UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN, Plaintiff, vs. THE METROPOLITAN MUSEUM OF ART, Defendant.	:	16-cv-07665 (LAP)

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

HERRICK, FEINSTEIN LLP
Lawrence M. Kaye
Howard N. Spiegler
Ross L. Hirsch
Yael M. Weitz
2 Park Avenue
New York, New York 10016
Tel: (212) 592-1400
Fax: (212) 592-1500
Attorneys for Plaintiff

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Statutes, Rules & Regulations

Miscellaneous

Plaintiff Laurel Zuckerman, as Ancillary Administratrix of the estate of Alice Leffmann (the "Leffmann estate"), through the undersigned counsel, Herrick, Feinstein LLP, respectfully submits this memorandum in opposition to the motion of the Metropolitan Museum of Art (the "Museum" or "Defendant") to dismiss Plaintiff's Amended Complaint (the "Complaint").

PRELIMINARY STATEMENT

This is a dispute over the ownership of a masterwork by Pablo Picasso entitled "The Actor" (*L'Acteur*) (the "Painting"), which is currently in the permanent collection of, and on display at, the Museum. Through its motion, the Museum falsely depicts the 1938 sale of the Painting as a run-of-the-mill commercial transaction in which a wealthy individual sold a painting in the open market at fair value to fund his international travels. This transaction, however, did not occur in a normal place, at a normal time, under normal circumstances.

This saga begins with Plaintiff's great granduncle and aunt, Paul and Alice Leffmann, a Jewish couple thriving in Germany until the Nazis ravaged all semblance of peace and normalcy. As alleged in the Complaint, they were stripped of almost all of their wealth, their livelihood and their property by the Nazis and fled for their lives to Italy — only to be confronted with an increasingly anti-Semitic Fascist regime. Not long after the Leffmanns arrived, Mussolini and Hitler formed a strong alliance, and Fascist Italy began to keep careful track of the German Jews who had sought refuge there. Paul and Alice were forced to flee yet again, this time to Switzerland, which refused to grant them permanent residency, and then to Brazil. It was during this dark period for Jews (especially German Jews) in Italy that Paul Leffmann sold The Actor in 1938 — under duress, for well below its value, in order to finance their escape from persecution. The Leffmanns' story is like that of many other Jews in Germany in the 1930's — except, unlike most and due in large part to the funds raised by the sale of the Painting — they survived.

It is through the prism of these dire circumstances enveloping Europe between 1933 and

1945 that the "sale" of The Actor must be scrutinized. Upon doing so, it is clear that the sale was compelled by the Nazi and Fascist persecution to which the Leffmanns, and many others, were subjected. Tribunals and commissions throughout the world, as well as over 40 nations at international conferences (including in the United States), have recognized the need for special protection of Jews who sold artwork under duress during the Nazi era — including those forced to sell to fund their escape. These determinations are predicated on the understanding that the circumstances were so menacing that the artworks must be deemed to have been sold under duress — and that those possessing the works now should not be able to shield them from their rightful owners by relying on technical defenses reliant on, for example, the passage of time.

That the Nazi era is unique, and that artwork lost during that era must be treated as such, is a key tenet of U.S. policy and law. On December 16, 2016, President Obama signed the Holocaust Expropriated Art Recovery (HEAR) Act of 2016,[1] creating a federal statute of limitations for claims to artwork lost due to persecution by the Nazis and their allies to allow for such claims to be heard on their merits rather than be stymied by "procedural obstacles." In recognizing the "unique and horrific circumstances of World War II and the Holocaust," Congress drew upon the Terezin Declaration, reflecting the principles agreed upon by 46 nations at the Holocaust Era Assets Conference in 2009, and the Washington Conference of 1998, where 44 nations convened and produced the "Principles on Nazi-Confiscated Art." The HEAR Act embraced the core tenet of the Washington Principles, reaffirmed in the Terezin Declaration, that it is essential to "facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims . . . " *Id.* at § 2(5)-(6).

[1] Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308 (2016).

This important principle was similarly emphasized in the landmark opinion in *Schoeps v. Museum of Modern Art & the Solomon R. Guggenheim Museum*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009). Presented with circumstances parallel to those here, Judge Rakoff addressed a challenge to a decades-old transfer of artworks by a Jew in Germany as the Nazi vise was tightening. On the defendants-museums' summary judgment motion, the Court rejected a laches defense as "inappropriate at this stage," and held that the German laws concerning public order and duress applied, leaving to the jury the ultimate question of whether plaintiffs' predecessor-in-interest would have transferred the paintings were it not for his fear of persecution. In doing so, the Court treated a transfer under duress during the Nazi era as it would a theft — *i.e.*, if duress under German law was proven, even though voidable under German law, no good title could be obtained under New York law by the museums that later acquired the paintings. Significantly, the Court's decision was "informed by the historical circumstances of Nazi economic pressures brought to bear on 'Jewish' persons and property." *Id.* at 467.

In contrast, the Museum's motion fails to acknowledge the context of Leffmanns' *June 1938* sale: in *February 1938*, the Fascist government announced that it would closely observe newly-arrived Jews such as the Leffmanns; in *May 1938*, Hitler, himself, marched in a grand parade through Florence where the Leffmanns resided; in *July 1938*, the Leffmanns submitted their "Directory of Jewish Assets," as required by the Reich; and by *September 1938*, Italy codified anti-Semitic racial laws forbidding aliens like the Leffmanns from residing in Italy. (Compl., ¶¶ 25-41). Nevertheless, the Museum depicts the sale of the Painting as a "freely negotiated" purchase for "value" on the "international art market." These callous assertions reverberate in the Museum's submission, in which it depicts the Leffmanns, not as refugees saddled by desperate hardships forcing them to flee, but as rich retirees traveling in comfort.

The Museum's flippancy is not just reflected in its tone, but also in the dismissiveness in which it addresses the legal issues. There is an undercurrent of "Plaintiff just waited too long." To be clear, Plaintiff does not ask the Court to override precedent or ignore the law. Rather, Plaintiff asks the Court to apply the pertinent law informed by historical circumstances, rather than reject the claims at the outset ***because*** of those circumstances. Especially when viewed through this lens, the Museum's arguments are not viable as a matter of law:

1) ***Standing:*** On the eve of filing its motion — and more than *six years* after Plaintiff was duly appointed by the Surrogate's Court of New York County as the "Ancillary Administratrix" for the Leffmann estate, consistent with the procedures of such court, and without objection from any person interested in the estate, despite court-issued notice — the Museum moved in Surrogate's Court to vacate Ms. Zuckerman's appointment. This tact rings loudly of sharp practice, especially considering that the Museum has ***no standing*** in Surrogate's Court, as a matter of statutory law, to challenge the Letters of Administration; and, even if it had standing, the Museum fails to invoke any valid statutory basis for vacating the appointment years later. The proceeding before this Court should not be "stayed" or otherwise impeded by the Museum's "Hail Mary" effort to strip away the rights of the Leffmann estate via collateral proceedings.

2) ***Timeliness:*** The Museum argues that the claims for replevin and conversion are barred by the statute of limitations because Plaintiff delayed in making her demand. This argument is not only mooted by the limitations period codified in the HEAR Act, but also constitutes a gross misapplication of New York's settled "demand-and-refusal" rule. It is also a direct affront to U.S. policy, as reflected in the Terezin Declaration.

Likewise, the Museum's invocation of the equitable doctrine of laches not only assaults the notion of resolving Nazi-era claims on their merits, but also asks the Court to grant

extraordinary relief — *i.e.*, dismissing a case based on laches on a pre-answer motion to dismiss. As the Court recognized in *Schoeps*, laches is a generally determined by a fact-intensive inquiry at trial as to the conduct of both plaintiff and defendant — an examination which would look into the historical context of the Nazi era and would consider the heightened expectation of diligence attributed to a museum confronted with artwork sold in Europe during the Holocaust era.

3) *Duress:* The Museum applies New York law on duress to evaluate the 1938 sale of the Painting by Paul Leffmann even though this transaction lacks any connection to New York. As demonstrated below, Italian law must be applied, and under the applicable Italian law — read through the lens of historical context, as it must be (and, as it was in *Schoeps*) — good title to the Painting was not transferred by Leffmann based upon the allegations in the Complaint. Accordingly, pursuant to New York law — which both parties agree applies to the subsequent transfer of the Painting to the Museum — title remains with the Leffmann estate.

The Museum's efforts to dispose of this claim — based on out-of-place technical arguments, an application of New York law to a transaction without a tie to this forum, and an end-run to Surrogate's Court — should not deprive the Leffmann estate of its day in court.

STATEMENT OF ALLEGED FACTS

Plaintiff respectfully refers to the Complaint, rather than re-state the detailed allegations. Though the Museum purports to "accept Plaintiff's allegations as true" for purposes of this motion, it actually modifies them in a misleading manner. For example:

- The Museum describes in its memorandum of law ("Br.") the 1938 purchasers of the Painting and their agent as "Jewish," citing the Complaint — even though Plaintiff made no such allegation. (Br. at 6, 1). The Museum injects religion to suggest that a sale between Jews could not have been made under duress or as a result of persecution. This implication is not only out of bounds on a motion to dismiss, but it is also false and insensitive to historical context.
- The Museum proclaims that the Painting "has been displayed at the Museum since Foy donated it in 1952" (Br. at 15, 19), implying that was a fact known to the

Leffmanns. That "fact" is not alleged in the Complaint, and the corresponding implication is baseless. The Museum should know better given the turmoil and uncertainty facing Jews in the post-Holocaust (and pre-internet) era.

- The Museum further states — citing the Complaint, which says nothing of the sort — that the "German professor" erroneously listed on the Museum's provenance as the owner of the Painting (instead of Paul Leffmann) was the Leffmanns' friend who had custody of the Painting in Switzerland. (Br. at 6, *citing* Compl. ¶¶ 62, 14).

- The Museum argues that "Plaintiff's allegations make clear that Leffmann had additional assets and other alternatives" (Br. at 13), suggesting that the sale of the Painting was a normal business decision disconnected from the need to fund their escape — even though the Complaint alleges to the exact contrary. (Compl. ¶ 47).

The Museum's effort to sanctify its conduct, and that of the original purchaser of the Painting, is inappropriate on this motion, especially through false citations to the Complaint.

ARGUMENT

I. THE MUSEUM'S COLLATERAL ATTACK IS SPECIOUS; NO STAY OR "DISMISSAL WITHOUT PREJUDICE" IS WARRANTED

The Museum's lead argument is that the Court should dismiss the Complaint, or put it on indefinite hold, because the Museum filed a "petition" in Surrogate's Court, on *November 21, 2016*, to vacate the appointment of Plaintiff as Ancillary Administratrix for the Leffmann estate — an appointment made more than six years ago in *October 2010*. This collateral proceeding will likely take, as advised by Plaintiff's special Surrogate's Court counsel, 1-2 years for the parties' submissions to be adjudicated. This prejudicial delay tactic is inconsistent with the principles of fairness and justness embedded in U.S. policy, as reflected in the HEAR Act, the Washington Principles, and the Terezin Declaration. Reasons abound for rejecting the Museum's effort to halt this case based on its meritless "capacity and standing" argument:[2]

First, as alleged in the Complaint (¶ 4), Plaintiff is the duly appointed representative of

[2] Though the Museum effectively avoided this Court's page limit by annexing its Surrogate's Court's Petition, Plaintiff has not been able to make a submission in Surrogate's Court because the Surrogate's Court has still not, two months after receipt of the Petition, issued the "Citation" setting the return date. This is reflective of the backlog in the Surrogate's Court.

the Leffmann estate pursuant to the "Decree Granting Ancillary Probate" from the Surrogate's Court of New York County, dated October 18, 2010, granting ancillary probate and issuing ancillary letters of administration to Laurel Zuckerman on the Leffmann estate. (Bowker Decl., Ex. B). As per Section 703 of the New York Surrogate's Court Procedure Act ("SCPA"), these letters are "conclusive evidence of the authority of the persons to whom they are granted . . . " SCPA § 703; *see Windbourne v. Eastern Air Lines, Inc.*, 479 F. Supp. 1130, 1156 (E.D.N.Y. 1979), *rev'd on other grounds*, 632 F.2d 219 (2d Cir. 1980); *Capozzola v. Oxman*, 216 A.D.2d 509, 510 (2d Dep't 1995); *Allen v. Fiedler*, 96 A.D.3d 1682, 1684 (1st Dep't 2012).

In contrast, the Museum's cited cases involve the inapposite scenario in which a plaintiff *had not been duly appointed* in Surrogate's Court — and thus the trial court found that she must first obtain such authority before suing in a representative authority. *See, e.g., Schoeps v. Andrew Lloyd Webber Art Found.*, 17 Misc. 3d 1128(A), 2007 WL 4098215, at *4 (Sup. Ct. 2007) ("plaintiff will have to convince the Surrogate's Court that he qualifies to be appointed the personal representative"), *aff'd*, 66 A.D.3d 137 (1st Dep't 2009); *Gayle v. NYS Div. of Parole*, 95 Civ. 10552, 1997 WL 53156, at *1 (S.D.N.Y. Feb. 10, 1997).[3]

Second, though the Museum argues that Plaintiff lacks standing, it is *the Museum* that, as a matter of statutory law, *has no standing to challenge Plaintiff's appointment* in Surrogate's Court. SCPA § 711 only allows a "co-fiduciary, creditor, person interested, any person on behalf of an infant or any surety on a bond of a fiduciary" to petition to vacate letters of administration.[4] Where the only connection to the estate is that the petitioner is "*a defendant in an action*

[3] *Cf. Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243 (S.D.N.Y. 2006) (declining to abstain, in lieu of slow Surrogate's Court proceeding, just because such court may find that plaintiff should not be the administratrix); *Keane v. Mixter*, 202 Misc. 1025, 1028 (Sup. Ct. 1952).

[4] "Person interested" is a defined term, effectively meaning a person having a beneficial interest in an estate. SCPA § 103(39).

commenced by the estate," the petitioner "*does not qualify as a party who may petition a court for revocation of letters of administration pursuant to SCPA 711.*" *In re Menis*, 137 A.D.2d 692, 692 (2d Dep't 1988) (emphasis added); *see also In re Chabrier*, 281 A.D.2d 346 (1st Dep't 2001). As in *Menis*, the Museum has no standing in Surrogate's Court just because it is the defendant in this case. The Museum's Petition is void of any allegation of standing. Rather than argue the impossible, the Museum ignores this deficiency.

Third, the Museum does not allege, much less substantiate, grounds for revocation under SCPA § 711 (*e.g.*, plaintiff is a felon or acted dishonestly), which "prescribes the only grounds upon which the Surrogate may lawfully make a decree affecting a fiduciary's letters." 2 *New York Civil Practice: SCPA* ¶ 711.0, at 7-102; *see also In re Palma*, 40 A.D.3d 1157, 1158 (3d Dep't 2007) ("the grounds for disqualification are limited to those specified in SCPA 707 and 711"). Although the Surrogate's Court has discretion under SCPA § 719 to revoke letters in certain other circumstances, none of them (§ 719(1)–(9)) applies here or is even alleged. To the extent that the Museum seeks to rely on § 719(10) ("[w]here any of the facts provided in 711 are brought to the attention of the court") as a "catch-all," that position fails because: (a) a ground under § 711 must be demonstrated, which it is not; and (b) as the Appellate Division recognized in *Menis*, that provision is not a back-door for those without standing. *Menis*, 137 A.D.2d at 692-93; *see also Palma*, 40 A.D.3d at 1158. The Museum's lack of standing and failure to allege any ground for revocation precludes consideration by the Surrogate's Court. *See, e.g.*, *In re McCann*, NYLJ, June 16, 2015, p. 27, col. 6 (Sur. Ct.) (unsubstantiated claim about capacity does not give standing pursuant to SCPA 719[10]).

Fourth, even if it had standing, the Museum's arguments are meritless. The parties agree that this Court is without authority to adjudicate the validity of Plaintiff's appointment, and

Plaintiff will be prepared to defend her appointment in Surrogate's Court. In addition to the grounds referenced above, Plaintiff will show that: (a) the Swiss bank (Schweizerische Bankgesellshaft, now UBS AG) named as the executor of Alice Leffmann's Will, has had no involvement with the estate since 1966 and, as the Surrogate's Court was advised in 2010, disavows responsibility and has refused to participate in the New York proceedings; (b) Plaintiff's appointment was in accordance with New York law; (c) Plaintiff's appointment was consistent with Swiss law;[5] (d) the Museum is mistaken and misses the point in stating that Plaintiff has no residuary interest in the estate;[6] and (e) the identified beneficiaries were provided with court-issued citations providing notice of Plaintiff's appointment in 2010 (Bowker Decl., Ex. F) — in response to which no one appeared, intervened, objected, or appealed.

The Surrogate's Court *will* dismiss the Museum's Petition. However, that may take a substantial period of time. No "stay" is warranted here pending that inevitable result.

II. PLAINTIFF'S CLAIMS ARE TIMELY

The Museum's threshold, technical arguments are without merit.

A. The HEAR Act Moots the Museum's Statute of Limitations Argument

The Museum's statute of limitations argument is now moot pursuant to the Holocaust Expropriated Art Recovery (HEAR) Act of 2016, passed unanimously by Congress and signed into law by President Obama on December 16, 2016. By way of background, the HEAR Act was designed to address Congressional concerns that Holocaust-era claims have been unfairly hindered by "procedural obstacles" such as the statute of limitations, which restrict claims from

[5] In Surrogate's Court, Plaintiff will be prepared to introduce Swiss law through an affidavit of foreign law, in contrast to the Museum's passing reference to the "advice of Swiss counsel."

[6] Since Plaintiff was the designee of a person entitled to designate under SCPA § 1604, it is irrelevant whether she had a residuary interest in the estate. Thus, the Museum's reliance on this issue is both a red herring and factually mistaken, as will be shown to the Surrogate's Court if and when appropriate.

being heard on the "facts and merits." Congress specifically recognized the "unique and horrific circumstances of World War II and the Holocaust," which make "statutes of limitations especially burdensome to the victims and their heirs":

> Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

Thus, the stated purpose of Act is clear:

> (1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.
>
> (2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.[7]

To accomplish these goals, the HEAR Act preempts all other provisions of federal or state law or any defense at law "relating to the passage of time," and provides instead for a six year statute of limitations in art recovery cases from the Nazi era. The law is drafted to broadly apply to "any artwork or other property that was '*lost*'," "throughout Europe," beginning on January 1, 1933 and ending on December 31, 1945, "*because of Nazi persecution*," which is defined to include persecution by *allies* of the Nazi Party.[8] The limitation period accrues upon the claimant's *actual* discovery of: the identity of the artwork; the location of the artwork; *and* the claimant's possessory interest in that property. *Id.*, at § 5(a). For claims already pending in court, the law will deem such claimants to have had the requisite "actual knowledge" as of the

[7] Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, §§ 2-3 (2016).

[8] Similarly, the foundational Terezin Declaration addressed artworks lost "through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and *sales under duress*" as a result of "Nazi persecution," which is defined to include "the Nazis, the *Fascists* and their collaborators." Prague Holocaust Era Assets Conference: Terezin Declaration (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm (emphasis added).

Act's date of enactment — December 16, 2016. *Id.*, at § 5(c)(2).

Here, there is no question that: (a) the Complaint alleges that the Leffmanns lost the Painting in 1938 because of the persecution by the Nazis and their Fascist allies (*e.g.*, Compl. ¶¶ 3, 9, 26-28, 42, 47); and (b) Plaintiff's claim was pending as of the date of the Act's enactment. Accordingly, pursuant to the terms of the HEAR Act, Plaintiff's claims are timely and the Museum is barred from raising the state statute of limitations to avoid resolution on the merits.[9]

B. The Statute of Limitations Has Not Run

In any event, any effort by the Museum to argue that somehow Plaintiff's claims are exempt from the HEAR Act would be futile because the claims are timely under New York law.

The Leffmann estate, as the rightful owner of the Painting, asserts claims for conversion and replevin. New York courts have long recognized that, for these claims, "the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand." *Menzel v. List*, 49 Misc. 2d 300, 304 (Sup. Ct. 1966), *mod.*, 28 A.D.2d 516 (1st Dep't 1967), *aff'd*, 24 N.Y.2d 91 (1969). This rule, known as the "demand and refusal rule," is the governing law in New York. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-18 (1991); *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982).

The applicable three-year statute of limitations (New York CPLR § 214) does not accrue until after the Leffmann estate demands the return of the Painting *and* the Museum refuses to return it. As alleged, the Leffmann estate demanded the return of the Painting on September 8, 2010. (Compl. ¶ 66). On February 7, 2011, the Museum and the Leffmann estate entered into a standstill agreement tolling any statute of limitations as of February 7, 2011. (*Id.*, at ¶ 67). The

[9] The Complaint did not allege the "actual discovery" date because the HEAR Act was not yet law when this action began. Such an allegation is unnecessary now because the date of the Act's enactment governs existing claims, but Plaintiff will amend if the Court deems it necessary.

standstill agreement was terminated on September 30, 2016, the day that Plaintiff commenced this action. The action is therefore timely. (*Id.*). Nevertheless, the Museum asserts that the governing demand and refusal rule does not apply. The Museum is wrong:

First, the Museum aims to eviscerate the demand and refusal rule by arguing that it cannot be invoked to "revive a stale claim." A claim cannot be stale if it has not yet accrued and, as shown, the claim here does not accrue until after demand and refusal. Likewise, the Museum's suggestion that the rule is inapplicable when the plaintiff has "delay[ed] in making his demand" undercuts the rule at its core — imposing obligations on the true owner, including "due diligence," where they do not belong. This is directly contrary to the law that "the issue of 'unreasonable delay' is relevant only to the defense of laches," not the statute of limitations. *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 482-83 (S.D.N.Y.), *aff'd*, 403 F. App'x 575 (2d Cir. 2010), *citing Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 46 (S.D.N.Y. 1990); *see also Hoelzer v. City of Stamford, Conn.*, 933 F.2d 1131, 1137 (2d Cir. 1991).[10] In *Republic of Turkey*, the Museum tried a similar tact, arguing that the owner of stolen property must demand its return within a reasonable time. In rejecting the argument, the Court found that it had no bearing on the limitations period. 762 F. Supp. at 46.

Second, the Museum relies on *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000), to assert that because it has "openly exercised ownership of the Painting," demand and refusal are not necessary. If the Museum was correct, mere possession would constitute "conversion," vitiating the demand and refusal rule entirely. *See Lubell*, 153 A.D.2d at 146-47.

[10] The Museum relies on *Austin v. Bd. of Higher Educ.*, 5 N.Y.2d 430, 422-43 (1959), which pertains to an Article 78 proceeding, not a claim for replevin or conversion. The Museum's only other case on this point — *In re Peters*, 34 A.D.3d 29, 37 (1st Dep't 2006) — clarifies, contrary to the Museum's argument, that a "reasonable diligence" requirement is only pertinent in the context of a laches defense.

In *Songbyrd*, a musician delivered recordings to a record executive "as demonstration tapes only, without any intent for either the [executive or the record company] to possess these aforementioned tapes as owner." *SongByrd,* 206 F.3d at 174. Against the musician's wishes, the company licensed the recordings to another label which, in turn, released an album of them. The Court ruled that the limitations period accrued when "the character of [the record company's] possession had changed by its actions in treating the master tapes as its own." *Id.* at 183. The shift, by the company's deliberate action, from custodian-for-the rightful-owner to owner-with-authority-to-license, triggered the accrual. The irreversible *shift in character* of the possession was deemed equivalent to a wrongful taking, thus dispensing of the need for demand and refusal.

Here, there was no affirmative "change" in the "character" of the Museum's possession, as the Museum concedes ("The Museum has openly exercised ownership and dominion over the Painting since 1952," Br. at 18). There was not an equivalent shift from permissive custodian (*i.e.*, with the true owner's knowledge and consent) to self-declared owner — unlike in the cases cited by the Museum. Thus the *Songbyrd* line of cases has no application here.[11]

Third, the Museum argues that it is exempt from the demand and refusal rule because the Complaint alleges that the Museum acted "in bad faith in its acquisition of the Painting." (Br. at 19). Plaintiff makes no such allegation. There are no allegations in the Complaint — including in Paragraphs 56-65, relied upon by the Museum — that the Museum acquired the Painting unlawfully, upon a taking or theft, or otherwise in bad faith.

Therefore, the demand and refusal rule applies. In the seminal decision in *Menzel*, the

[11] In *Sporn v. MCA Records*, 58 N.Y.2d 482, 488 (1983), the Court of Appeals confronted a similar dispute where a master recording was leased to a record company with the understanding that it would be returned, but instead was sold along with the company and used by the new record company as part of a movie soundtrack. The sale of the recordings — again evidencing a radical shift from consensual possessor to "usurper" of plaintiff's rights — triggered the statute of limitations. There is no parallel transformative event here.

court held that the demand and refusal rule applies as against a person who "lawfully comes by chattel," as opposed to by "stealing" or "taking." 49 Misc. 3d at 304. When a person acquires a chattel unlawfully, the limitations period accrues upon such unlawful act. As the Second Circuit reaffirmed in *Grosz*, the critical query is whether the defendant "lawfully comes by a chattel" or was a "bad faith purchaser." 403 F. App'x. at 577. As the plaintiff in *Grosz* did not allege that MoMA was a bad faith purchaser — *as is the case here* — the Second Circuit confirmed that the demand and refusal governed. *Id*; *see also Grosz*, 772 F. Supp. 2d at 481 (rule that statute of limitations runs on date of "theft or bad faith acquisition" inapplicable absent allegation that MoMA purchased the works with knowledge that they had been stolen"); *Lubell*, 153 A.D.2d at 146-47 (the limitations period runs immediately upon theft).[12]

C. The Premature Laches Argument Wrongly Presumes Unreasonableness

The Museum argues that Plaintiff's claims are barred by laches, invoking the "unreasonable delay" argument that it relied on (contrary to law) for the statute of limitations. However, laches cannot be raised because this claim was brought within the time allowed by the statute of limitations codified by the HEAR Act. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1974 (2014) (laches unavailable as a defense if the claim is brought within pertinent federal limitations period). Even if laches could be invoked, the Museum's argument fails:

First, the determination of laches is premature. The Museum must demonstrate that the Leffmanns and their heirs unreasonably delayed in starting this action, that the Museum suffered undue prejudice as a result, and that the equities tip in its favor. *U.S. v. Portrait of Wally*, 99 Civ. 9940 (MBM), 2002 WL 5535532, at *22 (S.D.N.Y. Apr. 12, 2002). Though "unreasonable delay" is an appropriate consideration in evaluating a laches defense *at trial*, it generally has no

[12] The Museum not only mischaracterizes the Complaint as alleging unlawful acquisition, but, in doing so, tries to "take refuge behind the shield of [its] own wrong." This alone defeats its statute of limitations argument. *See General Stencils v. Chiappa*, 18 N.Y.2d 125, 127 (1966).

place in a motion to dismiss. Unless a complaint leaves no doubt — which is certainly not the case here — the laches inquiry mandates a fact-intensive inquiry into plaintiff's conduct (as to the reasonableness of the "delay") and that of defendant (as to "undue prejudice," and the balancing of the equities):

> [A] determination that a claim is barred by laches requires a factual inquiry into the reasons for plaintiff's delay and the extent and nature of the prejudice suffered by defendant as a result of that delay. Again, this inquiry is inappropriate on a motion to dismiss. Thus, the Court rejects defendant's argument that plaintiff's claims are barred by laches.

Deere & Co. v. MTD Prods., Inc., 00 Civ. 5936 (LMM), 2001 WL 435613, at *2 (S.D.N.Y. Apr. 30, 2001) (internal citations omitted); *see also Portrait of Wally*, 2002 WL 553532, at *22 (Laches showing would "involve a fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities. Such issues are often not amenable to resolution on a motion for summary judgment, let alone a motion to dismiss").

Unsurprisingly, *not one case* cited by the Museum is in the context of a pre-discovery motion to dismiss. Indeed, in its primary source — *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010) — laches was evaluated in the context of a bench trial. When laches had been raised on summary judgment, the *Bakalar* Court found that laches was "an issue for trial," as it was premature to determine whether delay was excusable and whether plaintiff had been prejudiced. *Bakalar v. Vavra*, 05 Civ. 3037 (WHP), 2006 WL 2311113, at *3-4 (S.D.N.Y. Aug. 10, 2006).[13]

In *Schoeps*, MoMA and the Solomon R. Guggenheim Foundation argued, on a motion for summary judgment, that the heirs of a German Jew could not seek the return of Picasso paintings alleged to have been transferred as a result of Nazi duress. The Court rejected the laches

[13] *In re Peters*, 34 A.D.3d 29 (1st Dep't 2006), pertaining to a summary proceeding for pre-action disclosure, is the only laches case cited by the Museum relating to a pre-answer motion. In stark contrast to this case, it had already been factually established in *Peters* that petitioner had actual, continuing knowledge of the identity of the possessor of the artwork (who was an individual, not an institution such as the Museum).

defense, holding that the reasonableness of the delay, including as to whether the owner knew that there was a potential claim to the paintings, was a matter for trial. 594 F. Supp. 2d at 468.[14]

The Museum seeks to avoid a trial of these issues by declaring that the "delay" was presumptively unreasonable and to imply (without any basis in the Complaint, or otherwise) that the Leffmanns knew the Painting was on display at the Museum. (Br. at 19-20). As the Court recognized in *Schoeps*, the deprivation of Plaintiff's day in court, especially to reclaim what was lost in the Holocaust era, is not something that can be accomplished based on mere supposition.

Second, the Museum's reliance on *Bakalar* is further misplaced because critical to the laches analysis was defendant's status as "an ordinary non-merchant purchaser of art" with "no obligation to investigate the provenance" of the artwork. *Bakalar*, 819 F. Supp. 2d 293, 306 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012). Here, Defendant is the Metropolitan Museum of Art. The equitable laches analysis is not simply about plaintiff's delay; it is also about defendant's conduct. *Portrait of Wally*, 2002 WL 553532, at *22 (laches determinations "involve a fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities"); *see also Schoeps*, 594 F. Supp. 2d at 468. Unlike standard commercial actors in the ordinary course, institutions such as the Museum must act with a higher degree of diligence and responsibility — especially given the directives to museums about buying or accepting art misappropriated during the Nazi era issued by the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (also known as the "Roberts Commission") and the U.S. Department of State. (Compl. ¶ 64).

[14] Of further note is the New York Court of Appeals' decision in *In re Flamenbaum*, 22 N.Y.3d 962, 965 (2013), involving a dispute over a gold tablet stolen from a German museum during WWII. The New York Court of Appeals held that defendant could not establish its laches defense, explaining that plaintiff had valid reasons for not taking every step possible to track down the tablet, and that defendant failed to prove that, had the plaintiff taken such steps, the tablet would have surfaced earlier.

Likewise, the Museum's conduct should be measured in the context of the principles of the American Alliance of Museums ("AAM"), by which the Museum is accredited, and the Association of Art Museum Directors ("AAMD"), of which the Museum is a member — principles correlated to the Washington Principles. For example, recognizing that a museum's mission is to serve the public, AAM's "Standards Regarding Unlawful Appropriation of Objects During the Nazi Era" dictate that museums identify, research, and make the provenance available for all objects in its possession transferred in Europe during the Nazi era. (Compl. ¶ 65).

More broadly, the Museum acquires many works regularly, either through donation or purchase, qualifying it as an institution with "knowledge and experience in the art trade" with a higher duty of inquiry and diligence. *Brown v. Mitchell-Innes & Nash, Inc.*, No. 06 Civ. 7871)(PAC), 2009 WL 1108526 (S.D.N.Y. April 24, 2009); *see also Davis v. Flagstar Cos.*, 124 F.3d 203 (7th Cir. 1997); *R.F. Cunningham & Co. v. Driscoll*, 7 Misc. 3d 234 (City Ct. 2005); 2 Anderson U.C.C. § 2-104:35 (3d ed. 2011); *cf. DeWeldon, Ltd. v. McKean*, 125 F.3d 24 (1st Cir. 1997). Thus, the Museum had a heightened duty of inquiry and standard of care regarding the Painting's provenance. Faulty and careless scholarship, if established, would evince a failure to meet the requisite level of due diligence.

Third, the Museum's laches defense is further barred by the doctrine of unclean hands. *Schoeps*, 594 F. Supp. 2d at 468 (genuine issue of fact existed as to whether museums "had reasons to know that the Paintings were misappropriated and so are barred from invoking laches by the doctrine of 'unclean hands'"); *see generally Aris-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc.*, 792 F. Supp. 969, 970 (S.D.N.Y. 1992), *aff'd*, 983 F.2d 1048 (2d Cir. 1992). As alleged, the Museum — given its resources, relationships, expertise, and status as a museum that holds its collection in the public trust — should have discovered, through due diligence,

Leffmann's continuous ownership up until 1938, and the circumstances under which he was compelled to dispose of the Painting because of Nazi and Fascist persecution. Nonetheless, the Museum's published provenance for the Painting, delayed until 1967, was manifestly erroneous for 45 years. (Compl. ¶¶ 56-58). Notwithstanding the governmental directives and warnings referenced above, the Museum failed to meet its obligations as to its possession of the Painting.

III. THE MUSEUM'S LACK OF GOOD TITLE IS SUFFICIENTLY ALLEGED

The Museum's argument that it has good title to the Painting as a matter of law rests on two fatal premises: (a) good title passed through the 1938 sale of the Painting, a conclusion reached through the application of New York law to a transaction without connection to New York, and as to which the applicable law (Italian law) differs; and (b) the historical context of the Leffmanns' plight during the Holocaust era is irrelevant (though, as *Schoeps* held, it is critical).

A. New York Law Does Not Govern the 1938 Transaction

At the Complaint's core is the allegation that, "[a]s a matter of law and public policy, good title to the Painting never passed from Leffmann to Perls and Rosenberg, and thus neither Perls, Rosenberg nor Foy could convey good title to the Painting. Therefore, the Museum never acquired good title to the Painting, and it remains the property of the Leffmann estate." (Compl. ¶ 55). Thus, at issue are two distinct transactions: (a) Paul Leffmann's sale of the Painting in 1938 to Käte Perls, acting on behalf of Hugo Perls and Paul Rosenberg (Compl. ¶ 37) (the "1938 Transaction"); and (b) the Museum's acquisition of the Painting in 1952, via donation from Thelma Chrysler Foy (Compl. ¶ 54) (the "1952 Transaction"). Whether or not the Museum obtained good title through the 1952 Transaction cannot be determined without first, independently, examining the validity of the 1938 Transaction.

The Museum clearly errs as a matter of law by conflating the two transactions, applying New York law to the entire series of events. This conflation disregards the need to bifurcate the

choice of law analysis. Under the doctrine of "*depecage*," as applied by New York courts, "the rules of one legal system are applied to regulate certain issues arising from a given transaction or occurrence, while those of another system regulate other issues." *Bigio v. Coca-Cola Co*., 675 F.3d 163, 169 (2d Cir. 2012) (*quoting Fieger v. Pitney Bowes Credit Corp*., 251 F.3d 386, 397 n.1 (2d Cir. 2001)); *Golden v. Wyeth, Inc*., No. 04-CV-2841 (JS) (ARL), 2013 WL 4500879, at *3 (E.D.N.Y. Aug. 20, 2013). The doctrine recognizes that in a single action, different fora "may have different degrees of interests with respect to different operative facts and elements of a claim or defense." *2002 Lawrence R. Buchalter Alaska Trust v. Philadelphia Fin. Life Assur. Co*., 96 F. Supp. 3d 182, 200 (S.D.N.Y. 2015).

Further, particular tort claims may be "mixed" in that distinct issues *within that claim* require the application of separate law. That is, "[t]here is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction." *Weizmann Inst. of Sci. v. Neschis*, 229 F. Supp. 2d 234, 249-50 (S.D.N.Y. 2002). In *Weizmann*, the Court recognized that New York law governed the plaintiffs' conversion and tortious interference with contract claims because the acts giving rise to those claims occurred in New York. However, the Court looked to Lichtenstein law to evaluate the validity of the underlying contract — as the contract had no connection to New York. *Id.*; *see also Lund's Inc. v. Chem. Bank*, 870 F.2d 840, 845–46 (2d Cir. 1989) (applying the law of Minnesota and New York to separate issues underlying a conversion claim when issues pertaining to the underlying partnership originated in Minnesota); *Babcock v. Jackson*, 12 N.Y.2d 473, 484 (1963) ("there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction"); *cf. Don King Prods. v. Douglas*, 742 F. Supp. 741 n.30 (S.D.N.Y. 1990).

Indeed, in *Schoeps*, the Court bifurcated the choice of law analysis, finding that though

German law governed the initial transfer alleged to have been made under duress, there was a "separate issue of what law governs the validity and legal effect" of the subsequent transfer. 594 F. Supp. 2d at 467-68. The Court determined that New York law applied to the subsequent transfer, as the paintings had been shipped to New York where the purchaser resided.

Here, the parties agree that New York law applies to the 1952 Transaction, but, pursuant to choice of law principles (and common sense), New York law cannot govern the 1938 Transaction — which did not have any connection to New York.

B. Italian Law Governs the 1938 Transaction

As jurisdiction in this case is predicated on diversity of citizenship, New York's choice-of-law rules apply. In tort cases, New York courts have adopted an "interest analysis" to determine which jurisdiction has the "greate[st] interest in having its law applied in the litigation." *In re Dr. Reddy's Labs, Ltd.*, 01 Civ. 10102 (LAP), 2002 WL 31059289, at *10 n.8 (S.D.N.Y. Sept. 13, 2002), *citing Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 192 (1st Dep't 1998). Under this flexible approach, "the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort." *Id.* (internal citations omitted). The locus "is determined by where the plaintiffs' injuries occurred." *Id.* (internal citations omitted). "The place in which the injury is deemed to have occurred 'is usually where the plaintiff is located.'" *Id.*, *citing Cromer Fin. Ltd. v. Berger*, 158 F. Supp. 2d 347, 357 (S.D.N.Y. 2001) (*quoting Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 292 (S.D.N.Y. 2000)); *see also Bower v. Sheraton Overseas Mgmt. Corp.*, 07 Civ. 2348 (LAP), 2009 WL 734021, at *2 (S.D.N.Y. Mar. 19, 2009). Moreover, courts not only "may consider a spectrum of significant contacts," but also may "consider public policy 'where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests.'" *Brink's Ltd. v. S. African Airways*, 93 F.3d 1022, 1030-31 (2d Cir.

1996). Thus, "controlling effect is accorded to the law of the jurisdiction 'which has the greatest concern with, or interest in, the specific issue raised in the litigation.'" *John v. Sotheby's, Inc.*, 858 F. Supp. 1283, 1289 (S.D.N.Y. 1994) *aff'd*, 52 F.3d 312 (2d Cir. 1995).

In *Schoeps*, in order to determine the choice of law on the question of whether the initial transfer of the paintings was the "product of duress or other invalidity," the Court undertook an interest analysis and also considered the "center of gravity test" for contract claims. *Schoeps*, 594 F. Supp. 2d at 468. The Court determined that the law of Germany — where the transferors were located — governed this question even though there were other jurisdictions involved, including Switzerland, where, as here, the paintings may have been located. *Id.*

Ultimately, the focus of the interest analysis is on which jurisdiction has the greatest interest in having its policies, which underlie the relevant laws, apply based on the facts. Here, applying an interest analysis (or the hybrid test used in *Schoeps*), it is clear that Italian law applies to the question of whether the 1938 Transaction was the product of duress or other invalidity. Like Germany in the *Schoeps* case, Italy has the most significant interest in determining the validity of a sale: (i) by residents of *Italy*; (ii) who had come to *Italy* to find a (hopefully permanent) safe haven; (iii) were forced to sell the Painting to fund their flight from *Italy*; (iv) necessitated by increasing violence and persecution of Jews in *Italy* by the Nazis and their Fascist allies. The circumstances as to the sale are Italian-centric. Italy — certainly not New York — has the greatest governmental and policy interest in addressing the historic wrongs.[15]

The Museum asserts that there is no conflict of law, and that New York law thus necessarily applies regardless of the choice of law analysis. This is not true — contrary to the

[15] That the Painting was being held in Switzerland for safekeeping or that the purchasers were French (their exact whereabouts at the time are not known and are thus not alleged) does not alter this analysis — other than reaffirming the absence of connection for New York.

Museum's cursory, inaccurate presentation of Italian law (made without including the referenced law, translations, or an affidavit of foreign law).[16] As summarized below — and, in greater detail, in the annexed Declaration of Professor Marco Frigessi di Rattalma ("Decl."), which explains the applicable law and jurisprudence, and debunks the Museum's presentation — Italian law is distinct from New York law. Italian law includes the concepts of "public order," "public morals," and third-party duress that, as they have been interpreted, support Plaintiff's claims.

C. The 1938 Transaction is Void under Italian Public Order Law; Good Title Cannot Pass To the Museum Through the 1952 Transaction

The sale of the Painting was *void ab initio* under Italian law because it was contrary to public order — a component of Italian statutory law overlooked by the Museum. (Decl. ¶¶ 4, 15, 30, 38, 74). "Public order" is composed of the rules and principles that the Italian legal system considers indispensable for the protection of the public interest, and is intended to constrict the contractual autonomy of individuals to the extent that exchanges are inconsistent with the fundamental values of the Italian legal system. The concept of what violates the "public order" shifts over time, shaped by judges "in a manner reflecting the changing habits and sentiments of the citizens: in short, a collective social consciousness." (Decl. ¶¶ 7, 20-22).

As pertinent here, the Italian legal system would not recognize the validity of a contract in which a purchaser has obtained an imbalanced price taking advantage of the state of necessity and the dire circumstances of the seller. This is especially true when these circumstances involve the Holocaust — a context not lost on the Italian legal system which developed a specific set of post-War rules providing for particularly strong protections of Jewish individuals persecuted by

[16] Besides taking issue with the Museum's assertion that New York and Italian law are identical, Plaintiff also disagrees with the Museum's characterization of New York law on duress based on its effort to analogize the circumstances here. *See, e.g., Hugo V. Lowei, Inc. v. Kips Bay Brewing Co.*, 63 N.Y.S.2d 289, 290 (Sup. Ct. 1946) (Museum equates economic wartime pressure felt by a brewery in the U.S. to that of the state of fear endured by Jews fleeing in Europe).

the anti-Semitic laws, based on the rationale that Jewish individuals, during the Holocaust era are considered *de jure* as weak contractual parties and, more generally, *per se* as persons subjected to violence. The sale of the Painting for well below its actual value out of a desperate need to raise the funds to finance the Leffmanns' flight from Italy, and to survive Nazi and Fascist persecution is, under Italian law, void as against "public order." (Decl. ¶¶ 28-30, 33-36, 38). Under Italian law, a void contract may not be subsequently ratified. (Decl. ¶¶ 39-40).

The 1938 Transaction is also void under Italian law as against "public morals," referring to the social, moral and ethical requirements on which a society is based. Transactions contrary to the fundamental rules of public morality have no legal effect. As alleged, the 1938 Transaction was against "public morals," in that the Painting was sold to the prejudice of the seller, "a German Jew on the run from Nazi Germany living in Fascist Italy," where the purchaser had good reason to know that the "low price reflected the seller's desperate circumstances and the extraordinary prevailing conditions." (Decl. ¶¶ 4, 15, 24-26, 29, 30, 38, 74).

Since the 1938 Transaction is *void* under Italian public order law, it is impossible for the Museum to have acquired good title through the 1952 Transaction under New York law, which the parties agree applies to the 1952 transaction. *See, e.g., Smith v. Reid,* 134 N.Y. 568 (1892); *Overton v. Art Fin. Partners LLC,* 166 F. Supp.3d 388, 399-400 (S.D.N.Y. 2016); *Brown,* 2009 WL 1108526, at *4; *Candela v. Port Motors, Inc.*, 208 A.D.2d 486 (2d Dep't 1994). This alone sustains the Complaint and will ultimately mandate the Painting's return.

D. The 1938 Transaction was a Sale Under Nazi Duress Pursuant to Italian Law; Good Title Thus Cannot Pass to the Museum Under *Schoeps*

Ignoring Italian public order law, the Museum argues that the 1938 Transaction is, at most, voidable due to duress, and that the Leffmanns "ratified" the transaction by "receiving and retaining the proceeds" and not making "a claim" for the Painting. The Museum is mistaken in

its: (a) presentation of the Italian law on duress; (b) presumption of fact as to what the Leffmanns knew and could have done; (c) characterization of New York law on the effect of Nazi-era duress on title (as reflected in *Schoeps*); and (d) refusal to acknowledge historical context.

(1) Even If The 1938 Transaction Was Not Void (Which It Was), and Was Merely Voidable Under Italian Duress Law, It Was Not Ratified

Under Italian law, the 1938 Transaction was alternatively made under duress. Duress need not emanate from a particular person nor involve a direct threat or physical compulsion to the person who entered into the contract. The perceived duress may arise from a social environment, a government or political regime (like that of the Fascists), or even from a powerful criminal organization, like the Mafia. Italian law considers this type of third party "violence" or duress to be "moral or political violence." The latter is defined as a "state of fear" generated by a political party or regime. Furthermore, the violence does not have to be presently occurring or imminent (it can lurk in the future, although it may not be a mere supposition). (Decl. ¶¶ 4, 42-44, 46-49, 58-60, 74). Under these standards, the Complaint sufficiently alleges that the 1938 Transaction was made under the duress of Nazi and Fascist persecution — to fund their flight from Italy in the face of, *inter alia*, Hitler marching in a parade down the streets of Florence, a Fascist regime increasingly and aggressively implementing the Nazi ideology of anti-Semitic policies, and heightened surveillance and monitoring of Jews, especially foreign Jews like the Leffmanns. The threat posed to the Leffmanns placed them in a very real and objective state of fear. This is cognizable duress under Italian law. (Decl. ¶¶ 4, 58-60, 64).

As a duress sale is voidable under Italian law, there is the question of whether the Leffmanns ratified the 1938 Transaction.[17] Under Italian law, a sale by duress may only be

[17] Though the language of the pertinent Italian Civil Code states that a sale made under duress is "void," commentators have interpreted the statute to render such sales voidable and thus subject to ratification. (Decl. ¶¶ 66, 67). As the 1938 Transaction is void as contrary to public order, the

ratified if *after* the duress has ceased, the affected party makes an *explicit* declaration that he intends to ratify the contract or spontaneously performs an open contractual obligation. Here, after the duress ceased, there is no allegation (nor could there be) that the Leffmanns made such a declaration or performed a contractual obligation. Instead, it is alleged that the Leffmanns needed the sale proceeds to fund their flight from Italy into Switzerland and then to Brazil because the great majority of their assets were gone, either stripped by the Nazis or dissipated by the growing web of taxes, transfer losses, fees and "payments" that became part of their everyday lives as refugees. (Compl., ¶¶ 2, 15-21, 28, 46-47). An Italian court would not find that the Leffmanns had "ratified" the sale, as the Museum argues, by "accept[ing] the benefits of the contract" — while under duress — to fund an escape from genocide. (Decl. ¶¶ 68-73).

The Museum's other "evidence" is that the Leffmanns failed to repudiate the contract within five years or make "any claim for the Painting, despite the fact the Painting has been displayed at the Museum since Foy donated it." Italian law does not deem "inaction," or the lack of repudiation, as ratification, and, further, would not impose normal principles of commercial law on elderly Jews returning to war-torn Europe. (Decl. ¶¶ 71, 72). The Museum's "ratification" argument is also reliant on improperly presumed facts — *i.e.*, that the Leffmanns had a viable avenue for making a claim for the Painting and that the Leffmanns knew its location.[18]

(2) The *Schoeps* Analysis: Nazi Era Duress Treated Like Theft

Judge Rakoff's analysis in *Schoeps* is instructive as to the effect on subsequent transactions of a disposition of artwork made under Nazi-era duress, voidable under foreign law:

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viability of Plaintiff's claim can be decided without reaching ratification, but it is discussed herein in the context of the alternative theory of duress.

[18] *Cf. In re Peters*, 34 A.D.3d 29 (1st Dep't 2006) (petitioner had actual, continuing knowledge of the possessor of the artwork). The Museum's heavy reliance on *Peters* is further misplaced as that case had absolutely nothing to do with duress or ratification. *Id.*

1) The Court evaluated the initial 1935 transfer of the paintings under German law, addressing both the Civil Code provision dealing with duress — which would render the transfer voidable — and the public order statute which states that a contract is *void ab initio* if it is "entered into when one party is at a distinct disadvantage in bargaining."

2) The Court concluded that, despite the "meagre" record on summary judgment, the claimants had "adduced competent evidence sufficient to create triable issues of fact," including as to duress — *i.e.*, whether the paintings were only transferred "because of threats and economic pressures by the Nazi government." *Id.*

3) The Court directed that the status of the 1935 sale be "informed by the "historical circumstances of Nazi economic pressures brought to bear on 'Jewish' persons and property." *Id.*

4) Through this lens, the Court found, without any discussion of ratification or repudiation, that if the 1935 sale was made under Nazi-era duress under German law, good title would *not* pass to the subsequent purchaser in 1936 under New York law. This finding was based on the principle that: "New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in possession of a good-faith purchaser for value." *Id.*, *citing Lubell* 77 N.Y.2d at 317; *see also Menzel*, 49 Misc. 2d 314-15.

In other words, Judge Rakoff found that Nazi-era duress as to the disposition of artwork by Jews, if established under applicable foreign law and even if "voidable" under such law, should be treated as the equivalent of theft, thus barring, under New York law, subsequent good faith purchasers from obtaining good title of this "stolen property."

(3) The *Schoeps* Analysis Adheres to U.S. and International Law and Policy

Judge Rakoff's analysis is consistent with the principles underlying the Washington Principles and the Terezin Declaration (issued the same year as *Schoeps*). At the Washington

Conference on Holocaust Era Assets in 1998, Stuart Eizenstat, the Special Adviser to the Secretary of State for Holocaust Issues (and former U.S. Ambassador to the European Union), emphasized, like Judge Rakoff, that the Holocaust is different:

> We can begin by recognizing this as a moral matter — we should not apply the ordinary rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known. [19]

Building on this sentiment, the Terezin Declaration, in the preamble to the section on "Nazi Confiscated and Looted Art" equates, as did the court in *Schoeps*, "looted art" (*i.e.*, stolen art) with sales made under duress of Nazi and the Fascist persecution during the Holocaust era:

> art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the *Fascists* and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and *sales under duress*, during the Holocaust era between 1933-45 . . .[20] (Emphasis added).

The Ninth Circuit, assessing the impact of the Washington Principles and Terezin Declaration, acknowledged that, though not binding treaties, they reflect U.S. policy and are key tenets of U.S. restitution law. In reversing the dismissal of a suit against the Norton Simon Museum for the return of paintings lost in 1940 by a Jewish collector-dealer through a "forced sale," the Court found that litigation should provide "an opportunity to achieve a just and fair outcome to rectify the consequences of the forced transaction with Göring during the war." *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712, 723 (9th Cir. 2014). The Court, relying on the Washington Principles and the Terezin Declaration as "U.S. policy on the restitution of Nazi-

[19] http://fcit.usf.edu/HOLOCAUST/RESOURCE/assets/art.htm.

[20] Prague Holocaust Era Assets Conference: Terezin Declaration (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm (emphasis added).

looted art," stated that "every effort [should] be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress." *Id.*

A critical component of this effort to rectify the consequences is not holding War-era Jews responsible for their "inaction" following the War. The Senate Report for the HEAR Act acknowledges that "the special circumstances created by Nazi persecution necessitate an opportunity for [the] temporary waiver" of "defenses at law related to the passage of time." S. Rep. No. 114-394, at 9 (2016). The Act (§ 2(6)), itself, recognizes that expecting the prompt action of a normal commercial actor would be improper under the circumstances:

> Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

Consonant reasoning — *i.e.*, recognizing the horrible uniqueness of the Holocaust and its aftermath, and promoting the adjudication of Nazi-era claims on the merits — was invoked in the equitable tolling context in *Rosner v. U.S.*, 231 F. Supp. 2d 1202, 1208-09 (S.D.Fla. 2002), involving a claim for the return of property expropriated from Jews by the Nazi-aligned Hungarian government. In *Rosner*, the claimants argued that "the brutal reality of the Holocaust, and the resulting extraordinary circumstances that Plaintiffs were forced to endure, merit[ed] application of equitable tolling in this case." The court found that equitable tolling should apply, noting that "for the majority of Plaintiffs, the years following World War II were particularly difficult." Likewise, in *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135-36 (E.D.N.Y. 2000), the court noted that: "[P]laintiffs argue that the Holocaust, World War II, and the subsequent diaspora of the French Jewish community constitute extraordinary circumstances in and of themselves sufficient to invoke the doctrine of equitable tolling. . . This Court, under its powers in equity, finds that application of the equitable tolling provisions is merited in this case."

When confronted with the "merits" of analogous claims, restitution tribunals and commissions in Europe have repeatedly held that art sold by Jews under Nazi-era duress should be restituted to the original owners or their families. A few examples provided below are illustrative, and the victims' stories are strikingly similar to the experiences of the Leffmanns:

- On January 12, 2005, the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution recommended the restitution of three Karl Blechen paintings and a watercolor by Anselm Feuerbach to the heirs of Julius and Clara Freund because the paintings had been sold under duress in 1942 due to financial difficulties resulting from Nazi persecution.
- On April 25, 2013, the Netherlands' Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the "Restitutions Committee") recommended the restitution of an artwork by Maerten Fransz. van der Hulst to the heirs of Richard Semmel who was forced to flee Germany in 1933 to avoid persecution, and subsequently sold part of his art collection. The Restitutions Committee found that the auction of Semmel's paintings, "while at first sight prompted by economic factors, cannot be seen separately from Semmel's persecution by the Nazi regime in Germany."
- On May 3, 2010, the Restitutions Committee recommended the restitution of a Jan Brueghel painting to the heirs of Max Stern, a Jewish art dealer who sold his trading stock and private collection under orders by German authorities to close his business. The Committee advised "that the circumstances in which Stern found himself in late 1936 and throughout 1937 . . . were so menacing and dangerous that had he succeeded in selling the claimed painting during this period, it should be considered to have been under duress." The Committee also found "that any such sale would have been intended to raise funds for his flight." [21]

It is exactly these "historical circumstances of Nazi economic pressures brought to bear on 'Jewish' persons and property," that the court was referring to in *Schoeps*. These cases involve Jews, who, like the Leffmanns, were forced to flee Nazi persecution and to part with their belongings in order to survive their flight. These restitution tribunals and commissions throughout Europe understand, much like the court did in the *Schoeps* case, and as reflected in U.S. policy, that the actions taken by persecuted Jews can only be evaluated in this context.

[21] *See* https://www.kulturgutverluste.de/Content/06_Kommission/EN/Empfehlungen/05-01-12-Recommendation-Advisory-Commission-Freund-Germany.pdf?__blob=publicationFile&v=8; http://www.restitutiecommissie.nl/en/recommendations/recommendation_rc_3126.html; http://www.restitutiecommissie.nl/en/recommendations/recommendation_196.html.

(4) The *Schoeps* Analysis Applied Here: Good Title Did Not Pass to the Museum

An application of Judge Rakoff's analysis in *Schoeps*, consistent with U.S. law and policy, is thus warranted here in evaluating whether good title passed to the Museum:

1) The Court should evaluate the initial 1938 Transaction under Italian law (which derives, like the German code, from the Napoleonic Code), addressing both the provision dealing with duress and the public order statute which would render the Transaction void.

2) In addressing both statutes, the Court should conclude, based on the Complaint, that the Plaintiff has satisfied the elements of a claim, including that the 1938 Transaction is void as against public order, and the Painting was only transferred because of, and to escape, the threats and economic pressures of the Nazis and their Fascist allies — *i.e.*, duress.

3) The Court's analysis should be "informed by the historical circumstances" of Nazi and Fascist economic pressures brought to bear on Jewish persons and property.

4) Through this lens, the Court should find, based on the allegations in the Complaint, that the 1938 Transaction is: (a) void under Italian law on public order and public morals; and, alternatively, (b) voidable under Italian law on duress, and, applying the *Schoeps* analysis, good title to the Painting did not pass to the Museum through the 1952 Transaction under New York law.

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that this Court deny Defendant's motion.

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Respectfully submitted,

HERRICK, FEINSTEIN LLP

By: */s/ Lawrence M. Kaye*
Lawrence M. Kaye
Howard N. Spiegler
Ross L. Hirsch
Yael M. Weitz

2 Park Avenue
New York, New York 10016
Tel: (212) 592-1400
Fax: (212) 592-1500
lkaye@herrick.com
hspiegler@herrick.com
rhirsch@herrick.com
yweitz@herrick.com

Attorneys for Plaintiff