UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIMOTHY REIF and DAVID FRAENKEL, as Co-Trustees of the LEON FISCHER TRUST FOR THE LIFE AND WORK OF FRITZ GRÜNBAUM and MILOS VAVRA, Plaintiffs, – against – THE CARNEGIE INSTITUTE d/b/a CARNEGIE MUSEUMS OF PITTSBURGH, Defendant, An Artwork *PORTRAIT OF A MAN* (1917) by the Artist Egon Schiele, Defendant-in-rem.	Case No. 1:23-cv-00346 [rel. 23-cv-02108; 23-cv-02443; 23-cv-03009; 22-cv-10625]
TIMOTHY REIF and DAVID FRAENKEL, as Co-Trustees of the LEON FISCHER TRUST FOR THE LIFE AND WORK OF FRITZ GRÜNBAUM and MILOS VAVRA, Plaintiffs, – against – OBERLIN COLLEGE d/b/a ALLEN MEMORIAL ART MUSEUM, Defendant, An Artwork *GIRL WITH BLACK HAIR* (1911) by the Artist Egon Schiele, Defendant-in-rem.	Case No. 1:23-cv-02108 [rel. 23-cv-00346; 23-cv-02443; 23-cv-03009; 22-cv-10625]

TIMOTHY REIF and DAVID FRAENKEL, as Co-Trustees of the LEON FISCHER TRUST FOR THE LIFE AND WORK OF FRITZ GRÜNBAUM and MILOS VAVRA, Plaintiffs, – against – THE ART INSTITUTE OF CHICAGO, Defendant, An Artwork *RUSSIAN PRISONER OF WAR* (1916) by the Artist Egon Schiele, Defendant-in-rem	Case No. 1:23-cv-02443 [rel. 23-cv-00346; 23-cv-02108; 23-cv-03009; 22-cv-10625]
TIMOTHY REIF and DAVID FRAENKEL, as Co-Trustees of the LEON FISCHER TRUST FOR THE LIFE AND WORK OF FRITZ GRÜNBAUM and MILOS VAVRA, Plaintiffs, – against – THE SANTA BARBARA MUSEUM OF ART, Defendant, An Artwork *PORTRAIT OF THE ARTIST'S WIFE* (1915) by the Artist Egon Schiele, Defendant-in-rem.	Case No. 1:23-cv-3009 [rel. 23-cv-00346; 23-cv-02108; 23-cv-2443; 22-cv-10625]

MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO DISMISS AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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This case involves four actions for declaration of title, conversion and replevin to recover artworks lost as a result of Nazi persecution during World War II. On December 14, 2022, the Grünbaum Heirs filed these actions in the Supreme Court, New York County. The four artworks by the Austrian artist Egon Schiele (1890-1918) ("the Artworks") were stolen from Jewish cabaret artist Fritz Grünbaum ("Grünbaum") pursuant to a power of attorney he was forced to execute while imprisoned in the Dachau Concentration Camp, where he died in 1941. The Artworks, listed by titles below, are currently in the respective collections of the Art Institute of Chicago (the "AIC") *Russian Prisoner of War* (1916), the Carnegie Institute ("Carnegie") *Portrait of A Man* (1917), the Oberlin College Allen Museum ("Oberlin") *Girl With Black Hair* (1911), and the Santa Barbara Museum of Art ("Santa Barbara") *Portrait of the Artist's Wife* (1915) (collectively "the Museums").

Plaintiffs Timothy Reif and David Fraenkel (as Co-Trustees of the Leon Fischer Trust for the Life and Work of Fritz Grünbaum) and Milos Vavra (collectively as heirs of Franz Friedrich "Fritz" Grünbaum) ("the Grünbaum Heirs"), oppose the Museums' pre-answer motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure the complaints seeking declarations of title, conversion and replevin. The Grünbaum Heirs cross-move to convert the motions to dismiss to summary judgment motions pursuant to Rules 12(d) and 56 of the Federal Rules of Civil Procedure, seeking a declaration of title to the Artworks pursuant to 28 U.S.C. § 2201-02. In seeking dismissal pursuant to Rule 12(b)(6), the Museums invite the Court to make extensive findings of fact by taking judicial notice of numerous fact issues outside the pleadings such as accruals of statutes of limitations and accruals of prescriptive rights in multiple artworks, and voluminous materials outside the pleadings in support of dismissal on statute of limitations, collateral estoppel, laches and adverse possession grounds. The Museums also challenge the

constitutionality of the Holocaust Expropriated Art Recovery Act of 2016 ("the HEAR Act") which extended the Grünbaum Heirs' time to assert these claims until December 15, 2022.

PRELIMINARY STATEMENT

The simple question that would resolve this entire controversy is whether or not the power of attorney Fritz Grünbaum executed on July 16, 1938 in the Dachau Concentration Camp (the "Dachau Power of Attorney") is void as a product of duress and involuntary. If the Dachau Power of Attorney was involuntarily, this renders void any transfer of artworks that occurred after Grünbaum July 16, 1938 voiding any transaction that would divest any of Grünbaum's heirs of title to the Artworks. Because that simple question has been "actually decided" by the Appellate Division, First Department and was not "actually decided" by the Second Circuit (which expressly stated in its opinion "we do not decide" that question), this controversy can be resolved. Because collateral estoppel requires deference to the Appellate Division's decision, this Court should grant summary judgment in favor of the Grünbaum Heirs. The Grünbaum Heirs signaled their intention to ask the Court to convert the Museums' motions to dismiss to summary judgment motions, anticipating that the Museums would submit voluminous materials to the Court. The Court granted permission for the application pursuant to Rule 12(d) of the Federal Rules of Civil Procedure. Because there are no material issues of undisputed fact and because the Museums chose to lay bare all of their proof, it would be fair and just (and the Museums would suffer no prejudice) for the Court to award summary judgment granting replevin and declaring title in the Artworks to the Grünbaum Heirs, and awarding prejudgment interest for conversion.

Grünbaum was murdered in the Dachau Concentration Camp in 1941 after having been continuously imprisoned since his arrest by the Nazis in March 1938. In April 1938, a Nazi law declared all Jewish property to be available to Field Marshal Hermann Göring to implement the

Four Year Plan and directed Jews to inventory and report property subject to penalty of imprisonment. In July 1938, Grünbaum was forced to execute the Dachau Power of Attorney in favor of his wife Elisabeth ("Lily") Grünbaum so that she could report Grünbaum's assets and assist the Nazis in liquidating his property, including his life insurance policies. Attached to Grünbaum's Jewish Property Declaration compiled by Elisabeth and signed by her pursuant the Dachau Power of Attorney was a July 18, 1938 inventory by a Nazi art expert named Franz Kieslinger (the "Kieslinger Inventory") showed that the Nazis in Vienna had possession of Grünbaum's art collection comprised of 450 artworks, including 81 works by the artist Egon Schiele. Of the 81 Schieles, only five oil paintings were listed with titles. Among those five oils was *Dead City III*.

The Museums' motions to dismiss raise technical defenses in an effort to dodge this Court resolving the question of whether Fritz Grünbaum's art collection was stolen from him. The Museums' pre-answer motions to dismiss should be denied because the claims are timely and have never been litigated. The Museums cannot raise laches defenses because those defenses are pre-empted by the HEAR Act. Even if the HEAR Act did not preempt the Museums' laches defense, the Museums cannot raise disputed issues of fact sufficient to withstand summary judgment. The Museums' acquisitions of the Artworks occurred without the Museums exercising reasonable diligence after specific government warnings not to acquire Nazi looted art and corresponding Museum promises to return Nazi-looted art. The Museums' constitutional attacks on the HEAR Act are frivolous. New York and other common law jurisdictions do not recognize adverse possession of or prescriptive rights in stolen chattels, and even if they did, the Museums cannot put forth admissible evidence sufficient to raise a triable issue of fact on whether they could satisfy the elements of common law adverse possession under the law of any state.

On these motions to dismiss, the Museums argue that the Grünbaum Heirs' claims were not time-barred prior to January 1, 1999 and thus fall under an exception to the HEAR Act. The Grünbaum Heirs demonstrate below that California, Illinois, Ohio and Pennsylvania statutes of limitations barred their claims prior to January 1, 1999 and thus the Grünbaum Heirs' claims are extended by the HEAR Act. The Museums failed to argue or brief the accruals of statutes of limitations in California, Illinois, Ohio and Pennsylvania - issues of pure state law that the Museums' motions to dismiss fail to brief. The Grünbaum Heirs demonstrate here that those claims were time-barred under those laws and thus within the ambit of the HEAR Act's six-year extension to December 15, 2022.

The Museums' attempt to dodge the HEAR Act by positing that New York law opened a statute of limitations window for the Grünbaum Heirs to sue in 2006. This entirely frivolous argument is unexplained, baseless and should be rejected. As of 2006, the Artworks had not been in New York for decades.

The Museums' arguments on collateral estoppel, laches and adverse possession are similarly frivolous and should also be rejected. Contrary to counsel's representations to the Court, *Bakalar v. Vavra*, the Second Circuit made no findings related to the Artworks, limiting its decisions to only one Schiele drawing. Because the Second Circuit in *Bakalar v. Vavra* stated "we do not decide" whether Bakalar met his burden of proof of showing that *Torso* was "not stolen," this issue was not "actually decided" in *Bakalar v. Vavra* for collateral estoppel purposes.

This is not the first time that the frivolous arguments the Museums present to the Court have been rejected. The Appellate Division, First Department in *Reif v. Nagy* rejected the same arguments on collateral estoppel and laches raised by the Museums when those same arguments were raised by London art dealer Richard Nagy. Nagy argued that *Bakalar v. Vavra*, an SDNY

case (affirmed by non-precedential summary order) barred the Grünbaum Heirs' claims to other artworks in Grünbaum's collection that had appeared in an illustrated 1956 Gutekunst & Klipstein Catalogue for the sale of Egon Schiele's artworks in Bern, Switzerland (the "1956 Catalogue"). The Appellate Division rejected Nagy's arguments that *Bakalar v. Vavra*'s collateral estoppel effect extended beyond the Bakalar *Torso*. This Court should be guided by *Reif v. Nagy*'s statement of the law and grant summary judgment awarding title to the Grünbaum Heirs.

The Artworks were also sold at 1956 Gutekunst & Klipstein Egon Schiele sale and depicted in the 1956 Catalogue. The 1956 Catalogue identifies Fritz Grünbaum as the prior owner of *Dead City III*. The 1956 Catalogue fails to identify the provenance of the 53 remaining Schieles in the sale, including the Artworks. In 1998, following D.A. Robert Morgenthau's seizure of *Dead City III* at the Museum of Modern Art, Gutekunst & Klipstein' s proprietor Eberhard Kornfeld confirmed that all artworks in the 1956 Catalogue had belonged to Grünbaum.

The AIC, Carnegie, Oberlin and Santa Barbara each acquired the Artworks in the late 1950's or 1960's and the Artworks remained in California, Illinois, Ohio and Pennsylvania until the present. The statutes of limitations of California, Illinois, Ohio and Pennsylvania barred the Grünbaum Heirs from bringing claims to recover the Artworks from the late 1960's or early 1970's under the "injury" or "reasonable diligence" accrual rules. The Artworks held by AIC, Carnegie, and Oberlin had each been publicly displayed as Grünbaum's property in 1925 at Vienna's Würthle Gallery. The 1925 Würthle Gallery exhibition was documented in an illustrated catalogue that has been available to provenance researchers since 1925.

From 1941 to 2002 no Grünbaum Heirs were recognized by the Republic of Austria. In 2002, the Grünbaum Heirs obtained a certificate of heirship from an Austrian court giving them, for the first time, a "possessory interest" in the Artworks. Under Austrian law, an heir does not

have a "possessory interest" in a decedent's property absent a certificate of heirship. In 2016, Congress passed the HEAR Act that, notwithstanding any federal or state statutes of limitations, extended the time to claim artworks lost as a result of Nazi persecution to six years following the HEAR Act's passage. For claims where claimants had (1) "actual knowledge" of the location of the artworks on or after January 1, 1999 and (2) "actual knowledge" of a possessory interest, claims were extended until December 15, 2022. The present actions were filed on December 14, 2022, within the HEAR Act's limitations period. The HEAR Act's Section 5(e) creates an exception for claims that were not time-barred for a six-year period at some point between January 1, 1999 and December 16, 2016. Because California, Illinois, Ohio and Pennsylvania statutes of limitations barred the Grünbaum Heirs' claims prior to January 1, 1999 and because the Grünbaum Heirs had no "possessory interest" in the Artworks prior to 2002, the HEAR Act's exception does not apply.

In moving to dismiss, the Museums argue that exercising reasonable diligence, Grünbaum's heirs (including the predecessors in interest to the current heirs) should have discovered and litigated these claims in the 1950's. In 2006, in a separate written decision, Judge Pauley declined to permit the Grünbaum Heirs to pursue additional artworks in *Bakalar v. Vavra* and specifically limited the *Bakalar v. Vavra* case to only the *Torso* drawing.

In 2011, Judge Pauley resolved *Bakalar v. Vavra* by determining that the Grünbaum Heirs showed an arguable claim of title to Bakalar's *Torso* drawing, that the burden of proving good title shifted to Bakalar, that Bakalar could not prove good title to *Torso* because Bakalar could not show that Fritz Grünbaum made a voluntary transfer of *Torso,* and that because Bakalar was a novice art collector with no duty to research provenance, the failure of the Grünbaum's predecessors-in-interest to research their rights in Grünbaum's property had prejudiced Bakalar, warranting a declaration of title of *Torso* on laches grounds. Judge Pauley made the "inference" from Mathilde

Lukac's possession that the Nazis had not stolen Grünbaum's art collection. The Second Circuit affirmed by non-precedential summary order only on laches grounds. The Second Circuit specified that it "did not decide" the question of whether Bakalar had shown that the *Torso* was "not stolen."

In support of dismissal, the Museums raise five arguments.

First, the Museums argue that the HEAR Act's exception applies because the Grünbaum Heirs had an opportunity to sue when their claims were not time-barred. *Second,* the Museums argue for dismissal on collateral estoppel grounds based on the *res judicata* effect of *Bakalar v. Vavra* on the remainder of Grünbaum's art collection. *Third,* the Museums argue for dismissal on laches arguing that Judge Pauley's inference that Torso was "not stolen" binds this court with reference to the Artworks. *Fourth,* the Museums argue that the HEAR Act is an unconstitutional deprivation of the Artworks acquired by adverse possession. *Fifth,* Santa Barbara seeks dismissal for lack of personal jurisdiction.

The Grünbaum Heirs' cross-motions to convert and award summary judgment should be granted because Rule 12(d) of the Federal Rules of Civil Procedure requires conversion to a summary judgment motion under Rule 56 if the Court is to consider materials that are not incorporated into the complaint by reference and because resolution of this controversy over who has title to the Artworks turns on the question of whether or not the Dachau Power of Attorney was voluntary. Because Grünbaum's prior ownership of the Artworks is not in controversy and because the Dachau Power of Attorney was held to be involuntary by the Appellate Division, summary judgment is warranted this Court should declare title to the Artworks in the Grünbaum Heirs and direct the Museums to return the Artworks pursuant to 28 U.S.C. § 2201-02.

Conversion to summary judgment is warranted because the Museums laid bare their proofs and invited the Court to consider materials extrinsic to the pleadings. Because the materials show that each Artwork belonged to Fritz Grünbaum and was stolen from him, summary judgment is warranted. Because Rule 12(d) requires conversion to summary judgment to consider these materials, conversion to summary judgment under Rule 56 is warranted.

First, the Museums' argument that the Grünbaum Heirs' claims were not time-barred (and thus don't qualify for the HEAR Act's six-year extension) should be rejected because the Museums concede that the Grünbaum Heirs' predecessors-in-interest were on inquiry notice in the 1950s which would have triggered the California, Illinois, Ohio and Pennsylvania statutes of limitations and thus barred the Grünbaum Heirs claims to artworks located in those jurisdictions prior to January 1, 1999. Because the Museums have failed to brief these statutes of limitations on this motion the Museums have failed to meet their burden of proving that the HEAR Act's exception applies.

Second, the motions to dismiss on collateral estoppel grounds should be denied because the Second Circuit did not "actually decide" the issue of whether or not the Nazis stole Fritz Grünbaum's art collection and the issue was not fully litigated.

Third, the motions to dismiss on collateral estoppel grounds should be denied because the law has changed and the facts are different.

Fourth, the motions to dismiss on laches grounds should be denied because in passing the HEAR Act, Congress supplied a statute of limitations creating a remedy running from "actual knowledge" of an artwork's location and a possessory interest that this Court is not free to disregard.

Fifth, the motions to dismiss on constitutional grounds should be denied because the common law does not recognize adverse possession of stolen chattels and because Museums have repeatedly promised to return stolen artworks to Holocaust victims.

Sixth, Santa Barbara's motion to dismiss on personal jurisdiction grounds should be rejected because Santa Barbara has consented to jurisdiction by litigating the merits and because this Court has removal jurisdiction, and because the Second Circuit lifted restraints on this Court's jurisdiction to undo acts of Nazi spoliation in the 1954 *Bernstein* case.

I. FACTS

A. Grünbaum Acquires Schieles Shown at 1923 Exhibition

In 1923, a one-man show of Egon Schiele's work was mounted at the inaugural exhibition at Vienna's Neue Galerie. [Gruber Dec. at ¶ 36]. The owner of the Neue Galerie in 1923 was Otto Nirenstein, later known as Otto Kallir, a young Austrian publisher and former employee of the Würthle Galerie in Vienna. Kallir was one of the early proponents of Schiele's works. Art historian, author and researcher Sophie Lillie, who has seen the catalogue of the 1923 Neue Galerie show, confirms that numerous works from that show ended up in Fritz's collection. [Gruber Dec. at ¶ 36, 38]. It is believed that Fritz Grünbaum acquired most of the Schieles in his art collection from Otto Kallir. [Gruber Dec. at ¶ 38].

B. Grünbaum Loans Works for 1925 Würthle Galerie Exhibition

From December 1925 through January 1926, Vienna's Würthle Galerie featured an exhibition of 143 of Egon Schiele's artworks. [Gruber Dec. at ¶ 39]. Fritz Grünbaum lent 21 of his Schiele artworks for that exhibition. [Gruber Dec. at ¶ 39]. Three of the works at issue on the motion to dismiss appeared at that exhibition and are depicted and described in the exhibition catalogue: Oberlin's *Girl With Black Hair (63)*, AIC's *Russian Prisoner of War* (117), and *Portrait of a Man* (118) from the collection (sammlung) of Fritz Grünbaum. [Gruber Dec. at ¶ 39]. The

1925 Würthle Catalogue lists some artworks without any owner or lists some as coming from a private collection.

C. Grünbaum's Ownership of Schieles Is Documented In Correspondence From a 1928 Memorial Exhibition Organized By Otto Kallir

A memorial exhibition commemorating the tenth anniversary of Egon Schiele's death in 1918 was held in October-November 1928 at three locations in Vienna: the Hagenbund building, Neue Galerie and Würthle Galerie. As one of the organizers of the exhibition, Otto Kallir wrote to Grünbaum asking to borrow Schieles for the Hagenbund exhibition. Kallir later sent a letter confirming the four oil paintings and 21 drawings Grünbaum provided for the Schiele memorial show. [CI 37 at ¶¶ 47-48, 52 CI 15-4 at D&M 01800; AIC 15 at ¶¶57-58, 62, AI 15-4 at D&M 01800; OB 12 at ¶¶ 55-56, 61, OB 12-4 at D&M 01800; SBMA 13 at ¶¶ 55-56, 61, SBMA 13-4 at D&M 01800; Gruber ¶ 41, Ex. 9]. Grünbaum's 1928 correspondence with Otto Kallir about the event was maintained in Neue Galerie's business records and later donated to Austrian archives. [CI 37 at ¶¶ 47-48, 52; AIC 15 at ¶¶57-58, 62; OB 12 at ¶¶ 55-56, 61; SBMA 13 at ¶¶ 55-56, 61].

D. Grünbaum's Murder In The Dachau Concentration Camp Following His Execution of The Dachau Power of Attorney

The Nazi regime stole the Artworks from Grünbaum while he was imprisoned in the Dachau Concentration Camp, where the Nazis tortured him and compelled him to sign the unlawful Dachau Power of Attorney giving his wife authority to convey his property, including the subject artworks. [CI 37 ¶ 4, 6]; [AIC 15 ¶¶ 6, 8]; [OB 12 ¶¶ 5, 7]; [SBMA 13 ¶¶ 5, 7]. On July 16, 1938, while they imprisoned Grünbaum at Dachau, the Nazis forced Grünbaum to sign under duress the Dachau Power of Attorney permitting Elisabeth to liquidate his assets and hand the assets over to the Nazi regime. [CI 37 ¶ 27, 15-10 (Dachau Power of Attorney)]; [AIC 15 ¶ 34, 15-10 (Dachau Power of Attorney)]; [OB 12 ¶ 32, 12-10 (Dachau Power of Attorney)]; [SBMA

13 ¶ 13, 13-10 (Dachau Power of Attorney]. This coerced Dachau Power of Attorney was a "theft" under New York and Austrian law. Under New York law and in all common law jurisdictions, no one can take good title from a thief. [CI 37 ¶ 26]; [AIC 15 ¶ 35]; [OB 12 ¶ 34]; [SBMA 13 at ¶ 32)]. The Artworks were among a larger group of artworks, including *Dead City III*, that the Nazis stole from Grünbaum based on the unlawful Dachau Power of Attorney. [CI 37 ¶ 6]; [AIC 15 ¶ 8]; [OB 12 ¶ 7]; [SB 13 ¶ 6].

These actions were originally filed in New York State Supreme Court, New York County, as related to *Reif v. Nagy.* In *Reif v. Nagy*, the Hon. Charles Ramos determined conveyances involving Fritz Grünbaum's art collection pursuant to the unlawful Dachau Power of Attorney, including transactions involving the artworks at issue on this motion and *Dead City III*, are invalid based on the Dachau Power of Attorney because "[a] signature at gunpoint cannot lead to a valid conveyance." *Reif v. Nagy*, 61 Misc.3d at 326, 80 N.Y.S.3d 629, 634 (Sup. Ct., New York County Comm. Div. 2018) ("*Reif v Nagy I"*)[1], *aff'd, Reif v. Nagy*, 175 A.D.3d 107, 106 N.Y.S.3d 5 (1st

[1]Actions with multiple reported decisions are listed in abbreviated form for the convenience of the Court and parties, as follows: *Reif v. Nagy*, 61 Misc.3d 80 N.Y.S.3d 107 (Sup. Ct., New York County Comm. Div. 2018) is marked as ("*Reif v Nagy I"*); *Reif v. Nagy*, 175 A.D.3d 107, 106 N.Y.S.3d 5 (1st Dept. 2019) is marked as ("*Reif v. Nagy II*"). *Bakalar v. Vavra*, 237 F.R.D. 59 (S.D.N.Y. 2006) is marked as ("*Bakalar 2006*"); *Bakalar v. Vavra*, 619 F.3d 136 (2nd Cir. 2010) is marked as ("*Bakalar 2010*"); *Bakalar v Vavra*, 819 F.Supp.2d 293 (SDNY 2011) is marked as (*"Bakalar 2011")*; *Bakalar v. Vavra*, 500 Fed. Appx. 6 (2d Cir. 2012) is marked as ("*Bakalar 2012").*

Dept. 2019) (*"Reif v Nagy II"), leave to review declined*, 25 N.Y.3d 986, 125 N.Y.S.3d 76 (May 24, 2022). [CI 37 ¶ 5]; [AIC 15 ¶ 7]; [OB 12 ¶¶ 5-7]; [SBMA 13 ¶ 6].

Reif v. Nagy relied, *inter alia*, on *Bakalar v. Vavra*, 619 F.3d 136 (2nd Cir. 2010) ("Bakalar 2010"). In *Bakalar 2010* Judge Korman, who drafted the majority decision, also drafted a concurrence to explain that, under New York law, the Dachau Power of Attorney that Grünbaum was forced to execute while in the Dachau Concentration Camp and that divested him of legal control over *Torso* caused "an involuntary divestiture of possession and legal control" rendering any subsequent transfer void and not merely voidable. *Bakalar 2010* at 148, 149.

In 2023, the Museums removed these actions to the U.S. District Court for the Southern District of New York. These four actions and *Timothy Reif et al. v. Republic of Austria et al.* (22-cv-10625 (*"Reif v. Austria"*) were deemed "related cases" and ultimately assigned to this Court on April 13, 2023. [*Reif v. Austria*, ECF 35]; [AIC 24];[CI 35]; [OB 15]; [SBMA 11]. *Reif v. Austria* involves, *inter alia*, title to Egon Schiele's *Dead City III*.

E. Grünbaum's 450-Piece Art Collection, Including *Dead City III*, Stolen By The Nazis Pursuant To The Dachau Power of Attorney Inventoried In Jewish Property Declarations

On April 27, 1938, the Nazis passed an anti-Semitic law requiring only Jews with property valued over 5,000 Reichsmarks to declare their property to the Nazi regime quarterly under penalty of imprisonment. [CI 37 ¶ 27]; [AIC 15 ¶ 32]; [OB 12 ¶ 32]; [SBMA 13 ¶ 32)]. Such property was available to Field Marshal Göring to implement the Four Year Plan. [*Id.*]; [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1, SBMA 13-1) ¶ 61]. From 1938 to 1939, Elisabeth declared Fritz's assets to the Nazi authorities on Jewish Property declarations and was forced to liquidate Fritz's assets pursuant to Nazi decrees. [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1, SBMA 13-1) at ¶¶ 60, 64].

As part of the process of securing Jewish assets to prevent transfers or sales, the Jewish Property Transaction Office (Vermögensverkehrsstelle) of Vienna commissioned Nazi Franz Kieslinger, an expert of the Dorotheum auction house, to inventory Grünbaum's art collection while Grünbaum was in the Dachau Concentration Camp in July 1938. [CI 37 ¶ 57; AIC 15 ¶ 67; OB 12-1 ¶ 67; SBMA 13 ¶ 66]. The Kieslinger Inventory is part of the Elisabeth and Fritz Grünbaum Jewish Property files maintained in the Austrian State Archives. [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1; SBMA 13-1) at 61, Ex. J]. The Dorotheum was a Nazi-controlled auction house in Vienna used by the Nazi regime to sell art plundered from Jews and turn the proceeds over to the Nazi Reich. [CI 37 ¶ 61; AIC 15 ¶ 69; OB 12-1 ¶ 69; SBMA 13 ¶ 67]. The Kieslinger Inventory valued Grünbaum's art collection at 5,791 Reichsmarks. *[*CI 37 ¶ 62; AIC 15 ¶ 70; OB 12-1 ¶ 70; SBMA 13 ¶ 69].

According to the Kieslinger Inventory, Grünbaum's art collection contained at least 81 works by the artist Egon Schiele with five oils listed by name including *Dead City III*. [CI 37 ¶ 63; AIC 15 ¶ 71; OB 12-1 ¶ 71; SBMA 13 ¶ 70]; [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1 ¶ 138; SBMA 13-1) at 41-42]. The stamps Elisabeth's and Fritz's Jewish Property Declarations bear "Erledigt," "Gesperrt" and Vermoegens-Anmeldung" stamps. [CI 37 ¶ 65; AIC 15 ¶ 72; OB 12 ¶ 72; SBMA 13 ¶ 71]; [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1, SBMA 13-1) at ¶ 66, Ex. M]. "Erledigt" ["done" or "completed"] and "Gesperrt" ["closed" or "blocked"] and "Vermoegens-Anmeldung" ["property office"] were official Nazi stamps indicating that the property of the Jewish person in question had been spoliated and sequestered by the Nazis. [CI 37 ¶ 64; AIC 15 ¶ 71; OB 12-1 ¶ 71; SBMA 13 ¶ 70]; [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1 ¶ 138; SBMA 13-1) at ¶ 66, Ex. M]. Because the art collection was inventoried and described in the Jewish Property Declarations, the "Erledigt" "Gesperrt" and Vermoegens-Anmeldung"

stamps demonstrate conclusively that the Nazis stole Fritz Grünbaum's art collection. [CI 37 at ¶ 66; AIC 15 ¶ 73; OB12 ¶ 73; SBMA 13 ¶ 72]; [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1, SBMA 13-1) at ¶ 66, Ex. M].

F. The 1956 Gutekunst & Klipstein Sale of *Dead City III* and 53 Other Schiele Artworks And Resale of *Dead City III* To Otto Kallir With 19 Other Grünbaum Schieles, Including the Artworks

On September 8, 1956, proprietor Eberhard Kornfeld offered 54 Egon Schiele artworks for sale at Gutekunst & Klipstein in Bern, Switzerland in an illustrated catalogue ("the 1956 Catalogue"). (*Reif v. Nagy II* at 114-115*).* The 1956 Catalogue included the Artworks as well as the Bakalar *Torso* and *Dead City III*. *Dead City III*[2], pictured below, now at the Leopold Museum in Vienna, appears as number 1 in the 1956 Catalogue, with Fritz Grünbaum as the last owner. The 1956 Catalogue lists *Dead City III*'s appearances at the 1925-1926 Würthle Galerie exhibition, at the 1928 Schiele memorial exhibition at the Hagenbund (which showed Grünbaum's ownership) and at image number 24 in Kallir/Nirenstein's 1930 publication, *The Egon Schiele Book.*

[2] The 1956 Catalogue identifies work no. 1 as *Tote Stadt I (Dead City I)* though modern scholars refer to the artwork as *Dead City III.*

Dead City

Tote Stadt I. 1911. Öl auf Holz. 37,3:30,1 cm.

Signiert u. datiert: «EGON SCHIELE 1911» (eingekratzt).
Rückseitig betitelt: TOTE STADT.

Otto Nirenstein, Egon Schiele; Persönlichkeit und Werk, Wien 1930, Werkverzeichnis Nr. 94. – Vgl. auch Nirenstein Nr. 63, 112 u. 113.

Wohl das farbig und malerisch schönste und abgeschlossenste der Landschaftsbilder «Tote Stadt», die der Künstler in den Jahren 1910–12 im böhmischen Städtchen Krumau, dem Heimatort der Mutter, malte.

Sammlungen: Fritz Grünbaum, Dr. Alfred Spitzer, Arthur Roessler, alle in Wien, dann in Privatbesitz Wien.

Ausstellungen: Hagenbund, Wien 1912, Nr. 237. – Kunsthandlung Würthle, Wien 1925/26, Nr. 11. – Gedächtnisausstellung Hagenbund, Wien 1928, Nr. 20. – «Die Kunst unserer Zeit», Künstlerhaus, Wien 1930.

Abbildungen: Nirenstein, Tafel 59. – Karpfen, Das Egon-Schiele-Buch, Tafel 24.

Girl with Black Hair (*Halbakt. Schwarzes Madchen*), below, now at Oberlin, is number 14 in the 1956 Catalogue.

14. Halbakt «Schwarzes Mädchen». Aquarell u. Bleistift. 44,9:29,2 cm.

Sehr schöne voll signierte und «11» datierte Arbeit. Auf gelbem Packpapier. – Die Dargestellte ist das Modell des Bildes «Schwarzes Mädchen», Nirenstein Nr. 83, Taf. 48.

Portrait of the Artist's Wife (*Bildnis Edith Schiele*), below, now at Santa Barbara, is number 36 of the 1956 Catalogue.

36. Bildnis Edith Schiele. Schwarze Kreide. 29,7:21,2 cm.

Prachtvolle lineare Zeichnung nach der Frau des Künstlers. Dieses Blatt dokumentiert die einzigartige Porträtkunst Schieles. Die Linie wird hier zum reichklingenden Instrument, das mit allen Registern die Anmut, den Charme und die ganze Schönheit dieser Frau besingt. Das Blatt ist im Jahr der Verheiratung mit Edith entstanden. Voll signiert und «1915» datiert.

Russian Prisoner of War (Bildnis eines gefangenen Russen), below, now at AIC, is number 39 of the 1956 Catalogue.

39. Bildnis eines gefangenen Russen. Schwarze Kreide u. Tempera. 47,7:26,3 cm.

Sehr schön aufgebaute Porträtstudie eines russischen Soldaten aus dem Kriegsgefangenenlager in Mühling, wo Schiele seit Januar 1916 in der «Provianturabteilung» des Lagers Dienst leistete. Voll signiert und «1916» datiert. Oben der Name des Dargestellten in russischer Schrift. – Rückseitig: Stehendes, aneinandergelehntes nacktes Paar. Bleistift. 48,4:30,2 cm. Voll signiert und «1913» datiert. Auf Japan.

Portrait of a Man (*Mannliches Bildnis*), below, now at Carnegie, is number 42 of the 1956 Catalogue.

42. Männliches Bildnis. Schwarze Kreide. 34,5:20,8 cm.

Prachtvolle Studie, in der der Porträtierte mit wenigen Akzenten: Kopf, linker Arm mit Hand und rechte Hand, psychologisch und bildmässig gültig erfasst und ausgesagt ist. Auf glattem Maschinenpapier. Voll signiert und «1917» datiert.

Torso (*Sitzende mit angezogenem linkem Bein*), below, the drawing at issue in *Bakalar*, is number 51 in the 1956 Catalogue.

51. Sitzende mit angezogenem linkem Bein. Schwarze Kreide u. Tempera. 35,1 : 25,5 cm.

Sehr schöne farbige Zeichnung. Auf glattem Maschinenpapier. Voll signiert und «1917» datiert.

A September 18, 1956 Gutekunst & Klipstein invoice shows that Otto Kallir purchased *Dead City III* together with 19 other Schiele artworks from the 1956 Catalogue. [Petropoulos Report at 11, Exhibit F (OB 15-7)]. Among the artworks Otto Kallir purchased (with corresponding Gutekunst & Klipstein inventory numbers) are *Girl With Black Hair (Halbakt. Schwarzes Mädchen)* (No. 36520); *Russian Prisoner of War (Bildnis eines gefangenen Russen)* (No.36765); *Portrait of a Man (Männliches Bildnis)* (No. 36772) (now at Carnegie); and *Portrait of the Artist's Wife (Bildnis Edith Schiele)* (No. 36527).

G. U.S. Foreign And Domestic Policy To Undo Nazi-Era "Seemingly Voluntary" Transactions Since The London Declaration of January 5, 1943

The U.S. has consistently maintained its policy to undo coerced Nazi-era transactions both in the U.S. and worldwide. Dowd, Raymond, *Nazi Looted Art And Cocaine: When Museum Directors Take It, Call The Cops,* 14 Rutgers Journal of Law and Religion 529 at 537 (2013) *("Nazi Looted Art")* at 536. The London Declaration served as a "formal warning to all concerned, and in particular persons in neutral countries," that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war…." *Von Saher v. Norton Simon Museum of Art at Pasadena,* 592 F.3d 954, 960-962 (9th Cir. 2009). After the Allied victory over the Third Reich in 1945, the United States reaffirmed the commitment of

the 1943 London Declaration by requiring European nations to repudiate all purported transactions in art stolen by the Nazis between 1933 and 1945 and to draft laws mandating return of all property stolen from Nazi persecutees. Dowd, *Nazi Looted Art* at 535. In 1947, the U.S. and its Allies established a formal legal presumption that any transfer of property that a persecuted Jew made in Germany after the Nazis took power in January 1933 was so inherently coercive that the victim was entitled to the return of the item. [Petropoulos Report at ¶ 44 (CI 37 ¶ 73; AIC 15 ¶ 80; OB 12 ¶ 80)]. In 1947 the U.S. Government promulgated Military Government Law No. 59 (hereinafter "MGL No 59"), 12 Federal Register 7983 (29 November 1947), the stated purpose of which was "to effect to the largest extent possible the speedy restitution of identifiable property… to persons who were wrongfully deprived of such property" within this period "for reasons of race, religion, nationality, ideology or political opposition to National Socialism" (Article 1). [Petropoulos Report at 44 (CI 37 ¶ 74; AIC 15 ¶ 80; OB 12 ¶ 80; SBMA 13 ¶ 80)].

H. Government Warnings To Museums And Art Collectors Against Acquiring Artworks Situated In Europe During World War II

The London Declaration put the art and museum community on heightened notice not to acquire artworks that were in Europe after 1933 and created prior to 1946 without complete provenances. [Petropoulos Report at ¶¶ 41-43 (OB 12-1; AIC 15-1; SBMA 13-1)]. In 1945, the American Commission for the Protection and Salvage of Artistic and Historic Monuments In War Areas ("Roberts Commission") issued a "circular letter" to museums, art and antique dealers and auction houses concerning reports of objects being offered to museums and to the trade by present and former members of the armed forces, stating how items looted from public or private collections during war time could not give rise to good title. [Petropoulos Report at ¶ 41 (OB 12-1; AIC 15-1; SBMA 13-1)]. In 1950, the State Department sent a similar advisory to universities, museums, libraries, art dealers and booksellers, asking them to identify cultural objects improperly

dispersed during World War II. [Petropoulos Report at ¶ 49 (OB 12-1; AIC 15-1; SBMA 13-1)]. The Museums were thus warned against acquiring Nazi looted art. [AIC 15 at 12-13]; [SBMA 13 at 12]; [CI 37 at 11-12); [OB 12 at 13].

Following World War II, Nazi looting of artworks from Jewish victims received tremendous media attention in the United States. [CI 37 ¶ 73]; [AIC 15 ¶ 80]; [OB 12 ¶ 80]; [SBMA 13 ¶ 79] (Petropoulos Report at 26). After World War II, U.S. government initiatives, together with media coverage put the educated U.S. population engaged in the business of acquiring artworks on notice of the Holocaust, Nazi art looting practices, and the systematic spoliation of Jews' assets such that an ordinary purchaser knew that acquiring an artwork with European provenance that entered the United States after 1932 but was created before 1946 was a "red flag" transaction that should have prompted vigilance in ascertaining the true owners of the work before taking possession. [Dowd, *Nazi Looted Art* at 537]; [AIC 15 ¶¶ 83-84]; [SBMA 13 ¶¶ 81-82]; [CI 37 ¶ 76]; [OB 12 ¶ 83]; [Petropoulos Report at 54]. Thus, the "good faith purchaser" defense would not be available to anyone purchasing artworks with a European provenance that entered the United States after 1932 and that had been created prior to 1946. `

When acquiring the Artworks, the Museums were fully aware that Egon Schiele's major collectors were largely murdered Jews and were otherwise under circumstances showing the Museums' direct or circumstantial knowledge that in acquiring the subject artworks from Otto Kallir, they were receiving artworks that likely were acquired through Nazi persecution. [OB 37 ¶ 87, citing Petropoulos Report (CI 12-1) at 15, 22, 24, 55]. Otto Kallir had all of the provenance information and the Museums failed to question him when he was alive and well in the 1950's and 1960's.

I. In 1954 The Second Circuit In *Bernstein* Determines That The U.S. Government Has Relieved The Courts of All Jurisdictional Limitations On Undoing Nazi Looting Transactions

In 1954, after the State Department made clear that federal courts should provide a forum for restitution of property stolen or obtained by Nazi duress, the Second Circuit stripped Nazi Germany (which included the territory of Austria) of sovereign immunity in *Bernstein v. N.V. Nederlandsche- Amerikaansche, Stoomvaart- Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (quoting Jack B. Tate).[3] Dowd, *Nazi Looted Art* at 536-537. In so doing, the Second Circuit cited a letter of the State Department's Acting Legal Advisor, Jack Tate:

> This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or people subject to their controls…. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.
> *Id.* at 376.

Thus, the U.S. government specifically put the federal judiciary on the task of returning property stolen from Holocaust victims without jurisdictional restraint. Dowd, *Nazi Looted Art* at 537.

[3]Austria was created by the Austria State Treaty of 1955. Article 26 of the Treaty forbids Austria from acquiring the property of Nazi persecutees. Article 26 has no time limit.

J. In 2016, Congress Passed The HEAR Act Following *Bakalar v. Vavra* To Void State Statutes of Limitations That Accrued Without Claimant's Actual Knowledge Of The Artworks' Location And Time-Barred Recovery Remedies

The Holocaust Expropriated Art Recovery Act of 2016 ("HEAR Act") extends the statute of limitations for a claim or cause of action to recover any artwork or other property that was lost during 1932-1945 no later than 6 years after the claimant's "actual discovery" of: (1) the identity and location of the artwork; and (2) a possessory interest of the claimant in the artwork. HEAR Act, Pub. L. No. 114-308 § 5(a) (December 16, 2016), 130 Stat 1524. For "preexisting claims"—*i.e.*, all claims that arose before 2016, the date of actual discovery is deemed the date of enactment of the HEAR Act. *Id.* § 5(c). Therefore, under the plain meaning of the HEAR Act, the statute of limitations for any time-barred Nazi-looted art claim is tolled until December 15, 2022.

The HEAR Act's preamble § 6 provides:

> Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended (See, e.g., Detroit Institute of Arts v. Ullin, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007). The unique and horrific circumstances of World War II and the Holocaust 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.

The HEAR Act's stated purposes are: "(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." HEAR Act §3.

K. Grünbaum Heirs' Predecessors-In-Interest's Knowledge Of Grünbaum Property Triggered Accrual And Barred Claims California, Illinois, Ohio and Pennsylvania In The 1950's And 1960's

According to the Museums, the Grünbaum Heirs should have exercised reasonable diligence to locate Grünbaum's art collection in the 1950's. [CI 47 at 30]. According to the Museums, Leon Fischer's and Milos Vavra's ancestors "should have known" of a potential claim to *Torso* and collateral estoppel compels a finding that the present Grünbaum Heirs should have known of their potential intestate rights in all works in Grünbaum's collection. The Museums point to Grünbaum's sister and heir, Elise Zozuli, who resided in Czechoslovakia in 1952, purportedly giving up on her heirship claims because Elisabeth Grünbaum's "Brussels sisters" had claimed Fritz's property as evidence that the Grünbaum Heirs' predecessors-in-interest were not diligent. [CI 47 at 13]. Accepting the Museums' arguments as true, the statute of limitations of California, Illinois, Ohio and Pennsylvania each barred the Grünbaum Heirs' claims prior to January 1, 1999 based on "reasonable diligence" accrual rules.

1. California's "Reasonable Diligence" Statute of Limitations Accrual Barred The Grünbaum Heirs' Claims In 1960

Adopting the Museums' reasoning on "reasonable diligence," California's statute of limitations barred the Grünbaum Heirs' claims in 1960. Santa Barbara acquired *Portrait of the Artist's Wife* (drawing D.1711) in 1957. In *Adler v. Taylor*, No. CV 04-8472-RGK(FMOX), 2005 WL 4658511, at *5 (C.D. Cal. Feb. 2, 2005), *aff'd sub nom. Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007), the court determined that the plaintiff was time-barred under California's then-applicable three-year statute of limitations because the plaintiffs, "by exercise of reasonable

diligence," should have discovered Taylor's ownership in 1963." By this logic, the Grünbaum Heirs' claims were barred in 1960, three years from Santa Barbara's acquisition.

2. Illinois' "Injury" Statute of Limitations Accrual Barred The Grünbaum Heirs' Claims In 1971

Adopting the Museums' reasoning on "reasonable diligence," Illinois' statute of limitations barred the Grünbaum Heirs' claims in 1971. The AIC acquired *Russian Prisoner of War* (drawing D.1839) in July 1966. In Illinois, actions "to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 Ill. Comp. Stat. Ann. 5/13-205. Under the Illinois discovery rule, a cause of action accrues, and the limitations period begins to run, when the party seeking relief knows or reasonably should know of its injury. *Finite Res., Ltd. v. DTE Methane Res., LLC*, 521 F. Supp. 3d 754, 757 (S.D. Ill. 2021), *aff'd*, 44 F.4th 680 (7th Cir. 2022); *Underwood v. City of Chicago*, 2017 IL App (1st) 162356, ¶¶ 45, 84 N.E.3d 420, 433 (June 29, 2017). Applying the "injury rule" the Illinois statute would have run in 1943, five years after Grünbaum was despoiled of his property. Applying the "reasonable discovery" rule, the claims were barred in 1971, five years following AIC's acquisition.

3. Ohio's "Reasonable Discovery" Statute of Limitations Barred The Grünbaum Heirs' Claims In 1962

Adopting the Museums' reasoning, Ohio's statute of limitations barred the Grünbaum Heirs' claims in 1962. Oberlin College's Allen Memorial Art Museum acquired *Girl with Black Hair* (drawing D.861) in 1958.. Ohio has a four year limitations period. Ohio Rev. Code Ann. § 2305.09. Under this discovery rule, claims accrue when the claimant discovers or, in the exercise of reasonable care, should have discovered the complained-of injury. *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 806–807 (N.D. Ohio 2006). Following this logic, the Grünbaum Heirs' claims were barred in Ohio in 1962, four years after Oberlin's acquisition.

4. Pennsylvania's "Injury" Statute of Limitations Barred The Grünbaum Heirs' Claims In 1962

Adopting the Museums' reasoning, Pennsylvania's statute of limitations barred the Grünbaum Heirs' claims in 1962. Carnegie acquired *Portrait of a Man* (drawing D.2081) in January 1960. Actions in Pennsylvania must be commenced within two years. 42 Pa. Stat. and Cons. Stat. Ann. § 5524(3) ("An action for taking, detaining or injuring personal property, including actions for specific recovery thereof."). "Under Pennsylvania law, a cause of action arises or accrues . . . when the plaintiff could have first maintained the action to a successful conclusion." *Douglas v. Joseph*, 656 F. App'x 602, 605 (3d Cir. 2016) citing *Kapil v. Ass'n of Pa. State Coll. & Univ. Faculties*, 504 Pa. 92, 470 A.2d 482, 485 (1983). Applying the "injury rule," the statute ran in 1940, two years after Grünbaum was despoiled of his property. Under the "reasonable discovery" rule, the statute would have run in 1962, two years after Grünbaum was despoiled of his property.

L. Grünbaum Heirs Leon Fischer And Milos Vavra Had No "Possessory Interest" In The Artworks Until 2002, The First Time An Austrian Court Issued A Certificate of Heirship

Austrian government records demonstrate that following Fritz's death in 1941 and Elisabeth's death in 1942 no Grünbaum family member could have legally recovered the art collection until 2002 because the Grünbaums had no heirs appointed by an Austrian court and no Austrian decrees of distribution were issued until September 12, 2002. [CI 37 ¶ 33; AIC 15 ¶ 42; OB 12 ¶ 41; SBMA 13 at ¶ 41]; [Gruber ¶¶ 8, 62-64, Exs. 1, 20-21]. Under Austrian law, for a family member to transfer a decedent's assets, that family member must first be declared an heir and receive a decree of distribution. [CI 37 ¶ 34; AIC 15 at ¶ 43; OB 12 ¶ 42; SBMA 13 ¶ 42] [Gruber ¶¶ 62-65, Exs. 20-23] (Austrian legal experts reports, Austrian Civil Law). Pursuant to a Certificate of Heirship issued by the District Court Innere Stadt Vienna dated September 12, 2002,

Leon Fischer ("Fischer") and Milos Vavra ("Vavra") were each declared an heir of Fritz Grünbaum's estate entitled to an undivided fifty percent (50%) share. [CI 37 ¶ 37; AIC 15 ¶ 46; OB 12 ¶ 45; SB 13 ¶ 45]; [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1, SB13-1) at 40]; [Gruber ¶ 8, Ex. 1]. Thus, the lack of any heirship or distribution decrees from 1941 until 2002 in Austrian government files signifies, as a matter of law, that no family member could have taken title to Fritz Grünbaum's art collection, or title to any individual artworks belonging to Fritz prior to 2002. [CI 37 ¶ 35; AIC 15 ¶ 44; OB 12 ¶ 43; SBMA 13 ¶ 43]. Until at least the fall of the Iron Curtain in 1991, a line of Grünbaum's heirs were in Czechoslovakia, a totalitarian Communist State that did not recognize private property and where Jewish persons with private wealth would be in danger of expropriation and persecution. [CI 37 ¶ 36; AIC 15 ¶ 45; OB 12 ¶ 44; SB 13 ¶ 44] [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1, SB 13-1) at 44-45 and fn. 58].

M. Judge Pauley Invokes Laches To Extinguish The Grünbaum Heirs' Rights In the Bakalar *Torso* Drawing After Excluding Evidence

Despite Bakalar's inability to prove legal title, Judge Pauley determined that inactions of predecessors-in-interest of Leon Fischer and Milos Vavra extinguished possessory rights of the Grünbaum Heirs, as against Bakalar, a Massachusetts purchaser who purchased an artwork in New York from Otto Kallir of Galerie St. Etienne. [CI 37 ¶ 101; AIC 15 ¶ 102; OB 12 ¶ 102; SB 13 ¶ 101]. The *Bakalar* court invoked the doctrine of laches to reach this result. [CI 37 ¶ 103; AIC 15 ¶ 104; OB 12 ¶ 104; SB 13 ¶ 113]. The *Bakalar* court's laches finding was based on that court's exclusion of historical evidence on timeliness grounds, and thus was not a fair determination on the merits. [Petropoulos Carnegie Report at FN 58]. [CI 37 ¶ 104; AIC 15 ¶ 105; OB 12 ¶ 105; SBMA 13 ¶ 103]. On October 11, 2012, the Second Circuit Court of Appeals, in a summary (nonprecedential) order, affirmed Judge Pauley's 2011 decision by finding it not clearly erroneous.

Bakalar v Vavra, 819 F.Supp.2d 293 (SDNY 2011) (*"Bakalar 2011"*).[4] *Bakalar v. Vavra*, 500 Fed. Appx. 6 (2d Cir. 2012) *("Bakalar 2012").* [CI 37 ¶ 105; AIC 15 ¶ 109; OB 12 ¶ 109; SB 13 ¶ 108].

N. The Grünbaum Heirs Seek To Pursue The Art Collection By Class Action

In *Bakalar v. Vavra*, after Bakalar brought suit in 2005 against the Grünbaum Heirs (then Vavra and Fischer) with respect to a single Schiele work, *Torso*, the heirs counterclaimed and moved for class certification to include 450 works identified on the Kieslinger Inventory. *Bakalar v. Vavra*, 237 F.R.D. 59, 61 (S.D.N.Y. 2006). The Museum of Modern Art ("MoMA") opposed the motion, alleging, *inter alia*, "adjudication of title also may raise fact-specific defenses, including the statute of limitations, laches, and prescription." Jaffe Ex. D at 2, 4, 6 (*Bakalar*, MoMA March 9, 2006 Memorandum in Opp.). During oral argument, counsel for Bakalar (Mr. Charron's colleague) argued that his laches motion for summary judgment was limited solely to the work in Bakalar's possession, *Torso*. Jaffe Ex. B. at 19-20 (December 9, 2005 transcript).

O. Judge Pauley Limits Discovery

Judge Pauley denied the Grünbaum Heirs' application for additional class discovery, instead ordering that Sotheby's, Christie's and Galerie St. Etienne provide "statistics" about their prior sales of Schieles, such as indicating whether the purchaser was a museum, art dealer or

[4] Actions with multiple reported decisions are listed in abbreviated form for the convenience of the court and parties, as follows: *Bakalar v. Vavra*, 237 F.R.D. 59 (S.D.N.Y. 2006) is marked as ("*Bakalar 2006*"); *Bakalar v. Vavra*, 619 F.3d 136 (2nd Cir. 2010) is marked as ("*Bakalar 2010*"); *Bakalar v Vavra*, 819 F.Supp.2d 293 (SDNY 2011) is marked as (*"Bakalar 2011"*); *Bakalar v. Vavra*, 500 Fed. Appx. 6 (2d Cir. 2012) is marked as ("*Bakalar 2012"*).

private person, and that person's location at the time of purchase. Galerie St. Etienne was required to produce information about *Torso.* Jaffe Ex. C (January 4, 2006 Discovery Order); Jaffe Ex. B at 22-23, 26-27 (December 9, 2005 transcript).

P. Judge Pauley Limits *Bakalar v. Vavra* To One Drawing

In July 2006, Judge Pauley sided with the Museums, denying class certification and concluding that "[e]ach work has its own unique provenance or history and for the past sixty-eight years were transferred at different times, under different circumstances and in various jurisdictions." *Bakalar v. Vavra,* 237 F.R.D. 59 at 67 (S.D.N.Y. 2006) (*"Bakalar 2006"*). Judge Pauley found that the proposed Counterclaim–Defendants raised "unique, atypical defenses" and cannot serve as adequate representatives of the proposed subclasses." *Id.* Judge Pauley wrote:

> Based on the individualized nature of the subject matter in this action—artwork—unique defenses abound. In view of the careful consideration required to provide procedural fairness and safeguard the absent defendant class members, this Court concludes that the Heirs cannot meet their burden to establish typicality and adequacy. *See Moffat,* 2006 WL 897918, at *7 (declining to certify defendant class "based on due process and other related concerns"); *Thillens, Inc.,* 97 F.R.D. at 678 (Where unique defenses "will consume the merits of the case ... a court should refuse to certify a class due to atypicality."); *Alexander Grant & Co. v. McAlister,* 116 F.R.D. 583, 588 (S.D.Ohio 1987).

Bakalar 2006 at 68. Because class discovery was denied, the Grünbaum Heirs have been unable to trace Grünbaum's art collection. [Gruber Dec. at ¶¶ 32, 34-35].

Q. Judge Pauley Excludes Expert Witnesses

Judge Pauley prevented the Grünbaum Heirs from introducing the expert report and testimony of Dr. Jonathan Petropoulos, one of the foremost experts on Nazi theft during World War II. *Prior* to the close of discovery on November 30, 2007, the Grünbaum Heirs requested the discovery deadline be extended to February 15, 2008 to submit an expert report from Dr.

Petropoulos. The Grünbaum Heirs sought to introduce the testimony in response to speculations by the Court regarding a Jewish woman's ability to transfer property under the Nazi regime in the summer of 1938, when Grünbaum was already at Dachau and being pressed to sign the Dachau Power of Attorney and Kieslinger was inspecting and appraising Grünbaum's art collection at the Grünbaums' apartment. Jaffe Ex. K at 13-14 (July 11, 2008 Transcript). Judge Pauley denied the request to extend the discovery deadline. Jaffe Ex. I (December 4, 2007 Order).

The Grünbaum Heirs proffered Dr. Petropoulos's report again when the court permitted Sotheby's and Jane Kallir to testify on Bakalar's behalf not as fact witnesses but as experts. Jaffe Ex. K (July 11, 2008 Tr.) at 13-14. The Grünbaum Heirs again proffered Dr. Petropoulos's report and testimony to rebut anticipated trial testimony, but the Court precluded it. *Id.* On the eve of trial, when Bakalar's counsel changed the fundamental allegation of the complaint to a speculation that *Torso* had belonged to Fritz Grünbaum to a contrary allegation (echoing a theory first floated by Judge Pauley) that the artwork belonged to Mathilde Lukacs, the Grünbaum Heirs again tried unsuccessfully to introduce Dr. Petropoulos's testimony as rebuttal testimony on a motion *in limine*. Jaffe Ex. K (July 11, 2008 Tr.) at 13-14.

Further, Judge Pauley also prevented the Grünbaum Heirs from introducing the expert report of Dr. Milan Kostohryz ("Kostohryz"), a Czech lawyer specializing in estates, inheritance, and probate law. Kostohryz's report would have offered a rebuttal to Bakalar's laches defense that Vavra's forebears in Czechoslovakia should have asserted claims earlier. Kostohryz's report was proffered to show any alleged inaction by persons in Czechoslovakia was reasonable because legal action there was a practical and legal impossibility during the post-War communist era. Jaffe Ex. L [January 14, 2011 Order Excluding Kostohryz and Petropoulos] at 3-4. Jaffe Ex. Q [Declaration of Kostohryz] at 7-15. The legal and factual arguments corroborated points stated in the February

26, 2006 Declaration of Ivan Vavra submitted in opposition to Bakalar's prior unsuccessful motion for summary judgment on laches. Jaffe Ex. O [September 28, 2007 Letter from Raymond J. Dowd and James A. Janowitz] at 6-7. The Grünbaum Heirs served the Kostohryz Declaration three weeks after Bakalar announced they intended to reopen discovery to depose the Vavras. Jaffe Ex. H (October 24, 2007 Tr.) at 6-7. Ultimately, after a hearing on October 24, 2007 the Court granted Bakalar's application to exclude Kostohryz's Declaration. Jaffe Ex. G (October 24, 2007 Order). Jaffe Ex. H (October 24, 2007 Tr.) at 9.

In addition to excluding the expert testimonies of Dr. Petropoulos and Dr. Kostohryz, Judge Pauley also excluded two expert reports of Austrian law expert Dr. Katherine Höfer, describing how an intestate heir can take possession of an inheritance under Austrian law, responding to the points that Bakalar's Austrian law expert raised without notice or authorization, and opposing Bakalar's interpretation of a decision by the Austrian Supreme Court on the Nullity Act that was issued in April of 2008. Jaffe Exhibit K (July 11, 2008 Docket No. 213) at 6-7. *Bakalar 2011* at 293, 301.

R. Contrary To The Museums' Position On This Motion, While Representing David Bakalar, William Charron, Now Counsel For Oberlin, Carnegie and The Leopold Museum, Argued That The Artworks Were "Independently Linked" To Fritz Grünbaum Through Pre-War Evidence

On March 10, 2006 attorney William Charron submitted a declaration in *Bakalar v. Vavr*a asserting that 39 of the artworks that passed through the Kornfeld Gallery "can be independently linked to Fritz Grünbaum's collection through contemporaneous documents," including the 1925 Würthle Gallery catalog, 1928 correspondence between Grünbaum and Otto Kallir, and the 1938 Kieslinger Inventory. [Gruber Dec. ¶54, Exhibit 14]. The 1925 Würthle Gallery Catalogue identifies Fritz Grünbaum as the owner of *Portrait of a Man* (no. 118), *Girl with Black Hair* (no. 63) and *Russian Prisoner of War* (no. 117). Mr. Charron thus conceded in 2006 that examination

of the 1925 Würthle Catalogue would have revealed evidence that three of the four Artworks belonged to Grünbaum. [CI 37 ¶ 84; AIC 15 ¶¶ 63, 91; OB 12 ¶¶ 63, 91; SB 13 ¶¶ 62, 90].

In Carnegie and Oberlin's motions to dismiss, Mr. Charron now argues "Although not relevant to this motion, there is no evidence that directly links the drawings at issue in these cases to Grünbaum." [CI 47 at 4 and FN 4].[5]

S. *Reif v Nagy* Determined That There Is No Credible Evidence That Mathilde Lukacs Had Possession Of Fritz Grünbaum's 450-Piece Art Collection, And There Is Overwhelming Evidence That The Nazis Did Have Possession Of It In July 1939

In November 2015, shortly after learning that two other Egon Schiele artworks from the 1956 Gutekunst & Klipstein sale catalogue (*Woman Hiding Her Face* and *Woman In Black Pinafore*) were displayed by London art dealer Richard Nagy at the Park Avenue Armory, the Grünbaum Heirs commenced *Reif v. Nagy* in the New York State Supreme Court, New York County. [CI 37 ¶ 119; AIC 15 ¶ 124; OB 12 ¶ 124; SBMA 13 ¶ 123]. The two Schiele artworks in *Reif v. Nagy* were part of the 1956 Gutekunst & Klipstein sale. *Woman in Black Pinafore* was number 21 in the 1956 Gutekunst & Klipstein sale catalogue, *Girl Hiding Her Face* was number 22. [Gruber Dec. ¶ 30, Ex. 6]. Based on expert testimony from Dr. Petropoulos and Dr. Kostohryz

[5] Mr. Charron represented David Bakalar in *Bakalar v. Vavra.* Charron represented Aris Title Company, the title insurer that insured Richard Nagy's interest in two works the Grünbaum sued to recover in *Reif v. Nagy.* Mr. Charron represents Jane Kallir in *Robert Owen Lehman Foundation, Inc. v. Eva Zirkl et al.,* a case pending in the New York Supreme Court, Monroe County Commercial Division. Mr. Charron currently represents Carnegie, Oberlin, and the Leopold Museum Foundation, which is alleged to be in possession of 10 Grünbaum Schieles, including *Dead City III,* in the five related actions pending before this Court..

excluded in *Bakalar*, the Supreme Court, Ramos, J., granted summary judgment on the plaintiffs' replevin and conversion claims. *Reif v. Nagy II*. [CI 37 ¶ 120; AIC 15 ¶ 125; OB 12 ¶ 125; SB 13 ¶ 124].

Justice Ramos found that the Nazis confiscated Fritz Grünbaum's artworks by forcing Grünbaum to sign the Dachau Power of Attorney to his wife, who was later murdered by the Nazis, and that the act of signing the Dachau Power of Attorney was involuntary: "[a] signature at gunpoint cannot lead to a valid conveyance." *Reif v Nagy I* at 326 [CI 37 ¶ 121; AIC 15 ¶ 126; OB 12 ¶ 126; SBMA 13 ¶ 125]. In affirming, the Appellate Division, First Department, determined that the Dachau Power of Attorney the Nazis forced Fritz to execute was involuntarily: "reject[ing] the notion that a person who signed a power of attorney in a death camp can be said to have executed the document voluntarily." *Reif v. Nagy II* at 129. [CI 37 ¶ 122; AIC 15 ¶ 127; OB 12 ¶ 127; SBMA 13 ¶ 126]. The First Department concluded Elisabeth was never able to convey good title. *Reif v Nagy I* at 129. [CI 37 ¶ 123; AIC 15 ¶ 128; OB 12 ¶ 128; SBMA 13 ¶ 127]. The First Department also determined that the art collection was in Austria on June 30, 1939, after Grünbaum's sister-in-law Mathilde Lukacs had fled Vienna for Belgium. *Reif v. Nagy II at* 111-112. [CI 37 ¶ 125; AIC 15 ¶ 127; OB 12 ¶ 127; SBMA 13 ¶ 126]. The First Department further determined that Grünbaum's art collection "never legally left Austria." *Reif v. Nagy II* at 111. [CI 37 ¶ 124; AIC 15 ¶ 129; OB 12 ¶ 129; SBMA 13 ¶ 128].

Unlike the *Bakalar* trial judge, in the wake of the HEAR Act *Reif v. Nagy* carefully analyzed the historical circumstances and rejected decisively the theory that Grünbaum's sister-in-law Mathilde Lukacs had laundered Grünbaum's artworks through Switzerland, concluding that Mathilde Lukacs never had custody of the art collection, and certainly lacked custody of the art collection during the War when she was imprisoned:

> We note that there are no records, including invoices, checks, or receipts documenting that the Artworks were purchased by Kornfeld from Mathilde. Moreover, even if Mathilde had possession of Grünbaum's art collection, possession is not equivalent to legal title.

Reif v. Nagy II at 127. [CI 37 ¶ 128; AIC 15 ¶ 133; OB 12 ¶ 133; SBMA 13 ¶ 132]. *Reif v. Nagy* rejected the proposition that the decedent Mathilde Lukacs's missing testimony could have prejudiced Nagy because "Mathilde could not have shown she had good title to the artworks and her testimony would not have been probative." *Reif v. Nagy II* at 131. [CI 37¶ 36; AIC 15-1 ¶ 136; OB 12-1 ¶ 136; SBMA 13 ¶ 135]. In rejecting Nagy's "prejudice" argument, *Reif v. Nagy* relied on the New York Court of Appeals 2013 *Flamenbaum* decision clarifying that the proponent of the laches defense must show that a decedent's missing testimony would have supported a claim of title. *In re. Matter of Flamenbaum*, 22 N.Y.3d 962 at 966 (2013). [CI 37 ¶ 133; AIC ECF 15 ¶ 138; OB ECF 12-1 ¶ 138; SBMA 13 ¶ 137].

The First Department determined that relative to the London art dealer Richard Nagy, the Grünbaum Heirs had "superior ownership and possessory interests" in the Schiele artworks. *Reif v. Nagy II* at 132. [CI 37 ¶ 131; AIC 15-1 ¶ 45; OB 12-1 a¶ 44; SBMA 13 ¶ 44].

T. Unlike *Bakalar v. Vavra's* Flawed Laches Analysis, *Reif v. Nagy* Correctly Considered Expert Evidence That Milos Vavra and His Forbears Were Behind The Iron Curtain Until 1991

Until at least the fall of the Iron Curtain in 1991, a line of Grünbaum's heirs was living in Czechoslovakia, a totalitarian Communist State that did not recognize private property and where Jewish persons with private wealth would be in danger of expropriation and persecution. [CI 37 ¶ 36; AIC 15 ¶ 45; OB 12-1 ¶ 44; SBMA 13 ¶ 44]; [Petropoulos Report (CI 15-1, AIC 15-1, OB 12-1, SBMA 13-1 ¶¶ 44-45 and FN 58]. In *Reif v. Nagy II* the court found that "Vavra lived behind the Iron Curtain until 1989 and there is testimony in the record that he was unable to effectively pursue heirship claims while behind it." *Reif v. Nagy II* at FN 10.

U. In *Reif v. Nagy* The Appellate Division, First Department Found Kornfeld To Have Given False Testimony And To Be Discredited For His Role In the Gurlitt Scandal

In *Reif v. Nagy II*, the First Department concluded that "[p]lainly, Kornfeld's testimony that he did not know of the Grünbaum provenance of at least some of the Schieles in 1956 is false." *Id.* at 123. Kornfeld's 1956 Catalogue listed *Dead City III* as originating from Grünbaum. *Id.* Further, Kornfeld testified that apart from consulting Otto Kallir's 1930 Schiele catalogue raisonné when creating the 1956 Catalogue, he had never heard of Grünbaum. *Id.* However, the 1930 catalogue attributed *three* Schieles to Grünbaum's collection and Kornfeld attributed only *Dead City III* to Grünbaum's collection. *Id.* Additionally, Kornfeld misled the court as to how he had acquired the Schieles. Before the 1998 seizure of *Dead City III*, Kornfeld denied ever corresponding with Mathilde. *Id.* at 123. Yet in 2007, Kornfeld testified that he obtained the Schieles from Mathilde in 1956, even though her name does not appear in the 1956 Catalogue or Otto Kallir's 1966 update of his 1930 catalogue. *Id.* at 122. Moreover, in 2007 Kornfeld admitted that he had written to Rudolf Leopold, who had amassed the Leopold collection containing *Dead City III*, telling Leopold he had interacted with Mathilde when acquiring the artworks. *Id.* at 116.

Reif v. Nagy analyzed evidence not available to the *Bakalar* court. It considered post-*Bakalar* revelations involving Kornfeld's art dealings with Cornelius Gurlitt, whose home was raided in 2012, revealing over 1000 artworks valued at over $1 billion looted by the Nazis. *Id.* at 122. [CI 37 ¶ 129; AIC 15 ¶ 134; OB 12-1 ¶ 134; SBMA 13 ¶ 133]. Thus, *Reif v. Nagy's* factual findings are based on additional evidence revealed through the passage of time and additional scholarship not available to the *Bakalar* court. [CI 37 at ¶ 130; AIC 15 ¶ 135; OB 12-1 ¶ 135; SBMA 13 ¶ 134].

V. The Majority Of Grünbaum's 450-Piece Art Collection Inventoried In July 1938 By The Nazi Franz Kieslinger And Sequestered By The Nazis Has Not Yet Been Traced

Despite diligent efforts the Grünbaum Heirs have been unable to trace the vast majority of works identified in the Kieslinger Inventory of Fritz Grünbaum's art collection. Researchers assisting the Grünbaum Heirs combed archival records in Vienna to trace the shipment of Grünbaum's art collection to the Schenker warehouse and shipping company, which fell to Nazi hands in the 1930s, and later was used to ship Nazi-looted art. [Gruber Dec. ¶¶ 27-28]. The Grünbaum Heirs next traced a number of Fritz's works to the 1956 exhibition of Schiele's works at Kilpstein & Kornfeld/Gutekunst & Klipstein Gallery in Bern, Switzerland ("the Bern Exhibition"). [Gruber Dec. at ¶30]. The Heirs' researchers monitor online databases about lost art, art publications, catalogs, museum announcements and notices of auction sales. [Gruber Dec. ¶ 28]. The Grünbaum Heirs have posted about their search for stolen artworks on online lost art registries and created a blog publicizing their efforts, leading to some inquiries. [Gruber Dec. ¶¶ 47, 51]. The Heirs have established that a number of Grünbaum works exist in the possession of the Defendant Museums or in the possession of other museums or institutions in New York or abroad. Where such works are known to exist, the Grünbaum Heirs have sued to recover them and most such suits are still pending. The whereabouts of hundreds of works from Grünbaum's 450-piece collection remain unknown. [Gruber Dec. ¶ 32].

II. STANDARD OF REVIEW

> The standard for granting summary judgment is well established. "The [C]ourt shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." The moving party bears the initial burden of "informing the district court of the basis for its motion" and

> identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." The substantive law governing the case will identify those facts that are material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."
>
> In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. If the moving party meets its burden, the nonmoving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible.

Trimmer v. Barnes & Noble, Inc., 31 F. Supp. 3d 618, 620–21 (S.D.N.Y. 2014) (Koeltl, J.)

"While a statute-of-limitations defense may be raised in a motion to dismiss under Fed. R. Civ. P. 12(b)(6), such a motion should not be granted unless 'it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Lennon v. Seaman*, 63 F. Supp. 2d 428, 439 (S.D.N.Y. 1999) *quoting Ortiz v. Cornetta*, 867 F.2d 146, 148 (2d Cir.1989); *Bice v. Robb,* 324 F. App'x 79, 81 (2d Cir. 2009) (vacating dismissal on statute of limitations grounds and remanding for additional discovery); *Securities. & Exch. Comm'n v. Fiore*, 416 F. Supp. 3d 306, 331 (S.D.N.Y. 2019) ("a claim should only be dismissed on a motion to dismiss based on a statute of limitations defense if the factual allegations in the complaint clearly show that the claim is untimely, and if drawing all reasonable inferences in favor of the plaintiff, the court concludes that the plaintiff's own factual allegations prove the defendant's statute of limitations defense"). Because the statute of limitations is an affirmative defense, the defendant bears the burden of establishing by *prima facie* proof that the limitations period has expired since the plaintiff's claims accrued. *Overall v. Est. of Klotz*, 52 F.3d 398, 403 (2d Cir. 1995). Whether a statute of limitations has accrued is a triable issue of fact. *Massey v. Byrne*, 112 A.D.3d 532, 534, 977 N.Y.S.2d 242, 244 (1st Dept. 2013).

Under New York law of collateral estoppel, issue preclusion is inapplicable to pure questions of law. *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, 988 F.3d 634, 642 (2d Cir. 2021). The declaratory judgment exception, recognized under both New York and federal law, limits the *res judicata* preclusive effect of the declaratory judgment to the "subject matter of the declaratory relief sought, and permits the plaintiff or defendant to "continue to pursue further declaratory or coercive relief." *Duane Reade, Inc. v. St. Paul Fire and Mar. Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010) (the preclusive effect of a declaratory judgment action applies only to the "matters declared" and to "any issues actually litigated ... and determined in the action").

In the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief. *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 580 U.S. 328, 346 (2017). "The equitable nature of laches necessarily requires that the resolution be based on the circumstances peculiar to each case. The inquiry is a factual one." *Tri-Star Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994).

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 the possession of a good-faith purchaser for value. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 320 (1991). New York does not recognize adverse possession in stolen chattels, instead following the common law rule that if there is a thief in the chain-of-title, no one can take good title.

III. ARGUMENT

A. The Cross-Motions For Summary Judgment Awarding Title To The Grünbaum Heirs Should Be Granted By Converting The Museums' Motions Under Rules 12(d) and 56 Of The Federal Rules Of Civil Procedure Because The Museums Have Laid Bare Their Proofs And Not Raised Any Disputed Issues of Fact

The cross-motions for summary judgment should be granted because there are no disputed material issues of fact regarding the Grünbaum Heirs' title to the Artworks. Because the question of whether or not the Dachau Power of Attorney was voluntary disposes of this controversy, because that question was already answered in the affirmative by the Appellate Division, First Department, and because the Museums, in moving to dismiss, invite this Court to determine the collateral estoppel effect of the First Department decision and submitted all of their proof extrinsic to the complaint, conversion of these motions to summary judgment motions pursuant to Rules 12(d) and 56 would serve the interests of justice and judicial efficiency. The Museums have laid bare their proofs, submitting voluminous materials extrinsic to the pleadings. None of the materials raise any disputed issues of fact that would prevent a grant of summary judgment.

Converting the motions to motions for summary judgment is warranted here where the Grünbaum Heirs' pre-motion letters gave notice that the heirs would seek conversion under Rule 12(d) if the Museums relied on materials outside the pleadings. Counsel reiterated and gave notice of the intention to move under Rule 12(d) during the conference with the Court. Jaffe Aff. Ex. M (March 13, 3023 pre-motion letter to W. Charron); Jaffe Ex. N at 2 (April 10, 2023 letter to J. Lonergan at AIC).

Parties submitting evidence extrinsic to the complaint are on notice that the Court might convert a motion into one for summary judgment. *Green v. Doukas*, 205 F.3d 1322, 1322 (2d Cir. 2000). Where, as here, a party moving to dismiss relies on extrinsic materials, Rule 12(d) requires a district court to either exclude the additional material and decide the motion on the complaint

alone or convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material or conduct pertinent discovery. *MacFall v. City of Rochester*, 495 F. App'x 158, 161 (2d Cir. 2012). ("The supporting material that parties are entitled to submit after a Rude 12(d) conversion is limited to that which "is pertinent to the motion."). *Mazurkiewicz v. New York City Health & Hosps. Corp.*, 356 F. App'x 521, 522 (2d Cir. 2009) (court should have converted Rule 12(c) motion into a Rule 12(d) motion).

1. AIC's Materials Extrinsic To The Complaint Do Not Raise Disputed Issues of Fact

AIC relies on materials extrinsic to the Complaint — over three hundred pages — warranting conversion to a motion for summary judgment pursuant to FRCP 12(d) and a grant of summary judgment because these documents do not raise disputed issued of fact preventing summary judgment. AIC proffers the Declaration of Jessica Lonergan and five exhibits, 303 pages in total. [AIC 32; AIC 32-1 through AIC 32-5]. The first exhibit, from 2005, is 105 pages consisting of correspondence between counsel for the Grünbaum Heirs and counsel for AIC, a newspaper article, and provenance research summaries for approximately 100 artworks with suspected Grünbaum provenance, showing images of the works, places of prior exhibitions, medium and measurements of works, recorded provenance. [AIC 32-1]. Another exhibit consists of 164 pages of correspondence between counsel, a declaration and additional charts and summaries of provenance research. [AIC 32-3]. The remainder of the exhibits consist of additional correspondence between counsel, including a letter from AIC's counsel that admits Grünbaum's ownership of *Russian Prisoner of War*. By filing such materials extrinsic to the Complaint on a motion to dismiss, AIC has laid bare its proof and charted a summary judgment course.

2. Oberlin and Carnegie's Reliance On Over 600 Pages of Materials Extrinsic To The Complaint

Oberlin and Carnegie have each relied on materials extrinsic to the Complaints filed against them, none of which challenge the Grünbaum Heirs' title. To start, each of those defendants has submitted 606 pages of extrinsic materials through the Declaration of William Charron and nineteen (19) exhibits provided with it. At least six of the exhibits are thirty (30) pages in length or longer; one [CI 45-2, OB 23-2] is 311 pages in length, a jumble of extrinsic evidence consisting of miscellaneous documents that are not identified or summarized in any detail in the Charron Declaration. Moreover, part of that exhibit is mislabeled, misfiled or deliberately misleading. For example, page 101 of the 311-page exhibit [Bates stamped P 788], identified as a "Certificate of Accuracy," is anything but accurate. That document purports to attach, for example: a receipt dated 24 April 1956; a list of artwork owned by St. Coninx Foundation, Zurich and Dr. O. Kallir; a list of artwork including a framed owl painting, drawings and watercolors. But none of those supposed attachments are actually provided with the Certificate of Accuracy. The same defect plagues Exhibit 5 to the Charron Declaration. [CI 45-5/OB 23-5]. The identical "Certificate of Accuracy" appears there. Additionally, in Exhibit 2 there are purported translations of documents from German to English but only the English version is supplied. *Id.* Footnote 3 of the Carnegie/Oberlin brief refers to pages EK00029 and EK00021 which Oberlin and Carnegie claim is evidence that Mathilde Lukacs sold Oberlin's *Portrait of A Man* and Carnegie's *Girl With Black Hair* to Eberhard Kornfeld. These documents can only be found by hunting through the 311-page document to find them at pages 306 and 307 of the PDF. [OB at 4, FN 3]. There one finds only untranslated Gutekunst & Klipstein ledgers showing cash transactions with an unnamed seller. No correspondence with Mathilde Lukacs is indicated. No invoices to or from Mathilde Lukacs are included. The materials at pages 306 and 307 were not the certified translations of materials that

were the subject of the *Bakalar* litigation, which related to the *Torso* drawing only. These materials are inadmissible and, even if they were admissible, would not raise any triable issues of fact.[6]

Carnegie's motion to dismiss also includes a Declaration of Maria Bernier. The Bernier Declaration discusses the "formal demand" made in 2006 for Carnegie to turn over *Portrait of a Man*, introduces extrinsic evidence about whether the Grünbaum Heirs pursued that artwork after that time, and provides additional extrinsic evidence concerning whether or when Carnegie exhibited *Portrait of a Man* on its online database at any time. Oberlin's motion to dismiss includes the Declaration of Matthew Lahey with exhibits. The Lahey Declaration discusses the "formal demand" made in 2006 for Oberlin to turn over *Girl With Black Hair*, introduces extrinsic evidence about whether the Grünbaum Heirs pursued that artwork after that time, and provides additional extrinsic evidence concerning whether or when Oberlin exhibited that artwork publicly since 2006. Carnegie has laid bare its proof, charted a summary judgment course, yet failed to raise any disputed issues of material fact.

3. Santa Barbara's Reliance On Materials Extrinsic To The Complaint

Santa Barbara has submitted evidence extrinsic to the pleadings and irrelevant to the Grünbaum Heirs' title in the form of the Declaration of Larry Feinberg, the Museum's Director, alleging facts as to when and how the Museum acquired *Portrait of the Artist's Wife* and his knowledge and inferences as to whether that work has been in New York since the date of acquisition. [SB 20]. Additionally, Santa Barbara's counsel, Caren Decter, has submitted a Declaration that introduces four exhibits consisting of correspondence and newspaper articles.

[6] Neither AIC nor SB submitted any extrinsic materials on this motion purporting to indicate that Mathilde Lukacs sold *Russian Prisoner* or *Portrait of the Artist's Wife* to Kornfeld.

[SBMA 21, 21-1 through 21-5]. The Feinberg and Decter Declarations, with exhibits, amount to 188 pages of extrinsic evidence. Santa Barbara has laid bare its proof, charted a summary judgment course, but raised no material issues of disputed facts as to title.

B. Summary Judgment Awarding Title In The Artworks To The Grünbaum Heirs Is Warranted

The issue that resolves the question of who has title to the Artworks is whether or not the Dachau Power of Attorney Grünbaum executed in the Dachau Concentration Camp rendered every subsequent transfer void. The Museums argue that the answer is no. The Museums invite the Court to interpret the text of *Reif v. Nagy* (where the Appellate Division, First Department concluded that the Dachau Power of Attorney was involuntary) and try to distinguish it [CI 47 at 10, 12] (arguing Dachau Power of Attorney was given in favor of Elisabeth and not in favor of Nazis); AIC 31 at 8-9, 17 (arguing Judge Pauley's "finding" of no Nazi ownership applies to all works in Grünbaum's collection, and that *Reif v Nagy* failed to address that part of *Bakalar* record, so it doesn't compel different result). Because the First Department determined that the Dachau Power of Attorney was involuntary, this Court is bound by that "actually decided" issue by collateral estoppel. The First Department also concluded that all of the artworks in the 1956 Catalogue belonged to Grünbaum. Because the First Department "actually decided" that the Museums' Artworks belonged to Grünbaum, collateral estoppel bars relitigation of the question and thus summary judgment is warranted. Point I. S.

The Museum's argument that *Bakalar v. Vavra* determined that the Nazis did not steal Grünbaum's art collection from him is based on entirely false premises. *First,* the Second Circuit's decision refers only to the Bakalar *Torso* and mentions no other artworks. *Second,* the Second Circuit stated that "we do not decide" the question of whether Bakalar met his burden of proof to

show the *Torso* was not stolen. Because of this, the question of whether or not the Nazis stole Grünbaum's art collection was not "actually decided" in *Bakalar v. Vavra*.

New York courts often must determine what constitutes a "final adjudication" in the context of collateral estoppel or res judicata. *See, e.g.*, *Rojas* v. *Romanoff*, 128 N.Y.S.3d 189, 195 (1st Dep't 2020) ("[I]ssue preclusion applies: [i] after *final adjudication* [ii] of an identical issue [iii] actually litigated and necessarily decided in the first suit and [iv] the issue was necessary to support a valid and final judgment on the merits." (emphasis added)). Under New York law, a trial court's alternative holdings are not binding for collateral estoppel purposes unless expressly approved by the appellate court. *Tydings v. Greenfield, Stein & Senior LLP*, 11 N.Y.3d 195, 200 (2008).

Judge Pauley's "inference" that the Nazis did not steal Grünbaum's art collection was an alternative holding that the Second Circuit expressly stated it was not deciding. As a result, it is not binding on this Court. The Second Circuit first cited Bakalar's burden:

> In a title action under New York law, a good faith purchaser of an artwork has the burden of proving that the work was not stolen. *Bakalar v. Vavra*, 619 F.3d 136, 147 (2d Cir.2010) (citing *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991)).

Bakalar v. Vavra 2012 at 6, 7. Then, the Second Circuit expressly avoided deciding the question of whether Bakalar's demonstration that Lukacs possessed the *Torso* proved that the *Torso* was not stolen, affirming only on the alternative grounds of laches:

> We do not decide whether Bakalar discharged his burden under *Lubell* by tracing the provenance back to Lukacs, who was a close relative of Grünbaum (she was sister to Mrs. Grünbaum, who survived Grünbaum before herself being murdered by the Nazis). The point was not pressed by Bakalar, and we affirm instead on the district court's ruling that the claim against Bakalar is defeated by laches.

Bakalar v. Vavra 2012 at 6, 8. Where an appellate court intentionally declines to rule on certain issues decided by a lower court, those lower court findings are not given preclusive effect and the appellate court's silence is not read to be preclusive effect. *Crysknife Capital v Liberty Specialty Markets*, 22 CIV. 7912 (KPF), 2023 WL 3255777, at *9 (S.D.N.Y. May 3, 2023) *citing In re PCH Assocs.*, 949 F.2d 585, 593 (2d Cir. 1991). Because the Judge Pauley's inference relating to the Nazi theft of the Drawing was not part of a chain of reasoning affirmed by the Second Circuit, the issue was not "actually decided" and thus not entitled to issue preclusion. Because the Second Circuit opinion makes no reference whatsoever to any artwork other than the Drawing, no issue related to Fritz Grünbaum's art collection was "actually decided" in *Bakalar v. Vavra.* Thus, because the Second Circuit addressed only the *Torso* and did not "actually decide" whether or not Grünbaum's art collection was stolen from him, questions relating to the Artworks title were not "actually decided" in *Bakalar v. Vavra.*

On the other hand, this Court may conclude that it is bound by collateral estoppel to grant summary judgment awarding title to the Grünbaums in denying the Museums' motions because the Appellate Division, First Department already determined that the *Bakalar v. Vavra* litigation involved only one artwork and did not collaterally estop the Grünbaum Heirs from pursuing additional artworks in the 1956 Gutekunst & Klipstein Egon Schiele sale in Bern, Switzerland:

> Nagy's contention that the dismissal in Bakalar, which was based upon application of the doctrine of laches, collaterally estops plaintiffs from pursuing their claims to two other Schiele pieces, "Woman in a Black Pinafore" and "Woman Hiding Her Face," is misplaced. Collateral estoppel requires the issue to be identical to that determined in the prior proceeding, and requires that the litigant had a full and fair opportunity to litigate the issue[…]. (see Schwartz v. Public Adm'r of County of Bronx, 24 N.Y.2d 65, [298 N.Y.S.2d 955, 246 N.E.2d 725] [1969]). Neither of those requirements has been shown here where the purchaser, the pieces, and the time over which the pieces were held differ significantly. The three works are

> not part of a collection unified in legal interest such to impute the status of one to another [….]"

Reif v. Nagy II at 119.

Another reason that *Bakalar*. *Vavra* is no longer good law is that *Matter of Flamenbaum*, a 2013 New York Court of Appeals case, determined that a missing witness in an alleged chain of legal title, for laches purposes, needs to be shown to have been able to demonstrate legal title. *In re Flamenbaum,* 22 N.Y.3d 962, 1 N.E.3d 782 (2013). This change in New York law has been applied to the precise factual question of whether Mathilde Lukacs' death could have been a prejudice to the Museums by the Appellate Division, First Department, providing binding guidance to this Court. *Reif v Nagy II* applied *In re Flamenbaum,* 22 N.Y.3d 962, 1 N.E.3d 782 (2013) to reject the contention that Mathilde Lukacs' death could have caused a prejudice that would support a laches defense:

> In any event, as we already discussed, Mathilde could not have shown she had good title to the Artworks and her testimony would not have been probative (*In re Flamenbaum,* 22 N.Y.3d 962, 1 N.E.3d 782 (2013) at 966) ["although the decedent's testimony may have shed light on how he came into possession of the [artwork], we can perceive of no scenario whereby the decedent could have shown that he held [good] title.

Reif v. Nagy II at 131. Thus, *In re Flamenbaum,* 22 N.Y.3d 962, 1 N.E.3d 782 (2013) invalidated the holding of *Bakalar v. Vavra* which relied on a Surrogate's Court decision that was reversed.

Even if this Court decides that it is not bound by collateral estoppel to grant summary judgment to the Grünbaum Heirs and is free *de novo* to determine the voluntariness of the Dachau Power of Attorney or the question of whether Nazis robbed Grünbaum (the way Nazis systematically robbed thousands of other Dachau inmates), the undisputed facts and evidence presented warrant summary judgment. The Museums' unsupported conclusory suggestion that the Dachau Power of Attorney did not divest Grünbaum of his property is - apart from being so

reprehensible as to shock the conscience of the Court - insufficient to withstand summary judgment based on the undisputed facts before the Court. Point I.D at 10-11. (Judge Korman's discussion of the Dachau Power of Attorney); Dean. Martin, *Robbing The Jews: The Confiscation of Jewish Property in the Holocaust, 1933-1945* (Cambridge U. Press 2010). Nor is there any controversy over Grünbaum's prior ownership of the Artworks. William Charron's March 10, 2006 Affidavit concedes that three of the artworks: AIC, Carnegie and Oberlin, were documented as Grünbaum's in pre-war documentation. Point I.R at 29-30. This is a party admission that is binding on the Museums and thus definitively resolves this controversy. SBMA has not submitted any admissible evidence contesting Grünbaum's ownership.

Conversion to summary judgment would serve the interests of justice and save the Court and the parties time, energy and money by getting to the heart of the disputed matters related to the unpleaded affirmative defenses upon which the Museums predicate the motions to dismiss. If the Court declines to convert the motions to dismiss to summary judgment motions, it is respectfully requested in the alternative that such motions be considered without reference to the extrinsic materials and denied for the reasons set forth below.

C. The Motions To Dismiss Should Be Denied Because The HEAR Act Extended The Grünbaum Heirs' Time to Sue To Recover Nazi Looted Artworks Until December 15, 2022 Where Such Claims Were Time-Barred In California, Illinois, Pennsylvania and Ohio In The 1960's By "Reasonable Diligence" Accrual Rules In Those Jurisdictions

The Museums' pre-answer motions to dismiss on statutes of limitations grounds should be denied because this action was timely filed on December 14, 2022. The HEAR Act extended until December 15, 2022 the time to bring the Grünbaum Heirs' claims for artworks lost as a result of Nazi persecution that were time-barred, at the latest, in the late 1960's or early 1970's under California, Illinois, Ohio and Pennsylvania law. Point I.J at 20-21. The HEAR Act applies where claimants had actual knowledge of the location of the artworks on or after January 1, 1999 but had

no opportunity to bring timely claims after January 1, 1999 (having actual knowledge of the location of the artworks and of a possessory interest in the Artworks). Because the Grünbaum Heirs' claims were time-barred prior to January 1, 1999 and because the Grünbaum Heirs did not acquire a possessory interest until 2002, the Grünbaum Heirs' claims do not fall under the HEAR Act's exception (Section 5(e)). Point I.J at 20-21]. Because the statute of limitations is an affirmative defense, each Museum has the burden of pleading and proving that the Grünbaum Heirs' claims were not time-barred in California, Illinois, Ohio and Pennsylvania. *Overall v. Est. of Klotz*, 52 F.3d 398, 403 (2d Cir. 1995). Because the facts relied on by the Museums show that the Grünbaum Heirs' claims are timely under the HEAR Act, and because the Museums have made no argument whatsoever regarding the relevant statutes of limitations of California, Illinois, Ohio and Pennsylvania, the motion to dismiss should be denied.

1. Dismissal On Statute of Limitations Grounds Should Be Denied Because This Action Was Filed Within The HEAR Act's Statute of Limitations of December 15, 2022

The motions to dismiss should be denied because the Grünbaum Heirs timely commenced these actions on December 14, 2022, within the HEAR Act's statute of limitations which expired on December 16, 2022 because the Grünbaum Heirs acquired a possessory interest in the Artworks only in 2002. The Grünbaum Heirs obtained an Austrian Certificate of Heirship from an Austrian court on October 31, 2002. [CI 37 ¶ 37; AIC 15 ¶ 46; OB 12 ¶ 45; SBMA 13 ¶ 45]. [Gruber Dec. Ex. 1]. Prior to 2002, under Austrian law, no Grünbaum heir had any possessory interest in any of Grünbaum's estate, including his artworks. Point I.M at 24-25. [CI 37 ¶¶ 41-43; AIC 15 ¶¶ 42-44; OB 12 ¶¶ 41-43; SBMA 13 ¶¶ 42-43]. [Gruber Dec. at ¶¶ 62-63], [Gruber Dec. Ex. 21-22] (according to Austrian legal expert Dr. Kathrin Höfer, under the Austrian Civil Code (ABGB Section 797), no one may take into possession an inheritance until a court has issued a decree of

distribution. (*Id.* at D&M 02423-02425, D&M 04233)). The Certificate of Heirship was issued in 2002. [Gruber Dec. at ¶ 62]; [Gruber Dec. Ex. 22 at D&M 04524-04525].

The HEAR Act §5(a) permits a claim for an artwork lost due to Nazi persecution to be commenced no later than six years from (1) the date of actual discovery of the identity and location of the artwork and (2) the date of actual discovery of a possessory interest of the claimant in the artwork. (HEAR Act, Pub. L. No. 114-308 § 5(a)). Thus, the HEAR Act extends the time to sue for the recovery of artworks lost as a result of Nazi persecution to six years following the date of the HEAR Act's passage whereas here, the Grünbaum Heirs acquired a possessory right in the artworks after January 1, 1999. (Hear Act). The HEAR Act §5(c) "Preexisting Claims" further specifies that a civil action covered by §5(a) shall be deemed to have been discovered on the date of the HEAR Act's enactment *whether or not the claims were time-barred by a Federal or state statute of limitations*.

Accordingly, because no person had a right to bring a lawsuit to recover artworks belonging to Fritz Grünbaum prior to the Austrian Certificate of Heirship being issued in 2002, and because the HEAR Act applies where claimants had actual knowledge of the location of the artworks on or after January 1, 1999 but had no opportunity to bring timely claims prior to January 1, 1999, the Grünbaum Heirs' claims are timely.

2. The HEAR Act's Exception For Claims That Could Have Been Timely Maintained For Six Years Following January 1, 1999 Does Not Apply Because The Grünbaum Heirs Claims Were Time-Barred By Reasonable Diligence Accrual Rules In California, Illinois, Ohio and Pennsylvania

The motions to dismiss should be denied because the Museums have not met their burden of showing that the HEAR Act's exception for claims to recover Nazi-looted artworks that were not time-barred for six years following January 1, 1999 applies.

The HEAR Act's exception Section 5(e) provides:

> Subsection (a) shall not apply to any civil claim or cause of action barred on the day before the date of enactment of this Act by a Federal or State statute of limitations if— (1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after January 1, 1999; and (2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.

HEAR Act §5(e).

Indeed, the Museums concede facts fatal to their arguments. Point I.K at 21-24. The Museums each argue that this Court should adopt Judge Pauley's reasoning that in 1952 the Grünbaum Heirs' predecessors-in-interest failed to exercise reasonable diligence to find Grünbaum's art collection in the decades following World War II. Point I.K at 21-24. citing AIC 31 at 21-23, CI 47 at 29-30, SBMA 19 at 2, 8. *See also* AIC 31 at 20 -21 ("Plaintiffs allege that the Russian was taken from Fritz Grünbaum at some point between 1938 and 1939, but they did not bring this case until 2022, a delay of over 80 years" "from the events in question"); CI 47 at 13-14, 30-31 (arguing that Vavra's predecessor, Fritz's sister Elise Zozuli, made a claim to Fritz's artwork in 1951 and withdrew it in 1953, but that inactivity of the Grünbaum' Heirs' predecessors from 1945 until 2005 caused essential evidence to disappear); SBMA 19 at 8 (record establishes Plaintiffs' ancestors knew about circumstances giving rise to claims for works from Grünbaum's collection for decades). Accepting as true the Museums' argument that the Grünbaum Heirs' ancestors had knowledge of their interests in Fritz's property in 1952 or 1953 would time-bar the Grünbaum Heirs' conversion and replevin claims under California, Illinois, Ohio and Pennsylvania law prior to 1999. Point I.K at 21-24. HEAR Act §2 (6)("State statutes of limitations…typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended.") (HEAR Act §2 (6)).

Indeed, the HEAR Act's entire premise is that the laws of states like California, Illinois, Ohio and Pennsylvania would likely have barred the Grünbaum Heirs claims under one doctrine of constructive knowledge or another and that Congress intended the HEAR Act to preempt such application of constructive notice doctrines where heirs either had no actual knowledge of an artwork's location or knew of the location but did not have a possessory interest. (HEAR Act §5 (e)).

Based on the injury or reasonable discovery rules, applicable to Artworks situated in California, Illinois, Ohio and Pennsylvania from the 1960's through the present the Grünbaum Heirs' claims would have been time-barred by the 1960's or early 1970's. Point I.K at 22-23. Because the Museums argue facts that would time-bar the Grünbaum Heirs' claims prior to January 1, 1999 in California, Illinois, Ohio and Pennsylvania decades prior to 1999, Section 5(e)'s exception to the HEAR Act's extension of time to sue argued by the Museums does not apply so the motions to dismiss should be denied. As the Museums concede, only in 2002 did the Grünbaum Heirs obtain a "possessory interest" in the Artworks when an Austrian court issued a Certificate of Heirship [OB 23 at 12-14]

The Museums' argument should also be rejected under the doctrine of judicial estoppel or waiver because in *Bakalar,* the Museums successfully asserted a contrary position. *Irish Lesbian and Gay Organization v. Bratton,* No. 95 Civ. 1440, 1995 WL 575330, at *1 (S.D.N.Y. Sept. 29, 1995)("The City cannot now reasonably argue that Judge Keenan's opinion covered future permit applications after representing last year that it did not.")

In 2006 the Museums argued that the Grünbaum Heirs would need to bring lawsuits in California, Illinois, Ohio and Pennsylvania subject to the respective laws of those states. Point I.K at 22-23. On March 10, 2006, in opposition to the Grünbaum Heirs' motion for class certification,

Oberlin argued on behalf of AIC, Carnegie and Santa Barbara that New York law did not apply and that each artwork was subject to different substantive state law and unique defenses in the jurisdiction where the artwork was located. Point I.N at 26. *Bakalar* ECF 76 at 11, 12, 15-16, 22 (Oberlin's brief in opposition to class certification) ("Given the value of the works at issue, the Heirs can bring suit against the absent Defendants in such defendants' home jurisdictions."). MoMA argued that museums had individual statute of limitations defenses. Point I.N at 25-26. Judge Pauley accepted Oberlin's arguments made on behalf of the Museums that local defenses in local actions under local substantive laws should prevail over an action in New York applying New York's demand and refusal rule. *Bakalar 2006.*

Because the Museums successfully argued in 2006 that local defenses under local substantive laws and local actions were required, the Museums should be estopped from arguing that New York law permitted claims to proceed in New York in 2006.

3. The Motions To Dismiss Should Be Denied Because The HEAR Act Does Not Reference Any Tolling Statutes or Doctrines That Would Refer To New York's Accrual Rule

The motions to dismiss on statute of limitations grounds should be denied because the Grünbaum Heirs had no opportunity to sue that was not barred by a state statute of limitations for artworks located in California, Illinois, Ohio and Pennsylvania after acquiring knowledge of the artworks' location and their possessory interest in 2002. The Museums' argument that New York law permitted timely claims is unexplained and baseless. As explained in Point K. above, California, Illinois, Ohio and Pennsylvania's statutes of limitations barred the Grünbaum Heirs' claims from the 1960's or 1970's. The Museums' argument that the HEAR Act's exception applies because New York law created a window of opportunity to sue in 2006 for artworks located in California, Illinois, Ohio and Pennsylvania should be rejected as contrary to the HEAR Act's plain language or any discernible logic.

Fatal to the Museums' argument that the Court should rely on New York's statute of limitations to somehow toll the claims, the HEAR Act's plain language does not reference any tolling doctrines or statutes. Thus, this Court should — as the HEAR Act does — refer to the plain language of the statute of limitations of those states and need not guess at whether Grünbaum Heirs might have successfully invoked tolling based on fraud, concealment, lulling or other equitable doctrines. In enacting the HEAR Act, Congress made clear that it wished to have courts resolve these cases on the merits and to reunite stolen artworks with owners. [HEAR Act] Point I.J at 20–21.

The Museums' reliance on *Vincent v. Money Store,* 915 F.Supp.2d 553 (S.D.N.Y. 2013) to argue that New York's law would have saved the Grünbaum Heirs' claims had they persisted in suing after Judge Pauley declined to certify the defendants' class is misplaced. The HEAR Act's plain language makes no reference to any tolling provisions or doctrines.

The plain text and preamble of the HEAR Act refers directly to the substantive laws of states in which claims to recover stolen property had been time-barred in the past. Point I.J at 21. New York's "demand and refusal" is part of New York's substantive law of conversion and replevin. *See Guggenheim,* 77 N.Y.2d 311 at 319, 567 N.Y.S.2d 623 (1991) ("demand and refusal" part of New York substantive law of conversion and replevin) *citing* CPLR 206; *State of N.J. v. State of N.Y.,* No. 120, 1997 WL 291594, at *51–54 (U.S. Mar. 31, 1997). A federal court sitting in diversity in 2023 analyzing the availability of claims to artworks located in California, Illinois, Ohio and Pennsylvania has no reason to apply New York's "demand and refusal" accrual rule in applying the HEAR Act because New York's statute of limitations accrual rules do not have extraterritorial effect on artworks located in California, Illinois, Ohio and Pennsylvania. By referring to "a Federal or State statute of limitations," the HEAR Act does not require a diversity

court to conduct a conflicts analysis or to determine whether claims time-barred in one state would have succeeded in another state. Accordingly, the HEAR Act looks at whether the statutes of limitations of California, Illinois, Ohio or Pennsylvania would have barred claims by the early 1970s brought in those states. If the answer is "yes" — as it is here — the HEAR Act extends those time-barred claims.

D. The Museums' Motions To Dismiss On Collateral Estoppel Grounds Should Be Denied Because Judge Pauley's Inference That The Nazis Did Not Loot Fritz Grünbaums Art Collection Was Not Affirmed By The Second Circuit, Was Not "Actually" or "Necessarily Decided" Was Not Fully Litigated and Thus Is Not Entitled To Collateral Estoppel Effect

The motions to dismiss on collateral estoppel grounds with respect to a purported finding that the Nazis did not loot Fritz Grünbaum's art collection should be denied for five main reasons. *First*, the issue of whether or not the Nazis stole Fritz Grünbaum's art collection was not "actually decided" because the Second Circuit expressly disclaimed the question and made no reference to any artwork other than the Bakalar *Torso*. *Second*, the issue of whether or not the Nazis stole Fritz Grünbaum's art collection was not "necessarily decided." *Third,* the issue of whether or not the Nazis stole Fritz Grünbaum's art collection was not "fully litigated." *Fourth*, the Second Circuit's summary orders do not have collateral estoppel effect for purposes of non-parties asserting defensive non-mutual collateral estoppel.

Doubts regarding the preclusive effect of a federal courts' findings must be resolved in favor of plaintiff, as the party opposing application of the doctrine. *Russell v New York Univ.*, 204 A.D.3d 577, 589 (1st Dept. 2022).

1. Collateral Estoppel Does Not Apply Because The Issue Of Whether Or Not The Nazis Stole Grünbaum's Collection Was Not "Actually Decided" By The Second Circuit

Collateral estoppel does not apply because the Second Circuit did not reach the question of whether or not the Nazis stole Fritz Grünbaum's art collection in a "final adjudication" entitled to

collateral estoppel effect under New York law. *First*, the text of the decision *Bakalar v. Vavra*, 500 Fed Appx 6, 7 (2d Cir. 2012) makes no reference whatsoever to an "art collection". The texts refers only to a "Drawing." Thus, the Second Circuit did not reach or affirm any findings with respect to the Artworks. So any issues with respect to the Artworks were not "actually decided" by the Second Circuit.

Second, Judge Pauley's inference that the Nazis did not steal Fritz Grünbaum's collection is not part of the Second Circuit's "final adjudication" of Bakalar's title claim to Torso so was not "actually decided" for collateral estoppel purposes.

2. Collateral Estoppel Does Not Apply Because The Issue of Whether Or Not The Nazis Stole Grünbaum's Art Collection Was Not "Necessarily Decided"

For the same reasons set forth in Point C. 1, above the issue of whether not Nazis stole Grünbaum art collection was not "necessarily decided." The Second Circuit expressly stated that it did not decide this question and its opinion referred to no artworks other than the Bakalar *Torso.*

3. Collateral Estoppel Does Not Apply The Issue of Whether Or Not The Nazis Stole Grünbaum's Art Collection Because The Issue Was Not Fully Litigated Due To Defaults on Discovery Deadlines

Collateral estoppel on the issue of whether or not the Nazis stole Fritz Grünbaum's art collection should not apply because the issue was not fully litigated in Bakalar v. Vavra due to defaults on discovery deadlines. Doubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate. *Buechel v Bain*, 97 NY2d 295, 305 (2001). In New York, collateral estoppel should not normally be applied to default judgments. *See D'Arata v. N.Y. Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 667, 563 N.Y.S.2d 24, 564 N.E.2d 634 (1990) (applying Restatement (Second) of Judgments § 27 & *cmt.* e); *Halyalkar*, 72 N.Y.2d at 267–68, 532 N.Y.S.2d 85, 527 N.E.2d 1222 (applying Restatement (Second) of Judgments § 27 & *cmt.* e); *Kaufman*, 65 N.Y.2d at 456–57, 492 N.Y.S.2d

584, 482 N.E.2d 63 (stating that "[a]n issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation" (citing Restatement (Second) of Judgments § 27 *cmts.* d–e)).

Bakalar successfully moved to exclude the Grünbaum Heirs' expert witnesses in *Bakalar v. Vavra*. Having no expert testimony in the record, Judge Pauley was free to draw inferences based on the lack of evidence. However, this victory, since it was based on a litigation default that resulted in a one-time benefit to Bakalar and not resolved on the merits, is not entitled to collateral estoppel effect. This was demonstrated in Reif v. Nagy where the excluded expert evidence was held to have a dispositive effect and resulted in the finding that the Nazis did steal Fritz Grünbaum's art collection. Point I.Q at 27-29. If significant new evidence is uncovered subsequent to the proceeding said to result in an estoppel of the present action, then it cannot be found that a party was afforded a full and fair opportunity to present his case in the absence of that evidence. *See Hampton Heights Dev. Corp. v. Board of Water Supply of City of Utica*, 136 Misc.2d 906, 911, 519 N.Y.S.2d 438, 443 (Sup.Ct.1987), *aff'd as modified*, 140 A.D.2d 958, 531 N.Y.S.2d 421 (4th Dep't 1988). Based on the foregoing,

E. The Motions To Dismiss On Collateral Estoppel Grounds As To The Artworks' Title And Laches Because Those Issues Were Not Actually, Necessarily Or Fully Litigated In Bakalar v. Vavra And Because The Museums' Legal And Factual Positions Are Different From David Bakalar's Position

Collateral estoppel does not apply because the title to the Artworks has never been litigated previously. Point C, above. The declaratory judgment exception, recognized under both New York and federal law, limiting the *res judicata* preclusive effect of the declaratory judgment to the "subject matter of the declaratory relief sought, and permits the plaintiff or defendant to "continue to pursue further declaratory or coercive relief." *Duane Reade, Inc. v. St. Paul Fire and Mar. Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010) (the preclusive effect of a declaratory judgment action

applies only to the "matters declared" and to "any issues actually litigated ... and determined in the action." *Am. Home Assur. Co. v Intl. Ins. Co.*, 90 N.Y.2d 433, 440 (1997) (doctrine of collateral estoppel does not preclude American from litigating pure issue of law again, despite the Federal courts' prior adverse determination on the point).

1. Because David Bakalar and The Museums Succeeded In Limiting *Bakalar v. Vavra* To Only One Artwork And Excluding Important Evidence On Timeliness Grounds, Collateral Estoppel Does Not Apply Because The Artworks' Title Was Not Actually or Necessarily Decided In *Bakalar v. Vavra*

Collateral estoppel does not apply because *Bakalar v. Vavra* did not decide title to the Artworks or resolve any factual or legal issues relating to the title of the Artworks. The Grünbaum Heirs sought to counterclaim against additional defendants (including the Museums) and to create a defendants' class action that would address and resolve claims to Grünbaum's art collection as reflected in the Kieslinger Inventory. The Bakalar *Torso* had been part of a 1956 sale of 54 Egon Schiele artworks at the Gutekunst & Klipstein gallery in Bern, Switzerland. Point I.N-P at 25-27. The proposed class representatives, the MoMA, Oberlin College and the Neue Galerie Museum, argued that a defendants' class action would not be appropriate because museums had individualized statutes of limitations and laches defenses to each of the works in the 1956 Gutekunst & Klipstein sale because the substantive laws of jurisdictions other than New York applied. Point I.P at 26-27.

Judge Pauley provided limited class discovery that permitted holders of artworks potentially looted from Fritz Grünbaum to obscure their identities. Jaffe Exhibit C (January 4, 2006 Order). In denying class certification, Judge Pauley ruled that defendants, including the Museums, would have individualized statutes of limitations and laches defenses and limited *Bakalar v. Vavra* to only one artwork – the Schiele *Torso* possessed by David Bakalar located in New York. Point I.P at 26-27. In 2006, Judge Pauley denied additional class discovery, frustrating the Grünbaum

Heirs' efforts to trace Grünbaum's art collection. Because of this lack of judicial relief, the Grünbaum Heirs have not been able to trace the 450-work art collection. [Gruber Dec.] (describing efforts to trace Grünbaum's art collection).

2. Collateral Estoppel Is Not Warranted Because Unlike The *Bakalar* Torso, Three Of The Artworks Are in the 1925 Würthle Catalogue

Three of the Artworks were featured in the 1925 Würthle Catalogue as belonging to Fritz Grünbaum. Collateral estoppel does not apply because, other than the Kieslinger Inventory's reference to Grünbaum's ownership of 76 un-named Schiele drawings, there was no pre-war documentation specifically showing that Grünbaum owned the Bakalar *Torso*. Point I.R at 29..

The 1925 Würthle Gallery Catalogue is a game-changer that precludes the application of *res judicata.* Because this pre-war documentation of Grünbaum's ownership was available to the Museums for decades through Otto and Jane Kallir, the Museums cannot claim the same prejudice that Bakalar did. No principle of *res judicata* prevents reliance upon new significant evidence. *Lane Bryant, Inc. v. Tax Comm'n of City of New York*, 21 A.D.2d 669, 670, 249 N.Y.S.2d 994, 996 (1st Dept. 1964), *aff'd sub nom. Lane Bryant, Inc. v. Tax Comn. of City of New York*, 19 N.Y.2d 715, 225 N.E.2d 882 (1967). There is significant additional evidence available now that was not available to the *Bakalar* court.

3. The Motions to Dismiss on Collateral Estoppel Grounds Should be Denied Because of Changes In New York Law Invalidating *Bakalar v. Vavra*

The motions to dismiss on collateral estoppel grounds should be denied because *Bakalar* was superceded by the New York Court of Appeals decision in *Matter of Flamenbaum*, and thus Mathilde Lukacs' death could not have been a prejudice to the Museums because Lukacs could not have had good title to the Artworks. In his 2011 ruling, Judge Pauley relied on In re *Flamenbaum*, 27 Misc.3d N.Y.S.2d (N.Y. Sur. Ct. 2010), a Nassau County Surrogate's decision since reversed by the New York Court of Appeals. In 2013, the New York Court of Appeals

determined that a proponent of laches had to show that a predecessor-in-interest had arguable legal title. *In re Flamenbaum,* 22 N.Y.3d 962, 1 N.E.3d 782 (2013) at 962.

In *Bakalar,* Judge Pauley's 2011 decision relied on only one trial-level New York state case --- *In re Flamenbaum,* 27 Misc.3d 1090, 899 N.Y.S.2d 546 (N.Y. Sur. Ct. 2010) --- to come to his laches conclusions. *Bakalar 2011* at 293, 304. Because the *Bakalar* court pointed to Mathilde's death as a prejudice to a claimant, it has been superseded by *In re Flamenbaum* which held --- contrary to *Bakalar* --- such evidence to be irrelevant under New York law.

Reif v. Nagy II's application of the changed New York law to invalidate the answer to the same question previously addressed by *Bakalar v. Vavra* warrants denial of the motions to dismiss on collateral estoppel grounds. *Matter of Estate of Baby Girl Launders,* 218 A.D. 501, 504, 640 N.Y.S.2d 309, 311 (1st Dept. 1995) (affirming lower court's determination that it was not bound to follow earlier decision because an intervening change in law had materially altered the parties' rights); *Hodes v. Axelrod,* 70 N.Y.2d 364, 373, 515 N.E.2d 612 (1987) (where statutory rights of the parties changed between the first and second proceedings, a lack of requisite identity between proceedings barred application of *res judicata*).

In Bakalar 2011, Judge Pauley rejected the Grünbaum Heirs' arguments that laches could not apply because they were unaware of any claim against Bakalar and did not know the *Torso* artwork's whereabouts until 2005:

> These arguments, however, construe the laches inquiry too narrowly. To have "knowledge" of their claim, Defendants need not have been aware of a claim against Bakalar specifically; it is enough that they knew of—or should have known of—the circumstances giving rise to the claim, even if the current possessor could not be ascertained. *See Sanchez,* 2005 WL 94847, at *1–3 (laches found despite the fact that the possessor of the allegedly stolen artifacts was unknown by the plaintiff until shortly before the lawsuit was filed); *Greek Orthodox,* 1999 WL 673347, at *10 (same); *In re Flamenbaum,* 27 Misc.3d N.Y.S.2d (N.Y. Sur. Ct. 2010) at 546.

Bakalar 2011. The proposition for which Judge Pauley quoted *Flamenbaum* was reversed. *In re Flamenbaum*, 22 N.Y.3d 962, 1 N.E.3d 782 (2013) at 962. The motions to dismiss on collateral estoppel grounds should be denied because of an intervening change in law that invalidated *Bakalar v. Vavra*'s rationale.

4. The Motions to Dismiss On Collateral Estoppel Grounds Should Be Denied Because The Appellate Division, First Department Held That *Bakalar v. Vavra* Does Not Bar The Grünbaum Heirs' Claims To Artworks In the 1956 Gutekunst & Klipstein Sale Because The Artworks Were Not Part of A Collection "Unified In Legal Interest"

The motions to dismiss on collateral estoppel grounds should be denied because the Artworks were not part of a collection unified in legal interest such that collateral estoppel may be applied offensively against the Grünbaum Heirs. In 2017, the Appellate Division held that *Bakalar v. Vavra* was not entitled to collateral estoppel effect in a similar case where "where the purchaser, the pieces, and the time over which the pieces were held differ significantly. The three works [the Bakalar Torso and two other works from the 1956 Gutekunst & Klipstein Egon Schiele sale] are not part of a collection unified in legal interest such to impute the status of one to the other." *Reif v. Nagy I*. In a lengthy 2019 opinion, the First Department reaffirmed this finding. ("*Reif v. Nagy III").*

Reif v. Nagy bars the application of collateral estoppel to prevent the Grünbaum Heirs from claiming the Artworks. In 2015, the Grünbaum Heirs commenced *Reif v. Nagy* to successfully recover two artworks stolen from Grünbaum that had been sold in the 1956 Gutekunst & Klipstein Schiele sale. The Nagy artworks were found at the Park Avenue Armory in the possession of a London art dealer, Richard Nagy. Unlike *Bakalar v. Vavra,* and in light of Congress' expressed intent in the newly-enacted HEAR Act, the Appellate Division, First Department considered Dr. Petropoulos' expert testimony involving Nazi art looting that the *Bakalar* court had declined to review. *Reif v. Nagy II*. Applying the new and correct rule of *In re Flamenbaum,* 22 N.Y.3d 962,

1 N.E.3d 782 (2013), the First Department held Mathilde Lukacs' possession to be irrelevant because Nagy demonstrated no scenario where Lukacs could not have had legal title to Grünbaum's art collection.

On these motions to dismiss, the Museums raise the same arguments in favor of collateral estoppel and laches that the Appellate Division rejected in *Reif v. Nagy*. As a federal court applying state law, this court is obliged to follow the state law decisions of state intermediate appellate courts. *Pentech Int'l, Inc. v. Wall St. Clearing Co.*, 983 F.2d 441, 445 (2d Cir.1993). Even if this Court finds that it is not bound on *res judicata* or issue preclusion grounds by the Appellate Division's holding, it should be persuaded by its compelling logic and deny the Museums' motions to dismiss on collateral estoppel grounds.

5. The Motions To Dismiss on Collateral Estoppel Grounds Should Be Denied Because The HEAR Act Changed The Law With An "Actual Knowledge" Requirement That Preempts Bakalar's Constructive Knowledge Rationale

The motions to dismiss should be denied because collateral estoppel does not apply where, as here, a change in federal law has invalidated *Bakalar v. Vavra*'s rationale. The HEAR Act preempted *Bakalar v. Vavra's* imputation of knowledge to the Grünbaum Heirs. Further, the HEAR Act's requirement of "actual knowledge" of the location of a particular artwork to start a statute of limitations clock running supersedes any of the *Bakalar* court's findings relating to the purported inaction of the Grünbaum Heirs. In *Bakalar*, the Grünbaum Heirs undisputedly had no knowledge that Grünbaum's art collection survived World War II. The Grünbaum Heirs learned of Bakalar's possession of the artwork when Bakalar tried to auction it at Sotheby's in 2005 in London and immediately claimed it. In enacting the HEAR Act, Congress sought to stop the practice of courts and statutes of limitations museums imputing knowledge of an artwork's location and provenance to cut off the rights of crime victims.

Because *Bakalar v. Vavra*'s imputation of constructive knowledge to cut off victim claims has been forbidden by the HEAR Act, collateral estoppel does not apply. Because collateral estoppel does not apply where there has been a change in applicable law and because the HEAR Act changed the law since *Bakalar v. Vavra*, the motions to dismiss on collateral estoppel grounds should be denied.

6. The Museums' Motions To Dismiss On Collateral Estoppel Grounds Should Be Denied Because The Facts Relating To Laches Are Different: Unlike David Bakalar The Museums Had A Legal Duty To Interview Mathilde Lukacs When She Was Alive and Would Have Found Their Artworks In The 1925 Würthle Catalogue and Gutekunst & Klipstein Ledgers

The motions to dismiss on collateral estoppel grounds should be denied because the facts and legal standards applicable to the Museums' duty of diligence is different from the fact and legal situation faced by novice art collector David Bakalar. The Museums' Collateral superior knowledge due to the law and government warnings and duty of diligence is unlike the completely ignorant novice art collector David Bakalar whose plight caused Judge Pauley to invoke equity.

The laches finding of *Bakalar v. Vavra* was unique to David Bakalar because Judge Pauley found him to be a novice art collector in 1964 and based on Bakalar's testimony that he was unaware of Nazi art looting. [AIC 15 ¶ 106; OB 12 ¶ 106; SBMA 13 at ¶ 105]. As sophisticated acquirers of artworks and superior advance knowledge and warnings of Nazi art looting, Defendant Museums stand in a radically different factual position from David Bakalar vis-à-vis any potential laches defense. [AIC 15 ¶ 106; OB 12 ¶ 106; SBMA 13 ¶ 106]. Unlike Bakalar, Defendant Museums had the knowledge, sophistication and advance opportunity to inquire into the provenance of the subject Schieles and thus would be unable to rely on the reputation of any art gallery from which they acquired the artworks to invoke a laches defense. [AIC 15 ¶ 107; OB 12 ¶ 107; SBMA 13 ¶ 106; CI 15-1 (Petropoulos Report) at ¶ 39].

The Museums acquired the Artworks while Mathilde Lukacs was still alive. The Museums could have investigated the Artworks' provenance and interviewed her but chose not to do so. It is the Museums' fault that it didn't consult her or locate the extant Grünbaum Heirs. In 2013, the New York Court of Appeals clarified that a proponent of laches in the context of stolen art must show that a dead witness would have been able to show good title. *In re Flamenbaum, 22 N.Y.3d 962, 1 N.E.3d 782 (2013)* at 966 ("although the decedent's testimony may have shed light on how he came into possession of the tablet, we can perceive of no scenario whereby the decedent could have shown that he held title to this antiquity.").

Because the claims involve different artworks, because the Museums are sophisticated and got government warnings, and because reasonable diligence would have uncovered the 1925 Würthle Gallery catalogue showing three of the four Artworks and Mathilde Lukacs' lack of an heirship certificate, the Museums cannot and have not demonstrated the prejudice prong of laches.

From the time of Grünbaum's death in the Dachau Concentration Camp in 1941 until October 31, 2002, no certificate of heirship issued, therefore no Grünbaum heir or family member could have had the possessory interest required by the HEAR Act to transfer Grünbaum's property prior to October 31, 2002. Unlike David Bakalar, each of the Museums is highly sophisticated in acquiring art, had been specifically warned against acquiring potentially-looted artworks from Europe, and was legally required to check provenance before accepting artworks. Unlike David Bakalar, the Museums' diligence — which the Museums inexcusably failed to perform — would have revealed a lack of standing to sell in the late 1950s and would have uncovered the 1925 Würthle Gallery catalogue documenting Fritz Grünbaum's ownership of three out of the four artworks in question here.

F. The Motions To Dismiss Should Be Denied Because A Laches Defense Based On Constructive Knowledge of The Artworks' Locations Is Preempted By The HEAR Act's "Actual Knowledge" Requirement

The motions to dismiss on laches grounds should be denied because the HEAR Act preempts defenses based on constructive knowledge of the Artworks' location that would shorten the six-year extension of time to make claims specified in the HEAR Act. In the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief within the time period prescribed by Congress. *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 580 U.S. 328, 346 (2017). *SCA Hygiene* involved the assertion of the laches doctrine in a case involving the Patent Act's six-year statute of limitations. *SCA Hygiene* analyzed *Petrella v. Metro–Goldwyn–Mayer, Inc.*, 572 U.S. 663, 664 ("[l]aches cannot be invoked as a bar to Petrella's pursuit of a claim for damages brought within [the Copyright Act's] three-year window."). *SCA Hygiene* observed:

> *Petrella's* holding rested on both separation-of-powers principles and the traditional role of laches in equity. Laches provides a shield against untimely claims, [*Petrella*, 572 U.S.] at 685, 134 S.Ct., at 1977, and statutes of limitations serve a similar function. When Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief. *Id.*, at 677, 134 S.Ct., at 1972–1973. The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted. Therefore, applying laches within a limitations period specified by Congress would give judges a "legislation-overriding" role that is beyond the Judiciary's power. Id., at 680, 134 S.Ct., at 1974. As we stressed in *Petrella*, "courts are not at liberty to jettison Congress' judgment on the timeliness of suit." Id., at 667, 134 S.Ct., at 1967. *SCA Hygiene*, 572 U.S. at 664.

Thus here, under the doctrine of *Petrella* and *SCA Hygiene*, where Congress enacted the HEAR Act to address when an action brought to recover Nazi looted artwork will be considered

timely, the enactment of that federally-created window for bringing suit bars any laches defense invoked during the federally-mandated period. The HEAR Act specifies that parties seeking to recover artwork lost during the Nazi era have six years to bring their claim from learning of the artwork's location. For pre-existing claims, the claims are deemed to have been actually discovered on the date of the HEAR Act's enactment. Accordingly, because the Grünbaum Heirs brought their claims within the six-year window authorized by the HEAR Act, laches based on constructive notice of the Artworks' locations cannot be invoked to bar legal relief.

Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 194-197 (2d Cir.), which Defendant Museums rely on for their laches argument was not a Nazi-looted art case and, consequently, did not apply the HEAR Act. The *Zuckerman* claim did not allege the subject artwork was stolen by the Nazis. *Id.* at FN 10. As a result, the Second Circuit concluded it "need not and do not decide whether Zuckerman's claims, for recovery of art sold under duress to non-Nazi affiliates, are within the ambit of the [HEAR Act]." *Id.* at n.10. Consequently, because *Zuckerman* was not decided based on the HEAR Act, it doesn't apply here, where the complaint alleges Grünbaum's art collection was stolen by the Nazi regime.

Because the Museums seek to raise a laches defense that has been preempted by the HEAR Act and that, as argued in Point J above, raises new disputed issues of fact, the motions to dismiss should be denied.

G. The Museums' Pre-Answer Motions To Dismiss On Adverse Possession Grounds Should Be Denied Because The HEAR Act Is Constitutional: Common Law Does Not Create Prescriptive Rights In Stolen Chattels And The Museums Have Not Shown That The Law of California, Illinois, Ohio, Pennsylvania or New York Grant Prescriptive Rights In Stolen Chattels Because No Such Rights Exist

The motions to dismiss should be denied because the Museums have not demonstrated prescriptive rights in the Artworks that would make the HEAR Act unconstitutional. The Museums

concede that "Congress is free to revive a cause of action after the limitations period has expired"... "unless the passage of the statute of limitations creates a prescriptive property right, such as title in adverse possession." *AIC* Brief at 19, *citing Brown v. Hutton Grp.*, 795 F. Supp. 1307, 1315 (S.D.N.Y. 1992). The Museums' pre-answer motions to dismiss on the grounds that the HEAR Act is unconstitutional because they acquired the Artworks by adverse possession should be denied because the Museums have not shown that adverse possession of a stolen chattel is recognized in California, Illinois, Ohio, Pennsylvania or New York and because adverse possession and prescriptive rights in stolen chattel are not recognized by the common law which, instead, follows the rule that a thief cannot pass good title. 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 the possession of a good-faith purchaser for value. *Guggenheim*, 77 N.Y.2d at 317. New York refuses to become a marketplace for stolen artwork. *Id.* New York follows the common law rule that if there is a thief in the chain-of-title, no one can take good title. *Guggenheim*, 77 N.Y.2d at 320. *Reif v. Nagy II* at 129; *Federal Ins. Co. v. Diamond Kamvakis & Co.*, 144 A.D.2d 42, 44, 536 N.Y.S.2d 760 (1st Dept. 1989) *lv denied* 74 N.Y.2d 604, 543 N.Y.S.2d 39. Thus, New York does not recognize adverse possession in stolen chattels. *Lightfoot*, 198 N.Y. at 267.

Congress' enactment of the HEAR Act is within its powers. The HEAR Act restores access to private property rights that were unfairly hindered by pre-2016 judicial decisions unfairly stripping family members of rights in a decedent's property without notice or due process based on the legal fiction of constructive notice. By passing the HEAR Act, Congress restored the expectations of the framers of the U.S. Constitution that courts would protect private property, consistent with state laws protecting rights in decedents' property that require notice and an opportunity to be heard before such rights are lost.

The Museums argue that "it has long been settled that a legislature cannot retroactively extend a statute of limitations to deprive a person of ownership acquired by adverse possession." The Museums' arguments should be rejected. Congress may create retroactive remedies for past wrongs. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 at 316 (1945). ("it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment…. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federal constitutional right."). Under the common law, once there is a thief in the chain of title, no one can take good title. *Guggenheim,* 77 N.Y.2d at 320. Nor can the Museums rely on a spoils of war theory doctrine to obtain title. *In re Flamenbaum,* 22 N.Y.3d 962, 1 N.E.3d 782 (2013) at 965. (declining to adopt any doctrine that would establish good title based on looting and removal of cultural objects during wartime because adopting spoils of war doctrine would be fundamentally unjust). Because *Reif v. Nagy* concluded all works in the Grünbaum collection were stolen, because the Grünbaum Heirs' complaints allege the Artworks were stolen, and because the Museums cannot show adverse possession of a stolen chattel, the Museums' arguments should be rejected.

Fatal to the Museums' argument that prescriptive rights were acquired, the Museums' briefs contain no argument relating to the creation of prescriptive property rights under California, Illinois, Ohio and Pennsylvania law. The Museums' motions to dismiss should be denied because New York does not recognize adverse possession in cases of stolen or concealed property. The Museums argue the contrary, relying on *Bd. of Managers of Soho International Arts Condo. v. City of New York*, No. 01 CIV. 1226 (DAB), 2005 WL 1153752, at *6 (S.D.N.Y. May 13, 2005). However, *Soho International* did not recognize adverse possession of a chattel. Indeed, in *Soho International*, a federal question case brought under the Visual Artists Rights Act ("VARA") Judge

Batts *denied* a claim of adverse possession to artworks attached to the side of a building. *Soho International* relied on *Lightfoot v. Davis*, 198 N.Y. 261, 267 (1910) for the following: "the doctrine of adverse possession also applies to claims of ownership of personal property." But, fatal to the Museums' arguments, *Lightfoot* does not recognize adverse possession of a chattel.

Lightfoot first points out that New York does not have an adverse possession statute and, as of 1910 had never recognized adverse possession of chattels. *Lightfoot v Davis*, 198 NY 261, 265 (1910) ("We have in our state, however, no statute relating to the adverse possession of chattels or personal property, nor do I know of any in any other state. …. there are no decisions in our courts on the question…."). *Lightfoot* then imposes a constructive trust to ensure that property wrongfully obtained from an owner should be returned long past the running of any limitations period. *Id.*

Thus *Lightfoot* shows that New York does not recognize adverse possession of chattels (much less stolen chattels) and is consistent with New York's well settled public policy that a wrongdoer is not entitled to ill-gotten gains. Accordingly, because neither *Soho International* nor *Lightfoot* found adverse possession of a stolen chattel, and because *Lightfoot* suggests that the Museums' superior knowledge would justify a constructive trust, the Museums' arguments should be rejected.

Where, as here, Grünbaum's artworks were found by the Appellate Division to have been stolen by the Nazis, there is no law that would possibly grant the Museums good title. Nor have the Museums cited to any prescriptive rights under California, Illinois, Ohio or Pennsylvania law that would bar Congress from extending the statute of limitations in Nazi looted art cases, the HEAR Act is constitutional and the motions to dismiss should be denied.

A party asserting possession by adverse possession must prove by clear and convincing evidence that the possession is "actual, open and notorious, exclusive, hostile, under claim of right, and uninterrupted for the statutory period." *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 CIV. 1226 (DAB), 2005 WL 1153752, at *6 (S.D.N.Y. May 13, 2005).

The motions to dismiss should be denied because the Museums do not meet the "exclusive" requirement necessary to plead adverse possession because a museum may hold artworks only for limited charitable purposes. "Use or occupation in common with third persons or the public generally is not exclusive possession." *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 CIV. 1226 (DAB), 2005 WL 1153752, at 9 (S.D.N.Y. May 13, 2005). A museum's collections are for the benefit of the public. *See e.g.*, *Graham v. Prince*, No. 15-CV-10160 (SHS), 2023 WL 3383029, at 15 (S.D.N.Y. May 11, 2023) *citing Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2006); *Frick Collection v. Goldstein*, 83 N.Y.S.2d 142, 145 (Sup. Ct. N.Y. County 1948), *aff'd*, 274 A.D. 1053, 86 N.Y.S.2d 464 (1st Dept. 1949).

The motions to dismiss should be denied because the Museums' possession has not been hostile or "under a claim of right" as adverse possession would require. Here, the Amended Complaint shows AIC was not acting under a "claim of right" because an officer of the AIC who was President of the American Association of Museum Directors gave sworn testimony on behalf of the Museums before Congress in 2006 that AIC was doing diligence to determine the title of Nazi looted artworks and determining that all such claims of title would be resolved amicably once researched. [AIC 15 ¶¶ 165-167]. Accordingly, the Museums never asserted a claim of right to the Artworks.

The Museums do not have and did not make a "claim of right" to the Artworks. Adverse possession, "must be under a claim of absolute right without recognition or deference to the interest

or rights of any other." *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 CIV. 1226 (DAB), 2005 WL 1153752, at *8 (S.D.N.Y. May 13, 2005); *Petry v. Gillon*, 199 A.D.3d 1277, 159 N.Y.S.3d 165, 169 (3d Dept. 2021) ("A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner."). A thief cannot convey title or other rights in stolen property. *See Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 318, 569 N.E.2d 426 (1991) (noting when statutes of limitations begin to run in event of a theft); *Becker v. Murtagh*, 19 N.Y.3d 75 (2012) (thief cannot convey clear title); *Lightfoot v. Davis*, 198 N.Y. 261, 267, 91 N.E. 582, 584 (1910) (noting that a thief cannot convey good title, which would defeat adverse possession).

Over decades, the Museums have concealed the chain of title (or "provenance") from the public. During this period, the Museums, in the face of government warnings against laundering stolen artwork, promised to return any stolen Holocaust-era property. *July 27, 2006 Testimony of Art Institute of Chicago Director James Cuno to Subcommittee on Domestic and International Monetary Policy, Trade and Technology on Financial Services.* U.S. House of Representatives, 109th Congress. (2d Session) at 67-93 (promising that all such claims, once researched, will be resolved amicably).

Fatal to any "adverse possession" arguments, the Museums have consistently and publicly affirmed, including in Mr. Cuno's testimony to Congress, that the Museums would recognize legitimate ownership claims to Nazi looted art based on its ongoing provenance research. Despite purporting to reveal all provenance disputes to Congress, Mr. Cuno's testimony lacks any reference to *Russian Prisoner*. That omission is striking given that Mr. Cuno's testimony references the Oberlin Schiele reported by the Allen Museum, yet conceals the *Bakalar v. Vavra* claim against the AIC.

Mr. Cuno's testimony leads the listener — the average member of Congress or the public — to understand that the Artworks will be returned if the Museums learns in the course of provenance research and friendly conversations with families of Holocaust victims that the Museums have committed to that the Artwork is stolen. Mr. Cuno's testimony contradicts the "hostile" element that an adverse possession theory requires. Rather than "hostility," the February 3, 2006 fax from AIC's counsel Sally Venverloh contains language strongly suggesting that AIC is open to a meritorious claim: "Based on our current understanding of the law and facts, we do not believe your clients' claim has any merit." [AIC 34-D]. Because this tentative, ambiguous statement leaves an open door to future proof, it does not satisfy the "clear and convincing" "hostility" that adverse possession requires.

H. Santa Barbara's Motion To Dismiss On Personal Jurisdiction Grounds Should Be Denied Because Santa Barbara Has Chosen To Litigate The Merits And Because This Court Has Removal Jurisdiction

1. Dismissal Should be Denied Because the Removal Statute Was Amended to Permit This Court to Exercise Removal Jurisdiction Over Removed Matters if Any U.S. District Court Has Personal Jurisdiction

Santa Barbara's motion to dismiss for lack of jurisdiction should be denied because this court may exercise removal jurisdiction if any court in the United States has personal jurisdiction and the U.S. district court for the district in which the Santa Barbara museum is seated has personal jurisdiction. In 1986, 28 U.S.C. §1441(f) was amended to eliminate the requirement that a federal court have only jurisdiction derivative of the state court from which it was removed. *Barnaby v. Quintos,* 410 F Supp.2d 142, 143 (S.D.N.Y. 2005). Santa Barbara's assertion that personal jurisdiction in New York was lacking prior to removal, even if true, is irrelevant to the SDNY's removal jurisdiction. 28 U.S.C. § 1441(f) empowers the SDNY to exercise removal jurisdiction if any U.S. district has personal jurisdiction. Because Santa Barbara Museum and *Portrait of the*

Artist's Wife (1915) are both located in the Central District of California, the U.S. District Court for the Central District of California has personal jurisdiction over Santa Barbara. Because Santa Barbara voluntarily removed the action against it from New York State Court to the Southern District of New York, it subjected itself to this Court's jurisdiction under 28 U.S.C. § 1441(f). Santa Barbara failed to move to transfer this action to the Central District of California. Accordingly, the motion to dismiss on personal jurisdiction grounds fails.

2. Dismissal Should be Denied Because Santa Barbara Waived Objections to Personal Jurisdiction by Seeking Relief on the Merits

Santa Barbara Museum waived any personal jurisdiction argument by affirmatively removing the action against it to the SDNY, conceding that the SDNY has "original jurisdiction," and arguing the merits on this motion to dismiss. SBMA 1 (Notice of Removal) at ¶¶ 10-12. "It is well settled that the defense of lack of personal jurisdiction can be waived." *Universitas Educ., LLC v. Grist Mill Cap., LLC*, No. 21-2690, 2023 WL 2170669, at *2 (2d Cir. Feb. 23, 2023) (finding defendant waived personal jurisdiction defense). "To waive or forfeit a personal jurisdiction defense, a defendant must give a plaintiff a reasonable expectation that it will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking." *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion*, 832 F.3d 92, 102 (2d Cir. 2016).

Here, Santa Barbara has clearly argued the merits and sought dismissal on laches, collateral estoppel and arguing substantive matters such as whether Plaintiffs' claims are barred by collateral estoppel or laches, whether the claims are barred by a pre-HEAR Act decision in *Bakalar,* and where the situs of the injury for Plaintiffs' conversion and replevin claims exists. *SBMA* 19 at 7-8, 11-12. Not content to limit itself to the pleadings, Santa Barbara has lustily joined in an entirely frivolous constitutional challenge to the HEAR Act and submitted evidence outside the pleadings

in the form of the Declaration of Larry Feinberg, the Museum's Director, alleging facts as to when and how the Museum acquired *Portrait of the Artist's Wife* and whether that work has been in New York since the date of acquisition. [SBMA 20]. Santa Barbara's counsel, Caren Decter, has also introduced facts outside the Complaint, introducing four exhibits consisting of correspondence and newspaper articles. [SBMA 21, 21-1 through 21-5]. Santa Barbara's support of the frivolous litigation positions of the other Museums has clearly caused the court to expend effort in analyzing these issues at Santa Barbara's request — effort that would be wasted if personal jurisdiction were found to be lacking. For this reason, the motion to dismiss on personal jurisdiction grounds should be denied because Santa Barbara waived the defense.

3. Dismissal Should be Denied Because *Bernstein* Relieves This Court From Limitations on Jurisdiction to Undo Nazi-era Looting Transactions

Nor is personal jurisdiction a restraint on this Court's ability to undo Nazi-looting transactions. In 1954 in *Bernstein,* 210 F.2d 375, the Second Circuit relied on a statement of United States Executive Policy as articulated in a U.S. State Department press release entitled "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers." Based on that Executive Policy, the court in *Bernstein* stripped Nazi Germany of sovereign immunity and struck out all restraints based on the inability of the court to pass on acts of officials in Germany during the Nazi era. As a result, there is no restraint on this Court's jurisdiction over Plaintiffs' efforts to recover artworks confiscated due to acts of Nazi officials. As the Complaint shows, Santa Barbara has trampled on the rights of New York residents to decedents' property. [SBMA 13 at ¶25-26] Because of this, Santa Barbara's motion to dismiss for lack of personal jurisdiction should be denied.

4. In the Alternative, Discretionary Transfer Is Not Warranted Because This Controversy Should be Litigated in the Southern District of New York

This case should be litigated in the Southern District of New York. By removing the suit to the SDNY, choosing to litigate the merits and failing to move for a transfer, Santa Barbara has conceded that SDNY is a proper location for the adjudication of the claims raised here. Venue is also proper here as the *Portrait of the Artist's Wife,* like every artwork at issue on Defendant Museums' motion to dismiss, was trafficked through New York and Otto Kallir's Galerie St. Etienne in Manhattan. In 1957 Santa Barbara's founder and benefactor, Wright S. Ludington, bought *Portrait of the Artist's Wife* from Otto Kallir and gifted it to Santa Barbara. [SBMA 13 at 23-24; [Gruber Dec. Ex. 19 ¶ 61] [index card for *Portrait of the Artist's Wife*)]. Mr. Ludington communicated with Otto Kallir's Galerie St. Etienne in New York for purposes of acquiring that artwork. Because Mr. Ludington acted on behalf of Santa Barbara to acquire the artwork, reaching into the State of New York to engage in that commercial transaction on behalf of Santa Barbara, and because Santa Barbara accepted the artwork shipped from New York, Santa Barbara has a sufficient nexus with the State of New York that it is proper for this Court to adjudicate Plaintiffs' claims against Santa Barbara.

CONCLUSION

For the reasons set forth above, the motions to dismiss should be denied and the cross-motions to convert the motions to dismiss to summary judgment on the Grünbaum Heirs' declaration of title and conversion claims pursuant to Rules 12(d) and 56 of the Federal Rules of Civil Procedure granted, together with judgment declaring the Grünbaum Heirs hold title to the Egon Schiele artworks *Portrait of a Man* (1917), *Girl With Black Hair* (1911), *Russian Prisoner of War* (1916) and Portrait *of the Artist's Wife* (1915), determining that the Museums converted the Artworks by wrongfully refusing to return the Artworks as of December 15, 2022, together

with an order pursuant 28 U.S.C. 1651 and 2201-02 directing that the Artworks be returned to the Grünbaum Heirs, care of Dunnington Bartholow & Miller LLP at Gander & White, (Attn.: James Samartzis), 45-11 33rd Street, Long Island City, New York 11101, along with an award of prejudgment interest running from December 15, 2022.

Dated: New York, New York
June 29, 2023

Respectfully submitted,

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