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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR JOINT MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES & RULES

LEGISLATION

Defendants Carnegie and Oberlin respectfully submit this reply memorandum of law in further support of their joint motion to dismiss on the bases of collateral estoppel and laches. Carnegie and Oberlin also fully incorporate the reply arguments made by defendant AIC in its related action: (i) supporting dismissal on the basis of statute of limitations; (ii) concerning the treatment of these motions to dismiss under Rule 12(b)(6), not Rule 12(d); and (iii) concerning the impropriety of Plaintiffs' cross-motion for summary judgment.

PRELIMINARY STATEMENT

Plaintiffs' opposition to Carnegie/Oberlin's motion to dismiss on the bases of collateral estoppel and laches proceeds from numerous misrepresentations of fact, procedural history, and law. Plaintiffs' misrepresentations, which are readily revealed, should not save their pleadings.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL

There is no justification to allow Plaintiffs to relitigate the question of whether Kornfeld acquired the Collection – which includes the drawings now at issue – from Lukacs or from Nazis. That question was resolved against Plaintiffs in *Bakalar* based upon careful review of Kornfeld's evidence and testimony by Judge Pauley during a full bench trial.[1]

Nor need this Court follow *Nagy's* opinion that each of the 53 works in the Collection should be subject to re-examinations through duplicative lawsuits based upon each work and each current owner because the works in the Collection supposedly are not otherwise "unified in legal interest." *Reif v. Nagy*, 149 A.D.3d 532, 533 (1st Dep't 2017). The problematic rationale of *Nagy*,

[1] Plaintiffs do not contest that this Court may apply federal collateral estoppel rules on this motion. (*Carnegie* ECF No. 47 at 22.)

which enabled that court to reexamine what Judge Pauley and the Second Circuit did in *Bakalar*, also frees this Court from the confines of that decision.

Plaintiffs do not contest that the key issue in these cases is whether Kornfeld acquired the Collection from Lukacs or from Nazis. That same issue was resolved against Plaintiffs in *Bakalar*. Plaintiffs have always conceded that, if Kornfeld acquired the Collection from Lukacs, then Nazis could not have stolen the Collection. *Bakalar v. Vavra*, 237 F.R.D. 59, 66 (S.D.N.Y. 2006) ("[T]he Heirs concede that Lukacs could not have retrieved artwork from the Nazis."). (*Accord Bakalar* ECF No. 201 at ¶¶ 106, 286.)

Accordingly, Plaintiffs' claims should be dismissed pursuant to collateral estoppel. Plaintiffs' opposition arguments are an assortment of misrepresentations.

A. Plaintiffs Misrepresent The Second Circuit's Ruling In *Bakalar* That No Nazi Theft Occurred

Plaintiffs repeatedly assert that the Second Circuit in *Bakalar* did not "actually" or "necessarily" decide the question of whether Nazi looting of *Torso* occurred. (*Carnegie* ECF No. 52 at 2, 4, 8, 42-43, 52-54.) That is false.

The Second Circuit *expressly* affirmed Judge Pauley's finding "that the [*Torso*] Drawing was not looted by the Nazis." *Bakalar v. Vavra*, 500 F. App'x 6, 7-8 (2d Cir. 2012) ("*Bakalar III*"). Judge Pauley made that finding as part of his finding that Kornfeld acquired *Torso* from Lukacs along with the *entire Collection*. *Bakalar v. Vavra*, No. 05-cv-3037 (WHP), 2008 WL 4067335, at *2, 7 (S.D.N.Y. Sept. 2, 2008) ("*Bakalar I*"), *vacated in part*, 619 F.3d 136 (2d Cir. 2010); *accord Bakalar v. Vavra*, 819 F. Supp. 2d 293, 295 (S.D.N.Y. 2011) ("*Bakalar II*"), *aff'd*, 500 F. App'x at 7-8.

Judge Pauley concluded that, "[b]ecause Lukacs possessed the [*Torso*] Drawing *and the other Schiele works she sold to Kornfeld*" (including the drawings now at issue), Bakalar met his

burden of proving that such art "remained in the Grunbaum family's possession *and was never appropriated by the Nazis*." *Bakalar I*, 2008 WL 4067335, at *7 (emphasis supplied); *Bakalar II*, 819 F. Supp. 2d at 298 (emphasis supplied). That finding was not dicta; it was necessary to the case's outcome and the determination of whether *Torso* was sold to Kornfeld by Lukacs as part of the Collection, or laundered through Kornfeld by Nazis.

Judge Pauley made his finding that no Nazi theft occurred notwithstanding Plaintiffs' arguments concerning the Power of Attorney, which Plaintiffs seek to re-litigate here (discussed further below). *Bakalar II*, 819 F. Supp. 2d at 300-01. The Second Circuit heard the same arguments from Plaintiffs and found that they did not "come close to showing that the district court's finding [of no Nazi theft] was clearly erroneous." *Id.* That language was not dicta, either. Plaintiffs' assertion that the Second Circuit did not actually and necessarily decide and reject their assertion of Nazi theft in *Bakalar* is misguided.

1. Plaintiffs Conflate Different Portions Of The Second Circuit's Decision

Plaintiffs conflate the Second Circuit's affirmance of Judge Pauley's ruling that no *Nazi* theft occurred, with the Second Circuit's affirmance of Judge Pauley's distinct laches ruling with regard to Plaintiffs' alternative theory that *Lukacs* was a 'thief.' The Second Circuit stated:

> *After finding that the Drawing was not stolen by the Nazis*, the district court extended its Lubell analysis by requiring Bakalar to show that Lukacs acquired proper title in the Drawing [relative to Grunbaum's other heirs], and found that he could not.

Bakalar III, 500 F. App'x at 8 (emphasis supplied). In language upon which Plaintiffs now misleadingly over-rely, the Second Circuit also stated:

> We do not decide whether Bakalar discharged his burden under Lubell by tracing the provenance back to Lukacs, who was a close relative of Grunbaum …. 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.

Id. This language affirmed Judge Pauley's rejection of Plaintiffs' alternative theory of duress that focused on Lukacs, not on Nazis (the language suggests the Second Circuit would have agreed that Bakalar also met his burden of *disproving* theft by Lukacs, but the Court affirmed regardless on the basis of laches).

Accordingly, Plaintiffs are incorrect that the identical issues of fact they seek to relitigate were not previously resolved against them in *Bakalar*.[2]

2. Plaintiffs Misrepresent The Operation Of The Power Of Attorney

Plaintiffs re-assert here, as they did in *Bakalar*, that the Power of Attorney was used by Elisabeth Grunbaum to "assist the Nazis in liquidating [her husband's] property, including his life insurance policies." (*Carnegie* ECF No. 52 at 3.) That is false. This same assertion was rejected by Judge Pauley and the Second Circuit in *Bakalar*, for very good reasons. *Bakalar II*, 819 F. Supp. 2d at 300-01, *aff'd*, 500 F. App'x at 9; *see also In re Kassover*, 257 F. App'x 339, 340 (2d Cir. 2007) ("His brief expressly argued this point. It was undoubtedly one of his 'remaining claims.' We found the 'remaining claims' to be without merit. We conclude that the [prior Second Circuit] decision rejected on the merits [the relitigated argument].").

First, the evidence was overwhelming that Nazis did not "liquidate" the Collection given Lukacs's possession of the Collection after the war. *Bakalar II*, 819 F. Supp. 2d at 298-99, *aff'd*, 500 F. App'x at 7-8. The Power of Attorney did not result in any Nazi appropriation of the Collection.

[2] Citing no authority, Plaintiffs assert that the Second Circuit's Summary Order affirming Judge Pauley's rulings does "not have collateral estoppel effect" against Plaintiffs here. (*Carnegie* ECF No. 52 at 53.) Plaintiffs are incorrect. The Second Circuit's Local Rule 32.1.1(b) expressly permits citation of summary orders, even those dated prior to January 1, 2007, "in any case for purposes of estoppel or res judicata; …."

Nor did the Power of Attorney "convey" title in Grunbaum's property to his wife (let alone to a Nazi). The Power of Attorney granted Grunbaum's wife co-existent authority to transport his property to Belgium, as their family members simultaneously did with the approval of the Nazi authorities, and as the Grunbaums awaited Fritz's release from custody so they could both also emigrate to Belgium, as the Nazis had just allowed Sigmund and Mathilde Lukacs to do. (*Carnegie* ECF No. 47 at 8-12 & n.6.)

Nor did the Power of Attorney cause the "liquidation" of Grunbaum's life insurance. The evidence in *Bakalar* showed that Elisabeth Grunbaum had (understandably) lied in signing a property declaration claiming that her husband's life insurance policy had been liquidated. It was revealed during the trial cross-examination of Leon Fischer (the predecessor to current plaintiff Leon Fischer Trust) that Grunbaum's life insurance policy had not been liquidated, and that, in fact, Fischer himself had obtained a $500,000 payout from that policy. (Charron Decl. Ex. 9 (7/17/08 Trial Tr. at 630:15-631:17, 651:24-653:22, 657:20-658:9; 7/18/08 Trial Tr. at 706:10-709:7.) The Power of Attorney simply did not do what Plaintiffs claim it did, and did not operate as Plaintiffs conclusorily assert.

Plaintiffs now rely on the lone concurring opinion by Judge Korman in the Second Circuit's 2010 *Bakalar* ruling that remanded that case for reconsideration under New York (instead of Swiss) law – which concurring opinion is actually responsible for conceiving Plaintiffs' Power of Attorney theory. But Plaintiffs overlook that *six* other federal judges disagreed with Judge Korman, including the two other judges on his panel in 2010, Judge Pauley, and the three Second Circuit judges who unanimously affirmed Judge Pauley's rulings under New York law in 2012. (*Carnegie* ECF No. 52 at 12.) *Bakalar v. Vavra*, 619 F.3d 136, 148 (2d Cir. 2010) (Korman, J., concurring); *Bakalar II*, 819 F. Supp. 2d at 298 & n.3 ("On remand, Vavra and Fischer adopted the rationale

[concerning the Power of Attorney] advanced by Judge Korman in his concurring opinion as a new theory of their counterclaim. In a demonstration of the dangers of dicta, the concurrence spawned substantial additional briefing concerning an argument that, after due consideration, this Court finds to be without merit.").

Judge Korman was mistaken about the Power of Attorney, which is why his devised theory did not prevail at any stage in *Bakalar*.

B. Plaintiffs Misrepresent That "Different" Facts Exist In These Cases That Would Render The Fact-Finding In *Bakalar* Invalid

Plaintiffs' assertions that "the facts are different" in these cases than the facts in *Bakalar*, and that Plaintiffs supposedly now can prove that "Mathilde Lukacs never had custody of the art collection," are nonsense. (*Carnegie* ECF No. 52 at 8, 32.)

There is no new evidence pleaded or identified by Plaintiffs that gives any plausible basis for this Court to find that Judge Pauley's and the Second Circuit's determination of Kornfeld's evidence is invalid. (*See Carnegie* ECF No. 47 at 27 (citations omitted).) Relying on inadmissible hearsay, Plaintiffs allege a "revelation" that Kornfeld purportedly dealt with Cornelius Gurlitt in 1988, more than three decades after Kornfeld had purchased the Collection from Lukacs. (*Carnegie* ECF No. 52 at 34.) Even if such hearsay were true, it would not plausibly state any basis to find that "the validity of" Judge Pauley's findings concerning Kornfeld's dealings with Lukacs is "so undermine[d]" as to "render application of the [collateral estoppel] doctrine impermissibly 'unfair.'" *S.E.C. v. Monarch Funding Corp.*, 192 F.3d 295, 304 (2d Cir. 1999). The inadmissible (and entirely speculative) character point that Plaintiffs would ask the Court to draw concerning Kornfeld states no basis to overturn Judge Pauley's fact-finding in *Bakalar* – particularly where Plaintiffs seek to attack Kornfeld's character *retroactively*, based on alleged conduct that occurred decades after his dealings with Lukacs. *See* Fed. R. Evid. 404(a).

Plaintiffs identify no other "additional evidence revealed" since *Bakalar*. (*Carnegie* ECF No. 52 at 34.) Plaintiffs assert that a 1925 catalogue from the Würthle Gallery "is a game-changer that precludes the application of *res judicata* [sic]." (*Carnegie* ECF No. 52 at 57.) The Würthle catalogue is not new evidence; it was *admitted into evidence in Bakalar*, and Plaintiffs relied upon it to support their theories. (*E.g.*, *Bakalar* ECF No. 215 ¶ 248 (relying on Würthle catalogue to try to prove Grunbaum provenance of works in the Collection); Charron Decl. Ex. 9 (7/15/08 Trial Tr. at 334:16-337:14) (trial cross-examination of Jane Kallir concerning Würthle catalogue content).)

Plaintiffs' reference to "additional scholarship not available to the *Bakalar* court" (*Carnegie* ECF No. 52 at 34) refers to purported expert opinions that were excluded in *Bakalar*, which imagined alternative facts based upon so-called "Nazi custom and practice" to support Plaintiffs' hypothesis that Kornfeld acquired the Collection from Nazis, not from Lukacs. (*See Carnegie* ECF No. 47 at 17-18 & n.9.) Plaintiffs cannot contest that they had a full and fair opportunity to litigate the admissibility of such opinions before both Judge Pauley and the Second Circuit. (*Id.*) Plaintiffs' likening of the unfavorable rulings they received in *Bakalar* as effectively constituting a "default judgment" against them is baseless. (*Carnegie* ECF No. 52 at 54-55.) Through these cases, Plaintiffs improperly seek "the proverbial second bite at the apple" regarding opinions that both Judge Pauley and the Second Circuit determined were properly excluded. *See Levich v. Liberty Cent. Sch. Dist.*, 361 F. Supp. 2d 151, 159 (S.D.N.Y. 2004).[3]

[3] Plaintiffs now assert that Judge Pauley also "prevented" them from "introducing the expert report of Dr. Milan Kostohryz," a purported Czech law expert. (*Carnegie* ECF No. 52 at 29.) This is a half-truth. In fact, after missing extended deadlines in *Bakalar*, Plaintiffs disingenuously buried Kostohryz's report within what they claimed was a supplemental *fact* discovery production; and they did so, moreover, without providing any notice of their intention to raise Czech law as an issue in the case. (*Bakalar* ECF No. 246 (11/24/10 Charron Declaration) ¶¶ 20-26.) As Plaintiffs had tried to with Petropoulos, Plaintiffs sought to use Kostohryz's opinion to distract attention from the direct fact evidence in the case: *i.e.*, direct evidence

Nor is this Court "bound by" the decision in *Nagy*, which erroneously rejected the fact-finding in *Bakalar* that Kornfeld acquired the Collection from Lukacs. (*Carnegie* ECF No. 52 at 42.) As previously explained, the result in *Nagy* expressly applies only to the two works from the Collection that were at issue in that case. (*Carnegie* ECF No. 47 at 24-26, 28.) Plaintiffs conspicuously do not address that point.

C. Plaintiffs Misrepresent The Scope Of Discovery Conducted In *Bakalar*

As they (shamefully) did in *Nagy*, Plaintiffs continue to assert that Judge Pauley limited discovery in *Bakalar* following his denial of Plaintiffs' class certification motion in that case, and prevented Plaintiffs from taking discovery into any Schiele work other than *Torso*. (*Carnegie* ECF No. 52 at 28.) That is flatly false.

The class certification motion in *Bakalar*, which preceded merits discovery, concerned far more than the 53-work Collection that Lukacs sold to Kornfeld. Plaintiffs sought to certify a class of owners of over *450* works of art by various artists with entirely different evidence and provenance issues. That is why Judge Pauley denied class certification. *See Bakalar v. Vavra*, 237 F.R.D. 59, 65 (S.D.N.Y. 2006) ("[T]he Heirs represented that class membership is based on all [450] artwork[s] included in the Kieslinger Inventory, not just the [81] Schieles …. This Court

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from Elise Zozuli (Fritz Grunbaum's sister) confirming that she had abandoned her own claim to her brother's property after the war once she learned that Lukacs had already made a claim for his property. (*Id.* at ¶¶ 2-15, 20-26; *Carnegie* ECF No. 47 at 13.) Judge Pauley appropriately excluded Kostohryz's untimely and makeweight opinion, which the Second Circuit affirmed. (*Bakalar* ECF No. 174 at ¶ 4.) *Bakalar III*, 500 F. App'x at 9. Judge Pauley also found that Zozuli's commencement of a claim "in Communist Czechoslovakia" after the war debunked Plaintiffs' theory – reasserted here and also espoused by Kostohryz – that living "behind the Iron Curtain" supposedly made such a claim impossible. (*Carnegie* ECF No. 52 at 33.) *Bakalar II*, 819 F. Supp. 2d at 296.

declines the Heirs' invitation to embark on an odyssey that would require innumerable fact intensive inquiries to ascertain class membership.").

Nevertheless, following class certification denial, Plaintiffs conducted extensive discovery and trial examinations into the Collection as a whole, not "only" with regard to *Torso*, as they now misrepresent (and as they previously misrepresented to the state court in *Nagy*). (*See Carnegie* ECF No. 47 at 5-7, 16-17, 19-20; *see also* Charron Decl. Ex. 1 (Kornfeld Dep.) at 121:5-20 (Plaintiffs' counsel's questioning of Kornfeld that "everything from 1 through 53 [of the works in the Collection] has the same provenance.").) The judicially noticeable record is conclusive that Plaintiffs were not "only permitted to ask [Kornfeld] about that one work [*Torso*]" in *Bakalar*. (*Carnegie* ECF No. 47 at 6-7.)[4]

Plaintiffs had a full and fair opportunity in *Bakalar* to litigate the critical issue of whether Kornfeld acquired the Collection from Lukacs or from Nazis. Plaintiffs should be barred by collateral estoppel from relitigating that issue.

II. PLAINTIFFS' CLAIMS ARE BARRED BY LACHES

There is also no justification to allow Plaintiffs to relitigate the facts decided in *Bakalar* establishing the laches defense. Nor should Plaintiffs avoid dismissal as a matter of law based upon the allegations in their pleadings.

Plaintiffs' predecessors' awareness of the relevant facts, awareness of Grunbaum's art collection, and choice not to sue Lukacs for supposedly taking art from them under duress, were

[4] Plaintiffs accuse Carnegie/Oberlin of filing "mislabeled" papers. (*Carnegie* ECF No. 52 at 40.) This, too, is false. Carnegie/Oberlin submitted the actual filings and admitted trial exhibits in *Bakalar*.

proved in *Bakalar*. *Bakalar II*, 819 F. Supp. 2d at 304-05, 307, *aff'd*, 500 F. App'x at 8. Plaintiffs plead nothing that would plausibly alter those judicially noticeable facts.[5]

The undue prejudice resulting from Plaintiffs' predecessors' delay was also proved in *Bakalar*, with reasoning that applies equally here, without any plausible rebuttal. *Bakalar II*, 819 F. Supp. 2d at 306, *aff'd*, 500 F. App'x at 8. Specifically, the loss of Lukacs and of Plaintiffs' predecessors to testify as to exactly how and when Lukacs acquired each of the works in the Collection, and why no family members who were actually involved in the underlying events ever accused Lukacs of 'duress,' unfairly prevents all current owners of works from the Collection from meeting their burden of proof under New York's unique burden-shifting rules. *See Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 320-21 (1991) (establishing burden-shifting while also holding that delay by claimants with resulting prejudice in the form of lost, important evidence remains relevant to laches defense).

Plaintiffs' arguments in opposition consist of misrepresentations of law.

A. Plaintiffs Misrepresent That *Bakalar* Was "Superseded" By *Flamenbaum*

Ignoring Carnegie/Oberlin's previous discussion of *Matter of Flamenbaum*, 22 N.Y.3d 962 (2013), (*Carnegie* ECF No. 47 at 32 n.13), Plaintiffs insist that *Flamenbaum* "superseded" *Bakalar*, rendering *Bakalar* invalid. (*Carnegie* ECF No. 52 at 57-58.) Plaintiffs are incorrect.

For one thing, the Second Circuit earlier this year, in *Republic of Turkey v. Christie's Inc.*, 62 F.4th 64, 70-71 (2d Cir. 2023), expressly reconfirmed the continuing vitality of *Bakalar*, without finding that it had been superseded in any respect.

[5] The *Nagy* decision does not address the issue of undue delay in its brief laches discussion. *Reif v. Nagy*, 175 A.D.3d 107, 130-31 (1st Dep't 2019).

Moreover, as Carnegie/Oberlin previously explained, *Flamenbaum* simply reaffirms the long-standing rule under New York law that undue delay *without* undue prejudice cannot establish a laches defense. 22 N.Y.3d at 966. Because the evidence in that case was conclusive that theft of an artifact had occurred, and there was "no scenario whereby the [present owner] could have shown that he held title to this antiquity," a laches defense could not be proved regardless of undue delay. *Id.*

Unlike *Flamenbaum*, here it is a resolved fact that Nazi theft of the Collection *did not* occur. Nor is there conclusive evidence of duress by Lukacs vis-à-vis her relatives. *See Matter of Levy*, 69 A.D.3d 630, 632 (2d Dep't 2010); *see also Bakalar III*, 500 F. App'x at 8 ("We do not decide whether Bakalar discharged his burden under *Lubell* by tracing the provenance back to Lukacs, who was a close relative of Grunbaum ….").

The determination by the Second Circuit in *Bakalar* that "[t]here 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," has not been "superseded" or held "to be irrelevant under New York law" by *Flamenbaum*. (*Carnegie* ECF No. 52 at 58.) The Second Circuit's finding remains valid and dispositive with respect to every current owner of a work from the Collection.[6]

[6] Plaintiffs also ignore that Judge Pauley cited the *Flamenbaum* lower court decision at the end of a *string cite*. *Bakalar II*, 819 F. Supp. 2d at 304 (also citing *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), and *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, No. 98 Civ. 7664 (KMW), 1999 WL 673347, at *10 (S.D.N.Y. Aug. 30, 1999)). The particular analyses of facts supporting findings of prejudice in *Sanchez* and *Greek Orthodox* – as well as *Bakalar* – are unchanged by the later decision in *Flamenbaum*.

B. Plaintiffs Misrepresent That The HEAR Act Bars The Laches Defense

Plaintiffs assert that *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186 (2d Cir. 2019), does not squarely hold that laches defenses are not barred by the Holocaust Expropriated Art Recovery ("HEAR") Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016). Plaintiffs again are incorrect.

In a lengthy portion of the *Zuckerman* decision, the Second Circuit expressly held that "[t]he HEAR Act does not prevent defendants from asserting a laches defense." *Id.* at 196-97. Analyzing the HEAR Act's legislative history as well as the *very same* authorities upon which Plaintiffs now rely, (*Carnegie* ECF No. 52 at 63 (citations omitted)), the Second Circuit held:

> One of the stated purposes of the HEAR Act is to ensure that claims to recover art lost in the Holocaust era are "resolved in a just and fair manner." HEAR Act § 3(2). But the HEAR Act does not allow potential claimants to wait indefinitely to bring a claim. To do so would be neither just nor fair.

Zuckerman, 928 F.3d at 196.

Plaintiffs' reliance on a footnote in *Zuckerman* stating that the court did not address whether claims "for recovery of art sold under duress to non-Nazi affiliates, are within the ambit of the statute," is misplaced. *Id.* at 196 n.10. The laches defense in *Bakalar* applied with respect to Plaintiffs' alternative theory that other family members involuntarily surrendered Grunbaum-owned art to Lukacs under duress after the war. The HEAR Act does not apply to such a claim (because it does not involve Nazi theft), and thus the HEAR Act could not invalidate that laches defense. But even if the HEAR Act hypothetically applied to such a claim, *Zuckerman* would be controlling that the laches defense would not be barred.[7]

[7] Plaintiffs further contend that the HEAR Act's "actual knowledge" requirement "preempted" the laches ruling in *Bakalar*. (*Carnegie* ECF No. 52 at 60.) Again, Plaintiffs conflate concepts. The HEAR Act's "actual knowledge" requirement concerns the timeliness of claims brought under that statute. Because the

C. Plaintiffs Misrepresent That Alleged Unreasonable Diligence By The Museums Could Bar The Laches Defense

Plaintiffs defame Carnegie and Oberlin as supposedly failing to conduct reasonable diligence into alleged Nazi theft of their drawings. (*Carnegie* ECF No. 52 at 61-62.) This assertion is frivolous.

First, none of the drawings from the Collection was stolen by Nazis. Any deep diligence into the matter would have led to the same conclusion as in *Bakalar* that Lukacs, not Nazis, sold the Collection to Kornfeld. Plaintiffs' argument is thus a red-herring.

Second, even assuming, *arguendo*, that the museums had some greater duty of diligence, their failure to have unearthed evidence leading to the same, contrived conclusion that Plaintiffs draw would not matter because Plaintiffs cannot plausibly claim to have been prejudiced. It is long-established under New York law that a current owner's "alleged failure to make a reasonable inquiry into the background of [art] prior to purchasing it" does not bar a laches defense where such failure "did not cause any prejudice to plaintiff." *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, 300 A.D.2d 117, 118-19 (1st Dep't 2002) (citations omitted); *accord Matter of Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 38 (1st Dep't 2006).

Plaintiffs point to evidence to which they and their predecessors had equal access at all times – including, most particularly, Lukacs herself. (*Carnegie* ECF No. 52 at 61.) Plaintiffs' faulting of the museums for not "Interview[ing] Mathilde Lukacs When She Was Alive" is ironic, to say the least, where Plaintiffs' predecessors – who were close to Lukacs until her death, who

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HEAR Act does not bar laches defenses, regardless of timeliness, the laches findings in *Bakalar* are not "preempted" or negated at all.

fully knew the Lukacses' and Grunbaums' circumstances, and who saved the Lukacses – obviously could have done the same.[8]

III. PLAINTIFFS' CLAIMS ARE BARRED BY STATUTES OF LIMITATIONS

Carnegie and Oberlin respectfully supplement AIC's further discussion in its reply brief of the statute of limitations defense as follows:

A. Plaintiffs' Claims Against Carnegie Would Be Time-Barred Even If Pennsylvania's Statute Of Limitations Rules Applied

Plaintiffs assert that their claims against Carnegie would have been time-barred in either 1940 or 1962 under Pennsylvania's two-year statute of limitations rule for replevin claims.

[8] As submitted by AIC, Plaintiffs' cross-motion for summary judgment is procedurally improper and substantively meritless. Among other things, there are questions of fact as to whether *Portait of a Man* (owned by Carnegie) and/or *Girl With Black Hair* (owned by Oberlin) was owned by Grunbaum at the time of his arrest. No direct evidence supports such ownership. Plaintiffs rely upon non-illustrated references to generically described Schiele drawings belonging to Grunbaum in the 1920s; however, Schiele's drawings were not titled, and their titles change over time with various owners' descriptions. (*Carnegie* ECF No. 47 at 4-5 n.4.) Moreover, it is uncontested that none of the drawings that Grunbaum owned at the time of his arrest is identified by title. Linking the drawings at issue to Grunbaum's collection at the time of his arrest is a matter of pure speculation and inference. *Bakalar*, 237 F.R.D. at 65 ("[T]he Heirs cannot adequately explain how they intend to identify the 76 Schiele works broadly described as 'drawings' … in item 37 of the Kieslinger Inventory…. Because Schiele created more than 2,700 drawings, there is at most a 2.8 percent chance that any one of those works was one of the 76 Schieles that Kieslinger inventoried in the Grunbaum apartment in July 1938."). Plaintiffs' assertion that the undersigned, in opposing class certification in 2006 on behalf of Mr. Bakalar, supposedly made "a party admission that is binding on the Museums" (whom the undersigned did not represent at the time) conceding Grunbaum provenance, is baseless. (*Carnegie* ECF No. 52 at 30-31, 46.) The undersigned did no such thing, and Judge Pauley did not so find. *Bakalar*, 237 F.R.D. at 65. As also submitted by AIC, the museums that were not parties in *Bakalar*, including but not limited to Carnegie, are not "judicially estopped" from making any arguments in these cases. Nor did Judge Pauley, in any event, resolve any issues of fact or choice of law contentions made at the class certification stage to trigger a judicial estoppel; he identified possible individualized arguments in finding lack of typicality. *Id.* at 67.

(*Carnegie* ECF No. 52 at 25.) While Pennsylvania's limitations rules do not apply in this case (for the reasons discussed by AIC), even assuming, *arguendo*, application of those rules, Plaintiffs are mistaken about how they operate.

Plaintiffs overlook that a replevin claim against a current, good faith possessor of allegedly stolen chattel accrues under Pennsylvania law (as under New York law) following the demand and refusal for the return of such chattel. *E.g.*, *Zuk v. E. Pa. Psychiatric Inst. of the Med. College of Pa.*, 103 F.3d 294, 300 (3d Cir. 1996) (applying Pennsylvania law and explaining that claim expired two years after current possessor had "refused to comply" with plaintiff's demand).[9]

As Carnegie previously submitted, Plaintiffs did not demand the return of *Portrait of a Man*, and Carnegie did not refuse to comply with that demand, until 2006. (*Carnegie* ECF No. 47 at 21.) Under hypothetically applicable Pennsylvania law, Plaintiffs had until 2008 to bring a replevin claim against Carnegie. Plaintiffs' contention that they would have been barred under Pennsylvania law from bringing such a claim after January 1, 1999, and that accordingly the HEAR Act revived and extended such a hypothesized claim until December 16, 2022, is meritless.[10]

[9] Plaintiffs rely on another Third Circuit decision, *Douglas v. Joseph*, 656 F. App'x 602, 605 (3d Cir. 2016) (per curiam) – which itself relied on *Zuk* and other authorities – for the proposition that demand and refusal are not necessary for a replevin claim to accrue. But the replevin claim in *Douglas* was against the *converter* himself, who had "seized [the plaintiff's] paintings" more than two years before the plaintiff sued him. *Id.* Replevin claims against good faith possessors of allegedly stolen property, on the other hand, require demand and refusal (as in *Zuk*).

[10] As also submitted by AIC, the HEAR Act alternatively would effect an unconstitutional taking. As in New York, Pennsylvania recognizes adverse possession of chattels. *Priester v. Milleman*, 55 A.2d 540, 543-44 (Pa. 1947).

B. Plaintiffs' Claims Against Oberlin Would Be Time-Barred Even If Ohio's Statute Of Limitations Rules Applied

Plaintiffs similarly assert that their claims against Oberlin would have been time-barred in 1962 under Ohio's four-year statute of limitations rule for replevin claims. (*Carnegie* ECF No. 52 at 24.) Again, as an academic matter, Plaintiffs are mistaken.

A replevin claim against a current, good faith possessor of allegedly stolen chattel accrues under Ohio law following the demand and refusal for the return of such chattel. *E.g.*, *Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co.*, 493 N.E.2d 289, 292 (Ohio Ct. App. 1985) (explaining that "demand and refusal are necessary" for replevin claim to accrue under Ohio law against good faith possessor of allegedly stolen property).[11]

As Oberlin previously submitted, Plaintiffs did not demand the return of *Girl with Black Hair*, and Oberlin did not refuse that demand, until 2006. (*Carnegie* ECF No. 47 at 21.) Under hypothetically applicable Ohio law, therefore, Plaintiffs would have had until 2010 to bring a replevin claim against Oberlin.

[11] Plaintiffs rely on *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 807-08 (N.D. Ohio 2006), for the proposition that a claim for replevin could accrue under Ohio law without demand and refusal. The court in that case extrapolated a "discovery rule" from Ohio state court decisions that did not deal with replevin claims against current good faith possessors of allegedly stolen property (and then buttressed its reasoning with a California law decision). *Id.* (citations omitted). The tort committed by a good faith possessor of allegedly stolen property is its non-return of such property upon demand. *See Ohio Tel.*, 493 N.E.2d at 292. Such a claim could not accrue without a demand and refusal. *Id.*

CONCLUSION

Carnegie and Oberlin respectfully request that the Court dismiss all of Plaintiffs' claims against them with prejudice, and that the Court award such other and further relief as deemed just and proper.

Dated: New York, New York
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I hereby certify that this memorandum contains 5,162 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.

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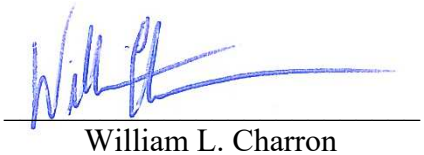

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