18-0634-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiff-Appellant,

– v. –

THE METROPOLITAN MUSEUM OF ART,

Defendant-Appellee.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

LAWRENCE M. KAYE
ROSS L. HIRSCH
YAEL M. WEITZ
HERRICK, FEINSTEIN LLP
Attorneys for Plaintiff-Appellant
Two Park Avenue
New York, New York 10016
(212) 592-1400

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PRELIMINARY STATEMENT

The Nazis and their Fascist allies did not seize the Painting from Paul and Alice Leffmann. Rather, Plaintiff alleges that the Nazis and/or their Fascist allies would have *seized the Leffmanns* had they not sold the Painting, for well under its fair value, to finance their flight from Italy to Switzerland and then Brazil, having already been forced to liquidate the vast majority of their assets when escaping Hitler's Germany. The Museum asks this Court to hold that, as matter of law, the heirs of the Leffmanns can only recover the Painting in the first scenario, and that an imbalanced transaction made to finance flight from persecution should be given the same judicial deference as a run-of-the-mill commercial transaction. Is the Museum's formalistic position, embraced by the District Court, consistent with U.S. and international policy? *No.* Is it required by law? *No.* The Museum, breaching the public trust to which it holds a duty, premises its position on a series of missteps:

First, the Museum goes outside the pleadings on this motion to dismiss and the record on appeal to spin a yarn about the historical context and the specific circumstances facing the Leffmanns. The Museum is so cognizant of its own improprieties that it repeatedly footnotes disclaimers of its

indefensible tactic. The Museum compulsively tries to paint a false picture of the 1938 Transaction as an "open market" sale "in Paris" (using each of those misleading phrases *16 times*). It does so by downplaying the state of impending doom faced by foreign Jews in Italy as of June 1938, describing it merely as "tense and fearful" with some slight "economic pressure" and, gallingly, arguing that perceiving the Leffmanns' situation as a life-and-death predicament was an "ahistorical hypothetical" requiring "reimagination." The Museum also takes extreme liberties with the facts, contradicting the Complaint, to falsely depict the Leffmanns not as fugitives on the run from genocidal evil, but as still-wealthy individuals who sold the Painting, after years of deliberation, as a business decision.

Second, the Museum tries to overcome the critical policy considerations applicable here by declaring—again, without any basis in the record or the Complaint—that it acted responsibly, and thus the return of the Painting falls outside the purview of U.S. policy as embodied by the HEAR Act, the Washington Principles, the Terezin Declaration, the JUST Act, *etc.* In other words, as long the Museum self-professes to having handled the claim to the Painting with "sensitivity," it should be deputized as judge and jury to determine its own resolution. This laissez-faire approach runs counter

to the recent wave of jurisprudence supporting the restitution of artwork lost as result of Holocaust Era persecution, including the many European tribunal determinations referenced in Plaintiff's opening submission, as well as an array of decisions in the United States.[1]

Third, the Museum's analysis of New York law on duress is drastically overly-restrictive (*e.g.*, there can *never* be third-party duress, even in the form of targeted persecution by a genocidal force) and is premised on a disregard for historical circumstances. The result is that unless the counterparty to the transaction is literally holding a gun to plaintiff's head, a plaintiff must be found to have exercised "free will," regardless of whether the transaction was *necessary* to survive. New York law does not mandate this approach, which would render duress a mere mirage, and it should especially not be adopted here given the U.S. commitment to achieving justice for Holocaust Era claimants.

[1] *See, e.g.*, *Reif v. Nagy*, 2018 WL 1638805 (N.Y. Sup. Ct. N.Y. Cty. Apr. 5, 2018); *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018); *Gowen v. Helly Nahmad Gallery Inc*., 2018 WL 2123915 (N.Y. Sup. Ct. N.Y. Cty. May 8, 2018); *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1097 (D.C. Cir. 2017); *Simon v. Republic of Hungry*, 812 F.3d 127 (D.C. Cir. 2016); *Von Saher v. Norton Simon Museum of Art*, 754. F.3d 712, 721 (9th Cir. 2014).

Fourth, the Museum likewise overly constricts Italian law. To the extent that the Court affirms the holding in the Decision that there is no third-party duress in New York, inapposite Italian law would apply here given its strong interest in addressing the Holocaust Era pressures imposed within its borders. The Italian courts—taking into account historical circumstances and international policy—would invalidate the 1938 Transaction under the law on public order/morals and duress.

Fifth, even though the purpose of the HEAR Act is to ensure that claims to artwork "unlawfully lost because of persecution during the Nazi era" are *not barred* by the statutes of limitations and "other similar legal doctrines," the Museum argues that Plaintiff's claims *are barred* by the statute of limitations and the doctrine of laches. The Museum's arguments—seeking to circumvent a substantive resolution as it also tried to do by unsuccessfully challenging Plaintiff's authority in Surrogate's Court—are precluded by the HEAR Act and otherwise fail as a matter of well-settled law.

Sixth, as final scare tactic, the Museum makes a "slippery slope" argument—*i.e.*, if Plaintiff's claims are sustained, the floodgates would open to jeopardize "untold numbers of good-faith owners." Contrary to this rhetoric—and putting aside that the Museum was merely gifted the Painting

and holds it in trust for the public—Plaintiff does not suggest that all transactions made during the Holocaust Era are infirm.

Courts must view each individual claim through the lens of historical circumstances, so that transactions determined, based on the evidence presented, to have been made below fair value, in order to survive, and as a result of Holocaust Era persecution, are void as duress sales akin to physical compulsion. This is a workable "just and fair" framework, consistent with the law, within this Court's authority, and mandated by U.S. policy.

ARGUMENT

I. THE MUSEUM RELIES ON IMPROPER OUTSIDE-THE-RECORD STATEMENTS OF PURPORTED "FACT"

A Rule 12(b)(6) motion is addressed exclusively to the face of the complaint, which is deemed to include documents attached as exhibits, incorporated by reference, or integral such that the complaint facially relies on their terms and effect. *Goldman v. Belden*, 754 F.2d 1059, 1065-66 (2d Cir. 1985); *cf. Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153-54 (2d Cir. 2002). Moreover, an appellate court cannot consider evidence outside of the district court record absent extraordinary circumstances demonstrated through a motion to supplement the record. *Dollinger v. New York State Ins. Fund.*, 726 F. App'x 828, 830 (2d Cir. 2018).

Defying these two foundational principles, the Museum repeatedly relies on statements of purported fact that have no basis in the record, are inconsistent with Plaintiff's allegations, and do not reference any document. The Museum unsuccessfully tries (footnotes 2, 3, 12, 19) to justify its misconduct. However, this notion of attorney statements as self-authenticating evidence vitiates the very premises of a Rule 12(b)(6) motion and a record on appeal.

The Museum's improper references should be disregarded, and its reliance thereon underscores the overarching infirmity of its motion to dismiss. The Museum *needs* to go outside the record to defend its position:

To try to overcome the applicable crucial policy considerations as to Holocaust Era restitution—*i.e.*, "that every effort [should] be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales, and sales under duress"[2]—the Museum proclaims that it did its own investigation and "concluded" that the 1938 Transaction was not an "illegal confiscation," "unlawful appropriation," or "an involuntary sale compelled by Nazi coercion or duress." (Br-9, 60-63). The legislative mandate in the HEAR Act for claims to art unlawfully lost because of Nazi persecution to be *adjudicated on their merits*[3] does not mean that museums can be their own adjudicators. Just because counsel states that the Museum acted with "appropriate sensitivity," does not mean that it warrants judicial deference as to what constitutes a "just and fair resolution." Indeed, the Museum's false presentation of the Painting's provenance for decades (A-48-49, ¶¶57-63)

[2] *Von Saher*, 754. F.3d at 72.

[3] HEAR Act §2(7).

only highlights the need for scrutiny of the Museum's "investigations" and "research."[4]

To try to support its argument that the Leffmanns exercised "free will," the Museum states that Leffmanns took "years" to sell the Painting. (Br-3, 34). This statement intentionally misconstrues Plaintiff's contrary allegation that, though Paul *received* an offer for the Painting in 1936, it was only later, in a more desperate state, that he made a concerted effort to sell. (A-41-43, ¶¶33-34, 36-37).

To further support its "free-will" theory, and its arguments for laches and ratification, the Museum goes far beyond the record in stating that the Leffmanns made post-War efforts to recover their assets, but chose not to seek the Painting, and that it "would deny the will of the Leffmanns themselves" to return it to their heirs now. (Br-4, 6, 49-51, 58). These assertions are not only patently improper, but as Plaintiff will be able to show at the appropriate juncture, they are false. The Leffmanns had no avenue for reclaiming the Painting (*e.g.*, there was no mechanism in post-War Germany

[4] The Museum also tries to excuse its mishandling of the provenance by reference to an "interview." (Br-14, 33). Though the Museum falsely cites the Complaint, this is a purported fact with *no basis* in the record.

for the Leffmanns to recover a Painting that was in Switzerland at the time they sold it while living in Italy) from a location unbeknownst to them.

To try to justify its argument that the Leffmanns had "other alternatives" to selling the Painting, the Museum asks the Court to find the Leffmanns had "considerable resources . . . that were *at least* enough to cover their expenses for a decade or more." (Br-37). Each of the "expenses" that the Museum identifies—travel to Switzerland, taxes to enter Switzerland, "bribes," fees, and visas to enter Brazil (Br-37-38)—was essential to their survival. If the Museum disputes that the sale was necessary to finance that escape route, it can try to do so at trial. The Museum's *ad hoc* accounting, and rejection of the pleadings, cannot be considered now.

To try to dispute the threat level felt by the Leffmanns, the Museum derides Plaintiff's detailed allegations of the Leffmanns' life-and-death predicament as an "ahistorical hypothetical" and a "reimagination." (Br-10). What does the Museum reference for its history lesson? *Nothing*. Plaintiff welcomes the opportunity to present expert testimony from preeminent scholars *at trial* to rebut the Museum's depiction of 1938 Italy as merely "tense and fearful" for foreign Jews. (Br-2). As referenced in the amicus briefs, many of the unfortunate foreign Jews who were not able to escape

Italy were subjected to internment and, ultimately, deported to Nazi concentration camps where they perished. The Leffmanns *needed* to leave Italy to survive the concrete, targeted threat posed by the Nazis and the Fascists, and they *needed* to sell the Painting to leave.[5]

II. THE 1938 TRANSACTION IS VOID AS A MATTER OF U.S. POLICY AND NEW YORK LAW

In her Congressional testimony in support of the HEAR Act, Agnes Peresztegi, President of the Commission for Art Recovery, eloquently described the various ways in which Jews were dispossessed of their artwork during the Holocaust Era:

> It should not matter whether the loss occurred: (i) by a Nazi soldier taking the art from a Jewish family's apartment; (ii) by the Einsatzstab Reichsleiter Rosenberg (ERR), the Nazi art looting unit, systematically robbing French collectors; (iii) whether the art was sold to pay the so-called flight-tax; or (iv) was forcefully auctioned off; or (v) *whether a Jewish persecutee has sold the art below market value while fleeing for his life.*
>
> *Any and all types of dispossession are covered*.[6]

[5] The Museum absurdly suggests that the Leffmanns' failure to leave Italy immediately upon the 1938 Transaction is proof that conditions were not dire. (Br-10, 36). The Leffmanns needed time to organize their voyage, arrange for their entry into Switzerland, *etc.* Jews could not travel as if they were on vacation. (A-21, ¶¶42-44).

[6] *See* https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Peresztegi%20Testimony.pdf. (Emphasis added).

The Museum argues that New York law bars *all claims* for certain of these categories of Holocaust Era dispossession, including "flight sales" like the 1938 Transaction. In endorsing this categorical bar, the District Court erred as a matter of law and policy.

A. The 1938 Transaction Was Made Under Duress

The Museum's submission is wrong in its analysis of Plaintiff's duress claim under New York law.

Error 1: This is not a Holocaust-Related claim.

The Museum asks the Court to conclude that the 1938 Transaction was just an ordinary "open market" transaction (and, somehow, one that occurred in Paris).

As the Court of Appeals for the District of Columbia recently recognized, the "Holocaust proceeded in a series of steps," as "[t]he Nazis . . . achieved [the Final Solution] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them into camps, and finally, murdering the Jews and in many instances cremating their bodies." *Philipp*, 894 F.3d at 413, *quoting Simon v. Republic of Hungry*, 812 F.3d 127 (D.C. Cir. 2016). The Court further found that art disposed of in the

earlier stages, as a result of Nazi persecution, was not any less a part of the Holocaust or less worthy of restitution. *Id.*

In arguing that "there were no Nazis or Fascists involved" in the 1938 Transaction (Br-2) and distinguishing *Reif v. Nagy* on the basis that the Leffmanns were not murdered in a concentration camp (Br-28), the Museum rejects this framework for evaluating claims arising out of the Holocaust Era. Their theory is that if the Nazis are not forcing the sale of a particular artwork—with a gun to the head or while at a concentration camp—the threat endured by the persecuted owner is insufficient to state a claim.

The U.S. policy as to Holocaust Era claims, as embodied in the Terezin Declaration, the Washington Principles, and the HEAR Act, must be taken into consideration. In that context, artwork sold as a necessity for the purpose of escaping Nazi and/or Fascist persecution—which surely constitutes Nazi/Fascist "involvement"—voids the transaction under New York law.

Error 2: Any and All Claims for Third-Party Duress Must Be Dismissed.

The Museum argues that the claim must be dismissed because New York law "requires the counterparty to be the source of the wrongful threat"—*i.e.*, there is a bar to all claims of third-party duress (Br-21, 31). In support of this draconian rule, which would apply regardless of the identity of

third-party and the level/type of pressure it imposes, the Museum does not reference any decision of the New York Court of Appeals or this Court.[7] In contrast, in *Aylaian*, this Court recognized that "third-party duress may render a contract voidable." *Aylaian v. Town of Huntington*, 459 F. App'x 25, 27 (2d Cir. 2012). Though the Court continues to remark in *Aylaian* that "it cannot do so where the other contracting party gives value to the contract," it does so in reference to the Restatement (Second) of Contracts § 175(2). In the Restatement, the "provision of value" only sanctifies the transaction if the purchaser "has, in good faith and without reason to know of the duress, given value or changed his position materially in reliance on the transaction." *See also* Restatement (Third) of Restitution and Unjust Enrichment § 14 Comment i. Here, Plaintiff has alleged that the purchaser of the Painting was aware of the circumstances facing the Leffmanns and the unfairly low price. (A-43, ¶38).

There is not a prohibition of Plaintiff's claim merely because the purchaser was not the source of the threat.

[7] The *Mandavia* decision, cited by the Museum and the District Court, was affirmed by this Court, but the affirmance does not discuss this issue. *Mandavia v. Columbia Univ.*, 912 F. Supp. 2d 119 (S.D.N.Y. 2012), *aff'd*, 556 F. App'x 56 (2d Cir. 2014).

Error 3: The Threat Posed by Nazis/Fascists is not Akin to Physical Compulsion.

In *Menzel v. List*, the court recognized that when the Jewish owners left their Chagall painting behind when fleeing the Nazis, that "relinquishment . . in order to flee for their lives was no more voluntary than the relinquishment of property during a hold up." 49 Misc. 2d 300, 301-02, 267 N.Y.S.2d 804, 806 (N.Y. Sup. Ct. N.Y. Cty. 1966), *modified as to damages*, 28 A.D.2d 516 (1st Dep't 1967), *rev'd as to modification*, 24 N.Y.2d 91 (1969).

Rejecting *Menzel* (as well as *Reif v. Nagy*, Justice Korman's concurrence in *Bakalar v. Vavra*, and all other jurisprudence that is Holocaust Era-conscious), the Museum argues that the alleged threat cannot be found to be akin to physical compulsion here because there was no physical threat "directed at Leffmann" and the Leffmanns could not possibly have had a legitimate fear of "imminent physical violence." (Br-36). What jurisprudence or historical evidence does the Museum cite? *None*.

Plaintiff welcomes the opportunity to present historical records and expert testimony to substantiate the state of terror occupied by the Leffmanns as of June 1938. A review of the submissions of the Amicus Curiae—supported by leading scholars, historians, and Jewish organizations—should make clear that the Museum's historical perspective is the outlier.

Ultimately, the law cannot be that a threat can only be akin to physical compulsion if the Leffmanns had waited until physical violence was imposed upon them (at which point it would have been too late to sell or escape).

Error 4: Plaintiff Merely Alleged General Conditions of Economic Hardship.

If this Court were to analyze the claim in terms of mere "economic duress," it would wrongly inject an atmosphere of normalcy and liberty into a time of depravity and deprivation. The Leffmanns had no legal remedies or protections, nor did they have fair access to an "open market."

Nevertheless, even if the standard for economic duress applied, the Museum's argument still fails as it is reliant upon: (a) improper factual inferences and a misrepresentation of history, as discussed *supra* at 7-10, to support its characterization of the Leffmanns' "will" and "alternatives"; and (b) inapposite jurisprudence relating to standard commercial transactions.

The circumstances in the cases relied on by the Museum—unsubstantiated fear a spouse would not have married absent prenuptial agreement; lender's contractually-justified termination of credit; vague economic pressure as an excuse for entering loan agreement—are monumentally divergent from the Leffmanns' predicament. (Br-27). Even the one "wartime" case referenced by the Museum—where a supply shortage left

a brewer with poor leverage to negotiate a hops contract—does not correlate to the circumstances here. (Br-27, *citing Hugo v. Lowei, Inc. v. Kips Bay Brewing Co.*, 63 N.Y.S.2d 289, 290 (Sup. Ct. N.Y. Cty. 1946)).[8]

Though the Museum tries to connect Plaintiff's case with its caselaw under the rubric of "general conditions of economic hardship" (Br-27), what Plaintiff has alleged is not general (or merely "economic") in the least.

The Complaint identifies a concrete and certainly "wrongful" threat (the Nazis, Fascists), and concrete measures taken by that threatening force (measures that constitute crimes against humanity), targeted at the Leffmanns, starting with forced liquidation and flight from Germany, followed by measures being implemented at a rapidly escalating pace in Italy to track, restrict and punish Jews, and the increased presence of the Nazis in Germany, including Hitler himself. German Jews were already being arrested in Italy, with internment and deportation to extermination to later follow. Unlike the

[8] The Museum also cites the *dicta* findings by the District Court, on remand, in *Bakalar*, for the proposition that there is no duress in the Holocaust Era unless the Nazis take possession of the artwork. (Br-28, *citing Bakalar v. Vavra*, 819 F. Supp. 2d 293, 300 (S.D.N.Y. 2011)). The notion that Nazi-possession is necessary to sustain a claim is unsupported by law and directly contrary to U.S. and international policy (*see* Terezin Declaration). Judge Pauley's commentary is also flatly inconsistent with Judge Korman's prior concurrence. *Id.; see also Bakalar*, 619 F.3d at 148.

cases relied upon by the Museum (and the District Court), the Leffmanns did not sell the Painting at a steep discount just because they were in an economic bind—they sold it because it was their means of escaping an enveloping force of evil.

In that context, there should not be a question as to which analysis is more apt, the historically-attuned approach reflected in, for example *Menzel* and *Reif*—consistent with U.S. policy and the wealth of European tribunals addressing *genuinely* analogous circumstances—or the discussion of a brewery with reduced supplier options in *Lowei*.

B. The Museum Does Not Hold Good Title

The Museum argues that, even assuming duress, the 1938 Transaction was "subsequently ratified" and that good title passed to a good-faith purchaser. The Museum's theory is that the Leffmanns "received and retained" the proceeds from the 1938 Transaction and "continued to spend these proceeds as late as 1941" (Br-49)—*i.e.*, the Leffmanns waived their rights because they used the money to escape persecution. In addition to being unjust, these arguments are unavailing for several reasons:

First, as akin to physical compulsion, the 1938 Transaction is void *ab initio* and thus cannot have been "ratified" and good title could not have passed. (OpeningBr-46-48).

Second, the 1938 Transaction is void as unconscionable. The Museum argues that Plaintiff "waived" this argument. However, Plaintiff is within its rights to raise it because the District Court passed upon the validity of the 1938 Transaction under New York law. *See Russell v. Bd. of Plumbing Examiners of Cty. of Westchester*, 1 F. App'x 38, 41 (2d Cir. 2001); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Third, even if not void *ab initio*, the 1952 Transaction did not convey good title to the Museum, as per *Schoeps* and consistent with U.S. policy. (OpeningBr-52-61). The Museum mischaracterizes *Schoeps* as addressing only a "void" transfer under German law. (Br-53). However, Judge Rakoff also found that if the challenged transfer was voidable under German duress law, it would be treated like a theft in light of the historical circumstances. *Schoeps*, 594 F. Supp. 2d at 465-68.[9]

[9] The Museum's argument that the claim would fail on statute of limitations grounds if the 1938 Transaction was treated like a theft is specious—the claim is being made against the Museum, not the original counterparty.

Fourth, as mentioned *supra* at 8-9, the Museum's ratification argument relies on "facts" outside the record and disputed by Plaintiff. The Museum's insistence that the Leffmanns declined to utilize a post-War mechanism for retrieving the Painting is false and improper.

Fifth, it is inconsistent with U.S. policy to hold Holocaust Era Jews responsible for their "inaction" following the War. *Cf. Rosner v. U.S.*, 231 F. Supp. 2d 1202, 1208-09 (S.D. Fla. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135-36 (E.D.N.Y. 2000) ("the Holocaust, World War II, and the subsequent diaspora of the French Jewish community constitute extraordinary circumstances in and of themselves sufficient to invoke the doctrine of equitable tolling"). Jews fleeing, and then recovering from, persecution did not have capacity (or expectation) to rescind sales of flight art.[10]

III. 1938 TRANSACTION IS ALSO INVALID UNDER ITALIAN LAW

A. Italy's Interest in the 1938 Transaction is Substantial

To the extent that the Court affirms the District Court's finding that there can be no third-party duress under New York law and/or that there is no

[10] If Italian law applied to the question of "ratification," it would likewise not find that the Leffmanns had "ratified" the sale by not rejecting the transaction while under duress and fleeing genocide. (A-285-287, ¶¶68-73).

basis for voiding the 1938 Transaction under New York law (both of which it should not), New York and Italian law would materially differ. In that scenario, the Museum does not dispute that it would be appropriate to bifurcate the choice of law analysis as between the 1938 Transaction and the 1952 Transaction. (Br-21-22).

If there is found to be materially-diverging law and the choice of law analysis is performed for the 1938 Transaction alone, Italian law should govern for the reasons set forth in Plaintiff's opening submission. (OpeningBr-62-69). Though the Museum seeks to trivialize Plaintiff's argument as a mere "situs rule" (Br-24), there is a strong Italian interest in having its laws govern a transaction infected by threats imposed and suffered within its boundaries, including by its governmental institutions and military forces.

B. Italian Law on Public Order/Moral and Duress Is Not Blind to Historical Circumstances

The respective Italian law experts for the parties are in disagreement as to the application of Italian law on duress and public order/morals to the circumstances presented here. Without a Rule 44.1 hearing, the District Court arbitrarily "credited" the Museum's expert who presented a far simpler, unnuanced view of the law in which historical circumstances are irrelevant.

Professor Trimarchi, the Museum's Italian law affiant, describes his assignment as opining on the Italian law applicable "in 1938 to contracts entered into under duress or on unfair terms in a situation of financial need." (A-380, ¶1). This statement makes no reference to the Holocaust, the persecution of Jews, or the international and Italian policy as to the treatment of artwork lost during the Holocaust Era (*e.g.*, the Terezin Declaration and Washington Principles, both of which Italy signed). This pervasive flaw infects the Museum's entire analysis of Italian law.

First, with respect to Italian statutes on public order/morals, the Museum argues that, regardless of the historical circumstances, such laws are inapplicable here because the subject matter of the 1938 Transaction (sale of artwork) did not seek to accomplish an illegal objective. (Br-40). This is not true. Italian courts have voided contracts without a per se illicit objective when they are inconsistent with the fundamental values of the Italian legal system. (A-276, ¶33). There is no more fundamental affront to these values than a transaction necessitated by persecution.

Second, that the "fundamental values of the Italian legal system" include the need to protect those entering into imbalanced transactions as a result of Holocaust Era persecution is illustrated by the various post-War

legislative enactments and Italy's embrace of the Washington Principles and the Terezin Declaration. However, the Museum tries to use "Article 19"—legislation created to *protect* Jews—to disadvantage them. The Italian courts have specifically held that Article 19 is not intended to preclude other remedies, and there is no basis for holding that Article 19 reflects the definitive demarcation as to when foreign Jews felt sufficient pressure to fear for their lives. (OpeningBr-76-77).

Third, the Museum ignores the "pension" cases (*see* OpeningBr-81-82), reflecting the Italian judiciary's most contemporary evaluation of Holocaust Era persecution, where the courts have treated such persecution as per se "acts of violence" even absent physical violence directed at the claimant. Article 1112 of the 1865 Italian Civil code, addressing duress, expressly states that "the age, gender, and condition of the person threatened" must be taken into account in evaluating the seriousness and effectiveness of the threat. The Leffmanns' "condition," as recognized in the pension cases, was that of a victim of violence—not of mere economic or political pressure as the Museum suggests. (Br-29-30).

Fourth, though the Museum comments that the parties are in accord as to Italian law on duress (Br-20), that is false. (*Compare* A-278, ¶¶41-57 *with*

A-386, ¶¶22-24). Duress may be caused by "a government, political regime or social environment" (A-278, ¶¶42-43), which is contrary to the Museum's argument that Italian law requires a threat "purposefully presented by its author to extort the victim's consent." (Br-20, 26). The caselaw that the Museum relies upon does not mention the Holocaust or the persecution of the Jews.[11] As set forth in Plaintiff's opening submission, the duress infecting the 1938 Transaction would, as per the decision in *Schoeps* and consistent with policy, preclude the Museum from having good title under New York law. (OpeningBr-53-54, 84-85).

The Museum's presentation of Italian law, wrongly accepted by the District Court, suffers from the same infirmity as the rest of its submission—it merely evaluates the 1938 Transaction as an ordinary, commercial transaction, conducted in ordinary times.

IV. PLAINTIFF'S CLAIMS ARE NOT TIME-BARRED

Though the Museum announces a supposed "commitment" to resolving claims in "a just and fair manner" (Br-62), it nonetheless continues to advocate for Plaintiff's claims to be dismissed on technical grounds, contrary

[11] The Museum misleadingly suggests (Br-41 n.9) that a 1988 text, which they failed to attach, contains a comprehensive review of relevant cases. This outdated text is just a broad overview of how the Italian Courts applied post-War legislation; it does not purport to analyze all available causes of action.

to the HEAR Act and the policy it embodies.

The Museum's timeliness arguments are without merit.

A. The HEAR Act Moots the Museum's Statute of Limitations Argument

Pursuant to the terms of the HEAR Act, Plaintiff's claims are timely and the Museum is barred from raising the New York statute of limitations.

The HEAR Act preempts all provisions of federal or state law or any defense at law "relating to the passage of time," and provides instead for a six-year statute of limitations in art recovery cases from the Nazi Era. *See, e.g., Gowen,* 2018 WL 2123915, *12 ("By the express language of the HEAR Act, state statutes of limitations pertaining to causes of action involving artwork lost due to Nazi persecution are preempted."). The law is drafted to broadly apply to "any artwork or other property that was 'lost'," "throughout Europe," "because of Nazi persecution," which is defined to include persecution by allies of the Nazi Party. The limitation period accrues upon the claimant's actual discovery of: the identity of the artwork; the location of the artwork; and the claimant's possessory interest in that property. HEAR Act § 5(a). For claims already pending in court, the law will deem such claimants to have had the requisite "actual knowledge" as of the Act's date of enactment—December 16, 2016. *Id.*, at § 5(c)(2).

Here, there is no question that: (a) the Complaint alleges that the Leffmanns lost the Painting in 1938 because of the persecution by the Nazis and their Fascist allies (*e.g.*, A-32, 33, 39-40, 44-46 at ¶¶3, 9, 26-28, 42, 47); and (b) Plaintiff's claim was pending as of the date of the Act's enactment.

Nonetheless, the Museum attempts to circumvent application of the HEAR Act by arguing that it "cannot be stretched to encompass" the 1938 Transaction. (Br-56-57). The text of the HEAR Act belies this argument. A declared purpose of the HEAR Act is "[t]o ensure that laws governing claims to Nazi-confiscated art . . . 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." HEAR Act §3(1). The Terezin Declaration specifically addresses artworks lost "through various means including . . . on grounds of relinquishment as well as forced sales and *sales under duress*" as a result of "Nazi persecution," which is defined to include "the Nazis, *the Fascists* and their collaborators."[12] The fact that the HEAR Act is not intended to be limited to only literal confiscation by the Nazis is further evidenced by Congress' reference to *Detroit Institute of Arts v. Ullin*, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007)—

[12] *See* http://www.state.gov/p/eur/rls/or/126162.htm. (Emphasis added).

which involved a third-party sale, not an outright looting by the Nazis—as an example of the type of case unfairly barred by procedural defenses and now protected by the Act. HEAR Act §2(6).

The testimony of Ambassador Ronald S. Lauder in support of the HEAR Act, echoing Ms. Peresztegi's testimony referenced previously, punctuates that it is intended to include the loss of the Painting, as consistent with U.S. policy. He stated that "the term 'confiscation' includes any taking, seizure, theft, forced sale, *sale under duress, flight assets, or any other loss of an artwork that would not have occurred absent persecution during the Nazi era*."[13]

B. The Statute of Limitations Has Not Run

Even if the HEAR Act did not apply, Plaintiff's claims for conversion and replevin are timely. New York courts have long recognized that "the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand." *Menzel*, 49 Misc. 2d at 304, *mod.*, 28 A.D.2d 516 (1st Dep't 1967), *aff'd*, 24 N.Y.2d 91 (1969). This rule, known as the "demand and refusal rule," is the governing law. *Solomon R. Guggenheim Found. v.*

[13] *See* https://www.judiciary.senate.gov/imo/media/doc/06-07-16LauderTestimony.pdf. (Emphasis added).

Lubell, 77 N.Y.2d 311, 317-18 (1991); *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982).

The applicable three-year statute of limitations (New York CPLR § 214) did not accrue until after the Leffmann estate demanded the return of the Painting *and* the Museum refused to return it. The Leffmann estate demanded the return of the Painting on September 8, 2010. (A-51, ¶ 66). On February 7, 2011, the Museum and the Leffmann estate entered into a standstill agreement tolling any statute of limitations as of February 7, 2011. (*Id.*, ¶67). The standstill agreement was terminated on September 30, 2016, the day Plaintiff commenced this action. The action is timely. (*Id.*). Nevertheless, the Museum wrongly asserts that the demand-and-refusal rule does not apply.

First, the Museum aims to eviscerate the demand-and-refusal rule by arguing that it cannot be invoked to "revive a claim that expired many years ago." (Br-57). A claim cannot expire if it has not yet accrued and, as shown, the claim here did not accrue until after demand and refusal.[14]

Second, the Museum relies on *SongByrd, Inc. v. Estate of Grossman*,

[14] The Museum's reference to *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y 2010) undercuts its argument as the decision reaffirms that unreasonable delay "is relevant only to the defense of laches." *Id., citing Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 46 (S.D.N.Y. 1990).

206 F.3d 172 (2d Cir. 2000), to assert that because it has "openly exercised ownership" of the Painting, demand and refusal are not necessary. If the Museum was correct, mere possession would constitute "conversion," and any museum/gallery could just run the limitations period by placing artwork on its walls, vitiating the demand-and-refusal rule. *See Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 146-47 (1st Dep't 1990). In *Songbyrd*, a musician delivered recordings to a record executive "as demonstration tapes only." *SongByrd*, 206 F.3d at 174. Against the musician's wishes, the company licensed the recordings to another label which, in turn, released an album of them. The court ruled that the limitations period accrued when "the character of [the record company's] possession had changed by its actions in treating the master tapes as its own." *Id.* at 183. The irreversible *shift in character* of the possession made known to true owner was deemed equivalent to a wrongful taking, thus dispensing of the need for demand and refusal.

Here, there was no affirmative "change" in the "character" of the Museum's possession from permissive custodian (*i.e.*, with the true owner's knowledge and consent) to self-declared owner.

C. The Premature Laches Argument Wrongly Presumes Unreasonableness

The Museum's argument that Plaintiff's claims are barred by laches is misplaced, as this action was brought within the time allowed by the statute of limitations codified by the HEAR Act. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1974 (2014) (laches unavailable as a defense if the claim is brought within pertinent federal limitations period); *Reif*, 2018 WL 1638805, at *5 (where action is timely under the HEAR Act, the "statute of limitations and laches defenses fail"); *Goodman v. Universal Beauty Prod. Inc.*, No. 17-CV-1716 (KBF), 2018 WL 1274855, at *7 (S.D.N.Y. Mar. 9, 2018) (laches defense "not available against a claim made within an express statutory limitations period").

Even if laches could be invoked, the Museum's argument fails:

First, the determination of laches is premature. The Museum must demonstrate that the Leffmanns and their heirs unreasonably delayed in starting this action, that the Museum suffered undue prejudice as a result, and that the equities tip in its favor. *U.S. v. Portrait of Wally*, 99 Civ. 9940 (MBM), 2002 WL 553532, at *22 (S.D.N.Y. Apr. 12, 2002). Though "unreasonable delay" is an appropriate consideration in evaluating a laches defense *at trial*, it generally has no place in a motion to dismiss. Unless a

complaint leaves no doubt—which is not the case here—the laches inquiry mandates a fact-intensive inquiry into plaintiff's conduct (as to the reasonableness of the "delay") and that of defendant (as to "undue prejudice," and the balancing of the equities). *Deere & Co. v. MTD Prods., Inc.*, 00 Civ. 5936 (LMM), 2001 WL 435613, at *2 (S.D.N.Y. Apr. 30, 2001) (laches inquiry "inappropriate on a motion to dismiss"). Unsurprisingly, *not one case* cited by the Museum is in the context of a pre-discovery motion to dismiss. In its primary source—*Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010)—laches was evaluated in the context of a bench trial.

In *Schoeps*, the court rejected the laches defense raised by the museums, holding that the reasonableness of the delay, including as to whether the owner knew that there was a potential claim to the paintings, was a matter for trial. 594 F. Supp. 2d at 468.

The Museum seeks to avoid a trial of these issues by declaring that the "delay" was presumptively unreasonable and to imply *without any basis* that the Leffmanns knew the Painting was on display at the Museum. (Br-59). As recognized in *Schoeps*, the deprivation of Plaintiff's day in court, especially to reclaim what was lost in the Holocaust Era, is not something that can be accomplished based on supposition.

The Museum's further asserts that discovery is not necessary because the Museum purportedly shared with Plaintiff all "documents and information" that it deemed "relevant." (Br-59). The Museum's unsupported statements go well beyond the pleadings and the record on appeal, and contain improper references to (and mischaracterizations of) exchanges between the parties during settlement discussions. If the case is permitted to proceed, Plaintiff will present evidence, and take discovery, to refute the Museum's laches defense.

Second, the Museum's reliance on *Bakalar* is misplaced because, critical to the laches analysis, was defendant's status as "an ordinary non-merchant purchaser of art" with "no obligation to investigate the provenance" of the artwork. *Bakalar*, 819 F. Supp. 2d 293, 306 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

The equitable laches analysis is not simply about plaintiff's delay; it is also about defendant's conduct. *Portrait of Wally*, 2002 WL 553532, at *22; *Schoeps*, 594 F. Supp. 2d at 468. Institutions such as the Museum must act with a high degree of diligence and responsibility—especially given the directives to museums about buying or accepting art misappropriated during the Nazi era issued by the Roberts Commission and the U.S. Department of

State. (A-49-50, ¶64).

More broadly, the Museum acquires works regularly, either through donation or purchase, qualifying it as an institution with knowledge and experience in the art trade with a higher duty of inquiry and diligence. *See, e.g., Brown v. Mitchell-Innes & Nash, Inc.*, No. 06 Civ. 7871(PAC), 2009 WL 1108526 (S.D.N.Y. Apr. 24, 2009); *DeWeldon, Ltd. v. McKean*, 125 F.3d 24 (1st Cir. 1997). Thus, the Museum had a heightened duty of inquiry and standard of care regarding the Painting's provenance.

Third, the Museum's laches defense is barred by the doctrine of unclean hands. *Schoeps*, 594 F. Supp. 2d at 468; *see generally Aris-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc.*, 792 F. Supp. 969, 970 (S.D.N.Y. 1992), *aff'd*, 983 F.2d 1048 (2d Cir. 1992). The Museum should have discovered, through due diligence, Leffmann's continuous ownership until 1938, and the circumstances under which he was compelled to dispose of the Painting. Nonetheless, the Museum's published provenance for the Painting, delayed until 1967, was manifestly erroneous for 45 years. (A-47-48 ¶¶56-58). Notwithstanding the governmental directives and warnings, the Museum failed to meet its obligations as to its possession of the Painting.

V. THE MUSEUM'S SCARE TACTICS RING HOLLOW

The Museum argues that sustaining Plaintiff's claim "would cast doubt on the well-settled rights and expectations of the untold numbers of good-faith owners of property sold under similar circumstances" and that there would be "no workable limit." (Br-4). Despite this feigned hysteria, the relief sought is not a Trojan Horse but rather a "just and fair" opportunity for justice for the heirs of those persecuted by the Nazis and their allies. Notably, the Museum does not mention reports of claimants lining up at the doors of the European tribunals and commissions, which have, for years, striven to restitute artwork lost through flight sales and other circumstances analogous to those faced by the Leffmanns. (*See* OpeningBr-57-60).

Moreover, there is no aversion in this Court to handling Holocaust Era claims—indeed, "both the United States and the State of New York have historical and public policy driven interests in adjudicating claims involving artwork looted during the Nazi regime." *Gowen*, 2018 WL 2123915, at *13.

Ultimately, there is a workable limit. When a claim is made relating to artwork disposed of for less than fair value in Holocaust Era Europe, the trial court should, based on the evidence presented, evaluate whether the artwork was lost because of persecution by the Nazis and/or their allies—whether

because a Nazi solder took it, it was sold to pay a flight tax, it was forcefully auctioned off, or because it was sold by persecuted Jews (like the Leffmanns) to fund their flight. This is "just and fair," consistent with New York law, in adherence with U.S. and international policy, and within the powers of this Court. It is the right thing to do.

CONCLUSION

Plaintiff respectfully requests that this Court reverse the District Court's Decision.

Dated: New York, New York
August 3, 2018

HERRICK, FEINSTEIN LLP

By: /s/ Lawrence M. Kaye

Lawrence M. Kaye
Ross L. Hirsch
Yael M. Weitz
2 Park Avenue
New York, New York 10016
(212) 592-1400

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) and Second Circuit Local Rule 32.1(a)(4)(B). The brief contains 6,971 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-Point font.

Dated: August 3, 2018

HERRICK, FEINSTEIN LLP

s/Lawrence M. Kaye
Lawrence M. Kaye

CERTIFICATE OF SERVICE

I certify that on August 3, 2018, I electronically filed the forgoing Reply Brief of Plaintiff-Appellant Laurel Zuckerman, as Ancillary Administratrix of the estate of Alice Leffmann with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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

Dated: August 3, 2018

HERRICK, FEINSTEIN LLP

s/Lawrence M. Kaye
Lawrence M. Kaye