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 GRUNBAUM 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 GRUNBAUM 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]

DEFENDANTS CARNEGIE INSTITUTE d/b/a CARNEGIE MUSEUMS OF PITTSBURGH'S AND OBERLIN COLLEGE d/b/a ALLEN MEMORIAL ART MUSEUM'S COMBINED MEMORANDUM OF LAW IN SUPPORT OF THEIR JOINT MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINTS

Of counsel: PRYOR CASHMAN LLP, 7 Times Square, New York, New York 10036
William L. Charron, Paul Cossu, Katherine Lihn, Helen Hunter
Attorneys for Defendants Carnegie Institute d/b/a Carnegie Museums of Pittsburgh & Oberlin College d/b/a Allen Memorial Art Museum

TABLE OF CONTENTS

TABLE OF CONTENTS, *cont'd*

TABLE OF AUTHORITIES

CASES **PAGE(s)**

STATUTES & RULES

LEGISLATION

WEBSITES

Defendants Carnegie Institute d/b/a Carnegie Museums of Pittsburgh ("Carnegie") and Oberlin College d/b/a Allen Memorial Art Museum ("Oberlin"), jointly and through their undersigned counsel, respectfully submit this memorandum of law in support of their joint motion to dismiss with prejudice all claims asserted against them (respectively) in their related actions by plaintiffs Timothy Reif and David Fraenkel as co-trustees of the Leon Fischer Trust and Milos Vavra (collectively, "Plaintiffs") pursuant to Fed. R. Civ. P. 12(b)(6) on the bases of collateral estoppel and laches.

Carnegie and Oberlin also respectfully fully incorporate hererin by reference the accompanying motion to dismiss by defendant Art Institute of Chicago ("AIC") against Plaintiffs in their related action on the basis of statute of limitations, and Carnegie and Oberlin herein supplement that motion to dismiss with additional facts and law relevant to Carnegie and Oberlin in particular.

PRELIMINARY STATEMENT

The same salient facts asserted by Plaintiffs in this case alleging Nazi looting of a collection of drawings by the artist Egon Schiele ("Schiele") were raised by the same Plaintiffs, through the same counsel, in a case decided by the late-Judge William H. Pauley III, unanimously affirmed by the United States Court of Appeals for the Second Circuit (the "Second Circuit"), over a decade ago. *Bakalar v. Vavra*, No. 05-cv-3037 (WHP), 2008 WL 4067335 (S.D.N.Y. Sept. 2, 2008) ("*Bakalar I*"), *vacated in part*, 619 F.3d 136 (2d Cir. 2010), *re-decided on remand*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011) ("*Bakalar II*"), *aff'd*, 500 F. App'x 6 (2d Cir. 2012) (at times "*Bakalar III*"), *cert. denied sub nom.*, *Vavra v. Bakalar*, 569 U.S. 968 (2013).

Following years of international discovery conducted through the Hague Convention, and a full bench trial before Judge Pauley, Judge Pauley and the Second Circuit in *Bakalar* rejected

the same fact allegations that Plaintiffs re-assert here. It is appalling that we find ourselves back here re-litigating those same facts. Plaintiffs allege no newly discovered facts; on the contrary, the allegations in their pleadings are recycled from Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law from *Bakalar*, which Judge Pauley and the Second Circuit largely rejected. Plaintiffs' attempt to relitigate the identical fact issues that were resolved in *Bakalar* should be dismissed on the bases of collateral estoppel and laches.

For the reasons stated in AIC's accompanying motion to dismiss, the cases against Carnegie and Oberlin should alternatively be dismissed as time-barred. The record is conclusive that Plaintiffs had actual knowledge of Carnegie's and Oberlin's possession of their Schiele drawings back in 2006 – Plaintiffs made written demands for those drawings at that time, which were refused. Yet Plaintiffs made no claims against Carnegie or Oberlin until the end of 2022. As explained by AIC, under both New York law and the statute of limitations rules prescribed by the Holocaust Expropriated Art Recovery ("HEAR") Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016), Plaintiffs' claims against Carnegie and Oberlin are time-barred.

RELEVANT ALLEGATIONS AND FACTS

A. The *Bakalar* Case

Bakalar concerned title to a Schiele drawing known as *Seated Woman with Bent Left Leg (Torso)* ("*Torso*"), which was part of the same collection of Schiele art that Plaintiffs once again place at issue in these cases. *Bakalar I*, 2008 WL 4067335, at *2-3; *Bakalar II*, 819 F. Supp. 2d at 295, 298-300, *aff'd*, 500 F. App'x at 7-9.

In *Bakalar*, Leon Fischer ("Fischer," the predecessor-in-interest to Plaintiff Fischer Trust in these actions) and Milos Vavra ("Vavra," who remains a co-Plaintiff in these actions), represented by the same counsel representing Plaintiffs in these actions, alleged that a collector

named David Bakalar, who had purchased *Torso* in the 1960s from a New York gallery, lacked good title to that work due to Nazi theft. *Bakalar II*, 819 F. Supp. 2d at 295. It was undisputed that the New York gallery had acquired *Torso* in the mid-1950s from a Swiss art dealer named Eberhard Kornfeld ("Kornfeld"). *Id*.

1. Evidence From Kornfeld Disproved Fischer's And Vavra's Primary Theory Of Nazi Theft

Kornfeld, who passed away earlier this year at the age of 99[1], was the central figure in Fischer's and Vavra's theory in *Bakalar*, and considerable discovery was obtained regarding Kornfeld's acquisition of *Torso*. (*See* Declaration of William L. Charron dated June 8, 2023 ("Charron Decl.") Ex. 1 (May 25, 2007 Kornfeld deposition transcript from *Bakalar* ("Kornfeld Dep."); Ex. 2 (Pl. Trial Exs. 2, 7, 12, 14, 20, 22, 24-25, 32-33, 36, 42-43, 47, 54-56, 58-61, 63-65, 67, 71, 73-75, 78-81, 84, 90, 109, and 112.)[2]

Fischer and Vavra asserted in *Bakalar* that Kornfeld had been a Nazi fence and had acquired *Torso* from Nazis. (*Bakalar* ECF No. 201 (Fischer's & Vavra's Ans. to Am. Compl. and Cntrclms.) at ¶¶ 5, 166.) The evidence elicited in *Bakalar*, however, – including most critically Kornfeld's voluntary production of testimony and original records in Switzerland, which he was

[1] https://www.swissinfo.ch/eng/culture/swiss-art-collector-eberhard-kornfeld-dies-aged-99/48438264.

[2] The Court may take judicial notice of the contents of the *Bakalar* docket and the admitted trial exhibits from that case under Fed. R. Civ. P. 12(b)(6), without converting this motion to one for summary judgment under Rules 12(d) and 56. *E.g.*, *Houck v. U.S. Bank, NA*, No. 15-cv-10042, 2016 WL 5720783 (S.D.N.Y. Sept. 30, 2016), *aff'd sub nom.*, *Houck v. U.S. Bank, N.A. for Citigroup Mortg. Loan Tr. 2007-AR5*, 689 F. App'x 662 (2d Cir. 2017); *BRS Assocs., L.P. v. Dansker*, 246 B.R. 755, 765 (S.D.N.Y. 2000). The admitted exhibits from the *Bakalar* trial as well as the trial transcripts cited herein are not available through PACER and are therefore attached as exhibits to the Charron Decl.

strictly protected under Swiss law from having to provide – led Judge Pauley and the Second Circuit to find that Kornfeld had actually acquired *Torso* as part of a 53-work collection of Schiele art (the "Collection") sold to him in the mid-1950s by a woman named Mathilde Lukacs ("Lukacs"). *Bakalar I*, 2008 WL 4067335, at *2-3; *Bakalar II*, 819 F. Supp. 2d at 295, 298-300, *aff'd*, 500 F. App'x at 7-9. That finding was devastating to Fischer's and Vavra's theory because Lukacs was not a Nazi; she was the *sister-in-law* of Plaintiffs' predecessor, Franz Friedrich (Fritz) Grunbaum ("Grunbaum"), through whom Plaintiffs assert title. *Bakalar II*, 819 F. Supp. 2d at 295. It is uncontested that the drawings currently owned by Carnegie and Oberlin were also part of the Collection that Lukacs sold to Kornfeld in 1955-56.[3]

Fischer and Vavra conceded in *Bakalar* that, if Lukacs had indeed sold *Torso* to Kornfeld, then *Torso* could not have been stolen from Grunbaum by Nazis because it was unreasonable to infer that Lukacs, a Jewish family member, would have been able to obtain *Torso* (or any other art) from the Nazis. (*Bakalar* ECF No. 201 at ¶¶ 106, 286.) *Bakalar v. Vavra*, 237 F.R.D. 59 (S.D.N.Y. 2006). It is equally unreasonable to infer that the Nazis stole any of the drawings at issue in these cases.[4]

[3] The drawing owned by Carnegie, *Portrait of a Man* (1917), was sold by Lukacs to Kornfeld on May 22, 1956. (Charron Decl. Ex. 2 (Pl. Trial Ex. 112) at EK00029 (Inventory No. 36772).) The drawing owned by Oberlin, *Girl With Black Hair* (1911), was sold by Lukacs to Kornfeld on February 7, 1956. (*Id.* at EK00021 (Inventory No. 36520).)

[4] Although not relevant to this motion, there is no evidence that directly links the drawings at issue in these cases to Grunbaum. Schiele made over 2,700 drawings, without titling them. *Bakalar I*, 2008 WL 4067335, at *1. The titles to Schiele's drawings change over time based upon each successive owner's description of them (for example, *Torso* had previously gone by the title *Woman Sitting, With Left Leg Drawn Up*).

a. Fischer's And Vavra's Thorough Discovery In *Bakalar* Of Kornfeld And His Testimony That He Acquired The Collection From Lukacs In The Mid-1950s, Not From Nazis

Because Fischer and Vavra acknowledged that Kornfeld's acquisition of the Collection from Lukacs would defeat their theory of Nazi theft, they thoroughly examined Kornfeld – and then they raised every possible objection to try to exclude Kornfeld's evidence. But Fischer and Vavra simply could not overcome the obvious genuineness of Kornfeld's evidence and the truth of what it revealed: namely, that Kornfeld purchased the Collection from Lukacs, not from Nazis.

Kornfeld's voluntarily produced evidence included, *inter alia*, over five years of correspondence and dealings he had with Lukacs (between 1952 and 1957) reflected in letters, postcards, receipts bearing postmarks and tax stamps from the 1950s that are no longer utilized in Switzerland, and correspondence such as a change of address notification by Lukacs written on pink paper with blue pencil.[5]

Kornfeld's evidence also included his original, bound, black inventory book, about 8.5 by 11 inches in size, with yellowed interior paper, a deteriorated binding and handwritten white ink on the binder that reads: "1955 to 1957" (the "Inventory Book"). (Charron Decl. Ex. 1 (Kornfeld Dep.) at 40:24-50:6.) The Inventory Book reflects Kornfeld's acquisition of the Collection in the

---

Bakalar, 237 F.R.D. at 65. Lukacs's possession and sale of the drawings after the war is the only circumstantial evidence that arguably offers a basis to potentially infer Grunbaum's prior ownership of the drawings (*i.e.*, based upon his and Lukacs's familial relationship). *See Bakalar II*, 819 F. Supp. 2d at 300-01.

[5] (Charron Decl. Ex. 2 (Pl. Trial Exs. 42-43, 58-61, 63-65, 67, 75, 78-81, 84, 112); Charron Decl. Ex. 1 (Kornfeld Dep. at 31:16-21, 34:17-35, 40:24-44:11, 45:7-23, 49:2-20, 52:6-13, 76-77:17, 79:20-80:1, 82:13-25, 84:7-85:9, 86:1-14, 93:6-94:7, 110-112:6); Charron Decl. Ex. 3 (Pl. Trial Ex. 62); Charron Decl. Ex. 4 (Pl. Trial Ex. 69); Charron Decl. Ex. 5 (Pl. Trial Ex. 70).)

mid-1950s. (*E.g.*, Charron Decl. Ex. 2 (Pl. Trial Ex. 112 at EK00021, 29).) Kornfeld's documents were copied and carefully described into the record, with Plaintiffs' current counsel personally attending, reviewing and acknowledging such physical descriptions and contents as accurate. (*See generally* Note 5, *supra*.)

Kornfeld's evidence showed specifically that he purchased the Collection from Lukacs in three tranches, including eight Schiele works in September 1955 (Charron Decl. Ex. 2 (Pl. Trial Ex. 67)), 20 Schiele works in February 1956 (including the drawing now owned by Oberlin) (Charron Decl. Ex. 2 (Pl. Trial Ex. 112 at EK00021)), and the remaining works in the Collection in May 1956 (including the drawing now owned by Carnegie) (*id*. at EK00029; *see also id.* at EK00017 (Lukacs's payment receipt); Charron Decl. Ex. 1 (Kornfeld Dep. at 25:21-27:21, 35:3-38:11, 121:5-20).) *Bakalar I*, 2008 WL 4067335, at *2-3.

During Kornfeld's deposition in *Bakalar*, Plaintiffs' counsel did not limit his deposition questioning to *Torso* only. Plaintiffs' counsel asked Kornfeld a number of questions about the entirety of the Collection. For example:

- Plaintiffs' counsel's first question to Kornfeld about a specific artwork was not about *Torso* but was about another work from the Collection known as *Dead City III* (Charron Decl. Ex. 1 (Kornfeld Dep. at 121:21-122:9).)

- Plaintiffs' counsel's second question about a specific artwork was not about *Torso* but was about *Schriftsteller TOM*, a different artwork from the Collection. (*Id.* at 123:5-13.)

- Plaintiffs' counsel's first overall line of questioning of Kornfeld established, with respect to *all* of the works in the Collection that Kornfeld acquired from Lukacs, that "***everything from 1 through 53 has the same provenance***." (*Id.* at 121:5-20 (emphasis supplied).)

- Plaintiffs' counsel attempted to establish that all of the works in the Collection had been laundered by Nazis through Kornfeld, not by Kornfeld having acquired them from Lukacs. (*Id.* at 128:15-24, 132:2-135:4, 139:19-21.)

- With respect to all of the works from the Collection, Plaintiffs' counsel asked Kornfeld to "describe how Mathilde Lukacs first delivered *these art works to you*," and counsel explored the specific deliveries of the art from the Collection to Kornfeld in depth. (*Id.* at 128:15-24, 132:11-135:4 (emphasis supplied).)

- Plaintiffs' counsel asked Kornfeld: "When she [Lukacs] said that *these works* came from her family, did you ask her whether any of her other family members had ownership rights in *these works*?" (*Id.* at 139:19-21 (emphases supplied).)

- Plaintiffs' counsel asked Kornfeld: "Other than what you have produced to use here and the documents that we have seen [spanning Kornfeld's entire course of dealings with Lukacs between 1952-1957], did you take any other notes about your meetings with Mathilde Lukacs?" (*Id.* at 132:2-5.)

Faced with compelling evidence from Kornfeld that his account of having purchased the Collection from Lukacs, not from Nazis, was correct, Fischer and Vavra made a long list of arguments to Judge Pauley and the Second Circuit that Kornfeld's evidence should have been excluded. Fischer and Vavra contended, among other things: (i) that an opinion from their putative handwriting expert, Christian Farthofer, supported the conclusion that Kornfeld "fabricated" all of his documents and "invented" a "story" about having acquired the Collection from Lukacs (*Bakalar* ECF No. 203 (Mem. in Opp. to Fischer's & Vavra's Mot. *in Limine*) at 4); (ii) that Kornfeld's documents were unreliable based upon his inconsistent use of pencil and pen in his Inventory Book (*id*. at 12-13); (iii) that the "best evidence" and "completeness" doctrines barred Judge Pauley from evaluating copies of Kornfeld's records (*id*. at 7-10); (iv) that Kornfeld's documents were inadmissible hearsay (*id*. at 10-15); and (v) that New York's Dead Man's Statute, CPLR § 4519, "render[ed] Kornfeld incompetent to testify both to documents and testimony [sic]" concerning his personal dealings with Lukacs (*id*. at 15-18).

Judge Pauley reviewed all of Kornfeld's evidence for its genuineness in connection with the *Bakalar* trial and found that Kornfeld's documents were genuine, and that Fischer's and Vavra's various evidentiary objections were meritless. *Bakalar I*, 2008 WL 4067335, at *2, 7

("credit[ing] Kornfeld's testimony," finding that Kornfeld purchased the Collection in three tranches from Lukacs between September 1955 and May 1956, and further finding that, "[b]ecause Lukacs possessed the [*Torso*] Drawing ***and the other Schiele works she sold to Kornfeld*** in 1956, [including the drawings at issue in these cases,] Kornfeld was entitled to presume that she owned them.") (emphasis supplied); *accord Bakalar II*, 819 F. Supp. 2d at 295, *aff'd*, 500 F. App'x at 7. (Charron Decl. Ex. 6 (7/11/08 Final Pre-Trial Conf. Tr.) at 7:7-12:6 (denying Vavra's and Fischer's motion *in limine* concerning Kornfeld's evidence).) The Second Circuit found no basis to disturb any of Judge Pauley's finding and rulings concerning Kornfeld's evidence. *Bakalar*, 619 F.3d at 146-47; *Bakalar III*, 500 F. App'x at 7-8.

The finding that Lukacs, in fact, sold the Collection to Kornfeld was dispositive in *Bakalar*. As the Second Circuit explained:

> Vavra and Fischer argue that the district court's finding is clearly erroneous and that the Nazis stole the Drawing. However, Bakalar traced the provenance back to Mathilde Lukacs, Grunbaum's sister-in-law, who sold it to a gallery in 1956. ***Vavra and Fischer's hypothesis – that the Nazis stole the Drawing from Grunbaum*** only to subsequently return or sell it to his Jewish sister-in-law – ***does not come close to showing that the district court's finding was clearly erroneous***.

Bakalar III, 500 F. App'x at 7-8 (emphases supplied). That same finding of fact, which applies to the entirety of the Collection, including each of the drawings at issue in these cases, is equally dispositive here. Plaintiffs had their full and fair opportunity to contest this fact in *Bakalar*. They did not succeed for very good reasons.

b. The Evidence Elicited In *Bakalar* Explaining What Happened To The Grunbaums And The Lukacses

Because discovery in *Bakalar* was extensive, including through research of archives in Vienna, Austria, the parties were able to discover much of what happened to the Grunbaums and Lukacses following the Anschluss in March 1938. The following discussion summarizes what the

evidence showed, and what was actually the subject of litigation and presented to the courts in *Bakalar*.

Immediately following the Anschluss, the Gestapo arrested both Fritz Grunbaum and Mathilde Lukacs's husband, Sigmund Lukacs ("Sigmund"). (*Bakalar* ECF No. 247-2 (Joint Pretrial Order Stipulated Facts ("JPTO Stip. Fact") 9, 22, 32); Charron Decl. Exs. 7-8 (Pl. Trial Exs. 26, 105).) Neither of their wives – Elisabeth Grunbaum or Mathilde Lukacs – was arrested. (*Id.*) The Gestapo told both men they would be released, and the Gestapo *did* shortly thereafter release Sigmund (in May 1938) upon his execution of a "Commitment to Leave Austria." (Charron Decl. Ex. 7.) The Grunbaums and Lukacses then worked with the brother of Elisabeth Grunbaum and Mathilde Lukacs, Max Herzl ("Herzl"), who was a diamond dealer in Belgium (and who was also the grandfather of Leon Fischer), to obtain emigration visas from the Belgian government for both the Grunbaums and Lukacses. (Charron Decl. Ex. 9 (relevant excerpts from the trial transcripts in *Bakalar* ("Trial Tr.")) (7/17/08 Trial Tr. at 640:23-24, 641:17-642:4); Charron Decl. Ex. 10-13 (Pl. Trial Exs. 155, 157-159).)

Herzl was successful, and Sigmund and Mathilde Lukacs emigrated from Austria to Belgium in August 1938. (*Bakalar* ECF No. 247-2 (JPTO Stip. Fact 22); Charron Decl. Ex. 7 (Pl. Trial Ex. 26) at P763.) They did so with the permission of the Nazi government, which approved their emigration and also approved their export of most of their property, including a substantial amount of art. (*Bakalar* ECF No. 247-2 (JPTO Stip. Fact 22); Charron Decl. Ex. 11-12 (Pl. Trial Exs. 157, 158); Charron Decl. Ex. 9 (7/18/08 Trial Tr. at 764:11-765:1.)

At the same time this was happening, the Gestapo was making "repeated promises" to the Grunbaums that Fritz would also be "release[d]," and they permitted Elisabeth Grunbaum to obtain emigration visas to Belgium through Herzl as well. (*See generally* Charron Decl. Ex. 10 (Pl. Trial

Ex. 155 (correspondence from Max Herzl to Belgian authorities recounting Grunbaums' situation).) Because of the Nazis' fixation with 'legalistic formalities,' they also required Elisabeth to obtain formal authority from Fritz to export their property, *including their art collection*. (Charron Decl. Ex. 9 (7/18/08 Trial Tr. at 743:14-18, 775:17-18); Charron Decl. Ex. 8 (Pl. Trial Ex. 105 at STHB 000501-504, P811, 819).) The Nazis accordingly had Fritz execute a power of attorney (the "Power of Attorney") in July 1938. (*Id.* at P 815.) That Power of Attorney was *not* executed in favor of a Nazi; it was executed in favor of Fritz's wife. *Id.*

The Power of Attorney did not divest Grunbaum of his ownership of property, but rather vested Elisabeth with co-existent authority to handle his property, through which the Nazis approved Elisabeth's export of the Grunbaums' property in September 1938, *including all of the art*. (Charron Decl. Ex. 8 (Pl. Trial Ex. 105 at P 815).) (The number of artworks identified in Elisabeth Grunbaum's September 1938 export permit almost exactly equals the number of artworks inventoried in the Grunbaums' apartment following Fritz's arrest in March 1938.) (Charron Decl. Ex. 2 (Pl. Trial Ex. 20 at P 770; Pl. Trial Ex. 25 at P 823).)[6]

The record also showed that Elisabeth met with a lawyer, the Lukacses, and another family member named Berthold Reiss in her apartment in June 1938, as emigration visas and export

[6] The Power of Attorney states in full: "With this power of attorney, I, the undersigned Franz, Friedrich (called Fritz) Grunbaum, actor in Vienna IV., Rechte Wienzeile 29, currently Dachau, authorize my wife Elisabeth Grunbaum, Wien IV, Rechte Wienzeile 29, to file for me the legally required statement of assets and to provide on my behalf all declarations and signatures required for their legal effect according to the statutory provisions, and to represent me in general in all my affairs. Furthermore, I give her the authority to transfer, in her discretion, this power of attorney to the same or a limited extent to another person." Charron Decl. Ex. 8 (Pl. Trial Ex. 105 at P815).

permits to Belgium were being arranged. (Charron Decl. Ex. 14 (Pl. Trial Ex. 160).) As with the Lukacses and Grunbaums, the Nazis also approved the export of Berthold Reiss's property, including art, and he shipped his art to safety on January 26, 1939. (*Id.*; Charron Decl. Ex. 9 (7/18/08 Trial Tr. at 754:3-757:3, 763:16-19).)

The archives therefore show that the Nazis had released Grunbaum's brother-in-law, Sigmund Lukacs; the Nazis were promising to release Grunbaum as well; Max Herzl had obtained emigration visas to Belgium for everyone; the Nazis were approving the export of the entire family's property, including all of their art; and Elisabeth was going to export her and her husband's property to safety with the family in Belgium, and did so export their property to safety. Grunbaum's art collection (whatever its contents) *evaded* the Nazis, it did not get appropriated or liquidated by the Nazis.

While Elisabeth had the opportunity to leave Austria for Belgium with the Lukacses, she made the fateful decision to wait until Fritz was released from custody, as the Nazis were still promising to do. Max Herzl recounted his sister's situation to the Belgian government on March 10, 1939 as follows:

> My sister did not want to leave Austria until her husband was released. After a thousand attempts and superhuman efforts she now has only received the formal promise by the German authorities that her husband will be released as soon as the quarantine is lifted from Buchenwald [where Fritz had been transferred for a time], where typhoid fever is raging. She received this promise based on the possibility of leaving Germany using a Belgian visa.

(Charron Decl. Ex. 10 (Pl. Trial Ex. 155 at p.6/10).)

The Nazis, however, did not release Fritz. Instead, the Nazis also subsequently arrested Elisabeth and both Grunbaums were killed.

What is next known is that Mathilde Lukacs began corresponding with Kornfeld in the 1950s, and she sold the Collection to Kornfeld between September 1955 and May 1956, as

described above. For purposes of this motion, it can be assumed that the drawings at issue were once owned by Grunbaum (although, as explained in footnote 4, that assumption is not directly provable). Nevertheless, because Lukacs had the drawings after the war, that means the Nazis did not steal them from Grunbaum. That was the critical finding of fact by Judge Pauley and the Second Circuit in *Bakalar*. *Bakalar II*, 819 F. Supp. 2d at 298-99 ("[T]he Drawing remained in the Grunbaum family's possession ***and was never appropriated by the Nazis***…. Lukacs' possession of the Drawing after World War II ***strongly indicates that such a seizure [by the Nazis] never occurred***.") (emphases supplied), *aff'd*, 500 F. App'x at 7.

Judge Pauley's and the Second Circuit's finding was made despite Fischer's and Vavra's contention that the Power of Attorney apparently used by Elisabeth to export the Grunbaums' property had supposedly divested Grunbaum of his ownership (which was a factually and legally incorrect assertion), and had itself constituted an act of theft. *Bakalar II*, 819 F. Supp. 2d at 300-01 (rejecting Plaintiffs' arguments concerning Power of Attorney because there was no evidence that Power of Attorney was ever used to direct Grunbaum's property to a thief (*i.e.*, a Nazi), nor was there any "way of knowing whether the Drawing was in fact transferred pursuant to the power of attorney," and that "[a]ny contrary holding would be pure speculation."), *aff'd*, 500 F. App'x at 7. Plaintiffs continue to allege the same theory in these cases, despite their full and fair opportunity to have litigated the same point in *Bakalar*. (*Carnegie* ECF No. 37 at ¶ 26; *Oberlin* ECF No. 12 at ¶ 34; *Bakalar* ECF No. 201 at ¶¶ 78-80, 90-91, 114 ; *Bakalar* ECF No. 215 at ¶ 237.)

2. Evidence From Fischer's And Vavra's Families Refuted Their Alternative Theory That Mathilde Lukacs Was A Thief

Fischer and Vavra alternatively alleged in *Bakalar* that, if Mathilde Lukacs had Grunbaum's art after the war, then she was a "thief" because Austria's intestacy laws (both Grunbaums died without wills and without children) permitted Lukacs only to a share of

Grunbaum's estate. (*Bakalar* ECF No. 201 at ¶¶ 111-12.) Discovery in *Bakalar* thus also included a thorough examination of the activities and knowledge of Fischer's and Vavra's respective predecessors to determine if they ever believed that Lukacs had been a 'thief.' The record overwhelmingly showed that neither of Plaintiffs' predecessors ever made any such claim, despite their very likely awareness of Lukacs's possession of Grunbaum property after the war.

a. Vavra's Predecessor

Plaintiff Vavra's predecessor was a woman named Elise Zozuli ("Zozuli"), who was Fritz Grunbaum's sister. *Bakalar II*, 819 F. Supp. 2d at 296. Discovery revealed a handwritten letter from Zozuli to Paul Reif, the father of current trustee-plaintiff Timothy Reif, written in 1964, explaining that Zozuli had herself commenced a proceeding in Vienna to claim Fritz's property in 1951, but that once she learned that *Mathilde Lukacs* (identified by Zozuli as the "Brussels sisters [sic]" of Elisabeth Grunbaum) had already made a claim to Fritz's property, Zozuli withdrew her own claim in or about July 1953, and considered the matter "settled." (*Bakalar* ECF No. 247-2 (JPTO Stip. Facts 41- 43); Charron Decl. Exs. 15 (Pl. Trial Ex. 21), 7 (Pl. Trial Ex. 26 at P763); 2 (Pl. Trial Exs. 42, 43, 63-65, 75, 112 at EK00051-52 & P798-99); 3 (Pl. Trial Ex. 62); 16 (Pl. Trial Ex. 141); 17 (Pl. Trial Ex. 146), 9 (7/16/08 Trial Tr. at 505:9-506:20, 513:6-514:2, 7/17/08 Trial Tr. at 532:7-21, 535:5-17, 594:4-12, 600:18-20).)

b. Fischer's Predecessors

Plaintiff Fischer's predecessors were his grandparents, Max and Gisele Herzl, and his parents, Charles and Renee Fischer. *Bakalar II*, 819 F. Supp. 2d at 296-97. (Charron Decl. Ex. 9 (7/17/08 Trial Tr. at 633:15).) Fischer's family had saved the Lukacses, had sponsored Belgian emigration visas for the Lukacses and Grunbaums and the export of their property from Austria, had known that the Grunbaums were Holocaust victims, and had remained "in pretty close contact"

with Mathilde Lukacs after the war and until her death in 1979. (*Id.* at 633:21-24, 644:2-20.) Fischer knew Mathilde and referred to her as "Aunt Tilde." (*Id.* at 648:1-3.) Fischer's grandparents and parents never tried to recover assets from Grunbaum's estate, or from Lukacs. (*Id.* at 630:11-24, 634:19-635:4, 648:4-12, 655:6-16.) Notably, Fischer's parents had inherited a significant art collection from Fischer's paternal grandparents, including works by Chagall, Permeke and Vlaminck, in 1955, which was the same time period that Lukacs was selling the Collection to Kornfeld. (*Id.* at 638:16-639:18, 656:7-11.)

These facts led Judge Pauley and the Second Circuit to find that Plaintiffs' predecessors had awareness of the facts and the ability to bring a claim against Mathilde Lukacs for 'theft' years ago (had they believed in such a theory), and that they had chosen not to pursue such a claim. *Bakalar II*, 819 F. Supp. 2d at 305 ("Zozuli was aware of Grunbaum's art collection and her potential intestate rights to Grunbaum's property … [b]ut there is no indication that she ever attempted to pursue a claim … [n]or did she announce the supposed 'theft' of these pieces …. The Fischers … had ample opportunity to inquire about Fritz Gunbaum's property, yet … neither [Fischer] nor any of his predecessors made any such inquiries or claims."), *aff'd*, 500 F. App'x at 8 (rejecting Plaintiffs' arguments that their predecessors may have lacked knowledge as merely "speculative") (citations omitted).

Plaintiffs' predecessors' inactivity over six decades (from 1945 until 2005, when the *Bakalar* case commenced) caused essential evidence necessary to prove or disprove that Lukacs had been a 'thief' to disappear, including in particular the deaths of all such predecessors and of Lukacs. *See Bakalar III*, 500 F. App'x at 8 ("There can be no serious dispute that the deaths of family members—Lukacs and others of her generation, and the next—have deprived Bakalar of key witnesses.") (citations omitted). Such facts led to the conclusion that Fischer and Vavra were

barred by laches from contesting Lukacs's possession and sale of art to Kornfeld. *Bakalar II*, 819 F.Supp.2d at 304-05 ("[T]his Court finds by a preponderance of the evidence that Defendants' ancestors were aware of – or should have been aware of – their potential intestate rights to Grunbaum property, and Vavra and Fischer are bound by the knowledge of their respective families."), *aff'd*, 500 Fed. Appx. at 8 (citations omitted). The same findings of fact supporting the laches holding in *Bakalar* apply with equal force here.[7]

B. Plaintiffs' Allegations In These Cases Are An Attempt To Relitigate The Record And Their Unsuccessful Arguments In *Bakalar*

These actions have been commenced in disrespect of the substantial litigation in *Bakalar*, and of Judge Pauley's and the Second Circuit's findings of fact in *Bakalar*. Plaintiffs now allege in these cases – as if *Bakalar* never happened – that Bakalar had "promoted the false story that Grünbaum's sister-in-law Mathilde Lukacs had obtained Grünbaum's art collection and sold it to Swiss art dealer Eberhard Kornfeld in 1956." (*Carnegie* ECF No. 37 at ¶¶ 90-91; *Oberlin* ECF No. 12 at ¶¶ 94-95.) Mathilde Lukacs's sale of the Collection to Kornfeld in 1955-56 is not a "false story"; it is a fact, properly adjudicated by Judge Pauley and the Second Circuit that Plaintiffs had every reasonable opportunity in *Bakalar* to try to contest.

[7] The state court in *Reif v. Nagy* found that the loss of Lukacs was not prejudicial because she could not have provided any "probative" information. *Reif v. Nagy*, 175 A.D.3d 107, 131 (1st Dep't 2019). That finding, which is directly at odds with the Second Circuit's finding, makes no sense. *See also Bakalar II*, 819 F. Supp. 2d at 299 ("[T]here is simply no evidence as to how Lukacs acquired the Drawing, nor is there any evidence that might explain why Grunbaum's relatives did not pursue any claims against Lukacs.").

1. To Avoid Collateral Estoppel In *Nagy*, Plaintiffs Misrepresented What Was Actually Litigated In *Bakalar*

Plaintiffs now point to their success in the New York state court case of *Reif v. Nagy* as negating the significance of what was litigated and decided in *Bakalar*. (*E.g.*, *Carnegie* ECF No. 37 at ¶ 127 ("The Appellate Division [in *Nagy*] carefully analyzed overwhelming evidence suggesting that *Mathilde Lukacs never had custody of the art collection*, ….") (emphasis supplied).) *Reif v. Nagy*, 175 A.D.3d 107, 131 (1st Dep't 2019). Plaintiffs' reference to "the art collection" yet again confirms that these cases are about the provenance of the same Collection that was determined in *Bakalar*. Plaintiffs' reliance on *Nagy* to avoid *Bakalar*, however, is misplaced.

To survive a motion to dismiss based upon collateral estoppel in *Nagy*, Plaintiffs' counsel misrepresented to the state court that Judge Pauley had supposedly "circumscribed [Fischer's and Vavra's] discovery," "circumscribed the issues that [Fischer and Vavra] could litigate" in *Bakalar*, and "circumscribed the length and breadth of our questioning of the Swiss art dealer [Kornfeld] **where we were only permitted to ask about that one work [*Torso*]**." (Charron Decl. Ex. 18 (8/4/16 *Nagy* Hrg. Tr., at 15:8-18) (emphasis supplied).) As shown above, those representations, made to make it appear like Plaintiffs had not received a full and fair opportunity from Judge Pauley to litigate the facts in *Bakalar*, and that discovery in *Bakalar* was "only" about *Torso* without any inquiry into the rest of the Collection, were egregiously false.[8]

[8] Judge Pauley was generous to Plaintiffs and permitted them to take wide-ranging discovery about the Collection in *Bakalar*. Judge Pauley likewise permitted Plaintiffs to ask extensive questions about works in the Collection during the bench trial. (Charron Decl. Ex. 9 (7/15/08 Tr. at 294:20-22, 298: 7-25, 301:17-302:2, 304:4-25, 306:22-308:17, 310:1-7, 328:21-330:19).) Plaintiffs twice contended to the Second Circuit in *Bakalar* that Judge Pauley had treated them unfairly in discovery, and both times the Second

After making that critical misrepresentation to the New York state court, Plaintiffs then audaciously imported the *Bakalar* record into the *Nagy* case, supplementing it only with so-called expert evidence that had been excluded by Judge Pauley and the Second Circuit in *Bakalar* following multiple hearings (this point is discussed more fully below). No re-examination of Kornfeld occurred, no new fact documents from archives were discovered, and no trial occurred in *Nagy*.

2. Judge Pauley And The Second Circuit Did Not Deny Plaintiffs Their Right To Offer Expert Evidence In *Bakalar*, As They Now Falsely Allege

Plaintiffs in *Nagy* submitted a putative expert opinion from a professor named Jonathan Petropoulos ("Petropoulos"). Fischer and Vavra had tried to offer Petropoulos's opinion in *Bakalar* as well, but Judge Pauley excluded it, repeatedly. (*Bakalar* ECF Nos. 178, 241-3, 241-4; *Bakalar* ECF No. 226-13 (4/25/08 Hrg. Tr. at 28:4-9); *Bakalar* ECF No. 226-10 (7/11/08 Hrg. Tr. at 13:19-14:2); Charron Decl. Ex. 20 (12/11/08 Hrg. Tr. at 8:4-12:21).) The Second Circuit affirmed Judge Pauley's exclusion of Petropoulos's opinion. *Bakalar III*, 500 F. App'x at 9.

Petropoulos had imagined an alternative scenario that conveniently fit Plaintiffs' theory that Kornfeld did not acquire the Collection from Lukacs, based upon Petropoulos's so-called expert understanding of Nazi "custom[] and practice[]." (*Bakalar* ECF No. 178 (Fischer's & Vavra's Discovery Extension Request) at 1.) Nevertheless, despite offering other expert evidence in *Bakalar* within Judge Pauley's (generously extended) case management schedule, including evidence from their other historian expert, Herbert Gruber, Fischer and Vavra did not timely offer an opinion from Petropoulos. (*See Bakalar* ECF No. 58-2 (Gruber Declaration); *Bakalar* ECF No.

Circuit disagreed and affirmed Judge Pauley's discretion and handling of the case in all respects. *Bakalar I*, 619 F.3d at 147; *Bakalar III*, 500 F. App'x at 9.

179 (Scheduling Order Granting Fischer's & Vavra's Discovery Extension Request); *Bakalar* ECF No. 227 at 3 (pre-motion conference letter).) Judge Pauley rejected Fischer's and Vavra's contention that Petropoulos's untimely (and makeweight) opinion was necessary to avoid undue prejudice to them. (*See Bakalar* ECF No. 200 (Fischer's & Vavra's Mem. in Supp. of Mot. *in Limine*) at 16-18.)[9]

Fischer and Vavra re-raised their contention of prejudice based upon the exclusion of Petropoulos's opinion in the Second Circuit, and the Second Circuit agreed with Judge Pauley that Petropoulos's opinion was properly excluded. *Bakalar II*, 500 F. App'x at 9 ("Citing little authority, Vavra and Fischer argue that the district court should have permitted them to supplement the record with additional expert testimony on remand. They misconstrue this Court's remand instruction that the district court *could* reopen discovery to mean that it was required to do so….") (citations omitted). Accordingly, Plaintiffs had their full and fair opportunity to have offered their opinion from Petropoulos in *Bakalar*.[10]

---

[9] *See, e.g.*, *Sierra v. Nat'l R.R. Passenger Corp.*, No. 19-CV-05726 (CM), 2022 WL 2316855, at *8 (S.D.N.Y. June 28, 2022) (disregarding expert testimony that contradicted factual record); *Fin. Guar. Ins. Co. v. Putnam Advisory Co.*, No. 12 Civ. 7372 (AT), 2020 WL 4251229, at *4 (S.D.N.Y. Feb. 19, 2020) (excluding trial testimony of expert whose opinion contradicted facts in record).

[10] Plaintiffs also allege that they were denied the right to have a handwriting expert analyze Kornfeld's documents. (*Carnegie* ECF No. 37 at ¶ 93; *Oberlin* ECF No. 12 at ¶ 97.) That, too, is untrue. Plaintiffs offered an opinion from a handwriting expert, Christian Farthofer, concerning Kornfeld's documents early in the case (Kornfeld had voluntarily produced copies of his documents even prior to voluntarily accepting a Hague Convention commission for his examination in Switzerland). (*Bakalar* ECF No. 30 at ¶ 30; *Bakalar* ECF No. 30-14; Charron Decl. Ex. 2 (Pl. Trial Ex. 84 at P0048-49, D&M 01671-72).) Plaintiffs

3. Judge Pauley And The Second Circuit Did Not Limit Fact Discovery In *Bakalar* To Be About *Torso* "Only" Following Judge Pauley's Denial Of Plaintiffs' Effort To Certify A Class Of Alleged Grunbaum Art Owners

At the outset of *Bakalar*, Fischer and Vavra had sought to certify a broad class of owners of art allegedly once owned by, and stolen from, Grunbaum. *Bakalar*, 237 F.R.D. at 59. Specifically, Fischer and Vavra sought to certify a class of owners of approximately 450 works of art, by numerous artists, the overwhelming majority of which had nothing to do with Lukacs or Kornfeld. *See id.* at 65. Judge Pauley denied class certification because Fischer and Vavra could not establish the requisite class elements of commonality and typicality. *Id.* at 68. The Second Circuit affirmed that ruling. *Bakalar*, 619 F.3d at 147.

After that class certification denial, Fischer and Vavra embarked upon their broad fact discovery and litigation in *Bakalar* concerning Kornfeld, Lukacs and the Collection. Judge Pauley did not prohibit Fischer and Vavra from asking questions about any other works in the Collection both during discovery and during the trial itself, when Fischer and Vavra conducted a lengthy cross-examination of Schiele expert Jane Kallir about numerous works from the Collection (in an unsuccessful attempt to prove Grunbaum provenance of such works independent of Lukacs's possession and sale of the Collection to Kornfeld). (Charron Decl. Ex. 9 (7/15/08 Trial Tr. at 289:14-341:23, 7/16/08 Trial Tr. at 360:15-433:22).) Plaintiffs' allegations in these cases that Judge Pauley "limited" discovery in *Bakalar* after the class certification denial to be about *Torso*

---

then obtained further permission from Judge Pauley to have their handwriting expert (Farthofer) accompany Plaintiffs' counsel to the deposition of Kornfeld in Switzerland to further examine his documents (yet again belying Plaintiffs' contention that Judge Pauley had "circumscribed" their discovery with respect to Kornfeld). (*Bakalar* ECF No. 177 (Order appointing Farthofer as additional Commissioner for Kornfeld's deposition).)

only is conclusively refuted by the judicially noticeable record. (*See Carnegie* ECF No. 37 at ¶ 96; *Oberlin* ECF No. 12 at ¶ 98.)

C. In Connection With Plaintiffs' Effort To Certify A Class In *Bakalar*, Plaintiffs Made Demands Upon Oberlin And Carnegie, Which Were Refused, Rendering Plaintiffs' Claims Against Them In These Cases Time-Barred

In promotion of their unsuccessful effort to certify a class, Fischer and Vavra served demand letters on a number of putative class members in 2006, demanding the turnover of art that they claimed had been looted from Grunbaum by Nazis. Oberlin and Carnegie both received such demand letters.

1. Plaintiffs' Prior Demand To Oberlin Was Refused

On January 24, 2006, Fischer and Vavra (through the same counsel representing Plaintiffs herein) sent a demand letter to Oberlin "to formally demand the return of art works owned by Grunbaum" and "demand the return of the artworks held at your institution," which was further identified in a chart submitted in the *Bakalar* case to include the Schiele drawing owned by Oberlin, *Girl with the Black Hair* (1911). (Declaration of Matthew Lahey dated June 7, 2023 ("Lahey Decl.") at ¶ 2, Ex. A.) The demand letter additionally stated: "If you fail to notify us of your intention to return the works, it is our intention to assert claims against your institution for the return of the works in an amended pleading [in *Bakalar*] …." (Lahey Decl. Ex. A.)

Oberlin did not accede to Fischer's and Vavra's demand and did not surrender its Schiele drawing to them. Accordingly, on February 6, 2006, Fischer and Vavra amended their pleading in *Bakalar* and named Oberlin as an additional counterclaim-defendant and putative class representative. (*Bakalar* ECF No. 35.) Fischer and Vavra alleged that they had "demanded the return of the Grunbaum artworks [sic] held by Oberlin College. Oberlin has refused to return the works or ignored such demand." (*Id.* at ¶ 296.) Following the denial of Fischer's and Vavra's

motion for class certification in 2006, they made an additional, correspondence-based demand upon Oberlin in or about early 2009, which was likewise refused. (Lahey Decl. at ¶ 3; Ex. B.)[11]

Fischer and Vavra did not re-assert a claim against Oberlin until bringing this action concerning the same Schiele work in December 2022, over 16 years after their initial demand had been refused.

2. Plaintiffs' Prior Demand To Carnegie Was Refused

On January 24, 2006, Fischer and Vavra sent the same form demand letter described above to Carnegie in connection with its ownership of a Schiele drawing known as *Portrait of a Man* (1917). (Declaration of Maria Bernier dated June 8, 2023 ("Bernier Decl.") at ¶ 2, Ex. A.) Carnegie likewise did not accede to Fischer's and Vavra's demand by their stated deadline. Accordingly, on February 6, 2006, Fischer and Vavra identified Carnegie as a putative counterclaim-defendant class member as well. (*Bakalar* ECF Nos. 47-5, 48 at ¶ 44.) Following the denial of their class certification motion in 2006, Fischer and Vavra did not pursue a claim against Carnegie until they commenced this case concerning the same work over 16 years later.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL

Plaintiffs undeniably seek to relitigate issues of fact that were resolved in *Bakalar*. The fact that Plaintiffs seek to litigate these cases at the same time about works emanating *from the same Collection* as *Torso* proves that these cases, just like *Bakalar*, are about the provenance of that Collection. The key facts in these cases are identical to the facts that were fully and fairly

[11] Acknowledging Oberlin's ongoing refusal, Plaintiffs' counsel responded provocatively and entirely unreasonably and without basis: "The fact that Oberlin's Holocaust scholars have told us 'to go to hell' is really beyond the pale." (Lahey Decl. Ex. B.)

resolved in *Bakalar*. Plaintiffs' claims in these cases should be dismissed under the doctrine of collateral estoppel.

A. Federal Collateral Estoppel Law May Apply

In diversity cases such as these, federal courts generally apply the issue or claim preclusion rules of the forum state unless those rules are materially the same as federal law, in which case federal preclusion rules may apply. *E.g.*, *Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co.*, 585 F. Supp. 3d 540, 560 n.12 (S.D.N.Y. 2022) ("Cases applying collateral estoppel under federal common law are relevant here because 'there is no material difference between federal and New York State preclusion principles'"), *aff'd sub nom., Phoenix Light SF Ltd. v. Deutsche Bank of N.Y. Mellon*, 66 F.4th 365 (2d Cir. 2023) (quotation omitted); *Rafter v. Liddle*, 704 F. Supp. 2d 370, 374-75 (S.D.N.Y. 2010); *Algonquin Power Income Fund v. Christine Falls of N.Y., Inc.*, 362 F. App'x 151, 154 (2d Cir. 2010) (summary order).

New York and federal issue preclusion (*i.e.*, collateral estoppel) rules are materially the same. *E.g.*, *id.*; *Bouchard Transp. Co. v. Long Island Lighting Co.*, 807 F. App'x 40, 44 n.2 (2d Cir. 2020) (finding that "New York's doctrine of collateral estoppel … is nearly identical to the federal standard.") (citation omitted) (summary order). Accordingly, this Court may apply federal collateral estoppel law. Under either federal or New York law, however, the result should be the same.

B. The Issues In These Cases Are Identical To The Issues Litigated In *Bakalar*

"Collateral estoppel, or issue preclusion, prevents parties or their privies from relitigating in a subsequent action an issue of fact or law that was fully and fairly litigated in a prior proceeding." *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, 689 F.3d 263, 284 (2d Cir. 2012) (quoting *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288 (2d Cir. 2002)); *accord Long Island Lighting Co. v.*

Imo Indus. Inc., 6 F.3d 876, 885 (2d Cir. 1993). ("The requirements for collateral estoppel under New York law are that [1] the issue be identical and necessarily decided in the prior proceeding, and [2] that the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue in the prior proceeding.") (citations omitted).

It is indisputable that the parties are identical: Milos Vavra and Leon Fischer previously litigated the *Bakalar* case; Milos Vavra and the Leon Fischer Trust are currently litigating these cases.

Moreover, as discussed above, Plaintiffs are re-raising *all* of the identical facts in these cases that they previously raised, litigated and were necessarily decided in *Bakalar*. No new fact evidence has been unearthed. No motion for a new trial was ever brought before Judge Pauley. The only differences between these cases and *Bakalar* are that these cases involve different Schiele drawings than the Schiele drawing at issue in *Bakalar*.

Nevertheless, it is undisputed that all of the Schiele drawings at issue in these cases and in *Bakalar* were sold by Kornfeld. The critical fact issue raised by Plaintiffs in these cases, therefore, is *identical* to the fact issue they raised and litigated in *Bakalar*: namely, how did Kornfeld acquire these Schiele drawings? Judge Pauley and the Second Circuit, upon thorough discovery, a complete record and bench trial, necessarily answered that question: Kornfeld acquired the *Torso* drawing at issue in *Bakalar*, and each of the drawings now at issue in these cases, as part of the 53-Schiele work Collection that he purchased from Mathilde Lukacs in the mid-1950s. *Bakalar I*, 2008 WL 4067335, at *2; *Bakalar II*, 819 F. Supp. 2d at 295, *aff'd*, 500 F. App'x at 7-8. Because Kornfeld purchased the Collection from Lukacs, the Nazis did not steal or liquidate the Collection. *Id.*

1. The Issue Of Whether Kornfeld Was A Thief Was Fully And Fairly Litigated And Necessarily Resolved In *Bakalar*

Kornfeld's documents and testimony concerning his acquisition of the Collection from Lukacs was "credited" as genuine and truthful in *Bakalar*. *Id.* Plaintiffs plead no basis to relitigate that same fact issue again (and again, and again, …) for each of the 53 works from the Collection. Courts routinely hold that collateral estoppel bars the relitigation of facts when a prior litigation concerned an object in the same collection at issue in a later action. *See, e.g.*, *Lefkowitz v. McGraw-Hill Glob. Educ. Holdings, LLC*, 23 F. Supp. 3d 344, 360-63 (S.D.N.Y. 2014) (applying collateral estoppel to bar relitigation of same issues involving different photographs); *Poindexter v. Cash Money Recs.*, No. 13 Civ. 1155 (RWS), 2014 WL 818955, at * 4 (S.D.N.Y. Mar. 3, 2014) (applying collateral estoppel to bar relitigation of same issues involving different master recordings); *Galin v. United States*, No. 08-cv-2508 (JFB)(ETB), 2008 WL 5378387, at *7 (E.D.N.Y. Dec. 23, 2008) (applying collateral estoppel to bar relitigation of same issues involving different parcels of property); *Baker v. Firstcom Music*, No. LA 16-cv-08931 VAP (JPRx), 2018 WL 3617884, at *1 (C.D. Cal. Apr. 6, 2018) (applying collateral estoppel to bar relitigation of same issues involving different songs on same album). Plaintiffs plead no basis to relitigate in these cases how Kornfeld acquired the Collection.

a. The *Nagy* Decision Is Not Preclusive

Plaintiffs rely in their pleadings on the state court action of *Nagy*. (*E.g., Carnegie* ECF No. 37 at ¶¶ 119-137; *Oberlin* ECF No. 37 at ¶¶ 124-142.) Plaintiffs may not rely on *Nagy* as preclusive, however, because that court held collateral estoppel should *not* apply with respect to the various works in the Collection, finding that the 53 works in the Collection are "not part of a collection unified in legal interest such to impute the status of one to another." *Reif v. Nagy*, 149 A.D.3d 532, 533 (1st Dep't 2017). The *Nagy* court found: "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 …. Neither of those requirements has been shown here where the purchaser, the pieces, and the time over which the pieces were held differ significantly." *Id.*

Accordingly, under *Nagy*, this Court should have to re-determine the relevant facts with respect to Carnegie's and Oberlin's drawings (as the *Nagy* court did with respect to the two drawings from the Collection that Mr. Nagy had acquired).

b. The Findings Of Fact In *Bakalar* Should Be Preclusive

In finding that collateral estoppel does not apply to the Collection, the court in *Nagy* erroneously focused on the different circumstances of how Mr. Bakalar and Mr. Nagy acquired their respective Schiele drawings after the war, and on the fact that the drawings themselves are different. *Nagy*, 149 A.D.3d at 533. Nevertheless, the differences between the drawings do not matter. *See, e.g.*, *Poindexter*, 2014 WL 818955, at *4. Nor is the material issue how each defendant subsequently came to acquire its respective drawing from the Collection. *See id.*

The material issue is whether *Kornfeld* had acquired all of the drawings in the first place from Lukacs, as he claimed, or from Nazis. The question of whether a theft occurred turns on the knowledge and activities of the alleged thief, not on the knowledge and activities of later purchasers further down the chain of title. *See, e.g.*, *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 465-67 (S.D.N.Y. 2009) (explaining that German law governed question of whether art was looted by Nazis, and either Swiss or New York law governed "separate issue" of whether later possessors of the art should have to surrender it); *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-18 (1991) (explaining difference under New York law for applying statute of

limitations and burden of proof with respect to thief or bad faith acquiror of allegedly stolen art, and later good faith possessor of allegedly stolen art).[12]

Because this Court is not bound by *Nagy*, it may re-examine the relevant issues for itself. Because this Court also may take judicial notice of the record in *Bakalar* and how the *Bakalar* courts resolved the identical issues of fact presented by Plaintiffs once again here, this Court may find that *Bakalar* precludes Plaintiffs' attempted re-litigation. There would be no justification to go through the same discovery as occurred in *Bakalar* (particularly where Kornfeld is now deceased).

c. Plaintiffs Plead No Plausible Basis For The Court To Disregard The Findings In *Bakalar*

Critically, Kornfeld's testimony and evidence in *Bakalar* as to how he acquired *Torso* was not *limited* to *Torso*. His account covered the entire Collection, including the drawings now at issue. Judge Pauley and the Second Circuit credited Kornfeld's account as a true and resolved finding of fact. *Bakalar I*, 2008 WL 4067335, at *7 ("Because Lukacs possessed the [*Torso*] Drawing *and the other Schiele works she sold to Kornfeld* in 1956, Kornfeld was entitled to presume that she owned them.") (emphasis supplied). There is no need or justification for this Court to reconsider the exact same evidence.

[12] In its later laches ruling, the *Nagy* court expressed its disapproval of Mr. Nagy's acquisition of his two Schiele drawings after the *Bakalar* case had been decided, which the state court found should have put Mr. Nagy on notice of Plaintiffs' claims that works from the Collection had been stolen (notwithstanding the finality of the *Bakalar* decisions that such theft had *not* occurred). *Nagy*, 175 A.D.3d at 130-31. Regardless of the *Nagy* court's questionable reasoning, Carnegie and Oberlin, like Mr. Bakalar, acquired its respective Schiele drawings decades ago (in the late 1950s and 1960s), when Lukacs was still alive and long before Plaintiffs' claims had surfaced. (*See* Carnegie Complaint at ¶ 87; Oberlin Complaint at ¶ 148.)

Although courts may examine the merits of a decision that is the basis for collateral estoppel when "circumstances … so undermine confidence in the validity of [the] original determination as to render application of the doctrine impermissibly 'unfair'", *S.E.C. v. Monarch Funding Corp.*, 192 F.3d 295, 304 (2d Cir. 1999), Plaintiffs do not plausibly plead any such circumstances here. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that, to survive dismissal under Rule 12(b)(6), a plaintiff must allege sufficient facts "to state a claim to relief that is plausible on its face."); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (same).

There is no plausible basis for this Court to infer that Judge Pauley and a unanimous panel of the Second Circuit fundamentally mishandled the record in *Bakalar* such that it is unsuitable for collateral estoppel application on this Rule 12(b)(6) motion. *See, e.g.*, *Houck v. U.S. Bank N.A.*, No. 15-cv-10042 (AJN), 2016 WL 5720783, at *3-4 (S.D.N.Y. Sept. 30, 2016), *aff'd sub nom.*, *Houck v. U.S. Bank, N.A. for Citigroup Mortg. Loan Tr. 2007-AR5*, 689 F. App'x 662 (2d Cir. 2017) ("On a motion to dismiss, '[i]n addition to the allegations in the complaint itself, a court may consider documents attached as exhibits, incorporated by reference, or relied upon by the plaintiff in bringing suit, as well as any judicially noticeable matters.'… Courts are permitted to take judicial notice of [] court documents, even on a motion to dismiss…. *This is especially true when a court is tasked with deciding the preclusive effect of the prior proceedings*.") (citations omitted) (emphasis supplied); *BRS Assocs., L.P. v. Dansker*, 246 B.R. 755, 765 (S.D.N.Y. 2000) (same); *Free Holdings Inc. v. McCoy*, No. 1:22-cv-00881-JLC, 2023 WL 2561576, at *9 (S.D.N.Y. Mar. 17, 2023) ("A court need not convert a motion to dismiss for failure to state a claim to one for summary judgment merely because it has considered extrinsic evidence for purposes of resolving a motion to dismiss ….") (citations omitted).

Nor is there any basis to find that Judge Pauley and the Second Circuit denied Plaintiffs some fundamental right that prevented them from "litigat[ing] the relevant issue vigorously in the original action …." *Monarch Funding*, 192 F.3d at 304 (citation omitted). As this Court can see for itself, Plaintiffs litigated the issues extremely vigorously in *Bakalar* for over eight years, through every level of the federal court system. Plaintiffs indisputably had a "full and fair opportunity" to litigate these identical issues in *Bakalar*. *See also Conte v. Justice*, 996 F.2d 1398, 1401 (2d Cir. 1993) ("Under New York law, an inquiry into whether a party had a full and fair opportunity to litigate a prior determination must concentrate on 'the various elements which make up the realities of litigation.' Factors listed by the New York Court of Appeals to assist in this inquiry include the forum for the prior litigation, the competence and experience of counsel, the foreseeability of future litigation, and the context and circumstances surrounding the prior litigation that may have deterred the party from fully litigating the matter.") (citations omitted); *Levich v. Liberty Cent. Sch. Dist.*, 361 F. Supp. 2d 151, 159 (S.D.N.Y. 2004) ("[Plaintiff] was obviously satisfied with his counsel's expertise and performance during the [prior proceeding] as he chose the same individual to represent him in this action…. This is exactly the type of scenario that the doctrine of collateral estoppel was designed to prevent: the proverbial second bite at the apple.").

Accordingly, collateral estoppel should bar Plaintiffs' relitigation in these cases of the question of whether Kornfeld stole or fenced the Collection for Nazis, or whether he acquired the Collection (inclusive of each of the drawings now at issue) from Mathilde Lukacs. The result in *Nagy* applies only to those two drawings (as that court found). *Nagy* is thus no bar to this Court giving preclusive effect to the findings by Judge Pauley and the Second Circuit in *Bakalar*. It would be contrived *not* to do so.

2. The Issue Of Whether Lukacs Was A Thief Was Fully And Fairly Litigated And Resolved In *Bakalar*

Collateral estoppel should also bar Plaintiffs from relitigating the fact issues appurtenant and necessary to a laches ruling.

Laches requires showings of: (i) unreasonable delay by plaintiffs or their predecessors in interest, including their family members, in bringing claims; and (ii) resulting undue prejudice to the current possessors due to the loss of evidence necessary to defend their good title. *E.g.*, *Bakalar II*, 819 F. Supp. 2d at 303, *aff'd*, 500 F. App'x at 8; *Republic of Turkey v. Christie's Inc.*, 62 F.4th 64, 73 (2d Cir. 2023) (reconfirming *Bakalar* and applying laches in case involving allegedly stolen artifact); *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 194-97 (2d Cir. 2019) (dismissing case involving allegedly stolen painting at pleadings stage on basis of laches).

Judge Pauley and the Second Circuit found both conditions to exist in *Bakalar*. Vavra's and Fischer's respective predecessors were both found to have been aware of Lukacs's possession of Grunbaum's property and to have decided not to make any claims against Lukacs. *Bakalar II*, 819 F. Supp. 2d at 305, 307 ("[U]ltimately, both Vavra's and Fischer's ancestors were aware of their relationship to the Grunbaums and their eventual deaths in concentration camps. Given this knowledge, … Defendants' ancestors were aware of – or should have been aware of – their potential intestate rights to Grunbaum property, and Vavra and Fischer are bound by the knowledge of their respective families."), *aff'd*, 500 F. App'x at 8. There is no basis to relitigate those identical facts in these cases.

Judge Pauley and the Second Circuit also found that Plaintiffs' delay in bringing a cause of action resulted in undue prejudice to Bakalar, as the current possessor of one of the drawings from the Collection, because the key witnesses necessary for Bakalar to prove that Lukacs had not been a thief had all passed away – including in particular, and most obviously, Lukacs. As the

Second Circuit aptly explained: "There can be no serious dispute that the deaths of family members – Lukacs and others of her generation, and the next – have deprived Bakalar of key witnesses." *Bakalar III*, 500 F. App'x at 8 (citations omitted). That same finding necessarily applies with respect to every current possessor of a Schiele work from the Collection.

II. PLAINTIFFS' CLAIMS ARE BARRED BY LACHES AS A MATTER OF LAW

Even without application of collateral estoppel, this Court should dismiss Plaintiffs' claims as barred by laches as a matter of law. *E.g.*, *Zuckerman*, 928 F.3d at 193 (affirming dismissal under Rule 12(b)(6) on the basis of laches and explaining that "laches may be decided 'as a matter of law' when 'the original owner's lack of due diligence and prejudice to the party currently in possession are apparent.'") (citation omitted).

A. Plaintiffs Unduly Delayed

In view of the facts established in *Bakalar*, of which this Court may take judicial notice, Plaintiffs allege no plausible reason for the Court to infer that they and their predecessors did not unduly delay in bringing these claims against Carnegie and Oberlin. *See Zuckerman*, 928 F.3d at 190 (at Rule 12(b)(6) stage, court may consider allegations in complaint as well as "matters of which judicial notice may be taken.") (citation omitted); *see also Bakalar II*, 819 F. Supp. 2d at 305 (finding that Vavra's predecessor, Zozuli, "was aware of Grunbaum's art collection and her potential intestate rights to Grunbaum's property, … [b]ut there is no indication that she ever attempted to pursue a claim to Grunbaum's art collection. Nor did she announce the supposed 'theft' of these pieces or write to museums or galleries regarding their whereabouts"; and further finding that Fischer's predecessors, his grandparents and parents, were "intimately involved in [the] family's plight during the Holocaust" and "remained in close contact with Lukacs for years afterwards," yet never pursued any claims or declared a supposed theft to have occurred); *Sanchez*

v. Trs. of the Univ. of Pa., No. 04 Civ. 1253 (JSR), 2005 WL 94847, at *1-3 (S.D.N.Y. Jan. 18, 2004) (applying laches and finding 80-year delay to recover Collection unreasonable when "Plaintiffs [ ] offered no evidence that their grandfather, from whom the collection was allegedly stolen, undertook any search or made any effort whatever to recover the Collection."); *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, 300 A.D.2d 117, 118-19 (1st Dep't 2002) (applying laches based upon "family's lack of due diligence . . ."); *Matter of Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 38 (1st Dep't 2006) (applying laches and finding 70-year delay to recover painting unreasonable).

Plaintiffs aggravated that delay by waiting another 16 years after first making formal demands upon Carnegie and Oberlin (in 2006) before commencing these claims. (*See* Lahey Decl. at ¶ 4; Bernier Decl. at ¶ 3.)

B. Defendants Are Unfairly Prejudiced

Plaintiffs also fail to allege any plausible basis to infer that Defendants are not unfairly prejudiced by Plaintiffs' undue delay. As Judge Pauley and the Second Circuit found in *Bakalar*, the critical witnesses here were Plaintiffs' ancestors and, most importantly, Lukacs, all of whom are deceased. Only they could have explained when, how and why Lukacs came to possess each of the works in the Collection (as Judge Pauley found, the specific circumstances of her acquisitions of each work could have been quite different). *See Bakalar II*, 819 F. Supp. 2d at 300 (finding that Lukacs may have come to acquire works in the Collection "*before*" the war).

The absence of these witnesses due to the passage of time indisputably prejudices Defendants unfairly. *See also Republic of Turkey*, 62 F.4th at 73 ("Although Turkey was guilty of an unreasonable delay, that delay must have prejudiced Defendants for laches to apply…. The deaths of the Martins and Klejman deprived Defendants of key witnesses, forming just such an

inequity. Indeed, if Defendants had been held to their burden of proving that the Stargazer was not stolen, *they could not have produced a witness testifying as to where, when, and how Klejman came into possession of the Stargazer* – testimony potentially absolving Defendants from liability. That this testimony remains unknown demonstrates why Turkey's delay was prejudicial.") (citations omitted) (emphasis supplied); *Zuckerman*, 928 F.3d at 194-95 ("Assuming *arguendo* that Plaintiff's central claim that the Sale is void because it was made under third-party duress is cognizable under New York law, resolution of that claim would be factually intensive and dependent on, among other things, the knowledge and intent of the relevant parties…. No witnesses remain who could testify on behalf of the Met that the Sale was voluntary, or indeed on behalf of the Plaintiff that the Painting was sold 'involuntar[ily],' ….") (citations omitted).[13]

[13] Plaintiffs advised during the pre-motion conference their reliance on *Matter of Flamenbaum*, 22 N.Y.3d 962 (2013). That reliance is misplaced. The Court in *Flamenbaum* found that laches could not bar a German museum's claim to a stolen artifact, despite the museum's failure to have acted sooner, because the museum's delay did not cause prejudice. *Id.* at 965-66. In particular, the evidence was conclusive that the artifact had, in fact, been stolen from the museum during World War II. *Id.* at 966. Because of that fact, the court explained that it could "perceive of no scenario whereby the [present owner] could have shown that he held title to this antiquity." *Id.* *Flamenbaum* simply reiterates the long-standing rule that, if the passage of time does not result in the loss of critical witnesses and evidence, and if the evidence is conclusive that there is a thief in the chain of title, then a good faith present owner of the stolen property must return it. *E.g.*, *Bakalar*, 619 F.3d at 140-41. But here it is hardly conclusive that any thefts of works in the Collection occurred. As Judge Pauley and the Second Circuit very reasonably found, Lukacs's possession of the Collection after the war *disproves* Nazi theft. Furthermore, Lukacs's possession of the Collection hardly indicates that she 'stole' them, or that other family members surrendered works to her involuntarily or under duress. *See Matter of Levy*, 69 A.D.3d 630, 632 (2d Dep't 2010) (finding ratification

III. PLAINTIFFS' CLAIMS ARE TIME-BARRED

As stated above, Carnegie and Oberlin respectfully fully incorporate by reference the motion to dismiss by AIC. For the reasons discussed therein, and upon the same points and authorities, Plaintiffs' claims against Carnegie and Oberlin are time-barred.

The record is conclusive that Plaintiffs made demands upon Carnegie and Oberlin for the return of the works now at issue, and that those demands were refused, more than 16 years ago. *See Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 483-84 (S.D.N.Y. 2010) ("[R]efusal [of a demand] need not be conveyed in words at all. Rather … [i]f either the [demand] recipient's words or actions evidences 'an intent to interfere with the demander's possession or use of his property … then the demand has been refused and the cause of action accrues, even if the words 'I refuse your demand' were not explicitly used."), *aff'd*, 403 F. App'x 575 (2d Cir. 2010) (citations omitted).

Plaintiffs acknowledged that their prior demands upon Carnegie and Oberlin were refused when they sought to add both Defendants to the putative counterclaim-defendant class they sought to certify in *Bakalar*, arguing to the Court at the time that both Defendants should have been made parties in that case because they had refused Plaintiffs' demands for replevin. (*Bakalar* ECF No. 47-5 at ¶¶ 44, 30, 31; *Bakalar* No. 47-4 at ¶¶ 342-348; *Bakalar* ECF No.111.)

---

or acquiescence to distribution of artwork in family estate following private meeting between heirs). The only way to have known what happened would have been to have Plaintiffs' ancestors and Lukacs testify. That can no longer occur. As numerous courts since *Flamenbaum* have held, where, as here, the passage of time *does* result in the loss of critical witnesses, then laches applies. *E.g.*, *Republic of Turkey*, 62 F.4th at 73; *Zuckerman*, 928 F.3d at 194-95.

Accordingly, as explained by AIC in its accompanying motion to dismiss, under both New York statute of limitations and the HEAR Act (to the extent the HEAR Act were applicable), Plaintiffs' claims against Carnegie and Oberlin are untimely and should be dismissed. Plaintiffs sued well in excess of three years following Carnegie's and Oberlin's refusals in 2006 of Plaintiffs' prior demands, and therefore the claims against Carnegie and Oberlin are time-barred under New York law. (Bernier Decl. at ¶¶ 2-3, Ex. A; Lahey Decl. at ¶ 2, Ex. A.) *See, e.g.*, *Wallace Wood Props. v. Wood*, 117 F. Supp. 3d 493, 497 (S.D.N.Y. 2015) ("The statutory period of limitations for conversion and replevin claims is three years from the date of accrual"), *aff'd*, 669 F. App'x 33 (2d Cir. 2016) (citation omitted); *Grosz*, 772 F. Supp. 2d at 481, *aff'd*, 403 F. App'x at 577 (same).

Nor does the HEAR Act revive Plaintiffs' untimely claims where: (a) as it has already been resolved in *Bakalar*, no Nazi theft of the Collection occurred, and thus the HEAR Act is inapplicable; (b) the record is conclusive that Plaintiffs had actual knowledge of their claims against Carnegie and Oberlin in 2006, with opportunities to assert them in a timely manner, but they chose not to do so (Bernier Decl. at ¶¶ 2-3; Lahey Decl. at ¶¶ 2-4); and (c) application of the HEAR Act at this point to deprive Carnegie and Oberlin of their vested title in their respective drawings would cause an unconstitutional taking, as explained in AIC's accompanying motion to dismiss brief. (*See also* Bernier Decl. at ¶¶ 2-4; Lahey Decl. at ¶¶ 2-5.)

CONCLUSION

For the foregoing reasons, and the reasons also stated in AIC's accompanying motion to dismiss papers, which are fully incorporated herein by reference, Carnegie and Oberlin respectfully request that the Court dismiss all of Plaintiffs' claims against them with prejudice (including all claims in Plaintiffs' Third Amended Complaint against Carnegie, and all claims in

Plaintiffs' First Amended Complaint against Oberlin), and that the Court award Carnegie and Oberlin such other and further relief as deemed just and proper.

Dated: New York, New York
June 8, 2023

PRYOR CASHMAN LLP

By: _____

William L. Charron
wcharron@pryorcashman.com
Paul Cossu
pcossu@pryorcashman.com
Katherine Lihn
klihn@pryorcashman.com
Helen Hunter
hhunter@pryorcashman.com
7 Times Square
New York, New York 10036
(212) 421-4100

Attorneys for Defendants Carnegie Institute d/b/a Carnegie Museums of Pittsburgh and Oberlin College d/b/a Allen Memorial Art Museum

Word Length Certification

I hereby certify that this memorandum contains 11,133 words (excluding the cover page, certification of compliance, table of contents, and table of authorities), and further certify that this memorandum complies with all formatting rules under Judge Koeltl's Individual Rule II.D.

Dated: June 8, 2023