18-0634-cv

United States Court of Appeals

for the

Second Circuit

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,

Plaintiff-Appellant,

– v. –

THE METROPOLITAN MUSEUM OF ART,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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STATEMENT OF JURISDICTION

The District Court has jurisdiction over the underlying litigation pursuant to 28 U.S.C. §1332 because there is complete diversity between the citizenship of Plaintiff-Appellant Laurel Zuckerman, as Ancillary Administratrix of the estate of Alice Leffmann ("Plaintiff" or the "Leffmann estate") and Defendant-Appellee, the Metropolitan Museum of Art ("Defendant" or the "Museum").

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291. This is an appeal from a final judgment of the District Court (Preska, J.), dated February 7, 2018 (the "Decision").

This appeal was timely filed. The appealed Decision was entered on February 7, 2018, and the notice of appeal was filed on March 6, 2018.

ISSUES PRESENTED

1. Whether the District Court erred in disregarding United States policy regarding the return of artworks, lost as a result of Holocaust Era persecution, to the victims or their heirs.

2. Whether the District Court erred on a pre-answer motion to dismiss by making factual findings inconsistent with Plaintiff-Appellant's well-pled Complaint.

3. Whether the District Court erred in its interpretation of New York law on duress by finding that (i) the defendant or counterparty to the transaction must cause the duress — *i.e.*, that New York law forecloses the possibility of third-party duress; and (ii) New York law cannot support a claim for duress in the Holocaust Era context unless the Fascists or Nazis seized the disputed item themselves.

4. To the extent that this Court concurs with the District Court that New York law provides no relief to Plaintiff-Appellant, notwithstanding U.S. policy as to the restitution of artworks lost as a result of Holocaust Era persecution, whether the District Court erred in not applying Italian law to the 1938 sale of the Painting (as defined herein), as Italy was where the duress was alleged to have been imposed and suffered.

5. Whether the District Court erred in its interpretation of Italian law by finding that a sale made by Jews to liquidate their assets in order to escape certain persecution and possible death at the hands of the Fascists and the Nazis cannot be found contrary to the law on public order and morals and cannot constitute a duress sale.

SUMMARY OF ARGUMENT

Imagine yourself a German Jew residing in Florence in 1938. Having fled Germany after the Nazis robbed you of your home, business and all assets that they could identify, you soon find Adolf Hitler parading through your new neighborhood with full military support and the backing of the Fascist-Italian leadership. Needing quick cash to allow you and your wife to flee again, you arrange a sale, for well under fair value, of your last remaining asset of worth. You either sell or face an unspeakable fate.

That is the precise circumstance endured by Paul Leffmann, Plaintiff's great granduncle. In dismissing the Complaint, the District Court concluded that "[f]or failure to allege duress under New York law, the motion to dismiss is granted." (SPA-3). In reading that plain holding, one would presume that this matter involved a run-of-the-mill, open-market transaction in New York. However, this was a desperate act of survival during the most horrific of circumstances.

To take a step back, Paul and Alice Leffmann were a Jewish couple thriving in Germany until the Nazis ravaged all semblance of peace and normalcy. Paul and Alice were forcefully stripped of almost all of their wealth, their livelihood and their property by the Nazis. They fled to Italy

where they hoped to find a safe haven and a new home. Instead, they were confronted with an increasingly anti-Semitic Fascist regime.

Not long after Paul and Alice arrived in Florence, Mussolini and Hitler formed a strong alliance, and Fascist Italy began to keep careful track of the German Jews there, including the Leffmanns. In February 1938, the Fascist government announced that it would closely observe newly-arrived Jews such as the Leffmanns; in May 1938, the Italian Police, allied with the Gestapo, arrested scores of Jews in Florence, and then Hitler, himself, marched in a grand parade through Florence — *mere blocks from where the Leffmanns resided*. By June 1938, the writing was very clearly on the wall that a systematic wave of anti-Semitic legislation and activity was on the precipice of crashing down, and the Leffmanns' lives were, again, in immediate danger. And indeed, by July 1938, the Leffmanns submitted their "Directory of Jewish Assets," as required by the Reich; and by September 1938, Italy codified racial laws forbidding aliens like the Leffmanns from residing in Italy. Paul and Alice were forced to flee for their lives again, this time to Switzerland, which refused to grant them permanent residency, and then to Brazil where they waited out the war.

The Leffmanns' story is like that of many other Jews from Germany in the 1930's — except, unlike most, they survived. How did they survive? In large part, due to the funds raised by the sale of their last valuable asset, a masterwork by Pablo Picasso entitled "The Actor" (L'Acteur) (the "Painting"). In June 1938, Paul Leffmann sold the Painting, for well below its value, to French art-dealers who took advantage of the mounting life-and-death pressures facing the Leffmanns. This was a transaction made for the purpose of raising funds to finance flight.

Through the underlying action, Plaintiff, on behalf of the estate of Alice Leffmann, seeks to regain rightful possession of the Painting, which is currently in the permanent collection of, and on display at, the Museum. The tax-exempt Museum, which received the Painting as a donation to hold in trust for the public, has refused to return it, resulting in this lawsuit. The Museum moved to dismiss the action on, *inter alia*, procedural defenses of the statute of limitations and laches. The Museum went so far as to concurrently move in Surrogate's Court, more than six years after Plaintiff was duly appointed as the "Ancillary Administratrix" for the Leffmann estate, to vacate her appointment. This effort and the Museum's subsequent motion for re-argument were rejected by the Surrogate's Court.

Nevertheless, the District Court denied Plaintiff her day in court, holding that New York law on duress shuts down any avenue for relief. In reaching this conclusion, the District Court erred in several, critical respects.

First, the District Court treated this action as a generic claim of contemporary, economic duress, failing to examine Paul's sale of the Painting through the prism of the dire circumstances enveloping Europe between 1933 and 1945, and the precise and concrete threats facing the Leffmanns in 1938. That the Leffmanns are alleged to have sold the Painting to avoid the wrath of virulent Nazi and Fascist persecution needs to be a primary consideration.

As set forth herein, that the Holocaust Era is unique, and that artworks lost during that era as a result of persecution (including through a duress sale) must be returned to their owner, is a *key tenet of U.S. policy and law*. This key tenet, now recognized by the courts as policy and codified by Congress through the Holocaust Expropriated Art Recovery (HEAR) Act of 2016,[1] was aptly captured by Stuart Eizenstat, the Special Adviser to the Secretary of State for Holocaust Issues (and former U.S. Ambassador to the European Union), at the Washington Conference on Holocaust-Era Assets of 1998,

[1] Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 stat. 1524 (2016).

where 44 nations convened and produced the "Principles on Nazi-Confiscated Art":

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

See http://fcit.usf.edu/HOLOCAUST/RESOURCE/assets/art.htm.

Here, the District Court, in disregard of U.S. policy, improperly treated the 1938 Holocaust Era duress sale as an ordinary, commercial transaction.

Second, the District Court not only failed to properly account for the historical circumstances and U.S. policy, but it mischaracterized the circumstances specifically facing the Leffmanns as alleged in the Complaint, wrongly drawing inferences against Plaintiff on a motion to dismiss. For example, a pivotal finding by the District Court was that the Leffmanns had "other financial alternatives" to selling the Painting as evidenced by the "fact that the Leffmanns *spent several years looking to sell the Painting*, *rejected other offers* and *had additional assets including properties in Italy that they sold to an Italian businessman in 1937*." Each of the italicized phrases distorts Plaintiff's well-pled allegations, each injecting normalcy into an imbalanced transaction made out of fear and necessity.

Third, the District Court misstated New York law in finding that for a duress claim to be sustained, "the defendant must have caused the duress," foreclosing any possibility of third-party duress regardless of the circumstances. This erroneous statement of the law resulted in the Court's holding that, despite the "undeniably horrific circumstances" confronted by the Leffmanns, Plaintiff cannot possibly state a claim for duress unless the "counterparties to the transaction," or the Museum, itself, were the source of the duress. It would shock the conscience if the law categorically barred a claim for relief because the seller was compelled to sell by a third party (even the Nazis and Fascists) rather than by the buyer who knowingly took advantage of the situation. New York law and U.S. policy do not require that unconscionable result and, rather, demand a finding that the 1938 Transaction (as defined herein) is void.

Fourth, in the event that this Court affirms the District Court's ruling that New York precludes a claim of third-party duress in the circumstances pled in this case and despite U.S. policy, New York law would be inconsistent with Italian law, which would then apply here in evaluating the 1938 Transaction. Though New York law should govern the ultimate transfer to

the Museum, Italy — where the Leffmanns endured the pressure and historic wrongs that forced their sale — has a great interest in the 1938 Transaction.

Fifth, if Italian law governs, the 1938 Transaction would be void, despite the District Court's conclusion to the contrary. Italian statutory law provides that a transaction is void when contrary to law, public morality or public order. A sale by Jews who tried to liquidate their assets for well below fair value in order to flee for their lives would be considered a sale contrary to public order and morals. Moreover, though the District Court held that the 1938 Transaction was not made under duress because the Leffmanns had endured only "generic, indiscriminate persecutions of fascism," such a finding inaccurately depicts Italian law, fails to analyze the circumstances through the lens of historical context (even with Italy as a signatory to the Terezin Declaration and the Washington Principles), and, critically, neglects to comprehend that there was nothing "generic" happening here. Specific people, including the Leffmanns, were targeted using specific strategies and tools.

The District Court's dismissal of Plaintiff's case — before she had a chance to present the evidence of the Leffmanns' plight and the historic struggle that they were enduring — is wrong as a matter of law, is premised

on misstatements of factual allegations, is contrary to U.S. policy, and should be reversed.

STATEMENT OF THE CASE

Paul Leffmann purchased the Painting in 1912 and thereafter presented it at a variety of exhibitions in Germany. During this time and until the start of the Nazi period, Paul and Alice lived in Cologne, Germany. (A-33 ¶9, 10).[2]

Beginning in 1933, the world the Leffmanns knew began to shatter. Adolf Hitler came to power, and racist laws directed against Jews were enacted and enforced, leading to the adoption of the Nuremberg Laws on September 15, 1935, depriving all German Jews of the rights and privileges of German citizenship, ending any normal life for Jews in Germany, and relegating them to a marginalized existence, a first step toward their mass extermination. (A-33-34 ¶11).

The Nuremberg Laws ushered in a process of eventual total dispossession through what became known as "Aryanization" or "Arisierung," first through takeovers by "Aryans" of Jewish-owned businesses and then by forcing Jews to surrender their assets. Through this

[2] "A-__" refers to the Joint Appendix, "SPA-__" refers to the Special Appendix and "ADD-__" refers to the Addendum of foreign legal authorities.

process, Jewish workers were dismissed, and businesses belonging to Jews were forcibly transferred to non-Jewish Germans, who "bought" them at prices officially fixed and well-below market value. By April 1938, the Nazi regime moved to the final phase of dispossession, requiring Jews to register their assets and then moving to possess all such assets. (A-34 ¶12).

On September 16, 1935, the Leffmanns were forced to sell their home to an Aryan German corporation. On December 19, 1935, Paul and his Jewish partner were forced to transfer ownership of their rubber manufacturing company to their non-Jewish minority business partner. On July 27, 1936, Paul was forced to sell his real estate investments to another Aryan German corporation. Paul had no choice but to accept nominal compensation. These were not real sales, but essentially thefts by Nazi designees of substantially everything the Leffmanns owned. (A-34 ¶13).

Some time prior to their departure from Germany, Paul and Alice had arranged for The Actor to be held in Switzerland by a non-Jewish German acquaintance, Professor Heribert Reiners. For this reason only, the Painting was saved from Nazi confiscation. (A-35 ¶14).

Paul and Alice found themselves faced with the threat of growing violence, imprisonment, and possibly deportation and death. To avoid the

loss of their remaining property — not to mention their lives — they began liquidating their remaining assets in Germany to enable them to escape. The Leffmanns fled in the spring of 1937, by which time the Nazi regime had already put in place its network of taxes (including a massive "flight tax" required to obtain an exit permit), charges, and foreign exchange regulations designed to arrogate Jewish-owned assets to itself. Consequently, upon their escape, the Leffmanns had been dispossessed of most of what they once owned. (A-35, 37 ¶15-16, 19).

Italy was one of the few European countries still allowing the immigration of German Jews. So that is where the Leffmanns went, hoping that Italy's significant Jewish population would provide a safe haven from the Nazi onslaught. (A-37 ¶20).

In light of the ever-tightening regulations governing the transfer of assets, emigrants sought alternative means of moving their funds abroad. In December 1936, the Leffmanns did so by purchasing a house and factory in Italy for an inflated price of RM 180,000 and pre-agreeing to sell the property back to a designated Italian purchaser, at a considerable loss, upon their arrival in Italy a few months later. In April 1937, the Leffmanns crossed into Italy, going first to Milan and then to Florence. Their hope was that life there

could go on in some form of normalcy. Shortly after their arrival, as pre-agreed, the Leffmanns sold their newly-acquired property at a substantial loss — for 456,500 Lira (or about 61,622 RM) — and rented a home in Florence. (A-37-38 ¶21-23).

It soon became clear that the persecution was about to engulf them in Italy as well. In April 1936, Italy and Germany adopted the Italo-German Police Agreement providing for the exchange of information, documents, evidence, and identification materials by the police with regard to all emigrants characterized as "subversives," which included German Jews residing in Italy. The Gestapo could compel the Italian police to interrogate, arrest and expel any German Jewish refugee. On November 1, 1936, Mussolini announced the ratification of the Rome-Berlin Axis. During the summer and fall of 1937, the head of the Italian Police and Mussolini accepted a proposal from the notorious General Reinhard Heydrich, the chief of the Security Service of the Reichsführer (the "SS") and the Gestapo, to assign a member of the German police to police headquarters in various cities, including Florence. This facilitated the Nazi efforts to check on "subversives," *i.e.,* Jewish individuals. (A-38-39 ¶24-26).

By the fall of 1937, anti-Semitism dashed any illusions about a longer stay in Italy for the Leffmanns. Germany and Italy began to prepare for Hitler's visit to Italy. In October, the Ministry of the Interior created lists of German refugees residing in Italy's various provinces. This marked a turning point in the 1936 Italo-German Police Agreement, with the Gestapo requesting these lists so that it could monitor "subversives" in anticipation of Hitler's visit. On February 17, 1938, every newspaper in Italy published a Government announcement which stated that "[t]he Fascist Government reserves to itself the right to keep under close observation the activity of Jews newly arrived in our country." Nazi police officials were posted at thirteen Police Headquarters in border towns, ports, and large cities to conduct interrogations and house searches. (A-39-41 ¶27, 29-30).

As the situation grew increasingly desperate for Jews living in Italy, it became clear that the Fascist regime's treatment of Jews would soon mimic that of Hitler's Nazis. Paul and Alice had to make plans to leave. They wanted to go to Switzerland to find refuge, but, as was well-known at the time, passage into Switzerland did not come easily or cheaply. They had no choice but to turn their limited assets into cash; Paul had to liquidate his masterpiece, The Actor. This was not something that he wanted to do. Back

in September 1936, even as the Leffmanns had been forced by the Nazis to part with nearly everything they owned, Paul rejected an overture from notorious art dealer, C.M. de Hauke of Jacques Seligmann & Co. (whom the U.S. State Department later identified as a trafficker in Nazi-looted art). Nearly two years later, on April 12, 1938, Paul, in a more desperate state, reached out to de Hauke asking him if he would be interested in purchasing the Painting. (A-40 ¶28, 33).

Just days after writing to de Hauke, the situation in Italy grew even worse. From April 24-26, General Heydrich, SS Reichsführer Heinrich Himmler (whom Hitler later entrusted with the planning and implementing of the "Final Solution") and SS General Josef Dietrich, the commander of Hitler's personal army, went to Rome to complete preparations for Hitler's visit. There were over 120 Gestapo and SS officers in Italy — primarily in Florence, Rome, and Naples. The Gestapo officials and Italian police continued investigations and surveillance of "suspicious persons" until the end of Hitler's visit. The Italian police carried out the arrests. Many German Jewish residents fled in anticipation and as a result of these arrests. (A-41-42 ¶34).

On May 3, Hitler arrived for his official state visit, traveling to Rome, Naples, and Florence. The Italian people turned out in the tens of thousands to greet him with parades and military displays. The streets were covered in thousands of Nazi swastika flags, flowerbeds were decorated in the shape of swastikas, and photographs of Mussolini and Hitler were made into postcards and displayed in shop windows. In Florence, city officials made an official postmark that commemorated Hitler's visit. Mail sent during that time was stamped "1938 Il Führer a Firenze" and decorated with swastikas. (A-42 ¶35).

For the Leffmanns, the time to flee was quickly approaching. Needing to raise as much cash as possible, Leffmann responded to a letter from de Hauke, telling him that he had already rejected an offer obtained through another Paris dealer, presumably Käte Perls, for U.S. $12,000 (net of commission). (A-42-43 ¶36).

Violence was increasing, and the persecution of Jews was on the rise. All foreign Jews in Italy, including the Leffmanns, risked arrest and had reason to fear possible deportation and death. Just days after telling de Hauke that he had rejected Käte Perls' low offer, in late June 1938, Leffmann sold the Painting at the very price he told Perls and de Hauke he would not consider (the "1938 Transaction"). With his back against the wall, he

accepted Käte Perls' offer of U.S. $13,200 (U.S. $12,000 after a standard ten percent selling commission), who was acting on behalf of her ex-husband, Hugo Perls, also an art dealer, and art dealer Paul Rosenberg, with whom Perls was buying the Painting. (A-43 ¶37).

On July 26, 1938, Frank Perls, Käte's son, wrote to automobile titan Walter P. Chrysler Jr., asking if he would be interested in The Actor. Having just acquired a Picasso masterpiece from a German Jew on the run from Nazi Germany living in Fascist Italy for a low price that reflected the seller's desperate circumstances and the extraordinary prevailing conditions, he described the work as having been purchased from "an Italian collector" — an outright lie. (A-43 ¶38).

In July 1938, the Leffmanns submitted their "Directory of Jewish Assets" forms detailing their assets, which the Reich required all Jews (even those living abroad) to complete. The penalties for failing to comply included fines, incarceration, prison, and seizure of assets. Meanwhile, the plight of the Jews in Italy worsened. In August 1938, enrollment of foreign Jews in Italian schools was prohibited. A Jewish census, in which the Leffmanns were forced to participate, was conducted in preparation for the Italian racial laws. The Italian government increased surveillance because of the fear that

Jews would transfer their assets out of Italy or emigrate and take their assets with them. A series of anti-Semitic publications were released, among them the infamous "Manifesto degli scienziati razzisti" ("Manifesto of the Racial Scientists"), which attempted to provide a scientific justification for the coming racial laws, and the venomous magazine, "La difesa della razza" ("The Defense of the Race"). A number of regional newspapers published lists of many of the names of Jewish families residing in Florence. (A-43-44 ¶39-40).

On September 7, 1938, the first anti-Semitic racial laws were introduced in Italy, including "Royal Enforceable Decree Number 1381." All "alien Jews" who arrived in Italy after January 1, 1919 had to leave within six months or face forcible expulsion. Bank accounts opened in Italy by foreign Jews were immediately blocked. Italy's measures had become extremely draconian, and in some instances even harsher than the corresponding measures enacted in Germany. (A-44 ¶41).

The Leffmanns frantically prepared for departure. Switzerland became even more difficult to enter beginning in 1938. In April, the Swiss government began negotiations with the Germans regarding the introduction of the notorious "J" stamp. On August 18-19, 1938 the Swiss decided to

reject all refugees without a visa. On October 4, 1938, with an agreement reached on the adoption of the "J" stamp, they imposed visa requirements on German "non-Aryans." Receiving asylum was virtually impossible, and German and Austrian Jews could only enter Switzerland with a temporary residence permit, which was not easy to obtain. (A-44-45 ¶42).

Sometime before September 10, 1938, the Leffmanns managed to obtain a temporary residence visa from Switzerland, valid from September 10, 1938 to September 10, 1941. In October 1938, just days after the enactment of the racial laws expelling them from Italy, the Leffmanns fled to Switzerland. By the time they arrived, the Anschluss and other persecutory events had triggered a rising wave of flight from the Reich. Consequently, Swiss authorities required emigrants to pay substantial sums through a complex system of taxes and "deposits" (of which the emigrant had no expectation of recovery). (A-45 ¶43-44).

In October 1938, all German Jews were required to obtain a new passport issued by the German government stamped with the letter "J" for Jude, which definitively identified them as being Jewish. As German citizens who required a passport to continue their flight, the Leffmanns had no choice but to comply. The Leffmanns temporarily resided in Switzerland, but,

unable to stay, prepared to flee yet again, this time to Brazil and, again, needed to spend much of their remaining funds to obtain the necessary documentation and visas to enter. On May 7, 1941, the Leffmanns, still on the run, immigrated to Rio de Janeiro where they lived for the next six years. Had the Leffmanns not fled for Brazil when they did, they likely would have suffered a much more tragic fate. (A-45-46 ¶45-47).

Given the various payments required to enter Switzerland and then Brazil, the Leffmanns needed the $12,000 they received from the sale of the Painting in order to survive, as it constituted the majority of the Leffmanns' available resources as of June 1938. (A-46 ¶47).

The Leffmanns were not able to return to Europe until after the war. In 1947, they settled in Zurich, Switzerland. Paul died in 1956 at the age of 86, leaving his estate to his wife, Alice, who died in 1966, leaving her estate to 12 heirs (all relatives or friends). (A-46 ¶48-50).

The immediate history of the Painting after Perls and Rosenberg purchased it in June of 1938 is unclear, but it is known that Rosenberg loaned the Painting to the Museum of Modern Art in New York in 1939. In the paperwork documenting the loan, Rosenberg requested that MoMA insure the Painting for $18,000 (a difference of $6,000, or a 50 percent increase over

what had been paid to the Leffmanns less than a year earlier). Sometime prior to October 28, 1940, the Painting was consigned for sale by Rosenberg to the well-known M. Knoedler & Co. Gallery in New York, New York. On November 14, 1941, M. Knoedler & Co. sold the Painting to Thelma Chrysler Foy for $22,500 (a difference of U.S. $9,300, or a 70 percent increase from the price paid to Leffmann). Foy donated the Painting to the Museum in 1952, where it remains today (the "1952 Transaction"). The Museum accepted this donation. (A-47 ¶52-54).

The Museum's published provenance for the Painting was manifestly erroneous when it first appeared in its catalogue of French Paintings in 1967. Instead of saying that Leffmann owned the Painting from 1912 until 1938, it read as follows: "P. Leffmann, Cologne (in 1912); a German private collection (until 1938) . . . ," thus indicating that Leffmann no longer owned the Painting in the years leading up to its sale in 1938. This remained the official Museum provenance for the next forty-five years, including when it was included on the Museum's website as part of the "Provenance Research Project," which is the section of the website that includes all artworks in the Museum's collection that have an incomplete Holocaust Era provenance. From 1967 to 2010, the provenance listing was changed numerous times. It

continued to state, however, that the Painting was part of a German private collection and not that Leffmann owned it from 1912 until 1938. (A-48 ¶57-59).

In connection with a major exhibition of the Museum's Picasso holdings in 2010, the Museum changed the provenance yet again. Despite purported careful examination, as of 2010, the provenance of the Painting continued erroneously to list the "private collection" subsequent to the Leffmanns' listing. In October 2011, only after correspondence with Plaintiff, the Museum revised its provenance again, finally acknowledging the Leffmanns' ownership through 1938 and their transfer of it during the Holocaust Era. (A-48-49 ¶60-61, 63).

On September 8, 2010, Plaintiff's attorneys wrote to the Museum, demanding the return of the Painting. The Museum refused. Plaintiff brought suit in October 2017, in correlation with the expiration of a standstill agreement, which had been tolling any statute of limitations. (A-51 ¶66-67; A-2). On November 30, 2016, the Museum filed a motion to dismiss the Complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure based on the following grounds: (i) lack of standing; (ii) failure to allege duress; and (iii) the claims are time-barred under the statute of limitations and

laches. The Museum also petitioned in Surrogate's Court, corollary to their argument as to standing, to vacate the appointment of Plaintiff as ancillary adminstratix. Upon Plaintiff's motion, the Surrogate's Court dismissed the Museum's motion (and rejected its subsequent motion for re-argument).

On February 7, 2018, the District Court dismissed the Complaint for failure to allege duress under New York law. The District Court did not address the Museum's arguments as to the statute of limitations and laches. The District Court also held that the Museum's challenge as to standing was moot as the Museum had conceded that issue at oral argument due to the determinations made by the Surrogate's Court.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's granting of a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief. *See Doe v. Columbia Univ.*, 831 F.3d 46, 53 (2d Cir. 2016).

ARGUMENT

I. U.S. POLICY COMPELS THE RETURN OF ARTWORK LOST AS A RESULT OF HOLOCAUST ERA PERSECUTION

As alleged, by the time Paul and Alice fled for their lives from Italy, the great majority of their assets were lost, either stripped by the Nazis or dissipated by the growing web of taxes, fees and "payments" that became part of their everyday lives as refugees. The 1938 Transaction was precipitated by need, and colored by the real fear of impending doom, at a time when normal commercial rules could no longer apply.

And, normal commercial rules should not apply in evaluating the validity of the 1938 Transaction. United States policy requires that the historical circumstances shape any assessment of claims by heirs for artwork lost during the Holocaust Era as a result of Nazi and Nazi-ally persecution. The District Court's Decision, narrowly-focused on a (mis)application of New York law, is in disharmony with this policy of extreme and overarching importance.

In 1998, the United States government convened the Washington Conference on Holocaust-Era Assets, attended by governmental officials, art experts, museum officials and other interested parties from around the world

to consider the issues raised by the continuing discovery of Nazi-looted assets, including artworks. The conference promulgated the "Washington Conference Principles on Nazi-Confiscated Art" (the "Washington Principles") adopted by forty-four nations. The Washington Principles expressly invited Holocaust victims and their heirs to assert claims for the recovery of artworks, encouraged affected nations to develop processes to implement the principles and address disputes as to the artworks to achieve a "just and fair" solution, and acknowledged the need to take into account "the circumstances of the Holocaust era."[3]

At the subsequent Prague Holocaust Era Assets Conference in 2009, forty-six nations signed the "Terezin Declaration on Holocaust Era Assets and Related Issues" (the "Terezin Declaration"), which reaffirmed the core tenet of the Washington Principles that it is essential to "facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims . . . ."[4] The participating states urged, through

[3] https://www.state.gov/p/eur/rt/hlcst/270431.htm.

[4]http://www.holocausteraassets.eu/program/conference-proceedings/declarations/.

the Declaration, that all parties, including *public and private institutions*, adhere to its principles.

In conjunction with the Washington Principles and the Terezin Declaration, tribunals and commissions were established throughout the world (*see infra* at 57-60) that recognized the need to provide a remedy to Jews who sold artwork during the Holocaust Era as a result of persecution, including many who were forced to sell to fund their escape. These determinations, many recommending restitution, were predicated on the understanding that the circumstances were so menacing that, even absent direct, physical violence, the artworks must be deemed to have been sold under duress and that those possessing the works must return them to their rightful owners.

In 2014, the Ninth Circuit Court of Appeals confirmed that the United States, like these other countries, has a policy that adheres to the Washington Principles and Terezin Declaration, urges museums to adhere the principles articulated therein, and requires "concerted efforts to achieve expeditious, just and fair outcomes." *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712, 721 (9th Cir. 2014). In addressing a restitution claim against a museum, the Court, relying on the Washington Principles and the Terezin Declaration,

stated that pursuant to "U.S. policy," "every effort [should] be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and *sales under duress*." *Id.* (emphasis added).

Another significant step forward came with President Obama's signing of the HEAR Act on December 16, 2016, creating a federal statute of limitations for claims to artwork lost due to persecution by the Nazis and their allies so as to allow for such claims to be heard on their merits. In recognizing the "unique and horrific circumstances of World War II and the Holocaust," Congress specifically drew upon the Terezin Declaration and the Washington Principles.[5] HEAR Act, §2(6). Indeed, a core purpose of the HEAR Act is to ensure that courts apply the law in furtherance of the principles espoused in those critical doctrines:

> To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the [Washington Principles] and the Terezin Declaration.

[5] Further reaffirmation of U.S. policy as to sales under Nazi-era duress continues. On May 9, 2018, the President signed into law the "JUST Act" to help Holocaust survivors and their families obtain restitution or the return of wrongfully seized or transferred, Holocaust-era assets, defined specifically to include "sales or transfers under duress." Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. No. 115-171 (2018). The JUST Act requires the State Department to report on the progress of certain European countries towards the return or restitution of wrongfully confiscated or transferred assets, including artwork.

HEAR Act, §3, *cited by Reif v. Nagy*, 2018 WL 1638805 at *2 (N.Y. Sup. Apr. 5, 2018).

Critically, the HEAR Act defines, in a broad and all-encompassing manner, the category of artworks for which Congress intends to facilitate restitution: "any artwork or other property that was lost during the covered period because of Nazi persecution" (with "Nazi" defined to include Nazi allies). HEAR Act, §§5, 4(5). The transactions protected by the HEAR Act include those made under duress, as set forth in the Terezin Declaration, specifically incorporated into the HEAR Act. In the Terezin Declaration, the preamble to the section on "Nazi Confiscated and Looted Art" equates "looted art" (*i.e.*, stolen art) with, and defines it to include, sales made under duress of Nazi and the Fascist persecution during the Holocaust Era:

> art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and *sales under duress*, during the Holocaust era between 1933-45 . . .[6]

[6] http://www.holocausteraassets.eu/program/conference-proceedings/declarations/ (emphasis added).

United States policy and legislation thus compel the judiciary to help return sales of artwork sold under duress in the Holocaust Era to its owners. This cannot be accomplished if the claims are treated as normal commercial transactions. As discussed above, Stuart Eizenstat emphasized at the Washington Conference that "ordinary rules designed for commercial transactions" cannot apply to transactions in the context of the Holocaust Era.[7]

In a recent New York Supreme Court decision, Justice Charles Ramos recognized as much. In a case of a compelled transaction by an Austrian Jew as a result of Nazi pressure, Justice Ramos held that the HEAR Act "compels us to help return Nazi-looted art to heirs," including artwork transferred under duress. *Reif*, 2018 WL 1638805 at *3. The court ruled that the claims for replevin and conversion "must be viewed in the context" of the HEAR Act and the Washington Principles, and that reliance upon judicial findings that pre-date the enactment of the HEAR Act, and do not account for historical circumstances, are "irrelevant." *Id*. at 2-3.

The importance of historical context was also emphasized in the landmark opinion in *Schoeps v. Museum of Modern Art and Solomon R.*

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

Guggenheim Foundation, 594 F. Supp. 2d 461 (S.D.N.Y. 2009). Presented with circumstances parallel to those here, Judge Rakoff addressed a challenge to a decades-old transfer of artworks by a Jew in Germany as the Nazi vise was tightening. On the defendants-museums' summary judgment motion, the Court rejected a laches defense as "inappropriate at this stage," and held that the German laws concerning public order and duress applied, leaving to the jury the ultimate question of whether plaintiffs' predecessor-in-interest would have transferred the paintings were it not for his fear of persecution. In doing so, the Court treated a transfer under duress during the Holocaust Era as it would a theft — *i.e.*, if duress under German law was proven, even though voidable under German law, no good title could be obtained under New York law by the museums that later acquired the paintings. Significantly, the Court's decision was "informed by the historical circumstances of Nazi economic pressures brought to bear on 'Jewish' persons and property." *Id.* at 466. Judge Rakoff's findings are consistent with the principles underlying the Washington Principles and the Terezin Declaration, issued the very same year as *Schoeps*. As was the First Circuit's recognition, in *Vineberg v. Bissonette*, of the need to right the wrongs of art lost as a result of "a notorious exercise of man's inhumanity to man." 548 F.3d 50, 58-59 (1st Cir. 2008).

Even though the Ninth Circuit confirmed in *Von Saher* that museums are bound by this pronounced federal policy favoring restitution of artworks lost a result of Holocaust Era persecution, the Museum — a tax-exempt entity and a public trustee which received the Painting as a donation, with no consideration exchanged — has refused to return the Painting.[8]

The District Court likewise did not adhere to U.S. policy. The 50-page Decision is absent *any reference* to U.S. policy, as reflected in the HEAR Act, the Terezin Declaration or the Washington Principles, instead holding that Paul's 1938 sale of the Painting must, regardless of the "undeniably horrific circumstances of the Nazi and Fascist regimes," strictly meet the (misstated) standard for duress in New York. The District Court's categorical disregard of the impact of the Nazi and Fascist regimes reflects a failure to account for historical circumstances — *i.e.*, that the 1938 Transaction took place during a

[8] Unlike standard commercial actors in the ordinary course, institutions such as the Museum must act with a higher degree of diligence and responsibility, especially given the directives to museums about buying or accepting art misappropriated during the Holocaust Era issued by the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (also known as the "Roberts Commission") and the U.S. Department of State. Likewise, the Museum's conduct should be measured in the context of the principles of the American Alliance of Museums ("AAM"), by which the Museum is accredited, and the Association of Art Museum Directors ("AAMD"), of which the Museum is a member — principles correlated to the Washington Principles. (A-49-51 ¶64-65).

time and place of unimaginable atrocities, during which Paul and Alice were specifically targeted. That fundamental error infects the District Court's entire analysis; the District Court should have rendered a decision in favor of Plaintiff consistent with U.S. policy.

II. THE DISTRICT COURT MADE IMPROPER FINDINGS OF FACT PREJUDICIAL TO PLAINTIFF

The District Court compounded its insensitivity to historical context by drawing inferences against Plaintiff with respect to the specific circumstances alleged to have been faced by the Leffmanns.

For purposes of reviewing a motion to dismiss for failure to state a claim, the court must accept a complaint's factual allegations, and all reasonable inferences that can be drawn from those allegations in plaintiff's favor. *Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007). A ruling on a motion for dismissal pursuant to Rule 12(b)(6) is not an occasion for the court to make findings of fact. *Id.* at 509; *see also Simmons v. Local Union 1199/SEIU-AFL-CIO*, 57 F. App'x 16, 20 (2d Cir. Dec. 31, 2002). Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). Under this standard, it is inappropriate on a motion to dismiss to make presumptions against, and draw

inferences adverse to, Plaintiff. Yet, that is precisely what the District Court did here. Indeed, the District Court rendered factual findings in its "Discussion" section that stray from the Decision's own "Background" section, which was largely extracted from the Complaint.

In concluding that Plaintiff fails to state a claim for duress under both New York and Italian law, the Court draws factual conclusions at odds with the pleadings, including:

> The fact that the Leffmanns spent several years looking to sell the Painting, rejected other offers and had additional assets including properties in Italy that they sold to an Italian businessman in 1937, suggests that they had the other financial alternatives. (SPA-35).

First, Paul and Alice did not "spen[d] several years looking to sell the Painting." Likewise, the District Court wrongly states that the "Leffmanns *took* two years from the time they received an initial offer to sell the Painting in September 1936 until they negotiated for its sale in June, 1938." (SPA-34) (emphasis added). Rather, Plaintiff alleges that "[i]n September of 1936, after he had been forced by the Nazis to part with nearly everything he owned, Leffmann had rejected an offer from the notorious art dealer, C.M. de Hauke of Jacques Seligmann & Co. (whom the U.S. State Department later identified as a trafficker in Nazi-looted art) to sell The Actor." (A-41 ¶33; SPA-4-6).

Nowhere does the Complaint suggest that Paul, on his own initiative, "looked to sell" the Painting or that he engaged in any efforts to do so in 1936. Rather, Paul was contacted by a dealer and, despite being under the siege of Nazi persecution, resisted that unilateral overture. As further alleged, nearly two years later, Leffmann, in an even more desperate state and with his assets greatly reduced, had no choice but to liquidate the Painting to flee Italy. (A-41-43 ¶33-34, 36-37).

Second, the statement that the Leffmanns "had additional assets including properties in Italy that they sold to an Italian businessman in 1937" erroneously implies that Paul and Alice had a portfolio of assets at their disposal as of June 1938 when they sold the Painting. The Complaint makes clear that though once wealthy, the Leffmanns were dispossessed of almost all of what they had before fleeing Germany and were forced to spend what remained of their assets to secure passage to, and residence in, Italy. (A-34-37 ¶13-19). The "property in Italy" to which the District Court refers is the parcels that they had purchased pre-arrival and then sold at a steep discount upon arrival as the only feasible way (and quite an imbalanced, exploitative way) to get funds out of Germany. (A-38 ¶22-23). They ***did not*** have these assets in June 1938. As alleged, they "had no choice but to turn whatever

assets they still controlled into cash." (A-40 ¶28; SPA-11). Their primary asset was the Painting. (A-46 ¶47; SPA-18).

Third, the District Court finds that the Leffmanns were only "temporarily passing through" Italy, inferring that Italy was just a convenient way-station on their international travels. (SPA-48, 42). In reality, as alleged, Paul and Alice hoped for Italy to be "safe haven from the Nazi onslaught" where they could regain normalcy. (A-37-38 ¶20-22). They were forced to run for their lives when it became clear that the "Fascist regime's treatment of the Jews would mimic that of Hitler's Nazis." (A-40 ¶28; SPA-10).

The net effect of the District Court's improper factual findings, each inconsistent with the pleadings, is a permeating presumption that the Leffmanns had the capacity and means to act as normal commercial actors with options and discretion. These adverse inferences further denigrate the Leffmanns' predicament when forced to sell the Painting, in a positon of extreme disadvantage, to raise funds for escape. The District Court's mistaken legal analysis is premised on these misrepresentations.

III. NEW YORK LAW DOES NOT BAR RELIEF FOR THOSE LIKE THE LEFFMANNS WHO SOLD ASSETS TO ENABLE ESCAPE FROM PERSECUTION

As alleged: (a) Paul and Alice were in real danger in June 1938, facing a concrete Fascist and Nazi threat to their liberty, property rights, and lives; (b) Paul and Alice understood the gravity and immediacy of their situation, having recently fled Nazi persecution in Germany; (c) Paul and Alice needed to sell the Painting to finance an escape, as the great majority of their assets had been "Aryanized" or "taxed" in Germany, or liquidated in connection with their initial flight; (d) the Painting was sold for well under fair value, with the purchaser of the Painting aware of the Leffmanns' dire predicament.

Despite these dire circumstances facing the Leffmanns, as pled in detail in the Complaint, the District Court held that New York law governs and forecloses any possibility of relief. Plaintiff acknowledges that New York did not confront the Holocaust on its soil and thus its common law may not specifically account for the circumstances at issue. That does not, and cannot, mean that a Federal Court sitting in New York should narrowly apply New York law on economic duress as if Holocaust Era transactions by Jews on the run are indistinguishable from ordinary, market transactions. Moreover, the District Court erred in several respects in its application of the law.

A. New York Recognizes Third-Party Duress in the Circumstances Alleged by Plaintiff

The District Court held that Plaintiff's claims were barred because, "[c]ritically, under New York law, the defendant must have caused the duress." (SPA-31). Thus, the District Court found that "although the Leffmanns felt economic pressure during the undeniably horrific circumstances of Nazi and Fascist regimes, that pressure, when not caused by the counterparties to the transaction (or the Defendant) where the duress is alleged, is insufficient to prove duress to the transaction." (SPA-33).

The rule propagated by the District Court is that duress imposed by the Fascists and Nazis cannot provide a basis to invalidate a transaction, unless it was the Nazis or Fascists themselves who obtained the asset — regardless of the severity of the pressure imposed. This finding not only runs counter to bedrock, U.S. policy as discussed above, but it also misstates New York law.

New York law expressly recognizes (like other U.S. jurisdictions) that third-party duress *can* provide a basis for voiding a contract. *Aylaian v. Town of Huntington*, 459 F. App'x 25, 27 (2d Cir. 2012). It can do so when the party that acquired the disputed property had reason to know about the underlying duress. *Oquendo v. CCC Terek*, 111 F. Supp. 3d 389, 409 (S.D.N.Y. 2015) ("[U]nder New York law, '[d]uress by other than the

opposing party to a contract cannot constitute compulsion sufficient to void the contract'….although *there is an exception when the promisee had knowledge of* or consented to *the third party's actions* . . . .") (emphasis added); *cf. Curtis Lumber v. Louisiana Pac. Corp.*, 618 F.3d 762, 784 (8th Cir. 2010) ("It makes little difference who exerts the pressure and who receives the payment so long as the duress is causally tied to the defendant and the pressure is sufficient to reasonably deem a payment involuntary. Any limitation on this doctrine based on the identity of the party exerting pressure would be artificial.").

This rule is consistent with the Restatement (Second of Contracts) §175(2), referenced by this Court in *Aylaian*, 459 F. App'x 25, 27:

> If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party has, in good faith and without reason to know of the duress, given value or changed his position materially in reliance on the transaction.

See also Restatement (Third) of Restitution and Unjust Enrichment §14, Comment i ("The duress that makes a transfer subject to avoidance need not be exerted by the transferee. The usual case involving duress by a third party allows rescission against a transferee who takes as a donee, or who takes with knowledge of the third party's coercion."); 28 Williston on Contracts §71:8

(4th ed.) ("it is immaterial . . . whether the duress is exercised by a party to the transaction or by a third party").

Here, Plaintiff alleges that the purchaser of the Painting was aware of the circumstances facing the Leffmanns and, when trying to sell the Painting, lied about identity of the seller to cover up the dark reality that would have been obvious if the truth had been revealed:

> On July 26, 1938, Frank Perls, Käte's son, who was also a dealer, wrote to automobile titan Walter P. Chrysler Jr., asking if he would be interested in purchasing The Actor. Obviously aware of the "sensitivity" of his overture, having just acquired a Picasso masterpiece from a German Jew on the run from Nazi Germany living in Fascist Italy for a low price that reflected the seller's desperate circumstances and the extraordinary prevailing conditions, he described the work as having been purchased by Mrs. Perls from "an Italian collector" -- an outright lie. (A-43 ¶38).

Plaintiff's claim of duress, as pled, fits firmly within the standard for third-party duress under New York law and under the Restatement (Second) of Contracts. The District Court wrongly dismissed the claim on a pre-answer motion without providing Plaintiff her day in court.

B. The District Court's Duress Analysis Was Premised on Improper Factual Assumptions

The District Court not only bypassed the historical context, but its application of what it presented as the standard for economic duress is premised largely on critical factual mischaracterizations, as discussed *supra* at 33-36.

In *Menzel v. List*, the Jewish owners of a painting by Marc Chagall left their apartment in Brussels when they fled the Nazis in March 1941. 49 Misc. 2d 300, 301-02, 267 N.Y.S.2d 804, 806 (N.Y. Sup. Ct. 1966), *modified as to damages*, 28 A.D.2d 516 (1st Dep't 1967), *rev'd as to modification*, 24 N.Y.2d 91 (1969). The painting was seized by the Nazis, who left a certification or receipt "indicating that the painting, among other works of art, had been taken into 'safekeeping.'" *Id*. at 301, 267 N.Y.S.2d at 806. The trial judge hearing the case concluded that the painting had not been abandoned because it did not constitute "a voluntary relinquishment of a known right." *Id*. at 305, 267 N.Y.S.2d at 809-10. The justice continued: "The *relinquishment* here by the Menzels *in order to flee* for their lives was no more voluntary than the relinquishment of property during a holdup." *Id*. (emphasis added).

Though the Nazis did not take the Painting here, the *Menzel* case is an important guidepost as to what the concepts like "voluntary," "free will," and

"alternatives" mean in the context of characterizing behavior shaped by flight from persecution. *Cf. Bakalar v. Vavra*, 619 F.3d 136, 149 (2d Cir. 2010) (concurrence, Korman, J.) (referencing historical context to analogize relinquishment in *Menzel* to signature made in confinement in Dachau).

The District Court's holding that the Leffmanns "exercised free will" is not only overly-restrictive, but it also based on the erroneous statement that the "Leffmanns took nearly two years" to negotiate the sale of the Painting. (SPA-34). The Complaint does not allege that the Leffmanns "took" those two years to do anything other than flee for their lives from Germany and try to set up a new home in Italy. That they rejected an earlier, uninitiated overture to acquire the Painting and then sold it in 1938 for that same low price is only reflective of the grim circumstances at the time of the 1938 Transaction. (A-41, 43 ¶33, 37).

The District Court's holding that that Leffmanns had "other financial alternatives" is based on the erroneous statement that they "had additional assets including properties in Italy that they sold to an Italian businessman in 1937." (SPA-35). This statement is not only discombobulated — how could they have additional assets if they sold them a year earlier — but it implies a level of resources that, as alleged, was a distant reality for the Leffmanns. (A-

34-38 ¶13-22). The only "alternative" to selling the Painting was to face imprisonment and/or death. New York law cannot possibly consider that to be a viable alternative.

Put simply, the factual underpinning of the District Court's duress analysis is directly inconsistent with the Complaint. To compound this error, the District Court again applied the standard in a way that is unjustifiable here. In the case that the Decision relies upon as "no other alternative," *Kramer v. Vendome Grp. LLC*, 11-CIV- 5245 (RJS), 2012 WL 4841310, at *6 (S.D.N.Y. Oct. 4, 2012), the identified "other alternative" is "pursuing legal remedies." The Leffmanns did not have that recourse against their oppressors.

Indeed, it should be noted that the Restatement (Third) of Restitution and Unjust Enrichment §14, comment f (2011) takes fault with the very notion of "no other alternative" as a condition to duress:

> [I]t is not a requirement of restitution for duress that impermissible coercion leave the transferor with no alternative to compliance. Frequently, a person confronted with an unjustified demand has potential legal remedies that would—in theory, at least—permit resolution of the controversy without the need to accede to the threat. The existence of such remedies will not validate a transfer that is otherwise subject to avoidance for duress.

The focus on this section in the Restatement (Third) Restitution and Unjust Enrichment is, instead, on the *wrongfulness* of the coercion, explaining that "a conclusion that a transfer that has been induced by duress depends not only on an appreciation of the circumstances of the transaction — including the considerations motivating one party to make the threat and the other to yield to it — but on an underlying social judgment about the forms and the extent of the pressure that one person may legitimately bring to bear in seeking to influence the actions of the other." *Id.*, comment g.

In narrowly applying what it took to be the technical requirements of the New York standard for economic duress to its misstatement of the alleged facts, the District Court lost sight of these core notions of wrongfulness and illegitimacy.

C. The Allegations Support a Finding that the 1938 Transaction Was Void as Made Under Duress Akin to Physical Compulsion

Duress generally "may be said to exist where one is compelled to perform an act which he has the legal right to abstain from performing." *Gerstein v. 532 Broad Hollow Road Co.*, 75 A.D.2d 292, 297 (1st Dep't 1980).

In finding that Plaintiff did not state a claim for "economic duress," the District Court focused on "general economic conditions" and inaptly analogized the 1938 Transaction to standard commercial dynamics. The cases referenced in the Decision universally pertain to business and work-place settings that cannot be compared to the situation confronted by the Leffmanns when Paul sold the Painting in the face of the barbaric campaign of persecution that the Nazis and Fascists were waging against the Jews. *See, e.g., Interpharm, Inc. v. Wells Fargo Bank, Nat. Ass'n*, 655 F.3d 136, 142 (2d Cir. 2011) (dispute between bank as to line of credit); *Stewart M. Muller Constr. Co. v. N.Y. Tel. Co.*, 40 N.Y.2d 955, 956 (1976) (contract dispute between construction company and telephone company). Indeed, the District Court noted that many courts have observed that "an element of economic duress is present when many contracts are formed." (SPA-32) (internal references omitted). None of those courts were speaking of contracts entered into by Jews facing persecution during the Holocaust Era (or anything remotely analogous to this life-or-death scenario). As alleged, the 1938 Transaction was not a financial decision, it was the only means of survival.

Indeed, the District Court's mere assumption that Plaintiff's claim must fit within rubric of "*economic* duress" is indicative of its failure to

acknowledge U.S. policy and grasp the significance of the Holocaust Era. Though not addressed by the District Court, New York law also recognizes duress when there is physical compulsion, threat, or undue influence. *See Evans v. Waldorf-Astoria Corp.*, 827 F. Supp. 911, 913–14 (E.D.N.Y. 1993), *aff'd*, 33 F.3d 49 (2d Cir. 1994); *see also Reid v. IBM Corp.*, No. 95 CIV. 1755 (MBM), 1997 WL 357969, at *6 (S.D.N.Y. June 26, 1997).

Physical compulsion, or something akin to physical compulsion, means that a party is compelled by force to do an act that he has no intention of doing. This is a basis for voiding a contract —*i.e.,* the result, like a theft or taking, is that there is no contract at all, a "void contract" as distinguished from a voidable one. Restatement (Second) of Contracts §174 (1981); Restatement (Third) of Restitution and Unjust Enrichment §14 (2011); *see, e.g., Reynolds v. Dime Sav. Bank,* 121 Misc. 2d 463, 464, 467 N.Y.S.2d 971, 973 (Civ. Ct. 1983) (funds withdrawn at knifepoint).

Moreover, a threat without physically-applied force can be sufficient to void a transaction where "a threat of imminent physical violence is exerted upon the victim of such magnitude as to cause a reasonable person, in the circumstances, to fear loss of life, or serious physical injury, or actual imprisonment for refusal to sign the document." 28 Williston on Contracts

§71:8 (4th ed.), *citing U.S. for Use of Trane Co. v. Bond*, 322 M.D. 170 (M.D. 1991). The threat itself can come in different forms, as set forth in the Restatement (Second) of Contracts §176 (1981):

> (1) A threat is improper if:
>
> (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
>
> (b) what is threatened is a criminal prosecution,
>
> (c) what is threatened is the use of civil process and the threat is made in bad faith, or
>
> (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
>
> (2) A threat is improper if the resulting exchange is not on fair terms, and
>
> (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
>
> (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
>
> (c) what is threatened is otherwise a use of power for illegitimate ends.

Restatement (Second) of Contracts §176 (1981); *see also Matter of Rosasco,* 31 Misc. 3d 1214(A), 927 N.Y.S.2d 819, *8 (N.Y. Surr. Ct. Apr. 5, 2011) (recognizing that past acts of violence import a threat of repeated violence);

cf. Borouchov v. Strobel, 95 CIV. 0611 (JSM), 1995 WL 510013, at *3 (S.D.N.Y. Aug. 28, 1995), *aff'd*, 98 F.3d 1359 (Fed. Cir. 1996) ("[a] threat to do that which one has the right to do does not constitute duress.").

The assessment of the threat is a subjective one. Restatement (Second) of Contracts §175 cmt. c (2011) ("Threats that would suffice to induce assent by one person may not suffice to induce assent by another. All attendant circumstances must be considered, including such matters as the age, background and relationship of the parties."). And, if the circumstances are sufficiently threatening, the person cannot be expected to wait until he bears the full brunt of the force. *Cf. Vaughn v. Vill. of Port Chester*, 15 N.Y.S. 474, 474-75 (2d Dep't 1891), *aff'd*, 135 N.Y. 460, 32 N.E. 137 (1892) (plaintiff was not "obliged to wait any longer, to see what would actually be done").

Thus, if this case proceeds beyond the pleading stage, Plaintiff will have the opportunity to present evidence, both documentary and in the form of expert historical testimony, as to the circumstances facing the Leffmanns as of June 1938 — including, *inter alia*, the threats they had already faced in Germany, the increasing threats of violence and imprisonment, and persecution of Jews (especially foreign Jews) in Italy, the military, police and governmental measures being implemented in Italy to track, restrict and

punish Jews, and the increased presence of the Nazis in Germany. (A-39-44 ¶25-41).

Plaintiff will also present evidence as to the Leffmanns' spiraling financial condition, having been stripped of their wealth by the Nazis, and reliant on the Painting to fund their escape from Italy. (A-46 ¶47). Furthermore, Plaintiff will present evidence as to the fair value of the Painting as compared to the actual sale price. (A-43, 47 ¶37, 52-53).

Based on the evidence, the District Court can then — and only then — fairly evaluate whether, when they sold the Painting, the pressure felt by the Leffmanns, as a result of the Nazis and the Fascists, was of sufficient magnitude as to cause a reasonable person to fear loss of life, or serious physical injury, or actual imprisonment. With the claim dismissed at inception, Plaintiff has been denied the opportunity for relief just because Paul and Alice had the foresight to sell their last valuable asset to pre-empt the worst consequences of persecution.

In the context of the Holocaust Era, did the Leffmanns have to wait until it was too late to escape before the pressure could be deemed akin to physical compulsion? New York law does not require that lethal Catch-22 in

order to state a claim for duress; the allegations support a finding that the 1938 Transaction is void.

D. The 1938 Transaction Was Void as Unconscionable, A Principle Overlooked by the District Court

In evaluating the 1938 Transaction, unconscionability is another essential principle that the District Court should have, but did not, consider.

In New York, contracts may be voided under the doctrine of unconscionability — *i.e.,* where the circumstances of the sale are so reprehensible that it shocks the conscience of the court. *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 381 (S.D.N.Y. 2002); N.Y. U.C.C. Law §2-302(1). The unconscionability doctrine, which has been described as a "flexible doctrine with roots in equity," offers protection to the weaker party: unconscionability exists where there is "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *State of N.Y. v. Wolowitz*, 96 A.D.2d 47, 66 (2d Dep't 1983) (internal quotations removed). Courts in New York have "identified various elements" of unconscionable contracts, including "substantive and procedural" elements. Substantive elements are those that appear "in the content of the contract per se," while procedural elements must be "identified by resort to evidence of the contract

formation process." *Matter of Friedman*, 64 A.D.2d 70, 85 (2d Dep't 1978). But because unconscionability "must necessarily be applied in a flexible manner," there are circumstances in which "[one] factor alone may be sufficient to sustain (a finding that the contract is unconscionable)" — for example where "the disparity in the consideration exchanged by the parties is overwhelming . . . since such disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of (one party)." *Id*. (internal quotations removed).

In this case, a Jewish family who lost most of its property to Nazi persecution, and then, to fund their escape, sold their last remaining asset of worth for well below fair value to dealers, who turned around and sold it for a much higher price while lying about its provenance, should "shock" the conscience of the court. The disparity in bargaining power between Leffmann and Perls, taken together with the dire circumstances surrounding the Leffmanns, should be sufficient, at least at the pleading stage, for a court to find that the 1938 Transaction was unconscionable at the time of its occurrence, and hence, void.

E. Even if the 1938 Transaction is Not Void *Ab Initio*, "Voidability" is Not a Bar to Relief for Plaintiff

Plaintiff expects the Museum to argue that, at most, the 1938 Transaction is voidable and the Leffmanns' failure to repudiate the transaction precludes a challenge now.[9] This "gotcha" result — *i.e.*, that Plaintiff is foreclosed because the Leffmanns somehow "ratified" the contract while they were fleeing for their lives — is an affront to the very historical context in which these cases must be viewed. The HEAR Act compels the courts to help return Nazi-looted art to its heirs. *Reif*, 2018 WL 1638805 at *3, *citing* HR Rep. Vol 162, at H7332 (Dec. 7, 2016). The Terezin Declaration urged "every effort to be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress, which were part of the persecution of these innocent people and groups."[10] The Ninth Circuit, in *Von Saher*, recognized that U.S. policy requires "concerted efforts to achieve expeditious, just and fair outcomes

[9] To the extent that the Museum argues that it holds superior title because it obtained the Painting from Foy who acquired "good title" (A-80-81), that is not a conclusion that can be drawn on a motion to dismiss. The circumstance of Foy's acquisition is a matter appropriately resolved after discovery. The Museum has acknowledged that, as a donee, it merely acquired whatever title the donor possessed.

[10] http://www.holocausteraassets.eu/program/conference-proceedings/declarations/.

when heirs claim ownership to looted art" and "that every effort be made to remedy the consequences of forced sales." 754 F.3d at 721.

How can these objectives be accomplished, if the persecuted persons and their heirs are penalized for focusing on survival more than their contract rights? Judge Rakoff's decision in *Schoeps* gets right to the heart of this issue.

1. The 1952 Transaction Did Not Convey Title to the Museum, Pursuant to *Schoeps* and U.S. Policy

In *Schoeps*, the court evaluated the initial 1935 transfer of the paintings under German law, addressing both the German Civil Code provision dealing with duress — which would render the transfer voidable — and the public order statute which states that a contract is *void ab initio* if it is "entered into when one party is at a distinct disadvantage in bargaining." *Schoeps,* 594 F. Supp. 2d at 466.

The court concluded that, despite the "meagre" record on summary judgment, the claimants had "adduced competent evidence sufficient to create triable issues of fact," including as to duress — *i.e.,* whether the paintings were only transferred "because of threats and economic pressures by the Nazi government." *Id*. at 464-66.

The court directed that the status of the 1935 sale be "informed by the historical circumstances of Nazi economic pressures brought to bear on 'Jewish' persons and property." *Id*. at 466. Through this lens, the court found, without any discussion of ratification or repudiation, that if the 1935 sale was made under Holocaust Era duress under German law, good title would not pass to the subsequent purchaser in 1936 under New York law. This finding was based on the principle that: "New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in possession of a good-faith purchaser for value." *Id*. at 467, *citing Lubell*, 77 N.Y.2d at 317; *see also Menzel*, 49 Misc. 2d 314-15.

In other words, Judge Rakoff found that Holocaust Era duress as to the disposition of artwork by Jews, if established under applicable law, and even if "voidable" under such law, should be treated as the equivalent of theft, thus barring, under New York law, subsequent good faith purchasers from obtaining good title of this "stolen property." *Schoeps,* 594 F. Supp. 2d at 467. Justice Ramos' recent decision in *Reif* is consistent with *Schoeps*. *Reif*, 2018 WL 1638805 at *4.

Plaintiff submits that, consistent with Judge Rakoff's holding in *Schoeps* and U.S. policy, as confirmed in *Reif* and reflected in the Terezin

Declaration, the Washington Principles, and the HEAR Act, the question of whether good title to The Actor — an artwork sold under Holocaust Era duress — passed to the Museum should be determined as follows:

1) The Court's analysis should be "informed by the historical circumstances" of Nazi and Fascist economic pressures brought to bear on Jewish persons and property. *Schoeps*, 594 F. Supp. 2d at 467.

2) Plaintiff has alleged the Painting was only transferred to fund the Leffmanns' escape from, and because of, the concrete and severe threats and pressures of the Nazis and their Fascist allies. They sold to survive and avoid a violent fate.

3) Through the historical lens and assuming the allegations to be true, the Court should find that this duress rendered the 1938 Transaction void *ab initio*, as the threat was akin to physical compulsion and/or is unconscionable under New York law.

4) To the extent the 1938 Transaction is found voidable rather than void, applying the *Schoeps* analysis and U.S. policy, good title to the Painting did not pass to the Museum through the 1952 Transaction because such Holocaust Era duress is akin to a taking.

2. The *Schoeps* Holding is Consistent with U.S. and International Law and Policy

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

Importantly, when confronted with analogous claims, restitution tribunals and commissions in Europe have repeatedly held that art sold by Jews under Holocaust Era duress, including those who sold to finance their escape, should be restituted to the original owners or their families. The few examples (of many) below are illustrative, and the victims' stories are strikingly similar to the experiences of the Leffmanns. If space allowed, this list could continue:

1) On April 29, 2016, the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution (the "Advisory Commission") recommended that a painting by Lovis Corinth be restituted to the heirs of Alfred Salomon. Until 1936, the painting was owned by Salomon, a Jewish businessman living in Berlin. Restitution was recommended because, subjected to Nazi persecution, and "in order to prepare their emigration. . . [they] found themselves forced to sell all their home furnishings, library holdings and artworks including the painting by Corinth."[11]

[11] Recommendation of the Advisory Commission in "Heirs of the Salomon family v. City of Gelsenkirchen," https://www.kulturgutverluste.de/Content/06_Kommission/EN/Empfehlungen/16-04-29-Recommendation-Advisory-Commission-Salomon-Gelsenkirchen.pdf?__blob=publicationFile&v=6).

2) On April 25, 2013, the Netherlands' Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the "Restitutions Committee") recommended the restitution of an artwork by Maerten Fransz. van der Hulst to the heirs of Richard Semmel who was forced to flee Germany in 1933 to avoid persecution, and subsequently sold part of his art collection. The Restitutions Committee found that the auction of Semmel's paintings, "while at first sight prompted by economic factors, cannot be seen separately from Semmel's persecution by the Nazi regime in Germany."[12]

3) On May 3, 2010, the Restitutions Committee recommended the restitution of a Jan Brueghel painting to the heirs of Max Stern, a Jewish art dealer who sold his trading stock and private collection under orders by German authorities to close his business. The Committee advised "that the circumstances in which Stern found himself in late 1936 and throughout 1937 . . . were so menacing and dangerous that had he succeeded in selling the

[12] Binding Opinion in the Dispute on Restitution of the Painting The Landing Stage by Maerten Fransz. van der Hulst from the Estate of Richard Semmel, Currently Owned by Stichting Kunstbezit en Oudheden Groninger Museu (Case number RC 3.126) (April 25, 2013), http://www.restitutiecommissie.nl/en/recommendations/recommendation_rc_3126.html.

claimed painting during this period, it should be considered to have been under duress." The Committee also found "that any such sale would have been intended to raise funds for his flight."[13]

4) On September 22, 2016, the Cologne City Council agreed to return a drawing by Adolf von Menzel from the Wallraf-Richartz-Museum to the heirs of Elisabeth Linda Martens because the drawing was sold under duress in December 1938 to finance Martens' escape and emigration to the United States.[14]

5) On October 4, 2010, The Restitutions Committee recommended the return of the painting, Winter Landscape by Jan van de Velde II, to the heirs of Curt Glaser who, in 1933, when victim to anti-Jewish measures enacted by the Nazis, including the Aryanization of his home and the loss of his employment, sold many of his artworks at auction. The Restitutions

[13] Recommendation Regarding Stern (Case number RC 1.96) (May 3, 2010), http://www.restitutiecommissie.nl/en/recommendations/recommendation_196.html.

[14] Press Release, *Cologne restitutes Menzel drawing – research work funded by the German Lost Art Foundation*, Oct. 4, 2016, https://www.kulturgutverluste.de/Content/02_Aktuelles/EN/News/2016/October/16-10-04_Restitution-Menzel-Zeichnung-Wallraf-Richartz-Museum.html.

Committee found that "he probably had to use [the paintings] to fund his escape to the United States and to pay the exit taxes imposed by the Nazis."[15]

6) On January 12, 2005, the Advisory Commission recommended the restitution of three Karl Blechen paintings and a watercolor by Anselm Feuerbach to the heirs of Julius and Clara Freund. Towards the end of 1933, Julius Freund moved his collection to Switzerland in order to protect it from being seized by the Nazis. In 1939, Julius and his wife Clara, who had both since become destitute as a result of Nazi persecution, emigrated to London. Following her husband's death in 1941 and given her financial situation, in 1942, Clara felt compelled to sell the collection at auction in Switzerland. The Advisory Commission recommended the paintings' restitution because the sale was necessary as a result of financial difficulties caused by Nazi persecution.[16]

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[15] Recommendation Regarding Glaser (Case number RC 1.99) (Oct. 4, 2010) http://www.restitutiecommissie.nl/en/recommendations/recommendation_199.html).

[16] Press Release, The Return of Cultural Property Seized as a Result of Nazi Persecution –
The First Recommendation of the Advisory Commission (Jan. 12, 2005), https://www.kulturgutverluste.de/Content/06_Kommission/EN/Empfehlungen/05-01-12-Recommendation-Advisory-Commission-Freund-Germany.pdf?__blob=publicationFile&v=8.

It is exactly these "historical circumstances of Nazi economic pressures brought to bear on 'Jewish' persons and property," that the court was referring to in *Schoeps*. 594 F. Supp. 2d at 467. These cases involve Jews, who, like the Leffmanns, were forced to flee Nazi persecution and to part with their belongings in order to survive their flights. In adhering to the Terezin Declaration and the Washington Principles, these restitution tribunals and commissions throughout Europe understand, much like the court did in the *Schoeps* case, as Justice Ramos recently recognized in *Reif*, and as reflected in U.S. policy, that the actions taken by persecuted Jews can only be evaluated in this context and that restitution is necessary when artwork was lost by Jews as a result of Holocaust Era persecution. The District Court's disregard for national and international policy sets it apart from these principled determinations.

IV. PLAINTIFF STATES A CLAIM UNDER ITALIAN LAW

The United States and Italy are signatories to the Terezin Declaration and the Washington Principles and both endorse the policy of returning artworks lost as a result of Holocaust Era persecution.

To the extent that this Court nevertheless concurs with the District Court that Plaintiff's claim for third-party duress is unsustainable under New

York law, the Court should then apply Italian law, which, consistent with this important policy, would render the 1938 Transaction void or, in the alternative, voidable.

A. Italian Law Governs if New York Law is Found Not to Offer Protections to Plaintiff

The District Court undertook a choice-of-law analysis, determining that New York law governs all aspects of Plaintiff's claims because, relying on *Bakalar v. Vavra*, 619 F.3d 136, 144 (2d Cir. 2010), New York has the "overwhelming interest in preserving the integrity of transactions" and "prevent[ing] the state from becoming a marketplace for stolen goods." (SPA-40, *quoting Bakalar*); *see also Reif*, 2018 WL 1638805 (N.Y. Sup. Apr. 5, 2018) (same result). To the extent that this Court affirms the District Court's (and Justice Ramos') interpretation of *Bakalar*, New York law would govern here and provides relief to Plaintiff for the reasons presented above.

However, if the Court re-examines the choice-of-law question, there is a sound basis for applying Italian law to the 1938 Transaction and New York law to the 1952 Transaction.

1. The Choice-of-Law Analysis and the Propriety of Bifurcation

If New York and Italian laws diverge in a determinative manner, an analysis under New York's choice-of-law rules would be required, as jurisdiction in this case is predicated on diversity of citizenship. New York's interest analysis test is not rigid, but rather is determined by an evaluation of the facts or contacts which relate to the purpose of the particular law in conflict. *Abu Dhabi Inv. Auth. v. Citigroup, Inc.*, 12-CV-283 (GBD), 2013 WL 789642, at *6 (S.D.N.Y. Mar. 4, 2014), *aff'd*, 557 F. App'x 66 (2d Cir. 2014) (*quoting Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 521 (1994)). Interest analysis is a fact intensive "flexible approach intended to give controlling effect to the law of the jurisdiction, which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Fin. One. Pub. Co. v. Lehman Bros. Special Fin.*, 414 F.3d 325, 337 (2d Cir. 2005) (internal citations omitted).

Moreover, courts must examine the purposes and policies of the conflicting laws in the context of the facts of the case. *Brink's Ltd. v. S. African Airways*, 93 F.3d 1022, 1030-31 (2d Cir. 1996) (internal citations removed).

The same choice-of-analysis need not apply for all aspects of an action, or even different components of an individual claim. Under the doctrine of "depecage," as applied by New York courts, "the rules of one legal system are applied to regulate certain issues arising from a given transaction or occurrence, while those of another system regulate other issues." *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 169 (2d Cir. 2012) (*quoting Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 397 n.1 (2d Cir. 2001)); *Golden v. Wyeth, Inc.*, No. 04-CV-2841 (JS) (ARL), 2013 WL 4500879, at *3 (E.D.N.Y. Aug. 20, 2013). The doctrine recognizes that in a single action, different fora "may have different degrees of interests with respect to different operative facts and elements of a claim or defense." *2002 Lawrence R. Buchalter Alaska Trust v. Philadelphia Fin. Life Assur. Co.*, 96 F. Supp. 3d 182, 200 (S.D.N.Y. 2015); *see generally* 15 C.J.S. Conflict of Laws §35 ("Splitting Issues - Depecage") ("Thus, different policies and interests may make the law of one jurisdiction appropriate for the resolution of some issues and the law of another interested jurisdiction the most rational choice for resolving other issues in the same case"); Symeon C. Symeonides, *Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect*, 45 U. Tol. L. Rev. 751, 755 (2014) (if a case or, more precisely, a cause of action, comprises more than one issue on

which the substantive laws of the involved states conflict, each issue should be subjected to a separate choice-of-law analysis).

Further, particular tort claims may be "mixed" in that distinct issues within that claim require the application of separate laws. That is, "[t]here is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction." *Weizmann Inst. of Sci. v. Neschis*, 229 F. Supp. 2d 234, 249-50 (S.D.N.Y. 2002); *see also Lund's Inc. v. Chem. Bank*, 870 F.2d 840, 845–46 (2d Cir. 1989); *Babcock v. Jackson*, 12 N.Y.2d 473, 484 (1963).

In *Schoeps,* Judge Rakoff appropriately bifurcated the choice of law analysis, finding that German law, where the transferors were located and the alleged duress was suffered, governed the initial transfer alleged to have been made under duress. As to the "separate issue of what law governs the validity and legal effect" of the subsequent transfer, the court determined that New York law applied, as the paintings had been shipped to New York. 594 F. Supp. 2d at 467-68.

2. Italy Has a Strong Interest in the 1938 Transaction and the Precipitating Circumstances

Here, the core allegation is that, "[a]s a matter of law and public policy, good title to the Painting never passed from Leffmann to Perls and

Rosenberg, and thus neither Perls, Rosenberg nor Foy could convey good title to the Painting. Therefore, the Museum never acquired good title to the Painting, and it remains the property of the Leffmann estate." (A-47 ¶55). At issue are two distinct transactions: (a) the 1938 Transaction — Paul's sale of the Painting in 1938 to Käte Perls, acting on behalf of Hugo Perls and Paul Rosenberg (A-43 ¶37); and (b) the 1952 Transaction — the Museum's receipt of the Painting in 1952, via donation (A-47 ¶54). Whether the Museum obtained good title through the 1952 Transaction cannot be determined without first, independently, examining the validity of the 1938 Transaction. Thus, the 1938 Transaction and the 1952 Transaction should be bifurcated for purposes of the choice of law analysis.

Though the parties (and the District Court) agree that New York law applies to the 1952 Transaction, Italy, like Germany in the *Schoeps* case, has a significant interest in determining the validity of the 1938 Transaction: (i) residents of Italy; (ii) who had come to Italy to find a (hopefully permanent) safe haven; (iii) were forced to sell the Painting to fund their flight from Italy; (iv) necessitated by increasing violence and persecution of Jews in Italy by the Nazis and their Fascist allies. Italy also has a governmental and policy interest in addressing the historic wrongs that occurred within its borders and

that necessitated the 1938 Transaction. In contrast, neither New York nor anyone residing in it had any connection to the 1938 Transaction or the duress imposed on the Leffmanns.

The District Court's lack of regard for Italy's interest is largely based on a mistaken linking of Italy here to Switzerland in *Bakalar*. In *Bakalar*, plaintiff-heirs alleged that artwork was stripped from the decedent by the Nazis in Vienna and later sold to a Swiss gallery where it briefly stayed before being shipped to New York. Applying Swiss law, the District Court found that the Swiss gallery had purchased the artwork in good faith and thus acquired good title, and shrouded good title on all subsequent purchasers, regardless of the circumstances under which decedent had lost the artwork. *Bakalar*, 619 F.3d at 143. Concerned that the law of Switzerland, which had no connection other than hosting the artwork for a few months, would prevent the merits from being heard, this Court determined that New York's interest in regulating its marketplace outweighed Switzerland's marginal interest. Switzerland's connection to the artwork was evanescent and attenuated, as the drawing only "passed through" there for a few months. In contrast, here, it was in Italy that the duress was imposed and suffered, and it was the circumstances in Italy that forced the disposition of the artwork from its

owner. Indeed, as alleged, the Leffmanns would have remained in Italy had they not been forced out. Though the District Court characterizes Italy's interest as "pass through" and "tenuous" (SPA-42, 48), that description belittles the effect of Italian actions and laws on the Leffmanns' plight. The Italian interest far exceeds the fleeting Swiss interest in *Bakalar*.[17]

Indeed, the more analogous country in *Bakalar* is Austria, where the alleged wrongdoing was inflicted by the Nazis. The Court did not reject the application of Austrian law as to the initial transaction, but rather found that Austrian law, consistent with New York law, would allow plaintiff the opportunity to present its case. *Id.* at 145-46. The Court did not determine how it would have proceeded had Austrian law differed from New York law.

Ultimately, it is a mistake to interpret *Bakalar* as a condemnation of bifurcation in the choice-of-law analysis or as a mandate that the interest analysis must result in New York law whenever a disputed object sits in New York. Here, Italy has a substantial interest in addressing the nightmarish pressure imposed upon the Leffmanns in connection with the 1938

[17] That the Painting was being held in Switzerland for safekeeping or that the purchasers were French (their exact whereabouts at the time are not known and are thus not alleged) does not alter this analysis or diminish Italy's interest.

Transaction and should apply if this Court affirms the District Court's holding as to the perceived limits of New York law on duress.

As a final note as to choice-of-law, if this Court determines that Italy has a superior interest in the 1938 Transaction but, unlike New York law, does not provide relief to Plaintiff in a manner consistent with U.S. policy, as adopted by New York courts, then the Court should apply New York law because Italian law would be repugnant to that policy. *See Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 321, 642 N.E.2d 1065, 1070 (1994); *Brink's Ltd.*, 93 F.3d 1022. For the reasons set forth herein, it is Plaintiff's position that she states a claim for relief under both New York and Italian law even if the applicable laws are not identical (*e.g.,* the distinctness of Italy's law on public order and morals).

B. Recognition of the Holocaust Era Is a Critical Component in the Application of Italian Law

In finding Italian law unavailing to Plaintiff, the District Court "credited" the opinion of the Museum's expert, Professor Pietro Trimarchi ("Trimarchi" or "Trimarchi Report"), rather than that Plaintiff's expert, Professor Marco Frigessi Di Rattalma ("Frigessi" or "Frigessi Report").[18]

[18] The foreign legal authorities referenced herein are, if not in the Joint Appendix as attachments to the Frigessi or Trimarchi Reports, included, with

The Trimarchi Report *does not even mention* the Holocaust, Jews, the Terezin Declaration, or the Washington Principles, let alone analyze the law through the perspective of historical context. The Trimarchi Report is also devoid of reference to the Leffmanns or the allegations in the Complaint — *i.e.*, the facts here do not matter. (A-379-406). Consistent with the District Court's treatment of New York law, the Decision wrongly embraces a legal perspective that, with stunning silence, ignores the context of the Holocaust Era and the particular hardships faced by the Leffmanns.

If applied, Italian law, like New York, must account for the Holocaust Era when analyzing the 1938 Transaction. The Frigessi Report stresses the importance, under Italian law and constitutional framework, of viewing the 1938 Transaction through the lens of the internationally-accepted principles best reflected in the Terezin Declaration and the Washington Principles (both of which Italy signed):

> The Washington Conference Principles and the Terezin Declaration affirm that one cannot use normal principles of commercial law and applying them to the circumstances to a case involving the Holocaust . . . While the [Washington Principles]

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translation, in the Addendum of foreign legal authorities annexed to this submission. This Court may consider these sources in interpreting and applying Italian law. *See Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 604 (2d Cir. 1999).

> and the Terezin Declaration are not international treaties, Italian law concepts of "public order," "morals" and "duress" as properly interpreted are consistent with such international instruments, when applied to sale that place in 1938 by a German Jew who was forced to flee Fascist Italy after suffering both Nazi and Fascist persecution. (A-271-272 ¶12-13).

As Professor Frigessi explained, "it would be unimaginable to apply the Italian law of duress to the 'Sale' without the recognition of these extraordinary circumstances." (A-285 ¶64). The Italian legal system, as it has evolved, is in accord. For example, in addressing "pension" claims by Jews who lost their ability to work at the hands of Fascist persecution, the Italian court in charge of State accounting matters (the "Corte dei Conti") has made clear in recent years that the evaluation of the standard for this relief must be interpreted through the lens of historical context:

> [I]t must be generally observed that any legal assessment of the conditions establishing entitlement to this benefit for victims of political and racial persecution cannot be divorced from the inseparable historical context in which the persecution of these citizens developed and unfolded . . . [19]

As with New York law, had District Court's analysis of Italian law properly accounted for the overwhelming impact of Holocaust Era

[19] Corte dei Conti, Sezioni Riunite, no. 8, 25 March 2003. (ADD-10).

persecution on the 1938 Transaction, it would have found that Plaintiff stated a claim for relief.

C. The 1938 Transaction is Void as Against Public Order and Morals

Under Italian law, the sale of the Painting is void *ab initio* because it was contrary to "public order" and "morals," as per Article 12 of the 1865 Civil Code:

> An obligation without "causa," or based on a fraudulent or unlawful "causa" cannot have any effect.
>
> The "causa" is unlawful when it is contrary to the law, public morality or public order.[20]

(A-269, 272, 275, 277, 287 ¶4, 15, 30, 38, 74); *see* Art. 12, 1119 and 1122 of the 1865 Italian Civil Code ("ICC") and Art. 1343 and 1418 of the 1942 ICC.

The Supreme Court of Cassation (the highest court in Italy) defines "public order" as the fundamental principles of the Italian legal system. *See* Court of Cassation, no. 6381, 8 June 1993. (ADD-124). "Public order" is thus composed of the rules and principles that the Italian legal system considers indispensable for the protection of the public interest, and is intended to constrict the contractual autonomy of individuals to the extent that

[20] The literal translation of "causa" is "consideration," but the term is more broadly understood under Italian law to encompass the "purpose" of the contract. (A-272 ¶16 n.5).

exchanges are inconsistent with the fundamental values of the Italian legal system. (A-269-270, 273-274 ¶7, 20-22); *see also* Enciclopedia del diritto, vol. XXX, page 1054 (Giuffré Editore) (public order law represents "the values that characterize" the Italian legal system) (ADD-175).

The concept of what violates the "public order" shifts over time, shaped by judges "in a manner reflecting the changing habits and sentiments of the citizens: in short, a collective social consciousness." (A269-270, 273-274 ¶7, 20-22); *see also* Court of Cassation, no. 234, 15 February 1960, in *Giust. civ.*, 1960, I, page 961 et seq. (defining immoral acts as "those principles and ethical requirements of the collective moral conscience that constitute the social decency") (ADD-77).

Transactions contrary to the fundamental rules of public morality — referring to the social, moral and ethical requirements on which a society is based — have no legal effect. (A-269, 272, 274-275, 277, 287 ¶4, 15, 24-26, 29, 30, 38, 74); *see also* Court of Cassation, no. 1378, 14 May 1955, in *Temi*, 1955 ("there is no doubt that the judge is called upon *ex lege* to assess if a given contract constitutes an offense to morality") (ADD-109).

As pertinent here, and as explained by Professor Frigessi, the Italian legal system does not recognize the validity of a contract in which a purchaser

has obtained an imbalanced price taking advantage of the state of necessity and the dire circumstances of the seller who needed to raise funds to finance escape from persecution. The 1938 Transaction was also against "public morals," in that the Painting was sold to the prejudice of the seller, "a German Jew on the run from Nazi Germany living in Fascist Italy," where the purchaser had good reason to know that the "low price reflected the seller's desperate circumstances and the extraordinary prevailing conditions." (A-274-277 ¶28-30, 33-36, 38).

That these circumstances involve the Holocaust Era is a context not lost on the Italian legal system which repealed all anti-Semitic laws, enacted the Republican Italian Constitution, and developed a specific set of post-war rules providing for particularly strong protections of Jewish individuals persecuted by the anti-Semitic laws. (A-270, 274-277 ¶9-10, 28-30, 33-36, 38). For example, Article 19 of legislative decree lieutenant April 12, 1945, provides a simplified way for a Jewish seller to nullify an unbalanced contract. The underlying principle recognized through this legislation is that Jewish individuals during the Holocaust Era are considered as weak contractual parties and, more generally, as persons subjected to violence. (*Id.*) Though the 1938 Transaction falls outside the purview of such legislation, as it applies

to transactions that occurred after October 1, 1938, it is instrumental to understanding that the circumstances here give rise to a violation of the public order and morals.

As such, the 1938 Transaction should be rendered void under Italian public order law. (A-277-278 ¶39-40). Thus, if proven, it would be impossible for the Museum to have acquired good title through the 1952 Transaction under New York law, which the parties agree applies to the 1952 Transaction. *See, e.g., Smith v. Reid*, 134 N.Y. 568 (1892); *Overton v. Art Fin. Partners LLC*, 166 F. Supp. 3d 388, 399-400 (S.D.N.Y. 2016); *Brown v. Mitchell-Innes & Nash*, 2009 WL 1108526, at *4 (S.D.N.Y 2009); *Candela v. Port Motors, Inc.*, 208 A.D.2d 486 (2d Dep't 1994). This alone sustains the Complaint and should ultimately mandate the Painting's return.

Nevertheless, in rejecting the application of the law on public order and morals, the District Court found that such law only addresses contracts "when the performance that is bargained for is illicit (*e.g.*, hiring someone to commit a crime)." (SPA-28). This is an overly restrictive view of the law. Italian courts have stressed that they can "find a contract void as against 'public order' and 'morals,' in conjunction with Article 2 of the Constitution, when its terms are severely unfair and unbalanced to the prejudice of one

contracting party" — even if they have the appearance of standard commercial transactions that are not illicit. (A-276 ¶33, *citing* Italian Constitutional Court, no. 248, 24 October 2013 (ADD-189-191) and no. 77, 2 April 2014 (ADD-182-184)).

Indeed, Professor Trimarchi, the Museum's expert, acknowledged the importance of the principles of public order in his treatise, not limiting its breadth to instances of illegality:

> The purpose of the public protection order is to protect, in certain contractual relationships, the economically weak party that has suffered the imposition of unfair contractual conditions . . .

Istituzioni di diritto privato, (Giuffré Editore, Milano 2016). (ADD-215).

Moreover, the District Court mistakenly adopts the view that specific remedies displace the law on public order, rendering it merely academic. (SPA-29-30). The District Court found that because Italy's postwar rule, Article 19, expressly provided rescission for contracts by people affected by the racial laws after October 6, 1938, any transactions prior to that date, including the 1938 Transaction from June 1938, are categorically free of the stain of persecution and the purview of legal protection. (SPA-29-30).

The postwar legislation was not intended to preempt claims based on the public order or morals, but rather was designed to further *strengthen* the

protections, and *streamline* the relief mechanism, afforded to victims of the Fascist regime.[21] (A-270, 276-277 ¶¶10, 34-38). Indeed, Professor Trimarchi recognized in his treatise that public order law is intended to complement, not compete with legislation: "the judge has the task of translating them into rules practically applicable to concrete cases, complementing the set of public order provisions expressly stipulated by the legislator." *Istituzioni di diritto privato*, (Giuffré Editore, Milano 2016). (ADD-213).

As an example of the application of Article 19, in *Haas v. Cisitalia* (1949), the Tribunal of Turin ordered the rescission of a sale by a foreign Jew of property sold in January 1939, two months before the deadline for Italy's expulsion of foreign Jews, finding:

> [E]very Jew, by the mere fact of being registrable as such, had reason to fear a sudden worsening of persecution, to the detriment of his or her person and property. Any conveyance carried out in those periods by such individuals. . . must be presumed to have been concluded in view of, and as a function

[21] In a decision by the Tribunal of Milan, the court stated that an action based on Article 19 is only "an indication of the general character surrounding the available action (from among those available, invalidity, annulment due to a lack of consent, termination, etc.). . . " 11 December 1947, in *Foro padano*, 1948, I, page 139 (ADD-232); *see also* Court of Appeal in Brescia, 3 May 1950, in *Foro*, I, page 359 et seq. (ADD-64-70). The analysis in this decision confirms that Article 19 is not intended to be preclusive of actions under other laws.

> of, not only the laws that were progressively being enacted but also new and more cruel repressive laws, as an action gradually taken to appropriately defend, *rebus sic stantibus* [under these circumstances], their own weakened financial position.[22]

Though the Italian legislature determined that contracts entered into after a certain date were presumptively invalid, that does not mean, as the District Court held, that any contract entered into before that date was *necessarily* valid and not made out of a desperate need to flee persecution.[23]

A similar argument, to what the Museum made here and the District Court accepted, was proffered in the expert report on German law in *Schoeps* on behalf of the museums. In analyzing an analogous public morals provision found in the German Civil Code, the report concluded that a judge may not "rely[] on the open concept of unconscionability" and the "standard of 'good morals.'" Report of Wolfgang Ernst, *Schoeps v. Museum of Modern Art*, No. 1:07-cv-11074-JSR, Dkt. 57-7, at 103 (S.D.N.Y. Oct. 20, 2008). Despite this

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[22] Tribunal of Turin, 11 January 1949, in *Foro it.*, 1950, page 776 et seq. (ADD-239-241).

[23] Of note, Article 19 has also been applied by Italian courts to contracts executed by Jewish sellers *before the entry into force of the anti-Semitic laws*, recognizing that the pre-announcement of the incumbent anti-Semitic laws caused a "state of threat" and "fear on the part of the persons threatened" for Jews during that period. Tribunal of Turin, 5 July 1947, *in Foro it.*, 1948, page 591. (ADD-236).

argument, Judge Rakoff determined that Section 138 of the German Civil Code presented valid grounds for voiding the contract. The District Court should have determined likewise here, especially at the pre-answer stage.

D. The 1938 Transaction was a Sale under Duress Pursuant to Italian Law

Under Italian law, the 1938 Transaction was alternatively made under duress:[24]

> 1108. Consent is invalid if it was given in error, extorted by violence or extracted with deceit.
>
> 1111. Violence applied against a person accepting an obligation makes the contract null and void, even though it may have been applied by someone other than the person to whose advantage an agreement is being adopted.
>
> 1112. Consent is deemed extorted by violence, when it is of such a nature as to impress a reasonable person and to cause him to fear that he or his property will be exposed to an unjust and considerable injury. In this respect, the age, sex and condition of the persons shall be considered.

Duress need not emanate from a particular person nor involve a direct threat or physical compulsion to the person who entered into the contract. *See* 1865 ICC Art. 1108, 1111-1114; *see also* 1942 ICC Art. 1427, 1434-1437. The duress may arise from a social environment, a government or political

[24] Similar provisions are restated in the ICC which came into force in 1942.

regime (like that of the Fascists), or even from a powerful criminal organization, like the Mafia. Italian law considers this type of third-party "violence" or duress to be "moral or political violence." The latter is defined as a "state of fear" generated by a political party or regime. Furthermore, the violence does not have to be presently occurring or imminent (it can lurk in the future, although it may not be a mere supposition). (A-269, 278-279, 282-284, 287 ¶4, 42-44, 46-49, 58-60, 74).

Under these standards, the Complaint sufficiently alleges that the 1938 Transaction was made under the duress of Nazi and Fascist persecution — to fund their flight from Italy in the face of, *inter alia*, Hitler marching down the streets of Florence, a Fascist regime increasingly and aggressively implementing the Nazi ideology of anti-Semitic policies, and heightened surveillance and monitoring of Jews, especially foreign Jews like the Leffmanns. The threat posed to the Leffmanns — whose "condition" the law requires the courts to take into account — placed them in a real and objective state of fear. This is cognizable duress under Italian law. (A-269, 282-285 ¶4, 58-60, 64).

As with its analysis of New York law, the District Court's evaluation of duress under Italian law is premised on a false factual construct, namely that

the Leffmanns only faced "generic, indiscriminate persecutions of fascism" without a "specific and concrete threat of harm." (SPA-28). The persecution faced by the Leffmanns — the forced relinquishment of their assets and exile from Germany and, in Italy, the targeted surveillance, tracking, interrogating, and monitoring, the financial restrictions, the rampant anti-Semitic policies, the inability to obtain permanent status, the deployment of Gestapo and SS Officers in Florence, *etc.* (A-39-43 ¶25-38) — was "very real and far more than supposition" (A-282-284 ¶59). For the District Court to conclude, on a motion to dismiss, that Paul and Alice did not face a concrete threat of harm — with the knowledge of the unspeakable fate that ultimately befell those Jews unable to escape — is a critical lack of appreciation of the severe threat posed by the Nazis and Fascists regimes as they inexorably proceeded on their path towards the "Final Solution."

That the Leffmanns' duress was not one of theoretical conjecture is reaffirmed by the Italian courts' recognition, in recent decades, of the concreteness of the fear and the targeted nature of the persecution. More specifically, the Corte dei Conti has been confronted with cases by Italian Jews seeking a "pension" to compensate for the persecution faced at the hands of the Fascists (for loss of working capacity) where the applicable

statute requires a showing of "acts of violence."[25] In these matters, and in awarding relief, the Italian courts have interpreted anti-Jewish legislation and its implementing measures as per se acts of violence (*i.e.,* even without particularized acts of physical violence) and as suitably "specific" state action intended to harm the "inviolable values of the victim." (A-284-285 ¶63).

In one recent case, the Corte dei Conti noted that the enactment of the anti-Semitic legislation was a severe and morally despicable offense that should be considered an insult to the fundamental values of the individual so piercing and so abjectly motivated as to "not require any other attribute to fall back on in the full sense of 'act of violence.'" [26]

Moreover, the District Court's finding that duress requires that the threat be "purposefully presented by its author to extort the victim's consent"

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[25] The pertinent "pension" law, enacted in 1955, provides an avenue for relief for Italian (not foreign) Jews who suffered racial persecution after July 7, 1938, again acknowledging that persecution and violence started before the official decrees were enacted in September 1938. (A-284 ¶62).

[26] Corte dei Conti, Sezioni Riunite, no. 8, 25 March 2003 (ADD-10); *see also* Italian Constitutional Court, no. 268, 7-17 July 1998 (describing "[d]iscrimination against Jews" as "detrimental to fundamental rights and dignity of the individual") (ADD-198); Corte dei Conti, Sezioni Riunite, no. 9, 1 April 1998 (recognizing "moral violence" resulting from fascist persecution, in addition to physical violence) (ADD-31-42); Corte dei Conti, Sezione Lombardia, no. 207, 6 December 2016 (defining moral violence to include fear of persecution, abandonment of home, expropriation of real estate, etc.) (ADD-56-59).

is inaccurate and an overly-restrictive characterization of Italian law. (SPA-27). This narrow vision of Italian duress law — arbitrarily selecting only one of the numerous cases cited by the parties' respective experts[27] — is precisely the view sharply critiqued by preeminent Italian jurist, Arturo Jemolo. In a renowned, oft-cited commentary — embedded directly into the published version of the case most heavily relied upon by the Museum (Court of Cassation, no. 697, 21 March 1963, in *Giur. it.* 1963, I, page 859 et seq.) (ADD-103-107) — Professor Jemolo attacks the notion that the political violence of the Fascists is merely speculative fear in the context of the violence and harm inflicted upon other persons who rebelled against their wishes. As such, a finding of duress is appropriate, even in the absence of an individualized threat, where the fear arose from a justifiable conviction that denial and resistance would lead to reprisals.[28] (A-280 ¶52-53).

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[27] This District Court only relied upon Corte di Appello Aprile 1953 - 31 Agosto 1953), an inapt case that did involve Jews and where the court found that a powerful political organization could not complain about the Fascists because the persecution had ended years earlier. The District Court ignored the rulings and leading commentaries quoted and cited in the Frigessi Decl., A-278-280 ¶43-53.

[28] Both experts acknowledge that these commentaries (of which Professor Jemolo's is particularly well-regarded) carry important weight in this civil law system for which judicial precedents are not binding. (Trimarchi Decl., A-381-382 ¶9; Frigessi Decl., A-269 n.1). Notably, though the Museum

Ultimately, as *both* experts acknowledge, Italian law: (a) recognizes third-party duress to which the counterparty to the contract need not be complicit (Frigessi Decl., A-278-279 ¶42-45; Trimarchi Decl., A-386 ¶22-23) and (b) duress need not explicitly be made with words, but may result from behavior, and can be interpreted as actively threatened in view of behavior in similar cases (A-380 ¶1; A-279-280, 282 ¶46, 53, 56). It should come down to a factual question of whether the threat imposed upon the Leffmanns by the Fascists and the Nazis was concrete and substantial enough. Plaintiff is certain that historical experts and the historical documentation will make clear, based on the specific circumstances facing the Leffmanns, that their fear was not a mere suspicion of a threat. Plaintiff invites the Museum to try to prove to the contrary.

E. If the 1938 Transaction is Merely Voidable under Italian Law, the 1952 Transaction Still Did Not Convey Title to the Museum, Pursuant to *Schoeps* and U.S. Policy

As to the question of the whether the Museum obtained title through the 1952 Transaction, both parties agree that New York applies. As such, the

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translated the decision for the District Court, and referenced the Jemolo commentary (A-384, ¶19 n.4), it failed to translate the embedded Jemolo commentary, providing only a partial translation to the District Court. (A-414).

Schoeps decision (discussed *supra* at 53-54) would apply, consistent with, U.S. policy, if Italian law governed the 1938 Transaction:

1) The Court's analysis should be "informed by the historical circumstances" of Nazi and Fascist economic pressures brought to bear on Jewish persons and property. 594 F. Supp. 2d at 467.

2) Through this lens, the Court should find, based on the allegations in the Complaint, that the 1938 Transaction is: (a) void under Italian law or, alternatively, (b) voidable under Italian law on duress.

3) With respect to void *ab initio*, Plaintiff has sufficiently alleged that the 1938 Transaction is void as against public order and morals.

4) With respect to voidable, Plaintiff has sufficiently alleged the Painting was only transferred to fund the Leffmanns' escape from, and because of, the concrete and severe threats and pressures of the Nazis and their Fascist allies — *i.e.*, duress.

5) To the extent the 1938 Transaction is found voidable rather than void, applying the *Schoeps* analysis and U.S. policy, good title to the Painting did not pass to the Museum through the 1952 Transaction.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the District Court's Decision, dated February 7, 2018.

Dated: New York, New York
May 25, 2018

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B). The brief contains 17,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Pursuant to this Court's Order of May 10, 2018, the brief does not exceed 18,000 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-Point font.

Dated: May 25, 2018

HERRICK, FEINSTEIN LLP

s/Lawrence M. Kaye
Lawrence M. Kaye

Special Appendix

SPECIAL APPENDIX TABLE OF CONTENTS

SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,

Plaintiff,

v.

THE METROPOLITAN MUSEUM OF ART,

Defendant.

16 Civ. 7665 (LAP)

OPINION

LORETTA A. PRESKA, Senior United States District Judge:

This is an action by Laurel Zuckerman, the Ancillary Administratrix of the estate of Alice Leffmann (the sole heir of Paul Friedrich Leffmann) (the "Leffmann estate"), to recover from New York's Metropolitan Museum of Art (the "Museum") a monumental work by Pablo Picasso entitled "The Actor," 1904-1905, oil on canvas, 77 1/4 x 45 3/8 in., signed lower right Picasso ("The Actor")(the "Painting"), which was owned by Paul Friedrich Leffmann ("Leffmann"), a German Jew, from approximately 1912 until 1938.

In 1937, Alice and Paul Leffmann (the "Leffmanns") fled from Germany to Italy in fear for their lives, after losing their business, livelihood, home, and most of their possessions due to Nazi persecution. In 1938, while living in Italy, the

Leffmanns sold the Painting at a price well below its actual value in an effort to gather enough money to pay for passage out of Italy, which itself had become a perilous place for the Leffmanns to remain. The Museum received the Painting as a donation in 1952 and has possessed it since that time.

Plaintiff, the great-grandniece of Paul and Alice Leffmann, received Ancillary Letters of Administration CTA for the estate of Alice Leffmann from the Surrogate's Court of the State of New York, New York County, on October 18, 2010. Pursuant to 28 U.S.C. § 1332(c)(2), because Alice Leffmann was a Swiss domiciliary, the Ancillary Administratrix is deemed to be a citizen of Switzerland as well.

In this diversity suit, Plaintiff seeks replevin of the Painting, $100 million in damages for conversion, and a declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202 declaring the Leffmann estate as the sole owner of the Painting on the grounds that good title never passed to the Museum, inter alia, because the 1938 sale of the Painting was void for duress under Italian law. (See Amended Compl. ("Am. Compl."), dated Nov. 2, 2016 [dkt. no. 8], ¶¶ 68-82.)

Defendants move to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the following grounds: (1) lack of standing; (2) failure to allege duress under New York or Italian law; (3) ratification of the transaction; (4) the Museum

received good title from a good-faith purchaser; (5) Plaintiff's claims are time-barred under the statute of limitation and laches. (See Mem. of Law in Supp. of Def. Mot. to Dismiss, ("Def. Mot."), dated Nov. 30, 2016 [dkt. no. 12].) For failure to allege duress under New York law, the motion to dismiss is granted.

I. BACKGROUND

The following facts are accepted as true for the purposes of this motion. In 1912, the Leffmanns purchased the Painting, which was one of their most valuable acquisitions. (See Am. Compl. ¶ 9.) From 1912 until at least 1929, the Leffmanns presented the Painting at a variety of exhibitions in Germany, where they were identified as the owners of the Painting. The Painting was also featured in newspaper articles, magazines, and monographs. (See id.)

During this time and until the start of the Nazi period, Paul and Alice, German Jews, lived in Cologne, Germany. They had sizeable assets, including Atlantic Gummiwerk, a rubber manufacturing company that was one of the leading concerns of its kind in Europe, which Paul co-owned with Herbert Steinberg; real estate investment properties in Cologne (Hohenzollernring 74 and Friesenwall 77); and their home located at Haydnstrasse 13, Köln-Lindenthal. The Leffmanns' home included a collection

of Chinese and Japanese artifacts and other artworks, including the masterwork by Pablo Picasso that is the subject of this action. (See id. ¶ 10.)

Beginning in 1933, the world the Leffmanns knew in Germany began to change dramatically. Adolf Hitler came to power, and racist laws directed against Jews were quickly enacted and enforced, leading to the adoption of the Nuremberg Laws ("The Laws for the Protection of German Blood and German Honor") on September 15, 1935. The Nuremberg Laws deprived all German Jews, including Paul and Alice, of the rights and privileges of German citizenship, ended any normal life or existence for Jews in Germany, and relegated all Jews to a marginalized existence. (See id. ¶ 11.)

The Nuremberg Laws formalized a process of exclusion of Jews from Germany's economic and social life. It ushered in a process of eventual total dispossession through what became known as "Aryanization" or "Arisierung," first through takeovers by "Aryans" of Jewish-owned businesses and then by forcing Jews to surrender virtually all of their assets. Through this process all Jewish workers and managers were dismissed, and businesses and corporations belonging to Jewish owners were forcibly transferred to non-Jewish Germans, who "bought" them at prices officially fixed and well below market value. As a result, the number of Jewish-owned businesses in Germany was

reduced by approximately two-thirds from April 1933 to April 1938. By that time, the Nazi regime moved to the final phase of dispossession, first requiring Jews to register all of their domestic and foreign assets and then moving to possess itself of all such assets. (See id. ¶ 12.)

On September 16, 1935, the Leffmanns were forced to sell their home to an Aryan German corporation, Rheinsiche Braunkohlensyndikats GmbH Köln. On December 19, 1935, Leffmann and his Jewish partner, Herbert Steinberg, were forced to transfer ownership of Atlantic Gummiwerk to Aloys Weyers (their non-Jewish minority business partner). On July 27, 1936, the Leffmanns were forced to sell all of their real estate investments to Feuerversicherungsgesellschaft Rheinland AG, another Aryan German corporation. In return, the Leffmanns had no choice but to accept only nominal compensation. Indeed, these were not real sales at all but essentially thefts by Nazi designees of substantially everything the Leffmanns ever owned. (See id. ¶ 12.) Some time prior to their departure from Germany, Paul and Alice had arranged for The Actor to be held in Switzerland by a non-Jewish German acquaintance, Professor Heribert Reiners. Reiners kept The Actor in his family home in Fribourg, where it remained for its entire stay in Switzerland. For this reason only, The Actor was saved from Nazi confiscation. (See id. ¶ 13.)

Paul and Alice, like so many other German Jews, found themselves faced with the threat of growing violence, the risk of imprisonment, and possibly deportation and death. Thus, to avoid the loss of the property they had left—and potentially their lives—they began planning their flight from Germany, liquidating their remaining assets in Germany to enable them to survive and escape. (See id. ¶ 15.) The Leffmanns fled Germany in the spring of 1937. By that time, the Nazi regime had already put in place its ever-tightening network of taxes, charges, and foreign exchange regulations designed to arrogate Jewish-owned assets to itself. Emigrants were only able to leave with a tiny fraction of their assets. Consequently, upon their escape from the Reich, the Leffmanns had been dispossessed of most of what they once owned. (See id. ¶ 16.)

One measure by which the Reich seized assets from fleeing Jews was the flight tax. Flight tax assessments were based on wealth tax declarations, which referred to wealth in the previous year and which were calculated at 25 percent of the value of the reported assets. Payment of the flight tax did not give the emigrant any right whatsoever to transfer abroad any of the remaining assets after payment of the tax. In fact, the flight tax amount typically would have been considerably higher than 25 percent of the assets actually owned at the time of emigration, as those who were persecuted by the Nazis—such as

the Leffmanns—suffered dramatic financial losses in the period leading up to their emigration, so that their assets at the time of emigration would have been considerably smaller than those on which their flight tax was assessed. The payment of the flight tax was necessary to obtain the no-objection certification of the tax authorities, which in turn was necessary to obtain an exit permit. In the case of the Leffmanns, the flight tax was thus calculated at 25 percent of the assets they reported on their 1937 tax form, which would have included their total assets held in 1936. The Leffmanns paid this flight tax in the amount of 120,000 to 125,000 Reichsmark ("RM") in cash. (See id. ¶ 19.)

The Leffmanns would have preferred neutral Switzerland to Italy, as Italian Fascists were already in power and close relations with Nazi Germany had begun to develop. However, a long-term stay in Switzerland would have been virtually impossible. Italy, as opposed to Switzerland, was one of the few European countries still allowing the immigration of German Jews. So that is where the Leffmanns went, hoping that Italy's significant Jewish population would provide a safe haven from the Nazi onslaught. (See id. ¶ 20.) In light of the ever-tightening regulations governing the transfer of assets, emigrants sought alternative means of moving their funds abroad. One major avenue involved creating a triangular agreement

whereby individuals who owned property outside the Reich and were in need of RM would agree to exchange the currency for property, which they would then immediately liquidate upon arrival in the new country. This is exactly the type of transaction the Leffmanns took part in when, in December 1936, they purchased a house and factory in Italy for an inflated price of RM 180,000 from the heirs of Eugenio Usenbenz from Stuttgart. The Leffmanns pre-agreed to sell the property back to a designated Italian purchaser for lire at a considerable loss upon their arrival in Italy a few months later. (See id. ¶ 21.)

In April 1937 the Leffmanns crossed the border into Italy, going first to Milan and then to Florence, where their newly acquired house and factory were located. (See id. ¶ 22.) Shortly after their arrival in Italy, as pre-agreed, the Leffmanns sold their newly-acquired properties to an Italian businessman named Gerolamo Valli, who was a business partner of the family from Stuttgart from whom they had originally purchased the house and factory. They sold the properties at a considerable loss—for 456,500 Lira (or about 61,622 RM)—and rented a home in Florence at Via Terme 29 and later at Via di San Vito 10. (See id. ¶ 23.)

The Leffmanns' time in Italy was short-lived. It soon became clear that the persecution from which they had fled in

Germany was encroaching upon them in Italy as well. Moving once more meant yet again losing a significant part of their remaining financial assets. The Leffmanns had already lost two-thirds of their initial RM investment in transfer costs, and they now stood to lose much of their remaining cash proceeds as the tight Italian foreign exchange restrictions forced them to seek conversion in "unofficial" ways. Paul was in his late sixties when they arrived in Italy; Alice was six years younger. They were living as refugees, unable to work in Italy, their prior lives destroyed by Nazi persecution, and on the run. (See id. ¶ 24.)

In April 1936, Italy and Germany had secretly adopted the Italo-German Police Agreement. The agreement provided for the exchange of information, documents, evidence, and identification materials by the police with regard to all emigrants characterized as "subversives," which by definition included German Jews residing in Italy. Pursuant to this agreement, the German State Secret Police (the "Gestapo") could compel the Italian police to interrogate, arrest and expel any German Jewish refugee. (See id. ¶ 25.) On November 1, 1936, Mussolini publicly announced the ratification of the Rome-Berlin Axis. During the summer and fall of 1937, the head of the Italian Police, Arturo Bocchini, and Mussolini accepted a proposal from the notorious General Reinhard Heydrich, the chief of the

Security Service of the Reichsführer (the "SS") and the Gestapo, to assign a member of the German police to police headquarters in various cities including Florence, where the Leffmanns resided. This facilitated the Nazi efforts to check on "subversives." (See id. ¶ 26.)

By the fall of 1937, anti-Semitism in Italy dashed any illusions about a longer stay in Italy for the Leffmanns. That fall, Germany and Italy began to prepare for Hitler's visit to Italy. In October, the Ministry of the Interior created lists of all German refugees residing in Italy's various provinces. The lists were intended to draw clear distinctions between "those who supported the Nazi regime" and "anti-Nazi refugees" or Jews. This was the first time that the Italian Government had explicitly associated all German Jews with anti-Nazi Germans. This marked a turning point in the 1936 Italo-German Police Agreement, with the Gestapo requesting these lists so that it could monitor "subversives" in anticipation of Hitler's visit. From the beginning of January 1938 until Hitler's visit in May, the Gestapo received a total of 599 lists from the police throughout Italy's provinces. (See id. ¶ 27.)

As the situation grew increasingly desperate for Jews living in Italy, it became clear that it would only be a matter of time before the Fascist regime's treatment of Jews would mimic that of Hitler's Nazis. Paul and Alice had to make plans

to leave, and this would require money. They wanted to go to Switzerland to escape the horrors of Nazism and Fascism and find a truly safe haven. But, as was well known at the time, passage into Switzerland did not come easily or cheaply. Given the urgency of their situation, Paul began to explore the possibility of selling his masterpiece, The Actor, with dealers in Paris. The events following the Austrian Anschluss and Hitler's visit to Italy in May 1938 confirmed that they would have had no choice but to turn whatever assets they still controlled into cash. (See id. ¶ 28.)

Meanwhile, conditions for Jews in Italy grew worse. On February 17, 1938, every newspaper in Italy published a Government announcement ("Diplomatic Notice Number 18," issued on February 16), which stated that "[t]he Fascist Government reserves to itself the right to keep under close observation the activity of Jews newly arrived in our country." (See id. ¶ 29.) In March 1938, SS General Heydrich traveled to Rome to meet with the head of the Italian Police, Bocchini, in order to plan for Hitler's visit. Nazi police officials were posted at thirteen Police Headquarters in border towns, ports, and large cities to conduct interrogations and house searches. These officials, dressed in Nazi uniforms, arrived on April 10-11, 1938. Id. Meanwhile, on March 18, 1938, the Italian Ministry of the Interior informed prefects in border provinces that "ex-Austrian

Jewish subjects" should be denied entry into Italy. (See id. ¶ 30.)

In April 1938, in the face of the growing Nazi persecution spreading across Europe and into Italy, Paul escalated his efforts to liquidate The Actor. (See id. ¶ 32.) In September 1936, after they had been forced by the Nazis to part with nearly everything they owned, the Leffmanns had rejected an offer to sell The Actor from the notorious art dealer, C.M. de Hauke of Jacques Seligmann & Co. (whom the U.S. State Department later identified as a trafficker in Nazi-looted art). (See id. ¶ 32.) Nearly two years later, on April 12, 1938, the Leffmanns, in an even more desperate state, reached out to de Hauke asking him if he would be interested in purchasing the Painting. (See id.)

Just days after writing to de Hauke, the situation in Italy grew even worse. From April 24-26, General Heydrich, SS Reichsführer Heinrich Himmler (whom Hitler later entrusted with the planning and implementation of the "Final Solution") and SS General Josef "Sepp" Dietrich, the commander of Hitler's personal army, went to Rome to complete preparations for Hitler's visit. For three weeks in April and May 1938, there were over 120 Gestapo and SS officers in Italy—primarily in Florence, Rome, and Naples. The Gestapo officials and Italian police continued investigations and surveillance of "suspicious

persons" until the end of Hitler's visit, arresting at least 80 people in Florence. The Italian police carried out the arrests. Many German Jewish residents fled in anticipation of and as a result of these arrests. (See id. ¶ 34.)

On May 3, Adolf Hitler arrived in Italy for his official state visit. The Italian people turned out in the tens of thousands to greet the German leader. From May 3 through May 9, 1938, Hitler traveled to Rome, Naples, and Florence. The streets of these Italian cities were covered in thousands of Nazi swastika flags, which flew alongside Italy's tricolor. Flowerbeds were decorated in the shape of swastikas and photographs of Mussolini and Hitler were made into postcards and displayed in shop windows. Parades and military displays in honor of Hitler, attended by thousands of Italians, young and old, took place in every city he visited. In Florence, the last city visited by Hitler on May 9th, city officials made an official postmark that commemorated Hitler's visit. Mail sent during that time was stamped "1938 Il Führer a Firenze" and decorated with swastikas. (See id. ¶ 35.)

For the Leffmanns, the time to flee Italy was quickly approaching, so they continued to try to sell the Painting through de Hauke. Trying to raise as much cash as possible for the flight, the Leffmanns responded to a letter from de Hauke, telling him that they had already rejected an offer obtained

through another Paris dealer, Käte Perls, for U.S. $12,000 (net of commission). It is clear from the letter that the Leffmanns were desperately trying to improve their leverage to maximize the amount of hard currency they could raise. (See id. ¶ 36.)

Violence was increasing, and the persecution of Jews was on the rise. Foreign Jews in Italy risked arrest and had reason to fear possible deportation and death. The Leffmanns were in fear of their liberty and their lives. Just days after telling de Hauke that they had rejected Mrs. Perls' low offer, in late June 1938, the Leffmanns sold the Painting at the very price they told Perls and de Hauke they would not consider. They finally accepted Käte Perls' offer of U.S. $13,200 (U.S. $12,000 after a standard ten percent selling commission), who was acting on behalf of her ex-husband, Hugo Perls, also an art dealer, and art dealer Paul Rosenberg, with whom Perls was buying the Painting. (See id. ¶ 37.)

On July 26, 1938, Frank Perls, Käte's son (who was also a dealer) wrote to automobile titan Walter P. Chrysler Jr., asking if he would be interested in purchasing The Actor. Having just acquired a Picasso masterpiece from a German Jew on the run from Nazi Germany living in Fascist Italy for a low price that reflected the seller's desperate circumstances and the extraordinary prevailing conditions, Frank Perls misrepresented

to Chrysler that the Painting was purchased by Mrs. Perls from "an Italian collector." (See id. ¶ 38.)

In July 1938, the Leffmanns submitted their "Directory of Jewish Assets" forms detailing all of their assets, which the Reich required all Jews (even those living abroad) to complete. The penalties for failing to comply with this requirement included fines, incarceration, prison, and seizure of assets. (See id. ¶ 39.) Meanwhile, the plight of the Jews in Italy worsened. In August 1938, enrollment of foreign Jews in Italian schools was prohibited. A Jewish census, in which the Leffmanns were forced to participate, was conducted in preparation for the Italian racial laws, which were soon to follow. A legal definition of what constituted a "Jew" was considered, and discriminatory legislation was drafted. The Italian government increased surveillance of Jews because of the fear that Jews would transfer their assets out of Italy or emigrate and take their assets with them. A series of anti-Semitic publications was released, among them the infamous "Manifesto degli scienziati razzisti" ("Manifesto of the Racial Scientists"), which attempted to provide a scientific justification for the coming racial laws, and the venomous magazine, "La difesa della razza" ("The Defense of the Race"). In addition, a number of regional newspapers published lists of many of the names of Jewish families residing in Florence. (See id. ¶ 40.)

On September 7, 1938, the first anti-Semitic racial laws were introduced in Italy, including "Royal Enforceable Decree Number 1381," which was approved by the Council of Ministers on September 1st and was published in daily newspapers on September 2nd. With this Enforceable Decree, all "alien Jews" were forbidden from residing in Italy. All Jews who arrived in Italy after January 1, 1919 had to leave Italy within six months (i.e., by March 12, 1939) or face forcible expulsion. Bank accounts opened in Italy by foreign Jews were immediately blocked. (See id. ¶ 41.)

The Leffmanns were desperate and prepared for immediate departure. Switzerland, which already had strict border controls, became even more difficult to enter beginning in 1938. Following the incorporation of Austria into the Reich, Switzerland imposed visa requirements on holders of Austrian passports on March 28, 1938. In April, the Swiss government began negotiations with the Germans regarding the introduction of the notorious "J" stamp. On August 18-19, 1938 the Swiss decided to reject all refugees without a visa. On October 4, 1938, with an agreement reached on the adoption of the "J" stamp, they imposed visa requirements on German "non-Aryans." Receiving asylum was virtually impossible, and German and Austrian Jews could only enter Switzerland with a temporary residence permit. Given the strict controls and asset

requirements imposed by the Swiss government, these permits were not easy to obtain. (See id. ¶ 42.)

Sometime before September 10, 1938, however, the Leffmanns managed to obtain a Toleranzbewilligung (a tolerance or temporary residence visa) from Switzerland, valid from September 10, 1938 to September 10, 1941. In October 1938, just days after the enactment of the racial laws expelling them from Italy, the Leffmanns fled yet again, this time to Switzerland, where they were allowed to stay only temporarily. (See id. ¶ 43.) By the time the Leffmanns arrived in Switzerland, the Anschluss and other persecutory events had triggered a rising wave of flight from the Reich. Consequently, Swiss authorities required emigrants to pay substantial sums through a complex system of taxes and "deposits" (of which the emigrant had no expectation of recovery). (See id. ¶ 44.)

In October 1938, all German Jews were required to obtain a new passport issued by the German government stamped with the letter "J" for Jude, which definitively identified them as being Jewish. As German citizens who required a passport to continue their flight, the Leffmanns had no choice but to comply. (See id. ¶ 45.) The Leffmanns temporarily resided in Bern, Switzerland, but, unable to stay, prepared to flee yet again, this time to Brazil. In addition to bribes that were typically required to obtain necessary documentation, Brazil would only

provide visas for Jews who could transfer more than 400 contos (USD $20,000) to the Banco do Brasil. On May 7, 1941, the Leffmanns, still on the run, immigrated to Rio de Janeiro, Brazil, where they lived for the next six years. But even in Brazil, they could not escape the effects of the ongoing war. All German residents living there, including the Leffmanns, were forced to pay a levy imposed by the Brazilian government of 20,000 Swiss Francs ("SF") (or about U.S. $4,641). (See id. ¶ 46.)

Given the various payments required by Switzerland, as well as those that the Leffmanns would need to enter Brazil, the Leffmanns depended on the $12,000 (or approximately SF 52,440 in 1938) they received from the sale of The Actor, as it constituted the majority of the Leffmanns' available resources in June 1938. Had the Leffmanns not fled for Brazil when they did, they likely would have suffered a much more tragic fate at the hands of the Nazi regime and its allies. (See id. ¶ 47.)

The Leffmanns were not able to return to Europe until after the War had ended. In 1947, they settled in Zurich, Switzerland. (See id. ¶ 48.) Paul Leffmann died on May 4, 1956 in Zurich, Switzerland at the age of 86. (See id. ¶ 49.) He left his entire estate to his wife, Alice Brandenstein Leffmann. (See id. ¶ 49.) Alice Leffmann died on June 25, 1966 in Zurich,

Switzerland at the age of 88. She left her entire estate to 12 heirs (all relatives or friends). (See id. ¶ 50.)

The immediate history of the Painting after Perls and Rosenberg purchased it in June of 1938 is unclear, but it is known that after the purchase, art dealer Paul Rosenberg loaned the Painting to the Museum of Modern Art ("MoMA") in New York in 1939. In the paperwork documenting the loan, Rosenberg requested that MoMA insure the Painting for $18,000 (a difference of $6,000, or a 50 percent increase over what had been paid to the Leffmanns less than a year earlier). (See id. ¶ 52.) Sometime prior to October 28, 1940, the Painting was consigned for sale by Rosenberg to the well-known M. Knoedler & Co. Gallery in New York, New York. On November 14, 1941, M. Knoedler & Co. sold the Painting to Thelma Chrysler Foy ("Foy") for $22,500 (a difference of U.S. $9,300, or a 70 percent increase from the price paid to the Leffmanns). (See id. ¶ 53.) Thelma Chrysler Foy donated the Painting to the Museum in 1952, where it remains today. The Museum accepted this donation. (See id. ¶ 54.)

The Museum's published provenance for the Painting was manifestly erroneous when it first appeared in the Museum's catalogue of French Paintings in 1967. Instead of saying that the Leffmanns owned the Painting from 1912 until 1938, it read as follows: "P. Leffmann, Cologne (in 1912); a German private

collection (until 1938) . . . ," thus indicating that the Leffmanns no longer owned the Painting in the years leading up to its sale in 1938. (See id. ¶ 57.) This remained the official Museum provenance for the Painting for the next forty-five years, including when it was included on the Museum's website as part of the "Provenance Research Project," which is a section of the website that includes all artworks in the Museum's collection that have an incomplete Nazi-era provenance. (See id. ¶ 58.) From 1967 to 2010, the provenance listing was changed numerous times. It continued to state, however, that the Painting was part of a German private collection and not that the Leffmanns owned it continuously from 1912 until 1938. (See id. ¶ 59.)

In connection with a major exhibition of the Museum's Picasso holdings in 2010 entitled, "Picasso in the Metropolitan Museum of Art," the Museum changed the provenance yet again. (See id. ¶ 60.) Despite purported careful examination, as of 2010, the provenance of the Painting continued erroneously to list the "private collection" subsequent to the Leffmanns' listing. In October 2011, only after extensive correspondence with Plaintiff, the Museum revised its provenance yet again. The revised provenance omitted the reference to the private German collector who had purportedly owned The Actor from 1913-1938 and finally acknowledged the Leffmanns' ownership through

1938 and their transfer of it during the Nazi era. (See id. ¶ 63.)

On or about August 26, 2010, Nicholas John Day, the Executor named in the will of Alice Anna Berta Brandenstein, a legatee named in the will of Alice Leffmann, submitted a Petition for Ancillary Probate for the estate of Alice Leffmann in the Surrogate's Court of the State of New York, New York County ("Surrogate's Court"), authorizing Laurel Zuckerman to receive Ancillary Letters of Administration CTA of the estate. On October 18, 2010, Laurel Zuckerman received Ancillary Letters of Administration CTA and was named Ancillary Administratrix by the Surrogate's Court of the State of New York, New York County. (See id. ¶ 51.)

On September 8, 2010, Plaintiff's attorneys, Herrick Feinstein LLP, wrote to the General Counsel of the Museum, demanding the return of the Painting. The Museum refused to deliver the Painting to Plaintiff. The Painting remains in the possession of the Museum. (See id. ¶ 66.) On February 7, 2011, the parties entered into a standstill agreement tolling any statute of limitations as of February 7, 2011. Such agreement was thereafter amended several times to terminate on September 30, 2016. The final amendment of the standstill agreement terminated on September 30, 2016. (See id. ¶ 67.)

II. LEGAL STANDARD

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must "accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." Phelps v. Kapnolas, 308 F.3d 180, 184 (2d Cir. 2002)(citation and internal quotation marks omitted). Though a court must accept all factual allegations as true, it gives no effect to "legal conclusions couched as factual allegations." Stadnick v. Vivint Solar, Inc., 861 F.3d 31, 35 (2d Cir. 2017) (quoting Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. This "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (citations omitted). Deciding whether a complaint states a claim upon which relief can be granted is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Rahman v. Schriro, 22 F. Supp. 3d 305, 310 (S.D.N.Y. 2014)(quoting Iqbal, 556 U.S. at 679).

III. DISCUSSION

Plaintiff asserts claims for replevin and conversion and seeks a declaration that the Leffmann estate is the rightful owner of the Painting and that, as Ancillary Administratrix of the Leffmann estate, she is entitled to immediate possession of the Painting. (Am. Compl. ¶¶ 68-82.) In doing so she relies on the Italian law principles of (1) duress and (2) public order and public morals. (See Pl. Mem. of Law in Opp. to Def. Mot. to Dismiss, ("Pl. Opp."), dated Jan. 20, 2017 [dkt. No. 17].)

The Museum moves to dismiss, arguing that under either Italian law or New York law, Plaintiff has not adequately alleged duress and that, even under Italian law, the Leffmanns' sale of the Painting did not violate public order or public morals. (See Reply Br. in Further Supp. of Def. Mot. to Dismiss, ("Def. Rep."), dated Feb. 27, 2016 [docketed Feb. 27, 2017][dkt. no. 21].) The Museum also argues other bases for dismissal, including ratification, statute of limitations, and latches. (Def. Mot. at 13-19.)

A. Standing

In its moving papers, the Museum argued that Plaintiff lacks standing to bring this suit on the grounds that the New York County Surrogate's Court Decree that appointed Plaintiff as

Ancillary Administratrix of the Leffmann estate was defective and should be vacated. (See Def. Mot. at 7-9.) At oral argument, however, after additional developments in the Surrogate's Court, the Museum conceded that Plaintiff has standing. Accordingly, that portion of the Museum's motion based on lack of standing is denied as moot.

B. Choice-of-Law

Jurisdiction in this case is predicated on diversity of citizenship, and therefore New York's choice-of-law rules apply. Bakalar v. Vavra, 619 F.3d 136, 139 (2d Cir. 2010) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). "Under New York choice-of-law rules, the first inquiry in a case presenting a potential choice-of-law issue is whether there is an actual conflict of laws on the issues presented." Fed. Ins. Co. v. Am. Home Assurance Co., 639 F.3d 557, 566 (2d Cir. 2011) (citation omitted). The court will not engage in the choice-of-law analysis if there is no actual conflict. See id. However, where an actual conflict exists, New York courts give controlling effect to the law of the jurisdiction having "the greatest concern with the specific issue raised." Loebig v. Larucci, 572 F.2d 81, 84 (2d Cir. 1978).

Here, the Court turns to the threshold question of whether there is a difference between the laws of Italy and New York upon which the outcome of the case is dependent. Bakalar, 619 F. 3d at 139. In determining the law of a foreign country:

> Rule 44.1 of the Federal Rules of Civil Procedure allows a court to determine the content of foreign law based on 'any relevant material or source . . . whether or not submitted by a party.' However, it does not require a court 'to undertake its own analysis to determine' the content of foreign law.

Shld, LLC v. Hall, No. 15 CIV. 6225 (LLS), 2017 WL 1428864, at *4 (S.D.N.Y. Apr. 20, 2017) (quoting In re Nigeria Charter Flights Contract Litig., 520 F. Supp. 2d 447, 458 (E.D.N.Y. 2007). Additionally, "[t]he Court's determination must be treated as a ruling on a question of law." Ennio Morricone Music Inc. v. Bixio Music Grp. Ltd., No. 16-CV-8475 (KBF), 2017 WL 5990130, at *3 (S.D.N.Y. Oct. 6, 2017).

Rule 44.1 therefore "has two purposes: (1) to make a court's determination of foreign law a matter of law rather than fact, and (2) to relax the evidentiary standard and to create a uniform procedure for interpreting foreign law." In re Vitamin C Antitrust Litig., 837 F.3d 175, 187 (2d Cir. 2016); see also Rationis Enters. Inc. v. Hyundai Mipo Dockyard Co., 426 F.3d 580, 585 (2d Cir. 2005).

In support of their respective positions, both parties submitted expert reports regarding Italian law. Plaintiff's expert is Professor Marco Frigessi. (See Decl. of Prof. Marco Frigessi Di Rattalma ("Frig.")[dkt. no. 18].) Defendant's expert is Professor Pietro Trimarchi. (See Decl. of David W. Bowker Ex. 1, "Decl. of Prof. Pietro Trimarchi," ("Tri.")[dkt. no. 22-1].) After examining both parties' declarations, the Court concludes that insofar as it impacts the outcome of this case, New York and Italian law do not differ on the issue of duress. Because Plaintiff argues that there is an outcome-determinative difference between New York and Italian law, the Court will also undertake a choice-of-law analysis.

i. Italian Law

The Court credits the expert opinion of Professor Trimarchi in finding that Italian law, like New York law, requires a party alleging duress to plead and prove "a specific and concrete threat of harm" that "induced the victim to enter into a contract that would not otherwise have been concluded." (See Tri. ¶¶ 13, 26.) Both Plaintiff's and Defendant's experts rely on the 1865 Italian Civil Code ("Code") as the legal authority for duress under Italian law, which was in force at the time of the 1938 transaction and was replaced in 1942 by a new Civil

Code with "[s]imilar provisions." (See Frig. ¶¶ 6-8, 15-18, 41; See Tri. ¶¶ 8, 10.) In defining duress, Article 1108 of the Code provides that "consent is not valid if it was given by mistake, extorted by duress ('violenza'), or obtained by fraud." (Tri. ¶ 11; See Frig. ¶ 41.) "In this provision the word Violenza (i.e. 'duress') means the threat of unjust harm made in order to force a person to enter into a contract, which otherwise would not have been concluded." (Tri. ¶ 12.) The "threat of unjust harm" includes "the fear induced by a specific and concrete threat of harm, purposefully presented by its author to extort the victim's consent." (Tri. ¶ 13) (emphasis added). A general state of fear arising from political circumstances is not sufficient to allege duress:

> For duress to have legal significance as a vitiation of consent that invalidates a legal transaction, it must be a determinative cause of the transaction.
>
> The generic indiscriminate persecutions of fascism . . . do not constitute legally significant duress pursuant to Art. 1108 of the 1865 Civil Code . . . when there is no specific, direct relationship between these persecutions and the legal transaction alleged to have been carried out under this act of duress.

(Tri. Ex. 3) (translating Corte di Appello, 9 aprile-31 agosto 1953, Rassegna Mensile Dell'Avvocatura Dello Stato 1954, IV, sez. I civ., 25 et seq. (It.)).

Here, Plaintiff's allegation that Leffmann "was forced by the circumstances in Fascist Italy to sell" the Painting in 1938

is insufficient to plead duress. (See Am. Compl. ¶ 9) (emphasis added). Plaintiff's allegation does not demonstrate a "specific and concrete threat of harm" beyond the "generic indiscriminate persecutions of fascism" and thus fails to meet the pleading standard for duress under Italian law. (Tri. Ex. 3.)

Plaintiff further alleges that the 1938 transaction is void under Italian principles of "public order" and "public morals." (See Pl. Opp. 22; see Frig. ¶¶ 15-38.) The Court disagrees and credits Professor Trimarchi's definition: "Public order and public morals are subsidiary rules aimed at completing the legal system with rules to be applied to prevent illicitness in situations not expressly regulated by code or statute." (See Tri. ¶ 62(c).)

Specifically, contracts violate public morals or public order "when the performance that is bargained for is illicit (e.g. hiring someone to commit a crime)." (See Tri. ¶ 52.) Here, the performance bargained for was the sale of a painting in exchange for U.S. $12,000 (net of commission). (See Am. Compl. ¶ 36.) The contract did not seek an illicit objective and therefore is not akin to a contract deemed void on the grounds of public morals or public order such as one where "spouses agreed to release themselves from the civil obligation of fidelity." (See Tri. ¶ 52 n.30.)

Plaintiff further argues, citing principles of public morals and public order, that the Italian legal system "would not recognize the validity of a contract" where, as here, the "circumstances involve the Holocaust—a context not lost on the Italian legal system which developed a specific set of post-War rules providing for particularly strong protections of Jewish individuals persecuted by the anti-Semitic laws." (Pl. Opp. 22-23.) Plaintiff's expert cites to one such "post-War rule," Article 19 ("Article 19") of legislative decree lieutenant April 12, 1945, no. 222. (See Frig. ¶ 35 n.14) (citing Decreto Legge 12 aprile 1945, n.222, G.U. May 22, 1945, n.61 (It.)). Article 19 states that "rescission is allowed" for "sales contracts stipulated by people affected by the racial provisions after October 6, 1938—the date when the directives on racial matters issued by the former regime were announced" and only where the claimant could prove a certain level of damages. (See id.) (emphasis added); (see also Tri. ¶ 47.) The transaction at issue took place in June, 1938, failing to meet the "after October 6, 1938" criteria established under Article 19. (See Am. Compl. ¶ 62.) Therefore, under Article 19, Plaintiff's claim for "rescission" would fail.

Even Plaintiff's expert acknowledges that under the Italian legal system, "[t]he principle of the voidness of contracts which are immoral or contrary to public order performs the role

of a subsidiary rule with respect to the prohibitions established by the Civil Code." (Frig. ¶ 19) (citing Francesco Ferrara, Teoria del negozio illecito nel diritto civile italiano, 1902, Milano page 296) (emphasis added). Professor Frigessi, like Professor Trimarchi, states that the passage of Article 19 "shows that the Italian legal system developed a specific policy and specific rules protecting Jewish individuals affected by anti-Semitic laws who sold goods under such dire circumstances." (Frig. ¶ 35; Tri. ¶¶ 57-62.) Therefore, by admission of Plaintiff's expert, the Italian legal system considered the issue of Jewish individuals as weak contracting parties during the Holocaust and declined to extend the protections of Article 19 to transactions prior to October 6, 1938. Id. Because "public order performs the role of a subsidiary rule," this Court declines to extend its boundaries under Italian law to encompass a transaction that the Italian legal system opted not to include under Article 19. (Frig. ¶ 19; Tri. ¶¶ 57-59) (emphasis added). Accordingly, the 1938 transaction would not be subject to rescission under Italian law.

ii. New York Law

Under New York law, "to void a contract on the ground of economic duress," Plaintiff must plead and show that the 1938

transaction "was procured by means of (1) a wrongful threat that (2) precluded the exercise of its free will." Interpharm, Inc. v. Wells Fargo Bank, Nat. Ass'n, 655 F.3d 136, 142 (2d Cir. 2011); see Stewart M. Muller Constr. Co. v. N.Y. Tel. Co., 40 N.Y.2d 955, 956 (1976); see also Kramer v. Vendome Group LLC, 11 Civ. 5245, 2012 WL 4841310, at *6 (S.D.N.Y. Oct. 4, 2012) ("To prove economic duress, a party seeking to void a contract must plausibly plead that the release in question was procured by (1) a threat, (2) which was unlawfully made, and (3) caused involuntary acceptance of contract terms, (4) because the circumstances permitted no other alternative.").

In characterizing a "wrongful threat," New York "law demands threatening conduct that is wrongful, i.e., outside a party's legal rights." Interpharm, 655 F.3d at 142 (internal quotation marks and citation omitted). "Critically," under New York law, the defendant must have caused the duress. See Mandavia v. Columbia Univ., 912 F. Supp. 2d 119, 127-28 (S.D.N.Y. 2012), aff'd, 556 F. App'x 56 (2d Cir. 2014)(quoting Kramer, 2012 WL 4841310, at *6)(stating that "to prove duress, a plaintiff must demonstrate that the difficult circumstances" or wrongful threat "she faces are a result of the defendant's actions . . . to constitute duress, a defendant's actions must have amounted to threats that preclude[d] the exercise of [a plaintiff's] free will").

Moreover, courts have noted that "an element of economic duress is . . . present when many contracts are formed." VKK Corp. v. Nat'l Football League, 244 F.3d 114, 123 (2d Cir. 2001). For that reason, a party seeking to void a contract on the basis of economic duress bears a heavy burden. Davis & Assocs., Inc. v. Health Mgmt. Serv., Inc., 168 F. Supp. 2d 109, 114 (S.D.N.Y. 2001); Bus. Incentives Co. v. Sony Corp. of Am., 397 F. Supp. 63, 69 (S.D.N.Y. 1975)("Mere hard bargaining positions, if lawful, and the press of financial circumstances, not caused by the defendant, will not be deemed duress.") (emphasis added). Additionally, pressure exerted from general economic conditions is not enough to allege duress. See Mfrs. Hanover Tr. Co. v. Jayhawk Assocs., 766 F. Supp. 124, 128 (S.D.N.Y. 1991) (rejecting a defense of economic duress in connection with a refinancing agreement where defendants claimed to be under "economic pressure in general" but failed to show any duress at the hands of plaintiff).

Here, first, Plaintiff is unable to plead "a wrongful threat" by the Defendant Museum or the counterparties to the 1938 transaction. Specifically, Plaintiff does not plead that Käte Perls, Hugo Perls or Paul Rosenberg, respectively the negotiator and purchasers on the other side of the Leffmann transaction, or the Museum used "wrongful" or "threatening conduct . . . outside [their] legal rights" in effectuating the

1938 sale. Rather, Plaintiff states that "but for the Nazi and Fascist persecution to which [the Leffmanns] had been . . . subjected," they "would not have disposed of this seminal work at that time." (Am. Compl. ¶ 3.) Effectively, Plaintiff claims that the "circumstances in Fascist Italy," not the counterparties to the 1938 transaction or the Museum, forced the Leffmanns to sell the Painting under duress. (Am. Compl. ¶¶ 3, 9.) However, the 1938 transaction occurred between private individuals, not at the command of the Fascist or Nazi governments. As in Bakalar, "there is no . . . evidence that the Nazis ever possessed the [Painting], and therefore . . . this Court cannot infer duress based on Nazi seizure." Bakalar v. Vavra, 819 F. Supp. 2d 293, 300 (S.D.N.Y. 2011), aff'd, 500 F. App'x 6 (2d Cir. 2012), cert. denied sub nom. Vavra v. Bakalar, 569 U.S. 968 (2013). Thus, although the Leffmanns felt economic pressure during the undeniably horrific circumstances of the Nazi and Fascist regimes, that pressure, when not caused by the counterparties to the transaction (or the Defendant) where the duress is alleged, is insufficient to prove duress with respect to the transaction. Id.

Second, Plaintiff fails to plead that the Leffmanns entered into the 1938 transaction by force that "preclude[ed] the exercise of [their] free will." Orix Credit All., Inc. v. Bell Realty, Inc., No. 93 CIV. 4949, 1995 WL 505891, at *4 (S.D.N.Y.

Aug. 23, 1995) (quoting Austin Instrument v. Loral Corp., 324 N.Y.S.2d 22, 25 (N.Y. Ct. of App. 1971)). Rather, Paul Leffmann exercised his free will in "explor[ing] the possibility of selling his masterpiece, The Actor, with dealers in Paris." (See Am. Compl. ¶ 28.) The Leffmanns took nearly two years from the time they received an initial offer to sell the Painting in September, 1936, until they negotiated for its sale in June, 1938. (See Am. Compl. ¶¶ 28, 32-33, 36.) In the interim, the Painting was in Switzerland for safekeeping. (See Am. Compl. ¶ 14.)

Additionally, the Leffmanns negotiated with several parties prior to the 1938 transaction, rejected offers from other dealers, and attempted to "improve [their] leverage to maximize" the sale price before ultimately accepting an offer from Perls and Rosenberg, the proceeds of which the Leffmanns retained and used in later years. (See Am. Compl. ¶¶ 28, 32-33, 36-37, 47.) Each transaction occurred between private individuals, not at the behest of Nazi or Fascist officials. (See Am. Compl. ¶¶ 28, 32, 33, 36.) Accordingly, these allegations are fatal to a claim of duress as Plaintiff is unable to show "a wrongful threat by the other party which precluded the exercise of [Paul's] free will in making the contract at issue." Mfrs. Hanover Tr. Co. v. Jayhawk Assocs., 766 F. Supp. 124, 128 (S.D.N.Y. 1991) (quoting 805 Third Ave. Co. v. M.W. Realty

Assoc., 58 N.Y.2d 447, 451 (N.Y. 1983)) (internal quotation marks omitted) (emphasis added).

Third, Plaintiff fails to plead facts demonstrating that the Leffmanns had "no other alternative" than to engage in the 1938 transaction. Kramer v. Vendome Grp. LLC, No. 11 CIV. 5245, 2012 WL 4841310, at *6 (S.D.N.Y. Oct. 4, 2012). Plaintiff's assertion that the Leffmanns were "forced by the circumstances in Fascist Italy to sell [the Painting] under duress in 1938" conflates the Leffmanns' need "to raise as much cash as possible" with the Leffmanns having "no other alternative." (See Am. Compl. ¶¶ 9, 36.) The fact that the Leffmanns spent several years looking to sell the Painting, rejected other offers, and had additional assets including properties in Italy that they sold to an Italian businessman in 1937, suggests that they had other financial alternatives. (See Am. Compl. ¶¶ 9, 28, 32-33, 36.) Accordingly, the Court finds that there is no outcome-determinative difference between Italian law and New York law; Plaintiff's claims fail under both.

iii. New York Choice-of-Law

Plaintiff argues that there is an outcome-determinative difference between New York law and Italian law. As explained above, the Court disagrees. In the alternative, to the extent Plaintiff might be correct, the Court will undertake a choice-

of-law analysis. If a court has established that the outcome of the case is dependent upon a difference in the law of two jurisdictions, a federal district court in the Southern District of New York sitting in diversity must apply New York's choice-of-law rules. Bakalar v. Vavra, 619 F.3d 136, 139 (2d Cir. 2010); Schoeps v. Museum of Modern Art & the Solomon R. Guggenheim Museum, 594 F. Supp. 2d 461, 465 (S.D.N.Y. 2009). Plaintiff and Defendant agree that New York applies an "interest analysis" to choice-of-law questions. (See Pl. Opp. at 20; Def. Rep. at 4.)

Under New York conflict principles, "[t]he New York Court of Appeals has explicitly held that the New York interest analysis is not rigid, but rather is determined by 'an evaluation of the facts or contacts which related to the purpose of the particular law in conflict.'" Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12 CIV. 283 (GBD), 2013 WL 789642, at *6 (S.D.N.Y. Mar. 4, 2013), aff'd, 557 F. App'x 66 (2d Cir. 2014)(quoting Padula v. Lilarn Props. Corp., 84 N.Y.2d 519, 521 (1994)). Interest analysis is a fact intensive "'flexible approach intended to give controlling effect to the law of the jurisdiction, which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.'" Fin. One Pub. Co. v. Lehman Bros. Special Fin., 414 F.3d 325, 337 (2d Cir. 2005)

(quoting Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 72 (1993); see Bakalar, 619 F.3d at 144 ("New York choice of law rules require the application of an 'interest analysis,' in which 'the law of the jurisdiction having the greatest interest in the litigation [is] applied. . . ".)(quoting Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 85 (2d Cir. 2002)); see John v. Sotheby's, Inc., 858 F. Supp. 1283, 1289 (S.D.N.Y. 1994), aff'd, 52 F.3d 312 (2d Cir. 1995) (citing J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 37 N.Y.2d 220, 226-27 (1975))("The Court will apply the laws of the jurisdiction that has the greatest interest in, and is most intimately concerned with, the outcome of a given litigation." (emphasis added)).

In applying an interest analysis to the instant case, the Court of Appeals' analysis in Bakalar is instructive. Bakalar centered on a dispute over the ownership of a drawing ("Drawing") by Egon Schiele. 619 F.3d at 137. Originally owned by Franz Friedrich Grunbaum ("Grunbaum") in Vienna in 1938, heirs to the Grunbaum estate alleged that he was deprived of his possession and dominium over the Drawing after being arrested by the Nazis and signing a power of attorney to his wife, while imprisoned at Dachau. Id. Grunbaum died in Dachau in 1941; his wife died in a concentration camp in 1942. Id. at 138-39. The Drawing was purchased along with forty-five other Schieles by

Galerie Gutekunst, a Swiss art gallery, in February and May of 1956. Id. at 139. Several months later, on September 18, 1956, the Drawing was purchased by the Galerie St. Etienne and was shipped to it in New York. Id. On November 12, 1963, the Galerie sold the drawing to David Bakalar. Id. The way in which the Drawing traveled from Vienna to Switzerland to Galerie St. Etienne, the New York art gallery from which Bakalar purchased it, is unclear, as there are no records of what became of the art collection after Grunbaum's arrest. Id. at 138.

As in the instant action, multiple jurisdictions had a logical claim for providing the relevant law in Bakalar: Austria, the situs of the initial alleged theft; Switzerland, where title was transferred in the 1950s; and New York, where the drawing was sold to a gallery and ultimately purchased by Bakalar in 1963. Id. at 146. Although the District Court and the Court of Appeals agreed that New York's choice-of-law rules governed, they came to differing conclusions. The District Court, relying on the traditional "situs rule," held that "[u]nder New York's choice of law rules, questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer," which was Switzerland. Bakalar v. Vavra, 550 F. Supp.2d 548, 550 (S.D.N.Y. 2008) (quoting Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., 1999 WL

673347, at *4-5 (S.D.N.Y. Aug.30, 1999)). Following a 2008 bench trial, judgement was entered for Bakalar. See Bakalar v. Vavra, 2008 WL 4067335, at *9 (S.D.N.Y. 2008). Applying Swiss law, the District Court found that the Swiss Galerie Gutekunst had purchased the drawing in 1956 in "good faith" from Mathilde Lukacs, the sister-in-law of Grunbaum, and therefore Galerie Gutekunst had acquired good title to the Drawing. Id. As a subsequent purchaser from the Swiss Galerie, the Court concluded that Bakalar had also acquired good title to the Drawing. Id.

The Court of Appeals disagreed, finding that New York's choice-of-law rules demanded the application of New York substantive law, not Swiss law. The Court stated that choice-of-law disputes regarding the validity of a transfer of personal property are not governed by the "situs rule," which relies on the location of the disputed property, or parties, at a given point in time. Bakalar, 619 F.3d at 143. Rather, New York's choice-of-law analysis is driven by the "interests" of affected jurisdictions, not the location of events. The Court of Appeals explained New York's choice-of-law approach this way:

> The problem with the traditional situs rule . . . is that it no longer accurately reflects the current choice of law rule in New York regarding personal property. This is demonstrated by our decision in Karaha Bodas Co., LLC v. Perusahaan Pertambangan Dan Gas Bumi Negara, 313 F.3d 70, 85 n.15 (2d Cir. 2002). The plaintiff there argued that "the law of the situs of the disputed property generally controls." Id. We declined to apply this rule because "the New York

> Court of Appeals explicitly rejected the 'traditional situs rule' in favor of interest analysis in Istim." Id. (citing Istim, Inc. v. Chemical Bank, 78 N.Y.2d 342, 346-47, (1991) . . . . "In property disputes, if a conflict is identified, New York choice of law rules require the application of an 'interests analysis,' in which 'the law of the jurisdiction having the greatest interest in the litigation [is] applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.'" Karaha Bodas, 313 F.3d at 85.

Bakalar, 619 F.3d at 143-44.

The Court concluded that it was New York, not Switzerland, that had the "greatest interest in the litigation" over the Drawing. Id. The "locus of the [alleged] theft was simply not relevant." Id. (citing Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 846 (E.D.N.Y. 1981)). Rather, New York had an interest in "preserv[ing] the integrity of transactions and, by having its substantive law applied, prevent[ing] the state from becoming a marketplace for stolen goods". Bakalar, 619 F.3d at 144 (emphasis omitted). Indeed, "if the claim of [Grunbaum's heirs] is credited, a stolen piece of artwork was delivered in New York to a New York art gallery, which sold it in New York to Bakalar." Id. The Court reasoned that these events "made New York a marketplace for stolen goods and, more particularly, for stolen artwork." Id. (internal quotation marks and citations omitted). Moreover, the Court stated that "[t]he application of New York law may cause New York purchasers of artwork to take

greater care in assuring themselves of the legitimate provenance of their purchase." Id. Therefore, "[h]owever the Drawing came into the possession of the Swiss art gallery, New York has a compelling interest in the application of its law." Id. In this way, New York had the "greatest interest in," and "is most intimately concerned with, the outcome" of, this litigation. See John v. Sotheby's, Inc., 858 F. Supp. 1283, 1289 (S.D.N.Y. 1994), aff'd, 52 F.3d 312 (2d Cir. 1995) (internal citations omitted).

By contrast, the Court found that Switzerland, where a portion of the Schiele collection had surfaced in the mid-1950s before being sold to a New York gallery, had only a "tenuous interest" in the litigation. Bakalar, 619 F.3d at 144. "The resolution of an ownership dispute in the Drawing between parties who otherwise have no connection to Switzerland does not implicate any Swiss interest simply because the Drawing passed through there." Id. Although "the Drawing was purchased in Switzerland by a Swiss art gallery," it was "resold [ ] within five months to a New York art gallery" where it remained for years. Id.

The facts of Bakalar are analogous to those in the present case. Here, as in Bakalar, New York has "the greatest interest in," and "is most intimately concerned with, the outcome" of, this litigation. Id.; Sotheby's, 858 F. Supp. at 1289 (emphasis

added). Although the immediate history of the Painting after Perls and Rosenberg purchased it in June 1938 is unclear, the Painting has remained in New York since at least 1939, within one year of the disputed 1938 transaction, when art dealer Paul Rosenberg loaned it to MoMA located in New York. (See Am. Compl. ¶ 52.) By October 1940, a well-known New York Gallery consigned the Painting for sale and sold it on November 14, 1941, to Foy, a New York collector. (See Am. Compl. ¶ 53.) In 1952, Foy donated the Painting to the Museum, "a New York not-for-profit corporation operating as a public museum located in New York County, New York." (See Am. Compl. ¶ 5.) The Defendant Museum, a major New York cultural institution, possessed and exhibited the Painting for the past 66 years, all in New York. (See Am. Compl. ¶ 54.)

Just as the Court of Appeals in Bakalar held that Swiss interests were not implicated by the mere fact of the painting's passing through Switzerland before relocating to New York in less than one year, this Court similarly finds the interests of Italy "tenuous" when compared to those of New York. Although the Leffmanns were in Italy during the 1938 sale, they were not Italian citizens and resided in Italy for only four months after the sale, which took place in France, through a Parisian dealer to French counter-parties. (See Am. Compl. ¶ 2, 13-14, 36-37.) Additionally, the Painting was never located in Italy, rather

the Leffmanns moved it "[s]ome time prior to their departure from Germany" to Switzerland, where it "was saved from Nazi confiscation or worse." (See Am. Compl. ¶ 14.)

Here, as in Bakalar, "the application of New York law may cause New York purchasers of artwork to take greater care in assuring themselves of the legitimate provenance of their purchase." Bakalar, 619 F.3d at 145. Therefore, "[t]he tenuous interest of [Italy] created by these circumstances, however, must yield to the significantly greater interest of New York, as articulated in Lubell and Elicofon, in preventing the state from becoming a marketplace for stolen goods." Id. (citing Elicofon, 536 F. Supp. at 846 (holding that "[u]nder New York law, in an action to recover converted property from a bona fide purchaser an owner must prove that the purchaser refused, upon demand, to return the property" and therefore, the statute of limitations did not begin to run until demand and refusal)).

Plaintiff's reliance on Schoeps v. Museum of Modern Art, 594 F. Supp. 2d 461 (S.D.N.Y. 2009), to support the position that Italian law should govern the 1938 transaction is misplaced. (See Pl. Opp. at 5, 15-16, 19-21.) Schoeps involved claims by Julius Schoeps and other heirs of Paul von Mendelssohn-Bartholdy ("Paul M.") and/or of his second wife, Elsa, that two Picasso paintings (collectively "the Picassos")—"Boy Leading a Horse" (1905-1906) ("Boy") and "Le Moulin de la

Galette" (1900)—once owned by Paul M. and held by, respectively, MoMA and the Solomon R. Foundation, were transferred from Paul M. and/or Elsa as a result of Nazi duress and rightfully belonged to one or more of the Claimants. Schoeps, 594 F. Supp. at 463. In 1933, Paul M. shipped five Picasso paintings to Switzerland where he sold them approximately one year later, allegedly under duress, for an unknown price. (See Compl. for Declaratory Relief at 11-12, Schoeps, 594 F. Supp. 2d 461 (S.D.N.Y. 2009)(No. 07-11074) [dkt. no. 1].) The purchaser of the Picassos, Justin Thannhauser, a Swiss art dealer, sold Boy to American collector William Paley, who ultimately donated it to MoMA in 1964. (Id. at 1-2.) Thannhauser held onto Le Moulin de la Galette before donating it to the Guggenheim Museum in New York in 1963, following his relocation to the United States. Id. The District Court held that under New York's choice-of-law rules, German law governed whether the transfer of the Paintings to Thannhauser was the product of duress. Schoeps, 594 F. Supp. at 465.

Plaintiff relies on the Court's holding in Schoeps stating, "[t]he Court determined that the law of Germany—where the transferors were located—governed this question even though there were other jurisdictions involved, including Switzerland, where, as here, the paintings may have been located." (Pl. Opp. at 21.) In reaching this conclusion, the District Court stated

that "New York applies interest analysis to choice-of-law questions" but then described interest analysis using the "five factors" which govern "contract dispute[s]." Schoeps, 594 F. Supp. at 465 (emphasis added). However, these five factors, "including the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties" are the five factors of the "center of gravity" test, not an "interest analysis." Id.; see Md. Cas. Co. v. Cont'l Cas. Co., 332 F.3d 145, 151-52 (2d Cir. 2003) (listing the five factors of the "center of gravity" test). Therefore, by conflating the "center of gravity" test with an "interest analysis," the District Court effectively created what both Plaintiff and Defendant have called "a hybrid test." (See Pl. Opp. at 21; Def. Rep. at 5.)

In the instant case, the application of a "hybrid test" is inappropriate, as the Court of Appeals has stated that an "interest analysis," not an "interest analysis" combined with the factors of a "center of gravity test," is what governs in choice-of-law disputes regarding the transfer of personal property. See Globalnet Financial.com, Inc. v. Frank Crystal & Co., 449 F.3d 377, 384 (2d Cir. 2006). "Under New York law there are two different 'choice-of-law analyses, one for contract claims, another for tort claims.'" Id.; See Granite

Ridge Energy, LLC v. Allianz Glob. Risk U.S. Ins. Co., 979 F. Supp. 2d 385, 392 (S.D.N.Y. 2013) (citations omitted); see, e.g., Fin. One Pub. Co., 414 F.3d at 336. The Court of Appeals has established a clear distinction between the "center of gravity" approach and the "interest analysis" approach. Globalnet Financial.com, 449 F.3d at 384 ("[T]he relevant analytical approach to choice of law in tort actions in New York is the '[i]nterest analysis.'") (citation omitted); Benefield v. Pfizer Inc., 103 F. Supp. 3d 449, 457 (S.D.N.Y. 2015) ("For contract claims, New York courts apply the 'center of gravity' or 'grouping of contacts' choice of law theory.") (citation omitted); Winter v. Am. Inst. of Med. Scis. & Educ., 242 F. Supp. 3d 206, 218 (S.D.N.Y. 2017) ("New York maintains two choice-of-law tests—one for contract claims and one for tort claims.").

For contract claims in New York, the "center of gravity" test, traditionally known as the "situs" rule, makes use of five factors to determine which of two or more jurisdictions has the "most significant relationship" or "contacts" to a given contract dispute. Md. Cas. Co., 332 F.3d at 151-52. Under this test, a court considers five factors: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile or place of business of

the contracting parties. Id. The five factors comprising the "center of gravity" test are thus the same five factors the District Court used in Schoeps to conduct what it called an "interest analysis." The Court concluded without elaborating that "[a]ll five of these factors plainly support the application of German law to the issue of whether the transfer of these German-held Paintings in 1935 was a product of Nazi duress or the like." Schoeps, 594 F. Supp. at 465.

Plaintiff's reliance on the "hybrid test" in Schoeps is misguided as the Court of Appeals explicitly stated that "the conflation of the two tests is improper." Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1539 n.5 (2d Cir. 1997). Based on this "hybrid test," Plaintiff maintains that "[t]he circumstances as to the [1938] sale are Italian-centric," and therefore, Italian law should govern the issue of duress in this case. (Pl. Opp. at 21.) However, even examining the facts of the 1938 transaction under the "center of gravity" factors does not conclusively point to the application of Italian law here. Parties in Italy and France negotiated and performed the contract via letters, while the Painting remained in Switzerland, not Italy. (See Am. Compl. ¶¶ 13, 14, 36.) Once sold, the Painting traveled to France, purchased through a Parisian dealer on behalf of French counter-parties. Id. Although the Leffmanns resided in Italy at the time of the 1938

sale, New York courts have stated that the locus of the alleged injury is not dispositive in an "interest analysis." See Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12-283, 2013 U.S. Dist. LEXIS 30214, at *23 (S.D.N.Y. Mar. 4, 2013) (stating that "[w]hile the place where the injury was felt is an important factor, it is not conclusive"); see Cummins v. Suntrust Captial Mkts., Inc., 649 F. Supp. 2d 224, 237 (S.D.N.Y. 2009). Thus, even under Plaintiff's "hybrid test" from Schoeps, French law, not Italian law, might well be applicable. In any event, the Court rejects this analysis as incorrect under New York choice-of-law rules.

Here, as in Bakalar, the interests of a European jurisdiction where one party to the transaction was temporarily passing through are "tenuous" when compared to those of New York. Bakalar, 619 F. 3d at 144-45. New York's interests surpass those of Italy, where, as here, the artwork was transferred to New York shortly after the 1938 transaction, was ultimately sold to a New York resident, and donated to a New York institution where it has remained, mostly on display to the public, since 1952. Moreover and consistent with Bakalar, New York has an interest in "preserv[ing] the integrity of transactions and prevent[ing] the state from becoming a marketplace for stolen goods" by having its substantive law applied. Id. For these reasons, under an "interest analysis,"

New York has the greatest interest in, and is most intimately concerned with, the outcome of this litigation. Accordingly, under New York choice-of-law analysis, New York substantive law is applicable to the 1938 transaction.

iv. The Amended Complaint Fails to State a Claim

As set out in Part III.B.i and Part III.B.ii above, the Court finds no outcome-determinative difference between Italian and New York law and that under either law, Plaintiff fails to state a claim for relief. Accordingly, dismissal is required under Fed. R. Civ. P. 12(b)(6).

In the alternative, as set out in Part III.B.iii above, to the extent that a difference is perceived between Italian and New York law, New York's choice-of-law analysis prescribes that New York law is applicable to the 1938 transaction. As noted in Part III.B.ii above, Plaintiff fails to state a claim for relief under New York law.

IV. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss the Amended Complaint [dkt. no. 11] is granted.

The Clerk of Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED.

Dated: New York, New York
February 7, 2018

LORETTA A. PRESKA
Senior United States District Judge

SPA-51

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMAN,

Plaintiff,

-v-

THE METROPOLITAN MUSEUM OF ART.

Defendant.

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16 **CIVIL** 7665 (LAP)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion dated February 7, 2018, Defendant's Motion to Dismiss the Amended Complaint is granted; accordingly, the case is closed.

Dated: New York, New York
February 7, 2018

RUBY J. KRAJICK

Clerk of Court

BY: K Mango

Deputy Clerk

CERTIFICATE OF SERVICE

I certify that on May 25, 2018, I electronically filed the forgoing Opening Brief of Plaintiff-Appellant Laurel Zuckerman, as Ancillary Administratrix of the estate of Alice Leffmann with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in the case in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 25, 2018

HERRICK, FEINSTEIN LLP

s/Lawrence M. Kaye
Lawrence M. Kaye