties entered into a binding settlement agreement to resolve their disputes, and that Defendant's acts caused a direct effect on the United States. Plaintiff also asserts that venue is proper because Defendant was obligated to pay $47.5 million dollars to a Florida bank account. Plaintiff finally argues that the complaint satisfies the elements for a breach of contract and unjust enrichment claim. Because Defendant has misinterpreted both the facts and the law, Plaintiff concludes that the motion to dismiss should be denied in all respects.

A. General Principles of the Foreign Sovereign Immunities Act

Before reaching the merits, we must set forth the principles governing the FSIA because that will inform whether the Court has jurisdiction over this action. Under the FSIA, a foreign state is immune from the jurisdiction of both the federal and the state courts, except as provided by international agreements, *see* 28 U.S.C. § 1330(a); *id.* § 1604, by specifically enumerated exceptions, *see id.* § 1605(a)(1)-(7), (b), (d), or by certain other exceptions relating to counterclaims in actions brought by the foreign state itself, *see id.* § 1607. If no exception applies, a foreign sovereign's immunity under the FSIA is complete and a state or federal court does not have subject matter jurisdiction over a plaintiff's case. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) ("The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country."); *see also Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1543 (11th Cir. 1993) (noting that FSIA is "[t]he only possible source of federal jurisdiction in suits against corporations owned by foreign states").

"If sovereign immunity exists, then the court lacks both personal and subject matter jurisdiction to hear the case and must enter an order of dismissal." *de Sanchez v. Banco Cent. De Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985) (internal citations omitted). Conversely, "[i]f an exception does apply, the district court has jurisdiction." *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 2015 WL 7760057, at *4 (S.D. Fla. Dec. 2, 2015) (citing *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1312 (11th Cir. 2009)); *see also Argentine Republic v. Amerada Hess Shipping*

Corp., 488 U.S. 428, 434 (1989) (stating that the FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts").

To establish subject matter jurisdiction, a plaintiff must overcome the presumption that a foreign state is immune from suit by producing evidence that "the conduct which forms the basis of [the] complaint falls within one of the statutorily defined exceptions." *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1300 (11th Cir. 2000); *see also In re Terrorist Attacks on September 11, 2001,* 538 F.3d 71, 80 (2d Cir. 2008) (finding that a plaintiff has the burden of producing evidence showing that, under exceptions to the FSIA, immunity should not be granted). Whether the plaintiff has satisfied his burden of production is determined by looking at "the allegations in the complaint [and] the undisputed facts, if any, placed before the court by the parties." *In re Terrorist Attacks,* 538 F.3d at 80 (quotation marks, alterations, and citation omitted). Once the plaintiff demonstrates that one of the statutory exceptions to FSIA immunity applies, the burden then shifts to the defendant to prove, by a preponderance of the evidence, that the plaintiff's claims do not fall within that exception. *See S & Davis Int'l,* 218 F.3d at 1300; *Arango v. Guzman Travel Advisors Corp.,* 621 F.2d 1371, 1378 (5th Cir. Unit B 1980).

Attacks on subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), such as under the FSIA, come in two forms: (1) "facial attacks" on the which require the court to draw all reasonable inferences in favor of the plaintiff to see if the plaintiff has sufficiently alleged a basis for subject matter jurisdiction;

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and (2) "factual attacks," which "challenge the existence of subject matter jurisdiction in fact" and require the court to consider matters outside the pleadings because no presumption of truthfulness attaches to plaintiff's allegations. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (internal citations omitted).

B. Whether Plaintiff's Claims are "Based Upon" Commercial Activity

Based on these legal principles, Defendant first argues that Plaintiff's complaint should be dismissed because – even when accepting all the allegations in the amended complaint as true – the Court lacks jurisdiction over this case under the FSIA. The decision to accept each jurisdictional allegation as true represents a facial attack on Plaintiff's amended complaint because Defendant "does not contest the [complaint's] alleged jurisdictional facts, but rather, challenges their legal adequacy[.]" *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009). When a facial attack is made, a plaintiff bears the burden "of presenting a *prima facie* case that jurisdiction exist[s]." *Id.* (citing *S & Davis Int'l,* 218 F.3d at 1300). And to determine whether a plaintiff has met that burden, courts review "the complaint's jurisdictional allegations to determine whether they [are] sufficient to eliminate [a foreign state's] presumptive immunity." *Id.* (citing *Mwani v. bin Laden*, 417 F.3d 1, 15-16 (D.C. Cir. 2005) (where foreign sovereign did not expressly concede plaintiffs' factual allegations but argued that the allegations, even if substantiated, were insufficient to trigger FSIA exception, sovereign's argument was a challenge to the legal sufficiency of the allegations subject to *de novo* review)); *see also Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353, 1367 (11th Cir. 1997) (noting that a facial

challenge to the legal sufficiency of a claim or defense, unlike a denial of the complaint's factual allegations, "always presents a purely legal question").

Defendant argues that Plaintiff's amended complaint should be dismissed because it is not "based upon" commercial activity. The commercial activity exception applies if one of three actions occur:

> [T]he action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The parties agree that only the third prong is at issue. For jurisdiction to exist under the third prong "'1) the lawsuit must be based upon an act that took place outside the territory of the United States[2]; 2) the act must have been taken in connection with a commercial activity[;] and 3) the act must have caused a direct effect in the United States.'" *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1224 (11th Cir. 2018) (quoting *de Csepel v. Republic of Hung.*, 714 F.3d 591, 598 (D.C. Cir. 2013)).

Defendant views the alleged acts as those committed by a sovereign state because Plaintiff claims that there was an "agreement pursuant to which Angola committed to paying USD 47.5 million to [Africa Growth] . . . for the transfer of all rights to the property owned by [Africa Growth], which is located in Luanda, Angola . . . [and Africa Growth] agreed to relinquish all of its rights, title, and any potential

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[2] Neither party disputes that the lawsuit is based on activity that took place outside the United States – i.e. Portugal. The parties disagree, however, on the second and third prongs.

claims to said property[.]" [D.E. 50 at ¶ 10]. Defendant posits that the "property" at issue is the seizure "of assets and real property," *id.* ¶ at 10, and that the agreement between the parties was intended to compensate for a wrongful taking. Because these takings are sovereign-based, as opposed to that of a private actor, Defendant concludes that the commercial activity exception does not apply.

Plaintiff disagrees because the parties entered into a binding settlement agreement and Defendant failed to wire funds to a Florida bank account. That is a quintessential commercial agreement that private parties can and do enter into. So while Defendant focuses on the reasons for entering into the settlement agreement, Plaintiff looks to the breach that triggered this lawsuit. Plaintiff contends that Defendant's actions are commercial in nature because any private party can enter into a settlement agreement and then breach it by failing to uphold its end of a bargain. In other words, Plaintiff views this case as a breach of contract and posits that the underlying reasons for the negotiation of the agreement (i.e. the unlawful seizure and expropriation of assets and real property) are irrelevant. Plaintiff therefore frames the questioned presented as whether Defendant engaged in activities that could include private actors. And because entering into a contract is a commercial activity as opposed to an activity restricted solely to foreign states, Plaintiff concludes that this case is "based upon" a commercial activity and that the Court has jurisdiction under this exception.

1. Identifying the Underlying Conduct

To determine whether the allegations in this case should be considered commercial or sovereign, the first step is to "identify the conduct upon which the suit is based." *Devengoechea*, 889 F.3d at 1222 (citing *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015)). "That, in turn, requires us to look at 'the 'particular conduct' that constitutes the 'gravamen' of the suit.'" *Id.* (quoting *OBB Personenverkehr AG*, 136 S. Ct. at 396). The focus should be on the "core" of the suit or, to put it simply, the foreign state's "acts that actually injured" the plaintiff. *Id.*; *see also Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 107 (2d Cir. 2016) (quoting *Black's Law Dictionary* 817 (10th ed. 2014) (defining "gravamen" as "[t]he substantial point or essence of a claim, grievance, or complaint")).

The Supreme Court's decisions in *Nelson* and *Sachs* are instructive on how this concept operates in practice. In *Saudi Arabia v. Nelson*, the plaintiff was in the United States when he was recruited for a position in a Saudi Arabia Government-controlled hospital. *See* 507 U.S. 349, 351-52 (1993). The plaintiff signed a contract in the United States to work at a Saudi hospital. *Id.* at 352. While working there, the plaintiff discovered several safety hazards and reported them to the hospital, but the hospital instructed him to ignore the problems. *Id.* Shortly thereafter, agents of the Saudi Government arrested, tortured, beat, and imprisoned the plaintiff for over a month. *Id.* at 352–53.

The plaintiff sued Saudi Arabia and its hospital with allegations of intentional torts including battery, unlawful detainment, wrongful arrest and imprisonment, false imprisonment, inhuman torture, disruption of normal family life, and infliction of mental anguish. *Id.* at 353-54. To support the "based upon" requirement, the plaintiff relied on the facts that Saudi Arabia had recruited him to work at the hospital, had signed an employment contract with him, and had ultimately employed him. *Id.* at 358. The Supreme Court held that no jurisdiction existed under the FSIA because the plaintiff's claims were not "based upon" these acts. *Id.* Instead, the plaintiff's tort claims were based on Saudi Arabia's tortious conduct and that did not constitute "commercial activity." *Id.* Saudi Arabia undertook its tortious conduct by exercising the powers of the police and penal officers – actions that were peculiarly sovereign in nature and therefore not "commercial." *Id.* at 361-63.

Likewise ,in *Sachs*, the Supreme Court applied the meaning of "based upon" in the context of a lawsuit relying on the first clause of the commercial-activity exception, so the plaintiff had to show that her action was "based upon a commercial activity carried on in the United States by the foreign state." 136 S.Ct. at 394 (quoting 28 U.S.C. § 1605(a)(2)). Sachs was a California resident who bought a ticket in the United States for rail travel in Europe. *Id.* at 393. Unfortunately, she fell onto the tracks at a station in Austria while trying to board a train operated by the Austrian state-owned railroad company and, as a result, she suffered traumatic injuries. *Id.* She then sued Austria for negligence, strict liability for

design defects, strict liability for failure to warn of design defects, breach of an implied warrant of merchantability for providing a train and platform unsafe for their intended uses, and breach of an implied warranty of fitness for providing a train and platform unfit for their intended uses. *Id.* Sachs relied on the sale of the train pass in the United States to establish that her claims were "based upon" commercial activity because the sale of the pass was an element of each of her claims. *Id.* at 394–95.

The Supreme Court disagreed, however, for several reasons. First, the Court concluded that Sachs's claims were not "based upon" the sale of the train pass because there was "nothing wrongful about the sale of the Eurail pass standing alone." *Id.* at 396. Second, the Court found that the conduct making up the gravamen of Sachs's lawsuit happened in Austria because "[a]ll of her claims turn[ed] on the same tragic episode" that occurred there. *Id.* Nevertheless, the Court did caution that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits . . . ." *Id.* at 397 n.2. And importantly, the Court recognized that the gravamen of different claims may occur in different locations. *Id.*

Applying these concepts to this case, the conduct that injured Plaintiff was "Angola's unlawful seizure and expropriation of assets and real property lawfully owned by [Africa Growth] and its Angolan subsidiaries," because that is why the parties entered into a settlement agreement in the first place. [D.E. 50 at ¶ 2]. Plaintiff self-servingly disagrees because the focus should simply be on the

settlement agreement and the breach that followed. But, the breach of the settlement agreement is not what "actually injured the plaintiff." *Devengoechea*, 889 F.3d at 1223 (finding that the actual injury was the defendant's decision to neither pay plaintiff nor return a collection of historical artifacts because the "causes of action – breach of contract and unjust enrichment – turn on this circumstance."). That was the seizure and expropriation of commercial buildings, bank accounts, and real property. [D.E. 50 at ¶ 14]. In other words, the core injury here took place well before the parties ever entered into an alleged oral agreement. The Supreme Court teaches us that we must turn our lens on that injury in applying the FSIA.

Indeed, Plaintiff's own amended complaint makes this clear, as throughout its pleading Plaintiff explains that these are the reasons for entering into the settlement agreement, and then asserts repeatedly that this case arises out of the taking of Plaintiff's assets. *Id*. at ¶ 51 ("Since the dispute between AFGC and Angola began – arising out of the uncompensated taking of the AFGC Angolan Assets"). Yet Plaintiff seeks to divert attention from these allegations even though both of its claims are grounded on Angola's seizure and expropriation of assets.

For example, with respect to the breach of contract claim, Plaintiff alleges that Angola's failure to tender $47.5 million dollars in compensation for the seizure of Plaintiff's assets constitutes the breach. And for the unjust enrichment claim, Plaintiff alleges that Angola's decision to retain those same funds and withhold payment led to Angola receiving a windfall. Therefore, the conduct upon which this

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suit is based is the expropriation of real property. For purposes of applying the FSIA, that conclusion is pivotal because we are duty bound to "identify the conduct upon which the suit is based." *Devengoechea*, 889 F.3d at 1222.

2. Determining whether a Taking is a Sovereign or Commercial Act

The next question is whether a taking of commercial buildings, bank accounts, and real property is considered a commercial or sovereign act. "The touchstone for determining if a foreign government's act is commercial is whether the *nature* of the act is public or private." *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1325 (11th Cir. 2003) (emphasis in original) (citing *Weltover,* 504 U.S. at 618). The Supreme Court has defined commercial acts as those that allow for the participation of a private party. *See Weltover*, 504 U.S. at 618. Public acts, on the other hand, require sovereign power and thus cannot be performed by a private party. *Id.* The Court has emphasized that public acts must make use of a state's sovereign authority:

> [W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. . . . [T]he issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce." Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts to acquire goods.

Id. at 614 (citations omitted).

A foreign government's act is thus commercial if it is the type of transaction that private actors can complete. For example, in *Weltover,* the Supreme Court found that Argentina's issuance of bonds to finance a currency-exchange program was a commercial activity because private corporations can also raise capital through the issuance of debt instruments in the same manner. *See id.* at 616. The Eleventh Circuit, in the same vein, determined that the Government of Yemen engaged in commercial activity when it entered into a contract to purchase grain from an American corporation because the contract was "just a contract and . . . not based upon regulatory reasons." *S & Davis Int'l,* 218 F.3d at 1303.

"By contrast, a government's regulation of the market, [the] use of [its] police power, or other activities requiring state authority are not commercial." *Beg*, 353 F.3d at 1326 (citing *Nelson,* 507 U.S. at 359–63 (finding that the alleged detention and torture by Saudi police of an American citizen, who had entered into an employment contract with a state hospital, was not commercial activity); *Weltover,* 504 U.S. at 614 (determining that the regulation of foreign exchange policy is sovereign activity)). For instance, the plaintiff in *Nelson* claimed that the Saudi government's detention and torture was not commercial because the government had entered into an employment contract with him. But, the Supreme Court determined that the tortious activity was pursuant to the state's police power and was "not the sort of action by which private parties can engage in commerce." *Nelson*, 507 U.S. at 362. And although there was an employment contract between the two parties, the basis of Nelson's claim was the tortious

conduct by government agents. *See id.* at 361–63. Thus, the Court determined that foreign government acts, "however monstrous," that are "peculiarly sovereign in nature" are not subject to review by our courts under the FSIA's commercial activities exception. *Id.*at 361.

The same reasoning applies in this case because, although Plaintiff's two causes of action are premised on a breach of contract and an unjust enrichment claim – the actual wrongful conduct was the seizure and expropriation of assets and real property that purportedly injured Plaintiff. Plaintiff admittedly does not tackle how the taking of these assets constitute commercial activity because Plaintiff placed all of its eggs in one basket – the argument that the breach of the settlement agreement was the real gravamen of this lawsuit. But, for the reasons already discussed, that cannot be. And Plaintiff has failed to reference any FSIA case where a court has begun and ended its analysis by looking solely to the existence of a single commercial contract as the end all and be all of FSIA review.

Indeed the Eleventh Circuit has cautioned district courts against the position that Plaintiff now advances because "[i[n ascertaining the gravamen of a complaint, courts are to focus on the core conduct giving rise to the suit rather than individually analyzing the elements of each cause of action. This approach prevents plaintiffs from side-stepping the FSIA's limitations 'through artful pleading.'" *Sequeira v. Republic of Nicaragua*, 2020 WL 2499808, at *4 (11th Cir. May 14, 2020) (quoting *OBB Personenverkehr AG*, 136 S. Ct. at 396). And the Eleventh Circuit has directly held that the taking of real property is a power reserved to a

sovereign power – not a private actor. *See, e.g.*, *Beg*, 353 F.3d at 1326 ("Confiscation of real property is a public act because private actors are not allowed to engage in 'takings' in the manner that governments are.") (citing *Shakour v. Fed. Republic of Germany,* 199 F.Supp.2d 8, 13 (E.D.N.Y. 2002) (finding that the German Democratic Republic's expropriation of three factories is a public, not a commercial act); *Haven v. Polska,* 215 F.3d 727, 736 (7th Cir. 2000) (determining that the commercial activity exception did not apply to expropriation of real property in Poland because it was not based upon any commercial activity within the United States)).

In cautioning us against a litigant side-stepping the FSIA through "artful pleading," the Eleventh Circuit was prescient. That is exactly what this amended complaint is all about. Plaintiff argues forcefully how it has been damaged by Defendant's wrongful conduct in Angola. But rather than pursuing its legal positions in the forum it chose to consider that conduct, which admittedly proved difficult when the court dismissed the case under the FSIA, Plaintiff took a very different path to "elect its remedies:" by filing this lawsuit seeking relief in this jurisdiction for a purported oral agreement entered into in Lisbon, Portugal. And Plaintiff claims it can do so simply because it has the right to enforce a basic commercial contract. Artful pleading indeed.

But wait, there is more. Another reason Angola's alleged actions fall outside the scope of the FSIA is because "[d]etermining whether or how to compensate property owners for takings is also a sovereign function, not a market transaction."

Beg, 353 F.3d at 1327 (citing *United States v. Carmack*, 329 U.S. 230, 236-37 (1946)). That is exactly the case here because the settlement agreement between the parties was an attempt to compensate Plaintiff for the taking of real property. And the Supreme Court has specifically stated that expropriation does not take place in a free-market setting:

> The power of eminent domain is essential to a sovereign government. If the United States has determined its need for certain land for a public use that is within its federal sovereign powers, it must have the right to appropriate that land. Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will. The Fifth Amendment, in turn, provides him with important protection against abuse of the power of eminent domain by the Federal Government.

Carmack, 329 U.S. at 236-37.

Thus, while Plaintiff maintains that the settlement agreement with Angola is commercial activity and that the analysis should stop there, that contention is unavailing because the gravamen of this case is the expropriation of real property and that is *not* an activity in which private actors can engage.[3] *Sequeira*, 2020 WL 2499808, at *4 ("The commercial-activity exception does not apply here because Sequeira's amended complaint was based on the alleged taking of his land, which is not a commercial activity.") (citing *Beg*, 353 F.3d at 1327-28 ("Beg contends that the Punjabi regional government's agreement to compensate him is the equivalent of a

[3] We further note that, even if we focused solely on the contract and not the actual harm that caused the injury, the result remains the same. That is, the result is no different because the contract in this case is to resolve the taking of real property. And private actors cannot enter these types of contracts because they cannot expropriate real property in the first place. That power belongs solely to a sovereign state. This is yet another reason why the activity in this case is sovereign – not commercial.

contract and, therefore, is commercial activity. This analogy is not persuasive," because "[e]xpropriation is neither the type of activity in which private actors engage nor is it a market transaction.")); *see also Devengoechea*, 889 F.3d at 1228 ("[E]xpropriation is a uniquely sovereign act, as opposed to a private act," because "[s]imilar to the concept embodied in our Fifth Amendment to the U.S. Constitution, FSIA expropriation involves sovereign 'takings' of property, without just compensation.") (citing authorities).

3. Considering the Notices of Supplemental Authority

Having now considered all of the cases presented in the underlying motion to dismiss, Plaintiff requests that we consider additional cases included in its first notice of supplementary authority that Plaintiff filed on July 23, 2020.[4] This notice directed the Court's attention to the Second Circuit's recent decision in *Fontana v. Republic of Argentina*, 962 F.3d 667, 673 (2d Cir. 2020). The plaintiffs in that case filed a lawsuit against Argentina seeking payment on defaulted bonds. The

[4] We note that we need not even consider Plaintiff's notices of supplemental authority because Plaintiff violated Local Rule 7.1(c). That rule authorizes only opposing and reply briefs. The rule also makes clear that "no further or additional memoranda of law shall be filed without prior leave of Court." Local Rule 7.1(c). Yet, Plaintiff included arguments in support of its notices of supplemental authority in violation of the Local Rule. *See, e.g.*, *Barron v. Snyder's-Lance, Inc.*, 2014 WL 2686060, at *1 (S.D. Fla. June 13, 2014) (stating that, while "supplemental filings should direct the Court's attention to legal authority or evidence . . . [they] should do nothing more. In particular, they should not make legal arguments.") (citations omitted). Plaintiff's notices are also defective because some of the cases included were obviously available at the time it filed its initial response because they were published many years ago. It appears that Plaintiff simply missed them after conducting its initial research, kept performing research after the fact, and filed a notice of supplemental authority each time a persuasive case came along. While we could avoid any discussion of these cases altogether, we will nevertheless address them in the interests of fairness and completeness to make certain we are reaching the correct result.

plaintiffs prevailed and the district court entered judgment. Shortly thereafter, the plaintiffs settled their claims and their former counsel sought to recover his fees. Before reaching the merits of the fee petition, the Second Circuit considered whether the case fell within the commercial activity exception of the FSIA. The Court focused on the third clause of the commercial activity exception and found that each prong was satisfied because (1) the act of settling the underlying claim occurred outside the United States (i.e. Argentina), (2) there was no dispute that the settlement was made in connection with a commercial activity (i.e. bonds), and (3) the settlement ended a long-running lawsuit, thereby having a direct effect on the United States.

Plaintiff equates *Fontana* to the facts presented because it shows that the Court has jurisdiction under the FSIA. Plaintiff first states that *Fontana* is persuasive because it supports the argument that Angola waived its sovereign immunity. This argument is somewhat perplexing because Plaintiff no longer contends that Angola is subject to the Court's jurisdiction under the FSIA's waiver exception to sovereign immunity. Plaintiff abandoned that argument when Plaintiff filed an amended complaint.[5] It is therefore unclear why this argument was presented in conjunction with the notice of supplementary authority. Either way, it is easily dismissed.

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[5] When Plaintiff filed its motion for leave to amend, it admitted that it wanted to "narrow its jurisdictional allegations by removing the allegations of express and implied waiver of immunity, thus focusing on the commercial activity exception to immunity pursuant to 28 U.S.C. § 1605(a)(2)." [D.E. 47 at 3].

Plaintiff's next argument is that the alleged settlement in this case is the same as the agreement in *Fontana*. The problem with this contention is that, in *Fontana*, it was undisputed that the settlement agreement was commercial. *See Fontana*, 962 F.3d at 673 ("Argentina does not dispute that this settlement was made 'in connection with' its commercial activities.") (citing *Weltover,* 504 U.S. at 615–17 (holding that Argentina's issuance of bonds constitutes a commercial activity within the meaning of the FSIA); *Lord Day & Lord v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549, 559 (S.D.N.Y. 2001) ("[I]nitiation and settlement of commercial litigation may be a 'commercial activity' within the meaning of the statute.")). But, putting that aside, the underlying harm was, of course, commercial because the acts that actually injured the plaintiffs in *Fontana* were Argentina's failure to compensate bondholders. And as stated earlier, private actors can engage in the issuance of debt instruments so that holding makes perfect sense.

With that being said, *Fontana* is unhelpful because – when compared to the allegations in this case – Plaintiff does not complain that Angola failed to pay bondholders or that Angola engaged in any other commercial activity. Instead, Plaintiff alleges that Angola expropriated real property, commercial buildings, and bank accounts. *Fontana* therefore undermines Plaintiff's position because it shows that it is not the contract itself that constitutes the gravamen of a lawsuit. Rather, it is the underlying harm (i.e. the failure to compensate bondholders) that actually matters. So, if we take the reasoning in *Fontana* and look to the underlying harm beneath the contract in this case then we arrive at the same conclusion we reached

earlier because Plaintiff alleges that Angola expropriated real property. And that constitutes sovereign activity and therefore falls outside the scope of the FSIA. *See Beg*, 353 F.3d at 1326 ("Confiscation of real property is a public act because private actors are not allowed to engage in 'takings' in the manner that governments are.") (citing cases). So the Second Circuit is entirely in sync with the Eleventh Circuit in this important respect. Plaintiff's reliance on *Fontana* thus proves unhelpful.

In a second notice of supplemental authority filed on August 6, 2020 [D.E. 86], Plaintiff relies on a district court's decision in *Figueroa v. Ministry for Foreign Affairs of Sweden*, 222 F. Supp. 3d 304 (S.D.N.Y. 2016).[6] There, an employee of Puerto Rican descent filed a state court action (that was later removed to federal court) against his employers,[7] asserting claims for personal injury, retaliation, and discrimination based on national origin, race, and disability, and a separate claim for the breach of a tolling agreement. The defendants hired plaintiff as an office clerk and chauffeur. The plaintiff's employment was governed by an employment agreement that provided, among other things, the plaintiff's entitlement to a pension, life insurance, and a funeral grant under Swedish law.

The plaintiff alleged that, from the beginning of his employment, his Swedish employers treated him differently and discriminated against him on a daily basis

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[6] Plaintiff also relied on the district court's opinion in *Reichler, Milton & Medel v. Republic of Liberia*, 484 F. Supp. 2d 1 (D.D.C. 2007), as support for the proposition that Angola's breach of a contractual duty had a direct effect on the United States. We need not discuss this case because, for the reasons stated below, the actual harm that Plaintiff suffered was a sovereign act.

[7] The plaintiff's employers in *Figueroa* were the Ministry of Foreign Affairs of Sweden and the Permanent Mission of Sweden to the United Nations.

due to his race and national origin. In May 2012, the plaintiff's employer directed him to assemble two large pieces of furniture to avoid the cost of hiring professionals even though the assembly instructions stated that two workers with carpentry experience should perform the construction. While assembling the furniture, the plaintiff alleged that he fell from a ladder, leading to serious injuries. Following his injuries and informing the defendants about the possibility of litigation, the parties entered into a tolling agreement that preserved all of the parties' claims and defenses.[8]

Although the district court found that Plaintiff's retaliation and discrimination claims were sovereign based and lacked jurisdiction under the FSIA, the court determined that a breach of the tolling agreement was commercial. The plaintiff alleged that the defendants breached the tolling agreement when they reduced his medical leave compensation. The defendants asserted, in response, that the tolling agreement should be considered a sovereign act and outside the court's jurisdiction because it was inextricably intertwined with the underlying employment claims for discrimination and retaliation, and therefore not the product of commercial activity.

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[8] The tolling agreement provided that, "[t]o enable [the defendants] to fully evaluate [the plaintiff's] claims, including those claims related to his physical injuries, and to enable the Parties to attempt to negotiate a confidential settlement of [the plaintiff's] claims, all of which are denied by [the defendants], [the plaintiff] will continue to remain on a partially paid leave of absence at the same level of compensation as presently being received (something to which [the defendants] take[ ] the position that he is not entitled to at this time)." *Figueroa*, 222 F. Supp. 3d at 309.

The district court rejected the defendants' argument because "plaintiff's claim [was] not that the defendants breached the underlying employment agreement by reducing his benefits, but that the defendants breached their obligations as set forth in a new contract wholly separate and apart from the underlying employment agreement." *Figueroa*, 222 F. Supp. 3d at 317. The court reasoned that a tolling agreement created enforceable rights between the parties and that it was the type of contract that private parties regularly used to freeze their respective rights in anticipation of litigation. *See id.* (citing *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 81 F. Supp. 3d 1, 15 (D.D.C. 2015); *Medtronic Navigation, Inc. v. Saint Louis Univ.*, 2013 WL 5323307, at *4 (D. Colo. Sept. 23, 2013)). That is, the tolling agreement provided that the plaintiff would keep his claims confidential and, in exchange, the defendants would maintain his leave and compensation. And the court construed this agreement as "plainly not the product of an act peculiar to a sovereign." *Figueroa*, 222 F. Supp. 3d at 317.

The district court then relied on the Fifth Circuit decision in *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992), because it included a similar fact pattern where a sovereign breached a settlement agreement:

> In an analogous case involving a sovereign's alleged breach of a settlement agreement, the Court of Appeals for the Fifth Circuit reasoned that, "The negotiation of contracts, including entry into a settlement agreement, clearly is the type of act performed by private persons. There, the Court of Appeals held that any jurisdictional inquiry under the commercial activity exception must focus on the settlement agreement that the sovereign allegedly breached. Accordingly, the underlying activities and claims resolved by the settlement agreement were irrelevant to the jurisdictional inquiry. As the Court of Appeals concluded, the settlement "agreement functioned

> as a new contract between the parties, and [the plaintiff] now wants to recover for an alleged breach of that new contract," meaning that the settlement agreement was the activity that had to support jurisdiction under the commercial activity exception. In that case, although the entry into the settlement agreement was a commercial activity, the commercial activity exception did not apply because the settlement agreement had no jurisdictional connection to the United States.

Figueroa, 222 F. Supp. 3d at 317 (internal citations omitted). Finding this reasoning persuasive, the district court held that it was "irrelevant that the plaintiff's underlying employment relationship with the defendants was noncommercial in nature because the tolling agreement was a distinct transaction that is commercial in nature." *Id.*

Plaintiff suggests that the reasoning in *Figueroa* is applicable here because it shows that any jurisdictional inquiry under the commercial activity exception must focus on the breach of a settlement agreement. But, there is a noticeable problem when comparing *Figueroa* to the facts of this case. *Figueroa*, unlike here, included disputes over *two contracts* – an employment agreement and a subsequent tolling agreement. While the district court found that the underlying employment agreement was based on sovereign activity, the court made a distinction with respect to the tolling agreement because that was an entirely new contract apart from the plaintiff's claims for discrimination and retaliation. The tolling agreement was also a contract that any private party could enter into because it froze the parties' rights in the contemplation of future litigation. The district court therefore

refused to allow the defendants to enter into more than one contract and rely on the argument that they were all based on sovereign activity.[9]

This case is materially different because we do not have the presence of two contracts. We merely have allegations that Angola expropriated real property and that the parties entered into a contract to compensate Plaintiff for a wrongful taking. If this case involved facts where the parties entered into more than one commercial contract then *Figueroa* might have much more relevance. But, considering there is only one isolated contract at issue in this case, which is not in fact the source of the core injury that led us here, it is unclear as to how *Figueroa* is relevant to the facts presented.

To the extent *Figueroa* is at all relevant, it undermines Plaintiff's argument because – when the court considered whether plaintiff's employment was commercial or sovereign based with respect to the employment contract – it looked to the underlying facts of the employment relationship (as we did above) as opposed to the mere presence of a contract. Indeed, the district court focused on whether the plaintiff's job activities were governmental in nature and whether the employment relationship was "sufficiently intertwined with that activity to provide that the employment relationship itself was part of the governmental function. *Figueroa*,

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[9] Although not stated directly, the policy rationale for the district court's decision is that a foreign state should not be allowed to shield itself from the FSIA by breaching multiple contracts with the same underlying sovereign act. In other words, when a foreign state enters into a contract and then breaches it, it cannot enter into a subsequent contract and expect both contracts to be considered sovereign activity. If that were the rule, it would allow a foreign state to enter into countless contracts and avoid the FSIA merely because a sovereign act caused the first injury.

222 F. Supp. 3d at 313 (citation and quotation marks omitted). The court did not hang its hat on the mere presence of a contract. The court only examined the second contract (i.e. the tolling agreement) differently because that was "based upon" the breach of an underlying contract and therefore the actual harm was too attenuated to focus again on the plaintiff's employment relationship.

The district court's reliance on the Fifth Circuit's decision in *United States v. Moats* is distinguishable for many of the same reasons because that case also involved the presence of multiple contracts. *See* 961 F.2d at 1205. In that case, there were underlying contracts for the fabrication of steel and other materials, and then there was also a settlement agreement to resolve a breach of those contracts. The Fifth Circuit reasoned that the settlement agreement constituted commercial activity because it "functioned as a new contract between the parties," contemplated a resolution for the failure to pay for goods illegally removed from a factory (also a commercial activity unlike the allegations here), and the plaintiff "want[ed] to recover for an alleged breach of that new contract." *Id.* at 1206. Again, Plaintiff is not attempting to enforce a settlement agreement to resolve the breach of a prior contract. Plaintiff only wants Angola to fulfill its obligations with respect to a single contract and to compensate Plaintiff for a wrongful taking.

Moats is distinguishable for an additional reason because, although the Fifth Circuit stated that "[t]he negotiation of contracts, including entry into a settlement agreement, clearly is the type of act performed by private persons," the Court found that there was "no doubt that the foreign employer engaged in commercial activity,

as opposed to the public acts of a sovereign, *at all relevant times*." *Id.* at 1205 (emphasis added). This case is the opposite of *Moats* because every allegation in Plaintiff's pleading complains of a sovereign act. Indeed, there is nothing about this case that resembles commercial activity other than the fact that the parties entered into a settlement agreement but, for the reasons explained below, that too is unpersuasive.

The Fifth Circuit also found that there was "nothing in the contracts or the agreement that would indicate the acts of a state, nor [did the foreign employer] suggest[] that these activities were really governmental activities." *Id.* (citing *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578-79 (7th Cir. 1989) (describing contractual arrangements that may be considered public, rather than private, acts)). That is significant because the foreign employer conceded that the acts were commercial based and that nothing required the use of sovereign power. We agree with the Fifth Circuit's decision because the breach merely concerned the failure of one Mexican company to pay another. Yet, this case alleges that Angola expropriated real property and that the settlement agreement was intended to compensate Plaintiff for an illegal taking. And we have located not a single case – nor has Plaintiff referenced one – where private actors can enter into these types of agreements. *See Moats*, 961 F.2d at 1205 ("An activity is considered 'commercial' if it is the type a private person normally would engage in for profit.") (citing *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108 n. 6 (5th Cir. 1985)). The reason for that omission is because a taking is a sovereign power – meaning

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private actors cannot resolve these types of disputes among themselves because they cannot expropriate real property in the first place.

4. Whether Entry of a Settlement Agreement is a Commercial Act

Having now considered every case that Plaintiff relies on, this leads us to the only argument left standing: whether the entry into a settlement agreement by itself (notwithstanding that it involves the taking of real property) is enough to constitute a commercial act. This argument fails because if the only thing that mattered were the settlement agreement itself, then any conduct flowing from a breach could constitute commercial activity. In other words, entering into a settlement agreement cannot be *per se* commercial activity because it would vastly expand jurisdiction under the FSIA while, at the same time, turning a blind eye to the conduct that actually harmed a plaintiff. It would, for example, allow a plaintiff to sue a foreign state for an unlimited range of sovereign conduct merely because the parties attempted to resolve a dispute in a settlement agreement. Because jurisdiction under the FSIA is limited to the exceptions provided in the statute and to the conduct that actually caused an injury, Plaintiff's proposed rule would, in many respects, rewrite the FSIA and allow for U.S. courts to consider matters far beyond the scope that Congress provided.

The opposite danger was presented in *Figueroa* and *Moats* because the foreign state in those cases wanted to bypass the FSIA with arguments that, irrespective of multiple breaches, the same underlying sovereign conduct should be enough to shield themselves from liability. This too was an attempt to rewrite the

FSIA because it would have allowed a foreign state to enter into a contract, breach it, and then enter into subsequent contracts and breach them by relying again on the same sovereign conduct that led to the first breach. If the courts had adopted that rule, it would have allowed any foreign state to enter into more than one contract and avoid the FSIA merely because a sovereign act caused the first injury.

Neither position holds water because both fail to examine whether an act is actually "based upon" commercial activity. In *Figueroa* and *Moats*, the actual injury was the breach of the settlement agreement that attempted to resolve the underlying breach of contracts. And in this case, the actual injury is the taking of real property. The difference is subtle, but important because if ones goes too far in favor of a foreign state then any sovereign conduct can be used to defeat jurisdiction for a breach contract claim, irrespective of how many breaches the sovereign commits. On the other hand, if one goes too far in Plaintiff's corner then any breach of contract constitutes commercial activity. Neither is correct because – while the former would severely restrict jurisdiction under the FSIA – the latter would vastly expand it.

Returning to Plaintiff's argument that the mere presence of a settlement agreement is enough to constitute commercial activity, this is unconvincing for an entirely separate reason because this is not the first time that it has been considered. The plaintiff in *Beg* made a similar contention with an attempt to focus solely on the presence of contract with the hope that it would constitute commercial activity. Beg complained that the Government of Pakistan, the Pakistan Army and

the regional Government of Punjab expropriated his real property and offered him other parcels of land in exchange for a taking. But, Beg later learned that he did not have good title to these parcels of land and that the Pakistani courts refused to recognize him as the owner. Beg then entered into a subsequent agreement with the Government of Punjab where the latter *agreed* to provide him with monetary compensation. Beg argued, like Plaintiff, that this agreement – subsequent to his original injury – was equivalent to a contract and constituted commercial activity. But, the Eleventh Circuit rejected that position because, irrespective of whether the agreement to compensate Beg was the equivalent of a contract, private actors cannot enter into contracts to resolve the taking of real property:

> Beg contends that the Punjabi regional government's agreement to compensate him is the equivalent of a contract and, therefore, is commercial activity. This analogy is not persuasive. First, as the Supreme Court made clear in *Weltover,* the dispositive issue in determining whether an activity is commercial is whether private actors could undertake this type of activity in a market. Expropriation is neither the type of activity in which private actors engage nor is it a market transaction. Second, the FSIA has a separate exception for certain foreign government expropriations, further indicating that a foreign government's use of its eminent domain power is not commercial activity.

Beg, 353 F.3d at 137-28 (citations omitted).

Plaintiff attempts to sidestep *Beg* with arguments that the signing of a settlement agreement should be the end of the inquiry, yet Plaintiff fails to explain how this case can be considered commercial activity when, like *Beg*, it seeks to litigate a failure to compensate for the taking of real property. Beg tried to enforce a subsequent agreement for his original injury, but he failed because – irrespective

of whether the agreement with the Government of Punjab was an enforceable contract – private actors cannot enter into contracts to resolve takings. Plaintiff is now struggling to do the same with this supposed "oral settlement agreement" of a pending case. Yet, it is very hard to see how a different conclusion can be reached if private actors cannot engage in these types of contracts in the first place. Plaintiff suggests that a settlement agreement is somehow different than a traditional contract but offers no explanation other than the cases that the Court has already distinguished.

The Eleventh Circuit's holding in *Beg* makes sense when considering the case law referenced above. It is not the presence of a "contract" that is dispositive. In *Nelson*, for example, the plaintiff signed a contract to work in the United States and, for the reasons already stated, the Supreme Court concluded that there was no commercial activity because the plaintiff's claims were not based on the contract itself. *See Nelson*, 507 U.S. at 352. Instead, Nelson's claims were based on Saudi Arabia's tortious conduct because the actions that actually harmed him were due to the sovereign state's police and penal officers – actions that were peculiarly sovereign in nature.

Now, juxtapose *Nelson* with the Eleventh Circuit's decision in *Devengoechea*, where a plaintiff and Venezuela also entered into a contract for the purchase of a private collection of artifacts. *See Devengoechea*, 889 F.3d at 1221. Unlike Saudi Arabia's actions in *Nelson*, "Venezuela flew to the United States to meet with the seller, examined the Collection, and negotiated to examine it further and return or

purchase it." *Id.* The Eleventh Circuit found that this constituted commercial activity because "[t]his [was] the type of activity that private persons and corporations regularly engage in" and "[n]othing about this activity is uniquely or peculiarly sovereign in nature." *Id.*

The reason that the outcomes in these cases are different – notwithstanding the fact that both included contracts – is because the analysis does not turn solely on a contract or a settlement agreement. There was a contract in *Nelson*, but the plaintiff failed to show that the injuries suffered were commercial because Saudi Arabia used its police powers to torture and beat him. There was also a contract in *Devengoechea*, yet the plaintiff was able to show commercial activity because every action that Venezuela took resembled a private actor. *Devengoechea*, 889 F.3d at 1230 ("[N]othing in the record support[ed] the notion that Venezuela came into possession of or refused to pay for or return the Bolívar Collection through the exercise of its sovereign 'takings' power."). Plaintiff suggests, without any other authority, that a settlement agreement alone is what matters and that the analysis should stop there.[10] Yet, this is mistaken because every Eleventh Circuit and

[10] Even if we found Plaintiff's position to be persuasive and focused solely on the contract itself, the conclusion remains the same because the contract in this case was an attempt to compensate a property owner for a taking – a contract that the Eleventh Circuit considers to be a sovereign function. *See Beg*, 353 F.3d at 1327 ("Determining whether or how to compensate property owners for takings is also a sovereign function, not a market transaction.") (citing *Carmack*, 329 U.S. at 236-37).

Supreme Court case on this issue has shown that this is legally incorrect.[11] What matters is not necessarily a settlement agreement but whether private actors can undertake the same type of alleged activity. And given the allegations in this case, no private actor can expropriate real property, commercial buildings, and bank accounts. That is a sovereign power.

In sum, the Court does not have jurisdiction under the FSIA because, although the signing of the settlement agreement took place outside the United States (i.e. Portugal), the core of this lawsuit relates to the taking of real property and that constitutes sovereign – not commercial – activity.

The parties presented additional arguments on whether Angola's failure to wire $47.5 million dollars to a Florida bank account had a direct effect on the United States, but we need not reach that question because jurisdiction is already lacking under the second prong. That is, even if Angola's failure to wire money to Florida had a direct effect on the United States, it would not cure the failure to meet the second prong of the commercial activity exception and our analysis need not go any further.[12] Plaintiff's failure to meet the second prong also means that we lack personal jurisdiction because "[i]f a foreign state is immune under the FSIA, courts of the United States lack both subject matter and personal jurisdiction in any

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11 Even if the out-of-circuit cases that Plaintiff relies are read to hold otherwise, they would then be squarely inconsistent with the Eleventh Circuit's decisions. *Beg* and its progeny are binding authority in our case and must control.

12 Plaintiff did not argue that jurisdiction existed under the expropriation exception of the FSIA. That exception, codified at § 1605(a)(3), provides that immunity does not apply in any case "in which rights in property taken in violation of international law are in issue." Because Plaintiff never raised this exception nor provided any arguments in support thereof, we will not consider it.

suit against it." *Samco Glob. Arms, Inc. v. Arita*, 395 F.3d 1212, 1214 (11th Cir. 2005) (citing *Weltover, Inc.*, 504 U.S. at 611). Because Plaintiff failed to allege that Defendant engaged in any commercial activity, this case does not fall under the § 1605(a)(2) exception to foreign government immunity and therefore the Court lacks subject matter jurisdiction under the FSIA. Accordingly, Defendant's motion to dismiss should be **GRANTED** for lack of subject matter jurisdiction.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be **GRANTED** for lack of subject matter jurisdiction. The case should thus be Closed.[13]

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to

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[13] Putting aside the fact that Plaintiff has now had two opportunities to draft its complaint, we recommend a dismissal without further leave to amend because no amendment could cure the commercial activity exception without a complete re-write of the allegations in this case. *See Hourani v. Mirtchev,* 943 F. Supp. 2d 159, 171 (D.D.C. 2013) (stating that "[a] plaintiff . . . may not plead facts in their amended complaint that contradict those in their original complaint."). "While reconcilable 'small variations' between the complaints are acceptable, *Price v. Socialist People's Libyan Arab Jamahiriya,* 389 F.3d 192 (D.C. Cir. 2004), a plaintiff may not blatantly change the facts to respond to a defendant's motion to dismiss and while doing so contradict the facts set forth in the prior pleading. *See Colliton v. Cravath, Swaine & Moore LLP,* 2008 WL 4386764, at *6, (S.D.N.Y. Sept. 24, 2008) (internal quotation marks and citations omitted).

factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 13th day of August, 2020.

/s/ *Edwin G. Torres*
EDWIN G. TORRES
United States Magistrate Judge