Table of Contents:

United States v. Portrait of Wally, 663 F. Supp. 2d 232 (S.D.N.Y. 2009) [2009 BL 210022]

United States District Court, S.D. New York.

UNITED STATES of America, Plaintiff, v. PORTRAIT OF WALLY, a Painting by Egon Schiele, Defendant In Rem.

No. 99 Cv. 9940 (LAP).

September 30, 2009.

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[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.] *[*234]*

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OPINION and ORDER

LORETTA A. PRESKA, Chief Judge.

This protracted dispute stems from the alleged theft of Portrait of Wally ("Wally" or "the Painting"), a painting by renowned Austrian artist Egon Schiele, from Lea Bondi Jaray ("Bondi"). The Government, and Bondi's Estate (the "Estate"), contend that after the Germans occupied Austria in 1938, Friedrich Welz, a Nazi, stole Wally from Bondi, a Jewish owner of a Viennese art gallery, and the Painting has remained stolen property ever since. The Government and the Estate further assert that claimant the Leopold Museum (the "Museum"), knowing Wally was stolen or converted, nonetheless shipped it into this country in violation of the National Stolen Property Act ("NSPA"), 18 U.S.C. § 2314 (1994), thereby rendering the Painting subject to civil forfeiture pursuant to 18 U.S.C. § 545, 19 U.S.C. § 1595(a)(c), and 22 U.S.C. § 401(a). *[*2]*

All parties now move for summary judgment.[fn1] The Museum *[*3]* seeks an order striking *[*237]* the Seizure Warrant whereby Wally was seized at the outset of this action, granting the Museum's claim to Wally, and releasing the Painting to the Museum. (Dkt. no. 219). The Government and the Estate seek a judgment declaring Wally forfeit.[fn2] (Dkt. no. 257.) I conclude that there is a triable issue of fact as to whether Dr. Leopold, and thus the Museum, knew that Wally *[*4]* was stolen when they imported it to the United States. Accordingly, both motions are DENIED.

I. BACKGROUND

A. Factual Backround[fn3]

Egon Schiele painted Wally in 1912. (Joint 56.1 Stmt. ¶ 2.) The oil-on-wood *[*238]* painting measures 32.7 × 39.8 cm and depicts Valerie Neuzil, Schiele's primary model and his lover from about 1911 until he married Edith Anna Harms in 1915. (Id. ¶¶ 3-4, 47; Third Am. V. Compl. ¶ 1.) The artist inscribed only "EGON SCHIELE, 1912" on the work. (LM 56.1 Stmt ¶ 16; Third Am. V. Compl. ¶ 1.) In the decades following World War II, Schiele became one of the most prominent Austrian artists of the twentieth century. (LM Counter 56.1 Stmt. ¶ 5.) Hence, in 2002, the Painting was valued in excess of $2 million. (Joint 56.1 Stmt. ¶ 137.)

Bondi, an Austrian Jew and owner of an art gallery in Vienna (the "Würthle Gallery") acquired Wally some time before 1925. (Joint 56.1 Stmt. ¶¶ 6-8.) Thereafter, although she occasionally showed it in exhibitions, Bondi primarily kept Wally hanging in her own apartment. (Id. ¶ 10.) In 1937, because of financial difficulties, she *[*5]* began negotiating the sale of the Würthle Gallery to Friedrich Welz ("Welz"). (LM 56.1 Stmt. ¶ 2.) However, the parties failed to reach an agreement at that time. (Id.)

In March of 1938, in what is known as the Anschluss, German troops occupied Austria and annexed it to Germany. (Joint 56.1 Stmt. ¶ 11.) Pursuant to German Aryanization laws prohibiting Jews from owning businesses, the Würthle Gallery was designated as "non-Aryan" and subject to confiscation. (Id. ¶ 14; Joint Counter 56.1 Stmt. ¶ 3.) Around March 13, 1938, Bondi reopened negotiations for the sale of the Würthle Gallery to Welz. (Joint Counter 56.1 Stmt. ¶ 3.) She ultimately sold it to him for 13,550 Reichsmarks. (LM 56.1 Stmt. ¶ 4.; 3/10/08 Levin Decl. Ex. 11 at LM 1662.)

While the Government and the Museum dispute whether this transaction was voluntary, there is no doubt that Welz became an official member of the National Socialist German Workers, or Nazi, Party shortly thereafter. (Joint Counter 56.1 Stmt. ¶ 4; Joint 56.1 Stmt. ¶¶ 15-16.) He subsequently obtained permission to Aryanize the Würthle Gallery on March 15, 1939. (Joint 56.1 Stmt. ¶ 13.) The following month, Bondi and her husband emigrated to England. (LM Counter 56.1 Stmt. ¶ 20; LM 56.1 Stmt. ¶ 1.) *[*6]*

i) *Wally* transferred to Welz

The circumstances under which Welz gained possession of the Painting are hotly contested. The Government contends that in 1939, on the eve of Bondi's escape to England, Welz went to her apartment to discuss the Würthle Gallery. (Joint 56.1 Stmt. ¶¶ 17, 20.) He saw Wally hanging on the wall and demanded that Bondi hand it over. (Id. ¶ 18.) She resisted, explaining that the Painting was part of her private collection and had never been part of the gallery. (Id.) However, she ultimately relented at the behest of her husband, who reminded her that they intended to flee Austria and that Welz could prevent their escape. (Id.) Welz did not compensate her for the Painting. (Id. ¶ 19.)

The Museum, on the other hand, raises a host of evidentiary objections to the Government's narrative, discussed in Part II(B)(ii)(2)(b) infra, contending that it is pure fiction. The Museum maintains, and the Government disputes, that Bondi sold Wally to Welz as part of the Würthle Gallery in 1938, more than a year before she left for England, in exchange for 200 Reichsmarks. (LM 56.1 Stmt. ¶ 5; LM Counter 56.1 Stmt. ¶¶ 18-19.) *[*7]*

ii. Welz acquires Schiele works from the Riegers

In 1938, Dr. Heinrich Reiger, a Jewish dentist and well-known collector of Schiele's works, approached Welz to negotiate the sale of his art collection to finance his emigration from Austria. (LM 56.1 *[*239]* Stmt. ¶¶ 11-12.) In or about 1939 or 1940, Welz acquired Schiele drawings and paintings from Dr. Rieger. (Joint 56.1 Stmt. ¶¶ 21-23.) Dr. Reiger and his wife, Berta, did not escape the Holocaust; they died in the Theresienstadt concentration camp in or about 1942. (Joint 56.1 Stmt. ¶ 25.)

iii. United States forces gain possession of *Wally*

United States forces occupied Austria in May 1945, after the end of World War II in Europe. (Joint 56.1 Stmt. ¶ 26.) They arrested and detained Welz for approximately two years. (3/10/08 Levin Decl. Ex. 11 at LM 0584.) They also seized Welz's property, including artworks he acquired from Bondi and the Rieger collection. (See Joint 56.1 Stmt. ¶ 33; 3/10/08 Levin Decl. Ex. 11 at LM 0584.) While the parties dispute the timing and circumstances of the seizure (LM 56.1 Stmt. ¶ 14; Joint 56.1 Stmt. ¶¶ 32-33), they acknowledge that, by military decree, United States forces were authorized to seize various categories of property, *[*8]* including property belonging to the Third Reich, Austrian Public Institutions, and all persons detained by the military. (Joint 56.1 Stmt. ¶ 27.) Nor do they dispute that Wally was among the seized property. (LM Counter 56.1 Stmt. ¶ 32.)

United States Forces in Germany and Austria were directed to restore works of art that had

been taken from Austria by Germany or from other countries into Austria or Germany "to the government of the country from which it was taken or acquired in any way . . . upon submission of satisfactory proof of its identifiability by the claimant government." (Joint 56.1 Stmt. ¶ 28.)[fn4] The Reparations, Deliveries, and Restitution Division ("RDR") of the U.S. Forces was charged with executing this task. (Id. ¶ 30.)

On or about May 16, 1947, Robert Rieger, Dr. Rieger's son, engaged attorneys Dr. Oskar Mueller ("Mueller") and Dr. Christian Broda ("Broda") to help him and his niece, Tanna Berger (collectively, the "Rieger heirs"), recover *[*9]* property the Nazis had taken from their family. (Id. ¶¶ 43-44.) Broda wrote to the RDR, requesting that it prevent Welz from reacquiring or hiding art he had obtained from the Rieger collection, including Schiele works identified as "Liebespaar" ("Lovers"), "Kardinal und Nonne" ("Cardinal and Nun") and "Bildnis seiner Frau" ("Portrait of His Wife"). (Id. ¶ 48.) Broda's letter made no explicit reference to a Schiele painting called "Portrait of Wally" or depicting Valerie Neuzil. (See id.)

iv. United States Forces Deliver *Wally* to the BDA

Broda also wrote to Dr. Otto von Demus ("Demus"), Director of the Bundesdenkmalamt, the Austrian Federal Office for the Preservation of Historical Monuments (the "BDA"), seeking that entity's assistance in locating Rieger's Schiele collection. (Id. ¶ 49.) He attached a preliminary list of artworks, which included a painting entitled "Bildnis seiner Frau" ("Portrait of His Wife") but none entitled "Portrait of Wally" or described as depicting Valerie Neuzil. (Id.) In August of 1947, Mueller also wrote the BDA, noting that several Schiele works, including "Portrait *[*240]* of his Wife," remained missing. (Id. ¶ 50.) *[*10]*

In November of 1947, the RDR reported that it had possession of several "paintings" claimed by the Rieger heirs, including "Embrace," "Cardinal and Nun," and "His Wife's Portrait" by Egon Schiele. (Id. ¶ 51; see also 3/10/08 Levin Decl. Ex. 11 at LM 0589-0590.) On or about December 4, 1947, it released fourteen "paintings" United States forces had seized from Welz to the BDA, as representative of the government of Austria, in an agreement (the "Receipt and Agreement") whereby the BDA agreed to "h[o]ld [them] as Custodians pending the determination of the lawful owners thereof." (Joint 56.1 Stmt. ¶ 52; 3/10/08 Levin Decl. Ex. 11 at LM 0211.) The three Schiele paintings listed in the schedule attached to the Receipt and Agreement are "Embrace," "Cardinal and Nun," and "His Wife's Portrait." (3/10/08 Levin Decl. Ex. 11 at LM 0213.) They are described as "[p]aintings purchased during the war by Frederic Wels, Salzburg, from the confiscated collection of Dr. Heinrich Reiger (deceased), former Jew of Vienna, and recovered from his collection in Salzburg." (Id.)

Wally was among the paintings the RDR delivered to the BDA at this time. (Joint 56.1 Stmt. ¶ 55; LM 56.1 Stmt. ¶ 24.) The Museum contends that the painting referred to as "His Wife's Portrait" in the Receipt and Agreement was *[*11]* Wally. (LM Counter 56.1 Stmt. ¶ 52.) It does not, however, offer any justification for viewing Wally as having been part of the Rieger collection. The Government, on the other hand, argues that "Portrait of His Wife" refers to an entirely different artwork, a drawing rather than a painting, and the RDR delivered Wally by mistake. (Joint 56.1 Stmt. ¶ 55.) Yet it does not identify another Schiele artwork to which "Portrait of his Wife" might have referred.

It is undisputed that approximately one month after the transfer, James Garrison ("Garrison"), Chief of the RDR, provided the BDA with a list of paintings confiscated from Welz that were cleared for release to the Salzburg government on December 19, 1947. (Joint 56.1 Stmt. ¶ 54.) Wally appears at number 573 of this list, followed by the parenthetical remark "this is a portrait of a woman named Vally," described as being located at the Residenz Depot in Salzburg. (Id. ¶ 54.) However, as noted above, the Painting had already been delivered to the BDA on December 4 among the paintings Welz acquired from Dr. Rieger.

Around June 8, 1948, Lieutenant Colonel McKee ("McKee") of the RDR wrote to the United States Forces, Property Control and Restitution Section, attaching a list of Rieger collection paintings acquired by Welz but still *[*12]* missing. (3/10/08 Levin Decl. Ex. 11 at 1282-86.) "His Wife's Portrait" is number three on the list. (Id.) Next to this entry, McKee wrote "Released to [BDA] 4 Dec 47 but this painting is not under control unless it is identical with `VALLY FROM KRUMAU.' — Wels #573 Wels' records do not state acquired from Reiger and Wels says this woman was not the artist's wife." (3/10/08 Levin Decl. Ex. 11 at LM 1283 (emphasis in original).) McKee's cover letter states that "inquiry will be made with the [BDA] as to whether or not `Vally from Krumau' was Egon Schiele's wife." (Id. at LM 1282.) The BDA received McKee's letter around June 14, 1948. (Joint 56.1 Stmt. ¶ 56.) A handwritten note on the BDA's copy of the letter says "Dr. Demus." (Id.)

Broda and Mueller's efforts on behalf of the Rieger heirs during this period were not limited to correspondence with the RDR and the BDA. They also initiated formal proceedings with an Austrian Restitution *[*241]* Commission.[fn5] (See Joint 56.1 Stmt. ¶¶ 45, 57.) On or about June 26, 1948, Broda sent a letter to the BDA enclosing a "Partial Finding" of the Restitution Commission ordering Welz to *[*13]* return twelve works of art to the Rieger Heirs. (Joint 56.1 Stmt. ¶ 57; 3/10/08 Levin Decl. Ex. 11 at LM 1276-77.) Listed among these is "Portrait of his Wife," described as a "drawing." (Joint 56.1 Stmt. ¶ 57; 3/10/08 Levin Decl. Ex. 11 at LM 1276-77.) There is no explicit reference to Wally. Mueller sent another letter to the BDA on September 12, 1949, enclosing another copy of the Restitution Commission's Partial Finding. (Joint 56.1. Stmt. ¶ 58; 3/10/08 Levin Decl. Ex. 11 at LM 1266-68.)

On October 28, 1949, Demus responded that the BDA possessed twelve "pictures from the possession of Dr. Rieger," only eight of which had been identified in the Restitution Commission's Partial Finding, among them "Portrait of his Wife." (3/10/08 Levin Decl. Ex. 11 at 001819.) He made no mention of McKee's letter indicating that the "Portrait of his Wife" delivered to the BDA as part of the Rieger collection may actually have been "Vally from Krumau."

v. *Wally* Goes to the Rieger Heirs

By letter dated May 10, 1950, the Austrian Federal Ministry of Finance consented to the BDA's restitution of several "paintings," including Schiele's "Portrait of His Wife," to the Rieger heirs. (RL Decl. Ex. X at LM 1411.) *[*14]* An agent of the Rieger heirs received the artworks on July 7, 1950. (Joint 56.1 Stmt. ¶ 61; 3/10/08 Levin Decl. Ex. 11 at LM 2036-37.) Although not explicitly referenced, Wally was included in the delivery. (See LM 56.1 Stmt. ¶¶ 26-27; Joint 56.1 Stmt. ¶¶ 61, 68-69.)

vi. *Wally* Goes to the Belvedere

In late 1950, the Rieger heirs negotiated the sale of art from the Rieger collection to the Österreichische Galerie Belvedere (the "Belvedere"), a national gallery owned by the Austrian government. (Joint 56.1 Stmt. ¶¶ 65, 67.) Belvedere officials, including its Director, Dr. Garzarolli ("Garzarolli"), his deputy, Dr. Novotny ("Novotny"), and a lecturer, Dr. Balke ("Balke"), inspected the items proposed for sale on November 30, 1950. (Joint 56.1 Stmt. ¶ 68; 3/10/08 Levin Decl. Ex. 11 at 000274.) Garzarolli sent a letter the next day cataloguing the items inspected by his team. (Joint 56.1 Stmt. ¶ 70.) Number three on the list is "Frauenbildnis" ("Portrait of a Woman"). (Id.) Next to this entry appears a handwritten note stating "Vally Neuzil aus Wien" ("Wally Neuzil from Vienna"). (Id. ¶ 70.) A handwritten list from the Belvedere's files for the year 1950, signed by Balke, does not include "Portrait of a Woman" but instead lists "E. *[*15]* Schiele, Vally aus Krumau" ("Wally from Krumau") at number three. (Id. ¶ 71.)

In early December of 1950, Garzarolli sought permission from the Austrian Federal Ministry of Education for the Belvedere's purchase of the artworks he, Balke, and Novotny had inspected on November 30. (Id. ¶ 75.) The Ministry approved purchase of eleven pictures, including three by Schiele described as "Umarmung" ("Embrace"), "Kardinal und Nonne" ("Cardinal and Nun"), and "Frauenbildnis" ("Portrait of a Woman"). (Id. ¶ 76.) The contract of sale between the Rieger heirs and the Belvedere, dated December 27, 1950, identifies the same three *[*242]* Schiele paintings. (3/10/08 Levin Decl. Ex. 11 at 000158 ILS.) Although not explicitly referenced in either the Ministry of Education approval or the contract of sale, Wally was included in the exchange. (See LM 56.1 Stmt. ¶¶ 27-28; accord Joint 56.1 Stmt. ¶¶ 69, 76-77.)

vii. Bondi's Restitution Proceeding

After the war, Bondi, like the Rieger heirs, actively sought to recover property acquired by the Nazis. On her behalf, Viennese lawyer Dr. Emerich Hunna ("Hunna") initiated a proceeding against Welz before an Austrian *[*16]* Restitution Commission. (See LM 56.1 Stmt. ¶ 6; Joint 56.1 Stmt. ¶ 34.) Although the exact claims and evidence she presented to the Restitution Commission are unknown, it is clear that Bondi sought return of the Würthle Gallery on the grounds that she had been forced to sell it due to Nazi persecution. (LM Counter 56.1 Stmt. ¶ 34; 3/10/08 Levin Decl. Ex. 11 at LM 1661-63.)

In a Partial Decision rendered in March of 1948, the Restitution Commission ordered Welz to return the Würthle Gallery to Bondi. (3/10/08 Levin Decl. Ex. 11 at LM 1661-63.) The Commission noted that "[d]uring the course of the evidentiary procedure no facts of the case could be determined that showed that [Bondi] would have sold [the Gallery] without being persecuted due to the national socialist seizure of power." (Id. at LM 1663.) The Commission further stated that "[Welz] did not always conduct himself in a fair and generous matter, e.g. . . . when he demanded a `Biedermeier table and a Schiele from [Bondi].'" (Id. at LM 1661.) However, the Commission also observed that "based on the evidentiary procedure to date, [it] has not come to the conclusion that [Welz] conducted himself improperly or that he did not adhere to the rules of honest dealings." (Id.) Another ground for this characterization of Welz's behavior was that he "caused no *[*17]* difficulties for [Bondi] as he easily could have done." (

Id.)

Welz appears to have unsuccessfully appealed the partial finding, relying in part on the Commission's observation that "he had observed the rules of fair business dealings." (3/10/08 Goldblatt Decl. Ex. 7 at LB000883; Ex. 8 at US 001943.) With regard to this point, Bondi argued that Welz unfairly "beat down even the low price that I demanded." (3/10/08 Goldblatt Decl. Ex. 7 at LB000883.) She further asserted that Welz had improperly "demand[ed] objects from [Bondi's] private assets . . ., the handover of which had never been discussed." (Goldblatt Decl. Ex. 7 at LB000884.)

The parties subsequently reached an undisclosed settlement agreement, approved by the Commission in August of 1949, by which Bondi regained possession of the Würthle Gallery and "all mutual claims [were] executed." (3/10/08 Goldblatt Decl. Ex. 8 at US 001943-44.) Although Bondi thus regained possession of her gallery, she never recovered Wally.

viii. Bondi Meets Dr. Leopold

Dr. Rudolph Leopold ("Dr. Leopold") is an Austrian citizen and resident born in March of 1925. (Joint 56.1 ***[*18]*** Stmt. ¶ 79.) He began studying medicine in 1945 and earned his doctorate in 1953, when he also married his wife, Elisabeth. (Joint 56.1 Stmt. ¶ 80.) During the 1950s, he took a particular interest in Schiele's works, acquiring a considerable number of them by 1956. (Joint 56.1 Stmt. ¶ 81.)

In 1953, Dr. Leopold went to London to meet with art collector Arthur Stemmer ("Stemmer"), who told him to visit Bondi and gave him her address. (Joint 56.1 Stmt. ¶ 82.) Dr. Leopold had heard of Bondi by this time. (LM 56.1 Stmt. ¶ 36; Joint 56.1 Stmt. ¶ 83.) He knew that she ***[*243]*** was the Jewish owner of the Würthle Gallery, that she had fled Austria due to Nazi persecution, and that the gallery had been restituted to her. (Joint 56.1 Stmt. ¶ 83.)

After meeting with Stemmer, Dr. Leopold visited Bondi in London and bought several artworks from her. (Joint 56.1 Stmt. ¶ 84.) Over the course of this transaction, Bondi asked Dr. Leopold where Wally was. (Joint 56.1 Stmt. ¶ 85.) Dr. Leopold knew that Bondi had owned Wally because she was listed as its owner in a 1930 art catalogue compiled by Otto Kallir (the "1930 Kallir Catalogue"). (LM 56.1 Stmt. ¶ 37.) He told her the painting was at the Belvedere. (Joint 56.1 Stmt. ¶ 85.) According to Dr. Leopold's 2006 deposition testimony, Bondi responded "but it is mine. ***[*19]*** Please go to the [Belvedere], get painting [sic], and then ship it to me." (3/10/08 Levin Decl. Ex. 9, Leopold Dep. 19:17-18, Oct. 16, 2006; accord Joint 56.1 Stmt. ¶ 85.) The Museum asserts, and the Government disputes, that Dr. Leopold subsequently set up a meeting between Bondi and the Belvedere's Garzarolli and, although she met with him twice, Bondi never laid claim to Wally. (Joint Counter 56.1 Stmt. ¶¶ 40-44.) The Museum also makes the contested claim that Dr. Leopold and Bondi met again in the summer of 1954, whereupon he asked her why she had not claimed Wally from the Belvedere, and she told him to "drop it." (RL Decl. ¶ 23; Joint Counter 56.1 Stmt. ¶ 45.)

ix. Dr. Leopold Acquires *Wally*

In June of 1954, Dr. Leopold and Garzarolli discussed how Dr. Leopold might acquire

"Cardinal and Nun" and Wally from the Belvedere in exchange for other paintings. (Joint 56.1 Stmt. ¶ 88.) Dr. Leopold proposed trading the Schiele painting "Rainerbub" for Wally. (Joint 56.1 Stmt. ¶ 90.) Correspondence between Dr. Leopold and the Belvedere on this topic repeatedly referenced the 1930 Kallir Catalogue, which listed Bondi as Wally's last owner. (Joint 56.1 Stmt. ¶ 89.) At a July 12, 1954 meeting attended by Garzarolli and Novotny, the Exchange Commission of the Belvedere *[*20]* approved the trade. (Joint 56.1 Stmt. ¶ 91.) Minutes of the meeting refer to Wally not as "Portrait of His Wife," but rather as "Vally aus Krumau." (Id.)

Upon the Belvedere's application, the Austrian Federal Ministry of Education then approved the exchange of "Vally aus Krumau" for "Rainerbub." (Joint 56.1 Stmt. ¶¶ 93-95.) This approval appears to have been rushed "[d]ue to the subsequent threat of one picture owner to withdraw his offer if the exchange were further delayed." (3/10/08 Levin Decl. Ex. 11, LM 1816 (referring to exchange approval in July 12 minutes); see also RL Decl. Ex. F at LM 1795 (July 12 minutes).) Dr. Leopold acquired Wally on September 1, 1954. (LM 56.1 Stmt. ¶ 52A.) He did not inform Bondi of either his intention to acquire Wally or his realization of this goal. (Joint 56.1 Stmt. ¶ 98.) Nor did he ask the Belvedere for any documentation showing that Wally truly had been restituted to the Rieger heirs. (Joint 56.1 Stmt. ¶ 100.)

x. Dr. Hunna Contacts Dr. Leopold

On October 23, 1957, Hunna wrote Dr. Leopold on behalf of Bondi. (Joint 56.1 Stmt. ¶ 107; RL Decl. Ex. N at LM 3832-33.) The letter recalled the 1953 meeting of Bondi and Dr. Leopold in London, which it asserts ended with Dr. *[*21]* Leopold's pledge to help Bondi recover the painting. (Id.) Hunna wrote that Bondi had just discovered that Dr. Leopold now possessed Wally and wondered whether he had acquired it from the Belvedere "based on [Bondi's] request that [Dr. Leopold] represent her interests, and [had] just not reported this to her yet." (Id.) "[I]n any *[*244]* case," wrote Hunna, "I ask you to explain." (Id.)

Dr. Leopold responded in a letter dated October 16, 1957, saying that Hunna's letter "concealed many important facts" and giving the following account of his 1953 meeting with Bondi and subsequent events. (RL Decl. Ex. O at LM 1255-56.) According to Dr. Leopold, he told Bondi to contact the Belvedere or hire an attorney, but she prevailed on him to speak personally with Belvedere representatives. (Id. at LM 1255.) He then spoke with Garzarolli, who said he "had never heard of" Bondi's claim and assured him that Wally had been properly restored to the Rieger heirs from whom the Belvedere had acquired it.[fn6] (Id.) Dr. Leopold met Bondi in Vienna soon after his meeting with Garzaroli and again advised her to claim the painting. (Id.) Bondi herself, when Dr. Leopold met her on *[*22]* a second trip to London that occurred "somewhat later," confirmed that she did not follow his advice.[fn7] (Id.) Because it was "clear that [Bondi] no longer had an ownership right to [Wally]," Dr. Leopold took the "unpleasant route of giving up something important from [his] collection" in exchange for it. (Id.) He desired Wally because he anticipated acquiring a counterpart self-portrait Schiele had painted the same year. (Id.) However, before proceeding with the exchange, Dr. Leopold again spoke with Garzarolli, who reiterated that Bondi had never claimed Wally from the Belvedere. (Id.)

Hunna replied by letter dated November 12, 1957. (3/10/08 Levin Decl. Ex. 11 at LM 3830-

31.) He wrote that Bondi had by no means "waived her ownership right" to Wally, which had been included in the Rieger collection by mistake, and asked that Dr. Leopold return it. (Id.)

Garzarolli responded on Dr. Leopold's behalf by letter dated December 3, 1957. (RL Decl. Ex. Q at LM 3829.) He wrote that the Belvedere had lawfully acquired Wally from the Rieger heirs and reiterated Dr. Leopold's previous assertion that Bondi had never laid claim to the Painting. (Id.) *[*23]*

After this exchange of letters, Dr. Leopold received no further communication regarding Wally from either Bondi or Hunna. (LM 56.1 Stmt. ¶ 62.)

xi. Bondi's Account of Her Efforts to Retrieve *Wally*

Bondi died in 1969. (LM 56.1 Stmt. ¶ 1.) Based on her correspondence and an unsigned statement found in her bureau more than twenty years after her death, the Government offers the following disputed account of her post-war efforts to recover Wally.[fn8] Before she met Dr. Leopold in London, Bondi saw Wally at the Belvedere and claimed it as her own but "did not receive any reply." (3/10/08 Levin Decl. Ex. 14 at US 000156; see Joint 56.1 Stmt. ¶ 41.) She did not further pursue the claim because she had regained the Würthle Gallery and, apparently for business reasons, "it was not possible for [her] to quarrel with the [Belvedere]." (3/10/08 Levin Decl. Ex. 14 at US 000156.) *[*24]*

In 1953, she met Dr. Leopold in London and asked him to bring her ownership to the Belvedere's attention. (3/10/08 Levin Decl. Ex. 12 at JK 000053-54.) When she *[*245]* subsequently discovered that Dr. Leopold had acquired Wally for himself, she asked Hunna to shame him publicly into returning the Painting, being reluctant to litigate the matter because "[i]t is probably very hard to have lawsuits in Vienna against a medical doctor residing in Vienna because the judges always take the side of the resident of Vienna, and if the lawsuit is lost, I have lost my picture forever." (Id.) Although Bondi never filed a formal lawsuit, she continued her efforts to recover Wally. (Joint 56.1 Stmt. ¶ 116.) She sought the assistance of Otto Kallir ("Kallir"), author of the 1930 Kallir catalogue, in this endeavor, but he did not secure the Painting for her. (See id. ¶¶ 112-15.)

xii. The Pre-Museum Catalogues

In 1966, Kallir published a new catalogue raisonné[fn9] on Schiele's work (the "1966 Catalogue"). (Joint 56.1 Stmt. ¶ 118.) This catalogue listed Wally's provenance as follows: *[*25]*

Emil Toepfer, Vienna

Richard Lanyi, Vienna

Lea Bondi, Vienna

Dr. Rudolph Leopold, Vienna

(Id. ¶ 118.) Six years later, Dr. Leopold published a book entitled Egon Schiele, Gemalde Aquarelle Zeichnungen ("Egon Schiele: Paintings, Watercolours, Drawings"), which included a section with the provenance of featured paintings (the "1972 Book"). (Joint 56.1 Stmt. ¶¶ 119, 122.) For those already listed in the 1966 Kallir catalogue, the 1972 Book gave only the first and last owners unless that information needed "to be corrected or substantially supplemented." (Joint 56.1 Stmt. ¶ 122; 5/14/09 Levin Decl. Ex. 4 at LB 000255.) The provenance for Wally lists only Emil Toepfer and "private collection, Vienna," the latter being a reference to Dr. Leopold himself. (Joint 56.1 Stmt. ¶ 123.) There is no reference to the Rieger heirs ever having owned Wally. (Id. ¶ 125.) A 1990 catalogue raisonné on Schiele prepared by Jane Kallir, Otto Kallir's granddaughter, likewise makes no mention of the Rieger heirs in Wally's provenance. (LM 56.1 Stmt. ¶¶ 72; Joint 56.1 Stmt. ¶ 126.) *[*26]*

xiii. The Museum Acquires *Wally*

Dr. Leopold sold his art collection, including Wally, to the newly established Museum on August 8, 1994. (Joint 56.1 Stmt. ¶ 131; LM 56.1 Stmt. ¶ 67.) As part of that transaction, Dr. Leopold became the Museum's "Museological Director" for life, with the power to appoint half of the Museum's Board of Directors and his own seat on the same. (See Joint 56.1 Stmt. ¶ 132.)

xiv. Dr. Leopold Revises *Wally*'s Provenance

In 1995, the Museum prepared a catalogue for three upcoming exhibitions of its Schiele collection in Germany. (Joint 56.1 Stmt. ¶ 127; LM 56.1 Stmt. ¶ 68.) Romana Schuler, Dr. Leopold's assistant at the Museum, suggested that the catalogue for the exhibited works be expanded to include every interim possessor to the extent available. (See LM 56.1 Stmt. ¶ 69; Joint 56.1 Stmt. ¶ 127.) The expanded provenance for Wally, which was authored by Dr. Leopold, reads as follows:

Emil Toepfer, Wien

Richard Lanyi, Wien

Lea Bondi Jaray, Wien, später London

Heinrich Rieger, Wien

Rieger, Jr., London

Österrichische Galerie, Wien *[*246]*

Rudolf Leopold, Wien.

(Joint 56.1 Stmt. ¶ 129.) *[*27]*

xv. *Wally* Enters the United States

Two years later, the Museum loaned part of its Schiele collection to New York's Museum of Modern Art (the "MOMA"). Both Dr. Leopold and the Museum's Commercial Director, Dr. Klaus Albrecht Schröder, signed the loan agreement (the "1997 Agreement") on its behalf. (RL Decl. Ex. T at LM 2067.) In addition to specifying agreed-upon agents for "import/export formalities" in Europe and the United States, the 1997 Agreement provided that "the transportation shall be organized by the [MOMA] . . . but always by mutual agreement with, and with the consent of the [Museum]." (RL Decl. Ex. T at LM 2059.) The Schiele works, including Wally, were shipped to New York in September of 1997. (Joint 56.1 Stmt. ¶ 136.)

B. PROCEDURAL HISTORY

The MOMA exhibited Wally from October 8, 1997 to January 4, 1998. **United States v. Portrait of Wally**, 105 F. Supp. 2d 288, 290 (S.D.N.Y. 2000) (hereafter "Wally I"). Three days after the exhibit ended, the New York District Attorney's Office issued a subpoena for the painting, which, on September 21, 1999, the New York Court of Appeals quashed as issued in violation of Section 12.03 of New York's Arts and Cultural Affairs Law. See Matter of the *[*28]* Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art, 93 N.Y.2d 729 (1999). United States Magistrate Judge James C. Francis IV then issued a seizure warrant for the painting, and the Government initiated this forfeiture action on September 22, 1999, alleging that the Leopold imported and/or intended to export Wally knowing it was stolen or converted. Wally I, 105 F. Supp. 2d at 290.

The ensuing years have seen a steady stream of motion practice in this action. On July 19, 2000, Judge Mukasey, to whom this action was originally assigned, granted the Museum's motion to dismiss the complaint. Id. at 294. He held that under the facts as alleged in the then-operative complaint, the federal recovery doctrine, discussed in further detail at Part II(B)(ii)(3)(a) infra, precluded a finding that Wally was stolen. Id. at 292-94. The Government then moved for reconsideration and, in the alternative, for an order altering the judgment so it could file an amended complaint. Judge Mukasey denied the reconsideration motion but granted leave to amend, reasoning in part that "[t]his case involves substantial issues of public policy relating to property stolen during World War II as part of a program implemented by the German government . . . [and] I am loath to decide this case without having all facts and theories considered. . . ." *[*29]* **United States v. Portrait of Wally**, No. 99 Civ. 9940, *2000 WL 1890403*, at *1 (S.D.N.Y. Dec. 28, 2000) (hereafter "Wally II"). The Museum and the MOMA then moved, inter alia, to dismiss the Government's Third Amended Complaint and to dismiss or strike the claim of the Bondi heirs. On April 12, 2002, Judge Mukasey issued a detailed opinion denying these motions. **United States v. Portrait of Wally**, No. 99 Civ. 9940 (MBM), *2002 WL 553532*, at *33 (S.D.N.Y. Apr. 12, 2002) (hereafter "Wally III").

After years of extensive discovery following the issuance of Wally III, the parties now move for summary judgment.

II. DISCUSSION

The Museum argues that dismissal is warranted both under the Act of State doctrine and in the interest of international *[*247]* comity. Should the Court reach the merits of this action, the Museum then asserts that Wally was neither stolen nor converted and, even if it were, the

Museum had no knowledge to that effect. The Museum further contends that suit is barred by the equitable defense of laches and, finally, that Wally's forfeiture would violate due process. For its part, the Government maintains that nearly all the Museum's arguments are foreclosed by Judge Mukasey's *[*30]* decision in Wally III and submits that it has adduced sufficient proof that the Museum illegally imported Wally knowing it was stolen to warrant immediate forfeiture. As explained below, I find that abstention is not warranted, there is no genuine dispute that Wally was, and remains, stolen, and the Museum's laches defense and constitutional objections are without merit. The trier of fact must, however, determine whether Dr. Leopold, and hence the Museum, knew Wally was stolen when shipped into this country.

A. Abstention Doctrines

i. The Act of State Doctrine

As it did in Wally III, the Museum argues that the Act of State doctrine precludes adjudication of the present controversy. This doctrine bars U.S. courts from invalidating the public acts of foreign sovereigns within their own jurisdictions. See W.S. Kirkpatrick & Co. Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own *[*31]* territory."); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."). However, in determining whether the doctrine applies, courts must be mindful of their obligation "to decide cases and controversies properly presented to them." W.S. Kirkpatrick, 493 U.S. at 409. This in turn requires consideration of the policies underlying the Act of State doctrine and "whether, despite the doctrine's technical availability, it should nonetheless not be invoked." Id. The Museum bears the burden of showing that abstention is justified. Bigio v. Coca-Cola Co., 239 F.3d 440, 453 (2d Cir. 2001).

In Wally III, the Leopold and MOMA argued that the Court was barred from revisiting the BDA's disposition of Wally to the Belvedere because the BDA was part of the Austrian government. *2002 WL 553532*, at *8. Judge Mukasey questioned whether, in this instance, either the "act" or "state" requirements of the doctrine had been met, as it was unclear whether the BDA's allegedly erroneous delivery of Wally to the Belvedere qualified as an "act" and whether the BDA had governmental authority to restitute the *[*32]* Painting. *Id.* at *8-9. He found, however, that it was unnecessary to resolve these questions because the policies underlying the Act of State doctrine did not require its application. *Id. at 9.* Judge Mukasey reasoned that the doctrine was intended to prevent United States courts "from inquiring into the validity of a foreign state's acts if adjudication would embarrass or hinder the executive in its conduct of foreign relations." *Id.* at *9 (citing Bigio, 239 F.3d at 452). Here, he found, "[a]n inquiry into the BDA's shipment of a painting under the post-war Austria regime would not impinge upon the executive's preeminence in foreign relations, *[*248]* particularly where the restoration of ownership has always been a professed goal of Austrian law and where it is the executive branch itself that brings this forfeiture action under United States law." Id.

The Museum now argues that this action must be dismissed because the Government is asking the Court to "disregard" three "express approvals" by the Austrian government: (1) the Austrian Ministry of Finance's May 10, 1950 letter consenting to the BDA's restitution of several paintings to the Rieger heirs; (2) the Austrian Federal Ministry of Education's December 13, 1950 approval of the Belvedere's acquisition of artworks from the Rieger heirs; and (3) the Ministry of Education's August 27, 1954 *[*33]* approval of the Belvedere's exchange of Wally for Dr. Leopold's "Rainerbub." (LM Mem. 14-15.) The Museum maintains that Wally III does not bar application of the Act of State doctrine at this juncture because that decision concerned a motion to dismiss, whereas the Court may now consider documents outside the pleadings and is not required to take all facts alleged in the complaint as true. (LM Reply Mem. 18.)

Assuming the law of the case does not bar application of the Act of State doctrine at this stage, the Museum has not shown that the doctrine compels dismissal here. As a threshold matter, the Court is not being asked to invalidate any action by an Austrian governmental authority, but only to determine the effect of such action, if any, on Wally's ownership. See W.S. Kirkpatrick, 493 U.S. at 409-10 ("The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."). Furthermore, as in Wally III, it is far from clear that any of the "approvals" the Museum cites qualify as state acts to which the doctrine applies. See *Wally III at *8-9*. For example, the Museum has submitted nothing to *[*34]* show that the BDA, the Austrian Ministry of Finance, or the Austrian Federal Ministry of Education had any authority "to dispose of artwork other than through the Restitution Commissions." See *id. at *9* . Also, although it speculates that the Restitution Commission may have addressed Wally's ownership during Bondi's restitution proceeding, the Museum has submitted no evidence supporting this assertion. (See LM Reply Mem. at 7, 18.) Rather, it acknowledges that the precise claims addressed therein are unknown. (See LM Counter 56.1 Stmt. ¶ 34; 3/10/08 Levin Decl. Ex. 11 at LM 1661-63.)

Finally, and perhaps most importantly, the Museum offers nothing to alter Judge Mukasey's determination that the balance of interests favors adjudication of this action. See Wally III, *2002 WL 553532*, at *9. The Museum does not dispute his observation that the Act of State doctrine is intended to prevent courts from inquiring into the validity of foreign acts where doing so would "embarrass or hinder the executive in its conduct of foreign relations" and that this concern is not implicated here, where both the executive branch actively seeks adjudication of its claim and Austrian law favors restoration of ownership. *Id.* Accordingly, the Museum has *[*35]* not demonstrated that the Act of State doctrine requires abstention from this case.

ii. International Comity

The Museum next argues that international comity compels dismissal. As explained in Wally III, which the parties agree fairly summarizes the relevant law (see LM Reply Mem. 19 (stating that Wally III "sets out the relevant law"); Joint Opp. Mem. 21 (same)), "[i]nternational *[*249]* comity requires recognition of foreign actions, decrees, and proceedings that do not conflict with the interests or policies of the United States," Wally III, *2002 WL 553532*, at *9 (citing

Bigio, 239 F.3d at 454). Such recognition "fosters international cooperation and encourages reciprocity." Spatola v. United States, 925 F.2d 615, 618 (2d Cir. 1991). Whether to abstain on comity grounds is within the Court's discretion. Bigio, 239 F.3d at 454. In making this determination, the Court balances the "interests of the respective forums and of international policy." Wally III, *2002 WL 553532*, at *9.

In Wally III, the Museum argued that the balance of interests required deference to the Austrian restitution system, which purportedly had a larger stake in the case than does the United States. *Id.* Judge Mukasey disagreed, ***[*36]*** finding that: (1) the Museum failed to identify any Austrian "action, proceeding, or decree" to which deference was owed; (2) Austrian courts were not vested with exclusive jurisdiction over claims involving Holocaust related property; (3) "there has been no formal or purposeful act of the Austrian judiciary, executive, or legislature with respect to [Wally] rising to a level that would implicate international comity"; and (4) the United States "has a strong interest in enforcing its own laws as applied to conduct on its own soil." *Id. at *10.*

The Museum's arguments in favor of its current motion do not support a different conclusion. The Museum first argues that the 1947 Receipt and agreement between the RDR and the BDA "expressly gave Austria the responsibility for restitution of [Wally]." (LM Mem. 15.) As the Government observes, this argument is simply a recharacterization of an argument already rejected by Judge Mukasey, namely that the Court should defer to the Austrian restitution system even if Bondi's claim was never adjudicated. See Wally III, *2002 WL 553532*, at *10 ("[T]he principle of comity does not operate as a pre-emption doctrine, barring this court from hearing a valid forfeiture action merely because there are foreign laws that might also apply."). ***[*37]***

Rather than respond to this point directly, the Museum makes a new argument in its reply, namely that the Austrian Federal Finance Ministry's May 10, 1950 approval of the BDA's restitution of Schiele artworks to the Rieger heirs requires deference. (LM Reply Mem. at 19.) However, the Museum offers no reason as to how this approval qualifies as a "formal or purposeful act of the Austrian judiciary, executive, or legislature with respect to [Wally] rising to a level that would implicate international comity." Wally III, *2002 WL 553532*, at *10. Indeed, even assuming this approval qualified as such an act, it is not clear that the Court is being asked to countermand it, if for no other reason than that the approval in question does not explicitly refer to Wally but rather to a painting called "Portrait of His Wife," who was not Valerie Neuzil. (See RL Decl. Ex. X at LM 1411.) Finally, even assuming that Austrian governmental interests are implicated by adjudicating this case, the Museum has not specified why any such interest trumps the United States' "strong interest in enforcing its own laws as applied to conduct on its own soil." Wally III, *2002 WL 553532*, at *10. Accordingly, I will not exercise my discretion to dismiss this action on the basis of international comity. ***[*38]***

B. Arguments on the Merits

Having disposed of the Museum's abstention arguments, I now turn to the parties' substantive arguments. ***[*250]***

i. Legal Standards

Summary judgment is appropriate only if the evidence demonstrates that "there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A factual dispute is material if it could affect an action's disposition. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.") Furthermore, there is no genuine issue "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). With respect to each motion, evidence must be construed in the light most favorable to the non-movant. Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 253 (2d Cir. 2002).

The Government seeks forfeiture under 19 U.S.C. § 1595a(c) and 18 U.S.C. § 545 claiming that the Museum knowingly imported Wally "contrary to law" insofar as it ***[*39]*** did so in violation of the NSPA.[fn10] An NSPA violation consists of three elements: "(1) the transportation in interstate or foreign commerce of property, (2) valued at $5,000 or more, (3) with knowledge that the property was ***[*40]*** stolen, converted, or taken by fraud."[fn11] *Wally III, at *12* (quotation marks omitted); 18 U.S.C. § 2314; Dowling v. United States, 473 U.S. 207 , 214 (1985); United States v. Wallach, 935 F.2d 445, 466 (2d Cir. 1991). In this case, the parties concede that Wally is worth more than $5,000. (Joint 56.1 Stmt. ¶ 137.) This Court's task is therefore to determine whether it is genuinely disputed that the Museum imported Wally from abroad knowing the Painting was stolen or converted.

Although the parties dispute the relevant burden of proof, they agree that the Court of Appeals' decision in United States v. Parcel of Prop. (Aguilar), 337 F.3d 225 (2d Cir. 2003) controls the issue. (Joint Mem. 2-4; LM Opp. Mem. 4.) Aguilar held that the burden-of-proof allocations prescribed by Congress for civil forfeitures before the Civil Asset Forfeiture ***[*251]*** Reform Act of 2000 ("CAFRA"), Pub.L. No. 106-185, 114 Stat. 202 (2000), are constitutional. [fn12] ***[*41]*** 337 F.3d at 233. Under the pre-CAFRA framework, the Government can seize property upon a showing of probable cause. Aguilar, 337 F.3d at 230; see also 19 U.S.C. § 1615 (requiring that probable cause, "to be judged of by the court," be shown in order to institute civil forfeiture action.) To meet this burden, the Government must show "reasonable grounds, rising above the level of mere suspicion" to believe the property is subject to forfeiture. See United States v. An Antique Platter of Gold, 991 F. Supp. 222, 228 (S.D.N.Y. 1997) (applying probable cause standard to civil forfeiture action under NSPA) (quoting United States v. One Parcel of Property Located at 15 Black Ledge Drive, Marlborough, Conn., 897 F.2d 97, 101 (2d Cir. 1990)). Once the Government has made this showing, the burden shifts to the claimant to show, by a preponderance of the evidence, that the property is not subject to forfeiture. Aguilar, 337 F.3d at 230; Antique Platter, 991 F. Supp. 222 at 228; see also 19 U.S.C. § 1615. If the claimant meets this burden, "the government must provide evidence of its own to the contrary that is at ***[*42]*** least as persuasive and credible." Aguilar, 337 F.3d at 232.

The Museum argues that, under Aguilar, "the Government in this case . . . must come forward with admissible evidence to prove its forfeiture claim." (LM Opp. Mem. 4.) However, this is not necessarily so. It is well-settled that in the pre-CAFRA context, the Government may use hearsay evidence to make its threshold showing of probable cause. See Aguilar, 337 F.3d at

236 ("[T]here is clear authority in our circuit allowing the use of hearsay to establish probable cause." (citing United States v. Daccarett, 6 F.3d 37, 56 (2d Cir. 1993))). Should the Government establish probable cause to believe Wally is forfeit, the burden shifts to the Museum to prove otherwise, and the Government need provide admissible evidence only after the Museum has met that burden. See id. at 232.

The Museum relies on the Aguilar court's statement that "when a claimant presents evidence that the property was not connected to [the crime at issue], the government must provide evidence of its own to the contrary that is at least as persuasive and credible." Id. However, the preceding sentence from Aguilar clarifies that such an obligation is imposed on the Government, assuming it has *[*43]* made a threshold showing of probable cause, only after the Museum shows by a preponderance that Wally is not subject to forfeiture: "under pre-CAFRA procedures a claimant may recover his property by proving by a preponderance of the evidence that the property was not used to facilitate the [crime at issue]." Id. This same language directly contradicts the Museum's suggestion at oral argument that it should be held to a lesser burden than preponderance of the evidence should the Government show probable cause to believe Wally forfeit. (Oral Argument Tr., 4:3-7:1, Sept. 21, 2009 ("O/A Tr.").)

ii. Analysis

To prove Wally is subject to forfeiture, the Government must first show probable *[*252]* cause to believe that (1) the Museum imported Wally, (2) Wally was stolen, and (3) the Museum knew Wally was stolen when it shipped the Painting to the MOMA. To establish that Wally was stolen when imported, the Government must show that (a) Welz stole the Painting from Bondi and (b) it remained stolen when shipped to this country. See Wally III, *2002 WL 553532* , at *16 ("To state a violation of [the NSPA] in this case, the government must allege not only that Welz stole the painting but also that the painting remained stolen at the *[*44]* time it was imported in 1997."). I conclude that while there is no genuine dispute over whether the Museum imported Wally and whether the Painting was stolen, trial is warranted to determine whether the Museum knew Wally was stolen.

1. The Museum Aided and Abetted the Importation of Wally

The Museum briefly argues that the MOMA, not the Museum, imported Wally. (LM Reply Mem. 32.) Under this logic, even if all of the Government's other allegations are true, the Painting was not imported by someone with knowledge that it was stolen and therefore it is not forfeit. However, it is undisputed that Dr. Leopold, the Museum's museological director for life, signed the 1997 Agreement pursuant to which the Museum's Schiele collection was brought into the United States. (Joint 56.1 Stmt. ¶ 134.) The agreement provided that the MOMA would arrange transportation "by mutual agreement with, and with the consent of, the [Museum]." (RL Decl. Ex. T at LM 2059.) The Government has thus shown probable cause to believe the Museum and the MOMA jointly imported Wally, and the Museum offers no evidence indicating otherwise. Furthermore, if the Museum knew that Wally was stolen when it agreed to *[*45]* have the MOMA arrange the painting's transportation into the United States, it is liable for Wally's importation in violation of the NSPA even if the MOMA lacked this knowledge. See, e.g., United States v. Giles, 300 U.S. 41, 48-49 (1937) (defendant's use of

innocent intermediary did not insulate him from conviction for falsifying bank records).

2. Welz Stole *Wally*

The Museum next contends that the Government has not met its burden of showing that Welz stole Wally from Bondi. While the NSPA does not define "stolen," the Court of Appeals has held that the term should be broadly construed to encompass "'all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny.'" United States v. Long Cove Seafood, Inc., 582 F.2d 159, 163 (2d Cir. 1978) (quoting United States v. Turley, 352 U.S. 407, 417 (1957)). Its meaning does not depend on "the archaic distinctions between larceny by trespass, larceny by trick, embezzlement and obtaining properly by false pretenses." Id. (citing United States v. Benson, 548 F.2d 42, 44-46 (2d. Cir. 1977)). Rather, determination of whether property is "stolen" in the NSPA *[*46]* context depends on "whether there has been some sort of interference with a property interest." (Id.) An item is stolen if it "belonged to someone who did not . . . consent" to its being taken. United States v. Schultz, 333 F.3d 393, 399 (2d Cir. 2003).

Here, it is undisputed that Wally "belonged to" Bondi. The 1930 Kallir Catalogue reflects her as its most recent owner, and no subsequent catalogue identified by either party, including those authored by Leopold himself, includes Welz as one of *[*253]* Wally's rightful possessors. However, the parties dispute whether Bondi voluntarily surrendered the Painting to Welz. The Government contends that Welz wrongfully demanded Wally from Bondi when he visited her apartment on the eve of her escape to England in 1939. The Museum argues that Bondi sold Wally to Welz in 1938 as part of the Würthle Gallery. For the reasons below, I find that the Government has shown probable cause to believe the Painting was stolen, and no reasonable juror could find the Museum has introduced a preponderance of the evidence indicating otherwise.

a. The Government's Evidence

The Government's evidence consists primarily of Bondi's written statements; the Partial Decision rendered *[*47]* by the Austrian Restitution Commission in Bondi's action to recover the Würthle Gallery; and the undisputed fact that Welz was a Nazi and Bondi, as a Jew hoping to escape the unspeakable fate of so many who died in the Holocaust, could not refuse to comply with his wishes. The Government cites the following written statements by Bondi to show that Welz took Wally without her consent: (1) an October 3, 1957 letter from Bondi to Hunna; (2) a May 16, 1965 letter from Bondi to Kallir; (3) an August 22, 1966 letter from Bondi to Kallir; and (4) an unsigned, undated statement attributed to Bondi and discovered long after her death (the "Bondi Statement"). (Joint 56.1 Stmt. ¶¶ 17-20.) In the first two letters, Bondi recites that Wally was never part of her gallery and that Welz took the Painting from her apartment. (3/10/08 Levin Decl. Ex. 12 at JK 000053-54, JK 000057-58.) Bondi's May, 16, 1965 letter to Kallir also states that Welz gave her no compensation for the Painting. (Id. Ex. 12 at JK 000057-58.) The remaining two written statements offered by the Government assert that Welz came to Bondi's apartment, saw the Painting on her wall, and demanded she hand it over notwithstanding her objections that it was not part of her gallery and thus had not been included in the gallery's sale. (Id. Ex. 12 at LB 002290-91; Ex. 14 at US 000156.). Both of these documents *[*48]* state that, at the behest of her husband, Bondi

ultimately surrendered the Painting because she was afraid Welz would prevent them from leaving the country. (Id. Ex. 12 at LB 002290-91; Ex. 14 at US 000156.)

To further support its view that Welz stole Wally, the Government cites purported references to the Painting in both the post-war Restitution Commission's Partial Decision regarding Bondi's claim to the Würthle Gallery and her response to Welz's appeal thereof. In its Partial Decision, the Commission remarked that Welz had wrongfully "demanded a Biedermeier table and a Schiele from [Bondi]." (Id. Ex. 11 at LM 1661 (quotation marks omitted).) In her response to Welz's appeal of that decision, Bondi asserted that Welz, "without any consideration, demand[ed] objects from [her] private assets." (3/10/08 Goldblatt Decl. Ex. 7 at LB 000876-85; Joint Mem. 12.)

Finally, to reinforce the Bondi Letters and Bondi Statement insofar as they state that Bondi kept Wally separate from her gallery, the Government offers a 1925-26 Würthle Gallery Exhibition catalogue listing the Painting's owner as "Privately owned L.B." (3/10/08 Levin Decl. Ex. 13 at LB 002260), as well as a 1928 catalogue listing two Schiele paintings as belonging to the Würthle Gallery and ***[*49]*** Wally as belonging to "Lea Bondi, Vienna" (id. at LB 002269-70).

b. The Museum's Evidentiary Objections

The Museum asserts that the letters and Bondi's unsigned statement are unauthenticated, unreliable, and inadmissible hearsay. ***[*254]*** Even if this were so, as observed supra in Part II(B)(i), the Government may use inadmissible evidence to meet its initial burden of showing probable cause. See Aguilar, 337 F.3d at 236. Furthermore, as detailed below, the Museum's evidentiary objections are without merit because (1) the Government has established the authenticity of these documents pursuant to Federal Rule of Evidence 901(a), b(1), and b(8) through the testimony of the documents' custodians, (2) any objections to the trustworthiness of these documents go to their weight, not their admissibility, and (3) the documents fit within the ancient documents exception to the hearsay rule provided in Federal Rule of Evidence 803(16).

Authentication, or the provision of "evidence sufficient to support a finding that the matter in question is what its proponent claims," is a prerequisite to admissibility. Fed.R.Evid. 901(a). A showing of authenticity is sufficient if "a reasonable juror could ***[*50]*** find in favor of authenticity or identification." United States v. Tin Yat Chin, 371 F.3d 31, 38 (2d Cir. 2004). Authenticity may be established in a number of ways, including through testimony of a witness with knowledge of the proffered item, see Fed.R.Evid. 901(b)(1), or, in the case of ancient documents, with evidence that the offered material "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered," Fed.R.Evid. 901 (b)(8).

All of the Bondi letters at issue have been sufficiently authenticated by the deposition testimony of Jane Kallir (Otto Kallir's granddaughter) and Hildegard Bachert. Jane Kallir began working for her grandfather at the Gallery St. Etienne in 1977. (3/10/08 Levin Decl. Ex. 6, Kallir Dep. 8:24-9:3, Aug. 9, 2004.) She testified that the letters came from a folder containing

Kallir's correspondence with Bondi which was drawn from a larger Bondi file kept at the Gallery St. Etienne in 1984. (Id. at 67:16-68:22; 85:7-11.) She further testified that the larger Bondi file from which the folder was drawn had been maintained at the Gallery since before she began working there. (Id. at 201:20-25.) Bachert was Kallir's secretary *[*51]* from 1940 to 1978, during which time she maintained his files. (5/14/09 Levin Decl., Ex. 3, Bachert Dep. 8:22-24, 10:6-18, 14:5-7, Sept. 19, 2007.) She set up a file for Bondi documents and correspondence, which she read because she was interested in the story, and helped create the folder in which the Bondi letters were located. (Id. at 57:19-58:9, 59:5-11, 60:17-61:17, 63:10-64:24, 81:7-15; 108:14-16.)

This testimony is sufficient to show that the letters are in fact what they purport to be. They are admissible under 901(b)(1) insofar as Bachert and Kallir testified that they were part of the Gallery St. Etienne's records. See 5 Jack B. Weinstein & Margaret Berger, Weinstein's Federal Evidence, § 901.03[2] (2d ed. 2009). The letters are also authenticated under Rule 901(b)(8) in that (1) there is no allegation that they have been tampered with or otherwise altered so as to give reason to doubt their authenticity, (2) they were found in a place, namely Kallir's Gallery's files, where authentic Bondi correspondence would likely be stored, and (3) they are more than 20 years old. See Arasimowicz v. Bestfoods, Inc., 81 F. Supp. 2d 526, 529-30 (S.D.N.Y. 2000); Walker v. 300 S. Main, LLC, No. 2:05-CV-442, *2007 WL 3088097*, at *1-2 (D. Utah Oct. 22, 2007) (original documents that had been in *[*52]* the plaintiff's files for over 40 years satisfied the authentication requirements of Rule 901(b)(8)). *[*255]*

While it presents a closer question, the Government has also made an adequate prima facie showing of the Bondi Statement's authenticity under Rule 901(b)(8). At his deposition, Gideor Southwell, Bondi's great-great nephew, testified that he found this typewritten, unsigned, undated, and admittedly incomplete one-page document in a Biedermeier bureau located at the 2 Lambolle Road residence that had belonged to Bondi and was used by his grandmother, Margaret Fisher, after Bondi died. (3/10/08 Levin Decl. Ex. 7, Southwell Dep. 71:6-20, 82:12-20, Feb. 7, 2007.) Southwell testified that the document was typed on Bondi's "L.B.J." letterhead, with which he was familiar. (See id. at 175:11-21). He further testified that he had lived in the 2 Lambolle Road residence for several years in the late 80's and early 90's and that Bondi's belongings remained there long after her death in 1969. (Id. at 68:23-69:8.) Sometime between 1987 and 1990, when he was helping his grandmother "tidy the bureau," he discovered the Bondi Statement, along with other papers belonging to his grandmother and to Bondi, "in the lower drawer of the two main drawers" of the bureau. (Id. at 70:12-23, 71:25-72:11, 73:20-23.) *[*53]*

Although it is unsigned and undated, the Government has sufficiently shown that the Bondi Statement is what it purports to be. First, the appearance of this document does not raise a contrary suspicion. It contains a first-person narrative in English typed on Bondi's personal letterhead, using a typeface similar to that used by Bondi in other correspondence with Kallir, some of which she wrote in English. (See 5/14/09 Levin Decl. Ex. 5 at LM 2252; 3/10/08 Levin Decl. Ex. 12 at JK 000045-46, JK 000051-52, JK 000053-54, JK 000057-58.) As further detailed below, the narrative substantially reiterates assertions made elsewhere in Bondi's correspondence.[fn13] Second, the document was found in a likely place — namely a bureau used by Bondi at her residence in London. Finally, Southwell's testimony provides a reasonable basis for concluding that the document is more than twenty years old.

The Museum's assertions that the Bondi letters and Statement are not credible and that some of them appear to be incomplete, even if true, do not preclude a finding of authenticity for purposes of this motion. As the Government correctly observes, these arguments go to the *[*54]* weight of the evidence rather than its admissibility. See 5 Weinstein's Federal Evidence § 901.11[2] ("Any question about the credibility of [an ancient] document's contents goes to the weight the trier of fact chooses to accord to the document, not to its admissibility."); Threadgill v. Armstrong World Indus., 928 F.2d 1366, 1375-76 (3d Cir. 1991) ("[T]he point of a Rule 901(b)(8) inquiry is to determine whether the documents in question are, in fact, what they appear to be. . . . Questions as to the documents' content and completeness bear upon the weight to be accorded the evidence and do not affect the threshold question of authenticity." (quotation marks and citation omitted)).

Furthermore, the only real inconsistency observed by the Museum is that two of Bondi's letters and the Bondi Statement indicate that Bondi surrendered Wally in 1938, whereas only her August 22, 1966 letter to Kallir indicates that the transfer took place in 1939.[fn14] These materials are *[*256] [*55]* otherwise fairly consistent. As discussed above, they all state that Wally was Bondi's private property and that Welz came to her apartment and took it from her. These allegations are supported by the Partial Decision of the Restitution commission and Bondi's response to Welz's appeal therefrom. Furthermore, all the letters at issue, as well as the Bondi Statement, recount the undisputed fact that Bondi met Dr. Leopold in London after the War, when she asked him to help her recover Wally.

Having established that the Bondi letters and Statement have been adequately authenticated, the Museum's hearsay objection need not detain us long. Rule 803(16) provides a hearsay exception for ancient documents. A document falls within this exception where, as here, it meets the authenticity requirements of Rule 901(b)(8). See Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 643 (2d Cir. 2004) (letters authenticated as ancient documents *[*56]* excepted from hearsay); George v. Celotex Corp., 914 F.2d 26, 30 (2d Cir. 1990) (affirming admission of document authenticated as ancient document under hearsay exception); 5 Weinstein's Federal Evidence § 803.18 ("[I]f a document meets the requirements for authentication under Rule 901, statements in it are excepted from the hearsay rule by Rule 803(16).").

c. The Government Has Met Its Threshold Burden

In Wally III, Judge Mukasey found that Welz stole Wally within the meaning of the NSPA if he "demanded the [P]ainting from Bondi in the face of a claim that it was part of her private collection and thus unconnected to Welz's Aryanization of her gallery." *2002 WL 553532* at *16. Viewing the Government's documentary evidence, which consists of letters, the Bondi Statement, documents from Bondi's post-war restitution proceedings, and catalogues showing that Wally was not part of the Würthle Gallery, against the historical backdrop of the Anschluss, I conclude that there are ample grounds to believe that this indeed occurred. Therefore, the Government has met its threshold burden of showing probable cause to believe Welz *[*57]* stole Wally from Bondi by demanding it from her at a time when she could not refuse.

d. The Museum Has Not Met Its Burden

The burden thus shifts to the Museum to show, by a preponderance of the evidence, that Welz did not steal Wally. The Museum contends that Bondi fabricated "a dramatic 1939 transfer" of Wally to Welz when in reality she sold it as part of the Würthle Gallery more than a year before she left for England. (LM Opp. Mem. 14.) The crux of this argument, as explained by Judge Mukasey in Wally III, is that Wally cannot have been stolen because "Welz *[*257]* acquired [Wally] in connection with his Aryanization of the gallery, which, although repugnant, was legal at the time." Wally III, *2002 WL 553532*, at *16. To support this contention, the Museum offers (1) an entry in an accounting report of Welz's business conducted by unknown government officials in 1943 (before the allied invasion of Europe) indicating that Welz paid 200 Reichmarks for Wally, (2) an October 31, 1966 letter from Kallir purportedly showing that Welz "bought" the Painting, (3) documents from Bondi's restitution proceedings indicating that Bondi sold her Gallery to Welz, (4) a December 6, 1957 letter from Hunna to Bondi stating that she had "entrusted" Wally to Welz, *[*58]* and (5) documents indicating that Welz acquired Wally in 1938 rather than 1939.

These are insufficient to carry the Museum's burden. First, the anonymous accounting entry is the only evidence in the entire record directly supporting the notion that Welz paid anything for Wally. The entry reads "4 Egon Schiele Vally v. Krumau [acquired] Lea Jaray, Vienna, according to letter of March 24, 1939 [for Reichmarks 200]. (Barron Decl. Ex. C at LB 000579.) The letter to which this entry refers has not been found in any archives. (Joint Counter 56.1 Stmt. ¶ 5.)[fn15] Even if admissible, this uncorroborated entry, prepared by an unknown individual years after the event in question, is insufficient to counter Bondi's multiple written statements indicating she was not paid for the Painting and the Restitution Commission's acknowledgement that Welz had improperly *[*59]* "demanded a Biedermeier table and a Schiele from [Bondi]. (3/10/08 Levin Decl. Ex. 11 at LM 1661.)

Furthermore, the October 31, 1966 letter from Kallir to Bondi does not indicate that Welz paid for Wally but rather undermines any such contention. The Museum highlights the following language: "You wrote that . . . the painting was first `bought' by Welz from you against your will." (Barron Decl. Ex. D at JK 000044.)[fn16] The Museum argues that Kallir's use of "[t]he word `bought' clearly indicates, whether rightly or wrongly, under pressure or otherwise, or as part of an Aryanization, Welz paid for the painting."[fn17] (O/A Tr. 72:14-17.) Setting aside for a moment the undisputed fact that this statement came from a man with absolutely no first-hand knowledge of the incident that took place at Bondi's apartment nearly twenty years earlier, the cited passage clearly contradicts the Museum's interpretation. That Kallir put the word "bought" in quotes indicates that he either suspected or had been told *[*60]* otherwise, and the *[*258]* remainder of the sentence clearly indicates that Welz took Wally "against [Bondi's] will." (Barron Decl. Ex. D at JK 000044.) Thus, Kallir's October 31, 1966 letter tends to strengthen the Government's case rather than the Museum's and does nothing to controvert the Government's showing that Welz stole Wally.

The Museum's reliance on documents from Bondi's restitution proceedings, first offered for the first time at oral argument rather than addressed in its exhaustive briefing, is also misplaced. These documents consist of (1) the July 29, 1949 testimony on Welz's behalf of Luise Kremlacek, who worked at the Würthle Gallery for Bondi and then Welz; (2) a

December 4, 1947 letter from Hunna to the Vienna Police headquarters; and (3) the August 25, 1949 testimony of Engineer Karl Gerstmayer, Welz's cousin who evidently worked for him at the gallery and about whom the Museum has submitted no further information. (Leopold Museum Foundation Letter and Documents in Response to this Court's Order dated September 16, 2009 ("LM O/A Binder") Exs. 11-13.) The Museum asserts that because all of these documents say that Welz did not coerce Bondi into selling her gallery, he cannot have stolen Wally. (See LM O/A Binder Ex. 11 at LB001014 ("This business was taken over by the accused from [Bondi] in the best mutual consent."); Ex. *[*61]* 12 at LB000805 ("According to my information to date, Mr. Friedrich Welz exerted no direct personal coercion on Mrs. Jaray in executing the sales contract."); Ex. 13 at LB001022 (Bondi "placed great importance on turning over [her gallery] to Friedrich Welz, not only because of the many years of doing business with one another, but above all because she knew that Welz had the same artistic intentions (advocate of modern paintings).").) Assuming without deciding that these documents are otherwise admissible, they are irrelevant insofar as they discuss only Bondi's sale of her gallery, the Aryanization of which is undisputed, and say absolutely nothing about Wally. Furthermore, like Kallir's October 31, 1966 letter discussed above, these documents do nothing to controvert Bondi's explicit and repeated statements that Welz came to her apartment and took Wally, which was never part of her gallery, against her will.

Nor does the Hunna letter alter this analysis. There, Hunna states that he is "of the opinion that Dr. Leopold is obligated to hand over the picture" and pursue a claim against the Belvedere for its purchase price. (Barron Decl. Ex. D at JK 000027). "The prerequisite for all this", wrote Hunna, "is that the heirs of Dr. Reiger actually did receive the Picture `Vally' erroneously and [that it] was *[*62]* not sold to them by Welz (to whom you somehow entrusted it) or [they] received it in an exchange etc." (Id.) The Museum seizes on the word "entrusted" as indicating that Bondi voluntarily surrendered Wally. (LM Opp. Mem. 16.) This tortured reading is belied by the letter's recommendation that Bondi sue Leopold for the Painting because it belonged to her rather than Welz or anyone else. Furthermore, Hunna had no personal knowledge of the event in question, and his curious phrasing in one letter does not amount to a preponderance of the evidence sufficient to match that offered by the Government.

Finally, the Museum contends that chronological inconsistencies in Bondi's correspondence and the Bondi Statement support the conclusion that she sold Wally along with the Würthle Gallery. (LM Opp. Mem. 13-16.) The Museum observes that both Bondi's October 3, 1957 letter to Hunna and her March 14, 1958 letter to Kallir indicate that Welz took Wally from her in 1938 rather than 1939. (See id.). If the transfer took place in 1938, the argument *[*259]* goes, not only does it undermine the narrative contained in Bondi's August 22, 1966 letter to Kallir, which states that Welz took Wally immediately before she and her husband fled to England in 1939 (and which, the Museum argues, was prepared with an eye towards litigation and is thus incredible), but *[*63]* it also indicates that she sold the Painting as part of the Würthle Gallery because both transactions occurred in 1938.

This diversionary argument is fundamentally flawed not only because it is purely speculative but also because Bondi's statements consistently indicate that Welz stole Wally. As noted above, all of her letters, as well as the Bondi Statement, indicate that Welz took Wally from Bondi's apartment after she told him that it was her private property apart from the Würthle

Gallery. That the incident may have occurred in 1938 rather than 1939 is immaterial. See Wally III, *2002 WL 553532*, at *16 (Welz stole Wally if he "demanded the painting from Bondi in the face of a claim that it was part of her private collection and thus unconnected to [his] Aryanization of her gallery.").

In sum, no reasonable trier of fact could find that the Museum has met its evidentiary burden of showing by a preponderance of the evidence that Welz did not steal Wally. To the contrary, most of the admissible evidence contradicts the Museum's assertion that Bondi sold Wally as part of the Würthle Gallery and supports the Government's position that he took the Painting against her will. ***[*64]***

3. *Wally* Remained Stolen

This finding does not, however, end the inquiry. The Government must also show that Wally remained stolen at the time the Museum shipped it to the United States in 1997. Wally III, *2002 WL 553532*, at *16; Antique Platter, 991 F. Supp. at 232. The Museum argues that under both United States and Austrian law, even if Welz stole Wally, the Painting was longer stolen by the time the Museum acquired it. As explained below, these arguments are unavailing.

a. The Recovery Doctrine

First, the Museum argues, as it did in Wally I and Wally III, that even if Welz stole Wally, the Painting ceased to be stolen by operation of law when United States forces recovered it after World War II. Under the recovery doctrine, derived from English common law, "one cannot be convicted of receiving stolen goods if, before the stolen goods reached the receiver, the goods had been recovered by their owner or his agent, including the police." United States v. Muzii, 676 F.2d 919, 923 (2d Cir. 1982). The doctrine is rooted in agency principles, which imply a principal-agent relationship where government officials are deemed to act on the owner's behalf "because they are charged by law with doing so." Wally I, ***[*65]*** 105 F. Supp. 2d at 293 ("It seems obvious that stolen property, recaptured by the police, no longer has the status of stolen goods but, rather, is held by the police in trust for, or for the account of, the owner."); see United States v. Johnson, 767 F.2d 1259, 1267 n. 7 (8th Cir. 1985).

In Wally I, Judge Mukasey relied on the recovery doctrine in dismissing the Government's Second Amended Verified Complaint because the Government's allegations implied that United States Forces "were charged with recovering stolen items and acting on behalf of the items' true owners" and therefore Wally ceased to be stolen when it came into the RDR's possession.[fn18] 105 F. Supp. 2d at 294. However, ***[*260]*** after allowing the Government to amend its complaint in Wally II, Judge Mukasey found in Wally III that the recovery doctrine no longer barred this action. *2002 WL 553532*, at *14. In its Third Amended Verified Complaint, the Government "retracted the allegation that the United States armed forces were holding stolen works of ***[*66]*** art with an eye toward their eventual restitution, which . . . formed the predicate of the implied agency." *Id. at *15.* Specifically, the [Third] Complaint alleges that, under Military Decree Number 3, "the allied forces seized all of the property of suspected war criminals, regardless of whether it was stolen, Aryanized, or legitimately acquired." *Id.* Additionally, United States Forces had no legal duty to return seized property to its true owner

but rather were required "merely to sort all seized property and transfer it to the BDA." *Id.* Accordingly, Judge Mukasey held that "[t]his lack of both knowledge and duty makes this case unlike every other case cited to the court that applied the recovery doctrine to the police or other implied agents. It negates the existence of the requisite agency relationship." *Id.*

Similar logic precluded any finding of implied agency between Bondi and the BDA because "like the armed forces, the BDA did not know Wally was stolen." *Id.* Furthermore, "the BDA had divided loyalties because it was also responsible for deciding whether owners of cultural assets should be permitted to export them from Austria. . . . [The BDA] often sought to keep certain works in Austria and place them in Austrian museums." *Id. at *15. [*67]*

The Museum now argues that the evidence supports the Government's original allegations and, as in Wally I, compels re-application of the recovery doctrine to Wally. (LM Mem. 7-12.) The Government has shown probable cause to believe otherwise. As the Museum concedes in its moving brief, "'[t]he point of the Recovery Doctrine rests on the agent's knowledge that stolen property has been recovered." (LM Mem. at 11 (quoting Wally III, *2002 WL 553532*, at *15).) The Government has provided ample evidence that United States forces did not know Wally was stolen when they seized it. After World War II, the United States military seized millions of items of property pursuant to military decrees governing its operations. (3/10/08 Levin Decl. Ex. 8, Adams Dep. 56:17-57:9, Mar. 28, 2007; Joint 56.1 Stmt. ¶ 27). As Judge Mukasey observed, these decrees authorized seizure of all property of persons, like Welz, who were detained by the military, regardless of whether such property was stolen. See Wally III, *2002 WL 553532*, at *15; (Joint 56.1 Stmt. ¶ 27). All artworks confiscated in this fashion were then transferred to their countries of origin. (See Adams Dep. 55:19-56:4; Joint 56.1 Stmt. ¶ 29.) The sheer volume of such seizures provides ample reason to doubt that United States forces had any real knowledge of Wally's history. Nor is there any indication that the BDA *[*68]* knew Wally was stolen, and, as Judge Mukasey noted, even if it had, it cannot be deemed to have been Bondi's agent due to "divided loyalties." Wally III, *2002 WL 553532*, at *15; (see 3/10/08 Levin Decl. Ex. 20, Declaration of Dr. Peter Lambert sworn to 3/17/00 ("3/17/00 Lambert Decl."), ¶ 32).

For its part, the Museum has submitted virtually no evidence, much less a preponderance, to support a finding that either *[*261]* United States Forces or the BDA knew Wally was stolen. It principally relies on the following language from the 1947 Receipt and Agreement, describing the artworks delivered by the RDR to the BDA (among which Wally, although not specifically listed, was apparently included):

Paintings purchased during the war by Frederic Wels, Salzburg, from the confiscated collection of Dr. Heinrich Reiger (deceased) former Jew of Vienna, and recovered from his collection in Salzburg.

(LM Mem. 11; 3/10/08 Levin Decl. Ex. 11 at LM 0213.) Yet the Museum does not explain how this language supports its theory. Quite to the contrary, as the Government observes, the paintings are described as having been "purchased" rather than wrongfully taken. (Joint Opp. Mem. 10-11.) Even assuming the RDR and BDA knew these paintings were wrongfully taken because they belonged to a Jew killed in *[*69]* the holocaust, there is no indication in the above language (or indeed in any of the alleged facts) that the Rieger collection had not been

Aryanized and thus, according to the Museum's own logic (at least when addressing the issue of whether Welz stole Wally in the first place), never stolen. The Museum cannot have it both ways: it cannot credibly maintain that Wally was not stolen and simultaneously assert that the RDR and BDA knew it was. The cases relied on by the Museum to support application of the recovery doctrine here are thus inapposite because they address situations in which the governmental agency that purportedly recovered once-stolen property knew it had been stolen. See Muzii, 676 F.2d 919; United States v. Warshawsky, 818 F. Supp. 181 (E.D. Mich. 1993), aff'd in part, rev'd in part, 20 F.3d 204 (6th Cir. 1994).

Even assuming arguendo that the RDR and the BDA knew Wally was stolen, there is no evidence that either was under a legally enforceable duty to return the Painting to Bondi. Cf. Wally I, 105 F. Supp. 2d at 293 (stating that the doctrine applies to goods recovered by government officials "charged by law" with acting on the owner's behalf.) The Museum relies on language from the Receipt and Agreement indicating that the "items described in Schedule `A' . . . will be returned to their lawful *[*70]* owners." (3/10/08 Levin Decl. Ex. 11 at LM 0211.) However, the attached schedule does not list Wally but rather "His Wife's Portrait." (Id. at LM 0213.) Also, with respect to the BDA at least, the Government has shown (and the Museum has offered no evidence to rebut) that its primary interest was in keeping Austrian cultural objects in Austria rather than in restitution. (See 3/17/00 Lambert Decl. ¶ 32.)

Finally, even interpreting the evidence as the Museum does, it is unclear how either the RDR or the BDA could be deemed to have acted as Bondi's agent. The Museum asserts that Wally 's transfer was prompted by lawyers for the Rieger heirs, who sought restitution of their client's interests, not Bondi's. (LM Mem. 12.) Accordingly, I see no reason to disturb Judge Mukasey's finding in Wally III that the recovery doctrine is inapposite here.[fn19]

b. Bondi's Restitution Proceedings

The Museum next contends that even if Welz stole Wally, the Painting ceased to be stolen when Bondi settled the claims she brought against him before the *[*262]* Restitution Commission and thus regained her gallery. This argument *[*71]* turns on whether Bondi sought to recover Wally during those restitution proceedings, the precise contours of which are unknown. (LM Counter 56.1 Stmt. ¶ 34.) The Government has shown probable cause to believe she did not by (1) offering Bondi's correspondence, the Bondi Statement, and two catalogues described in Part II(B)(ii)(2)(a) supra, all of which indicate that Wally was never part of the Würthle Gallery; and (2) observing that, although it mentions Welz's reprehensible behavior with respect to "a Biedermeier table and a Schiele," the Restitution Commission's Partial Decision orders only that the Würthle Gallery be returned to Bondi and that Welz provide an accounting of the gallery's revenues since April 1, 1938. (3/10/08 Levin Decl. Ex. 11 at LM 1661-62 (quotation marks omitted).)

The burden thus shifts to the Museum to show that Bondi did in fact claim Wally in her restitution proceedings. To this end, the Museum relies on a declaration of its Austrian law expert, Dr. Peter Konwitschka, who asserts that Bondi could have claimed Wally in that proceeding. (Second Konwitschka Decl. ¶ 16.) It then seizes on the Partial Decision's conclusion that Welz "did not always conduct himself in a fair and generous manner, e.g. . . . when he demanded a `Biedermeier table *[*72]* and a Schiele' from the Claimant," arguing this

language indicates that she had in fact made such a claim. (3/10/08 Levin Decl. Ex. 11 at LM 1661; LM Opp. Mem. at 17.)

Such speculation hardly amounts to a preponderance of the evidence.[fn20] That Bondi may have been able to claim Wally during her restitution proceedings does not mean she actually did so. Furthermore, as the Government observes, the Partial Decision's reference to Welz's failure to "conduct himself in a fair and generous manner" with regard to "a Biedermier table and a Schiele" might well indicate that the Commission was distinguishing these items from property belonging to the Gallery and thus subject to appropriation under the Aryanization laws, in which case the reference to a Schiele would not necessarily imply that Bondi had submitted a separate claim for it in those same proceedings. ***[*73]***

c. *Wally*'s Status as Stolen Under Austrian Law

Finally, the Museum argues that Wally lost its stolen status by operation of Austrian law. Wally I and III established that "although federal law determines whether property has been stolen, local law `controls the analytically prior issues of (a) whether any person or entity has a property interest in the item such that it can be stolen, and (b) whether the receiver of the item has a property interest in it.'" Wally III, *2002 WL 553532*, at *16 (quoting Wally I, 105 F. Supp. 2d at 292). The Museum argues that in the years between the close of World War II and Wally 's 1997 importation, either the Belvedere or Dr. Leopold acquired title to the Painting. This Court is obliged to resolve "[i]ssues involving the interpretation of foreign law . . . as a matter of law." Antique Platter, 991 F. Supp. at 231. For the reasons below, I conclude that the Museum's arguments must fail. ***[*263]***

aa. Prescriptive Possession by the Belvedere

As it did in Wally III, the Museum argues that "the Belvedere probably had the requisite confidence to acquire title to [Wally]" by prescription and then transfer its ***[*74]*** valid property interest to Dr. Leopold. (LM Opp. Mem. 19.) Under the Austrian law, "a possessor of property may acquire title to that property if the possession is based on legal title (purchase or exchange) and extends throughout the statutory period accompanied by the possessor's belief that the possession is lawful." Wally III, *2002 WL 553532*, at *17. However, a possessor lacks the requisite confidence to acquire title by prescription "if, at any time during the prescription period, the possessor had any objective reason to doubt his claim, or if he was negligent in maintaining his belief of lawful possession." (*Id.*) If the possessor has an objective reason to doubt his ownership, he may regain confidence by performing an investigation sufficient to remove any such doubt, at which point the statutory period begins to run anew. (Konwitschka Decl. ¶¶ 24-26, 61; Lambert Resp. Decl. ¶ 9.)

The Government advances the same arguments it used in Wally III for why the Belvedere never acquired title to the Painting under Austrian law, now bolstered by evidentiary citations. It argues that: (1) the Belvedere did not acquire Wally by purchase contract because the Painting had been confused with a Schiele drawing called "Portrait of His Wife" and mistakenly given to the Rieger heirs, who ***[*75]*** therefore could not convey valid title (Joint Mem. 14 n. 12)[fn22]; (2) the Belvedere had cause to suspect that Wally ***[*76]*** did not belong to the Rieger heirs because when Garzarolli, Balke, Novotny, and Broda's secretary inspected

the works restituted to the Rieger heirs to determine whether the Belvedere should acquire them, they described Wally as "Portrait of a Woman," while handwritten notes indicate they knew it depicted "Wally Neuzil from Vienna" and no painting matching this description had been restituted to the Rieger heirs (Joint Mem. 17-18)[fn23]; and (3) as evidenced by the Bondi Statement, Bondi *[*264]* visited the Belvedere and claimed ownership of Wally, thereby providing an independent objective reason for the Belvedere to doubt it owned the Painting (Joint Mem. 20). At the very least, Bondi's assertion in the Bondi Statement that she laid claim to Wally at the Belvedere is sufficient to satisfy the Government's threshold showing of probable cause to believe the Belvedere lacked the requisite confidence to acquire title to Wally by prescription. (See 3/10/08 Levin Decl. Ex. 14 at 000156.)

The Museum has not met its burden of showing otherwise. It argues that (1) since no title is written on *[*77]* Wally itself, it is of no moment that the Painting was variously referred to as "Portrait of His Wife" or "Portrait of a Woman" (LM Opp. Mem. 20-21); (2) the Government has not shown that there ever was a "drawing" called "Portrait of His Wife" and thus there is no reason to suspect that this designation in the list of items claimed by, and restituted to, the Rieger heirs was not Wally (See LM Opp. Mem. 22); (3) Wally was properly restituted to the Rieger heirs by the BDA as a result of the restitution proceedings they brought against Welz (LM Opp. Mem. 25); and (4) Bondi never laid claim to Wally (LM Opp. Mem. 11).

The Museum cites two documents to support its first three contentions. The first is a March 28, 1950 letter from Mueller (the Rieger heirs' lawyer) to Dr. Blauensteiner (of the Belvedere) noting that, "according to Dr. Rieger's list," item # 3 on the list of items he claimed as part of the Rieger collection ("Portrait of His Wife") "was in [Dr. Rieger's] possession before 1938." (Barron Decl. Ex. B at 001747.) The second is a BDA record dated March 31, 1950 which states that "[a]ccording to information conveyed by phone by the law firm of Dr. Broda, the picture listed under No. 3 `Schiele, Portrait of his *[*78]* Wife' is also part of the collection of Dr. Rieger." (Id. Ex. B at 001946.)

However, in his letter, Mueller also expressly notes that "[a]s far as I know, it was determined at the time that the Schiele picture `Portrait of his Wife' listed under 3. belonged to the Jaray collection. Unfortunately, I am unable to examine the accuracy of this statement." (Id. Ex. B at 001747.) This alone should have been sufficient cause for the Belvedere to suspect that Wally was not part of the Rieger collection, even setting all other Government contentions aside and assuming that, as the Museum argues, Bondi never went to the Belvedere and personally laid claim to the Painting. Yet the Museum cites no evidence indicating that the Belvedere conducted any type of follow-up investigation or contacted Bondi, the owner of the Jaray collection.[fn24] *[*79]*

Furthermore, Dr. Leopold's own 2008 declaration, submitted by the Museum in support of its motion, makes it unnecessary to further scrutinize the labyrinthine arguments regarding the Belvedere's confidence in its purported ownership of Wally. The Museum concedes, by virtue of the declaration of its Austrian law expert, *[*265]* that when he met Bondi in London, Dr. Leopold "encountered a suspicious fact" sufficient to cause him to doubt the Belvedere's ownership of Wally. (Konwitschka Decl. ¶¶ 26-27.) Dr. Leopold asserts that this meeting took place "[i]n the Summer of 1953." (RL Decl. ¶ 9.) He further declares that he told the Belvedere's Garzarolli of Bondi's claims "in late Summer or Fall of 1953." (Id. ¶ 17.) It is

undisputed that the Belvedere obtained Wally from the Rieger heirs after the parties agreed to a contract of sale for eleven works, including "Portrait of a Woman," dated December 27, 1950. (Joint 56.1 Stmt. ¶ 77.) Thus, even assuming that the Belvedere had a good faith belief in its ownership of Wally when it first acquired the Painting from the Rieger heirs, it encountered a suspicious fact triggering a need for further investigation when Dr. *[*80]* Leopold informed Garzarolli of Bondi's claim. As this occurred in "Summer or Fall" of 1953, and the shortest potentially applicable statutory prescription period is three years (Konwitschka Decl. ¶¶ 54-57), the Belvedere did not possess Wally long enough to acquire the Painting by prescription before it encountered a suspicious fact.

bb. Dr. Leopold Did Not Acquire Title

The Museum's contention that Dr. Leopold acquired Wally either as a bona fide purchaser or by prescription ultimately fails because he too had reason to doubt the Belvedere's ownership and never performed an investigation sufficient to assuage that doubt.[fn25] Under Austrian law, even slight negligence by an acquirer (through either bona fide purchase or prescription) destroys the confidence necessary to gain title. (Lambert Resp. Decl. ¶ 7.) Negligence is "the non-observance of the care and diligence usually required in the relevant circumstances." (Id. ¶ 8.) *[*81]* Should a purchaser have reason to suspect the seller's ownership, he is required either to return the item in question to its true owner or to conduct a reasonable investigation sufficient to "credibly remove" any ownership doubts. (Konwitschka Decl. ¶ 24; Lambert Resp. Decl. ¶ 9.) In assessing the adequacy of this investigation, Austrian courts take into account any special knowledge pertinent to the context of the exchange; for example, "the Austrian Supreme Court has required business people to use the special knowledge that is generally available to other business people." (Lambert Resp. Decl. ¶ 8; see also Third Konwitschka Decl. ¶ 29(2) ("'The scope of diligence is determined according to the common practice and the concrete suspicious fact.'") (quoting Austrian Supreme Court, Judgment dated May 15, 2001, Index No. 5 Ob 324/00h)).) However, this "duty to make inquiries is limited to a reasonable expenditure of time and efforts." (Third Konwitschka Decl. ¶ 29(1) (quoting Austrian Supreme Court, Judgment dated November 23, 1993, Index No. 5 Ob 563/93).)

As discussed supra in Part II(B)(ii)(3)(c)(aa), the Museum concedes in its proffered expert testimony that Leopold's meeting with Bondi in London constituted an objective reason to doubt the Belvedere's ownership of *[*82]* Wally that could not be dispelled without adequate investigation.[fn26] *[*266]* (Konwitschka Decl. ¶¶ 26-27 ("Dr. Leopold encountered a suspicious fact . . . in the meeting with Bondi in her gallery in London in 1953 when Bondi told him that she had a claim to the Painting. . . . Dr. Leopold therefore was obliged to do additional investigation.") (emphasis added).) Relying almost exclusively on Dr. Leopold's 2008 Declaration, the Museum now argues that he made sufficient inquiries into Bondi's claim.[fn27] *[*267]* *[*83]*

According to Dr. Leopold's declaration, Bondi told him in 1953 that "she had a claim to the picture" and asked for his help regaining it. (RL Decl. ¶ 12.) She did not tell him, nor did he inquire, how she had lost Wally. (Id. ¶ 13.) Dr. Leopold informed Garzarolli of Bondi's claim in late summer or fall of 1953. (Id. ¶ 17.) At that time, Garzarolli told him that he had never heard of Bondi's ownership claim and the lawyers for the Rieger heirs had assured him that Wally was part of the Rieger collection. (Id.) Dr. Leopold thus "concluded that Mrs. Jaray had sold

the picture to Dr. Rieger" because his heirs sold it to the Belvedere. (Id. ¶ 18.)

That winter, Bondi told him she was coming to Vienna, and, at her behest, Dr. Leopold arranged a meeting between Bondi and Garzarolli. (Id. ¶ 19.) Bondi agreed to call him after she met Garzarolli but never did so. (Id. ¶ 21.) A month later, Dr. Leopold spoke with Garzarolli, who said he had twice met with Bondi but she never spoke of her claim to Wally. (Id. ¶ 22.) Garzarolli further remarked "You *[*84]* see? It cannot be true what Mrs. Jaray had told you about her alleged ownership rights to the picture. The picture belonged to the heirs of Dr. Rieger." (Id.) Finally, Leopold states that he again met Bondi in London in June of 1954. (Id. ¶ 23.) He asked why she had not called him and why she did not tell Garzarolli of her claim to Wally. (Id.) Bondi responded: "Let's drop it. I do not want to talk about it any more."[fn28] (Id.)

The Museum, casting Leopold as a 28 year-old medical student and a neophyte to the art world, argues that Dr. Leopold thus resolved any doubt that the Rieger heirs, and the Belvedere, owned Wally. I disagree. As a threshold matter, I note that Dr. Leopold was an experienced art buyer by the time he met Bondi. He had begun acquiring works by Schiele three years earlier (id. ¶¶ 6-7); he went to London to acquire yet another Schiele painting from a different art dealer (id. ¶ 9); and he had studied the 1930 Kallir catalogue listing Bondi as Wally's most recent owner *[*85]* (LM 56.1 Stmt. ¶ 37). Dr. Leopold also knew Bondi was Jewish and cannot have been ignorant of the indisputable fact that Nazi persecution gave reason to suspect the provenance of artworks that had formerly belonged to Jews. (See Lambert Resp. Decl. ¶ 20.)

I need not hold that, under Austrian law, Dr. Leopold's knowledge of Bondi's claim required him to do extensive provenance research in order to find his cursory investigation inadequate to dispel any ownership doubts. Dr. Leopold's declaration makes readily apparent that soon after Bondi told him she owned Wally, he "concluded that Mrs. Jaray had sold the picture to Dr. Rieger" on the word of Garzarolli alone. (See RL Decl. ¶ 23.) Notably, he sought no documentation whatsoever regarding Wally's provenance, even though the last catalogue addressing the issue listed Bondi as its owner.[fn29] Nor did he contact either the Rieger heirs or their lawyers. He did not even *[*86]* ask Bondi why she thought the Painting was hers or how she had lost it to begin with. Rather, he simply asked the party from whom he hoped to acquire Wally to deal with the issue and looked no further.[fn30] Dr. Leopold cannot be said to have reasonably dispelled any ownership doubts by relying solely on the seller's uncorroborated word.

The Museum's strongest argument is that Bondi herself told Dr. Leopold to *[*268]* "drop the matter" when they met for the second time in London in June of 1954. Even under the facts as presented by Dr. Leopold, however, Bondi did not rescind her claim to Wally. She simply said she did not *[*87]* want to talk about it. Furthermore, although Bondi did not know it, Dr. Leopold clearly contemplated acquiring Wally for himself at that time. Even before this alleged second meeting with Bondi, he had begun discussing a possible exchange with the Belvedere, and Garzarolli specifically, that same month. (RL Decl. ¶ 25.) Nevertheless, Dr. Leopold never told Bondi of his intentions nor did he ask why she thought Wally belonged to her. Bondi might well have reacted differently had she known what Dr. Leopold was thinking. [fn31] In short, had he been truly interested in resolving any doubts as to Wally's ownership,

Dr. Leopold would have disclosed this information and asked Bondi for the basis of her claim. His failure to do so was plainly negligent and serves to vitiate any claim to good-faith acquisition he might otherwise have had.

I conclude that, as a matter of law, Dr. Leopold cannot have acquired good title to Wally either as a bona fide purchaser or by prescription. He was not a bona fide purchaser because he had objective reason to doubt the Belvedere's ownership before he acquired Wally, and his *[*88]* minimal efforts did not dispel that doubt.[fn32] Nor, with respect to acquisition by prescription, did he perform an adequate investigation after he acquired Wally. The Museum's argument that Dr. Leopold became confident in his ownership after exchanging letters with Hunna in 1957 makes little sense. (Konwitschka Decl. ¶ 60.) Hunna claimed that Bondi owned Wally. (RL Decl. Ex. N at LM 3832-33.) Dr. Leopold responded by describing why he had gotten the Painting and that Garzarolli had assured him it belonged to the Rieger heirs; he made no mention of any 1954 meeting with Bondi.[fn33] (Id. Ex. O at LM 1255-56.) When Hunna *[*89]* responded that Bondi still asserted her ownership right and the Rieger heirs had obtained Wally by mistake, Dr. Leopold had Garzarolli respond. (Id. Ex. P at 3830-31; Ex. Q at LM 3829.) That Hunna did not send Dr. Leopold further correspondence on the matter does not mean that the doubts raised were laid to rest. *[*269]* Dr. Leopold knew that Bondi still asserted a claim and refused to give her the Painting. The Museum cites no authority indicating that a possessor thus aware of an adverse ownership claim nonetheless holds the property at issue in good faith unless the adverse party then sues for it. Objective doubts must be resolved by adequate investigation, and Dr. Leopold admittedly investigated the matter no further.[fn34] *[*90]*

4. Scienter

The Government has thus far shown probable cause to believe that Wally was stolen and remained so until it arrived in this country, whereas the Museum has not met its burden of showing otherwise. However, this is not alone sufficient to render the Painting subject to forfeiture under the pre-CAFRA NSPA. The Government must also show that the Museum imported Wally into the United States knowing it was either stolen or converted. To this end, the Government contends that Dr. Leopold either knew Wally was stolen or himself converted it and that his knowledge should be attributed to the Museum under agency principles. I conclude that the trier of fact must determine whether Dr. Leopold knew the Painting was either stolen or converted. Should the jury find that he did, his knowledge will be imputed to the Museum.

a. Whether Dr. Leopold knew *Wally* was stolen

My conclusion that, under Austrian law, Dr. Leopold did not perform an adequate investigation to obviate reasonable suspicion that Wally belonged to Bondi does not compel a finding that he knew someone stole it from her. It is possible that, while Dr. Leopold's efforts to remove *[*91]* a reasonable doubt that he had title to the Painting were legally insufficient to support acquisition by prescription under Austrian law, they were made in good faith. Indeed, as the Museum observes, the Government has offered no evidence indicating that Bondi ever told Dr. Leopold how she lost Wally.

On the other hand, Dr. Leopold need not have been expressly told that Wally was stolen to have known it was. The Painting is also subject to forfeiture if Dr. Leopold was aware of a high probability that Wally was stolen and deliberately looked the other way. See, e.g., United States v. Reyes, 302 F.3d 48, 54 (2d Cir. 2002) ("[D]eliberate ignorance and positive knowledge are equally culpable. . . . [t]o act `knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, `positive' knowledge is not required.") (quoting United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976) (en banc)). The Government may rely on circumstantial evidence to show that Dr. Leopold had the requisite knowledge to render Wally forfeit. See United States v. Spencer, 439 F.2d 1047, 1049 (2d Cir. 1971). ***[*92]***

aa. The Government's Evidence

The Government has produced sufficient evidence to support a finding of probable cause to believe Dr. Leopold knew Wally was stolen or deliberately avoided learning that fact. To this end, in addition to emphasizing the inadequacy of Dr. Leopold's investigation of Bondi's ownership claim, the Government relies on the haste with which Dr. Leopold acquired Wally, Hunna and Bondi's correspondence, and Dr. Leopold's ***[*270]*** subsequent publications of the Painting's provenance. First, the Government observes that the Austrian Ministry of Education's approval of the Belvedere's exchange of Wally for "Rainerbub" was expedited "due to the subsequent threat of one picture owner to withdraw his offer if the exchange were further delayed." (3/10/08 Levin Decl. Ex. 11 at LM 1816; RL Decl. Ex. F at LM 1795.) The Government contends that Dr. Leopold was the referenced "picture owner" and that his rush to conclude the exchange evidences his awareness that he doubted whether the Rieger heirs, and thus the Belvedere, really owned Wally.[fn35] (Joint Opp. Mem. 25.) ***[*93]***

The Government next argues that various correspondence demonstrates Dr. Leopold's guilty knowledge. Hunna's two letters to Dr. Leopold in 1957 reminded him of Bondi's ownership claim, yet he made no further inquiries on the subject.[fn36] Furthermore, in her October 3, 1957 letter to Hunna, Bondi asserts that after discovering Dr. Leopold had acquired Wally, she encountered him at an exhibition "and asked him at once whether he had brought my picture along with him. He was very self-conscious and said that must be settled in some way, but unfortunately he was called away immediately. . . ." (3/10/08 Levin Decl. Ex. 12 at JK 000053-54.)

The Government also cites Dr. Leopold's own publications as evidence that he knew, or deliberately avoided knowing, that Wally was stolen. It argues that Dr. Leopold's 1972 book on Schiele is fundamentally inconsistent with his assertion that he believed the Riegers ever owned Wally for two reasons. First, the book contains an essay on Rieger that contains the following ***[*94]*** language (translated from German): "In addition to two paintings ["Cardinal and Nun" and "Lovers"], Dr. Rieger later owned a substantial collection of Schiele's drawings and watercolors, which was exhibited at the `Neue Galerie' in 1928." (RL Opp. Decl. Ex. A at 669.) The Government contends that had he believed Dr. Rieger owned Wally, he would have said so here. (Joint Reply Mem. 29.)[fn37] Second, it seizes on the following language in the introduction to the 1972 book's catalogue raisonné: "[s]equences of ownership . . . were included only if the information in [the 1966 Kallir Catalogue] had to be corrected or

substantially supplemented." (5/14/09 Levin Decl. Ex. 4 at LB000255.) The 1966 Kallir catalogue gave the following provenance for Wally: Emil Toepfer, Vienna; Richard Lanyi, Vienna; Lea Bondi, Vienna; Dr. Rudolf Leopold, Vienna. (Joint 56.1 Stmt. ¶ 118.) Dr. Leopold's book lists only Emil Toepfer and himself. (Id. ¶ 123.) Thus, the Government asserts, Dr. Leopold's failure to include Dr. Rieger, his heirs, or the Belvedere, despite the fact *[*271]* that their purported ownership had not been reported in the 1966 *[*95]* Kallir catalogue, shows that he knew they never owned Wally.

Finally, the Government argues that Dr. Leopold's 1995 revision of Wally's provenance evidences an overt attempt to legitimate his ownership through sheer fabrication. Here, for the first time, Dr. Leopold listed Dr. Rieger, Heinrich Rieger, Jr. and the Belvedere as prior owners of Wally. (Id. ¶ 130.) Because he had not previously done so, the Government thus infers that Dr. Leopold knew Wally never belonged to the Rieger heirs but wanted to forestall any uncomfortable questions about the Museum's title to the Painting.

This showing is sufficient to establish probable cause to believe that Dr. Leopold knew, or consciously avoided knowing, that Wally was stolen. He admittedly knew that Bondi claimed the painting but never asked her how she lost it. He also knew that she owned Wally before World War II and that she had fled Austria once the Nazis took over. Dr. Leopold purportedly relied solely on Garzarolli's word that the Riegers had owned the Painting when he acquired it from the Belvedere, and he never sought any sort of documentary confirmation or attempted to contact the Rieger heirs or question Bondi himself. This, added to the evidence indicating he rushed the exchange whereby he *[*96]* acquired Wally and, despite authoring one of the definitive books on Schiele, made no mention of the Riegers' supposed ownership of the Painting until 1995, provides reasonable grounds to believe he effectively knew that Wally was stolen.

bb. The Museum's Evidence Raises a Genuine Factual Dispute as to Whether It Has Met Its Evidentiary Burden

For its part, the Museum offers multiple reasons to doubt that Dr. Leopold knew, or avoided knowing, the Painting was stolen: (1) he investigated Bondi's claim, (2) he made no attempt to hide his acquisition of Wally, and (3) his publications were not intentionally misleading. Making all reasonable inferences in the Museum's favor, as I must when assessing whether to grant the Government's summary judgment motion, these arguments and the evidence supporting them raise a triable issue of fact as to whether the Museum has shown by a preponderance of the evidence that Dr. Leopold lacked the requisite scienter to render Wally forfeit.

First, the Museum reiterates the arguments it made in support of Dr. Leopold's claim to good faith ownership under Austrian law, namely that after his 1953 encounter *[*97]* with Bondi (during which time she never told him that Welz had stolen Wally), Dr. Leopold arranged for Bondi to meet with Garzarolli to claim Wally from the Belvedere but she declined to do so (RL Decl. ¶ 22); he confirmed with Garzarolli that Wally belonged to the Rieger heirs before the Belvedere acquired it (id. ¶ 17); and when he asked Bondi about the Painting in 1954 she asked him to "drop it" (id. ¶ 23). Dr. Garzarolli's December 3, 1957 letter to Hunna corroborates this account insofar as it asserts that Bondi twice visited the Belvedere without mentioning any claim to Wally and that the Painting had been restituted to the Rieger heirs.

(RL Decl. Ex. Q at LM 3829.) Dr. Leopold also asserts that Mueller told him Wally had belonged to the Rieger collection. (RL Decl. ¶ 51.)

That I have already rejected these arguments when applied to the question of whether Dr. Leopold restored the requisite level of confidence in his ownership to acquire the Painting by prescription does not mean they have no bearing here. Even if Dr. Leopold's investigation of the suspicious fact he undoubtedly encountered when Bondi told him Wally was hers *[*272]* had been performed in good faith, it was too perfunctory to serve as a basis for his acquisition of title to the Painting under Austrian law. However, if this were the case, and Dr. Leopold merely acted negligently, he *[*98]* may have lacked the scienter necessary to render Wally forfeit.

Additionally, the Museum observes that Dr. Leopold did not try to hide his acquisition of Wally. To the contrary, he publicly exhibited the Painting on multiple occasions and in various countries besides Austria, including Japan, Switzerland, and London, before it became part of the Museum's collection. (LM 56.1 Stmt. ¶ 65.) Indeed, according to Hunna's letter, Bondi discovered Leopold had acquired Wally at just such an exhibition. (See RL Decl. Ex. N at LM 3832). The Museum further argues that the silence of Bondi and her heirs between 1958 and the initiation of this lawsuit long ago laid to rest any fears Dr. Leopold may have had that Wally was stolen. (LM Mem. 42-46.)

The Museum also offers evidence to counter the Government's spin on Dr. Leopold's publications. With regard to Dr. Leopold's 1972 book, it cites yet another Declaration by Dr. Leopold indicating that he never intended to imply that the only two paintings owned by Dr. Rieger were Cardinal and Nun and Lovers. (RL Opp. Decl. ¶¶ 2-3.) To support this statement, Dr. Leopold observes that his 1972 book lists Dr. Rieger in the provenance of other Schiele paintings, a point to which the Government *[*99]* has not responded. (Id. ¶ 3.) The Museum also submits that Dr. Leopold's failure to list the Rieger heirs in Wally's provenance at this time was not due to any suspicion that they had not owned the Painting but rather conformed with the book's stated practice of listing only a paintings first or very early owner followed by its most recent owner. (See 5/14/09 Levin Decl. Ex. 4 at LB000255; LM Counter 56.1 Stmt. ¶ 125.) Because the 1966 Kallir Catalogue already listed Emil Toepfer and Dr. Leopold, no revision was necessary.[fn38] (See LM Opp. Mem. 29 n. 38.)

With respect to the 1995 provenance, the Museum underscores the fact that Dr. Leopold's assistant, rather than Dr. Leopold, suggested expanding Wally's provenance to include interim owners between Toepfer and Dr. Leopold. *[*100]* Thus, the Museum argues, Dr. Leopold was not looking to falsify Wally's history, but rather added information he sincerely believed to be true. (See RL Opp. Decl. ¶ 9 ("I had no doubt that Dr. Heinrich Rieger, the Rieger Estate, and the Belvedere were the owners of the Painting.").)

cc. Trial is warranted

Both the Government and the Museum have thus offered conflicting evidence to support their respective positions on Dr. Leopold's knowledge with respect to Wally. If, as the Museum contends, Dr. Leopold actually believed that the Painting was not stolen, he cannot be said to have *[*273]* consciously avoided that fact. United States v. Schultz, 333 F.3d 393, 413 (2d Cir.

2003). If, on the other hand, he purposely rushed his acquisition of Wally because he knew it belonged to Bondi and sought to conceal this fact in his later publications, Dr. Leopold undoubtedly had the requisite knowledge to render Wally forfeit. I cannot say that, making all reasonable inferences in favor of the non-moving party with respect to each motion, there is only one choice for a reasonable trier of fact on this issue. Accordingly, the question is properly one for the jury. As I have already found that the Government has met its threshold burden of showing probable cause to believe Dr. ***[*101]*** Leopold knew Wally was stolen, the Museum will bear the burden of proving at trial that he did not. See United States v. Collado, 348 F.3d 323, 327 (2d Cir. 2003).

b. Whether Dr. Leopold Converted *Wally*

The Government's contention that Dr. Leopold criminally converted Wally presents a similar question for the trier of fact. Criminal conversion under the NSPA is "the `[u]nauthorized and wrongful exercise of dominion and control over another's personal property, to exclusion of or inconsistent with [the] rights of [the] owner.'" Wally III, *2002 WL 553532*, at *24 (quoting United States v. Smith, 686 F.2d 234, 242 (5th Cir. 1982)). However, to have criminally converted Wally, Dr. Leopold cannot merely have been negligent in acquiring it.[fn39] See United States v. Bright, 517 F.2d 584, 587 (2d Cir. 1975) ("A negligent or a foolish person is not a criminal when criminal intent is an ingredient."). He must have had the requisite mens rea, i.e., he must have known that his possession was wrongful. See id. (stating that in cases involving receipt of stolen ***[*102]*** goods, knowledge required to prove guilt "should always embrace the ultimate concept of mens rea"); see also Wally III, *2002 WL 553532*, at *24 (stating that Dr. Leopold must have intended to convert Wally.) The Government has established probable cause to believe Dr. Leopold knew he wrongfully acquired Wally by virtue of the undisputed fact that he knew Bondi claimed to own the Painting. However, as discussed above with respect to whether Dr. Leopold knew Wally was stolen, the Museum's arguments that he attempted to investigate Bondi's claims, believed in Garzarolli and Mueller's assurances that the Belvedere had lawfully acquired Wally from the Rieger heirs, and made no effort to hide his acquisition of the Painting are sufficient to raise a triable issue of fact as to whether Dr. Leopold had the requisite intent to effect a criminal conversion. At trial, the Museum will bear the burden of proving that he did not.

c. Dr. Leopold's Knowledge may be imputed to the Museum.

In Wally III, Judge Mukasey held that Dr. Leopold's knowledge as to Wally's status is properly imputed to the Museum. *2002 WL 553532*, at *24 ("All parties concede that Dr. Leopold's knowledge can be imputed to the Leopold Foundation by reason of his having been the Museological ***[*103]*** Director at all relevant times."). His conclusion was well-founded, as the Government repeatedly argued that the Museum knew what Dr. Leopold knew, and the Museum offered no rebuttal. (See Government's Memorandum of Law in Opposition to Motions to Dismiss the Third Amended Verified Complaint of the Leopold Museum-Privatstiftung ***[*274]*** and the Museum of Modern Art as Claimants and the American Association of Museums, et al. as Amici Curiae 29 ("[t]he Leopold, through its Museological Director, Dr. Leopold, imported the painting with knowledge that it was stolen property."); 124 ("[t]he Complaint contains ample allegations . . . that the Leopold, through it [sic] Museological Director, Dr. Leopold, had the requisite knowledge that Wally had been obtained by

conversion."); 124 ("[t]he Leopold, through Dr. Leopold, knew Wally to be stolen and converted property at the time it was imported into the United States."); 125 ("[t]he Leopold, through Dr. Leopold, imported Wally with knowledge that it was stolen from Bondi.").) Now, more than six years later, the Museum belatedly contests Judge Mukasey's finding, arguing for the first time that imputing Dr. Leopold's knowledge to the Museum is improper.

This argument is barred by the law of the case, according to which courts generally "refuse to reopen what *[*104]* has been decided." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) (quoting Messinger v. Anderson, 225 U.S. 436, 444 (1912)). The Supreme Court has cautioned that although a court has power to revisit such an issue, it "should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was `clearly erroneous and would work a manifest injustice.'" Id. (quoting Arizona v. California, 460 U.S. 605, 618 n. 8 (1983)). This is particularly true in a case, such as this, in which the presiding judge has changed. L-3 Commnc'ns Corp. v. OSI Sys., No. 02 Civ. 9144 (PAC), 2007 WL 576124, at *5 (S.D.N.Y. Feb. 23, 2007) ("When . . . the judges in a case are switched mid-stream, as happened here, the successor judge may not reconsider his predecessor's rulings with the same freedom that he may consider his own rulings."), rev'd in part on other grounds, 283 Fed. Appx. 830 (2d Cir. 2008). Here, the Museum has presented no "extraordinary circumstances" to justify revising Wally III. The Museum had ample opportunity to contest the Government's pervasive charge that it knew what Dr. Leopold knew before Judge Mukasey's decision. It did not. On this basis alone, Judge Mukasey was entitled to find the Museum had conceded the point. The Museum was then free to *[*105]* request reconsideration. Again, it did not. I will not now revisit the matter.

5. Laches

The Museum argues that, even if Wally would otherwise be subject to forfeiture, the Court should apply the equitable doctrine of laches to bar this action. The Court has discretion to apply the doctrine in light of "the `equities of the parties.'" Robins Island Pres. Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 423 (2d Cir. 1992) (quoting Gardner v. Panama R.R. Co., 342 U.S. 29, 30-31 (1951)). "Generally, laches is applied where it is clear that a plaintiff unreasonably delayed in initiating an action and a defendant was unfairly prejudiced by the delay." Id. (citing Stone v. Williams, 873 F.2d 620, 623 (2d Cir. 1989), vacated on other grounds, 891 F.2d 401 (2d Cir. 1989)). Here, the Museum observes that neither Bondi nor any of her heirs sought to retrieve Wally in the forty-year period between Hunna's last letter to Dr. Leopold and Wally's importation to New York. The Museum argues that *[*106]* its ability to defend against forfeiture has been substantially prejudiced by this delay because many witnesses to the events at issue in this action are long dead: Hunna died in 1964; Garzarolli died in 1964; Bondi died in 1969; Otto Kallir died in 1978; Welz died in 1980; Novotny died in 1983; Broda *[*275]* died in 1987; and Kremlacek died in 1990 (LM Mem. 26, 28, 30-31.) It also points to numerous letters from Bondi indicating that although she knew where Wally was, she consciously chose not to sue for it because, as she wrote in a May 16, 1965 letter to Kallir, "if the litigation was lost, the picture would irrevocably be taken from my possession."[fn41] (Barron Decl. Ex. D at JK 00058; LM 56.1 Stmt. ¶ 87.)

The Museum has not, however, provided any legal basis for asserting a laches defense against the Government. It offers no authority indicating that laches even applies to a civil

forfeiture action brought by the United States, and for good reason, as Supreme Court precedent makes this a dubious proposition. See United States v. Summerlin, 310 U.S. 414, 416 (1940) ("It is well settled that the United *[*107]* States is not . . . subject to the defense of laches in enforcing its rights."). Indeed, the Museum acknowledged at oral argument that the Government is "immune" from the laches defense. (O/A Tr. 27:17-21.) Moreover, even if a laches defense could apply, the Museum does not contest that the United States timely filed suit. Also, to the extent this defense is directed at the Bondi Estate, it is irrelevant insofar as the Museum's motion does not seek to strike the Estate's claim. (See dkt. No. 219.)

The Museum's principal argument, for which it offers no legal authority involving a civil forfeiture action, is that the Government's forfeiture claim depends on the viability of the Estate's claim to Wally and is thus barred by laches if the defense would apply to a similar claim by the Estate. (O/A Tr. 27:10-12.) However, the Estate's claim would be predicated on whether it has title under Austrian law, and Judge Mukasey has already decided that "under [Austrian law], Bondi's ownership claim survives." Wally III, *2002 WL 553532*, at *20. Thus, not only was this forfeiture timely asserted under federal law, but a claim by the Estate would be timely under Austrian law as well. Accordingly, the Government's claim may not be barred on the basis of any purportedly undue delay by Bondi or her estate. *[*108]*

6. Due Process

Lastly, as it did in Wally III, the Museum argues that application of the NSPA in this case would violate its due process right to "fair notice" that importing Wally was unlawful. In assessing this contention, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." United States v. Lanier, 520 U.S. 259, 267 (1997). The Museum again argues that applying the NSPA to Wally is unconstitutional because Wally was not stolen but rather is subject to a genuine ownership dispute. It further contends that Austrian law is unclear as to Wally's ownership. These arguments are even less persuasive now than they were at the motion-to-dismiss stage. See Wally III, *2002 WL 553532*, at *26-27. I have already found that the Government has demonstrated probable cause to believe both that Wally was stolen, not merely subject to an ownership dispute, and remained so under Austrian law until it was seized in this action. The Museum has not shown otherwise. Furthermore, the Museum may yet prevail by proving to the trier of fact that Dr. Leopold did not know, or deliberately *[*276]* avoid discovering, that Wally was stolen or converted. *[*109]*

III. CONCLUSION

For above the reasons, trial is warranted on the issue of whether Dr. Leopold knew Wally was stolen when the Museum imported it into the United States for exhibition at the MOMA. The parties' summary judgment motions [dkt nos. 219, 257] are hereby DENIED. The parties shall confer and inform the Court by letter no later than October 14, 2009 how they propose to proceed.

SO ORDERED:

[fn1] The Parties rely on the following submissions and the exhibits attached thereto:

Amended Memorandum of Law in Support of Motion by the Leopold Museum for Summary Judgment ("LM Mem."); The Leopold Museum's Amended 2008 Statement of Undisputed Material Facts Pursuant to Local Rule 56.1 ("LM 56.1 Stmt."); Declaration of Rudolf Leopold, sworn to February 29, 2008 ("RL Decl."); Declaration of Elizabeth Leopold sworn to February 29, 2008 ("EL Decl."); Declaration of Martin Eder sworn to February 27, 2008 ("Eder Decl."); Declaration of Romana Schuler sworn to October 5, 2004 ("Schuler Decl."); Declaration of Peter Konwitschka sworn to March 7, 2008 ("First Konwitschka Decl."); Declaration of Robert Holzbauer sworn to March 7, 2008 ("Holzbauer Decl."); Declaration of James Lide sworn to March 5, 2008 ("Lide Decl."); Declaration of William M. Barron sworn to March 7, 2008 ("Barron Decl."); Memorandum of Law of Plaintiff United States of America and Claimant Estate of Lea Bondi Jaray in Opposition to Claimant Leopold Museum's Motion for Summary Judgment ("Joint Opp. Mem."); Response by Plaintiff United States of America and Claimant Estate of Lea Bondi Jaray to Claimant Leopold Museum's Local Civil Rule 56.1 Statement ("Joint Counter 56.1 Stmt."); Declaration of Sharon Cohen Levin sworn to March 26, 2009 ("3/26/09 Levin Decl."); Declaration of Bonnie Goldblatt, dated March 25, 2009 ("3/25/09 Goldblatt Decl."); Declaration of Dr. Peter Lambert in Response to Declaration of Dr. Peter Knowitschka sworn to March 26, 2009 ("Lambert Resp. Decl."); Reply Memorandum of Law in Further Support of Motion by the Leopold Museum for Summary Judgment ("LM Reply Mem."); Declaration of Martin Eder, dated April 22, 2009 ("Eder Reply Decl."); Third Declaration of Dr. Peter Konwitschka sworn to May 14, 2009 ("Second Kownwitschka Decl."); Reply Declaration of William M. Barron sworn to May 14, 2009 ("Barron Reply Decl."); Amended Memorandum of Law of Plaintiff United States of America and Claimant Estate of Lea Bondi Jaray in Support of Their Motion for Summary Judgment ("Joint Mem."); Amended Local Civil Rule 56.1 Statement of Material Facts in Support of Joint Motion for Summary Judgment By Plaintiff United States of America and Claimant Estate of Lea Bondi Jaray ("Joint 56.1 Stmt."); Supplemental Declaration of Sharon Cohen Levin sworn to February 26, 2009 ("Levin Supp. Decl."); Declaration of Sharon Cohen Levin Sworn to March 10, 2008 ("3/10/08 Levin Decl."); Declaration of Bonnie Goldblatt sworn to March 10, 2008 (3/10/08 Goldblatt Decl."); Memorandum of Law in Oppostion to Motion for Summary Judgment by Plaintiff and the Bondi Estate ("LM Opp. Mem."); The Leopold Museum's Response to the Amended Local Civil Rule 56.1 Statement of Plaintiff and the Estate ("LM Counter 56.1 Stmt."); Opposition Declaration of Rudolf Leopold sworn to June 4, 2008 ("RL Opp. Decl."); Opposition Declaration of William M. Barron sworn to March 26, 2009 ("Barron Opp. Decl."); Second Declaration of Dr. Peter Konwitschka sworn to June 2, 2008 ("Second Konwitschka Decl."); Second Declaration of Dr. Robert Holzbauer sworn to March 12, 2009 ("Second Holzbauer Decl."); Reply Memorandum of Law of Plaintiff United States of America and Claimant Estate of Lea Bondi Jaray in Further Support of Joint Motion for Summary Judgment ("Joint Reply Mem."); Declaration of Sharon Cohen Levin sworn to May 14, 2009 ("5/14/09 Levin Decl."); and the Declaration of Anna E. Arreola sworn to May 14, 2009 ("Arreola Decl.").

[fn2] Unless otherwise noted, this Memorandum hereafter refers only to the Government's position on the instant motion, with the understanding that the Estate shares that position. Because the Government instituted this civil forfeiture proceeding, it is the only party that can properly be termed a Plaintiff. The Estate, like the Museum, is a claimant, although it joins in the Government's application because the Government has represented that should Wally be forfeit, it will give the Painting to the Estate. Thus, the Museum is the only party opposing forfeiture at this stage.

[fn3] Unless otherwise indicated, the following facts are undisputed.

[fn4] The Museum objects that this provision could not have applied to Wally because on its face it applied to "restitution from Germany and Austria to Italy, Hungary, Rumania, and Finland, and from Germany to Austria," and Wally never left Austria. (LM Counter 56.1 Stmt. ¶ 28.) This interpretation is unduly restrictive. It is undisputed that Germany "incorporated Austria into Germany" in the Anschluss; therefore property need not have left Austria to have been seized by Germany and thus require restitution to Austria after the War. (Joint 56.1 Stmt. ¶ 11.)

[fn5] As noted in Judge Mukasey's decision denying the Museum's motion to dismiss the Third Amended Complaint, Restitution Commissions were established at each of the Austrian provincial courts and presided over by a professional judge. **United States v. Portrait of Wally**, No. 99 Civ. 9940, *2002 WL 553532*, at *2 n. 1 (S.D.N.Y. April 12, 2002).

[fn6] The Government disputes this assertion. (Joint Counter 56.1 Stmt. ¶ 41.) Relying on documents to which the Leopold objects as inadmissible, the Government asserts that Bondi indeed presented her claim to Wally to the Belvedere, to no avail. (See id.)

[fn7] As noted above, the Government also disputes this assertion.

[fn8] For the sake of completeness, this account will be briefly presented here despite the Leopold's multiple evidentiary objections, which are discussed in Part II(B)(ii)(2)(b), infra.

[fn9] "A catalogue raisonné is a definitive listing and accounting of the works of an artist." DeWeerth v. Baldinger, 836 F.2d 103, 112 (2d Cir. 1987).

[fn10] 19 U.S.C. § 1595a(c) provides, in relevant part:

Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:

(1) The merchandise shall be seized and forfeited if it —

(A) is stolen, smuggled, or clandestinely imported or introduced;

. . .

18 U.S.C. § 545 provides, in relevant part:

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law —

Shall be fined under this title or imprisoned not more than 20 years, or both. . . .

Merchandise introduced into the United States in violation of this section . . . shall be forfeited to the United States.

The Government also initiated this action under 22 U.S.C. § 401(a), which provides for forfeiture of property exported in violation of law. However, it has not briefed this ground for forfeiture, asserting that the Court need not address it to find in its favor. (Joint Mem. 10 n. 9.)

[fn11] Specifically, the NSPA authorizes fines and/or a term of imprisonment to "[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud."

[fn12] CAFRA raised the Government's initial burden of proof in civil forfeiture actions from probable cause to a preponderance of the evidence. In Wally III, the Museum argued that CAFRA thus heightened the Government's burden of pleading and proof in this action. Judge Mukasey rejected this argument, holding that "CAFRA does not apply to forfeiture proceedings commenced before August 23, 2000." Wally III, *2002 WL 553532*, at *13.

[fn13] There is however, an assertion in the Bondi Statement that is not repeated elsewhere, specifically the statement that Bondi visited the Belvedere and laid claim to Wally after the war. (3/10/08 Levin Decl. Ex. 14 at 000156); see infra n. 14.

[fn14] Bondi's October 3, 1957 letter to Hunna and a letter she wrote to Kallir on March 14, 1958 indicate that the transfer occurred in 1938. (3/10/08 Levin Decl. Ex. 12 at JK 000053-54; Barron Decl. Ex. D at JK 000997-98.) The Bondi Statement also indicates that Welz took Wally "one day before I left the Gallery," which Welz took over in 1938. (3/10/08 Levin Decl. Ex. 14 at 000156.) Only Bondi's August 22, 1966 letter to Kallir states that Welz demanded Wally immediately immediately before she fled Vienna in 1939 (Id. Ex. 12 at LB 002290-91), although, like her 1966 letter to Kallir, the the Bondi Statement asserts that she surrendered Wally at her husband's urging "in order not to impair our departure, under duress" (id. Ex. 14 at 000156.) As detailed below, the Museum uses this inconsistency as a basis for its assertion that Bondi sold Wally to Welz along with her gallery. I note, however, that the Museum cannot reasonably use these documents to make its case and simultaneously dispute their admissibility.

[fn15] The Government objects to consideration of this entry as inadmissible hearsay and unsupported by personal knowledge insofar as it is not known who prepared the report. (Joint Counter 56.1 Stmt. ¶ 5.) It also asserts that it comes from a tax audit of Welz's business "prepared for . . . government officials of the Third Reich," and is therefore of dubious evidentiary value. (O/A Tr. 55:24-56:3.) I need not resolve this issue because, as discussed below, even if it were admissible, the entry is insufficient to carry the Museum's burden of proof and the Museum's remaining evidentiary arguments are without merit. As the Museum admitted at oral argument, this document is not "a case winner by any means." (O/A Tr. 55:9-10.)

[fn16] The Government objects to consideration of this letter as inadmissible hearsay and

because the statement upon which the Museum relies was made without personal knowledge. (O/A Tr. 91:24-92:1.) I need not rule on the letter's admissibility because this document only reinforces the Court's ultimate conclusion that the Museum has not shown that Welz did not steal Wally.

[fn17] Thus, even the Museum shies away from explicitly asserting that the letter proves Wally was Aryanized along with Bondi's gallery.

[fn18] This ruling was predicated on the following passage from the Second Amended Verified Complaint:

The task of the United States Forces in Austria with respect to art restitution at that time was to sort such artworks and return them to the countries from which they had been seized, in order for those countries to return them to their rightful owners.

(Second Am. V. Compl. ¶ 5(g).)

[fn19] I further note that even if the recovery doctrine did apply here, it would not bar the Government's forfeiture claim predicated on the theory that Dr. Leopold criminally converted Wally.

[fn20] Indeed, as the Museum admitted at oral argument, it has provided no evidence indicating that Wally was ever part of the Würthle Gallery. (O/A. Tr. 58:15-17.) Furthermore, its assertion that "[n]or do we have any evidence to the contrary" (id. at 58:5-6) is flatly contradicted by Bondi's letters, as well as the 1928 catalogue offered by the Government expressly listing two Schiele paintings as belonging to the gallery and Wally as belonging to "Lea Bondi, Vienna" (3/10/08 Levin Decl. Ex. 13 at LB 002260, 002269-70).

[fn22] In this respect, the Government observes that the Rieger Restitution Commission's May 31, 1948 Partial Finding ordered Welz to restore 12 artworks, including a Schiele "drawing" referred to as "Portrait of His Wife" (Joint 56.1 Stmt. ¶¶ 57-58; 3/10/08 Levin Decl. Ex. 11 at LM 1266-68, 1276-77.) The Government also cites, inter alia, Garrison's letter to Demus at the BDA enclosing a list of paintings confiscated from Welz and describing item 573 as "a portrait of a woman named Vally" (Joint 56.1 Stmt. ¶ 54 (undisputed)) and McKee's June 8, 1948 letter to the Commanding General of United States forces, a copy of which was sent to the BDA, indicating that further inquiry should be made as to whether the "Portrait of His Wife" in the inventory of Rieger artworks provided by the Rieger lawyers was the same as Wally, which Welz had told him did not depict Schiele's wife. (Joint 56.1 Stmt. ¶ 56). The Government also submits the declaration of one of the Rieger heirs, Robert Rieger, saying that Wally was never part of the Rieger collection. (3/10/08 Levin Decl. Ex. 12 at JK 000007.) The Museum objects that the declaration is inadmissible. (LM Opp. 11-12.) However, as already observed, the Government need not use admissible evidence to make its threshold showing of probable cause. Additionally, the statement has been authenticated by Bachert as having come from the files of the Galerie St. Etienne and is admissible as an ancient document under Rules 901(b)(8) and 803(16).

[fn23] In this regard, the Government further notes that the Belvedere was the first to refer to

"Portrait of a Woman" rather than "Portrait of His Wife" as having been part of the Rieger collection. The Government argues that in this fashion "the Belvedere concealed the fact that Wally had been wrongfully included among the works sent with the Rieger collection." (Joint Mem. 18-21.)

[fn24] Under Austrian law, a bona fide purchaser for value can acquire title "at a public auction from a tradesman authorized to carry on such trade," regardless of whether the seller actually owned the property in question, but only if the purchaser has a good faith belief that the owner is the seller from the time the contract governing the transfer is completed to the time of the actual property transfer. (Konwitschka Decl. ¶¶ 17-18, 22.) The Museum does not argue that this provision applies to the exchange between the Rieger heirs and the Belvedere, presumably because they did not acquire Wally at a public auction, the Rieger heirs were not "authorized tradesm[e]n," and, as already discussed, the Belvedere had reason to believe the Riegers did not own Wally at the time of the initial exchange.

[fn25] To the extent the Museum contends that the equitable defense of laches operated to invest Dr. Leopold with title to Wally, the proposition is defective as a matter of law. Laches is a defense, not a means by which title is positively established. See Halcon Int'l, Inc. v. Monsanto Australia Ltd., 446 F.2d 156, 159 (7th Cir. 1971) ("The doctrine of laches . . . is a shield of equitable defense rather than a sword for the investiture or divestiture of legal title or right."); see also A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd., No. 88 Civ. 4500 (MJL), *1989 WL 115941*, at *2 (S.D.N.Y. Sept. 27, 1989) (same).

[fn26] Aside from this concession, the Government offers several additional facts that should have made Dr. Leopold doubt the Belvedere owned Wally: he knew (1) Bondi was listed as Wally's owner in the 1930 Kallir catalogue (LM 56.1 Stmt. ¶ 37), (2) she was an Austrian Jew who had fled the country because of Nazi occupation (Joint 56.1 Stmt. ¶ 83), and (3) her gallery had been restituted to her after the war (id.).

I also note that, because Bondi's meeting with Dr. Leopold in London undoubtedly raised a duty to investigate before Dr. Leopold could acquire good title to Wally, the presumption of good faith under Austrian law is immaterial. Briefly, Austrian law presumes the good faith of a possessor, and a claimant must show evidence indicating a "high probability" of bad faith to destroy the possessor's confidence in good title. (Konwitschka Decl. ¶ 23; Lambert Resp. Decl. ¶¶ 10, 12.) However, if it is shown that the possessor encountered a suspicious fact, which Dr. Leopold's meeting with Bondi indisputably raised, good faith has been lost and can be restored only if reason for suspicion is "credibly removed" by "adequate research." (Konwitschka Decl. ¶ 24.)

[fn27] The Government objects to consideration of the 2008 Leopold Declaration on the basis that he has already given deposition testimony and his declaration is inadmissible for purposes other than impeachment if he does not testify at trial. (Joint Opp. Mem. 24 n. 15.) The Museum correctly observes that the Government submits no evidentiary support for the assertion that Dr. Leopold will not be available to testify at trial. (LM Reply 2.) Accordingly, absent directly contradictory deposition testimony, I decline the Government's invitation to "disregard the new [declaration]," although I recognize that the Government disputes the veracity of its contents.

[fn28] The Government disputes that any such meeting ever took place, arguing that if it had, Bondi's correspondence would have mentioned the meeting and Dr. Leopold would have related it in his October 1957 letter responding to Hunna's inquiry as to why he acquired Wally for himself when he had promised to help Bondi recover it. (Joint Counter 56.1 Stmt. ¶ 45.) Such arguments go to credibility, and the Government has not shown any directly contradictory evidence. I will therefore assume for the purposes of the instant motions that the meeting took place as Dr. Leopold describes.

[fn29] The Museum's expert observes that Dr. Leopold may not have been able to obtain a copy of the Restitution Commission's decision regarding the Riegers claim — which might have put him on notice that Wally was not specifically referenced therein — because "[i]t is impossible to find a restitution decision if one does not know the commission and the file number, and it was not possible to get access to that decision without being a party to the proceedings or a representative of such party." (Third Konwitschka Decl. ¶ 25.) However, Dr. Leopold knew that Garzarolli was in touch with representatives of the Rieger heirs and could at least have asked for such documentation.

[fn30] In this regard, I note that the Belvedere Museum had a substantial interest in facilitating the exchange of "Rainerbub" for Wally because it deemed the former to be much more valuable. The minutes of the Belvedere's July 12, 1954 Exchange Commission meeting (which Garzarolli attended) note that:

[Rainerbub] by EGON SCHIELE is one of his best early works, from the year 1910, and in the opinion of the undersigned is to be valued at S 8,000. — (eight thousand Schillings). Since the [Belvedere] purchased the painting "Vally from Krumau" for $3000, the purchase is decidedly commercially advantageous, even if the idea of the greater importance of [Rainerbub] did not influence the [Belvedere].

(RL Decl. Ex. F at LM 1795.) The Museum further asserts, and the Government disputes, that Dr. Leopold knew that "Rainerbub" was more valuable than Wally. (Joint Counter 56.1 Stmt. ¶ 52.) Thus, accepting the Museum's assertion as true, Dr. Leopold had all the more reason to suspect that Garzarolli's affirmation of ownership was motivated by self-interest.

[fn31] Indeed, when she discovered that Dr. Leopold had gotten Wally from the Belvedere, Bondi asked Hunna to retrieve it from him. (3/10/08 Levin Decl. Ex. 12 at JK 000053-54.)

[fn32] Accordingly, I need not reach the parties' remaining arguments concerning Article 367 of the Austrian Civil Code.

[fn33] In his 2008 Declaration, Dr. Leopold asserts that he called Mueller, one of the Rieger heirs' lawyers, to confirm Wally had indeed belonged to the Rieger heirs before responding to Hunna. (RL Decl. ¶ 51.) As the Government observes, this assertion is belied by Dr. Leopold's failure to mention this call in his detailed letter to Hunna defending his acquisition of Wally and the fact that he made no such inquiry when he acquired Wally in the first place. (Joint Counter 56.1 Stmt. ¶ 58.)

However, assuming, as I must for purposes of the Government's motion, that he indeed called Mueller, Dr. Leopold's investigation remained inadequate. Even after being contacted by Bondi's attorney and faced with the immediate threat of litigation, Dr. Leopold admittedly sought no documentation whatsoever regarding Wally's provenance, never contacted the Rieger heirs (who, as evidenced by the Rieger declaration described in footnote 22, supra, have stated that Wally was never part of the Rieger collection), or asked either Bondi or Hunna for any details regarding how Bondi parted with Wally. These investigative deficiencies are all the more glaring insofar as Dr. Leopold knew that Bondi had indeed owned Wally before the war and had even once agreed to facilitate her retrieval of the Painting. Furthermore, I note that, like Garzarolli, Mueller had an interest in asserting the validity of the sale of Wally to the Belvedere, in which he had a hand.

[fn34] As noted below, this finding is not predicated on any conclusion as to Dr. Leopold's state of mind with regard to Wally. Even if he called both Garzarolli and Mueller in a good faith attempt to resolve his doubts as to the Painting's true owner, Dr. Leopold's investigation of Wally's ownership was negligent at best. (See Lambert Resp. Decl. ¶ 7.)

[fn35] Although the underlying documents clarify that the reference is to the exchange of Wally for "Rainerbub," the Museum denies that the quoted language is a reference to Dr. Leopold. (LM Counter 56.1 Stmt. ¶ 97). It does not, however, assert that the Belvedere hurried to complete the transaction. Nor does the Museum explain why the Belvedere would threaten to terminate an exchange which the Belvedere viewed as "decidedly commercially advantageous." (RL Decl. Ex. F at LM 1795.).

[fn36] As noted in footnote 33, supra, the Government disputes that Dr. Leopold ever called Mueller to verify that Wally belonged to the Rieger heirs.

[fn37] As further explored below, Dr. Leopold expressly denies that this sentence was meant to be a complete list of Dr. Rieger's Schiele paintings: "The paragraph at issue merely asserts that in addition to two Schiele paintings owned by Dr. Rieger, a collection of his Schiele drawings and water colors was exhibited in 1928 at the Neue Galerie in Vienna." (RL Opp. Decl. ¶ 2.)

[fn38] In its response to the Government's Rule 56.1 statement, the Museum further asserts that it was not common practice among art historians at this time to list all interim possessors of a painting, citing a May 9, 1965 letter from Otto Kallir to Bondi. (LM Counter 56.1 Stmt. ¶ 125.) This citation is somewhat odd, as the referenced letter clearly shows that Kallir was contemplating inserting all interim possessors into Wally's provenance. (Barron Decl. Ex. D at JK 000059.)

More compelling is the Museum's observation during oral argument that even though Dr. Leopold acquired "Cardinal and Nun" from the Belvedere in 1957 (LM 56.1 Stmt. ¶ 55) and the Belvedere had acquired this painting in the same transaction in which it gained possession of Wally, Leopold's 1972 book lists only the first and last owners in its catalogue (Dr. Heinrich Rieger and Dr Leopold) and makes no mention of the Belvedere. (O/A Tr. 66:5-67:8.)

[fn39] Therefore, one may lack the good-faith confidence in ownership required to gain title by prescription under Austrian law, according to which negligence in the acquisition of a good will negate the ordinary presumption of good-faith ownership, without having criminally converted that good under the NSPA.

[fn41] The Government interprets the same correspondence to mean that "Bondi never filed a lawsuit for Wally because the post-war climate in Austria in which Jews had great difficulty recovering their property led Bondi to conclude that any legal proceeding in Austria would fail." (Joint Counter 56.1 Stmt. ¶ 87.)

Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010) [2010 BL 9183]

Pagination
* F.3d

United States Court of Appeals, Ninth Circuit.

Marei VON SAHER, Plaintiff-Appellant, v. NORTON SIMON MUSEUM OF ART AT PASADENA, Norton Simon Museum of Art at Pasadena; Norton Simon Art Foundation, Defendants-Appellees.

No. 07-56691.

Argued and Submitted December 8, 2008.

Filed August 19, 2009. Amended January 14, 2010.

*[*955]*

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.] *[*956]*

Lawrence M. Kaye, New York, NY, for plaintiff-appellant Marei Von Saher.

Fred Anthony Rowley, Jr., Los Angeles, CA, for defendants-appellees Norton Simon Museum of Art at Pasadena and Norton Simon Art Foundation.

Frank Kaplan, Santa Monica, CA, for amicus curiae Bet Tzedek Legal Services, The Jewish Federation Council of Greater Los Angeles, American Jewish Congress, American Jewish Committee, Simon Wiesenthal Center and Commission for Art Recovery.

Edmund G. Brown, Jr., Attorney General of the State of California by Antonette Benita Cordero, Los Angeles, CA, for amicus curiae State of California.

Appeal from the United States District Court for the Central District of California, John F. Walter, District Judge, Presiding. D.C. No. CV-07-02866-JFW.

Before: HARRY PREGERSON, D.W. NELSON and DAVID R. THOMPSON, Circuit Judges.

Opinion by Judge THOMPSON;

Dissent by Judge PREGERSON.

ORDER AMENDING OPINION AND DENYING THE PETITIONS FOR REHEARING AND FOR REHEARING EN BANC AND AMENDED OPINION

ORDER

The panel, with the following amendments, has granted the petition for panel rehearing filed by the appellee, Norton Simon Museum of Art at Pasadena, and has denied the petitions for rehearing and for rehearing en banc filed by the appellant Marei Von Saher, and by amici the State of California and Earthrights International. *[*957]*

The opinion filed August 19, 2009, slip op. 11333, and published at 578 F.3d 1016 (9th Cir. 2009) is amended as follows:

At page 578 F.3d at 1031 the last two paragraphs of the majority opinion are deleted. The first of these two paragraphs begins "The museum contends that the articles" and the last paragraph of the two paragraphs ends "dismissed without leave to amend." The following new paragraph is inserted in place of the two deleted paragraphs:

Because it is not clear that Saher's complaint could not be amended to show a lack of reasonable notice, dismissal without leave to amend was not appropriate. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). We, therefore, grant Saher leave to amend her complaint to allege the lack of reasonable notice to establish diligence under California Code of Civil Procedure § 338, and remand this case to the district court for that purpose.

The full court was advised of the petitions for rehearing and for rehearing en banc, and of the proposed amendments set forth above. No judge requested rehearing en banc.

The opinion as amended above is filed simultaneously with this order.

With the exception of the relief granted above pursuant to the appellee's petition for panel rehearing, the petitions for rehearing and for rehearing en banc are DENIED. Judge Pregerson voted to grant the petitions for rehearing and for rehearing en banc.

No further petitions for rehearing or rehearing en banc may be filed.

OPINION

THOMPSON, Senior Circuit Judge:

Marei von Saher ("Saher") seeks the return of two paintings alleged to have been looted by the Nazis during World War II. The paintings were purchased in or around 1971 by the Norton Simon Museum of Art in Pasadena, California ("the Museum"), and are now on display there. Saher brought this claim against the Museum under § 354.3 of the California Code of Civil

Procedure, which extends the statute of limitations until 2010 for actions for the recovery of Holocaust-era art. The primary issue on appeal is whether § 354.3 infringes on the national government's exclusive foreign affairs powers. The district court held that it does. We agree, and affirm the district court's holding that § 354.3 is preempted.

California also has a three-year statute of limitations for actions to recover stolen property. California Code of Civil Procedure § 338. The district court granted the Museum's Rule 12(b)(6) motion to dismiss Saher's complaint under that statute without leave to amend. Because it is possible Saher might be able to amend her complaint to bring her action within § 338, we reverse the district court's dismissal without leave to amend, and remand for further proceedings.

I. Background

A. Nazi Art Looting in WWII

During World War II, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe, in what has been termed the "greatest displacement of art in human history." Michael J. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts 202 (N.Y.U Press 2003).

Following the end of World War II, the Allied Forces embarked on the task of returning the looted art to its country of origin. In July 1945, President Truman authorized the return of "readily identifiable" works of art from U.S. collecting points. *See, e.g.*, Presidential Advisory Commission on Holocaust Assets in the ***[*958]*** United States, Plunder and Restitution: The U.S. and Holocaust Victims' Assets SR-142 (Dec. 2000) (hereinafter Plunder and Restitution). At the Potsdam Conference, President Truman formally adopted a policy of "external restitution," under which the looted art was returned to the countries of origin — not to the individual owners. American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, Report, 148 (1946) (hereinafter Roberts Commission Report).

Despite these restitution efforts, many paintings stolen by the Nazis were never returned to their rightful owners. *See, e.g.*, Bazyler at 204. Tracking the provenance of Nazi-looted art is nearly impossible, since many changes of ownership went undocumented, and most of the transactions took place on the black market. *Id.* In recent years, a number of the world's most prominent museums have discovered their collections include art stolen during World War II. *Id. at 205-06.*

The federal government has continued to take action to address the recovery of Holocaust-era art. In 1998, Congress enacted the U.S. Holocaust Assets Commission Act of 1998, Pub.L. No. 105-186, 112 Stat. 611 (codified as amended at 22 U.S.C. § 1621). This Act established the Presidential Advisory Commission on Holocaust Assets, which conducted research on the fate of Holocaust-era assets, and advised the President on future policies concerning the recovery of these assets. *Id.* That same year, the State Department convened a conference with forty-four other nations to address the recovery of Holocaust-era assets.

U.S. Dep't of State, Proceedings of the Washington Conference on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm (hereinafter Washington Conference Proceedings). In the meantime, numerous Holocaust victims and their heirs have turned to the courts to recover their looted art. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004).

B. Section 354.3

Many obstacles face those who attempt to recover Holocaust-era art through lawsuits. The challenges range from procedural hurdles such as statutes of limitations, to prudential standing doctrines. See, *e.g.*, Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 Houston L. Rev. 193, 213-28 (2006); Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 Williamette J. Int'l L. & Disp. Resol. 243, 252-58 (2006). In 2002, California responded to these difficulties by enacting California Code of Civil Procedure § 354.3.[fn1] Section 354.3 provides:

Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

Section 354.3(b). The California statute allows suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." Section 354(a)(1). ***[*959]*** The statute also extends the statute of limitations for *§ 354.3* claims until December 31, 2010. Section 354.3(c).

California has enacted several other laws extending the statute of limitations for claims relating to the Holocaust. *See, e.g.*, Section 354.5 (extending statute of limitations for insurance policy claims by Holocaust victims or their heirs); Section 354.6 (creating a cause of action and extending the statute of limitations for slave labor claims arising out of WWII). Both of these sister statutes have been found unconstitutional under the foreign affairs doctrine. *Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims*, 133 Cal. App.4th 689, 34 Cal.Rptr.3d 944, 953 (2005) (finding § 354.5 unconstitutional); *Deutsch v. Turner Corp.*, 324 F.3d 692, 716 (9th Cir. 2003) (finding § 354.6 unconstitutional).

C. The Cranachs

Saher, the only surviving heir of Jacques Goudstikker, a deceased art dealer, filed this suit in 2007 against the Museum under § 354.3 and California Penal Code § 496, seeking the return of a diptych entitled "Adam and Eve." The diptych, a pair of oil paintings by sixteenth-century artist Lucas Cranach the Elder (hereinafter the "Cranachs"), is currently on public display at the Museum.

Goudstikker bought the Cranachs at an art auction in Berlin in or about May 1931.[fn2] Goudstikker was a prominent art dealer in the Netherlands; he specialized in Old Master

paintings. Goudstikker's collection contained more than 1,200 artworks, including Rembrandts, Steens, Ruisdaels, and van Goghs.

When the Nazis invaded the Netherlands in May 1940, Goudstikker and his family fled the country. The family left their assets behind, including the Gallery. Goudstikker brought with him a black notebook containing a list of over 1,000 of the artworks he had left behind in his collection (the "Blackbook"). The Blackbook lists the Cranachs as Numbers 2721 and 2722, and states that they were purchased at the Lepke Auction House and were previously owned by the Church of the Holy Trinity in Kiev.

After the Goudstikkers escaped, the Nazis looted Goudstikker's gallery. Herman Goring, Reischsmarschall of the Third Reich, seized the Cranachs and hundreds of other pieces from the gallery. Goring sent the artwork to Carinhall, his country estate near Berlin, where the collection remained until approximately May 1945 when the Allied Forces discovered it. The recovered artwork was then sent to the Munich Central Collection Point, where the works from the Goudstikker collection were identified. In or about 1946, the Allied Forces returned the Goudstikker artworks to the Netherlands.

The Cranachs were never restituted to the Goudstikker family. Instead, after restitution proceedings in the Netherlands, the Dutch government delivered the two paintings to George Stroganoff, one of the claimants, and he sold them, through an art dealer, to the Museum.

The Museum filed a Rule 12(b)(6) motion to dismiss Saher's complaint filed in this case for the return of the paintings. The district court granted the motion and dismissed Saher's claim with prejudice. The district court held that *§ 354.3*'s extension of the statute of limitations was unconstitutional on its face, because it violated the foreign affairs doctrine, as interpreted and applied by the Ninth Circuit in *Deutsch*, 324 F.3d 692. The district court ***[*960]*** concluded that by seeking to redress wrongs committed in the course of World War II, the California statute intruded on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims. The court then dismissed Saher's complaint because it had not been filed within the three-year period of California's statute of limitations, California Code of Civil Procedure § 338. This appeal followed.

II. Standard of Review

We review de novo the district court's decision dismissing Saher's complaint under Rule 12(b)(6). *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004). We accept all well-pleaded factual allegations as true, and construe them in the light most favorable to Saher. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007); *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1122 (9th Cir. 2008).

III. Motion for Judicial Notice

The Museum moves for judicial notice of two Presidential Commission reports, a military order approved by President Truman and enacted under the command of General Eisenhower, and a memorandum prepared by a State Department committee. Judicial notice of legislative facts such as these is unnecessary. Fed.R.Evid. 201(a), advisory comm. note to 1972

amendments. *See, e.g., Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002) ("[J]udicial notice is generally not the appropriate means to establish the legal principles governing the case.").

The Museum also moves for judicial notice of the fact that various newspapers, magazines, and books have published information about the Cranachs. Courts may take judicial notice of publications introduced to "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n. 15 (3d Cir. 2006); *accord Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n. 118 (9th Cir. 1999) (taking judicial notice "that the market was aware of the information contained in news articles submitted by the defendants."). These publications meet the standards for admissibility set forth in Federal Rule of Evidence 201(b). Accordingly, we take judicial notice of them solely as an indication of what information was in the public realm at the time.

IV. Constitutionality of *§ 354.4* Under the Foreign Affairs Doctrine

The Supreme Court has characterized the power to deal with foreign affairs as a primarily, if not exclusively, federal power. *See, e.g., Am. Ins. Assoc. v. Garamendi* 539 U.S. 396, 413-14, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003); *Zschernig v. Miller*, 389 U.S. 429, 432, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941). The Supreme Court has declared state laws unconstitutional under the foreign affairs doctrine when the state law conflicts with a federal action such as a treaty, federal statute, or express executive branch policy. *See, e.g., Garamendi* 539 U.S. at 421-22, 123 S.Ct. 2374 (invalidating a California statute which conflicted with Presidential foreign policy); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (invalidating a Massachusetts statute which stood as an obstacle to a Congressional act imposing sanctions on Burma); *U.S. v. Belmont*, 301 U.S. 324, 327, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) (holding that the Litvinov Assignment, an executive agreement, preempted New York public policy). ***[*961]***

Occasionally, however, in the absence of any conflict, the Court has declared state laws to be incompatible with the federal government's foreign affairs power. *See, e.g., Zschernig*, 389 U.S. at 432, 88 S.Ct. 664 (striking down an Oregon probate law, in the absence of any federal action, because it was an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"); *Hines*, 312 U.S. at 63, 61 S.Ct. 399 (invalidating a Pennsylvania immigration law because the field of immigration regulation was occupied exclusively by federal statutes and regulations); *see also Deutsch*, 324 F.3d at 712 (concluding that § 354.6 infringed on the federal government's exclusive power to wage and resolve war).

The Museum argues that § 354.3 is preempted under either theory. First, the Museum contends, § 354.3 conflicts with the Executive Branch's policy of external restitution following World War II. Alternatively, the Museum argues, § 354.3 is preempted because it infringes on the federal government's exclusive power to conduct foreign affairs, and specifically, the power to redress injuries arising from war. We address each argument in turn.

A. Does § 354.3 Conflict With the Executive Branch's Policy of External Restitution?

Federal law's "power" to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States" and "all Treaties . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Under a traditional statutory preemption analysis, conflict or obstacle preemption occurs where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (citing *Hines*, 312 U.S. at 67, 61 S.Ct. 399) (internal quotation marks omitted).

Executive agreements settling claims with foreign nations and nationals have long been accorded the same preemptive effect. *Garamendi* 539 U.S. at 416, 123 S.Ct. 2374 ("[V]alid executive agreements are fit to preempt state law, just as treaties are[.]"); *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981); *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *Belmont*, 301 U.S. at 324, 57 S.Ct. 758. In *Garamendi* the Supreme Court invalidated a California statutory scheme which facilitated litigation of Holocaust-era insurance claims. *Garamendi* 539 U.S. at 401, 123 S.Ct. 2374. The Court concluded that the California scheme posed an obstacle to the German Foundation Agreement and other expressions of Executive Branch policy preferring nonjudicial resolution of such claims. Id. at 405-07, 123 S.Ct. 2374.

Here, the Museum contends that § 354.3 is preempted by the Executive Branch's policy of external restitution. This policy, the Museum argues, was expressed in two main sources: first, the London Declaration, and second, "Art Objects in U.S. Zone," a U.S. policy statement approved by President Truman during the Potsdam Conference in August of 1945.

London Declaration

The United States and the Netherlands, along with sixteen other nations, were signatories to the London Declaration of January 5, 1943. Forced Transfers of Property in Enemy-Controlled Territory, 1943, in 3 Dep't of State, Treaties and Other International Agreements of the United States of America 1776-1949, p. 754 (C. Bevans comp.1969) (hereinafter Bevans). The ***[*962]*** Declaration served as a "formal warning to all concerned, and in particular persons in neutral countries," that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war[.]" *Id.*

In the Declaration, the Allies explicitly reserved the right to invalidate wartime transfers of property, regardless of "whether such transfers or dealings [had] taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purported] to be voluntarily effected." *Id.* The Declaration does not explicitly address restitution or reparations, but has been credited by some with laying the foundation for the United States's postwar restitution policy. *See, e.g.*, Plunder and Restitution at SR-139.

Art Objects in U.S. Zones

When the American forces entered Germany in the winter of 1944-45, they discovered large

stashes of Nazi-looted art, hidden in castles, banks, salt mines, and even caves. Plunder and Restitution at SR-13, SR-85. U.S. authorities established several central collection points within the U.S. Zone to assemble the recovered artwork "for proper care and study." Report, Art Objects in U.S. Zone, July 29, 1945, NACP, RG 338, USGCC HQ, ROUS Army Command, Box 37, File: Fine Art [313574-575] (hereinafter "Art Objects in U.S. Zone").

On July 29, 1945, at the Potsdam Conference, President Truman approved a policy statement setting forth the standard operating procedures governing the looted artwork found within the U.S. zone of occupation. Art Objects in U.S. Zone; Roberts Commission Report at 148. The governments of the formerly occupied countries submitted consolidated lists of items taken by the Germans, with information about the location and circumstances of the theft. Plunder and Restitution at SR-142. The U.S. authorities examined the lists, and when artwork was identified, it was returned to the country of origin. *Id.* Under this policy of "external restitution," the U.S. restituted the looted artwork to countries, not individuals. Art Objects in U.S. Zone; Plunder and Restitution at SR-139-SR-142. The newly liberated governments were responsible for restituting the art to the individual owners. Once the art was returned to the country of origin, the U.S. played no further role.

A contemporaneous memorandum from the State Department illuminates several of the reasons the federal government preferred the policy of external restitution over individual restitution. U.S. Dep't of State, Memorandum from Interdivisional Comm. on Rep., Rest., & Prop. Rights, Subcomm. 6, Recommendations on Restitution, Apr. 10, 1944, 1, NACP, RG 59, Lot 62D-4, Box 49, State/Notter, [320633-644] (hereinafter Recommendations on Restitution). First, in view of the complexities of the sham transactions through which the Nazis seized many of the artworks, the State Department felt it best to allow the individual countries to handle restitution in "whatever way they see fit." *Id. at 2.* Second, the State Department observed, in some cases, it might "be impossible to locate the original owners or their heirs and the governments involved will have to decide what should be done with the property or proceeds therefrom." *Id.* Finally, the State Department recognized that the liberated countries themselves had a stake in the restitution of art owned by their citizens:

[I]n many, if not most, cases the local funds[with which the Nazis "purchased" the art from the persecuted] were supplied originally by the local government or central bank as occupation costs or through forced credits. The Germans in effect forced the local government to ***[*963]*** pay for their purchases. The individual owner received recompense in local currency but the country as a whole received no recompense for the transfer of property to foreign owners. These cases constitute looting just as much as the cases of outright seizure without recompense.

Id. at 2-3.

The U.S. authorities stopped accepting claims for external restitution of looted artwork as of September 15, 1948. Plunder and Restitution at SR-143. By the beginning of 1949, close to three million pieces of Jewish cultural property had been restituted to twelve different countries by the U.S. authorities. *Id.*

Had California enacted § 354.3 in 1945, it would have directly conflicted with the federal

government's policy of external restitution. If the statute had been enacted in the immediate aftermath of the war, it would have presented a competing method of resolving restitution claims, and a forum for individuals to seek the return of their looted art — in clear contravention of the Executive Branch policy. The California statute also would have presented a direct threat to several of the goals underlying the Executive Branch's policy, including the rehabilitation of Germany.

The United States's policy of external restitution, however, ended in 1948. After September 15, 1948, the U.S. authorities refused to accept any more claims for external restitution. Plunder and Restitution at SR-143. In fact, as Saher states in her complaint, the Cranachs were returned to the Netherlands through the U.S. external restitution program. Section 354.3 cannot conflict with or stand as an obstacle to a policy that is no longer in effect.

The Museum also argues, however, that many of the federal government's concerns leading to the external restitution policy remain relevant today. For example, the Museum argues that claims under § 354.3 are problematic, because they ask California courts to review the restitution decisions of foreign governments.[fn3] Even if true, there would still be no conflict because, as stated above, the external restitution policy is no longer in effect.

In sum, had the California statute been enacted immediately following WWII, it undoubtedly would have conflicted with the Executive Branch's policy of external resolution. The statute does not, however, conflict with any current foreign policy espoused by the Executive Branch.

B. In the Absence of Any Conflict With Federal Law or Foreign Policy, is § 354.3 Nonetheless Preempted Under the Foreign Affairs Doctrine?

At times, albeit seldomly, the Supreme Court has found a state law to be preempted because it infringes upon the federal government's exclusive power to conduct foreign affairs, even though the law does not conflict with a federal law or policy. *Zschernig*, 389 U.S. at 432, 88 S.Ct. 664; *Mines*, 312 U.S. at 63, 61 S.Ct. 399. In *Garamendi*, the Court suggested that a traditional statutory "field" preemption analysis should be employed in such cases:

If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted, and if it had, without reference to the degree of any conflict, the principle ***[*964]*** having been established that the Constitution entrusts foreign policy exclusively to the National Government. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Garamendi 539 U.S. at 420 n. 11, 123 S.Ct. 2374.

Unlike its traditional statutory counterpart, foreign affairs field preemption may occur "even in [the] absence of a treaty or federal statute, [because] a state may violate the Constitution by establishing its own foreign policy." *Deutsch*, 324 F.3d at 709 (internal citation and quotations omitted). The central question, then, is this: in enacting § 354.3, has California addressed a traditional state responsibility, or has it infringed on a foreign affairs power reserved by the

Constitution exclusively to the national government?

1. Does *§ 354.3* Concern a Traditional State Responsibility?

Saher contends § 354.3 concerns a quintessential state function: the establishment of a statute of limitations for actions seeking the return of stolen property. Property, of course, is traditionally regulated by the state. But § 354.3 cannot be fairly categorized as a garden variety property regulation. Section 354.3 does not apply to all claims of stolen art, or even all claims of art looted in war. The statute addresses only the claims of Holocaust victims and their heirs. Section 354.3(b).

Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs. *See, e.g., Garamendi* 539 U.S. at 425-26, 123 S.Ct. 2374 (rejecting purported state interest in regulating insurance business and blue sky laws); *Crosby*, 530 U.S. at 367, 373 n. 7, 120 S.Ct. 2288 (rejecting purported state interest in taxing and spending); *Zschernig v. Miller*, 389 U.S. 429, 437-38, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968) (rejecting purported state interest in regulating descent of property); *Deutsch*, 324 F.3d at 707 (rejecting purported state interest in procedural rules).

The *Garamendi* Court in dicta rejected the "traditional state interests" advanced by California in support of HVIRA, finding instead that the real purpose of the state law was the "concern for the several thousand Holocaust survivors said to be living in the state." *Garamendi* 539 U.S. at 426, 123 S.Ct. 2374. Though § 354.3 purports to regulate property, an area traditionally left to the states, like HVIRA, *§ 354.3*'s real purpose is to provide relief to Holocaust victims and their heirs.

California's desire to help its resident Holocaust victims and their heirs is a noble legislative goal, with which we are entirely sympathetic. In *Garamendi* however, the Supreme Court held that "California's concern for the several thousand Holocaust survivors said to be living in the state . . . does not displace general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction, under which the State's claim is not a strong one." *Garamendi* 539 U.S. at 426-27, 123 S.Ct. 2374. The State's interest alone was not sufficient in *Garamendi* to save the statute: "[T]here being about 100,000 survivors in the country, only a small fraction of them live in California. As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy." *Id.*

California arguably has a stronger interest in enacting § 354.3 than it did in enacting the related statutes struck down in *Deutsch* and *Garamendi*. Section 354.3 addresses the problem of Nazi-looted art currently hanging on the walls of the ***[*965]*** state's museums and galleries. Assem. Jud. Com., Background Information Worksheet for Assem. BUI No. 1758 (2001-2002 Reg. Sess.) Jan. 30, 2002.

California certainly has a legitimate interest in regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art. Indeed, it appears the original goal of § 354.3 may have been to regulate California museums and galleries in such a manner. Prior to its enactment, however, the bill was amended. The

restriction limiting the scope of the statute to suits against "museums and galleries in California" was stricken. Assem. Amend, to Assem. Bill No. 1758 (2001-2002 Reg. Sess.); Sen. Jud. Com., Analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) Jun. 25, 2002, pp. 5-6. As enacted, the statute allows suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance," whether located in the state or not. Section 354.3(a)(1).

The scope of the statute as enacted belies California's purported interest in protecting its residents and regulating its art trade. The amended version of § 354.3 suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state. A memorandum from the Governor's office provides further illustration of California's intent. In it, California is characterized as a pioneering leader in the quest for justice for Holocaust victims:

In the past decade, it has come to the public's attention that spoils gained by the Nazi Holocaust were enjoyed not just by the Nazis. *California has been a leader in exposing those entities* who benefitted financially from the plunder or exploited the unusual circumstances of the Holocaust, who have been less than forthcoming in their business dealings.

Governor's Office of Planning & Research, Enrolled Bill Report on Assem. Bill No. 1758 (2001-2002) Reg. Sess. Aug. 1, 2002 (emphasis added).

By opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against "any museum or gallery" whether located in the state or not, California has expressed its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of Word War II. In so doing, California can make "no serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 419 n. 11, 123 S.Ct. 2374; *see also Deutsch*, 324 F.3d at 712 (rejecting California's interest in "redress[ing] wrongs committed in the course of the Second World War"). California cannot have a "distinct juristic personality" from that of the United States when it comes to matters of foreign affairs. *Pink*, 315 U.S. at 232, 62 S.Ct. 552. When it comes to dealings with foreign nations, "state lines disappear." *Belmont*, 301 U.S. at 331, 57 S.Ct. 758.

In sum, the scope of § 354.3 belies any purported state interest in regulating stolen property or museums or galleries within the State. By enacting § 354.3, California has created a world-wide forum for the resolution of Holocaust restitution claims. While this may be a laudable goal, it is not an area of "traditional state responsibility," and the statute is therefore subject to a field preemption analysis. *See Garamendi* 539 U.S. at 419 n. 11, 123 S.Ct. 2374.

2. Does the California Statute Intrude on a Power Expressly or Impliedly Reserved to the Federal Government by the Constitution?

The District Court held that § 354.3 intrudes on the power to make and resolve ***[*966]*** war, a power reserved exclusively to the federal government by the Constitution. We agree.

The Constitution divides the war power between the Executive, who is the Commander-in-

Chief of the Armed Forces, and the Congress, who has the power to declare war. U.S. Const. art. II, § 2; *Id.* at art. I, § 8. *Deutsch* clearly provides that "[m]atters related to war are for the federal government alone to address," and state statutes which infringe on this power will be preempted. *Deutsch*, 324 F.3d at 712.

Section 354.3 establishes a remedy for wartime injuries. The legislative findings accompanying the statute repeatedly reference the "Nazi regime," "Nazi persecution," and "the many atrocities" the Nazis committed. 2002 Cal. Legis. Serv. 332 (West 2002). By enacting § 354.3, California "seeks to redress wrongs committed in the course of the Second World War" — a motive that was fatal to § 354.6. *Deutsch*, 324 F.3d at 712.

Section 354.3 was closely modeled on § 354.6, which was found to infringe on the federal government's exclusive power to make and resolve war. Sen. Rules Com., Off. of Sen. Floor Analyses, 3d. reading analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) Aug. 8, 2002. Like its sister statute struck down in *Deutsch*, § 354.3 "creates a special rule that applies only to a newly defined class" of plaintiffs. *Id.* Like § 354.6, § 354.3 creates a new cause of action "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection." 324 F.3d at 708. This is significant because, as the *Deutsch* Court noted, "[a] state is generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties." 324 F.3d at 708.

Saher, however, argues that § 354.3 is distinguishable from the statute at issue in *Deutsch*, because it does not target former wartime enemies. Section 354.3 authorizes suits only against museums and galleries, but the actionable injury at the heart of the statute is the Nazi theft of art. The California legislature enacted § 354.6 "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection." *Deutsch*, 324 F.3d at 708. California enacted § 354.3 with the same verboten intent. Distinctions between the class of eligible defendants are irrelevant in light of this fatal similarity.

Saher also contends that under *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), claims for restitution of "garden variety property" can be distinguished from claims for reparation arising from wartime injury. In *Alperin* we considered whether the claims for restitution presented by a class of Holocaust survivors presented a nonjusticiable political question. Saher places particular reliance on the following quote: "Reparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution." *Alperin*, 410 F.3d at 551. This quote references the first *Baker* test, which requires courts to consider whether the case in question concerns an issue that has been textually committed by the Constitution to another branch of government. Id. at 544, 549-52 (citing *Baker v. Carr*, 369 U.S. 186, 210-11, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). Ultimately, in *Alperin* we concluded that despite the political overtones inherent in cases brought by Holocaust survivors, the underlying property issues presented in such cases were not political questions constitutionally committed to the political branches. Id. at 551. ***[*967]***

Saher's reliance on *Alperin* is misplaced. Our holding that the judiciary has the power to adjudicate Holocaust-era property claims does not mean that states have the power to

provide legislative remedies for these claims. Here, the relevant question is whether the power to wage and resolve war, including the power to legislate restitution and reparation claims, is one that has been exclusively reserved to the national government by the Constitution. We conclude that it has.

Section 354.3, at its core, concerns restitution for injuries inflicted by the Nazi regime during Word War II. Claims brought under this statute, including the instant claim, would require California courts to review acts of restitution made by foreign governments. For example, in this case, the parties contest the provenance of the Cranachs. In order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts. This example illustrates that *§ 354.3* claims cannot be separated from the Nazi transgressions from which they arise.

Our conclusion today is buttressed by the documented history of federal action addressing the subject of Nazi-looted art. The Art Looting and Investigation Unit of the Office of Strategic Services gathered a great deal of intelligence about looted art through covert operations during and after the war. Plunder and Restitution at SR-92. Immediately following the war, the federal government implemented the program of external restitution, as discussed in more detail above. It is beyond dispute that there was no role for individual states to play in the restitution of Nazi-looted assets during and immediately following the war.

Recent Administrations and Congresses continue to address problems facing Holocaust survivors and their heirs. *See, e.g.*, Pub.L. No. 105-186, June 23, 1998, 112 Stat. 611, codified at 22 U.S.C. § 1621 (establishing the Presidential Advisory Commission on Holocaust Assets in the United States); Plunder & Restitution, *supra* (the final report of the Presidential Advisory Commission on Holocaust Assets in the United States); U.S. Dep't of State, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm (hereinafter Washington Principles). (adopted by the forty-four governments participating in the Washington Conference on Holocaust-Era Assets, hosted by the State Department on December 3, 1998). This history of federal action is so comprehensive and pervasive as to leave no room for state legislation. *Cf. English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (discussing traditional statutory field preemption).

Finally, the federal government, "representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines*, 312 U.S. at 63, 61 S.Ct. 399. The recovery of Holocaust-era art affects the international art market, as well as foreign affairs. Many have called for the creation of an international registration system, and a commission to settle Nazi-looted art disputes. *See, e.g.*, Pollock, 43 Houston L. Rev. at 231. Only the federal government possesses the power to negotiate and establish these or other remedies with the international community. As discussed above, the federal government has initiated discussions with other countries, which will hopefully yield a comprehensive remedy for all Holocaust victims and their heirs. *See, e.g.* , Washington Conference Report. No organization comparable to the International Commission on Holocaust Era Insurance Claims has been established *[*968]* yet to resolve Holocaust-era art claims. This does not, however, justify California's intrusion into a field

occupied exclusively by the federal government.

In sum, it is California's *lack* of power to act which is ultimately fatal. In *Deutsch*, we held that "[i]n the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes." *Deutsch*, 324 F.3d at 714. California may not improve upon or add to the resolution of the war. *Id.* The factual circumstances surrounding this case — the many years which have passed since Goring stole the Cranachs from Goudstikker, restitution of the paintings to the Netherlands by the Allies, or the changes in ownership since then — cannot save § 354.3 from this fatal flaw.

V. Did the District Court Err in Concluding that Saher's claim was Time-Barred Under California Code of Civil Procedure § 338?

Though Saher cannot bring her claim under § 354.3, she may be able to state a cause of action within the three-year statute of limitations of § 338. The district court held that Saher's *§ 338* claim was time-barred, because she did not inherit her interest in the Cranachs until after the statute of limitations on the claim had expired. The claim, however, might survive a Rule 12(b)(6) motion to dismiss depending upon how Saher might be able to allege the notice element.

A. Constructive Notice

At the time the museum acquired the Cranachs, around 1971, § 338 provided a strict three-year statute of limitations. Cal.Civ.Proc. Code § 338(3).[fn4] In 1982, the section was amended to incorporate a discovery rule: "[T]he cause of action in the case of theft, as defined in § 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft."[fn5] Cal.Civ.Proc. Code § 338(c); 1982 Cal. Legis. Serv. 3401 (West). Saher does not claim that the 1982 amendments should be applied to her case. Rather, she contends that the statute of limitations on her claim did not begin to run until she discovered that the Cranachs were in the possession of the museum.

Decisions from California's intermediate appellate court have reached differing conclusions as to when the statute of limitations under § 338 begins to run for property stolen prior to 1983. In *Naftzger v. American Numismatic Society*, the court held that a cause of action for the return of property stolen before the 1982 amendment "accrue[s] when the owner discovered the identity of the person in possession of the stolen property, and not when the theft occurred." 42 Cal.App.4th 421, 49 Cal.Rptr.2d 784, 786 (1996). The *Naftzger* court concluded that "there was a discovery rule of accrual implicit in the prior version of section 338." 49 Cal.Rptr.2d at 786. In *Society of California Pioneers v. Baker*, however, the court held that prior to the 1982 amendments, "the statute of limitations began to run anew against a subsequent purchaser." 43 Cal.App.4th 774, 50 Cal.Rptr.2d 865, 869-70 (1996). The *Pioneers* court specifically noted its ***[*969]*** disagreement with *Naftzger*. 50 Cal. Rptr.2d at 870 n. 10.

The California Supreme Court has not addressed the issue, but "has, however, specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive

notice." *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007) (citing *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 658, 751 P.2d 923 (1988)). Thus, in *Orkin*, we concluded that "under the discovery rule, a [pre-1983] cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property." *Id.* at 741.

Saher argues, however, that the *Naftzger* court adopted a discovery rule based on actual, not constructive, notice. As we pointed out in *Orkin*, such a rule would be clearly inconsistent with California Supreme Court precedent. *Id.* (citing *Jolly*, 44 Cal.3d at 1109, 245 Cal.Rptr. 658, 751 P.2d 923).

Saher urges that we certify the issue to the Supreme Court of California for resolution. Though Saher contends that the Orkin court's interpretation of California state law is incorrect, "it is well established that we may reconsider earlier Ninth Circuit precedent only by en banc review or after an intervening Supreme Court decision." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1285 (9th Cir. 1992) (declining to revisit the court's interpretation of New York state law under similar circumstances). Under *Orkin*, we are bound to apply a constructive notice standard.

In conclusion, Saher's cause of action began to accrue when she discovered or reasonably could have discovered her claim to the Cranachs, and their whereabouts. *Orkin*, 487 F.3d at 741.

B. Reasonable Diligence

The Museum asserts that Saher is precluded as a matter of law from making the required showing of reasonable diligence, because the facts underlying her claim were publicly available. We disagree.

A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when "the running of the statute is apparent on the face of the complaint." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006). "[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 (9th Cir. 1995).

In *Orkin*, we concluded that the plaintiffs' claims were time-barred because the face of the complaint established facts that foreclosed any showing of reasonable diligence. *Orkin*, 487 F.3d at 742. The Orkins' complaint admitted that the defendant had purchased the painting in question at a publicized auction, and that she was listed as the owner in a publicly available catalogue raisonné. Id. at 741-42. By contrast, there are no facts on the face of Saher's complaint which foreclose a showing of lack of reasonable notice as a matter of law.

Because it is not clear that Saher's complaint could not be amended to show a lack of reasonable notice, dismissal without leave to amend was not appropriate. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). We, therefore, grant Saher

leave to amend her complaint to allege the lack of reasonable notice to establish diligence under California Code of Civil Procedure § 338, and remand this case to the district court for that purpose. *[*970]*

VI. Conclusion

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. The case is **REMANDED** for further proceedings consistent with this opinion.

[fn1] All subsequent references are to the California Code of Civil Procedure, unless otherwise stated.

[fn2] The facts in this section are alleged in Saher's complaint; some are disputed by the Museum. Given the procedural posture of the case, we accept these factual allegations as true, and construe them in the light most favorable to Saher.

[fn3] These and other related concerns are addressed more fully in the section below dealing with field preemption.

[fn4] In 1988, § 383(3) was renumbered § 383(c); all subsequent references refer to subsection (c) for simplicity's sake. 1988 Cal. Legis. Serv. 1186 (West).

[fn5] In 1989, the phrase "art or artifact" was replaced with "article of historical, interpretive, scientific, or artistic significance." Cal. Civ.Proc. Code § 338(c) (West 1989).

PREGERSON, Circuit Judge, dissenting in part:

I dissent from the majority's conclusion that California is acting outside the realm of traditional state responsibility, and that field preemption applies. Where a State acts within its "traditional competence," the Supreme Court has suggested that conflict preemption, not field preemption, is the appropriate doctrine. *Am. Ins. Ass'n v. Garamendi* 539 U.S. 396, 420 n. 11, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003). *Garamendi* counsels that field preemption would apply "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility. . . ." *Id.* That is not the case here.

It is undisputed that property is traditionally regulated by the State. The majority acknowledges that California has a legitimate interest in regulating museums and galleries, and that California Code of Civil Procedure § 354.3 "addresses the problem of Nazi-looted art currently hanging on the walls of the state's museums and galleries." Maj. Op. at 964-65. However, the majority goes on to hold that because Section 354.3 applies to any museum or gallery, "California has created a world-wide forum for the resolution of Holocaust restitution claims," and that the State is therefore acting outside the scope of its traditional interests. Maj. Op. at 965.

The majority reads the statute far too broadly. A reasonable reading of "any museum or gallery" would limit Section 354.3 to entities subject to the jurisdiction of the State of California. Because California has a "serious claim to be addressing a traditional state

responsibility," it is clear that *Garamendi* requires us to apply conflict preemption, not field preemption.

The majority's reliance on *Deutsch v. Turner Corp.*, 324 F.3d 692, (9th Cir. 2005) is misplaced. The statute in *Deutsch*, California Code of Civil Procedure § 354.6, allowed recovery for slave labor performed "between 1929 and 1945, [for] the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." This court held that California impermissibly intruded upon the power of the federal government to resolve war by enacting the *Deutsch* statute "with the aim of rectifying wartime wrongs *committed by our enemies* . . . ." Id. at 708, 711(emphasis added).

The majority concludes that Section 354.3 suffers from a "fatal similarity" to the *Deutsch* statute because Section 354.3 applies to looted artwork. Maj. Op. at 966. I do not agree. The majority overlooks significant differences between the *Deutsch* statute and Section 354.3. First, as discussed above, here California has acted within the scope of its traditional competence to regulate property over which it has jurisdiction. Furthermore, unlike the statute in *Deutsch*, Section 354.3 does not target enemies of the United States for wartime actions. Nor, contrary to the majority's characterization, does Section 354.3 provide for war reparations.[fn1] Maj. Op. at 966-67. Here, Appellee, a museum located in California, acquired stolen property in 1971. Appellant now seeks to recover that property. I fail to ***[*971]*** see how a California statute allowing such recovery intrudes on the federal government's power to make and resolve war.

I would reverse the district court. As the majority correctly holds, Section 354.3 does not conflict with federal policy. However, California has acted within its traditional competence, and field preemption should not apply. Accordingly, I dissent in part.

[fn1] Black's Law Dictionary defines reparation as "[c]ompensation for an injury or wrong, esp. for wartime damages or breach of an international obligation." *Black's Law Dictionary* 1325 (8th ed. 2004). Section 354.3 allows only for the recovery of stolen art.

--- F.3d ----, 2010 WL 5028828 (C.A.9 (Cal.))
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Only the Westlaw citation is currently available.

United States Court of Appeals,
Ninth Circuit.
Vazken MOVSESIAN; Harry Arzoumanian; Garo Ayaltin; Miran Khagerian; Ara Khajerian, individually and on behalf of all others similarly situated including thousands of senior citizens, disabled persons, and orphans as well as on behalf of the general public and acting in the public interest, Plaintiffs-Appellees,
v.
VICTORIA VERSICHERUNG AG, a German corporation; Ergo Versicherungsgruppe AG, a German corporation, Defendants,
and
Munchener Ruckversicherungsgesellschaft Aktiengesellschaft AG, a German corporation, Defendant-Appellant.
No. 07-56722.

Argued and Submitted Dec. 8, 2008.
Filed Dec. 10, 2010.

Neil Michael Soltman, Los Angeles, CA, for the defendant/appellant.

Brian S. Kabateck, Los Angeles, CA, for the plaintiffs/appellees.

Appeal from the United States District Court for the Central District of California, Christina A. Snyder, District Judge, Presiding. D.C. No. CV-03-09407-CAS-JWJ.

Before HARRY PREGERSON, DOROTHY W. NELSON and DAVID R. THOMPSON, Circuit Judges.

ORDER AND OPINION

PREGERSON, Circuit Judge:

ORDER

*1 Judge Pregerson and Judge Nelson vote to grant the petition for rehearing and Judge Thompson votes to deny the petition for rehearing. The petition for rehearing is GRANTED.

The opinion and dissent filed on August 20, 2009, are hereby withdrawn. The opinion and dissent attached to this order are hereby filed.

New petitions for rehearing and rehearing en banc may be filed.

OPINION

Section 354.4 of the California Code of Civil Procedure extends the statute of limitations until 2010 for claims arising out of life insurance policies issued to "Armenian Genocide victim[s]." Cal.Civ.Proc.Code § 354.4(c) (West 2006). The primary issue in this appeal is whether § 354.4 conflicts with a clear, express federal executive policy. We conclude that there is no express federal policy forbidding states to use the term "Armenian Genocide," and we affirm the district court.

I. Background

In 2000, the California Legislature enacted Senate Bill 1915, which amended California's Code of Civil Procedure [FN1] to provide California courts with jurisdiction over certain classes of claims arising out of insurance policies held by "Armenian Gen-

ocide vitcim[s]." Sen. Bill No.1915 (1999-2000 Reg. Sess.), 2000 Cal. Legis. Serv. 543 (West 2000), codified at Cal.Civ.Proc.Code § 354.4. The Bill also amended the Code to extend the statute of limitations for such claims until December 31, 2010. *Id.* Section 354.4, in its entirety, provides:

> FN1. Hereinafter, all statutory references are to the California Code of Civil Procedure, unless otherwise indicated.

(a) The following definitions govern the construction of this section:

(1) "Armenian Genocide victim" means any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period.

(2) "Insurer" means an insurance provider doing business in the state, or whose contacts in the state satisfy the constitutional requirements for jurisdiction, that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe or Asia at any time between 1875 and 1923.

(b) Notwithstanding any other provision of law, any Armenian Genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer described in paragraph (2) of subdivision (a), may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state, which court shall be deemed the proper forum for that action until its completion or resolution.

(c) Any action, including any pending action brought by an Armenian Genocide victim or the heir or beneficiary of an Armenian Genocide victim, whether a resident or nonresident of this state, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2010.

***2** (d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

In the legislative findings accompanying the statute, the Legislature recognized that:
[D]uring the period from 1915 to 1923, many persons of Armenian ancestry residing in the historic Armenian homeland then situated in the Ottoman Empire were victims of massacre, torture, starvation, death marches, and exile. This period is known as the Armenian Genocide.

Sen. Bill No.1915 at § 1.

In December 2003, Vazken Movsesian ("Movsesian") filed this class action against Victoria Versicherung AG ("Victoria"), Ergo Versicherungsgruppe AG ("Ergo"), and Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG ("Munich Re"). Movsesian and his fellow class members are persons of Armeni-

an descent who claim benefits from insurance policies issued by Victoria and Ergo. Munich Re is the parent company of Victoria and Ergo. Movsesian seeks damages from all three companies for breach of written contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and other related claims. Munich Re filed a Rule 12(b)(6) motion to dismiss the claims, arguing that the class members lacked standing to bring claims under § 354.4, and contending that it was not a proper defendant under § 354.4. Munich Re also challenged the constitutionality of § 354.4, on the grounds that it violated the due process clause of the United States Constitution and was preempted under the foreign affairs doctrine.

The district court granted Munich Re's motion to dismiss the claims for unjust enrichment and constructive trust, and denied Munich Re's motion to dismiss the claims for breach of contract and breach of the covenant of fair dealing. The court held that the class members had standing to bring their claims, and that Munich Re was a proper defendant under § 354.4. The court rejected Munich Re's due process challenge, and held that § 354.4 was not preempted under the foreign affairs doctrine.

Munich Re filed a motion to certify the district court's order for interlocutory appeal, and to stay the action pending appeal. The district court granted the motion, and stayed the case. Within the ten-day window provided by 28 U.S.C. § 1292(b), Munich Re petitioned this court for permission to pursue an interlocutory appeal, which we granted.[FN2]

FN2. At oral argument, Munich Re asked us to take judicial notice of a December 4, 2008 letter from Nabi Sensoy, the Turkish Republic's Ambassador to the United States, to Molly Dwyer, Clerk of the United States Court of Appeals for the Ninth Circuit (December 4, 2008). We decline to take judicial notice of the letter because the letter was submitted after-and apparently in response to-the district court's decision. *See, e.g., Ctr. for Bio-Ethical Reform, Inc. v. City and County of Honolulu,* 455 F.3d 910, 918 n. 3 (9th Cir.2006) (declining to take judicial notice of documents issued after the district court's decision).

On appeal, the parties address three issues: first, whether § 354 .4 is preempted under the foreign affairs doctrine; second, whether Munich Re is a proper defendant; and third, whether the Plaintiff-Appellees have standing to bring these claims.[FN3] We address each issue in turn.

FN3. Neither party addresses the due process issue on appeal.

II. Standard of Review

We review de novo a district court's grant of a Rule 12(b)(6) motion to dismiss. *Edwards v. Marin Park, Inc.,* 356 F.3d 1058, 1061 (9th Cir.2004). "When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN,* 393 F.3d 1068, 1072 (9th Cir.2005).

III. The Constitutionality of § 354.4 Under the Foreign Affairs Doctrine

***3** This case presents the issue of whether § 354.4 of the California Code of Civil

Procedure is preempted under the foreign affairs doctrine. Munich Re contends that § 354.4 is preempted in two ways: first, that it conflicts with the Executive Branch's policy prohibiting legislative recognition of an "Armenian Genocide"; and second, that it is preempted by the Claims Agreement of 1922 (the "Claims Agreement") and the War Claims Act of 1928 (the "War Claims Act"). We conclude that there is no clear federal policy with respect to references to the Armenian Genocide, and, therefore, that there can be no conflict. We also conclude that neither the Claims Agreement nor the War Claims Act, which resolved World War I-related claims between the United States and Germany, has any application to life insurance policies issued to citizens of the Ottoman Empire between 1915 and 1923.

A. Conflict Preemption

It is well settled that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy." *Am. Ins. Assoc. v. Garamendi,* 539 U.S. 396, 413 (2003). "Nor is there any question generally that there is executive authority to decide what that policy should be." *Id.* at 414. However, not every executive action or pronouncement constitutes a proper invocation of that potentially preemptive policy-making power. *See Medellin v. Texas,* 552 U.S 491, 531-32 (2008) (limiting preemptive effect of informal presidential communications where Congress has not implicitly approved such authority). *Garamendi* established that executive agreements do carry policy-making force, at least where Congress has historically acquiesced to such executive practices. *See Garamendi,* 539 U.S. at 415; *Medellin,* 552 U.S 491 at 531-32. In *Garamendi,* the Court found that several executive agreements, coupled with statements from executive branch officials, constituted an express federal policy. *Garamendi,* 539 U.S. at 415. Here, in contrast, there is no executive agreement regarding use of the term "Armenian Genocide."

Instead, Munich Re points to informal presidential communications as the sole source of a clear, express federal policy against use of the term "Armenian Genocide." For example, in 2000, House Resolution 596 proposed to recognize the Ottoman Empire's atrocities against the Armenians between 1915 and 1923. H.R. Res. 596, 106th Cong. (2000). President Clinton and senior administration officials sent letters to the House, suggesting that Resolution 596 would negatively impact United States interests in the Balkans and Middle East. Letter to the Speaker of the House of Representatives on a Resolution on Armenian Genocide, 3 Pub. Papers 2225-26 (Oct. 19, 2000); H.R.Rep. No. 106-933, at 16-19 (2000). Resolution 596 was never brought to a floor vote.

In 2003, a proposed general resolution "reaffirm[ed] support of the Convention on the Prevention and Punishment of the Crime of Genocide" and used the term "Armenian Genocide." H.R. Res. 193, 108th Cong. (2003). A State Department official opposed the resolution, arguing that it would hamper peace efforts in the Caucasus. H.R.Rep. No. 108-130, at 5-6 (2003). The resolution never reached the House floor.

*4 In 2007, the House entertained another resolution that would provide official recognition to an "Armenian Genocide." House Resolution 106 was nearly indistinguishable from House Resolution 596, discussed above. President Bush opposed Res-

olution 106, to which he referred as the "Armenian genocide resolution," on the ground that it would negatively affect the war on terror. Remarks on Intelligence Reform Legislation, 43 Weekly Comp. Pres. Doc. 1320 (Oct.10, 2007). The House never brought Resolution 106 to the floor for a vote.

Munich Re argues that these communications are sufficient to constitute an express federal policy. They are not. The three cited executive branch communications arguing against recognition of the Armenian Genocide are counterbalanced, if not outweighed, by various statements from the federal executive and legislative branches *in favor* of such recognition.

Despite its occasional reluctance to officially recognize the Armenian Genocide, the House of Representatives has done so in the past. In 1975, the House observed a day of remembrance for "all victims of genocide, especially those of Armenian ancestry." H.J. Res. 148, 94th Congress (1975). In 1984, the House similarly recognized "victims of genocide, especially the one and one-half million people of Armenian ancestry." H.J. Res. 247, 98th Congress (1984).

The Executive Branch has repeatedly used terms virtually indistinguishable from "Armenian Genocide." In 1998, President Clinton publicly commemorated "the deportations and massacres of a million and a half Armenians in the Ottoman Empire in the years 1915-1923." 1 Pub. Papers 617 (Apr. 24, 1998). In 1981, President Reagan explicitly stated that "like the *genocide of the Armenians* before it, and the genocide of the Cambodians, which followed it-and like too many other persecutions of too many other people-the lessons of the Holocaust must never be forgotten." Proclamation 4838 (Apr. 22, 1981) *available at* http://www.reagan.utexas.edu/archives/speeches/1981/42281c.htm (emphasis added).

The current administration has also at times favored recognition of the Armenian Genocide. In the midst of his campaign for the presidency, then-Senator Obama asserted in a Senate floor statement that "[i]t is imperative that we recognize the horrific acts carried out against the Armenian people as genocide." *See, e.g.,* 110th Cong. Rec. S3438-01 (Apr. 28, 2008). Since taking office, President Obama has issued additional statements that seem to support recognition of the Armenian Genocide. In 2009, for example, President Obama publicly remembered "the 1.5 million Armenians who were [ ] massacred or marched to their death in the final days of the Ottoman Empire. The Meds Yeghern must live on in our memories, just as it lives on in the hearts of the Armenian people." *See* Statement of President Barack Obama on Armenian Remembrance Day, http://www.white-house.gov/the_press_office/Statement-of-President-BarackObama-on-Armenian-Remembrance-Day/ (last accessed August 13, 2010). "Meds Yeghern" is the term for "Armenian Genocide" in the Armenian language.

***5** We also note that while some forty states recognize the Armenian Genocide, the federal government has never expressed any opposition to any such recognition. *See, e.g.,* Mich. Comp. Laws § 435.281 ("Michigan Days of Remembrance of Armenian Genocide"); 1990 Okla. Sess. Law Serv. Sen. Conc. Res. 68 (West) ("Armenian Remembrance Day"); Proclamation of Governor Jim Gibbons De-

claring April 24, 2010 as "Armenian Genocide Remembrance Day", http://gov.state.nv.us/PROCs/2010/2010-04-24_Armenian_ genocide_ remembrance.pdf (last visited August 13, 2010); Proclamation of Governor John Hoeven Declaring April 24, 2007 "Armenian Genocide Remembrance Day", http:// governor.nd.gov/proc/docs/2007/04/20070424a.pdf (last visited August 20, 2010).

Considering the number of expressions of federal executive and legislative support for recognition of the Armenian Genocide, and federal inaction in the face of explicit state support for such recognition, we cannot conclude that a clear, express federal policy forbids the state of California from using the term "Armenian Genocide."

The Supreme Court has suggested that field and conflict preemption are "complementary," *Garamendi,* 539 U.S. at 420 n. 11, and that it "would be reasonable" to consider the strength of a state's interest to determine "how serious a conflict must be shown before declaring the state law preempted." *Id.* at 420. Having determined that there is no clear federal policy with which § 354.4 could conflict, we briefly discuss the possibility of field preemption. Under the Court's suggested approach, field preemption would only apply if a "State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Id.* at 420 n. 11. That is not the case here.

California's attempt to regulate insurance clearly falls within the realm of traditional state interests. The legislative findings accompanying California Code of Civil Procedure § 354.4 recognize that thousands of California residents and citizens have often been deprived of their entitlement to benefits under certain insurance policies. S.1915, 1999-2000 Reg. Sess. (Cal.2000) at § 1(b). The Supreme Court has recognized that California has "broad authority to regulate the insurance industry." *Garamendi,* 539 U.S. at 434 n. 1 (Ginsburg, J. dissenting) (citing *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.,* 451 U.S. 648, 653-655 (1981)). California has not exceeded that authority merely by "assigning special significance to an insurer's treatment arising out of a[ ] [particular] era...." *Id.* California's interest in ensuring that its citizens are fairly treated by insurance companies over which the State exercises jurisdiction is hardly a superficial one. Furthermore, Section 354.4 's regulation of the insurance industry has, at most, an incidental effect on foreign affairs, particularly considering that thirty-nine other states already officially recognize the Armenian Genocide. *See Garamendi,* 539 U.S. at 418-42.

B. Preemption By the Claims Agreement and the War Claims Act

***6** In 1922, the United States and Germany entered into an executive agreement establishing a commission to resolve all claims concerning "debts owing to American citizens by the German government or by German nationals." 42 Stat. 2200 (1922) (the "Claims Agreement"). In 1928, the Settlement of War Claims Act (the "War Claims Act") provided for payment of Claims Agreement awards. *Z & F Assets Realization Corp. v. Hull,* 114 F.2d 464, 476 (D.C.Cir.1940), *aff'd,* 311 U.S. 470 (1941). The Claims Agreement and War Claims Act, if applicable, have preemptive effect. *See Garamendi,* 539 U.S. at 416; *Medellin,* 552 U.S. at 532.

Munich Re argues that the Claims Agree-

ment and War Claims Act apply to claims against German insurance companies by Armenian Genocide victims. We disagree. The insurance policies were the private property of insured Armenian citizens of the Ottoman Empire, not German debts owing to American citizens.

Munich Re's reliance on *Deutsch v. Turner,* 324 F.3d 692 (9th Cir.2003), is misplaced. In *Deutsch,* we invalidated a California statute that allowed World War II slave laborers to bring war-related claims against wartime enemies of the United States. *Deutsch,* 324 F.3d at 712. We held that California's attempt to create a private right of action for war-related injuries intruded upon the federal government's exclusive power over matters related to war. *Id.* at 712-716.

Here, in contrast, § 354.4 does not implicate the government's exclusive power over war. Section 354.4 covers private insurance claims, not wartime injuries. *See Alperin v. Vatican Bank,* 410 F.3d 532, 548 (9th Cir.2005) (distinguishing "garden-variety" private property interests from war injuries). Furthermore, as the district court noted, the Claims Agreement was signed *before* the end of the Armenian Genocide. According to the California legislature, the Armenian Genocide ended in 1923, a year after the Claim Act was signed at Berlin. We reject Munich Re's assertion that the Claims Agreement, which resolved claims from the concluded fighting in World War I, has any bearing on life insurance policies issued to citizens of the Ottoman Empire. The Claims Agreement and War Claims act therefore do not preempt § 354.4.

IV. Whether Munich Re Is a Proper Defendant

Munich Re also argues that is it not an "insurer," as defined in § 354.4(a)(2), and therefore is not a proper defendant. Specifically, Munich Re contends that it did not issue insurance policies in Europe or Asia at any time between 1875 and 1923. However, Munich Re's subsidiaries, Victoria and Ergo, *did* issue such policies. Contrary to Munich Re's interpretation, § 354.4 does not define "insurer" for purposes of limiting the class of potential *defendants,* but rather to limit the types of *claims* that may be brought. Cal.Civ.Proc.Code § 354.4(b). Accordingly, Munich Re is a proper defendant.

V. Whether Movsesian Has Standing

*7 Lastly, we agree with the district court that § 354.4(c) confers standing on Movsesian. We reject Munich Re's assertion that § 354.4(c)'s reference to Armenian genocide victims, their heirs, and beneficiaries is "all-encompassing." The broad language of § 354.4(c) clearly applies to "any action" seeking benefits under the insurance policies, so long as the action is filed before December 31, 2010.

VI. Conclusion

California Code of Civil Procedure § 354.4 is not preempted by federal law. There is no clearly established, express federal policy forbidding state references to the Armenian Genocide. California's effort to regulate the insurance industry is well within the realm of its traditional interests. Nothing in § 354.4(a)(2) or § 354.4(b) operates to limit the class of proper defendants, nor does § 354.4(c) limit standing to any particular group. Accordingly, the district court's order denying the Rule 12(b)(6) motion to dismiss is AFFIRMED.

THOMPSON, Senior Circuit Judge, dissenting:

Contrary to the majority's view, I would hold that a clear Presidential foreign policy exists in this case against officially recognizing the "Armenian Genocide." Over the past decade, three separate House Resolutions have attempted to formally recognize the "Armenian Genocide." *See* H.R. Res. 596, 106th Cong. (2000); H .R. Res. 193, 108th Cong. (2003); H.R. Res. 106, 110th Cong. (2007). Each time, however, the Administrations of President Clinton and President Bush took specific actions, both publicly and privately, to oppose those Resolutions [FN1] and to urge that legislative action was not the preferred solution. [FN2] And each time, as a result, the Resolutions concerned were never brought to a vote on the floor.

> FN1. *See, e.g.,* Letter to the Speaker of the House of Representatives on a Resolution on Armenian Genocide, 3 Pub. Papers 2225-26 (Oct. 19, 2000) (noting that H.R. Res. 596 could have "far-reaching negative consequences for the United States" and might "undermine efforts to encourage improved relations between Armenia and Turkey"); H.R.Rep. No. 108-130, at 5-6 (2003) (noting that H.R. Res. 193 "could complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish-Armenian reconciliation"); Press Release, White House Office of the Press Secretary, President Bush Discusses Foreign Intelligence Surveillance Act Legislation (Oct. 10, 2007) (noting that H.R. Res. 106 "would do great harm to our relations with a key ally in NATO and in the global war on terror").
>
> FN2. *See, e.g.,* Press Release, White House Office of the Press Secretary, President Bush Discusses Foreign Intelligence Surveillance Act Legislation (Oct. 10, 2007) (urging opposition to H .R. Res. 106 because it was "not the right response to these historic mass killings"); Press Release, White House Office of the Press Secretary, Press Briefing by Dana Perino (Oct. 11, 2007) ("The President believes that the proper way to address this issue and express our feelings about it is through the presidential message and not through legislation.").

Based on this undisputed evidence, which in my view is not undermined by the federal government's occasional efforts to commemorate these tragic and horrific events, I would conclude that there is an express foreign policy prohibiting legislative recognition of the "Armenian Genocide," as pronounced by the Executive Branch and as acquiesced in by Congress. Accordingly, I dissent. I would find that California Code of Civil Procedure § 354 .4 is preempted because it clearly conflicts with this express federal policy. *See Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 420-25 (2003).

More importantly, the same result is mandated under a theory of field preemption. The Supreme Court has characterized the power to deal with foreign affairs as primarily, if not exclusively, vested in the federal government. *See, e.g., id.* at 413-14; *Zschernig v. Miller,* 389 U.S. 429, 435-36 (1968); *United States v. Pink,* 315 U.S. 203, 233 (1942). As a result, the Court has declared state laws to be preempted when they were incompatible with the federal government's foreign affairs power,

even in the absence of any conflict. *See, e.g., Zschernig,* 389 U.S. at 432, 440-41 (striking down an Oregon probate law, in the absence of any federal action, because it was an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"); *Hines v. Davidowitz,* 312 U.S. 52, 62-65 (1941) (invalidating a Pennsylvania statute governing aliens because the field of immigration regulation is occupied exclusively by federal law). This court has done the same on occasion, also in the absence of any apparent conflict. *See, e.g., Von Saher v. Norton Simon Museum of Art at Pasadena,* 592 F.3d 954, 965-68 (9th Cir.2010) (finding preempted California's statute dealing with recovery of art stolen by the Nazis because the statute intruded on the federal government's power to make and resolve war); *Deutsch v.. Turner Corp.,* 324 F.3d 692, 715-16 (9th Cir.2003) (finding unconstitutional California's statute providing recovery to World War II slave laborers because the statute intruded on the federal government's power to resolve war claims).

***8** The central question under a field preemption analysis is whether, in enacting § 354.4, California has addressed a "traditional state responsibility," *Garamendi,* 539 U.S. at 419 n. 11, or whether it has "infringed on a foreign affairs power reserved by the Constitution exclusively to the national government." *Von Saher,* 592 F.3d at 964. Courts have consistently looked past "superficial" interests to ascertain true legislative intent. *See, e.g., Garamendi,* 539 U.S. at 425-26 (rejecting purported state interest in regulating insurance business and blue sky laws); *Zschernig,* 389 U.S. at 437-41 *(rejecting purported state interest in regulating descent of property); Von Saher,* 592 F.3d at 964-65 (rejecting purported state interest in establishing a statute of limitations for actions seeking the return of stolen property); *Deutsch,* 324 F.3d at 707-08 (rejecting purported state interest in procedural rules).

In this case, even though § 354.4 purports to regulate the insurance industry, its real purpose is to provide relief to the victims of "Armenian Genocide." *See* Sen. Jud. Comm., Analysis of S.B.1915, 1999-2000 Reg. Sess. 5-6 (May 9, 2000). By its terms, only "Armenian Genocide" victims or their heirs and beneficiaries can bring a claim under the statute. CAL. CIV. PROC. CODE § 354.4(b). "Armenian Genocide victim," in turn, is defined as "any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period." *Id.* § 354.4(a). In short, § 354.4 is California's attempt to provide relief to a specific category of claimants who were aggrieved by a foreign nation, not a general attempt to regulate the insurance industry. While this may be a commendable goal, it is not an area of "traditional state responsibility," and the statute is therefore subject to a field preemption analysis. *See Garamendi,* 539 U.S. at 419 n. 11, 425-27; *Von Saher,* 592 F.3d at 964-65.

The majority errs in relying on Justice Ginsburg's dissent in *Garamendi* to reach a contrary conclusion. *See ante* at 19659. The *Garamendi* majority specifically *rejected* Justice Ginsburg's position that California in that case had broad authority to regulate the insurance industry, noting instead that the challenged statute "effectively single[d] out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." 539 U.S. at 425-26. Similarly, in this case,

California's interest is weak because instead of regulating the insurance industry generally, § 354.4 effectively singles out only policies issued in Europe or Asia, to any person of Armenian ancestry, in the Ottoman Empire, at least 87 years ago.

As applied to this case, there can be no doubt that § 354.4 is preempted. The Constitution vests with the President the power to make policy determinations regarding national security, wars in progress, and diplomatic relations with foreign nations. *See* U.S. Const. art. II, § 2, cl. 1; *id.* § 2, cl. 2; *id.* § 3; *see also Garamendi,* 539 U.S. at 414-15; *Deutsch,* 324 F.3d at 708-09. The Constitution also delegates to the President the prerogative "to speak for the Nation with one voice in dealing with other governments." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 381 (2000). When it comes to interactions with foreign nations, "state lines disappear." *United States v. Belmont,* 301 U.S. 324, 331 (1937). By declaring that the "Armenian Genocide" has occurred and by providing a right of action for its victims, California is intruding into the field of foreign relations by passing judgment on another nation when the President has expressly decided to pursue an alternate way of addressing the issue.[FN3] California's approach, thus, "undercuts the President's diplomatic discretion and the choice he has made exercising it." *See Garamendi,* 539 U.S. at 423-24.

> FN3. The President's concern that a formal recognition of the "Armenian Genocide" might have negative consequences on our relations with Turkey is very real. For example, when the French National Assembly voted in favor of a bill that would criminalize denial of the events of 1915, the Turkish military cut all contacts with the French military and terminated defense contracts under negotiation. *See* Letter from Robert M. Gates, Sec'y of Defense, and Condoleeza Rice, Sec'y of State, to Nancy M. Pelosi, Speaker of the House of Representatives (Mar. 7, 2001).

***9** Finally, the majority's opinion appears to be in conflict with our recent case law on the issue. The majority highlights the fact that in this case there is no executive agreement regarding the use of the term "Armenian Genocide." See ante at 19656. However, our recent decisions in *Deutsch* and *Von Saher* indicate that the preemptive power of federal policy is not derived from the form of the policy statement, but rather from the source of the Executive Branch's authority to act. Thus, we have recently stated that "foreign affairs field preemption may occur 'even in the absence of a treaty or federal statute, because a state may violate the Constitution by establishing its own foreign policy.' " *Von Saher,* 592 F.3d at 964 (quoting *Deutsch,* 324 F.3d at 709). Applying this principle, the court can hold a state law preempted regardless of "whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government." *See Garamendi,* 539 U.S. at 419 n. 11; *accord Von Saher,* 592 F.3d at 963-64.

Accordingly, I would conclude there is an express Presidential foreign policy, as acquiesced in by Congress, prohibiting legislative recognition of the "Armenian Genocide." By formally recognizing the "Armenian Genocide," § 354.4 directly

conflicts with this foreign policy. Moreover, far from concerning an area of traditional state interest, § 354.4 instead infringes upon the federal government's prerogative to conduct foreign affairs. Therefore, I respectfully dissent and would reverse the district court's order denying the Rule 12(b)(6) motion to dismiss.

C.A.9 (Cal.),2010.
Movsesian v. Victoria Versicherung AG
--- F.3d ----, 2010 WL 5028828 (C.A.9 (Cal.))

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Dunbar v. Seger-Thomschitz, 615 F.3d 574 (5th Cir. 2010) [2010 BL 193416]

United States Court of Appeals, Fifth Circuit.

SARAH BLODGETT DUNBAR, Plaintiff-Appellee v. CLAUDIA SEGER-THOMSCHITZ, Doctor, Defendant-Appellant.

No. 09-30717.

Filed August 20, 2010.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES, Chief Judge, and KING and HAYNES, Circuit Judges.

EDITH H. JONES, Chief Judge:

A painting by Oskar Kokoschka entitled *Portrait of Youth* (Hans Reichel)(1910) ("the painting") is currently in the physical possession of the Appellee, Sarah Dunbar, in New Orleans, Louisiana. Appellant, Dr. Claudia Seger-Thomschitz, claims title to the painting, asserting that it was "confiscated" by the Nazis from her deceased husband's family. Dunbar sued to quiet title to the painting based on her ownership by acquisitive prescription under Louisiana law and the fact that Seger-Thomschitz's claims were barred by Louisiana's prescriptive laws. The district court granted summary judgment in favor of Dunbar. Segar-Thomschitz now appeals, asserting that this court should invoke "federal common law authority" to displace Louisiana law and Louisiana law is *[*2]* preempted by the foreign policy of the Executive Branch. We reject these arguments and affirm the judgment of the district court.

I.

Dr. Seger-Thomschitz, the sole heir of Raimund Reichel's estate, alleges that the painting was confiscated by the Nazis from Reichel's father through a "forced sale" in Vienna, Austria, in 1939. According to Seger-Thomschitz, Reichel's father, who was facing increasing Nazi persecution, transferred ownership of the painting and four other paintings to a Jewish art dealer named Kallir, an alleged collaborator with the Nazis. When Dunbar's mother

purchased the painting from Kallir in 1946 in New York, she knew the Reichel family had owned the painting and knew or should have known that the painting may have been stolen. Dunbar's mother, according to the appellant, had a duty to investigate the painting's ownership. Dunbar inherited the painting from her mother in 1973.

After receiving a demand letter from appellant, Dunbar filed suit to quiet title to the painting. Seger-Thomschitz counterclaimed based on quasi-contract and unjust enrichment. The district court granted summary judgment in favor of Dunbar, because Dunbar had obtained title by acquisitive prescription under Louisiana state law and Seger-Thomschitz's counterclaims were time-barred by the applicable Louisiana prescriptive periods. The district court rejected Seger-Thomschitz's argument that the Louisiana prescription laws should be supplanted with "federal common law" to ensure the goals of the federal Holocaust Victims Redress Act ("HVRA"), Pub.L. No. 105-158, *§ 202*, 112 Stat. 15, 17-18 (1998). The district court noted, *inter alia*, that the HVRA did not create a federal common law cause of action or a private right of action. The district court also found no material factual dispute over Dunbar's ownership of the painting, which had been open and continuous for well over ten years, fulfilling the requirements to establish ownership by acquisitive prescription *[*3]* under Louisiana law. Undisputed evidence also established that the Reichel family sought post-Nazi compensation for other works of art and property, but not for this painting. The family twice loaned this painting to Kallir for exhibit and possible sale prior to the Nazi occupation of Austria. Significantly, those members of the Reichel family with direct knowledge of the painting's sale never sought its return.

On appeal, Appellant no longer relies on the HVRA, nor does she question that Louisiana prescriptive laws were correctly applied. Instead, she argues that Louisiana law should not be applied at all. Appellant contends that the court should invoke its "federal common law authority" to displace Louisiana law, and Louisiana law is preempted by the "Terezín Declaration," a non-binding document promulgated at the Prague Holocaust Assets Conference of June 30, 2009.

II.

We review the district court's grant of summary judgment *de novo*. *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 576 (5th Cir. 2003). The court of appeals will not generally consider evidence or arguments that were not presented to the district court. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988). Plaintiffs may not advance on appeal new theories or raise new issues not properly before the district court to obtain reversal of the summary judgment. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1071 (5th Cir. 1994) (en banc). The court of appeals will not consider an issue that a party fails to raise in the district court, absent extraordinary circumstances. *North Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 916 (5th Cir. 1996). Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it. *Id.*

*[*4]*

III.

A.

Appellant argues, as she did in the district court, that "federal common law authority" should displace Louisiana law's prescriptive periods with federal doctrines of laches and unclean hands to enable claims to recover Nazi-confiscated artworks to be decided on their

substantive merits. Appellant asserts that "federal courts displace otherwise applicable state law *whenever* it conflicts with or frustrates important federal interests or policies." No court has ever adopted what Appellant is urging here — some form of special federal limitations period governing all claims involving Nazi-confiscated artwork. In such cases, courts have consistently applied state statutes of limitations. *See, e.g., Orkin v. Taylor*, 487 F.3d 734, 741-42 (9th Cir. 2007); *Von Saher v. Norton Simon Mus. of Art at Pasadena*, 578 F.3d 1016, 1029-30 (9th Cir. 2009); *Detroit Institute of Art v. Ullin, 2007 WL 1016996*, *2 (E.D.Mich. 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d. 802, 806 (D. Ohio 2006). Further, as this case is brought under federal diversity jurisdiction, the application of state statutory limitations periods is controlled by *Erie. Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945).

With regard to fashioning federal common law, the Supreme Court has held:

> The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of ***[*5]*** the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41, 101 S. Ct. 2061, 2067 (1981). Here, no Act of Congress has articulated "rights and obligations of the United States" in regard to these claims; even the HVRA creates no individual cause of action. *Orkin*, 487 F.3d at 739. Where Congress has not acted, federal courts' power to displace state law with federal common law is severely constrained. Further, no interstate or international disputes are implicated in this controversy that require creation of a uniform federal rule of law. There is in sum no basis to lay out any federal common law to replace Louisiana's prescriptive periods.

B.

For the first time on appeal, Seger-Thomschitz contends that the application of Louisiana's prescriptive laws conflicts with and must be preempted by U.S. foreign policy, most recently articulated in the Terezin Declaration.[fn1] The preemption theory she now raises is unrelated to the

argument for invoking federal common law. Although federal preemption is a legal issue, Appellant has not met the burden of establishing extraordinary circumstances to justify consideration of a new legal theory for the first time on appeal. *See North Alamo Water, supra*

.

Appellant argues that she could not have cited the Terezin Declaration to the district court

because it was issued just a few days before the district court's ruling. That the Terezin Declaration was promulgated contemporaneously with *[*6]* the district court's order would not have prevented Appellant from citing the Declaration to the court after it ruled. But more important, the Terezin Declaration is not crucial to the Appellant's preemption argument. It is a "nonbinding executive agreement" that is representative of what Appellant argues to be the preemptive scope of longstanding U.S. foreign policy. Appellant thus could have easily raised the preemption theory to the district court based upon the historical antecedents of the Terezin Declaration, which she avers date back to 1998.[fn2] Appellant offered no compelling reason why she failed to present this theory to the district court nor does it appear that a miscarriage of justice will result from our failure to address it. We are unpersuaded that this novel theory should be explored for the first time on appeal.

C.

Even if we were to consider Appellant's preemption theory, it is untenable. Appellant relies principally on *American Insurance Association v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374 (2003), to support the argument that the Terezin Declaration should preempt the Louisiana prescriptive periods. In *Garamendi*, California enacted the Holocaust Victim Insurance Relief Act, which required any insurer that did business in California and that sold insurance policies to Europe during the Holocaust era to disclose certain information about those policies to the California State Insurance Commissioner or risk losing its license. The Supreme Court held the California law was preempted by the implied dormant foreign affairs power of the President. Id. at 423-24, 123 S. Ct. at 2391-92. The opinion noted that "resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs." Id. at 420, 123 S. Ct. at 2390. Federal *[*7]* preemption prevented the state from pursuing a more aggressive policy than the President's foreign policy, as expressed by executive agreements with other nations and statements by high-level executive officials. Id. at 421-22, 427, 123 S. Ct. at 2390, 2393 ("California seeks to use an iron fist where the President has consistently chosen kid gloves."). Significantly, *Garamendi* found preemption while acknowledging the absence of either an express federal preemption clause or a direct conflict between California and federal law. *Garamendi* noted, however, that where a state has acted within "its traditional competence, but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or traditional importance of the state concern asserted." Id. at 420 n. 11, 123 S. Ct. at 2390.

Seger-Thomschitz argues that to apply Louisiana's prescriptive laws would unconstitutionally intrude on the President's authority to conduct foreign affairs. The policy represented by the Terezin Declaration should preempt Louisiana prescription periods because it expresses a preference to adjudicate claims for recovery of Nazi-confiscated artworks on their facts and merits. As additional support, Appellant cites statements by various executive branch officials expressing concern that such claims were not being adjudicated on the merits but were barred by statutes of limitations and other defenses.

There are key distinctions between this case and *Garamendi*. In *Garamendi*, California was essentially pursuing independent policy objectives in favor of Holocaust victims. The existence of its law limited the President's ability to exercise his preeminent foreign affairs authority. In

this case, Louisiana has not pursued any policy specific to Holocaust victims or Nazi-confiscated artwork. The state's prescription periods apply generally to any challenge of ownership to movable property. La. Civ. Code art. 3544 (1870); La. Civ. Code art. 3506 (1870). Louisiana's laws are well within the realm of ***[*8]*** traditional state responsibilities. In exercising its strong interest in regulating the ownership of property within the state through these prescriptive laws, Louisiana has not infringed on any exclusive federal powers. Indeed, the Terezin Declaration itself contains language noting that "different legal traditions" should be taken into account. Appellant presents no proof that U.S. policy on behalf of Holocaust victims is committed to overriding generally applicable state property law. The type of preemption established by *Garamendi* is thus inapplicable; Louisiana's prescriptive laws are not preempted by the Terezin Declaration, U.S. foreign policy, or the President's foreign affairs powers.

IV.

For these reasons, we affirm the judgment of the district court is **AFFIRMED**.

[fn1] The Terezin Declaration is a "legally non-binding" document promulgated on June 30, 2009, at the Prague Holocaust Era Assets Conference organized by the Czech Republic. Forty-six states, including the United States, approved of the document. The Terezin Declaration recommends that participating countries implement national programs to address real property confiscated by Nazis, Fascists, and their collaborators and the development of "non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable property."

[fn2] Appellant's own evidence on appeal notes that the "Terezin Declaration reinforces the Washington Principles." The Washington Conference Principles on Nazi-Confiscated Art were promulgated in 1998 as part of the Washington Conference on Holocaust-Era Assets. Forty-four nations, including the United States, approved these "non-binding principles."

Museum of Fine Arts, Boston v. Seger-Thomschitz, No. 09-1922, 2010 BL 243356 (1st Cir. Oct. 14, 2010)

United States Court of Appeals, First Circuit.

MUSEUM OF FINE ARTS, BOSTON, Plaintiff, Appellee, v. CLAUDIA SEGER-THOMSCHITZ, Defendant, Appellant.

No. 09-1922.

October 14, 2010.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS; [Hon. Rya W. Zobel, U.S. District Judge].

Thomas J. Hamilton, with whom J. Owen Todd, David H. Rich, and Todd & Weld LLP were on brief, for appellant.

Simon J. Frankel, with whom Theodore P. Metzler, Covington & Burling LLP, Robert J. Muldoon, Jr., Thomas Paul Gorman, and Sherin & Lodgen LLP were on brief, for appellee.

Before Torruella and Lipez, Circuit Judges, and Barbadoro,[fn*] District Judge.

[fn*] Of the District of New Hampshire, sitting by designation.

*[*2]*

LIPEZ, Circuit Judge.

Claudia Seger-Thomschitz, the sole surviving heir of Austrian-Jewish art collector Oskar Reichel, seeks to recover possession of Oskar Kokoschka's Two Nudes (Lovers) ("the Painting"), a valuable oil painting formerly owned by Reichel and now held by the Museum of Fine Arts, Boston ("the MFA"). Seger-Thomschitz alleges that Reichel was forced to sell the Painting under duress after Austria was annexed by Nazi Germany in 1938 and that good title never passed to the original purchaser or to the MFA. The MFA counters that the original transaction was valid and that Seger-Thomschitz's claim to the Painting is time-barred in any event.

After private negotiations between Seger-Thomschitz and the MFA proved fruitless, the MFA commenced this action for a declaratory judgment to "confirm its rightful ownership of the painting." The district court granted summary judgment for the MFA on statute of limitations

grounds, holding that Seger-Thomschitz's claims were time-barred. Having carefully reviewed the record, we now affirm that statute of limitations ruling.

I.

Oskar Reichel was a successful physician and art collector in Vienna during the first decades of the twentieth century. Before World War I, Dr. Reichel came to know Oskar Kokoschka, the celebrated Austrian expressionist, and became an early patron and collector of Kokoschka's work. Dr. Reichel *[*3]* acquired a number of Kokoschka paintings during that period, including Two Nudes (Lovers), which he purchased from Kokoschka in 1914 or 1915. The Painting is a self-portrait of the artist in an embrace with Viennese socialite (and widow of composer Gustav Mahler) Alma Mahler, with whom Kokoschka was having a tempestuous affair at the time. The MFA describes the Painting as "large and striking," measuring more than three feet wide and five feet tall.

During the interwar period, Dr. Reichel lent the Painting on three occasions to Otto Kallir, [fn1] the proprietor of the Neue Gallery in Vienna, for display and possible sale. Dr. Reichel and Kallir agreed to a sale price for the Painting on at least two of those occasions: $1,800 U.S. dollars (gross) in 1924 and 4,000 Austrian schillings (net to Dr. Reichel) in 1933.[fn2] Although Dr. Reichel was able to sell six of his eleven Kokoschka works between the wars, he never sold the Painting, which remained in his possession until 1939 along with four other Kokoschka works.

Conditions for Dr. Reichel and other Austrian Jews rapidly deteriorated following the Anschluss — the annexation of Austria by the Third Reich in March 1938. Pursuant to Nazi regulations, Dr. Reichel was forced to file a declaration in June *[*4]* 1938 listing all of the valuable property he owned. One expert witness described the declaration as a "prelude to the formal Nazi confiscation and seizure of all Jewish-owned property in Austria and Germany." Proceeds from the sale of declared property had to be deposited into a Nazi-controlled account and could be withdrawn only in limited amounts. In his 1938 property declaration, Dr. Reichel stated that he owned the Painting and four other Kokoschka works. He declared the combined value of the Painting and another work to be 250 Reichsmark.

Around the same time, Kallir, who was also Jewish, transferred ownership of his gallery to his non-Jewish secretary and moved to Paris. While Kallir was in Paris, Dr. Reichel agreed to transfer his remaining five Kokoschka works, including the Painting, to Kallir. The details of this transaction are sketchy. It is not clear whether Dr. Reichel received any consideration for the works at the time. Two contemporaneous notes indicate that Kallir agreed to purchase the five paintings for a total of 800 Swiss francs. However, Dr. Reichel's son Raimund later said that his father arranged for Kallir to send the proceeds of the transaction to another son, Hans, who had already immigrated to the United States. According to Raimund, Kallir sent Hans $250 for the five paintings in 1940 or 1941, and Hans forwarded half that sum to Raimund. The five Kokoschkas, including the Painting, were *[*5]* transferred from Dr. Reichel to a shipping company in Vienna, then exported to Paris.

Dr. Reichel and his wife Malvine suffered at the hands of the Nazis. They were forced to close the business Dr. Reichel had founded and to give up their family home and another property.

Their eldest son was deported to Lodz, Poland, where he was killed. Malvine was sent to the Theresienstadt concentration camp in 1943, and Dr. Reichel died of natural causes that same year. The two younger sons had emigrated by that time — Hans to the United States and Raimund to Argentina. Malvine survived the war and eventually joined Hans in the United States.

Meanwhile, Kallir had settled in New York, where he opened the Galerie St. Etienne. He brought the Painting with him and sold it to the Nierendorf Gallery for $1,500 in 1945. The Nierendorf Gallery then sold the Painting to the E.A. Silberman Galleries, which in turn sold the Painting to Sarah Reed Blodgett in 1947 or 1948. Blodgett kept the painting for many years, lending it out for exhibitions from time to time. She eventually bequeathed the Painting to the MFA, which acquired possession in 1973.[fn3] The Painting has been on almost continuous display at the *[*6]* MFA since then, though it has been loaned out many times for exhibitions in the United States and around the world.

Raimund moved back to Vienna in 1982. He executed a will in 1989, in which he designated Seger-Thomschitz as his sole heir. It is not clear how Raimund and Seger-Thomschitz knew each other. She is described in one document as his "select-niece," but they are not blood relatives. When Raimund died in 1997, Seger-Thomschitz became the sole surviving heir of Dr. Reichel.[fn4]

Seger-Thomschitz says that she "first learned that the Nazis confiscated artworks from Oskar Reichel in the Fall of 2003 when the Museums of Vienna contacted her concerning their intent to return to her as the sole heir of Oskar Reichel four artworks in their collection by the artist Anton Romako. . . ." The restitution of the Romako works was pursuant to a municipal resolution that Vienna had passed in 1999, which in turn implemented a 1998 national art restitution law. One municipal document notes that "it seemed quite proper" to return the works to Seger-Thomschitz because Dr. Reichel "had to sell [them] due to his persecution as a Jew." Notably, Dr. Reichel appears to have sold *[*7]* the Romako works around the same time that he sold the Painting, and under similar circumstances. He sold three of the four Romakos to the Neue Gallery in 1939 "for only small equivalent amounts," and he sold the fourth to the Neue Gallery in 1942. The gallery, by then under the direction of Otto Kallir's former secretary, subsequently sold the Romakos to the city.

Following her correspondence with the Museums of Vienna, Seger-Thomschitz retained a Viennese attorney, Erich Unterer — who had also been Raimund Reichel's attorney — "for purposes of handling the restitution of any artworks that Oskar Reichel may have lost due to Nazi persecution." Seger-Thomschitz and Unterer initially thought that all of the artwork Dr. Reichel lost during the Nazi era had been returned. In 2006, however, an American attorney "began a colloquy" with Seger-Thomschitz and alerted her to the possibility that other works formerly owned by Dr. Reichel might be located outside Austria. Seger-Thomschitz retained the attorney, whose firm then sent a letter to the MFA on March 12, 2007, demanding the return of the Painting.

When confronted with Seger-Thomschitz's claim to the Painting, the MFA undertook "an exhaustive effort to research and document the provenance of the Painting in order to ascertain whether the claim . . . appeared valid or not." An MFA curator and an independent

provenance researcher spent eighteen months researching the Painting's history, during which time they visited *[*8]* approximately ten museums and governmental archives around the world and corresponded with numerous other museums and archives. Based on that research, the MFA concluded that the original transfer of the Painting from Dr. Reichel to Kallir was valid and that it would retain the Painting in its collection. It commenced an action against Seger-Thomschitz in the United States District Court for the District of Massachusetts on January 22, 2008, seeking a declaratory judgment to "confirm its rightful ownership of the painting." Seger-Thomschitz answered the complaint in May of that same year and asserted counterclaims for conversion, replevin, and other state law causes of action.

In September 2008, the MFA filed a motion for summary judgment arguing that all of Seger-Thomschitz's counterclaims were time-barred as a matter of law. Seger-Thomschitz opposed the motion for summary judgment and also filed a motion to amend her answer to add a theory of fraudulent concealment (which might have extended the limitations period, see Mass. Gen. Laws ch. 260, § 12) and an accompanying affidavit requesting the postponement of summary judgment proceedings so that she could have extra time to conduct discovery on the fraudulent concealment theory, see Fed.R.Civ.P. 56(f).

The district court granted the motion for summary judgment and denied the motion to amend. See **Museum of Fine Arts, Boston v. Seger-Thomschitz**, No. 08-10097, *2009 WL 6506658 [*9]* (D. Mass. June 12, 2009). Applying the three-year Massachusetts statute of limitations applicable to tort and replevin actions, Mass. Gen. Laws ch. 260, § 2A, the district court held that the causes of action against the MFA accrued when the Reichel family and/or Seger-Thomschitz discovered or should reasonably have discovered the basis for their claims to the Painting. Museum of Fine Arts, *2009 WL 6506658* at *7. It then addressed both the Reichel family's knowledge and Seger-Thomschitz's knowledge, concluding that all parties should have known about the basis for their claims more than three years before Seger-Thomschitz made her demand on the MFA through her attorney's letter. It also denied the motion to amend. Judgment was entered in favor of the MFA, [fn5] and this appeal followed.

II.

Only a narrow range of issues is presented on appeal. Because the district court proceedings ended with summary judgment on statute of limitations grounds, we are not asked to judge the validity of the original transfer of the Painting from Dr. Reichel to Kallir. On this record, given the passage of time, the validity of the transfer "is not clear-cut."[fn6] See *id.* at *6. The question *[*10]* we face, however, is whether Seger-Thomschitz's counterclaims, meritorious or not, are time-barred as a matter of law.

The limitations question, in turn, has generated two separate strands of argument in this litigation. The dominant strand in the district court proceedings, and the one the MFA now focuses on, concerns the accrual of Seger-Thomschitz's causes of action under Massachusetts law. The district court held that the claims accrued "decades before the filing of this lawsuit," and in any event no later than the fall of 2003, when Seger-Thomschitz was apprised of Vienna's decision to return the Romako works. Museum *[*11]* of Fine Arts, *2009 WL 6506658*, at *8-9. Seger-Thomschitz argues that there is a triable issue as to when she and/or the Reichels were on notice of the basis for the claims, and she complains that the

district court should have allowed her more time to conduct discovery. She also contends that even if the district court correctly applied the Massachusetts discovery rule, the circumstances of this case justify displacing the Massachusetts limitations period with a federal common law laches defense. We address each of these arguments in turn.

A. Massachusetts Discovery Rule

The district court and the parties have limited the breadth of the statute of limitations inquiry in three important ways. First, the district court held that the law of Massachusetts, rather than the law of Austria, New York, or some other jurisdiction, governs both the merits of Seger-Thomschitz's counterclaims and the limitations period applicable to those claims. The parties do not contest that determination on appeal. Second, the district court held that, under Massachusetts law, Seger-Thomschitz's counterclaims are governed by the three-year limitations period applicable to tort and replevin actions, Mass. Gen. Laws ch. 260, § 2A. Although Seger-Thomschitz argued below that the six-year period applicable to contract claims should apply, she has abandoned that position on appeal and so has conceded that the three-year period applies. ***[*12]***

Third, under the applicable statute of limitations, "actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues." Mass. Gen. Laws ch. 260, § 2A. The district court analyzed the accrual question by applying the so-called discovery rule, which provides that "a cause of action accrues when `an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury.'" Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 903 (Mass. 2009) (quoting Bowen v. Eli Lilly & Co., 557 N.E.2d 739, 741 (Mass. 1990)). Although the discovery rule is not the only possible way of measuring accrual in a missing art case, [fn7] the parties do not contest the ***[*13]*** district court's decision to apply it here. We therefore follow the district court's lead in applying the discovery rule to Seger-Thomschitz's counterclaims.

The party seeking the benefit of the discovery rule has the burden of showing (1) that she lacked actual knowledge of the basis for her claim and (2) that her lack of knowledge was objectively reasonable. Koe v. Mercer, 876 N.E.2d 831, 836 (Mass. 2007). Courts applying the discovery rule in missing art cases have tested the reasonableness of the claimant's lack of knowledge by asking whether the claimant "acted with due diligence in pursuing his or her personal property." O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980); accord Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 288-89 (7th Cir. 1990); Erisoty v. Rizik, No. 93-6215, *1995 WL 91406*, at *10 (E.D. Pa. Feb. 23, 1995).

In contrast to many missing art cases, the location of the Painting has been no secret in this case. The Painting has long been on public display at the MFA, a major international museum. Since 2000, the MFA has listed the Painting in a provenance database on its publicly accessible website. Several published books and at least one catalogue raisonné of Kokoschka's works[fn8] identify the MFA as the current holder of the Painting. ***[*14]*** Finally, the Getty Provenance Index, a database of provenance information that has been searchable on the internet since 1999, notes that the Painting is part of the MFA's collection. There is no

question that the MFA's possession of the Painting has long been discoverable with minimal diligence.

Then there is the question of when the Reichel family should have known that Dr. Reichel formerly owned the Painting and gave it up under conditions that may have amounted to duress. The district court held that Hans, Raimund, and Malvine Reichel "had ample notice of any possible claim to the Painting decades before the filing of this lawsuit." Museum of Fine Arts, *2009 WL 6506658*, at *8. Among other things, the district court noted that Raimund wrote several letters to art historians during the 1980s in which he indicated that he remembered the Painting and knew the details of its transfer to Kallir. See *id.* at *7-8. That knowledge, plus the fact that the Reichel family sought compensation for some artworks but not the Painting, led the district court to conclude that the family's failure to lay claim to the Painting was not due to ignorance about the availability of restitution. *Id.* at *7, 8 n. 11.

There is also the separate question of Seger-Thomschitz's knowledge of the Painting, an issue somewhat obscured by her motion to amend her counterclaim. She sought leave to amend while the motion for summary judgment was pending in the district court, ***[*15]*** alleging that Kallir fraudulently concealed the details of Dr. Reichel's sale of the Painting from the Reichel family. She also filed an affidavit in accordance with Federal Rule of Civil Procedure 56(f) asking for additional time to conduct discovery on the fraudulent concealment theory. The district court denied the motion, concluding that summary judgment was warranted even if the allegations of fraudulent concealment were true. See Museum of Fine Arts, *2009 WL 6506658*, at *9-10.

As Seger-Thomschitz acknowledged at oral argument, there is no allegation that Kallir fraudulently concealed anything from her. Hence the fraudulent concealment claim does not affect the knowledge of Seger-Thomschitz herself, which the district court cited as an alternative basis for granting summary judgment. We focus our analysis on that ruling.

By her own admission, Seger-Thomschitz "learned that the Nazis had confiscated artworks from Oskar Reichel in the Fall of 2003 when the Museums of Vienna contacted her concerning their intent to return to her as the sole heir of Oskar Reichel four artworks in their collection by the artist Anton Romako." That information put her on notice that she might have a claim to other artworks that were previously owned by Dr. Reichel. She retained a Viennese attorney that same year "for purposes of handling the restitution of any artworks that Oskar Reichel may have lost due to Nazi persecution." Yet she did not demand the return of the ***[*16]*** Painting from the MFA until March 12, 2007, well over three years after she was contacted about the Romakos.

As we have already noted, and as the district court explained more fully, provenance information for the Painting, including the fact of Dr. Reichel's prior ownership, was available on the MFA's website, in the Getty Provenance Index, in several catalogues raisonnés of Kokoschka's works, and in a book published in Vienna in 2003 that "included a picture of the Painting, traced its provenance from Reichel to the MFA, included a transcription of Reichel's April 1938 property declaration listing the Painting[,] and described the sale of the work to Kallir and its subsequent exhibition in the United States at the Galerie St. Etienne." Museum of Fine Arts, *2009 WL 6506658*, at *9. In addition, Dr. Reichel's property declaration has been

directly accessible to the public since 1998. Although the availability of some of these sources may not have been obvious to Seger-Thomschitz, who is a nurse with no specialized training in Nazi-era art claims, that fact does not excuse her delay. It was her burden under Massachusetts law to discover from the relevant professional communities whether she had a cognizable legal claim. Doe v. Harbor Sch., Inc., 843 N.E.2d 1058, 1067 n. 13 (Mass. 2006). Indeed, she had an attorney available to her in 2003 who could have helped her discover the basis for her claim. *[*17]*

Seger-Thomschitz argues that "because the discovery rule is fact intensive, juries — rather than the court — should decide when plaintiffs knew or should have been aware of their claims." That argument does not get her far. The issue of what a party knew or should have known is often a question of fact to be submitted to the jury. Mercer, 876 N.E.2d at 836. However, summary judgment may be granted on a limitations defense if there is no genuine dispute about the material facts, and the record evidence would not permit a reasonable jury to return a verdict for the nonmoving party. See Genereux v. Am. Beryllia Corp., 577 F.3d 350 , 361 (1st Cir. 2009); Doyle v. Shubs, 905 F.2d 1, 1 (1st Cir. 1990) (per curiam). Cf. Mercer, 876 N.E.2d at 836 (applying a similar standard under Massachusetts Rule of Civil Procedure). That is the case here.

Seger-Thomschitz did not submit her own affidavit to explain what she was doing between 2003 and 2007, a curious omission given that she is in the best position to account for that period. Her American attorney, whom she retained in 2006, submitted an affidavit in connection with her Rule 56(f) request in which he stated that Seger-Thomschitz and her Austrian attorney "had come to believe that all of the artwork that Oskar Reichel lost due to Nazi persecution had remained in Vienna and had been restituted." Of course, in light of all the publicly available information about the provenance of the Painting, a mistake of that *[*18]* sort does not delay the commencement of the limitations period. Any reasonable jury confronted with the summary judgment record would conclude that Seger-Thomschitz's causes of action accrued no later than the fall of 2003, when she learned that the Nazis had confiscated artworks from Dr. Reichel, and could then, with reasonable diligence, have discovered her claim to the Painting. Because she did not make a demand on the MFA until March 12, 2007, more than three years after her causes of action accrued, summary judgment was properly granted on the MFA's limitations defense.

B. Federal Preemption

Seger-Thomschitz argues in the alternative that the Massachusetts statute of limitations should not be applied at all. She contends that her case implicates important federal interests, and so should be governed by federal timeliness principles based in equity rather than the more rigid Massachusetts limitations period.

1. MFA's Tax-Exempt Status

In the district court and in her opening brief on appeal, Seger-Thomschitz focused much of her preemption argument on the MFA's status as a tax-exempt organization under section 501 (c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). She argues that the application of a state limitations period in this case would frustrate the "many discrete and compelling

federal interests that inhere when judicial claims to recover Nazi-confiscated artworks are brought against U.S. tax-exempt public trustees such *[*19]* as the MFA." In lieu of the Massachusetts limitations period, she would have us apply the more flexible doctrine of laches as a matter of federal common law, thereby placing the burden on the MFA to prove the lack of diligence of a claimant such as Seger-Thomschitz and the prejudice experienced by the MFA because of Seger-Thomschitz's delay in asserting her claims.[fn9] The logic of her position would entail displacing state limitations periods in favor of a federal laches rule whenever a claim for restitution of a Nazi-era artwork was made against a tax-exempt organization.

The Supreme Court has warned that the judiciary should create special federal common law rules in "few and restricted" cases. O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (internal citations and quotation marks omitted). "'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." Atherton v. FDIC, 519 U.S. 213, 218 (1997) (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)). To justify the application of a federal common law rule, the proponent must typically show that there is a "significant conflict between some federal policy or interest and the use of state law." Id. (internal quotation marks omitted). *[*20]*

Seger-Thomschitz contends that the federal government has a compelling interest in "ensuring that charitable organizations that operate as tax exempt entities provide the public with the benefits for which their tax exemptions were granted." Tax-exempt museums, in her view, have "undermine[d] the rationale for their tax exemptions" by consistently failing to investigate the provenance of the artworks they acquire, thereby facilitating commerce in stolen artworks and other contraband. Without further elaboration, she concludes, "Federal courts therefore are empowered to formulate appropriate rules of accrual in lawsuits seeking to reclaim Nazi-confiscated artworks in the possession of U.S. tax-exempt museums that will encourage these museums to operate lawfully."

On this record, Seger-Thomschitz's argument asks too much of the federal courts and the federal tax code. Tax-exempt organizations, no less than non-exempt organizations, are already subject to applicable state law. See, e.g., Abramian v. President & Fellows of Harvard Coll., 731 N.E.2d 1075 (Mass. 2000) (upholding judgment against tax-exempt university under state employment law). Indeed, as the MFA notes, its trustees are subject to common law fiduciary duties relevant to the accusations of wrongdoing that Seger-Thomschitz has made in this case. The principal distinguishing characteristic of a section 501(c)(3) organization is that, by "legislative grace," it is not required to pay federal *[*21]* taxes on its income.[fn10] IHC Health Plans, Inc. v. Comm'r, 325 F.3d 1188, 1193-94 (10th Cir. 2003) (internal quotation marks omitted).

Although 501(c)(3) status is conditioned on the organization's adherence to certain federally prescribed standards, see Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983), these standards do not justify a free-ranging superintendence by the federal courts. If a 501(c)(3) organization fails to meet its obligations under the tax code, the law provides a remedy: the organization's tax-exempt status can be revoked. See Rev. Proc. 2010-9, 2010-2 I.R.B. 258; Branch Ministries v. Rossotti, 211 F.3d 137, 141-42 (D.C. Cir. 2000). In addition, egregious abusers of section 501(c)(3) may be subject to civil or criminal penalties. See, e.g., United

States v. Fumo, 628 F. Supp. 2d 573, 593-95 (E.D. Pa. 2007). The federal interest in ensuring that tax-exempt organizations "demonstrably serve and be in harmony with the public interest," Bob Jones Univ., 461 U.S. at 592, is adequately protected through these mechanisms and others. We perceive no need to create additional federal common law rules to punish and deter bad behavior by tax-exempt organizations, as Seger-Thomschitz proposes.

In sum, Seger-Thomschitz has not shown that application of the Massachusetts statute of limitations to the Massachusetts *[*22]* causes of action in this case would cause a "significant conflict with, or threat to," the federal interests and policies embodied in section 501(c)(3). Atherton, 519 U.S. at 225. We therefore decline her invitation to replace, on that basis, the Massachusetts limitations period with a federal common law laches defense.

2. Foreign Affairs Preemption

Seger-Thomschitz also argues that the Massachusetts statute of limitations should be set aside because it conflicts with the federal government's foreign policy.[fn11] She grounds her argument in a federal statute and several international declarations signed by the executive branch that touch on the subject of Nazi-confiscated art. She correctly recognizes that the statute and the declarations are merely hortatory, and so do not create any substantive legal rules capable of directly preempting state law. See Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1443 (2009). Nevertheless, she argues that they constitute evidence of a federal policy disfavoring the application of rigid limitations periods to claims for Nazi-looted artwork. That federal policy, she contends, is itself capable of preempting the Massachusetts statute of limitations. *[*23]*

In support of her argument, Seger-Thomschitz relies on American Insurance Association v. Garamendi, 539 U.S. 396 (2003). The Supreme Court held in Garamendi that "state law must give way" when it is in "clear conflict" with an "express federal policy" in the foreign affairs context. 539 U.S. at 421, 425. At issue was California's Holocaust Victim Insurance Relief Act (HVIRA), a law that required insurance companies doing business in the state to disclose information about policies sold in Europe during the Nazi era. Id. at 401. A group of insurers challenged the law on the ground that it interfered with the President's policy, expressed in executive agreements and statements by executive branch officials, encouraging voluntary settlement of Nazi-era insurance claims through the auspices of the International Commission on Holocaust Era Insurance Claims. Id. at 413, 421. The Supreme Court agreed, concluding that California's aggressive disclosure requirements were an "obstacle to the success of the National Government's chosen `calibration of force' in dealing with the Europeans using a voluntary approach." Id. at 425 (citation omitted). The Court held that the "clear conflict" between the state statute and an "express federal policy" was sufficient to justify preemption. Id. It added:

If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating *[*24]* disclosure of European Holocaust-era insurance policies in the manner of HVIRA.

Id.

We conclude that Garamendi is inapposite for two reasons.[fn12] First, there is no comparably express federal policy bearing on the issues in this case. Second, even if there were such a policy, the Massachusetts statute of limitations would not be in clear conflict with it.

As evidence of an express federal policy disfavoring the application of limitations periods to claims for Nazi-looted artwork, Seger-Thomschitz directs our attention to four sources of law: the Holocaust Victims Redress Act of 1998, the Washington Conference Principles on Nazi-Confiscated Art, the Vilnius Forum Declaration, and the Terezín Declaration on Holocaust Era Assets and Related Issues.[fn13] The Holocaust Victims Redress Act is a *[*25]* federal statute, and the other three documents are executive agreements — international declarations signed by the executive branch on behalf of the United States, but not approved by the Senate (as treaties) or by the entire Congress (as congressional-executive agreements).

The four documents are, for the most part, phrased in general terms evincing no particular hostility toward generally applicable statutes of limitations. The Holocaust Victims Redress Act, for example, merely expresses the "sense of the Congress" that "all governments should undertake good faith efforts to facilitate the return" of Nazi-confiscated property. Pub.L. No. 105-158, *§ 202*, 112 Stat. 15, 17-18 (1998). Similarly, the Washington Principles state that when Nazi-confiscated artwork is identified, "steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case." U.S. Dep't of State, The Washington Conference on Holocaust Era Assets, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), *[*26]* http://www.state.gov/www/regions/eur/holocaust/heacappen.pdf. The Vilnius Forum Declaration "asks all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust" and recognizes that "solutions may vary according to the differing legal systems among countries and the circumstances surrounding a specific case." Vilnius International Forum on Holocaust-Era Looted Cultural Assets, Vilnius Forum Declaration (Oct. 5, 2000), available at http://www.lootedartcommission.com/vilnius-forum. We discern no express federal policy disfavoring statutes of limitations in the general language of those documents.

The Terezín Declaration is more on point. The parties to the Declaration stated, in relevant part:

[W]e urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

Prague Holocaust Era Assets Conference, Terezín Declaration (June 30, 2009), http://www.holocausteraassets.eu/program/ conference-proceedings/declarations. This

statement reflects a clear *[*27]* preference that Nazi-era art disputes should be resolved "based on the facts and the merits" rather than on legal technicalities. Nevertheless, the language is too general and too hedged to be used as evidence of an express federal policy disfavoring statutes of limitations. A preference for the resolution of claims on the merits does not mean that all time limitations should be abandoned. Moreover, the Terezín Declaration recognizes that "various legal provisions that may impede the restitution of art and cultural property" will continue to be applied. The proposed solution is for governments applying such provisions to "consider all relevant issues . . . in order to achieve just and fair solutions." None of this language is sufficiently clear and definite to constitute evidence of an express federal policy against the applicability of state statutes of limitations to claims for the recovery of lost, stolen, or confiscated art.

Even if there were an express federal policy disfavoring overly rigid timeliness requirements, the Massachusetts statute of limitations would not be in "clear conflict" with that policy. The Supreme Court indicated in Garamendi that it is appropriate to "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." 539 U.S. at 420. The enactment of generally applicable statutes of limitations is a traditional state prerogative, and states have a substantial *[*28]* interest in preventing their laws from being used to pursue stale claims. In that sense, the statute in this case is unlike the law in Garamendi, which "effectively single[d] out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." Id. at 425-26 (distinguishing HVIRA from a "generally applicable `blue sky' law").

Moreover, as our earlier discussion makes clear, the Massachusetts statute of limitations, as tempered by the discovery rule, is flexible and sensitive to the facts of each case. It strikes a reasonable balance between restitution and repose, permitting a claimant who has diligently pursued her rights to have her day in court. Indeed, because a claimant in a missing or confiscated art case may be able to defeat summary judgment by demonstrating that she diligently pursued her property, the Massachusetts discovery rule may not be that different in practice from the federal common law laches defense that Seger-Thomschitz would like us to apply. The Massachusetts statute of limitations is not preempted under Garamendi. Accord Dunbar v.

Seger-Thomschitz, No. 09-30717, 2010 WL 3292678, at *4 (5th Cir. Aug. 20, 2010) (rejecting a similar argument).

III.

Statute of limitations defenses, even when tempered by a discovery rule, may preclude otherwise meritorious claims. Inescapably, statutes of limitations are somewhat arbitrary in *[*29]* their choice of a particular time period for asserting a claim. Yet statutes of limitations cannot be fairly characterized as technicalities, and they serve important interests:

Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the

adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979) (internal quotation marks and citations omitted).

Precisely because they do not address the merits of a claim, statutes of limitations do not vindicate the conduct of parties who successfully invoke them. Although we make no judgment about the legality of the MFA's acquisition of the Painting in 1973, we note the MFA's own disclosure that, when confronted with Seger-Thomschitz's claim, it initiated a provenance investigation for the Painting that it had not done before. The timing of that investigation may have been legally inconsequential in this case. However, for works of art with unmistakable roots in the Holocaust era, museums would now be well-advised to follow the guidelines of *[*30]* the American Association of Museums: "[M]useums should take all reasonable steps to resolve the Nazi-era provenance status of objects before acquiring them for their collections — whether by purchase, gift, bequest, or exchange." American Association of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era (Nov. 1999), http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm .

AFFIRMED.

[fn1] At the time, Kallir was known professionally as Otto Nirenstein or Otto Kallir-Nirenstein. He legally changed his name to Kallir in 1933.

[fn2] The parties have not attempted to convert the various currencies noted in the opinion to present day dollars. We simply report the sums as they appear in the record.

[fn3] Blodgett bequeathed another Kokoschka painting, Portrait of a Youth — which depicts Hans Reichel as a boy — to her daughter. Seger-Thomschitz claimed ownership of that painting as well, but the U.S. District Court for the Eastern District of Louisiana found that Blodgett's daughter had acquired title through acquisitive prescription (a civil law doctrine analogous to adverse possession) and that Seger-Thomschitz's claims were time-barred in any event. See Dunbar v. Seger-Thomschitz, 638 F. Supp. 2d 659, 663-64 (E.D. La. 2009). The Fifth Circuit recently affirmed that decision. See Dunbar v. Seger-Thomschitz, No. 09-30717, 2010 WL 3292678 (5th Cir. Aug. 20, 2010).

[fn4] Hans died in 1979. His will designated Raimund as his sole heir.

[fn5] The judgment reads, in relevant part: "IT IS ORDERED AND ADJUDGED that Defendant Dr. Claudia Seger-Thomschitz does not have a valid claim to the painting Two Nudes (Lovers) by Oskar Kokoschka because any claim by defendant to that painting is time-barred."

[fn6] One commentator explains that "[s]orting the legitimate transaction from the illegitimate sixty or seventy years later can be extremely difficult":

> Much art was Aryanized, or subjected to forced sales for prices significantly below market value (if any value ever actually materialized for the seller), and some art was sold at infamous "Jew auctions," which are now universally recognized as illegal. But some sales before April 26, 1938, were legitimate and for fair market value or close thereto. Some people were able to voluntarily sell art on the open market, albeit not much modern art after Hitler declared it "degenerate". Additionally, because so many Jews were compelled to forfeit "flight asset[s]" to pay for their passage out of the Reich, the European art market reflected depressed prices.

Jennifer Anglim Kreder, The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?, 88 Or. L. Rev. 37, 49-50 (2009). Cf. Schoeps v. Museum of Modern Art, 594 F. Supp. 2d 461, 466 (S.D.N.Y. 2009) (holding, on facts similar to those presented here, that a triable issue existed as to whether the original transfer was voluntary under German law); Bakalar v. Vavra, No. 08-5119, 2010 WL 3435375, at *10-15 (2d Cir. Sept. 2, 2010) (Korman, J., separately concurring) (discussing some of the relevant legal considerations under New York law).

[fn7] A number of alternative approaches are noted in Ashton Hawkins et al., A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art, 64 Fordham L. Rev. 49, 77 & nn. 174-75 (1995), and Steven A. Bibas, Note, The Case Against Statutes of Limitations for Stolen Art, 103 Yale L.J. 2437, 2440-48 (1994). They include variations on the doctrine of adverse possession, rules tying accrual to the date the possessor acquired the property, and the rule that a cause of action for conversion against an innocent purchaser does not accrue until there has been a demand for, and a refusal to surrender, the property. New York explicitly follows the demand and refusal rule. See Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991). The case law suggests that such a rule could potentially be applied in Massachusetts as well. See Atl. Fin. Corp. v. Galvam, 39 N.E.2d 951, 952 (Mass. 1942); In re Halmar Distribs., Inc., 968 F.2d 121, 129 (1st Cir. 1992); see also W. Page Keeton et al., Prosser and Keeton on Torts 93-94 (5th ed. 1984). Because Seger-Thomschitz's concession removes these issues from our consideration, we do not express any opinion on them.

[fn8] As the district court explained, a catalogue raisonné is a comprehensive scholarly listing of an artist's works. Museum of Fine Arts, *2009 WL 6506658*, at *2 n. 4.

[fn9] "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." Costello v. United States, 365 U.S. 265, 282 (1961).

[fn10] An important collateral benefit is that donations to a 501(c)(3) organization are tax-deductible. See Bob Jones Univ. v. Simon, 416 U.S. 725, 727-28 (1974).

[fn11] The MFA contends that Seger-Thomschitz's foreign affairs preemption argument is

forfeited because it was raised for the first time in her reply brief. That is not correct. Seger-Thomschitz specifically argued for foreign affairs preemption in her opening brief. She then developed that argument further in her reply brief. There was no forfeiture.

[fn12] We recognize that the Supreme Court's decision in Medellín v. Texas, 552 U.S. 491 (2008), may have cast doubt on the continuing vitality of Garamendi. See, e.g., A. Mark Weisburd, Medellín, the President's Foreign Affairs Power and Domestic Law, 28 Penn St. Int'l L. Rev. 595, 625 (2010) ("One fairly clear consequence of Medellín is that the very broad language used in American Ins. Ass'n v. Garamendi no longer carries weight." (footnote omitted)). But see In re Assicurazioni Generali, S.P.A., 592 F.3d 113, 119 n. 2 (2d Cir. 2010) (concluding that Medellín is consistent with a broad understanding of Garamendi); Movsesian v. Victoria Versicherung AG, 578 F.3d 1052, 1059 (9th Cir. 2009) (acknowledging Medellín but nonetheless applying Garamendi broadly). We express no opinion on that issue. Even if the Garamendi doctrine retains its full force, it does not aid Seger — Thomschitz in this case.

[fn13] Seger-Thomschitz also relies on what she characterizes as "statements of high ranking U.S. officials." However, the first statement — remarks by former Ambassador Stuart Eisenstadt at the Prague Holocaust Era Assets Conference — was delivered in the speaker's personal capacity and so does not represent the position of the executive branch. The second statement — remarks by Ambassador J. Christian Kennedy at the State Department in 2009 — was stricken from the record for procedural reasons and is not otherwise publicly available. Neither statement can be used to support Seger-Thomschitz's preemption argument, and she has not directed our attention to any other statements of executive branch policy akin to the official letters and testimony that the Supreme Court considered in Garamendi.

Schoeps v. Museum of Modern Art, 594 F. Supp. 2d 461 (S.D.N.Y. 2009) [2009 BL 14629]

Pagination
* F. Supp. 2d

United States District Court, S.D. New York.

Julius H. SCHOEPS, Edelgard Von Lavergne-Peguilhen, and Florence Kesselstatt, Plaintiff, v. The MUSEUM OF MODERN ART, and the Solomon R. Guggenheim Foundation, Defendant.

No. 07 Civ. 11074 (JSR).

January 27, 2009.

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]

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OPINION

JED S. RAKOFF, District Judge.

This case essentially involves claims by Julius Schoeps, Edelgard von Lavergne-Peguilhen, and Florence Kesselstatt ("Claimants"), heirs of Paul von Mendelssohn-Bartholdy ("Paul") and/or of his second wife, Elsa, that two Picasso paintings — Boy Leading a Horse (1905-1906) ("Boy") and Le Moulin de la Galette (1900) (collectively, "the Paintings") — once owned by Paul and now held by, respectively, the Museum of Modern Art and the Solomon R. Foundation ("the Museums"), were transferred from Paul and/or Elsa as a result of Nazi duress and rightfully belong to one or more of the Claimants.[fn1] The case began as a declaratory judgment action by the Museums seeking, in effect, to "quiet title" as to the Paintings, but has now been reconfigured to more accurately reflect the parties' positions.[fn2] Prior to the repositioning, the Museums moved for summary judgment granting their request for declaratory relief and dismissing all counterclaims brought by the Claimants; but the Court,

by Order dated December 30, 2008, denied the Museums' motion. See Order, 12/30/08. The Order also informed the parties that the Court had determined that German law governs the issue of duress relating to the sale or transfer of the Paintings and that New York law governs the issue of whether the Claimants' claims are barred by laches. By Order dated January 20, 2009, the Court further ruled that New York law, rather than Swiss law, applies to the issues raised by the parties concerning the validity and legal effect of the transfer of Boy to William Paley ("Paley") by art dealer Justin Thannhauser ("Thannhauser") in 1936. This Opinion briefly sets forth the reasons for these various rulings.

In an action for declaratory judgment, the burden of proof rests on the party who would bear it if the action were brought in due course as a claim for non-declaratory relief. Preferred Acc. Ins. Co. of N.Y. v. Grasso, 186 F.2d 987, 991 (2d *[*464]* Cir. 1951). See Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d *§ 2770.* This, indeed, is one of the reasons the Court subsequently repositioned the parties. Accordingly, on this summary judgment motion, as at trial, it is the Claimants who bear the burden of establishing their rights, if any, to ownership of the Paintings. It is well-established, moreover, that summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991). The central question on this summary judgment motion, therefore, is whether the Claimants have adduced competent evidence sufficient to create triable issues of fact as to the essential elements of their claims, viewing the evidence in the light most favorable to them. As reflected in the Order of December 30, 2008, the Court concludes that they have.

It is undisputed that, prior to 1927, the Paintings were owned by Paul von Mendelssohn-Bartholdy, a German of Jewish descent. With regard to Schoeps, the Museums argue that two documents executed in 1935 establish that Paul gave the Paintings as a wedding gift in 1927 to his second wife Elsa, née von Lavergne-Peguilhen, and that Schoeps, who is descended from Paul's sister Marie Busch, therefore has no valid claim to them.[fn3] The Claimants' primary argument in response is that the alleged 1927 gift was in fact merely a pretext, conceived by Paul as he neared death in 1935 in response to anti-Semitic measures taken by the then — ascendent Nazi government, and was designed to protect the Paintings by putting them in the name of Elsa, who was considered "Aryan." The Claimants point, inter alia, to records from the Lucerne branch of Thannhauser's art gallery listing Paul as the owner of the paintings in 1934, Report of Laurie A. Stein ("Stein Report"), Ex. 8 to Declaration of Evan A. Davis in Support of Plaintiffs' Motion for Summary Judgment ("Davis Decl."), at 27-28, as well as to the stark fact that there is no pre-1935 document of any kind evidencing the alleged gift. Moreover, three of the Claimants' experts express the opinion that Paul only pretended that he had given the paintings to Elsa but actually intended to protect them and pass them on to his sisters, Rebuttal Report of Ulf Bischof, dated September 10, 2008, Ex. 14 to Davis Decl., at 3; Report of Christoph Kreutzmueller, dated July 30, 2008, Ex. 10 to Davis Decl., at 2; Report of Lucilee Roussin, dated July 30, 2008, Ex. 11 to Davis Decl., at 4. The Court finds this evidence more than sufficient to create a triable issue of fact on this point.

Moreover, even if the jury trying this case (beginning February 2, 2009) were to find that there was a bona fide gift of the Paintings to Elsa in 1927, this would not, of itself, eliminate the

Claimants' claim to the Paintings, because the other two Claimants, von Lavergne-Peguilhen and Kesselstatt, are heirs of Elsa[fn4], and the *[*465]* Claimants' ultimate position is that, regardless of whether the Paintings still belonged to Paul or were simply being held by him on behalf of Elsa, the transfer of the Paintings to the Museums' predecessors in interest was still voidable as the product of Nazi duress.

The Museums argue that von Lavergne-Peguilhen and Kesselstatt have waived any claim they might have as Elsa's heirs because, in their responses to the Museums' Requests for Admission, they both declined to admit that Paul gave the Paintings to Elsa in 1927 or at any point before his death, Responses of Counterclaim-Plaintiff Florence Kesselstatt to Plaintiffs and Counterclaim-Defendants' Requests for Admission ("Kesselstatt Responses"), Ex. 3 to Davis Decl., ¶¶ 58-72; Responses of Counterclaim-Plaintiff Edelgard von Lavergne-Peguilhen to Plaintiffs and Counterclaim-Defendants' Requests for Admission ("Lavergne-Peguilhen Responses"), Ex. 4 to Davis Decl., ¶¶ 58-72. But a refusal to admit is not the equivalent of an affirmative admission of the opposite. As for Kesselstatt's statement in her deposition that she interpreted one of the 1935 documents as merely containing a "hint" that Paul had given the Paintings to Elsa, Deposition of Florence Kesselstatt, dated July 18, 2008, Ex. 19 to Davis Decl., at 67-70, this is most likely not admissible evidence at all, and, even if it were, neither it nor the Claimants' experts' opinion that the gift was pretextual constitutes a formal concession waiving a party's right to contest the alleged admission or opinion. See, e.g., Guadagno v. Wallack Ader Levithan Ass'n, 950 F. Supp. 1258, 1261 (S.D.N.Y. 1997).

The Museums next argue that even if one or all of the Claimants can bring a claim, the claim must fail because Paul's or Elsa's transfer of the Paintings was not the product of duress or other invalidity. As a preliminary matter, the Court agrees with the Museums that this is an issue governed, as a substantive matter, by German law. New York choice of law rules govern in diversity cases, see Finance One Public Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 331 (2d Cir. 2005), and New York applies interest analysis to choice-of-law questions, Istim, Inc. v. Chemical Bank, 78 N.Y.2d 342, 346-47 (1991). The New York Court of Appeals has laid down five factors to be considered in determining which forum's law will govern a contract dispute, including the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties. Maryland Cas. Co. v. Continental Cas. Co., 332 F.3d 145, 151-52 (2d Cir. 2003) (citing Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317 (1994)). All five of these factors plainly support the application of German law to the issue of whether the transfer of these German-held Paintings in 1935 was a product of Nazi duress or the like.[fn5]

If German law applies, the next issue is whether one is talking about the ordinary German Civil Code, which dates back to 1900 and is still in place, or whether the standard that should be invoked is that contained in Military Government Law 59 ("MGL 59"), a law put in place by the Allies during the postwar occupation of *[*466]* Germany that establishes a presumption that property was confiscated if it was transferred between January 30, 1933 and May 8, 1945 by a person subject to Nazi persecution. But MGL 59 did not displace the German Civil Code. It simply established a limited regime under which claims brought in a particular tribunal, which no longer exists, and by a given deadline, which has passed, were entitled to a special

presumption, which is no longer available. Cf. Dreyfus v. Von Finck, 534 F.2d 24, 29 (2d Cir. 1976) ("Military Law 59 created its own regulations and its own tribunals to interpret and enforce them. It was completely self-contained."). Thus MGL 59 neither applies to this case nor precludes the claim here asserted. Indeed, the only German court decision that has been provided to this Court in its entirety — a 2008 judgment from the Berlin District Court — allowed a claim similar to the one here asserted to go forward, without benefit of the MGL presumption and without the claim being barred by the expiration of MGL 59.

The relevant provisions of the German Civil Code, or Bürgerliches Gesetzbuch ("BGB"), that are relevant here to Claimants' claim of duress or other such invalidity are BGB *§ 138* and *§ 123*. Under BGB *§ 138*, a contract may be declared void ab initio if it is entered into when one party is at a distinct disadvantage in bargaining — for example, if that party is in "dire need" — and its terms lopsidedly favor the other party. Report of Wolfgang Ernst ("Ernst Report"), Ex. 5 to Davis Decl., at 76. Under BGB *§ 123*, a party may rescind a contract if he or she entered into it because of a threat. *Id. at 104*.

While the record regarding the transfers of these Paintings is meagre, it is informed by the historical circumstances of Nazi economic pressures brought to bear on "Jewish" persons and property, or so a jury might reasonably infer, and, in this context, the Court concludes that Claimants have adduced competent evidence sufficient to create triable issues of fact as to whether they have satisfied the elements of a claim under BGB *§ 138* and/or BGB *§ 123*. For example, Claimants have adduced competent evidence that Paul never intended to transfer any of his paintings and that he was forced to transfer them only because of threats and economic pressures by the Nazi government. Summary judgment is therefore not appropriate.

Although German law governs the issue of duress, the Claimants frame their substantive claims (originally, counterclaims) in common law terms like "conversion" and "replevin." In that regard, the Museums argue that Claimants may not bring such claims without first having been appointed as representatives of the relevant estate by the New York Surrogate. The Museums rely on Schoeps v. The Andrew Lloyd Webber Art Foundation, 2007 NY Slip Op 52183U (N.Y.Sup.Ct. Nov. 19, 2007) ("Webber"), in which the New York Supreme Court held that one of the Claimants in this case, Julius Schoeps, did not have standing to bring a similar restitution claim for a painting once owned by Paul because he had not been appointed representative of Paul's estate.

It is true that under New York law, a cause of action possessed by the decedent at the time of his or her death may be brought subsequently by a representative of the decedent only if the plaintiff has been appointed personal representative of the decedent's estate by the New York Surrogate. See, e.g., George v. Mt. Sinai Hospital, 47 N.Y.2d 170, 177 (1979). At the same time, however, when under the relevant foreign inheritance law there is no estate but rather property passes immediately ***[*467]*** by operation of law to the decedent's heirs, this requirement does not apply. Roques v. Grosjean, 66 N.Y.S.2d 348, 349 (N.Y.Sup.Ct. 1946); Bodner v. Bank Paribas, 114 F. Supp. 2d 117, 126 (E.D.N.Y. 2000); Pressman v. Estate of Steinworth, 860 F. Supp. 171, 177 (S.D.N.Y. 1994). As the Claimants point out, the Museums' own expert witness explains that under German law there is no estate as there is under American law; rather, the decedent's assets vest immediately in his or her heirs at death. Ernst Report at 11. The Webber court was not squarely presented with this issue as no similar

authority had been introduced in that case. Webber at *4. In light of Roques, this Court is constrained to disagree with the dictum in Webber that Bodner is contrary to New York law. [fn6] The Claimants' failure to be appointed representatives of the relevant estates is not therefore a bar to bringing their conversion and replevin claims. It is, indeed, difficult to imagine how the Claimants could be appointed representatives of Paul's or Elsa's estates when, according to the Museums' witness, no such estates ever existed or would exist under German law.

Although German law governs the issue of whether the transfer of the Paintings from Paul or Elsa was a product of duress or the like, there is a separate issue of what law governs the validity and legal effect of the sale of Boy to Paley in 1936, since that sale, of which some record exists, might create a "good faith purchaser" defense for the Museum of Modern Art (to which Paley willed the painting) even if the transfer from Paul or Elsa were infected with duress. Claimants say that New York law governs this issue, while Museums say it is governed by the law of Switzerland, where the sale occurred.

The issue is indeed pertinent, as Swiss and New York law provide different applicable standards. See Finance One Public Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 331 (2d Cir. 2005) (choice of law analysis is not necessary in the absence of an actual conflict between the laws of the two relevant jurisdictions). "New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value." Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 317 (1991). See also, e.g., Phelps v. McQuade, 158 A.D. 528, 530 (1st Dept. 1913) ("The possession of personal property obtained by common-law larceny confers no title which can protect an innocent purchaser from the thief."); Candela v. Port Motors, Inc., 208 A.D.2d 486, 487 (2d Dept. 1994) (holding that, under UCC 2-403(1), one who purchased a stolen car cannot convey good title to a subsequent purchaser for value). Under Swiss law, on the other hand, owners of stolen goods receive less protection. A party who acquires an object in good faith becomes the owner even if the seller was not authorized to transfer ownership, the purchaser's good faith is presumed, and the exception enabling the owner of lost or stolen property to reclaim it even from a good faith purchaser applies only for five years. See Bakalar v. Vavra, No. 05 Civ. 3037, 2008 WL 4067335, at *6 (S.D.N.Y. Sept. 2, 2008); Autocephalos Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374*[*468]*, 1400 (D. Ind. 1989), aff'd 917 F.2d 278 (7th Cir. 1990).

As previously noted, New York applies interest analysis to choice of law questions. Istim, 78 N.Y.2d at 346-47. In disputes over transfers of personal property, interest analysis will often lead to the conclusion that the law of the forum where the transfer took place applies, the same result that would have been reached under the traditional lex loci delicti rule. See, e.g., Kunstammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 845-46 (E.D.N.Y. 1981). But such a result is not inevitable, and where another forum has a more significant relationship to the parties and the property, that forum's law will apply. See Restatement 2d of Conflict of Laws *§ 245.* In particular, when the parties did not intend that the property would remain in the jurisdiction where the transfer took place, that forum will have a lesser interest in having its law applied. Restatement 2d of Conflict of Laws *§ 244* cmt. f; Autocephalos, 717 F. Supp. at 1394.

Here, Boy was held at the time of its sale by the Galerie Rosengart in Lucerne, Switzerland, which was, according to the Museums' expert, a branch gallery run by Thannhauser but a legally independent entity. Stein Report at 33, 24-25. But Boy was immediately shipped to New York, where Paley lived, Stein Report at 34, and the painting was paid for by a check made out to a New York bank, see Letter from Albert Skira to William Paley dated August 27, 1936, Ex. 56 to Davis Decl. The owner of Boy, whether Paul, Elsa, or Thannhauser, was not a Swiss resident or citizen at the time. And Boy has been in New York for over 70 years and is now the property of a major New York cultural institution that is also a party to this action. Under these circumstances, interest analysis leads to the conclusion that New York law applies to the sale of Boy to Paley, and the Claimants' claims as to Boy are therefore not barred by Swiss law.

Finally, the Museums assert that the claims are barred by laches. The parties agree that New York law governs this issue. See transcript, December 18, 2008. As the Court indicated in its December 30, 2008 Order, the fact-intensive question of whether laches bars Claimants' action will be the subject of an evidentiary hearing conducted by the Court simultaneously with the jury's trial of the merits of the case. Summary judgment is inappropriate at this stage because genuine questions of fact exist as to, inter alia, whether Elsa knew she had a potential claim to the Paintings during her lifetime and whether the Museums, as Claimants argue, had reason to know that the Paintings were misappropriated and so are barred from invoking laches by the doctrine of "unclean hands."

Although the Court has also considered, and rejected, various other arguments made by the Museums, the foregoing expresses the basic reasoning underlying the Court's Order of December 30, 2008 denying the Museums' motion for summary judgment, as well as the supplemental Order of January 20, 2009.

[fn1] The Claimants have entered into a side-agreement waiving any conflicts and agreeing to divide any recovery that any one or more of them may obtain in this lawsuit. See Waiver of All Potential and Real Conflicts of Interest and Addendum to Retainer Agreement, Ex. 46 to Declaration of Evan A. Davis in Support of Plaintiffs' Motion for Summary Judgment ("Davis Decl.").

[fn2] Specifically, by Order dated January 20, 2009 the Court repositioned the parties and amended the caption in this case so that Schoeps — originally defendant and counterclaim-plaintiff — and von Lavergne-Peguilhen and Kesselstatt — originally counterclaim-plaintiffs — now stand as plaintiffs, and the Museums stand as defendants.

[fn3] Under German law, if no such gift had been made, Paul's sisters would have inherited the Paintings upon Elsa's death. Elsa was Paul's "first heir," while his sisters were Paul's "second heirs." This meant that Elsa would have the equivalent of a life estate in any property that Paul possessed at his death, and upon her death such property would pass immediately by operation of law to the second heirs or, if they were no longer living, to their heirs. Report of Wolfgang Ernst, Ex. 5 to Davis Decl., at 13-14.

[fn4] As noted, the Claimants have waived all conflicts between them, so as to allow their counsel to argue in the alternative.

[fn5] Under one possible view of the facts, the Paintings were in Switzerland at the Lucerne branch of the Thannhauser gallery as early as 1932, see Stein Report at 29, before any transfer was made. Neither party, however, has argued that Swiss law applies to the duress question; the choice, both sides agree, is between New York and German law.

[fn6] This is not to say that the authorities cited in Webber are not accurate statements of New York law; all stand for the valid proposition that an action on behalf of a New York estate must be brought by a representative duly appointed by the New York Surrogate. See, e.g., Tajan v. Pavia & Harcourt, 257 A.D.2d 299, 302 (1st Dept. 1999).

Bakalar v. Vavra, No. 08-5119-cv, 2010 BL 205255 (2d Cir. Sept. 02, 2010)

United States Court of Appeals, Second Circuit.

DAVID BAKALAR, Plaintiff-Counter-Defendant-Appellee, v. MILOS VAVRA AND LEON FISCHER, Defendant-Counter-Claimant-Appellants, SCHENKER INC. AND SCHENKER & CO. A.G., Counter-Defendants.

No. 08-5119-cv.

Argued: October 9, 2009.

Decided: September 2, 2010.

An appeal from a judgment of the United States District Court for the Southern District of New York (Pauley, J.), after a bench trial, declaring that David Bakalar was the owner of an untitled drawing by Egon Schiele.

VACATED AND REMANDED. Judge Korman concurs in a separate opinion.

RAYMOND J.DOWD, (Carol A. Sigmond, Thomas V. Marino, on the brief) Dunnington, Bartholow & Miller LLP, New York, N.Y., for Defendants-Counter Claimant-Appellants.

JAMES A. JANOWITZ, (William L. Charron, on the brief), Pryor Cashman LLP, New York, N.Y., for Plaintiff-Counter-Defendant-Appellee.

Before: CABRANES and LIVINGSTON, Circuit Judges, and KORMAN, District Judge.[fn*]

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

*[*2]*

EDWARD R. KORMAN, District Judge:

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

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

The statement of assets, to which the power of attorney referred, required Jews to list all of their property. The information was then used by the Nazis to impose confiscatory taxes and ***[*3]*** penalties of various kinds.[fn1] The power to represent Grunbaum "in all [his] affairs" enabled the Nazis to compel Elisabeth to dispose of Grunbaum's assets for the purpose of paying the imposed taxes and penalties.[fn2] Indeed, in a report dated four days after the execution of the power of attorney, Franz Kieslinger, an appraiser for the Nazis with the Viennese auction house Dorotheum — which was "a prime selling point of loot[ed] art in Austria" (A-1265) — conducted an appraisal of the 449 artworks that Grunbaum kept in his apartment, including the eighty-one Schieles. On August 1, 1938, ***[*4]*** Mrs. Grunbaum signed a List of Assets "for Franz Freidr. Grunbaum, according to Power of Attorney dated July 16, 1938." (A-933.) The valuation she placed on it was identical to that which Kieslinger had assigned it.

The manner in which the Drawing made its way from Vienna to Galerie St. Etienne, the New York art gallery from which Bakalar purchased it, is unclear. Grunbaum died in Dachau in 1941. The Registration of Death, a document filed in the district court of Vienna in which Mrs. Grunbaum reported the death of her husband, states that "[a]ccording to the deceased's widow, Elisabeth Sara Grunbaum, there is no estate." (A-982.) Mrs. Grunbaum was arrested by the Nazis on October 5, 1942, and died shortly thereafter in a concentration camp in Minsk. The Drawing was purchased along with forty-five other Schieles by Galerie Gutekunst, a Swiss art gallery, in February and May of 1956. The district judge found that the seller was Mathilde Lukacs-Herzl ("Lukacs-Herzl" or "Lukacs"), the sister of Mrs. Grunbaum. Later the same year, on September 18, 1956, the Drawing was purchased by the Galerie St. Etienne and was shipped to it in New York. On November 12, 1963, the latter sold the drawing to David Bakalar for $4,300.

Bakalar, a resident of Massachusetts, filed this action seeking a declaratory judgment that he is the rightful owner of the Drawing. The complaint was filed after a winning bid of approximately $675,000 for the Drawing at a Sotheby's auction was withdrawn, apparently because of a letter written on behalf of Milos Vavra and Leon Fischer, which challenged Bakalar's title. Vavra and Fischer, who have been formally designated by an Austrian court as the legal heirs to the estate of Grunbaum, are the two named defendants in this case. In response to Bakalar's complaint, Vavra and Fischer, who are residents of the Czech Republic and New York, respectively, filed counterclaims for declaratory judgment, replevin, and damages. After a bench trial, a judgment was ***[*5]*** entered in the Southern District of New York (Pauley, *J.*), based on findings of fact and conclusions of law, which sustained the claim of David Bakalar that he was the rightful owner.

In his post-trial findings of fact and conclusion of law, the district judge reaffirmed his pre-trial ruling that Swiss law applied. ***Bakalar v. Vavra***, 2008 WL 4067335, at *6 (S.D.N.Y. Sept. 2, 2008) (citing ***Bakalar v. Vavra***, 550 F. Supp. 2d 548, 550 (S.D.N.Y. 2008)). Under Swiss law, "a person who acquires and takes possession of an object in good faith becomes the owner, even if the seller was not entitled or authorized to transfer ownership." *Id.* at *7. One "relevant exception to this rule is that if the object had been lost or stolen, the owner who previously lost the object retains the right to reclaim the object for five years." *Id.* The district judge proceeded to hold that, because Lukacs-Herzl "possessed the Drawing and the other Schiele works she sold" in 1956, the Galerie Gutekunst, as buyer, "was entitled to presume that she owned them." *Id.* Because Galerie Gutekunst was a good faith purchaser, and because the Grunbaum heirs had "not produced any concrete evidence that the Nazis looted the Drawing or that it was otherwise taken from Grunbaum," Bakalar acquired good title when he purchased the Drawing from Galerie St. Etienne. *Id.* at *8. Nevertheless, even if the Drawing had been stolen at some point prior to the Galerie Gutekunst's purchase in 1956, "any absolute claims to the property" by those from whom the Drawing was stolen "expired five years later, in 1961," pursuant to Swiss law. *Id.* at *7.

DISCUSSION

I

Because jurisdiction in this case is predicated on diversity of citizenship, New York's choice-of-law rules apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Before engaging in a choice-of-law analysis, we turn to the threshold question whether there is a difference ***[*6]*** between the laws of Switzerland and New York upon which the outcome of the case is dependent. We conclude that there is a significant difference that is reflected in the laws and policies of these two jurisdictions.

A. Swiss Law and Practice

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

[t]here has never been a legal presumption that art works with a potential relationship to Germany during World War II (i.e. emanating from a German collection or created by artists deemed "degenerate" by the Nazis) would in general and *per se* be tainted, and that a dealer

accepting such art works would automatically be subject to a heightened standard of diligence in the 1950s. Such a presumption did not in the 1950s and does not today exist in Swiss law.

See also Final Report of the Independent Commission of Experts (Bergier Commission Report), *[*7] Switzerland, National Socialism and the Second World War* 364 (2002).

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

Nevertheless, Bakalar argues that Swiss law is "not blind to the rights of dispossessed former owners," and does not "reflect indifference to the possibility of theft." While this benign assessment of Swiss law has been disputed by others, *see e.g.*, Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* 155 (1st ed. 1995), we have no occasion to address this issue. Instead, we simply note the obvious: Swiss law places significant hurdles to the recovery of stolen art, and almost "insurmountable" obstacles to the recovery of artwork stolen by the Nazis from Jews and others during World War II and the years preceding it. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 at 159 ("[T]he legal and practical obstacles to the recovery of [stolen] art . . . are already substantial, if not insurmountable.").

B. New York Law

Unlike Switzerland, in New York, a thief cannot pass good title. *See Menzel v. List*, 49 Misc. 2d 300, 305 (N.Y. Sup. Ct. 1966), *modified as to damages*, 28 A.D.2d 516 (1st Dep't 1967), *rev'd as to modification*, 24 N.Y.2d 91 (1969); *see also Silsbury v. McCoon*, 3 N.Y. 379, 383-84 (1850). *[*8]* This means that, under New York law, as *Menzel v. List* specifically held and one scholar observed, "absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods." Michelle I. Turner, Note, *The Innocent Buyer of Art Looted During World War II, 32 Vand. J. Transnat'l L. 1511, 1534 (1999)*. The manner in which the New York rule is applied reflects an overarching concern that New York not become a marketplace for stolen goods and, in particular, for stolen artwork.

The leading New York case in this area is *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311 (1991), which principally addresses the issue of when a cause of action for replevin accrues, thus triggering the three-year statute of limitations. The case was decided against the backdrop of the New York market in stolen artwork. As one commentator has observed, "[b]ecause stolen art work can be very valuable, may eventually filter into the open market, and may be handled by the shadowy institution of the art gallery, art owners may be victimized by international trading in stolen art. Original owners, however, have only a few

fragmentary and little-known mechanisms by which to register or recover their stolen art objects." Sydney M. Drum, Comment, DeWeerth v. Baldinger: *Making New York A Haven for Stolen Art?*, 64 N.Y.U. L. Rev. 909, 944 (1989). Moreover, they are "further disadvantaged by the art dealers' usual practice of not examining the sources of the art works in which they trade. While art dealers protest that they are only protecting the desire of their wealthy clients to remain anonymous, and that they are under no legal duty to inquire into the sources of art work they trade, such anonymity removes illegitimate transactions from needed scrutiny." *Id. at 912-13.*

The circumstances that Drum described are reflected in the market conditions described in *[*9]* the opinion in *Lubell.* Indeed, the opening paragraph begins with the observation that "[t]he backdrop for this replevin action is the New York City art market, where masterpieces command extraordinary prices at auction and illicit dealing in stolen merchandise is an industry all its own." *Lubell*, 77 N.Y.2d at 314 (internal citation omitted). *Lubell* then observed that "New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value." Id. at 317. One aspect of that protection is the rule that a cause of action for replevin against the good-faith purchaser of stolen property "accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it. Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful" and the statute of limitations does not begin to run. Id. at 317-18 (internal citations omitted).

While the Court of Appeals acknowledged that "the demand and refusal rule is not the only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to true owners of stolen property," and it rejected any suggestion that less protective measures should be adopted. Id. at 318. Thus, it declined to adopt a discovery rule "with the Statute of Limitations running from the time that the owner discovered or reasonably should have discovered the whereabouts of the work of art that had been stolen." Id. at 318-19. Indeed, the Court of Appeals observed that New York had already considered — and rejected — the adoption of such a rule. Specifically, a bill proposing that a museum would be immune from future claims once it "gave required public notice of acquisition and a three year statute of limitations period had passed," Drum, *supra*, at 936, was vetoed by Governor Mario Cuomo, who "stated that he had been advised by the State Department that the bill, if it went into effect, would have caused *[*10]* New York to become `a haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill.'" *Lubell*, 77 N.Y.2d at 319 (alteration in original).

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

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

Id. at 320.

This is not all the Court of Appeals held in *Lubell*. In the course of its opinion, it went on to agree with the Appellate Division, "for the reasons stated by that court, that the burden of proving that the painting was not stolen properly rests with [the possessor]." Id. at 321. Specifically, the Appellate Division had held that "an issue of fact exists as to whether the gouache was stolen, and that the burden of proof with respect to this issue is on defendant, it being settled that a complaint for wrongful detention contains every statement of fact essential to a recovery where it alleges the ***[*11]*** plaintiff's ownership of the property and the defendant's possession and refusal on demand to deliver." *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 153 (1st Dep't 1990) (citing 23 N.Y. Jur. 2d, Conversion, and Action For Recovery of Chattel, *§ 175*, at 422). While the Appellate Division recognized that the burden it was placing on the good-faith possessor was an "onerous one," it held that "it well serves to give effect to the principle that persons deal with the property in chattels or exercise acts of ownership over them at their peril." *Id.* (internal citations omitted).

II

Against this backdrop, we turn to the issue of the appropriate choice of law and the issue of whether the Drawing was stolen. We address first the choice of law issue, because if Swiss law applies, it is immaterial whether the Drawing was stolen. Specifically, the district judge held: "Under New York's choice of law rules, questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer." 550 F. Supp. 2d at 550 (quoting *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., 1999 WL 673347*, at *4-5 (S.D.N.Y. Aug. 30, 1999)). Accordingly, he concluded that "[t]he Court must apply the law of the country where title passed, if at all." (*Id.*) (internal quotation omitted). In adopting this choice-of-law rule, the district judge relied heavily on the opinion of Judge Mishler in *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 845-46 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150, 1157-58 (2d Cir. 1982).

Elicofon arose out of the theft of two Albrecht Duerer paintings possessed by the predecessor of the Kunstsammlungen zu Weimar, a German art museum. In July 1945, during the American occupation of the town of Weimar, the paintings were stolen from a castle where they had been ***[*12]*** placed for safekeeping. Edward Elicofon purchased the paintings in good faith in 1946 from an ex-serviceman who appeared at his Brooklyn, New York residence and claimed that he had purchased them in Germany. *Elicofon*, 536 F. Supp. 2d at 830, 833. Some twenty years later, upon the discovery of the location of the Duerer paintings, the

museum demanded their return. Elicofon refused, and the museaum sued to recover the paintings. Elicofon moved for summary judgment under a provision of German property law called *Ersitzung*, which allowed title to moveable property to be obtained by its good faith acquisition and possession without notice of a defect in title for a period of ten years from the date on which the rightful owner loses possession.

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

The problem with the traditional situs rule, upon which Judge Mishler relied in part and upon which the district judge here relied exclusively, is that it no longer accurately reflects the current choice of law rule in New York regarding personal property. This is demonstrated by our decision in *Kahara Bodas Co., LLC v. Perusahaan Pertambangan Dan Gas Bumi Negara*, 313 F.3d 70, 85 n. 15 (2d Cir. 2002). The plaintiff there argued that "the law of the situs of the disputed property ***[*13]*** generally controls." *Id.* We declined to apply this rule because "the New York Court of Appeals explicitly rejected the `traditional situs rule' in favor of interest analysis in *Istim*." *Id.* (citing *Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 346-47 (1991)). The interest analysis, which generally applies in all choice-of-law contexts, *see Istim*, 78 N.Y.2d at 347, begins with an examination of the contacts each jurisdiction has with the event giving rise to the cause of action. *See Kahara Bodas*, 313 F.3d at 85. "Once these contacts are discovered and analyzed they will indicate (1) that there exists no true conflict of laws, . . . as in most choice of law cases, or (2) that a true conflict exists, i.e., both jurisdictions have an interest in the application of their law." *In re Crichton's Estate*, 20 N.Y.2d at 135 n. 8. "In property disputes, if a conflict is identified, New York choice of law rules require the application of an `interests analysis,' in which `the law of the jurisdiction having the greatest interest in the litigation [is] applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." *Kahara Bodas*, 313 F.3d at 85.

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

In applying the New York rule that a purchaser cannot acquire good title from a thief, New York courts do not concern themselves with the question of where the theft took place, but simply whether one took place. Similarly, the residence of the true owner is not ***[*14]***

significant[,] for the New York policy is not to protect resident owners, but to protect owners generally *as a means to preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods.* In finding that New York law governs the question of title, we hold that Elicofon did not acquire title under Ersitzung.

Id. (emphasis added).

Judge Mishler's analysis of the compelling New York interest to "preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods," which preceded the clear articulation of this interest by the Court of Appeals in *Lubell*, is relevant here. However the Drawing came into the possession of the Swiss art gallery, New York has a compelling interest in the application of its law. Indeed, it has applied its own law in a case comparable to this one without pausing to engage in a choice-of-law analysis. *See Menzel*, 49 Misc. 2d at 314-15. Simply stated, if the claim of Vavra and Fischer is credited, a stolen piece of artwork was delivered in New York to a New York art gallery, which sold it in New York to Bakalar. Indeed, Bakalar concedes that "a substantial part of the events or omissions giving rise to the claims herein" occurred in New York. (A-271.) These "events and omissions" made New York a "marketplace for stolen goods" and, more particularly, for stolen artwork, which was of special concern in *Lubell*. *See* 77 N.Y.2d at 320.

By contrast, the resolution of an ownership dispute in the Drawing between parties who otherwise have no connection to Switzerland does not implicate any Swiss interest simply because the Drawing passed through there. While the Drawing was purchased in Switzerland by a Swiss art gallery, which resold it within five months to a New York art gallery, the application of New York law here would not have any adverse effect on the Swiss art gallery. Nor would it affect any other ***[*15]*** Swiss citizen or Swiss interest. The application of New York law may cause New York purchasers of artwork to take greater care in assuring themselves of the legitimate provenance of their purchase. This, in turn, may adversely affect the extra-territorial sale of artwork by Swiss galleries. The tenuous interest of Switzerland created by these circumstances, however, must yield to the significantly greater interest of New York, as articulated in *Lubell* and *Elicofon*, in preventing the state from becoming a marketplace for stolen goods. *Elicofon*, 536 F. Supp. at 846, *Lubell*, 77 N.Y.2d at 320. Thus, the Restatement (Second) of Conflict of Laws, which strongly tilts toward the situs rule, acknowledges that "[t]here will also be occasions when the local law of some state other than that where the chattel was situated at the time of the conveyance should be applied because of the intensity of the interest of that state in having its local law applied to determine the particular issue." Restatement (Second) of Conflict of Laws *§ 244* cmt. g (1971).

Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., 1999 WL 673347 (S.D.N.Y. Aug. 30, 1999), upon which the district judge and Bakalar rely, does not compel a different result. The issue in that case was whether New York or French law would apply to a stolen artifact over which a citizen of France acquired title based on prescriptive possession after thirty years, as permitted under French law. The artifact was ultimately brought to New York, where the auction house, Christie's, Inc., auctioned it for $2 million. The Greek Orthodox Patriarchate of Jerusalem subsequently sued the purchaser and the prior French owner. The district judge granted summary judgment in favor of the defendants, on the ground that French law applied and on the ground of laches. The choice of law determination was based on the district

judge's erroneous application of the old situs rule. Moreover, she declined to apply the public policy exception to that rule after determining that "[t]he thirty-year period for prescriptive possession under French law, however, *[*16]* is a substantial length of time, not an indication of `commercial indifference.'" *Id.* at *5. We need not say here whether the application of French law was correct, although we can say the situs rule on which the district judge relied is not consistent with the New York choice-of-law rule, and that Swiss law and the commercial practice it fosters is significantly different than that of France.[fn3]

While we have focused on the laws of Switzerland and New York, there is a third jurisdiction, the laws of which are arguably relevant. The Drawing began its journey in Austria, and Austrian courts have recognized that Vavra and Fischer are the heirs to Grunbaum's estate. Certainly, Austria has no interest in defeating the claim by these heirs against a United States citizen. Nevertheless, it is relevant that after World War II, Austria enacted a statute known as the Austrian Nullification Act, which provided that "[a]ny paid and unpaid legal transactions and other legal business which occurred during the German occupation of Austria will be considered null and void if they were contracted as a consequence of any political or economic influence exercised by the German Reich in order to deprive individuals or entities of property assets or interests owned by or due them as of March 13, 1938." NichtigkeitsG [Austrian Nullification Act] No. 106/1946, *§ 1* (Austria). The claims made on the basis of the Austrian Nullification Act were to be determined by subsequent legislation. While Austria enacted legislation relating to restitution of property from private parties — the Third Restitution Law BGB No. 54/1947, which the district judge observed *[*17]* imposed "a lesser burden for proving an illegitimate transfer of the Drawing in Austria," (A-347) — the statute expired on July 31, 1956. Nevertheless, an opinion of the Supreme Court of Austria, a translation of which is before us, declared that the Austrian Nullification Act is "in accordance with the immutable principles of our General Civil Code that nobody is obligated to adhere to a contract that was concluded on the basis of unfair and well-founded fear." Oberster Gerichtshof [OGH] [Supreme Court] Apr. 1, 2008, Docket No. 5 Ob 272/07x (citing Austrian Civil Code *§ 870*). Moreover, the Supreme Court of Austria observed that "[e]ven though claims for expropriation of property within the meaning of the [Third Restitution Law] can no longer be asserted due to expiration of the time limit (July 31, 1956), [these principles] continue[] to be an integral part of Austrian law." *Id.*

Although it is unclear whether a cause of action comparable to the counterclaims of Vavra and Fischer against Bakalar could be successfully brought in Austria, allowing the claims to go forward under New York law is consistent with the principles underlying the decision of the Supreme Court of Austria. While Austria may have allowed its restitution-enabling act to elapse eleven years after the end of WWII in order to protect Austrian citizens, the present case does not involve a claim against any citizen of Austria.[fn4] Accordingly, we conclude that Austria has no *[*18]* competing interest in the circumstances presented here.

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

III

Notwithstanding its conclusion that the manner in which the Drawing was acquired from Grunbaum would not have affected the outcome of the case, the district judge found that the Grunbaum heirs had failed to produce "any concrete evidence that the Nazis looted the Drawing or that it was otherwise taken from Grunbaum." ***Bakalar v. Vavra***, 2008 WL 4067335, at *8 (S.D.N.Y. Sept. 2, 2008). Our reading of the record suggests that there may be such evidence, and that the district judge, by applying Swiss Law, erred in placing the burden of proof on the Grunbaum heirs in this regard. Indeed, as discussed earlier, if the district judge determines that Vavra and Fischer have made a threshold showing that they have an arguable claim to the Drawing, New York law places the burden on Bakalar, the current possessor, to prove that the Drawing was not stolen. *See Lubell*, 77 N.Y.2d at 321 ("[T]he burden of proving that the painting was not stolen property rests with the [possessor]."). Moreover, should the district judge conclude that the Grunbaum heirs are entitled to prevail on the issue of the validity of Bakalar's title to the Drawing, the district judge should also address the issue of laches. This defense, which Bakalar raised in response to the counterclaim of the Grunbaum heirs, is one that New York law makes available to him. ***[*19]***

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

IV

We turn briefly to the entirely collateral argument of the Grunbaum heirs that the district judge abused his discretion by limiting the discovery they sought for the purpose of filing a class action certification request. The order of the district judge directed non-parties Sotheby's, Inc., Christie's Inc., and Galerie St. Etienne, to provide "statistical information" necessary to address questions of class numerosity. Vavra and Fischer challenge the portion of the order excluding the identities of those who may have purchased works owned by Grunbaum. During a conference held on December 9, 2005, the district judge gave the following explanation for that limitation:

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

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

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

considerable discretion."). *[*20]*

CONCLUSION

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

[fn1] "Of particular significance is the ordinance dated April 26, 1938, which required Jews to register their assets and which covered both those who sought to leave the Reich [of which Austria was a part] and those who remained, with the Reich seeking to appropriate their domestically as well as their externally held assets." Claims Resolution Tribunal: Deposited Assets Claims: Selected Laws, Regulations, and Ordinances Used by the Nazi Regime to Confiscate Jewish Assets Abroad, http://crt-ii.org/_nazi_laws/; *see also* Robert Gallately, *Backing Hitler: Consent and Coercion in Nazi Germany* 124 (2001); Otto D. Tolischus, *Goering Starts Final Liquidation of Jewish Property in Germany*, N.Y. Times, Apr. 28, 1938, at 1.

[fn2] While the Nazis could simply have confiscated all of Grunbaum's possessions without a power of attorney, the manner in which they proceeded here reflected their practice of camouflaging theft with a veneer of legality. Raul Hilberg, the preeminent historian of the Nazi war against the Jews, has written: "Lawyers were everywhere and their influence was pervasive. Again and again, there was a need for legal justifications." Raul Hilberg, *Perpetrators Victims Bystanders: The Jewish Catastrophe, 1933-1945*, at 71 (1992). Indeed, the U.S. Consul General in Vienna at the time observed that "[t]here is a curious respect for legalistic formalities. The signature of the person despoiled is always obtained, even if the person in question has to be sent to Dachau in order to break down his resistance." *See* Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* 39, Chapter 2 n. 30 (First Vintage Books ed., 1994) (quoting NA, RG 59, SD Cable 862.4016/2103, Geist, Berlin, to Secretary of State, April 11, 1939); *see also* Gallately, *supra* note 1, at 124. Scholars have explained that respect for legalistic formalities was not a curious eccentricity. *See, e.g.*, Henry Friedlander, *Nazi Crimes and the German Law, in Nazi Crimes and the Law* 16-17 (Nathan Stoltzfus & Henry Friedlander eds., 2008). Instead, "obedience to legal forms strengthened [the Reich's] power. Upstanding citizens felt a moral obligation to submit to the law's authority. . . . Resistance was immoral. If any citizens felt unease about a particular policy, their pained consciences were salved via display of a suitably stamped document in pursuance to a decree." Richard Lawrence Miller, *Nazi Justiz: Law of the Holocaust* 1 (1995). In sum, the law "removed the question of the morality or legitimacy of the process." Peter Hayes, *Summary and Conclusions, in Confiscation of Jewish Property in Europe, 1933-1945*: New Sources and Perspectives: Symposium 143, 147 (2003).

[fn3] According to Bakalar's expert, the Swiss Act on the International Transfer of Cultural Property ("CPTA") extended the statute of limitations for the return of stolen or lost cultural objects of a certain importance from five years to thirty years. The Act, however, does not apply to events that occurred prior to its enactment in June 2005. More significantly, the Act is hardly clear regarding which objects come within the Act's definition. Indeed, as Bakalar's expert opined, "[w]hether a cultural object is of importance in the sense of the CPTA is a

question of interpretation, which must be answered on a case-by-case basis, taking into account the current opinion of art experts, the treatment of the object in scientific publications, etc. Objects of `museum quality' are usually considered to be of importance in the sense of the Act." (A-707 n. 11.)

[fn4] Significantly, the Republic of Austria continues to investigate all works of art acquired between 1938-1945, which are now owned by it. Indeed, as the Austrian Embassy in the United States observed, "[w]orks of art not properly obtained will be returned to their original owners or their heirs." Austrian Press and Information Service, Austrian Holocaust Restitution, http://www.austria.org/content/view/414/1. Indeed, the International Bar Association recently reported that "The Austrian `Commission for Provenance Research' issued 11 recommendations, recommending the transfer of the disputed objects (including paintings, prints, sculpture, ethnographical objects and musical instruments) to the heirs of the initial owners in ten cases, and in part in one case." Sarah Theurich, International Bar Association, *Art, Cultural Institutions and Heritage Law August 2009*, http://www.ibanet.org/Article/Detail.aspx? ArticleUid=C93CF2FA-F5F6-4A64-A7D1-8BD907FDF3DD; *see also* Holocaust Claims Processing Office, *Eight Artworks Returned to Rightful Heir From Austrian Museums with [Assistance] of Holocaust Claims Processing Office* , http://www.claims.state.ny.us/pr081002.htm. ***[*21]***

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

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

While the panel opinion observes that "[o]ur reading of the record suggests that there may be such evidence," **[Panel Opinion, ante at 18]** it does not say what that evidence is, nor does it discuss the legal principles applicable to what is essentially a mixed question of law and fact. The district judge is left to comb the record without assistance, looking for evidence he did not see the first time around, and without guidance as to the legal principles that make the evidence particularly relevant. I write to fill this gap.

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

"Under American law and the law of many foreign states there is only one scenario in which ***[*22]*** a good-faith purchaser's claim of title is immediately recognized over that of the original

owner. This scenario arises when the owner *voluntarily* parts with possession by the creation of a bailment, the bailee converts the chattel, and the nature of the bailment allows a reasonable buyer to conclude that the bailee is empowered to pass the owner's title." Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art, 50 Duke L. J. 955, 971 (2001)* (emphasis added). The principle to which Professor Reyhan alludes is codified in more limited form in section 2-403(2) of the Uniform Commercial Code, which was adopted by New York, and which provides that "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." No such voluntary entrustment took place here. Nor did Grunbaum's flight from the Nazis constitute a voluntary abandonment.

Section 2-403(1) of the Uniform Commercial Code, which addresses principally the consequences of the transfer of title, rather than mere possession, provides that a person with voidable title has the power to transfer good title to a good-faith purchaser for value, and provides four examples of circumstances in which this rule applies. "The key to the voidable title concept appears to be that the original transferor voluntarily relinquished possession of the goods and intended to pass title." Franklin Feldman & Stephen E. Weil, *Art Law § 11.1.3* (1986). The Feldman & Weil treatise continues: "He may have been defrauded, or the check he received may have bounced, or he may have intended to sell it to Mr. X rather than to Mr. Y, but, nevertheless, he intended to pass title. In such cases, the transferor has an option to void the sale, but the transferee can pass good title. A person who acquired the goods from a thief, however, has no title and consequently neither he nor successive transferees can pass ownership." *Id.*; *see also* Thomas M. Quinn, *Quinn's Uniform [*23] Commercial Code Commentary and Law Digest § 2-403[A][6]* (2d ed., 2002). Grunbaum never voluntarily intended to pass title to the Drawing. On the contrary, the circumstances strongly suggest that he executed the power of attorney with a gun to his head.

Nevertheless, the district judge, relying on U.C.C. § 2-403(1), concluded that "Galerie St. Etienne was a seller with voidable title to the Drawing, having acquired it from Galerie Gutekunst in 1956," and that Bakalar, a good faith purchaser for value, acquired good title to the Drawing. 2008 WL 4067335, at *6. While the district judge did not identify the defect in the title acquired by Galerie Gutekunst, which rendered voidable the title it passed to Galerie St. Etienne, his conclusion that the title was voidable implicitly recognizes that there was some legal defect in the passage of title to the Drawing as it made its way from Grunbaum to the Galerie Gutekunst. Otherwise, the district judge would have had no basis to characterize as "voidable" the title the latter conveyed to the Galerie St. Etienne. This characterization, however, ignores the fact that, if the power of attorney signed by Grunbaum was involuntary, any subsequent transfer was void and not merely voidable.

This case is analogous to the circumstances in two reported cases. In *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008), *aff'g* 529 F. Supp. 2d 300, 307 (D.R.I. 2007), the Nazis issued an edict directing the Jewish owner of an art gallery to liquidate the gallery and its inventory after determining that he "lacked the requisite personal qualities to be an exponent of German culture." Id. at 53. After unsuccessfully appealing this edict, the owner "surrendered to the inevitable," and consigned most of the affected works to a government-approved purveyor. *Id.* The consigned pieces, including a painting by Franz Xaver Winterhalter known as

"MM—dchen aus den Sabiner Bergen" ("Girl from the Sabine Mountains"), were auctioned at prices below their fair market value. Fearing for his life, the owner fled Germany shortly after the forced sale. Consequently, he never retrieved the auction ***[*24]*** proceeds. *Id.* The district court had little trouble in concluding that the owner's "relinquishment of his property was anything but voluntary," 529 F. Supp. 2d at 307, and that holding was not challenged on appeal.

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

It is of no moment that Perls Galleries may have been a *bona fide* purchaser of the painting, in good faith and for value and without knowledge of the saga of the Menzels. No less is expected of an art gallery of distinction. Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner. ***[*25]***

Id. at 314-15 (citations omitted).[fn5]

Based on the historical record of the time, to which reference has already been made, the power of attorney Grunbaum signed in the fourth month of his confinement in Dachau does not appear to be any more voluntary a relinquishment of his legal interest in the Drawing than the acts discussed in *Vineberg* and *Menzel*. Bakalar's suggestion that the power of attorney constituted a voluntary entrustment of property to his wife is a proposition that remains for him to prove. Unless he does so, even if Mrs. Grunbaum "subsequently transferred the Drawing to her sister, Mathilde Lukacs, in 1938, to prevent it from falling into the hands of the Nazis," as Bakalar alleges, she could not convey valid title to the artwork. Significantly, the district judge made no finding that any entrustment for this purpose even took place.

On this score, Bakalar's amended complaint, which was filed on the eve of trial, posits two theories for what happened to the collection: 1) "that Elisabeth succeeded in hiding the [Drawing] from the Nazis prior to her deportation, and that her sister, Lukacs-Herzl, managed to take the collection with her into exile in Belgium," or 2) "that after the Grunbaum's apartment was aryanized by the Nazis in 1938, the family's library and art collection were

purchased by a Viennese antiquarian bookseller who lived in the same neighborhood for approximately $90, and that the Viennese bookseller then either sold or gave the collection to Lukacs-Herzl at some point thereafter." (A-277.) ***[*26]*** Of course, the second alternative assumes that the property was taken by the Nazis, and Bakalar acknowledges that, even under the first theory, scholars believe it is unlikely that Lukacs-Herzl could have saved the entire collection given the circumstances under which she left Austria. Indeed, Grunbaum's heirs offered expert evidence consistent with the premise that Lukacs-Herzl could not have removed or salvaged the paintings because "she was a Jewish woman who was interned in a Belgian work camp by the Nazis until 1944 after she fled Vienna together with her husband. It is more likely that a person like Kieslinger with direct ties to the Nazis took possession of the Grunbaum collection." (A-1273.) Significantly, neither of the two theories posited by Bakalar are predicated on the assumption that Mrs. Grunbaum voluntarily gave over Fritz Grunbaum's art collection to either Lukacs-Herzl or the Nazis who aryanized her apartment.

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

Moreover, although Bakalar now claims that there is no "direct evidence that all of the Schiele art sold by Lukacs had once belonged to Fritz Grunbaum," or that "the Drawing belonged to Fritz Grunbaum prior to or during the war," there is significant circumstantial evidence that this artwork had belonged to him. Indeed, the district judge decided the case on this premise, and it was supported ***[*27]*** by the deposition testimony of Eberhard Kornfeld, a partner at Galerie Gutekunst, and the trial testimony of Jane Kallir, the current director of the Galerie St. Etienne. Significantly, the Sotheby's Catalogue Description for the Drawing, February 8, 2005, which it prepared on Bakalar's behalf, listed the provenance as follows:

Fritz Grunbaum, Vienna (until 1941)

Elisabeth Grunbaum-Herzl, Vienna (widow of the above; until 1942; thence by decent)

Mathilde Lukcas-Herzl (sister of the above)

Gutekunst & Klipstein, Bern (on consignment from the above by 1956)

Galerie St. Etienne, New York

Norman Granz, New York

Galerie St. Etienne, New York

Acquired from the above by the present owner

(A-700.)

The admission by Sotheby's as to the initial provenance of the Drawing was confirmed by the judicial admission regarding its provenance in Bakalar's original complaint. *See Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003). Specifically, Bakalar alleged in his complaint that:

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

(A-217.) On the eve of trial, Bakalar moved to file an amended complaint, deleting his admission ***[*28]*** as to the initial provenance of the Drawing, because it was based on information he obtained from Kornfeld, who had come to this conclusion in 1998 after he learned of Fritz Grunbaum's relationship to Lukacs-Herzl. While Bakalar was apparently permitted to file an amended complaint, Kornfeld and Kallir had sufficient expertise in the field to provide competent evidence on this score. Nor is it any answer to argue, as Bakalar does here, that their opinion was based on circumstantial rather than direct evidence. Moreover, notwithstanding the amended complaint, Bakalar's admission as to the provenance of the Drawing constitutes competent evidence that the trier of fact is free to consider, along with Bakalar's explanation for its inclusion in the original complaint.

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

[fn5] The assumption that the Perls Galleries acted in good faith was undermined by its own conscious avoidance. As the New York Court of Appeals explained in the course of upholding the award of damages against it in favor of the good faith purchaser, the Perls Galleries was responsible for the position in which it found itself. Specifically, the Perls Galleries would not have been in that position if it had satisfied itself that it was getting good title from the art gallery from whom it purchased the artwork. Instead, the Perls testified "that to question a reputable dealer as to his title would be an `insult.' Perhaps, [the Court of Appeals responded], but the sensitivity of the art dealer cannot serve to deprive the injured buyer of compensation for a breach which could have been avoided had the insult been risked." *Menzel*, 24 N.Y.2d at 98.