UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Alan PHILIPP, Gerald G. STIEBEL, and Jed R. LEIBER, 1155 N. La Cienega Boulevard West Hollywood, CA 90069, Plaintiffs, v. FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSISCHER KULTURBESITZ, Defendants.	Case No. 15-cv-00266

FIRST AMENDED COMPLAINT

(Filed Jan. 14, 2016)

This is a civil action by plaintiffs Alan Philipp ("Philipp"), Gerald G. Stiebel ("Stiebel"), and Jed R. Leiber ("Leiber," together with Philipp and Stiebel, the "plaintiffs"), for the restitution of a collection of medieval relics known as the "Welfenschatz" or the "Guelph Treasure" now wrongfully in the possession of the defendant Stiftung Preussischer Kulturbesitz, a/k/a the Prussian Cultural Heritage Foundation (the "SPK"). The SPK is an instrumentality of the defendant Federal Republic

of Germany ("Germany," together with the SPK, the "defendants").

INTRODUCTORY STATEMENT

1. This is an action to recover the Welfenschatz, a unique collection of medieval relics and devotional art that was sold by victims of persecution of the Nazi regime under duress, and far below actual market value. Those owners were a consortium of three art dealer firms in Frankfurt: J.&S. Goldschmidt, I. Rosenbaum, and Z.M. Hackenbroch (together, the "Consortium"). Zacharias Max Hackenbroch ("Hackenbroch"), Isaak Rosenbaum ("Rosenbaum"), Saemy Rosenberg ("Rosenberg"), and Julius Falk and Arthur Goldschmidt ("Goldschmidt") were the owners of those firms, together with plaintiffs' ancestors and/or predecessors-in-interest in this action.

2. This sale to the Nazi-controlled State of Prussia on June 14, 1935, via a manipulated sham transaction, was spearheaded by the Dresdner Bank, which was acting on behalf and by order of the two most notorious Nazi-leaders and war criminals, Hermann Goering ("Goering") and the German dictator, the "Führer" Adolf Hitler ("Hitler"), themselves. The transaction relied on the atmosphere of early Nazi terror, in which German Jews could never be arms'-length commercial actors.

3. This is also an action to address a second victimization suffered by the Plaintiffs. Germany advances the pretense that it has enacted procedures to

address Nazi-looted art, but the reality is quite different. The sham process to which the Plaintiffs were subjected in 2014 provides additional justification for this action.

4. The coerced sale of the Welfenschatz resulted in payment of barely 35% of its market value to the Consortium—or even as little as 15%, according to German state museum professionals contemporaneous to the exchange. That money was never fully at the Consortium's disposal even after payment (and consisted partly of other artworks that were worth nothing like their promised value). The proceeds, such as they were, were then also subjected to confiscatory "flight taxes"—the extortionate payments that Jews had to pay for the privilege of escaping with their lives.

5. Most critically with respect to the illegitimacy of the 1935 sale, they were Jewish and regarded by the National Socialists as traitors and enemies of the Germanic state, in line with the corrupt ideology of Hitler's racist and inhuman manifesto *Mein Kampf*. These Jewish art dealers were viewed as parasites selling off cultural items at the heart of the Nazi identic for self-gain and for damaging and harming the German identity.

6. Iconic Germanic art was at the core of the Nazi worldview, and the Welfenschatz was the kind of art in general, and the specific artworks in particular, that the Nazis desperately wanted, and for which they would stop at nothing. The Consortium's Jewish heritage

placed it within the Nazis' grasp after the party's ascension to power in Germany.

7. The foregoing, without more, is sufficient under longstanding principles of international law to establish that the 1935 transaction was illegitimate. Any sale of property in Nazi Germany by Jewish owners—let alone to the Nazi-run state itself—was presumptively under duress, illegitimate, and void. Were Germany to claim otherwise, it would be explicitly endorsing—in 2015—the plunder of Goering (part of whose collection, it should be said, decorated the rooms of the German chancellor's office, the "Bundeskanzleramt," as recently as 2014 until a journalist called attention to it).

8. There is, however, considerably more. Specifically, after the Nazi seizure of power in 1933 and the spasmodic violence and intimidation towards Jews, the boycotting of Jewish business, and the eventual elimination of Jews from all aspects of civic life, high ranking Nazis targeted the Welfenschatz, specifically, by virtue of the vulnerability of its Jewish owners, who were publicly accused of selling national treasures and who became public enemies as a result. The choice they faced was clear: their property or their lives.

9. Infamous criminals Hitler, Goering, Bernhard Rust ("Rust"), and Hjalmar Schacht ("Schacht") among them, were all involved in explicit correspondence whose intent was to "save the Welfenschatz" for the German *Reich* from these declared enemies of the state.

10. After the Nazi-takeover of power in Germany, and as a direct and proximate result of the historic persecution that was the official policy of the State of Prussia and the German Reich, the members of the Consortium faced catastrophic economic hardship. Starting from day one, the Nazi-regime was engaged in spreading fear, panic, and violence in these early days of terror as part of the ongoing so-called "National Socialist revolution" in Germany. Both the early unlawful laws of the new Germany, the anti-Semitic riots, the nationwide boycotts of Jewish businesses, and the growing permanent, pseudo-legal monitoring of Jews by the "Nazified" administrative bodies, first and foremost by the German tax authorities, directly affected these art dealers' lives and businesses. Means of systematic disenfranchisement, discrimination, and terror, fomented by the Third Reich's officials, caused also the three art dealers' sale revenues to fall virtually to zero within the shortest period of time and made it impossible thereafter for any of them to earn a living in Germany. On information and belief, the Consortium were targeted by the *Geheime Staatspolizei* (Gestapo) and subjected to direct personal threats of violence for being Jews and for trying to sell the Welfenschatz fairly.

11. The Nazis' crowning touch was to intercede just when a willing fair market buyer for the Welfenschatz appeared, to dictate that any further arms'-length negotiations cease, through which the Consortium could have realized the value of its property.

12. With the market duly fixed, and their own situation having descended into ahistorical levels of persecution, humiliation, and risk, the Consortium relented in 1935. From the Consortium's perspective, the "deal"—for 4.25 million RM (barely 35% of its actual value) split and partly paid only into a blocked account—was a predicament and without any alternative.

13. Soon after Goering, by then hailed as the "savior of the Welfenschatz," had forcefully and punitively "rescued" the collection from the Jews, as highlighted in his biography of 1940, he presented the Welfenschatz as a personal "surprise gift" to Hitler himself at a ceremony in November 1935.

14. In 2014, the Plaintiffs, as heirs to the Consortium, suffered a parallel victimization. Despite Germany's international commitments to "fair and just" solutions with respect to Nazi-looted art, it has enacted no meaningful procedures or laws to address victims of art looted and sales under duress. Worse, it has only appointed an "Advisory Commission" that issues only non-binding recommendations, which are not adjudications of any property rights.

15. That Advisory Commission, since being established in 2003 as a governmental entity, has shown a disturbing tendency to ignore longstanding principles of international law—chief among them the unassailable principle that a sale by owners like the Consortium in Nazi Germany was by definition coercive and void. Instead, in successive decisions the

Advisory Commission has sought to revise history with respect to the treatment of Jews in Germany in 1935, disqualifying any notion that Germany makes "fair and just solutions" available to victims and their heirs.

16. These failures leave the Plaintiffs no choice but to seek the present relief.

PARTIES

17. Philipp is an individual, citizen of the United Kingdom, and a resident of London, England, UK. He is the grandson and sole legal successor to the estate of the late Zacharias Max Hackenbroch, who was the sole owner of the former Hackenbroch art dealers.

18. Stiebel is an individual and a United States citizen who resides in Santa Fe, New Mexico. He is the great-nephew of the late Isaak Rosenbaum, who was co-owner of I. Rosenbaum art dealers with Saemy Rosenberg, and legal successor to Rosenbaum's estate. He brings these claims on behalf of himself and the heirs of Isaak Rosenbaum.

19. Leiber is an individual and a United States citizen who resides in West Hollywood, California. He is the grandson of Saemy Rosenberg, and the sole legal heir to Saemy Rosenberg's rights in the Welfenschatz and related events. He is also a great-nephew of Isaak Rosenbaum, and partly a successor to Rosenbaum's estate.

20. Phillip, Stiebel, and Leiber are together the assignees of the claims of Julius Falk Goldschmidt by

written instrument and the authorized agents in fact for the heirs of Arthur Goldschmidt, who together were the sole owners of the J.&S. Goldschmidt firm. Phillip, Stiebel, and Leiber bring this case together under that authority, whether by independent legal assignment as referenced further below or by agreement between the parties and their counsel.

21. Germany, a/k/a the *Bundesrepublik Deutschland*, is a sovereign nation comprised of the 16 federal states ("Länder"). Germany is the political—and under international law, the legal—successor to the German *Reich* a/k/a the *Third Reich* a/k/a Nazi Germany. Germany was established as West Germany in 1949 from the 11 Länder, in the Western-occupied areas of the Third Reich (including West Berlin), and absorbed the remaining 5 Länder as part of reunification in 1990.

22. The SPK is the successor-in-interest to the Free State of Prussia (the "Freistaat Preussen"), a political subdivision of the German Weimar Republic and later the Third Reich—with respect to all interests in cultural property and fine art. The SPK is a foundation under German law, erected by the German parliament in 1957, and an instrumentality of Germany. The SPK operates by and through its President Professor Dr. Hermann Parzinger. The SPK's board consists of representatives from the German Federal government, and from its political subdivisions, the 16 *Länder*.

JURISDICTION AND VENUE

23. This Court has subject matter jurisdiction over all defendants pursuant to 28 U.S.C. § 1330 and 28 U.S.C. §§ 1605-07 (the Foreign Sovereign Immunities Act). Process was served on all defendants pursuant to 28 U.S.C. § 1608.

24. The defendants are not immune from suit, under either the so-called "expropriation exception" of 28 U.S.C. § 1605(a)(3), or the so-called "commercial activity exception of 28 U.S.C. § 1605(a)(2), all as alleged in further detail herein.

25. This action concerns rights in property taken by the State of Prussia and/or the German Reich, and/or Goering, in his capacity as Prime Minister of the State of Prussia in 1935, in violation of international law, within the meaning of 28 U.S.C. § 1605(a)(3). That taking included, *inter alia* and without limitation the following:

i. The Welfenschatz was acquired by the Nazi State of Prussia to present it as a personal gift to Hitler. It served no public purpose, but was made for personal gain of the Nazi leaders and their reputation.

ii. In addition, their takings were discriminatory since the art dealers were Jewish and therefore belonged to a persecuted group, and the collection was wrongfully appropriated not least because they were regarded as state's enemies for holding the iconic Welfenschatz.

iii. Further, the German Government has not yet returned the collection to the plaintiffs or justly compensated them for the value of the collection. Without compensation, this taking cannot be valid.

iv. Dresdner Bank and the Nazi-State of Prussia gained possession of the Welfenschatz in a joint effort by setting up a scheme of manipulation, coercion, and terror. In violation of international law, they took the collection from plaintiffs' predecessors-in-interest in order to "Aryanize," to "rescue," and to get hold of the collection for *völkisch* reasons in accordance with the National Socialists' policy, which in its entirety was condemned as inhuman and void by the Allies and the United States Government after 1945.

v. Dr. Robert Schmidt, former director of the Berlin Schlossmuseum and a key actor in the matter at hand, intentionally misled the Allied Forces and the United States Military government for Germany and Bavaria in the postwar-era about the true nature of the acquisition of the collection in order to protect himself and in order to prevent restitution of the collection to the art dealers, based on and granted by Allied Military law. The current German Government, when it learned of the art dealers' heirs' rights to the collection of the Welfenschatz, adopted Schmidt's cover-up and deceived the heirs as to the circumstances of its acquisition of the collection.

vi. The defendants, Germany and the SPK, wrongfully assert ownership over the collection in furtherance of the taking in violation of international law.

vii. Germany, in its capacity as the political-legal successor of the Nazi Third Reich, is not immune from suit for its complicity in and perpetuation of the discriminatory appropriation of the Welfenschatz collection. Among other things, violations of Germany's obligations under the 1907 Hague Convention on the Laws and Customs of War on Land, and Germany's official repudiation after 1949 of all Nazi transactions bar any defense that this transaction was legitimate and not coercive.

viii. The policy of the United States of America since at least 1945 has been to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property and, with respect to claims asserted in the United States for restitution of such property, to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of the Nazi officials. *See* Press Release No. 296, "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," reprinted in *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F2d 375, 375-76 (2d Cir. 1954).

26. Germany and the SPK are engaged in commercial activity within the United States, within the meaning of 28 U.S.C. § 1605(a)(3), including but not limited to the following:

i. The SPK engages in regular exhibitions within the United States by loaning objects to museums in the United States from the collections of the museums administered by the SPK. By way of example but without limitation, the SPK loaned objects to an exhibition entitled "Byzantium and Islam Age of Transition" at the Metropolitan Museum of Art in New York in 2012. The SPK also licensed photographs of its collection for inclusion in the catalogues of those exhibitions, which are sold and marketed throughout the United States (including in the District of Columbia) by retail and Internet sales.

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

iii. The SPK solicits subscriptions to its newsletters, solicitations that reach the District of Columbia, among other parts of the United States. SPK-administered museums seek to and sell entrance tickets to the Berlin museums to patrons in

the United States, including but not limited to patrons in the District of Columbia.

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

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

vi. The Kunstgewerbemuseum in Berlin, administered by the SPK and the location of the bulk of the Welfenschatz, publishes and sells a book entitled *Schätze des Glaubens: Meisterwerke aus dem Dom-Museum Hildesheim und dem Kunstgewerbemuseum*

Berlin (*Treasures of Belief: Masterworks from the Hildesheim Cathedral Museum and the Kunstgewerbemuseum Berlin*), within the United States, including but not limited to within the District of Columbia. The Welfenschatz features prominently in this catalogue as well.

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

viii. On information and belief, the Bodemuseum in Berlin, administered by the SPK, has a staff exchange program with the Metropolitan Museum of Art in New York.

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

x. On information and belief, academic conferences organized and administered by the SPK include solicitations to academics in the United States (including the District of Columbia) to contribute and participate.

xi. The SPK publishes and sells a book entitled *Original und Experiment: Ausstellung der Stiftung Preußischer Kulturbesitz aus der Antikensammlung der Staatlichen Museen zu Berlin* (*Original and Experiment: Exhibition by the Stifttung Preußischer*

Kulturbesitz from the Antiques Collection of the State Museums in Berlin) within the United States, including but not limited to the District of Columbia.

xii. The SPK publishes and sells a book entitled *Digital Resources from Cultural Institutions for Use in Teaching and Learning: A Report of the American/German Workshop* within the United States, including but not limited to within the District of Columbia.

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

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

xv. The SPK publishes and sells an annual report entitled *Prussian Cultural Property:*

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

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

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

27. On information and belief, Germany engages in a broad range of commercial activity in the United States, including but not limited to the commercial promotion of German companies and industries and the solicitation of American visitors to German museums, including but not limited to those administered by the SPK.

28. Jurisdiction is also proper in this action pursuant to 28 U.S.C. § 1605(a)(2) and the recent guidance of the Supreme Court in *OBB Personenverkehr v. Sachs* because the defendants engage in commercial activity outside the territory of the United States with respect to the Welfenschatz in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. Specifically, the defendants derive from the Welfenschatz itself through licensing and other activities, revenue in the United States that rightfully could be earned by the plaintiffs absent the defendants' wrongful possession. Plaintiffs invoke the commercial activity exception of 28 U.S.C. § 1605(a)(2) solely with respect to Count IV for Unjust Enrichment, and do not allege that the Court has jurisdiction over the underlying allegations for title to the Welfenschatz pursuant to the commercial activity exception.

29. Venue is proper in the District of Columbia against Germany pursuant to 28 U.S.C. § 1391(f)(4) as a case brought against a foreign state (Germany), and venue is proper in the District of Columbia against the SPK pursuant to 28 U.S.C. § 1391(f)(3) because the SPK is an agency or instrumentality of Germany (a

foreign state) and the SPK is doing business within the District of Columbia, *inter alia*, as alleged above.

FACTUAL ALLEGATIONS

The Welfenschatz and the Consortium

30. The Welfenschatz consists of several dozen medieval reliquary and devotional objects that were originally housed in the *Braunschweiger Dom* (Brunswick Cathedral) in Germany. Although dating primarily from the 11th to the 15th century, the collection acquired its commonly-known name hundreds of years later when it passed into the hands of the Royal House of Brunswick-Lüneburg, and later acquired the name Welfenschatz because of its association with one of the branches of the "Welfenhaus", or "House of Guelph."

31. The portion of Welfenschatz that is wrongfully in the possession of the SPK consists of the following objects:

i. Guelph Cross (*Welfenkreuz*);

ii. Portable Altar With Embossed Silver Figures (*Tragaltar mit Silberfiguren*), 3rd quarter, 13th century;

iii. Demetrius Tablet (*Demetrius-Tafel*), 12th century;

iv. Tablet Shaped Portable Alter with Agate Slab (*Tafelförmiger Tragaltar mit Achatplatte*), ca. 1200;

v. Tablet Shaped Portable Alter with Slab of Rock Crystal (*Tafelförmiger Tragaltar mit Bergkristallplatte*);

vi. Rectangular Casket with Painted Ivory Tablets (*Rechteckiger Kasten mit Bemalten Elfenbeinplättchen*);

vii. Eight-Cornered Casket with Lid (*Achteckiger Deckelkasten mit Bleibeschlag*);

viii. Portable Altar of Adelvoldus (*Tragaltar des Adelvoldus*);

ix. Portable Altar With Crystal Columns (*Tragaltar mit Kristallsäulchen*);

x. Standard Cross Borne by Three Lions (*Standkreuz, von drei Löwen getragen*);

xi. Portable Altar of Eilbertus (*Tragaltar des Eilbertus*);

xii. Portable Altar with the Cardinal Virtues (*Tragaltar mit den Kardinaltugenden*);

xiii. Walpurgis Casket (*Walpurgis-Kasten*);

xiv. Portable Altar with Abraham and Melchizedek (*Tragaltar mit Abraham und Melchisedek*);

xv. Chapel Reliquary (*Kuppelreliquiar*);

xvi. Highly Colored Reliquary Casket (*Der stark-farbige Reliquienkasten*);

xvii. Small Reliquary Casket with Champlevé Enamel (*Kleiner Reliquienkasten mit Grubenschmelz*);

xviii. Arm Reliquary of St. Sigismund (*Armreliquiar des Hlg. Sigismund*);

xix. Arm Reliquary of St. Innocentius (*Armreliquiar des. Hlg. Innocentius*);

xx. Arm Reliquary of St. Theodorus (*Armreliquiar des. Hlg. Theodorus*);

xxi. Arm Reliquary of St. Caesarius (*Armreliquiar des. Hlg. Caesarius*);

xxii. Arm Reliquary of St. Bartholomew (*Armreliquiar des. Hlg. Bartholomaeus*);

xxiii. Arm Reliquary of St. Lawrence (*Armreliquiar des. Hlg. Laurentius*);

xxiv. Reliquary in the Form of a Portable Altar in Wood (*Tragaltarförmiges Reliquiar aus Holz mit Steinen besetzt*);

xxv. Reliquary in the Shape of a Chest, 12th/13th Century (*Reliquiar in Truhenform, 12/13. Jhdt.*);

xxvi. Reliquary in Chest Form (*Reliquiar in Truhenform*);

xxvii. Portable Altar in Tablet Form (*Tafelförmiger Tragaltar*);

xxviii. Tablet-Shaped Portable Altar, 12th Century (*Tafelförmiger Tragaltar, 12. Jhdt.*);

xxix. Head Reliquary of St. Cosmas (*Kopfreliquiar des Hlg. Cosmas*);

xxx. Head Reliquary of St. Blasius (*Kopfreliquiar des Hlg. Blasius*);

xxxi. Plenar for Sundays (*Plenar für Sonntage*);

xxxii. Plenar of Duke Otto the Mild (*Plenar Herzog Otto des Milden*);

xxxiii. Arm Reliquary of St. George (*Armreliquiar des Hlg. Georg*);

xxxiv. Wooden Casket with Painted Heraldic Symbols (*Holzkasten mit Wappenmalerei*);

xxxv. Relic Monstrance with Ivory Reliefs (*Reliquienmonstranz mit Elfenbeinreliefs*);

xxxvi. Relic Cross on a Gilded Copper Base (*Reliquienkreuz auf Fuss/Kl. Vergoldetes Kupferstandkreuz*);

xxxvii. Small Folding Altar with Foot (*Klappaltärchen auf Fuss mit Elfenbeinerner Madonnenstatuette*);

xxxviii. Relic Capsula (*Reliquienkapsel/Agnus Dei*) *mit Anna Selbdritt*;

xxxix. Turned Box With Lid (*Gedrehte Deckelbüchse*);

xl. Arm Reliquary of St. Mary Magdalene (*Armreliquiar der Hlg. Maria Magdalena*);

xli. Arm Reliquary of One of the Ten Thousand Warriors (*Hölzernes Armreliquiar eines der zehntausend Krieger*);

xlii. The Large Relic Cross (*Das Grosse Reliquienkreuz*).

32. The Welfenschatz occupies a unique position in German history and culture, harkening back to the

early days of the Holy Roman Empire and conceptions of German national identity and power.

33. Conservative estimates of the present-day fair market value of the Welfenschatz (including those advanced by the SPK itself) exceed $250,000,000.

34. In or around 1929, the Consortium was formed. It consisted of the plaintiffs' ancestors and/or predecessors-in-interest, and on information and belief it received additional funding from third parties in what amounted to a loan. Only these three art dealer firms—Z.M. Hackenbroch, I. Rosenbaum and J. & S. Goldschmidt—were the signatories to the contracts of 1929 and of 1935. On information and belief, the Consortium was solely entitled to ownership rights of the collection in the time period of October 5, 1929 to June 14, 1935 when the Welfenschatz had been in their possession. This ownership was unaffected by certain lenders, banks, and individuals (*e.g.*, a business man called Hermann Netter ("Netter") from Frankfurt, Germany), who acquired no property interest in the collection.

35. By written agreement between the Consortium and the Duke of Brunswick-Lüneburg, the Consortium acquired the Welfenschatz on October 5, 1929. A true and accurate copy of that agreement is attached hereto as Exhibit 1, followed by a certified translation.

36. When the possibility that the Consortium might successfully acquire the Welfenschatz first arose, it was to the particular annoyance of disappointed German museums and states. As the Hannover High

Provincial President Gustav Noske ("Noske"), the former Reich Minister of defense, wrote on November 26, 1929 to the Prussian Minister of Finance and the Prussian Minister for Science, Art and Education, the price for the Welfenschatz would be "a minimum amount of 20 million RM." Indeed, the famed *Kuppelreliquiar* now wrongfully in the possession of the SPK (and which is shown prominently on the museum guide sold in the United States that is referenced above) was discussed as having a value of 4 million RM *all by itself* at that time (*i.e.*, a sum consisting of the better part of the amount for which the Consortium was eventually forced to sell the *entire* Welfenschatz).

37. Concerted efforts by Germany's Reichsregierung (Reich Government), the Prussian State Government and several other entities and museum officials in June of 1930 to "save [the Welfenschatz] for Germany" failed, mainly caused by Otto Braun, the then-Prussian Prime Minister's veto. While perhaps the House of Welf could not regain the treasure, there was an interest as described by President of the Prussian Staatsrat, Oskar Mulert ("Mulert"), with anti-Semitic foreshadowing to "sell the pieces to Germany, to avoid an accusation of hucksterism abroad."

38. At the request of the National Socialist faction, the town council of Frankfurt resolved as follows on August 26, 1930 concerning the "maintenance" of the Welfenschatz:

> A provisional enactment is adopted . . . [ ] that the most valuable and oldest cultural assets

> of the German people, in particular the Welfenschatz, should not be permitted to be sold abroad, so that it can remain in the country.

39. Even a nationwide lottery was planned to collect money for the "salvation of the Welfenschatz."

40. By 1930, the official intention was to buy the Welfenschatz for the Berlin museums. This failed due to the resistance and vetoes of the then-Prussian Prime Minister Braun. Braun was particularly passionate about his plans for a democratic land reform, which earned him the enmity of the large Prussian landowners. In the final years of the Weimar Republic, Braun opted for cooperation with the conservative forces to keep the Nazis from power. He forbade the Rhenish steel helmet ("Stahlhelm"), a World War I community of ultra-conservative and National Socialist veterans, and enforced the nationwide ban of the Nazis' *Sturmabteilung* ("S.A."), the Nazi Party's paramilitary goon-squad and branch. In early March 1933, Braun fled Germany in fear for his life and went into exile in Switzerland.

41. Nevertheless, in the dying days of the Weimar Republic, the Consortium was able to bring the Welfenschatz to the United States to offer it for sale to museums. To some extent, the Consortium succeeded. By 1930-31 about half of the collection had been sold to museums and individuals in Europe and in the United States. Those 40 pieces (out of 82 overall) which were sold to the Cleveland Museum of Art and others,

however, comprised only about 20 percent of the value of the Welfenschatz acquired in 1929—and did not include the most valuable pieces such as the iconic *Kuppelreliquiar*.

42. After the dramatic events and reactions of 1930, matters settled down briefly with respect to the Welfenschatz. The Consortium, while not unaffected by the growing world economic depression, was able to safeguard the core income of its members and stay in business. None of the three companies filed for bankruptcy.

43. This period of relative calm, however, was not to last.

The Nazi Rise to Power

44. Founded in 1923, the National Socialist German Workers Party (*National Sozialistische Deutsche Arbeiterpartei*, or "NSDAP"), grew out of various nationalist movements in the wake of World War I. Originally called the DAP, (*Deutsche Arbeiterpartei*), Hitler was member No. 55. He soon took control of the movement, and his message from the start was the unmistakable intent to marginalize and eliminate European Jews.

45. Throughout the 1920s, the NSDAP struggled for relevance in the economic chaos of the fledgling Weimar Republic. A failed coup d'état in 1923 that came to be known as the "Beer Hall Putsch" was derided as amateurish, and Hitler and other Nazi leaders

were imprisoned. While incarcerated at Landsberg Prison, Hitler penned the foundational document of what would become the Nazi movement: *Mein Kampf*. The book left no doubt as to Hitler's worldview, and his views on where Jews fit into it, *i.e.*, they did not. For anyone seeking to rise within the NSDAP, or later the government that it took over, it left no secret about how to please Hitler.

46. With the onset of the Great Depression, the electoral fortunes of the NSDAP improved. Still unable to break through into a position of parliamentary control, they nonetheless achieved substantial enough minorities to be reckoned with, and made a name for themselves with threatening behavior in the legislatures they joined.

47. That threatening behavior took its worst form outside the halls of town halls, "Landtage," the German states' parliaments, and the Reichstag, however. The Nazis and their "brownshirts," the S.A., became known for politically-motivated violence and attacks on political opponents, communists, socialists, and Jews.

48. The Nazis also now found resonance in the electorate with their scapegoating of Jews. Jews had long been stereotyped in association with commerce, as part of the alleged "Global Jewish Conspiracy." The NSDAP played off this, and blamed Jews for any and all economic setbacks: the hyperinflation of the Weimar Republic, the collapse of the stock market, bank closings, and the Great Depression. In a frightening

time, the Jews of Germany felt the scorn of their neighbors as never before.

49. In the parliamentary elections of 1932, the NSDAP won a plurality of the popular vote for the first time. This gave the NSDAP the largest faction within the Reichstag, though not yet a majority. It was to be the last even arguably democratic election in Germany until after 1945.

50. On January 30, 1933, Adolf Hitler was appointed Chancellor by aging Reich President Paul von Hindenburg. What was initially perceived as a stabilizing nod to conservatism, quickly descended into an onslaught of repression. All the designs of the Nazi Party program of 1920, the failed "putsch" of 1923, and *Mein Kampf* had now assumed the authority of the state.

51. On February 27, 1933, a fire broke out in the Reichstag, the imperial parliament building that housed the legislature of the Weimar Republic.

52. This provided the Nazis with the entire pretext they needed. Cited as proof that German communists were plotting against the government, despite flimsy evidence and the likelihood that it was orchestrated by the Nazis themselves as an excuse to act, it was to become the precipitating event for Nazi Germany.

53. With the "Decree of the Reich President for the Protection of People and State" of 28 February 1933, better known as the Reichstag Decree, Hitler

was given far-reaching, violent means of power. Articles 114, 115, 117, 118, 123, 124, and 153 of the German Constitution, which affected the fundamental rights of citizens, were overridden. Henceforth, the restriction of personal freedom, freedom of expression and of personal property were expressly sanctioned by the state. Infringements of the Regulation were punished with confiscation, prison, penitentiary, and death.

54. With free exercise curtailed and violent enforcers unleashed on the streets, victory in the election of March 5, 1933 was ensured. The Nazis emerged with a majority of the seats in the Reichstag, and carte blanche was delivered to Hitler and his anti-Semitic program.

55. Hitler and his regime wasted no time whatsoever. The Enabling Act of 1933 (*Gesetz zur Behebung der Not von Volk und Reich*, or Law for the Remedy of the Emergency of the People and the Reich) amended the Weimar Constitution further, giving the Chancellor—*i.e.*, Hitler—the power to enact laws without the legislature.

56. Other laws followed in this vein: the Restoration of the Civil Service Law of July 4, 1933, the destruction of public unions and democratic trade associations in April and May, 1933, the institutionalization of the one-party state and expulsion of non-National Socialists (July 14, 1933), and the repeal of the fundamental constitutional rights of the Weimar Republic all followed.

57. These laws and regulations, while draconian, barely approach the repression that was unleashed on Germany's Jews. Through the collective humiliation, deprivation of rights, robbery, and murder of the Jews as a population, they were officially no longer considered German.

58. Boycotts of Jewish businesses spread in March and April 1933, just weeks after Hitler's ascension, with the encouragement of the state itself.

59. By the spring 1933, the concentration camp at Dachau had opened, and the murder of Jews detained there went unprosecuted. This may seem unsurprising with the benefit of hindsight, but Germany had descended in a matter of weeks to a place where Jews could be plucked off the streets, imprisoned, and murdered just yards away from their neighbors, all without consequence. Closer to the Consortium, the Osthofen concentration camp outside of Frankfurt opened in May, 1933.

60. It was not merely that such violence could happen with impunity, but also that it was now officially encouraged.

61. The boycott of Jewish-owned businesses is hard to imagine now. Judges, lawyers, doctors, retailers, art dealers—the bedrock of the German middle class—were targeted and driven out of their ability to make a living.

62. Propaganda was soon in full swing. The *Völkischer Beobachter* was the notorious official Nazi Party

paper. In an edition dated March 31, 1933, Julius Streicher (who published his own militant and racist newspaper *Der Stürmer*) called on the populace to boycott Jews as "profiteers, war slide, convicts, deserters and Marxist traitors." He concluded:

> All Jews will have to fight so long, until victory is ours! Nazis! Defeat the enemy of the world! And if the world would be full of the devil, we must succeed yet!

63. S.A. men, the by-now-ubiquitous brownshirt thugs, fanned out to express "public opinion," as the police and ordinary citizens looked on. Jewish shops were smashed, stores and apartments were looted, and Jewish lawyers were beaten on their way to court.

64. The latent danger for Jews to lose their lives and their property was not dependent on the new laws noted above, though they hastened the threat. More laws restricted the ability of Jews to transfer assets—punishable by death—as Jews were tortured in Gestapo, S.A. and S.S. cellars or simply beaten to death in broad daylight.

65. For example, on April 1, 1933, furrier Hirsch Ber Gottfried was beaten through the streets of Leipzig, and had a sign hung around his neck that read "I am a dirty Jew."

Prussia and the Nazis Train Their Sights on the Welfenschatz

66. No Jews could remain unaffected by the foregoing, and the members of the Consortium were no different. The members of the Consortium were soon completely cut out of economic life in Germany, and on information and belief, were themselves threatened with violence.

67. On information and belief, the *Geheime Staatspolizei*—the Gestapo—opened files on the members of the Consortium because of their ownership of the Welfenschatz and their prominence and success.

68. Not surprisingly, Prussian interest in the Welfenschatz was soon revived now that the Consortium was so vulnerable.

69. Former District and Local Leader of the *Kamfbund für deutsche Kultur*—the League of Struggle for German Culture—and new Mayor of Frankfurt Friedrich Krebs ("Krebs") quickly wrote to Hitler himself (emphasis added):

> Upon coming to power, National Socialism in Frankfurt a.M. also found extraordinarily unclear relationships in the area of art. Since then, the coarsest grievances have been resolved and in the course of reconstructing the artistic life of the old imperial city, I have come to the question of how one of the greatest artistic and cultural properties of the German people, the [Welfenschatz], which was last exhibited in Frankfurt a.M. in 1930 and

then transported to America, can be won back for the German people. . . .

[ ]

The Gospels of Henry the Lion must be regarded as a key piece of the Guelph Treasure that is located in Gmunden. This work of German book illumination is the greatest of all time and is not included (in the inventory) in the Guelph Treasure and has also therefore not been moved to America; however, it belongs integrally and, indeed, as a key piece.

The securing of the Gospel of Henry the Lion would be the most important act in a systematic cultivation of historical artifacts for Germany and would attract even more attention because the work is hardly known in wide sections of the population and has never been shown to the public.

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

> people, create the legal and financial preconditions for the return of the [Welfenschatz].

70. A true and accurate copy of this letter is attached hereto as Exhibit 2, followed by a certified translation.

71. Ostensibly Krebs sought the acquisition of the Gospels of Henry the Lion, but his real intention was to save the honor of the German people, to snatch the Welfenschatz from the Jewish merchants, and bring it "home to the Reich," and asks *Hitler himself* to lay the groundwork for obtaining the Welfenschatz at only 1/3 of its value.

72. To place Krebs in context among Nazi zealots, he distinguished himself as mayor by firing all Jewish civil service employees ten days *before* the Law for the Restoration of the Civil Service was enacted.

73. Standing behind all of this was Goering himself, Hitler's highly decorated deputy—Prime Minister of Prussia at that time—aided by the desire and expediency by his underlings to demonstrate their anti-Semitic credentials to him and to Hitler.

74. Goering was a notorious racist and anti-Semite who, in view of the massive destruction of infrastructure and buildings, mostly synagogues, caused by the Nazi-mob on occasion of the Reich's Pogrom Night, or "Night of Broken Glass" ("Kristallnacht") in November 1938, is quoted saying that he would have "preferred if you would have slain two hundred Jews rather than destroying such values. . . ."

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

76. Adolf Feulner ("Feulner") had a career beginning in 1930 as director of the Museum of Decorative Arts and History Museum in Frankfurt, and from 1938 to his death as head of the *Kunstgewerbe* (arts and crafts collection) of Cologne.

77. In a letter dated November 1, 1933, Feulner wrote to the President of the German Association for the Preservation and Promotion of Research (*Deutsche Gemeinschaft zur Erhaltung und Förderung der Forschung*, or the "DFG"), Friedrich Schmidt-Ott ("Schmidt-Ott") about the Welfenschatz. This letter makes clear that it was Feulner who approached the Consortium, and not the other way around, and at the instigation of Krebs or at the very least in consultation with him. Feulner wrote: "After consultation with Mr. Hackenbroch / . . . / the owners are very willing . . . to enter into negotiations with the Reich."

78. Although the Welfenschatz was physically stored in Amsterdam, the Netherlands by this time,

there is no question that the peril faced by the Consortium as Jews, still living in Germany and vulnerable to Nazi attacks at any time, placed it well within the Nazis' grasp. Any resistance posed grave risks to the Consortium and their families.

79. On January 1, 1934 the museum directors Dr. Otto Kümmel ("Kümmel," of the State Museums), Dr. Robert Schmidt ("Schmidt" of the Schloss Museum, the predecessor of the Kunstgewerbemuseum where the Welfenschatz is today), Dr. Karl Koetschau ("Koetschau" at the Kaiser-Friedrich-Museum), and Dr. Demmler (at the German Museum), together with Dr. Hans-Werner von Oppen ("von Oppen," Speaker in the Ministry of Education and Board member of the Dresdner Bank) visited the collections stored at the bank whose possession had been taken by Prussian intervention. The Welfenschatz was discussed at this meeting, and clearly not for the first time. As the minutes of the meeting composed by a Mr. Stern of the Dresdner Bank noted:

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

80. Von Oppen directed Stern to lead the effort "in all respects."

81. Later, in December, 1946, Schlossmuseum director Schmidt misled the Allied forces in securing himself a role at the Central Collecting Point at Wiesbaden, from which he found himself a prosperous postwar career. Despite direct firsthand knowledge of the transaction, he described the purchase price of Prussia's 1935 acquisition of the Welfenschatz as 7 million RM, plus a number of valuable works of art. While still below market, this was a complete fabrication that allowed Schmidt to shift blame to others, a regrettably recurring theme among those like Schmidt who acquiesced in this kind of illicit behavior.

82. Stern notes in the minutes menacingly that although the Welfenschatz had been purchased in 1929 for 7.5 million RM, that the Consortium might be willing to accept a lower price "to liquidate the business so as not to suffer even more loss of interest. . . . "

83. Just days before Stern had told Alfons Heilbronner, owner of the art dealer Max Heilbronner in Berlin, a Jewish debtor to Dresdner Bank and since that time the messenger between the bank and the Consortium, to "determine whether a price substantially below the price that it cost, would have appeared promising."

84. Stern then told Heilbronner that he did not want to approach the Consortium, but that if Heilbronner did he could be assured a commission.

85. Heilbronner became suspicious. He had heard that "negotiations with the Reich were in progress," but he dismissed Stern because he was concerned that if an interested buyer appeared, he could not be sure if they were acting for themselves or for a third party. In any event, it was agreed that Heilbronner would "initiate his efforts immediately."

86. It was clear from the words of the representatives of the Dresdner Bank that it intended to pursue the Welfenschatz with the German Reich to obscure Prussia's role in transacting business with Jews.

87. The SPK has publicly argued that the Consortium initiated the dialogue that ultimately resulted in the 1935 transaction. In fact, there is no evidence whatsoever to suggest that the Consortium sought to begin negotiations with the Nazi state. The only plausible interpretation of the correspondence among high-ranking Nazis is that it was they—the Prussian functionaries—who sought out the Consortium.

88. This conclusion is underscored by the Dresdner Bank's role as intermediary in the targeting of other Jewish collections. Dresdner Bank was majority-owned by the German state at the time of the Nazi ascension to power. Between 1933 and 1937, when it was once again privatized, it played a similar role in other cases. On August 15, 1935, the Dresdner Bank executed an agreement to sell the Berlin museums more than 1,000 works, including works "purchased" from Jewish owners under the days of early Nazi terror. These works of art came from Jewish art collections

which had been handed over to Dresdner Bank as collateral at some point and which were sold by Dresdner Bank, as the bank's property, in mid-1935 to the Prussian Nazi-State in order to enrich the Berlin state's museums' collections. The bank's role in the Welfenschatz transaction is consistent with this complicity.

89. The Dresdner Bank's role as an agent and/or co-conspirator of the Nazi state is further underscored by a statement made by the law firm Bergschmidt-Toussaint-Burchard of Berlin on April 20, 1936, which represented Dresdner Bank's interests in a claim against Herbert Bier, the nephew of Zacharias M. Hackenbroch, living as a Jewish refugee in London at that time. The letter states that "/ . . . / as you may be aware, Dresdner Bank's and the German Reich's Treasury's economic issues are very much the same. The receivables we have been given order to seize from you, therefore is German tax payers' money."

90. As detailed in an investigative report in *Der Spiegel*, the leading German weekly news magazine, a study commissioned by the Dresdner Bank took an unprecedented look at the role of a financial institution in Nazi Germany:

> "Dresdner Bank in the Third Reich" paints a stark picture of how the firm actively courted Nazi favor in order to make money and rapidly expand its business.
>
> The study also shows the bank took part early on in the Third Reich's policy of confiscating Jewish property and wealth. "It's a myth that

> the bank was forced to take part in the 'Aryanizing' of Jewish wealth," [ ]
>
> But perhaps one of the most damning associations for Dresdner's past managers is its close ties to Heinrich Himmler's SS. The bank was the most important private lender for the Nazi organization and played a key role for its operations in occupied Europe, essentially acting as the bank of the SS in Poland.

91. The Dresdner Bank's approach to the Consortium is completely consistent with this history, and is the only plausible inference from the documentary evidence.

92. On January 23, 1934, Stern reported to the Reichsbank directorate that Heilbronner had not succeeded with the spokesman of the Consortium. He was told that the Consortium "will not go down under 6.5 million RM, perhaps 6 million RM in extreme circumstances."

93. Heilbronner quickly traveled to Paris under pressure from the bank syndicate to tell Saemy Rosenberg that the price could not exceed 3.5 million RM.

94. Stern memorialized another meeting on May 11, 1934: Mulert had called, and wanted to know if it was going to be possible to "secure the Welfenschatz for German museums." Stern had informed Mulert that the Consortium had advised that they had an offer in hand for 7 million RM, probably from a Berlin private banker.

95. It was hardly unexpected that such an offer would have come in, nor that the Consortium would have wanted to wait out for bidders to compete against each other. Anyone listening to Hitler's speeches and official propaganda about art knew how Nazi art tastes ran: they detested modern art that they deemed "degenerate," and they exalted traditional, historical German art and motifs. The Welfenschatz was, literally, the highest example of what the Nazis sought. It combined both impeccable "German" credentials, but was also of unquestioned quality apart from the state sponsored works being churned out by the likes of Josef Thorak and Arno Breker.

96. But the Consortium did not have time to wait for the fair market value of the Welfenschatz. Legion examples of Jewish collectors and professionals exist who waited too long and lost everything.

97. Koetschau then asked Stern when the negotiations over the Welfenschatz would begin. Stern reported that he expected a firm offer from the Consortium, and that the price of 3.5 million RM being pursued would be a "very low" price constituting 15% of the Welfenschatz's value.

98. To put it in context, if 3.5 million RM were 15% of the value of the Welfenschatz, then the Welfenschatz's full value would have been ***23.33 million RM***, or nearly six times what the Consortium was paid.

99. A month later, Stern advised the director of the Schloss Museum that negotiations had stalled

because the Consortium continued to insist on a price over 7 million RM.

100. Starting in the summer of 1934, two people in particular took up the mantle of "saving" the Welfenschatz for Germany: Paul Körner ("Körner") and Wilhelm Stuckart ("Stuckart"). It was this effort that led to the eventual sale under duress of for dramatically below market value.

101. The Consortium could scarcely have expected fair treatment from them.

102. Körner already had a successful Nazi career behind him by 1934. Since 1926 he had been adjutant for Goering. Körner was an NSDAP Party member starting in 1931 (long before even a cynic could argue it was advantageous or necessary for status in Nazi-run Germany), as well as the *Schutzstaffel* (the "S.S.") —an organization later declared by the International Military Tribunal at Nuremberg to be a criminal enterprise, and about which its elite members cannot ever have had any illusions. He rose to an S.S. Group Leader (*Gruppenführer*)—an "achievement" that speaks for itself—and was appointed as personal assistant to Goering in the Prussian Ministry of the Interior.

103. After Goering became Prussian Prime Minister in April 1933, Körner was appointed Secretary of the Prussian State Ministry. On the occasion of the opening of the Prussian State Council (Staatsrat) described above, Körner wrote a foreword in the *Völkischer Beobachter*, in which he took aim at "all liberal and democratic sentiments," and described the task of

the new Staatsrat as, "to be National Socialist in its operation."

104. Goering transferred authority to Körner on April 10, 1933 over the "Research Office," the notorious institution that took over all telephone, telegram, radio, and mail monitoring in the Third Reich.

105. Goering also approved Körner for the post of Secretary of State in the Four-Year Plan. In this role, Körner was to be instrumental in helping to make the German economy "ready for war." Finally, and most tellingly, Körner later attended the Wannsee Conference in suburban Berlin in 1941, at which Reinhard Heydrich, Adolf Eichmann, and other high ranking war criminals decided upon the implementation of the "final solution of the Jewish question"—the plan to exterminate the entire Jewish population of Europe.

106. Stuckart first came into contact with the Nazi Party in 1922 while a law student, and enrolled in the Party at a time when it was barely on the fringe of mainstream German politics. By 1926, he was the legal adviser of the NSDAP in Wiesbaden. Starting in 1930, he was also a member of the *Kampfbund fur Deutsche Kultur*. He applied to the civil service in 1930, but was dismissed in 1932 because of his political (*i.e.*, Nazi) convictions. Stuckart also joined the S.A. in 1932 and ascended to be the legal secretary to the S.S. and S.A. in Pomerania.

107. On May 15, 1933 Stuckart was appointed as Acting Assistant Secretary of State in the Prussian Ministry of Science, Culture and Public Education.

Just a few weeks later, he was appointed Secretary of the Ministry of Science and entrusted with the representation of Minister Rust.

108. Rust had been a member of the NSDAP since 1922. He was a "Gauleiter" (an honorific given to regional leaders within the party) after 1928 of the nationalist/anti-Semitic National Socialist Society for German Culture. After the seizure of power, he founded in 1935 the racial ideology Reich Institute for the History of the New Germany. Rust committed suicide on the day of German surrender on May 8, 1945.

109. Stuckart's area of professional responsibility by then included primarily "Jewish Affairs," and he was to become the architect of the development of the anti-Jewish law. Notably, he was instrumental in the drafting of the "Nuremberg Laws" that codified the exclusion of Jews from all aspects of society. In 1936 he became Chairman of the Reich Committee for the Protection of German Blood.

110. This, then, was the first of the characters with which the Consortium was confronted in seeking to recoup the fair market value of their property.

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

> I note that in the opinion of the Prussian Minister of Finance, an acquisition by the

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

112. A true and accurate copy of this letter is attached as Exhibit 3 hereto, followed by a certified translation.

113. The cast of notorious National Socialists identified in the paragraphs above and arrayed against the Consortium is sobering. First, of course, the draft letter is intended for Hitler himself. Currying favor with the Führer through acquiring the Welfenschatz was the overriding goal. Second, Stuckart had already vetted the plan with the Prime Minster of Prussia —*i.e.*, Goering. Lastly, the financing that had been

considered, approved, and planned, came from Schacht, the President of the Reichsbank.

114. For his part, Schacht was no lightweight in the Nazi Party; in addition to his duties as President of the Reichsbank from 1933 to 1939, he was the Reich's Economic Minister from 1934 to 1937, as Germany flouted the Versailles treaty, targeted resources in the Saarland that were supposed to remain neutral, and made every preparation to plunge Europe—and with it the whole world—into war.

115. The letter went on to describe how Stern, and a "Mr. Pilster" would soon appear as "interested parties," offering intentionally lowball offers of 3 million and 4 million RM—a scheme orchestrated by the "M.P.", *i.e.* by Prime Minister Goering, quite literally for Hitler. It went on to recommend that the city of Hannover be discouraged from entering into the negotiating picture.

116. The letter closes, "With German greetings and Heil Hitler!"

117. Stuckart thus describes the motive for the acquisition of Welfenschatz: to impress Hitler and his circle, and to do so for a less than market price. The pressure that would allow this to happen is so axiomatic as to be a basic aspect of Nazi Germany: the life and liberty of the Consortium were at stake.

118. For Stuckart himself, he is even more frank. The Welfenschatz is "obviously politically" valuable for Prussia "in its later rise in the Reich." The stage was

thus set, to take advantage of the weakened position of the Consortium by virtue of their persecuted status, to acquire the Welfenschatz for far-below-market price.

119. That process only accelerated as 1934 went on. The National Socialist regime was not content to enact legislation targeting specific policy aims. The Nazis were clear that the real goal was *Gleichschaltung*-the transformation of society itself. Art was at the center of this plan.

120. In 1933, Minister for Propaganda and Education Joseph Goebbels founded the Reich Chamber of Culture (*Reichskulturkammer*)—after first organizing the April 1, 1933 Jewish boycotts. The *Reichskulturkammer* assumed total control over cultural trade, and membership was required to conduct business. Needless to say, Jews were excluded, effectively ending the means of work for any Jewish art dealer in one stroke. Major dealers' collections were liquidated because they could not legally be sold.

121. Ideologue and "Reichsleiter" Alfred Rosenberg soon got involved as well. Alfred Rosenberg played many roles. He was the editor of the *Völkischer Beobachter*, and he was also the author of the polemical screed *The Myth of the 20th Century* (*Der Mythos des 20. Jahrhunderts*)—second only to Hitler's *Mein Kampf* in its influence on Nazi racist ideology. Later, he gave his name and direction to the notorious *Einsatzstab Reichsleiter Rosenberg* (ERR) that coordinated the systematic looting of occupied countries,

particularly the collections of French Jews (those Jews, of course, were frequently then murdered).

122. Not surprisingly, Alfred Rosenberg was tried as a war criminal at Nuremberg after the war, convicted, and hanged.

123. Alfred Rosenberg's *Kampfbund für Deutsche Kultur* disrupted auctions at Jewish establishments and drove some to ruin.

124. In an added and ironic tragedy, Jewish art dealers also lost their Jewish customers, whose economic means were being destroyed systematically and comprehensively; there was no money left to buy art.

125. The impact of the Jewish exodus from German economic and cultural life by this time was made clear in a Municipal Memorandum Concerning the Departure from Culture Associations by Jewish Members," dated February 16, 1934. Rental revenue from Jewish tenants plummeted; the Municipal Theatre in Frankfurt, for example, saw its revenue fall by 100,000 RM; the Museum Society lost 40% of its revenue, the Frankfurt Art Association lost 270 Jewish and 50 non-Jewish members, nearly half of all members together; and the Staedelsches Kunstinstitut likewise saw its membership drop from 120 to 70. Investment in art fell too.

126. To sum it all up, on December 1933, the Frankfurt city treasurer wrote to Krebs with regard to the current climate:

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

127. The local museums, who were mainstay customers of the dealers in the Consortium, fell away too but not for reasons of economic difficulty. Rather, they were subject to new stringent nationalist regulations, characterized by the infamous signs *Kauft nicht beim Juden!*—"Don't buy from Jews!"

128. Because of the anti-Semitic climate, Isaak Rosenbaum and his nephew Saemy Rosenberg, the two co-owners of I. Rosenbaum, gave up, when Saemy Rosenberg had received a warning from a trusted friend and World War I comrade, that he should better "go on a long vacation abroad." They left Germany, and emigrated to Holland. Both were liable for the payment of flight tax in the amount of 25 percent of their total (movable and immovable) assets. A true and accurate copy of the Gestapo memo that memorialized this extortion is attached hereto as Exhibit 4, followed by a certified translation.

129. The owners of the art dealer J. & S. Goldschmidt (also part of the Consortium) were forced by

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

130. The nephew and designated successor of Z.M. Hackenbroch, Herbert Bier, later described the cataclysm that befell his uncle: "The depression of 1930 and what followed was naturally notable, but the real decline began with the boycott in 1933." And the lawyer for Hackenbroch's widow Clementine later added poignantly:

> Although, according to a letter from the President of Fine Arts, the deceased husband was allowed to exercise his profession / . . . / until 7/31/37, such an exercise of his business amounted to little or nothing in view of the economic damage caused by the general Boycott. Like a still-licensed attorney, a doctor was allowed to operate, but it was known that the Jew was boycotted and was shunned despite official permission from Christians. I was also a "Front Combatant" with an Iron Cross 1st Class, and thus allowed my activity by law. But I had nothing more to do.

131. While "Aryan" companies had suffered just as Jewish businesses had under the global economic crisis, starting in 1933 the former soon got back on its legs thanks to the Nazi regime and, relevantly, prospered from the repression of their Jewish competitors.

Dresdner Bank

132. Dresdner Bank, which became notorious as the "S.S. bank", was frequently complicit in one-sided and manipulative taking advantage of other Jewish business owners, as spotlighted in many studies, e.g. by the Office of Military Government for Germany (OMGUS)—Financial Division, by its 1946/47 summary reports on the investigation of the role of the German banks during the Nazi era (*cf.* OMGUS: Dresdner Bank Report—Report on the Investigation of the Dresdner Bank, 1946). According to these studies, Dresdner Bank executives forged especially close ties to SS leader Heinrich Himmler: "We are the bank of SS," as Dresdner Bank executive board member Emil Meyer had declared in 1941. Dresdner Bank—which until the early 1990s had claimed only a limited role in helping the Nazis—was deeply involved in the Third Reich in many ways and, after Hitler came to power in 1933, it took the lead in seizing Jewish property, set up countless subsidiaries in occupied territories and financed the arms sector. Dresdner Bank became a leading financier of the German occupation authorities in occupied Poland and Hitler's invasion of his neighbors enabled the bank to expand its operations and increase its earnings potential in a way it had never envisaged.

Dresdner Bank, like other Third Reich banks, was extensively involved in expulsions, genocide and war.

133. On February 9, 1935 Dresdner Bank Director Samuel Ritscher wrote in a file note that Prussian Finance Minister Johannes Popitz ("Popitz") had asked him to care for the matter of the Welfenschatz. It would fall to him to carry out this transaction together with the art collection of Dresdner Bank, "so the whole thing appears to be together."

134. The magnitude of this opportunity was apparent to Popitz, who saw the possibility of taking advantage of the Consortium's condition to acquire the Welfenschatz.

135. Stern described a meeting of the Director of the Schloss Museum with Director Nollstadt ("Nollstadt") of Dresdner Bank of February 12, 1935: Heilbronner remained in "continuous negotiations" with the Consortium. Nollstadt discussed the importance of conveying the impression to the Consortium that the buyer whom Dresdner Bank represented intended to gift it to the state museums, such that the Consortium would conclude there were no other potential buyers (those very museums being the most obvious candidates otherwise).

136. At the beginning of April, 1935, Otto von Falke, one of the leading and well-known German art experts and co-author to a rare catalog compiled on the Welfenschatz by 1930, viewed the remaining parts of the Welfenschatz. He reported, "that the most beautiful and historically the most outstanding works of art,

on which the fame of the Welfenschatz is based, still exist."

137. On April 6, 1935 Heilbronner reported directly to Director Ritscher that he had been "intensely preoccupied with the matter" for a year and a half. The problem according to Heilbronner, was that Rosenberg and the other members of the Consortium were confident in the rectitude of the asking price. Heilbronner resolved to convince the Consortium of the fleeting nature of the opportunity—fleeting of course because of the grave peril that the Consortium now faced in the Nazi regime.

138. By the spring of 1935, the exclusion of Jews from the German life had assumed more threatening forms, and had become nearly total. The means by which German art could be sold by Jewish dealers had effectively been eliminated.

139. It is hardly a surprise then, that after two and a half years of pronounced repression and the very real risk that they would lose the entire Welfenschatz, if not more, the Consortium sent word that it might be "willing" to relent from the fair market value of the collection and sell it for 5 million RM—already far below what all involved had acknowledged was its real value. These "deliberations" were, of necessity, coerced and under duress by virtue of the circumstances.

140. On April 10, 1935, Heilbronner spoke again with Ritscher, who told him that Dresdner Bank "in the name of its client," was authorized to submit a bid of 3.7 million RM for the Welfenschatz.

141. Then, a new issue arose that threatened the intended acquisition of the Welfenschatz, the "solution" to which only underscores the coercive context of the pending transaction.

142. In Herrenhausen bei Hannover (near the City of Hannover, capital of the German federal state Lower-Saxony), a new museum had been planned, and it intended to seek to acquire the Welfenschatz. The basic economics of the effect that this could have had on the negotiations is clear: it presented the possibility that a new, motivated bidder would enter the discussion willing to pay the fair market value, against which Prussia's lowballing would stand no chance in a real negotiation.

143. Dresdner Bank, which was acting on behalf of Prussia and which had also indemnified Heilbronner for his commissions, assured that it would take appropriate action: The "authoritative entities" were to be invited to review the plans at Herrenhausen to ensure that there was no "conflict." In other words, the Nazis made it clear to the museum in Herrenhausen to cease its interest in buying the Welfenschatz fairly.

144. Thus, in one final stroke the Nazi state and its agents stripped away the last chance that the Consortium had to recover the value of its property.

145. After two years of direct persecution, of physical peril to themselves and their family members, and, on information and belief, secure in the knowledge that any effort to escape would result in the certain

seizure outright of the Welfenschatz, the Consortium had literally only one option left.

146. Rosenberg submitted an offer valid until May 4, 1935 under the most extreme duress: a sale price of 4.35 million RM.

147. Dresdner Bank, still in its role as the "purchaser," would not drop the ruse. It claimed that its "client" (*i.e.*, the Nazi state itself) was "traveling" and could not yet respond to the offer, asking for another 16 days to respond. "However," said the bank, "we believe it should be noted that the margin between the price 3.7 million RM that you rejected, and your current demand, is so great that we fear that our client will not increase his offer."

148. Additional discussions ensued about the proportion of the sales price that would be paid in cash, and whether in local or foreign currency, and whether in Germany, or elsewhere.

149. On May 17, 1935, Rosenberg made a final offer on behalf of the Consortium. By early June, the negotiations had progressed to the point that the acquisition of the Welfenschatz was considered all but certain, such that Rust, as Reich Minister for Science, Education and Culture, wrote to the Minister of Finance:

> It is with great satisfaction that I welcome the repurchase of the Welfenschatz, in connection with the proposed acquisition of the art holdings of the Dresdner Bank. Its recovery for

> Germany gives the entire action its historic value.

150. During the negotiations, Saemy Rosenberg was staying at the Hotel "Fürstenhof" at Potsdamer Platz in Berlin. At this same time, S.A., Hitler Youth, and non-party members were demonstrating against Jewish shops daily, chanting, "do not buy from Jews!"

151. The same day—Friday, June 14, 1935—when Saemy Rosenberg signed the sales contract in Berlin, apparently in great haste and pushed by his counterparts from Dresdner Bank—he sent a letter to Dresdner Bank when he returned to the hotel, stating that the contract should be regarded as legally valid, even without the other owners having signed it at this point. Furthermore, he promised to get all of the owners of the Welfenschatz to sign it properly by return.

152. On July 1, 1935, Saemy Rosenberg went to the Kaiser Friedrich Museum in Berlin to view the works of art in the collection, as the incorporation of some existing works had come into the discussion for the Welfenschatz negotiation.

153. A true and accurate copy of both the contract of June 14, 1935, and the letter of Saemy Rosenberg of June 14, 1935, are attached hereto as Exhibit 5 and Exhibit 6, respectively, followed by certified translations.

154. The surviving copy of the contract bears four signatures only: of Saemy Rosenberg, Isaak

Rosenbaum, Zacharias Max Hackenbroch and Julius Falk Goldschmidt—the sole owners of the collection.

155. The tactics of the Nazi-Prussian state and of Goering to get possession of the Welfenschatz under "favorable conditions" thus proved successful, accomplished by means of terror and threat, relying on the great imbalance of power of the contracting parties and by pursuing a scheme of grave manipulative negotiation and a cover-up.

156. In mid-July, as the "deal" was being concluded, there were riots on Berlin's Kurfürstendamm.

157. On July 18, 1935, the Welfenschatz, supervised by director Dr. Schmidt, was carefully packed in Amsterdam for delivery to the Schlossmuseum in Berlin.

158. On July 19, 1935, Dresdner Bank made the requisite payments pursuant to this document.

159. The agreed upon terms and conditions of the contract of June 14, 1935 were to the unique benefit of the buyer, the Nazi state. Moreover, the Consortium was obligated to pay a commission of 100,000 RM to Alfons Heilbronner out of their pockets (which enabled Heilbronner to pay back his debts he had with Dresdner Bank to some extent). After the deduction of that commission, the remaining purchase price of 4.15 million RM was split: 778,125 RM were paid to a "Sperrmark account," a blocked account with Dresdner Bank. To be offset against the credited money, the art dealers had to accept art objects from the Berlin

Museums instead of having access to freely dispose of that money. The received works of art eventually were sold in order to repay the Consortium's foreign loans. According to Hackenbroch, the selection of the pieces from the museums to be delivered to them, and contrary to prior mutual agreement, was not made by the art dealers, but ultimately by museums' officials. They were thus forced to accept other items in lieu of payment—not by choice—but at their risk of selling them at appropriate prices (which was of course impossible because of their persecution as Jews).

160. The balance, the amount of 3,371,875 RM, was credited to three different bank accounts of Hackenbroch in Germany.

161. The Consortium used that money to repay the investors, the money lenders from 1929 in full, the receipt of which is confirmed by German tax records. This only diminished further the diluted value for their property that the Consortium realized in this coercive transaction. Thus, the Consortium disposed of the Welfenschatz at a significant loss relative to its market value, when they had no longer had any alternative in Germany to earn a living.

162. By this time, Jews were denied not only to transfer cash abroad legally, but any other receivables of more than 50,000 RM. One of the massive obstacles to emigration was the so-called flight tax on all emigrating nationals who had assets of more than 200,000 RM. While originally intended to discourage emigration in the Great Depression, it was used by the Nazi

regime as a means simply to steal what Jews had left as they fled for their lives.

163. Hackenbroch died on August 9, 1937, officially because of cardiac insufficiency.

164. Cleveland Museum of Art director William M. Milliken ("Milliken") traveled to Germany before the war on a regular basis and had been well acquainted with the art dealers. In his autobiography, he discussed the Consortium and the Welfenschatz.

165. Milliken left no doubt that the very possession of the Welfenschatz by the Consortium, and in particular the decision to sell portions of the collection in America, subjected the Consortium to specific anti-Semitic vitriol.

166. Milliken also relates rumors he had heard about Hackenbroch being "dragged to his death through the streets of Frankfurt by a Nazi mob."

167. In either event, Hackenbroch's widow was evicted from their house—on what had then been renamed, in the bitterest of ironies, "Hermann Goering Ufer"—two months later so that the Hitler Youth could use it. The last remnants of his gallery inventory came to auction in December, and on December 30, 1937 the firm was deleted from the commercial register and simply ceased to be.

168. Clementine Hackenbroch, the widow of Zacharias, emigrated in the summer of 1938 with her daughter Irene to England. After 52,808 RM for flight tax was extorted from her, and their accounts blocked

at Deutsche Securities, and Exchange Bank, she had no other property.

169. Lucie Ruth Hackenbroch (Philipp's mother) came under surveillance of the Gestapo and was herself stripped of her citizenship in humiliating fashion: published under the swastika of the German Reichs Gazette and Prussian Gazette. Almost as an afterthought, it is noted that all those on the list who have been expelled have also had their property seized. One can well imagine what would have happened to the Hackenbroch and other families if the dealers had decided, given Goering's role, to send all the remaining items to USA to sell there?

170. Julius Falk Goldschmidt and the other members of that firm tried to continue the company in Berlin, Frankfurt and Amsterdam. He emigrated to London in summer of 1936. His cousin Arthur Goldschmidt was later arrested in Paris, imprisoned in several camps, and emigrated in 1941 to Cuba, and then in 1946 to the United States.

171. Saemy Rosenberg and Isaak Rosenbaum had emigrated by 1935 from Germany. In Amsterdam, the two founded the company Rosenbaum NV, which was "Aryanized" by a German "manager" after the occupation of the Netherlands by Hitler's army in 1940. Saemy Rosenberg's brother, Siegfried Rosenberg, ran operations in Frankfurt as best he could until 1937, when the company was liquidated and closed. After a further reduction in the Rossmarkt where it had traditionally stood, it moved to a warehouse. On July 11,

1938, this firm too—based in Frankfurt since the mid-19th century—was deleted from the commercial register.

172. Saemy Rosenberg had to pay 47,815 RM in Reich Flight Tax. Isaak Rosenbaum was expelled from Germany and paid 60,000 RM, plus 591.67 RM in interest, to the tax office Frankfurt-Ost.

173. In an indication of what would have befallen Saemy Rosenberg had he and the Consortium failed to capitulate, the coda to his Gestapo file was written on May 2, 1941. In this confidential file memo, Rosenberg, his wife, and his daughter Gabriele—Leiber's mother—are officially stripped of their citizenship and their property officially seized outright. *See* Exhibit 4. To add insult to injury, Rosenberg is identified on the latter part of the form with "Israel" included in his name, an appellation that the Nazi government compelled all Jewish men to add to their names. *Id.*

174. Isaak Rosenbaum died on October 28, 1936 in Amsterdam.

175. Overall, the firm of I. Rosenberg and/or its owners taxed in the amount of at least 219,497.57 RM, for the sole and exclusive reason that they were Jews.

176. In August 1939 Saemy Rosenberg fled with his wife and child from Amsterdam, the Netherlands, via Mexico to the United States.

The Aftermath

177. In the introduction to the new guide for the Welfenschatz by Otto Kümmel, housed at the Berlin Schlossmuseum in 1936, the matter is put bluntly: "The Welfenschatz was recovered for Germany in the summer of 1935 by the Prussian state government." The guide thanks Popitz, Rust, and Goering for their particular efforts in "rescuing" the Welfenschatz. The Consortium goes unmentioned.

178. Propaganda films were commissioned to celebrate the acquisition.

179. On October 31, 1935, the *Baltimore Sun* reported that the Welfenschatz was to be given as a "surprise gift" for Hitler (emphasis added):

> The bulk of the so-called Guelph Treasure, ***which was purchased by the Prussian Government for $2,500,000***, will be presented to Adolf Hitler as a "surprise gift," it was disclosed here tonight.
>
> The treasure includes an important collection of church vessels and sacred relics, richly studded with precious stones. Long owned by the Dukes of Brunswick, the treasure was purchased by a consortium of art dealers and sold to the Prussian government. Gen. Hermann Wilhelm Goering, Premier of Prussia, will preside at the ceremony at which the gift to Hitler will be made.

180. A true and accurate copy of this article is attached hereto as Exhibit 7. At the exchange rate of

the day, the reported purchase price of $2,500,000, apparently being revealed to journalists at that time by Nazi propaganda, would have been worth approximately 6-7 million RM—far more than what the Consortium actually was paid (before being further extorted for those proceeds).

181. During the Second World War, the Welfenschatz was housed in the Berlin museums, and later shipped out of the city to be saved from destruction and robbery as the war turned against Germany. After the war, it was seized by U.S. troops, then handed over in trust to the State of Hesse.

182. The end of the war brought important changes for Prussian institutions like the Berlin museums. Prussia had been long blamed for Germany's militarism in connection with two world wars.

183. After the war, the Allies had seen enough. By joint act in 1945, the *Freistaat Preussen* was officially dissolved.

184. The SPK was created for the purpose, *inter alia*, of succeeding to all of Prussia's rights in cultural property—including Prussia's wrongfully acquired possession of the Welfenschatz.

185. It is noteworthy that even the previous owner of the Welfenschatz up to 1929, the Duke of Brunswick-Lüneburg, later on, in the 1960s, claimed that the SPK, because of the tainted sale of 1935, was not to be legally entitled to the collection, but the art dealers were.

The Sale of the Welfenschatz Under Duress in 1935 was a Taking of Property in Violation of International Law

186. Since World War II, a presumption of international law has been that any sale of property by a Jew in Nazi Germany after January 30, 1933, or in any country occupied by Nazi Germany carries a presumption of duress and thus entitled to restitution.

187. This is for the basic reason, as demonstrated by the foregoing, that no Jewish citizen or resident of Germany could possibly have entered into an arms'-length transaction with the Nazi state itself.

188. In addition, the Consortium faced specific threats of violence and, on information and belief, surveillance and intimidation by the Gestapo.

189. Altogether, the economic and physical threats faced by the members of the Consortium made the 1935 sale a transaction under duress, and thus void. Viewed conversely, the 1935 transaction would be valid only if Jews in 1935, in Germany, under economic and physical peril, were free to make an arms'-length bargain with the Nazi state itself. Only to state the premise is to reveal its absurdity, and the invalidity of the 1935 transaction.

190. According to international principles of law, German law—German Civil Code ("BGB") included—the tainted and voidable acquisition of the Welfenschatz by the Nazi Prussian State in 1935 did not convey good title to Germany and SPK.

191. A bona fide acquisition of unlawfully expropriated or otherwise lost cultural goods according to § 935 BGB is prohibited within the Common law legal system—according to the *nemo dat quod non habet* principle as well as with the codified German Civil Law, according to § 935 BGB.

192. If the res in question has been stolen or lost, then bona fide acquisition according to § 932 BGB et seq. is not available (§ 935 BGB). The idea behind this limitation is that the owner has not parted with his direct possession deliberately, so that a third person shall not have the benefit of the appearance of entitlement through possession under such circumstances.

193. Any sale by the victims of the Nazi regime after January 30, 1933 that were under duress are void, with effect *ex tunc* within the meaning of § 138 BGB. This is because, *inter alia*, the transaction would not have been conducted absent the coercive rule of National Socialism. Any acquisition of such cultural objects cannot be considered a bona fide purchase in accordance with § 935 BGB.

194. Such objects whose sale is to be regarded as void under § 138 BGB, fall under the category of § 935 para. 1 BGB and apply as "lost" under German law.

195. As a result, any claimant, whose claim meets the aforementioned requirements, generally speaking, has a claim for restitution, according to § 985 BGB.

The Sham Process by the Limbach Commission, and Germany's Refusal to Honor its International Commitments to Victims of Nazi Looting Constitutes a Second Taking in Violation of International Law

196. In 1998, the United States Department of State organized and hosted the Washington Conference on Holocaust Era-Assets (the "Washington Conference").

197. The Washington Conference resulted in what have become known as the Washington Conference Principles on Nazi-Confiscated Art. Germany was a key participant, along with Austria, France, the United States, and dozens of other nations. The Washington Principles state:

> In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.
>
> 1) Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
>
> 2) Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
>
> 3) Resources and personnel should be made available to facilitate the identification of all

art that had been confiscated by the Nazis and not subsequently restituted.

4) In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.

5) Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.

6) Efforts should be made to establish a central registry of such information.

7) Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.

8) If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be 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.

9) If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

> 10) Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
>
> 11) Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

198. The restitution encouraged by the Washington Principles is, and has been for more than 15 years, the foreign policy of the United States. The United States Supreme Court, as well as the Courts of Appeal of the United States, have recognized that proceedings in furtherance of that goal such as this one are entirely consistent with that policy.

199. In addition, Germany is a signatory to the Washington Principles. On December 9, 1999, the Federal Republic itself, the 16 *Länder*, and the association of local authorities issued a declaration of adherence to the Washington Principles, entitled the "*Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz" vom 9. Dezember 1999* (the "Collective Declaration").

200. The Collective Declaration commits to the restitution of Nazi-looted artworks, notwithstanding any other wartime claims compensation or restitution by Germany or the Allies and, consistent with postwar

Allied Military Government law, without distinguishing according to whether or not Nazi-looted assets had been robbed, stolen, confiscated, or had been sold under duress or by pseudo-legal transaction.

201. In 2009, the Czech Republic hosted a follow-up to the Washington Conference (the "Prague Conference"). Representatives of some 49 countries, most of which were affected by Nazi crimes during World War II, and nearly two dozen NGOs were invited to attend. The Conference focused on immovable (real) property, Nazi-looted art, Holocaust education and remembrance, archival access, and the recovery of Judaica. In addition, there was a session on the social welfare needs of survivors of Nazi persecution, an issue of great importance to the United States.

202. The Prague Conference resulted in the Terezin Declaration, which states, with respect to Nazi-stolen art:

> Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence, and
>
> Recalling the Washington Conference Principles on Nazi-Confiscated Art as endorsed at the Washington Conference of 1998, which

enumerated a set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions,

1) We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,

2) In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts,

3) Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we 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.

203. Pursuant to the Washington Principles, the Terezin Declaration, United States law, German law, and international law, the 1935 sale of the Welfenschatz was not an arms'-length transaction and must be considered a transfer of property under duress, a transfer that could not have passed, and that did not pass legitimate title to the SPK.

204. Pursuant to the Washington Principles, the Terezin Declaration, United States law, German law, and international law, Germany has committed to address victims of art looting in a fair and equitable manner.

205. Germany itself has acknowledged these principles—but only when it suits. In 2003, Germany created the "German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property," (*Die*

Beratende Kommission für die Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz) better known as the "Limbach Commission" for its presiding member, former German Supreme Constitutional Court judge Jutta Limbach ("Limbach" or the "Advisory Commission"). The Advisory Commission is a non-binding mediation that issues recommendations to German state museums, but its decisions have no preclusive effect.

206. In one of its first decisions, Limbach considered a claim for restitution from the collection of Julius and Clara Freund, German Jews who were persecuted as such. After Julius died in his British exile in 1941, Clara sold their collection in desperation in Switzerland. Both the owner and the artwork were outside of Nazi Germany (United Kingdom and Switzerland), a far more secure place than Amsterdam in 1935, and they were paid a near-market price. Yet the larger picture was clear, and the Limbach Commission recommended restitution for a collection that was clearly sold under duress.

207. Austria also has a commission for the restitution of Nazi-looted art, and is bound by the same principles. By way of example, Austria restituted 177 botanical drawings and prints to the heirs of Dr. Ernst Moritz Kronfeld in 2014. Even though the commission could not determine with certainty how the prints had passed from Kronfeld to Baldur von Schirach, another high-level Nazi and Gauleiter of Vienna, the point was that in such a case it does not really matter:

> These questions can be left open, because the sale by either Dr. Kronfeld or his widow would have been sales by persons in a persecuted group, and would also be void as an appropriation. . . .

208. Germany has a unique historical responsibility to victims of the Holocaust, which it has gone to great lengths to accept in other contexts.

209. The attitude towards looted artworks in German museums remains, regrettably, an exception to Germany's otherwise laudable approach to confronting history.

210. Despite the creation of the Advisory Commission, despite the Collective Declaration and other measures ostensibly pursuant to the Washington Principles, Germany today still has no coherent policy towards victims of Nazi-looted art.

211. The World Jewish Congress and other victims' representatives, groups and nongovernmental organizations ("NGOs"), share this view and have repeatedly expressed their concern about it.

212. At best, the Advisory Commission serves as a non-binding mediation process. German museums are not obliged to accept its recommendations, and the Advisory Commission itself is not actually independent. It is not an arbitration, and it does not adjudicate rights in property.

213. At worst, Germany portrays the Advisory Commission as a *solution* to this inadequacy, to give

cover to the idea that Germany is in compliance with the Washington Principles.

214. The international scandal of the Cornelius Gurlitt ("Gurlitt") affair beginning in 2013 has given the lie to this notion. Gurlitt's father Hildebrand was an art dealer authorized in the Nazi state to buy and sell so called "degenerate art," which was considered contraband in the hands of anyone else.

215. In 2013 it was revealed that Germany had seized approximately 1,280 works of art from Cornelius Gurlitt as part of a tax investigation on suspicion that it was looted.

216. Since that time (the revelation itself by a newspaper was nearly two years after the artwork was found and held in secret), Germany has failed to adopt any new policies or laws. The State of Bavaria reached a private agreement with Cornelius Gurlitt shortly before he died in May, 2014, an agreement whose terms have still never been revealed.

217. That agreement appointed a Task Force to examine the Gurlitt collection, but Germany has not even followed the public recommendations of that Task Force. Instead, it has continued to resist restitution even of artworks that the Task Force recommended be restituted. On information and belief, the Task Force has made only five recommendations public, and Germany has restituted only two of those five works to their rightful owners. On information and belief, the Task Force ceased to exist on December 31, 2015.

218. A November, 2014 agreement with the named heir of Gurlitt, the Kunstmuseum Bern in Switzerland, has provided the public with some information, but the process remains opaque notwithstanding the self-congratulatory publicity that surrounded it.

219. Worse, the chairwoman of the Advisory Commission herself took the occasion to argue that *German museums* are the victims in the whole affair. This episode is telling on the perspective of German authorities to looted art: Jewish victims can wait, but German museums should be made whole.

220. In the absence of meaningful recourse, but in an interest to reach agreement on the Welfenschatz, the plaintiffs submitted their claim (on behalf of themselves and as empowered by, *inter alia*, the assignments attached hereto as Exhibit 8) to the Advisory Commission and presented conclusive evidence of the foregoing aspects of early Nazi terror and duress.

221. Despite these internationally accepted principles and precedents (among many others), the Advisory Commission failed to recommend the restitution of the Welfenschatz.

222. In what was, on information and belief, politically-motivated decision—ironically a desire to "save the Welfenschatz" that mirrors the one that animated its plunder 70 years ago—the Advisory Commission turned a blind eye to the desperate circumstances of the Consortium, and to the active manipulation and interference by the highest levels of the Prussian-Nazi state.

223. Most importantly, the Advisory Commission accepted the persecution of the Consortium as fact, but ignored the governing presumption of law—that as Jews, any sale was under duress. The SPK and its attorneys concede this presumption. The SPK presented *no evidence to the contrary* to rebut the internationally-recognized presumption of duress. By definition, the Advisory Commission should have recommended restitution without any further deliberation.

224. Instead, the Advisory Commission endeavored to re-write history with no mandate to do so. The Advisory Commission acknowledged that the art dealers were persecutees, and as such, were subject to a hostile market environment that pervaded the Reich at that time. More particularly, the Advisory Commission heard from five experts who established the context surrounding the sale at issue by showing (i) the actual market value of the collection in 1935; 11.6 Million RM; (ii) the law applicable to the sale; (iii) the historical background which supports the claim that the sale in issue was coercive and made under duress—and certainly cannot be characterized as one governed by free will and free choice in an open market; and (iv) the art dealers were the sole owners of the collection.

225. Neither the qualifications nor credibility of these experts were challenged. As such, the SPK did not carry its burden of showing why these experts should not be accepted nor rebuts their conclusions.

226. The experts in the Welfenschatz case have devoted their academic careers to studying and understanding this period and have gained an insight that is unchallenged.

227. Nonetheless, the Advisory Commission did not incorporate the uncontested findings of these experts into the recommendation, issued on March 20, 2014. This challenges the important role and assistance they contributed to the process, a role that should be encouraged. Ignoring the experts entirely in an otherwise detailed opinion undermines the credibility of the report by the Advisory Commission. It also leaves future claimants to wonder how claims are to be supported so that the Advisory Commission can reach reasoned and non-arbitrary results.

228. It also is telling that, having had ample time to gather its own evidence to rebut this expert testimony, the SPK before the Advisory Commission neither challenged these experts nor offered their own expert testimony. Put another way, *the SPK could not produce anyone who could testify to the fairness of this transaction*. Indeed, to the contrary, the SPK accepted the qualifications and testimony of the plaintiffs' experts.

229. Moreover, the defendants are likely the custodians of additional relevant documents, but failed to produce them in the course of the Advisory Commission's work. These documents likely include further correspondence among Nazi functionaries, Gestapo

files, and photographic evidence. These have been concealed from the plaintiffs.

230. Under these circumstances, this testimony must be given some weight which must form part of its decision if that decision is to be seen as reasoned and consistent with established principles of law, *e.g.*, § 286 Abs. 1 ZPO (German Civil Code of Procedure).

231. The recommendation against restitution of the Welfenschatz was also inconsistent with other prior decisions of the Advisory Commission.

232. As referenced above, in the Freund case the Advisory Commission held that victims of Nazi persecution, financially strained, who had long since fled Nazi Germany with their art collection and sold it in Switzerland, should nevertheless recover their paintings, even though both the paintings and the people were abroad and a fair price was paid.

233. By contrast, in the Welfenschatz case, the victims of Nazi persecution were still in Germany at the time of the coerced sale. They were Jews living under dire conditions under the swastika. They were forced to experience the destruction of their livelihoods through sanctions by the Nazi state, which was engineering a retaking of the Welfenschatz. The expert opinions overwhelmingly support this conclusion.

234. The recommendation by the Advisory Commission lacks any explanation as to why the Panel—consistent with their previous assumptions and approved standards of review—excludes and denies a fair

and just resolution in the Welfenschatz case, in accordance with their own established standards.

235. The SPK and Germany refuse to provide justice to the plaintiffs, based on what must be seen as questionable findings by the Advisory Commission, obtained in a questionable, non-binding proceeding, using questionable standards.

236. On information and belief, the answer is in fact very simple: the German government simply does not wish to relinquish the Welfenschatz, no matter how ill-gotten it is.

237. In so doing, Germany has turned its back on its historic responsibility. This is particularly disappointing given Germany's decades-long and admirable confrontation with its wartime past. Sadly, Nazi-looted art in German state institutions remains a blind spot and justice is not served.

238. By contrast, at the Länder level in Germany the compensable persecution of these very members of the Consortium has been recognized and been grounds for restitution. In 2015, the Staatsgalerie Stuttgart agreed to return *Bildnis Pfalzgraf Johann III* (Portrait of Elector-Palatine Johann III), ca. 1526, by Hans Wertinger to the heirs of Saemy Rosenberg and Rosenbaum.

239. Rosenbaum and Saemy Rosenberg sold the Wertinger in 1936, but the proceeds were paid into a Nazi-blocked account—just as part of the proceeds for the Welfenschatz were. In assessing the claim to the

Wertinger, Baden-Württemberg (which administer the Staatsgalerie Stuttgart) state secretary Jürgen Walter said, "We stand by our historic responsibility to identify and return cultural goods expropriated from those persecuted by the Nazi regime." Baden Württemberg had little trouble acknowledging the Wertinger "sale" for what it is: a coerced transaction of looted art. That fact—and that fact alone—mandated restitution, just as it does with the Welfenschatz.

240. By contrast, the Advisory Commission continues to demonstrate it does not understand the core issues of Nazi repression in the 1930s, or worse, outright denies them. In March, 2015, the Advisory Commission again recommended against restitution to the heirs of a Jew persecuted in the 1930s. George Eduard Behrens, a Hamburg banker, owned *Pariser Wochentag* (Paris Weekday) by Adolph von Menzel, and sold the painting—also in 1935.

241. Yet despite being subject to the codification of the Nazi racial philosophy, the Advisory Commission continued to advance its Potemkin Village version of life in Nazi Germany:

> It is, however, undisputed in the historical record that Jewish private banks in the early years of the Third Reich were not directly affected.

242. This statement is categorically false and a violation of Germany's historic responsibility to victims of the Holocaust after 1933.

243. For present purposes, this is the deliberative body on whose decision Germany bases its retention of the Welfenschatz.

244. In its most recent decision as of the filing of this First Amended Complaint, the Advisory Commission has continued this trend.

245. The Advisory Commission was presented with a claim by the heirs of Berlin Jewish publisher Ludwig Traube for *Still Life with Fruit Basket: Pumpkin, Melons, and Cherries on an Oak Tree* by Abraham Mignon. The painting was auctioned by Traube's widow in Berlin in 1935. The heirs pointed to the "Aryanization" of the publishing company in 1933 as evidence that the sale was the result of financial peril occasioned by persecution.

246. In its November 30, 2015 recommendation, Advisory Commission conceded the point of persecution, but still did not recommend restitution. Rather, it invented a fraction of the value and recommended that the museum in possession pay the heirs that sum.

247. Taken as a whole, this trend confirms that the Advisory Commission is not, and cannot be held up as, a "fair and just solution" that Germany agreed to provide under the Washington Principles and the Collective Declaration beyond a rote recitation of the phrase when it is doing just the opposite.

248. Lastly, the SPK itself recently conceded this inadequacy. On information and belief, in a speech to the newly-opened Deutsches Zentrum Kulturgutverluste

(German Center for Cultural Property Losses) operated by the German state, SPK President Dr. Parzinger proposed material changes to the Advisory Commission. According to a report by the Commission for Looted Art in Europe, Dr. Parzinger proposed the following:

> 1. That the Commission should also act if it is called upon by only one of the two parties to a dispute. Currently it only acts if both sides agree.
>
> 2. That the administration of the Commission should be carried out by an independent secretariat and not the DZK. This must probably be seen in the context that the DZK's task is to advise e.g. museums when they are confronted with claims, but at a later state may have to act for the Commission which should be neutral. Also the heir of the collector Hans Sachs recently questioned the neutrality of the Commission in a law suit at the Magdeburg Administrative Court. He said that the Koordinierungsstelle, a for[e]runner of the DZK, had originally advised the Deutsches Historisches Museum, assisting it on how to handle the restitution claim, while it later, in 2008, acted as the secretariat of the Commission which decided on the claim.
>
> 3. That there should be transparency, primarily in connection with the research of museums, as many currently do not publish their findings if they come to the conclusion that a work was not lost due to Nazi persecution. This may also relate to the Limbach

Commission which is currently denying the Sachs heir access to the files of the 2008 procedure, and which is the cause for the current court case in Magdeburg.

4. That the Commission should have procedural rules like any arbitration body.

5. That a representative of a Jewish organisation be on the Commission.

249. According to the same report, Dr. Parzinger:

[A]lso stressed, like the German Cultural Minister Monika Grütters the day before, that there should be no doubt that the persecution of Jews in Germany started in 1933. This was apparently a reaction to criticism by Holocaust historians concerning a remark in a brief to a US Court related to the Guelph Treasure and to the publication [] of an English translation of the Commission's Recommendation in the case of Behrens v. Düsseldorf in which the Advisory Commission had held that Jewish bankers had not been persecuted and had unimpaired access to the courts till mid 1935.

Parzinger also [emphasized] that German cultural institutions confronted with claims must show (in cases of allegedly forced sales) that the price paid to a persecuted person was fair and that the persecuted person actually received the money at his/her free disposal, the implication being, contrary to the Behrens decision made by the Commission, that the work of art be considered looted if both conditions

> are not met. In its recommendation the Commission also deviated from the policies set out in the 'Handreichung', first issued in Germany in 2001.

* * *

CAUSES OF ACTION

Count I—Declaratory Relief

250. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-230 as though fully set forth herein.

251. An actual case or controversy has arisen between and among the Plaintiffs, the SPK, and Germany, as to the ownership of the Welfenschatz.

252. The Defendants have wrongfully detained the Welfenschatz and have refused to provide restitution to the Plaintiffs.

253. Plaintiffs are entitled to a declaratory judgment decreeing that they are the owners of the Welfenschatz and directing the Defendants to return the Welfenschatz to the Plaintiffs.

254. Plaintiffs are further entitled to a declaratory judgment decreeing that their right, title, and ownership in the Welfenschatz is superior to any held by either the SPK, Germany, or both.

Count II—Replevin

255. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-235 as though fully set forth herein.

256. The defendants have deprived the plaintiffs of their rightful property, the Welfenschatz.

257. The plaintiffs are entitled to the replevin of the Welfenschatz in the possession of the SPK.

Count III—Conversion

258. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-238 as though fully set forth herein.

259. The Welfenschatz is the rightful property of the plaintiffs, as heirs and/or successors in interest of the Consortium.

260. The SPK and Germany exercise unlawful control and dominion over the plaintiffs' property: the Welfenschatz.

261. Despite lawful demand for the return of the Welfenschatz, defendants SPK and Germany have refused to return the plaintiffs' property.

262. Plaintiffs have been damaged by the defendants' conversion in an amount to be determined at trial, but in any event not less than the value of the Welfenschatz, which by conservative estimates exceeds $250,000,000.

Count IV—Unjust Enrichment

263. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-243 as though fully set forth herein.

264. The SPK has wrongfully possessed the Welfenschatz for decades.

265. The SPK has used the Welfenschatz in commerce in the United States and/or outside the United States having an effect within the United States within the meaning of 28 U.S.C. § 1605(a)(2) and clarified in *OBB Personenverkehr v. Sachs* as a significant attraction and source of revenue.

266. The SPK's use of the Welfenschatz in this manner has unjustly enriched the SPK and Germany.

267. The SPK should disgorge to the plaintiffs the amounts by which it has been unjustly enriched, in an amount to be determined at trial.

Count V—Fraud in the Inducement

268. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-248 as though fully set forth herein.

269. The negotiations leading to the "sale" of the Welfenschatz were a sham orchestrated by the Prussian government and high-ranking Nazis through the Dresdner Bank.

270. The representations that led to the execution of the 1935 contract, including but not limited to the existence of other interested buyers and the true identity of the party in interest—the Nazi state—were knowingly false when made.

271. The Consortium reasonably relied on those false statements to their detriment.

272. As a result of the fraud perpetrated by the Prussian government and the Dresdner Bank, the Consortium was damaged.

273. As a remedy for the fraud in the inducement, the plaintiffs, as successors in interest to the Consortium, are entitled to rescission of the 1935 contract and to the return of the Welfenschatz in its entirety from the defendants, the successors in interest to Prussia and the German Reich.

Count VI—Breach of Fiduciary Duty

274. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-254 as though fully set forth herein.

275. As a result of the inequitable and genocidal conduct of the defendants' predecessors-in-interest, the Consortium was deprived of its property.

276. When Nazi Germany was defeated, the defendants succeeded to the interests of Prussia and Nazi Germany.

277. By virtue of the political reorganization of Germany, Germany's international committments, the Washington Principles, the Terezin Declaration, and/or the Collective Declaration, a trust—express, implied, or constructive—arose for the benefit of the Consortium and its heirs and/or successors in interest: the plaintiffs.

278. As trustees of that trust, the defendants owe the plaintiffs a duty of absolute good faith and against self-dealing,

279. The defendants have breached that fiduciary duty by refusing to restitute the Welfenschatz to the plaintiffs and by otherwise enriching themselves at the plaintiffs' expense through the use of trust property.

280. The plaintiffs have been damaged by the defendants' breach of fiduciary duty in an amount to be determined at trial, but in any event not less than the value of the Welfenschatz, which by conservative estimates exceeds $250,000,000.

Count VII—Breach of the Covenant of Good Faith and Fair Dealing

281. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-261 as though fully set forth herein.

282. The 1935 agreement constituted an enforceable contract.

283. Every contract has an implied term of good faith and fair dealing.

284. Throughout the negotiations leading to the "sale," the state of Prussia—of which the SPK is the direct successor—and the German Reich—of which Germany is the successor—were engaged in coercive efforts to eliminate competition and any possibility of an arms'-length transaction.

285. These actions, combined with the pretense of a straw man through the Dresdner Bank, violate the covenant of good faith and fair dealing.

286. As a result of this violation of the good faith and fair dealing by the defendants' predecessors-in-interest, the Consortium was damaged. By extension, the plaintiffs, as the Consortium's successors in interest, have been damaged in an amount to be determined at trial, but in any event not less than the value of the Welfenschatz, which by conservative estimates exceeds $250,000,000.

Count VIII—Civil Conspiracy

287. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-267 as though fully set forth herein.

288. Prussia and Germany conspired to deprive the Consortium of the benefits and protections of the Welfenschatz in and before 1935.

289. Since 1935, the SPK and Germany have, at various times, conspired to deprive the plaintiffs of the benefits and protections of the Welfenschatz.

290. This conspiracy was conducted for an illegal purpose—including but not limited to the concealment of the real facts surrounding the acquisition of the Welfenschatz and through illegal means—the indisputable horrors of Nazi Germany.

291. The defendants, as the legal successors to the original conspirators, have continued that conspiracy to this day.

292. By virtue of this conspiracy, the plaintiffs have been damaged in an amount to be determined at trial, but in any event not less than the value of the Welfenschatz, which by conservative estimates exceeds $250,000,000.

Count IX—Bailment

293. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-273 as though fully set forth herein.

294. For decades after the war, the true facts of the conspiracy behind the plot to acquire the Welfenschatz for Hitler were unknowable.

295. Since the revelation of long secret documents, the plaintiffs have been engaged in negotiations with the SPK concerning the restitution of the Welfenschatz.

296. As a result of those negotiations, an implied bailment arose pending resolution of the dispute over title to the Welfenschatz.

297. After negotiations failed, the plaintiffs demanded the return of the Welfenschatz in 2014 and the SPK refused.

298. As a result of the defendants' breach of this implied bailment, the plaintiffs have been damaged in an amount to be determined at trial, but in any event not less than the value of the Welfenschatz, which by conservative estimates exceeds $250,000,000.

Count X—Tortious Interference

299. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-279 as though fully set forth herein.

300. The Consortium had prospective contracts for the sale of the Welfenschatz with private buyers in Berlin and Hannover, among others.

301. The State of Prussia and Germany know of those prospective contracts.

302. The State of Prussia and Germany interfered with those prospective relationships for wrongful motives—anti-Semitism—and through wrongful means —the violent and dangerous treatment of Jews in Nazi Germany.

303. The current defendants are the successors in interest to the State of Prussia and Nazi Germany with regard to the foregoing.

304. As a result of the foregoing tortious interference, the plaintiffs have been damaged in an amount to be determined at trial, but in any event not less than the value of the Welfenschatz, which by conservative estimates exceeds $250,000,000.

PRAYERS FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that the Court:

A) Enter judgment on all counts in favor of the plaintiffs; and

B) Order the defendants to return the objects known as the Welfenschatz to the plaintiffs forthwith; and/or

C) Order the defendants to pay the plaintiffs a sum of $250,000,000 or such higher amount as the Court deems just; and

D) Order the defendants to pay the plaintiffs their reasonable attorneys' fees; and

E) Enter such other and further relief as is just and proper under the circumstances.

January 14, 2016 SULLIVAN & WORCESTER LLP

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A. Qualifications and assignment

I. I am a tenured professor for private law and legal history at Leibniz University Hanover. I have published extensively in various fields of private law and am the editor of a leading publication on

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

II. I have been retained by plaintiff's attorneys to prepare an expert opinion for the plaintiff for a case presently pending before the United States District Court for the District of Columbia, *Philipp v. Fed. Rep. of Germany*, No. 15-cv-00266. My understanding is that defendants dispute that there is a claim for returning a collection of medieval artifacts referred to as "Welfenschatz".

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

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

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

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

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

IV. My assumption is that regarding the facts underlying the case, I can only address the claims stated in the complaint ("First Amended Complaint", FAC) and its attachments. This means that even if several claims are subsequently shown to be false, I am required to assume these to be truthful at this stage of the litigation. It goes without saying that my replies may have been different if individual claims are shown to be false. My remuneration is in no way linked to the outcome of the litigation.

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

I. "Consortium" term

A "Consortium" (from Latin *consortium*) is defined as a temporary association of several natural or legal persons that remain legally and economically independent, in particular of companies or

business persons, for the purpose of executing a closed-ended, agreed-upon, limited economic objective; these are also in many cases limited to the implementation of one or a limited number of individual transactions on joint account. Consortiums are typically formed when the contract value or the transaction volume are too large for an individual company and/or an individual business person

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

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

The case in question involves a consortium between the art dealerships J. Rosenbaum, Z. M. Hackenbroch and J. & S. Goldschmidt, which had collaborated to execute an individual transaction, that is to say buying and reselling the "Welfenschatz" – presumably because the transaction was financially too large for each of the consortium members alone. The art dealers – by definition –

remained legally and economically independent in this case (under whatever legal-commercial legal forms they were active at that time – either as sole proprietorships [Einzelunternehmen], general partnerships [*Offene Handelsgesellschaft*(OHG)], etc).

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

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

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

2. The nature of a standard BGB corporation

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

flexibly adapted to the particular economic (or other) purposes of the association – on the basis of the particular agreements between the shareholders. The legal form of the BGB corporation therefore exists in a wide range of embodiments, with the legal structure of the BGB corporation, which also include so-called "tendering consortiums", also existing in highly varied embodiments

> (see Staudinger/*Geiler*, BGB, 9th edition 1929, preliminary remarks on Section 705 I 2., Annex A to the 14th Vol., credits and I., Annex B to the 14th Vol., 1.2.; Palandt/*Sprau*, BGB, 75th edition 2016, Section 705 margin note 1, margin note 36 ff.).

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

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

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

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

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

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

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

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

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

What structure, what internal charter, and what degree of organization a tendering consortium has in detail is predominantly determined by the will of the parties and first and foremost by the provisions in the shareholder agreement. The shareholder agreement of a "tendering consortium

generally already waives large parts of the discretionary provisions in Sections 705 ff BGB

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

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

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

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

> (see Staudinger/*Geiler*, BGB, 9th ed. 1929, Annex A to the 14th Vol., I., and Annex B to the 14th Vol., 1.2.).

c) Whether tendering consortiums are formed as internal or external BGB corporations is also solely at the discretion of the shareholders' wills. In this case, tendering consortiums are frequently formed as internal corporations that are characterized by

not participating in legal and business affairs and by waiving the formation of corporation assets

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

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

German commercial law does not apply to consortiums.

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

(see Baumbach/*Hopt*, HGB, 37th ed. 2016, Section 1 margin note 13; *Ulmer*/*Schäfer* in:

> Münchener Kommentar [Munich Commentary] BGB, 6th ed. 2013, before Section 705 margin note 51; also see Reichscourt, ruling dated April 23, 1907, RGZ 66, 48, 51).

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

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

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

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

The contracts dated 1929 (contract on the acquisition of the "Welfenschatz" collection dated October 5, 1929) and 1935 (contract on the sale of the "Welfenschatz" collection dated June 14, 1935) reveal that the consortium members had formed the association to achieve a joint objective (resale of the Welfenschatz) – which then happened in stages during the years 1929-35. In this regard, a significant factual element of Section 705 BGB has

been fulfilled. However, the association fails to exhibit many other factual elements required for a standard BGB corporation, in particular including the "formation of an open-ended legal relationship". In this case, the consortium members only collaborated to execute a single transaction: acquiring and subsequently reselling the "Welfenschatz" collection. This fact alone eliminates the existence of a standard BGB corporation in this case.

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

Due to the lack of participation in legal transactions under its own name and due to the lack of corporation assets (in this regard also refer below), the tendering consortium "Welfenschatz" Consortium can therefore in total only be viewed as an

internal corporation, but not as an external corporation.

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

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

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

aa) For example, the expression “hereinafter called “Consortium” chosen in the introductory passage of the purchase agreement dated June 14, 1935 specifically does not represent a short name reference to the tendering consortium, but instead merely refers to the legal term “Consortium”. A reference to the shareholders as “Consortium” can therefore not be deemed or qualified as a self-selected name and/or reference to the corporation under which the consortium members conducted the transaction – as is however erroneously assumed and/or suggested by Armbruster (Armbruster expert opinion, p.6 under Section 13.)

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

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

The Consortium members also did not act as individuals on behalf of the Consortium ("as all the individuals who acted on behalf of the Consortium"), as Armbrüster (Armbrüster expert opinion, and other locations) asserts. The Consortium members instead acted as shareholders of the Consortium. To the extent that one of the shareholders may also have acted on behalf of other shareholders, this shareholder was evidently previously authorized and empowered to do so in each individual case (FAC – Exhibit 6: "I have orally received the assent of the other authorized members of the Consortium."). Contrary to Armbrüster's assertion (Armbrüster expert opinion, and other locations), this is not an expression of the will or the intent of the shareholders to appoint a special corporate officer as representative – a managing director of the company under the exclusion of the disposition power of the other shareholders (Sections 714 BGB); this is instead evidence for the straightforward empowerment of a shareholder by one or several joint shareholders to perform a single act. This empowerment changes nothing in the generally existing joint management and representation power pursuant to Sections 709 para. 1 BGB. Even Armbrüster is forced to concede that the language refers to "the other owners" (Armbrüster expert appraisal, and other locations). The letter

from the co-shareholder Saemy Rosenberg dated June 14, 1935 to Dresdner Bank (FAC – Exhibit 6, see Armbruster expert opinion, on p.7 under FN 13, section quoted verbatim by him) instead confirms the joint management and disposition authority of all shareholder[s] pursuant to Section 709 para.1 BGB, where it is stated: "I have received the verbal agreement *of the other authorized* Consortium members" (emphasis added).

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

This results in the conclusion that no contract was concluded "on behalf of the GbR" (e.g. "on behalf of the BGB corporation" or "under the accounts of the BGB corporation"), but instead that a contract was concluded between the consortium members listed at the beginning of the contract dated June 14, 1935 under 1. to 3. as sellers and owners, with a buyer – Dresdner Bank. In this regard, the tendering consortium was also not equipped with an independent identity, as demonstrated by the fact that there was no special name or specific reference under which the "Welfenschatz" tendering consortium conducted business transactions. As a result, the conclusion must be drawn that all three members of the Consortium were equally authorized (Section 709 para. 1 BGB), that no separate management pursuant to Sections 710, 714 BGB

was established, and that as a result no externally acting organization existed.

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

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

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

this case in its weakest form of strictly a tendering consortium – has no citizenship

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

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

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

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

The assumption that the tendering consortium "Welfenschatz" Consortium had formed separate corporate assets independent from the shareholders also negated by the fact that during the years 1929 to 1935, BGB corporations by law were categorically unable to hold rights and obligations, as

will be discussed in detail below. Armbrüster evidently completely fails to address the need to also evaluate the case facts from a historical-legal perspective – as is mandatory in cases such as this one – and, by omitting any form of related analysis, engages in inappropriate considerations and comes to inapplicable conclusions.

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

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

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

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

When Armbrüster opines that the tendering consortium must be evaluated on the basis of today's perspective on the basis of today's applicable law and current legal [precedent], this represents incorrect and unsustainable reasoning. The sources Armbruster cite (Armbruster expert opinion, p.11, FN 22 and FN 23) fail to corroborate this assertion, since these do not establish what law – from a historical point of view – shall apply to the case facts from the years 1929-1935. To the contrary: the sources Armbrüster cites unequivocally state that "any interpretation of law [is] to a certain extent bound by time."

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

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

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

Armbrüster fails to do so, omits the mandatory analysis of the historical legal circumstances,

rendering the results of his efforts as largely worthless.

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

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

> (Reichscourt, ruling dated December 11, 1903, RGZ 56, 206, 209; *Sayn* in: BGB-RGRK, 6th ed. 1928, Section 705 note 1, Section 719 note 1; *Planck*, BGB, 4th ed. 1928, Section 719 note 1; Staudinger/*Geiler*, 9th ed. 1929, prel. remarks on Section 705 II 1. and 2. plus Annex B 11.1.; Mugdan, Vol. II, Motives, p.341; *von Gamm* in: BGB-RGRK, 12th ed., before Section

705 margin note 4; regarding this earlier legal framework, also see Palandt/*Sprau*, BGB, 75th ed. 2016, Section 705 margin note 24; plus also German Supreme Court [Bundesgerichtshof], ruling dated March 26, 1981, BGHZ 80, 222, margin note 21 cited as per juris, with additional notes).

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

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

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

As an intermediate result, it is therefore noted that accordingly, the tendering consortium between the consortium members – the "Welfenschatz" Consortium – under review herein must be deemed to have no legal capacity. The tendering consortium "Welfenschatz" consortium was not

independently endowed with rights and obligations, and was therefore also not the owner of the Welfenschatz collection during the years 1929-1935.

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

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

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

(German Supreme Court, ruling dated January 29, 2001, NJW 2001, 1056 = BGHZ 146, 341; *Gummert* in: Münchener Handbuch des Gesellschaftsrechts [Munich Handbook of

> Corporation Law] Vol. 1, 4th ed. 2014, GbR Section 17, margin note 21; see therein, margin note 6 to margin note 10 with additional references on this legal [precedent] development and the associated discussion in the literature).

Since then, the BGB corporation is viewed as a special acting entity -an independent assignable object – that can engage in legal transactions as a group of persons. In these cases, the assumption is that the BGB corporation can be endowed with legal capacity or partial legal capacity, if and when it asserts its own rights and obligations as an external corporation by engaging in legal transactions. The BGB corporation can therefore independently assert certain legal positions, however does not qualify as a legal person

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

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

b) Irrespective of the fact that the literature and legal [precedent] continue to dispute to the present day to whom the corporation assets of a BGB

corporation should be assigned in rem- to the BGB corporation as such or to its shareholder

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

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

> (see Staudinger/*Geiler*, BGB, 9th ed. 1929, Section 705 II 3. plus Annex B 1.2.; Palandt/*Sprau*, BGB, 75th ed. 2016, Section 718 margin note 1).

This applies all the more so to a tendering consortium as the weakest embodiment of a BGB corporation, where – as is the case for the "Welfenschatz" – the corporate association is limited to a single business relationship and confirmation, and in which case the shareholders had no reason to form corporation assets due to the focus on a single transaction and limited common purpose.

c) It is also not evident that the tendering consortium "Welfenschatz" Consortium could have been an "external corporation", as was for instance to be assessed in the landmark decision by the German

Supreme Court in 2001. An "external corporation" presumes that the corporation as such "is endowed with its own rights and obligations by engaging in legal transactions", which was the consideration in the case at that time that ultimately swayed the German Supreme Court to actually – and for the first time – assert the limited legal capacity of the BGB corporation.

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

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

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

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

It is my opinion that a German court today – by applying today's law and in conjunction with the

mandatory inclusion of the historical legal framework of the years 1929-35 – would not under any legal consideration whatsoever (as discussed above in detail) award the "Welfenschatz" Consortium a qualification with its own legal person status[.] The Consortium was not an "external corporation" and, as purely a tendering consortium, was also not the owner of the "Welfenschatz" collection.

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

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

(see Staudinger/*Geiler*, BGB, 9th ed. 1929, Annex to the 14th Vol., B. I.1. and I.7., Section 726 I. and II.; *Hadding* in: Schimansky/

> Bunte/Lwowski, Bankrechts-Handbuch [Banking Law Handbook], Vol. II, 2nd ed. 2001, Section 87 margin note 23; *Karsten Schmidt*, Gesellschaftsrecht [Corporation Law], 3rd ed. 1997, Section 58 II 1; *Wiedemann*, Gesellschaftsrecht [Corporation Law] Vol. II, 204, p.667, p.670).

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

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

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

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

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

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

(see *Gummert* in: Münchener Handbuch des Gesellschaftsrechts [Munich Handbook on Corporation Law] Vol. I, 4th ed. 2014, GbR Section 17, margin note 30; Soergel/Hadding/Kießling, BGB, . . . ed., Section 718 margin

note 14; BGH, ruling dated September 27, 1999 – II ZR 371/98, BGHZ 142, 315 ff, margin note 13 – cited as per juris).

IV. **Conclusions**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

importantly, is not the nature of a tendering consortium.

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

The statutory specifications of the German law regarding BGB corporations are largely discretionary, that is to say that the ownership circumstances in the corporate assets – if these exist – can vary greatly in their scope and nature, and depend in large part on the corporate contractual arrangements between the shareholders. For instance this could involve forming either joint ownership of total assets [Miteigentum "zur gesamten Hand"], or fractional ownership, but also sole ownership by each consortium member proportional to his contribution; even sole ownership by only a single shareholder is conceivable. When the purpose of a corporation is strictly limited to the joint transaction of commercializing and/or reselling an art collection (as is the case here), one would have to assume the sole ownership of each consortium member proportional to his contribution ratio (assuming the existence of corporate assets).

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

Since the joint or corporate purpose in the case of the "Welfenschatz" Consortium was limited to the

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

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

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

In his discussion of this point, Armbrüster draws incorrect conclusions in his expert opinion, because, as shown above, he already inaccurately assesses the legal nature of the "Welfenschatz" Consortium. The assertion that special, controlled and official proceedings ("Follow-up liquidation") are required to liquidate new or rediscovered assets of a corporation (Armbrüster expert opinion, p. 14-17) is – as his entire expert appraisal – replete with the erroneous assumption that the "Welfenschatz" Consortium in the present case was a corporation with its own legal person status and its own corporation assets that are claimed to

have exhibited an organizational structure in alignment with merchant corporations or capital corporations under German law. As demonstrated above, this was specifically not the case for the Consortium.

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

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

c) For lack of evidence to the contrary, the assumption must be made that the "Welfenschatz" Consortium ended as a tendering consortium without further ado during the course of 1935 after the purchase price was disbursed, Section 726 BGB.

There was evidently no requirement at that time to formally process the disbursement of the purchase price.

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

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

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

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

Even the ruling of the German Supreme Court dated June 21, 1979 cited by Armbrüster (Armbrüster expert opinion, p. 14 FN 31, German Supreme Court Ruling NJW 1979, 1987) does not apply to the present legal dispute. The ruling deals with a completely different corporate form, that is to say a general partnership [Offene Handelsgesellschaft, Sections 105 ff HGB, and in the specific case deals with a company that was able to sue under its corporation and had legal capacity and legal standing. As was shown at length above, these conditions are summarily absent in the present case.

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

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

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

In conclusion, I find that the present case does not involve the continuing existence of a corporation, and that there is also no requirement for the plaintiffs – as heirs and legal successors to the former co-shareholder of the tendering consortium "Welfenschatz" Consortium – to undergo follow-up liquidation proceedings to present their claims in a legally valid manner.

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

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

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

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

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

6. **Conclusions**

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

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

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

I. Legal nature of the claims

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

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

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

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

II. Restitution of cultural and art objects

The treatment of claims for restitution of cultural and art objects that the former owners involuntarily surrendered from their possessions during the Nazi regime, for instance by way of seizure or forced sale, has not been conclusively settled world-wide to the present day. After most European countries, in particular Germany, adopted

regulations for returning cultural artifacts already immediately after WW II, and returns of in some cases substantial scope were implemented, this topic increasingly receded into the background toward the end of the 1950s due to the "Cold War". Restitution issues only gained renewed interest following the collapse of the Soviet Union at the beginning of the 1990s.

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

III. Restitution and returns in the Federal Republic of Germany

1. No claims pursuant to German Restitution laws

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

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

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

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

According to the German Supreme Court, additional restitution claims can only be brought in

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

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

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

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

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

2. No claims under German Civil Code (BGB)

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

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

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

the restitution claim regulations under public law for asserting restitution claims and related claims in regards to the special laws governing Nazi infractions have been affirmed pursuant to the landmark decision by the German Supreme Court from the 1950s, and have been consistently reaffirmed in the following decades; said regulations excluding regulations under civil law (German Supreme Court, ruling dated October 8, 1953, BGH

NJW 1953, 1909f.). The German Supreme Court at that time ruled – without this legal [precedent] having been reversed to the present day – that the restitution laws conclusively settle the seizure cases based on persecution actions by the Nazi regime, and that therefore restitution claims based on general civil law – that is to say the German Civil Code [Zivilrecht] – are therefore categorically excluded.

This thesis, which to the present day is overwhelmingly represented in the literature and by legal [precedent], is also not overturned by the ruling of the 5th Civil Division of the German Supreme Court dated March 16, 2012 (German Supreme Court, ruling dated March 16, 2102, BGH V ZR 279/10) and cited by Thiessen as proof of the opposite, for this case does not involve tested legal [precedent], but to the extent apparent, represents a singular ruling unique over the last sixty years through today, which assumed as enforceable under civil law and under very narrow conditions a claim for restitution of a poster collection seized during the Nazi era.

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

IV. **Conclusions**

The plaintiffs Alan Philipp, Gerald Stiebel, and Jed Leiber cannot pursue the claims asserted

before the District of Columbia in Washington D.C. before German courts.

E. Summary

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

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

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

F. Attachments

Professional career:

- Study of Law, Philosophy and History in Erlangen, Frankfurt am Main and Berlin. Visiting student in Italy (1978/79) and the United States of America (1983/84)
- PhD at University of Frankfurt am Main 1988
- Post-doctoral qualification at University of Frankfurt am Main 1992
- Lecturer at the Universities of Würzburg, Erlangen, Münster, Frankfurt am Main and Greifswald from 1992-1994

- Professor for Civil Law and Modern Private Law History at Europe – an University/ Viadrina in Frankfurt an der Oder from 1995 – 1998
- Professor for Civil Law and Legal History at the University of Hanover since April 1, 1998

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HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016

PUBLIC LAW 114–308—DEC. 16, 2016

130 STAT. 1524

An Act

To provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Holocaust Expropriated Art Recovery Act of 2016".

SEC. 2. FINDINGS.

Congress finds the following:

(1) It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the "greatest displacement of art in human history".

(2) Following World War II, the United States and its allies attempted to return the stolen artworks to their countries of origin. Despite these efforts, many works of art were never reunited

with their owners. Some of the art has since been discovered in the United States.

(3) In 1998, the United States convened a conference with 43 other nations in Washington, DC, known as the Washington Conference, which produced Principles on Nazi-Confiscated Art. One of these principles is that "steps should be taken expeditiously to achieve a just and fair solution" to claims involving such art that has not been restituted if the owners or their heirs can be identified.

(4) The same year, Congress enacted the Holocaust Victims Redress Act (Public Law 105–158, 112 Stat. 15), which expressed the sense of Congress that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.".

(5) In 2009, the United States participated in a Holocaust Era Assets Conference in Prague, Czech Republic, with 45 other nations. At the conclusion of this conference, the participating nations issued the Terezin Declaration, which reaffirmed the 1998 Washington Conference Principles on Nazi-Confiscated Art and urged all participants "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.". The Declaration also urged participants to "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.".

(6) Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. (See, e.g., Detroit Institute of Arts v. Ullin, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).) The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

(7) Federal legislation is needed because the only court that has considered the question held that the Constitution prohibits States from making exceptions to their statutes of limitations to

accommodate claims involving the recovery of Nazi-confiscated art. In Von Saher v. Norton Simon Museum of Art, 592 F.3d 954 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork. The Court held that the law was an unconstitutional infringement of the Federal Government's exclusive authority over foreign affairs, which includes the resolution of war-related disputes. In light of this precedent, the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(8) While litigation may be used to resolve claims to recover Nazi-confiscated art, it is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.

SEC. 3. PURPOSES.

The purposes of this Act are the following:

(1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated

Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

SEC. 4. DEFINITIONS.

In this Act:

(1) ACTUAL DISCOVERY.—The term "actual discovery" means knowledge.

(2) ARTWORK OR OTHER PROPERTY.—The term "artwork or other property" means—

(A) pictures, paintings, and drawings;

(B) statuary art and sculpture;

(C) engravings, prints, lithographs, and works of graphic art;

(D) applied art and original artistic assemblages and montages;

(E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and

(F) sacred and ceremonial objects and Judaica.

(3) COVERED PERIOD.—The term "covered period" means the period beginning on January 1, 1933, and ending on December 31, 1945.

(4) KNOWLEDGE.—The term "knowledge" means having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.

(5) NAZI PERSECUTION.—The term "Nazi persecution" means any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.

SEC. 5. STATUTE OF LIMITATIONS.

(a) IN GENERAL.—Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—

(1) the identity and location of the artwork or other property; and

(2) a possessory interest of the claimant in the artwork or other property.

(b) POSSIBLE MISIDENTIFICATION.—For purposes of subsection (a)(1), in a case in which the artwork or other property is one of a group of substantially similar multiple artworks or other property, actual discovery of the identity and location of the artwork or other property shall be deemed to occur on the date

on which there are facts sufficient to form a substantial basis to believe that the artwork or other property is the artwork or other property that was lost.

(c) PREEXISTING CLAIMS.—Except as provided in subsection (e), a civil claim or cause of action described in subsection (a) shall be deemed to have been actually discovered on the date of enactment of this Act if—

(1) before the date of enactment of this Act—

(A) a claimant had knowledge of the elements set forth in subsection (a); and

(B) the civil claim or cause of action was barred by a Federal or State statute of limitations; or

(2)(A) before the date of enactment of this Act, a claimant had knowledge of the elements set forth in subsection (a); and

(B) on the date of enactment of this Act, the civil claim or cause of action was not barred by a Federal or State statute of limitations.

(d) APPLICABILITY.—Subsection (a) shall apply to any civil claim or cause of action that is—

(1) pending in any court on the date of enactment of this Act, including any civil claim or cause of action that is pending on appeal or for which the time to file an appeal has not expired; or

(2) filed during the period beginning on the date of enactment of this Act and ending on December 31, 2026.

(e) EXCEPTION.—Subsection (a) shall not apply to any civil claim or cause of action barred on the day before the date of enactment of this Act by a Federal or State statute of limitations if—

(1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after January 1, 1999; and

(2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.

(f) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to create a civil claim or cause of action under Federal or State law.

(g) SUNSET.—This Act shall cease to have effect on January 1, 2027, except that this Act shall continue to apply to any civil claim or cause of action described in subsection (a) that is pending on January 1, 2027. Any civil claim or cause of action commenced on or after that date to recover artwork or other property described in this Act shall be subject to any applicable Federal or State statute of limitations or any other Federal or State defense at law relating to the passage of time.

Approved December 16, 2016.