UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,	:	
Plaintiff,	:	16 CIV 07665 (LAP)
vs.	:	(Oral Argument Requested)
THE METROPOLITAN MUSEUM OF ART,	:	
Defendant.	:	

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT THE METROPOLITAN MUSEUM OF ART'S MOTION TO DISMISS THE AMENDED COMPLAINT

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In defending its ownership of the Painting, the Museum does not seek to diminish the persecution that the Leffmanns and millions of Jews and persecuted persons across Europe suffered during the Nazi era. Plaintiff's case at its core, however, is a plea to treat an open market sale for value as if it were a forced sale at the hands of Nazis. Her theory is that transactions involving Jews or other persecuted persons could not have been truly voluntary given a general state of fear in Fascist Italy. This goes far beyond legal precedent, which has wrestled with and acknowledged the hardships of the time. Plaintiff says she "does not ask the Court to override precedent or ignore the law," Opp. 4, but that is exactly what would be required to reach back 79 years to undo a voluntary open-market transaction where no Nazis or Fascists took actions to compel or restrict the Sale, or were otherwise involved in the Sale. As Plaintiff has alleged, Leffmann spent months offering the Painting for sale on the international art market, negotiated with multiple parties, and ultimately accepted the highest offer in an arms'-length sale through a private dealer in Paris to two other private French dealers. Mot. 5-6 (citing AC ¶¶ 14, 28, 32-33, 36-37, 43, 47). These allegations are fatal to her claim.

Calling attention to Plaintiff's pleading failures should not be mistaken for "flippancy" or "dismissiveness." Opp. 4. The Museum remains deeply sympathetic to the tragic plight of Jews and other persecuted persons in the Nazi era and is steadfastly committed to handling Nazi-era claims in accordance with the highest standards and principles. Mot. 1-2. This explains why the Museum has returned works in other cases and spent years in this case investigating the facts surrounding the 1938 Sale, provided all relevant documents and information to Plaintiff and her counsel, and tried through years of good-faith negotiations to reach a common understanding of the relevant facts and legal analysis. Having engaged in that full and fair process, the Museum should not be attacked for having concluded that Plaintiff's claim fails as a matter of law—both

procedurally and on the merits—for many reasons that now require dismissal of this lawsuit: she lacks authority to represent the Estate (*infra* I), fails to plead duress under New York law or Italian law (*infra* IV-V), cannot rebut ratification or the good-faith purchaser defense (*infra* VI-VII), and cannot revive a claim that expired more than a half-century ago (*infra* VIII).

I. This Action Must Be Stayed Or Dismissed Without Prejudice Because Plaintiff Lacks Authority To Represent The Estate

Plaintiff contends that her ancillary letters are "conclusive evidence" of her authority to represent the Estate in this matter, Opp. 7, but her own allegations demonstrate fatal defects in those letters. She makes the vague statement that the Surrogate's Court "was advised" that the originally appointed-executor, UBS AG, "disavows responsibility" to represent the Estate in this matter, Opp. 9, but even if true, that would not satisfy the requirement to file a formal, written renunciation from the executor. N.Y. Surr. Ct. Proc. Act ("SCPA") §§ 1417, 1604(1)(b); *see also* Mot. 7-9 (citing Surrogate's Court Petition, Bowker Decl. Exh. 1 ¶¶ 28-30). Plaintiff further alleges that the "identified" beneficiaries were provided notice and took no action, Opp. 9, but New York law requires an applicant for ancillary letters to file "the acknowledged … consent of all of the beneficiaries;" and Plaintiff does not allege that the Public Administrator received the required citation. SCPA §§ 1418(2), (6), 1604(1)(d); *see also* Mot. 8 (citing Surrogate's Court Petition, Bowker Decl. Exh. 1 ¶¶ 23, 38-39, 46, 48-51). Because of these and other defects in her ancillary letters, Plaintiff lacks authority to represent the Estate. Mot. 7-9.[1]

Tellingly, Plaintiff does not attempt to defend her ancillary letters on the merits; instead, she takes the untenable position that neither this Court nor Surrogate's Court can examine them. Opp. 7-8. Plaintiff is wrong that this Court is "without authority" to do so. Opp. 8; *see*, *e.g.*, *Meehan v. Cent. R.R. Co.*, 181 F. Supp. 594, 600 (S.D.N.Y. 1960) (exercising authority to

[1] Contrary to Plaintiff's suggestion, Opp. 4, the Museum raised this issue years ago, and also raised it in litigation at the first possible opportunity.

examine alleged defects in letters of administration). Regardless of whether this Court may vacate or modify Plaintiff's ancillary letters, it undoubtedly may determine whether Plaintiff has standing and capacity to represent the Estate in this action, including by examining her ancillary letters. Plaintiff must establish that she is the Estate's "duly appointed representative," Mot. 8-9 (quoting *Matter of Peters v. Sotheby's Inc.*, 821 N.Y.S.2d 61, 65 (App. Div. 2006)), and she has not met that burden because her ancillary letters are patently defective under New York law. She therefore lacks standing and capacity to bring this lawsuit on behalf of the Estate. *See* Mot. 9.

Plaintiff is wrong that the Surrogate's Court cannot adjudicate the Museum's challenge to her letters, *see, e.g.*, SCPA §§ 711(4), 719(10), and, in any case, that is for the Surrogate's Court to decide. Nor does it matter that the process "may take a substantial period of time." Opp. 9. Nearly 79 years have passed since the 1938 Sale, 50 years have elapsed since the Estate passed to the beneficiaries, and six years have passed since Plaintiff obtained her defective letters. Any potential benefit of avoiding further delay would be far outweighed by the risks of wasting judicial resources and causing irreparable harm to the Museum—and the absent Estate and beneficiaries—if this case were allowed to proceed in the absence of a properly-appointed representative of the Estate. Accordingly, in the event this Court does not dismiss this suit with prejudice for failure to state a claim and lack of timeliness, this litigation must be halted—by a dismissal without prejudice or a stay—pending adjudication of the petition in Surrogate's Court.

II. A Choice-Of-Law Analysis Is Unnecessary Because There Is No Dispositive Difference Between New York And Italian Law

It is irrelevant that New York and Italian Law are not "identical." Opp. 22, n.16. What matters is that there are no differences "upon which the outcome of the case is dependent." *See Bakalar v. Vavra*, 619 F.3d 136, 139 (2d Cir. 2010); Mot. at 10, n.5. Given the absence of such a material conflict, a choice-of-law analysis is unnecessary. *Bakalar*, 619 F.3d at 139-40.

III. In Any Event, New York's Choice-Of-Law Analysis Points To New York Law

In the event of a true conflict of laws, Plaintiff and the Museum agree that New York employs an "interest analysis" to determine the applicable law. Opp. 20. The "[i]nterest analysis … is the bedrock principle that underlies New York's entire choice-of-law regime." *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 336-37 (2d Cir. 2005) (citation omitted). The interest analysis identifies "the jurisdiction that has the greatest interest in, and is most intimately concerned with, the *outcome* of a given litigation." *John v. Sotheby's, Inc.*, 858 F. Supp. 1283, 1289 (S.D.N.Y. 1994), *aff'd,* 52 F.3d 312 (2d Cir. 1995) (emphasis added) (citing *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 226-27 (1975)). The rule is the same in disputes concerning artworks allegedly transferred under duress in the Nazi era. *See Bakalar*, 619 F.3d at 144 ("New York choice of law rules require the application of an 'interest analysis,' in which 'the law of the jurisdiction having the greatest interest in the litigation [is] applied.") (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002)).

Here, New York has the "greatest interest in the litigation" and its "outcome." The Painting has been in New York since at least 1941, when it was sold through a New York dealer to a New York collector. AC ¶ 53. It was donated to the Museum, a "New York not-for-profit corporation operating as a public museum located in … New York," where it has been for the past 65 years. AC ¶¶ 5, 7, 54. In these circumstances, New York's interests in the litigation and its outcome far exceed those of any other jurisdiction. *See Bakalar*, 619 F.3d at 144 (holding that New York law applies because New York's interests exceeded those of Austria and Switzerland, where painting was allegedly transferred under duress in Austria, subsequently sold in Switzerland, and later "delivered in New York to a New York art gallery, which sold it in New York" to a Massachusetts resident). As the Second Circuit has explained, New York's interest is

paramount—exceeding even the interest of a European jurisdiction where the alleged Nazi-era duress occurred—where, as here, the artwork was transferred to New York in the post-War years and was eventually sold by a New York gallery. *Id.* at 144-45 (reasoning that "[t]he application of New York law may cause New York purchasers of artwork to take greater care in assuring themselves of the legitimate provenance of their purchase").

Contrary to Plaintiff's assertion, New York's "interest analysis" cannot be combined with the "center of gravity test" to create what she calls a "hybrid test" that points to Italian law. Opp. 21 (citing *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009)). As the Second Circuit has held, "the conflation of the two tests is improper." *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 n.5 (2d Cir. 1997)[2]; *see also John*, 858 F. Supp. at 1289 (applying "interest analysis" in property dispute over ownership of painting where underlying contract questions also at issue); *cf. Bakalar*, 619 F.3d at 138-39, 143 (applying "interest analysis" in property dispute over ownership of painting where validity of underlying transfers also at issue). In any event, Plaintiff's own "hybrid test" does not point to Italian law. Plaintiff contends that Italy has the greatest interest because the 1938 Sale was "Italian-centric," Opp. 21, but her allegations belie that claim. The Painting was never in Italy and the sale did not occur there. AC ¶¶ 13-14, 36-37 (alleging that the Painting was in Switzerland until it was sold in France through a Paris dealer to French counter-parties). Although the Leffmanns were in Italy at the time of the 1938 Sale, they were not Italian citizens, had no intention of staying, and moved to Switzerland several months later. AC ¶ 2. With only a passing connection to Italy, the 1938 Sale cannot be said to have occurred there and, in any case, the "situs" of the events in

[2] *See also Granite Ridge Energy, LLC v. Allianz Glob. Risk U.S. Ins. Co.*, 979 F. Supp. 2d 385, 392 (S.D.N.Y. 2013) (distinguishing between the two tests) (citing *GlobalNet Fin. Com, Inc. v. Frank Crystal & Co., Inc.*, 449 F.3d 377, 383 (2d Cir. 2006).

question are irrelevant. *See Bakalar*, 619 F.3d at 143-44 (rejecting traditional "situs" rule and holding that "interest analysis" governs choice-of-law in Nazi-era duress case).

IV. The Amended Complaint Fails To State A Claim Under New York Law

If New York law applies, it requires dismissal. Even Plaintiff concedes—by not contesting—that she cannot state a claim under New York law. *See* Mot. 9-17. Under New York law, Plaintiff must plead and show that the 1938 Sale "was procured by means of (1) a wrongful threat that (2) precluded the exercise of [Leffmann's] free will … and (3) permitted no other alternative." Mot. 9 (quoting *Interpharm, Inc. v. Wells Fargo Bank, N.A.*, 655 F.3d 136, 142 (2d Cir. 2011)). Plaintiff must also plead and show that the threat was made by the counterparty. Mot. 9 (citation omitted). Plaintiff does not contest that she failed to plead these elements. Mot. 10-13. Dismissal is therefore required under New York law.

V. The Amended Complaint Also Fails To State A Claim Under Italian Law

A. The Amended Complaint Fails To Allege Duress Under Italian Law

Plaintiff does not even attempt to argue that allegations of a general "state of fear" arising from "the circumstances" suffice to plead ordinary duress under Italian law. Under Italian law, Plaintiff must plead and prove (1) a specific and concrete threat of harm that induced her consent to a contract that he would not otherwise have entered into, and (2) the threat was purposefully presented to extort such consent. *See* Bowker Reply Decl. Exh. 1 ("Trimarchi Op.") ¶¶ 13, 26; *see also* Trimarchi Op. ¶ 20 n.6 (citing, *inter alia*, Court of Cassation, 28 July 1950, No. 2150 (contract voidable for duress where owner forced to choose between selling vehicle and risking seizure by Nazi army); Court of Palermo, 14 June 1946, No. 113 (contract voidable for duress where owner was forced to choose between selling land and risking retaliation)). Here, the conclusory allegation that Leffmann was "forced *by the circumstances* in Fascist Italy" to consent to the 1938 Sale, AC ¶ 9 (emphasis added), falls short because it fails to identify any

specific or concrete threat made for the purpose of "extorting" his consent to the 1938 Sale.

Under Italian law, it is not enough to allege a general "'state of fear' generated by a political party or regime" based on a threat that "can lurk in the future." Opp. at 24. Claims based on "[t]he generic and wholesale persecutions exerted by the Fascists against their political opponents … where there is no specific and direct relationship between such persecutions and the agreement concluded allegedly as a result of duress ['violenza'] do not amount to duress." Trimarchi Op. n.5 (quoting Court of Appeal of Rome, 9 April/31 August 1953). Italy's highest court has held that "the mere fear of retaliation, easy to arise in the mind of citizens during the [F]ascist regime" does not suffice, "but a real threat of retaliation must have actually occurred." Trimarchi Op. ¶ 20 (quoting Court of Cassation, 21 March 1963, No. 697).

Italian courts have consistently rejected "political duress" claims where, as here, the plaintiff fails to allege that a specific and concrete threat was made for the purpose of extorting the victim's consent to a particular transaction. In a case where Fascist officials were directly involved in a sale (which has not been alleged here), an Italian court rejected plaintiff's claim of duress because there was no genuine threat with a "specific and direct relationship" to the contract in question.[3] Even in a case where Fascist officials expressly threatened the seller (which, again, has not been alleged here), an Italian court rejected a claim of duress for failure to allege that the threats related directly to the transaction in question.[4] Here, the Amended Complaint's generic allegation of duress based on "the circumstances" thus falls well short of the standard for pleading duress under Italian law.[5]

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[3] *See* Trimarchi Op. nn.5 & 8 (citing Court of Appeal of Rome, 9 April/31 August 1953).
[4] *See* Trimarchi Op. n.9 (citing Tribunal of Bologna, 26 February 1952 (no duress where sale of land followed threats by Fascist leaders, because threats deemed too generic)).
[5] To the extent Plaintiff alleges duress based on the theory that Leffmann sold the Painting to "[t]ry[] to raise as much cash as possible for the flight and whatever the future would bring," AC

B. Italian Notions Of "Public Order" Or "Public Morals" Cannot Save The Amended Complaint

Although the Amended Complaint pleads a theory of duress, AC ¶ 9, Plaintiff's brief takes a new tack to try to avoid dismissal, relying heavily on Italian public order and public morals. This approach fails, however, because these concepts are inapposite. Under Italian law, contracts violate public order or public morals when parties seek to achieve unlawful ends. Trimarchi Op. ¶ 52. Here, there is no allegation that any of the parties to the 1938 Sale sought to accomplish an illegal objective through that Sale. To the contrary, it is undisputed that the Sale was for value on the international art market in Paris. The Sale has nothing in common with contracts that have been ruled null and void based on Italian public order or morals, *e.g.*, where spouses agreed to release themselves from the civil law obligation of fidelity; parties agreed to transact in certain goods during a time when the law required all of those goods to be transferred to the State; licensed business owners agreed to lease a business to an unlicensed individual; and parties entered a loan agreement to finance an illegal business. Trimarchi Op. n.30.

Plaintiff points to no examples of contracts resembling the 1938 Sale that have been deemed violations of Italian public order or morals.[6] She relies instead on a "set of post-War rules providing for particularly strong protections of Jewish individuals persecuted by the anti-Semitic laws," Opp. 22-23, but those rules did not apply to the 1938 Sale. As Plaintiff's own expert notes, they applied only to contracts formed "after October 6, 1938—the date when the directives on racial matters issued by the [Fascist] regime were announced" and only where the claimant could establish a certain level of damages." Frigessi Decl. ¶ 35, n.14; *see also*

¶¶ 28, 36, Opp. 23, that does not state a claim for duress, because there is no duress under Italian law when an individual makes a sale due to his financial needs. *See* Trimarchi Op. ¶¶ 44-50. In any case, the allegation that Leffmann sold the Painting to obtain cash in part for "whatever the future would bring," AC ¶ 36, contradicts her theory of urgent financial need.

[6] A 1988 review of cases regarding contracts Jews entered into during the Fascist era revealed no cases finding that the contracts violated public order or morals. Trimarchi Op. ¶ 57.

Trimarchi Op. ¶¶ 47, 62. Here, Plaintiff apparently concedes that the 1938 Sale does not meet either condition. Even if it did, the result would be to render the transaction *voidable* at the option of the victim (not void *ab initio*) and, even then, only for a period of one year following the War. *See* Frigessi Decl. ¶ 35 n.14; *see also* Trimarchi Op. ¶ 47 (recognizing that the period was extended by two years to 1948). Here, there is no allegation that the Leffmanns ever sought to void or otherwise repudiate the 1938 Sale.

Nor is there any authority for Plaintiff's new argument that it would be a violation of Italian public order and morals to enforce any contract where parties to a contract allegedly have taken advantage of a counter-party's state of necessity. Under Italian law, such contracts are generally enforceable, unless they fit within one of two special circumstances set forth in the Italian Code: one involving real estate and the other involving rescues at sea. Neither of these circumstances is remotely applicable here and, in any case, such contracts are voidable, not void *ab initio*. Trimarchi Op. ¶¶ 44-50.[7]

VI. Even If Plaintiff Had Adequately Alleged Duress, The Amended Complaint Fails To State A Claim Because The Leffmanns Ratified The 1938 Sale

Plaintiff concedes that even if Leffmann had sold the Painting under duress (which he did not), that would have rendered the 1938 Sale voidable (and not void *ab initio*), such that the Leffmanns would have had the choice of repudiating or ratifying it. Opp. 24. One who wishes to repudiate a sale made under duress must do so promptly after the duress subsides; if he fails to do so, he will be deemed to have ratified it. *See* Mot. 14-16 (discussing both New York and Italian law); Trimarchi Op. ¶¶ 28-31. Plaintiff concedes—by not disputing—that the New York law of ratification is fatal to her claim. And despite her effort to avoid dismissal by applying the Italian law of ratification, Opp. 25, it is equally fatal to her claims. Under Italian law, unless the

[7] In the event that the 1938 Sale is deemed a violation of public order or public morals, that would lead to the conclusion that the statute of limitations has expired. *See infra* n.9.

victim of duress repudiates a contract within five years after the duress subsides, it cannot be voided and Italian law will deem it to be ratified. *See* Trimarchi Op. ¶¶ 28-31 (citing 1865 Italian Civil Code, art. 1300 ("Actions for nullity or rescission may be brought within five years" after "the Violenza [duress] has ceased.")); *see also* Mot. 14, n.9 (citing same).

Plaintiff's argument that Italian law will not deem a contract to be ratified by "the lack of repudiation" within the five-year statutory period has no support. Plaintiff cites her Italian law expert for that proposition, who, in turn, offers no authority to support his conclusory assertion. Opp. 25 (citing Frigessi Decl. ¶¶ 71-72 (citing nothing)). In contrast, there is ample Italian authority to support the black letter rule that unless an individual repudiates a contract formed under duress within five years after the duress ends, the contract is enforceable. Trimarchi Op. nn. 16-17 (citing authorities). A failure to repudiate within the allowable period is deemed to be ratification. Trimarchi Op. ¶¶ 28-31. Here, the Leffmanns survived the 1938 Sale by eighteen and twenty-eight years, respectively, and the end of the War by eleven and twenty-one years, respectively, yet there is no allegation that they repudiated the contract. To the contrary, Plaintiff alleges that they received and accepted the proceeds of the 1938 Sale, which they allegedly continued to spend years after leaving Italy. AC ¶¶ 46-48. On these allegations, the law of ratification is fatal to Plaintiff's claims. Mot. 13-16.

Plaintiff tries to avoid the consequences of ratification by suggesting that it was somehow improper for the Museum to assume that the Leffmanns had the capacity in the post-War years to affirmatively repudiate the 1938 Sale or that they had any "viable avenue" for making post-War claims. Opp. 25; *see also* Frigessi ¶ 72. As Plaintiff knows from her own investigation and from extensive records of the Leffmanns' post-War claims (which the Museum obtained from government archives and shared with Plaintiff and her counsel and which Plaintiff or her counsel

also independently obtained), the Leffmanns had both the means and the capacity to engage sophisticated counsel who helped them successfully pursue numerous post-War claims for Nazi-era losses.[8] These claims contained no mention of the Painting. Leaving aside whether it was proper to omit such facts from the Amended Complaint, Plaintiff should not be heard to suggest that the Leffmanns were unable to submit post-War claims.

VII. Even If There Was Duress And No Ratification, The Amended Complaint Fails To State A Claim Because Title Subsequently Passed To A Good-Faith Purchaser

Plaintiff does not dispute that Foy was a good-faith purchaser in 1941 when she bought the Painting from a New York gallery that had it from Rosenberg. Nor does she dispute that "'[a] person with voidable title has power to transfer a good title to a good-faith purchaser for value.'" Mot. 16 (quoting *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 623 (App. Div. 1990) (quoting UCC 2-403(1)), *aff'd*, 569 N.E.2d 426 (N.Y. 1991)). Instead, Plaintiff attempts to avoid the good-purchaser defense by asking this Court to treat the 1938 Sale like a theft that transferred *void* title, such that good title could not pass even to a good-faith purchaser. Opp. 26. However, that position directly contradicts Plaintiff's (correct) concession two pages earlier that, under Italian law, if Leffmann had sold the Painting under duress in 1938 he would have transferred *voidable* title, Opp. 24, and it also contradicts New York law, which says the same. *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 122 (2d Cir. 2001) ("[a] contract … which is induced by duress, is voidable"). Plaintiff's argument that this Court can treat a *voidable* foreign duress sale as a theft rests on misreading of *Schoeps*. That case involved a transfer allegedly made under "threats and economic pressures by the Nazi government" in Germany in 1935, which German law would have treated as *void*. *Schoeps*, 594 F. Supp. 2d at

[8] The Court may consider information beyond the four corners of the complaint for purposes of a Rule 12(b)(6) motion where, as here, "plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).

465-66. *Schoeps* reasoned that if the sale was void under German law, the purchaser's title would be no better than a thief's because both would result in void title, and under New York law a good-faith purchaser cannot subsequently obtain valid title from a possessor of void title. 594 F. Supp. 2d at 466-67. But *Schoeps* says nothing to support treating *voidable* foreign duress sales as "thefts"; nor does it support Plaintiff's assertion that the 1938 Sale should be treated as *void*, contrary to both New York law and Italian law.[9]

VIII. The Amended Complaint Is Time-Barred

A. The Statute Of Limitations Bars Plaintiff's Claim

Plaintiff argues that her claim is not subject to the three-year statute of limitations because the HEAR Act revives certain claims for property "lost … because of Nazi persecution." Opp. 10. Plaintiff's position is that the Painting was "lost … because of Nazi persecution," even though it was safely in Switzerland and was sold on the open market through a dealer to private individuals in Paris, without any involvement by the Nazis or Fascists. But this position has no support in the text of the HEAR Act or her own Amended Complaint.

The Act, by its terms, protects "[t]hose seeking recovery of Nazi-confiscated art." Holocaust Expropriated Art Recovery Act of 2016 ("HEAR Act"), Pub. L. No. 114-308 § 2. The Act's stated purpose is to change the "laws governing claims to Nazi-confiscated art" for purposes of ensuring "that claims to artwork … stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations." HEAR Act § 3 ("Purposes"). The HEAR Act's purpose is thus to revive certain claims for artworks "confiscated," "stolen," or "misappropriated" by the Nazis. This is not such a case. Plaintiff cites paragraphs in her

[9] If the 1938 Sale were treated as a "theft," this action would be untimely because the "statute of limitations for conversion and replevin automatically begins to run against a bad faith possessor on the date of the theft or bad faith acquisition." *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 481-82 (S.D.N.Y. 2010), *aff'd*, 403 F. App'x 575 (2d Cir. 2010). *See supra* n.6.

Amended Complaint that supposedly allege the Painting was "lost" because of Nazi persecution, Opp. 11 (citing AC ¶¶ 3, 9, 26-28, 42, 47), but those paragraphs never once use the word "lost"; instead, they use words like "disposed of" (AC ¶ 3), "sell … under duress" (AC ¶ 9), "explore the possibility of selling" (AC ¶ 28), "turn … into cash" (AC ¶ 28), "sold" (AC ¶ 42), and "received from the sale" (AC ¶ 47). The HEAR Act's reference to art "lost … because of Nazi persecution" cannot be stretched to encompass a voluntary transaction for cash, which—according to Plaintiff's own allegations—was a negotiated "sale" on the open market through a Paris dealer to two French dealers, and where no Nazis or Fascists took actions to compel or restrict that Sale, or were otherwise involved in it.

Plaintiff argues that if the HEAR Act does not apply, her claims are still timely because New York's demand-and-refusal rule tolled the limitations period for many decades. As discussed above, however, even if the Leffmanns once had a claim for duress, they ratified the 1938 Sale by not promptly bringing that claim in the post-War years, *see supra* VI; and, in any event, title would have passed in 1941 to Foy as a good-faith purchaser, *see supra* VII. Thus, neither of the Leffmanns had a viable claim for duress at the time of his or her death in 1956 and 1966, respectively.[10] Nor can Plaintiff confer upon the Estate a claim that was extinguished before the Leffmanns died many decades ago simply by making a demand that the Museum refuses. *See Estate of Young*, 367 N.Y.S.2d 717, 722 (Sur. Ct. 1975) ("A personal representative acquires only such title as the decedent had."); *see also Grosz*, 772 F. Supp. 2d at 482 ("plaintiffs have no more right to *Poet* than Grosz would have had if he were still alive").

[10] Plaintiff cannot use *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y.1990), to avoid the conclusion that any claim to undo the Sale expired during the Leffmanns' lives. Opp. 12. The *Turkey* court's holding—that an owner's delay in bringing a replevin claim for stolen items did not bear on the statute of limitations defense against that claim—does not affect this case, where the Leffmanns sold the Painting and then took no action to undo it within the prescribed limitations period (or ever).

In any event, demand-and-refusal does not apply because the Museum has openly possessed and displayed the Painting as its own since 1952. *See SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000). Plaintiff tries to distinguish *SongByrd* on the ground that it involved a "shift in character of the possession" of the music recordings when the custodian began to openly treat them as his own, Opp. 13, but the "shift" is irrelevant here. There is no dispute that the Museum has openly treated the Painting as its own, *e.g.*, by accepting the donation, AC ¶ 54, adding it to the Museum's permanent collection, or putting it on public display. *See Del Piccolo v. Newburger*, 9 N.Y.S.2d 512, 513 (1st Dep't 1939) ("[T]o establish a conversion it is unnecessary to show a demand when the holder exercises an act of ownership inconsistent with the ownership and dominion of the true owner, as such an act itself constitutes an unlawful misapplication amounting to a conversion."). Here, the Amended Complaint makes clear that the Museum has treated the Painting as its own, in a way that was clearly inconsistent with Leffmann's (and the Estate's) alleged ownership. AC ¶¶ 52-67. In this circumstance, demand-and-refusal cannot revive a claim that expired many decades ago.

B. Laches Bars Plaintiff's Claim

A dismissal based on laches prior to discovery would not be "premature." Opp. 14-15. The parties have spent years investigating the facts and the Museum has shared with Plaintiff and her counsel all relevant documents and information it possesses. Mot. 1-2. As a result, the facts material to a laches defense are known to both parties: neither the Leffmanns nor the Estate has made a prior claim against the Museum, and the instant claims come nearly eight decades after the 1938 Sale, more than seven decades after the end of the War, and more than six decades after the Museum acquired the Painting. These are unreasonably long delays. Plaintiff suggests the Leffmanns may have been too elderly or incapable of finding the Painting in the post-War years, but the Leffmanns survived the War by many years, retained sophisticated counsel, and

successfully brought other post-War claims. *See supra* 10-11. Moreover, the Museum has been prejudiced by the delay because the Leffmanns, Rosenberg, Hugo Perls, Kate Perls, Foy, and other would-be witnesses are deceased. "[W]here the original owner's lack of due diligence and prejudice to the party currently in possession are apparent, [laches] may be resolved as a matter of law." *Matter of Peters*, 821 N.Y.S.2d at 69.

Plaintiff cannot avoid a laches dismissal by accusing the Museum of failing at the time of the acquisition to "discover[], through due diligence … the circumstances under which [Leffmann allegedly] was compelled to dispose of the Painting because of Nazi and Fascist persecution." Opp. 17-18. Even the most thorough diligence at that time would have revealed the same "circumstances" now alleged in Plaintiff's Amended Complaint, *i.e.*, that the Leffmanns spent months offering the Painting for sale on the international art market, negotiated with multiple parties, and ultimately accepted the highest offer in an arms-length sale through a dealer in Paris to two French dealers, and no Nazis or Fascists took actions to compel or restrict that Sale, or were otherwise involved in the Sale. Mot. 5-6 (citing AC ¶¶ 14, 28, 32-33, 36-37, 43, 47).

Nor can Plaintiff avoid a laches dismissal by accusing the Museum of "unclean hands" based on an alleged failure to discover that the Painting had been "misappropriated." Opp. 17. Not only was the Painting never "misappropriated" (and therefore the Museum cannot be penalized for failing to discover that it was), but also this accusation is undermined by Plaintiff's prior assurance (in her effort to preserve the demand-and-refusal rule) that she "makes no such allegation" of a bad faith acquisition by the Museum. Opp. 13.

CONCLUSION

For the foregoing reasons, the Museum respectfully requests that this Court dismiss the Amended Complaint, or stay the case pending resolution of the petition in Surrogate's Court.

Dated: New York, New York
February 27, 2016

Respectfully submitted,

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