UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Alan PHILIPP, Gerald G. STIEBEL, and Jed R. LEIBER, Plaintiffs, v. FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSISCHER KULTURBESITZ, Defendants.	)	Case No. 15-cv-00266 (CKK)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

May 11, 2016

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Plaintiffs Alan Philipp ("Philipp"), Gerald G. Stiebel ("Stiebel"), and Jed R. Leiber ("Leiber," together with Philipp and Stiebel, the "Plaintiffs"), by their undersigned counsel, respectfully oppose the Motion to Dismiss filed on March 11, 2016 (the "Motion") by Defendants the Federal Republic of Germany ("Germany") and the Stiftung Preussischer Kulturbesitz ("SPK," together with Germany the "Defendants"). Germany has a unique responsibility to victims of the Holocaust. The Motion is a complete abdication of that responsibility, and presents no sound reason not to allow this case to proceed.

INTRODUCTION

The Nazi death camps did not spring fully formed into history. Indeed, the Holocaust did not begin in 1942 when the Nazis—including those involved in the facts of this case—conspired at the Wannsee Conference to plan the industrialized murder of every Jew in Europe. It did not begin when German troops crossed into Poland on September 1, 1939 and started World War II. It did not even begin when Germans smashed the homes and businesses of Jews on November 9, 1938—the infamous Kristallnacht. The Holocaust began on January 30, 1933, when Adolf Hitler became Chancellor of Germany, and the institutionalized persecution of German Jews commenced immediately. Plaintiffs' ancestors were swept up in that storm. From the moment the Nazis took power, the collection of art dealers that each owned part of the iconic collection of Medieval devotional art and reliquaries known as the Welfenschatz, or Guelph Treasure, were in the sights of officials stretching all the way to Hitler. And when the levers of power began to pivot towards the Welfenschatz—in 1933—those Jewish art dealers had no chance.

Defendants presently seek the jurisdictional dismissal (or the parallel avoidance of substance, their premature and unwarranted statute of limitations defense) of Plaintiffs' case for a simple reason: this case can only be litigated and won by endorsing the coercive and rapacious

acquisition of the art in question in this case by Hermann Goering. That is to say, Defendants could only prevail in this case by endeavoring to prove substantively the validity of a scheme hatched in a letter to Hitler, prosecuted with the knowledge and support of Goering, to take the Welfenschatz from Plaintiffs' ancestors. Germany's international reputation could never recover from such an endeavor, and Defendants are understandably keen to avoid it if they can. Plaintiffs respectfully submit that the Court should not indulge them, because the legal arguments they offer here are insufficient reason to do so.

Plaintiffs are the successors to those men whose world and professional lifeblood was taken by Germany—a Defendant in this case. They come before this Court because Congress conferred jurisdiction over claims such as the Plaintiffs' pursuant to the Foreign Sovereign Immunities Act (the "FSIA"). The FSIA identifies those circumstances in which foreign sovereigns (Germany) and their instrumentalities (the SPK) cannot claim sovereign immunity and are subject to this Court's jurisdiction under what are known as the expropriation and commercial activity exceptions to sovereign immunity. In this case, the FSIA confers jurisdiction over Plaintiffs' claims arising out of their allegations that the Welfenschatz was conveyed under duress in 1935 to a straw man for the Prussian government at the bidding of Hermann Goering. The reasons that the FSIA applies here are straightforward. Any transaction involving Jews in Germany 1935 carries a legal presumption of coercion and invalidity, a presumption that was imposed by the victorious Allies that had to defeat Defendant Germany in a war it had started, the worst that the world has ever seen. After the war, the Allies established principles of international law that recognized Germany's genocide and disregard for property for what it was. Jewish victims of persecution like the Plaintiffs' ancestors are victims of takings in property in violation of international law. As a result, and because the Defendants are

engaged in commercial activity in the United States, this case presents precisely the category of claims over which § 1605(a)(3) of the FSIA, the expropriation exception, creates jurisdiction.

Against this, Defendants take a position that is almost too remarkable to believe. Germany, the instigator of the Holocaust and World War II, contends that the persecution and expropriation of property from its Jewish residents were a sufficiently internal affair so as not to be a violation of international law. In addition to the callousness that this argument reflects, it is a contention that has been rejected by every court thus far to consider claims to Nazi-looted art brought under the expropriation exception. Defendants offer a variety of excuses for this assertion, but they all boil down to this: Germany believes that it has done enough when it comes to Nazi-looted art. As the First Amended Complaint ("FAC") makes clear, nothing should be further from the truth. The obvious absurdity is Germany's argument that while the actions of Nazi allies like Hungary against their own citizens are not immune from review, Germany's destruction of its own Jewish population (including Plaintiffs' ancestors) was somehow a purely internal affair that should not be subject to jurisdiction.

In the alternative, the FSIA provides jurisdiction over Plaintiffs' claim for unjust enrichment pursuant to § 1605(a)(2), the commercial activity exception. If Defendants' characterization of the 1935 transaction were to carry the day, then it would be, in their own words, a purely commercial event. Defendants' actions in Germany, and their actions in the United States, would meet the elements of that exception to sovereign immunity.

Despite Defendants' various arguments, there are no legal, prudential, or equitable impediments to Plaintiffs' claims. Plaintiffs' case is squarely in line with the foreign policy of the United States and does not provide any basis to constrain this Court's jurisdiction. There has been no adjudication to date in Germany that is entitled any comity or deference. There is,

indeed, no administrative remedy available that Plaintiffs could exhaust, but even if there were they are not required to do so before bringing this action. Defendants disingenuously refer to the Advisory Commission created by Germany in 2003 that presided over an unsuccessful mediation as "the chance [for Plaintiffs] to make their claim." Motion at p. 35. The Advisory Commission is a non-binding body that renders recommendations to German museums, nothing more. Defendants well know this and proclaim as much routinely.

Not only is the Advisory Commission a mere consultative body, it is also a sham. In thirteen years it has presided over a paltry number of disputes relative to the scale of Nazi-looted art in German museums, and has established in recent years that it exists only to create a pretense of offering fair and just solutions to victims of Nazi plunder and their heirs. In the Plaintiffs' case, it heard compelling evidence of the fractional value that the 1935 transaction supposedly gave to the Plaintiffs' ancestors—to which they were not allowed free access—established by an expert appraisal by Sotheby's. It saw the documents in which Goering and Hitler's henchmen discussed explicitly the small portion of the Welfenschatz's actual worth that the transaction paid. It heard nothing in response from Defendants, yet it waved away Plaintiffs' claim in a conclusory recommendation. Since then, the Advisory Commission has continued to embarrass itself with recommendations that make pronouncements such as the suggestion that conditions for Jewish bankers in 1935 in Germany were not really all that bad, a contention that would come as a great surprise to Germany's Jews of the time.

This deficiency underscores why the Defendants' *forum non conveniens* argument fails to persuade. Germany is not an adequate forum. Its courts are hostile to restitution claims and would not hear this case. Even if, as Defendants self-servingly suggest, they would not themselves raise the statute of limitations in Germany, it would not mean that Plaintiffs would

find a viable forum there. Substantively, Germany has proven a complete inability to address substantively the question of Nazi looted art. Despite the adoption of the 1998 Washington Principles on Nazi-Stolen Art, the 1999 "*Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz" vom 9. Dezember 1999*" (the "Collective Declaration") that committed Germany's federal government and 16 states to the Washington Principles, and the creation of the Advisory Commission itself, Germany's national level restitution policies are completely incoherent. Even more tragically, given Germany's admirable confrontation of its past in other respects, when it comes to art, Germany is more at home in the company of the countries of Eastern Europe that barely acknowledge the historical reality at all (as the Motion concedes). The "progress" that Defendants tout is taken out of context and is out of date. In short, Germany is hurtling in the wrong direction when it comes to Nazi-looted art, tragically ironic given Germany's sole responsibility for the issue. The Defendants' gloating in the Motion about the recommendation of the useless and compromised Advisory Commission that they themselves control only proves the point.

Further, even if Germany were an adequate alternate forum, Defendants have not met their burden to meet the public and private factors necessary to disturb Plaintiffs' choice of forum. Two Plaintiffs are United States citizens. There is no meaningful difference in the burden that the translation of documents imposes; whether the case is there or here it will be litigated in a language that is foreign to one side of the case. This Court is entirely competent to consider the application of German law.

Lastly, Plaintiffs' claims are timely. Defendants' assertion of the statute of limitations flouts two decades of international commitments by dozens of nations around the world to reach

the merits of Nazi-looted art claims. It is sad that Germany, responsible above all others in the first instance, is the first such nation in history to plead the passage of time as a defense to its art looting war crimes. Legally, the fact-intensive argument advanced by Defendants is wholly premature on a motion to dismiss. It is also wrong as a matter of actual fact. Germany itself, through the adoption of its various policies, has agreed to hold disputed objects like the Welfenschatz in trust pending any resolution. It did not break that promise until 2014. Furthermore, the documents that demonstrate the high level conspiracy involving Goering were only recently available from their archival sources.

FACTS

The Welfenschatz consists of several dozen medieval reliquary and devotional objects that were originally housed in the *Braunschweiger Dom* (Brunswick Cathedral) in Germany. FAC at ¶ 30. Originally comprised of eighty-two objects, the portion of Welfenschatz that is now wrongfully in the possession of the SPK consists of forty-two remaining pieces. *Id.* at ¶ 31. Among them are the famous Guelph Cross (*Welfenkreuz*); Portable Altar of Eilbertus (*Tragaltar des Eilbertus*); the Head Reliquary of St. Blasius (*Kopfreliquiar des Hlg. Blasius*); and the crown jewel of them all, the Chapel Reliquary (*Kuppelreliquiar*) that is featured on commercial articles sold around the world, including the United States. *Id.* at ¶ 26, 31. The Welfenschatz occupies a unique position in German history and culture, harkening back to the early days of the Holy Roman Empire and conceptions of German national identity and power. *Id.* at ¶ 32.

In or around 1929, the Consortium of the Plaintiffs' ancestors and predecessors came together. *Id.* at ¶ 34. It consisted of three art dealer firms in Frankfurt: J.&S. Goldschmidt, I. Rosenbaum, and Z.M. Hackenbroch (together, the "Consortium"). *Id.* Zacharias Max Hackenbroch ("Hackenbroch"), Isaak Rosenbaum ("Rosenbaum"), Saemy Rosenberg ("Rosenberg"), and Julius Falk and Arthur Goldschmidt ("Goldschmidt") were the owners of

those firms, together with plaintiffs' ancestors and/or predecessors-in-interest in this action. *Id.* at ¶ 1. The Consortium was a loose association of these art dealers in the Frankfurt area who pooled their resources to acquire the Welfenschatz on October 5, 1929 by agreement with the Duke of Brunswick-Lüneburg. *Id.*, Exhibit 1. It was not a separate incorporated entity; despite the Motion's inventions on this point the FAC is explicit that the Welfenschatz owners were those who signed the agreement to buy it and the coerced transaction to sell it, not a formal corporation of some sort. *Id.* at ¶ 34-35. This acquisition on the eve of the Great Depression, even though the Nazis had not yet assumed power, was controversial, even at the time, among the significant nativist forces that would make Hitler's assumption of the Chancellorship possible. *Id.* at ¶¶ 36-40.

As the Consortium went about their business, the town council of Frankfurt resolved on August 26, 1930 "that the most valuable and oldest cultural assets of the German people, in particular the Welfenschatz, should not be permitted to be sold abroad, so that it can remain in the country," despite having no interest in the private property of the members of the Consortium. *Id.* at ¶ 38. As the Weimar Republic careened towards its disastrous end, the Consortium was able to bring the Welfenschatz to the United States to offer it for sale to museums. *Id.* at ¶ 41. To some extent, the Consortium succeeded. By 1930-31 about half of the collection had been sold to museums and individuals in Europe and in the United States. *Id.* Those 40 pieces (out of 82 overall) which were sold to the Cleveland Museum of Art and others, however, comprised only about 20 percent of the value of the Welfenschatz acquired in 1929—and did not include the most valuable pieces such as the iconic *Kuppelreliquiar*. *Id.*

In the end, they ran out of time. The members of the Consortium were soon caught along with millions of others with the rise to power of the Nazis – the National Socialist German

Workers Party (*National Sozialistische Deutsche Arbeiterpartei*, or "NSDAP"). *Id.* at ¶ 44. In the parliamentary elections of 1932, the NSDAP won a plurality of the popular vote for the first time. *Id.* at ¶ 49. This gave the NSDAP the largest faction within the Reichstag, though not yet a majority. It was to be the last democratic election in Germany until after 1945. *Id.*

On January 30, 1933, Adolf Hitler was appointed Chancellor by aging Reich President Paul von Hindenburg. *Id.* at ¶ 50. What was initially perceived as a stabilizing nod to conservatism, immediately descended into an onslaught of repression. *Id.* After the Reichstag Fire of February 27, 1933, the administrative and legislative enactment of the Nazis' racial theories were enacted swiftly, with popular and violent expression along side it. *Id.* at ¶¶ 51-52. The "Decree of the Reich President for the Protection of People and State" of February 28, 1933, better known as the Reichstag Decree, gave Hitler far-reaching, violent means of power. *Id.* at ¶53. Articles of the German Constitution that affected the fundamental rights of citizens were overridden. *Id.* Henceforth, the restriction of personal freedom, freedom of expression and of personal property were expressly sanctioned by the state. *Id.* Infringements of the Regulation were punished with confiscation, prison, penitentiary, and death. *Id.* Similarly, the Enabling Act of 1933 (*Gesetz zur Behebung der Not von Volk und Reich*, or Law for the Remedy of the Emergency of the People and the Reich) amended the Weimar Constitution further, giving the Chancellor—*i.e.*, Hitler—the power to enact laws without the legislature. *Id.* at ¶ 55. Other laws followed in this vein: the Restoration of the Civil Service Law of July 4, 1933, the destruction of public unions and democratic trade associations in April and May, 1933, the institutionalization of the one-party state and expulsion of non-National Socialists (July 14, 1933), and the repeal of the fundamental constitutional rights of the Weimar Republic all followed. *Id.* at ¶ 56.

These laws and regulations, while draconian, barely approach the repression that was unleashed on Germany's Jews. *Id.* at ¶ 57. Through the collective humiliation, deprivation of rights, robbery, and murder of the Jews as a population, they were officially no longer considered German. *Id.* Boycotts of Jewish businesses spread in March and April 1933, just weeks after Hitler's ascension, with the encouragement of the state itself. *Id.* at ¶ 58. By the spring of 1933, the concentration camp at Dachau had opened, and the murder of Jews detained there went unprosecuted. *Id.* at ¶ 59. This may seem unsurprising with the benefit of hindsight, but Germany had descended in a matter of weeks to a place where Jews could be plucked off the streets, imprisoned, and murdered just yards away from their neighbors, all without consequence. *Id.* It was not merely that such violence could happen with impunity, but also that it was now officially encouraged. *Id.* at ¶ 60.

None of this was in any way subtle or removed from the Nazis' stated goal: the complete physical removal of Jews from German society. *Id.* at ¶ 61. Judges, lawyers, doctors, retailers, art dealers—the bedrock of the German middle class—were targeted and driven out of their ability to make a living. *Id.* The latent danger for Jews to lose their lives and their property was not dependent on the new laws noted above, though they hastened the threat. *Id.* at ¶ 64. More laws restricted the ability of Jews to transfer assets—punishable by death—as Jews were tortured in Gestapo, S.A. and S.S. cellars or simply beaten to death in broad daylight. *Id.*

Prussia and the Nazis Train Their Sights on the Welfenschatz

The members of the Consortium were soon completely cut out of economic life in Germany and themselves threatened with violence. *Id.* at ¶ 66. The *Geheime Staatspolizei*—the Gestapo—opened files on the members of the Consortium because of their ownership of the Welfenschatz and their prominence and success. *Id.* at ¶ 67. Not surprisingly, Prussian interest in the Welfenschatz that had previously faltered was soon revived now that the Consortium's

members—the owners of the Welfenschatz—were so vulnerable as Jews. *Id.* at ¶ 68. What was only recently revealed after the pertinent documents were concealed for decades is just how explicit the conspiracy to take the Welfenschatz from the Consortium was, and how clearly those conspirators knew, subjectively, that the contours of the "negotiation" were fractions of the collection's actual value. *Id.* at ¶ 69.

The Consortium's members had the misfortune to live in Frankfurt, which had a new mayor: former District and Local Leader of the *Kamfbund für deutsche Kultur*—the League of Struggle for German Culture—Friedrich Krebs ("Krebs"). Krebs quickly wrote to Hitler himself (emphasis added):

> Under your leadership, the new Germany has broken with the materialism of the past. It considers the honor of the German people as its most valuable asset. In order to reclaim this honor on an artistic level, I believe the recovery and the ultimate acquisition of any irreplaceable treasures from German's middle ages, such as they are organically combined in the [Welfenschatz], would be a decisive step. According to expert judgment, the purchase is possible **at around 1/3 of its earlier value**. It therefore relates to an amount that will be proportionally easy to raise. I therefore request that you, as Führer of the German people, create the legal and financial preconditions for the return of the [Welfenschatz].

Id., Exhibit 2. To put this in context, in the period of time that the Motion tries to portray as less than repressive, the Consortium was explicitly targeted by the mayor of the city in which they lived, in a direct communication to Hitler himself—which itself acknowledges the intent to obtain the Welfenschatz for a reduced value. *Id.* at ¶ 71. Krebs would go on to distinguish himself as mayor by firing all Jewish civil service employees before the Law for the Restoration of the Civil Service was enacted—laying to rest the legalistic fiction advanced by the Motion that the passage of Nazi laws puts the deprivation of Jews' rights as Germans on any kind of limited time frame after January 30, 1933. *Id.* at ¶ 72.

As would later become apparent, Goering soon assumed the role as the real driver of the quest for the Welfenschatz. Goering was Prime Minister of Prussia at that time. *Id.* at ¶¶ 73-74.

His appetites were as prodigious as they were legendary, particularly with respect to art. *Id.* at ¶ 75. He cultivated for himself an image of culture and refinement that was belied by his lust for plundered art. Throughout his period of influence in the Third Reich, Goering targeted art that he wanted, but seldom, if ever, did he simply seize property. Instead, he routinely went through the bizarre pretense of "negotiations" with and "purchase" from counterparties who had little or no ability to push back without risking their property or their lives. *Id.*

Goering had considerable help in the gathering conspiracy, which soon approached the Consortium. Adolf Feulner ("Feulner") was director of the Museum of Decorative Arts and History Museum in Frankfurt starting in 1930, and, from 1938 to his death, the head of the *Kunstgewerbe* (arts and crafts collection) of Cologne. *Id.* at ¶ 76-77. In a letter dated November 1, 1933, Feulner wrote to the President of the German Association for the Preservation and Promotion of Research (*Deutsche Gemeinschaft zur Erhaltung und Förderung der Forschung*, or the "DFG"), Friedrich Schmidt-Ott ("Schmidt-Ott") about the results of his approach to Hackenbroch about acquiring the Welfenschatz. *Id.* at ¶ 77.

On January 1, 1934 museum directors Dr. Otto Kümmel ("Kümmel," of the State Museums), Dr. Robert Schmidt[1] ("Schmidt" of the Schloss Museum, the predecessor of the Kunstgewerbemuseum where the Welfenschatz is today), Dr. Karl Koetschau ("Koetschau" at the Kaiser-Friedrich-Museum), and Dr. Demmler (at the German Museum), together with Dr. Hans-Werner von Oppen ("von Oppen," Speaker in the Ministry of Education and Board member of the Dresdner Bank) visited the collections stored at the bank whose possession had

[1]Schmidt was later shown to be the most craven sort of opportunist. When the war ended, he lied to Allied forces to secure himself a role at the Central Collecting Point at Wiesbaden, from which he found himself a prosperous post-war career. Despite direct firsthand knowledge of the transaction, he described the purchase price of Prussia's 1935 acquisition of the Welfenschatz as 7 million RM—both below market, as well as a complete fabrication. *Id.* at ¶ 81.

been taken by Prussian intervention. *Id.* at ¶ 79. The Welfenschatz was discussed at this meeting, and clearly not for the first time. *Id.* As the minutes of the meeting composed by a Mr. Stern of the Dresdner Bank noted:

> On previous visits the museum directors, and in particular Prof. Koetschau, had noted that it was of considerable interest to establish the ways in which to incorporate the Welfenschatz. When Prof. Koetschau returned to this issue again and Dr. von Oppen was informed about the possibilities on the matter, I told him that the Welfenschatz was with an art dealer consortium, that would be happy to liquidate their failing business, and that I would be able to commence negotiations with the appropriate person, if this were desired.

Id. Stern notes in the minutes menacingly that the Consortium might be willing to accept a lower price "to liquidate the business so as not to suffer even more loss of interest. . . ." *Id.* at ¶ 82.

It was at this point that the Dresdner Bank assumed its eventual role as a straw man for the intended transaction. *Id.* at ¶ 88. Dresdner Bank (ironically founded in the 19th century by German Jews later also persecuted and deprived of their art collection) was majority-owned by the German state at the time of the Nazi ascension to power. *Id.* Between 1933 and 1937, when it was once again privatized, it played a similar role in other cases. *Id.* On August 15, 1935, the Dresdner Bank executed an agreement to sell the Berlin museums more than 1,000 works, including works "purchased" from Jewish owners under the days of early Nazi terror. *Id.* These works of art came from Jewish art collections which had been handed over to Dresdner Bank as collateral at some point and which were sold by Dresdner Bank, as the bank's property, in mid-1935 to the Prussian Nazi-State in order to enrich the Berlin state's museums' collections. *Id.*

On January 23, 1934, Stern reported to the Reichsbank directorate that his intermediary Alfons Heilbronner ("Heilbronner") had not succeeded with the spokesman of the Consortium. *Id.* at ¶ 92. He was told that the Consortium "will not go down under 6.5 million RM, perhaps 6 million RM in extreme circumstances." *Id.* Heilbronner traveled to tell Rosenberg that the price could not exceed 3.5 million RM. *Id.* at ¶ 93. Stern memorialized another meeting on May 11,

1934: Mulert had called, and wanted to know if it was going to be possible to "secure the Welfenschatz for German museums." *Id.* at ¶ 94. Koetschau then asked Stern when the negotiations over the Welfenschatz would begin. *Id.* at ¶ 97. Stern reported that he expected a firm offer from the Consortium, and that the price of 3.5 million RM being pursued would be a "very low" price constituting 15% of the Welfenschatz's value. *Id.* To put it in context, if 3.5 million RM were 15% of the value of the Welfenschatz, then the Welfenschatz's full value would have been 23.33 million RM, or nearly *six times* the eventual price of the transaction. *Id.* at ¶ 98. A month later, Stern advised the director of the Schloss Museum that negotiations had stalled because the Consortium continued to insist on a price over 7 million RM. *Id.* at ¶ 99.

Starting in the summer of 1934, the situation was stepped up by the involvement of two enthusiastic purveyors of genocide: Paul Körner ("Körner") and Wilhelm Stuckart ("Stuckart"). *Id.* at ¶ 100. Körner already had a successful Nazi career behind him by 1934. Since 1926 he had been adjutant for Goering. *Id.* at ¶ 102. Körner was an NSDAP Party member starting in 1931, and later of the *Schutzstaffel* (the "S.S."). *Id.* After Goering became Prussian Prime Minister in April 1933, Körner was appointed Secretary of the Prussian State Ministry. *Id.* at ¶ 103. Finally, and most tellingly, Körner later attended the Wannsee Conference in suburban Berlin in January 1942, at which Reinhard Heydrich, Adolf Eichmann, and other high ranking war criminals decided upon the implementation of the "final solution of the Jewish question"—the plan to exterminate the entire Jewish population of Europe. *Id.* at ¶ 105.

Stuckart first came into contact with the Nazi Party in 1922 while a law student, and enrolled in the Party. *Id.* at ¶ 106. By 1926, he was the legal adviser of the NSDAP in Wiesbaden, and in 1930 of the *Kampfbund fur Deutsche Kultur*. *Id.* On May 15, 1933 Stuckart was appointed as Acting Assistant Secretary of State in the Prussian Ministry of Science, Culture

and Public Education. *Id.* at ¶ 107. Just a few weeks later, he was appointed Secretary of the Ministry of Science and entrusted with the representation of Science Minister Bernhard Rust. *Id.* Notably, Stuckart was instrumental in the drafting of the "Nuremberg Laws" that codified *de jure* the *de facto* exclusion of Jews from all aspects of society. *Id.* at ¶ 109. In 1936 he became Chairman of the Reich Committee for the Protection of German Blood. *Id.*

Still in his capacity as Deputy Minister of the Ministry of Science, Stuckart replied to a June 26, 1934 letter from Körner on July 14, 1934. *Id.* at ¶ 111. Körner had submitted to Stuckart a draft of a letter to be sent to Hitler, to which Stuckart offered his opinion as follows:

> I note that in the opinion of the Prussian Minister of Finance, an acquisition by the Prussian State would be within the range of possibilities, providing that the President of the Reichsbank (in parallel the negotiations that were recently held between him and myself in relation to the question of purchasing the art collections that are situated at Dresdner Bank, about which I have notified the Prime Minister through official channels) declares himself to be in agreement that the payment would not take place in cash, but by issuing Prussian treasury bonds. Reichsbank President Schacht held out the prospect of the same kind of financing for the acquisition of the Guelph Treasure by the Prussian State. This means that Prussia does not need to raise any funds now, but solely takes on a less onerous indebtedness. In this way, Prussia would be put in a position where it was able to subsequently bring the historically, artistically and national-politically valuable Guelph Treasure to the Reich in addition to many other valuable cultural treasures.

Id., Exhibit 3 (emphasis added). Most importantly, this draft letter *is intended for Hitler himself.* Currying favor with the Führer through acquiring the Welfenschatz was the overriding goal. *Id.* at ¶ 113. Further, it reflects that Stuckart had already vetted the plan with the Prime Minster of Prussia—*i.e.*, Goering. *Id.* Lastly, the financing that had been considered, approved, and planned, came from Schacht, the President of the Reichsbank. *Id.* Stuckart thus describes the motive for the acquisition of Welfenschatz: to impress Hitler and his circle, and to do so for a less than market price. *Id.* at ¶ 117. The letter went on to recommend that the city of Hannover be discouraged from entering into the negotiating picture. *Id.* at ¶ 115.

This process only accelerated as 1934 went on. *Id.* at ¶ 119. The National Socialist regime was not content to enact legislation targeting specific policy aims. *Id.* The Nazis were clear that the real goal was *Gleichschaltung*-the transformation of society itself. *Id.* Art was at the center of this plan. *Id.* In 1933, Minister for Propaganda and Education Joseph Goebbels founded the Reich Chamber of Culture (*Reichskulturkammer*)—after first organizing the April 1, 1933 Jewish boycotts. *Id.* at ¶ 120. The *Reichskulturkammer* assumed total control over cultural trade, and membership was required to conduct business. *Id.* Needless to say, Jews were excluded, effectively ending the means of work for any Jewish art dealer like the Consortium members in one stroke. *Id.* Major dealers' collections were liquidated because they could not legally be sold. *Id.* The impact of the Jewish exodus from German economic and cultural life by this time was made clear in a Municipal Memorandum Concerning the Departure from Culture Associations by Jewish Members," dated February 16, 1934. *Id.* at ¶ 125. To sum it all up, on December 1933, the Frankfurt city treasurer wrote to Krebs with regard to the current climate:

> In the period from 1 March to 31 October 1932, 372 Jewish firms were closed. In the same period of the year 1933, 536 Jewish firms were closed. It is not only the increasing the number closures from 1932 to 1933 that shows the severe economic damage that the city has seen. Rather, it has to be noted that while the earlier closures were also followed by corresponding new applications, there can of course be no question of any significant new registrations in 1933.

Id. at ¶ 126. This was not in the 1940s, it was the same calendar year as the Nazis took power.

Because of the anti-Semitic climate Rosenbaum and his nephew Rosenberg, the two co-owners of I. Rosenbaum, gave up after Rosenberg had received a warning from a trusted friend and World War I comrade that he should better "go on a long vacation abroad." *Id.* at ¶ 128. They left Germany, and emigrated to Holland after being extorted by the Gestapo for "flight tax." *Id.*, Exhibit 4. The owners of the art dealer J. & S. Goldschmidt (also part of the Consortium) were forced by the Reich Chamber of Culture to vacate its premises at Berlin in

1934, where it had been since 1923 in the Palais Rathenau. *Id.* at ¶ 129. J.&S. Goldschmidt had no choice but to move to the back room of the antiques firm of Paul Graupe auction house, as subtenants. *Id.* Naturally, sales continued to decline precipitously, and the business was de facto closed by 1936, when Julius Falk Goldschmidt and his cousin Arthur fled Germany in July and in November the same year, leaving behind all of their assets. *Id.*

On February 9, 1935 Dresdner Bank Director Samuel Ritscher ("Ritscher") wrote in a file note that Prussian Finance Minister Johannes Popitz had asked him to care for the matter of the Welfenschatz. *Id.* at ¶ 133. Stern described a meeting of the Director of the Schloss Museum with Director Nollstadt of Dresdner Bank of February 12, 1935: Heilbronner remained in "continuous negotiations" with the Consortium. *Id.* at ¶ 135. The problem according to Heilbronner, was that Rosenberg and the other members of the Consortium were confident in the rectitude of the asking price. *Id.* at ¶ 137. Heilbronner resolved to convince the Consortium of the fleeting nature of the opportunity—fleeting of course because of the grave peril that the Consortium now faced in the Nazi regime. *Id.*

It is hardly a surprise then, that after two and a half years of pronounced repression and the very real risk that they would lose the entire Welfenschatz, if not more, the Consortium sent word that it might be "willing" to relent from the fair market value of the collection. *Id.* at ¶ 139. These "deliberations" were, of necessity, coerced and under duress by virtue of the circumstances. *Id.* On April 10, 1935, Heilbronner spoke again with Ritscher, who told him that Dresdner Bank "in the name of its client," was authorized to submit a bid of 3.7 million RM for the Welfenschatz. *Id.* at ¶ 140.

One last hope for the Consortium then emerged. In Herrenhausen bei Hannover (near the City of Hannover, capital of the German federal state Lower-Saxony), a new museum had been

planned, and it intended to seek to acquire the Welfenschatz. *Id.* at ¶ 142. The basic economics of the effect that this could have had on the negotiations are clear: the Hannover museum presented the possibility that a new, motivated bidder would enter the discussion willing to pay the fair market value, against which Prussia's lowballing would stand no chance in a real negotiation. *Id.* The "authoritative entities" were to be invited to review the plans at Herrenhausen to ensure that there was no "conflict." *Id.* at ¶ 143. In other words, the Nazis made it clear to the museum in Herrenhausen to cease its interest in buying the Welfenschatz fairly. *Id.* Thus, in one final stroke the Nazi state and its agents stripped away the last chance that the Consortium had to recover the value of its property. *Id.* at ¶ 144.

After two years of direct persecution, of physical peril to themselves and their family members, and, on information and belief, secure in the knowledge that any effort to escape would result in the certain seizure outright of the Welfenschatz, the Consortium had literally only one option left. *Id.* at ¶ 145. On May 17, 1935, Rosenberg made a final offer on behalf of the Consortium members. *Id.* at ¶ 149. By early June, the negotiations had progressed to the point that the acquisition of the Welfenschatz was considered all but certain, such that Rust, as Reich Minister for Science, Education and Culture, wrote to the Minister of Finance:

> It is with great satisfaction that I welcome the repurchase of the Welfenschatz, in connection with the proposed acquisition of the art holdings of the Dresdner Bank. Its recovery for Germany gives the entire action its historic value.

Id. The coerced sale was documented and signed on Friday, June 14, 1935 for a token price of 4.35 million RM. *Id.*, Exhibit 5.

On July 19, 1935, Dresdner Bank made the requisite payments pursuant to this document into blocked accounts. *Id.* at ¶ 158. The agreed upon terms and conditions of the contract of June 14, 1935 were to the unique benefit of the buyer, the Nazi state. *Id.* at ¶ 159. Moreover, the Consortium was obligated to pay a commission of 100,000 RM to Heilbronner out of their

pockets. *Id.* After the deduction of that commission, the remaining purchase price of 4.15 million RM was split: 778,125 RM were paid to a "Sperrmark account," a blocked account with Dresdner Bank. *Id.* To be offset against the credited money, the art dealers had to accept art objects from the Berlin Museums instead of having access to freely dispose of that money. *Id.* The received works of art eventually were sold in order to repay the Consortium's foreign loans. According to Hackenbroch, the selection of the pieces from the museums to be delivered to them, and contrary to prior mutual agreement, was not made by the art dealers, but ultimately by museums' officials. *Id.*

Hackenbroch's widow was evicted from their house—on what had then been renamed, in the bitterest of ironies, "Hermann Goering Ufer"—two months later so that the Hitler Youth could use it. *Id.* at ¶ 167. The last remnants of his gallery inventory came to auction in December, and on December 30, 1937 (after his untimely death) the firm was deleted from the commercial register and simply ceased to be. *Id.* Lucie Ruth Hackenbroch (Philipp's late mother) came under surveillance of the Gestapo and was herself stripped of her citizenship, published in the *German Reichs Gazette* and *Prussian Gazette*. *Id.* at ¶ 169.

Julius Falk Goldschmidt and the other members of that firm tried to continue the company in Berlin, Frankfurt and Amsterdam. *Id.* at ¶ 170. He emigrated to London in summer of 1936. *Id.* His cousin Arthur Goldschmidt was later arrested in Paris, imprisoned in several camps, and emigrated in 1941 to Cuba, and then in 1946 to the United States. *Id.* Rosenberg and Rosenbaum had emigrated by 1935 from Germany. *Id.* at ¶ 171. In Amsterdam, the two founded the company Rosenbaum NV, which was "Aryanized" by a German "manager" after the occupation of the Netherlands by Hitler's army in 1940. *Id.* Rosenberg's brother, Siegfried, ran operations in Frankfurt as best he could until 1937, when the company was liquidated and

closed. *Id.* After a further reduction in the Rossmarkt where it had traditionally stood, it moved to a warehouse. *Id.* On July 11, 1938, this firm too—based in Frankfurt since the mid-19th century—was deleted from the commercial register. *Id.* Rosenberg had to pay 47,815 RM in Reich Flight Tax. *Id.* Rosenbaum was expelled from Germany and paid 60,000 RM, plus 591.67 RM in interest. *Id.*

Ultimately, of course, Germany's ambitions exceeded its own borders and it started World War II and razed much of Europe to the ground. Thankfully, it was defeated by the United States and its allies in 1945. The *Freistaat Preussen* was officially dissolved that year as well. *Id.* at ¶ 183. The SPK was created for the purpose, *inter alia*, of succeeding to all of Prussia's rights in cultural property—including Prussia's wrongfully acquired possession of the Welfenschatz. *Id.* at ¶ 184. Principles of law were established that identified transactions like the Welfenschatz sale as presumptively coercive and void. *Id.* at ¶ 200.

Plaintiffs Are Offered a Sham Proceeding Whose Outcome was Predetermined

In 1998, the United States Department of State organized and hosted the Washington Conference on Holocaust Era-Assets (the "Washington Conference"). *Id.* at 196. The Washington Conference resulted in what have become known as the Washington Conference Principles on Nazi-Confiscated Art (the "Washington Principles"). *Id.* at 197. Germany was a key participant, along with Austria, France, the United States, and dozens of other nations. *Id.* The restitution encouraged by the Washington Principles is, and has been for decades, the foreign policy of the United States. *Id.* at ¶ 198. The United States Supreme Court, as well as the Courts of Appeal of the United States, have recognized that proceedings in furtherance of that goal such as this one are entirely consistent with that policy. *Id.*

On December 9, 1999, Germany itself, its 16 *Länder*, and the association of local authorities issued the Collective Declaration, a pledge of adherence to the Washington

Principles. *Id.* at ¶ 199. The Collective Declaration commits to the restitution of Nazi-looted artworks, notwithstanding any other wartime claims compensation or restitution by Germany or the Allies and, consistent with postwar Allied Military Government law, without distinguishing according to whether or not Nazi-looted assets had been robbed, stolen, confiscated, or had been sold under duress or by pseudo-legal transaction. *Id* at ¶ 200. It constitutes a promise to hold disputed art in its care pending a fair and just resolution to any claim on the merits. *Id.*

In 2009, the Czech Republic hosted a follow-up to the Washington Conference (the "Prague Conference"). *Id.* at ¶ 201. The Prague Conference resulted in the Terezin Declaration, which affirms the Washington Principles. *Id.* at ¶ 202. In 2003, Germany created the "Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property," (*Die Beratende Kommission für die Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz*) better known as the "Limbach Commission" for its presiding member, former German Supreme Constitutional Court judge Jutta Limbach ("Limbach" or the "Advisory Commission"). *Id.* at ¶ 205. The Advisory Commission is a non-binding mediation that issues recommendations to German state museums, but its decisions have no preclusive effect. *Id*.

At most, the Advisory Commission serves as a non-binding mediation process. *Id.* at ¶ 212. German museums are not obliged to accept its recommendations, and the Advisory Commission itself is not actually independent. *Id.* It is not an arbitration, and it does not adjudicate rights in property. *Id.* At worst, Germany portrays the Advisory Commission as a *solution* to this inadequacy, to give cover to the idea that Germany is in compliance. *Id.* at ¶ 213. Despite the creation of the Advisory Commission, however, and despite the Collective

Declaration and other measures ostensibly pursuant to the Washington Principles, Germany today still has no coherent policy towards victims of Nazi-looted art. *Id.* at ¶ 210.

In the absence of meaningful recourse, but in an interest to reach agreement on the Welfenschatz, the Plaintiffs submitted their claim to the Advisory Commission and presented conclusive evidence of the foregoing aspects of early Nazi terror and duress. *Id.* at ¶ 220. Despite internationally accepted principles and precedents (among many others), the Advisory Commission failed to recommend the restitution of the Welfenschatz. *Id.* at ¶ 221. In fact, as Plaintiffs allege, Germany never had any intention of considering the prospect of restituting the Welfenschatz. The entire proceeding was a sham to create process for its own sake to defend the wrongful retention. *Id.* at ¶¶ 222-23.

The Advisory Commission heard from five experts presented by the Plaintiffs, who established the context surrounding the sale at issue by showing (i) the actual market value of the collection in 1935: at least 11.6 Million RM; (ii) the law applicable to the sale; (iii) the historical background which supports the claim that the sale in issue was coercive and made under duress; and (iv) the art dealers were the sole owners of the collection. *Id.* at ¶ 224. Notably, the Plaintiffs presented the expert opinion of Sotheby's, which appraised the value of the Welfenschatz as of 1935, and presented the evidence of the facially inadequate price that the Consortium members were paid. Affidavit of Markus Stötzel (the "Stötzel Aff.") at ¶ 7.

Neither the qualifications nor credibility of these experts were challenged. FAC at ¶ 225. The SPK presented *no evidence to the contrary* to rebut the internationally-recognized presumption of duress. *Id.* at ¶ 228. By definition, the Advisory Commission should have recommended restitution without any further deliberation. *Id.* at ¶ 225. More to the point, the SPK *could not produce anyone* who could testify to the fairness of this transaction. *Id.* at ¶ 228.

Indeed, to the contrary, the SPK accepted the qualifications and testimony of the Plaintiffs' experts. *Id.* As such, the SPK did not carry—or even attempt to carry—its burden of showing why these experts should not be accepted nor rebuts their conclusions. *Id.* at ¶ 225. Plaintiffs made this showing on foreign soil despite last-minute hearing cancellations and other rank prejudice. The Advisory Commission issued a recommendation that was predetermined: that despite the foregoing, the Welfenschatz should stay in Germany. *Id.* at ¶ 227.

ARGUMENT

I. STANDARD ON A MOTION TO DISMISS

In assessing a defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the Court must assume the truth of all factual allegations in the complaint, construing them in the light most favorable to the plaintiff, even if some are subject to dispute by the opposing party. *See Republic of Aus. v. Altmann*, 541 U.S. 677, 681 (2004). To defeat a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a complaint need only "contain sufficient factual matter, accepted as true, to '"state a claim to relief that is plausible on its face,'" such that a court may "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). So long as the "[f]actual allegations [] raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)," the case may proceed. *Twombly*, 550 U.S. at 555 (citations omitted).

II. DEFENDANTS ARE NOT IMMUNE FROM SUIT

Germany's primary defense to the Plaintiffs' claims is that, along with the SPK, it enjoys sovereign immunity. Germany, however, fails at the outset to acknowledge the burden that it bears is asserting this defense. Specifically, once a defendant has asserted sovereign immunity, it bears the burden of proving that the plaintiff's allegations do not bring his or her case within a

statutory exception to immunity. *Phoenix Consulting, Inc. v. Republic of Angl.*, 216 F.3d 36, 40 (D.C. Cir. 2000), *citing Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985); *see also Princz v. Fed. Republic of Ger.*, 26 F.3d 1166, 1171 (D.C. Cir. 1994). Where, as here, the Defendants argue that they are immune from the allegations of the FAC, the court accepts all the allegations of the FAC as true in determining whether they bring the Defendants within any of the exceptions to immunity. *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

Conversely, because the FSIA provides the exceptions under which Germany and the SPK are not immune from suit, it also establishes this Court's jurisdiction over them and Plaintiffs' claims. Pursuant to the expropriation exception to sovereign immunity, suit against a foreign sovereign may proceed when rights in property were taken in violation of international law and the defendant is engaged in commercial activity in the United States. 28 U.S.C. § 1605(a)(3). Pursuant to the commercial activity exception, a defendant is not immune from suit in a case:

> in which the action is based upon [i] a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). Both exceptions serve to defeat the Defendants' assertion of sovereign immunity and establish this Court's jurisdiction.

A. Defendants Are Not Immune from Suit Because of the Expropriation Exception, 28 U.S.C. § 1605(a)(3).

As noted above, § 1605(a)(3) applies where "(i) the claim [is] one in which 'rights in property' are 'in issue'; (ii) the property in question [has been] been 'taken in violation of international law'; and (iii) one of two commercial-activity nexuses with the United States [is]

satisfied." *Simon v. Republic of Hung.*, 812 F.3d 127, 140 (D.C. Cir. 2016), *citing Abelesz v. Magyar Nemzeti Bank* 692 F.3d 661, 671 (7th Cir. 2012). It is settled law in the D.C. Circuit that to meet the required showing that "rights in property taken in violation of international law" are in issue, "the plaintiff need only make a 'non-frivolous' showing at the jurisdictional stage." *Simon*, 812 F.3d at 140-41; *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venez.*, 784 F.3d 804, 811-12 (D.C. Cir. 2015); *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940-41 (D.C. Cir. 2008).

Coerced sales are takings of property, and sales involving Jews between 1933 and 1945 in Germany are presumptively coercive. Military Government Law No. 59 ("MGL No. 59"), entitled "Restitution of Identifiable Property," was enacted after the war ended. It provides the governing substantive law of the 1935 transaction for the Welfenschatz because of the circumstance (not least the Allied victory and dissolution of warmongering Prussia, the counterparty to the transaction):

> Property shall be restored to its former owner or to his successor in interest in accordance with the provision of this Law even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where this Law provides otherwise.

Property is defined as "confiscated" in MGL No. 59 where it was (1) not in good faith, under duress, or otherwise an unlawful taking; (2) seized by government act or in abuse of a government act; or (3) seized as a result of measures taken by the Nazis. Article 3 reads:

> Presumption of Confiscation
>
> It shall be presumed in favor of any claimant that the following transactions entered into between 30 January 1933 and 8 May 1945 constitute acts of confiscation within the meaning Article 2:
>
> Any transfer or relinquishment of property made during a period of persecution by any person who was directly exposed to persecutory measures on any of the grounds set forth in Article 1;

> Any transfer or relinquishment of property made by a person who belonged to a class of persons which on any of the grounds set forth in Article 1 was to be eliminated in its entirety from the cultural and economic life of Germany by measures taken by the State or the NSDAP.

The presumption may be rebutted only by showing that the transferor was paid a fair purchase price, but not if the transferor was then denied the right of free disposal—as was usually the case in Germany with regard to the use of blocked accounts and confiscatory "flight taxes."

MGL No. 59 is expansive in its treatment of rights to be vindicated. Dissolved entities' rights can be enforced either by a judicially appointed representative or by individual members of the organization:

> If a partnership, company, or corporation organized under the Commercial Law was dissolved or forced to dissolve under any of the reasons set forth in Article 1, the claim for restitution may be asserted by any associate (partner, member or shareholder). The claim for restitution shall be deemed to have been filed on behalf of all associates who have the same cause of action.

In every case since the enactment of the FSIA to consider the question, the organized plunder of art by the Nazis and their puppets and allies has been held to meet the threshold takings requirement. *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010) (painting sold for paltry sum to finance flight of persecuted German Jew constituted taking in violation of international law); *Altmann v. Republic of Aus.*, 317 F.3d 954, 968 (9th Cir. 2002) ("The Nazis did not even pretend to take the Klimt paintings [at issue] for a public purpose; instead, Dr. Fuehrer sold them for personal gain or exchanged them to supplement his private collection. In addition, their taking appears discriminatory. Altmann is a Jewish refugee"), *aff'd in part*, 541 U.S. 677 (2004); *de Csepel v. Republic of Hung.*, 808 F. Supp. 2d 113, 129-30 (D.D.C. 2011); *de Csepel v. Republic of Hung.*, Civil Action No. 10-1261 (ESH), 2016 U.S. Dist. LEXIS 32111, at *50 (D.D.C. Mar. 14, 2016); *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 307 (D.D.C 2005) (paintings left for safekeeping by Kazimir Malevich with custodian later

persecuted by Nazis warranted later jurisdiction against current sovereign possessor of artworks). This Court recently put the issue to rest beyond any remaining dispute in the pending case between the heirs of the fabled Herzog collection and the Republic of Hungary over ownership of more than forty paintings taken from the Herzog family after years of persecution:

> [T]he artworks named in the Complaint were originally seized during the Holocaust in furtherance of the Nazis' campaign of genocide in Europe, and there is no question that plaintiffs properly characterized the art takings in their Complaint within the context of genocide.

de Csepel, 2016 U.S. Dist. LEXIS 32111, at *50. As if it needed stating explicitly, the *de Csepel* court reminded Hungary that the D.C. Circuit has ruled forcefully on the question:

> The Holocaust's pattern of expropriation and ghettoization entailed more than just moving Hungarian Jews to inferior, concentrated living quarters, or seizing their property to finance Hungary's war effort. Those sorts of actions would not alone amount to genocide because of the absence of an intent to destroy a people. The systematic, 'wholesale plunder of Jewish property' at issue here, however, aimed to deprive Hungarian Jews of the resources needed to survive as a people. Expropriations undertaken for the purpose of bringing about a protected group's physical destruction qualify as genocide.

de Csespel v. Republic of Hung., 714 F.3d 591, 594 (D.C. Cir. 2013) (assessing Hungary's first facial challenge to Herzog heirs' claims under the FSIA and allowing suit to proceed) (emphasis added). This logic applies no less to Germany, the instigator of the Holocaust, than to Hungary, which in 1944 was stepping up its persecution of its own citizens to impress its German ally.

There is little question that Germany's *sui generis* racial discrimination against Jews that was the foundation of the Holocaust led to sales under duress like that of the Welfenschatz constitute takings of property in violation of international law. A review of the circumstances of the foregoing cases—tragedies with parallels to the Consortium that Germany would have the Court gloss over with high level pronouncements about international respect—doom the Motion. In *Altmann*, Maria Altmann, niece and heir of Ferdinand Bloch-Bauer, sought restitution from

the state-owned Belvedere Gallery in Vienna of several paintings that had been "Aryanized" by attorney Erich Führer after the *Anschluss* in 1938. Austria disputed that its title to the works was invalid, but in any event contested the jurisdiction of the U.S. District Court in a case that is parallel in all material respects to the current dispute. Altmann invoked the expropriation exception, and defeated Austria's motion to dismiss in the District Court and Austria's appeal to the Court of Appeals as well. As the Ninth Circuit stated:

> The facts of record, which in this procedural posture we must take as true, show that the Klimt paintings have been wrongfully and discriminatorily appropriated in violation of international law. The Nazis did not even pretend to take the Klimt paintings for a public purpose; instead, Dr. Fuehrer sold them for personal gain or exchanged them to supplement his private collection. In addition, their taking appears discriminatory. Altmann is a Jewish refugee, now a United States citizen, who is a descendant of a Czech family whose property was looted by the Nazis because of their religious heritage. According to Altmann, despite convening a Committee to evaluate expropriation claims and return stolen artwork, the Austrian government intentionally intervened to thwart a fair and impartial vote on the restitution of the Klimt paintings. Further, the Austrian government has not yet returned the paintings to Altmann and her family or justly compensated them for the value of the paintings. Without compensation, this taking cannot be valid.

Altmann, 317 F.3d at 968. The Supreme Court did not reach this question, but affirmed the retroactivity of the FSIA to the Nazi era. *Altmann*, 541 U.S. at 700. The case was resolved on the merits in arbitration, and the paintings were returned to Altmann (without any further decisions in U.S. courts).

Similarly, the Ninth Circuit endorsed without reservation the conclusion that Lilly Cassirer's 1939 sale while preparing to flee Germany was also such a taking. Jakob Scheidwimmer had been appointed to "appraise" Cassirer's collection and entered into similar "negotiations." Cassirer could not take the painting or any money out of Germany without permission, which Scheidwimmer secured after she agreed to sell him the painting for a pittance. *Cassirer*, 616 F.3d at 1023. Even that token sum was illusory, because, as with a material

portion of the inadequate consideration paid for the Welfenschatz, it was put in a blocked account. *Id.* The Ninth Circuit recognized this for what it was:

> a taking offends international law when it does not serve a public purpose, when it discriminates against those who are not nationals of the country, or when it is not accomplished with payment of just compensation.

Id. at 1027.[2] Lastly, while not about artwork, *Simon* engaged in a detailed analysis about *why* the targeting of Jews' property under Nazi repression is a taking in violation of international law because it is part of genocide:

> The Convention on the Prevention of the Crime of Genocide, adopted by the United Nations in the immediate aftermath of World War II and ratified or acceded to by nearly 150 nations (including the United States), defines genocide as follows:
>
> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group; [or]
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . .

Simon, 812 F.3d at 143, *citing* Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 (emphasis added).

Thus it was no surprise that this Court applied *Simon* squarely to the Herzog collection claims in *de Csepel*. That case concerns the legacy of the art collection of Baron Mór Lipot Herzog, a Jewish art collector in Budapest. Baron Herzog died in 1934, and the collection stayed with his wife. When she died, the collection was inherited and divided by their children Erzsébet, Istaván, and András. András was killed while in compulsory forced labor in 1942 for

[2] Spain at least had the good taste—unlike Germany in the present circumstances—to concede that the coercive sale made by Lilly was obviously a taking in violation of international law. *Id.*

being a Jew (after years of escalating persecution patterned explicitly on the discriminatory "legal" regime in Germany), and his sisters soon came under persecution when the German army occupied Hungary following Hungary's unsuccessful attempts to negotiate a separate armistice.

The D.C. Circuit passed on reaching a decision on the expropriation exception on the appeal of Hungary's first unsuccessful motion to dismiss because it concluded that the commercial activity exception applied. Even so, the Court of Appeals made clear what the circumstances really were:

> Of course, we have no quarrel with the historical underpinnings of the district court's analysis. During World War II, the Hungarian government did indeed enact a series of anti-Semitic laws "designed to exclude Jews from meaningful roles in Hungarian society." Compl. ¶ 44. This exclusion was both symbolic, through the requirement that Jews "wear distinctive signs identifying themselves as Jewish," de Csepel, 808 F. Supp. 2d at 129, and physical, through expulsion "to territories under German control where they were mistreated and massacred," Compl. ¶ 49.

de Csepel, 714 F.3d at 598. But earlier this year, the District Court reached the question once it was properly back before it on remand:

> forty-two of the forty-four artworks named in the Complaint were originally seized during the Holocaust in furtherance of the Nazis' campaign of genocide in Europe, and there is no question that plaintiffs properly characterized the art takings in their Complaint within the context of genocide. (See, e.g., Compl. ¶¶ 1, 59 (noting that it was "the Hungarian government and their Nazi [ ] collaborators" that "discovered the hiding place" of the Herzog Collection and confiscated the artwork, acting "as part of a brutal campaign of genocide" against Hungarian Jews.)

de Csepel, 2016 U.S. Dist. LEXIS, at *50. Germany makes an interesting point when, in seeking to distinguish *de Csepel*, it excoriates its erstwhile ally Hungary as having "struggled to accept and address its role as a former Axis Power." Germany contends that Hungary signed the Washington Principles but never designated a commissioner [to address Nazi restitution claims]." Motion at p. 45, n.22. Defendants are largely correct. But Germany then proceeds to

make the same arguments that Hungary—the supposed pariah of the international restitution community—made unsuccessfully.

1. The Coerced Sale of the Welfenschatz Was a Taking In Violation of International Law.

It is beyond serious debate that the systematic targeting of its Jewish citizens to make their property vulnerable for seizure and opportunists was a taking of property in violation of international law by Nazi Germany. Yet this is what Germany, for all its mixture of self-flagellation and self congratulation, does in the Motion. It argues that the most murderous and genocidal campaign in history was a purely internal affair. For the sake of retaining the Welfenschatz, Germany casts aside decades of admirable self-reflection and understanding. In any event, at this stage, it is not for Germany to engage in this kind of Holocaust revisionism and denial. The FAC plainly alleges facts that constitute takings in violation of international law, and the Court need go no further in evaluating the Defendants' claim to immunity.

The FAC alleges that the members of the Consortium were specifically targeted because they were Jewish, and because their possession of an ethnic German icon offended the Nazis' racist sensibilities. FAC at ¶¶ 25, 66-75. The Plaintiffs have alleged that this persecution was directed at the Consortium members for the specific purpose of depriving them of their rightful ownership of the Welfenschatz. *Id.* at ¶¶ 128-31, 145. The FAC alleges unambiguously that the Consortium members entered into the transaction only because of that pressure, and for a price that the Nazi conspirators themselves described as a small fraction of the actual value. *Id.* at ¶¶ 70, 97-98, 155. The Plaintiffs allege further, with factual support, that the transaction's price was objectively and grossly inadequate under the market conditions of the day. *Id.* at ¶¶ 4, 12. And the FAC makes clear that the proceeds, meager though they were relative to the collection's value, were not freely available to the Consortium's members. *Id.* at ¶ 162. No public policy is

even arguably applicable to the 1935 sale under duress, though the Motion strongly implies that the SPK's investments since the taking should count as a public purpose. They do not. Together, these facts suffice to clear the "exceptionally low bar" of non-frivolousness at the jurisdictional stage; *Chabad*, 528 F.3d at 940-41.

Incredibly, the Motion seems to suggest that *Simon* helps the Defendants. *Simon*, in fact, removes any remaining question that the Defendants are not immune from suit. First, as noted above, Plaintiffs have met the test that prior cases laid out and that *Simon* affirmed. More importantly, *Simon* disposes of the Defendants' "domestic takings" argument because, as in *Simon* and *de Csepel*, the Nazis' genocidal rampage is at the very heart of the Plaintiffs' claims. Defendants' first Motion to Dismiss, already struggling to differentiate *Abelesz*, revealed their true colors on the issue when they took the position that the taking of the Welfenschatz did not qualify as a taking in violation of international law because it "preceded the Holocaust by several years." *See* Defendants' Motion to Dismiss, October 30, 2015, at p. 27. And while the current Motion wisely backed off of this alarmingly revisionist contention, the core of their argument has not changed: that German Jews under duress in 1935 have no cognizable complaint against the acts of the Nazi government.

Simon dispenses with the aforementioned contention that there is no taking merely because the Welfenschatz itself was not liquidated or used to finance directly Germany's murder of six million European Jews. *Simon* explains why that is genocide: the persecution and systematic organized plunder of Jews was the *first step in the Holocaust*. No dollar-for-dollar relationship to the actual murder of the actual claimant's ancestors is required or even implied under the law. Germany's implication to this effect is an offense to those victims. The plaintiffs' ancestors in *de Csepel* and *Simon* experienced in Hungary what the Nazis had

perfected in Germany: when a country takes away a person's economic ability to exist, and then their rights, all because of that country's stated desire to physically exterminate that people, it is genocide, regardless of how remote in distance or causation the economic deprivation was from the actual mass murder. One leads to another:

> The systematic, "wholesale plunder of Jewish property" at issue here, however, aimed to deprive Hungarian Jews of the resources needed to survive as a people. [] Expropriations undertaken for the purpose of bringing about a protected group's physical destruction qualify as genocide.

Simon, 872 F.3d at 143 (emphasis added), *citing de Csepel*, 714 F.3d at 594. The *de Csepel* plaintiffs did not allege that the Herzog collection was liquidated or otherwise used literally to pay for the Herzogs' deportation to death camps, because that is not what happened. Nor did they have to. Plaintiffs here carry no unique burden that was not required of those plaintiffs. The status of the Welfenschatz and the involvement of Goering himself with Hitler's top henchmen makes the current Plaintiffs' burden lower, not higher.

This only underscored the failure of the Defendants' argument in their first motion to dismiss that relied on *Abelesz*. Defendants make that argument again here, but to no avail for the same reasons. In *Abelesz*, the Seventh Circuit acknowledged the general rule that a taking by a sovereign from its own citizens would not be an expropriation within the meaning of § 1605(a)(3). *Abelesz*, 692 F.3d at 674-77. Yet the plaintiffs' claims against the Hungarian railways in that case (much like the ones at issue in *Simon*) were also not barred by sovereign immunity under the expropriation exception because they were an "integral part of the genocidal plan to depopulate Hungary of its Jews." *Id.* at 675-77.

Nothing was more prominent in the years of early Nazi terror than the marginalization and financial deprivation of Germany's Jews. FAC at ¶¶ 2, 10, 88, 155, 250. Defendants are correct that Plaintiffs have not alleged that the Welfenschatz was used to finance "the transport

and murder" of Germany's Jews. It is also irrelevant. Plaintiffs have alleged, just as in *de Cespel* and *Simon*, that the escalating economic repression and threat of physical violence were part of the Holocaust—because they were. Applying the test endorsed in *Simon*, the allegations in the FAC qualify, specifically under the last clause of the Genocide Convention:

> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . .

Simon, 812 F.3d at 143. That is precisely what Germany was doing from the day that Hitler was named Chancellor, as the FAC alleges (and historians unanimously agree). The Nazis' stated purpose from the start of their control of government, and well before, was the complete annihilation of Jews. Economic persecution was one of the first tools they used in service of this goal. It worked. Nazi Germany did not deport Jews to death camps on January 31, 1933 and Plaintiffs do not suggest that it did. Instead, with the leadership of the very war criminals implicated in the plot to seize the Welfenschatz, Germany imposed conditions that were absolutely, in a subjective sense, designed from Day 1 to "bring about [their] physical destruction in whole or in part." But there can be no mistake that the Final Solution and the Wannsee Conference do not happen without Kristallnacht, which does not happen without the Nuremberg Laws, which does not happen without the expulsion of Jews from Germany's social and economic life. There is no beginning point of the Holocaust during the Nazi era before which Germany can absolve itself of responsibility—which is what the Motion proposes to do. Defendants' argument would leave the absurd result that the Hungarian Holocaust was genocide, but not the German Holocaust. And just like in Hungary, the FAC alleges squarely that German Jews had ceased to be "German" in the eyes of their government long before the Nuremberg Laws. FAC at ¶ 57.

Germany instead makes the flippant contention that "a collection of medieval art, however valuable, is not remotely like food, medication, and shelter; it is not essential to survival." Indeed, but the inability to exist economically—squarely alleged by the FAC—is. This is not undermined by idea that the Consortium is somehow less deserving of protection because it intended to sell the Welfenschatz (for a fair, not an extortionate, price)—just the kind of Jews-in-commerce trope in which the Nazis so freely traded.

Moreover, to whatever extent that the Defendants seek to portray the Advisory commission as an adjudication, it merely provides another basis to apply the expropriation exception. That is, the very sham process on which Germany attempts to rely itself would itself justify the invocation of the expropriation exception under the law of this circuit. In *Chabad*, the plaintiffs would have prevailed under the fairly-conducted judicial process in Russia and won the restitution of the historic library of the movement's charismatic leader. *Chabad*, 528 F.3d at 945-46. The expropriation exception entitled the Chabad plaintiffs to proceed because Russian political factions interfered with the process, depriving them of their rightful remedy:

> if the victim of a property seizure secured a judgment from the highest available judicial authority that papers seized by the government should be turned over to its ally, and a lower court then abruptly "reversed" that decision, authorizing the government to keep the papers, we would have little difficulty viewing the latter order as a purported retaking of the property. It would enhance the retaking case if high executive officials issued orders paralleling those of the highest court, followed by countermanding legislative action and accompanied by government officials' physical action. We cannot say that the analogy is perfect. Here, the lines of authority among the various judicial, executive, and legislative bodies appear to defy comprehension by outsiders (indeed, they may be inconsistent with the concept of lines of authority altogether). But neither can we declare insubstantial or frivolous the plaintiff's claim that the 1991-1992 actions of Russia and the Russian State Library constituted a retaking of the property; thus we reverse the district court's decision on the point.

Id. at 946 (emphasis added). The Advisory Commission and Germany did just this. They pretended that the Advisory Commission would offer a meaningful and impartial recommendation, then they offered a politically-influenced fig leaf to mask the illegitimate possession of the Welfenschatz. FAC at ¶ 213. That, too, would be a taking that would be an appropriate basis to apply the expropriation exception. *Chabad*, 528 F.3d at 946.

2. Defendants Are Engaged in Commercial Acts in the United States.

Whether claims are asserted against a foreign state (Germany) or instrumentality (the SPK), "both kinds of claims require: (i) that the defendants possess the expropriated property or proceeds thereof; and (ii) that the defendants participate in some kind of commercial activity in the United States." *Simon*, 812 F.3d at 146. The commercial activity necessary to satisfy the expropriation exception need not bear any relation to the claim itself, unlike under the commercial activity exception. *Malewicz*, 362 F. Supp. 2d at 312-13. The FAC lays out facts that satisfy this two-part test. As the Ninth Circuit noted in reaching the merits of the expropriation exception's applicability in *Altmann*, 317 F.3d at 969:

> The key commercial behavior of the Gallery here is not its operation of the museum exhibition in Austria, however, but its publication and marketing of that exhibition and the books in the United States.

The Defendants are engaged in commercial activity in the United States within the meaning of 28 U.S.C. § 1605(a)(3). The FSIA does not require the property at issue to be physically present in the United States to constitute the commercial activity required by the expropriation exception. If it did, none of *Altmann*, *Cassirer*, *Chabad*, or *de Csepel*, would have survived dismissal—yet of course they all did and/or were affirmed by the respective Courts of Appeals. *Cassirer*, 616 F.3d at 1032-33; *Chabad*, 528 F.3d at 946-47; *Altmann*, 317 F.3d at 968-69; *de Csepel*, 2016 U.S. Dist. LEXIS 32111, at *65. The FAC lists the myriad publications and marketing efforts by Germany and the SPK, many of which prominently feature the

Welfenschatz. Indeed, both Germany and the SPK are engaged in commercial activity in the United States based on the Welfenschatz itself. These include the sale of multiple books and guidebooks featuring their ill-gotten possession prominently. The Plaintiffs did not allege that "the Welfenschatz or property exchanged for it is present in the U.S." because they do not have to. Motion at p. 24. Instead, the Plaintiffs need only set forth commercial activity by Defendants in the United States, as they have done:

- The SPK engages in regular exhibitions within the United States by loaning objects to museums in the United States from the collections of the museums administered by the SPK. The SPK loaned objects to an exhibition entitled "Byzantium and Islam Age of Transition" at the Metropolitan Museum of Art in New York in 2012. The SPK also licensed photographs of its collection for inclusion in the catalogues of those exhibitions, which are sold and marketed throughout the United States (including in the District of Columbia) by retail and Internet sales.

- The SPK licenses images of its collection to the general public throughout the United States (including the District of Columbia) on an ongoing basis, including but not limited to licensing relationships with Art Resource in New York, and the United States National Holocaust Memorial Museum in the District of Columbia.

- The SPK solicits subscriptions to its newsletters, solicitations that reach the District of Columbia, among other parts of the United States. SPK-administered museums seek to and sell entrance tickets to the Berlin museums to patrons in the United States, including but not limited to patrons in the District of Columbia.

- The Museum of Decorative Arts ("Kunstgewerbemuseum") in Berlin, administered by the SPK and the current location of the Welfenschatz, publishes and sells a book entitled *Kunstgewerbemuseum Berlin* within the United States of the highlights of its collection, including but not limited to within the District of Columbia. The Welfenschatz features prominently in this catalogue, in particular the famous *Kuppelreliquiar* (the "Chapel Reliquary")—which is depicted on the very cover of the book.

- The Kunstgewerbemuseum publishes and sells a book entitled *Katalog des Kunstgewerbemuseums* (*Catalogue of the Kunstgewerbemuseum*) within the United States, including but not limited to within the District of Columbia. The Welfenschatz features prominently in this catalogue, and is referred to as such for any object that is part of the Welfenschatz.

- The Kunstgewerbemuseum publishes and sells a book entitled *Schätze des Glaubens: Meisterwerke aus dem Dom-Museum Hildesheim und dem Kunstgewerbemuseum Berlin* (*Treasures of Belief: Masterworks from the Hildesheim Cathedral Museum and the Kunstgewerbemuseum Berlin*), within the United States, including but not limited to within the District of Columbia. The Welfenschatz features prominently in this catalogue as well.

- The SPK previously announced plans to publish in 2015 and has arranged for presales of a book entitled *The Neues Museum: Architecture, Collections, History* within the United States, including but not limited the District of Columbia.

- The Bodemuseum in Berlin, administered by the SPK, has a staff exchange program with the Metropolitan Museum of Art in New York.

- The SPK offers research grants to academics within the United States, including within the District of Columbia.

- Academic conferences organized and administered by the SPK include solicitations to academics in the United States (including the District of Columbia) to contribute and participate.

- The SPK publishes and sells a book entitled *Original und Experiment: Ausstellung der Stiftung Preußischer Kulturbesitz aus der Antikensammlung der Staatlichen Museen zu Berlin* (*Original and Experiment: Exhibition by the Stifttung Preußischer Kulturbesitz from the Antiques Collection of the State Museums in Berlin*) within the United States, including but not limited to the District of Columbia.

- The SPK publishes and sells a book entitled *Digital Resources from Cultural Institutions for Use in Teaching*

and Learning: A Report of the American/German Workshop within the United States, including but not limited to within the District of Columbia.

- The SPK publishes and sells a book entitled *Schätze Der Weltkulturen in den Sammlungen Der Stiftung Preussischer Kulturbesitz (Treasures of World Cultures in the Collections of the Stiftung Preussischer Kulturbesitz*) within the United States, including but not limited to within the District of Columbia.

- The SPK participated in an exhibition National Gallery of Art in the District of Columbia entitled *Dürer And His Time: An Exhibition From The Collection Of The Print Room, State Museum, Berlin Stiftung Preussischer Kulturbesitz*, including the loan of works of art from the SPK. The SPK contributed further to the catalogue from that exhibition, which is sold in the United States, including but not limited to within the District of Columbia.

- The SPK publishes and sells an annual report entitled *Prussian Cultural Property: 25 Years in Berlin, Collecting, Researching, Educating: from the Work of the SPK 1961-1986 (Annual Report of the SPK)* or *Preussischer Kulturbesitz: 25 Jahre in Berlin, Sammeln, Forschen, Bilden: aus der Arbeit der Stiftung Preussischer Kulturbesitz 1961-1986 (Jahrbuch Preussischer Kulturbesitz)* (as well as other similar editions in other years) within the United States, including but not limited to within the District of Columbia.

- The SPK publishes and sells a book entitled *Kinderbildnisse aus vier Jahrtausenden: Aus den Sammlungen der Stiftung Preussischer Kulturbesitz Berlin* (*Children's Pictures from Four Millennia: from the Collections of the Prussian Cultural Heritage Foundation*) within the United States, including but not limited to within the District of Columbia.

- The SPK publishes and sells copies of the law that gave rise to its creation, the *Gesetz Zur Errichtung Einer Stiftung "Preussischer Kulturbesitz" Und Zur Übertragung Von Vermögenswerten Des Ehemaligen Landes Preussen Auf Die Stiftung* (*Law for the Creation of a Foundation "Prussian Cultural Heritage" and the Transfer of Property from the Former State of Prussia*) within the United States, including but not limited to within the District of Columbia.

FAC at ¶ 26. This frequent and substantial commercial activity[3] concerning the very property at issue greatly exceeds the single or rare points of contact that were held sufficient in *Cassirer*, *Altmann*, *Chabad*, and *de Csepel*, among others. *See Cassirer*, 616 F.3d at 1027; *Chabad*, 528 F.3d at 946-47; *Altmann*, 317 F.3d at 958; *de Csepel*, 2016 U.S. Dist. LEXIS 32111, at *61-66. This Court has held that activities in connection with painting or exhibition loans are enough to meet requirements of 28 U.S.C. § 1605(a)(3). *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007).

B. In the Alternative, Defendants' Commercial Acts in 1935 in Germany and Later in the United States Strips Them of Sovereign Immunity.

As noted above, the expropriation exception provides jurisdiction over all of the Plaintiffs' claims, and the Court need not reach Defendants' argument about the commercial activity exception. In the alternative, however, should the Court adopt any part of the Defendants' characterization of the 1935 transaction, then Defendants will have merely established the applicability of the commercial activity exception, 28 U.S.C. § 1605(a)(2).

The commercial activity exception has three available avenues to jurisdiction, specifically, for any case:

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

[3]In addition, while not referenced in the FAC because it had not yet happened, the Pergammon Museum in Berlin, one of the world's great museums on ancient Near Eastern art, has made a substantial loan to an exhibition that just opened at the Metropolitan Museum of Art in New York while the Pergammon Museum's renovations are completed. The Pergammon Museum, like the Kunstgewerbemuseum where the Welfenschatz is located, is administered by the SPK. Exhibition details can be viewed at: http://www.metmuseum.org/press/exhibitions/2016/pergamon.

28 U.S.C. § 1605(a)(2). Under all three prongs, the touchstone is the nature of the act; is the activity complained of essentially commercial, or essentially sovereign? If the former, then jurisdiction is available; if the latter, then sovereign immunity forbids the suit. *See, e.g., de Csepel*, 714 F.3d at 600; *see also Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Under this precedent, to rely on either the first or the third prong of the commercial activity exception, the act complained of must have occurred in the United States or cause an effect within the U.S. such as performance that necessarily would occur within U.S. territory. *Id.*; *see also Schoeps v. Bayern*, 611 F. App'x 32, 33 (2d Cir. 2015) (disputed agreement did not have to be performed in New York and no jurisdiction was available). As the Motion correctly points out, to invoke the commercial activity exception, the commercial activity at issue must form the "gravamen of the complaint." *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 392 (2015).

As noted above, the 1935 transaction was a fundamentally coercive event that brought to bear the confiscatory power of the Nazi government. Under this view, only the expropriation exception would apply to this exercise of genocidal sovereign power. But Defendants do not accept this characterization, they ask the Court to view the 1935 sale as a case of buyer's remorse. While this is wrong, it would provide an alternative basis for jurisdiction over at least the unjust enrichment claim, if not more. The basis of the unjust enrichment claim is the Defendants' commercial exploitation of the Welfenschatz within the United States and from outside the United States causing an effect here arising from the Defendants' breaches of their promises made in supposed devotion to the Washington Principles. First, as detailed in the FAC, the Defendants make ample use of the Welfenschatz to sell catalogues and guidebooks in commerce throughout the United States, including the District of Columbia. FAC at ¶ 26. Furthermore, Defendants use their exclusive access to the collection in Berlin to offer and license

photographs within the United States, licenses that are offered at the complete discretion of the Defendants in Germany, but without which reproduction of those images in the United States is unavailable. Thus, those licenses—or infringement without them—are necessarily performed only in the United States. The Plaintiffs have alleged that they, and not the Defendants, should rightly be in possession of the Welfenschatz (thanks to the 1935 transaction that Defendants portray as purely commercial), and that the revenue that results from the foregoing activities constitute an inequitable profit here in the District of Columbia—unjust enrichment. Those connections to quintessentially commercial activity in the United States deprive the Defendants of any right to sovereign immunity. Thus, the "gravamen" of the claim, if the Court declines jurisdiction as a taking in violation of international law, would relate to a commercial transaction in 1935 and the commercial exploitation here in the United States of the property involved in that transaction. These transactions necessarily touch the United States, and jurisdiction would be warranted on that alternative basis.

Moreover, Plaintiffs have alleged that Germany's promises to hold suspected loot in art for the benefit of fair and just resolutions. This is much like the bailments that were found to warrant jurisdiction over the Complaint in *de Csepel*. 714 F.3d at 599-600. They further warrant jurisdiction under the commercial activity exception.

III. THE CLAIMS ARE NOT PRE-EMPTED AND SHOULD NOT BE DISMISSED ON COMITY GROUNDS

A. Germany did not give plaintiffs a chance to make their claims.

As the successor to the architect of the Holocaust, Germany has a unique responsibility to ensure that Nazi-looted art is restituted to victims or their heirs. *See* FAC at ¶ 237. Despite this responsibility, and despite more than seventy years of opportunity, Germany has failed to develop a coherent policy towards victims of Nazi-looted art. *Id.* at ¶ 210. This view is widely

shared by victims' representatives, groups and non-governmental organizations, including the World Jewish Congress. *Id.* at ¶ 211. In particular, Germany's failure to restitute Nazi-looted art that currently is held by German museums is acute. *Id.* at ¶ 237.

The Advisory Commission merely gives cover to this failure by paying lip service to the Washington Principles. *See id.* at ¶ 213. The Advisory Commission is not an implementation of the Washington Principles. It is, at best, ineffective and, at worst, a sham. *See id.* at ¶¶ 212-13. By its own terms, the Advisory Commission serves as a non-binding mediation process. *Id.* at ¶ 212. It does not even have procedural rules to ensure the effective administration of justice. *See Id.* at ¶ 248. German museums are not required to accept the recommendations of the Advisory Commission. *Id.*at ¶ 212. The Advisory Commission has no legal authority to adjudicate rights in property, only "moral" authority. *See id.* at ¶ 212. Even that moral authority is dubious. The Advisory Commission is not meaningfully independent. *See id.* at ¶¶ 212, 248.

The SPK itself recently conceded the inadequacy of the Advisory Commission. *Id.* at ¶ 248. In a speech, the SPK President Dr. Hermann Parzinger proposed material changes to the Advisory Commission including that the administration of the Advisory Commission should be carried out by an independent secretariat and that the Advisory Commission should have procedural rules like an arbitration body. *See id.* After the Minister of Culture disgraced herself by refusing to include a Jewish member because that person would be uniquely "prejudiced"—as opposed to the German members considering the fate of art in German museums—Germany relented on that point (in theory), though no changes have yet been made.

The Advisory Commission's recommendations evidence the Advisory Commission's inadequacy as a mechanism for resolving restitution claims. Defendants wrongly characterize Plaintiffs' FAC as lauding certain Advisory Commission decisions and argue that this

demonstrates how the Advisory Commission is implementing the Washington Principles. *See* Motion at pp. 44-45. The allegations in the FAC actually demonstrate how the Advisory Commission follows the law only when it suits the interests of German museums. The Advisory Commission is not a "fair and just solution" that Germany agreed to provide under the Washington Principles. FAC at ¶ 247.[4]

The FAC amply demonstrates how the Advisory Commission failed to do justice in Plaintiffs' case. Plaintiffs submitted conclusive—and unrebutted—evidence to the Advisory Commission that the 1935 sale of the Welfenschatz was not an arms' length transaction under German and international law. FAC at ¶¶ 203, 220. This included an independent appraisal by Sotheby's of the Welfenschatz's value as of 1935. Stötzel Aff." at ¶ 7, Exhibit 1. The Sotheby's appraisal confirmed what the Nazis themselves declared when they believed no one would ever call them to account: the 1935 price was barely a third of the actual value of the collection. Plaintiffs demonstrated further that even this inadequate consideration was not freely available to them. *Id.*; FAC at ¶¶ 12, 159, 168, 239.

The Advisory Commission ignored this evidence, the lack of rebuttal, and the legal presumption that any sale by victims of the Nazi regime after January 30, 1933 carries a presumption of duress and is thus voidable, and issued what could only be a politically motivated

[4]Defendants wrongly imply that Plaintiffs' claims should not be heard because plaintiffs did not make their claim to the Welfenshatz until 2008. *See* Motion at p. 26. It is the policy of the United States to encourage heirs of pre-war owners of looted art to come forward and claim art that has not been restituted. *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712, 721 (9th Cir. 2014). For example, in *Von Saher*, the plaintiff waited until 1998 to submit a claim to the Dutch government for restitution of artwork taken by Goring in a forced sale. The Ninth Circuit concluded that this fact should not prevent the plaintiff from seeking restitution in a U.S. court. *See id.* at 722-23.

recommendation that the Welfenschatz not be restituted.[5] *See* FAC at ¶¶ 186, 221-27, 235-37. The Advisory Commission waived it all away with the latently anti-Semitic pronouncement that the members of the Consortium's decision to "sell" was not under duress because they were already trying to market the Welfenschatz. *Id.*

Since the recommendation in the Plaintiffs' case, the Advisory Commission has adopted the revisionist attitude evidenced in the Motion to Dismiss, stating, for example, that conditions for Jewish bankers in Germany had actually improved from 1933 to 1935. FAC at ¶ 241. The Ministry of Culture of the Federal Republic of Germany is devoted to orchestrating press coverage for staged events like the release of the Gurlitt Task Force "final report," while failing to make any progress at all. FAC at ¶¶ 214-219. More recently, the same Ministry suffered the humiliation of announcing, and then withdrawing after unanimous outcry, a self-serving exhibition of the Gurlitt collection without proposing any real progress. In short, everyone except the Defendants themselves sees German national-level restitution as a farce, particularly in contrast to state-level treatment of the same issues and affecting the very same members of the Consortium. FAC at 239. It is certainly no basis to decline jurisdiction over Plaintiffs' claims.

One final point is in order with respect to the notion that this Court would be required to sit in judgment of the Advisory Commission. This is not so. The point is that this Court, and any court, should not pay the Advisory Commission any mind whatsoever. No court in the United States would ask, or adjudicate, whether a court-supervised mediator had correctly assessed a case in brokering a negotiation. For all the Defendants' pomp and circumstance, the Advisory Commission is nothing more than that, albeit a more formal one.

[5] Plaintiffs do not advocate for "automatic restitution for sales by Jews in and after 1933," *see* Motion at p. 46. Plaintiffs argue that Germany has failed to meet or even attempt to meet the burden that it bears to overcome the presumption of duress.

B. Plaintiffs' claims do not conflict with U.S. policy and are not preempted.

Defendants oversimplify U.S. policy with respect to Nazi-looted art by focusing on external resolution. In truth, U.S. policy with respect to Nazi-looted art is more nuanced. U.S. policy on the restitution of Nazi-looted art includes the following tenets:

> (1) a commitment to respect the finality of 'appropriate actions' taken by foreign nations to facilitate the internal restitution of plundered art; (2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of prewar owners and their heirs; (3) the encouragement of prewar owners and their heirs to come forward and claim art that has not been restituted; (4) concerted efforts to achieve expeditious, just and fair outcomes when heirs claim ownership to looted art; (5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and (6) a recommendation that every effort be made to remedy the consequences of forced sales.

Von Saher,, 754 F.3d 712 at 721.

The U.S.'s preference for internal resolution is not at the expense of seeking just and fair outcomes when heirs claim ownership to looted art or remedying the consequences of forced sales. Plaintiffs would certainly have preferred a non-litigious resolution, but faced with no other option, they have no other choice. To suggest that a preference to avoid litigation to restore looted art to its rightful owners immunizes Defendants from jurisdiction is like saying that a victim of a home invasion who prefers to get her property back and put the matter behind her immunizes the thief from liability. Moreover, the U.S. has a strong interest in providing relief to its citizens, including plaintiffs Stiebel and Leiber. *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 367 (S.D.N.Y. 2002) ("[T]he United States and New York have a strong localized interest in providing relief to their residents, who allegedly have been injured by defendants' wrongful acts during the Holocaust era."); *see also Agudas Chasidei Chabad v. Russian Fed'n,,* 466 F. Supp. 2d 6, 29-30 (D.D.C. 2006) ("There is a public interest in resolving issues of significant impact in a more central forum, such as this one."), *aff'd*, 528 F.3d

934 (D.C. Cir. 2008); *de Csepel v. Republic of Hung.*, 808 F. Supp. 2d 113, 139 (D.D.C. 2011), *aff'd*, 714 F.3d 591 (D.C. Cir. 2013)(same).

The Supreme Court took explicit notice of this history of support for restitution when it allowed Altmann to proceed. *Altmann*, 541 U.S. at 700. This traces back to a well known statement by the State Department that is now known as the Tate Letter. The State Department issued Press Release No. 296 on April 27, 1949, entitled: "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers." It stated, *inter alia*:

> As a matter of general interest, the Department publishes herewith a copy of a letter of April 13, 1949 from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 in the United States District Court for the Southern District of New York.
>
> The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, 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.

The Second Circuit adopted this principle in reinstating a restitution case for the forced transfer of ownership of a company. *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

The cases that Defendants cite in which courts dismissed a case as preempted due to conflicting U.S. policy involved explicit conflicts not present here. For example, in *Deutsch v. Turner Corp.*, the Ninth Circuit preempted plaintiff's cause of action under a California statute explicitly allowing causes of action by plaintiffs forced to work as slave laborers for German and Japanese companies during the Second World War. 324 F.3d 692, 703 (9th Cir. 2003). The Ninth Circuit reasoned that the foreign affairs doctrine prevents a state from "establish[ing] its

own foreign policy," and California's statute effectively established a foreign policy. *See id.* at 709 (internal quotation marks omitted); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003) (involving California statute explicitly targeting companies that participated in crimes by German government during World War II); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (involving a statute targeting companies doing business with Burma). In short, private restitution has been consistent with U.S. foreign policy since the war.

Here, Plaintiffs have brought suit under the FSIA, a federal statute that explicitly permits suits against foreign countries. In addition, Plaintiffs have brought claims under state laws of general applicability. These laws do not violate the constitution because they have some "incidental or indirect effect in foreign countries." *See Deutsch*, 324 F.3d at 710. Moreover, the FSIA is not the only Congressional pronouncement. The Holocaust Victims Redress Act (HVRA), P.L. 105-158 was passed in 1998. In it, Congress expressed 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.

Defendants have no place to tell this Court otherwise in the face of these clear pronouncements of U.S. policy, pronouncements necessary in the first instance because of Germany's war.

A claim under a law of general applicability may be preempted, in some rare circumstances where, as applied, the law conflicts with U.S. policy. However, in those cases where courts have held a claim preempted, there existed a much more significant conflict with federal policy than exists in this case. For example, in *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, heirs of life insurance policy beneficiaries killed during the Holocaust brought suit in the U.S. against European insurance companies to collect on policies issued

before World War II. 340 F. Supp. 2d 494, 499-500 (S.D.N.Y. 2004). The court dismissed the case because it conflicted with the U.S. policy favoring resolution of such claims through the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), which was set up specifically to deal with such claims. Indeed, the federal government had entered into an executive agreement with Germany in which it agreed that, in all cases involving Holocaust-era claims against German companies, it would file a brief arguing for dismissal in favor of the ICHEIC. *See also Freund v. Republic of Fr.*, 592 F. Supp. 2d 540, 547-50 (S.D.N.Y. 2008) (dismissing based on federal policy in favor of alternative recovery mechanisms put in place pursuant to a U.S. agreement with France).

In the realm of Nazi-looted art, there is no equivalent international forum[6] set up to resolve these claims. Indeed, the citation that Defendants make to U.S. policy (specifically the former Special Envoy for Holocaust Affairs) is quite clear that no such forum is remotely likely to come to pass anytime soon. Nor is the U.S. a party to any agreement that requires it to file a brief in all cases Nazi art-related cases in the United States arguing for dismissal in favor of another procedural mechanism. Plaintiffs' claims therefore do not conflict with federal policy like the claims that did in *In re Assicurazioni Generali S.P.A.*

An even more dramatic conflict with federal policy existed in *Saleh v. Titan Corp.*, where plaintiffs, former detainees at U.S. prisons in Iraq, brought state law claims against civilian interrogators for abuses they suffered. 580 F.3d 1, 7-8 (D.C. Cir. 2009). The D.C. Circuit held the claims preempted because allowing the suit to proceed would hamper the federal government's ability to conduct warfare, a core federal power. *See id.* Nothing of the sort is at

[6]Interestingly, Defendants concede that they are bound by the Washington Principles, something that makes their arguments in the Motion all the more feckless. See Motion at p. 39, n.16 ("That the Washington Principles and Terzin Declaration are non-binding is irrelevant.").

issue here. The United States has already defeated Nazi Germany. Plaintiffs claims for restitution of the Welfenschatz do not hamper the federal government's ability to carry out any of its core functions and are not preempted.

This case is far more similar to *Simon*. *Simon*, 812 F.3d at 149-51. The court concluded that no conflict existed, even though a U.S.-Hungary treaty provided a mechanism for victims of the Holocaust to seek compensation. *See id.* The court reasoned that the treaty mechanism was not the exclusive mechanism for seeking compensation and therefore, allowing the plaintiffs' claims to proceed, did not conflict with U.S. policy. *See id.* The concurring opinion in *Simon* scolded Hungary for even making this argument. *Id.* at 151 (Henderson, J, concurring) ("I write separately to emphasize the baselessness of Hungary's invocation of the Treaty Exception to the Foreign Sovereign Immunities Act").

Simon is not the only case to address a sovereign defendant's efforts to retain Nazi-looted art by arguing that the case would create a conflict with the foreign policy of the United States. In *Cassirer*, the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation each argued at various points that permitting the lawsuit to proceed would impinge the foreign policy of the United States, either because of the United States's preference to avoid litigation and/or with respect to the revised California statute of limitations. The Ninth Circuit, twice, would have none of it. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d, 613, 618-19 (9th Cir. 2013); *Cassirer*, 616 F.3d at 1027. The Norton Simon Museum made similar arguments, and similarly was rejected. That case will go to trial this September, and the foreign policy of the United States will not be impaired or infringed upon. Critically, the District Court had made the following finding in its dismissal of Marei von Saher's claims in 2012:

> In this case, the United States made a decision and chose its favored remedy for the restitution of Nazi-looted art, i.e., a country of origin's bona fide restitution

> proceedings. This external restitution policy has not changed since it was first adopted by the United States after World War II. However, Plaintiff's action seeks to trump and interfere with United States foreign policy, by relying on an entirely different remedy for the restitution of Nazi-looted art, i.e. the laws of the State of California.

Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044, 1052-53 (C.D. Cal. 2012). This is precisely what Germany suggests now. And it is precisely the conclusion that the Ninth Circuit expressly rejected in 2014 when it first identified what the foreign policy of the United States is:

> In sum, U.S. policy on the restitution of Nazi-looted art includes the following tenets: (1) a commitment to respect the finality of "appropriate actions" taken by foreign nations to facilitate the internal restitution of plundered art; (2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of prewar owners and their heirs; (3) the encouragement of prewar owners and their heirs to come forward and claim art that has not been restituted; (4) concerted efforts to achieve expeditious, just and fair outcomes when heirs claim ownership to looted art; (5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and (6) a recommendation that every effort be made to remedy the consequences of forced sales.

Von Saher, 754 F.3d at 714. Applying those identified principles to the case at hand, the Ninth Circuit overruled the view that Defendants ask this Court to take now:

> Von Saher is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims, again, because the Cranachs were never subject to internal restitution proceedings. . . . Perhaps most importantly, this litigation may provide Von Saher an opportunity to achieve a just and fair outcome to rectify the consequences of the forced transaction with Göring during the war, even if such a result is no longer capable of being expeditiously obtained.

Id. at 723. Goering, of course, is the very same war criminal responsible for the deprivation of the Welfenschatz from the Plaintiffs' predecessors in interest, "the sorts of heir[s] that the Washington Principles and Terezin Declaration encouraged to come forward to make claims." *Id.* And it underscores that the Solicitor General's letter submitted in opposition to Von Saher's 2010 petition for certiorari is no reason to decline jurisdiction. *Id.* at 724 ("We are not at all

persuaded, as is the dissent, that the Solicitor General's brief requires a different outcome. Certainly, 'there is a strong argument that federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy.' But there are many reasons why we find that weight unwarranted here.") (citations omitted).

It bears noting that the foregoing principle is true even when the Department of State has argued otherwise. In *Chabad*, the Russian defendants withdrew from participation after losing their appeal to the D.C. Circuit, and judgment entered against them. *See Agudas Chasidei Chabad of United States v. Russian Federation et al.*, Case. No. 1:05-cv-01548-RCL, Docket No. 71 ("Notice With Respect to Further Participation"). When the plaintiffs moved for sanctions, and then for the entry of a liquidated judgment on the monetary sanctions that this Court ordered, the United States opposed both times, on the grounds that diplomatic efforts might be impinged. This Court entered the judgment anyway. *Id.*, Docket No. 143.

C. Comity does not require dismissal of the claims.

Neither of Defendants' arguments for dismissal on grounds of comity is persuasive. This court owes no deference to the Advisory Commission. Despite the Defendants' smug characterizations, Plaintiffs did not "lose" their case, there was no case to win or lose before a non-binding mediation. Nor were Plaintiffs required to exhaust remedies in Germany prior to filing suit in the U.S. It is in this assertion that the Defendants' Potemkin Village is revealed for what it is. Defendants have erected a sham process for the purpose of saying that they have a process, and that this Court should defer to that process even though Defendants know it was by its own terms at most a mediation. According to Defendants:

- This case is an attempt by Plaintiffs to "try their luck again," (Motion at p. 4) as though a mediation that did not result in a bilateral agreement was an adjudication of some kind;

- They "gave plaintiffs the chance to make their claims" (Motion at p. 35)—even though the SPK would legally have been free to ignore the recommendation of the Advisory Commission;
- Plaintiffs here should "lose again, as surely and as soundly as they lost the first time" (Motion at p. 70).

Yet there is no "internal proceeding" to which deference is capable, even if the Advisory Commission were as reputable as the Defendants allege (an allegation, of course, that has no ability to refute the allegations of an initial pleading on a motion to dismiss).

1. Comity does not require deference to the Advisory Commission.

Comity does not require deference to the Advisory Commission for two reasons: (i) the recommendation of the Advisory Commission is not a binding legal decision and (ii) the Advisory Commission is not a fair and just mechanism for resolving claims for restitution of Nazi-looted art.

It is true, of course, that under certain circumstances, U.S. courts will defer to proceedings in a foreign court. *See Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999). The Advisory Commission, however, is not a foreign court. The Advisory Commission is not a tribunal of any kind. It is an advisory body that investigates claims and makes recommendations. German museums are not required to follow them. The Advisory Commission describes itself thusly:

> The "Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property" convened for its constituent session in Berlin on 14 July 2003. The commission was formed in agreement between the Federal Government Commissioner for Culture and the Media, the Conference of the Ministers of Education and Cultural Affairs (KMK) and the leading municipal associations. It can be called upon to mediate in cases of dispute involving the restitution of

> cultural assets which were confiscated during the Third Reich, especially from persecuted Jewish citizens and are now held by museums, libraries, archives or other public institutions in the Federal Republic of Germany.
>
> The commission can mediate between the institutions which manage the collections and the former owners or heirs of the cultural goods, if desired by both sides. It can also offer recommendations for settling differences of opinion.

See Website of the Deusches Zentrum Kulturgutverluste (German Center for Cultural Property Losses, http://www.kulturgutverluste.de/en/advisory-commission) (emphasis added). This distinguishes this case from the cases that defendants cite, which involved foreign court proceedings. *See, e.g.*, *Finanz AG Zurich*, 192 F.3d at 246 (involving foreign bankruptcy proceedings); *Tahan v. Hodgson*, 213 U.S. App. D.C. 306, 662 F.2d 862, 868 (1981) (involving Israeli judgment in commercial case); *Phila. Gear Corp. v. Phila. Gear, S.A.*, 44 F.3d 187, 194 (3d Cir. 1994) (ordering district court to consider whether comity should be afforded to Mexican bankruptcy proceeding where Mexican court issued letter rogatory to US court seeking stay or transfer).

Courts have held that comity is not implicated by certain foreign alternative dispute resolution mechanisms. For example, in *In re Assicurazioni Generali S.P.A.*, the court held that comity concerns were not implicated by an analysis of the ICHEIC. 228 F. Supp. 2d at 356. The court explained that the "ad-hoc, non judicial, private international claims tribunal" was not independent and had fewer indicia of reliability than the courts of a foreign sovereign. *See id.* The court declined to dismiss plaintiff's Holocaust-related insurance claims in favor of the ICHEIC on comity grounds. *See id.* Just like the ICHEIC, the Advisory Commission is not independent and lacks the indicia of reliability of the courts of a sovereign.

Moreover, as Defendants' cited cases demonstrate, even where formal foreign judicial proceedings are at issue, U.S. courts do not always defer to foreign proceedings where there exist

compelling reasons not to do so. *See, e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 162 (1895) (denying comity to French judgment because France would not have recognized an equivalent American judgment); *Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB De CV (In re Vitro SAB De CV)*, 701 F.3d 1031, 1036 (5th Cir. 2012) (denying enforcement of Mexican plan of reorganization due to conflicts with U.S. bankruptcy law). Therefore, even if the Advisory Commission were the type of body to which deference was due (which it is not), the Advisory Commission's lack of independence and dubious record leaves no doubt that dismissal is not warranted.

Defendants confuse Plaintiffs' allegations on this issue concerning the earlier recommendations of the Advisory Commission. Plaintiffs alerted the Court to the recommendations in the Freund case, when the Advisory Commission was acknowledged as a finite resource of circumscribed effect. That is because when the Advisory Commission made that recommendation, Germany did not pretend that it had created in the Advisory Commission a cure-all process. To state the obvious: Germany, a nation whose numerous, significant, and prestigious museums have barely looked below the surface for Nazi-looted art, has reviewed fewer than fifteen cases in thirteen years. The Advisory Commission served as a useful distraction when assessing claims to paintings that did not threaten Germany's possession of historic objects like the Welfenschatz. It has proven inadequate cover for predetermined outcomes since, rendering moot any arguable deference owed.

2. Comity does not require that plaintiffs exhaust remedies in Germany.

Defendants' argument that Plaintiffs should exhaust remedies in Germany rests on case law from other circuits, which does not bind this court.[7] Defendants rely principally on *Fischer*

[7]Defendants' assertion that international exhaustion has parallels in U.S. law is misleading. Under U.S. law, a plaintiff is required to exhaust post-deprivation remedies before a government taking can be considered a constitutional violation. As the *Simon* Court explained, no comparable rule exists when, in cases like this, the taking is part of a genocide: "In the

v. Magyar Allamvasutak Zrt, in which the Seventh Circuit dismissed claims by Holocaust survivors and their heirs against the Hungarian national railway and national bank because the plaintiffs failed to exhaust available remedies in Hungary. 777 F.3d 847, 857-59 (7th Cir. 2015).

The D.C. Circuit recently considered *Fischer*, however, and could have adopted its exhaustion requirement, but did not. *Simon*, 812 F.3d at 149 (explicitly not deciding whether as a prudential matter exhaustion of domestic remedies is required). *de Csepel* was the first court in this Circuit to consider prudential exhaustion after the D.C. Circuit's decision in *Simon*, and likewise concluded that exhaustion was not required as a prudential matter, expressly rejecting the Seventh Circuit's decision in *Fischer*. *de Csepel*, 2016 U.S. Dist. LEXIS 32111 at *61-66 ("The Court therefore respectfully disagrees with the Seventh Circuit's holding in *Fischer* and rejects defendants' exhaustion argument based on international comity."). The *de Csepel* court noted that "both international and domestic courts (including the D.C. Circuit) have reasonably construed the prudential theory of exhaustion to be inapplicable to causes of action brought by individuals and not states." *Id.* at 65-66. This is in line with the law that expressly rejects an exhaustion requirement to assert the expropriation exception. *Chabad*, 528 F.3d at 949.

Defendants also cannot quite decide how to describe the Advisory Commission in arguing for comity. When it suits them, the Advisory Commission is some august tribunal that has resolved all aspects of the dispute. When they argue for prudential abstention, however, Plaintiffs have somehow managed not to exhaust all their remedies in Germany. Motion at p. 41. This illogic is enough to dispense with Defendants' comity argument.

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context of a genocidal taking, unlike a standard expropriation claim, the international-law violation does not derive from any failure to provide just compensation. The violation is the genocide itself, which occurs at the moment of the taking, whether or not a victim subsequently attempts to obtain relief through the violating sovereign's domestic laws." *Simon*, 812 F.3d at 149.

IV. THIS COURT IS THE PROPER FORUM FOR PLAINTIFFS' CLAIMS

The doctrine of *forum non conveniens* applies only in "exceptional circumstances." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). The application of the doctrine "is a drastic exercise of the court's inherent power" because its results in the dismissal of the plaintiff's case. *Carigano v. Occidential Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (internal citations omitted). Courts therefore treat "forum non conveniens as an exceptional tool to be employed sparingly, and not a doctrine that compels plaintiffs to choose the optimal forum for their claim." *Id.* (internal citations omitted). In sum, "[d]ismissal for forum non conveniens is the exception, rather than the rule." *Lans v. Adduci Mastriani & Schaumberg L.L.P.*, 786 F. Supp. 2d 240, 265 (D.D.C. 2011); *see also* 15 Charles Alan Wright et al., Federal Practice and Procedure § 3828.2, at 607-608.

Under a *forum non conveniens* analysis, the court must "consider (1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal." *de Csepel*, 714 F.3d at 605 (internal citations omitted). The defendant "bears the burden...as to *all* elements of the [] analysis." *Lans*, 786 F. Supp. 2d at 300 (emphasis added); *see also El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676-677 (D.C. Cir. 1996) (defendant has burden of demonstrating the existence of an available and adequate alternative forum).

The availability of an available adequate forum is a threshold test; "a forum non conveniens motion cannot be granted unless the test is fulfilled." *El-Fadl*, 75 F.3d at 676-677 (internal citations omitted). If an adequate available forum exists, then the court must proceed to the second part of the analysis – balancing the public and private interest factors. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp.*, 330 U.S. at 508. Where a defendant seeks to transfer the matter to a

foreign jurisdiction, there is a strong presumption in favor of an American plaintiff's choice of forum in the United States. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

A. Germany is not an Adequate Forum.

Contrary to Defendants' contention, Germany is *not* an adequate forum. An alternative forum is inadequate when "there is … danger that [Plaintiffs] will be deprived of any remedy or treated unfairly." *Piper*, 454 U.S. at 254. Moreover, "where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative" forum. *Id.* at n.22.

Defendants' claim that Germany is "consistently deemed to be adequate alternate fora by U.S. courts" is inapposite. Motion at p. 55. *All* of Defendants' cases find Germany to be an adequate alternative forum when plaintiffs' complained of differences in *procedural* rules between U.S. and German courts. Motion at n. 34 (string cite to cases in which U.S. courts have rejected arguments that Germany is adequate based on differences in rules for testimony, pleading standards and discovery rules, evidence, jury trials and punitive damages, and contingency fees). Here, Germany is inadequate, not because of any procedural differences between U.S. and German courts, but because of the inability for plaintiffs even to bring the claims, Germany's lack of a coherent policy generally toward victims of Nazi-looted art, and the unfair treatment that Plaintiffs specifically have already suffered as a result of the Advisory Commission's recommendation.

Through a lengthy (and expensive) process, Plaintiffs have already received the only "remedy" that Germany will afford them. This resulted in nothing more than the Advisory Commission's recommendation in what was politically-motivated decision that resolved to keep the Welfenschatz in the hands of a German state-owned museum rather then return the works to their rightful owners. *Id.* at ¶¶ 222, 223, 227. Germany has no coherent policy towards victims

of Nazi looted art, about which victims' representatives have repeatedly expressed concern. *Id.* at ¶¶ 210-11. Having failed to meet this threshold test (*i.e.*, that Germany is an adequate forum), Defendants' motion for *forum non conveniens* must be denied.

The Motion attempts to distract the analysis by pledging not to assert the statute of limitations in Germany. This, Defendants argue, removes any obstacle to consideration of Germany as an adequate alternate forum. This is too clever by half, and is an obvious attempt to end-run the holding in *Malewicz* that the prospect of facing a statute of limitations defense precluded application of the doctrine of *forum non conveniens*. In reality, Defendants offer only the possibility of a forum in Germany; their proffered expert Professor Jan Thiessen[8] will only go so far as to note the relatively obvious fact that German courts would have jurisdiction over the German defendants. Thiessen Opinion at pp. 5-6. That is of little use in aiding the Court's analysis of the adequacy of Germany as a forum here, however. In addition, while Plaintiffs certainly agree that under German *law* they are the rightful owners of the Welfenschatz, that does not mean a German *court* would receive their claims. In fact, it likely would not. Professor

[8]Dr. Christian Armbrüster's opinion submitted with Defendants' first Motion to Dismiss was directed to the point of standing, an argument that the Defendants have wisely abandoned. Nonetheless, his conclusion on that point is now premised on the unsupported counter-allegation that the Consortium had a separate legal existence—a connection to Germany that the Defendants suggest further warrants litigation there rather than here. Both Dr. Thiessen and Dr. Armbrüster are, however, mistaken as a matter of the facts alleged and of law:

> A German court today - by applying today's law and in conjunction with the mandatory inclusion of the historical legal framework of the years 1929-35 - would not under any legal consideration whatsoever (as discussed above in detail) award the "Welfenschatz" Consortium a qualification with its own legal person status. The Consortium was not an "external corporation" and, as purely a tendering consortium, was also not the owner of the "Welfenschatz" collection.

See Meder Opinion at p. 21. The FAC does not allege that the Consortium was a legally distinct entity as opposed to an informal association made of the owners of the Welfenschatz. No allegation in the FAC supports an inference to the contrary, and, even if it could, Defendants are entitled to no such inference in assessing the viability of the forum.

Thiessen argues that limitations-based defenses are "generally affirmative defenses, which a court will not consider unless raised by the parties." Motion at p. 54, n. 33. "Generally" is not the same as the certain availability of the alternate forum required to dismiss the case. It is also cold comfort for Plaintiffs, who were deceptively induced into Defendants' invitation to a German process once before. Doubling down on this fiction is no basis to dismiss the case on a discretionary basis.

As Dr. Stephan Meder of the University of Hannover in Germany explains in his expert opinion submitted herewith, German courts are fickle at best with regard to restitution claims for moveable personal property like the Welfenschatz. *See* Expert Opinion of Professor Dr. Stephan Meder (the "Meder Opinion"), attached to the Declaration of Nicholas M. O'Donnell in Opposition to Defendants' Motion to Dismiss (the "O'Donnell Declaration") as Exhibit 2 (with certified translation as Exhibit 1). Professor Meder makes the operative point succinctly: "any related claims can today no longer be asserted before German courts." Meder Opinion at p. 36 (O'Donnell Declaration Exhibit 2). German courts *might* hear a claim like that of the Hans Sachs collection cited by Professor Thiessen—notable also because the plaintiffs in that claim had gone to the Advisory Commission and "lost," as Defendants would no doubt put it. But more likely, as Professor Meder explains, they would not:

> From my point of view, and in consideration of the legal framework, the literature and the legal precedence, the matter of asserting and enforcing these claims in Germany before German courts must be at best affirmed theoretically (in contrast to the assertion by Thiessen), but is de facto excluded from a practical point of view.

Id. at pp. 33-34. And further:

> The plaintiffs would therefore be excluded from asserting claims in connection with the "Welfenschatz" collection, to the extent that they were to invoke the special laws on restitution and reparations of Nazi infractions.

Id. at p. 37 . That uncertainty rules out Germany as an adequate alternate forum.

B. Even if Germany were an Adequate Forum (Which it is Not), the Case Should Not Be Dismissed on *Forum non conveniens* Grounds.

Even if Germany were an adequate forum (which it is not), Defendants' argument that the case should be dismissed on *forum non conveniens* grounds still fails because (1) Plaintiffs' choice of forum should not be disturbed; and (2) the balance of private and public interests do not weigh strongly in Defendants' favor.

1. Plaintiffs' Choice of Forum is Entitled to Strong Deference.

Defendants contend that Plaintiffs' choice of forum is not entitled to any deference because this case involves non-U.S. plaintiffs who have engaged in "forum shopping," a lazy term that most often appears whenever there is no legal basis to disturb a plaintiff's viable choice of forum. Motion at p. 67. This is objectively incorrect.

First, two of the three plaintiffs are U.S. citizens, and all the Plaintiffs are assignees of another American. A U.S. citizen's choice of forum is entitled to greater deference than a forum chosen solely by foreign plaintiffs. *See Piper Aircraft,* 454 U.S. at 256 (plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum). "It also generally is acknowledged that citizens should rarely be denied access to courts of the United States." *Reid-Walen v. Hansen,* 933 F.2d 1390, 1394 (8th Cir. 1991). A court "should not dismiss a complaint brought by American plaintiffs in favor of a foreign jurisdiction on forum non conveniens grounds unless trial in the United States is demonstrably unjust, vexatious, or oppressive." *Bodner v. Banque Paribas,* 114 F. Supp. 2d 117, 131 (E.D.N.Y. 2000) (internal citations omitted). The U.K. citizenship of the third plaintiff does not affect this analysis.

The fact that the two U.S. citizen-plaintiffs do not reside in the District of Columbia is irrelevant. For purposes of a *forum non conveniens* analysis, a U.S. citizen's home forum is "any United States Court." *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103 (2d Cir.

2000); *Guidi v. Inter-Cont'l Hotels Corp.*, 224 F.3d 142, 146 & n.4 (2d Cir. 2000)("Plaintiffs argue -- and we agree -- that their 'home forum' as American citizens is a United States court…the states where Plaintiffs reside are not relevant to the forum non conveniens analysis in this case"); *Reid-Walen*, 933 F.2d at 1394 & n.4 (in a *forum non conveniens* case involving a foreign court, "the 'home' forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives").

Moreover, Plaintiffs' did not bring suit in the District of Columbia as a "forum shopping" expedition or to otherwise harass or vex defendants. Plaintiffs brought a suit under U.S. law, the FSIA. Plaintiffs brought their suit in the District of Columbia because both Defendants are amenable to suit here. Defendant SPK is amenable to suit under 28 U.S.C. § 1391(f)(3) based on its engagement in commercial activity in the district. *Altmann v. Republic of Aus.*, 142 F. Supp. 2d 1187, 1215 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954, 972 (9th Cir. Cal. 2002) (venue for U.S. citizen's action against Austria was proper in Central District of California because Austria's art gallery was doing business in that district, as it distributed publications and advertisements to solicit tourism). And Defendant Germany is amenable to suit in the district under 28 U.S.C. § 1391(f)(4), which designates the District of Columbia as the proper venue for an action brought against a foreign state. While Plaintiffs certainly could have filed suit in the District Courts of their homes, the Central District of California or the District of New Mexico, they selected instead the District Court most versant with issues of sovereign immunities—this one.

Thus, as the majority of Plaintiffs are U.S. citizens, their choice of forum is entitled to strong deference and should only be disturbed in "exceptional circumstances." *Gulf Oil Corp.*, 330 U.S. at 504. Such circumstances do not exist here.

2. The Public and Private Factors Do Not Balance Strongly in Defendants' Favor To Overcome Strong Deference to Plaintiffs' Choice of Forum.

Even if Plaintiffs' choice of forum was not entitled to great deference (which it is), for Defendants to prevail on a *forum non conveniens* argument, Defendants still must prove that the balance of public and private interests is strongly in their favor. *Id.* But Defendants have articulated no "exceptional circumstances" that warrant dismissal. *Id.*

(a) The Private Factors Weigh in Favor of Litigation in the United States.

In a *forum non conveniens* analysis, the relevant private interests are: "(1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) cost of attendance of witnesses; (4) enforceability of a judgment, if obtained; and (5) other practical problems that make trial of a case easy, expeditious and inexpensive." *Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 28 (D.D.C. 2006) (internal citations omitted). None of the private factors cited by Defendants balance strongly in their favor as would be required to grant the Motion on that basis.

First, Defendants contend that they will need to introduce hundreds of hard copy documents[9] that are located in Germany and will require translation from German to English. This is hardly a voluminous number of documents and pales in comparison to a typical document production in complex litigation matters. In international litigation, it is hardly uncommon for documents to be located abroad. *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 361 (S.D.N.Y. 2002). In addition, the documents can be easily scanned and sent electronically from Germany to the United States. *See, e.g., Lans*, 786 F. Supp. 2d at 294

[9]From Martin Seyfarth's declaration submitted by the Defendants, it appears that Defendants claim there are "hundreds of *pages*," not hundreds of documents that they will need to introduce as evidence. *See* Motion, Ex. C at ¶ 12 (emphasis added).

("due to modern technology, the physical location of the documents is less important in determining the convenience of the parties").

As one district court noted:

> The advances of modern technology and the development of a global economy with instant access to information worldwide severely undercut defendants' claim of forum non conveniens …. The costs involved to defendants in defending this action…are significantly mitigated by the time- and money-saving tools including e-mail, fax, scanners, digital photography, and global access to the internet.

Bodner, 114 F. Supp. 2d at 133 (citation omitted). Even if the suit were brought in Germany, the documents would have to be copied or scanned for use in the proceeding; thus, there is no cost-saving or convenience factor that weighs in Defendants' favor based on the fact that the documents are in hard copy form. And regardless of the forum (Germany or the United States), the documents will have to be provided to Plaintiffs and its counsel, located in the United States, undercutting any claim by Defendants that there would be more ease of access to evidence if the case was tried in Germany. *Chabad*, 466 F. Supp. 2d at 29.

Second, Defendants' allegations (assuming they are true) that the facts in this case "turn almost entirely on German-language documents located in German historical archives" do not "amount to the 'extreme circumstances' and 'material injustice' needed to overcome the strong private interests of [Plaintiffs'] choice of a domestic forum." *Am. Home Assurance Co. v. Ins. Corp. of Ir., Ltd.*, 603 F. Supp. 636, 641 (S.D.N.Y. 1984) (allegations by movants concerning greater access in Britain to documents, witnesses and evidence are not sufficient to overcome the strong private interest of plaintiffs' choice of a domestic forum). Nor does the cost of translating a few hundred pages from German to English weigh in favor of the Defendants. *See Chabad*, 466 F. Supp. 2d at 29; *de Csepel*, 808 F. Supp. 2d at 139. Plaintiffs have already done so at their own

expense, translating the FAC for service and Professor Meder's opinion here. Defendants allege that many of the German-language documents are hand written in "old-fashioned German." Motion to Dismiss, Ex. C. at ¶ 12. Therefore, there would likely still be "translation" disputes among the parties even if the documents remained in their original language over the interpretation of the documents into more modern German.

In favor of the application of the private factor element of *forum non conveniens*, Defendants submit an affidavit from their own lawyer who represented them before the Advisory Commission. Martin Seyfarth is an experienced and respected lawyer, who will no doubt be a witness in this case to the extent the conduct of the Advisory Commission requires proof. More to the point, he is a German lawyer who also speaks English. Offering the statements of the Defendants' own advocate to suggest either that Plaintiffs' translations already submitted are imperfect has no persuasive or evidentiary value.

Defendants argue several things about what they "believe" the true circumstances of the 1935 transaction were. Motion at pp. 56-57. This, they contend "turn[s] almost entirely on German-language documents" such that making a decision based on them would be overwhelmingly difficult, if not impossible. *Id.* at pp. 57-58. This is an insult to the Court's deliberative ability. No Court of this circuit need shy away from a case because there is voluminous or even potentially conflicting evidence. Defendants hold no special key to divine the meaning of this evidence, but the fact that they wish to return to a forum of their own says far more about their motivations than the evidence ever could. Germany's idea of confronting its historical responsibility is to slander the memory of persecuted Jews by calling them "sophisticated businessmen" (a tired anti-Semitic double entendre of which their predecessors in interest would have been proud) who "got what they could from a doomed art investment in the

midst of the Great Depression." Motion at p. 5. Apparently Germany still thinks that Jewish merchants like the Consortium members had it coming.

Finally, Defendants' assertion that this Court's judgment will not be respected in Germany is at once without merit and more than a little troubling. *See* Motion to Dismiss at 59. The FSIA allows for the attachment of certain German government property in the United States, which gives Plaintiffs "significant leverage" over Defendants and increases the likelihood that Germany or its courts will respect the judgment of a U.S. court. *Chabad*, 528 F.3d at 951 (noting that district court viewed argument that district court "will likely be unable to afford Chabad the relief it seeks, possession of the Archive (and the Library)" as "an 'affront' to the court."). Moreover, "the possibility that the judgment of the district court may go unenforced does not bear upon whether that court is an inconvenient forum in which to defend." *TMR Energy Ltd. v. State Prop. Fund of Uk.*, 411 F.3d 296, 303 (D.C. Cir. 2005). That Germany has already raised the prospect of defying this Court's judgments is disturbing indeed and further grounds to deny Germany's complaints of inconvenience.

In proposing to defy this Court's judgment just as the recalcitrant Russian defendants in *Chabad* currently under sanction of this Court have, Defendants make a tautological argument. A German court, they say, would not enforce a foreign judgment by a court that lacked jurisdiction. Motion at p. 60. As a result, so they say, that refusal to recognize a judgment means that this Court lacks jurisdiction. *Id.* This argument is circular, and merely proves the inadequacy of Germany as a forum.

Other private factors favor Plaintiff's choice of forum. First, the location of witnesses weighs in Plaintiffs' favor. Leiber's mother, who has personal knowledge of the allegations in the Complaint, resides in the United States and is of advanced age. It would be extremely

difficult for her to travel internationally to give testimony in Germany, and particularly inequitable to compel her to return to Defendants' country that expelled her as a young woman for the crime of being a Jew. Moreover, the two U.S. plaintiffs live on the West Coast, in Santa Fe, New Mexico and West Hollywood, California. It is by far more convenient for these U.S. citizens to travel domestically within the United States during the course of the proceedings, than to travel internationally to Europe. And the District of Columbia is convenient to the Defendants. Diplomatic representatives of Germany, including Germany's ambassador to the United States, work in the District of Columbia, and the Embassy of the Federal Republic of Germany is located approximately 5 miles away from the federal courthouse. *See Altman*, 142 F. Supp. 2d 1187 (denying dismissal for lack of venue and noting that the Austrian Consulate is located a short distance from the federal courthouse and that diplomatic representatives of Austria work in the Central District of California).

In sum, Defendants fail to meet their heavy burden of demonstrating that the private factors outweigh Plaintiffs' choice of forum.

(b) The Public Interest Factors Favor Litigation in the United States.

The relevant public interest factors include: "(1) the preference for deciding local controversies at home, and conversely (2) the preference for resolving significant issues in a more central forum; (3) in diversity cases, the familiarity of the forum with applicable state law; and (4) the burden of jury duty on citizens of a forum unrelated to the case." *de Csepel*, 808 F. Supp. 2d at 138-139 (internal citations omitted). *All* of the applicable public interests factors[10] favor Plaintiffs. Germany has thumbed its nose at the restitution of art when it wishes to keep

[10]There is no burden on potential jurors, as jury trials are not available in suits brought under the FSIA. *Chabad*, 466 F. Supp. 2d at 30; *de Csepel*, 808 F. Supp. 2d at 139.

valuable and important objects. The legislative and executive policy of the United States neither requires nor even suggests that such recalcitrance overcomes the public interest.

Although Germany has claimed an interest in deciding this matter in Germany, that is not reason enough to grant dismissal and falls far short of demonstrating that the "strong presumption" in favor of Plaintiffs' choice of forum should be disturbed. *Piper Aircraft*, 454 U.S. at 255; *see also Am. Home Assurance Co.*, 603 F. Supp. at 642 ("[P]ublic policy favors providing a forum in which United States citizens may seek to redress an alleged wrong.").

Moreover, contrary to Defendants' assertion, federal courts in the United States have expressed a strong interest in providing a forum for the resolution of Holocaust-era claims.*See e.g.*, *Chabad*, 466 F. Supp. 2d at 29-30 ("There is a public interest in resolving issues of significant impact in a more central forum, such as this one."); *de Csepel*, 808 F. Supp. 2d at 139, (same); *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 369 (S.D.N.Y. 2002)("[T]he United States….ha[s] a strong localized interest in providing relief to [its] residents, who allegedly have been injured by defendants' wrongful acts during the Holocaust era."). Furthermore, Defendants' focus on the possibility that German law will apply to certain issues is misplaced. Congress designated the District of Columbia as the proper venue for cases against foreign states under the FSIA; this Court is therefore "familiar with the issues of law presented by such a case." *de Csepel*, 808 F. Supp. 2d at 139. Whether here or there, either Germany or this Court may have to deal with foreign legal concepts. *de Csepel*, 808 F. Supp. 2d at 139. To the extent that German law may apply, Defendants concede that the majority of German law at issue is historical law, as evidenced by their affidavit of Professor Dr. Christian Armbrüster analyzing German laws from 1929 to 1935. Dismissal on the application of historical foreign law does not weigh in Defendants' favor as both the United States and

Germany would need to use historical legal experts on these matters. *In re Assicurazioni Generali S.P.A. Holocaust Ins. Lit.*, 228 F. Supp. 2d at 369 ("[T]he need to apply foreign law is not dispositive, especially when only past foreign law applies, as any forum would need to employ historical legal experts."). But this presents no particular burden that warrants dismissal. The parties have already consulted and procured their respective experts, who are more than capable of presenting their analysis (and already have).

In addition, "[f]ederal courts are experienced in applying foreign law and should not be reluctant to do so." *In re Disaster at Riyadh Airport, Saudi Arabia, on August 19, 1980*, 540 F. Supp. 1141, 1153 (D.D.C. 1982). And courts in this district have not considered "the burden of applying foreign law to be very significant in relation to the [*forum non conveniens*] test overall." *Transamerica Leasing, Inc. v. La Republica de Venez.*, 21 F. Supp. 2d 47, 54 (D.D.C. 1998); *see also Rogers v. Petroleo Braslerio, S.A.*, 741 F. Supp. 2d 492, 509 (S.D.N.Y. 2010), *rev'd on other grounds*, 673 F.3d 131 (2d Cir. 2012) ("The need to apply foreign law is not in itself a reason to apply the doctrine of *forum non conveniens* and [courts] must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform."). The District Court in Los Angeles did just that in presiding over the matter in *Cassirer*. *See Cassirer v. Thyssen-Bornemisza Collection Foundation*, Case No. 2:05-cv-03459-JFW-E, Docket No. 315 (Order on Motion for Summary Judgment, June 4, 2015).

Curiously, having excoriated Hungary in a footnote earlier, Defendants cannot resist to citing to *Fischer*, the only case (and not one from this circuit) that took anything like Defendants' worldview, which claimed an important interest for Hungary in reviewing crimes against its own citizens. Motion at pp. 63-64. A citation to *Fischer* is unavailable in this circuit after *Simon*, however, so the point needs no further consideration even apart from its obvious

hypocrisy. Germany's last line of defense is to suggest that "Germany has a powerful interest in remedying the crimes of the Nazi government and in providing compensation and restitution and restitution of Nazi-looted art to victims of Nazi persecution." It does, but as the FAC makes plain, it has abdicated that interest in favor of self-serving pronouncements and staged events.

V. PLAINTIFFS' CLAIMS ARE TIMELY

Defendants' final gambit is to argue that the Plaintiffs' claims are time barred. They are not. Most seriously, this assertion is an explicit repudiation of decades of Germany's international commitments. Through the Collective Declaration, Germany has promised not to assert technical defenses like statutes of limitations, promises that Germany made to join the international community in coming to terms with the effects of Nazi art looting. FAC at ¶¶ 200, 247, 277; Stötzel Aff. at ¶¶ 15-16. Germany knows this well, in that it has agreed to meet its obligations if only the Plaintiffs will march to the inadequate forum of Germany's choosing, where Defendants assure the Court that they will not assert the statute of limitations. This is the purest hypocrisy and should doom the Motion without further consideration.

At the outset, the courts of this circuit have made clear time and again that the assertion of a statute of limitations defense is highly disfavored for resolution[11] at the procedural posture of a motion pursuant to Fed. R. Civ. P. 12(b)(6).

> There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense. . . . [A] responding party often imposes an undue burden on the trial court and impedes the orderly administration of the lawsuit when he relies on a motion to dismiss to raise such an affirmative defense.

[11]Defendants know this perfectly well. As they noted in pressing the application of *forum non conveniens*, limitations-based defenses "are generally affirmative defenses," making application at this stage all the more misplaced.

Richards v. Mileski, 662 F.2d 65, 73 n.13 (D.C. Cir. 1981) (emphasis added) (referring to "overwhelming line of authority" for the proposition); *see also Firestone v. Firestone*, 76 F.3d 1205, 1208-09 (D.C. Cir. 1996) (overturning denial of leave to amend because "courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint . . . because statute of limitations issues often depend on contested questions of fact, dismissal is appropriate only if the complaint on its face is conclusively time-barred."); *Allen v. Beta Constr.*, 309 F. Supp. 2d 42, 48 (D.D.C. 2004). Assuming the allegations of the FAC as true, the action is timely. The Motion only serves to make counter-allegations of fact, an approach that has no effect on the proper analysis at the Rule 12 stage.

D.C. Code § 12-301(2) governs "claims relating to "the recovery of personal property or damages for its unlawful detention." D.C. Code § 12-301(2); *Gilson v. Republic of Ir.*, 682 F.2d 1022, 1025 n.7 (D.C. Cir. 1982) ("The applicable statute of limitation [in a FSIA case] is determined by the local law of the forum."). Defendants claim to have acquired the Welfenschatz lawfully. In addition, as the FAC alleges, Germany agreed in 1999 pursuant to the Collective Declaration to hold disputed property for the benefit of claimants pending resolution—and then engaged with the Plaintiffs before the Advisory Commission, albeit disingenuously. Thus, Plaintiffs' claims accrued "when the plaintiff demands the return of the property and the defendant refuses, or when the defendant takes some action that a reasonable person would understand to be either an act of conversion or inconsistent with a bailment." *Malewicz*, 517 F. Supp. 2d at 335. Plaintiffs explicitly allege such a bailment, and no such sequence inconsistent with that appears in the FAC because, until the 2014 recommendation by the Advisory Commission, Defendants never unequivocally refused to return the collection. In fact, quite to the contrary, they maintained before and since that had the recommendation been

otherwise, they would return the Welfenschatz, ruling out any conclusion that their acts were inconsistent with the prospect that they would return the collection.

Germany's affirmative actions since 1999 render the statute of limitations unavailable. Germany has signed international commitments to reach fair and just solutions on the merits, not selective assertions of time-bars only when a claimant refuses to subject itself to an inadequate forum. Saying "Germany is committed to fair and just solutions" does not actually mean that Germany is committed to fair and just solutions. Only actions speak to that, and Germany's assertion of the limitations defense here makes a mockery of those international commitments. Defendants' overt inducement to claimants generally and to Plaintiffs specifically constitute "lulling" that would compel tolling the statute of limitations through and until the farce that was the Advisory Commission was revealed for what it was. *Jones v. Gov't Emps. Ins. Co.*, 621 A.2d 845, 847 (D.C. 1993) ("lulling" tolls statute of limitations where (i) there was "affirmative inducement"); *Bailey v. Greenberg*, 516 A.2d 934, 937-40 (D.C. 1986) (equitable tolling is appropriate where "if it appears [the defendant] has done anything that would tend to lull the plaintiff into inaction, and thereby permit the limitation prescribed by the statute to run."). Plaintiffs allege squarely that since the Collective Declaration, Germany has pledged to hold the Welfenschatz in trust pending resolution of the claims. FAC at ¶ 200. That restitution was put out of reach only upon the poorly-considered Advisory Commission decision in early 2014, less than a year before this case was filed. The SPK, which now tries to paint the Advisory Commission as some kind of binding arbitration, clearly concedes that it was prepared (or deceptively claimed to be prepared) to restitute the Welfenschatz as an inducement to draw the Plaintiffs into the Advisory Commission rather than vindicate their rights in court. As is now clear, and as the FAC explicitly alleges, the Advisory Commission proceedings were a sham

designed only to provide bad-faith cover for the restitution of the collection. No applicable statute of limitations could have started to run under those circumstances until the Advisory Commission's recommendation was issued. Even if that were not so, it would be a matter of fact for the Defendants to prove, rendering their request at this posture entirely inappropriate.

Further, where a defending party plays a hand in concealing information that would inform the plaintiff of its right to pursue a claim, that defendant is estopped from asserting the statute of limitations. *William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1191-92 (D.C. Ct. App. 1980) ("any statement, word or act which tends to suppress the truth raises the suppression to that level" and compels that the statute be tolled). This is pursuit to the familiar doctrine of equitable tolling. Equitable tolling operates on the basic notion of fairness and wrongdoing:

> To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232-33 (1959). No claim could be a better candidate for equitable tolling that one against Germany—the instigator and executioner of the Holocaust—for claims related to that historic crime.

Defendants' citations to various Holocaust looted art claims that were dismissed as time barred does not establish their point. Above all else, none of the parties involved were sovereign nations that pledged to adhere to the Washington Principles, or the Collective Declaration, and to reach the merits of such disputes. And, of course, none of them are the nation singularly responsible for the entire tragedy in the first instance, as Germany is. In addition, *Museum of Fine Arts v. Seger-Thomschitz* actually cuts against Defendants' argument entirely: that case was resolved at summary judgment, not a motion to dismiss, and involved documentary evidence that Oskar Reichel's sons knew of the transaction and did not object to it. 623 F.3d 1, 14 (1st

Cir. 2010). In both *Toledo Museum of Fine Arts v. Ullin* and *Orkin v. Taylor*, the statute of limitations did not allow for a discovery rule, making the application on a Rule 12 motion far simpler. *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006). Lastly, *Dunbar v. Seger-Thomschitz* dealt with an entirely anomalous concept under American law, that of prescriptive adverse possession of personal property, which allowed for no equitable or factual defenses—but which in any event was also a summary judgment decision, not a ruling on a motion to dismiss. 615 F.3d 574, 576 (5th Cir. 2010). It has no relevance to Plaintiffs' claims.

Finally, even if the Court applied the discovery rule advocated by the Defendants, the claims are still timely because information central to the claims—and attached to the Complaint—was unavailable despite reasonable diligence from discovery. Under the "discovery rule," a claim will accrue when the plaintiff knows, or with the exercise of reasonable diligence could know, of the existence of the claim. *Ling Yuan Hu v. George Wash. Univ.*, 766 F. Supp. 2d 236, 241 (D.D.C. 2011). Documents that evidence the conspiracy among high-ranking Nazis were not available or accessible until quite recently. Stötzel Aff., ¶ 3. Plaintiffs did not only present five expert opinions to the Commission, but discovered more documents during the procedure after June 29, 2012, that evidence the conspiracy among high-ranking Nazis, in trying to get hold of the Welfenschatz collection: *Id.* at ¶ 11.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court DENY the Motion to Dismiss.

May 11, 2016

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CERTIFICATION

I hereby certify that on May 11, 2016, a copy of the foregoing Plaintiffs' Opposition to Defendants' Motion to Dismiss and associated papers was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

May 11, 2016

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Alan PHILIPP, Gerald G. STIEBEL, and Jed R. LEIBER, Plaintiffs, v. FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSISCHER KULTURBESITZ, Defendants.	Case No. 15-cv-00266 (CKK)

DECLARATION OF NICHOLAS M. O'DONNELL IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I, Nicholas M. O'Donnell, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am an attorney and a partner at the law firm of Sullivan & Worcester LLP, counsel to Plaintiffs Alan Philipp, Gerald G. Stiebel, and Jed R. Leiber ("Plaintiffs"). I submit this Declaration in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss.

2. Attached as Exhibit 1 is a true and correct copy a certified translation of the Expert Opinion of Professor Dr. Stephan Meder (the "Meder Opinion"), dated April 22, 2016.

3. Attached as Exhibit 2 is a copy of the Meder Opinion in the original German and of Dr. Meder's CV.

Dated: May 11, 2016
Boston, Massachusetts

/s/ Nicholas M. O'Donnell
Nicholas M. O'Donnell

Exhibit 1

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04.22.2016

Expert Opinion by

Prof. Dr. Stephan MEDER

A. Qualifications and assignment

I. I am a tenured professor for private law and legal history at Leibniz University Hanover. I have published extensively in various fields of private law and am the editor of a leading publication on banking and capital market law. I am also a legal historian. As such, I have studied the historical developments of private law, that is to say both before and also after the German codification of 1900 ("German Civil Code" [*Bürgerliches Gesetzbuch*] - hereinafter called "BGB") went into effect. In connection with this, I have also examined societal legal topics and issues that address problems related to the illegal Nazi state and political totalitarianism. In addition to my academic activities, I was also active as a legal expert on behalf of the German Government and on behalf of the German Parliament [*Deutscher Bundestag*] in connection with projects on legal reform. My curriculum vitae is found together with a list of publications in the attachments.

II. I have been retained by plaintiff's attorneys to prepare an expert opinion for the plaintiff for a case presently pending before the United States District Court for the District of Columbia, *Philipp v. Fed. Rep. of*

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Germany, No. 15-cv-00266. My understanding is that defendants dispute that there is a claim for returning a collection of medieval artifacts referred to as "Welfenschatz".

In preparation for my expert opinion, I reviewed plaintiff's complaint – First Amended Complaint (FAC). In addition, I reviewed defendant's Motion to Dismiss and the appraisal by the German legal experts retained by defendant, in particular the Armbrüster declaration dated March 4, 2016 ("Armbrüster Expert Opinion") and the Thiessen declaration dated March 7, 2016 ("Thiessen Expert Appraisal").

III. I was asked to respond to the following questions associated with this legal dispute:

1) Relying on the allegations in the First Amended Complaint, did the Consortium of art dealers described therein have any separate legal existence under German law?

2) If not, who owned the "Welfenschatz" between 1929 and 1935 under German law?

3) Regardless of the answer to these questions (1, 2), do the plaintiffs in this case, Alan Philipp, Gerald Stiebel, and Jed Leiber, have standing to bring their claims under German law?

IV. My assumption is that regarding the facts underlying the case, I can only address the claims stated in the complaint ("First Amended Complaint", FAC) and its attachments. This means that even if several claims are subsequently shown to be false, I am required to assume these to be truthful at this stage of the litigation. It goes without saying

that my replies may have been different if individual claims are shown to be false. My remuneration is in no way linked to the outcome of the litigation.

B. Regarding the question of whether the Consortium of art dealers had any separate legal existence under German law

I. "Consortium" term

A "Consortium" (from Latin *consortium*) is defined as a temporary association of several natural or legal persons that remain legally and economically independent, in particular of companies or business persons, for the purpose of executing a closed-ended, agreed-upon, limited economic objective; these are also in many cases limited to the implementation of one or a limited number of individual transactions on joint account. Consortiums are typically formed when the contract value or the transaction volume are too large for an individual company and/or an individual business person

(see www.duden.de under "Konsortium"; *Ulmer/Schäfer* in: Münchener Kommentar [Munich Commentary], BGB, 6th edition 2013, before Section 705 margin note 51 and margin note 58 for the example case of a large loan; see for the case of loan consortiums *Hadding* in: Schimansky/Bunte/ Lwowski, Bankrechts-Handbuch [Banking Law Handbook], Vol. II, 2nd edition 2001, Section 87 margin note 24).

Currently, for example, the international media enterprises and groups of journalists that uncovered the scandal surrounding the formation of questionable shell companies in Panama and that are jointly commercializing the information, are referred to as consortiums (see Frankfurter Allgemeine Zeitung dated April 9, 2016, p. 19).

The case in question involves a consortium between the art dealerships J. Rosenbaum, Z. M. Hackenbroch and J. & S. Goldschmidt, which had collaborated to execute an individual transaction, that is to say buying and reselling the "Welfenschatz" - presumably because the transaction was financially too large for each of the consortium members alone. The art dealers - by definition - remained legally and economically independent in this case (under whatever legal-commercial legal forms they were active at that time - either as sole proprietorships [Einzelunternehmen], general partnerships [*Offene Handelsgesellschaft*(OHG)], etc).

II. The "Welfenschatz" Consortium as BGB enterprise (Section 705 BGB) in its weakest embodiment, that is to say the "tendering consortium" [Gelegenheitsgesellschaft]

1. Temporally applicable law for qualifying the corporate form of a consortium

Section 705 BGB is one of the few codes that have remained unchanged through today since the BGB went into effect in 1900. In regards to fundamental issues for assessing and qualifying the corporate form of a consortium, the legal framework for the years 1929 to 1935 is comparable in many ways to the present day situation, so that old and new legal precendent and literature can both be cited for this fundamental evaluation and analysis.

2. The nature of a standard BGB corporation

Section 705 BGB is the basic code for BGB corporations, which lawmakers drafted in a flexible manner, and only by means of mostly elective provisions. As a result, the BGB corporation, or "Gesellschaft bürgerlichen Rechts (GbR)", as a legal form is an exceptionally adaptable legal instrument, whose organization and structure can be flexibly adapted to the particular economic (or other) purposes of the associa-

tion - on the basis of the particular agreements between the shareholders. The legal form of the BGB corporation therefore exists in a wide range of embodiments, with the legal structure of the BGB corporation, which also include so-called "tendering consortiums", also existing in highly varied embodiments

(see Staudinger/*Geiler*, BGB, 9th edition 1929, preliminary remarks on Section 705 I 2., Annex A to the 14th Vol., credits and I., Annex B to the 14th Vol., I.2.; Palandt/*Sprau*, BGB, 75th edition 2016, Section 705 margin note 1, margin note 36 ff.).

Pursuant to the terminology definitions in Section 705 BGB, several natural or legal persons mutually agree to promote the attainment of a joint objective by entering into a shareholder agreement. By what means this is to be accomplished and what contributions the shareholders are required to provide is defined in an informal, written or verbally agreed-upon shareholder agreement. Yet another factual element of a standard BGB corporation is that the shareholder agreement forms an "open-ended legal relationship" that results in a special loyalty obligation of the shareholders to each other

(see Staudinger/*Geiler*, BGB, 9th edition 1929, prel. remarks on Section 705 I 5 a), Section 705 II. 1.; Manual commentary BGB/*Saenger*, BGB, 7th ed. 2012, Section 705 margin note 2f; Palandt/*Sprau*, BGB, 75th ed. 2016, Section 705 margin note 1, margin note 36 ff.).

Generally speaking, BGB corporations involve the creation of company assets; however, this is not a mandatory criterion for defining the legal form, is not the nature of a BGB corporation and is therefore also not a required condition for forming or for the existence of a BGB corporation. BGB corporations are therefore conceivable and possible where the shareholders explicitly do not (wish to) form jointly held assets. Staudinger/*Geiler* names consortiums and underwriting transactions as examples for this. Whether or not company assets are formed is therefore at the discretion of the shareholders

(see Staudinger/*Geiler*, BGB, 9th ed. 1929, Section 705 II 3., Annex A to the 14th Vol., I.; Palandt/*Sprau*, BGB, 75th ed. 2016, Section 718 margin note 1).

The standard BGB corporation - in particular when it is to be considered as an external corporation and as a "higher-level" or "organized" BGB corporation - generally has its own identity features, that is to say a name under which it engages in business transactions, a corporate domicile, an externally active organization, in particular corporate officers pursuant to Sections 709f. BGB and - but not necessarily - its own liability charter (total jointly held assets)

(see *Meschkowski*, Zur Rechtsfähigkeit der BGB-Gesellschaft [On the Legal Capacity of the BGB Corporation], 2005, p.255 ff., p.264; *Ulmer/Schäfer* in: Münchener Kommentar [Munich Commentary] BGB, Vol. 5, 6.., 149 with additional references).

3. **The nature of the "tendering consortium" [Gelegenheitsgesellschaft]**

a) Tendering consortiums are BGB corporations in their weakest embodiment, at the "lowest" level, or with only limited degree of organization. Staudinger/*Geiler* therefore also describes tendering consortiums as "temporary and loose associations". The legal form of the tendering corporation is employed in particular to form economic associations, where not the entire enterprise is contributed to the consortium, but only certain interests. A classic application example for tendering consortiums are therefore consortiums, which Staudinger/*Geiler* already lists under "miscellaneous tendering consortiums [*sonstige Gelegenheitsgesellschaften*]". While consortiums are therefore included in the definition of BGB corporations, they nevertheless represent a special form of these

(Reichscourt, ruling dated December 11, 1903, RGZ 56, 206, 207; Staudinger/*Geiler*, BGB, 9th ed. 1929, prel. remarks on Section 705 I 2 b) dd), and Annex B to the 14th Vol., I.1. and I.6.; nothing else applies today: see Palandt/*Sprau*, BGB, 75th ed. 2016, Section 705 margin note 36).

What structure, what internal charter, and what degree of organization a tendering consortium has in detail is predominantly determined by the will of the parties and first and foremost by the provisions in the shareholder agreement. The shareholder agreement of a "tendering consortium generally already waives large parts of the discretionary provisions in Sections 705 ff BGB

(see Staudinger/*Geiler*, BGB, 9th ed. 1929, Annex B to the 14th Vol., I.1. and 2.; *Ulmer/Schäfer* in: Münchener Kommentar [Munich Commentary] BGB, 6th ed. 2013, before Section 705 margin note 51 ff., margin note 64; *K. Schmidt*, Corporation Law, 3rd ed. 1997, Section 58 III 6b).

Brought to a point, consortiums represent a special case of BGB corporations for which nearly all provisions of Section 705 ff. BGB are specifically not intended to apply

(see *Hadding* in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch [Banking Law Handbook] Vol. II, 2nd ed. 2001, Section 87 margin note 23).

b) In particular for tendering consortiums, even the exclusion to form total jointly held assets frequently conforms to the express or tacit will of the parties. As stated in *Geiler*, economic corporation assets are therefore frequently non-existent - in particular for consortiums

(see Staudinger/*Geiler*, BGB, 9th ed. 1929, Annex A to the 14th Vol., I., and Annex B to the 14th Vol., I.2.).

c) Whether tendering consortiums are formed as internal or external BGB corporations is also solely at the discretion of the shareholders' wills. In this case, tendering consortiums are frequently formed as internal corporations that are characterized by not participating in legal and business affairs and by waiving the formation of corporation assets

(see *Gummert* in: Münchener Handbuch des Gesellschaftsrechts [Munich Handbook for Corporation Law] Vol. 1, 4th ed.. 2014, GbR Section 17 margin note 13; *Schäfer* in: Münchener Kommentar [Munich Commentary] BGB, Vol. 5, 6th ed. 2013, Section 726 margin note 1 and margin note 7; *K. Schmidt*, Gesellschaftsrecht [Coporation Law], 4th ed. 2002, Section 58 III 6, p.1708 f).

4. **Non-applicability of commercial law to consortiums**

German commercial law does not apply to consortiums.

By limiting the corporation purpose to certain individual transactions, the factual element of an open-ended operation of a so-called "merchant business [Handelsgewerbe]" is already absent, therefore generally qualifying consortiums as BGB corporations, that is to say irrespective of the typical merchant characteristics of the shareholders - consortium members - although the transactions performed under the scope of the particular consortium are factually classified as merchant transactions. A planned, open-ended activity is in particular absent when only individual occasional transactions - for instance individual sales transactions - are executed and/or identifiable

> (see Baumbach/*Hopt*, HGB, 37th ed. 2016, Section 1 margin note 13; *Ulmer/Schäfer* in: Münchener Kommentar [Munich Commentary] BGB, 6th ed. 2013, before Section 705 margin note 51; also see Reichscourt, ruling dated April 23, 1907, RGZ 66, 48, 51).

In contrast to the opinion in Armbrüster (see Armbrüster expert opinion, p.7 under 14. and 15.), it may therefore be open to interpretation whether the consortium members - such as Saemy Rosenberg or Isaac Rosenbaum acted as owners of the corporation J. Rosenbaum, personally, or on behalf of the art dealership.

5. **Application to the case in question**

a) **Typical tendering consortium [Gelegenheitsgesellschaft]**

In the present case to be evaluated, the details of shareholder agreement (consortium agreement) concluded between the consortium members are not known; even if they were known, their relevance remains in question, largely already because on-going amendments can

be agreed in the course of a contractual relationship under corporation law.

The contracts dated 1929 (contract on the acquisition of the "Welfenschatz" collection dated October 5, 1929) and 1935 (contract on the sale of the "Welfenschatz" collection dated June 14, 1935) reveal that the consortium members had formed the association to achieve a joint objective (resale of the Welfenschatz) – which then happened in stages during the years 1929-35. In this regard, a significant factual element of Section 705 BGB has been fulfilled. However, the association fails to exhibit many other factual elements required for a standard BGB corporation, in particular including the "formation of an open-ended legal relationship". In this case, the consortium members only collaborated to execute a single transaction: acquiring and subsequently reselling the "Welfenschatz" collection. This fact alone eliminates the existence of a standard BGB corporation in this case.

Instead, all facts support qualifying the" Welfenschatz" Consortium as a classic tendering consortium. As is typical for tendering consortiums, we have in this case a merely "temporary and loose" association. Even the content and language of the agreements from 1929 and 1935 clearly indicate and prove that not the individual art dealerships are combined "merged" into a single corporation and/or a purposeful association, but instead that they are strictly pursuing a singular, common, closed-ended business interest, that is to say the acquisition and resale of the "Welfenschatz". Including - and in particular - by limiting the common purpose to the execution of this transaction, this indicates the typical characteristics of the relationship among the consortium members strictly as a tendering consortium, since the characteristics of an open-ended legal relationship are absent.

Due to the lack of participation in legal transactions under its own name and due to the lack of corporation assets (in this regard also refer below), the tendering consortium "Welfenschatz" Consortium can there-

fore in total only be viewed as an internal corporation, but not as an external corporation.

b) **No convergence with standard BGB corporation**

There is otherwise no indication of any kind that the consortium members had installed such a corporate structure in the years 1929-35 and had attained a degree of organization that would have exceeded that of a tendering consortium and that would be characteristic for a standard BGB corporation (external community of joint owners with corporation assets as a dedicated special fund, so-called "total jointly held assets", with joint management that acts externally on behalf of the corporation, a corporation name under which the company enters into legal and business transactions, the appointment of corporation directors as representatives, formation of a corporate domicile).

In relation to this, Armbrüster asserts in his expert opinion that the "Welfenschatz" Consortium exhibited such acting and organizational structures, and as they are typical for the standard BGB corporations described above, for which there are however neither actual nor legal indications in this concrete case. In other words, Armbrüster's related analyses are highly speculative and are otherwise disproved by the existing findings and evidence regarding the actual configuration and implementation of the corporation during the years 1929-35.

aa) For example, the expression "hereinafter called "Consortium" chosen in the introductory passage of the purchase agreement dated June 14, 1935 specifically does not represent a short name reference to the tendering consortium, but instead merely refers to the legal term "Consortium". A reference to the shareholders as "Consortium" can therefore not be deemed or qualified as a self-selected name and/or reference to the corporation under which the consortium members conducted the

transaction - as is however erroneously assumed and/or suggested by Armbrüster (Armbrüster expert opinion, p.6 under Section 13.)

The contract dated June 14, 1935 instead only reveals in the introductory passage - the "preamble" - that all consortium members are individually listed sequentially as solely empowered owners and sellers under 1. to 3. as contractual parties on the seller side, and for simplification reasons are then only referred to as "Consortium" in the following contract text. However, the strictly declaratory reference as "Consortium" does not "merge" the consortium members into a single, special contractual party. The reference to the sellers of the "Welfenschatz" collection as "Consortium" therefore also fails to qualify this tendering consortium as a corporation with its own legal person status and a proper name.In this respect, the contract dated June 14, 1935 is comparable with a notarized legal document for which several seller parties appeared as sellers and who are then subsequently jointly referred to as "Sellers" in the legal document; this specifically does not merge the individual sellers into a single "legal person".

My assumption that the "Welfenschatz" Consortium is a mere tendering consortium is further corroborated by the contract on the acquisition of the collection dated October 5, 1929, wherein only the generally accepted standard legal term "the sellers" was employed for the involved consortium members.

The Consortium members also did not act as individuals on behalf of the Consortium ("as all the individuals who acted on behalf of the Consortium"), as Armbrüster (Armbrüster expert opinion, and other locations) asserts. The Consortium members instead acted as shareholders of the Consortium. To the extent that one of the shareholders may also have acted on behalf of other shareholders, this shareholder was

evidently previously authorized and empowered to do so in each individual case (FAC - Exhibit 6: "I have orally received the assent of the other authorized members of the Consortium."). Contrary to Armbrüster's assertion (Armbrüster expert opinion, and other locations), this is not an expression of the will or the intent of the shareholders to appoint a special corporate officer as representative - a managing director of the company under the exclusion of the disposition power of the other shareholders (Sections 714 BGB); this is instead evidence for the straightforward empowerment of a shareholder by one or several joint shareholders to perform a single act. This empowerment changes nothing in the generally existing joint management and representation power pursuant to Sections 709 para. 1 BGB. Even Armbrüster is forced to concede that the language refers to "the other owners" (Armbrüster expert appraisal, and other locations). The letter from the co-shareholder Saemy Rosenberg dated June 14, 1935 to Dresdner Bank (FAC - Exhibit 6, see Armbrüster expert opinion, on p.7 under FN 13, section quoted verbatim by him) instead confirms the joint management and disposition authority of all shareholder pursuant to Section 709 para.1 BGB, where it is stated: "I have received the verbal agreement *of the other authorized* Consortium members" (emphasis added).

The fact that only the art dealerships listed under 1. to 3. in the contract dated June 14, 1935 and/or the art dealers Saemy Rosenberg and Isaak Rosenbaum as owners of the former company J. Rosenbaum signed the contract therefore also proves that only they were the solely authorized shareholders and therefore the sole owners of the "Welfenschatz" collection at the time of the sale.

This results in the conclusion that no contract was concluded "on behalf of the GbR" (e.g. "on behalf of the BGB corporation" or "under the accounts of the BGB corporation"), but instead that a contract was concluded between the consortium members listed at the beginning of the contract dated June 14, 1935 under 1. to 3. as sellers and owners, with a buyer - Dresdner Bank. In this regard, the tendering consortium was

also not equipped with an independent identity, as demonstrated by the fact that there was no special name or specific reference under which the "Welfenschatz" tendering consortium conducted business transactions. As a result, the conclusion must be drawn that all three members of the Consortium were equally authorized (Section 709 para. 1 BGB), that no separate management pursuant to Sections 710, 714 BGB was established, and that as a result no externally acting organization existed.

bb) There is also no evidence anywhere that the Consortium as a tendering consortium had established an "administrative seat" [Verwaltungssitz] to conduct a singular resale transaction, as Armbrüster erroneously claims in his expert opinion (Armbrüster expert opinion, p.9 ff.) – by citing from this author's point of view rather inconsequential literature and legal precendent under capital corporation law.

The phrase "in Frankfurt am Main [zu Frankfurt am Main]" in the contract dated October 5, 1929 evidently strictly and only refers to the private residences of the three art dealers acting as buyers. The same applies to the contract dated June 14, 1935, wherein the respective private residences and business facilities are referenced for each of the contractual parties listed as sellers under 1. to 3. This is in no way related to an independent "domicile of the Consortium", as further expressed by the fact that neither the contract from 1929 nor the contract from 1935 assign a separate "corporate domicile" to the Consortium - not to mention a separate mailing address.

Due to the absence of a "domicile" of the Consortium, all other attempts advanced by Armbrüster to create a link under international private law are equally moot (Armbrüster expert opinion, p. 9 to p. 11). As an unlimited company [Personalgesellschaft] without legal person status, the

BGB corporation - the "Welfenschatz" Consortium in this case in its weakest form of strictly a tendering consortium - has no citizenship

(see Staudinger/*Geiler*, BGB, 9th ed. 1929, prel. remarks Section 705 V.c); German-English Arbitration Tribunal, ruling dated March 27, 1922, JW 1922, 1161).

The tendering consortium therefore provides no linkages to determine the laws that apply to it (corporate statute), that is to say neither based on the so-called formation theory [Gründungstheorie] nor based on the so-called domicile theory [Sitztheorie]. Armbrüster's related discussion on this point is superfluous and irrelevant.

cc) There are also no indications of any kind that the tendering Consortium "Welfenschatz" formed a separate corporation and/or special fund.

As shown above, it is already not the nature of a standard BGB corporation to form corporation assets, and there is also no mandatory requirement to do so. This is even more so the case for tendering consortiums in the form of consortiums, for which the formation of corporation assets is fundamentally atypical. To the contrary: in particular for tendering consortiums, the will of the participants frequently is to specifically not form total jointly held assets, as was already shown above.

The assumption that the tendering consortium "Welfenschatz" Consortium had formed separate corporate assets independent from the shareholders also negated by the fact that during the years 1929 to 1935, BGB corporations by law were categorically unable to hold rights and obligations, as will be discussed in detail below. Armbrüster evidently completely fails to address the need to also evaluate the case facts from a historical-legal perspective - as is mandatory in cases such as this one - and, by omitting any form of related analysis, engages in inappropriate considerations and comes to inapplicable conclusions.

III. No independent legal entity status, no legal capacity of the tendering consortium during the years 1929 to 1935

1. Temporally applicable law for assessing the independent legal entity status and legal capacity of the tendering consortium during the years 1929 to 1935

In order to determine whether the "Welfenschatz" Consortium was a corporation with independent legal entity status and legal capacity - as claimed by Armbrüster - it is mandatory to refer to the laws applicable during the period from 1929 to 1935, which is solely applicable in this case. This corresponds to the general legal principle that legal transactions must be evaluated at the time they were concluded, is consistent with the principle of good faith, Section 242 BGB and otherwise also follows the interpretation rules in Section 133, 157 BGB, whereupon reference must be made to the time declarations of will were made and to the generally prevailing opinion from that time. In the present case, this is the time of the legal transaction declaration of the parties involved with contracts dated October 5, 1929 and June 14, 1935

(see Palandt/*Ellenberger*, BGB, 75th ed. 2016, Section 133 margin note 6b with additional notes).

When Armbrüster opines that the tendering consortium must be evaluated on the basis of today's perspective on the basis of today's applicable law and current legal precendent, this represents incorrect and unsustainable reasoning. The sources Armbrüster cite (Armbrüster expert opinion, p.11, FN 22 and FN 23) fail to corroborate this assertion, since these do not establish what law - from a historical point of view - shall apply to the case facts from the years 1929-1935. To the

contrary: the sources Armbrüster cites unequivocally state that "any interpretation of law [is] to a certain extent bound by time."

In consideration of the legal principles cited above, the legal system at that time, the evaluation standards at that time, and the intent of the historical lawmakers from that time are definitive for assessing the case in question here. "Correctness is not a timeless truth, but refers to the correctness for the legal system at that time"

(*Larenz/Canaris*, Methodenlehre der Rechtswissenschaft [Methodology theory of legal science], 3rd ed. 1995, p.133, 136).

The case of the "Welfenschatz" must therefore be properly evaluated on the basis of the applicable law from the period 1929 - 1935.

Armbrüster fails to do so, omits the mandatory analysis of the historical legal circumstances, rendering the results of his efforts as largely worthless.

2. **Tendering consortium without independent legal person status; corporation never assumed legal entity status**

a) Pursuant to the prevailing opinion in the literature and legal precendent at that time - e.g. during the period 1929-1935 what has historically been referred to as the legal term BGB corporation (including its special form of tendering consortium) was viewed as an unlimited company. Consortiums, tendering consortiums of all types were therefore viewed as unlimited companies without independent legal person status. These associations - corporations - therefore belonged to the group of unlimited companies organized under private law, and had no independent legal subjectivity based on the opinions expressed in the theory and by superior courts. Pursuant to the opinion of the Reichscourt, the BGB corporation was not viewed as having legal

subjectivity separate from the shareholders. The holders of corporate rights and obligations were always and solely the shareholders

(Reichscourt, ruling dated December 11, 1903, RGZ 56, 206, 209; *Sayn* in: BGB-RGRK, 6th ed. 1928, Section 705 note 1, Section 719 note 1; *Planck*, BGB, 4th ed. 1928, Section 719 note 1; Staudinger/*Geiler*, 9th ed. 1929, prel. remarks on Section 705 II 1. and 2. plus Annex B II.1.; Mugdan, Vol. II, Motives, p.341; *von Gamm* in: BGB-RGRK, 12th ed., before Section 705 margin note 4; regarding this earlier legal framework, also see Palandt/*Sprau*, BGB, 75th ed. 2016, Section 705 margin note 24; plus also German Supreme Court [Bundesgerichtshof], ruling dated March 26, 1981, BGHZ 80, 222, margin note 21 cited as per juris, with additional notes).

The historical lawmakers of the German Civil Code [Bürgerlichen Gesetzbuch] did not intend to give the BGB corporation its independent legal person status, and therefore also did not intend to establish a separate and/or independent legal existence. The historical lawmakers, along with the courts, therefore did not view the BGB corporation as having legal capacity - it was viewed as a "corporation without legal person status" that was not endowed with rights and obligations

(see *Gummert* in: Münchener Handbuch des Gesellschaftsrechts [Munich Handbook of Corporation Law] Vol. 1, 4th ed. 2014, GbR Section 17, marging note 2 a.E. with additional notes; BGHZ 142, 315, 319 f).

b) In consequence and on the basis of the applicable law at that time, the "Welfenschatz" Consortium, formed in 1929 and active during the years 1929-35, also was an unlimited company without independent legal person status.

As an intermediate result, it is therefore noted that accordingly, the tendering consortium between the consortium members - the "Welfenschatz" Consortium - under review herein must be deemed to have no legal capacity. The tendering consortium "Welfenschatz" consortium was not independently endowed with rights and obligations, and was therefore also not the owner of the Welfenschatz collection during the years 1929-1935.

3. **Changes in legal opinion during the post-war period on the legal capacity of the BGB corporation irrelevant**

a) This historical and consistent legal opinion was upheld for almost a century up to the turn of the millennium, and only changed beginning in 2001.

This change was set in motion by a landmark decision by the German Supreme Court dated January 29, 2001 (cited by Armbrüster, see Armbrüster expert opinion, p.11, FN 21) that overturned the previously held thesis of the legal incapacity of the BGB corporation. Since then, legal precendent and theory have in the meantime reinforced the opinion that the BGB corporation is potentially endowed with legal capacity. However, pursuant to the German Supreme Court, each specific case must be taken into consideration and reviewed against special considerations, such as specific legal regulations and the unique nature of the legal facts under review, and as to whether the assumption of legal capacity and/or legal competence of a corporation is contested with respect to a certain right or legal circumstances on a case-by-case basis.

(German Supreme Court, ruling dated January 29, 2001, NJW 2001, 1056 = BGHZ 146, 341; *Gummert* in: Münchener Handbuch des Gesellschaftsrechts [Munich Handbook of Corporation Law] Vol. 1, 4th ed. 2014, GbR Section 17, margin note 21; see therein, margin note 6 to margin note 10 with additional references on this legal precendent development and the associated discussion in the literature).

Since then, the BGB corporation is viewed as a special acting entity - an independent assignable object - that can engage in legal transactions as a group of persons. In these cases, the assumption is that the BGB corporation can be endowed with legal capacity or partial legal capacity, if and when it asserts its own rights and obligations as an external corporation by engaging in legal transactions. The BGB

corporation can therefore independently assert certain legal positions, however does not qualify as a legal person

(German Supreme Court, ruling dated January 29, 2001, NJW 2001, 1056 = BGHZ 146, 341; BGH NJW 2002, 368; BGH NJW 2014, 1107 Tz.24; Palandt/*Sprau*, BGB, 75th ed. 2016, Section 705, margin note 24).

The discussion surrounding the legal status of the BGB corporation has not been concluded as of today, and detailed issues continue to remain unanswered; in particular, the legal precendent and literature both have to contend with the objections that the change in legal precendent at that time gave rise to in practice.

b) Irrespective of the fact that the literature and legal precendent continue to dispute to the present day to whom the corporation assets of a BGB corporation should be assigned in rem- to the BGB corporation as such or to its shareholder

(see *Gummert* in: Münchener Handbuch des Gesellschaftsrechts [Munich Handbook of Corporation Law] Vol. 1, 4th ed. 2014, GbR Section 17, margin note 1 with additional references),

it is not known and not apparent in the present case what if any provisions the consortium members made regarding the "Welfenschatz" collection as potential corporation assets. As already discussed, the formation of corporation assets - at that time (1929-35) as much as today - is not a characteristic element of the standard BGB corporation and is not a necessary qualifying property of the latter.

(see Staudinger/*Geiler*, BGB, 9th ed. 1929, Section 705 II 3. plus Annex B I.2.; Palandt/*Sprau*, BGB, 75th ed. 2016, Section 718 margin note 1).

This applies all the more so to a tendering consortium as the weakest embodiment of a BGB corporation, where - as is the case for the "Welfenschatz" - the corporate association is limited to a single business relationship and confirmation, and in which case the shareholders

had no reason to form corporation assets due to the focus on a single transaction and limited common purpose.

c) It is also not evident that the tendering consortium "Welfenschatz" Consortium could have been an "external corporation", as was for instance to be assessed in the landmark decision by the German Supreme Court in 2001. An "external corporation" presumes that the corporation as such "is endowed with its own rights and obligations by engaging in legal transactions", which was the consideration in the case at that time that ultimately swayed the German Supreme Court to actually - and for the first time - assert the limited legal capacity of the BGB corporation.

In the case at that time, the company in question was a construction working committee [Arbeitsgemeinschaft (ARGE)] with the legal form of a BGB corporation that engaged externally in legal transactions under its own name and with its own letterhead, and concluded legal transactions. The working committee also interacted externally with a dedicated management appointed for this purpose, and therefore had a corporate officer that acted expressis verbis on behalf of the corporation and engaged in legal transactions (BGHZ 146, 341, 356 f, 359 f).

In the case of the "Welfenschatz" Consortium, there was no management, no executive board, no representing officers, no interaction and participation by the tendering consortium in business transactions as a corporation under its own name. There were no actions "in the name and/or on the accounts of" the corporation and there were apparently also no such organizational and acting structures that would even remotely qualify the "Welfenschatz" Consortium as a BGB corporation with its own legal person status as defined by the related legal precendent handed down by German courts since 2001.

Armbrüster otherwise fails to mention that the ruling by the German Supreme Court dated January 29, 2001 (BGHZ 146, 341) does not award general legal capacity to an association of legal subjects organized and represented as a BGB corporation, but only does so with limited scope and under special circumstances. The German Supreme Court takes the position in this case that while a BGB corporation "can assume any legal position", this is only the case "to the extent this is not negated by special considerations" (BGHZ 146, 341, 343; BGHZ 116, 86, 88; BGHZ 136, 254, 257; BGHZ 79, 374, 378 f). A BGB corporation is only endowed with legal capacity - without being a legal person - to the extent that it asserts its own rights and obligations "within these limits" (BGHZ 146, 341, 343).

d) In conclusion, it is therefore established that even when today's valid law is applied in conjunction with the legal precendent on the treatment of BGB corporations handed down by German courts since 2001, the association of the art dealerships J. Rosenbaum, Z. M. Hackenbroch and J. & S. Goldschmidt to a "Welfenschatz" Consortium cannot be viewed and treated as a corporation with its own legal person status. Armbrüster's position (Armbrüster expert opinion, p.11 under Section 26.) that a "German court that would today have to decide whether the Consortium in the time from 1929 to 1935 could have been endowed with legal capacity, would presumably be expected to so", must therefore be definitively disputed.

It is my opinion that a German court today - by applying today's law and in conjunction with the mandatory inclusion of the historical legal framework of the years 1929-35 - would not under any legal consideration whatsoever (as discussed above in detail) award the "Welfenschatz" Consortium a qualification with its own legal person statusThe Consortium was not an "external corporation" and, as purely a tendering consortium, was also not the owner of the "Welfenschatz" collection.

4. **Termination of the tendering consortium in 1935 by achieving the corporation purpose *ipso iure* (Section 726 BGB)**

a) A characteristic feature of the tendering consortium is that the corporation ends based on the mutual will of the involved parties by achieving the corporation purpose, which means that the corporate association only exists until the corporation purpose has been achieved and the transaction operated by the shareholders has been executed and completed. Once this purpose has been achieved, the corporation ends *ipso iure*. Accordingly, the tendering consortium seizes to exist in the moment when the "purpose" of the corporation and the outcome of the joint actions defined and intended by the participants - the underlying transaction that resulted in the association - has been fulfilled. The link and the corporate association becomes null and void when the purpose has been achieved (Section 726 BGB)

(see Staudinger/*Geiler*, BGB, 9th ed. 1929, Annex to the 14th Vol., B. I.1. and I.7., Section 726 I. and II.; *Hadding* in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch [Banking Law Handbook], Vol. II, 2nd ed. 2001, Section 87 margin note 23; *Karsten Schmidt*, Gesellschaftsrecht [Corporation Law], 3rd ed. 1997, Section 58 II 1; *Wiedemann*, Gesellschaftsrecht [Corporation Law] Vol. II, 204, p.667, p.670).

This automatic trigger - the termination of the corporation by force of law - is another feature that specifically characterizes tendering consortiums, such as the "Welfenschatz" Consortium, and differentiates the latter from standard BGB corporations with legal capacity. *Wiedemann* notes that Section 726 BGB "[has its origins] in the theoretical discussion on tendering consortiums and the automated motives in general debt law"

(see Staudinger/*Geiler*, BGB, 9th ed. 1929, Annex B to the 14th Vol., I.7.; *Wiedemann*, Gesellschaftsrecht [Corporation Law] Vol. II, 2004, p.670).

b) In the present case, wherein the art dealer consortium members formed the association strictly and only for the singular purpose limited by its scope and duration to acquiring the "Welfenschatz" for the purpose of resale, the joint consortium transaction had been completed in 1935 and the corporation purpose had been achieved upon concluding the execution of the purchase contract dated June 14, 1935. The tendering consortium "Welfenschatz" Consortium therefore ended *ipso iure*.

5. **No corporation assets without the existence of the tendering consortium**

Even if one were to assume that the "Welfenschatz" Consortium was more than strictly a tendering consortium, that this corporation had formed it own corporation assets in 1929-35 in the form of the "Welfenschatz" collection and that these assets were the property of the corporation and not the property of the shareholders, the corporation assets-said assets also including claims by the former corporation potentially only asserted long after the corporation had ended -even in this case are no longer the property of the legal entity upon the winding down and liquidation of the corporation (which then no longer exists), but are instead the assets of the (former) shareholders or their heirs.Armbrüster equally fails to see this.

The corporation assets are dependent on the existence of the corporation, since "assets" by themselves are not endowed with legal capacity, but are instead assigned to the "corporation" as the legal entity - assuming the legal entity status of the tendering consortium. Once the corporation has ended and/or has been wound down, there are no longer any corporation assets, but strictly the assets of the remaining shareholders - that is to say without differentiating these into private assets and former corporation assets.

(see *Gummert* in: Münchener Handbuch des Gesellschaftsrechts [Munich Handbook on Corporation Law] Vol. 1, 4th ed. 2014, GbR Section 17, margin note 30; Soergel/Hadding/Kießling, BGB, ...ed., Section 718 margin note 14; BGH, ruling dated September 27, 1999 – II ZR 371/98, BGHZ 142, 315 ff, margin note 13 – cited as per juris).

IV. Conclusions

In conclusion, it has been established that the association of the three art dealerships J. Rosenbaum, Z. M. Hackenbroch and J. & S. Goldschmidt – "Welfenschatz" Consortium – is strictly a tendering consortium without its own legal person status, which therefore was not endowed with legal capacity and seized to exist upon concluding the execution of the purchase contract dated June 14, 1935.

The former "Welfenschatz" Consortium therefore also did not and/or does not have a separate legal existence under German law.

As a tendering consortium, the "Welfenschatz" Consortium was not the owner of the "Welfenschatz" collection from 1929-35.

The tendering consortium "Welfenschatz" Consortium ended*ipso iure* in 1935 by achieving the corporation purpose limited to acquiring and reselling the collection, Section 726 BGB.

C. Regarding the question of who – if not "the Consortium" – was the owner of the "Welfenschatz" under German law between 1929 and 1935

1. The "buyers" listed in the contract from 1929 as the owners of the Welfenschatz

By way of a purchase contract dated October 5, 1929, the three owner-operated art dealerships J. Rosenbaum, Z. M. Hackenbroch and J. & S. Goldschmidt acquired the collection of medieval artifacts referred to in the contract as "Welfenschatz", Section 433, 929 BGB.

The act of title transfer to the three art dealerships was executed and completed with the - undisputed -transfer of the complete collection to the three buyers that occurred by no later than January 1930, Section 929 BGB.

2. **The shareholders of the Consortium as the holders of rights and obligations**

The three acquirers of the collection– J. Rosenbaum, Z. M. Hackenbroch and J. & S. Goldschmidt – were (as shown in detail above) shareholders (consortium members) of the tendering consortium "Welfenschatz" Consortium, who held title to the collection from 1929 to 1935 and who - by way of a contract dated June 14, 1935 - sold the "Welfenschatz" collection (which had been reduced in the meantime by the sale of individual pieces) to Dresdner Bank, which acted as a concealed buyer's agent on behalf of the State of Prussia.

Pursuant to the purchase agreement dated June 14, 1935, the sole sellers in turn were the art dealerships Z. M. Hackenbroch, J. & S. Goldschmidt, and Saemy Rosenberg and Isaac Rosenbaum as the last owners of the "J. Rosenbaum" dealership, which had been liquidated in the meantime.

The documents available to me contain no evidence that the title of the "Welfenschatz" collection was transferred in whole or in parts at any point during the years 1929-35 from the named three art dealerships, by their owners respectively, to other parties or to another legal entity.

The strictly declaratory note in the purchase contract dated June 14, 1935 that the "Welfenschatz" Consortium had involved "(...) foreign and domestic business associates in this transaction" does not represent proof that these "foreign and domestic business associates" had as a result further rights, in particular property and/or joint property rights, in the collection. There is no evidence for this.

There is also no evidence that the consortium members had transferred title to the collection to the tendering consortium "Welfenschatz" Consortium itself as an independent legal entity. Pursuant to my deliberations under B. above, we can exclude in this case that separate title to the collection was formed for the "Consortium" since - as was shown above - this was strictly a tendering consortium without independent legal person status and legal subjectivity.

Until the transfer in 1935 to the representatives of Dresdner Bank, respectively the representatives of the State of Prussia, the "Welfenschatz" collection continued to be in the uninterrupted possession of the members of the "Welfenschatz" Consortium - lastly in Amsterdam. As a result, the unrestricted and sole property of the three art dealerships, respectively their owners, can be assumed under German law even for the continued possession, arg ex. Section 1006 BGB. In this case the statutory assumption in Section 1006 para. 1 BGB is invoked - pursuant to which the assumption is made in favor of the owners of a movable asset that he is the owner of the asset.

Up to the resale of the "Welfenschatz" in 1935, the three art dealerships J. Rosenbaum, Z. M. Hackenbroch and J. & S. Goldschmidt, respectively their owners, accordingly were the sole holders of rights and obligations in connection with the "Welfenschatz" collection.

3. **No evidence of corporate asset formation for the tendering consortium**

The documents available to me also contain no evidence that at any point in time during the years 1929-35, the "Welfenschatz" collection became a separate corporate asset of the tendering consortium "Welfenschatz" Consortium by way of a legal act and express dedication, or by way of implied actions. There is no evidence for this.

a) As shown in detail under B. II. 2., the formation of corporate assets is not a necessary requirement for a standard BGB corporation, and, more importantly, is not the nature of a tendering consortium.

b) Even if one were to assume that a separate corporate asset had been formed based on the "Welfenschatz" collection, the question regarding the ownership circumstances in the corporate assets would remain unanswered.

The statutory specifications of the German law regarding BGB corporations are largely discretionary, that is to say that the ownership circumstances in the corporate assets - if these exist - can vary greatly in their scope and nature, and depend in large part on the corporate contractual arrangements between the shareholders. For instance this could involve forming either joint ownership of total assets [Miteigentum "zur gesamten Hand"], or fractional ownership, but also sole ownership by

each consortium member proportional to his contribution; even sole ownership by only a single shareholder is conceivable. When the purpose of a corporation is strictly limited to the joint transaction of commercializing and/or reselling an art collection (as is the case here), one would have to assume the sole ownership of each consortium member proportional to his contribution ratio (assuming the existence of corporate assets).

(see Staudinger/*Geiler*, BGB, 9th ed. 1929, Annex to the 14th Chapter A. plus Annex B II.1.; Reichscourt, ruling dated April 24, 1906 in BankArchiv Vol. 5 p.230).

Since the joint or corporate purpose in the case of the "Welfenschatz" Consortium was limited to the joint acquisition and resale of the collection, many indications corroborate the assumption in the event that corporation assets were formed, that sole ownership of each consortium member can be assumed in a portion of the Welfenschatz proportional to their contribution ratio.

4. **Follow-up liquidation neither required nor expected**

Armbrüster's blanket assertion that pursuant to German law - applicable at that time (1929-35) and today - BGB corporations continue to exist in a certain form if corporate assets appear after a corporation has ended - said assets also including legal claims - and that the treatment of said assets regularly requires a formal follow-up liquidation (Armbrüster expert opinion, p. 14 under Section 34. ff) does not apply, specifically when the case involves a tendering consortium, such as the "Welfenschatz" Consortium.

In his discussion of this point, Armbrüster draws incorrect conclusions in his expert opinion, because, as shown above, he already inaccurately assesses the legal nature of the "Welfenschatz" Consortium. The

assertion that special, controlled and official proceedings ("Follow-up liquidation") are required to liquidate new or rediscovered assets of a corporation (Armbrüster expert opinion, p. 14-17) is - as his entire expert appraisal - replete with the erroneous assumption that the "Welfenschatz" Consortium in the present case was a corporation with its own legal person status and its own corporation assets that are claimed to have exhibited an organizational structure in alignment with merchant corporations or capital corporations under German law. As demonstrated above, this was specifically not the case for the Consortium.

a) Armbrüster's premise that claims (only revealed after decades, respectively asserted under the scope of the pending complaint litigation) of the heirs and legal successors of the owners of the three art dealerships J. Rosenbaum, Z. M. Hackenbroch and J. & S. Goldschmidt involved between 1929-35 are a part of the corporate assets of the tendering consortium "Welfenschatz" Consortium is devoid of any basis. This would require that corporate assets of the tendering consortium were formed in the first place. But as shown above, this was specifically not the case here.

b) Moreover, the tendering consortium "Welfenschatz" Consortium had seized to exist *ipso iure* by achieving its objective in 1935, as shown above under B. III. 4. But since the existence of corporate assets without exception and directly depends on the existence of the corporation, there no longer are corporate assets when the corporation has seized to exist, and only the assets of the remaining shareholders exist - that is to say without a legal differentiation into private and former corporation assets.

c) For lack of evidence to the contrary, the assumption must be made that the "Welfenschatz" Consortium ended as a tendering consortium without further ado during the course of 1935 after the purchase price was

disbursed, Section 726 BGB. There was evidently no requirement at that time to formally process the disbursement of the purchase price.

d) Contrary to Armbrüster's assertion, there is then in this case neither a legally codified nor otherwise apparent obligation or need for the plaintiffs - as heirs and legal successors of the former owners of the "Welfenschatz" collection - to undergo follow-up liquidation proceedings.

e) The legal opinions and legal precendent Armbrüster cites in his expert opinion (Armbrüster expert opinion, p.14-17) do not apply in the present case, and are not relevant and therefore of no consequence for the further legal evaluation of the case.

For example, the Reichscourt in the case Armbrüster cites from the year 1905 (Armbrüster expert opinion, p.14 FN 30, Reichscourt ruling dated May 3, 1905, RG JW 1905, 430 N.8) addresses the case of a dispute that retroactively arose among the former shareholders after a corporation had seized to exist. It is evident that the present legal dispute does not involve a dispute among former shareholders or their legal successors, but a completely different matter, that is to say the claims against third parties - in this case against the Prussian Foundation for Cultural Artifacts and the Federal Republic of Germany.

The present case also does not involve a situation where "the purpose of the dispute" would require the assumption of the continuing existence of a tendering consortium that has long since seized to exist.

Even the ruling of the German Supreme Court dated June 21, 1979 cited by Armbrüster (Armbrüster expert opinion, p. 14 FN 31, German Supreme Court Ruling NJW 1979, 1987) does not apply to the present

legal dispute. The ruling deals with a completely different corporate form, that is to say a general partnership [Offene Handelsgesellschaft, Sections 105 ff HGB, and in the specific case deals with a company that was able to sue under its corporation and had legal capacity and legal standing. As was shown at length above, these conditions are summarily absent in the present case.

f) The statutory provisions (Sections 146, 150 HGB and Sections 730 ff. BGB) Armbrüster cites (Armbrüster expert opinion, p.15-17) as rationales for conducting the follow-up liquidation required in his opinion, neither apply nor must be observed in this case because the "Welfenschatz" Consortium was strictly a tendering consortium.

To the contrary. It is the consistently prevailing opinion in the literature and legal precendent that unlimited companies are specifically not bound by the liquidation laws specified in Sections 146, 150 HGB, Sections 730ff. BGB. Since the questions of winding down and liquidation are consistently discretionary laws, everything therefore depends on the agreements of the former parties among each other, e.g. the former shareholders of the tendering consortium; in terms of what they agree on these issues - e.g. liquidation of the corporation, including follow-up liquidation - they are not bound by laws and are at liberty to make any related arrangements of their choosing, § 731 BGB

> (see Baumbach/*Hopt*, HGB, 37th ed. 2016, Section 145 HGB margin note 10; *Wiedemann*, Gesellschaftsrecht [Corporation Law], Vol. II, Recht der Personengesellschaften [Partnership Law], 2004, p.552 f, p.671).

In conclusion, I find that the present case does not involve the continuing existence of a corporation, and that there is also no requirement for the plaintiffs - as heirs and legal successors to the former co-shareholder of the tendering consortium "Welfenschatz" Consortium -

to undergo follow-up liquidation proceedings to present their claims in a legally valid manner.

5. **Association by virtue of inheritance (Section 741 BGB)**

The present case instead represents an association among the heirs by virtue of inheritance pursuant to Section 741 BGB.

For example, by way of a ruling dated April 23, 1907 (RGZ 66, 48, 51), the Reichscourt decided that the testator cannot assume that his heirs will continue to operate the commercial enterprise when the latter develop, reconfigure, split, and then profitably sell a property that is part of the estate. According to the court, the intent of the joint heirs is solely limited in such a case to partitioning and selling the estate with a favorable outcome for all involved parties. According to the Reichcourt, such a case represents "an association by virtue of inheritance"

(Reichscourt, ruling dated April 23, 1907, RGZ 66, 48, 52).

This is also the nature of the present case. The plaintiffs - as heirs and legal successors of the former owners of the "Welfenschatz" collection - represent an association by virtue of inheritance, which is governed by the provisions in Sections 741 ff. BGB. Section 742 BGB specifies that in cases of doubt, the eligible parties are entitled to equal shares. Nothing else is required.

6. **Conclusions**

During the years from 1929 to 1935 - on the basis of German law - the art dealershipsrespectively their owners, referred to as "Buyers" under (1) to (3) in the contract dated October 5, 1929 and referred to as "Consortium" under 1.) to 3.) in the contract dated June 14, 1935 were the sole owners of the "Welfenschatz".

D. Regardless of the answer to these questions (B, C), do the plaintiffs in this case, Alan Philipp, Gerald Stiebel, and Jed Leiber, have standing to bring their claims under German law?

The expert opinion from Thiessen presented by the defendants regarding this, respectively similar questions, summarily fails to address the issues and is unsuited as a basis for the applicable evaluation of the competent court as to whether the plaintiffs can also assert their claims before German courts.

I. Legal nature of the claims

Based on the lawsuit pending before the Federal Court for the District of Columbia in Washington D.C., the plaintiffs demand the surrender and additional claims related to the allegedly illegal seizure of the "Welfenschatz" collection in the form of an emergency and/or forced sale imposed in 1935 in connection with racial persecution against the former owners at the hands of the Nazi regime.

These claims therefore have their origins in breaches of law that the legal predecessors of the plaintiff suffered as victims of the Nazi regime during the period of Nazi rule between January 30, 1933 to May 8, 1945.

The matter therefore in the broadest sense represents claims for restitution of Nazi looted art.

From my point of view, and in consideration of the legal framework, the literature and the legal precendent, the matter of asserting and enforcing these claims in Germany before German courts must be at best affirmed theoretically (in contrast to the assertion by Thiessen), but is de facto excluded from a practical point of view.

II. Restitution of cultural and art objects

The treatment of claims for restitution of cultural and art objects that the former owners involuntarily surrendered from their possessions during the Nazi regime, for instance by way of seizure or forced sale, has not been conclusively settled world-wide to the present day. After most European countries, in particular Germany, adopted regulations for returning cultural artifacts already immediately after WW II, and returns of in some cases substantial scope were implemented, this topic increasingly receded into the background toward the end of the 1950s due to the "Cold War". Restitution issues only gained renewed interest following the collapse of the Soviet Union at the beginning of the 1990s.

The term 'restitution' in the narrow sense in relation to the Nazi period refers to the surrender ["Rückgabe"] of seized property. The German terms "Rückerstattung ["Return"] and "Rückübertragung [Return Transfer]" have the same meaning. In contrast to compensation, these cases do not involve the definition of lump-sum payments for victims of Nazi persecution, but the surrender of specific pieces of property.

III. Restitution and returns in the Federal Republic of Germany

1. No claims pursuant to German Restitution laws

Already during the years immediately following the end of the war, even before the Federal Republic of Germany was formed in May 1949, the allies in the Western occupation zones issued legal regulations regarding the return of former Jewish and other assets seized by the Nazi regime, as well as compensation of victims of Nazi persecution for loss of life, freedom, physical injury, and health injuries. The baselines for

the laws were incorporated into the Accord for the settlement of issues in connection with war and occupation ("Transition Accord") and were in large parts implemented with the Federal Law to Compensate Victims of Nazi Persecution from 1956 [BEG] and the Federal Restitution Act from 1957 [BRüG]. On the basis of the BEG, the victims of Nazi persecution (for reasons of race, religion, or ideology) were awarded an annuity as compensation for loss of life, bodily injury, health injury, loss of freedom, loss of property, and impaired professional or economic advancement. Based on the German Restitution Act [Bundesrückerstattungsgesetz], claims for compensatory damages against the German Reich in connection with seized assets could be asserted to the extent said assets had not already been relocated and returned based on the Allied regulations.

The Allied Restitution Acts require that the claimed asset was seized for reasons of race, religion, nationality, ideology, or political opposition, or the persecuted individual had sold the item under duress in connection with the predicament created by the persecution. The claim is directed against the (present or former) owner.

However, the laws applicable in Germany, the Federal Restitution Act and the Federal Compensation Act also contain notification deadlines that have long-since expired. Continuing or resuming completed litigation is excluded in accordance with Supreme Court precendent (German Supreme Court, ruling dated August 3, 1995, BGH VIZ 1995, 644).

According to the German Supreme Court, additional restitution claims can only be brought in individual cases in connection with the German reunification. These include claims for assets located in the new federal

states - the former state territories of the "German Democratic Republic". These claims can be asserted even today if the claims are registered in time (1992/1993) on the basis of the "Act to Settle Open Property Issues" from 1990. However, the Property Act creates no new restitution claims in the old federal states, that is to say in the territories existing in the Western Federal Republic of Germany through 1990.

The registration deadlines specified in the named regulations have long-since expired, and the statutory regulations have been repealed, so that any related claims can today no longer be asserted before German courts.

(see Harald König, *Grundlagen der Rückerstattung* [Fundamentals of Restitution], *Bundesamt für Zentrale Dienste und offene Vermögensfragen* [Federal Agency for Central Services and Open Property Issues], http://www.badv.bund.de/DE/OffeneVermoegensfragen/Provenienzrecherche/Aufsaetze/Grundlagen/start.html).

Even Thiessen has to concede this point (Thiessen expert opinion, p.12 Item c.).

The plaintiffs would therefore be excluded from asserting claims in connection with the "Welfenschatz" collection, to the extent that they were to invoke the special laws on restitution and reparations of Nazi infractions.

2. No claims under German Civil Code (BGB)

To the extent that Thiessen asserts that the plaintiffs have legal recourse with their claims before German civil courts, this is not the case and must be disputed.

The sweeping, page-long dissertations by Thiessen on potentially applicable, civil law claims are superfluous for lack of applicability.

In view of the on-going discourse regarding the restitution of Nazi looted art, Thiessen specifically fails to make any mention of the fact as to whether reliable legal precendent or legal practice exists to derive restitution claims under civil law on the basis of "soft law" - for instance in the form of the "Washington Declaration on Holocaust-Era Assets".
In complete ignorance of this, Thiessen nevertheless engages in voluminous and superfluous dissertations of potential avenues for asserting claims. A text-book-based, academic discussion - no more - for he fails to mention that repeatedly affirmed legal precendent has been established since the 1950s that assumes a clear position regarding the enforceability of restitution claims of property seized under Nazi persecution:

the restitution claim regulations under public law for asserting restitution claims and related claims in regards to the special laws governing Nazi infractions have been affirmed pursuant to the landmark decision by the German Supreme Court from the 1950s, and have been consistently re-affirmed in the following decades; said regulations excluding regulations under civil law (German Supreme Court, ruling dated October 8, 1953, BGH NJW 1953, 1909f.). The German Supreme Court at that time ruled - without this legal precendent having been reversed to the present day - that the restitution laws conclusively settle the seizure cases based on persecution actions by the Nazi regime, and that therefore restitution claims based on general civil law - that is to say the German Civil Code [Zivilrecht] - are therefore categorically excluded.

This thesis, which to the present day is overwhelmingly represented in the literature and by legal precendent, is also not overturned by the ruling of the 5th Civil Division of the German Supreme Court dated March 16, 2012 (German Supreme Court, ruling dated March 16, 2102, BGH V ZR 279/10) and cited by Thiessen as proof of the opposite, for

this case does not involve tested legal precendent, but to the extent apparent, represents a singular ruling unique over the last sixty years through today, which assumed as enforceable under civil law and under very narrow conditions a claim for restitution of a poster collection seized during the Nazi era.

However, this apparently singular ruling creates no legal precendent, also because the case decided by the German Supreme Court is significantly different in a variety of ways, without elaborating on the details for the present purpose.

IV. Conclusions

The plaintiffs Alan Philipp, Gerald Stiebel, and Jed Leiber cannot pursue the claims asserted before the District of Columbia in Washington D.C. before German courts.

E. Summary

Regarding question 1) The "Welfenschatz" Consortium has no separate legal existence under German law.

Regarding question 2) During the years 1929 to 1935 - based on German law - the art dealerships, respectively their owners, referred to as "buyers" under (1) to (3) in the contract dated October 5, 1929 and as "Consortium" under 1.) to 3.) in the contract dated June 14, 1935 were the sole owners of the "Welfenschatz".

Regarding question 3) The plaintiffs Alan Philipp, Gerald Stiebel, and Jed Leiber cannot pursue their claims before German courts.

F. Attachments

Professional career:

- Study of Law, Philosophy and History in Erlangen, Frankfurt am Main and Berlin. Visiting student in Italy (1978/79) and the United States of America (1983/84)
- PhD at University of Frankfurt am Main 1988
- Post-doctoral qualification at University of Frankfurt am Main 1992
- Lecturer at the Universities of Würzburg, Erlangen, Münster, Frankfurt am Main and Greifswald from 1992-1994
- Professor for Civil Law and Modern Private Law History at European University/Viadrina in Frankfurt an der Oder from 1995 – 1998
- Professor for Civil Law and Legal History at the University of Hanover since April 1, 1998

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Exhibit 2

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22.04.2016

Expert Opinion of

Prof. Dr. Stephan MEDER

A. Qualifications and assignment

I. Ich bin ordentlicher Professor für Privatrecht und Rechtsgeschichte an der Leibniz Universität Hannover. Ich habe umfassend in verschiedenen Gebieten des Privatrechts publiziert und bin Herausgeber einer führenden Zeitschrift zum Bank- und Kapitalmarktrecht. Darüber hinaus bin ich Rechtshistoriker. Als solcher habe ich mich mit den historischen Entwicklungen des Privatrechts befasst, und zwar sowohl vor als auch nach Inkrafttreten der deutschen Kodifikation von 1900 ("Bürgerliches Gesetzbuch", im folgenden BGB). In diesem Zusammenhang habe ich auch gesellschaftsrechtliche Themen und Fragen untersucht, die von Problemen des NS-Unrechtsstaates und des politischen Totalitarismus handeln. Zusätzlich zu meiner akademischen Tätigkeit war ich als juristischer Experte für die Deutsche Regierung und für das Deutsche Parlament (Deutscher Bundestag) in Verbindung mit Projekten zur Reform der Gesetzgebung tätig. Mein curriculum vitae findet sich mit einer Liste der Publikationen im Anhang.

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II. Ich bin von den Anwälten der Kläger beauftragt worden, für die Kläger in einem Fall ein Gutachten zu erstellen, der gegenwärtig vor dem United

States District Court for the District of Columbia, *Philipp v. Fed. Rep. of Germany*, No. 15-cv-00266 anhängig ist. Ich habe verstanden, dass die Beklagten bestreiten, dass ein Anspruch auf Rückgabe einer Sammlung mittelalterlicher Kunstwerke besteht, die als "Welfenschatz" bezeichnet wird.

Zur Vorbereitung meines Gutachtens habe ich die Klageschrift – First Amended Complaint (FAC) – der Kläger untersucht. Darüber hinaus habe ich die Motion to Dismiss der Beklagten und die Stellungnahmen der von den Beklagten beauftragten deutschen Rechtsexperten, insbesondere die Erklärung Armbrüster vom 4. März 2016 („Armbrüster Gutachten") und Erklärung Thiessen vom 7. März 2016 („Thiessen Gutachten") geprüft.

III. Ich wurde gebeten, die folgenden mit diesem Rechtsstreit zusammenhängenden Fragen zu beantworten:

1) Relying on the allegations in the First Amended Complaint, did the Consortium of art dealers described therein have any separate legal existence under German law?

2) If not, who owned the "Welfenschatz" between 1929 and 1935 under German law?

3) Regardless of the answer to these questions (1, 2), do the plaintiffs in this case, Alan Philipp, Gerald Stiebel, and Jed Leiber, have standing to bring their claims under German law?

IV. Ich gehe davon aus, dass ich bezüglich der in dem Fall zugrunde gelegten Fakten nur diejenigen Behauptungen aufgreifen kann, die sich in der Klageschrift („First Amended Complaint", FAC) und deren Anlagen wiederfinden. Das heißt, dass ich, selbst wenn sich später herausstellen sollte, dass einige Behauptungen unzutreffend sind, in diesem Stadium des Verfahrens ihre Wahrheit unterstellen muss. Es versteht sich, dass

meine Antworten, sollte sich herausstellen, dass einzelne Behauptungen unzutreffend sind, anders hätten ausfallen können. Meine Vergütung steht in keinerlei Zusammenhang mit dem Ausgang des Verfahrens.

B. Zur Frage, ob das Konsortium der Kunsthändler irgendeine separate rechtliche Existenz unter deutschem Recht hatte

I. Begriff des „Konsortiums"

Ein „Konsortium" (von lateinisch *consortium*) ist als ein vorübergehender Zusammenschluss mehrerer rechtlich und wirtschaftlich selbständig bleibender natürlicher oder juristischer Personen, insbesondere von Unternehmen oder Kaufleuten, zur zeitlich begrenzten Durchführung eines vereinbarten, beschränkten wirtschaftlichen Zwecks zu definieren; auch die Begrenzung auf die Durchführung eines oder einer beschränkten Anzahl von Einzelgeschäften auf gemeinsame Rechnung ist dabei üblich. Konsortien werden typischerweise gebildet, wenn die Auftragshöhe oder das Geschäftsvolumen für ein einzelnes Unternehmen bzw. einen einzelnen Kaufmann zu groß sind

(vgl. www.duden.de unter „Konsortium"; *Ulmer/Schäfer* in: Münchener Kommentar, BGB, 6.Aufl. 2013, Vor § 705 Rn.51 und Rn.58 für den Beispielsfall des Großkredits; vgl. für den Fall von Kreditkonsortien *Hadding* in: Schimansky/Bunte/ Lwowski, Bankrechts-Handbuch, Bd.II, 2.Aufl. 2001, § 87 Rn.24).

Aktuell werden z.B. die internationalen Medienunternehmen und Journalistengruppen, die den Skandal um die Gründung von zweifelhaften Briefkastenfirmen in Panama aufgedeckt haben und die Informationen gemeinsam verwerten, als Konsortium bezeichnet (vgl. Frankfurter Allgemeine Zeitung vom 9. April 2016, S.19).

Im vorliegenden Fall liegt ein Konsortium der Kunsthandelsunternehmen J. Rosenbaum, Z. M. Hackenbroch und J. & S. Goldschmidt vor, die sich

– da wohl für jeden der Konsorten allein das Geschäft finanziell zu groß war – zur Durchführung eines Einzelgeschäfts, nämlich des Ankaufs und Weiterverkaufs des „Welfenschatz", zusammengeschlossen hatten. Dabei blieben die Kunsthändler (in welchen rechtlich-kaufmännischen Rechtsformen – Einzelunternehmen, offene Handelsgesellschaft (oHG) o.ä. – sie auch immer damals agierten) qua definitionem rechtlich und wirtschaftlich selbständig.

II. Das „Welfenschatz"-Konsortium als BGB-Gesellschaft (§ 705 BGB) in ihrer schwächsten Ausformung, nämlich der Gelegenheitsgesellschaft („tendering consortium")

1. Zeitlich anwendbares Recht für die Qualifizierung der Gesellschaftsform eines Konsortiums

§ 705 BGB ist eine der wenigen Normen, die seit dem Inkrafttreten des BGB im Jahr 1900 bis heute unverändert geblieben sind. Für grundsätzliche Fragen der Beurteilung und Qualifizierung der Gesellschaftsform eines Konsortiums ist die Rechtslage der Jahre 1929 bis 1935 der heutigen in vielen Punkten vergleichbar, so dass bei der grundlegenden Betrachtung und Analyse insoweit alte wie auch neue Rechtsprechung und Literatur herangezogen werden können.

2. Wesen der Normal-BGB-Gesellschaft

§ 705 BGB ist die Grundnorm für BGB-Gesellschaften, die vom Gesetzgeber flexibel und nur durch meist dispositive Bestimmungen geregelt ist. Deswegen ist die BGB-Gesellschaft, oder auch „Gesellschaft bürgerlichen Rechts" (GbR), als Rechtsform ein außerordentlich anpassungsfähiges Rechtsinstrument, dessen Organisation und Struktur flexibel an den jeweiligen wirtschaftlichen (oder sonstigen) Zweck der Gemeinschaft, auf Grundlage der jeweiligen Absprachen der Gesellschafter, angepasst werden kann. Die Rechtsform BGB-Gesellschaft zeigt sich daher in vielfältigen Erscheinungsformen die rechtliche Struktur der BGB-

Gesellschaft, darunter die sogenannten „Gelegenheitsgesellschaft", kann höchst unterschiedlich ausgestaltet sein

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, Vorbem. zu § 705 I 2., Anhang A zum 14. Titel, Vorspann und I., Anhang B zum 14. Titel, I.2.; Palandt/*Sprau*, BGB, 75.Aufl. 2016, § 705 Rn.1, Rn.36 ff.).

Nach der Begriffsbestimmung des § 705 BGB verpflichten sich mehrere natürliche oder juristische Personen durch einen Gesellschaftsvertrag gegenseitig, die Erreichung eines gemeinsamen Zwecks zu fördern. Auf welche Weise dies geschehen soll und welche Beiträge die Gesellschafter zu leisten haben, wird durch formlosen, schriftlich oder mündlich verabredeten Gesellschaftsvertrag bestimmt. Tatbestandsmerkmal der Normal-BGB-Gesellschaft ist weiterhin, dass der Gesellschaftsvertrag „eine auf Dauer angelegte Rechtsbeziehung" begründet, aus der eine besondere Treuepflicht der Gesellschafter untereinander erwächst

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, Vorbem. zu § 705 I 5 a), § 705 II. 1.; Handkommentar-BGB/*Saenger*, BGB, 7.Aufl. 2012, § 705 Rn.2f; Palandt/*Sprau*, BGB, 75.Aufl. 2016, § 705 Rn.1, Rn.36 ff.).

In aller Regel erfolgt bei Normal-BGB-Gesellschaften die Bildung von Gesellschaftsvermögen; dies ist jedoch kein zwingend erforderliches Kriterium zur Bestimmung der Rechtsform, gehört nicht zum Wesen der BGB-Gesellschaft und ist deswegen auch nicht notwendigerweise Voraussetzung zur Begründung oder für die Existenz einer BGB-Gesellschaft. Es sind daher BGB-Gesellschaften denkbar und möglich, bei denen die Gesellschafter explizit kein gemeinsames Vermögen bilden (wollen). Staudinger/*Geiler* nennt beispielhaft hierfür die Konsortien und Konsortialgeschäfte. Ob überhaupt Gesellschaftsvermögen gebildet wird, steht also zur Disposition der Gesellschafter

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, § 705 II 3., Anhang A zum 14. Titel, I.; Palandt/*Sprau*, BGB, 75.Aufl. 2016, § 718 Rn.1).

Die Normal-BGB-Gesellschaft, insbesondere wenn sie als Außengesellschaft und als „höherstufige" oder „organisierte" BGB-Gesellschaft anzusehen ist, verfügt in der Regel über eine eigene Identitätsausstattung,

das heißt über einen Namen, unter dem sie im Geschäftsverkehr auftritt, einen Gesellschaftssitz, eine externe Handlungsorganisation, insbesondere Geschäftsführungsorgane gemäß §§ 709f. BGB und, allerdings nicht notwendigerweise, über eine eigene Haftungsverfassung (Gesamthandvermögen)

(vgl. *Meschkowski*, Zur Rechtsfähigkeit der BGB-Gesellschaft, 2005, S.255 ff., S.264; *Ulmer/Schäfer* in: Münchener Kommentar BGB, Bd.5, 6.., 149 m.w.N.).

3. **Wesen der Gelegenheitsgesellschaft**

a) Gelegenheitsgesellschaften sind BGB-Gesellschaften in ihrer schwächsten Ausformung, auf „niedrigster" Stufe, oder mit nur geringem Organisationsgrad. Staudinger/*Geiler* beschreibt die Gelegenheitsgesellschaft deswegen auch als „vorübergehende und losere Gemeinschaft". Die Rechtsform der Gelegenheitsgesellschaft wird insbesondere zur Begründung von wirtschaftlichen Vereinigungen verwendet, bei denen nicht die gesamte Unternehmung vergemeinschaftet wird, sondern nur bestimmte Interessen. Ein klassisches Anwendungsbeispiel für Gelegenheitsgesellschaften sind deshalb Konsortien, die bereits von Staudinger/*Geiler* unter den „sonstigen Gelegenheitsgesellschaften" aufgeführt sind. Konsortien fallen demzufolge zwar unter die Definition von BGB-Gesellschaften, bilden aber doch eine besondere Art derselben

(Reichsgericht, Urt. v. 11. Dezember 1903, RGZ 56, 206, 207; Staudinger/*Geiler*, BGB, 9.Aufl. 1929, Vorbem. zu § 705 I 2 b) dd), und Anhang B zum 14.Titel, I.1. und I.6.; heute gilt nichts Anderes: vgl. Palandt/*Sprau*, BGB, 75.Aufl. 2016, § 705 Rn.36).

Welche Struktur, welche innere Verfassung und welchen Organisationsgrad eine Gelegenheitsgesellschaft im Einzelnen hat, richtet sich im Wesentlichen nach dem Parteiwillen und in erster Linie nach den Bestimmungen des Gesellschaftsvertrages. In aller Regel werden bereits im Gesellschaftsvertrag einer „Gelegenheitsgesellschaft" die dispositiven Regelungen der §§ 705 ff BGB weitgehend abbedungen („waived")

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, Anhang B zum 14. Titel, I.1. und 2.; *Ulmer/Schäfer* in: Münchener Kommentar BGB, 6.Aufl. 2013, Vor § 705 Rn.51 ff., Rn.64; *K. Schmidt*, Gesellschaftsrecht, 3. Aufl. 1997, § 58 III 6b).

Überspitzt formuliert bilden Konsortien einen Sonderfall der BGB-Gesellschaft, für die nahezu sämtliche Bestimmungen der §§ 705 ff. BGB gerade nicht zur Anwendung gelangen sollen

(vgl. *Hadding* in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch Band II, 2.Aufl. 2001, § 87 Rn.23).

b) Auch der Ausschluss der Bildung von Gesamthandvermögen entspricht gerade bei Gelegenheitsgesellschaften häufig dem ausdrücklichen oder stillschweigenden Parteiwillen. So ist, wie *Geiler* ausführt, insbesondere bei Konsortien häufig ein wirtschaftliches Gesellschaftsvermögen nicht vorhanden

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, Anhang A zum 14. Titel, I., und Anhang B zum 14. Titel, I.2.).

c) Ob Gelegenheitsgesellschaften als Innen- oder Außen-BGB-Gesellschaft ausgestaltet sind, obliegt ebenfalls allein dem Willen der Gesellschafter. Gelegenheitsgesellschaften sind dabei häufig als Innengesellschaften ausgestaltet, die durch Nichtteilnahme am Rechts- und Geschäftsverkehr und durch den Verzicht auf Bildung von Gesellschaftsvermögen gekennzeichnet sind

(vgl. *Gummert* in: Münchener Handbuch des Gesellschaftsrechts Bd.1, 4.Aufl. 2014, GbR § 17 Rn.13; *Schäfer* in: Münchener Kommentar BGB, Bd.5, 6. Aufl. 2013, § 726 Rn.1 und Rn.7; *K. Schmidt*, Gesellschaftsrecht, 4.Aufl. 2002, § 58 III 6, S.1708 f).

4. **Keine Anwendbarkeit des Handelsrechts auf Konsortien**

Das deutsche Handelsrecht ist auf Konsortien nicht anwendbar.

Da es wegen der Beschränkung des Gesellschaftszwecks auf bestimmte Einzelgeschäfte bereits am Tatbestandsmerkmal des auf Dauer

angelegten Betreibens eines sogenannten „Handelsgewerbes" fehlt, sind Konsortien in aller Regel als BGB-Gesellschaft zu qualifizieren, und zwar ungeachtet der typischen Kaufmannseigenschaft der Gesellschafter – Konsorten – und trotz sachlicher Zugehörigkeit der von ihnen im Rahmen des jeweiligen Konsortiums durchgeführten Geschäfte zum Bereich der Handelsgeschäfte. An einer planmäßigen, auf Dauer angelegten Tätigkeit fehlt es insbesondere dann, wenn nur einzelne Gelegenheitsgeschäfte, beispielsweise einzelne Veräußerungen, getätigt werden, respektive erkennbar sind

> (vgl. Baumbach/*Hopt*, HGB, 37.Aufl.2016, § 1 Rn.13; *Ulmer/Schäfer* in: Münchener Kommentar BGB, 6.Aufl. 2013, Vor § 705 Rn.51; vgl. bereits Reichsgericht, Urt. v. 23. April 1907, RGZ 66, 48, 51).

Daher kann es, anders als Armbrüster meint (vgl. Armbrüster Gutachten, S.7 unter 14. und 15.) im vorliegenden Fall auch dahinstehen, ob die Konsorten, wie beispielsweise Saemy Rosenberg oder Isaac Rosenbaum als Inhaber des Unternehmens J. Rosenbaum, persönlich oder im Namen ihres Kunsthandelsunternehmen handelten.

5. Anwendung auf den vorliegenden Fall

a) Typische Gelegenheitsgesellschaft

Im vorliegend zu beurteilenden Fall sind Einzelheiten eines zwischen den Konsorten geschlossenen Gesellschaftsvertrages (Konsortialvertrag) nicht bekannt; selbst wenn sie bekannt wären, bliebe die Relevanz fraglich, schon weil während eines gesellschaftsrechtlichen Vertragsverhältnisses fortlaufend Änderungen vereinbart werden können.

Jedenfalls geht aus den Verträgen von 1929 (Vertrag über den Erwerb der „Welfenschatz"-Sammlung vom 5. Oktober 1929) und 1935 (Vertrag über den Verkauf der „Welfenschatz"-Sammlung vom 14. Juni 1935) hervor, dass die Konsorten sich zur Erreichung eines gemeinsamen Zwecks zusammengeschlossen hatten (Weiterverkauf des Welfen-

schatz) – was dann in den Jahren von 1929-35 sukzessive geschah. Insoweit ist ein wesentliches Tatbestandsmerkmal des § 705 BGB erfüllt. Jedoch fehlt es diesem Zusammenschluss an vielen weiteren, für eine Normal-BGB-Gesellschaft erforderlichen Tatbestandsmerkmalen, insbesondere schon an einer „auf Dauer angelegten Rechtsbeziehung". Denn hier hatten sich die Konsorten nur zur Abwicklung eines singulären Geschäfts, dem Erwerb und anschließenden Weiterverkauf der „Welfenschatz"-Sammlung, zusammengetan. Allein dies schließt es bereits aus, hier die Existenz einer Normal-BGB-Gesellschaft anzunehmen.

Es spricht vielmehr alles dafür, das „Welfenschatz"-Konsortium als klassische Gelegenheitsgesellschaft zu qualifizieren. Wir haben es hier, wie für Gelegenheitsgesellschaften typisch, mit einer bloß „vorübergehenden und loseren" Gemeinschaft zu tun. Auch der Inhalt und die Diktion der Verträge von 1929 und 1935 lassen klar erkennen und beweisen, dass nicht die individuellen Kunsthandelsunternehmen zu einem einzigen Unternehmen, respektive zu einem Zweckverbund zusammengeführt – „vergemeinschaftet" – werden sollten, sondern dass lediglich ein singuläres, nicht auf Dauer angelegtes geschäftliches Interesse von ihnen gemeinsam verfolgt werden sollte, nämlich der Ankauf und Weiterverkauf des "Welfenschatz". Auch und gerade durch die Beschränkung des gemeinsamen Zwecks auf die Durchführung dieses Geschäfts, ist hier die Typik der Verbindung unter den Konsorten als eine reine Gelegenheitsgesellschaft gegeben, da es an dem Merkmal einer auf Dauer angelegten Rechtsbeziehung fehlt.

Mangels Teilnahme am Rechtsverkehr unter eigenem Namen und mangels Bildung von Gesellschaftsvermögen (vgl. hierzu auch weiter unten) kann die Gelegenheitsgesellschaft „Welfenschatz"-Konsortium daher insgesamt als eine bloße Innengesellschaft, nicht aber als Außengesellschaft betrachtet werden.

b) **Keine Annäherung an die Normal-BGB-Gesellschaft**

Im Übrigen fehlt es an jeglichen Anzeichen dafür, dass die Konsorten in den Jahren 1929-35 eine solche Gesellschaftsstruktur aufgebaut und einen Organisationsgrad erreicht hätten, die über diejenigen einer Gelegenheitsgesellschaft hinausgingen und die charakteristisch für die Normal-BGB-Gesellschaft sind (Gesamthandaußengesellschaft mit Gesellschaftsvermögen als gebundenem Sondervermögen, sogenanntes „Gesamthandvermögen", mit gemeinsamer Geschäftsführung, die nach außen im Namen der Gesellschaft und Gesellschafter erfolgt, Namensgebung der Gesellschaft, unter dem sie im Rechts- und Geschäftsverkehr auftritt, die Bestellung eines Vertretungsorgans, Begründung eines Sitz der Gesellschaft).

Diesbezüglich unterstellt Armbrüster in seinem Gutachten für das „Welfenschatz"-Konsortium das Bestehen solcher Handlungs- und Organisationsstrukturen und wie sie für die oben beschrieben Normal-BGB-Gesellschaft typisch sind, für deren Existenz im konkreten Fall jedoch weder tatsächliche noch rechtliche Anhaltspunkte bestehen. Mit anderen Worten, Armbrüsters Ausführungen dazu sind in hohem Maße spekulativ und sind im Übrigen widerlegt durch die bestehenden Erkenntnisse und Belege zur tatsächlichen Ausgestaltung und Durchführung der Gesellschaft in den Jahren 1929-35.

aa) So stellt beispielsweise die im Eingangspassus des Kaufvertrags vom 14. Juni 1935 gewählte Formulierung „nachstehend ‚Konsortium' genannt" eben nicht eine als Kurzname („short name") der Gelegenheitsgesellschaft gewählte Bezeichnung dar, sondern stellt lediglich auf den Rechtsbegriff „Konsortium" ab. Die Bezeichnung der Gesellschafter als „Konsortium" kann deswegen nicht als selbst gewählter Name bzw. Bezeichnung der Gesellschaft angesehen oder qualifiziert werden, unter dem bzw. unter der die Konsorten das Geschäft durchführten, wie Armbrüster dies aber fälschlicherweise annimmt beziehungsweise suggeriert (Armbrüster Gutachten, S.6 unter Punkt 13.)

Aus dem Vertrag vom 14. Juni 1935 geht, im Gegenteil, allein hervor, dass im Eingangspassus, im „Rubrum", alle Konsorten als allein berechtigte Eigentümer und Verkäufer unter 1. bis 3. einzeln nacheinander als Vertragsparteien auf Verkäuferseite aufgeführt sind, und im weiteren Vertragstext, aus Gründen der Vereinfachung, sodann nur noch „Konsortium" genannt werden. Durch die hier rein deklaratorisch zu verstehende Bezeichnung als „Konsortium" werden die Konsorten jedoch nicht zu einer einzigen, besonderen Vertragspartei „verschmolzen". Die Bezeichnung der Verkäufer der „Welfenschatz"-Sammlung als „Konsortium" qualifiziert diese Gelegenheitsgesellschaft deswegen auch nicht zu einer Gesellschaft mit eigener Rechtspersönlichkeit und einem Eigenname. Der Vertrag vom 14. Juni 1935 ist insoweit vergleichbar mit einer notariellen Urkunde, in der auf Verkäuferseite mehrere Verkaufsparteien erscheinen, und diese nachstehend in der Urkunde zusammen „Verkäufer" genannt werden; dadurch verschmelzen die individuellen Verkäufer eben gerade nicht zu einer einzigen „Rechtsperson".

Meine Annahme, dass es sich bei dem „Welfenschatz"-Konsortium um eine bloße Gelegenheitsgesellschaft handelte, findet seine weitere Bestätigung auch bereits mit dem Vertrag über den Ankauf der Sammlung vom 5. Oktober 1929, in dem lediglich der allgemein gebräuchliche Standard-Rechtsbegriff „die Käufer" für die beteiligten Konsorten Verwendung fand.

Die Konsorten haben auch nicht „als Individuen im Namen des Konsortiums gehandelt" („as all the individuals who acted on behalf of the Consortium"), wie Armbrüster (Armbrüster Gutachten, a.a.O.) meint. Vielmehr handelten die Konsorten als Gesellschafter des Konsortiums. Soweit einer der Gesellschafter gleichzeitig für andere Gesellschafter aufgetreten sein mag, so war er offensichtlich zuvor hierzu in jedem Einzelfall autorisiert und bevollmächtigt worden (FAC - Exhibit 6: „I have orally received the assent of the other authorized members of the Consortium."). Anders als Armbrüster meint (Armbrüster Gutachten, a.a.O.),

kommt hierin nicht der Wille oder die Absicht der Gesellschafter zum Ausdruck, ein besonderes Vertretungsorgan, einen Geschäftsführer der Gesellschaft unter Ausschluss der Verfügungsmacht der anderen Gesellschafter zu bestellen (§§ 714 BGB), sondern dies ist ein Beweis für die schlichte Bevollmächtigung eines Gesellschafters durch einen oder mehr Mitgesellschafter zur Vornahme einer einzelnen Handlung. An der generell bestehenden gemeinschaftlichen Geschäftsführung und Vertretungsmacht gem. §§ 709 Abs. 1 BGB ändert diese Bevollmächtigung nichts. Auch Armbrüster muss konzedieren, dass von „the other owners" die Rede ist (Armbrüster Gutachten, a.a.O.). Der Brief des Mitgesellschafters Saemy Rosenberg vom 14. Juni 1935 an die Dresdner Bank (FAC - Exhibit 6, vgl. Armbrüster Gutachten, auf S.7 unter FN 13, von ihm auf deutsch auszugsweise wörtlich zitiert) bestätigt vielmehr die gemeinschaftliche Geschäftsführungs- und Verfügungsberechtigung aller Gesellschafter gemäß § 709 Abs.1 BGB, indem es dort heißt: „Die Zusage *der anderen verfügungsberechtigten* Consorten habe ich mündlich erhalten" (emphasis added).

Die Tatsache, dass allein die unter 1. bis 3. des Vertrages vom 14. Juni 1935 aufgeführten Kunsthandelsunternehmen, beziehungsweise die Kunsthändler Saemy Rosenberg und Isaak Rosenbaum als Inhaber des ehemaligen Unternehmens J. Rosenbaum, den Vertrag unterzeichneten, belegt mithin auch, dass nur sie die allein verfügungsberechtigten Gesellschafter und damit die alleinigen Eigentümer der „Welfenschatz"-Sammlung im Zeitpunkt des Verkaufs waren.

Im Ergebnis ist daher davon auszugehen, dass kein Vertragsschluss „on behalf of the GbR" (d.h. „im Namen der BGB-Gesellschaft" oder „auf Rechnung der BGB-Gesellschaft") stattgefunden hat, sondern ein Vertragsschluss zwischen den unter 1. bis 3. eingangs des Vertrages vom 14. Juni 1935 aufgeführten Konsorten, als Verkäufer und Eigentümer, mit einem Käufer, der Dresdner Bank, vollzogen wurde. Es gab somit auch keine selbständige Identitätsausstattung der Gelegenheitsgesellschaft, was sich darin zeigt, dass es keinen besonderen Namen oder

gesonderte Bezeichnung gab, unter der die Gelegenheitsgesellschaft „Welfenschatz"-Konsortium im Verkehr aufgetreten wäre. Folglich ist davon auszugehen, dass alle drei Mitglieder des Konsortiums gleichermaßen verfügungsberechtigt waren (§ 709 Abs.1 BGB), dass keine gesonderte Geschäftsführung gem. §§ 710, 714 BGB etabliert worden ist und dass somit auch keine externe Handlungsorganisation vorlag.

bb) Es ist auch an keiner Stelle ersichtlich, dass das Konsortium als Gelegenheitsgesellschaft zur Durchführung eines singulären Weiterverkaufgeschäfts einen „Sitz" bzw. einen Verwaltungssitz („administrative seat") gehabt hätte, wie Armbrüster es in seinem Gutachten (Armbrüster Gutachten, S.9 ff.) – unter Anführung von hier eher unbeachtlicher, kapitalgesellschaftsrechtlicher Literatur und Rechtsprechung – fälschlicherweise unterstellt.

Mit „zu Frankfurt am Main" ist im Vertrag vom 5. Oktober 1929 für alle drei als Käufer auftretenden Kunsthändler offensichtlich allein und nur deren Wohnsitz bezeichnet. Gleiches gilt für den Vertrag vom 14. Juni 1935, in dem, jeweils zugeordnet zu den unter 1. bis 3. aufgeführten Vertragsparteien auf Verkäuferseite, deren jeweiliger Wohnsitz und Betriebsstättensitz bezeichnet sind. Mit einem eigenständigen „Sitz des Konsortiums" hat dies nichts zu tun, was auch darin zum Ausdruck kommt, dass weder im Vertrag von 1929 noch im Vertrag von 1935 dem Konsortium ein eigener „Firmensitz", geschweige denn, eine eigene Postadresse, zugeordnet ist.

Mangels „Sitz" des Konsortiums erübrigen sich auch alle internationalprivatrechtlichen Anknüpfungsbemühungen, die Armbrüster in seinem Gutachten (Armbrüster Gutachten, S.9 bis S.11) unternimmt. Die BGB-Gesellschaft, hier, im Falle des „Welfenschatz"-Konsortiums, in ihrer schwächsten Ausprägung einer reinen Gelegenheitsgesellschaft, besitzt als Personalgesellschaft ohne Rechtspersönlichkeit keine Staatsangehörigkeit

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, Vorbem § 705 V.c); Deutsch-Englisches Schiedsgericht, Urt. v. 27. März 1922, JW 1922, 1161).

Somit bietet die Gelegenheitsgesellschaft keinen Anknüpfungspunkt zur Bestimmung des auf sie anwendbaren Rechts (Gesellschaftsstatut), und zwar weder nach der sog. Gründungstheorie noch nach der sog. Sitztheorie. Die Diskussion, die Armbrüster hier zu diesem Punkt führt, ist überflüssig und irrelevant.

cc) Es gibt auch keinerlei Anhaltspunkte dafür, dass die Gelegenheitsgesellschaft „Welfenschatz"-Konsortium separates Gesellschafts- bzw. Sondervermögen gebildet hatte.

Zum einen gehört es, wie oben ausgeführt, schon nicht zum Wesen einer Normal-BGB-Gesellschaft, Gesellschaftsvermögen zu bilden und es besteht auch kein zwingendes Erfordernis, dies tun zu müssen. Erst recht gilt das für Gelegenheitsgesellschaften in Gestalt von Konsortien, für die die Bildung von Gesellschaftsvermögen grundsätzlich völlig untypisch ist. Im Gegenteil, gerade bei Gelegenheitsgesellschaften entspricht es häufig dem Willen der Beteiligten, gerade kein Gesamthandvermögen zu bilden, wie oben bereits dargelegt wurde.

Zum anderen scheitert die Annahme, dass die Gelegenheitsgesellschaft „Welfenschatz"-Konsortium eigenes, von den Gesellschaftern unabhängig bestehendes Gesellschaftsvermögen gebildet haben könnte auch daran, dass damals, in den Jahren 1929 bis 1935, BGB-Gesellschaften de jure grundsätzlich keine Träger von Rechten und Pflichten sein konnten, wie nachstehend näher erläutert werden soll. Die Notwendigkeit der Betrachtung eines Sachverhalts auch aus der historisch-rechtlichen Perspektive, in Fällen wie diesem zwingend geboten, verkennt Armbrüster offenbar völlig und unterlässt jede Auseinandersetzung damit, was ihn, in Konsequenz dessen, zu unzutreffenden Überlegungen und Resultaten kommen lässt.

III. Keine eigenständige Rechtsträgerschaft, keine Rechtsfähigkeit der Gelegenheitsgesellschaft in den Jahren 1929 bis 1935

1. Zeitlich anwendbares Recht für die Beurteilung der eigenständigen Rechtsträgerschaft und der Rechtsfähigkeit der Gelegenheitsgesellschaft in den Jahren 1929 bis 1935

Für die Beurteilung dessen, ob es sich bei dem „Welfenschatz-Konsortium" um eine Gesellschaft mit eigenständiger Rechtsträgerschaft und Rechtsfähigkeit gehandelt hat, wie Armbrüster es behauptet, ist zwingend auf das damals, im Zeitraum 1929 bis 1935, geltende Recht abzustellen, das hier allein anwendbar ist. Das entspricht dem allgemeinen Rechtsgrundsatz, dass Rechtsgeschäfte im Zeitpunkt ihrer Vornahme zu bewerten sind, entspricht dem Grundsatz von Treu und Glauben, § 242 BGB und folgt im Übrigen aus den Auslegungsgrundregeln der §§ 133, 157 BGB, wonach auf den Zeitpunkt der Abgabe von Willenserklärungen und der zu dieser Zeit geltenden Verkehrsauffassungen abzustellen ist. Im vorliegenden Fall ist also auf den Zeitpunkt der rechtsgeschäftlichen Erklärungen der Beteiligten mit Verträgen vom 5. Oktober 1929 und vom 14. Juni 1935 abzustellen

(vgl. Palandt/*Ellenberger*, BGB, 75.Aufl. 2016, § 133 Rn.6b m.w.N.).

Soweit Armbrüster meint, die Gelegenheitsgesellschaft sei aus heutiger Perspektive, auf der Grundlage heute geltenden Rechts und aktueller Rechtsprechung zu bewerten, so ist dies falsch und es kann dieser Auffassung nicht gefolgt werden. Die von Armbrüster zitierten Quellen (Armbrüster Gutachten, S.11, FN 22 und FN 23) stützen diese Meinung nicht, denn darin werden keine Feststellungen darüber getroffen, welches Recht, historisch betrachtet, auf einen Sachverhalt aus den Jahren 1929-1935 Anwendung findet. Im Gegenteil, die von Armbrüster zitierten Quellen weisen deutlich darauf hin, dass „jede Gesetzesauslegung bis zu einem gewissen Grade zeitgebunden [ist]."

Unter Beachtung der oben zitierten Rechtsgrundsätze, sind für die Beurteilung des hier in Rede stehenden Falls die damalige Rechtsordnung, die damaligen Bewertungsmaßstäbe und die damaligen Vorstellungen des historischen Gesetzgebers maßgebend. „Richtigkeit bedeutet keine zeitlose Wahrheit, sondern Richtigkeit für die Rechtsordnung der damaligen Zeit"

(*Larenz/Canaris*, Methodenlehre der Rechtswissenschaft, 3.Aufl. 1995, S.133, 136).

Richtigerweise ist der Fall des „Welfenschatz" deswegen auf der Grundlage des im Zeitraum 1929-35 geltenden Rechts zu beurteilen.

Armbrüster tut das nicht, unterlässt die zwingend gebotene Auseinandersetzung mit der historischen Rechtslage, was seine Arbeit im Ergebnis weitgehend wertlos macht.

2. **Gelegenheitsgesellschaft ohne eigene Rechtspersönlichkeit; Gesellschaft ist nie Rechtsträger geworden**

a) Nach einhelliger Meinung in Literatur und Rechtsprechung in jener Zeit, also im Zeitraum 1929-1935, wurde das, was sich seither hinter dem Rechtsbegriff der BGB-Gesellschaft verbirgt, einschließlich ihrer Sonderform Gelegenheitsgesellschaft, als Personengemeinschaft betrachtet. Konsortien, Gelegenheitsgesellschaften aller Art wurden demzufolge als Personalgesellschaften ohne eigene Rechtspersönlichkeit betrachtet. Diese Zusammenschlüsse, Gesellschaften, gehörten damit zu der Gruppe von privatrechtlich organisierten Personengemeinschaften, die nach Auffassung von Lehre und Obergerichten keine eigene Rechtssubjektivität besaßen. Nach Auffassung des Reichsgerichts bestand bei der BGB-Gesellschaft kein von den Gesellschaftern verschiedenes Rechtssubjekt. Träger der gesellschaftlichen Rechte und Pflichten waren stets und allein die Gesellschafter

(Reichsgericht, Urt. v. 11. Dezember 1903, RGZ 56, 206, 209; *Sayn* in: BGB-RGRK, 6.Aufl. 1928, § 705 Anm.1, § 719 Anm.1; *Planck*,

BGB, 4. Aufl. 1928, § 719 Anm.1; Staudinger/*Geiler*, 9.Aufl. 1929, Vorbem. zu § 705 II 1. und 2. sowie Anhang B II.1.; Mugdan, Bd. II, Motive, S.341; *von Gamm* in: BGB-RGRK, 12.Aufl., Vor § 705 Rn.4; vgl. zu dieser früheren Rechtslage vgl. auch Palandt/*Sprau*, BGB, 75.Aufl. 2016, § 705 Rn.24; so noch Bundesgerichtshof, Urt. v. 26. März 1981, BGHZ 80, 222, Rz.21 zitiert nach juris, m.w.N.).

An eine Verselbständigung der BGB-Gesellschaft als Rechtsperson (juristische Persönlichkeit im römisch-rechtlichen Sinne) und damit an die Etablierung einer separaten bzw. eigenständigen rechtlichen Existenz hat der historische Gesetzgeber des Bürgerlichen Gesetzbuches nicht gedacht. Der historische Gesetzgeber, wie auch die Gerichte, haben die BGB-Gesellschaft deswegen als nicht rechtsfähig betrachtet, sie galt als „Gesellschaft ohne Rechtspersönlichkeit", die kein Träger von Rechten und Pflichten sein konnte

(vgl. *Gummert* in: Münchener Handbuch des Gesellschaftsrechts Bd.1, 4.Aufl. 2014, GbR § 17, Rn.2 a.E. m.w.N.; BGHZ 142, 315, 319 f).

b) Folglich war auch das „Welfenschatz"-Konsortium, gebildet im Jahre 1929 und tätig in den Jahren 1929-35, auf der Grundlage damals geltenden Rechts eine Personengesellschaft ohne eigene Rechtspersönlichkeit.

Als Zwischenergebnis ist damit festzuhalten, dass demgemäß auch die hier zu beurteilende Gelegenheitsgesellschaft unter den Konsorten, das „Welfenschatz"-Konsortium, als nicht rechtsfähig anzusehen ist. Die Gelegenheitsgesellschaft „Welfenschatz"-Konsortium konnte damit nicht eigenständig Trägerin von Rechten und Pflichten sein und war in den Jahren 1929-1935 deshalb auch nicht die Eigentümerin der Welfenschatz-Sammlung.

3. **Rechtsansichtsänderungen in der Nachkriegszeit zur Rechtsfähigkeit der BGB-Gesellschaft irrelevant**

a) Diese historische und einhellige Rechtsmeinung hatte fast ein Jahrhundert, bis zur Jahrtausendwende, Bestand und änderte sich erst ab dem Jahr 2001.

Eingeleitet wurde diese Änderung durch eine Grundsatzentscheidung des Bundesgerichtshofs vom 29. Januar 2001 (zitiert bei Armbrüster, vgl. Armbrüster Gutachten, S.11, FN 21), in der die bisher vertretene These von der Nichtrechtsfähigkeit der BGB-Gesellschaft aufgegeben wurde. Seither entwickelte sich in Rechtsprechung und Lehre die mittlerweile verfestigte Auffassung, dass von einer potentiellen Rechtsfähigkeit der BGB-Gesellschaft auszugehen ist. Dem Bundesgerichtshof zufolge sind jedoch in jedem Einzelfall spezielle Gesichtspunkte, etwa besondere Rechtsvorschriften und die Eigenart des zu beurteilenden Rechtsverhältnisses, zu beachten und zu prüfen, und ob der Annahme der Rechtsfähigkeit bzw. der Rechtszuständigkeit einer Gesellschaft hinsichtlich eines bestimmten Rechts oder Rechtsverhältnisses im Einzelfall etwas entgegensteht

> (Bundesgerichtshof, Urt. v. 29. Januar 2001, NJW 2001, 1056 = BGHZ 146, 341; *Gummert* in: Münchener Handbuch des Gesellschaftsrechts Band 1, 4.Aufl. 2014, GbR § 17, Rn.21; vgl. dortselbst, Rn.6 bis Rn.10 m.w.N. zu dieser Rechtsprechungsentwicklung und die diese begleitende Literaturdiskussion).

Seither wird in der BGB-Gesellschaft eine besondere Wirkungseinheit, ein eigenständiges Zuordnungsobjekt gesehen, das als Personengruppe am Rechtsverkehr teilnehmen kann. Es wird dabei angenommen, dass die BGB-Gesellschaft Rechtsfähigkeit oder Teilrechtsfähigkeit besitzen kann, wenn und soweit sie als Außengesellschaft durch Teilnahme am Rechtsverkehr eigene Rechte und Pflichten begründet. Die BGB-Gesellschaft kann somit eigenständig bestimmte Rechtspositionen einnehmen, qualifiziert sich aber nicht als juristische Person

(Bundesgerichtshof, Urt. v. 29. Januar 2001, NJW 2001, 1056 = BGHZ 146, 341; BGH NJW 2002, 368; BGH NJW 2014, 1107 Tz.24; Palandt/*Sprau*, BGB, 75.Aufl. 2016, § 705, Rn.24).

Die Diskussion über die Rechtsfigur der BGB-Gesellschaft ist bis heute nicht abgeschlossen und Detailfragen sind weiter offen; insbesondere kämpfen sowohl Rechtsprechung und Literatur mit den Verwerfungen, die die damalige Rechtsprechungsänderung in der Praxis mit sich gebracht hat.

b) Unabhängig davon, dass bis heute in Literatur und Rechtsprechung auch umstritten geblieben ist, wem das Gesellschaftsvermögen einer BGB-Gesellschaft dinglich („in rem") zugeordnet ist, der Gesellschaft als solcher oder ihren Gesellschaftern

(vgl. *Gummert* in: Münchener Handbuch des Gesellschaftsrechts Bd.1, 4.Aufl. 2014, GbR § 17, Rn.1 m.w.N.),

so ist im vorliegenden Fall schon nicht bekannt und ersichtlich, ob überhaupt, und gegebenenfalls welche Regelungen die Konsorten bezüglich der „Welfenschatz"-Sammlung, als potentiellem Gesellschaftsvermögens, getroffen hatten. Denn, wie oben bereits ausgeführt, gehört die Bildung von Gesellschaftsvermögen – damals (1929-35) wie heute – nicht zum Wesen der Normal-BGB-Gesellschaft und ist nicht notwendigerweise qualifizierendes Merkmal einer solchen

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, § 705 II 3. sowie Anhang B I.2.; Palandt/*Sprau*, BGB, 75.Aufl. 2016, § 718 Rn.1).

Erst recht gilt dies für eine Gelegenheitsgesellschaft als schwächste Ausformung einer BGB-Gesellschaft, bei der sich, wie im Fall des „Welfenschatz", der gesellschaftliche Zusammenschluss auf eine einzelne geschäftliche Beziehung und Betätigung beschränkt und bei der die Gesellschafter aufgrund des auf ein Einzelgeschäft fokussierten und beschränkten gemeinsamen Zwecks keinen Anlass gehabt hatten, Gesellschaftsvermögen zu bilden.

c) Es ist auch nicht erkennbar, dass es sich bei der Gelegenheitsgesellschaft „Welfenschatz"-Konsortium um eine „Außengesellschaft" gehandelt haben könnte, wie sie beispielsweise in dem vom Bundesgerichtshof mit seiner Grundsatzentscheidung im Jahre 2001 zugrundeliegenden Fall zu beurteilen gewesen ist. Eine „Außengesellschaft" setzt nämlich voraus, dass die Gesellschaft als solche „durch Teilnahme am Rechtsverkehr eigene Rechte und Pflichten begründet", was letztlich für den Bundesgerichtshof in dem damals entschiedenen Fall der ausschlaggebende Gesichtspunkt gewesen war, die beschränkte Rechtsfähigkeit der BGB-Gesellschaft überhaupt, und erstmals, anzunehmen.

In dem damals entschiedenen Fall handelte es sich um eine bauwirtschaftliche Arbeitsgemeinschaft (ARGE) in der Rechtsform einer BGB-Gesellschaft, die unter eigenem Namen und unter eigenem Briefkopf im Rechtsverkehr nach außen auftrat und Rechtsgeschäfte tätigte. Die Arbeitsgemeinschaft trat zudem nach außen durch eine eigens dazu bestellte Geschäftsführung in Erscheinung, besaß also ein Gesellschaftsorgan, welches expressis verbis im Namen der Gesellschaft handelte und am Geschäftsverkehr teilnahm (BGHZ 146, 341, 356 f, 359 f).

Im Fall des „Welfenschatz"-Konsortium gab es keine Geschäftsführung, keinen Vorstand, kein Vertretungsorgan, kein Auftreten und keine Teilnahme der Gelegenheitsgesellschaft im Geschäftsverkehr als Gesellschaft unter eigenem Namen. Es gab kein Handeln „im Namen bzw. auf Rechnung" der Gesellschaft und es bestanden offensichtlich auch keine solchen Organisations- und Handlungsstrukturen, die das „Welfenschatz"-Konsortium auch nur ansatzweise als BGB-Gesellschaft mit eigener Rechtspersönlichkeit im Sinne der seit 2001 hierzu ergangenen Rechtsprechung deutscher Gerichte qualifizieren würde.

Armbrüster lässt im Übrigen unerwähnt, dass die Entscheidung des Bundesgerichtshof vom 29. Januar 2001 (BGHZ 146, 341) einem als BGB-Gesellschaft organisierten und auftretenden Zusammenschluss von Rechtssubjekten keine generelle Rechtsfähigkeit zuspricht, sondern nur

in eingeschränktem Umfang und unter besonderen Voraussetzungen zulässt. Die Position des Bundesgerichtshof ist dabei die, dass eine BGB-Gesellschaft zwar „jede Rechtsposition einnehmen kann", aber nur „soweit nicht spezielle Gesichtspunkte entgegenstehen" (BGHZ 146, 341, 343; BGHZ 116, 86, 88; BGHZ 136, 254, 257; BGHZ 79, 374, 378 f). Nur soweit die BGB-Gesellschaft „in diesem Rahmen" eigene Rechte und Pflichten begründe, sei sie – ohne juristische Person zu sein – rechtsfähig (BGHZ 146, 341, 343).

d) Im Ergebnis ist daher festzustellen, dass, auch bei Anwendung des heute geltenden Rechts und unter Einbeziehung der seit 2001 von deutschen Gerichten zur Behandlung von BGB-Gesellschaften ergangenen Rechtsprechung, der Zusammenschluss der Kunsthandlungsunternehmen J. Rosenbaum, Z. M. Hackenbroch und J. & S. Goldschmidt zu einem „Welfenschatz"-Konsortium nicht als Gesellschaft mit eigener Rechtspersönlichkeit zu betrachten und zu behandeln ist. Der Auffassung von Armbrüster (Armbrüster Gutachten, S.11 unter Punkt 26.), dass ein „deutsches Gericht, welches heute zu beurteilen hätte, ob das Konsortium in der Zeit von 1929 bis 1935 rechtlich fähig gewesen sein könnte, dies mutmaßlich annehmen würde", ist deswegen entschieden zu widersprechen.

Meiner Auffassung nach würde ein deutsches Gericht heute, in Anwendung heutigen Rechts, und unter zwingend erforderlicher Einbeziehung der historischen Rechtslage der Jahre 1929-35, dem „Welfenschatz"-Konsortium die Qualifikation als eigene Rechtspersönlichkeit unter keinem einzigen rechtlichen Gesichtspunkt, wie oben näher ausgeführt, zuerkennen. Das Konsortium war keine „Außengesellschaft" und war, als reine Gelegenheitsgesellschaft, auch nicht Eigentümerin der „Welfenschatz"-Sammlung.

4. **Beendigung der Gelegenheitsgesellschaft im Jahr 1935 durch Erreichung des Gesellschaftszwecks *ipso iure* (§ 726 BGB)**

a) Ein kennzeichnendes Merkmal der Gelegenheitsgesellschaft ist es, dass die Gesellschaft nach dem einvernehmlichen Willen der Beteiligten durch Erreichung des Gesellschaftszwecks endet, was bedeutet, dass der gesellschaftliche Zusammenschluss nur solange besteht, bis der Gesellschaftszweck erreicht und das von den Gesellschaftern betriebene Geschäft vollzogen und erledigt ist. Ist dieser Zweck erreicht, endet die Gesellschaft *ipso iure*. Die Gelegenheitsgesellschaft hört folglich in dem Augenblick auf zu existieren, wenn der „Zweck" der Gesellschaft, der von den Beteiligten bestimmte und gewollte Erfolg des gemeinsamen Handelns – das Geschäft, zu dessen Betreiben man sich zusammengetan hatte – erfüllt ist. Mit Erreichen des Zwecks fällt die Verbindung, fällt der gesellschaftliche Zusammenschluss weg (§ 726 BGB)

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, Anhang zum 14. Titel, B. I.1. und I.7., § 726 I. und II.; *Hadding* in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, Bd.II, 2.Aufl. 2001, § 87 Rn.23; *Karsten Schmidt*, Gesellschaftsrecht, 3.Aufl. 1997, § 58 II 1; *Wiedemann*, Gesellschaftsrecht Bd.II, 204, S.667, S.670).

Dieser Automatismus, die Beendigung der Gesellschaft kraft Gesetzes, ist ein weiteres Merkmal, das gerade Gelegenheitsgesellschaften, wie beispielsweise das „Welfenschatz"-Konsortium, kennzeichnet und von der rechtsfähigen, normalen BGB-Gesellschaft, unterscheidet. *Wiedemann* merkt an, dass § 726 BGB „aus der Gedankenwelt der Gelegenheitsgesellschaft und der automatischen Beendigungsgründe im allgemeinen Schuldrecht [stammt]"

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, Anhang B zum 14. Titel, I.7.; *Wiedemann*, Gesellschaftsrecht Bd.II, 2004, S.670).

b) Im vorliegenden Fall, in dem sich die Kunsthändler-Konsorten einzig und allein zu dem inhaltlich und zeitlich beschränkten, singulären Zweck zusammengeschlossen hatten, den „Welfenschatz" zum Zwecke des Weiterverkaufs zu erwerben, war das gemeinsame Konsortialgeschäft 1935

abgewickelt und war der Gesellschaftszweck mit Abschluss der Durchführung des Kaufvertrags vom 14. Juni 1935 erreicht. Die Gelegenheitsgesellschaft „Welfenschatz"-Konsortium endete damit *ipso iure*.

5. **Ohne Bestand der Gelegenheitsgesellschaft kein Gesellschaftsvermögen**

Selbst wenn man hier einmal unterstellt, dass das „Welfenschatz"-Konsortium mehr als eine reine Gelegenheitsgesellschaft gewesen wäre, dass diese Gesellschaft in den Jahren 1929-35 eigenes Gesellschaftsvermögen in Gestalt der „Welfenschatz"-Sammlung gebildet haben würde und dass dieses Vermögen im Eigentum der Gesellschaft, nicht aber im Eigentum der Gesellschafter gestanden hätte, so stünde selbst in diesem Fall das Gesellschaftsvermögen, darunter auch Ansprüche der früheren Gesellschaft, die möglicherweise erst lange nach Beendigung der Gesellschaft geltend gemacht werden, mit Wegfall und Auflösung der Gesellschaft nicht länger im Eigentum des Rechtsträgers, der dann nicht mehr existiert, sondern im Vermögen der (früheren) Gesellschafter, oder von deren Erben. Auch das übersieht Armbrüster.

Das Gesellschaftsvermögen ist nämlich vom Bestand der Gesellschaft abhängig, denn „Vermögen" als solches ist nicht rechtsfähig, sondern – Rechtsträgerschaft der Gelegenheitsgesellschaft einmal unterstellt – dem Rechtsträger „Gesellschaft" zugeordnet. Ist die Gesellschaft beendet bzw. weggefallen, gibt es kein Gesellschaftsvermögen mehr, sondern nur noch – und zwar ohne Unterscheidung in Privatvermögen und ehemaliges Gesellschaftsvermögen – Vermögen der verbleibenden Gesellschafter

(vgl. *Gummert* in: Münchener Handbuch des Gesellschaftsrechts Bd.1, 4.Aufl. 2014, GbR § 17, Rn.30; Soergel/Hadding/Kießling, BGB, ...Aufl., § 718 Rn.14; BGH, Urt. v. 27. September 1999 – II ZR 371/98, BGHZ 142, 315 ff, Rz.13 – zitiert nach juris).

IV. Ergebnis

Im Ergebnis ist daher festzustellen, dass es sich bei dem Zusammenschluss der drei Kunsthandlungen J. Rosenbaum, Z. M. Hackenbroch und J. & S. Goldschmidt – „Welfenschatz"-Konsortium – um eine reine Gelegenheitsgesellschaft ohne eigene Rechtspersönlichkeit gehandelt hat, die somit nicht rechtsfähig war und die mit Abschluss der Durchführung des Kaufvertrags vom 14. Juni 1935 aufhörte, zu existieren.

Das frühere „Welfenschatz"-Konsortium besaß bzw. besitzt deswegen auch keine separate rechtliche Existenz nach deutschem Recht.

Das „Welfenschatz"-Konsortium war, als Gelegenheitsgesellschaft, in den Jahren 1929-35 nicht Eigentümerin der „Welfenschatz"-Sammlung.

Die Gelegenheitsgesellschaft „Welfenschatz"-Konsortium wurde durch Erreichung des auf den Erwerb und Weiterverkauf der Sammlung beschränkten Gesellschaftszwecks im Jahre 1935 *ipso iure* beendet, § 726 BGB.

C. Zur Frage, wer – wenn nicht „das Konsortium" – nach deutschem Recht Eigentümer des „Welfenschatz" zwischen 1929 und 1935 war

1. Die im Vertrag von 1929 aufgeführten „Käufer" als Eigentümer des Welfenschatzes

Mit Kaufvertrag vom 5. Oktober 1929 erwarben die drei inhabergeführten Kunsthandelsunternehmen J. Rosenbaum, Z. M. Hackenbroch und J. & S. Goldschmidt die in dem Vertrag als „Welfenschatz" bezeichnete Sammlung mittelalterlicher Kunstwerke, § 433, 929 BGB.

Mit der – unstreitig – spätestens im Januar 1930 stattgefundenen Übergabe der vollständigen Sammlung an die drei Käufer war der Akt der

Eigentumsübertragung auf die drei Kunsthandlungsunternehmen vollzogen und abgeschlossen, § 929 BGB.

2. **Die Gesellschafter des Konsortiums als Träger von Rechten und Pflichten**

Die drei Erwerber der Sammlung – J. Rosenbaum, Z. M. Hackenbroch und J. & S. Goldschmidt – waren, wie oben näher ausgeführt, Gesellschafter (Konsorten) der Gelegenheitsgesellschaft „Welfenschatz"-Konsortium, welche die Sammlung von 1929 bis 1935 in Besitz hatten und die, mit Vertrag vom 14. Juni 1935, die durch zwischenzeitlichen Verkauf einzelner Stücke reduzierte „Welfenschatz"-Sammlung an die Dresdner Bank, die – verdeckt – als Kaufagent für den Staat Preußen auftrat, verkauften.

Alleinige Verkäufer waren laut Kaufvertrag vom 14. Juni 1935 wiederum die Kunsthandelsunternehmen Z. M. Hackenbroch, J. & S. Goldschmidt und Saemy Rosenberg und Isaac Rosenbaum als letzte Inhaber des zwischenzeitlich liquidierten Unternehmens „J. Rosenbaum".

In den mir vorliegenden Unterlagen findet sich kein Beweis dafür, dass das Eigentum an der „Welfenschatz"-Sammlung in den Jahren 1929-35 zu irgendeinem Zeitpunkt von den genannten drei Kunsthandelsunternehmen, von deren Inhabern respektive, auf andere Parteien, auf einen anderen Rechtsträger, ganz oder teilweise, übergegangen ist.

Der mit Kaufvertrag vom 14. Juni 1935 ergangene – bloß deklaratorisch zu verstehende – Hinweis, dass das „Welfenschatz"-Konsortium an „diesem Geschäft (...) in- und ausländische Geschäftsfreunde" beteiligt hatte, beweist nicht, dass diese „in- und ausländischen Geschäftsfreunde" damit auch weitergehende Rechte, insbesondere Eigentums- bzw. Miteigentumsrechte, an der Sammlung besessen hatten. Dafür gibt es keinen Beleg.

Ebenso wenig gibt es einen Beleg dafür, dass die Konsorten das Eigentum an der Sammlung auf die Gelegenheitsgesellschaft „Welfenschatz"-Konsortium selbst, als eigenständiges Rechtssubjekt, übertragen haben. Es kann, entsprechend meinen Ausführungen zu oben B., hier ausgeschlossen werden, dass an der Sammlung separates Eigentum des „Konsortiums" begründet worden ist, denn es handelte sich, wie oben aufgezeigt, um eine reine Gelegenheitsgesellschaft, ohne eigene Rechtspersönlichkeit und Rechtssubjektivität.

Die „Welfenschatz"-Sammlung befand sich noch bis zur Übergabe an die Vertreter der Dresdner Bank, die Vertreter des Staates Preußen respektive, im Jahre 1935 durchgängig im Besitz der Beteiligten des „Welfenschatz"-Konsortiums, zuletzt in Amsterdam, so dass, nach deutschem Recht, das unbeschränkte und alleinige Eigentum der drei Kunsthandelsunternehmen, deren Inhaber respektive, auch über den fortdauernden Besitz angenommen werden kann, arg. ex. § 1006 BGB. Hier greift die gesetzliche Vermutung des § 1006 Abs. 1 BGB, wonach zugunsten des Besitzers einer beweglichen Sache vermutet wird, dass er Eigentümer der Sache sei.

Bis zum Weiterverkauf des „Welfenschatz" im Jahr 1935 waren demzufolge die drei Kunsthandelsunternehmen J. Rosenbaum, Z. M. Hackenbroch und J. & S. Goldschmidt, deren Inhaber respektive, die alleinigen Träger von Rechten und Pflichten in Bezug auf die Sammlung „Welfenschatz".

3. **Keine Bildung von Gesellschaftsvermögen der Gelegenheitsgesellschaft ersichtlich**

Aus den mir vorliegenden Dokumenten ist auch nicht ersichtlich, dass zu irgendeinem Zeitpunkt in den Jahren 1929-35 die „Welfenschatz"-Sammlung durch Rechtsakt und ausdrückliche Widmung, oder durch konkludentes Handeln, zu separatem Gesellschaftsvermögen der Gelegenheitsgesellschaft „Welfenschatz"-Konsortium geworden ist. Dafür gibt es keinen Beleg.

a) Wie oben unter B. II. 2. näher ausgeführt, gehört die Bildung von Gesellschaftsvermögen schon nicht zu den notwendigen Voraussetzungen einer Normal-BGB-Gesellschaft und erst recht nicht zum Wesen der Gelegenheitsgesellschaft.

b) Selbst wenn man einmal unterstellt, dass an der „Welfenschatz"-Sammlung separates Gesellschaftsvermögen gebildet worden wäre, so blieben damit die Frage nach den Eigentumsverhältnisse am Gesellschaftsvermögen unbeantwortet.

Die gesetzlichen Vorgaben des deutschen Rechts zur BGB-Gesellschaft sind weitgehend dispositiv, das heißt, dass die Eigentumsverhältnisse am Gesellschaftsvermögen, so es denn besteht, höchst unterschiedlicher Ausprägung und Natur sein können und in starkem Maße von den gesellschaftsvertraglichen Abreden der Gesellschafter abhängen. Es könnte dann beispielsweise entweder Miteigentum „zur gesamten Hand" gebildet gewesen sein, oder Bruchteilseigentum, oder auch Alleineigentum jedes Konsorten an einem seiner Beteiligung entsprechenden Anteil; selbst das Alleineigentum nur eines einzigen Gesellschafters wäre möglich. Wenn, wie hier, der Zweck der Gemeinschaft lediglich in dem gemeinsamen Geschäft der Verwertung bzw. des Weiterverkaufs einer Kunstsammlung bestanden hat, so würde man, die Existenz von Gesellschaftsvermögen unterstellt, Alleineigentum jedes Konsorten an dem seiner Beteiligungsquote entsprechenden Teil annehmen müssen

(vgl. Staudinger/*Geiler*, BGB, 9.Aufl. 1929, Anhang zum 14. Kapital A. sowie Anhang B II.1.; Reichsgericht, Urt. v. 24. April 1906 in BankArchiv Bd.5 S.230).

Da der gemeinschaftliche oder gesellschaftliche Zweck im Fall des „Welfenschatz"-Konsortium lediglich in dem gemeinsamen Erwerb und Weiterverkauf der Sammlung bestand, spricht für den Fall der Annahme, dass Gesellschaftsvermögen gebildet worden wäre, vieles dafür, Alleineigentum jedes Konsorten an dem seiner Beteiligungsquote entsprechenden Teil des Welfenschatzes anzunehmen.

4. **Nachtragsliquidation weder erforderlich noch geboten**

Die pauschalisierende Behauptung von Armbrüster, dass nach deutschem – damals (1929-35) wie heute geltendem – Recht BGB-Gesellschaften im Falle von nach Beendigung einer Gesellschaft auftauchenden Gesellschaftsvermögenswerten, dazu zählen auch Rechtsansprüche, in gewisser Form fortbestehen würden und es im Umgang damit regelmäßig eines förmlichen Nachtragsliquidationsverfahrens bedürfe (Armbrüster Gutachten, S.14 unter Punkt 34. ff), ist unzutreffend, gerade dann, wenn es sich um eine Gelegenheitsgesellschaft wie das „Welfenschatz"-Konsortium handelt.

Armbrüster gelangt bei der Erörterung dieses Punkts in seinem Gutachten zwangsläufig zu falschen Schlüssen, weil er, wie oben aufgezeigt, bereits die Rechtsnatur des „Welfenschatz"-Konsortiums falsch beurteilt. Die Behauptung, es bedürfe eines besonderen kontrollierten und ordentlichen Verfahrens („Nachtragsliquidation"), um neue oder wiederentdeckte Vermögenswerte („assets") einer Gesellschaft zu liquidieren (Armbrüster Gutachten, S.14-17), ist – wie sein Gutachten insgesamt – durchzogen von der irrigen Annahme, dass es sich im vorliegenden Fall beim „Welfenschatz"-Konsortium um eine Gesellschaft mit eigener Rechtspersönlichkeit und eigenem Gesellschaftsvermögen gehandelt

habe, welches eine den Handelsgesellschaften oder Kapitalgesellschaften des deutschen Rechts ähnliche Organisationsstruktur aufgewiesen habe. Das aber war bei dem Konsortium, wie oben dargelegt wurde, gerade nicht der Fall.

a) Bereits die Prämisse von Armbrüster, die – erst nach Jahrzehnten aufgetauchten, respektive im Rahmen des anhängigen Klageverfahrens geltend gemachten – Ansprüche der Erben und Rechtsnachfolger der 1929-35 beteiligten Inhaber der drei Kunsthandlungsunternehmen J. Rosenbaum, Z. M. Hackenbroch und J. & S. Goldschmidt gehörten zum Gesellschaftsvermögen der Gelegenheitsgesellschaft „Welfenschatz"-Konsortium, entbehrt der Grundlage. Denn dies würde voraussetzen, dass überhaupt Gesellschaftsvermögen der Gelegenheitsgesellschaft gebildet worden wäre. Das aber ist, wie oben dargetan, hier gerade nicht der Fall.

b) Zum anderen war die Gelegenheitsgesellschaft „Welfenschatz"-Konsortium durch Zweckerreichung im Jahr 1935 *ipso iure* beendet, wie oben unter B. III. 4. dargelegt. Da aber die Existenz von Gesellschaftsvermögen ausnahmslos und unmittelbar vom Bestand der Gesellschaft abhängt, gibt es, wenn die Gesellschaft beendet ist, kein Gesellschaftsvermögen mehr, sondern nur noch – und zwar ohne rechtliche Unterscheidung in Privat- und ehemaliges Gesellschaftsvermögen – Vermögen der verbleibenden Gesellschafter.

c) Mangels entgegenstehender Hinweise ist davon auszugehen, dass das „Welfenschatz"-Konsortium im Laufe des Jahres 1935, nach Verteilung des Kaufpreises, als Gelegenheitsgesellschaft ohne Weiteres ihr Ende gefunden hat, § 726 BGB. Über die Verteilung des Kaufpreises hinaus hat es damals offensichtlich keinerlei Abwicklungsbedarf gegeben.

d) Aus diesem Grund besteht in diesem Fall, anders als Armbrüster meint, für die Kläger, als Erben und Rechtsnachfolger der früheren Eigentümer der „Welfenschatz"-Sammlung, weder eine gesetzlich normierte noch

aus anderen Gründen ersichtliche Pflicht oder die Notwendigkeit, sich einem Nachtragsliquidationsverfahren unterziehen zu müssen.

e) Die von Armbrüster in seinem Gutachten (Armbrüster Gutachten, S.14-17) angeführten Rechtsmeinungen und Rechtsprechung treffen auf den vorliegenden Fall nicht zu und sind für die weitere rechtliche Beurteilung des Falles nicht einschlägig und deswegen unerheblich.

So behandelte beispielsweise das Reichsgericht in dem von Armbrüster zitierten Fall aus dem Jahre 1905 (Armbrüster Gutachten, S.14 FN 30, Reichsgerichtsentscheidung vom 3. Mai 1905, RG JW 1905, 430 N.8) den Fall eines nach Beendigung einer Gesellschaft im Nachhinein aufgeflammten Streits der ehemaligen Gesellschafter untereinander. Offensichtlich geht es in dem vorliegenden Rechtsstreit nicht um eine Auseinandersetzung ehemaliger Gesellschafter, oder deren Rechtsnachfolger, untereinander, sondern um etwas völlig anderes, nämlich um Ansprüche gegenüber Dritten, hier gegen die Stiftung Preußischer Kulturbesitz und die Bundesrepublik Deutschland.

Auch liegt hier kein Fall vor, in dem es „der Zweck der Auseinandersetzung" erfordern würde, eine längst beendete Gelegenheitsgesellschaft als fortbestehend anzusehen.

Auch das von Armbrüster zitierte Urteil des Bundesgerichtshofs vom 21. Juni 1979 (Armbrüster Gutachten, S. 14 FN 31, Bundesgerichtshofentscheidung NJW 1979, 1987) ist für den vorliegenden Rechtsstreit nicht einschlägig. Die Entscheidung befasst sich mit einer völlig anderen Gesellschaftsform, nämlich einer „Offenen Handelsgesellschaft", §§ 105 ff HGB, und im konkreten Fall mit einem Unternehmen, welches unter seiner Firma klagen konnte und Rechts- und Parteifähigkeit besaß. Bereits an diesen Voraussetzungen fehlt es im vorliegenden Fall, wie oben ausführlich dargelegt wurde.

f) Die von Armbrüster (Armbrüster Gutachten, S.15-17) als Begründung für eine hier seiner Ansicht nach erforderliche Durchführung eines Nachtragsliquidationsverfahrens angeführten gesetzlichen Regelungen, §§ 146, 150 HGB und §§ 730 ff. BGB, sind, weil es sich bei dem „Welfenschatz"-Konsortium um eine reine Gelegenheitsgesellschaft gehandelt hatte, hier weder einschlägig noch zwingend zu beachten.

Im Gegenteil. Es entspricht der einhelligen Meinung in Literatur und Rechtsprechung, dass Personengesellschaften an das mit den §§ 146, 150 HGB, §§ 730ff. BGB geregelte Liquidationsrecht gerade nicht gebunden sind. Da die Fragen der Abwicklung und Liquidation durchweg dispositives Recht sind, hängt somit alles von den Vereinbarungen der früheren Beteiligten, also der früheren Gesellschafter der Gelegenheitsgesellschaft untereinander ab; sie sind in dem, was sie zu diesen Fragen – also Liquidation der Gesellschaft, auch Nachtragsliquidation – vereinbaren, nicht an Gesetze gebunden und können freie Vereinbarungen darüber treffen, § 731 BGB

(vgl. Baumbach/*Hopt*, HGB, 37.Aufl. 2016, § 145 HGB Rn.10; *Wiedemann*, Gesellschaftsrecht, Bd.II, Recht der Personengesellschaften, 2004, S.552 f, S.671).

Im Ergebnis stelle ich fest, dass im vorliegenden Fall nicht von einer fortbestehenden Gesellschaft gesprochen werden kann und auch keine Notwendigkeit für die Kläger, als Erben und Rechtsnachfolger der früheren Mitgesellschafter der Gelegenheitsgesellschaft „Welfenschatz"-Konsortium besteht, sich einem Nachtragsliquidationsverfahren unterwerfen zu müssen, um ihre Ansprüche rechtswirksam vortragen zu können.

5. **Durch Erbfall eingetretene Gemeinschaft (§ 741 BGB)**

Vielmehr ist vorliegend von einer durch Erbfall eingetretenen Gemeinschaft unter den Erben gemäß § 741 BGB auszugehen.

So hat beispielsweise das Reichsgericht mit Urteil vom 23. April 1907 (RGZ 66, 48, 51) entschieden, dass keine Fortsetzung eines Gewerbebetriebs des Erblassers durch dessen Erben anzunehmen ist, wenn diese ein zur Erbmasse gehörendes Grundstück erschließen, umgestalten, teilen und danach gewinnbringend veräußern. Die Absicht der Miterben, so das Gericht, erschöpft sich in einem solchen Fall allein darin, den Nachlass zu teilen und mit einem für alle Beteiligten günstigen Ergebnis zu veräußern. In einem solchen Falle liege, so das Reichsgericht, „eine durch Erbfall eingetretene Gemeinschaft" vor

(Reichsgericht, Urt. v. 23. April 1907, RGZ 66, 48, 52).

Ein solcher Fall liegt auch hier vor. Die Kläger, als Erben und Rechtsnachfolger der damaligen Eigentümer der „Welfenschatz"-Sammlung, bilden eine durch Erbfall eingetretene Gemeinschaft, auf welche die Regeln der §§ 741 ff. BGB anzuwenden sind. § 742 BGB bestimmt, dass im Zweifel anzunehmen ist, dass den Teilhabern gleiche Anteile zustehen. Mehr bedarf es nicht.

6. **Ergebnis**

In den Jahren von 1929 bis 1935 waren, in Anwendung deutschen Rechts, die im Vertrag vom 5. Oktober 1929 unter (1) bis (3) als „Käufer" bezeichneten, und im Vertrag vom 14. Juni 1935 unter 1.) bis 3.) als „Konsortium" bezeichneten Kunsthandlungsunternehmen, respektive deren Inhaber, die alleinigen Eigentümer des „Welfenschatz".

D. Regardless of the answer to these questions (B, C), do the plaintiffs in this case, Alan Philipp, Gerald Stiebel, and Jed Leiber, have standing to bring their claims under German law?

Das zu dieser, respektive zu ähnlicher Fragestellung von den Beklagten vorgelegte Gutachten von Thiessen geht völlig am Thema vorbei und ist als Grundlage für die zutreffende Beurteilung des erkennenden Gerichts,

ob die Kläger ihre Ansprüche auch vor deutschen Gerichten verfolgen können, nicht geeignet.

I. Rechtsnatur der Ansprüche

Die Kläger verfolgen mit der beim Bundesgericht im District of Columbia in Washington D.C. anhängigen Klage die Herausgabe und weitere Ansprüche in Bezug auf die behauptete, unrechtmäßige Entziehung der „Welfenschatz"-Sammlung, in Gestalt eines 1935 erfolgten Not- und/oder Zwangsverkaufs aufgrund von erlittener rassischer Verfolgung der früheren Eigentümer durch den NS-Staat.

Es handelt sich dabei um solche Ansprüche, deren Ursprung mithin in Rechtsverletzungen liegt, welche die Rechtsvorgänger der Kläger, als Verfolgte des Nazi-Regimes, in der Zeit der Herrschaft der Nationalsozialismus vom 30. Januar 1933 bis 8. Mai 1945 erlitten haben.

Der Sache nach handelt es sich im weitesten Sinne um Ansprüche auf „Restitution" von NS-Raubkunst („Nazi looted art").

Die Frage nach der Geltendmachung und Durchsetzung dieser Ansprüche in Deutschland, vor deutschen Gerichten, ist aus meiner Sicht, unter Berücksichtigung der Gesetzeslage, von Literatur und Rechtsprechung, und anders, als Thiessen es behauptet, allenfalls theoretisch zu bejahen, praktisch aber de facto ausgeschlossen.

II. Restitution von Kultur- und Kunstgegenständen

Der Umgang mit Ansprüchen auf Rückgabe von Kultur- und Kunstgegenständen, welche die ehemaligen Eigentümer während der Zeit des Nationalsozialismus unfreiwillig aus ihren Besitz gegeben haben, beispielsweise durch Beschlagnahmung oder Zwangsverkauf, ist bis heute weltweit nicht abschließend geklärt. Nachdem bereits unmittelbar nach

dem Zweiten Weltkrieg in den meisten europäischen Ländern, insbesondere in Deutschland, gesetzliche Regelungen über die Rückgabe von Kulturgütern ergingen und Rückführungen in teilweise größerem Umfang erfolgten, trat dieses Thema, bedingt durch den „Kalten Krieg", Ende der 1950er Jahre zunehmend in den Hintergrund. Erst mit dem Zusammenbruch des sozialistischen Staatensystems Anfang der 1990er Jahre gewannen Restitutionsfragen wieder neue Aktualität.

Unter dem Begriff „Restitution" im engeren Sinne, bezogen auf die Zeit des Nationalsozialismus, versteht man die Rückgabe entzogenen Eigentums. Gleichbedeutend sind die Begriffe „Rückerstattung" und „Rückübertragung". Anders als bei Entschädigung geht es dabei nicht um die Festsetzung pauschalierter Leistungen für Verfolgte des Nationalsozialismus, sondern um die Rückgabe konkreter Eigentumsobjekte.

III. Restitution und Rückerstattung in der Bundesrepublik Deutschland

1. Keine Ansprüche nach deutschen Rückerstattungsgesetzen

Bereits in den Jahren unmittelbar nach Kriegsende, noch vor Gründung der Bundesrepublik Deutschland im Mai 1949, erließen die Siegermächte in den westlichen Besatzungszonen rechtliche Bestimmungen über die Rückerstattung ehemals jüdischen und anderen vom NS-Regime entzogenen Vermögens, wie auch über die Entschädigung NS-Verfolgter für Schäden an Leben, Freiheit, Körper und Gesundheit. Die Grundlinien dieser Gesetzgebung fanden Eingang in den Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen ("Überleitungsvertrag") und wurden wesentlich mit dem Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung von 1956 (BEG) und dem Bundesrückerstattungsgesetz von 1957 (BRüG) umgesetzt. Auf der Grundlage des BEG wurde Opfern nationalsozialistischer Verfolgung (aus Gründen der Rasse, des Glaubens oder der Weltanschauung) eine Rente zugesprochen, um Schäden an Leben, Körper,

Gesundheit, Freiheit, Eigentum, Vermögen, beruflichem oder wirtschaftlichem Fortkommen auszugleichen. Aufgrund des Bundesrückerstattungsgesetzes konnten Schadensersatzansprüche gegen das Deutsche Reich wegen entzogener Vermögensgegenstände geltend gemacht werden, soweit diese nicht bereits aufgrund der Alliierten-Gesetzgebung aufgefunden und zurückgegeben worden waren.

Die Alliierten Rückerstattungsgesetze setzten voraus, dass der beanspruchte Vermögensgegenstand aus Gründen der Rasse, der Religion, der Nationalität, der Weltanschauung oder der politischen Gegnerschaft weggenommen worden war oder der Verfolgte den Gegenstand infolge der durch die Verfolgung erzeugten Zwangslage veräußert hatte. Der Anspruch richtete sich gegen den (derzeitigen oder früheren) Besitzer.

Die bundesrepublikanischen einschlägigen Gesetze, Bundesrückerstattungsgesetz und das Bundesentschädigungsgesetz, enthalten allerdings auch Anmeldefristen, die seit langem verstrichen sind. Eine Weiterführung oder Wiederaufnahme abgeschlossener Verfahren ist nach höchstrichterlicher Rechtsprechung ausgeschlossen (Bundesgerichtshof, Urt. v. 3. August 1995, BGH VIZ 1995, 644).

Lediglich in Einzelfällen, so der Bundesgerichtshof, kommt eine zusätzliche Geltendmachung wiedervereinigungsbedingter Restitutionsansprüche in Betracht. Das umfasst Ansprüche auf Vermögensgegenstände, die sich in den neuen Bundesländern, auf dem früheren Staatsgebiet der „Deutschen Demokratischen Republik", befinden. Diese sind auch heute noch, bei rechtzeitiger Anspruchsanmeldung (1992/1993) durchsetzbar auf der Grundlage des „Gesetz zur Regelung offener Vermögensfragen" aus dem Jahre 1990. In den alten Bundesländern, also auf dem Gebiet der bis 1990 im Westen bestehenden Bundesrepublik Deutschland, begründet das Vermögensgesetz hingegen keine neuen Rückübertragungsansprüche.

Die in den genannten Vorschriften vorgesehenen Antragsfristen sind mithin längst abgelaufen, die gesetzlichen Vorschriften außer Kraft gesetzt, so dass entsprechende Ansprüche heute nicht mehr vor deutschen Gerichten geltend gemacht werden können

> (vgl. Harald König, *Grundlagen der Rückerstattung*; Bundesamt für Zentrale Dienste und offene Vermögensfragen, http://www.badv.bund.de/DE/OffeneVermoegensfragen/Provenienzrecherche/Aufsaetze/Grundlagen/start.html).

Auch Thiessen räumt dies ein (Thiessen Gutachten, S.12 Punkt c.).

Die Kläger wären also mit der Geltendmachung von Ansprüchen in Bezug auf die „Welfenschatz"-Sammlung, soweit sie sich auf die Spezialgesetze zur Rückerstattung und Wiedergutmachung von NS-Unrecht berufen würden, vor deutschen Gerichten ausgeschlossen.

2. Keine Ansprüche nach deutschem Zivilrecht (BGB)

Soweit Thiessen behauptet, dass für die Kläger mit ihren Ansprüchen der Rechtsweg zu den deutschen Zivilgerichten eröffnet sei, trifft dies nicht zu und ist dem zu widersprechen.

Die breiten, seitenlangen Ausführungen von Thiessen zu etwaig möglichen zivilrechtlichen Anspruchsmöglichkeiten sind überflüssig, weil hier nicht einschlägig.

Insbesondere unterlässt Thiessen jeden Hinweis darauf, dass zu der Frage, ob sich, vor dem Hintergrund anhaltender Diskussion um die Rückgabe von NS-Raubkunst auf der Grundlage von „soft-law", in Gestalt beispielsweise der „Washington Declaration on Holocaust-Era Assets", heute noch Rückgabeansprüche nicht auch aus dem Zivilrecht herleiten lassen, eine gesicherte Rechtsprechung oder Rechtspraxis existiert.

In völliger Ignoranz dessen lässt sich Thiessen dennoch seitenweise zu überflüssigen Erörterungen möglicher Anspruchsgrundlagen aus. Eine lehrbuchmäßige, akademische Diskussion, mehr nicht, denn er unterlässt es, darauf hinzuweisen, dass es seit den 1950er Jahren eine gefestigte Rechtsprechung gibt, welche in Bezug auf Durchsetzbarkeit von Rückgabeansprüchen von NS-verfolgungsbedingt entzogenem Vermögen eine klare Position vertritt:

Nach einer Grundsatzentscheidung des Bundesgerichtshofs aus den 1950er Jahren, in den nachfolgenden Jahrzehnten immer wieder bestätigt, sind die öffentlich-rechtlichen Rückerstattungsregeln für die Geltendmachung von Rückgabeansprüchen und verwandten Ansprüchen in Bezug auf NS-Unrecht Spezialgesetze, welche die zivilrechtlichen Regelungen ausschließen (Bundesgerichtshof, Urt. v. 8. Oktober 1953, BGH NJW 1953, 1909f.). Der Bundesgerichtshof entschied seinerzeit, ohne dass diese Rechtsprechung bis heute aufgegeben wurde, dass die Rückerstattungsgesetze die auf Verfolgungsmaßnahmen durch den NS-Staat beruhenden Entziehungsfälle abschließend regeln und damit Rückforderungen nach dem allgemeinen bürgerlichen Recht, also Zivilrecht, grundsätzlich ausgeschlossen sind.

Dieser, bis heute maßgeblichen und in Literatur und Rechtsprechung ganz überwiegend vertretenen Auffassung, steht auch nicht die von Thiessen zum Beweis des Gegenteils zitierte Entscheidung des 5. Zivilsenats des Bundesgerichtshof vom 16. März 2012 entgegen (Bundesgerichtshof, Urt. v. 16. März 2012, BGH V ZR 279/10), denn dabei handelt es sich nicht um eine gefestigte Rechtsprechung, sondern um eine, soweit ersichtlich, in den vergangenen sechzig Jahren bis heute einmalige Entscheidung, die unter sehr engen Voraussetzungen einen zivilrechtlich durchsetzbaren Herausgabeanspruch für eine während der NS-Zeit enteignete Plakatsammlung als begründet angenommen hatte.

Dieser bislang ersichtlich singulären Entscheidung kommt indes keinerlei Präzedenzwirkung zu, auch, weil sich der vom Bundesgerichtshof

entschiedene Fall in vielerlei Punkten deutlich unterscheidet, ohne dass dies hier im Einzelnen darzulegen wäre.

IV. Ergebnis

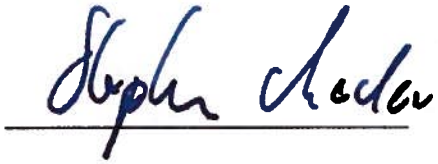
Die Kläger Alan Philipp, Gerald Stiebel, and Jed Leiber können ihre vor dem amerikanischen Bundesgericht im District Columbia in Washington D.C. erhobenen Ansprüche vor deutschen Gerichten nicht verfolgen.

E. Fazit

Zu Frage 1) Das „Welfenschatz"-Konsortium besitzt keine separate rechtliche Existenz in Anwendung deutschen Rechts.

Zu Frage 2) In den Jahren von 1929 bis 1935 waren, in Anwendung deutschen Rechts, die im Vertrag vom 5. Oktober 1929 unter (1) bis (3) als „Käufer" bezeichneten, und im Vertrag vom 14. Juni 1935 unter 1.) bis 3.) als „Konsortium" bezeichneten Kunsthandlungsunternehmen, respektive deren Inhaber, die alleinigen Eigentümer des „Welfenschatz".

Zu Frage 3) Die Kläger Alan Philipp, Gerald Stiebel, and Jed Leiber können ihre Ansprüche vor deutschen Gerichten nicht verfolgen.



Prof. Dr. Stephan Meder

F. Anhang

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- Studium der Rechtswissenschaft, Philosophie und Geschichte in Erlangen, Frankfurt am Main und Berlin. Studienaufenthalte in Italien (1978/79) und in den Vereinigten Staaten (1983/84)
- Promotion an der Universität Frankfurt am Main 1988
- Habilitation an der Universität Frankfurt am Main 1992
- Lehrtätigkeit an den Universitäten Würzburg, Erlangen, Münster, Frankfurt am Main und Greifswald von 1992-1994
- Professur für Bürgerliches Recht und Neuere Privatrechtsgeschichte an der Europa-Universität-Viadrina in Frankfurt an der Oder von 1995 – 1998
- Professur für Zivilrecht und Rechtsgeschichte an der Universität Hannover seit 1. April 1998

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29.04.2016

Curriculum Vitae of

Prof. Dr. Stephan MEDER

- Studium der Rechtswissenschaft, Philosophie und Geschichte in Erlangen, Frankfurt am Main und Berlin. Studienaufenthalte in Italien (1978/79) und in den Vereinigten Staaten (1983/84)
- Promotion an der Universität Frankfurt am Main 1988
- Habilitation an der Universität Frankfurt am Main 1992
- Lehrtätigkeit an den Universitäten Würzburg, Erlangen, Münster, Frankfurt am Main und Greifswald von 1992-1994
- Professur für Bürgerliches Recht und Neuere Privatrechtsgeschichte an der Europa-Universität-Viadrina in Frankfurt an der Oder von 1995 – 1998
- Professur für Zivilrecht und Rechtsgeschichte an der Universität Hannover seit 1. April 1998

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Alan PHILIPP, Gerald G. STIEBEL, and Jed R. LEIBER, Plaintiffs, v. FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSISCHER KULTURBESITZ, Defendants.	Case No. 15-cv-00266 (CKK)

DECLARATION OF MR. MARKUS H. STÖTZEL
IN SUPPORT OF PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Markus H. Stötzel declares under penalty of perjury:

1. I am a German citizen and German-qualified attorney (*Rechtsanwalt*), and have been practicing as an attorney in Germany since February 27, 1997. I am duly admitted to practice law in the Federal Republic of Germany, admitted to the Bar of Marburg (District Court) and of Frankfurt am Main (Higher Regional Court).

In 1986/87 I studied Political and Economic Sciences and Literature at the University of Siegen, Germany, then graduated from Marburg University Law School in 1993 (1st Jur. State Exam, "Erstes Juristisches Staatsexamen") and passed my 2nd State Exam in 1996 ("Zweites Staatsexamen", Marburg), with a focus on Public law.

I worked as Corporate/Legal Counsel (*Syndicus-Anwalt*) and Chairman Supervisory Board (*Aufsichtsratsvorsitzender*) of a Real Estate Company in the Frankfurt am Main Area, Germany from 1997 to 2000.

I have been practicing law in the international arena for more than 15 years, representing Jewish victims' families and claimants from various countries on Holocaust-related issues and claims, with a focus on "Nazi looted art". Since then I have been involved in numerous cases that are commonly referred to as "cross-border negotiation"; by that I mean legal disputes, mostly alternative dispute resolution, with parties from various countries and a factual background spreading over a number of countries/continents and/or proceedings pending before authorities in multiple jurisdictions.

2. I serve as German counsel for the plaintiffs Alan Philipp ("Philipp"), Gerald G. Stiebel ("Stiebel"), and Jed R. Leiber ("Leiber," together with Philipp and Stiebel, the "Plaintiffs") and represented them in the proceeding before the German "Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property" (the "Advisory Commission") regarding the plaintiffs' request for restitution of the "Guelph Treasure" (*Welfenschatz*). I am familiar with the factual and legal arguments made by the plaintiffs and defendants in the proceeding before the Advisory Commission.

3. I therefore have direct personal knowledge of the fact that documents that evidence the conspiracy among high-ranking Nazis were not available or accessible until quite recently.

4. By my letter of June 29, 2012, sent by order and on behalf of the Plaintiffs, the claim for the return of the Welfenschatz collection was submitted for review to the Advisory Commission, followed by Defendants' approval, by letter of Prof. Dr. Hermann Parzinger, President Stiftung Preußischer Kulturbesitz (the "SPK", *Prussian Cultural Heritage Foundation*) of September 14, 2012.

5. During the procedure before the Advisory Commission, Plaintiffs presented expert evidence to the Panel and to Defendants: five written expert opinions, issued by Professor Dr. Andreas Nachama, Museum Topography of Terror, Berlin; Professor Dr. Wolf Gruner, University of Southern California, Los Angeles; Professor Dr. Stephan Meder, Gottfried Wilhelm Leibniz University, Hanover; Sotheby's of New York and by Dr. Helen Junz, Adjudicator for the Claims Resolution Tribunal (CRT), Holocaust Victim Assets Litigation, Federal Court, Eastern District, New York.

6. The Advisory Commission, among others, heard from these five experts who established the context surrounding the sale at issue that (i) the actual market value of the collection in 1935 was close to 11,678,490 RM ("Reichsmark"), (ii) the historical background which supports the claim that the sale in issue was coercive and made under duress, and certainly cannot be characterized as one governed by free will and free choice in an open market, and (iii) the art dealers were the sole owners of the collection.

7. By letter dated December 12, 2013, Sotheby's of New York provided a letter to me, accompanying Sotheby's detailed evaluation of the Welfenschatz collection, by which Sotheby's valued the fair market value of the collection for mid-1935, when the collection was sold to Nazi-Prussia for RM 4.25 million, at 11,678,490 RM. Sotheby's expert opinion was made available to the Advisory Commission and Defendants legal counsel on December 13, 2013. A copy of this report is attached hereto as Exhibit 1.

8. Neither the qualifications nor credibility of these experts, among these Sotheby's, had been challenged during the procedure before the Advisory Commission. As such, the Defendants, SPK in particular, did not carry their burden of showing why these experts should not be accepted nor rebutted their conclusions.

9. The use of distinguished experts is particularly important in cases like this because not only under the law, but also under the Washington Principles of 1998 and its German equivalent, the "Gemeinsame Erklärung" of December 1999 – the German Federal Governments', the German Länder (Federal States) and the German National Associations of Local Authorities' self-commitment declaration of December 1999, called the "Joint Declaration on the tracing and return of Nazi-confiscated art, especially Jewish property." ("Joint Declaration", *see* http://www.lostart.de/Webs/EN/Datenbank/Grundlagen/GemeinsameErklaerung.html, last visited May 10, 2016) – there is a need to determine the facts regarding events that took place over 80 years ago. Documents need to be interpreted by "state of the art" scholarship of the surrounding historical circumstances. This is only achievable through qualified experts, a practice that also is well-accepted under both U.S. and German law.

10. Nonetheless, the Advisory Commission did not incorporate the uncontested findings of these experts into the recommendation of March 20, 2014. This challenges the role and assistance they contributed to the process and demonstrates that the Advisory Commission failed to meet even the minimal requirements of international adopted principles of law. Ignoring the experts, from an otherwise detailed opinion, such as this one, leaves room for doubt as to the veracity and finality of the Advisory Commission's recommendations. It also leaves future claimants to wonder how claims are to be supported so that the Panel can reach reasoned and non-arbitrary results.

11. In the Motion, Defendants stated that "both sides presented extensive evidence and argument to the Commission." (Motion at p. 8, 36, 56) Actually, the Plaintiffs did not only present five expert opinions to the Commission, but discovered more documents during the procedure after June 29, 2012, that evidence the conspiracy among high-ranking Nazis, in trying to get hold of the Welfenschatz collection:

12. Evidence shows that the Berlin Nazi-regime, towards the international press, stated the purchase price at 45% above what they paid the persecuted Jewish victims. The Nazis reported the price at $ 2,500,000 which is equivalent to RM 6.2 million. This was reported in the "Baltimore Sun" in October 1935, an article, discovered and made available to the Plaintiffs only in December 2013. If the price of 1935 had been fair, why would the Nazi government have gone to the trouble of inflating it? FAC at 179-180

13. Reichsmarschall Hermann Goering, notorious for his insatiable appetite for looting art, was the Prime Minister of Prussia at the time. The experts left no doubt as to his role based on documents from the Prussian Ministries. As soon as he had manipulated the deal, he *himself* gifted it to Hitler according to the "Baltimore Sun" newspaper, in October 1935. Thus, the evidence supports the expert finding that Goering acted and treated the collection as if it was his property to dispose of, including gifting, as he saw fit.

14. In this context, the Defendants repeatedly allege that they, on the one hand, "are committed to the Washington Principles and the Terezin Declaration" (Motion at p. 42, 68) and that SPK "was – and is – committed to adjudications on the merits of claims to Nazi-looted art" (Motion at p.

67), but, on the other hand, they declare that they will invoke the limitation defense before that court (Motion at p. 68), in the attempt to prevent the case to be decided upon the merits and to deny Plaintiffs' day in court. These statements by the Defendants are not only highly contradictory, but a sham and the Defendants hereby make a joke of the international community's ongoing serious efforts to provide late justice to the victims of Nazi persecution when it comes to redress the historic wrongs of the Nazi era.

It is almost absurd that Germany, the country of the perpetrators, claims to have and to take a leading role in researching and resolving Nazi looted art matters "on the merits of claims", but, at the same time, is trying to hide behind the limitation defense.

15. Even worse, in almost the same breath the Defendants seriously maintain that if Plaintiffs had "brought their claim to a German court, or if they did so after this suit is dismissed, the defendants would not invoke the time-bar." (Motion at p. 54, 68) – a highly questionable and, at the same time, revealing statement by Defendants:

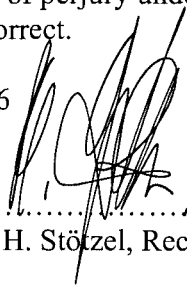
16. That – the waiver of the plea of statute of limitations and of the laches defense – is consistent with the German Joint Declaration and, as pointed out correctly by the Defendants, the Joint Declaration reaffirmed Germany's commitment to the Washington Principles and promised that Germany would redouble its efforts to ensure that "art that ha[s] been identified as Nazi-confiscated property and can be attributed to specific claimants [is] returned, upon individual examination, to the legitimate former owners or their heirs." (Motion at p. 35)

17. With that in mind, the Defendants, SPK and Germany, can not and will not object that this declaration, as repeatedly argued by governmental, states' and local officials in public since 1999, has a binding effect on the public institutions which includes the waiver of limitation defenses. That means none other than Germany and SPK pleading limitation is not consistent with both the Washington Principles declaration, signed by Germany, and the German "Joint Declaration" of 1999, no matter the place and forum of jurisdiction.

In other words: Defendants are barred from pleading limitation before that court, because this is a serious breach of international and national commitment on the return of Holocaust era assets, of the German "Joint Declaration" in particular. Furthermore, if the Defendants invoke the limitations defense before that court, this would not only be an act of pure arbitrariness and ignorance of international and of German and U.S. principles of law, but contradicts their self-portrayal as allegedly being "committed to adjudications on the merits of claims to Nazi-looted art" (Motion at p. 67). In summary, Defendants, by using their line of argumentation regarding the matter of statute of limitations as presented by the Motion, are wrong and loose all credibility.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Marburg, May 10, 2016



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Markus H. Stötzel, Rechtsanwalt

Exhibit 1

Sotheby's 1334 YORK AVENUE NEW YORK 10021 +1 212 606 7000 SOTHEBYS.COM

December 12, 2013

Melvyn Urbach, Esq.
Markus H. Stoetzel
c/o Law Offices of Markus H. Stoetzel
Uferstrasse 11
35096 Marburg
Germany

Evaluation of the Hackenbroch, Rosenbaum, Goldschmidt Property (Welfenschatz)

Dear Messrs. Urbach and Stoetzel:

This document accompanies Sotheby's valuation of the Welfenschatz property dated December 12, 2013

Sotheby's

Sotheby's predecessor, Baker and Leigh, was founded in London on 11 March 1744, when Samuel Baker presided over the disposal of "several hundred scarce and valuable" books from the library of Sir John Stanley. The current business dates back to 1804, when two of the partners of the original business (Leigh and Sotheby) left to set up their own book dealership. After Baker's death in 1778, his estate was divided between Leigh and John Sotheby. Under the Sotheby family, the auction house extended its activities to auctioning prints, medals, and coins. John Wilkinson, Sotheby's Senior Accountant, became the company's new CEO. The business did not specialize in the Fine Arts until rather later, our first major success in this field being the sale of a Frans Hals painting for nine thousand guineas in 1913.

In 1917, Sotheby's relocated within London from 13 Wellington Street to 34-35 New Bond Street, where the company's European businesses continue to be headquartered. In 1955, Sotheby's opened an office in New York City. In 1964, Sotheby's purchased Parke-Bernet, then the largest auctioneer of fine art in the United States. In the following year, Sotheby's moved to 980 Madison Avenue, New York. With international popularity of fine art auction growing, Sotheby's opened offices in Paris and Los Angeles in 1967, became the first auction house to operate in Hong Kong in 1973, and Moscow in 1988. Today Sotheby's maintains 90 locations in 40 countries and conducts 250 auctions each year in over 70 categories. In addition to our four principal salerooms, the company also conducts auctions in six other salerooms around the world

Sotheby's is the oldest publicly traded company on the New York Stock Exchange.

Since 1744, Sotheby's has distinguished itself as a leader in the auction world. Sotheby's has been entrusted with the sale of many of the world's treasures, amongst them: Napoleon's St Helena library, the Duchess of Windsor's jewels, the Estate of Mrs. Jacqueline Kennedy Onassis, Rembrandt's *Aristotle Contemplating the Bust of Homer*, Rubens' *Massacre of the Innocents*, Picasso's *Garçon à la Pipe*, Bacon's *Triptych, 1976*, Edvard Munch's *Scream* The Grand Ducal Collections of Baden, the Qianlong Yellow-Ground Famille-Rose Double-Gourd Vase, Giacometti's *L'Homme Qui Marche*, the Magna Carta, the first printing of the Declaration of Independence and The Martin Luther King Jr Collection.

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Sotheby's and Works of Art

Sotheby's has unparalleled experience in valuing and in selling the greatest masterpieces from the decorative arts. In recent years the selling market for masterpieces in every collecting category has outperformed the rest of the art market; the enthusiasm of collectors and museums alike for the rarest and most important artworks has propelled them into a separate category where different rules of pricing and appreciation apply. Sotheby's specializes in this area.

Amongst the individual masterpieces which we have offered for sale in recent years, the following follow are useful as comparators to the greatest pieces in the Guelph Treasure:

- the Gospels of Henry the Lion (sold in London in 1983 for the equivalent of $12.3m)
- The 1933 gold double eagle (sold 2002 for $7.6 and the world record for a coin at auction)
- the 5000 year old Guennol Lioness from (sold 2007 for $57.2m)
- the Albright Knox Artemis (sold 2007 for $28.6m)
- the British Rail Limoges enamel Chasse of Thomas a Becket (sold 1996 for GBP 3.6m)
- a Blue and White Ming vase with fruit sprays (sold October 2011 in Hong Kong for HK$168.7m, a world record for Ming Porcelain)
- the 17th Century Clark Sickle-Leaf Carpet (sold June 2013 for $33.8m, a world record for any carpet)
- the Bronze relief of Ugolino by Pierino da Vinci (sold privately for £10m to the Liechtenstein Museum, Vienna)
- a unique and important Prague statue of the dancing faun, by Adrien de Vries, circa 1610-1615 (sold London, December 1989, $11.3m)
- Romanesque gilt bronze base for a candlestick or cross (sold London, British Rail Pension Fund auction, July 1996, $6,866,340)
- a highly important and rare south German Limewood figure of Saint Catherine, by Tilman Riemenschneider (1460-1531 (sold New York, January 2008, $6.3m)
- France, Paris, between 1360-1380, a Rare and Exceptional Ivory Diptych of the Passion (sold Paris, the Dormeuil Collection, November 2007, $5,893,325)
- a highly important gilt and painted terracotta relief of the virgin and child, by Donato di Betto Bardi, called Donatello (circa 1386-1466) (sold New York, January 2008, $5,641,000)

In addition, Sotheby's team has valued and sold from a number of collections which have included great medieval works of art including the following:

- 1977 Mentmore Towers
- 1978 Robert von Hirsch Collection
- 1983 Thomas Flannery
- 1983 Contents of Hever Castle in Kent
- 1995 The Grand Ducal Collections of Baden-Baden
- 1996 British Rail Pension Fund
- 1997 The Keir collection of Medieval Art
- 2007 The Dormeuil Collection of Medieval Ivories and Enamels

Sotheby's team

Sotheby's European Works of Art Specialists together have 115 years of experience of working with and valuing Mediaeval works of art and connoisseurship unparalleled in the commercial art world.

Lucian Simmons
Senior Vice President
Worldwide Head Restitution

Lucian Simmons has worked at Sotheby's since 1995; prior to that he was a commercial litigation partner in the London solicitors firm of Barlow, Lyde and Gilbert where he specialized in lawsuits which involved fraud and forensic accounting. In addition to running Sotheby's worldwide Restitution Department, he has been closely involved in some of the most prominent sales of masterworks in recent years. Mr. Simmons has been responsible for the private placement of *The Little Dancer aged 14* by Edgar Degas, the *Declaration of Independence* and a number of oil paintings by Egon Schiele and Gustav Klimt. He has also been responsible for helping clients bring to auction a number of masterworks including *Litzelberg am Attersee* and *Kirche in Cassone* by Gustav Klimt, *Onement VI* by Barnett Newman and *Suprematist Composition* by Kasimir Malevich each of which sold for more than $40m. Lucian Simmons has worked very closely with the worldwide European Works of Art team over his 19 years in the company and has partnered with them on many of the transactions referred to above.

Margaret H. Schwartz
Senior Vice President
Director of European Works of Art, Sotheby's New York

Margaret H Schwartz joined Sotheby's in 1986, becoming Director of the European Works of Art department in 1992. She was named Senior Worldwide Specialist for European Works of Art & Sculpture in 2003 and became an Auctioneer in 2005.

Ms. Schwartz has been responsible for or has played a significant role in the most important European Sculpture & Works of Art collections sold worldwide during the last two decades, including The British Rail Pension Fund, including highly important Medieval works of Art in 1996, The Keir Collection of Medieval Works of Art in 1997, Property of the Albright-Knox Art Gallery in 2007 and Ivories and Enamels from the Middle Ages: Collection Dormeuil in 2007.

Ms. Schwartz has been directly responsible for achieving many world records for individual sculptures, including: the 2001 record-breaking sale of a Gothic limewood sculpture of a female Saint by Tilman Riemenschneider that sold for $2.9 million; another record-breaking sale of a figure of Saint Catherine by Riemenschneider that sold for $6.3 million in January 2008; the sale of an Austrian lead bust of a man by Franz Xaver Messerschmidt that sold for $4.8 million, a world record for an 18th century sculpture; and, most recently, the sale of the second sculpture by Donatello ever sold at auction, a polychrome terracotta group of the Madonna and Child, circa 1450 that achieved $5.6 million, a world-record for a Renaissance sculpture.

Ms. Schwartz lectures on Medieval, Renaissance and Baroque art and tapestries and has been invited to contribute to and has hosted scholarly symposia in her field of specialization. In conjunction with scholars from the Straus Center for Conservation, Harvard University Art Museum and the Rijksmuseum in Amsterdam, Ms. Schwartz edited a book of European Sculpture from the Abbott Guggenheim Collection that combines art historical and technical studies of the bronzes and sculpture in this seminal American private collection.

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Alexander Kader
Senior Director
Head of Department European Sculpture & Works of Art, Sotheby's London

Alexander Kader, is a graduate of the Courtauld Institute of Art, where he studied Medieval Art under Peter Lasko, George Zarnecki and John Lowden, and the City University. He joined Sotheby's in 1996 from the Sculpture Collection at the Victoria & Albert Museum, having begun his career at the renowned Heim Gallery of Jermyn Street. Since his appointment as head of the department in 1999, Alex has contributed to many notable sculpture sales, achieving record prices for works by Gianlorenzo Bernini, Andrea Riccio, Antonio Susini, Henry Cheere and Giovanni Ambrogio Miseroni amongst many others. Significant single owner sculpture sales during his tenure include the 2007 sale of Ivories and Enamels from the Middle Ages: Collection Dormeuil, the 2009 Romano Antiquari sale in Florence and the 2011 Fabius Freres sale in Paris.

In 2010 Alex negotiated the private sale of the most expensive Renaissance sculpture ever sold, the 16th century bronze relief of Ugolino by Pierino da Vinci acquired by the Liechtenstein collection for £10m. Since 2012, Alex has concentrated on growing the private sales of major European sculpture. Alex has written on sculpture from the 17th to 20th century in numerous scholarly publications, from a host of entries on Baroque sculpture in the *Grove Dictionary of Art* to the essay on sculpture in the V&A exhibition on Art Nouveau. In 2013 Alex lectured at a conference held at the Wallace Collection on Baroque sculpture to be published in 2014. Alex has also worked as part of the senior management team, initially as head of the Decorative Arts Division from 2002 to 2007, before being appointed head of the UK Regional Business from 2008 to 2010.

Elizabeth J. Wilson
Senior Consultant
European Sculpture & Works of Art Department

Elizabeth Wilson joined the European Sculpture & Works of Art department in 1964 and was Head of Department for many years. She is now a Senior Director and Specialist covering all sculpture and objects of European art from the 10th century to 1830. This includes religious works of art, ivories, wood carvings and renaissance bronzes; also 18th century marble and terracotta sculptures in particular from France and England. Ms Wilson organised all of Sotheby's most important European Sculpture & Works of Art sales since the 1970's, including: the Mentmore sale (1977); the von Hirsch (1983), Hever Castle (1983), Thomas F. Flannery, Jr. (1983), Thurn und Taxis (1992-3), Grand Ducal Collections of Baden (1995) and British Rail Pension Fund (1996) sales, as well as numerous fine sales of this category held annually in London.
Prominent and noteworthy examples of sculptures sold in our annual sales include the discovery by Ms Wilson, in 1989, of a previously unrecognized bronze sculpture by Adrien de Vries. This bronze, The Dancing Faun, was subsequently sold by Sotheby's in London for £6,820,000, creating a new world auction record for a Renaissance bronze. She oversaw the auction of the Small Bronze Hercules Reading by Antico that sold for £1,150,000 in July 1993; a Limoges 12th Century Reliquary Chasse for £3,800,000 and A Tirolese Wood Relief of the Nativity for £100,000 that both sold in July 1996; and French 14th Century Ivory Diptych for £520,000 and a Bronze Dragon by Annibale Fontana for £1,050,000 that sold in December 2000.

Our team is regularly asked to provide insurance values for major museum loan exhibitions and so have unparalleled access to works of art which would never be available for sale on the art market.

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Methodology

First, we must state that this collection is incredibly rare. Not only are the types of objects and the level of craftsmanship remarkable but also, and perhaps equally important, is the extraordinary and unbroken provenance. Furthermore, the fact that a large number of the pieces have remained together since the 12th /13th centuries unquestionably adds to the significance of the collection as a whole and therefore adds to the value. In fact, in our experience, with this kind of collection, the value of the whole is most often judged as greater than that of the individual values of each work of art. This certainly applies to the Welfenschatz. In addition, if Sotheby's and or its predecessors had been given the collection for sale in the mid1930s, we believe we could well have realized a price close to 11,678,940RM. We recognize the hostile environment for Jewish art dealers in Germany at that time.

Our expertise, education and experience in this field of medieval works of art is considerable. In approaching this kind of valuation, much like a valuation of museum highlights, such as objects from the Grunes Gewölbe, Dresden or the Kunsthistorisches Museum, Vienna, with extensive and noble provenances, we look at the most important objects that have sold in the field either privately or at auction. We research historical values in the field as well as values of material from related fields- -in this case, early silver, manuscripts, antiquities and sculpture. Furthermore, we compare the top pieces in the collection to seminal works of art in all fields, drawing parallels between their significance within the medieval field to the significance of, for example, an important early Old Master Painting within that field. In researching the Welfenschatz, we were also able to use material documenting the 1931 USD offering prices for some of the objects. The process is lengthy and thoughtful and can only be done properly with extensive research and long-term experience in a chosen field.

Very truly yours,
SOTHEBY'S, INC.

By: _____
Margaret Schwartz
Senior Vice President

Evaluation of the Hackenbroch, Rosenbaum, Goldschmidt Property (Welfenschatz)

Sotheby's

Evaluation of the Hackenbroch, Rosenbaum, Goldschmidt Property (Welfenschatz)

BERLIN, GERMANY

Prepared by Sotheby's, 1334 York Avenue, New York, New York 10021, +1 212 606 7000
12 December 2013 | Valuation Number 70244520

PAGE	SUMMARY	VALUE
4	European Works of Art	11,678,940 RM

1
(1)
785NY

WELFENKREUZ, 11. JHDT.
H: 33.1 cm
B: 12.5 cm
1,176,000 RM

2
(6)
785NZ

TRAGALTAR MIT GETRIEBENEN SILBERFIGUREN, DRITTES QUARTAL 13. JHDT.
H: 7.2 cm
B: 19.9 cm
T: 12 cm
126,000 RM

3
(7)
785P2

DEMETRIUS-TAFEL, 12. JHDT.
H: 18cm
273,000 RM

4
(8)
785P3

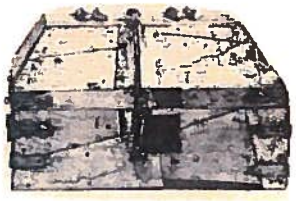
TAFELFÖRMIGER TRAGALTAR MIT ACHATPLATTE
um 1200
H: 23.9 cm
B: 33.5 cm
T: 3.5 cm
315,000 RM

5
(9)
785P4

TAFELFÖRMIGER TRAGALTAR MIT BERGKRISTALLPLATTE
H: 9 7/8 inches; 25 cm
B: 8 7/8 inches; 22.5 cm
T: 1 3/8 inches; 3.6 cm
147,000 RM

6
(11)
785P5

RECHTECKIGER KASTEN MIT BEMALTEN ELFENBEINPLÄTTCHEN
H: 15 cm
B: 25 cm
T: 17 cm
18,900 RM



7
(13)
785P6

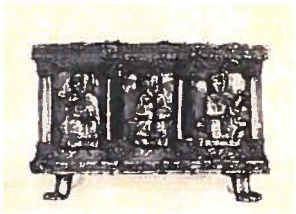
ACHTECKIGER DECKELKASTEN MIT BLEIBESCHLAG
H: 15.5 cm
B: 20 cm
11,760 RM

8
(14)
785P7

TRAGALTAR DES ADELVOLDUS
H: 21 cm
B: 21 cm
T: 7.5 cm
96,600 RM

9
(15)
785P8

TRAGALTAR MIT KRISTALLSÄULCHEN
um 1075
H: 10.9 cm
B: 30.9 cm
T: 16.6 cm
50,400 RM



10
(16)
785P9

STANDKREUZ, VON DREI LÖWEN GETRAGEN
H: 34.5 cm
218,400 RM

11
(17)
785PB

TRAGALTAR DES EILBERTUS
um 1150
H: 13.3 cm
B: 35.7 cm
T: 20.9 cm
2,436,000 RM

12
(18)
785PC

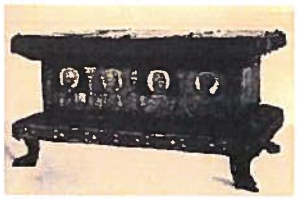
TRAGALTAR MIT DEN KARDINALTUGENDEN
um 1150
H: 17.6 cm
B: 28.8 cm
567,000 RM

13
(20)
785PD

WALPURGIS-KASTEN
1158
H: 31.4 cm
B: 40.5 cm
T: 23.5 cm
336,000 RM

14
(21)
785PF

TRAGALTAR MIT ABRAHAM UND MELCHISEDECK
H: 14.7 cm
B: 21.5 cm
336,000 RM



15
(22)
785PG

KUPPELRELIQUIAR
um 1180
H: 45.5 cm
B: 41 cm
2,520,000 RM

16
(23)
785PH

DER STARK FARBIGE RELIQUIENKASTEN, 12. JHDT.
H: 13.5 cm
B: 21.4 cm
T: 13 cm
327,600 RM

17
(24)
785PJ

KLEINER RELIQUIENKASTEN MIT GRUBENSCHMELZ, ERSTE HÄLFTE 13. JHDT.
Die Schmalseiten und die vordere Langseite
H: 14.5 cm
B: 8.5 cm
T: 9.2 cm
327,600 RM

18
(25)
785PK

ARMRELIQUIAR DES HLG. SIGISMUND, 12. JHDT.
H: 73.7 cm
176,400 RM

19
(26)
785PL

ARMRELIQUIAR DES HLG. INNOCENTIUS
um 1173
H: 50.2 cm
63,000 RM

20
(27)
785PM

ARMRELIQUIAR DES HLG. THEODORUS
H: 51 cm
67,200 RM

21
(28)
785PN

ARMRELIQUIAR DES HLG. CAESARIUS
1173
H: 53 cm
58,800 RM

22
(29)
785PP

ARMRELIQUIAR DES HLG. BARTHOLOMAEUS
H: 53.8 cm
67,200 RM

23
(31)
785PQ

ARMRELIQUIAR DES HLG. LAURENTIUS
um 1175-1180
H: 53.8 cm
197,400 RM

24
(33)
785PR

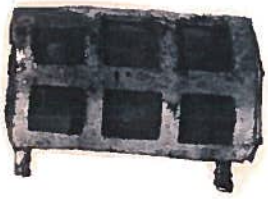
TRAGALTARFÖRMIGES RELIQUIAR AUS HOLZ, MIT STEINEN BESETZT (KLEINER TRAGALTAR), 12. JHDT.
H: 10.2 cm
B: 19.7 cm
T: 9.3 cm
10,920 RM

25
(34)
785PS

RELIQUIAR IN TRUHENFORM, 12./13. JHDT.
H: 7.5 cm
B: 10.6 cm
T: 6.5 cm
10,500 RM

26
(35)
785PT

RELIQUIAR IN TRUHENFORM
H: 7.5 cm
B: 11 cm
T: 6.5 cm
10,500 RM



27
(37)
785PV

TAFELFÖRMIGER TRAGALTAR, 12. JHDT.
H: 27 cm
B: 20.5 cm
T: 3 cm
10,080 RM

28
(38)
785PW

TAFELFÖRMIGER TRAGALTAR, 12. JHDT.
H: 34 cm
B: 22.3 cm
T: 2.3 cm
10,080 RM

29
(39)
785PX

KOPF-RELIQUIAR DES HLG. COSMAS
um 1275 - 1300
H: 30.8 cm
B: 22.2 cm
231,000 RM

30
(40)
785PY

KOPF-RELIQUIAR DES HLG. BLASIUS, 14. JHDT.
H: 51.5 cm
231,000 RM

31
(41)
785PZ

PLENAR FÜR DIE SONNTAGE
1326
H: 27.2 cm
B: 21 cm
109,200 RM

32
(42)
785Q2

PLENAR HERZOG OTTOS DES MILDEN
1339
H: 35.4 cm
B: 26 cm
798,000 RM

33
(44)
785Q3

ARMRELIQUIAR DES HLG. GEORG, MITTE 14. JHDT.
H: 55.3 cm
189,000 RM

34
(47)
785Q4

HOLZKASTEN MIT WAPPENMALEREI
um 1320
H: 34.2 cm
B: 18.8 cm
T: 25 cm
18,480 RM

35
(51)
785Q5

RELIQUIENMONSTRANZ MIT ELFENBEINRELIEFS, 14. JHDT.
H: 26.4 cm
7,560 RM

36
(53)
785Q6

RELIQUIENKREUZ AUF FUSS, KL. VERGOLDETES KUPFERSTANDKREUZ
um 1400
H: 30.5 cm
7,560 RM

37
(55)
785Q7

KLAPPALTÄRCHEN AUF FUSS MIT ELFENBEINERNER MADONNENSTATUETTE, 14. JHDT.
H: 16 cm
37,800 RM

38
(71)
785Q8

RELIQUIENKAPSEL (AGNUS DEI) MIT ANNA SELBDRITT, 15. JHDT.
D: 5 cm
2,520 RM

39
(77)
785QC

GEDREHTE DECKELBÜCHSE
H: 7.5 cm
D: 11.5 cm
1,680 RM

40
(78)
785QD

HÖLZERNES ARMRELIQUIAR DER HLG. MARIA MAGDELENA, 15. JHDT.
H: 57 cm
7,350 RM

41
(79)
785QF

HÖLZERNES ARMRELIQUIAR EINES DER ZEHNTAUSEND KRIEGER, 15. JHDT.
H: 53.7 cm
7,350 RM

42
(81)
785QG

DAS GROSSE RELIQUIENKREUZ
1483
H: 74 cm
B: 31 cm
T: 43.5 cm
65,100 RM

AFFIDAVIT

1. Sotheby's, whose principal place of business is located at 1334 York Avenue, New York, New York, 10021, is actively engaged in conducting public sales and valuations of art and literary property, including that of the kind and character set down upon the preceding schedule.

2. This is to affirm that the following specialists are qualified based on their background, experience and education to render a valuation for the items listed in this document

- Alexander Kader
- Margaret Schwartz
- Lucian Simmons
- Elizabeth J. Wilson

3. The values set forth, including

- the Reichsmark values issued for collection evaluation purposes and in connection with the presentation of the heirs to the 'Beratende Kommission in Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz (Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property) or "Limbach Commission" for short, as of June 1935.

represent to the best of the valuers' judgment of the items listed as of the date of the valuation unless otherwise indicated. In some instances, values have been based on photographs and information provided.

4. This valuation is subject to the terms of the Valuation Agreement between Sotheby's and Melvyn Urbach and Markus H. Stoetzel.

Signed: _____
Angela Morgan
Assistant Vice President

SOTHEBY'S