No. 12-

IN THE

Supreme Court of the United States

MILOS VAVRA AND LEON FISCHER,

Petitioners,

v.

DAVID BAKALAR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In far exceeding the limited powers granted under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Second Circuit's decision invalidating a foreign judicial act without respecting the forum state's issue preclusion rules raises important issues of federalism, threatens the private property interests of U.S. citizens worldwide, contradicts federal policies in the National Stolen Property Act 18 U.S.C. §2314, flouts the wishes of Congress expressed in the Holocaust Victims Redress Act ("HVRA") of 1988, PL 105-158, 112 Stat. 15 (Pet.App. 101a-102a) and reneges on the Executive Branch's written promise to make the U.S. legal system an effective forum for the recovery of looted artworks in the Washington Conference Principles (1998) and the Terezin Declaration (2009). When Hitler's Third Reich annexed Austria in 1938, the Nazis arrested Fritz Grunbaum, one of Vienna's most prominent Jewish residents, deported him to the Dachau Concentration Camp, liquidated his property and murdered him and his wife. In 2001, sixty years after his death, an Austrian court awarded Grunbaum's estate to Petitioners, his heirs. In conflict with *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) and teachings of New York's highest tribunal requiring written notice before disinheriting an heir, the Second Circuit applied a choice of law rule to extraterritorial matters governed by foreign sovereigns so arbitrary as to violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Second Circuit's choice of law conflicts directly with the approach of other Circuit Courts and this Court's teachings in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981).

Three questions are presented:

1. Does the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution require a federal court sitting in diversity to apply the forum state's issue preclusion rules when reviewing a foreign judicial act?

2. Where a federal court sitting in diversity chooses a local law to apply to rights that have vested under the laws of a foreign sovereign nation without regard to the forum's choice of law or the forum state's interest in having the law applied and such choice of law causes a forfeiture, does the choice violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution as arbitrary and unfair?

3. May a federal court siting in diversity use the Declaratory Judgment Act 28 U.S.C. § 2201 to interpret state law in a manner forbidden by the National Stolen Property Act 28 U.S.C. § 2314?

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OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Second Circuit, dated September 2, 2010, is reported at 619 F.3d 136. The Second Circuit vacated a final judgment entered by the Southern District of New York, dated September 2, 2008, reported at 2008 WL 4067335, and remanded for further proceedings (Pet. App. 62a-63a).

The second and final opinion of the United States Court of Appeals for the Second Circuit, dated October 11, 2012, is a summary order reported at 2012 WL 4820801. The Second Circuit affirmed the August 17, 2011 decision of the United States District Court for the Southern District of New York, reported at 819 F.Supp.2d 293. Judgment was entered on October 11, 2012. (Pet.App. 1a- 6a).

STATEMENT OF JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Second Circuit's summary order was rendered October 11, 2012. Petitioners sought rehearing on October 25, 2012. The Second Circuit denied the Petition for Rehearing or Rehearing En Banc on December 21, 2012. (Pet.App. 94a-95a).

STATUTORY PROVISIONS INVOLVED

Section 3-5.1(b)(2) of New York's Estates Powers & Trusts Law ("EPTL") provides in pertinent part:

> The intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death.
>
> The relevant text of the Holocaust Victims Redress Act and sections of the Austrian Civil Code are set forth in the Appendix at Pet.App. 96a-102a.

Amendment XIV to the United States Constitution provides in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 USCA §2314 provides in pertinent part:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods,

> wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud …
>
> Shall be fined under this title or imprisoned not more than ten years, or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this section is greater. If the offense involves the transportation, transmission, or transfer in interstate or foreign commerce of veterans' memorial objects with a value, in the aggregate, of less than $1,000, the defendant shall be fined under this title or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

A. *Bakalar I*

1. District Court Proceedings

On August 14, 2002, an Austrian court issued a Probate Decree to Leon Fischer and Milos Vavra certifying them as co-heirs of Fritz Grunbaum and distributing to each an undivided fifty percent interest in his estate.

David Bakalar acquired a 1917 drawing by the Austrian artist Egon Schiele titled "Seated Woman with Bent Left Leg (Torso)" ("the Drawing") in 1964. He bought it from Otto Kallir, who had been Fritz Grunbaum's art dealer before leaving Vienna to ply his trade in New York. When Bakalar bought the Schiele from Kallir, he did not ask where it came from.

Schiele died in 1918 at the age of 28. At the outbreak of World War II Schiele's work was unknown outside Austria. Schiele's collector base consisted in major part of prominent Viennese Jews, most of whom were murdered during Hitler's reign. From 1964 through 2004, Bakalar kept the Drawing concealed in his Massachusetts residence.

In 2004, Bakalar tried to auction the Drawing in New York, but Sotheby's advised him to withdraw the Drawing from sale because of provenance problems. Bakalar transported the Drawing to London and auctioned it on February 8, 2005. Petitioners' Austrian counsel wrote to Sotheby's asserting rights in the Drawing. Rather than pursuing discussions with Petitioners' counsel in Vienna, on March 21, 2005, forty-one days after the failed London auction, Bakalar, a Massachusetts resident, filed a Complaint in the Southern District of New York for, *inter alia*, a declaratory judgment for title to the Drawing and a determination that laches barred Petitioners' claims. Petitioners, the undisputed heirs of Grunbaum, counterclaimed for a declaration of title to Grunbaum's art collection, including the Drawing and sought to certify a class of possessors. Petitioner Leon Fischer is a resident of New York. Milos Vavra is a citizen and resident of the Czech Republic. Bakalar is a resident of Massachusetts. The value of the Drawing exceeds $75,000 so the district court had diversity jurisdiction pursuant to 28 U.S.C. §1332(a)(2).

On May 30, 2008, on a motion *in limine*, the district court concluded that Swiss law governed questions relating to the Drawing's title. *Bakalar v. Vavra*, 550 F. Supp.2d 548 (S.D.N.Y. 2008). A bench trial was held.

By opinion and order dated September 2, 2008, *Bakalar v. Vavra*, 2008 WL 4067335 (S.D.N.Y. Sept. 2, 2008), the district court found that the evidence established Grunbaum's ownership of the Drawing. 2008 WL at *4-5. Notwithstanding this determination, the district court held that Petitioners did not meet burdens of proving title to the Drawing required by Swiss law and declared title in Bakalar. *Id.* at *7-9 (Pet. App. 93a).

2. Second Circuit Proceedings

Petitioners appealed. The central point in Petitioners' brief was that New York's choice of law statute governing choice of law for personal property in decedent's estates applied and directed application of Austrian law, the law of the decedent's domicile. Section 3-5.1(b)(2) of New York's Estates Powers & Trusts Law ("EPTL") provides:

> The intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death.

On September 2, 2010, the Second Circuit, in an opinion by District Judge Korman, in which Circuit Judges Cabranes and Livingston joined, vacated the September 2, 2008 district court decision and remanded for further proceedings, if necessary. *Bakalar v. Vavra,* 619 F.3d 136 (Sept. 2, 2010) ("*Bakalar I*"). Judge Korman also wrote a concurrence (Pet.App. 63a-73a). *Bakalar I* held that the district court had erred in applying Swiss law to determine title to the Drawing. Applying an interest analysis, the

Second Circuit found that New York law conflicts with Swiss law regarding the ability of a true owner to recover stolen property and determined that New York had the stronger interest in having its law applied. 619 F.3d at 144-146. The Second Circuit observed that New York has selected the "demand and refusal" statute of limitations rule because it gives true owners the greatest protection possible and serves New York's public policy of not being a haven for stolen property. *Id.* at 141. The Second Circuit's decision did not mention EPTL §3-5.1(b)(2).

The Second Circuit noted: "absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods." *Id.* 141. The Second Circuit cited New York's rule on burdens of proof from *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (N.Y. 1991):

> To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art… This shifting of the burden onto the wronged owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser.

The Second Circuit further rejected the district court's conclusion that the Grunbaum heirs had failed to

produce "any concrete evidence that the Nazis looted the Drawing or that it was otherwise taken from Grunbaum." 691 F.3d at 147. The Second Circuit observed:

> Our reading of the record suggests that there may be such evidence, and that the district judge, by applying Swiss Law, erred in placing the burden of proof on the Grunbaum heirs in this regard. Indeed, as discussed earlier, if the district judge determines that Vavra and Fischer have made a threshold showing that they have an arguable claim to the Drawing, New York law places the burden on Bakalar, the current possessor, to prove that the Drawing was not stolen. *Id.*

In its discussion of the evidence that Fritz had been despoiled, the Second Circuit noted the particular significance of the ordinance dated April 26, 1938, which required Jews to register their assets and which covered both those who sought to leave the Reich (of which Austria was a part) and those who remained, enabling the Nazis to expropriate their domestically as well as their externally held assets. *Id*. at 137-38.

Judge Korman wrote a concurrence. In it he observed:

> Grunbaum was arrested while attempting to flee from the Nazis. After his arrest he never again had physical possession of any of his artwork, including the Drawing. The power of attorney, which he was forced to execute while in the Dachau concentration camp, divested him of his legal control over the Drawing. Such

> an involuntary divestiture of possession and legal control rendered any subsequent transfer void. . . . In sum, my reading of the record suggests that there is substantial evidence to support the claim of the Grunbaum heirs that the Drawing was owned by Grunbaum and he was divested of possession and title against his will. *Id.* at 148, 152

Accordingly, the Second Circuit remanded with instructions to apply New York law.

B. *Bakalar II*

1. District Court Proceedings

Following remand, on November 4, 2010, Petitioners sought to supplement the record with expert testimony and filed a motion to reopen expert discovery. The district court denied supplementation of the record. *Bakalar v. Vavra*, 819 F.Supp.2d 293, 2011 WL 165407 (S.D.N.Y. Jan. 14, 2011).

Bakalar moved for post-trial declaratory judgment on March 22, 2011. Petitioners filed a cross motion for post-trial declaratory judgment on April 22, 2011. By an order dated August 17, 2011, the district court awarded judgment to Bakalar, concluding that he holds lawful title to the Drawing and that Petitioners' counterclaims were barred by laches (Pet.App. 36a-37a). *Bakalar v. Vavra*, 819 F.Supp.2d 293 (S.D.N.Y. 2011).

The district court reaffirmed previous factual findings that: (i) Grunbaum possessed the Drawing prior to World

War II based on evidence of his ownership of other Schiele works and the testimony of Jane Kallir; (ii) Grunbaum was compelled to sign a power of attorney at Dachau, where he died in 1941; and (iii) Grunbaum's wife died in a concentration camp in 1944. *Id.* at 295.

The district court found that Bakalar did not meet his burden of proof to establish that Mathilde Lukacs had title to the Drawing or could convey good title. Specifically, the district court found that: (i) Bakalar could not prove that Lukacs acquired the Drawing as an *inter vivos* gift; (ii) Bakalar failed to prove that Grunbaum voluntarily relinquished possession of the Drawing; and (iii) Bakalar failed to prove that, as an intestate heir, Lukacs could transfer legal title to Grunbaum's estate. *Id.* at 299-302.

However, relying on the self-interested testimony of the Swiss art dealer who claimed (only after Lukacs's death) that he purchased the Drawing and the 54 other Schieles in the 1956 sale from Lukacs, the district court inferred that the Drawing "remained in the Grunbaum family's possession" and that, therefore, Nazi looting was unlikely. *Id.* at 298-99. Specifically, the District court ruled that while inclusion of property in a Nazi inventory "may have been a preliminary step in the looting of Jewish property" it does not constitute "proof" of seizure and that there was not evidence enough, therefore, to infer duress based upon Nazi seizure. *Id.* at 299.

The district court observed that the applicability of laches to Vavra and Fischer is "doubtful given that Vavra only became an heir to Grunbaum's estate in 1994, and Fischer only became aware of the existence of Grunbaum's estate in 1999." *Id.* at 305. However, the district court

concluded that the Vavra line of heirs knew that Grunbaum had collected art before his death and had been murdered in a concentration camp. *Id.* at 296-97.

The district court concluded that the Fischer line of heirs knew that they were related to Fritz's wife Elisabeth Grunbaum, that she died in a concentration camp and that they did not pursue Grunbaum's "potential intestate rights" which, in turn, prejudiced Bakalar and, thus, determined that Petitioners' claims were barred by laches. *Id.* at 307.

The district court found that Bakalar purchased the Drawing in good faith, declining to "saddle" Bakalar with the duty of inquiring into the Drawing's provenance. *Id.* at 306. Additionally, the district court declined to find that Bakalar had unclean hands based on his concealment of his ownership of the Drawing. *Id.* at 306-07. The district court found that the catalogue raisonné of Schiele's works published in 1991 concealing Bakalar's possession of the Drawing and omitting Lukacs and Grunbaum in the Drawing's provenance could not be attributed to Bakalar. *Id.* at 307.

2. Second Circuit Proceedings

On October 11, 2012, the Second Circuit affirmed the district court's decision in all respects by a non-precedential summary order. *Bakalar v. Vavra*, 11-4042-CV, 2012 WL 4820801 (2d Cir. Oct. 11, 2012). The Second Circuit held that it was "sound to recognize Bakalar's title on the basis of his laches defense." *Id.*, at *2 (Pet.App. 5a).

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S FAILURE TO RESPECT THE JUDICIAL ACT OF A FOREIGN SOVEREIGN UNDERMINES THE NOTION OF PRIVATE PROPERTY IN THE INTERNATIONAL ADMINISTRATION OF DECEDENTS ESTATES IN A CASE OF TREMENDOUS INTERNATIONAL IMPORTANCE, PRESENTING A COMPELLING VEHICLE FOR THIS COURT TO REVIEW IMPORTANT ISSUES OF FEDERALISM AND JUDICIAL RESTRAINT

A. Depriving Heirs Of Extraterritorial Inheritance Rights Without Written Notice Violates Due Process And Implicates Foreign Policy Because The Seizure Of Grunbaum's Property Led The U.S. To Adopt The Washington Conference Principles On Nazi-Confiscated Art.

The Due Process Clause of the U.S. Constitution requires that the government provide individuals with notice and an opportunity to be heard before depriving them of property. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 482 (1988). This Court established the controlling principle in *Mullane v. Cent. Hanover Bank and Trust Co.*, 339 U.S. 306 (1950): An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. 339 U.S. at 314.

As set forth in Section III, below, this case is the first Holocaust-era art trial ever to be conducted in a federal court and involves the property of a decedent whose estate caused a major U.S. foreign policy crisis when District Attorney Robert Morgenthau seized *Dead City II* at New York's Museum of Modern Art in 1998 and led the U.S. to adopt the Washington Conference Principles on Nazi Confiscated Art.

A core issue in this internationally significant and precedential case, accordingly, is thus, where the Due Process Clause of the U.S. Constitution requires actual written notice of probate proceedings before terminating property rights in a decedent's estate, does a federal court violate the Due Process Clause of the U.S. Constitution by adopting a doctrine of constructive notice. This Court's decisions and the record in this case demonstrates that the answer is yes: the district court violated the Due Process Clause of the U.S. Constitution by stripping Petitioners of their property without actual written notice.

Absent a ruling of a competent probate court, no heir could take legal title to Grunbaum's property. Pursuant to U.S. Supreme Court authority, termination of claims in probate proceedings without *actual notice* violates the Due Process Clause of the U.S. Constitution. *Tulsa*, 485 U.S. at 487-91. Because no probate occurred, the Second Circuit's Summary Order announces a result inconsistent with the Due Process Clause of the U.S. Constitution.

The district court found no evidence that the Co-Heirs' ancestors knew of Grunbaum's art collection following World War II and Nazi-era probate files were sealed until the late 1990s and the Austrian probate files from

1941 until 1999 showed that Grunbaum died without an estate. Thus, from 1941 to 1999, no probate proceeding put Petitioners' predecessors on *actual notice* that an estate was being probated. Thus the Due Process Clause of the U.S. Constitution prevents a district court from stripping property rights based on imputed knowledge of "potential intestate rights."

B. Because New York And Austria Have Well-Developed Statutory Schemes Governing Decedent's Property That The Second Circuit Offended In A Case Of International Significance And In Which The United States Made Commitments To Austria, This Decision Raises Important Issues Of Federalism, Foreign Policy, And Judicial Restraint Warranting This Court's Review.

In this case involving the property of an Austrian Holocaust victim whose art collection has embroiled the United States into a world debate over the powers of a state official to seize stolen property immunized by a treaty with Austria, *see* Section III.A. below, the Second Circuit determined that inactions of Grunbaum's ancestors caused Grunbaum's heirs to lose vested rights to inherit Grunbaum's property guaranteed by Austrian law. New York's EPTL 3-5.1(b)(2) requires that Austrian law apply to questions of ownership of the personal property of a foreign domiciliary. New York state's highest court in *Matter of Stern*, 673 N.Y.S.2d 972 (N.Y. 1998) and *In re Campbell's Estate*, 192 N.Y. 312 (N.Y. 1908) establish that New York may only act in an ancillary manner to a valid foreign probate or estate administration proceeding. Accordingly, the Second Circuit was precluded from

second-guessing the Austrian court on the issue of whether or not Petitioners are heirs under Austrian law. Because this is the very case that led the U.S. to adopt the Washington Conference Principles, this is a veritable slap in the face to Austria.

Additionally, New York's Surrogate Court Procedure Act ("SCPA") Section 1601, directed the Second Circuit to recognize Petitioners, ad decreed by Austria, and to turn over Grunbaum's estate.

> § 1601. Legislative declaration of purpose:
>
> > It is the intent and purpose of this article that ancillary administration shall be granted in this state only when there is an actual administration in the domiciliary jurisdiction. If the law of such jurisdiction does not provide for the appointment of a fiduciary but vests the property of a decedent in a person or persons subject to the obligation to pay the decedent's debts and expenses and the legacies bequeathed in his will or the distributive shares provided by law, such a person shall be recognized as the person acting therein to administer the decedent's estate in accordance with the law thereof, but only if such person has complied with all the requirements of such jurisdiction to entitle him to receive the property of the decedent and is acting or will act there to administer the estate.

Accordingly, the Austrian probate decree was not subject to question under New York law. There is no

recorded instance of the doctrine of laches being applied to disinherit heirs, as the Second Circuit has done. Because the Second Circuit's decision is such a significant federal intrusion into state sovereignty, it raises important issues of federalism and judicial restraint that warrant this Court's review.

C. Because The Second Circuit Has Applied Laches Where New York And Austria Would Not And Because Choice of Law Is Rarely Reviewed By This Court, The Second Circuit's Decision Is Likely To Have A Lasting And Pernicious Effect On The Proper Role Of A Court Sitting In Diversity With Respect To Fundamental Private Property Rights.

Both New York and Austrian law require the provision of notice to heirs of rights in the estate of a decedent who dies intestate before depriving such heirs of their inheritances.

New York law specifically defines who should get notice when a person dies intestate. SCPA § 103. Further New York law requires that every eligible person who has a right to the administration of an estate must be served with process. SCPA §1003. When a person dies intestate, the court is obligated to determine the distributes and conduct a diligent search for such distributees. SCPA §2225. Austria's notice requirements are set forth in Austrian Civil Code § 158. (Pet.App. 97a-98a). Under both New York and Austrian law, an heir cannot waive rights to property in a probate without an intentional relinquishment in a signed writing. N.Y. EPTL § 2-1.11(c)(2); Austrian Civil Code § 551. (Pet.App. 98a)

In failing to give obedience to laws forbidding termination rights of a non-resident and in conflict with *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) requiring written notice, the Second Circuit applied a choice of law rule to extraterritorial matters so arbitrary as to violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (choice of law can neither be arbitrary nor fundamentally unfair). Because this arbitrary treatment of private property directly undermines the entire U.S. concept of private property and will encourage reciprocal attacks on American private interest abroad, this case poses important questions worthy of this Court's review.

II. BECAUSE THE SECOND CIRCUIT'S ARBITRARY CHOICE OF LAW ENCOURAGES NATIONAL FORUM SHOPPING AND A SYSTEMIC ABUSE OF DIVERSITY JURISDICTION THROUGH A MISAPPREHENSION OF THE *ERIE* DOCTRINE, THIS CASE PRESENTS IMPORTANT ISSUES AFFECTING THE ENTIRE SYSTEM OF FEDERALISM

A. The Courts Are In Disarray And The Second Circuit's Decision Has Enhanced That Disarray.

The result in this case threatens bedrock principles of our entire system of private ownership of property. As the founders of our great American nation knew " '[N]othing would be more convenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law...'" *Societe Nationale*

Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 543-544 (1987) (*citing Emory v. Grenough,* 3 Dall. 369, 370, n. (1797) (*quoting* 2 U. Huber, Praelectiones Juris Romani et hodiemi, bk. 1, tit. 3, pp. 26-31 (C. Thomas, L. Menke, & G. Gebauer eds. 1725))).

Yet the Second Circuit has embraced precisely this pernicious promiscuity. Letting a Massachusetts resident transport a stolen artwork from a failed London auction and then, by accident of the artwork's new presence in New York, to permit the wrongdoer to gain the benefits of New York's laches defense and bypass valid probate decrees simply by suing a New York resident in a federal diversity suit is a blatant misconception of this Court's *Erie* doctrine.

But this is not a problem isolated in the Second Circuit. According to one scholar, writing over a decade ago choice of law in stolen art cases has long been a "chaotic palette". Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art,* 50 Duke L.J. 955, 971 (2001). In the ensuing decade, things have gotten worse and this Court has not provided guidance.

Because the possessor of stolen art can now game the U.S. system by picking and choosing fora based on inconsistent choices of law, the Second Circuit has put the possessor of stolen art in the driver's seat and will only cause more mischief in our courts. Since Bakalar possessed the Drawing and concealed it in Massachusetts for forty years, why does New York have any interest in protecting such behavior outside its borders? It does not.

One scholar has criticized the Second Circuit's choice of law decision in this case as "result-driven". She correctly identified "the need for clarification … [and] to restrain manipulation and promote predictability in the interest analysis's application." Laurie Frey, *Bakalar v. Vavra and the Art of Conflicts Analysis in New York: Framing A Choice of Law Approach for Moveable Property*, 112 Colum. L. Rev. 1055 (2012). Accordingly, certiorari should be granted to take the courts out of a choice of law disarray that has crippled our federal system for too long.

This federal intrusion into the business of probating estate assets raises important issues of state sovereignty and federalism warranting this Court's review.

B. This Case Presents A Compelling Vehicle To Address Federal Doctrines Of Comity Necessary To Protect Orderly Administration Of Decedents' Estates From Unwarranted Federal Intrusions

Federal courts simply cannot ignore, as the Second Circuit has done here, the judicial acts of a foreign sovereign. "[C]omity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated." *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985). As such, "[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972). Because

the Second Circuit failed to weigh Austria's interest in administering the property of its decedents in a case of international diplomatic significance, it is imperative that this Court provide a manageable test for federal courts sitting in diversity to review judicial acts of a foreign sovereign.

C. In Direct Conflict With Other Circuits, The Second Circuit Ignored The Compelling Interest Of The Respective States In The Orderly Administration of Decedent's Estates Making Clear Comity And Choice Of Law Rules Critical To Preservation Of Personal Private Property And Orderly Administration of The Federal Judicial System.

The Second Circuit's choice of law analysis did not consider or follow New York's choice of law statute applicable to decedent's estates. This creates a direct conflict with other circuits, such as the Fourth, Fifth and Eleventh Circuits, which have considered first whether the state has a choice of law statute and then considered carefully whether the court of the highest state would apply such a choice of law statute in light of the particular policies behind the statute. *Gulf Insurance Co. v. Davis*, 65 F.3d 166 (4th Cir. 1995); *D&J Tire & Rubber Co.,* 598 F.3d 200 (5th Cir. 2010) (Louisiana general choice of law statute); *Abraham v. State Farm Mutual Automobile Ins. Co.*, 465 F.3d 609 (5th Cir. 2006); *Marchesani v. Pellerin-Milnor Corp.,* 269 F.3d 481 (5th Cir. 2001); *Generac Corp. v. Caterpillar Inc.,* 172 F.3d 971 (7th Cir. 1999); *Morris v. SSE, Inc.*, 912 F.2d 1392 (11th Cir. 1990).

"In a society where inheritance is an important social concept, the managing of decedent's estate property is a sovereign right which may not be easily frustrated." *Riley v. New York Trust Co.*, 315 U.S. 343, 355 (1942). A state is interested primarily not in the payment of particular creditors, nor in the succession of heirs or beneficiaries, as such, but in the administration of the property of its citizens, wherever located, and that of strangers within its boundaries. *Id.* The just and orderly disposition of property at death is an area with which the States have an interest of considerable magnitude. *See, e.g., Reed v. Campbell*, 476 U.S. 852, 855 (1986).

The Second Circuit did not consider the central question that *Erie* and *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) impel it to have answered: would a New York court have applied New York's choice of law rule applying the substantive law of the decedent's domicile to questions of ownership of the decedent's personal property? New York has long applied the rule of applying the law of decedent's domicile to questions of personal property in cases of intestacy. *Holmes v. Remsen*, 4 Johns. Ch. 460 (1820); *Vroom v. Van Horne,* 10 Paige Ch. 549 (1844). New York has paid particular attention to respect the law of foreign nations governing personal property of intestate domiciliary decedents. *In re Matous' Estate*, 53 Misc.2d 255 (N.Y. Surr. Ct. Richmond Co. 1967) (applying Czech law); *Matter of Seaman*, 230 N.Y.S.2d 290 (N.Y. Surr. Ct. Nassau Co. 1962) (applying law of Quebec).

Instead of choosing the decedent's domicile as New York's choice of law statute mandates, the Second Circuit nullified the statute by applying an "interests analysis" to apply the affirmative equitable defense available only

under the substantive law of New York. Indeed, the Second Circuit has in the past respected New York's choice of law statute governing decedent's estates. *Kennedy v. Trustees of Testamentary Trust of Will of Kennedy*, 2010 WL 4250155, *2 (2d Cir. Oct. 28, 2010) ("Under New York law, '[i]nterpretation of a testamentary disposition of personal property shall be made in accordance with the local law of the jurisdiction in which the testator was domiciled at the time the will was executed.' N.Y. Estates, Powers and Trusts Law § 3–5.1.").

State probate courts regularly obtain respect and assistance from sister probate courts throughout the world in administering multi-jurisdictional estates. The Second Circuit's nullification of an Austrian probate decree is an embarrassment to New York and threatens a highly sophisticated international system of cooperation in the administration of decedent's estates. Thus, the Second Circuit has pronounced a rule that would permit any possessor of stolen property to simply transport it to New York and assert laches to invoke the jurisdiction of a federal court to second-guess a valid probate decree issued by a court anywhere in the world. In doing so, the Second Circuit failed to afford to the Austrian probate decree the comity to which it is due under this Court's jurisprudence. *Societe Nationale*, 482 U.S. at 543-44. Because the international nature of the administration of decedents' estates and the potential for federal abuse and overreaching that the Second Circuit's decision has created, this case raises important issues warranting this Court's review.

D. The Second Circuit's Decision Creates A Direct Conflict With The Approach Of Other Circuits On The Issue Of International Conflict of Laws And Encouraged Forum-Shopping

Because the Second Circuit adopted a conflict of laws rule that permits forum-shopping, it has directly attacked the viability of our federal system. Conflict of laws that involve the application of the substantive law of a foreign state are known as "international conflicts." Donald Childress, *When Erie Goes International*, 105 Nw. U. L. Rev. 1531, 1534 n.16 (Fall 2011). To "apply mechanically a rule developed in interstate cases to an international situation is both wrong and dangerous. *Id.* at n. 23 quoting Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States,* 54 Calif. L. Rev. 1599, 1599-1600 (1966).

As Professor Childress urges, if the *Erie* Doctrine is about separation of powers and federalism, it is time for this Court to modify a rule requiring federal courts to uncritically apply laws in a manner that encourages forum-shopping and the inequitable administration of the laws. 105 Nw.U.L. Rev. at 1535. The Second Circuit's mechanistic application of the law of the forum state, when directed by the forum's choice of law statute to apply the substantive law of a foreign state, is in direct conflict with those circuit decisions and decisions within the circuits that apply the substantive law of a foreign country when the conflict of laws rules so direct. *Compare Abogados v. AT&T, Inc.*, 223 F.3d 932 (9th Cir. 2000) (applying Mexican law); *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) (applying Mexican law); *Brink's Ltd. v. S. African Airways*, 93 F.3d 1022 (2d Cir. 1996) (applying South African law); *CenTra, Inc. v. Estrin*, 639 F. Supp. 2d 790

(E.D. Mich. 2009) (applying Canadian law); *Faggionato v. Lerner*, 500 F. Supp. 2d 237 (S.D.N.Y. 2007) (applying French law). The Supreme Court should correct this conflict.

Because the Second Circuit has adopted an approach criticized by scholars as "dangerous" and a threat to separation of powers and federalism, this case presents an important issue warranting this Court's review.

E. Bakalar's Blatant Forum Shopping To Game The *Erie* Doctrine Gives This Court A Compelling Vehicle To Address This Growing Practice

This case presents the perfect scenario for this Court to address the practice of forum-shopping by a bad actor who is able to game the *Erie* Doctrine. Petitioner is a Massachusetts resident who concealed the Drawing in his Massachusetts home for forty years, transported it to Sotheby's in London for a failed February 8, 2005 auction only to return it to New York for the purpose of suing the plaintiffs in this action commenced on March 21, 2005. What conceivable interest could New York have in having its laches rule vitiate a valid Austrian probate decree? Without answering this question, the Second Circuit declared New York's affirmative defense of laches to be available to Bakalar without any showing that New York has any interest in having its laches defense govern non-residents who merely transport property to New York for the purposes of a lawsuit over a failed auction in England. *See* Childress, 105 Nw. U.L.Rev. at 1535 ("forum shopping" might be encouraged by the Erie doctrine's application to cases involving foreign law").

In *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975), this Court clarified that a "federal court is not free to engraft onto those state [conflict of laws] rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." A federal court sitting in New York should not be opening floodgates for stolen art litigation in violation of New York law and public policy. As scholars have pointed out, mechanistic applications of the *Erie* Doctrine in cases involving the substantive law of foreign countries implicate important issues of separation of powers and federalism that are creating a growing problem of forum-shopping. This case presents a compelling vehicle for reviewing these important issues because New York's legislature has made a clear choice of the law applicable to decedent's estates, a traditional area of state regulation where states have a compelling interest in obtaining comity from courts in other jurisdictions through ancillary proceedings.

III. THE NATIONAL STOLEN PROPERTY ACT PREEMPTS INCONSISTENT STATE LAWS GOVERNING STOLEN PROPERTY: BECAUSE THIS CASE PRESENTS AN EXAMPLE OF THE DECLARATORY JUDGMENT ACT BEING USED IN CONJUNCTION WITH STATE LAW TO LAUNDER STOLEN PROPERTY AND UNDERMINE THE FEDERAL REGULATORY SCHEME IT PRESENTS IMPORTANT ISSUES FOR THIS COURT TO REVIEW

The Second Circuit's decision presents an example of the powers granted to a federal court sitting in diversity by the Declaratory Judgment Act 28 U.S.C. § 2201 being used to further state laws in a manner that directly conflicts

with the National Stolen Property Act 18 U.S.C. § 2314. Preemption occurs where, as here, the rules provided by state and federal law contradict each other, so that a court cannot simultaneously follow both. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 227 (2000). Additionally, state laws that purport to regulate an area of traditional state competence but that actually affect foreign affairs have been consistently struck down. *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000). State laws that infringe upon the federal government's powers to conduct foreign affairs are preempted. *Zschernig v. Miller*, 389 U.S. 429 (1968). Here, the Declaratory Judgment Act is being used as an end-run around these important principles of federalism.

The Second Circuit's decision is in tension with the Ninth Circuit's decision in *Von Saher v. Norton Simon Museum of Art at Pasadena*, 2010 WL 114959 (9th Cir. Jan 14, 2010). In *Von Saher*, the Ninth Circuit struck down California's statute of limitations statute permitting Holocaust victims to sue for the return of stolen art in California because the statute impeded the Executive's ability to conduct foreign affairs. In this case, the Second Circuit has wielded its discretionary powers under the Declaratory Judgment Act 28 U.S.C. 2201 to invalidate the judicial act of a foreign sovereign and to launder stolen property and thus rubber stamp activities forbidden by the National Stolen Property Act, 28 U.S.C. 2314, in direct conflict with expressed policies of the Executive expressed in the Washington Conference Principles on Nazi-Confiscated Art (1998) http://www.state.gov/p/eur/rt/hlcst/122038.htm and the Prague Holocaust Era Assets Conference Terezin Declaration (2009) http://www.state.gov/p/eur/rls/or/126162.htm.

A. The Traffic Of Stolen Art Is A Huge International Problem And Nazi-Looted Art Remains A Major Challenge.

Stolen art in the United States and around the world is an immense problem. Worldwide trade in stolen art and smuggled antiques—which in recent years has exceeded $7 billion per year—is considered, other than drug trafficking, the most lucrative criminal activity in existence. (Ralph Lerner and Judith Bresler *Art Law: The Guide for Collectors, Investors, Dealers, & Artists*, 3 ed., volume 1, at xvii (Practising Law Institute, 2005)). The Federal Bureau of Investigation established an Art Crime Team in 2004. The Federal Bureau of Investigation, Department of Justice, US Immigration and Customs Enforcement, and Interpol all are working to stifle the multi billion dollar industry.

From 1933 through 1945, Jews in countries occupied by the Nazis were robbed through an ingenious and sophisticated system of duress that combined threats of violence with indirect confiscations, such as confiscatory foreign exchange rates used to despoil Jews hoping to flee. Martin Dean, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust: 1933-1945* (U.S. Holocaust Memorial Museum, 2009)

In 1943, a commission headed by Supreme Court Justice Owen Roberts was created to protect works of cultural value in Allied-occupied areas of Europe. Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* at 234 (Vintage Books, 1995). In 1950 and 1951, the U.S. State Department distributed bulletins

warning museums, art dealers, colleges, and libraries not to acquire artworks of European provenance without ascertaining the chain of title. As everyone knew then, if a work of art came from Europe and the previous owner was unknown, the chances were good it had been stolen from a Jew. On Nov. 16, 1964, the *New York Times* published a front-page story by Milton Esterow titled "Europe is Still Hunting Its Plundered Art." The article reported that the State Department and other government agencies had recovered 3,978 stolen art objects found in the United States between 1945 and 1962.

Scholars agree that the problem of Nazi-looted art is a significant challenge for U.S. museums. By issuing decisions denying the return of Nazi-Looted art, "the judiciary is undermining the executive's ability to continue to lead the world movement toward securing a modicum of justice for Holocaust survivors affected by the "unfinished business" of World War II. Jennifer Kreder, *Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling Toward the Supreme Court*, 159 U.Pa.L.Rev. PENNumbra 253 (2011). As set forth below, this is a tremendous problem that this Court ought to address.

B. Artworks Stolen From Grunbaum Have Been At The Center Of Major Diplomatic Incidents, Leading To The Washington Conference Principles On Nazi-Confiscated Art.

In the wake of D.A. Morgenthau's seizure of Egon Schiele's *Portrait of Wally* and *Dead City III* at New York's Museum of Modern Art, the international community reeled from the scandal. As a result of the seizure of these paintings, on loan from the Leopold Museum in Austria,

many began to question the provenance of artwork bought and sold during the Nazi era throughout Europe hanging in museums and personal collections. These revelations, and the two cases that emerged, this case and *United States v. Portrait of Wally*, 2002 WL 553532, led to a change in the Austrian Restitution Law. "In 1998 the Austrian Parliament passed a law requiring restitution for Jews whose property was plundered during the Nazis' reign. It was passed after the Leopold Museum in Vienna had spent more than a decade fighting an effort by Jewish heirs to reclaim two paintings by Egon Schiele" Patty Cohen, *Vienna Jewish Museum Chided Over Nazi Loot,* New York Times, February 20, 2013.

Accordingly, it was a seizure of Grunbaum's property, *Dead City III*, which changed the international landscape. If Morgenthau's seizure was a call to Austria to examine its conscience, the Second Circuit's taking of the Drawing presents an equally compelling opportunity to exercise its supervisory powers in a case of such tremendous international importance. The U.S. State Department organized the Washington Conference on Nazi-Confiscated Art, which led to the adoption of the Washington Conference Principles which led to many countries—including Austria, Germany, and Great Britain—to form restitution commissions, open up archives, and encourage solutions based "on the merits" rather than by using technical defenses such as statutes of limitations. In the decade that followed the adoption of the Washington Conference Principles, U.S. museums have refused to grant free and open access to archives and have failed to publish acquisition information for artworks with a European provenance entering the United States after 1932 but created prior to 1946. *Nazi Era Stolen Art and*

U.S. Museums: A Survey, Claims Conference and WJRO, July 25, 2006. At the Prague Conference on Holocaust-Era Assets in 2009, the U.S. delegation demonstrated a sincere effort by Secretary of State Hillary Clinton to bring U.S. museums into a consensual, nonlitigious process for restituting stolen artworks. The continual stonewalling on the part of U.S. museums, however, has had a deleterious effect on the efforts of the Jewish diaspora to reclaim property throughout the world. Jennifer Kreder, *The New Battle ground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, Oregon Law Review, Vol. 88 N, Nov. 4, 2009. Thus, this case represents a key signal to the entire U.S. museum community as to whether to take the Executive's foreign policy commitments seriously.

C. The Second Circuit's Decision Directly Conflicts With U.S. Foreign Policy Because The United States Has Been On The Forefront Of Efforts To Reclaim Nazi-Looted Artwork Based On The Facts And Merits Of Claims Since The End Of World War II.

1. The U.S. State Department makes clear that federal courts should provide a forum for restitution of property stolen or obtained by Nazi duress

The Second Circuit's conclusion that Bakalar's possession of what federal law has labeled contraband for decades was innocent is contradicted by law, public policy, and common sense. After World War II, the U.S. worked diligently to restore stolen artworks to their

true owners for years thereafter. In 1951, a U.S. State Department bulletin proclaimed: "For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered." Ardelia R Hall, *The Recovery of Cultural Objects Dispersed During World War II,* 25 Dept. St. Bull. 337, 339 (1951):

> This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or people subject to their controls… The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) (quoting Jack B. Tate); *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved In Nazi Forced Transfers*, 20 Dep't State Bull. 592, 592-93 (1949). Because the Second Circuit's decision assumes that Bakalar was ignorant of these public activities and was under no duty to investigate the Drawing's provenance, the Second Circuit's decision violates an important U.S. policy, thus warranting this Court's review.

2. Congress Passes The Holocaust Victims Redress Act

In 1998 Congress passed the Holocaust Victims Recovery Act ("HRVA"). (Pet.App. 101a-102a).

In enacting the HVRA, Congress concluded that no federal remedy was necessary to effectuate restitution of stolen art in the United States because pre-existing state law remedies sufficed. *Orkin v. Taylor*, 487 F.3d 734, 739 -741 (9th Cir. 2007). As the Ninth Circuit observed:

> [T]he legislative intent was to encourage state and foreign governments to enforce existing rights for the protection of Holocaust victims. The sponsor and primary champion of the legislation, Representative Jim Leach (R-IA), believed that existing law would suffice to restitute Nazi-stolen artworks to their Nazi-era owners.
>
> * * *
>
> Finally, ... there can be no doubt—as this case amply demonstrates—that *state law provides causes of action for restitution of stolen artworks. ... Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services,* 105th Cong., 2d Sess. (1998).

Orkin, 487 F.3d at 739-741 (emphasis supplied). Accordingly, the Second Circuit's decision frustrates congressional intent. The legal scheme initiated by the Executive and

relied upon by Congress is for the federal judiciary to diligently enforce the restoration of stolen artworks to the true owners using common law. Because the Second Circuit's decision conflicts with explicit Congressional reliance on replevin remedies, it warrants this Court's review.

3. The Washington Conference Principles On Nazi-Confiscated Art and the Terezin Declaration have engaged the Executive in foreign policy relying on state remedies to restore stolen artworks.

More recently, the United States has been on the forefront of efforts to reclaim Nazi-looted artwork and has obtained new commitments from nations to facilitate restitution to the true, legal owners of stolen property pursuant to merits-based determinations of ownership. The United States' efforts are embodied in: (i) the Washington Conference Principles on Nazi-Confiscated Art (Dec. 8, 1998); and (ii) the Terezin Declaration, adopted at the 2009 Prague Conference and endorsed by 46 nations (30 June 2009).

The Washington Conference Principles are a consensus of principles to assist in resolving issues related to Nazi-looted art and encourages heirs to "come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted." Washington Conference Principles on Nazi-Confiscated Art (Dec. 8, 1998).

Similarly, the Terezin Declaration "urge[s] all stakeholders 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." Terezin Declaration (30 June 2009).

The Second Circuit's failure to weigh federal policies when balancing the equities frustrates important U.S. foreign policy and reneges promises that the Executive has made to the world's nations, raising an important issue warranting consideration from this Court.

D. The Declaratory Judgment Act Cannot Be Used By An *Erie* Court To Reach A Result Forbidden By Federal Law: Since The Second Circuit Has Done So, This Case Presents Important Issues Warranting This Court's Review.

Whether property was stolen by a Nazi or a family member is entirely immaterial in analyzing the strong federal and state interests in banning the possession and trafficking of stolen artwork. Federal laws, such as the National Stolen Property Act, 18 U.S.C. §2314, criminalizes transporting, trafficking and concealing stolen property, such as artwork. Similarly, under New York law, a person is guilty of criminal possession of stolen property in the fifth degree when he knowingly possesses stolen property with the intent to benefit himself or a person other than the true owner. N.Y. Criminal Procedure Law §165.40

The district court found, and the Second Circuit affirmed, that the Drawing belonged to Grunbaum and

that Grunbaum was murdered at Dachau. (Pet.App. 9a-10a). The district court determined, and the Second Circuit affirmed, that Bakalar could not show that Grunbaum's sister-in-law Mathilde Lukacs obtained legal possession of the Drawing. (Pet.App. 18a-26a).

If indeed Grunbaum's sister-in-law sold the Drawing to a Swiss art dealer, it would make her a thief under both Austrian and New York law. Otherwise put, whether one accepts, as Judge Korman did, that the record contains "substantial evidence" that the Nazis looted Grunbaum's art collection, including the Drawing, on the one hand, or whether one accepts the Swiss art dealer's story that first surfaced in 1998, long after Mathilde Lukacs died, that she sold Grunbaum's art collection to him in Switzerland in 1956, the Drawing is also stolen because Lukacs undisputedly had no Austrian certificate of inheritance.

Austrian law treats transactions by a potential heir who does not possess a certificate of inheritance to be null and void. Austrian Civil Code § 551. (Pet.App. 98a) Additionally, New York treats a family member who steals a decedent's property or a family member's property as a thief. *Gruen v. Gruen*, 496 N.E.2d 869, 872 (N.Y. 1986). Bakalar failed to prove that Grunbaum failed to voluntarily part with the drawing (Pet.App. 20a); *see Menzel v. List*, 49 Misc.2d 300 (N.Y. Sup. Ct. 1966). Accordingly, under any of the readings of the district court's opinion preceding *Bakalar II* and under the scenarios accepted by *Bakalar II*, the only permissible legal conclusion to draw is that the Drawing was stolen under New York and Austrian law.

This use of the Declaratory Judgment Act to rubber-stamp a crime conflicts with federal law and undermines U.S. foreign policy and important state and federal policies in regulating the trade in stolen art.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED OCTOBER 11, 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

11-4042-cv

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of October, two thousand twelve.

PRESENT: DENNIS JACOBS, *Chief Judge*,
ROBERT D. SACK, *Circuit Judge*,
JOHN GLEESON, *District Judge*.*

DAVID BAKALAR,

Plaintiff-Counter-Defendant-Third-Party-Defendant-Appellee,

-v.-

MILOS VAVRA, LEON FISCHER,

Defendants-Counter-Claimants-Appellants.

*The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York (Pauley III, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

This is an ownership dispute concerning a 1917 drawing by Egon Schiele (the "Drawing"), between David Bakalar, who seeks a declaration that he owns it by purchase from a dealer, and Milos Vavra and Leon Fischer, who are heirs of Austrian cabaret performer, Fritz Grunbaum, who owned it before he was murdered by the Nazis in 1941. The United States District Court for the Southern District of New York (Pauley III, *J.*) awarded judgment to Bakalar on the basis of laches. *Bakalar v. Vavra,* 819 F. Supp.2d 293, 307 (S.D.N.Y. 2011). "Following a bench trial, we set aside findings of fact only when they are clearly erroneous . . . . However, we review *de novo* the district court's conclusions of law and its resolution of mixed questions of law and fact." *Phansalkar v. Andersen Weinroth & Co., L.P.,* 344 F.3d 184, 199 (2d Cir. 2003) (citations omitted). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

In a title action under New York law, a good faith purchaser of an artwork has the burden of proving that the work was not stolen. *Bakalar v. Vavra,* 619 F.3d 136, 147 (2d Cir. 2010) (citing *Solomon R. Guggenheim Found. v. Lubell,* 77 N.Y.2d 311, 321, 569 N.E.2d 426, 567 N.Y.S.2d

623 (1991)). Here, the district court found that the Drawing was not looted by the Nazis. *Bakalar,* 819 F. Supp. 2d at 298-99. Vavra and Fischer argue that the district court's finding is clearly erroneous and that the Nazis stole the Drawing. However, Bakalar traced the provenance back to Mathilde Lukacs, Grunbaum's sister-in-law, who sold it to a gallery in 1956. Vavra and Fischer's hypothesis--that the Nazis stole the Drawing from Grunbaum only to subsequently return or sell it to his Jewish sister-in-law --does not come close to showing that the district court's finding was clearly erroneous.

After finding that the Drawing was not stolen by the Nazis, the district court extended its *Lubell* analysis by requiring Bakalar to show that Lukacs acquired proper title in the Drawing, and found that he could not. *Bakalar,* 819 F. Supp. 2d at 299-302. We do not decide whether Bakalar discharged his burden under *Lubell* by tracing the provenance back to Lukacs, who was a close relative of Grunbaum (she was sister to Mrs. Grunbaum, who survived Grunbaum before herself being murdered by the Nazis). The point was not pressed by Bakalar, and we affirm instead on the district court's ruling that the claim against Bakalar is defeated by laches.

This Court previously recognized that Bakalar could assert a laches defense under New York law. *See Bakalar,* 619 F.3d at 147. In order to prevail on laches, Bakalar had to show that "(1) [Vavra and Fischer] were aware of their claim [to the Drawing], (2) they inexcusably delayed in taking action, and (3) Bakalar was prejudiced as a result." *Bakalar,* 819 F. Supp. 2d at 303 (citing *Ikelionwu v. United*

States, 150 F.3d 233, 237 (2d Cir. 1998)). The district court found that Vavra and Fischer's "ancestors were aware of--or should have been aware of--their potential intestate rights to Grunbaum property," and that the ancestors "were not diligent in pursuing their claims to the Drawing." *Id.* at 305-06.

Vavra and Fischer contend that the district court committed two errors of law bearing on the laches defense. First, they argue that the court erroneously "imputed knowledge of 'potential intestate rights' to [Vavra and Fischer] based upon previous actions or inactions of other family members." But it was obviously necessary for the court to do just that; the alternative was to reset the clock for each successive generation. *See Bakalar*, 819 F. Supp. 2d at 303 ("This inquiry focuses not only on efforts by the party to the action, but also on efforts by the party's family.") (internal quotation omitted). Second, Vavra and Fischer argue that their families had no legal duty of diligence until they knew of the actual *location* of the Drawing. They rely on language in *Lubell* declining to "impose the additional duty of diligence before the true owner has reason to know where its missing chattel is to be found." 77 N.Y.2d at 320. However, though "[l]ack of diligence in locating the property" is not a consideration for a statute of limitations analysis, it is absolutely relevant "with respect to a laches defense." *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 182 (2d Cir. 2000) (citing *Lubell*, 77 N.Y.2d at 321).

Vavra and Fischer's factual arguments are no more persuasive. Their theories about what their ancestors knew (or didn't know) are speculative, and we do not have

a "'definite and firm conviction that a mistake has been committed.'" *Mobil Shipping & Transp. Co. v. Wonsild Liquid Carriers Ltd.*, 190 F.3d 64, 67-68 (2d Cir. 1999) (quoting *Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)).

Next, Vavra and Fischer contest whether Bakalar was prejudiced by their ancestors' delay in pursuing the Drawing. There can be no serious dispute that the deaths of family members--Lukacs and others of her generation, and the next--have deprived Bakalar of key witnesses. *See Sanchez v. Trustees of the Univ. of Pa.*, 2005 WL 94847, *3 (S.D.N.Y. Jan. 18, 2004) (noting that the death of potential witnesses is prejudicial) (citing *Solomon R. Guggenheim Found. v. Lubell,* 153 A.D.2d 143, 149, 550 N.Y.S.2d 618 (1st Dep't 1990)). And while a "defendant's vigilance is as much in issue as [a] plaintiff's diligence," *Lubell,* 153 A.D.2d at 152, Vavra and Fischer's speculation has not established clear error in the district court's finding that Bakalar, a good faith purchaser, was prejudiced by the delay. *See Bakalar,* 819 F. Supp. 2d at 306-07.

In sum, there is no clear error in the findings that Vavra and Fischer's ancestors knew or should have known of a potential claim to the Drawing, that they took no action in pursuing it, and that Bakalar was prejudiced in this litigation as a result of that delay. It was therefore sound to recognize Bakalar's title on the basis of his laches defense.

Citing little authority, Vavra and Fischer argue that the district court should have permitted them to supplement the record with additional expert testimony

on remand. They misconstrue this Court's remand instruction that the district court *could* reopen discovery to mean that it was required to do so. *See Bakalar,* 619 F.3d at 147 ("[W]e vacate the judgment of the district court and remand the case for further proceedings, including, *if necessary*, a new trial.") (emphasis added). *See also Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.,* 146 F.3d 66, 73 (2d Cir. 1998) ("The decision whether to hear additional evidence on remand is within the sound discretion of the trial court judge."). The district court granted a six month extension for expert discovery before trial, but Vavra and Fischer failed to meet the revised deadline. *See Bakalar v. Vavra,* 851 F. Supp. 2d 489, at 491-92 (S.D.N.Y. 2011). The district court did not abuse its discretion in abiding by its discovery calendar, especially in light of its generous extension.

Finding no merit in Vavra and Fischer's remaining arguments, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK
/s/_____

APPENDIX B — MEMORANDUM & ORDER OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 17, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 3037 (WHP)

DAVID BAKALAR,

Plaintiff,

-against-

MILOS VAVRA and LEON FISCHER,

Defendants.

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

This labyrinthine proceeding revolves around a relatively minor work by the Austrian artist Egon Schiele (the "Drawing"). In 2005, Plaintiff David Bakalar ("Bakalar") filed a declaratory judgment action against Defendants Milos Vavra ("Vavra") and Leon Fischer ("Fischer"), seeking a ruling that he is the lawful owner of the Drawing. Vavra and Fischer counterclaimed for conversion and replevin. Following a bench trial in July 2008, this Court applied Swiss law to the issue of whether Bakalar acquired title to the Drawing and awarded

judgment to Plaintiff. In September 2010, the Court of Appeals vacated and remanded for consideration of that issue under New York law.[1]

On remand, Bakalar once more moves for declaratory judgment. Defendants also move for reconsideration of this Court's order dated April 18, 2011, denying as futile their request for a pre-motion conference to strike a decision of the Austrian Restitution Committee, attached to Bakalar's moving brief. For the following reasons, this Court again awards judgment to Bakalar. Accordingly, Defendants' counterclaims are denied, and their motion for reconsideration, construed as a motion to strike, is denied as moot.

BACKGROUND

The facts are set forth comprehensively in this Court's prior memoranda and orders. *See Bakalar v. Vavra,* ___ F. Supp. 2d ___, 05 Civ. 3037 (WHP), 2011 WL 165407 (S.D.N.Y. Jan. 14, 2011); *Bakalar v. Vavra,* 05 Civ. 3037 (WHP), 2008 WL 4067335 (S.D.N.Y. Sept. 2, 2008); *Bakalar v. Vavra,* 550 F. Supp. 2d 548 (S.D.N.Y. 2008); *Bakalar v. Vavra,* 05 Civ. 3037 (WHP), 2006 WL 2311113 (S.D.N.Y. Aug. 10, 2006); *Bakalar v. Vavra,* 237 F.R.D. 59 (S.D.N.Y. 2006).

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1. Ironically, neither party argued before this Court or the Court of Appeals that New York law applied to the question. Bakalar urged application of Swiss law, while Vavra and Fischer argued for Austrian law.

Appendix B

I. *The Drawing*

This dispute centers on a 1917 drawing by Egon Schiele ("Schiele") in crayon and gouache known as "Seated Woman With Bent Left Leg (Torso)." Although the turmoil of World War II and the loss of evidence in the intervening years have obscured the Drawing's provenance, this Court previously made certain findings of fact. *See Bakalar,* 2008 WL 4067335, at * 1-5. First, this Court found that Fritz Grunbaum ("Grunbaum")--a prominent Austrian Jewish art collector--possessed the Drawing prior to World War II. *Bakalar,* 2008 WL 4067335, at *4-5. That determination was based on evidence of his prior ownership of another Schiele work and the testimony of Jane Kallir, director of Galerie Gutekunst in Bern, Switzerland. *Bakalar,* 2008 WL 4067335, at *4-5. In 1938, Franz Kieslinger, a Nazi art appraiser, inventoried Grunbaum's art collection, including 81 works by Egon Schiele. (JPTO Stip. Fact 12; Ex. 105.) The inventory listed only five Schiele works by name, none of which correspond to the Drawing, and it is impossible to determine whether the Drawing was among the remaining works. (Ex. 105.) However, based on the deposition testimony of Eberhard Kornfeld, a former partner at Gallery Gutekunst, this Court concluded that the Drawing was sold to that gallery in 1956 by Mathilde Lukacs ("Lukacs"), Grunbaum's sister-in-law. *Bakalar,* 2008 WL 4067335, at *2-3. Later that year, Galerie Gutekunst sold the Drawing to Galerie St. Etienne, a New York gallery specializing in Austrian and German art. *Bakalar,* 2008 WL 4067335, at *1. In 1964, Bakalar purchased the drawing in good faith from Galerie St. Etienne. *Bakalar,* 2008 WL 4067335, at *1, 9. This Court reaffirms these factual findings.

Appendix B

II. *The Grunbaum Heirs and Their Efforts to Recover Grunbaum Property*

In 1938, Grunbaum was arrested by the Nazis and sent to the concentration camp at Dachau, where he was compelled to sign a power of attorney in favor of his wife, Elisabeth Grunbaum. (JPTO Stip. Fact 18; Ex. 105 at P815.) He died there in 1941. (JPTO Stip. Fact 9; Ex. 149 at DBM 3975; Ex. 137 at P805.) In 1944, Elisabeth Grunbaum also died in a concentration camp. (JPTO Stip. Fact 32.) Fischer and Vavra first asserted a claim to Grunbaum's estate in 1999, and an Austrian Court issued certificates of inheritance and distribution decrees in their favor in 2002, awarding each an undivided 50% interest in the estate. (Declaration of Raymond J. Dowd dated Apr. 20, 2011 ("Dowd Decl.") Ex. B: Supplemental Expert Opinion of Dr. Kathrin Höfer ("Höfer Supp. Op.") 2; Dowd Decl. Exs. F, H: Letters to Vavra and Fischer from Austrian Claims Committee.) There is no evidence aside from those proceedings that Defendants or their ancestors had been recognized as heirs by the Austrian courts.[2]

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2. In 1963, a German court awarded a certificate of inheritance to Grunbaum property to Paul and Rita Reif, distant cousins of Grunbaum. That certificate was rescinded in 1998 when German authorities learned that Paul Reif had provided false information about his relationship to Grunbaum. (Exs. FF, 149; Tr. 595.) The Reifs were also unsuccessful in efforts to recover Dead City III, a major Schiele work, from the Museum of Modern Art in New York. *See In re Grand Jury Subpoena Duces Tecum,* 93 N.Y.2d 729, 719 N.E.2d 897, 898-99, 697 N.Y.S.2d 538 (N.Y. 1999).

Appendix B

A. *Milos Vavra*

Fritz Grumbaum was survived by his brother, Paul, who died in 1942, and his sister, Elise Zozuli ("Zozuli"), who died in 1977. (JPTO Stip. Fact 30.) Zozuli had one daughter, Marta Bakalova ("Bakalova"). (JPTO Stip. Fact 30.) Vavra is Marta Bakalova's nephew. (Tr. 515.) From childhood, Vavra knew of his relationship to Grunbaum and Grunbaum's art collecting and eventual death in a concentration camp. (Ex. 125, Resps. 5, 6.) On Bakalova's death in 1994, Vavra became an heir to Grunbaum's estate. (Tr. 506.) However, prior to being contacted by an attorney in 1998, he made no effort to locate or lay claim to any Grunbaum property. (Ex. 125, Resp. 14.) Indeed, to the best of his knowledge, no such efforts were made by any member of his family. (Ex. 125, Resp. 15; *see also* Tr. 509-10). There is no evidence in the record suggesting otherwise.

Zozuli lived in Czechoslovakia after World War II. (*See* Ex. 125 Resp. 11.) Both Vavra and his brother, Ivan, stated that "conditions in Communist Czechoslovakia rendered pursuit of any restitution efforts impossible and dangerous." (Ex. 125, Resp. 11; Tr. 507-08, 515-16.) Despite the purported dangers, however, Zozuli did make certain efforts to recover Grunbaum property. Based on a letter written by Zozuli in 1964, it is apparent that, in or around 1952, Zozuli received word from an Austrian attorney that she may have a claim to Grunbaum's music royalties. (Ex. 21.) As a result, she "sent him all the necessary papers, ran up various expenses," and visited the Austrian consulate in Prague. (Ex. 21.) Thereafter, the

attorney informed her that "the Brussels sisters of Lilli Grunbaum (Fritz's wife) presented themselves as heirs," and Zozuli considered the matter "settled." (Ex. 21.) The reference to the "Brussels sisters" is almost certainly a reference to Lukacs, who lived in Brussels between 1941 and 1957 and was then the only surviving sibling of Elisabeth Grunbaum. (JPTO Stip. Fact 23; Exs. 26, 146.) Despite knowledge of Grunbaum's art collection (Tr. 506), there is no indication that Zozuli made any efforts to claim it. Given that Zozuli considered the matter of her inheritance to certain Grunbaum property "settled" after learning of Lukacs in 1952, and that her 1964 letter referenced no further recovery efforts, this Court finds that Zozuli considered the entire issue of her Grunbaum inheritance "settled" in 1952. There is no evidence in the record to contradict this finding, nor is there any evidence of any further efforts by Zozuli to recover any Grunbaum property prior to her death in 1977.

B. *Leon Fischer*

Elisabeth Grunbaum was survived by four siblings, including her brother, Max Herzl ("Herzl"). (JPTO Stip. Fact 33.) Herzl died in 1946, survived by his daughter, Rene Herzl, and a grandson, Leon Fischer. (JPTO Stip. Fact 33.) Fischer only became aware of his relationship to Grunbaum in 1999. (Tr. 630.) However, he had known since his childhood that one of his grandfather's sisters (i.e., Elisabeth Grunbaum) had perished in the Holocaust. (Tr. 634-35, 655.) Fischer's parents were well versed in their family's history. Fischer's minimal knowledge of the history of his family during the Holocaust originated

from conversations he overheard among family elders, including his parents. (*See* Tr. 634-35, 648.) However, Fischer's parents generally refrained from speaking about the Holocaust with Fischer when he was a child. (Tr. 635, 648.) Although the precise details of his parents' knowledge are now lost, it is clear that they knew far more about these matters than Fischer himself. (*See* Tr. 634-35, 655.) The reasonable inference from these facts is that Fischer's parents were aware that Elizabeth Grunbaum had perished in the Holocaust.

Fischer's parents and grandparents remained in "pretty close contact" with Lukacs, and Fischer and his parents even visited her once on a trip to Europe in 1959. (Tr. 633-34.) Yet to Fischer's knowledge, his parents never made any claims for restitution or reparation for Grunbaum property (Tr. 655.) Fischer's grandfather, Max Herzl, was integral to Lukacs's escape from Austria in or about 1938, successfully obtaining emigration visas for her and her husband. (Exs. 158, 159.) Similar efforts by Herzl on behalf of the Grunbaums were unsuccessful. (Ex. 155.) There is no evidence, however, that Herzl made any claim to Grunbaum property.

III. *Procedural History*

After a bench trial, this Court applied Swiss law to the issue of whether Bakalar acquired good title to the Drawing. Under Swiss law, a person who acquires and takes possession of an object in good faith becomes the owner even if the seller was not entitled or authorized to transfer ownership. *Bakalar*, 2008 WL 4067335, at

*7. Furthermore, a purchaser has no general duty to inquire about a seller's authority to sell the object or about its origins unless suspicious circumstances exist. *Bakalar,* 2008 WL 4067335, at *7. Finding no suspicious circumstances that would require investigation, this Court held that Galerie Gutekunst purchased the Drawing from Lukacs in good faith and therefore passed title to Galerie St. Etienne, which in turn passed title to Bakalar. *Bakalar,* 2008 WL 4067335, at *8-9.

Judge Korman, writing for a unanimous panel, vacated and remanded, holding that New York law rather than Swiss law applies to the issue of whether Bakalar acquired good title to the Drawing. This ruling effectively shifted the burden to Bakalar to prove that the Drawing was not stolen. *Bakalar v. Vavra,* 619 F.3d 136, 146 (2d Cir. 2010). In this regard, the Court of Appeals offered the following guidance:

> The district judge found that the Grunbaum heirs had failed to produce "any concrete evidence that the Nazis looted the drawing or that it was otherwise taken from Gumbaum." Our reading of the record suggests that there may be such evidence, and that the district judge, by applying Swiss law, erred in placing the burden of proof on the Grumbaum heirs in this regard. ... [If] the district judge determines that Vavra and Fischer have made a threshold showing that they have an arguable claim to the drawing, New York law places the burden on Bakalar, the current possessor, to prove that

> the drawing was not stolen. Moreover, should the district judge conclude that the Grunbaum heirs are entitled to prevail on the issue of the validity of Bakalar's title to the drawing, the district judge should also address the issue of laches.

Bakalar, 619 F.3d at 147.

In a concurring opinion, Judge Korman wrote to "fill th[e] gap" left by the majority opinion and elaborated on the "concrete evidence that the Nazis looted the Drawing or that it was otherwise taken from Grunbaum." *Bakalar,* 619 F.3d 136, 148 (Korman, J., concurring). The concurrence opined that any transfer subsequent to Grunbaum's execution of the power of attorney at Dachau was void as a product of duress.[3]

3. On remand, Vavra and Fischer adopted the rationale advanced by Judge Korman in his concurring opinion as a new theory of their counterclaim. In a demonstration of the dangers of dicta, the concurrence spawned substantial additional briefing concerning an argument that, after due consideration, this Court finds to be without merit. As Justice Frankfurter observed, "[d]eliberate dicta ... should be deliberately avoided." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 411, 68 S. Ct. 525, 92 L. Ed. 746 (1948) (Frankfuter, J., concurring). Courts should "avoid passing gratuitously on an important issue ... where due consideration of [that issue] has been crowded out by complicated and elaborate issues that have to be decided." *Gypsum Co.,* 333 U.S. at 411.

Appendix B

DISCUSSION

I. *Title to the Drawing*

A. *New York Law on the Recovery of Stolen Chattel*

"[I]n New York, a thief cannot pass good title." *Bakalar,* 619 F.3d at 140 (citing *Menzel v. List,* 49 Misc. 2d 300, 267 N.Y.S.2d 804 (1966)). Thus, "absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that []he was buying stolen goods." *Bakalar,* 619 F.3d at 141 (quoting Michelle I. Turner, Note, The Innocent Buyer of Art Looted During World War II, 32 Vand. J. Transnat'l L. 1511, 1534 (1999).). When "an issue of fact exists as to whether the [chattel] was stolen ..., the burden of proof with respect to this issue is on [the possessor]." *Bakalar,* 619 F.3d at 142 (quoting *Solomon R. Guggenheim Found. v. Lubell,* 153 A.D.2d 143, 550 N.Y.S.2d 618 (App. Div. 1990). Accordingly, if "Vavra and Fischer [make] a threshold showing that they have an arguable claim to the Drawing, New York law places the burden on Bakalar, the current possessor, to prove that the Drawing was not stolen." *Bakalar,* 619 F.3d at 147.

B. *Whether the Drawing was Stolen*

Defendants offer two competing theories of the Drawing's theft. First, they argue that the Drawing may have been stolen by the Nazis. Second, even assuming

that the Drawing remained in the family, Defendants argue that Bakalar cannot establish that Lukacs acquired possession in a manner that permitted her to convey title to Galerie Gutekunst.

1. *Appropriation by the Nazis*

This Court previously found that the Drawing was possessed by Grunbaum prior to his arrest in 1938 and by Lukacs in 1956.[4] *Bakalar,* 2008 WL 4067335, at *2-5. The most reasonable inference to draw from these facts is that the Drawing remained in the Grunbaum family's possession and was never appropriated by the Nazis. The alternative inference--that the Drawing was looted by the Nazis and then returned to Grunbaum's sister-in-law--is highly unlikely. This is true even though the Nazis inventoried the art collection in Grunbaum's apartment. While an inventory may have been a preliminary step in the looting of Jewish property, it is not proof that the Drawing was seized. Indeed, the Drawing was not specifically catalogued in the inventory and may not have even been among the unnamed works of art in Grunbaum's apartment. In any event, Lukacs' possession of the Drawing after World War II strongly indicates that such

4. The concurring opinion notes that this Court could only "speculate" about how the Drawing made its way out of Austria. But the precise route of the Drawing's export is not nearly as significant as its final destination--with Mathilde Lukacs in Switzerland. A determination that the Nazis did not seize the Drawing, based on this single fact, is not speculation. It is an entirely appropriate inference supported by a preponderance of the evidence.

a seizure never occurred. Accordingly, what little evidence exists--that the Drawing belonged to Grunbaum and was sold by one of his heirs after World War II--suffices to establish by a preponderance of the evidence that the Drawing was not looted by the Nazis.

2. *Lukacs's Title to the Drawing*

a. *Inter Vivos Gift*

Bakalar suggests that the most likely explanation for Lukacs's possession of the Drawing is that it was given to her through a voluntary transfer such as a gift or for safekeeping. To create an *inter vivos* gift, "there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee." *Gruen v. Gruen,* 68 N.Y.2d 48, 496 N.E.2d 869, 872, 505 N.Y.S.2d 849 (N.Y. 1986). "[T]he proponent of a gift has the burden of proving each of these elements by clear and convincing evidence." *Gruen,* 496 N.E.2d at 872. As evidence of donative intent, Bakalar notes that Grunbaum's relatives were aware of Lukacs's possession of Grunbaum property and declined to pursue any claims against her. However, mere possession by a family member is insufficient to establish donative intent. *See In re Kelly's Estate,* 285 N.Y. 139, 140, 33 N.E.2d 62 (1941). Moreover, even if Grunbaum's heirs were aware of Lukacs's possession of the Drawing--or of Grunbaum property generally--inaction in the face of this knowledge is subject to multiple inferences, including, for example, a waiver of their claims. Ultimately, as even Bakalar concedes, there is simply no

evidence as to how Lukacs acquired the Drawing, nor is there any evidence that might explain why Grunbaum's relatives did not pursue any claims against Lukacs. Without such evidence, Bakalar cannot meet his burden of proof on this issue.

b. *Voidable Title*

Under the New York Uniform Commercial Code ("U.C.C."), "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value." N.Y.U.C.C. § 2-403(1). Although the U.C.C. does not define the term, "[t]he key to the voidable title concept appears to be that the original transferor voluntarily relinquished possession of the goods and intended to pass title." *Bakalar,* 619 F.3d at 136 (Korman, J., concurring) (quoting Franklin Feldman & Stephen E. Weil, Art Law § 11.1.3 (1986)). Bakalar argues that because the Drawing was likely given to Lukacs through some form of voluntary transaction, her title was at worst "voidable" under the U.C.C., and not "void." However, Article 2 of the U.C.C. applies only to "sales," defined as the "passing of title from the seller to the buyer *for a price*." N.Y.U.C.C. § 2-106(1) (emphasis added); *see also Takisada Co., Ltd v. Ambassador Factors Corp.,* 147 Misc. 2d 435, 556 N.Y.S.2d 788, 790 (App. Div. 1989) ("Article 2 of the UCC ... applies only to transactions of the sale of goods."); 93 N.Y. Jur. 2d Sales § 15 (noting the "obvious distinction" between a gift and a sale, "in that the former is a voluntary transfer without consideration or compensation whereas a sale is a transfer of title for a consideration called the price"). Accordingly, this argument also fails because Bakalar

has not presented any evidence that Lukacs acquired the Drawing through a "sale." Moreover, because there is no evidence as to how Lukacs acquired the Drawing, Bakalar cannot establish by a preponderance of the evidence that Grunbaum *voluntarily* relinquished possession of the Drawing, or that he did so intending to pass title.

c. *Duress*

Judge Korman suggests that the power of attorney that Grunbaum executed in Dachau was the product of duress and therefore any subsequent transfer was not just voidable, but void. *See Bakalar,* 619 F.3d at 148 (Korman, J., concurring). Although Judge Korman's discussion was dicta, on remand, Defendants embrace his theory as their own, arguing that the power of attorney precluded Grumbaum from passing valid title to Lukacs. The concurring opinion and Defendants' briefs rely on two decisions to buttress this point, *Vineberg v. Bissonnette,* 548 F.3d 50 (1st Cir. 2008), *aff'g* 529 F. Supp. 2d 300 (D.R.I. 2007), and *Menzel v. List,* 49 Misc. 2d 300, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966). But both authorities are inapposite to the facts of this case. In *Vineberg*, a Jewish art collector was deemed by the Nazis to "lack[] the requisite personal qualities to be a suitable exponent of German culture" and was directed to liquidate his collection. *Vineberg,* 548 F.3d at 53. The evidence established that as a result, he consigned the works to a Nazi-approved auction house, where they were sold at below-market value. *Vineberg,* 548 F.3d at 53. Similarly, in *Menzel*, a painting was labeled as "decadent Jewish art" and seized by the Nazis, who left a receipt indicating that it had been seized for "safekeeping."

Menzel, 49 Misc. 2d 300, 267 N.Y.S.2d 804, 806. Faced with indisputable evidence of Nazi seizure, both courts found that the works were not transferred voluntarily. *Vineberg,* 529 F. Supp. 2d at 307; *Menzel,* 267 N.Y.S.2d at 810. Here, however, there is no similar evidence that the Nazis ever possessed the Drawing, and therefore unlike *Vineberg* and *Menzel*, this Court cannot infer duress based on Nazi seizure. Indeed, as discussed above, Lukacs's possession of the Drawing establishes by a preponderance of the evidence that the Nazis *did not* appropriate the Drawing.

Moreover, assuming arguendo that a transfer of property to a family member subsequent to a compelled power of attorney is void as a product of duress, the concurrence overlooks the fact that there is no way of knowing whether the Drawing was in fact transferred pursuant to the power of attorney. It is equally possible that Lukacs obtained the Drawing before the power of attorney was executed. Although *Lubell* established that the burden of proving that a chattel was not stolen rests with the possessor, 569 N.E.2d at 431, that holding did not alter the well-established principle that the burden of proof to establish duress is on the party asserting the defense, *see Stewart M. Muller Const. Co., Inc. v. N.Y. Tel. Co.,* 40 N.Y.2d 955, 359 N.E.2d 328, 328, 390 N.Y.S.2d 817 (N.Y. 1976) (the defense of economic duress "permits a complaining party to void a contract and recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will"); *Finserv Computer Corp. v. Bibliographic Retrieval Servs., Inc.,* 125 A.D.2d 765, 509 N.Y.S.2d 187, 188 (App. Div. 1986)

("It was incumbent on defendant to establish evidence of all elements of economic duress."). Accordingly, absent any evidence as to when Lukacs acquired the Drawing, Defendants cannot meet their burden to establish that the Drawing was transferred under duress. Any contrary holding would be pure speculation.

d. *Intestacy*

Finally, Bakalar argues that because Lukacs was one of Grunbaum's intestate heirs, she owned at least a portion of the Drawing, and was therefore able to pass good title. The parties agree that Austrian law governs Lukacs's intestate rights, and that under Austrian law she was entitled to a fraction of the Grunbaum estate. *See* EPTL § 3-5.1 (b)(2) ("The intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death.") The parties disagree, however about whether Austrian or New York law governs an heir's transfer of title to personal property in the absence of formal intestacy proceedings. While the laws of Austria and New York differ in this regard, the outcome is the same.

In order for an intestate heir to take possession of an inheritance under Austrian law, the heir must first state explicitly that she accepts the inheritance, and a court must issue a decree of distribution, which constitutes a formal transfer of the estate to the intestate heir. (Def. Ex. Y4: Expert Report of Dr. Katherine Höfer ("Höfer

Rep.") ¶ 2.1.)[5] An heir may independently dispose of her intestate share only after the issuance of a decree of distribution. (Höfer Rep. ¶ 5.) However, even after the decree's issuance, an heir possesses only a fractional interest in the estate, rather than any actual property. (Höfer Rep. ¶ 5.) In other words, an heir who owns a one-fourth share of an estate would acquire a one-fourth interest in *each item in the estate.* An heir receives sole title to specific personal property only after the estate has been partitioned. (Höfer Rep. ¶ 5.) Here, it is undisputed that no decree of distribution was issued and that no partition took place prior to Lukacs's sale of the Drawing to Galerie Gutekunst in 1956. In the absence of such occurrences, Lukacs was not lawfully entitled to dispose of the Drawing under Austrian law.

In New York, when a decedent dies intestate, legal title to real property vests automatically in the statutory distributees as tenants in common. *See In re Seviroli,* 31 A.D.3d 452, 818 N.Y.S.2d 249, 251 (App. Div. 2006); *Pravato v. M.E.F. Builders,* 217 A.D.2d 654, 629 N.Y.S.2d 796 (App. Div. 1995); *In re Kania's Estate,* 208 Misc. 733, 126 N.Y.S.2d 395, 401 (N.Y. Sur. 1953). Legal title to *personal* property, on the other hand, passes first to the administrator of the estate, and not to the distributees. N.Y.E.P.T.L. § 13-1.1 (a) ("For purposes of the administration of an estate, the following assets of the decedent are personal property and together with every other species of personal property pass to the personal

5. Although Bakalar submitted a competing expert report, he does not dispute Defendants' characterization of Austrian estate law. (*See generally* Ex. 16: Expert Report of Dr. Thomas Kustor.)

representative."); *see also Kania,* 126 N.Y.S.2d at 402; *Christoforo v. Shore Ridge Assocs.,* 116 A.D.2d 123, 500 N.Y.S.2d 528 (App. Div. 1986) (noting that a leasehold is personal property that passes to the estate). Rather than obtaining immediate legal title, the distributees receive an "equitable title or interest" in the personal property. *Kania,* 126 N.Y.S.2d at 402. This "anomalous situation" was best explained by the Surrogate Court in *Kania*:

> "Upon the death of the owner, title to his real estate passes to his heirs or devisees. A different rule applies to personal property. Title to it does not vest at once in heirs or legatees. But immediately upon the death of the owner there vests in each of them the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution. Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue". . . . The synthesis [is] that, though title vests in the executor, this is a vesting of *legal title* analogous to that in the case of a trustee. In fact, the executor is a trustee, first, for creditors of the estate and, second, for legatees under the will of his testator. He holds legal title, but subject only to the composite effect of the estate's obligations,

> the legatees acquired the *equitable title* upon their testator's death.

Kania, 126 N.Y.S.2d at 402-03 (quoting *Brewster v. Gage,* 280 U.S. 327, 334, 50 S. Ct. 115, 74 L. Ed. 457, 1930-1 C.B. 274 (1930) (citations omitted) (emphasis added).[6]

Thus, under New York law, Lukacs would have received only *equitable* title on the Grunbaums' deaths. She would not have received *legal* title until the administration of the estate had been completed. As all parties concede, this did not occur prior to Lukacs's sale of the Drawing in 1956.

Bakalar relies on a single case, *Morgold, Inc. v. Keeler,* 891 F. Supp. 1361 (N.D. Cal. 1995), in support of his intestacy argument. In *Morgold*, a fifty-percent co-

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6. *Kania* predates the 1966 enactment of the EPTL, which purports to eliminate the distinction between real and personal property. *See* N.Y.E.P.T.L § 1-2.15 (defining "property" as "anything that may be the subject of ownership, and is real or personal property"); 38 N.Y. Jur. 2d § 54 ("The Estates, Powers and Trusts Law statute of descent and distribution has eliminated the former distinction between real and personal property and both kinds of property are treated alike under the statute."). Nevertheless, the "anomalous situation" noted in *Kania* has survived. *See Seviroli,* 818 N.Y.S.2d at 251; 41 N.Y. Jur. 2d § 1900 (noting that N.Y.E.P.T.L. § 13-1.1(a) "implies that older cases holding that real property does not pass to the executor or administrator, but devolves at the moment of death directly to the distributees or devisees, without the necessity for any act by the fiduciary, may still be good law."). In any event, even if the law relating to real property is unsettled, the law relating to personal property is not.

owner of a painting sold it without the consent of the other co-owner in violation of a joint ownership agreement. In response to the argument that the seller converted the painting and therefore could not pass good title, the court held that "there was no such conversion ... [because the Seller] was a co-owner of the painting." Thus, in *Morgold*, there was no dispute that the seller owned a fifty percent interest in the painting. The seller, holding at least partial title, could therefore pass that title to a buyer. In this case, however, whether Lukacs in fact had title to the painting --or even a partial interest--is the core of the dispute. And as discussed, Bakalar cannot establish that Lukacs held title to the painting at the time it was sold to Galerie Gutekunst. Accordingly, *Morgold* provides no support for Bakalar's argument that an intestate heir can pass title to an estate asset prior to formal intestacy proceedings.

II. *Laches*

Having failed to establish that Lukacs acquired valid title to the Drawing, this Court must address whether laches bars Defendants' claims. This defense is governed by New York law. *Bakalar,* 550 F. Supp. 2d at 551; *see also Fireman's Fund Ins. Co. v. Fraund,* No. 88 Civ. 2765 (MBM), 1989 WL 31490, at *5 (S.D.N.Y. Mar. 31, 1989) ("[T]he forum state's rule for choosing a statute of limitations is used to determine the timeliness of all claims for relief, no matter what substantive law governs those claims."); Restatement (Second) of Conflict of Laws, § 142 cmt. d (1971) ("[T]he local law of the forum determines whether an action is barred by laches."). In order prove laches, Bakalar must show that: (1) Defendants were

aware of their claim, (2) they inexcusably delayed in taking action; and (3) Bakalar was prejudiced as a result. *Bakalar,* 2006 WL 2311113, at *3; *see also Ikelionwu v. United States,* 150 F.3d 233, 237 (2d Cir. 1998). The opposing party need not have had actual knowledge of the claim; rather, it is sufficient that the opposing party *should have known*. *Philippine Am. Lace Corp. v. 236 W. 40th St. Corp.*, 32 A.D.3d 782, 822 N.Y.S.2d 25, 27 (App. Div. 2006); *Kraker v. Roll,* 100 A.D.2d 424, 474 N.Y.S.2d 527, 533 (App. Div. 1984). "In the context of claims of lost or stolen works of art or cultural artifacts, the doctrine of laches safeguards the interests of a good faith purchaser of lost or stolen art by weighing in the balance of competing interests the owner's diligence in pursuing his claim." *The Greek Orthodox Patriarchate v. Christie's, Inc.,* 98 Civ. 7664 (KMW), 1999 WL 673347, at *7 (S.D.N.Y. Aug. 30, 1999) (quotations and alterations omitted). Thus, to establish laches, Bakalar must show Defendants' lack of due diligence in "attempting to locate the property."[7]

7. The burden of establishing laches typically rests with the party asserting the defense. *See Ikelionwu,* 150 F.3d at 237 (2d Cir. 1998). The full quote from *Greek Orthodox*, however, states that "the Patriarchate [i.e., the party against whom laches was asserted] must show due diligence in attempting to locate the property to defeat the laches defense." *Greek Orthodox,* 1999 WL 673347, at *7. Thus, *Greek Orthodox* appears to shift the burden of proof away from the party asserting the defense. Given the considerable passage of time between the core events of that case and the time the case was decided--over 80 years--such burden shifting is understandable, and even equitable. Placing the burden on the possessor of an artifact in such cases, decades after any alleged theft, puts the possessor in the unenviable position of proving a negative--lack of diligence--on the basis of a meager and

Greek Orthodox, 1999 WL 673347, at *7; *see also Sanchez v. Trustees of the Univ. of Penn.,* 04 Civ. 1253 (JSR), 2005 WL 94847, at *2 (S.D.N.Y. Jan. 18, 2005). This inquiry "focuses not only on efforts by the party to the action, but also on efforts by the party's family." *Bakalar,* 2006 WL 2311113, at *3; *see also Sanchez,* 2005 WL 94847, at *2-3 (considering lack of effort made by plaintiffs' father and grandfather); *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.,* 300 A.D.2d 117, 752 N.Y.S.2d 295, 297 (App. Div. 2002) (noting absence of inquiries by family over time).

Greek Orthodox and *Sanchez* are particularly instructive on the issue of due diligence. *Greek Orthodox* involved a dispute over possession of a tenth century palimpsest containing two works by Archimedes. 1999 WL 673347, at *1. Although the palimpsest resided in a monastery during the nineteenth and early twentieth centuries, it came into the possession of a French businessman sometime in the 1920s, through unclear means. *Greek Orthodox,* 1999 WL 673347, at *2. Despite indications in the 1930s that the palimpsest was no longer in the monastery's collection, the monastery did not file a lawsuit, conduct any search, or announce the disappearance until shortly before seeking to enjoin its sale in 1998. Faced with these facts, Judge Wood found the question of diligence "easily answered": "the [monastery] was not diligent at all." *Greek Orthodox,* 1999 WL 673347, at *10.

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often non-existent historical record. Thus, perversely, the longer a potential claim lays dormant, the more difficult it becomes for a possessor to prove laches. Nevertheless, consistent with the governing law, this Court places the burden squarely on Bakalar to establish the elements of this defense.

Similarly, *Sanchez* involved a collection of pre-Columbian gold objects found by the plaintiffs' grandfather in 1909 that disappeared around 1920 and eventually found its way to the University of Pennsylvania. *Sanchez,* 2005 WL 94847, at *1. As in *Greek Orthodox*, the plaintiffs' efforts to recover the artifacts were "limited." *Sanchez,* 2005 WL 94847, at *1. First, "[p]laintiffs . . . offered no evidence that their grandfather, from whom the collection was allegedly stolen, undertook any search or made any effort whatever to recover the [c]ollection." As for the plaintiff himself, he

> visited the Metropolitan Museum of Art and several New York art galleries to look for the [artifacts]. He did not, however, write to any galleries or museums in an attempt to find information about [them], nor did he ask for any help from any experts on archaeology or pre-Columbian art. On two occasions over the years, Sanchez also attempted to interest lawyers in helping him search for the [artifacts], but they declined.

Sanchez, 2005 WL 94847, at *2. Faced with these facts, the court concluded that "[t]he desultory efforts [plaintiff] engaged in between 1970 and the present are not remotely enough to satisfy the requirements of a diligent search." *Sanchez,* 2005 WL 94847, at *3.

Vavra and Fischer argue that laches cannot apply because they were unaware of any claim against Bakalar and did not know of the Drawing's whereabouts until 2005. These arguments, however, construe the laches

inquiry too narrowly. To have "knowledge" of their claim, Defendants need not have been aware of a claim against Bakalar specifically; it is enough that they knew of--or should have known of--the circumstances giving rise to the claim, even if the current possessor could not be ascertained. *See Sanchez,* 2005 WL 94847, at *1-3 (laches found despite the fact that the possessor of the allegedly stolen artifacts was unknown by the plaintiff until shortly before the lawsuit was filed); *Greek Orthodox,* 1999 WL 673347, at *10 (same); *In re Flamenbaum,* 27 Misc. 3d 1090, 899 N.Y.S.2d 546 (N.Y. Sur. Ct. 2010) (same).

Nor did Vavra and Fischer need to have specific knowledge of the Drawing. Particularly for large art collections with several minor works, such a requirement would defeat laches in virtually every case. Even if a claimant had knowledge of the collection as a whole, it would be unreasonable to require the current possessor to establish the claimant's particularized knowledge of every work within that collection. Where several items were purportedly stolen under common circumstances, these items may be treated collectively for the purposes of establishing knowledge. *See Sanchez,* 2005 WL 94847, at * 1 (several pre-Columbian gold objects treated as a "collection," rather than as individual objects, for the purposes of laches inquiry). The scope of the knowledge inquiry also informs the scope of required diligence. Thus, where several items are treated collectively for the purposes of knowledge, the current possessor may show a lack of diligence with respect to the collection as a whole, rather than the individual items. *See Sanchez,* 2005 WL 94847, at *3.

Here, Vavra was aware since childhood of both Grunbaum's substantial art collection and his death in a concentration camp. He became an heir to Grunbaum in 1994 when his aunt, Bakalova, passed away. Yet prior to being contacted by an attorney in 1998, he made no effort to locate or claim title to any Grunbaum property. Indeed, he acknowledged that to the best of his knowledge, "no such attempts were made by any member of the Vavra family." (Pl. Ex. 125 at Resp. 15.) Elise Zozuli--Grunbaum's sister and Vavra's grandmother--displayed a similar lack of diligence. Like Vavra, Zozuli was aware of Grunbaum's art collection and her potential intestate rights to Grunbaum's property, as evidenced by her correspondence with an Austrian lawyer concerning Grunbaum's music royalties. But there is no indication that she ever attempted to pursue a claim to Grunbaum's art collection. Nor did she announce the supposed "theft" of these pieces or write to museums or galleries regarding their whereabouts. *See Greek Orthodox,* 1999 WL 673347, at *10 (no diligence where monastery neither asserted claims to other similar missing manuscripts nor announced that they were missing).

Similarly, although the name "Grunbaum" was unfamiliar to Fischer prior to 1999, he was aware that a close family member had died in the Holocaust. His predecessors were aware of these events in greater detail. Indeed, Fischer's grandfather, Max Herzl, was intimately involved in his family's plight during the Holocaust and attempted without success to bring the Grunbaums to safety in Belgium. Fischer's parents and grandparents remained in close contact with Lukacs

for years afterwards. And Fischer and his parents even visited her in Switzerland in 1959. The Fischers therefore had ample opportunity to inquire about Fritz Grunbaum's property, yet to Fischer's knowledge, neither he nor any of his predecessors made any such inquiries or claims. *See Sanchez,* 2005 WL 94847, at *2-3.

However laches is applied in this case, it will work a certain inequity on the losing party, and this Court is "in the unenviable position of determining who gets the artwork, and who will be left with nothing despite a plausible claim of being unfairly required to bear the loss." *United States v. Davis,* 648 F.3d 84, 2011 WL 2162897, at *1 (2d Cir. Jun. 3, 2011). On the one hand, a finding of no unreasonable delay would deprive Bakalar of property he purchased in good faith almost fifty years ago. On the other hand, a ruling for Bakalar will deprive Grunbaum's rightful heirs of a Drawing that, but for the atrocities of the Holocaust, might have remained in the family until today. Indeed, as to Vavra and Fischer personally, the applicability of laches is doubtful given that Vavra only became an heir to Grunbaum's estate in 1994, and Fischer only became aware of the existence of Grunbaum's estate in 1999. But ultimately, both Vavra's and Fischer's ancestors were aware of their relationship to the Grunbaums and their eventual deaths in concentration camps. Given this knowledge, this Court finds by a preponderance of the evidence that Defendants' ancestors were aware of--or should have been aware of --their potential intestate rights to Grunbaum property, and Vavra and Fischer are bound by the knowledge of their respective families. *See Wertheimer,* 752 N.Y.S.2d

at 297 (noting plaintiff's grandfather's lack of diligence); *Sanchez,* 2005 WL 94847, at *3 (same).

As for diligence, given the inevitable vagaries in property rights arising from the Holocaust, World War II, and the subsequent political and economic turmoil, a certain amount of delay or lack of specificity might be excused. It may have sufficed in this case if Vavra, Fischer, or their ancestors had been diligent in their efforts to recover Grunbaum's property generally, even if such efforts were not specifically related to art; or if they had made intermittent efforts, provided such efforts were made. But both Defendants stated that to their knowledge, no such efforts were made by any member of their families, and the only evidence of any effort by any heir to recover Grunbaum property is Zozuli's aborted effort to recover Grunbaum's music royalties. That was in 1952, and no further efforts were made. And although Vavra asserts that the political situation in Czechoslovakia at that time would have made such recovery both dangerous and virtually impossible, Zozuli's account of her own efforts in relation to the music royalties belies this assertion. Accordingly, this Court finds that Vavra's and Fischer's ancestors were not diligent in pursuing their claims to the Drawing.

The resulting prejudice to Bakalar is clear. Defendants' delay in pursuing their claim "makes it difficult [for Bakalar] to garner evidence to vindicate his .. . rights." *Greek Orthodox,* 1999 WL 673347, at *10. It has "resulted in deceased witnesses, faded memories, lost documents, and hearsay testimony of questionable value." *Sanchez,*

2005 WL 94847, at *3 (quoting *Guggenheim,* 550 N.Y.S.2d at 621 (quotations and alterations omitted)). Of the greatest significance is the death of Mathilde Lukacs in 1979, perhaps the only person who could have elucidated the manner in which she came to possess the Drawing, or indeed, whether she owned it at all.

Defendants argue that because Bakalar did not inquire into the provenance of the Drawing when he purchased it and failed to investigate its provenance for over forty years, any prejudice to Bakalar was due to his own conduct, rather than the Defendants' delay. However, this Court previously found that Bakalar purchased the Drawing in good faith, and there is no reason to disturb that finding. Moreover, Bakalar, as an ordinary non-merchant purchaser of art, had no obligation to investigate the provenance of the Drawing, and this Court will not saddle him with a greater duty than the law requires. *See Graffman v. Espel,* 96 Civ. 8247 (SWK), 1998 WL 55371, at *6 (S.D.N.Y. Feb. 11, 1998) ("As a matter of law, the [purchasers] had no obligation to investigate the provenance of the Painting.... [They] are not art dealers and are under no obligation to adhere to commercial standards applicable to art dealers."); *cf.* N.Y.U.C.C. § 2-103 ("Good faith *in the case of merchant* means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." (emphasis added)); *Morgold,* 891 F. Supp. at 1368 (under New York law, "a *dealer* in art must take reasonable steps to inquire into the title to a painting." (emphasis added)).

Finally, Defendants argue that a laches defense is unavailable because Bakalar has unclean hands. "Courts

apply the maxim requiring clean hands where the party asking for the invocation of an equitable doctrine has committed some unconscionable act that is directly related to the subject matter in litigation and has injured the party attempting to invoke the doctrine." *PenneCom B.V. v. Merrill Lynch & Co., Inc.,* 372 F.3d 488, 493 (2d Cir. 2004). Thus, "the equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage." *PenneCom,* 372 F.3d at 493 (quoting *Bein v. Heath,* 47 U.S. 228, 247, 12 L. Ed. 416 (1848)). Defendants base their unclean hands argument on the fact that in 1990, and again in 1999, a catalogue raisonnee of Schiele's complete works referenced Bakalar in the provenance but listed the current owner only as "private collection," despite Bakalar's continued ownership. In addition, the catalogue raisonnee listed Galerie Gutekunst as the earliest known provenance, and made no reference to either Lukacs or Grunbaum. From this, Defendants conclude that Bakalar concealed his ownership of the Drawing and information about the Drawing's provenance that might indicate to others that the Drawing may be stolen. This limited circumstantial evidence is a bridge too far. Bakalar may have had any number of reasons for keeping his possession of the Drawing confidential, and this Court will not infer any fraud, deceit, or unfairness based on such speculation. Nor can this Court conclude that the failure of Kallir to include Lukacs or Grunbaum in the Drawing's provenance in the catalogue raisonnees was the result of any fraudulent behavior on the part of Bakalar. There is simply no evidence in the record to support this assertion.

Accordingly, Defendants' claims against Bakalar are barred by laches.

III. *Motion to Strike*

By letter dated April 13, 2011, Defendants requested a pre-motion conference to move to strike a decision of the Austrian Restitution Committee ("Committee"), a governmental body whose members were appointed by the Minister of Education, Art, and Culture, which was attached to Bakalar's moving brief. The decision addressed, *inter alia*, whether Lukacs's ownership of certain Grunbaum art after World War II permitted an inference of Nazi theft. The Committee found that it did not, and Bakalar relied heavily on this decision in his moving brief. This Court denied Defendants' request for a pre-motion conference as futile, and Defendants moved for reconsideration. This Court now construes the Defendants' motion for reconsideration as a motion to strike. However, although this Court reached the same determination as the Austrian Restitution Committee, it did not rely on the Committee's decision. Accordingly, Defendants' motion is moot.

CONCLUSION

For the foregoing reasons, this Court awards judgment to Plaintiff David Bakalar, concluding that he holds lawful title to the Drawing and that Defendants' counterclaims are barred by laches. Accordingly, Defendants Milos Vavra's and Leon Fischer's counterclaims for declaratory judgment, conversion, and replevin are denied. The parties

are directed to submit a proposed judgment by August 31, 2011. The Clerk of Court is directed to terminate all pending motions and mark this case closed.

Dated: August 17, 2011
New York, New York

SO ORDERED:

/s/_____
WILLIAM H. PAULEY III
U.S.D.J.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 25, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 3037 (WHP)
(ECF Case)

DAVID BAKALAR,

Plaintiff and Counterclaim Defendant,

-against-

MILOS VAVRA and LEON FISCHER,

Defendants and Counterclaimants.

JUDGMENT

Pursuant to the Court's Memorandum and Order dated August 17, 2011, setting forth the findings of fact and conclusions of law on remand, Final Judgment shall be entered for the Plaintiff David Bakalar, concluding that he holds lawful title to the Egon Schiele drawing, dated 1917, known as "Seated Woman with Bent Left Leg (Torso)." Accordingly, Defendants' counterclaims for declaratory judgment, conversion and replevin are denied.

The Clerk of Court is directed to terminate all motions pending as of this date and mark the case closed.

Dated: New York, New York
August 25, 2011

/s/
Hon. William H. Pauley, III, U.S.D.J.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 2, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-5119-cv

619 F.3d 136; 2010 U.S. App. LEXIS 18343

DAVID BAKALAR,

Plaintiff-Counter-Defendant-Appellee,

-v.-

MILOS VAVRA AND LEON FISCHER,

Defendant-Counter-Claimant-Appellants,

SCHENKER INC. AND SCHENKER & CO. A.G.,

Counter-Defendants.

October 9, 2009, Argued
September 2, 2010, Decided

Before: CABRANES and LIVINGSTON, Circuit Judges, and KORMAN, District Judge.* EDWARD R. KORMAN, District Judge, separately concurring.

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* The Hon. Edward R. Korman, Senior United States District Court Judge for the Eastern District of New York, sitting by designation.

Appendix D

OPINION BY: EDWARD R. KORMAN

OPINION

EDWARD R. KORMAN, *District Judge*:

This case involves a dispute over the ownership of a drawing by Egon Schiele (the "Drawing") between plaintiff David Bakalar, the current possessor of the Drawing, and defendants Milos Vavra and Leon Fischer, heirs to the estate of Franz Friedrich Grunbaum ("Grunbaum"). Although the Drawing was untitled by the artist, one of the descriptive titles by which it is known is "Seated Woman with Bent Left Leg (Torso)."

Vavra and Fischer allege the following facts in their complaint. The Drawing was one of eighty-one Schieles that were included in a collection of 449 artworks owned by Grunbaum, an Austrian cabaret artist, and kept in his apartment in Vienna. Grunbaum was deprived of his possession and *dominium* over the Drawing after being arrested by the Nazis and signing a power of attorney while imprisoned at Dachau. The power of attorney, dated July 16, 1938 (four months after his imprisonment), authorized his wife Elisabeth "to file for me the legally required statement of assets and to provide on my behalf all declarations and signatures required for their legal effect according to the statutory provisions, and to represent me in general in all my affairs." (A-936.)

The statement of assets, to which the power of attorney referred, required Jews to list all of their property. The information was then used by the Nazis to impose

confiscatory taxes and penalties of various kinds.[1] The power to represent Grunbaum "in all [his] affairs" enabled the Nazis to compel Elisabeth to dispose of Grunbaum's assets for the purpose of paying the imposed taxes and penalties.[2] Indeed, in a report dated four days after the

1. "Of particular significance is the ordinance dated April 26, 1938, which required Jews to register their assets and which covered both those who sought to leave the Reich [of which Austria was a part] and those who remained, with the Reich seeking to appropriate their domestically as well as their externally held assets." Claims Resolution Tribunal: Deposited Assets Claims: Selected Laws, Regulations, and Ordinances Used by the Nazi Regime to Confiscate Jewish Assets Abroad, http://crt-ii.org/_nazi_laws/; *see also* Robert Gallately, *Backing Hitler: Consent and Coercion in Nazi Germany* 124 (2001); Otto D. Tolischus, *Goering Starts Final Liquidation of Jewish Property in Germany*, N.Y. Times, Apr. 28, 1938, at 1.

2. While the Nazis could simply have confiscated all of Grunbaum's possessions without a power of attorney, the manner in which they proceeded here reflected their practice of camouflaging theft with a veneer of legality. Raul Hilberg, the preeminent historian of the Nazi war against the Jews, has written: "Lawyers were everywhere and their influence was pervasive. Again and again, there was a need for legal justifications." Raul Hilberg, *Perpetrators Victims Bystanders: The Jewish Catastrophe, 1933-1945*, at 71 (1992). Indeed, the U.S. Consul General in Vienna at the time observed that "[t]here is a curious respect for legalistic formalities. The signature of the person despoiled is always obtained, even if the person in question has to be sent to Dachau in order to break down his resistance." *See* Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* 39, Chapter 2 n.30 (First Vintage Books ed., 1994) (quoting NA, RG 59, SD Cable 862.4016/2103, Geist, Berlin, to Secretary of State, April 11, 1939); *see also* Gallately, *supra* note 1, at 124. Scholars

execution of the power of attorney, Franz Kieslinger, an appraiser for the Nazis with the Viennese auction house Dorotheum—which was "a prime selling point of loot[ed] art in Austria" (A-1265)—conducted an appraisal of the 449 artworks that Grunbaum kept in his apartment, including the eighty-one Schieles. On August 1, 1938, Mrs. Grunbaum signed a List of Assets "for Franz Freidr. Grunbaum, according to Power of Attorney dated July 16, 1938." (A-933.) The valuation she placed on it was identical to that which Kieslinger had assigned it.

The manner in which the Drawing made its way from Vienna to Galerie St. Etienne, the New York art gallery from which Bakalar purchased it, is unclear. Grunbaum died in Dachau in 1941. The Registration of Death, a document filed in the district court of Vienna in which Mrs. Grunbaum reported the death of her husband, states that "[a]ccording to the deceased's widow, Elisabeth Sara Grunbaum, there is no estate." (A-982.) Mrs. Grunbaum was arrested by the Nazis on October 5, 1942, and died

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have explained that respect for legalistic formalities was not a curious eccentricity. *See, e.g.*, Henry Friedlander, *Nazi Crimes and the German Law, in Nazi Crimes and the Law* 16-17 (Nathan Stoltzfus & Henry Friedlander eds., 2008). Instead, "obedience to legal forms strengthened [the Reich's] power. Upstanding citizens felt a moral obligation to submit to the law's authority . . . . Resistance was immoral. If any citizens felt unease about a particular policy, their pained consciences were salved via display of a suitably stamped document in pursuance to a decree." Richard Lawrence Miller, *Nazi Justiz: Law of the Holocaust* 1 (1995). In sum, the law "removed the question of the morality or legitimacy of the process." Peter Hayes, *Summary and Conclusions, in Confiscation of Jewish Property in Europe, 1933-1945*: New Sources and Perspectives: Symposium 143, 147 (2003).

shortly thereafter in a concentration camp in Minsk. The Drawing was purchased along with forty-five other Schieles by Galerie Gutekunst, a Swiss art gallery, in February and May of 1956. The district judge found that the seller was Mathilde Lukacs-Herzl ("Lukacs-Herzl" or "Lukacs"), the sister of Mrs. Grunbaum. Later the same year, on September 18, 1956, the Drawing was purchased by the Galerie St. Etienne and was shipped to it in New York. On November 12, 1963, the latter sold the drawing to David Bakalar for $ 4,300.

Bakalar, a resident of Massachusetts, filed this action seeking a declaratory judgment that he is the rightful owner of the Drawing. The complaint was filed after a winning bid of approximately $ 675,000 for the Drawing at a Sotheby's auction was withdrawn, apparently because of a letter written on behalf of Milos Vavra and Leon Fischer, which challenged Bakalar's title. Vavra and Fischer, who have been formally designated by an Austrian court as the legal heirs to the estate of Grunbaum, are the two named defendants in this case. In response to Bakalar's complaint, Vavra and Fischer, who are residents of the Czech Republic and New York, respectively, filed counterclaims for declaratory judgment, replevin, and damages. After a bench trial, a judgment was entered in the Southern District of New York (Pauley, *J.*), based on findings of fact and conclusions of law, which sustained the claim of David Bakalar that he was the rightful owner.

In his post-trial findings of fact and conclusion of law, the district judge reaffirmed his pretrial ruling that Swiss law applied. *Bakalar v. Vavra*, 2008 U.S. Dist. LEXIS 66689, 2008 WL 4067335, at *6 (S.D.N.Y. Sept. 2, 2008)

(citing *Bakalar v. Vavra*, 550 F. Supp. 2d 548, 550 (S.D.N.Y. 2008)). Under Swiss law, "a person who acquires and takes possession of an object in good faith becomes the owner, even if the seller was not entitled or authorized to transfer ownership." 2008 U.S. Dist. LEXIS 66689, [WL] at *7. One "relevant exception to this rule is that if the object had been lost or stolen, the owner who previously lost the object retains the right to reclaim the object for five years." *Id.* The district judge proceeded to hold that, because Lukacs-Herzl "possessed the Drawing and the other Schiele works she sold" in 1956, the Galerie Gutekunst, as buyer, "was entitled to presume that she owned them." *Id.* Because Galerie Gutekunst was a good faith purchaser, and because the Grunbaum heirs had "not produced any concrete evidence that the Nazis looted the Drawing or that it was otherwise taken from Grunbaum," Bakalar acquired good title when he purchased the Drawing from Galerie St. Etienne. 2008 U.S. Dist. LEXIS 66689, [WL] at *8. Nevertheless, even if the Drawing had been stolen at some point prior to the Galerie Gutekunst's purchase in 1956, "any absolute claims to the property" by those from whom the Drawing was stolen "expired five years later, in 1961," pursuant to Swiss law. 2008 U.S. Dist. LEXIS 66689, [WL] at *7.

DISCUSSION

I

Because jurisdiction in this case is predicated on diversity of citizenship, New York's choice-of-law rules apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Before engaging

in a choice-of-law analysis, we turn to the threshold question whether there is a difference between the laws of Switzerland and New York upon which the outcome of the case is dependent. We conclude that there is a significant difference that is reflected in the laws and policies of these two jurisdictions.

A. Swiss Law and Practice

The preceding summary of the district judge's findings of fact and conclusions of law contain a description of Swiss law, to which we add only a few words. Under Article 934 of the Swiss Civil Code, as summarized by Bakalar's expert, "a buyer acting in good faith will *acquire valid title to stolen property* after a period of *five years*. After the five year period, a previous owner of a stolen object is no longer entitled to request the return of the stolen object from a good-faith possessor." (A-706) (emphasis in original). Moreover, as Bakalar's expert explained, Swiss law also presumes that a purchaser acts in good faith, and a plaintiff seeking to reclaim stolen property has the burden of establishing that a purchaser did not act in good faith. *See also In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000), *aff'd*, 413 F.3d 183, 186, 14 Fed. Appx. 132 (2d Cir. 2005); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990). Significantly, according to Bakalar's expert,

> [t]here has never been a legal presumption that art works with a potential relationship to Germany during World War II (i.e. emanating

> from a German collection or created by artists deemed "degenerate" by the Nazis) would in general and *per se* be tainted, and that a dealer accepting such art works would automatically be subject to a heightened standard of diligence in the 1950s. Such a presumption did not in the 1950s and does not today exist in Swiss law.

See also Final Report of the Independent Commission of Experts (Bergier Commission Report), *Switzerland, National Socialism and the Second World War* 364 (2002).

While it is true, as Bakalar's expert continues, that "[i]n 1987, the Swiss Federal Supreme Court raised the standards of due diligence with respect to sales transactions involving *second-hand luxury automobiles*," and later to the antiquities business because "in these businesses stolen property is known to be frequent; therefore a heightened alertness may be expected from buyers in these sectors," and "[w]hile some Swiss legal commentators are of the opinion that the *art market* should also fall into this category of businesses at risk, the Swiss Federal Supreme Court has *not* extended the stricter standards to transactions with works of art," (A-714) (emphasis in original).

Nevertheless, Bakalar argues that Swiss law is "not blind to the rights of dispossessed former owners," and does not "reflect indifference to the possibility of theft." While this benign assessment of Swiss law has been disputed by others, *see e.g.*, Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's*

Greatest Works of Art 155 (1st ed. 1995), we have no occasion to address this issue. Instead, we simply note the obvious: Swiss law places significant hurdles to the recovery of stolen art, and almost "insurmountable" obstacles to the recovery of artwork stolen by the Nazis from Jews and others during World War II and the years preceding it. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 at 159 ("[T]he legal and practical obstacles to the recovery of [stolen] art . . . are already substantial, if not insurmountable.").

B. New York Law

Unlike Switzerland, in New York, a thief cannot pass good title. *See Menzel v. List*, 49 Misc. 2d 300, 305, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966), *modified as to damages*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dep't 1967), *rev'd as to modification*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969); *see also Silsbury v. McCoon*, 3 N.Y. 379, 383-84 (1850). This means that, under New York law, as *Menzel v. List* specifically held and one scholar observed, "absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods." Michelle I. Turner, Note, *The Innocent Buyer of Art Looted During World War II*, 32 Vand. J. Transnat'l L. 1511, 1534 (1999). The manner in which the New York rule is applied reflects an overarching concern that New York not become a marketplace for stolen goods and, in particular, for stolen artwork.

Appendix D

The leading New York case in this area is *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991), which principally addresses the issue of when a cause of action for replevin accrues, thus triggering the three-year statute of limitations. The case was decided against the backdrop of the New York market in stolen artwork. As one commentator has observed, "[b]ecause stolen art work can be very valuable, may eventually filter into the open market, and may be handled by the shadowy institution of the art gallery, art owners may be victimized by international trading in stolen art. Original owners, however, have only a few fragmentary and little-known mechanisms by which to register or recover their stolen art objects." Sydney M. Drum, Comment, DeWeerth v. Baldinger: *Making New York A Haven for Stolen Art?*, 64 N.Y.U. L. Rev. 909, 944 (1989). Moreover, they are "further disadvantaged by the art dealers' usual practice of not examining the sources of the art works in which they trade. While art dealers protest that they are only protecting the desire of their wealthy clients to remain anonymous, and that they are under no legal duty to inquire into the sources of art work they trade, such anonymity removes illegitimate transactions from needed scrutiny." *Id.* at 912-13.

The circumstances that Drum described are reflected in the market conditions described in the opinion in *Lubell*. Indeed, the opening paragraph begins with the observation that "[t]he backdrop for this replevin action is the New York City art market, where masterpieces command extraordinary prices at auction and illicit dealing in stolen merchandise is an industry all its own."

Lubell, 77 N.Y.2d at 314 (internal citation omitted). *Lubell* then observed that "New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value." *Id.* at 317. One aspect of that protection is the rule that a cause of action for replevin against the good-faith purchaser of stolen property "accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it. Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful" and the statute of limitations does not begin to run. *Id.* at 317-18 (internal citations omitted).

While the Court of Appeals acknowledged that "the demand and refusal rule is not the only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to true owners of stolen property," and it rejected any suggestion that less protective measures should be adopted. *Id.* at 318. Thus, it declined to adopt a discovery rule "with the Statute of Limitations running from the time that the owner discovered or reasonably should have discovered the whereabouts of the work of art that had been stolen." *Id.* at 318-19. Indeed, the Court of Appeals observed that New York had already considered—and rejected—the adoption of such a rule. Specifically, a bill proposing that a museum would be immune from future claims once it "gave required public notice of acquisition and a three year statute of limitations period had passed," Drum, *supra*, at 936, was vetoed by Governor Mario Cuomo, who "stated

that he had been advised by the State Department that the bill, if it went into effect, would have caused New York to become 'a haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill.'" *Lubell*, 77 N.Y.2d at 319 (alteration in original).

The Court of Appeals observed that "[t]he history of this bill and the concerns expressed by the Governor in vetoing it, when considered together with the abundant case law spelling out the demand and refusal rule, convince us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence." *Id.* In justifying this holding, the Court of Appeals observed that its decision was

> . . . in part influenced by [its] recognition that New York enjoys a worldwide reputation as a preeminent cultural center. To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work unless the true owner was able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection

> and places the burden of investigating the provenance of a work of art on the potential purchaser.

Id. at 320.

This is not all the Court of Appeals held in *Lubell*. In the course of its opinion, it went on to agree with the Appellate Division, "for the reasons stated by that court, that the burden of proving that the painting was not stolen properly rests with [the possessor]." *Id*. at 321. Specifically, the Appellate Division had held that "an issue of fact exists as to whether the gouache was stolen, and that the burden of proof with respect to this issue is on defendant, it being settled that a complaint for wrongful detention contains every statement of fact essential to a recovery where it alleges the plaintiff's ownership of the property and the defendant's possession and refusal on demand to deliver." *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 153, 550 N.Y.S.2d 618 (1st Dep't 1990) (citing 23 N.Y. Jur. 2d, Conversion, and Action For Recovery of Chattel, § 175, at 422). While the Appellate Division recognized that the burden it was placing on the good-faith possessor was an "onerous one," it held that "it well serves to give effect to the principle that persons deal with the property in chattels or exercise acts of ownership over them at their peril." *Id*. (internal citations omitted).

II

Against this backdrop, we turn to the issue of the appropriate choice of law and the issue of whether the

Drawing was stolen. We address first the choice of law issue, because if Swiss law applies, it is immaterial whether the Drawing was stolen. Specifically, the district judge held: "Under 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." 550 F. Supp. 2d at 550 (quoting *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 1999 U.S. Dist. LEXIS 13257, 1999 WL 673347, at *4-5 (S.D.N.Y. Aug. 30, 1999)). Accordingly, he concluded that "[t]he Court must apply the law of the country where title passed, if at all." (*Id.*) (internal quotation omitted). In adopting this choice-of-law rule, the district judge relied heavily on the opinion of Judge Mishler in *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 845-46 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150, 1157-58 (2d Cir. 1982).

Elicofon arose out of the theft of two Albrecht Duerer paintings possessed by the predecessor of the Kunstsammlungen zu Weimar, a German art museum. In July 1945, during the American occupation of the town of Weimar, the paintings were stolen from a castle where they had been placed for safekeeping. Edward Elicofon purchased the paintings in good faith in 1946 from an ex-serviceman who appeared at his Brooklyn, New York residence and claimed that he had purchased them in Germany. *Elicofon*, 536 F. Supp. at 830, 833. Some twenty years later, upon the discovery of the location of the Duerer paintings, the museum demanded their return. Elicofon refused, and the museum sued to recover the paintings. Elicofon moved for summary judgment under a

provision of German property law called *Ersitzung*, which allowed title to moveable property to be obtained by its good faith acquisition and possession without notice of a defect in title for a period of ten years from the date on which the rightful owner loses possession.

Judge Mishler concluded that it was unnecessary to reach the substantive issues in connection with German law "because under New York choice of law theory, German law is not applicable to determine whether Elicofon acquired title to the paintings." *Id.* at 845. Specifically, Judge Mishler observed in the language quoted above that "New York's choice of law dictates that 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." *Id.* at 845-46. Because Elicofon purchased the paintings in New York, Judge Mishler concluded that New York law applied. Moreover, Judge Mishler concluded that even applying the more modern "interest analysis," New York substantive law still applied. *Id.*

The problem with the traditional situs rule, upon which Judge Mishler relied in part and upon which the district judge here relied exclusively, 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 *Kahara 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, 581 N.E.2d 1042, 575 N.Y.S.2d 796 (1991)). The interest analysis, which generally applies in all choice-of-law contexts, *see Istim*, 78 N.Y.2d at 347, begins with an examination of the contacts each jurisdiction has with the event giving rise to the cause of action. *See Kahara Bodas*, 313 F.3d at 85. "Once these contacts are discovered and analyzed they will indicate (1) that there exists no true conflict of laws, . . . as in most choice of law cases, or (2) that a true conflict exists, i.e., both jurisdictions have an interest in the application of their law." *In re Crichton's Estate*, 20 N.Y.2d at 135 n.8. "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." *Kahara Bodas*, 313 F.3d at 85.

The alternative basis for Judge Mishler's holding in *Elicofon* provides a clear example of the application of the interest analysis. While the theft of the paintings occurred in Germany, he concluded correctly that the locus of the theft was simply not relevant to the interest underlying *Ersitzung*. *Elicofon*, 536 F. Supp. at 846. By contrast, "the contacts of the case with New York, *i.e.*, Elicofon purchased and holds the paintings here, are indeed relevant to effecting its interest in regulating the transfer of title in personal property in a manner which best promotes its policy." *Id.* Judge Mishler continued:

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> In applying the New York rule that a purchaser cannot acquire good title from a thief, New York courts do not concern themselves with the question of where the theft took place, but simply whether one took place. Similarly, the residence of the true owner is not significant[,] for the New York policy is not to protect resident owners, but to protect owners generally *as a means to preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods*. In finding that New York law governs the question of title, we hold that Elicofon did not acquire title under Ersitzung.

Id. (emphasis added).

Judge Mishler's analysis of the compelling New York interest to "preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods," which preceded the clear articulation of this interest by the Court of Appeals in *Lubell*, is relevant here. However the Drawing came into the possession of the Swiss art gallery, New York has a compelling interest in the application of its law. Indeed, it has applied its own law in a case comparable to this one without pausing to engage in a choice-of-law analysis. *See Menzel*, 49 Misc. 2d at 314-15. Simply stated, if the claim of Vavra and Fischer 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. Indeed, Bakalar concedes that "a substantial part of the events or omissions giving rise to the claims

herein" occurred in New York. (A-271.) These "events and omissions" made New York a "marketplace for stolen goods" and, more particularly, for stolen artwork, which was of special concern in *Lubell. See* 77 N.Y.2d at 320.

By contrast, 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. While the Drawing was purchased in Switzerland by a Swiss art gallery, which resold it within five months to a New York art gallery, the application of New York law here would not have any adverse effect on the Swiss art gallery. Nor would it affect any other Swiss citizen or Swiss interest. 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. This, in turn, may adversely affect the extra-territorial sale of artwork by Swiss galleries. The tenuous interest of Switzerland 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. *Elicofon*, 536 F. Supp. at 846, *Lubell*, 77 N.Y.2d at 320. Thus, the Restatement (Second) of Conflict of Laws, which strongly tilts toward the situs rule, acknowledges that "[t]here will also be occasions when the local law of some state other than that where the chattel was situated at the time of the conveyance should be applied because of the intensity of the interest of that state in having its local law applied to determine the particular issue." Restatement (Second) of Conflict of Laws § 244 cmt. g (1971).

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Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., 1999 U.S. Dist. LEXIS 13257, 1999 WL 673347 (S.D.N.Y. Aug. 30, 1999), upon which the district judge and Bakalar rely, does not compel a different result. The issue in that case was whether New York or French law would apply to a stolen artifact over which a citizen of France acquired title based on prescriptive possession after thirty years, as permitted under French law. The artifact was ultimately brought to New York, where the auction house, Christie's, Inc., auctioned it for $ 2 million. The Greek Orthodox Patriarchate of Jerusalem subsequently sued the purchaser and the prior French owner. The district judge granted summary judgment in favor of the defendants, on the ground that French law applied and on the ground of laches. The choice of law determination was based on the district judge's erroneous application of the old situs rule. Moreover, she declined to apply the public policy exception to that rule after determining that "[t]he thirty-year period for prescriptive possession under French law, however, is a substantial length of time, not an indication of 'commercial indifference.'" 1999 U.S. Dist. LEXIS 13257, [WL] at *5. We need not say here whether the application of French law was correct, although we can say the situs rule on which the district judge relied is not consistent with the New York choice-of-law rule, and that Swiss law and the commercial practice it fosters is significantly different than that of France.[3]

3. According to Bakalar's expert, the Swiss Act on the International Transfer of Cultural Property ("CPTA") extended the statute of limitations for the return of stolen or lost cultural objects of a certain importance from five years to thirty years. The Act, however, does not apply to events that occurred prior to its

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While we have focused on the laws of Switzerland and New York, there is a third jurisdiction, the laws of which are arguably relevant. The Drawing began its journey in Austria, and Austrian courts have recognized that Vavra and Fischer are the heirs to Grunbaum's estate. Certainly, Austria has no interest in defeating the claim by these heirs against a United States citizen. Nevertheless, it is relevant that after World War II, Austria enacted a statute known as the Austrian Nullification Act, which provided that "[a]ny paid and unpaid legal transactions and other legal business which occurred during the German occupation of Austria will be considered null and void if they were contracted as a consequence of any political or economic influence exercised by the German Reich in order to deprive individuals or entities of property assets or interests owned by or due them as of March 13, 1938." NichtigkeitsG [Austrian Nullification Act] No. 106/1946, § 1 (Austria). The claims made on the basis of the Austrian Nullification Act were to be determined by subsequent legislation. While Austria enacted legislation relating to restitution of property from private parties—the Third Restitution Law BGB No. 54/1947, which the district judge observed imposed "a lesser burden for proving an

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enactment in June 2005. More significantly, the Act is hardly clear regarding which objects come within the Act's definition. Indeed, as Bakalar's expert opined, "[w]hether a cultural object is of importance in the sense of the CPTA is a question of interpretation, which must be answered on a case-by-case basis, taking into account the current opinion of art experts, the treatment of the object in scientific publications, etc. Objects of 'museum quality' are usually considered to be of importance in the sense of the Act." (A-707 n.11.)

illegitimate transfer of the Drawing in Austria," (A-347)—the statute expired on July 31, 1956. Nevertheless, an opinion of the Supreme Court of Austria, a translation of which is before us, declared that the Austrian Nullification Act is "in accordance with the immutable principles of our General Civil Code that nobody is obligated to adhere to a contract that was concluded on the basis of unfair and well-founded fear." Oberster Gerichtshof [OGH] [Supreme Court] Apr. 1, 2008, Docket No. 5 Ob 272/07x (citing Austrian Civil Code § 870). Moreover, the Supreme Court of Austria observed that "[e]ven though claims for expropriation of property within the meaning of the [Third Restitution Law] can no longer be asserted due to expiration of the time limit (July 31, 1956), [these principles] continue[] to be an integral part of Austrian law." *Id.*

Although it is unclear whether a cause of action comparable to the counterclaims of Vavra and Fischer against Bakalar could be successfully brought in Austria, allowing the claims to go forward under New York law is consistent with the principles underlying the decision of the Supreme Court of Austria. While Austria may have allowed its restitution-enabling act to elapse eleven years after the end of WWII in order to protect Austrian citizens, the present case does not involve a claim against any citizen of Austria.[4] Accordingly, we conclude that

4. Significantly, the Republic of Austria continues to investigate all works of art acquired between 1938-1945, which are now owned by it. Indeed, as the Austrian Embassy in the United States observed, "[w]orks of art not properly obtained will be returned to their original owners or their heirs." Austrian Press

Austria has no competing interest in the circumstances presented here.

In sum, we conclude that the district judge erred in holding that Swiss law, rather than New York law, applied here. Consequently, if, contrary to the holding of the district judge, the Drawing was stolen or otherwise unlawfully taken from Grunbaum, that circumstance would affect the validity of Bakalar's title.

III

Notwithstanding its conclusion that the manner in which the Drawing was acquired from Grunbaum would not have affected the outcome of the case, the district judge found that the Grunbaum heirs had failed to produce "any concrete evidence that the Nazis looted the Drawing or that it was otherwise taken from Grunbaum." *Bakalar v. Vavra*, 2008 U.S. Dist. LEXIS 66689, 2008

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and Information Service, Austrian Holocaust Restitution, http://www.austria.org/content/view/414/1. Indeed, the International Bar Association recently reported that "The Austrian 'Commission for Provenance Research' issued 11 recommendations, recommending the transfer of the disputed objects (including paintings, prints, sculpture, ethnographical objects and musical instruments) to the heirs of the initial owners in ten cases, and in part in one case." Sarah Theurich, International Bar Association, *Art, Cultural Institutions and Heritage Law August 2009*, http://www.ibanet.org/Article/Detail.aspx? ArticleUid=C93CF2FA-F5F6-4A64-A7D1-8BD907FDF3DD; *see also* Holocaust Claims Processing Office, *Eight Artworks Returned to Rightful Heir From Austrian Museums with [Assistance] of Holocaust Claims Processing Office*, http://www.claims.state.ny.us/pr081002.htm.

WL 4067335, at *8 (S.D.N.Y. Sept. 2, 2008). Our reading of the record suggests that there may be such evidence, and that the district judge, by applying Swiss Law, erred in placing the burden of proof on the Grunbaum heirs in this regard. Indeed, as discussed earlier, if the district judge determines that Vavra and Fischer have made a threshold showing that they have an arguable claim to the Drawing, New York law places the burden on Bakalar, the current possessor, to prove that the Drawing was not stolen. *See Lubell*, 77 N.Y.2d at 321 ("[T]he burden of proving that the painting was not stolen property rests with the [possessor]."). Moreover, should the district judge conclude that the Grunbaum heirs are entitled to prevail on the issue of the validity of Bakalar's title to the Drawing, the district judge should also address the issue of laches. This defense, which Bakalar raised in response to the counterclaim of the Grunbaum heirs, is one that New York law makes available to him.

Accordingly, for the reasons stated above, we vacate the judgment of the district court and remand the case for further proceedings, including, if necessary, a new trial.

IV

We turn briefly to the entirely collateral argument of the Grunbaum heirs that the district judge abused his discretion by limiting the discovery they sought for the purpose of filing a class action certification request. The order of the district judge directed non-parties Sotheby's, Inc., Christie's Inc., and Galerie St. Etienne, to provide "statistical information" necessary to address questions

of class numerosity. Vavra and Fischer challenge the portion of the order excluding the identities of those who may have purchased works owned by Grunbaum. During a conference held on December 9, 2005, the district judge gave the following explanation for that limitation:

> [G]iven the fact that this is a motion for class certification, what is important for the movant in that case, is to address the questions of numerosity. And the discovery that you are taking, you can, with the discovery that you are taking, that can be satisfied by providing you with statistics on the buyers and sellers of the Grunbaum works, and with the location by state or country at the time of the transaction, and whether the purchaser was a museum, an art dealer, or a private individual. *There is no reason to learn the specific identities of those people at this time.*

(A-65-66.) (emphasis added).

The order did not in any way prevent the Grunbaum heirs from obtaining discovery sufficient to satisfy the numerosity requirement or any other requirement of Fed. R. Civ. P. 23(a). Indeed, it suggested implicitly that such information could be obtained at some later point. Under these circumstances, the district judge did not abuse his discretion by denying defendants' request for additional discovery. *See Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 233 (2d Cir. 2006) ("The amount of [class] discovery is generally left to the trial court's considerable discretion.").

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CONCLUSION

The judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

CONCUR BY: EDWARD R. KORMAN

CONCUR

EDWARD R. KORMAN, *District Judge*, separately concurring:

Often, when a verdict after a trial is reversed, other issues will be addressed which, though they do not affect the result, are likely to arise again on remand. While such a discussion may constitute dicta, it is justified by the desire to avoid the burden and expense that would result from the repetition of uncorrected error. Whether to undertake such an exercise is, of course, discretionary. While my colleagues, for perhaps understandable reasons, decline to engage in it, I take a different view and write to address more fully Part III of the panel opinion, which takes issue with the district judge's finding that the Grunbaum heirs had failed to produce "any concrete evidence that the Nazis looted the Drawing or that it was otherwise taken from Grunbaum." *Bakalar v. Vavra*, 2008 U.S. Dist. LEXIS 66689, 2008 WL 4067335, at *8.

While the panel opinion observes that "[o]ur reading of the record suggests that there may be such evidence," **[Panel Opinion, ante at 18]** it does not say what that evidence is, nor does it discuss the legal principles

applicable to what is essentially a mixed question of law and fact. The district judge is left to comb the record without assistance, looking for evidence he did not see the first time around, and without guidance as to the legal principles that make the evidence particularly relevant. I write to fill this gap.

Grunbaum was arrested while attempting to flee from the Nazis. After his arrest, he never again had physical possession of any of his artwork, including the Drawing. The power of attorney, which he was forced to execute while in the Dachau concentration camp, divested him of his legal control over the Drawing. Such an involuntary divestiture of possession and legal control rendered any subsequent transfer void.

"Under American law and the law of many foreign states there is only one scenario in which a good-faith purchaser's claim of title is immediately recognized over that of the original owner. This scenario arises when the owner *voluntarily* parts with possession by the creation of a bailment, the bailee converts the chattel, and the nature of the bailment allows a reasonable buyer to conclude that the bailee is empowered to pass the owner's title." Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 Duke L. J. 955, 971 (2001) (emphasis added). The principle to which Professor Reyhan alludes is codified in more limited form in section 2-403(2) of the Uniform Commercial Code, which was adopted by New York, and which provides that "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer

all rights of the entruster to a buyer in ordinary course of business." No such voluntary entrustment took place here. Nor did Grunbaum's flight from the Nazis constitute a voluntary abandonment.

Section 2-403(1) of the Uniform Commercial Code, which addresses principally the consequences of the transfer of title, rather than mere possession, provides that a person with voidable title has the power to transfer good title to a good-faith purchaser for value, and provides four examples of circumstances in which this rule applies. "The key to the voidable title concept appears to be that the original transferor voluntarily relinquished possession of the goods and intended to pass title." Franklin Feldman & Stephen E. Weil, *Art Law* § 11.1.3 (1986). The Feldman & Weil treatise continues: "He may have been defrauded, or the check he received may have bounced, or he may have intended to sell it to Mr. X rather than to Mr. Y, but, nevertheless, he intended to pass title. In such cases, the transferor has an option to void the sale, but the transferee can pass good title. A person who acquired the goods from a thief, however, has no title and consequently neither he nor successive transferees can pass ownership." *Id.; see also* Thomas M. Quinn, *Quinn's Uniform Commercial Code Commentary and Law Digest* § 2-403[A][6] (2d ed., 2002). Grunbaum never voluntarily intended to pass title to the Drawing. On the contrary, the circumstances strongly suggest that he executed the power of attorney with a gun to his head.

Nevertheless, the district judge, relying on U.C.C. § 2-403(1), concluded that "Galerie St. Etienne was a seller with voidable title to the Drawing, having acquired

it from Galerie Gutekunst in 1956," and that Bakalar, a good faith purchaser for value, acquired good title to the Drawing. 2008 U.S. Dist. LEXIS 66689, 2008 WL 4067335, at *6. While the district judge did not identify the defect in the title acquired by Galerie Gutekunst, which rendered voidable the title it passed to Galerie St. Etienne, his conclusion that the title was voidable implicitly recognizes that there was some legal defect in the passage of title to the Drawing as it made its way from Grunbaum to the Galerie Gutekunst. Otherwise, the district judge would have had no basis to characterize as "voidable" the title the latter conveyed to the Galerie St. Etienne. This characterization, however, ignores the fact that, if the power of attorney signed by Grunbaum was involuntary, any subsequent transfer was void and not merely voidable.

This case is analogous to the circumstances in two reported cases. In *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008), *aff'g* 529 F. Supp. 2d 300, 307 (D.R.I. 2007), the Nazis issued an edict directing the Jewish owner of an art gallery to liquidate the gallery and its inventory after determining that he "lacked the requisite personal qualities to be an exponent of German culture." *Id.* at 53. After unsuccessfully appealing this edict, the owner "surrendered to the inevitable," and consigned most of the affected works to a government-approved purveyor. *Id.* The consigned pieces, including a painting by Franz Xaver Winterhalter known as "Madchen aus den Sabiner Bergen" ("Girl from the Sabine Mountains"), were auctioned at prices below their fair market value. Fearing for his life, the owner fled Germany shortly after the forced sale. Consequently, he never retrieved the auction proceeds. *Id.* The district court had little trouble

in concluding that the owner's "relinquishment of his property was anything but voluntary," 529 F. Supp. 2d at 307, and that holding was not challenged on appeal.

Similarly, in *Menzel v. List*, the Jewish owners of a painting by Marc Chagall entitled "Le Paysan a L'echelle" ("The Peasant and the Ladder") left their apartment in Brussels when they fled in March, 1941, before the oncoming Nazis. 49 Misc. 2d 300, 301-2, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966), *modified as to damages*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dep't 1967), *rev'd as to modification*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969). The painting was seized by the Nazis, who left a certification or receipt "indicating that the painting, among other works of art, had been taken into 'safekeeping.'" *Id.* at 301. The New York State Supreme Court Justice hearing the case concluded that the painting had not been abandoned because it did not constitute "a voluntary relinquishment of a known right." *Id.* at 305. The Justice continued: "The relinquishment here by the Menzels in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup." *Id.* Consequently, he ordered the current possessor of the painting, and good-faith purchaser, to either return it to Mrs. Menzel or pay her $ 22,500, its fair value at the time of the case. Moreover, he also held that the good-faith purchaser could recover the $ 22,500 for breach of warranty of title from the Perls Galleries, from whom the painting was purchased. In so doing, the Justice explained:

> It is of no moment that Perls Galleries may have been a *bona fide* purchaser of the painting, in good faith and for value and without

> knowledge of the saga of the Menzels. No less is expected of an art gallery of distinction. Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner.

Id. at 314-15 (citations omitted).[5]

Based on the historical record of the time, to which reference has already been made, the power of attorney Grunbaum signed in the fourth month of his confinement in Dachau does not appear to be any more voluntary a relinquishment of his legal interest in the Drawing than the acts discussed in *Vineberg* and *Menzel*. Bakalar's suggestion that the power of attorney constituted a voluntary entrustment of property to his wife is a proposition that remains for him to prove. Unless he does

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5. The assumption that the Perls Galleries acted in good faith was undermined by its own conscious avoidance. As the New York Court of Appeals explained in the course of upholding the award of damages against it in favor of the good faith purchaser, the Perls Galleries was responsible for the position in which it found itself. Specifically, the Perls Galleries would not have been in that position if it had satisfied itself that it was getting good title from the art gallery from whom it purchased the artwork. Instead, the Perls testified "that to question a reputable dealer as to his title would be an 'insult.' Perhaps, [the Court of Appeals responded], but the sensitivity of the art dealer cannot serve to deprive the injured buyer of compensation for a breach which could have been avoided had the insult been risked." *Menzel*, 24 N.Y.2d at 98.

so, even if Mrs. Grunbaum "subsequently transferred the Drawing to her sister, Mathilde Lukacs, in 1938, to prevent it from falling into the hands of the Nazis," as Bakalar alleges, she could not convey valid title to the artwork. Significantly, the district judge made no finding that any entrustment for this purpose even took place.

On this score, Bakalar's amended complaint, which was filed on the eve of trial, posits two theories for what happened to the collection: 1) "that Elisabeth succeeded in hiding the [Drawing] from the Nazis prior to her deportation, and that her sister, Lukacs-Herzl, managed to take the collection with her into exile in Belgium," or 2) "that after the Grunbaum's apartment was aryanized by the Nazis in 1938, the family's library and art collection were purchased by a Viennese antiquarian bookseller who lived in the same neighborhood for approximately $ 90, and that the Viennese bookseller then either sold or gave the collection to Lukacs-Herzl at some point thereafter." (A-277.) Of course, the second alternative assumes that the property was taken by the Nazis, and Bakalar acknowledges that, even under the first theory, scholars believe it is unlikely that Lukacs-Herzl could have saved the entire collection given the circumstances under which she left Austria. Indeed, Grunbaum's heirs offered expert evidence consistent with the premise that Lukacs-Herzl could not have removed or salvaged the paintings because "she was a Jewish woman who was interned in a Belgian work camp by the Nazis until 1944 after she fled Vienna together with her husband. It is more likely that a person like Kieslinger with direct ties to the Nazis took possession of the Grunbaum collection."

(A-1273.) Significantly, neither of the two theories posited by Bakalar are predicated on the assumption that Mrs. Grunbaum voluntarily gave over Fritz Grunbaum's art collection to either Lukacs-Herzl or the Nazis who aryanized her apartment.

Nor do the district court's findings of fact support Bakalar's argument "that someone in the Grunbaum family more likely than not exported the Drawing from Vienna." The district judge merely speculated that "[t]he Drawing could have been one of the 417 drawings Elisabeth Grunbaum *possibly* exported . . . in 1938," or that the Drawing "could have been one of three drawings Lukacs's husband exported," or that "it could have been" one of the three watercolors exported by Lukacs's brother-in-law. 2008 U.S. Dist. LEXIS 66689, 2008 WL 4067335, at *8 (emphasis added). These scenarios, based on pure speculation, do not constitute findings by a preponderance of the evidence that what "could have" happened, actually did happen.

Moreover, although Bakalar now claims that there is no "direct evidence that all of the Schiele art sold by Lukacs had once belonged to Fritz Grunbaum," or that "the Drawing belonged to Fritz Grunbaum prior to or during the war," there is significant circumstantial evidence that this artwork had belonged to him. Indeed, the district judge decided the case on this premise, and it was supported by the deposition testimony of Eberhard Kornfeld, a partner at Galerie Gutekunst, and the trial testimony of Jane Kallir, the current director of the Galerie St. Etienne. Significantly, the Sotheby's Catalogue

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Description for the Drawing, February 8, 2005, which it prepared on Bakalar's behalf, listed the provenance as follows:

> Fritz Grunbaum, Vienna (until 1941)
>
> Elisabeth Grunbaum-Herzl, Vienna (widow of the above; until 1942;
>
> thence by decent)
>
> Mathilde Lukcas-Herzl (sister of the above)
>
> Gutekunst & Klipstein, Bern (on consignment from the above by
>
> 1956)
>
> Galerie St. Etienne, New York
>
> Norman Granz, New York
>
> Galerie St. Etienne, New York
>
> Acquired from the above by the present owner

(A-700.)

The admission by Sotheby's as to the initial provenance of the Drawing was confirmed by the judicial admission

regarding its provenance in Bakalar's original complaint. *See Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003). Specifically, Bakalar alleged in his complaint that:

> The Drawing has an established and documented provenance. It originally belonged to the collection Fritz Grunbaum, a well-known Vienesse cabaret performer. In 1938, the Nazis confiscated Grunbaum's residence and inventoried the contents of his art collection. Grunbaum was deported to Dachau, where he died in 1941. His wife, Elisabeth, died the following year. By all credible accounts, however, the Grunbaum art collection escaped confiscation by the Nazis, and the collection, including the Drawing, subsequently came in to the possession of Grunbaum's sister-in-law, Mathilde Lukacs-Herzl, after the war.

(A-217.) On the eve of trial, Bakalar moved to file an amended complaint, deleting his admission as to the initial provenance of the Drawing, because it was based on information he obtained from Kornfeld, who had come to this conclusion in 1998 after he learned of Fritz Grunbaum's relationship to Lukacs-Herzl. While Bakalar was apparently permitted to file an amended complaint, Kornfeld and Kallir had sufficient expertise in the field to provide competent evidence on this score. Nor is it any answer to argue, as Bakalar does here, that their opinion was based on circumstantial rather than direct evidence.

Moreover, notwithstanding the amended complaint, Bakalar's admission as to the provenance of the Drawing constitutes competent evidence that the trier of fact is free to consider, along with Bakalar's explanation for its inclusion in the original complaint.

In sum, my reading of the record suggests that there is substantial evidence to support the claim of the Grunbaum heirs that the Drawing was owned by Grunbaum and he was divested of possession and title against his will.

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 2, 2008

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

05 Civ. 3037 (WHP)

2008 U.S. Dist. LEXIS 66689

DAVID BAKALAR,

Plaintiff,

-against-

MILOS VAVRA and LEON FISCHER,

Defendants.

September 2, 2008, Decided
September 2, 2008, Filed

WILLIAM H. PAULEY III, U.S.D.J.

OPINION BY: WILLIAM H. PAULEY III

OPINION

OPINION AND ORDER

Appendix E

WILLIAM H. PAULEY III, District Judge:

Plaintiff David Bakalar ("Bakalar") brings this action seeking a declaratory judgment that he is the rightful owner of an Egon Schiele ("Schiele") drawing known as "Seated Woman with Bent Left Leg (Torso)" (the "Drawing"). Defendants Milos Vavra and Leon Fischer seek a declaratory judgment that they own the Drawing, and bring counterclaims for conversion and replevin. Having conducted a bench trial, this Court makes the following findings of fact and conclusions of law, and awards judgment to Bakalar.

FINDINGS OF FACT

I. *The Parties*

Bakalar, a Massachusetts citizen, has been collecting works of art for more than forty years. (Amended Complaint dated June 5, 2008 ("Compl.") P 16; Fifth Amended Answer dated Jun. 24, 2008 ("Ans.") P 16; Trial Transcript ("Tr.") at 43-44.) Vavra, a Czech citizen, and Fischer, a New York citizen, are heirs to the estate of Fritz Grunbaum ("Grunbaum"). (Compl. PP 20, 21; Ans. PP 20, 21; Dx. H4: Estate assignment certificate dated Oct. 31, 2003.)

II. *The Drawing*

The Drawing, which Schiele dated 1917, is one of more than 2,700 drawings he created. (Joint Pretrial Order dated Apr. 22, 2008 ("JPTO") PP VI.A.1, VI.A.2.) Because Schiele never titled the Drawing, it has been given a

number of titles as it has passed to different owners and exhibitions, including "Woman Sitting, With Left Leg Drawn Up;" "Seated Woman (Without Head);" "Woman crouching, watercolor 1917," and currently "Seated Woman with Bent Left Leg (Torso)." (Tr. at 438; Ex. 2: Galerie St. Etienne receipt dated Nov. 12, 1963 at P0080; Ex. 111: Galerie St. Etienne receipt dated Nov. 12, 1.963 at KAL0341; Ex. 84: Excerpt from Galerie Gutekunst inventory book listing works purchased on February 7 and May 22, 1956 at P0048-49.) The medium for the Drawing is black crayon and gouache, a water-based paint that is difficult to distinguish from watercolor or tempera. (Tr. at 435; Ex. 2 at P0080; JPTO P VI.A.2.)

A. *Documented Provenance*

The earliest known documentation of the Drawing's provenance dates to 1956, when the Drawing appeared in a catalog published by the Galerie Gutekunst & Klipstein in Bern, Switzerland ("Galerie Gutekunst") in connection with a Schiele exhibition. (Ex. 2 at P0080.) In September 1956, Galerie Gutekunst sold the Drawing and nineteen other Schiele works to Galerie St. Etienne, a New York gallery specializing in German and Austrian art. (Tr. at 254; Ex. 109: Galerie Gutekunst bill of sale dated Sept. 18, 1956 at KAL0112.) Galerie St. Etienne was founded by Otto Kallir, the former director of the Neue Gallery in Vienna, after he fled Austria in the late 1930s. (Tr. at 286-87, 292.)

On November 12, 1963, Galerie St. Etienne sold the Drawing to Bakalar. (JPTO P VI.A.57.) In August 2004,

Bakalar consigned the Drawing to Sotheby's to sell at its November 2004 auction of Impressionist and Modern Art in New York. (Ex. 6: Consignment agreement dated Aug. 23, 2004 signed by Bakalar and Stephane Cosman Connery; Tr. at 52, 448.) After withholding the Drawing from the 2004 auction to conduct further research into its provenance, Sotheby's proceeded to auction it in London in February 2005. (Tr. at 448, 450-51; 463-65.)

B. *Galerie Gutekunst's Purchase of the Drawing*

On February 7, 1956, Eberhard Kornfeld ("Kornfeld"), a partner at Galerie Gutekunst, purchased twenty Schiele works from Mathilde Lukacs ("Lukacs"), a woman living in Belgium, and on May 22, 1956, he purchased another twenty-six Schiele works from her. (Ex. 84: Excerpt from Galerie Gutekunst inventory book listing works purchased on February 7 and May 22, 1956 at P0048-49; Deposition of Eberhard Kornfeld dated May 25, 2007 ("Kornfeld Dep.") at 45-46, 99.) Kornfeld testified that Lukacs sent some of the works by mail and brought others personally to him in Bern, though he cannot recall the specific works Lukacs delivered personally. (Kornfeld Dep. at 128.)

Kornfeld vaguely recalls paying for the works by check, though he has no copies of cancelled checks on file. (Kornfeld Dep. at 60.) Lukacs signed one receipt in pencil acknowledging that Galerie Gutekunst paid a combined 15,100 Swiss francs for the February and May 1956 purchases. (Ex. 84: Receipt dated Apr. 24, 1956 at EK00017; Kornfeld Dep. at 34-35.) Lukacs signed the receipt at Galerie Gutekunst in Bern. (Ex. 84 at EK00017;

Kornfeld Dep. at 35.) Lukacs's name does not appear anywhere else on the receipt. (Ex. 84 at EK00017.) The back of the receipt bears a Swiss tax stamp, which was required at the time to render a receipt legally valid in Switzerland. (Kornfeld Dep. at 39-40.) The Drawing, to which Galerie Gutekunst ascribed the inventory number 36777 and the description "Woman crouching, watercolor 1917," was among the works Galerie Gutekunst acquired from Lukacs in the May 1956 tranche. (Ex. 84 at P0049; Kornfeld Dep. at 36.) Based on this documentation, the Court credits Kornfeld's testimony that he purchased the Drawing from Lukacs.

Kornfeld first became acquainted with Lukacs five years earlier, when she contacted Galerie Gutekunst about its interest in auctioning original French and Dutch pieces that she owned. (Ex. 42 at P0002.) Galerie Gutekunst auctioned those works for Lukacs in 1953. (Ex. 61: Galerie Gutekunst auction sales invoice dated Nov. 24, 1953 at P0021.) Komfeld and Lukacs exchanged several letters between 1952 and 1957; the letters discuss potential meetings and Galerie Gutekunst's interest in purchasing Lukacs's art. (Exs. 47, 54, 55, 56, 58, 63, 65, 69, 73, 75, 78, 79, 80: Letters from Lukacs to Guteknust and to Kornfeld; Exs. 62, 64, 67, 71, 81: letters from Komfeld to Lukacs.) Lukacs met with Kornfeld in Bern several times during those years, and Kornfeld visited Lukacs in her apartment in Brussels once. (Kornfeld Dep. at 81, 129.) According to Kornfeld, Lukacs appeared to live comfortably and had expressed a desire to retire in Switzerland. (Kornfeld Dep. at 81-82, 129.) In September 1955, Lukacs delivered eight Schiele works to Kornfeld which, along with the forty-six

Schieles she sold to him in 1956, comprised the entirety of Galerie Gutekunst's 1956 Schiele exhibition. (Ex. 67: Letter from Kornfeld to Lukacs dated Sept. 21, 1955 at P0033, D&M01667; Kornfeld Dep. at 38, 42.)

Kornfeld did not ask Lukacs for any documentation confirming that she owned the Schieles. (Kornfeld Dep. at 127.) Kornfeld testified that he did not know anything about the location or ownership of the Drawing prior to purchasing it. (Kornfeld Dep. at 111.) Komfeld knew that Lukacs had emigrated to Belgium from Vienna. (Kornfeld Dep. at 82.) When he asked Lukacs where she acquired the Schieles, she told him they were "an old Viennese family possession," and he did not inquire further. (Kornfeld Dep. at 112.) Kornfeld testified that at that time, he did not know who Grunbaum was, let alone that Lukacs was related to him. (Kornfeld Dep. at 110.)

C. *Bakalar's Purchase of the Drawing*

Bakalar paid Galerie St. Etienne $ 3,300 for the Drawing, which he purchased along with another Schiele for a combined sum of $ 7,100. (Ex. 111 at KAL0341; Ex: 108: Undated Galerie St. Etienne inventory card at KAL0103.) He paid for the drawings in part by returning two lithographs by Kaethe Kollwitz ("Kollwitz") that he had previously purchased from Galerie St. Etienne and in part by tendering $ 4,300 in cash. (Ex. 111 at KAL0341; Tr. at 258-59.) Galerie St. Etienne valued the Kollwitz lithographs at $ 2,500 and $ 300; Galerie St. Etienne's records indicate that it had sold the $ 2,500 lithograph to Bakalar in 1961 for the same price. (Tr. at 323.) On

November 20, 1963, Galerie St. Etienne sent Bakalar written confirmation that it had received two checks from him covering the $ 4,300 balance in full. (Ex 163: Letter from Otto Kallir to Bakalar dated Nov. 20, 1963 at KAL0342.)

In 1963, Bakalar was a novice art collector who was unfamiliar with Schiele and had never heard of Grunbaum or Kornfeld. (Tr. at 46, 49-50.) Galerie St. Etienne did not include a certificate of provenance or authenticity with the Drawing, but according to its current director, Jane Kallir, it was not the practice to provide such documentation at the time. (Tr. at 50-51, 259.)

III. *Fritz Grunbaum and the Drawing*

A. *The Grunbaums*

Grunbaum was a well-known Jewish cabaret performer living in Vienna in the late 1930s, who maintained a large art collection that included a number of works by Schiele. (JPTO PP VI.A.3, VI.A.4.) Grunbaum was arrested on March 20, 1938, eight days after the Nazis annexed Austria (the "Anschluss"), and was held in concentration camps until his death on January 14, 1941 at Dachau. (JPTO PP VI.A.8, VI.A.9.) Grunbaum was survived by his wife, Elisabeth Grunbaum, who was arrested by the Nazis on October 5, 1942 and died shortly Grunbaum and Lukacs were sisters. (JPTO PP VI.A.20; Tr. at 642-43.) In addition to Lukacs, thereafter at a concentration camp in Minsk. (JPTO PP VI.A.10, VI.A.30, VI.A.32.) Elisabeth Elisabeth Grunbaum was survived by three other siblings. (JPTO P VI.A.33.)

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B. *Grunbaum's Schiele Collection After the Anschluss*

On April 26, 1938, the Nazis began forcing Jews living in the Nazi Reich who owned more than 5,000 Reichsmarks ("RM") in personal property to declare their assets to the government. (JPTO P VI.A.11.) The Nazis specifically required that art collections be inventoried and assessed. (Ex. N6 at DBM4527.) On July 20, 1938, Franz Kieslinger, an appraiser for the Nazis, appraised Grunbaum's art collection ("the Kieslinger Inventory"). (JPTO P VI.A.12; Ex. 20: Kieslinger Inventory dated July 20, 1938 at D&M0017-18.) According to the Kieslinger Inventory, Grunbaum owned eighty-one Schiele works at the time, including fifty-five large, colored drawings, twenty pencil drawings, five oil paintings and one print. (JPTO PP VI.A.14-16; Ex. 20 at D&M0017-18.) Only the oil paintings are identified by title. (JPTO PP VI.A.15-16; Ex. 20 at D&M0017-18.) The Kieslinger Inventory valued Grunbaum's total art collection, which consisted of 449 works, at 5,791 RM. (JPTO P VI.A.17.) On August 1, 1938, Elisabeth Grunbaum, who had received a power of attorney from Grunbaum after his arrest, signed a property declaration for Grunbaum that included artwork valued at 5,791 RM. (JPTO P VI. A.18.)

On September 8, 1938, a request prepared for an export permit bearing the name Schenker & Co., A.G. ("Schenker"), a shipping and storage company in Vienna, identified Elisabeth Grunbaum as a sender of 417 untitled works of art. (JPTO P VI.A.19; Ex. 25: Export permit application by Schenker dated Sept. 8, 1938 at DBM6081, P823.) The export permit does not include any custom stamp indicating the date and exact place in which Grunbaum's property

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On June 9, 1941, Elisabeth Grunbaum signed Grunbaum's death certificate, crossed the Austrian border. (Ex. 25 at DBM6080,. P822; Tr. at 766, 775.) identifying herself as his heiress and stating that "there is no estate . . . [and] in the absence of an estate, there are no estate-related proceedings." (JPTO PP VI.A.28-29.)

C. *Lukacs and Other Grunbaum Family Members After the Anschluss*

On August 12, 1938, Lukacs and her husband Sigmund Lukacs fled Vienna and moved to Belgium. (JPTO PP VI.A.22, VI.A.23.) Prior to emigrating, Sigmund Lukacs prepared an export permit application through Schenker. (Ex. 158: Export permit application for Sigmund Lukacs dated June 27, 1938.) The permit identifies three drawings, three watercolor paintings and eight graphic art pieces, as well as sixteen other works of art. (Ex. 158 at 2, 7.[1]) Unlike Grunbaum's export permit, Sigmund Lukacs's export permit includes a page with custom stamps, which indicates that the objects were shipped by rail on August 12, 1938 and passed through Austrian customs on August 14, 1938. (Ex. 158 at 4, 11; Tr. at 755-56.)

Berthold Reiss, a Vienna resident and husband of another of Elisabeth Grunbaum's sisters, also prepared an export permit prior to leaving Austria in 1939, with Schenker designated as the shipper. (Ex. 160: Export

1. Because Exhibits 158 and 160 do not include Bates-stamped pages, citations refer to the page numbers in those documents' sequential page order.

permit application of Berthold Reis dated Sept. 16, 1938 at 2, 6.) Berthold Reiss and his wife fled Austria, and their declared property, which included three watercolor paintings and sixteen graphic art pieces, passed successfully through Austrian customs on January 27, 1939. (Ex. 160 at 4; Tr. at 756.)

IV. *Evidence Establishing Grunbaum's Prior Ownership of the Drawing*

Among the Schieles that Kornfeld sold to Galerie St. Etienne in September 1956 was an oil painting titled "Dead City." (Kornfeld Dep. at 131; Ex. 84 at P0048-49; Ex. 109 at KAL0112.) Of the fifty-four works in Galeria Gutekunst's 1956 Schiele catalogue, "Dead City" was the only one that listed previous owners, one of whom as Grunbaum. (Ex. 2) Kornfeld include a provenance for '"Dead City" because he found one in a 1930 catalogue raisonne[2] of Schiele oil paintings produced by Otto Kallir. (Kornfeld Dep. at 121-22) Kornfeld never spoke with Otto Kallir about the provenance of "Dead City" or any of the other works in the Kornfeld catalog. (Kornfeld Dep. at 122-23.)

In early 1998, the New York County district attorney seized "Dead City" from an exhibition at the Museum Art after Rita Reif, a New York resident claiming to be Grunbaum's heir, asserted in a lawsuit that the painting had

2. A "catalogue raisonne" is a comprehensive catalog of artworks by one artist.

been looted by the Nazis.[3] (Tr. at 272, 494.) Upon hearing of the seizure, Galerie St. Etienne contacted Kornfeld and asked him for the source of Galerie Gutekunst's 1956 Schiele exhibition. (Tr. at 272-73.) Kornfeld informed Galerie St. Etienne that he purchased the works from Lukacs. (Tr. at 273, 337.) Shortly thereafter, Austrian newspapers investigating the story of the "Dead City" seizure in New York reported the discovery of Lukacs's relation to Grunbaum by a Viennese municipal archivist. (Tr. at 272-76.)

Once Jane Kallir learned that Kornfeld had purchased the Schiele works from Lukacs and that Lukacs was Grunbaum's sister-in-law, Kallir compared the descriptions in Galerie Gutekunst's 1956 catalog to the descriptions in a 1925 unillustrated Schiele catalog published by a gallery in Vienna which included Grunbaum in the provenance of several works (the "1925 Catalog"). (Tr. 333-37; [4]). Jane Kallir testified that some of the other Schiele works that Lukacs had sold appeared to match descriptions of Schiele works in the 1925 Catalog that listed Grunbaum as a previous owner. (Tr. at 336-337.) She concluded from this research and from her conversations with Kornfeld that Grunbaum was a previous owner of the Schieles in Galerie Gutekunst's 1956 catalog. (Tr. at 337.)

In August 2004, Sotheby's contacted Jane Kallir and Kornfeld's gallery in Switzerland as part of its provenance

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3. The New York State Court of Appeals subsequently quashed the district attorney's seizure. *See In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art,* 93 N.Y.2d 729, 719 N.E.2d 897, 697 N.Y.S.2d 538 (N.Y. 1999).

research in preparation for its November 2004 auction of the Drawing. (Tr. at 445-449.) Both Jane Kallir and Kornfeld's gallery informed Sotheby's that they believed Grunbaum owned the Drawing before Lukacs did. (Tr. at 447-48.) Sotheby's then consulted with two independent art researchers, who both verified that Kornfeld had purchased the Drawings from Lukacs. (Tr. at 455-461.) Sotheby's also spoke with two representatives of Ruth Rozniak, another potential Grunbaum heir, who both told Sotheby's that they also believed Lukacs sold the Drawing to Kornfeld, and that they did not intend to challenge title. (Tr. at 463-64, 472-75.) Sotheby's was satisfied that the Drawing had remained in the Grunbaum family without having been looted by the Nazis, and proceeded to auction it in February 2005. (Tr. at 463-65; Ex. 90: description of the Drawing in Sotheby's auction catalog dated Feb. 8, 2005 at STHBY000102.)

CONCLUSIONS OF LAW

I. *Bakalar's Claim to Title*

"The [Uniform Commercial Code] is applicable to art as to other chattels." *Interested Lloyd's Underwriters v. Ross,* No. 04 Civ. 4381 (RWS), 2005 U.S. Dist. LEXIS 25471, 2005 WL 2840330, at *4 n.1 (S.D.N.Y. Oct. 28, 2005). "A purchaser of goods acquires all title which his transferor had or had power to transfer . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value." N.Y.U.C.C. § 2-403(1). *See Tavoulareas v. Steven Kessler Motor Cars, Inc.*, 259 A.D.2d 262, 263, 686 N.Y.S.2d 17 (N.Y. App. Div. 1999)

(good-faith purchaser of automobile receives voidable title and has right to convey it); *Atlas Auto Rental Corp. v. Weisberg,* 54 Misc. 2d 168, 281 N.Y.S. 2d 400, 404-405 (N.Y. Civ. Ct. 1967) ("[D]efendant's claim to good title must founder on considerations of his own status. If he acquired the property from one who had a voidable title, he must show that he was a good faith purchaser for value.") (internal quotation marks omitted). A purchaser acts in good faith if he acts with "honesty in fact in the conduct or transaction concerned." N.Y.U.C.C. § 1-201(19). "A person gives 'value' for rights if he acquires them . . . generally, in return for any consideration sufficient to support a simple contract." N.Y.U.C.C. § 1-201(44)(d).

Bakalar purchased the Drawing and another Schiele work from Galerie St. Etienne in exchange for $ 4,300 in cash and the return of two Kollwitz works. (Ex. 111 at KAL0341.) Galerie St. Etienne's records confirm it received two checks from Bakalar totaling $ 4,300, and there is no evidence that Galerie St. Etienne undervalued the Kollwitz works in accepting them as partial consideration. (Ex. 163 at KAL0342; Tr. at 323.) Bakalar had just started to collect art when he purchased the Drawing, and had never heard of Schiele, Grunbaum or Kornfeld; there is no evidence contradicting those assertions. (Tr. at 46, 49-50, 63, 72.) Although Galerie St. Etienne did not include a certificate of provenance or authenticity with the Drawing, there was no evidence that Bakalar should have expected to receive one at that time. (Tr. at 50-51, 259.) Galerie St. Etienne was a seller with voidable title to the Drawing, having acquired it from Galerie Gutekunst in 1956. (Tr. at 254; Ex. 109 at

KAL0112.) Accordingly, Bakalar validly acquired title to the Drawing if Defendants cannot show that the property was unlawfully taken from their predecessors.

II. *Defendants' Counterclaims*

Defendants' counterclaims require establishing that they have superior ownership rights in the Drawing to Bakalar. To do so, Defendants must show that the Drawing was unlawfully taken from Grunbaum or his estate, and that Kornfeld's acquisition of it was therefore the product of an illegitimate transfer.

A. *Choice of Law*

Plaintiff argues Swiss law applies to Defendants' counterclaims to the Drawing; Defendants argue Austrian law applies. "New York's choice of law dictates that 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." *Kunstsammlungen Zu Weimar v. Elicofon,* 536 F. Supp. 829, 846 (E.D.N.Y. 1981); *see also Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.,* No. 98 Civ. 7664 (KMW), 1999 U.S. Dist. LEXIS 13257, 1999 WL 673347, at *4-5 (S.D.N.Y. Aug. 30, 1999) (applying the law of the country where "title passed, if at all" to plaintiff's claim seeking return of tenth-century manuscript). Prior to trial, this Court determined that the substantive law of Switzerland applies to Defendants' counterclaims, because their claims of title hinge on the propriety of Kornfeld's initial acquisition of the Drawing in Bern, the

first transfer of the Drawing that either party alleges or has evidence to support. *See Bakalar v. Vavra,* 550 F. Supp. 2d 548, 550-51 (S.D.N.Y. 2008); *Bakalar v. Vavra,* 05 Civ. 3037 (WHP), Order dated June 18, 2008 (Docket No. 195) (denying reconsideration). This Court based this determination on Kornfeld's deposition testimony that Lukacs signed an invoice for the sale of the Drawings in Switzerland, but left open the possibility that if facts arising at trial indicated a potentially legitimate transfer may have occurred elsewhere, it would revisit the issue. Because no such evidence was introduced at trial, this Court adheres to its earlier holding that Swiss law applies.

B. *Acquisition of Property Under Swiss Law*

A district court interpreting foreign law may "consider any relevant material or source . . . whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. Although this Court generally credits both parties' experts on Swiss law, it has relied on Bakalar's Swiss law expert to a greater extent, since his report provided greater detail and because he testified during trial.[4]

Under Swiss law, a person who acquires and takes possession of an object in good faith becomes the owner,

4. Upon this Court's inquiry, Bakalar's Swiss law expert disclosed for the first time during trial that he represents Kornfeld in a tax proceeding in Switzerland. (Tr. at 237.) However, having read his expert reports and listened closely to his testimony, this Court finds that his potential conflict of interest does not undermine his credibility on issues of Swiss law.

even if the seller was not entitled or authorized to transfer ownership. (Ex. 15: Expert opinion on Swiss law by Alexander Jolles dated Oct. 5, 2007 at P00658; Ex. P6: Expert opinion on Swiss law by Peter Mosimann and Markus Mueller-Chen dated Sept. 27, 2007 at DBM04631; Tr. at 184-85.) A purchaser acts in good faith if he sincerely believes that the seller was authorized to transfer ownership, and the purchaser may presume from the seller's possession of the object that the seller has the authority to sell it. (Ex. 15 at P00661; Tr. at 185.) The purchaser's good faith is presumed, and a claimant to the object bears the burden of establishing otherwise by proving either (1) the purchaser's actual knowledge that the seller lacked authority to sell the object, or (2) that the purchaser failed to exercise due diligence before purchasing the object. (Ex. 15 at P00661; Ex. P6 at DBM04631; Tr. at 194-195.) Even if the purchaser fails to exercise due diligence, the burden remains on the claimant to show that the required investigation would likely have revealed the seller's lack of authority to sell the object. (Ex. 15 at P00668.) The relevant exception to this rule is that if the object had been lost or stolen, the owner who previously lost the object retains the right to reclaim the object for five years. (Ex. 15 at P00659; Tr. at 199.)

Because Lukacs possessed the Drawing and the other Schiele works she sold to Kornfeld in 1956, Kornfeld was entitled to presume that she owned them. To the extent that the Drawing may have been lost or stolen at some point prior to Kornfeld's purchase, any absolute claims to the property expired five years later, in 1961. There is no evidence that Kornfeld had actual knowledge that

Lukacs lacked authority to sell the Drawing. Therefore, Kornfeld was only required to exercise due diligence in purchasing it.

Under Swiss due diligence standards, a purchaser of an object has no general duty to inquire about a seller's authority to sell the object, or to inquire about the object's origins, unless suspicious circumstances exist. (Ex. 15 at P00664; Ex. P6 at DBM04632; Tr. at 189.) Suspicious circumstances may exist if (1) the seller offers to sell the object well below its market value, (2) the seller has a notoriously bad reputation, (3) the seller tries to sell the object unusually quickly, (4) there are marks on the object indicating the likelihood of another owner, or (5) the seller makes an unusual demand for cash. (Ex. 15 at P00667; Ex. P6 at DBM04632-33; Tr. at 193.) Other circumstances that a purchaser should generally take into account include the seller's financial situation and personality, the place of the delivery, and the existence of documentation of sale, certificates of origin or appraisals. (Ex. P6 at DBM04632-33.) If any suspicious circumstances exist, the purchaser must seek a plausible answer from seller as to the object's origins and the seller's authority to sell it; once the seller gives a plausible explanation, no further investigation is required. (Ex. 15 at P00665; Ex. P6 at DBM04631; Tr. at 194-195.) The knowledge of the purchaser and the knowledge reasonably available at the time of purchase determine whether the purchaser should have exercised greater diligence; the subsequent discovery of suspicious circumstances or the seller's lack of authority is irrelevant to the purchaser's good faith at the time of purchase. (Ex. 15 at P00662, P00666; Tr. at 197-98.)

Appendix E

When Kornfeld purchased the Drawing and the other Schieles from Lukacs in 1956, he had known Lukacs for five years, had met her several times, and had auctioned several of her works without incident in 1953. (Kornfeld Dep. at 81-82, 129; 149.) She appeared to live a comfortable lifestyle, and there was no evidence that she was acting with any unusual haste. (Kornfeld Dep. at 81-82, 129.) Kornfeld asked her where her Schiele works came from, and her response--that they were an old Viennese family possession--was plausible, given that she had lived in Austria and seemed relatively well-off. That she wanted to sell the works to help finance her retirement home in Switzerland should not have been a cause for suspicion either. There is no evidence that she made an atypical demand for cash, and in any event, Kornfeld recalls paying for the works by check. (Kornfeld Dep. at 60.) Although Lukacs did not provide any documentation that she owned the works or that they were authentic, there is no evidence that such documentation was customary for an art sale at that time, and Swiss law did not require Kornfeld to demand them, especially in the absence of suspicious circumstances. Although one of the fifty-four Schieles Lukacs sold to Kornfeld in 1955 and 1956 was "Dead City," and Kornfeld knew that work to include a person named Fritz Grunbaum in the provenance, he testified that he had never heard of Grunbaum, and had no reason for him to believe that Lukacs's other Schiele works also came from Grunbaum. (Kornfeld Dep. at 110.)

Even assuming that the situation somehow required Kornfeld to conduct a more comprehensive investigation into the Drawing's provenance, it would have been highly

unlikely that he would have been able to conclude that the Nazis, or anyone else, had taken the Drawing from Grunbaum. After more than two years of discovery in connection with this litigation and the benefit of archival research unavailable in 1956, Defendants have not produced any concrete evidence that the Nazis looted the Drawing or that it was otherwise taken from Grunbaum. The Drawing could have been one of the 417 Drawings Elisabeth Grunbaum possibly exported through Schenker in 1938.[5] (JPTO P VI.A.19; Ex. 25; Tr. at 766, 775.) Alternatively, the Drawing could have been one of the three drawings Lukacs's husband exported through Schenker--or even one of the three watercolors he exported, since the Drawing's gouache medium is often confused for watercolor. (Ex. 158; Tr. at 435.) Lukacs's brother-in-law Berthold Reiss also exported three watercolors in 1938, and any of those could have been the Drawing. (Ex. 160.) Nor did the research by Sotheby's into the Drawing's provenance in 2004, which included consultations with two independent art researchers and a genealogist working for a potential Grunbaum heir, turn up any evidence that the Nazis stole it. (Tr. at 455-64, 472-75.) Accordingly, there is no reason to think a more extensive inquiry by Kornfeld over fifty years ago would have led him to any different conclusion.

Because Kornfeld purchased the Drawing in good faith, he acquired good title to it and had the authority to

5. Because the trial did not include any expert testimony on the degree to which the absence of official markings on export permits is a reliable indication that items were not exported, this Court cannot conclusively determine whether Elisabeth Grunbaum ever exported her declared property.

pass that title to Galerie St. Etienne. Thus, when Bakalar acquired the Drawing in good faith for value in 1963, title to the Drawing validly passed to him and he gained ownership to it with all accompanying property rights.

III. *Laches*

Because this Court finds that Bakalar holds valid title to the Drawing, it need not reach his affirmative defense of laches.

CONCLUSION

For the foregoing reasons, this Court awards judgment to Bakalar, concluding that he holds lawful title to the Drawing. Accordingly, Vavra and Fischer's counterclaims for declaratory judgment, conversion and replevin are denied. The parties are directed to submit a proposed judgment by September 12, 2008. The foregoing constitutes this Court's findings of fact and conclusions of law as required by Fed. R. Civ. P. 52. The Clerk of Court is directed to terminate all motions pending as of this date and mark the case closed.

Dated: September 2, 2008

New York, New York

SO ORDERED:

/s/_____
WILLIAM H. PAULEY III
U.S.D.J.

APPENDIX F — ORDER DENYING PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 21, 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO: 11-4042

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of December, two thousand twelve,

DAVID BAKALAR,

Plaintiff-Counter Defendant-Third Party-Defendant-Appellee,

v.

SOTHEBY'S INC.,

Defendant,

SCHENKER, INC., NEUE GALERIE, OBERLIN COLLEGE,

Counter Defendants,

MILOS VAVRA, LEON FISCHER,

Defendants-Counter Claimant-Appellants.

Appendix F

ORDER

Appellants Leon Fischer and Milos Vavra 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:

/s/_____
Catherine O'Hagan Wolfe, Clerk

APPENDIX G — AUSTRIAN CIVIL CODES

ABGB (Austrian Civil Code) § 128

Provisions for the case where the heirs are unknown, or where they do not submit a declaration of acceptance of inheritance § 128.

If the heirs in an estate matter are completely unknown to the court, or if the known heirs make no use of their entitlement within the determined deadline, regardless of the effected notification, or if the inheritance share due the defaulter remains unclaimed according to § 120., the court will have to appoint an estate curator (§ 78) and summon the unknown heirs officially by means of an edict in accordance with form no. III with the warning that they will have to come forward within six months and submit their declaration of acceptance of inheritance, if this is not the case negotiate the estate with those persons who declared that they accept the inheritance and proved their entitlement, and devolved it in accordance with their claims, the unclaimed part of the estate, however, or if nobody had made a declaration of acceptance of inheritance, the whole estate would be collected by the State as heirless. The claims of those heirs who might come forward at a later point in time, shall remain reserved so long as they are not terminated by statute of limitation.

ABGB (Austrian Civil Code) § 152

(1) The court commissioner has to take over documents about testamentary dispositions (last wills, codicils) and their revocations, contracts of legacy, inheritance

and compulsory portion, waivers of inheritance and compulsory portion contracts and their annulment or other declarations upon the accrual of the death and quote in a takeover protocol all the substantial circumstances required for the evaluation of genuineness and validity, as for example, if the writ was sealed or if it had external defects.

(2) A certified copy of the document has to be included in the estate file. The day of including it in the file has to be annotated on the copy. Uncertified copies are to be delivered to the parties and those persons who, according to the state of the file, would qualify as heirs by virtue of the law.

(3) The original has to be kept with the court, provided that nothing different results from § 111 paragraph NO. 2.

(4) If they assert that a verbal statement of the last will is available, the court commissioner has to question the witnesses regarding the contents of the statement and the circumstances which their validity depends on and state this in the takeover protocol.

ABGB (Austrian Civil Code) § 158

(1) If no heirs are known or if, according to the status of the file, there are indications that besides the known persons other persons are coming into consideration as heirs or mandatory heirs, the court commissioner must request them by public notice to file their claims within six months.

(2) If this deadline will be missed, the estate can be devolved upon the known heirs without regard to the claims of the unknown heirs or mandatory heirs, or it can be declared heirsless. This legal consequence must be pointed out in the public notice.

ABGB (Austrian Civil Code) § 531

The embodiment of the rights and liabilities of a deceased person, provided that they are not solely based on personal relations, shall be called Verlassenschaft or Nachlass [estate].

ABGB (Austrian Civil Code) § 532

The exclusive right to take possession of the whole estate or a part of it specified in relation to the whole (e.g. half, a third) is called Erbrecht [right to succeed]. It is a real right which shall be effective against anyone who intends to arrogate the estate. The person who owns the right to succeed shall be called Erbe [successor] and the estate in respect to the successor shall be called Erbschaft [legacy].

ABGB (Austrian Civil Code) § 551

Waiver of title to inheritance
Whoever may dispose over a legal title to inheritance shall also be entitled to waive this right in advance by establishing a contract with the testator. In order to become valid, the contract shall require a notarial deed or authentication by court records. Unless otherwise agreed, such waiver shall also apply to the descendants.

Appendix G

ABGB (Austrian Civil Code) § 730

(1) Legal successors shall be the spouse and the persons who are related to the testator in next line of descent.

(2) The descent must be certain or must at least have been legally enforced during the life of the testator and the persons arranging for the relationship. In case of unborn babies determination or legal enforcement of the descent within a year after the birth shall be enough.

ABGB (Austrian Civil Code) § 731

(1) The first line shall include those who unite under the testator as their stirps, this means: their children and their descendants.

(4) From the fourth line only the testator's first great-grandparents shall be appointed.

(3) The third line shall include the grand parents including the siblings of the parents and their descendants.

(2) The second lines shall include the testator's father and mother including those who unite with them under the father and the mother, this means: their siblings and their descendants.

ABGB (Austrian Civil Code) § 797

No person may take possession of an estate without authorization to do so.

Appendix G

The right to succeed must be heard in court and the transfer of title of the estate which is the transfer into legal possession must be effected by the same.

ABGB (Austrian Civil Code) § 828

To the extent as approved by all partners, they shall present one person only and shall have the right to act in respect to the joint affair at their discretion. If they disagree, no partner may make a change to the joint affair which would result in the attribution of the share of the other.

ABGB (Austrian Civil Code) § 829

Every partner shall be the whole owner of his share. To the extent to which they do not infringe the rights of their partners, they may pledge, bequeath or transfer other wise the said share or the usage of it.

ABGB (Austrian Civil Code) § 1478

When the acquisition of an object through the passing of time and proprietary possession (definition of acquisitive prescription) occurs at the same time as an objection of limitation (expiry of the period for raising claims), then acquisition of title is assumed at the moment at which the legal requirements necessary for each of the two premises for the act are fulfilled for at least one of these elements.

The statutory limitation also applies after 30 years if a legal claim (objection that could have been exercised) is not enforced.

APPENDIX H — HOLOCAUST VICTIMS REDRESS ACT

PL 105–158 (S 1564)
February 13, 1998
HOLOCAUST VICTIMS REDRESS ACT

An Act to provide redress for inadequate restitution of assets seized by the United States Government during World War II which belonged to victims of the Holocaust, and for other purposes.

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

Sec. 201. FINDINGS.

Congress finds as follows:

(1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.

(2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions

in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

Sec. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, 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.

Approved February 13, 1998.