

No. 18-0634-cv

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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

Plaintiff-Appellant,

v.

THE METROPOLITAN MUSEUM OF ART,

Defendant-Appellee.

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

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**AMENDED AMICUS CURIAE MEMORANDUM IN SUPPORT OF THE  
PETITION OF PLAINTIFF-APPELLANT FOR PANEL REHEARING  
AND REHEARING EN BANC**

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## I. INTRODUCTION AND SUMMARY OF HARP'S POSITION

The federal equitable doctrine of Unclean Hands – which considers relevant statutory objectives and the public interest whenever a party misuses a special federal privilege such as a tax exemption – precludes the MET from asserting a laches defense. The MET breached its fiduciary obligations of loyalty, care, and diligence in recklessly misappropriating *The Actor* by ignoring the conspicuously problematic ownership history of the painting. The MET's fiduciary malfeasance and abuse of its tax exemption privilege both forecloses it from equitable relief and negates any prejudice that it plausibly can assert.

## II. STATEMENT OF FACTS

HARP punctuates the allegations in ¶¶ 52-65 of the Amended Complaint (AC) concerning the misfeasance and malfeasance of the MET in recklessly misappropriating *The Actor* in 1952 in violation of its obligations as a public trustee and wrongfully retaining the Painting since then.

## III. ARGUMENT

### **A. The Court Ignored That Because the MET Misappropriated *The Actor* in Violation of the Fiduciary and Public Policy Obligations That Inhere in its Special Federal Tax-Exemption Privilege under § 501(c)(3), Controlling *Federal Equitable Doctrine* Precludes It's Laches Defense As a Matter of Law**

The Court ignored that *federal* equitable doctrine grounded expressly upon national public interests and relevant federal statutory objectives – rather than the

law of New York State – necessarily controls any potential laches defense in this proceeding.

The Court’s oversight is consequential because it invoked – *sua sponte* – the laches doctrine to affirm the lower court ruling. HARP respectfully submits that it was especially incumbent upon the Court to apply *federal equitable doctrine* which – as a matter of controlling federal law – governs the equitable defense of laches whenever a party misuses a special federal privilege such as a tax-exemption, as did the MET in misappropriating *The Actor*.

The Supreme Court consistently has instructed that when a party misuses a *special federal privilege* such as a patent, trademark, copyright, government contract – or the federal tax-exemption that the MET enjoys under 26 U.S.C. § 501(c)(3) and which enabled it to receive the Painting as a tax-deductible charitable contribution – the equitable doctrine of Unclean Hands becomes informed by relevant federal statutory objectives and public interests. In this context, the discrete statutory goals and public policies that justify such special privilege – as well as other important federal interests at stake – determine both whether and how equitable relief will be accorded.

For example, in *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945) the Court applied the doctrine of Unclean Hands to deny an injunction seeking to enforce a patent that the petitioner knew

had been obtained by fraud. The Court declared that “[a]ny willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the...maxim”.<sup>1</sup>

The Court stressed that the public has a compelling interest to ensure that patents – a special federal privilege – perform their intended function and are limited to their prescribed scope. So these considerations prevent wrongdoers from invoking equity to enforce patents obtained by fraud:

A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting (science and useful arts)...The far reaching social and economic consequence of a patent, therefore, ***give the public a paramount interest in seeking that patent monopolies spring from backgrounds free from fraud or other inequitable misconduct*** and that such monopolies are kept within their legitimate scope. The facts of this case must be measured by both public and private standards of equity.” 324 U.S. 806, 816. (Emphasis and italics supplied).

*See also Morton Salt Co. v G.S. Suppiger Co.*, 314 U.S. 488, 492 (1942), denying equitable relief when a patent holder wrongfully misused the patent to further an unlawful “tying arrangement” to restrain trade in violation of federal antitrust laws: “[i] is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where ***the plaintiff is using the right asserted contrary to the public interest.*** (Emphasis and italics supplied). *S&E Contractors*,

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<sup>1</sup> 324 U.S. at 815.

*Inc. v. United States*, 406 U.S. 1, 15 (1972), “[c]ontracts with the United States – like patents – ... entail the public interest.”

The Court also consistently has instructed that relevant federal statutory objectives in a particular context inform whether and how courts will accord equitable relief. For example, in *United States v. Morgan*, 370 U.S. 183, 194 (1939), the Court said that the Congressional policy of maintaining reasonable rates as expressed in relevant federal statutes necessarily must determine whether and how a court awards equitable relief in this context. *See also Mitchel v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291 (1960), “there is inherent in the Courts of Equity a jurisdiction to give effect to *the policy of the legislature.*” (Emphasis and Italics supplied).

Like the patents at issue in *Precision Instrument Mfg. Co.* and *Morton Salt Co.*, the federal tax-exemption that enabled the MET to obtain *The Actor* as a charitable donation for which all other U.S. taxpayers necessarily were “vicarious donors”<sup>2</sup> – is a special federal privilege<sup>3</sup> and infused, correspondingly, with important public policies and interests. The MET undermined these public policies and interests both in recklessly acquiring and retaining *The Actor*. So while the

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<sup>2</sup> *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983).

<sup>3</sup> *See, e.g., Synannon Church v. United States*, 579 F. Supp. 967, 976 (D D.C. 1984) noting “the public interest in conferring the *privilege* of tax exemption – which amounts to a subsidy from the public coffers – only on deserving organizations...” (Italics original)



MET necessarily must perform an educational function to justify its tax exemption, *it must do so in a way that does not injure the public*. As the Court explained in *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) the rationale for the federal tax-exemption derives from the common law concept of a public charitable trust – an organization that promotes the public good and is not otherwise illegal or violates established public policy. As a corollary “the purpose of a charitable trust must not be illegal or violate established public policies” *Id.* at 591. The institution’s activities must not “*undermine any public benefit that might otherwise be conferred.*” *Id.* at 592 (Emphasis and italics added).

To ensure that the MET operates lawfully and so does not negate the public benefit that its putative educational mission confers, it must discharge its fiduciary duties and public policy obligations. As a not-for-profit corporation organized and existing under relevant New York law – (which it must be to qualify for tax-exemption under § 501(c)(3) – the MET owes formal fiduciary duties of loyalty and care to the public to observe reasonable precautions against acquiring *Nazi-confiscated artworks* and other contraband.<sup>4</sup> And the failure of U.S. museums like the MET “to consider adequately the security of title” when acquiring art objects

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<sup>4</sup> Alan Ullberg, *Museum Trusteeship* (1981) at 7.

violates duties of loyalty and care.”<sup>5</sup> So “museums that do not exercise sufficient due diligence in acquiring works of art...are breaching their public and fiduciary obligations.”<sup>6</sup> In addition, the MET must operate in a manner that does not encourage or aid crime and illegality.

The “operational test” of Treas. Reg. § 1.501(c)(3)-1(c)1 further prohibits tax-exempt entities like the MET from attempting to accomplish charitable objectives in an illegal manner, or in a way that encourages crime or illegality such as recklessly acquiring artworks so as to sustains the illicit international trade and commerce in *Nazi-confiscated artworks*, stolen art, and other cultural contraband.

The AC alleges that the MET committed extensive equitably disqualifying misconduct within the meaning of *Precision Instrument Mfg. Co.* and other cited authorities by misappropriating and wrongfully retaining *The Actor* in violation of its fiduciary duties and public policy obligations. Discrete acts of equitably preclusive misconduct in this context include:

- The allegations of ¶56 that the MET failed to investigate the provenance of the Painting when it accepted it as a charitable donation in 1952.

Importantly, *all relevant witnesses to the 1938 duress sale then still were*

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<sup>5</sup> Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 Cardozo J. Int’l & Comp. L., 409, 454 (2003).

<sup>6</sup> *Ibid.*

*living*, as Paul did not die until 1956, and Alice lived until 1966. (AC ¶¶ 49, 50) That the MET breached this duty – and thereby forfeited an opportunity to investigate the circumstances of the 1938 coercive transfer – disqualifies it from now seeking equitable relief.

- The allegations of ¶ 64 that the MET ignored “repeated directives and warnings issued by the U.S. Government” during the period 1945-1951 to take affirmative, proactive precautions to identify artworks that were the subject of coercive transfers due to Nazi policies. By neglecting these warnings the MET negated any basis for seeking equitable relief, or maintaining “prejudice” that it readily could have avoided by discharging its duties.
- The allegations of ¶¶ 57-58 and 62 that the MET for decades failed to investigate properly the true provenance of the Painting which it readily could – and should – have done, and instead manufactured multiple erroneous versions of the ownership history of the Painting. As ¶ 62 of the AC alleges, “[t]he Museum’s asserted explanation for the forty-five years of erroneous provenance only underscores its improper conduct when it first acquired the Painting.”

The MET's fiduciary malfeasance so alleged impairs important U.S. public interests and statutory objectives within the meaning of *Precision Instruments Manufacturing Co.* First, the MET's reckless acquisition of the Painting helped spawn the international illicit trade in stolen art and cultural contraband as commentators for years have observed that the perpetually lax acquisition practices of U.S. museums catalyze the illicit international art trade.<sup>7</sup>

Second, by ignoring U.S. Government warnings to take precautions against acquiring Nazi tainted artworks the MET undermined U.S. foreign policy objectives to forestall commerce in *Nazi-confiscated artworks* and to restitute these materials. The MET's reckless acquisition and wrongful retention of *The Actor* violated the U.S. foreign policy expressed in the HEAR to resolve claims for the restitution of *Nazi-confiscated artworks* in a just, fair, and equitable manner. ***It is axiomatic that a public trustee such as the MET can get no equitable traction by violating its fiduciary duties.***

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<sup>7</sup> See, e.g., Leah Weiss, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 *Cardozo Arts & Ent. L.J.* 837, 840-41 (2007), (“museum professionals” “continue engaging in the illegal art trade...”; Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 *Ind. L. J.* 985, 996 (1995) (“[i]f museums could be eliminated from the illicit art market, illegal art dealing could be significantly reduced.”; Alan D. Ullberg, *Museum Trusteeship* (American Association of Museums 1981) at 78 (“[m]useums are prime candidates for... ***prosecution***”) (Emphasis and italics added).

Third, the MET recklessly accepted a *Nazi-confiscated artwork* for its public trust collective and – ironically – as an object through which it purports to perform its putative tax-exempt mission of “educating” the public about art. In this context – and beyond any doubt – the MET’s injury to the public interest, U.S. foreign policy, and federal statutory objectives far eclipses any “educational” benefit it confers by retaining *The Actor*.

So just as the Courts in *Precision Instrument Mfg. Co.* and *Morton Salt* denied the petitioners equitable relief because they misused a special public privilege, so, too, must the Court preclude the MET from invoking any equitable defense to the AC. At a bare minimum these allegations raise questions of material fact regarding the disqualifying equitable misconduct of the MET that preclude dismissal under Fed. R. Civ. P. 12 (b)(6).

**B. The Federal Common Law of Taxation Augments the Imperative for Applying Federal Equitable Doctrine to the MET’s Fiduciary and Public Policy Misconduct**

The MET received the *The Actor* as a charitable donation under § 170 (or its statutory predecessor) in 1952 for which all other U.S. taxpayers necessarily were “vicarious donors”.<sup>8</sup> To vindicate the overarching federal interests that the MET’s reckless misappropriation of the Painting impaired, federal equitable doctrine -

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<sup>8</sup> *Bob Jones, supra*, note 2 at 591.

rather than the law of New York State - must govern its fiduciary malfeasance. The Supreme Court long has declared that federal tax statutes such as §§ 501(c)(3) and 170 must be interpreted *uniformly*. See, e.g., *Burnet v. Harmel*, 287 U.S. 103, 110 (1932)(“[i]t is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a *uniform application to a nation-wide scheme of taxation*”); *United States v. Pelzer*, 312 U.S. 399, 402 (1941)(“the revenue laws are to be construed in the light of their general purposes to establish a *nationwide scheme of taxation uniform in its application*”). (Italics added).

This principle mandates for several reasons that federal courts apply *uniform federal equitable doctrine* as prescribed by *Precision Instrument Mfg. Co.* and related cases to all judicial actions challenging the ownership of tax-exempt museums to artworks transferred “because of” Nazi persecution during the years 1933-1945. First, fiduciary duties in this context impose a substantive rule of conduct upon federal tax-exempt museums. Whether a §501(c)(3) entity has a duty to investigate the background of a suspicious artwork offered for charitable donation (as was *The Actor* in 1952), and the substantive content of such duty, should not vary based upon disparate state law equitable doctrine.

Second, there can be no doubt either that federal courts – rather than the courts of the 50 individual states – are the appropriate judicial authorities to craft and

apply equitable doctrine in this context. *State courts necessarily do not formulate equitable principles to protect discrete federal interests.* Federal interests in this context include those that inhere when a federal tax-exempt entity like the MET recklessly misappropriates a *Nazi-confiscated artwork* within the meaning of U.S. foreign policy. State courts have no authority under the U.S. Constitution to develop legal or equitable standards that apply to either discrete subject matter.

Finally, allowing the potentially disparate equitable doctrines of 50 states to determine the fiduciary and public policy obligations of federal tax-exempt museums in this context would create inconsistent and chaotic results. Identical cases seeking the restitution of *Nazi-confiscated artworks* from publicly supported U.S. museums would be treated differently and unpredictably – based entirely upon varying state equitable doctrines. The inevitable result would be the tails of 50 potentially inconsistent state equitable doctrines wagging the federal dog of tax-exemption.

#### IV. CONCLUSION

For the foregoing reasons and those set forth in Zuckerman's Petition, the Court should reconsider and vacate its decision affirming the dismissal of this case.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 29(b)(4),  
32(g), 35(b) & 40(b)**

Case No. 18-0634-cv

I hereby certify that, pursuant to Rule 29(b)(4), 32(g), 35(b) and 40(b), the text of the foregoing *Amended Amicus Curiae Memorandum In Support of the Petition of Plaintiff-Appellant for Panel Rehearing and Rehearing En Banc* uses proportionally spaced 14-point Times New Roman font type. This brief contains less than 2,600 words (including footnotes) as calculated by Microsoft Word, the word processor used to create the document.

Dated: July 19, 2019.

Respectfully submitted,

BYRNE GOLDENBERG & HAMILTON, PLLC

By: /s/ Thomas J. Hamilton  
Thomas J. Hamilton

**CERTIFICATE OF SERVICE**

Case No. 18-0634-cv

I hereby certify that, on July 31, 2019, I electronically filed the foregoing *Amended Amicus Curiae Memorandum in Support of the Petition of Plaintiff–Appellant for Panel Rehearing and Rehearing En Banc*, with the Clerk of the United States Court of Appeals for the Second Circuit using the Court’s CM/ECF system.

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

Dated: July 31, 2019.

Respectfully submitted,

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