No._____

In The
Supreme Court of the United States

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

Petitioner,

v.

THE METROPOLITAN MUSEUM OF ART,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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App. 1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: February 27, 2019 Decided: June 26, 2019)

Docket No. 18-634

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

Plaintiff-Appellant,

–v.–

THE METROPOLITAN MUSEUM OF ART,

Defendant-Appellee.

Before:

KATZMANN, *Chief Judge*, LIVINGSTON and DRONEY, *Circuit Judges*.

Plaintiff-Appellant Laurel Zuckerman appeals from the judgment of the United States District Court for the Southern District of New York (Preska, *J.*) dismissing her complaint for failure to state a claim. Zuckerman seeks recovery of a painting by Pablo Picasso that has been in the Metropolitan Museum of Art's possession since 1952. The painting once belonged to

Zuckerman's ancestors, Paul and Alice Leffmann, who sold it in 1938 to a private dealer to obtain funds to flee fascist Italy after having already fled the Nazi regime in their native Germany. The district court concluded that Zuckerman failed to allege duress under New York law. We do not reach the issue of whether Zuckerman properly alleged duress because we find that her claims are barred by the doctrine of laches. Accordingly, we **AFFIRM**.

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KATZMANN, *Chief Judge*:

In the 1930s, the German government, under the control of Adolf Hitler's National Socialist German Workers' Party (the "Nazis"), launched a campaign of oppression against German Jews and other minorities. As part of its reign of terror, the Nazis and their affiliates forced Jews out of their homes, seized their businesses, and stripped them of their property. By the late 1930s, life in Germany for Jewish people became so dangerous that many were forced to flee the country. Of those who were unable to escape, most were removed from their homes, shipped to concentration camps, and murdered.

In recent decades, with the passage of time and as the number of survivors of Nazi brutality diminishes, there has been a sense of urgency that some measure of justice, albeit incomplete, be given to those victims and their heirs. International conferences and subsequent declarations have outlined principles designed to ensure, for example, that "legal systems or alternative processes, while taking into account the different

legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art." Prague Holocaust Era Assets Conference: Terezin Declaration, Bureau of European and Eurasian Affairs, U.S. Department of State (June 30, 2009), https://2009-2017.state.gov/p/eur/rls/or/126162.htm. What was a moral imperative has appropriately been converted into statute, with such landmark legislation as the Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act"). Pub. L. No. 114-308, 130 Stat. 1524. These efforts are grounded in the recognition that the claims of survivors and their heirs must be given serious and sympathetic consideration. To facilitate the processing of such claims, the HEAR Act creates a nationwide statute of limitations for bringing claims to recover artwork and other property lost during the Holocaust era. The HEAR Act directs that every case be given individual attention, with special care afforded to the particular facts. In that effort to render justice, the law does not eliminate equitable defenses that innocent defendants may assert, where to do otherwise would be neither just nor fair.

Paul and Alice Leffmann (the "Leffmanns") were German Jews who, prior to Hitler's rise to power, enjoyed a flourishing and prosperous life in Germany. They had "sizeable assets," including a manufacturing business and multiple properties. J. App'x 33. Among the items they owned, purchased in 1912, was The Actor, a "masterwork" painting by the famed artist Pablo Picasso. *Id.* When the Leffmanns were forced to sell their business and flee Germany in 1937, they lost

much of their property. Once in Italy, they sold their Picasso painting to raise money to escape Hitler's growing influence in Italy and relocate to Brazil.

Plaintiff-Appellant Laurel Zuckerman is the Leffmanns' great-grandniece. Zuckerman seeks replevin of the painting from Defendant-Appellee the Metropolitan Museum of Art (the "Met"). Zuckerman argues the Leffmanns sold the Painting under duress and that the sale is therefore void. The district court (Preska, *J.*), concluding that Zuckerman had failed to adequately allege duress under New York law, dismissed her complaint.

On appeal, the Met argues, *inter alia*, that Zuckerman's claims are barred by the doctrine of laches and that such a determination can be made on the pleadings. In this Court's narrow ruling, we agree. Laches is an equitable defense available to a defendant who can show "that the plaintiff has inexcusably slept on [its] rights so as to make a decree against the defendant unfair," and that the defendant "has been prejudiced by the plaintiff's unreasonable delay in bringing the action." *Merrill Lynch Inv. Managers v. Optibase Ltd.*, 337 F.3d 125, 132 (2d Cir. 2003).[1] Here, despite the facts that the painting was a significant work by a celebrated artist, that it was sold for a substantial sum to a well-known French art dealer, and that it has been in the Met's collection since 1952, neither the Leffmanns nor their heirs made any demand for the

[1] Unless otherwise indicated, case quotations omit all citations, internal quotation marks, footnotes, and alterations.

painting until 2010. Such a delay is unreasonable, and the prejudice to the Met is evident on the face of Zuckerman's complaint. We further conclude that the HEAR Act does not preempt the Met's laches defense. Accordingly, we **AFFIRM** the judgment of the district court.

BACKGROUND

The following facts are drawn from the allegations in Plaintiff-Appellant's Amended Complaint or are "matters of which judicial notice may be taken." *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 123 (2d Cir. 2011).

I. The Leffmanns

Paul Friedrich Leffmann, a German Jew from Cologne, purchased The Actor, a painting by Pablo Picasso, in 1912 (the "Painting"). Mr. Leffmann and his wife, Alice, lent the Painting for various exhibitions throughout Germany in the early 20th Century. The Painting was also featured in articles, magazines, and monographs.

After the adoption of the Nuremberg Laws in September 1935, the Leffmanns' lives in Germany became untenable. Stripped of the rights and privileges of German citizenship, they were forced to sell their property and businesses to "Aryan" corporations, receiving "nominal compensation." J. App'x 34.

By 1937, it became clear that life in Germany for Jews like the Leffmanns was no longer simply difficult,

but genuinely perilous. The Leffmanns decided to flee Germany for Italy. After paying exorbitant "flight taxes," the Leffmanns arrived in Italy in April 1937. They engaged in financial transactions at a loss in order to settle in Italy. For example, the Leffmanns arranged to purchase a home for 180,000 Reichsmark ("RM") but pre-agreed to later sell it back to the original owners at a substantial loss. These "triangular agreements" were common at the time, as they allowed individuals outside of Germany to acquire RM while simultaneously permitting German emigrants to circumvent "the ever-tightening regulations governing the transfer of assets" outside of the country. *Id.* at 37. Prior to fleeing Germany, the Leffmanns "arranged" for the Painting, one of their few remaining assets, "to be held in Switzerland by a non-Jewish German acquaintance." *Id.* at 35.

But by early 1938, Italy was no longer a safe place for Jews. The growing influence of Nazi Germany resulted in anti-Semitic policies—for example, in 1937, Italy's Ministry of the Interior produced a list of all German refugees (most of whom were Jewish) living in Italy—and a warm welcoming of Adolf Hitler in May 1938. The Leffmanns began to make plans to flee to Switzerland, which required money. On April 12, 1938, Paul Leffmann wrote to C.M. de Hauke, an art dealer whom the U.S. State Department later identified as dealing in Nazi-looted art, from whom Leffmann had previously rejected an offer to sell the Painting. Leffmann now sought to revive discussions about the possibility of a sale. As matters became more perilous for

Jews in Italy, Leffmann "continued to try to sell the Painting through de Hauke." *Id.* at 42. "Trying to raise as much cash as possible," and in attempt to "improve his leverage to maximize the amount of hard currency he could raise," in 1938, Leffmann told de Hauke that he had rejected a $ 12,000 offer from another dealer. *Id.* at 42-43.

Shortly after writing to de Hauke stating he had rejected an offer for $ 12,000 from another dealer, Leffmann sold the Painting in June 1938 for that very price to the Paris art dealer Käte Perls, who was acting on behalf of her former husband, Hugo Perls, and another art dealer, Paul Rosenberg.[2]

Funded partially by their June 1938 sale of the Painting (the "Sale"), the Leffmanns fled to Switzerland in October 1938. The record on appeal is unclear as to how much the Leffmanns had to pay in order to leave Italy and arrive in Switzerland, but Plaintiff-Appellant alleges that Swiss authorities required immigrants to pay substantial fees and taxes in order to enter the country. According to Plaintiff-Appellant, "[g]iven the various payments required by Switzerland . . . the Leffmanns depended on the $ 12,000 . . . they received from the [S]ale" in order to survive. *Id.* at 46.

Their stay in Switzerland was short. Having only been able to procure a temporary Swiss residence visa, the Leffmanns fled to Brazil. Relocating to Brazil was similarly expensive. The Leffmanns had to pay

[2] The selling price was $13,200, but after a 10% selling commission, the Leffmanns came away with $12,000.

unspecified bribes to acquire the necessary documentation from the Brazilian government and deposited at least $20,000 in the Banco do Brasil. They arrived in Rio de Janeiro on May 7, 1941. Once in Brazil, they had to pay a "levy" of $4,641 imposed by the Brazilian government on all Germans living in the country. *Id.* at 46. Plaintiff-Appellant avers that the Leffmanns "depended on the $ 12,000" from the Sale for these payments. *Id.*

The Leffmanns lived in Rio de Janeiro for six years. In 1947, after the war had ended, the Leffmanns returned to Europe and settled in Zurich, Switzerland, where they lived for the rest of their lives. Paul Leffmann died in 1956; Alice Leffmann died in 1966. While they were still alive, the Leffmanns brought a number of successful claims with the assistance of counsel for Nazi-era losses, but those claims were limited to property that was "taken in Germany" before the Leffmanns fled Germany. Oral Argument at 25:34-58, *Zuckerman v. The Metropolitan Museum Art*, No. 18-634, http://www.ca2.uscourts.gov/oral_arguments.html. The Leffmanns made no demand to reclaim the Painting.

II. The Painting after the Leffmanns' Sale

In 1939, Paul Rosenberg loaned the Painting to the Museum of Modern Art ("MoMA") in New York. Rosenberg asked MoMA to insure the Painting for $18,000. Sometime before October 28, 1940, Rosenberg consigned the Painting to the M. Knoedler & Co.

Gallery in New York. In November 1941, that gallery sold the painting to Thelma Chrysler Foy for $22,500. Thereafter, Foy, an arts patron noted for her gifts of prized pieces to public institutions, donated the Painting to the Met in 1952.

Since at least 1967, when the Painting appeared in the Met's published catalogue of French paintings, the Met's published provenance of the Painting listed Leffmann as a previous owner. Until recently, however, the provenance incorrectly suggested that Leffmann sold the Painting after 1912; it listed the provenance as "P. Leffmann, Cologne (in 1912); a German private collection (until 1938)." J. App'x 48.

III. Procedural History

On September 8, 2010, Plaintiff-Appellant, the Leffmanns' great-grandniece, demanded that the Met return the Painting. The museum refused. On October 18, 2010, Zuckerman was appointed Ancillary Administratix of the estate of Alice Leffmann by the New York Surrogate's Court.[3] On September 30, 2016, Zuckerman filed suit in the Southern District of New York, asserting claims for conversion and replevin on the theory that the 1938 Sale was made under duress. On February 7, 2018, the district court dismissed Zuckerman's claims "[f]or failure to allege duress under New York law." Special App'x 3. The district court did not

[3] On February 7, 2011, Zuckerman and the Met entered into a standstill agreement tolling any statute of limitations as of that date.

address the Met's contention that Zuckerman's claims are time-barred in New York by the statute of limitations and laches. This appeal followed.

DISCUSSION

On appeal, the Met argues, among other things, that Zuckerman's claims are barred by the doctrine of laches. We agree.[4] Neither the Leffmanns nor their heirs made a demand for the Painting until 2010. This delay was unreasonable, and it prejudiced the Met. We further conclude that the HEAR Act, which creates a uniform, nationwide six-year statute of limitations for claims to recover art lost during the Holocaust era, does not preempt the Met's defense.

I. Standard of Review

We review *de novo* a district court's decision to grant a motion to dismiss. *See Arar v. Ashcroft*, 585 F.3d 559, 567 (2d Cir. 2009). "In so doing, we accept as true the factual allegations of the complaint, and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff." *Id.* "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); *see*

[4] Below, the Met asserted its affirmative defenses—statute of limitations and laches—but "requested that the district court address the merits-based defenses," which the district court did. Appellee's Br. 55 n.15.

also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

II. The Doctrine of Laches

It is well established that "[w]e may . . . affirm on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 584 (2d Cir. 2000). The doctrine of laches "protect[s] defendants against unreasonable, prejudicial delay in commencing suit." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). "A party asserting a laches defense must show that the plaintiff has inexcusably slept on its rights so as to make a decree against the defendant unfair. Laches . . . requires a showing by the defendant that it has been prejudiced by the plaintiff's unreasonable delay in bringing the action." *Merrill Lynch Inv. Managers*, 337 F.3d at 132; *see also Matter of Stockdale v. Hughes*, 189 A.D.2d 1065, 1067 (N.Y. App. Div. 1993) ("It is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches. . . . ").

"[M]ere lapse of time, without a showing of prejudice, will not sustain a defense of laches." *Saratoga Cty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816

(2003).[5] "A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim." *Conopco Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996). Finally, laches may be decided "as a matter of law" when "the original owner's lack of due diligence and prejudice to the party currently in possession are apparent." *Matter of Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 38 (N.Y. App. Div. 2006).

a. Unreasonable Delay

First, we conclude that the delay in this case was unreasonable. The Painting is an important and well-known work by an influential and celebrated artist. The Leffmanns sold it for a substantial sum to a French dealer. The Painting was then moved to the United States, where it was acquired by a major public institution. Meanwhile, the Leffmanns were in Brazil beginning in October 1938, and Switzerland from 1947 until Alice Leffmann died in 1966.

It is evident on the face of the complaint that the Leffmanns knew to whom they sold the Painting in 1938, and Zuckerman nowhere contends that the Leffmanns, despite making some post-war restitution claims, made any effort to recover the Painting. Indeed, over seventy years passed between the sale of the painting in 1938 and Zuckerman's demand that the Met return the Painting in 2010. *See, e.g.*, *Krieger v.*

[5] Both parties rely solely on New York law in making arguments concerning laches. Therefore, we do the same.

Krieger, 25 N.Y.2d 364, 370 (1969) (delay of twelve years in commencing an action for declaratory judgment that a Florida divorce decree was void was an "inordinate length of time").

It is eminently understandable that the Leffmanns did not bring any claim for the Painting during the course of World War II and even, perhaps, for a few years thereafter, given their specific circumstances. However, it is simply not plausible that the Leffmanns and their heirs would not have been able to seek replevin of the Painting prior to 2010. As noted above, the Leffmanns, being a financially sophisticated couple, actively and successfully pursued other claims for Nazi-era losses. This is not a case where the identity of the buyer was unknown to the seller or the lost property was difficult to locate. Indeed, the Painting was a "masterwork" of Picasso, not an obscure piece of art. J. App'x 33. Nor is this a case where the plaintiff alleges that the buyers themselves exerted any undue or improper pressure on the sellers. The Leffmanns could have contacted Käte Perls, the MoMA, or the Met. Since at least 1967, "P. Leffmann" has been listed as a prior owner of the Painting. Although that—concededly incomplete—provenance was included in the Met's published catalogue, none of the Leffmanns' heirs demanded that the Painting be returned. *See Peters*, 821 N.Y.S.2d at 68-69 (concluding that the pre-suit delay was unreasonable given that "neither the estate nor anyone in the [original owner's] family . . . attempted to recover the painting from the [subsequent purchaser], even though both families lived in

Manhattan and the painting was exhibited . . . at prominent museums, galleries, and universities").

b. Prejudice

While the determination of prejudice is ordinarily fact-intensive, even at this early stage of the proceedings, based on the unusual circumstances presented by the complaint, we conclude that the Met has been prejudiced by the more than six decades that have elapsed since the end of World War II. This time interval has resulted in "deceased witness[es], faded memories, . . . and hearsay testimony of questionable value," as well as the likely disappearance of documentary evidence. *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 149 (N.Y. App. Div. 1990). Assuming *arguendo* that Plaintiff's central claim that the Sale is void because it was made under third-party duress is cognizable under New York law, resolution of that claim would be factually intensive and dependent on, among other things, the knowledge and intent of the relevant parties. *See* Restatement (Second) of Contracts § 175(2) (1981). No witnesses remain who could testify on behalf of the Met that the Sale was voluntary,[6] or indeed on behalf of the Plaintiff that the Painting was sold "involuntar[ily]," *Kamerman v. Steinberg*, 891 F.2d 424, 431 (2d Cir. 1989), because the Leffmanns "had absolutely no other alternative," *Kenneth D. Laub & Co., Inc. v. Domansky*, 172 A.D.2d 289, 289 (N.Y. App. Div.

[6] Käte Perls died in 1945. Paul Rosenberg died in 1959. Hugo Perls died in 1977.

1991).[7] Nor are there first-hand witnesses who could testify to facts relevant to the Met's possible affirmative defenses, including whether Foy purchased the Painting in good faith. On these facts, "the original owner[s'] lack of due diligence and prejudice to the party currently in possession are apparent," and the issue of laches can be decided as a matter of law. *Peters*, 34 A.D.3d at 38.[8]

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[7] Under New York's "demand and refusal" rule, the statute of limitations is not triggered "until a *bona fide* purchaser refuses an owner's demand for return of a stolen art object." *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272 (2d Cir. 1994). If this rule applies to claims for art objects sold under duress, the failure to pursue legal proceedings related to the Painting—namely, to make a demand—also prejudiced the Met by essentially extending the New York statute of limitations indefinitely. *See Peters*, 34 A.D.3d at 36. In *Peters*, the Appellate Division recognized that a consequence of New York's "demand and refusal" rule is that "there is a potential for a plaintiff to indefinitely extend the statute of limitations by simply deferring the making of the requisite demand" and that such a consideration is relevant to a laches analysis. *Id*. We do not reach the question of whether New York's "demand and refusal" rule, which unquestionably applies to stolen and looted art, applies to claims of an owner demanding the return of an art object sold under duress.

[8] *Peters* also involved a claim to recover a Nazi-era loss. In that case, in the early 1930s, the original owner of the painting at issue, Professor Curt Glaser, entrusted it to his brother, Paul, while fleeing Nazi Germany. *Id.* at 311. Paul, however, "apparently sold the work within the following year without first obtaining [Curt's] consent." *Id.* The painting ended up at a well-known art gallery in Cologne, Germany. *Id.* That gallery sold it to a steel magnate named Otten. *Id.* Otten fled Germany in 1937 but sent the painting out of the country. *Id.* at 32. Soon after learning that the painting had been sold, Curt Glaser attempted to buy it back but was rebuffed. *Id* at 31. He never "report[ed] a theft and,

c. The HEAR Act

Zuckerman argues in the alternative that, because her claims are timely pursuant to the applicable statute of limitations as codified by the HEAR Act, a laches defense is unavailable in this case.

The HEAR Act addresses the "unfair impediment" caused by "[s]tate statutes of limitations" that do not

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indeed, did not regard the painting as having been stolen." *Id.* at 35.

The painting eventually ended up in the United States, where it was exhibited in several museums and universities. *Id*. at 32. Decades later, the Otten family consigned the painting to Sotheby's which, in 2002, sold it for $1.5 million. *Id.* It was only in December 2003 that the petitioner (a descendant of Glaser's) sought to recover the painting on the theory that it was converted or otherwise misappropriated. *Id.* at 33.

The Appellate Division rejected the request for pre-action discovery to identify the new owner of the painting. It did not squarely hold whether the sale in that case constituted a conversion, finding instead that even "assum[ing] that the subject [painting] was converted," any claim for recovery was barred by the statute of limitations and the doctrine of laches. *Id.* at 37. With respect to laches, although Glaser attempted to buy back the painting soon after his brother sold it, he never made a legal claim for the painting. *Id.* at 35. Further, "[t]he delay by the Glaser family and the estate in asserting any claim of ownership during the approximately 70-year odyssey of [the painting] prejudiced the good-faith purchaser since none of the parties to the original sale of the painting—Professor Glaser, Albert Otten and Paul Glaser—are alive." *Id.* at 38. The Appellate Division determined that "the original owner's lack of due diligence and prejudice to the party currently in possession are apparent," such that the issue of laches could be decided as a matter of law, even at the pre-action discovery stage. *Id.* The Court of Appeals denied petitioner's motion for leave to file an appeal. *Matter of Peters v. Sotheby's Inc.*, 8 N.Y.3d 809 (2007).

account for "the unique and horrific circumstances of World War II and the Holocaust." S. REP. NO. 114-394, at 5 (2016). The HEAR Act encourages the return of Nazi-stolen and looted artwork to Holocaust victims, heirs, and their survivors by preempting state statutes of limitations and imposes instead a uniform nationwide six-year statute of limitations. Specifically, the statute provides that "a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during [the period between 1933 and 1945] because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant. . . ." HEAR Act § 5(a).[9]

Generally, "in [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014); *see also SCA Hygiene Prods.*, 137 S. Ct. at 960 ("The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted.").

This general rule does not apply to the HEAR Act. While the HEAR Act revives claims that would otherwise be untimely under state-based statutes of limitations, it allows defendants to assert equitable defenses

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[9] *Amicus* Holocaust Art Restitution Project ("HARP") urges us [sic] extend the HEAR Act beyond its enumerated scope and to create a federal common law cause of action for replevin for "Nazi-confiscated artwork." HARP Br. 15-30. We decline to do so.

like laches. The statute explicitly sets aside "defense[s] *at law* relating to the passage of time." HEAR Act § 5(a) (emphasis added). It makes no mention of defenses *at equity*. "[A] major departure from the long tradition of equity practice should not be lightly implied." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Moreover, a key Senate committee report accompanying the statute, discussed *infra*, unequivocally indicates that the Act does not preclude equitable defenses.[10] S. REP. NO. 114-394, at 7.

Allowing defendants to assert a laches defense, despite the introduction of a nationwide statute of limitations designed to revive Holocaust-era restitution claims, comports with the overall legislative scheme advanced by the HEAR Act. One of the stated purposes of the HEAR Act is to ensure that claims to recover art lost in the Holocaust era are "resolved in a just and fair manner." HEAR Act § 3(2). But the HEAR Act does not allow potential claimants to wait indefinitely to bring a claim.[11] To do so would be neither just nor fair. At the

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[10] The HEAR Act applies to claims to "recover any artwork . . . that was lost during the [Holocaust era] because of Nazi persecution." HEAR Act § 5(a). A stated purpose of the law is to recover property "stolen or misappropriated by the Nazis." *Id.* § 3(2). We need not and do not decide whether Zuckerman's claims, for recovery of art sold under duress to non-Nazi affiliates, are within the ambit of the statute. Even if we assume *arguendo* they are, her claims are nevertheless barred by the doctrine of laches.

[11] The HEAR Act's six-year statute of limitations applies after "actual discovery" of the claim. HEAR Act § 5(a). The statute also contains an exception to this generally applicable rule for preexisting claims: those will still be time-barred under the applicable

very core of a successful laches defense is prejudice to the defending party: even an unreasonable delay is not fatal to a claim if there has been no harm to the other party. Unlike a mechanical application of a statute of limitations, a laches defense requires a careful analysis of the respective positions of the parties in search of a just and fair solution.[12]

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state statute of limitations if "(1) the claimant or a predecessor-in-interest of the claimant had knowledge of [the claim] on or after January 1, 1999; and (2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations." *Id.* § 5(e). The Senate Report explained that Congress "recognizes the importance of quieting title in property generally and the importance that claimants assert their rights in a timely fashion." S. REP. NO. 114-394, at 10.

[12] The general principle that a codified statute of limitations prevents a defendant from asserting a laches defense does not apply to New York's applicable three-year statute of limitations for recovery of a chattel, N.Y. C.P.L.R. § 214. Even when a claim is timely pursuant to the statute of limitations, a defendant may still assert a laches defense. *See, e.g.*, *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991) (holding that "although [defendant-]appellant's Statute of Limitations argument fails, [its] contention that the [plaintiff] did not exercise reasonable diligence in locating the painting" is relevant "in the context of [a] laches defense"). Were this not the case, plaintiffs could, as discussed *supra* n.7, delay bringing their claims indefinitely without consequence. The availability of a laches defense in this context allows courts to examine whether a plaintiff has abused New York's idiosyncratic "demand and refusal" rule in a way that is unfair to defendants, while keeping that rule in place. Thus, even if Zuckerman's claims were properly brought within the New York statute of limitations (a question we do not reach), they can still be barred by laches.

Finally, the legislative history of the HEAR Act makes clear that Congress intended that laches remains a viable defense to otherwise covered claims. An early draft of the bill, introduced in the Senate Committee on the Judiciary on April 7, 2016, would have explicitly swept aside a laches defense. Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. § 5(c)(2)(A) (as introduced in Senate, Apr. 7, 2016 (permitting recovery "[n]otwithstanding . . . any . . . defense at law *or equity* relating to the passage of time (*including the doctrine of laches*)" (emphasis added)). That draft also stated that one of the purposes of the HEAR Act was to ensure that claims for the recovery of art lost during the Holocaust era were "not barred by statutes of limitations *and other similar legal doctrines* but are resolved in a just and fair manner on the merits." *Id.* § 3 (emphasis added).

The final version of the bill, however, drops this language. Introduced in the House on September 22, 2016, and the Senate on September 29, 2016, the final version does not include any mention of laches or other equitable defenses. In addressing the amendment, which was in the nature of a substitute, the Senate Report explicitly noted that the new version "remove[d] the reference precluding the availability of equitable defenses and the doctrine of laches." *See* S. REP. NO. 114-394, at 7. Moreover, there is no mention of "other similar legal doctrines" in the purposes section of the final version of the statute. The final version notes that one of the purposes is to "ensure that claims to artwork and other property stolen or misappropriated by the

Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner." HEAR Act § 3(2). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *see also* Simon J. Frankel & Sari Sharoni, Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016, 42 Colum. J.L. & Arts 157, 175-76 (2019) ("[B]y *removing* laches from the draft text of the statute, Congress intended laches and other equitable defenses under state law to remain available to good faith possessors of artworks."). The HEAR act does not prevent defendants from asserting a laches defense. We emphasize that each case must be assessed on its own facts: while the laches defense succeeds here, in other cases it will fail and not impede recovery for claims brought pursuant to the HEAR Act.

CONCLUSION

For the reasons set forth above, we conclude that the HEAR Act does not preempt the Met's laches defense and that Zuckerman's claims are barred by laches. Accordingly, we AFFIRM the judgment of the district court.

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 (Filed Feb. 7, 2018)

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 Feuerversicherungsgessellschaft 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 II 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. 2d 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. 2d 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. 2d 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. 2d 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 Capital 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

/s/ Loretta A. Preska
LORETTA A. PRESKA
Senior United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMAN [sic],

Plaintiff,

-v-

THE METROPOLITAN MUSEUM OF ART.

Defendant.

---------- X

16 **CIVIL** 7665 (LAP)

JUDGMENT

(Filed Feb. 7, 2018)

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: /s/ K Mango

Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of August, two thousand nineteen.

Laurel Zuckerman, as Ancillary Administratrix of the estate of Alice Leffmann,

Plaintiff - Appellant,

v.

The Metropolitan Museum of Art,

Defendant - Appellee.

ORDER

Docket No: 18-634

Appellant, Laurel Zuckerman, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

PUBLIC LAW 114–308—DEC. 16, 2016

HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016

Public Law 114–308
114th Congress

An Act

To provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Holocaust Expropriated Art Recovery Act of 2016".

SEC. 2. FINDINGS.

Congress finds the following:

(1) It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the "greatest displacement of art in human history".

(2) Following World War II, the United States and its allies attempted to return the stolen

artworks to their countries of origin. Despite these efforts, many works of art were never reunited with their owners. Some of the art has since been discovered in the United States.

(3) In 1998, the United States convened a conference with 43 other nations in Washington, DC, known as the Washington Conference, which produced Principles on Nazi-Confiscated Art. One of these principles is that "steps should be taken expeditiously to achieve a just and fair solution" to claims involving such art that has not been restituted if the owners or their heirs can be identified.

(4) The same year, Congress enacted the Holocaust Victims Redress Act (Public Law 105–158, 112 Stat. 15), which expressed the sense of Congress that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.".

(5) In 2009, the United States participated in a Holocaust Era Assets Conference in Prague, Czech Republic, with 45 other nations. At the conclusion of this conference, the participating nations issued the Terezin Declaration, which reaffirmed the 1998 Washington Conference Principles on Nazi-Confiscated Art and urged all participants "to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, 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 and all the relevant documents submitted by all parties.". The Declaration also urged participants to "consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.".

(6) Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. (See, e.g., Detroit Institute of Arts v. Ullin, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).) The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

(7) Federal legislation is needed because the only court that has considered the question held that the Constitution prohibits States from

making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art. In Von Saher v. Norton Simon Museum of Art, 592 F.3d 954 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork. The Court held that the law was an unconstitutional infringement of the Federal Government's exclusive authority over foreign affairs, which includes the resolution of war-related disputes. In light of this precedent, the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(8) While litigation may be used to resolve claims to recover Nazi-confiscated art, it is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.

SEC. 3. PURPOSES.

The purposes of this Act are the following:

(1) To ensure that laws governing claims to Nazi-confiscated art and other property further

United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

SEC. 4. DEFINITIONS.

In this Act:

(1) ACTUAL DISCOVERY.—The term "actual discovery" means knowledge.

(2) ARTWORK OR OTHER PROPERTY.—The term "artwork or other property" means—

(A) pictures, paintings, and drawings;

(B) statuary art and sculpture;

(C) engravings, prints, lithographs, and works of graphic art;

(D) applied art and original artistic assemblages and montages;

(E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and

(F) sacred and ceremonial objects and Judaica.

(3) COVERED PERIOD.—The term "covered period" means the period beginning on January 1, 1933, and ending on December 31, 1945.

(4) KNOWLEDGE.—The term "knowledge" means having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.

(5) NAZI PERSECUTION.—The term "Nazi persecution" means any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.

SEC. 5. STATUTE OF LIMITATIONS.

(a) IN GENERAL.—Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—

(1) the identity and location of the artwork or other property; and

(2) a possessory interest of the claimant in the artwork or other property.

(b) POSSIBLE MISIDENTIFICATION.—For purposes of subsection (a)(1), in a case in which the artwork or other property is one of a group of substantially similar multiple artworks or other property, actual discovery of the identity and location of the artwork or other property shall be deemed to occur on the date on which there are facts sufficient to form a substantial basis to believe that the artwork or other property is the artwork or other property that was lost.

(c) PREEXISTING CLAIMS.—Except as provided in subsection (e), a civil claim or cause of action described in subsection (a) shall be deemed to have been actually discovered on the date of enactment of this Act if—

(1) before the date of enactment of this Act—

(A) a claimant had knowledge of the elements set forth in subsection (a); and

(B) the civil claim or cause of action was barred by a Federal or State statute of limitations; or

(2)(A) before the date of enactment of this Act, a claimant had knowledge of the elements set forth in subsection (a); and

(B) on the date of enactment of this Act, the civil claim or cause of action was not barred by a Federal or State statute of limitations.

(d) APPLICABILITY.—Subsection (a) shall apply to any civil claim or cause of action that is—

(1) pending in any court on the date of enactment of this Act, including any civil claim or

cause of action that is pending on appeal or for which the time to file an appeal has not expired; or

(2) filed during the period beginning on the date of enactment of this Act and ending on December 31, 2026.

(e) EXCEPTION.—Subsection (a) shall not apply to any civil claim or cause of action barred on the day before the date of enactment of this Act by a Federal or State statute of limitations if—

(1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after January 1, 1999; and

(2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.

(f) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to create a civil claim or cause of action under Federal or State law.

(g) SUNSET.—This Act shall cease to have effect on January 1, 2027, except that this Act shall continue to apply to any civil claim or cause of action described in subsection (a) that is pending on January 1, 2027. Any civil claim or cause of action commenced on or after that date to recover artwork or other property described in this Act shall be subject to any applicable

Federal or State statute of limitations or any other Federal or State defense at law relating to the passage of time.

Approved December 16, 2016.

LEGISLATIVE HISTORY—H.R. 6130 (S. 2763):
SENATE REPORTS: No. 114–394 (Comm. on the Judiciary) accompanying S. 2763.
CONGRESSIONAL RECORD, Vol. 162 (2016):
Dec. 7, considered and passed House.
Dec. 9, considered and passed Senate.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN, Plaintiff, vs. THE METROPOLITAN MUSEUM OF ART, Defendant.	Index No. 16-civ-07665 **AMENDED COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff, Laurel Zuckerman, as Ancillary Administratrix of the estate of Alice Leffmann, through her undersigned counsel, Herrick, Feinstein LLP, for her Complaint against Defendant, alleges as follows:

NATURE OF THE ACTION

1. 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 "Painting"), which was owned by Paul

Friedrich Leffmann ("Leffmann" or "Paul"), a German Jew, from approximately 1912 until 1938.

2. In 1937, Paul, who until the advent of the Nazi regime had been a prosperous industrialist and investor, and his wife, Alice, were forced to flee Germany in fear for their lives, after losing their business, livelihood, home and most of their possessions due to Nazi persecution. The feasible escape route at the time was Italy, but any hope of finding a safe haven from the Nazis in Italy was soon dashed. Shortly after their arrival, Mussolini and his Fascist regime increasingly adopted and implemented the Nazi pattern of rampant anti-Semitic policies and outright physical persecution of Jews, especially of immigrants from Austria and Germany. By 1938, it was clear that remaining in Italy was no longer an option, and, desperate to flee, the Leffmanns were forced to sell their remaining possession of substantial value, The Actor, at a price well below its actual value. They left Italy a few months after the sale, in October 1938, only days after the racist laws expelling foreign Jews from Italy were enacted.

3. The Leffmanns would not have disposed of this seminal work at that time, but for the Nazi and Fascist persecution to which they had been, and without doubt would continue to be, subjected.

THE PARTIES

4. Laurel Zuckerman, 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), since Alice Leffmann was a Swiss domiciliary, the Ancillary Administratrix is deemed to be a citizen of Switzerland as well.

5. Defendant, the Metropolitan Museum of Art, is a New York not-for-profit corporation operating as a public museum located in New York County, New York.

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiff and Defendant, and the matter in controversy exceeds $75,000, exclusive of interest and costs.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(a), (b) and (c), because Defendant is a New York not-for-profit corporation located in New York County and the Painting that is the subject matter of this dispute is located in this judicial district.

8. The Court has jurisdiction to grant the relief requested pursuant to 28 U.S.C. §§ 2201(a) and 2202.

STATEMENT OF FACTS

9. In 1912, Leffmann purchased the Painting, which, until he was forced by the circumstances in Fascist Italy to sell it under duress in 1938, was one of his most valuable acquisitions. From 1912 until at least 1929, Leffmann exhibited the Painting at a variety of exhibitions in Germany, at which he was identified as the owner of the Painting. The Painting was also

featured in newspaper articles, magazines and monographs during this time.

10. During this time and up to the start of the Nazi period, Paul and Alice, German Jews, led a wonderful life together 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 coowned 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.

11. Beginning in 1933, the world the Leffmanns knew in Germany began to shatter. Adolf Hitler came to power and the racist laws directed against Jews quickly began to be 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, a first step toward their mass extermination.

12. 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 by takeovers by "Aryans" of Jewish-owned businesses and then by forcing Jews to surrender virtually all of their assets. In this process, all Jewish workers and managers were dismissed, and businesses and corporations belonging to Jewish owners were forcibly transferred from those owners 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 their domestic and foreign assets and then moving to possess themselves of all such assets.

13. 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, Paul and his Jewish partner, Herbert Steinberg, were forced to transfer ownership of Atlantic Gummiwerk to Aloys Weyers (their non-Jewish minority business partner); and on July 27, 1936, Paul was forced to sell all of his real estate investments to Feuerversicherungsgessellschaft Rheinland AG, yet another Aryan German corporation. In return, Paul had no choice but to accept only nominal compensation. These were, indeed, not real sales at all, but essentially thefts by Nazi designees of substantially everything the Leffmanns ever owned, except for

The Actor, which was, at the time, ever so fortuitously for them, located in neutral Switzerland.

14. 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 named 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 or worse.

15. The Leffmanns' world was falling apart piece by piece. Having lost their home, their business and their investment properties, and witnessing the rise to power of the Nazi regime, its adoption of radical racist policies, and the accompanying increase in physical violence against Jews, it became clear that the persecution of Jews in Germany was growing at an alarming rate. 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 – not to mention their lives – they began planning their flight from Germany, liquidating their remaining assets in Germany to enable them to survive and escape. Their lives were changed forever as they abruptly lost their wealth and identity and became fugitives.

16. The Leffmanns finally were able to flee Germany in the spring of 1937. By 1937, when the Leffmanns' migration began, the Nazi regime had already

put in place its ever tightening network of taxes, charges, and foreign exchange regulations designed to arrogate most, and subsequently all, Jewish-owned assets to itself. Emigrants were only able to leave with a tiny fraction of their assets. The Leffmanns, upon their escape from the Reich, consequently left having been dispossessed of most of what they once owned.

17. The groundwork for, as Reichsmarxhall Hermann Göring put it, "getting rid of the Jews, but keeping their assets," had been laid as early as 1934 with a change in the tax law that declared that the law be interpreted according to the National-Socialist ideology. This meant that Jews and other persecutees lost all legal recourse against discriminatory tax treatment and legislation. Subsequently, tax instruments became increasingly important in the set of quasi-legal instruments used to strip Jews of their assets. Among these, the flight tax ("*Reichsfluchtsteuer*") was prominent. But even before this, the wave of emigration following Hitler's accession to power had led to a tightening of the flight tax regulations not only by lowering its threshold, but even more important, by authorizing the tax offices to require security deposits as they saw fit. This became one of the more important instruments in the dispossession of emigrants and would-be emigrants, and was used, *inter alia*, to put Jews, especially wealthy ones, under surveillance by the foreign exchange authorities (the "*Devisenstelle*").

18. By the end of 1936 (i.e., shortly before the Leffmanns' emigration), the increasingly precarious foreign exchange position of the Reich caused a further

tightening of foreign exchange regulations, which imposed the death penalty on attempts to undercut these regulations and codified the *Devisenstelle's* authority to block assets of persons found to be evading or intending to evade the regulations. Thus, even suspicion of the intention to emigrate led the authorities with ever increasing frequency to require a suspect to put his assets in a blocked emigrant's account, which he could dispose of only with the approval of the *Devisenstelle.* Any legal transfers abroad could be made only from such blocked accounts via the *Deutsche Golddiskontbank*, the government bank through which foreign exchange transactions were made (the "*DeGo*"), at increasingly large discounts. In 1937 the discount charged by the *DeGo* exceeded 80%. This, then, was the environment in which the Leffmanns prepared for their flight from the Reich.

19. Another 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% 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% of the assets actually owned at the time of emigration, as those who were persecuted by the Nazis – as were 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% 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 RM in cash.

20. While they would have preferred neutral Switzerland over Italy, where the Fascists were already in power and closer relations with Nazi Germany had begun to develop, at the time, 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 they went, hoping that Italy, with its significant Jewish population, would be a safe haven from the Nazi onslaught.

21. 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 and 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.

22. In April 1937, the Leffmanns crossed the border into Italy, going first to Milan and then to Florence, where many other German Jewish refugees ended up, and where their newly acquired house and factory were located. Their hope, shared by other Jews emigrating from Austria and Germany to Italy, was that life there could go on in some form of normalcy, which it could not in Cologne.

23. 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.

24. But the Leffmanns' time in Italy was short-lived. It soon became clear that the nightmare from which they had fled was about to engulf them there as well. But moving on 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 his junior. They were living as refugees, unable to work in Italy, their prior lives destroyed by Nazi persecution, and on the run.

The Growing Influence of
Nazi Germany on Mussolini and Italy

25. In April 1936, Italy and Germany had secretly adopted the Italo-German Police Agreement, which 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 Gestapo could compel the Italian police to interrogate, arrest and expel any German Jewish refugee.

26. By the fall of 1936 and into 1937, things had grown even bleaker for Jews. On November 1, 1936, Mussolini publicly announced the ratification of the Rome-Berlin Axis. By March 1937, Italian bookshops had begun to exhibit and openly sell the notorious book, The Protocols of the Elders of Zion, along with other anti-Semitic writings. During the summer and fall of 1937, the head of the Italian Police, Arturo Bocchini, and Mussolini accepted a proposal from the notorious SS General Reinhard Heydrich, the chief of the Security Service of the Reichsfiihrer (the SS) and the German Secret State Police (the Gestapo), to assign a

member of the German police to police headquarters in the ten largest Italian cities, including Florence, where the Leffmanns resided. This facilitated the Nazi efforts to check on "subversives," that is, Jewish individuals.

27. By the fall of 1937, anti-Semitism in Italy, including in the highest levels of the Ministry of the Interior, 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.

Leffmann's Sale of the Painting

28. 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. Switzerland was where they

wanted to go 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, permanent or temporary, 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 the correctness of his actions – i.e., that they would have had no choice but to turn whatever assets they still controlled into cash.

29. Meanwhile, conditions for Jews in Italy only 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."

30. 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 13 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. 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.

31. Also in March 1938, the Italian Minister of Foreign Affairs informed the U.S. Ambassador to Italy that Italy would not be participating in the international initiative to "facilitate" the emigration of "political refugees" from Austria and Germany. Italian newspapers made clear that "political refugees" was a synonym for Jews.

32. In April 1938, in the face of the growing Nazi persecution Treading across Europe and into Italy, Paul escalated his efforts to liquidate The Actor.

33. In 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. Nearly two years later, on April 12, 1938, Leffmann, in an even more desperate state, reached out to de Hauke asking him if he would be interested in purchasing the Painting.

34. Just days after writing to de Hauke, the situation in Italy grew even worse. From April 24-26, General Heydrich, SS Reichsfiihrer 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 Leibstandarte (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 arrests were carried out by the Italian police. Many German Jewish residents fled in anticipation, and as a result, of these arrests.

35. On May 3, Adolf Hitler arrived in Italy for his official state visit. It was a momentous occasion for Mussolini, and 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. This was no typical state visit. Mussolini, anxious to strengthen the Axis alliance, made sure that Italy spared no expense in putting on its grandest show for Hitler. 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.

36. Hitler's visit made clear that the situation in Italy for Jews was tense and the fear palpable. For Leffmann, the time to flee Italy was quickly

approaching, so he continued to try to sell the Painting through de Hauke. Trying to raise as much cash as possible for the flight and whatever the future would bring, 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). It is clear from the letter that Leffmann was desperately trying to improve his leverage to maximize the amount of hard currency he could raise.

37. Violence was increasing and the persecution of Jews was on the rise. All foreign Jews in Italy risked arrest, and had good reason to fear possible deportation and death. Paul and Alice were in fear of their liberty and their lives. There was no time left. So just days after telling de Hauke that he had rejected Mrs. 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. He finally accepted Käte Perls' offer of U.S. $13,200 (U.S. $12,000 after a standard 10% 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.

38. 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.

39. In July 1938, the Leffmanns, as German Jews, 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, seizure of assets."

40. Meanwhile, the plight of the Jews in Italy deteriorated even further. 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 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"). In addition, a number of regional newspapers published lists of many of the names of Jewish families residing in Florence.

41. 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. It was signed by the King on September 7th and was published in the "*Gazzetta Ufficiale*" on September 12th. 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. At that point in 1938, Italy's anti-Jewish measures had become extremely draconian, and in some instances had become even harsher than the corresponding measures enacted in Germany.

42. The Leffmanns had no choice but to prepare for immediate departure. Paul had sold The Actor not a moment too soon. Switzerland was the obvious destination. But Switzerland, which already had strict border controls, became even more difficult to enter beginning in 1938. In fact, it was about the worst time to try to enter Switzerland. Switzerland, following the incorporation of Austria into the Reich, imposed visa requirements on holders of Austrian passports on March 28, 1938, and in April 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, given the strict controls, and asset requirements imposed by the Swiss government, was not easy to obtain.

43. 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.

44. 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).

45. 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.

46. The Leffmanns temporally 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 (or about U.S. $4,641).

47. 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 would have likely suffered a much more tragic fate at the hands of the Nazis regime and its allies.

48. The Leffmanns were not able to return to Europe until after the War had ended. In 1947 they settled in Zurich, Switzerland.

49. Paul Leffmann died on May 4, 1956 in Zurich, Switzerland at the age of 86. He left his entire estate to his wife, Alice Brandenstein Leffmann.

50. 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).

The Ancillary Estate of Alice Leffmann

51. In 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 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.

The Museum's Acquisition and Possession of the Painting

52. The immediate history of the Painting after it was purchased by Perls and Rosenberg in June of 1938 is unclear, but it is known that after the purchase, the Painting was loaned by art dealer Paul Rosenberg 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% increase over what had been paid to Leffmann less than a year earlier).

53. 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% increase from the price paid to Leffmann).

54. Thelma Chrysler Foy donated the Painting to the Museum in 1952, where it remains today. The Museum accepted this donation.

55. As 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.

56. The Museum, given its resources, relationships, expertise, and status as a museum that holds its collection in the public trust, should have discovered, through due diligence, Leffmann's ownership up and until 1938, and the circumstances under which he was compelled to dispose of the Painting because of Nazi and Fascist persecution.

57. Nonetheless, 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 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.

58. This remained the official Museum provenance for the Painting for the next 45 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.

59. 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 it was owned by Leffmann continuously from 1912 until 1938.

60. In connection with a major exhibition of the Museum's Picasso holdings in 2010 entitled, "Picasso in the Metropolitan Museum of Art", the provenance was changed yet again. The forward to the exhibition catalogue by the Museum's director, Thomas P. Campbell, states that "[m]ore than a dozen members of our curatorial and conservation staff devoted the last year to an intensive study of the Museum's works by Picasso . . . Thanks to these extensive studies, for example, we have been able to confirm the authorship of one painting and to better establish the early ownership and exhibition history of many other works." Picasso in the Metropolitan Museum of Art, The Metropolitan Museum of Art, New York, 2010, p. vii.

61. Despite purportedly careful examination, as of 2010, the provenance of the Painting continued to erroneously list the "private collection" subsequent to the Leffmann listing.

62. All of these versions of the Painting's provenance were incorrect. Paul owned the Painting from 1912 until its "sale" under duress to Perls in June 1938. The Museum's asserted explanation for the forty-five years of erroneous provenance only underscores its improper conduct when it first acquired the Painting. The Museum asserts that the genesis of the original provenance entry in 1967 was that, some fifteen years after acquiring the Painting, the Museum's curators finally asked Perls where he had obtained the Painting and that his answer was that he had bought it in 1938 from a "German professor" in Solothurn, Switzerland who had been "thrown out by Nazis." (Perls allegedly could not remember the name of the German collector when asked in the 1960's.) Therefore, at least at the time of the cataloguing, red flags should have been raised for the Museum. It should have tried to correct its error by then investigating the acquisition of the Painting, especially because Perls already said that he could not remember the name of the German collector and, more pointedly, that the seller had been "thrown out" of Germany by the Nazis. But obviously no investigation was conducted in 1967, and the provenance published in 1967, and for many years thereafter, was erroneous.

63. In October 2011, only after extensive correspondence with Plaintiff, the Museum revised its provenance yet again. The revised provenance omitted the

reference to the mysterious private German collector who had purportedly owned The Actor from 1913-1938 and finally acknowledged Leffmann's ownership through 1938 and his transfer of it during the Nazi era.

64. The Museum's conduct ignored directives and warnings issued by the U.S. Government. The Museum had specifically been warned about accepting or buying art misappropriated during the Nazi era As early as 1945, the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (also known as the "Roberts Commission") issued a circular, addressed "to museums, art and antique dealers and auction houses," which emphasized the importance of bringing "specific examples of looting of works of art or cultural material [] to light as soon as possible," and which encouraged museums and others to inform the Roberts Commission of objects of "special artistic importance" that had "obscure or suspicious" provenances. The Commission also issued the following statement: "[i]t is, of course, obvious that no clear title can be passed on objects that have been looted from public or private collections abroad." In or about 1947, the Department of State sent American museums, as well as universities, libraries, art dealers and book sellers, another bulletin, in which it highlighted the responsibility of museums and other American institutions to exercise "continued vigilance" in identifying cultural objects with provenances tainted by World War II. The directive underscored the need for museums to notify the Secretary of State of any objects identified as lacking a clear title.

In 1950, the College Art Association of America reprinted the directive in *College Art Journal*, and in 1951, the American Federation of Arts reprinted the directive again in *Magazine of Art.*

65. The Museum's conduct was also inconsistent with the principles espoused by the American Alliance of Museums ("AAM"), by which the Museum is accredited, and the Association of Art Museum Directors ("AAMD"), to which the Museum is a member principles closely correlated to the landmark *Washington Conference Principles on Nazi-Appropriated Art.* For example, recognizing that a museum's mission is to serve the public and that its responsibility to practice ethical stewardship is paramount, AAM's "Standards Regarding Unlawful Appropriation of Objects During the Nazi Era" dictates that museums: (i) identify all objects in their collections that were created before 1946 and acquired by the museum after 1932, that underwent a change of ownership between 1932 and 1946, and that were or might reasonably be thought to have been in continental Europe during those dates; (ii) make currently available object and provenance (history of ownership) information on those objects accessible; and (iii) give priority to continuing research as resources allow.

Plaintiff Demands the Return of the Painting and the Museum Refuses

66. On September 8, 2010, Plaintiff's attorneys, Herrick, Feinstein LLP, wrote to the General Counsel

of the Museum, demanding the return of the Painting, but the Museum failed and refused to deliver the Painting to Plaintiff. The Painting remains in the possession of the Defendant through the filing of this Complaint.

67. 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. The action is therefore timely.

FIRST CLAIM

(For Replevin)

68. Plaintiff repeats and realleges each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

69. The Leffmann estate is the rightful owner of the Painting, and Plaintiff, as Ancillary Administratrix of the Leffmann estate, is thus entitled to recover sole possession of the Painting.

70. The Painting is a unique and irreplaceable work of art.

71. Plaintiff demanded the return of the Painting. Defendant failed and refused to deliver the Painting to Plaintiff.

72. Plaintiff is entitled to the immediate return of the Painting.

SECOND CLAIM

(For Conversion)

73. Plaintiff repeats and realleges each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

74. The Leffmann estate is the rightful owner of the Painting, and Plaintiff, as Ancillary Administratrix of the Leffmann estate, is thus entitled to recover sole possession of the Painting.

75. Plaintiff demanded the return of the Painting. Defendant failed and ref used to deliver the Painting to Plaintiff.

76. In refusing to return the Painting when demanded, Defendant converted and appropriated the Painting for its own use in complete disregard and derogation of the Leffmann estate's rights, title and interest to the Painting.

77. As a result of Defendant's wrongful conduct, the Leffmann estate has suffered damages, and Plaintiff is entitled to an award, in an amount to be determined at trial, but estimated to be in excess of $100 million.

THIRD CLAIM

(For Declaratory Judgment)

78. Plaintiff repeats and realleges each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

79. The Leffmann estate is the rightful owner of the Painting, and Plaintiff, as Ancillary Administratrix of the Leffmann estate, is thus entitled to the immediate possession of the Painting.

80. Defendant does not have good title to the Painting.

81. Plaintiff demanded the return of the Painting. Defendant failed and refused to deliver the Painting to Plaintiff.

82. Plaintiff is entitled to a judgment declaring that the Leffmann estate is the sole owner of the Painting.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

a) On the First Claim, directing that Defendant immediately deliver the Painting to Plaintiff;

b) On the Second Claim, in the alternative, awarding Plaintiff damages in an amount to be proven at trial, but estimated to be in excess of $100 million;

c) On the Third Claim, declaring that the Leffmann estate is the rightful owner of the Painting and that Plaintiff, as Ancillary Administratrix of the Leffmann estate, is entitled to immediate possession of the Painting;

d) Awarding Plaintiff fees and costs pursuant to Fed. R. Civ. P. 54(d); and

e) Awarding any such other and further relief as the Court deems just and proper.

Dated: New York, New York
November 2, 2016

Respectfully submitted,

HERRICK, FEINSTEIN LLP

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