No. 20-

IN THE

Supreme Court of the United States

DAVID CASSIRER, *et al.*,

Petitioners,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
AN AGENCY OR INSTRUMENTALITY OF THE KINGDOM OF SPAIN

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 ("FSIA"), provides that where a foreign nation is not immune from jurisdiction in the courts of the United States or of any State, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 1606. In four circuits, the courts of appeals have held that this statutory requirement of parity with private litigation means that a federal court hearing an FSIA case must apply the choice-of-law rules of the State in which it is sitting. But the Ninth Circuit has held—repeatedly and without meaningful analysis, including in the decision below—that choice of law in FSIA cases is determined by application of federal common law.

The choice of law issue is critical in this case, in which the family of a Holocaust survivor seeks the return of a painting stolen by the Nazis. Under California law, a holder of stolen property (such as the Spanish state museum here) can never acquire good title, while under Spanish law, an adverse possession rule protects the museum's title.

The question presented is:

> Whether a federal court hearing state law claims brought under the FSIA must apply the forum state's choice-of-law rules to determine what substantive law governs the claims at issue, or whether it may apply federal common law.

PARTIES TO THE PROCEEDING

Petitioners, all of whom were plaintiffs in the district court and appellants in the court of appeals, are David Cassirer, the Estate of Ava Cassirer, and the Jewish Federation of San Diego County.

Respondent is the Thyssen-Bornemisza Collection Foundation, an agency or instrumentality of the Kingdom of Spain ("TBC"), which was the defendant in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

United Jewish Federation of San Diego is a nonprofit corporation with no parent corporation and no stock.

RELATED PROCEEDINGS

Cassirer v. Kingdom of Spain, et al., Nos. 06-56325, 06-56406, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 8, 2009. En banc judgment entered August 12, 2010. (*"Cassirer I"*)

Kingdom of Spain, et al. v. Estate of Claude Cassirer, No. 10-786, U.S. Supreme Court. Petition for writ of certiorari denied June 27, 2011.

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No. 12-56159, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Dec. 9, 2013. Petition for panel rehearing and rehearing en banc denied February 11, 2014. (*"Cassirer II*")

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, Nos. 15-55550, 15-55951, 15-55977, U.S. Court of Appeals for the Ninth Circuit. Judgment entered July 10, 2017. Petition for panel rehearing and rehearing en banc denied December 5, 2017. (*"Cassirer III"*)

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No. 17-1245, U.S. Supreme Court. Petition for writ of certiorari denied May 14, 2018.

Cassirer, et al., v. Kingdom of Spain, No. 05-cv-3549, U.S. District Court for the Central District of California. Judgment entered May 17, 2019.

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No.19-55616, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 17, 2020. Petition for panel rehearing and rehearing en banc denied December 7, 2020. ("*Cassirer IV*")

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The opinions of the Ninth Circuit directly at issue in this appeal are published at 824 F. App'x 452 (9th Cir. 2020) ("*Cassirer IV*") and 862 F.3d 951 (9th Cir. 2017) ("*Cassirer III*"), and are reproduced at Appendix A and Appendix C respectively. The district court decision from which the 2020 appeal was taken is unpublished and is reproduced at Appendix B; the 2017 appeal was taken from a district court decision published at 153 F. Supp. 3d 1148 (C.D. Cal. 2015) and is reproduced at Appendix D.

JURISDICTION

The Ninth Circuit decision affirming the final judgment that respondent TBC is the lawful owner of the stolen artwork was issued on August 17, 2020. Petitioners' timely-filed Petition for Panel Rehearing or Rehearing En Banc was denied on December 7, 2020. By Order of March 19, 2020, this Court extended the time to file a petition for a writ of certiorari to and including May 6, 2021.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611, are reproduced at App. F.

INTRODUCTION

This appeal arises from a two-decade quest by the family of Holocaust survivor Lilly Cassirer to recover a family treasure, *Rue Saint-Honoré, Afternoon, Rain Effect*, an 1897 oil painting by the renowned French impressionist Jacob Abraham Camille Pissarro (the "Painting"). It is undisputed that the Nazis stole the Painting from Lilly in 1939, and the record shows that it was smuggled out of Germany into California after World War II in violation of U.S. Military law, and traded privately in the United States between 1951 and 1976.

The Painting presently is in the possession of defendant-respondent TBC, an instrumentality of the Kingdom of Spain. TBC purchased it in 1993 from Baron Hans Heinrich von Thyssen-Bornemisza, the scion of the German Thyssen steel empire, who had bought it under suspicious circumstances from a New York gallery in 1976.

Although the United States Court of Restitution Appeals ("CORA") found that Lilly was the rightful owner in proceedings she brought, the Painting was assumed at that time to have been lost or destroyed in the War. It was not until 2000 that Lilly's grandson Claude Cassirer (a survivor himself and the original plaintiff in this action) learned that the Painting not only still existed but was in TBC's possession. Claude became a U.S. citizen in 1947, worked as a photographer in Cleveland, Ohio, and retired to San Diego, California in 1980.

In response to Claude's request for restitution, the Kingdom of Spain—flouting its professed adherence to international commitments to resolve claims to Nazi-stolen art "expeditiously" and "on the facts and merits" to "achieve a just and fair solution"—refused to return the Painting.

Claude accordingly sued TBC in 2005 under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611, in the District Court for the Central District of California asserting claims under California law.[1] A decade of procedural maneuvering by TBC ensued, including extensive district court proceedings, three earlier appeals to the Ninth Circuit, and two petitions for certiorari by TBC. When the courts below finally reached the merits, they decided to apply Spanish substantive law and, after a trial, found that TBC was entitled to keep the Painting under Spain's adverse possession or "acquisitive prescription" laws, which, according to the rulings below, effectively override the principle in most common law jurisdictions that even a good faith purchaser can never acquire good title to stolen property.

[1] Claude Cassirer passed away in 2010. Claude's interest in and claim for recovery of the Painting passed to his children David Cassirer and Ava Cassirer, and to the United Jewish Federation of San Diego County, who were substituted as plaintiffs. Following Ava's death in 2018, her Estate was substituted as a plaintiff. The Kingdom of Spain was originally named as a defendant and voluntarily dismissed in 2011.

This appeal focuses on the Ninth Circuit's decision—in direct conflict with four other circuits—that federal common law governs choice-of-law questions in FSIA cases. Without ever undertaking any meaningful analysis, the Ninth Circuit has persisted in applying that rule for decades, ignoring multiple thoughtful and reasoned decisions based on the intent of the FSIA and this Court's interpretations of it, in which the Second, Fifth, Sixth and D.C. Circuits have held that the choice-of-law rules of the forum state must be applied to determine the substantive law applicable to state law claims brought under the FSIA.

The time is ripe for the Court to address this Circuit conflict over an important issue of federal statutory interpretation. This case presents an appropriate opportunity to resolve the conflict because application of California substantive law would dictate return of the Painting to Petitioners, rather than allowing TBC to retain property that its Nazi predecessors in interest stole under the horrific conditions of the Holocaust.

STATEMENT OF THE CASE

In the nineteenth and early twentieth centuries, the Cassirers were one of Europe's most prominent families. Paul Cassirer bought *Rue Saint-Honoré* in 1900 directly from Pissarro's primary agent. Lilly inherited the Painting in 1926 and displayed it prominently in her parlor, where her grandson, Claude Cassirer, played as a child. *See generally* App. B at 2.

In 1939, the Nazis forced Lilly to "sell" the Painting for the equivalent of $360 (paid to a blocked account she could never access) so that she could obtain exit visas for herself and her husband to flee Germany. Lilly attempted to recover the Painting in Germany after the War, and while the CORA declared Lilly to be the rightful owner, it was believed that the Painting itself had been lost or destroyed in the War. *Id.* at 2–3.

Claude attempted through friends and associates to locate the Painting without success until the year 2000, when he learned that it was being held by TBC. Claude petitioned Spain and TBC to return the Painting, but they refused. *Id.* at 19–20. Although TBC does not deny the Nazis' theft or most other underlying facts, it is claiming ownership by adverse possession, or "acquisitive prescription" under Spanish law.

A. Respondents' Unsuccessful Procedural Defenses

Claude filed this action in 2005, and in 2010, the Ninth Circuit upheld FSIA jurisdiction under the "expropriation exception" in 28 U.S.C. § 1605(a)(3), because the Painting was stolen from Lilly by Germany in violation of international law,[2]

[2] As the Ninth Circuit found: "In 1939 Lilly decided she had no choice but to leave Germany. By that time—as the district court judicially noticed—German Jews had been deprived of their civil rights, including their German citizenship; their property was being 'Aryanized'; and the Kristallnacht pogroms had taken place throughout the country." *Cassirer I*, 616 F.3d at 1023. The district court's determination that Lilly was no longer regarded by Germany as a German citizen is not challenged on

and TBC had engaged in substantial commercial activities in the United States. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1032, 1037 (9th Cir. 2010) (en banc) ("*Cassirer I*").[3]

In 2013, the Ninth Circuit rejected TBC's statute of limitations defense. It held California's six-year limitations period for claims specifically to recover stolen fine art from a museum was not preempted by U.S. foreign policy and did not violate TBC's First Amendment rights. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 621 (9th Cir. 2013) ("*Cassirer II*"). It also held TBC's due process arguments could not be resolved on a motion to dismiss. *Id*.[4]

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appeal." *Id.* at 1023 n.2. Consequently, this Court's decision in *Federal Republic of Germany v. Philipp*, 592 U.S. __ (2021) does not affect this case.

[3] The Ninth Circuit also rejected Spain and TBC's argument that they were not covered by § 1605(a)(3) as it was Germany, not Spain, that expropriated the Painting in violation of international law. *Cassirer I*, 616 F.3d at 1031. The court held: "[W]e conclude that §1605(a)(3) does not require that the foreign state against whom suit is brought be the foreign state that took the property in violation of international law." *Id.* at 1032. This Court denied Spain and TBC's petition for certiorari on this issue. *See Kingdom of Spain v. Estate of Claude Cassirer*, 564 U.S. 1037 (2011); 2011 WL 2135028 (Brief of the United States as Amicus Curiae in support of the Cassirers).

[4] The dispute over the California limitations period was mooted by Congress' enactment of the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016) (the "HEAR Act"). The HEAR Act established a national six-year limitations period from the date of the plaintiff's "actual discovery" to commence a claim for Nazi-looted artworks, which expressly applied to any case "pending in any court on the date of enactment." *Id.* § 5(a), 5(d)(1). The Ninth Circuit held that this case is timely under the HEAR Act. App. C at 16; *Cassirer III*,

B. Choice-of-Law and Substantive Rulings Below

On cross-motions for summary judgment, the district court found in June 2015 that Spanish law governed the parties' dispute, rather than the law of California, the forum state. App. D at 11; *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1160 (C.D. Cal. 2015). It then applied the Spanish law doctrine of acquisitive prescription and held that the undisputed evidence entitled TBC to summary judgment on that basis. *Id.*

On appeal, the Ninth Circuit upheld the district court's decision to apply Spanish law. App. C at 60–61; *Cassirer III*, 862 F.3d at 981. It then went on to reverse the award of summary judgment, finding that the district court had incorrectly interpreted and applied Spanish law, and that the Cassirers' evidence had created a genuine issue of material fact as to whether TBC was an "encubridor"—roughly, an accessory after the fact to the Nazis' theft of the Painting, which would have precluded application of TBC's acquisitive prescription defense here. *Id.*

With respect to choice-of-law, the court of appeals made no attempt even to consider California's choice-of-law principles. Rather, with no reasoning or explanation, the Ninth Circuit's entire discussion of which choice-of-law rule to apply comprised the following two sentences:

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862 F.3d at 959–60. As discussed below, the court of appeals erred in finding that the Act "does not alter the choice of law analysis." App. C. at 26; *id.* at 964.

> This Court has held that, when jurisdiction is based on the FSIA, "federal common law applies to the choice of law rule determination. Federal common law follows the approach of the Restatement (Second) of Conflict of Laws."

App. C at 19; *Cassirer III*, 862 F.3d at 961 (quoting *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) (citations omitted)). As will be demonstrated below, the cited *Schoenberg* case is equally devoid of reasoning, as are all of the other Ninth Circuit cases on the subject dating back to the 1980s. By contrast, the four circuits that have reached the conflicting outcome—that state choice-of-law rules apply to FSIA claims—base their decisions on thorough analysis and consideration of the statutory language and purpose.

The Ninth Circuit then decided the choice-of-law issue using its mistaken federal common law approach, relying primarily on application of §§ 6, 222 and 246 of the Restatement (Second) of Conflict of Laws. App. C at 20–26; *Cassirer III*, 862 F.3d at 962–64. It concluded that Spanish law applied and remanded the case for trial on that basis. App. C at 60; *Id.* at 981.

Following a trial, the district court found in favor of TBC and issued findings of fact and conclusions of law on April 30, 2019, *see* App. B, and entered final judgment on May 17, 2019. Although the district court determined that Baron Thyssen-Bornemisza had not purchased the Painting in good faith and therefore did not pass good title to TBC, it nonetheless found that TBC lacked "actual knowledge"

that the Painting was stolen, which was, under the court's view of Spanish law, sufficient to allow TBC to keep the stolen Painting. App. B at 20–30, 35.

The Cassirers timely filed a notice of appeal on May 29, 2019. Petitioners again argued that the district court should have applied California law, as well as that the court had erred in its findings and application of Spanish law.

The Ninth Circuit affirmed the trial court's award of title to TBC under Spanish law in a decision dated August 17, 2020. App. A at 7–9; *Cassirer IV*, 824 F. App'x 452, 457 (9th Cir. 2020). Petitioners timely filed a Petition for Panel Rehearing or Rehearing En Banc, which raised the choice-of-law issues. It was denied on December 7, 2020. App. E.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE ENTRENCHED CIRCUIT SPLIT ON AN IMPORTANT ISSUE OF FEDERAL STATUTORY INTERPRETATION, NAMELY WHETHER THE FSIA REQUIRES APPLICATION OF STATE LAW OR FEDERAL COMMON LAW TO DETERMINE CHOICE-OF-LAW

As this case demonstrates, the Ninth Circuit is unalterably committed to applying federal common law to decide choice-of-law questions in FSIA cases. *See* App. C at 19; *Cassirer III*, 862 F.3d at 961 ("when jurisdiction is based on the FSIA, federal common law applies to the choice of law rule determination") (internal quote and citation omitted). *See, e.g.*, *Bakalian v. Central Bank of Republic of Turkey*, 932 F.3d 1229, 1233–34 (9th Cir. 2019) ("Because the plaintiffs assert statutory

jurisdiction under the FSIA, we apply federal common law choice of law rules to determine the applicable statute of limitations."); *Chuidian v. Philippine Nat. Bank*, 976 F.2d 561, 564 (9th Cir. 1992) ("federal common law choice of law rules apply, not the choice of law rules of the forum state").

In stark contrast, the Second, Fifth, Sixth and D.C. Circuits agree that the law of the forum state governs the choice-of-law analysis for state law claims brought under the FSIA. *See, e.g., Bank of New York v. Yugoimport*, 745 F.3d 599, 608–09 (2d Cir. 2014) ("When subject matter jurisdiction is based on the Foreign Sovereign Immunities Act (the 'FSIA'), we apply the choice-of-law rules of the forum state . . . ."); *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 960–61 (2d Cir. 1991) ("we conclude that the FSIA requires courts to apply the choice of law rules of the forum state"); *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 498 (5th Cir. 2009) ("Because this case arises under the FSIA, we apply the choice-of-law rules of the forum state."); *O'Bryan v. Holy See*, 556 F.3d 361, 381 n.8 (6th Cir. 2009) ("in FSIA cases, we use the forum state's choice of law rules to resolve 'all issues,' except jurisdictional ones" (citations omitted)); *Nnaka v. Federal Republic of Nigeria*, 756 F. App'x. 16, 18 (D.C. Cir. 2019) ("the FSIA requires us to apply the choice-of-law rules of the forum state"); *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) ("We thus agree with the Second Circuit that

applying the forum state's choice-of-law principles, rather than constructing a set of federal common law principles, better effectuates Congress' intent that foreign states be 'liable in the same manner and to the same extent as a private individual' in FSIA actions" (quoting 28 U.S.C. § 1606)); *Pittston Co. v. Allianz Ins. Co.*, 795 F. Supp. 678, 682 (D.N.J. 1992) ("the Court agrees with the Second Circuit that state choice-of-law rules should be applied" to FSIA cases).

Rather than discuss any of these well-reasoned decisions, the Ninth Circuit here held that "when jurisdiction is based on the FSIA, federal common law applies to the choice of law rule determination." App. C at 19; *Cassirer III*, 862 F.3d at 961. The only supporting authority that the court cited was its own 1991 decision in *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991). But to the extent that *Schoenberg* provides any explanation for applying federal common law, it is virtually meaningless. *Schoenberg* acknowledged that *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), requires federal courts sitting in diversity to apply state choice-of-law rules. *Schoenberg*, 930 F.2d at 782. Immediately thereafter, however, the Ninth Circuit propounded the following *ipse dixit*: "jurisdiction in this case is based on FSIA, not diversity. Therefore, federal common law applies to the choice of law rule determination," citing *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987) and *Liu v. Republic of China*, 892 F.2d 1419, 1425–26 (9th Cir.1989). *Schoenberg*, 930 F.2d at 782.

But those cases, in turn, added nothing whatsoever of substance. The cited page in the *Liu* decision merely referenced the same citation to *Harris* as did S*choenberg*. The sum total of reasoning on the issue in *Harris* was that (i) *Klaxon* was not literally applicable because after the FSIA's enactment, "federal courts no longer have diversity jurisdiction over foreign states as defendants. The FSIA is the exclusive source of federal jurisdiction," 820 F.2d at 1002 (citations omitted); and (ii) "In the absence of specific statutory guidance, ***we prefer*** to resort to the federal common law for a choice-of-law rule." *Id*. at 1003 (emphasis added). At that point *Harris* cited a Second Circuit case, *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), which *Harris* described as "resorting to federal common law choice-of-law rules in a federal question case." But *Harris* ignored that *Fomento* involved the "specialized area" of "nationally chartered banks." 629 F.2d at 795. It did not address a statute like the FSIA which is intended to treat foreign states identically to private litigants in U.S. courts, and in fact does contain "statutory guidance" in 28 U.S.C. § 1606, which directs that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." Thus, upon analysis, the Ninth Circuit's application of federal common law to decide FSIA choice-of-law issues rests on nothing more than a "preference" ("we prefer," in the words of *Harris*) that was adopted based on a wholly untenable comparison to federal question jurisdiction.

The contrast between the Ninth Circuit's superficial approach, and the thorough analyses of the four circuits that have reached a conflicting result—i.e., that the forum state's choice-of-law rules apply—could not be more stark.

For example, the Second Circuit's determination that the FSIA requires application of state choice-of-law rules is explicitly tied to the statutory mandate that a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. *See Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959–60 (2d Cir. 1991). As the Second Circuit recognized, it was "[b]ased on this language" that this Court "has held that, as a general matter, state substantive law is controlling in FSIA cases." *Id*. at 960 (citing *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances.")).

In light of the fact that the FSIA is a pass-through jurisdictional statute, the Second Circuit and other courts have reasoned that the rules of decision should be based on the forum state's choice-of-law rules. As the Second Circuit observed in *Bank of New York v. Yugoimport*, 745 F.3d 599, 609 n.8 (2d Cir. 2014):

> The FSIA operates as a pass-through, granting federal courts jurisdiction over otherwise ordinary actions brought against foreign states. It provides foreign states and their instrumentalities access to

> federal courts only to ensure uniform application of the doctrine of sovereign immunity.

See O'Bryan v. Holy See, 556 F.3d 361, 381 (6th Cir. 2009) (the FSIA was intended to operate as a "'pass-through' to state law principles" (citing *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996)). Of course, when an action is brought in state court, the forum state's choice-of-law rules apply. *See, e.g.*, *ABF Cap. Corp. v. Grove Properties Co.*, 126 Cal. App. 4th 204, 215 (2005) ("If there is no contractual choice-of-law provision, and California is the forum state, California employs a three-step examination to determine which law to apply . . . .").

Because the FSIA's goal is to "apply[] identical substantive laws to foreign states and private individuals," *Barkanic*, 923 F.2d at 959–60, this Congressional goal of equal treatment of foreign states "cannot be achieved unless a federal court utilizes the same choice-of-law analysis in FSIA cases as it would apply if all the parties to the action were private." *Id.* And that is the choice-of-law rule of the forum state.

Application of the forum state's choice-of-law rules also comports with the Congressional framework because the FSIA "codifies, as a matter of federal law, the restrictive theory of sovereign immunity," *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004), and directs its application in both state and federal courts. *Id.* (FSIA's "preamble states that 'henceforth,' both federal and state courts should

decide claims of sovereign immunity in conformity with the Act's principles. 28 U.S.C. §1602.").

The Second Circuit in *Barkanic* analyzed the FSIA's history at length:

> Our conclusion that forum law provides the proper choice of law rules for FSIA cases is supported by the statute's legislative history. As we noted in *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320 (2d Cir.1981), *rev'd on other grounds,* 461 U.S. 480 (1983), when Congress created the FSIA, it did not intend to alter the substantive law of liability or "to create new federal causes of action," but sought only "to provide 'access to the courts in order to resolve ordinary legal disputes.'" *Id.* at 326 (quoting legislative history) (emphasis omitted). Based on that goal, we suggested in dicta that "'state substantive law, *including choice of law rules, will be applied if the issue before the court is non-federal*.'" *Id.* at 326 n.19 (quoting legislative history) (emphasis added). Any other conclusion would permit courts to apply different substantive laws than those that would control if jurisdiction over the foreign state were based on diversity of citizenship—as it was before the FSIA was enacted—and would therefore *alter the substantive law of liability in violation of congressional intent*.

923 F.2d at 960 (emphasis added). Alteration of "the substantive law of liability" is, of course, what occurred here under the Ninth Circuit's federal common law approach. *See Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) ("We thus agree with the Second Circuit that applying the forum state's choice-of-law principles, rather than constructing a set of federal common law principles, better effectuates Congress' intent that foreign states be 'liable in the same manner and to the same extent as a private individual' in FSIA actions. 28 U.S.C. § 1606."). By contrast, the Ninth Circuit's "federal common law" rule means that the same FSIA claim would be subject to a different choice-of-law rule if

brought in federal court, since a state court hearing the same claim would apply its state's choice-of-law rules, thereby defeating Congress' mandate for consistency in the liability standards for foreign sovereigns and private parties.

Furthermore, the Ninth Circuit's position that "federal common law" governs choice-of-law for state law FSIA claims violates this Court's proscription against federal courts applying federal common law except in situations where it is "necessary to protect uniquely federal interests." *Rodriguez v. Federal Deposit Ins. Corp*, 140 S. Ct. 713, 717 (2018) ("there is 'no federal general common law,'" and "common lawmaking must be 'necessary to protect uniquely federal interests'" (citations omitted)).

Nothing in the court of appeals' choice-of-law analysis, either in this case or in prior Ninth Circuit decisions, identifies a "uniquely federal interest" that is "necessary to protect" through the application of federal common law. As this Court succinctly stated in *Rodriguez*, "Nothing like that exists here." *Id*. To the contrary, the FSIA expressly identifies an interest in ensuring that foreign nations are "liable in the same manner and to the same extent as a private individual" in FSIA actions. 28 U.S.C. § 1606. As this case demonstrates, the Ninth Circuit's rule grants TBC protection that a private gallery sued in California state court would not receive, namely the benefit of choice-of-law analysis under federal common law and the Restatement.

Finally, proper application of California choice-of-law principles requires application of California substantive law, which indisputably voids TPC's title to the Painting. *See* App. C at 18; *Cassirer III*, 862 F.3d at 960 ("Under California law, thieves cannot pass good title to anyone, including a good faith purchaser."). Although the district court did make an alternative finding that Spanish substantive law would apply under California's choice-of-law test, the court of appeals did not reach this issue. *See* App. C at 20 n.9; *id.* at 962 n.9.

California uses the three-step governmental interest test for choice-of-law issues. *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107 (2006).

First, "the court determines whether the relevant law of each of the potentially affected jurisdictions [here, California and Spain] with regard to the particular issue in question is the same or different." *Id.* There is no dispute that the difference here is profound—California law recognizes that victims of theft may recover their property from a transferee in virtually all circumstances, while Spain's doctrine of acquisitive prescription imposes a far higher burden on the victim.

Second, the court examines whether each state has an interest "in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *Id*. at 107–08.

Third, if a "true conflict" exists between the interests of the respective states, the court "carefully evaluates and compares the nature and strength" of each state's

interests, and, will apply the state's law whose interest would be "more impaired if its law were not applied." *Id*. at 108. In doing so, California law "will be displaced only if there is a compelling reason for doing so." *Kasel v. Remington Arms Co*., 24 Cal. App. 3d 711, 731 (1972); *see Strassberg v. New England Mut. Life Ins. Co*., 575 F.2d 1262, 1264 (9th Cir. 1978). In addition, "a state is not required to enforce a law obnoxious to its public policy." *Griffin v. McCoach*, 313 U.S. 498, 507 (1941).

It is undisputed that California has a strong interest in preventing the transfer of stolen personal property and ensuring its return to the victim of the theft. For example, under California law thieves cannot transfer good title, *see Crocker Nat'l Bank v. Byrne & McDonnell*, 178 Cal. 329, 332 (1918); and adverse possession does not apply to personal property, *People v. Smith*, 2004 WL 2240112, at *4 (Cal. Ct. App. Oct. 6, 2004).

Similarly, California's adoption of CIV. PROC. CODE § 338(c)(3)(A), pursuant to which the statute of limitations for restitution of stolen artworks begins to run only upon "actual discovery" is an expression of California's strong policy interest in protecting the rights of victims such as Petitioners. The fact that this extended limitations period applies only to claims against museums (and galleries, auctioneers and dealers)—but not against private individuals—further demonstrates that the Legislature made a deliberate policy decision as to where a fair balance rests as

between the victim of theft and even an innocent purchaser.[5] In doing so, California was rejecting a policy (like Spain's here) which allows the retention of stolen art based merely on the passage of time.

Similarly, in adopting the HEAR Act, Congress made it the policy of the United States to allow enforcement of claims for Nazi looted artworks for six years following "actual discovery." Congress identified the "Purposes" of the Act as including:

> 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.

HEAR Act, § 3(1), 130 Stat. 1525–26. Of particular significance here, Congress expressly decreed that such claims may be pursued "Notwithstanding . . . any defense at law relating to the passage of time." *Id.* § 5(a).

In this case, the district court decided that Spain's interest in applying its acquisitive prescription rule would not be "more impaired" than California's interests under the state's choice-of-law rules. But acquisitive prescription is a defense "relating to the passage of time" in the words of the HEAR Act. This is confirmed by the district court's enumeration of Spain's relevant interests as being:

[5] For example, a museum or dealer generally has far greater expertise and access to relevant information concerning a work of questionable provenance than a private purchaser.

"*certainty* of title, protecting defendants from *stale claims*, and encouraging plaintiffs not to *sleep on their rights*." App. D at 8; *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1157 (C.D. Cal. 2015) (emphasis added). All of these interests plainly relate to and derive from the mere "passage of time," and as such, the acquisitive presumption defense cannot be enforced in United States courts under the HEAR Act.

Moreover, the "purpose" of the HEAR Act was to "ensure that laws governing claims to Nazi-confiscated art further" the policies set forth in the Washington Principles and Terezin Declaration.[6] HEAR Act, § 3(1) 130 Stat. 1525–26. Those

[6] *See* Terezin Declaration on Holocaust Era Assets and Related Issues, U.S. DEP'T OF STATE (June 30, 2009) ("Terezin Declaration"), https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/, and Washington Conference Principles on Nazi-Confiscated Art ("Washington Principles"), U.S. DEP'T OF STATE (Dec. 3, 1998), https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/. The Terezin Declaration and Washington Principles are federal policies that charge participating countries (including the United States and Spain) with the responsibility of ensuring that Nations remedy—not perpetuate—the injustices of the Nazi regime, including by protecting victims from wrongful property dispossession. *See* Terezin Declaration; Washington Principles; *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014) (Washington Principles and Terezin Declaration constitute "federal policy.")

Federal policy supporting Americans' rights to recover property looted by the Nazis in U.S. courts dates back at least to the April 13, 1949 Letter from Jack B. Tate, Acting Legal Advisor, Department of State: "The letter . . . states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any

same policies were adopted by Spain when it ratified the Washington Principles and Terezin Declaration. Spain's adoption of these policies constitutes public, international acknowledgement, made outside the context of particular litigation considerations, that its interests in the restitution of Nazi looted art is in alignment with, and not contrary to, the interests of California and the United States. Spain, like the United States, is committed to "achieve just and fair solutions" to "make certain that claims to recover such art are resolved . . . based on the facts and merits of the claims." Terezin Declaration. Thus, notwithstanding the applicability of Spain's acquisitive prescription rule to personal property generally, Spain has effectively adopted a national policy eschewing the pursuit of that interest in cases of Nazi-confiscated art.

In light of Spain's policy position as evidenced by its adoption of these international agreements, it is clear that the specific, targeted interests of California and the United States in allowing claims against museums for the return of Nazi-stolen artworks would be "more impaired," *Kearney*, 39 Cal. 4th at 108, by enforcement of Spain's adverse possession rule, as compared to Spain's interest in

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restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (quoting Tate Letter). The State Department's issuance of the Tate Letter in 1949 is regarded as the official cornerstone of the United States' formal adoption of the "restricted" view of sovereign immunity, the basis of Congress' eventual enactment of the FSIA in 1976. *See generally Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004).

enforcing that general rule of property law. Indeed, application of Spain's acquisitive prescription rule not only directly impairs the express policy interests of California and the United States, it also contravenes Spain's own endorsement of the principles of restitution relating to the Nazi genocide in the Washington Principles and Terezin Declaration. In this context, those principles are not, as the courts below asserted, *see* App. A at 8–9 n.3; *Cassirer IV*, 824 F. App'x at 457 n.3; App. B at 33, merely "moral" imperatives that justify hand-wringing but not effective action. Rather, they have meaningful legal significance in the application of California's choice-of-law rules. Likewise, for the foregoing reasons, the requisite "compelling reason" does not exist for California to "displace" its own rules, *Kasel*, 24 Cal. App. 3d at 731, and California need not "enforce a law obnoxious to its public policy." *Griffin*, 313 U.S. at 507.[7]

Under proper application of California choice-of-law rules, California substantive law must be applied in this case, and the Cassirers' claim to the Painting upheld.

[7] Even if the court of appeals were correct in applying federal common law, it erred in its evaluation of the choice-of law factors in the Restatement (Second) of Conflict of Laws, among other reasons, by failing to give appropriate weight to the interests discussed in the text.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: May 6, 2021

APPENDIX A

NOT FOR PUBLICATION

FILED

AUG 17 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID CASSIRER; et al., Plaintiffs-Appellants, v. THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain, Defendant-Appellee.	No. 19-55616 D.C. No. 2:05-cv-03459-JFW-E MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted July 7, 2020
Pasadena, California

Before: CALLAHAN, BEA, and IKUTA, Circuit Judges.

Plaintiffs David Cassirer, the estate of Ava Cassirer, and the United Jewish Federation of San Diego County (collectively "the Cassirers") appeal from the district court's judgment, entered after a bench trial, in favor of Defendant Thyssen-Bornemisza Collection Foundation ("TBC") in the Cassirers' action to recover a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

painting by Camille Pissarro, a French Impressionist, which was stolen from their ancestors by the Nazi regime in 1939 ("the Painting"). In a prior appeal, we reversed the district court's grant of summary judgment in favor of TBC because there were genuine issues of material fact whether TBC knew the Painting was stolen when it purchased the Painting from the Baron Hans Heinrich Thyssen-Bornemisza (the "Baron") in 1993.[1] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951, 973 (9th Cir. 2017). In that prior appeal, we explained that if TBC had actual knowledge the Painting was stolen, TBC could be found by the trier of fact to be an *encubridor* (an "accessory after the fact") under Spain Civil Code Article 1956 ("Article 1956") who could not have acquired title to the Painting through acquisitive prescription. *Id.* at 972–73. After a bench trial, the district court concluded that TBC acquired title to the Painting pursuant to Spain's law of prescriptive acquisition because TBC did not have actual knowledge that the Painting was stolen when it purchased the Painting from the Baron in 1993.

We have jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291. We review the district court's factual findings for clear error and the district court's conclusions of law de novo. *Kohler v. Presidio Int'l, Inc.*, 782 F.3d 1064, 1068 (9th Cir. 2015). We affirm.

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[1] TBC purchased the Painting from Favorita Trustees Limited, an entity of the Baron. We refer to Favorita and the Baron collectively as "the Baron."

1. As a threshold matter, the Cassirers request that our 2017 decision be revisited en banc. The Cassirers argue that we erred in holding that (1) Spanish law governs their substantive claims; (2) the Holocaust Expropriated Art Recovery Act does not bar Spain's acquisitive prescriptive defense; (3) Spain's Historical Heritage Law does not prevent TBC from acquiring the Painting by acquisitive prescription; (4) Spain's acquisitive prescription laws did not violate the European Convention on Human Rights; (5) and Spain satisfied the element of public possession necessary to establish acquisitive prescription under Spanish law. Our prior holdings are both law of the case and binding precedent that we must follow in this appeal. *See Nordstrom v. Ryan*, 856 F.3d 1265, 1270 (9th Cir. 2017). Because the Cassirers have not identified any new factual or legal developments since our prior decision that require us to reconsider any of those five holdings, we disagree that our 2017 decision should be revisited en banc and will not take any steps toward en banc review.

2. The district court applied the correct legal standard for determining actual knowledge under Article 1956. A litigant may satisfy Article 1956's actual-knowledge requirement through proof of willful blindness on the part of the receiver of stolen property. *See* Spanish Supreme Court Judgment ("SSCJ"), Feb. 24, 2009 (RJ 2009/449); SSCJ, June 28, 2000 (RJ 2000/6080). According to the Cassirers, there are two alternative tests for willful blindness: (1) the "high risk or

likelihood" test, which considers whether "the illicit origin of the chattel is highly probable in light of the existing circumstances," and (2) the "perfectly imagined" test, which considers whether "the perpetrator could have perfectly imagined the possibility" "that the goods have their origin in a crime against personal property or socio-economic order." SSCJ, Feb. 24, 2009 (RJ 2009\449). The Cassirers argue the district court should have applied the perfectly imagined test rather than the high risk or likelihood test to determine whether TBC was willfully blind to the illicit origin of the Painting because the perfectly imagined test has a lower standard of proof. We disagree.

We are not convinced that the perfectly imagined and high risk or likelihood tests are different tests for willful blindness or that the perfectly imagined test has a lower standard of proof than the high risk or likelihood test used by the district court. Both appear to be verbal formulas that require the trier of fact to evaluate circumstantial evidence after taking into account objective indications, if any, of prior theft of the object, as well as the subjective knowledge and experience of the accused *encubridor*. To the extent the perfectly imagined test *is* a different, lower standard of proof than the high risk or likelihood test for willful blindness, the district court's failure to address the perfectly imagined test is harmless because the Spanish Supreme Court has not mentioned or applied the perfectly imagined test for willful blindness in a case analogous to the present case. Although the Cassirers and Amici

rely on several Spanish decisions that mention or apply the perfectly imagined test for willful blindness, none of those decisions involve stolen artwork or a receiver who purchased stolen goods from a seller that had an invoice reflecting that he had purchased the stolen goods from an established and well-known art gallery. *See* SSCJ, Nov. 4, 2009 (RJ 2010/1996) (concluding the receiver of a stolen handbag "could not have been unaware of the illegal origin" of the handbag because it contained an identification card and bracelet belonging to someone other than the seller of the handbag); SSCJ, Feb. 24, 2009 (RJ 2009/449) (reciting, but not stating whether it applied, the perfectly imagined test where the defendant purchased stolen cars from a dealer he knew, produced documentation to get licenses for the cars in Belgium using false numbers, stored the cars in his garage spaces, and sold the cars in Malaga, Spain); SSCJ, June 28, 2000 (RJ 2000/6080) (concluding a receiver of stolen jewelry "could have perfectly imagined" that the jewelry was stolen because he purchased the jewelry from a seller he did not know, "did not ask for proof or explanation of" the seller's possession of the jewelry, and sold the jewelry at an auction to "profit without any risk"); Álava Provincial Court, May 13, 2019, JUR 2019/224552 (holding the receiver of a stolen cellphone knew or could have imagined the cellphone was stolen because he purchased it at a street market without a box, charger, or warranty for less than half of the cellphone's fair market value and then sold it in a different town through a proxy); Las Palmas de Gran Canaria

Provincial Court, March 1, 2019, JUR 2019/194217 (concluding the defendant had knowingly received stolen clothes because the anti-theft magnetic strips were still attached to the clothes). Thus, we reject the Cassirers' argument that the district court applied the incorrect test for actual knowledge under Article 1956; or even if the district court applied the incorrect test, any error was harmless.

3. The district court's finding that the Baron lacked actual knowledge that the Painting was stolen was not clearly erroneous. Although parts of the record suggest that the Baron may have had knowledge the Painting was stolen when he purchased it from the Stephen Hahn Gallery, there is sufficient evidence in the record from which a trier of fact could conclude that the Baron lacked actual knowledge that the Painting was stolen.[2] The district court found that the Baron lacked actual knowledge of the theft based in part on evidence that the Baron purchased the Painting for fair market value from a reputable art dealer while the Painting was

[2] The district court found that the Baron's employee mistakenly recorded false provenance information about the Painting in the Baron's purchase notebook: that the Baron purchased the Painting from the Hahn Gallery in Paris, rather than the Stephen Hahn Gallery in New York, and listed the name of the Painting as "*La Rue St. Honoré, effet de Soleil, Après-Midi, 1898*," rather than *Rue Saint Honoré, après-midi, effet de pluie*. The Cassirers accuse the Baron of falsifying the record in his purchase notebook and argue the district court's finding that it was a mistake was clearly erroneous. We reject this argument because there is evidence in the record from which a trier of fact could find that the erroneous provenance information about the Painting in the Baron's purchase notebook was a mistake. Indeed, TBC's expert Laurie Stein opined that the false provenance information was a "mistake[]," and three other paintings, none of which are claimed to have been stolen goods, were similarly reported as sold in Paris rather than New York.

publicly displayed and then publicly and frequently exhibited the Painting after he purchased it, without anyone asserting it had been stolen in the past. Because the district court's finding that the Baron lacked actual knowledge that the Painting was stolen is supported by inferences that may be drawn from facts in the record, it is not clearly erroneous. *See United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009). Therefore, even if the Baron's knowledge could be imputed to TBC, it does not cause TBC to have actual knowledge.

The Cassirers argue the district court's finding that the Baron did not possess the Painting in good faith under Swiss law satisfies the actual-knowledge requirement under Article 1956. We reject this argument because lack of good faith under Swiss law does not equate to having actual knowledge of the theft under Spanish law. Lack of due diligence in investigating provenance, after proof of suspicious circumstances, can establish lack of good faith under Swiss law. *Compare Cassirer*, 862 F.3d at 975 (citing Swiss Civil Code Articles 3.1, 3.2, and 728) *with* SSCJ, Nov. 4, 2009 (RJ 2010/1996) (noting that under Spanish law, "[i]t is . . . not enough to simply suspect the illegal origin; rather, the defendant must be certain of it"). Thus, even if the Baron's knowledge of suspicious circumstances is imputed to TBC, that knowledge does not rise to the level of actual knowledge.

4. The district court's finding that TBC lacked actual knowledge that the Painting was stolen was not clearly erroneous. Although there is evidence in the

record that suggests TBC had actual knowledge that the Painting was stolen at the time that it entered the 1993 purchase agreement with the Baron, there is sufficient evidence in the record from which a trier of fact could find that TBC lacked actual knowledge that the Painting was stolen.

The district court's finding that TBC lacked actual knowledge that the Painting was stolen is based, at least in part, on Fernando Pérez de La Sota's trial testimony that, at the time TBC acquired the Painting from the Baron, there was a "minimal" or "hypothetical" risk that the Baron "did not have good title to the paintings" that he sold to TBC as reflected in the Baron's $10 million pledge or "*prenda*." The *prenda* is not irrefutable evidence that TBC recognized there was a high risk of defective title to the Painting because the pledge was security for the satisfaction and performance of *all* of the Baron's liabilities and obligations under the 1993 purchase agreement, not just the Baron's obligation to sell the paintings free of claims against title, and the district court weighed other evidence, including the testimony of de La Sota. Because the district court's finding that TBC lacked actual knowledge that the Painting was stolen is supported by inferences that may be drawn from facts in the record, it is not clearly erroneous.[3] *See Hinkson*, 585 F.3d at 1262.

[3] In 1998, forty-four countries, including the Kingdom of Spain, agreed to several non-binding principles set forth in the Washington Principles on Nazi-Confiscated Art. *See* Washington Conference Principles on Nazi-Confiscated Art,

AFFIRMED.

U.S. Department of State (Dec. 3, 1998), https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/. The Washington Principles provide, in relevant part: "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 that this may vary according to the facts and circumstances surrounding a particular case." *Id.* More than 10 years later, in 2009, forty-six countries, including Spain, reaffirmed their commitment to the Washington Principles by signing the Terezin Declaration. *See* Terezin Declaration on Holocaust Era Assets and Related Issues, U.S. Department of State (June 30, 2009), https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/. The Terezin Declaration reiterated that the Washington Principles "were *voluntary* commitments 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." *Id.* (emphases added). The Terezin Declaration "encourage[d] all parties including public and private institutions and individuals to apply [the Washington Principles]." *Id.* The preamble to the Terezin Declaration expressly states that these "moral responsibilities" are "*legally non-binding*" principles. *Id.* (emphasis added).

The district court noted that Spain and TBC's refusal to return the Painting to the Cassirers is inconsistent with Spain's moral commitments under the Washington Principles and Terezin Declaration. However, the district court found that it could not force Spain or TBC to comply with these non-binding moral principles, which counsel for TBC characterized as "guidelines." It is perhaps unfortunate that a country and a government can preen as moralistic in its declarations, yet not be bound by those declarations. But that is the state of the law. *See Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 577 (5th Cir. 2010) ("The Terezin Declaration is a 'legally non-binding' document."); *see id.* at 578 n.2 (referring to the Washington Principles as "non-binding principles"). We agree with the district court that we cannot order compliance with the Washington Principles or the Terezin Declaration.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 05-3459-JFW (Ex)** Date: April 30, 2019

Title: David Cassirer, et al. *-v-* Thyssen-Bornemisza Collection Foundation

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action, Plaintiffs David Cassirer, the Estate of Ava Cassirer (Egidijus Marcinkevicius, Administrator WWA), and the Jewish Federation of San Diego County (collectively, "Plaintiffs" or the "Cassirers") seek to recover the painting, *Rue St. Honoré, après midi, effet de pluie*, by French Impressionist Camille Pissarro (the "Painting"). The Painting was wrongfully taken from Plaintiffs' ancestor Lilly Cassirer Neubauer ("Lilly"),[1] by the Nazi regime, and is currently in the possession of Defendant Thyssen-Bornemisza Collection Foundation ("TBC"), an agency or instrumentality of the Kingdom of Spain.

After extensive motion practice and three appeals to the Ninth Circuit, this action came before the Court for trial on December 4, 2018. In accordance with the Ninth Circuit's instructions in its most recent remand to this Court, *see Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951 (9th Cir. 2017), the trial was limited to two main questions: (1) Did TBC have actual knowledge that the Painting was stolen property under Spanish law?; and (2) Did the Baron Hans Heinrich Thyssen-Bornemisza (the "Baron") possess the Painting in good faith under Swiss law?.

Pursuant to the Court's Second Amended Scheduling and Case Management Order [Docket No. 351], the parties filed written declarations for each of their witnesses in lieu of their live direct testimony. Plaintiffs filed declarations for the following six witnesses: (1) David Cassirer; (2) Jonathan Petropoulos; (3) William H. Smith; (4) Alfredo Guerrero Righetto; (5) Marc-André Renold; and (6) Gunnar Schnabel. TBC filed declarations for the following eight witnesses: (1) Evelio Acevedo Carrero; (2) Fernando J. Pérez de la Sota; (3) Laurie A. Stein; (4) Lynn Nicholas; (5)

[1]The Court adopts Plaintiffs' preferred designation and refers to Lilly Cassirer Neubauer as "Lilly" in its Findings of Fact and Conclusions of Law.

Mariano Yzquierdo Tolsada; (6) Adriana de Buerba; (7) Dr. Wolfgang Ernst; and (8) Guy Jennings. The parties also each filed excerpts of the deposition testimony of Claude Cassirer (deceased). All of Plaintiffs' and TBC's declarations and deposition excerpts were admitted into evidence. Trial Tr. at 6-7.

TBC elected not to cross-examine any of Plaintiffs' witnesses. Accordingly, none of Plaintiffs' witnesses appeared at trial. Plaintiffs elected to cross-examine only four of TBC's witnesses -- Mr. Carrero, Mr. de la Sota, Ms. Stein, and Ms. Nicholas. Those witnesses testified at trial on December 4, 2018.

The parties also offered trial exhibits, numbered from 1-385.[2] Although TBC raised objections to certain of those exhibits at trial, the objections were subsequently withdrawn. Accordingly, the Court admitted all of the exhibits into evidence.

Post-trial briefing was concluded on February 11, 2019.

After carefully considering all of the evidence, the parties' trial and post-trial briefs, amicus curiae briefs, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a)(1):

FINDINGS OF FACT[3]

I. THE CASSIRER FAMILY'S OWNERSHIP OF THE PAINTING AND SUBSEQUENT LOOTING OF THE PAINTING BY THE NAZIS

French Impressionist painter Camille Pissarro completed the Painting in 1897. In 1898, Pissarro sold the Painting to his primary dealer or agent, Paul Durand-Ruel of Galerie Durand-Ruel, Paris. On April 11, 1900, Paul Cassirer purchased the Painting from Durand-Ruel. Julius Cassirer acquired the Painting sometime thereafter.

Lilly Cassirer Neubauer, Plaintiffs' great-grandmother, inherited the Painting in 1926. As a Jew, Lilly was subjected to increasing persecution in Germany after the Nazis seized power. In 1939, in order for Lilly and her husband Otto Neubauer to obtain exit visas to flee Germany, Lilly was forced to transfer the Painting to Jakob Scheidwimmer, a Nazi art appraiser. In "exchange" for the Painting, Scheidwimmer transferred 900 Reichsmarks (around $360 at 1939 exchange rates), well below the actual value of the Painting, into a blocked account that Lilly could not access.

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[2]Some numbers in the sequence were omitted by the parties. The parties also submitted exhibits related to the 1958 Settlement Agreement, merely to ensure that there is a complete record for any appeal. The Amended List of Exhibits and Witnesses [Docket No. 591] identifies each of the exhibits received into evidence.

[3]The Court has elected to issue its decision in narrative format because a narrative format more fully explains the reasons behind the Court's conclusions. Any finding of fact that constitutes a conclusion of law is hereby adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact is hereby adopted as a finding of fact.

In 1939, Scheidwimmer participated in a second forced sale involving the Pissarro Painting, trading it for three German paintings (works by Carl Spitzweg, Heinrich Buerkel, and Franz Defregger) owned by another German Jew, Julius Sulzbacher, who was also attempting to flee Germany. Although Sulzbacher obtained possession of the Pissarro Painting, it was ultimately confiscated by the Gestapo.

In 1943, the Painting was sold at the Lange Auction in Berlin to an unknown purchaser for 95,000 Reichsmarks.

II. LILLY'S POST-WAR RESTITUTION CLAIM

After the war, the Allies established processes for restoring property to the victims of the Nazis' looting. The law in the American Zone of Germany, Military Zone Law No. 59 ("MGL No. 59"), provided for restitution of property, or if the property could not be found, compensation. In 1948, Lilly filed a timely claim against Scheidwimmer under MGL No. 59 for restitution of, or compensation for, the Painting. Sulzbacher also filed claims under MGL No. 59 seeking restitution of, or compensation for, the Painting and the three German paintings. In 1954, the Court of High Restitution Appeals ("CORA") of the Allied High Commission published a decision that confirmed that Lilly owned the Painting ("1954 CORA decision").

In 1957, after the German Federal Republic regained its sovereignty, Germany established a law governing claims related to Nazi-looted property known as the Brüg. Lilly then dropped her restitution claim against Scheidwimmer, and initiated a claim against Germany for compensation based on the wrongful taking of the Painting. Grete Kahn, Sulzbacher's heir, was also a party to this action. The parties to the action against Germany, including Lilly, were unaware of the location of the Painting (and believed that it had been lost or destroyed during the war). In addition, only two of the German paintings originally owned by Sulzbacher were available for return. Accordingly, in 1958, the parties entered into a settlement agreement (the "1958 Settlement Agreement"), which provided that: (1) Germany would pay Lilly 120,000 Deutschmarks (the Painting's agreed value as of April 1, 1956); (2) Grete Khan would receive 14,000 Deutschmarks from the payment to Lilly; and (3) Scheidwimmer would receive two of Sulzbacher's three German paintings. Although Lilly settled her claim for monetary compensation with the German government, she did not waive her right to seek restitution or return of the Painting. *See* Order dated March 13, 2015 [Docket No. 245]; *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951, 977-79 (9th Cir. 2017).

III. POST-WAR PROVENANCE

Without Lilly's knowledge, the Painting surfaced in the United States in 1951. On July 18, 1951, the Frank Perls Gallery of Beverly Hills arranged to sell the Painting to Sidney Brody, an art collector in Los Angeles, for $14,850. The Frank Perls Gallery received a commission of $3,105 for arranging the sale of the Painting to Mr. Brody. The invoice for the Painting states that it was purchased for Mr. Brody from "Herr Urban thru Union Bank & Trust Co." Trial Exhibit 36. It appears that the Painting came from Herr Urban's collection in Munich, Germany. Trial Exhibit 65.

Prior to arranging the sale of the Painting to Mr. Brody, Frank Perls and E. Coe Kerr of M. Knoedler & Co. ("Knoedler") (an art dealer in New York City) attempted to determine if the

Painting could have been a looted or stolen artwork. Specifically, it appears that the dealers reviewed the 1939 Catalogue Raisonné for Camille Pissarro, by Lionello Venturi and Ludovic Rodo Pissarro (which listed minimal provenance information about the Painting),[4] as well as searched a list of stolen art created after the war.[5] Neither of those sources would have revealed that the Painting had been owned by the Cassirer family or that the Painting had been looted by the Nazis.

Around February 1952, less than a year after Sidney Brody purchased the Painting, Frank Perls put the Painting back on the art market for Brody, placing it on consignment with Knoedler in New York. On May 7, 1952, W.F. Davidson of Knoedler wrote to Frank Perls, asking for additional exhibition and publication information on the Painting. Specifically, Davidson asked Perls: "Any information you have on collections to complete our pedigree would be very helpful." Trial Exhibit 42. A handwritten note on the letter indicates, "info given by telephone." *Id.*

In May 1952, Sydney Schoenberg, an art collector in St. Louis, Missouri, purchased the Painting from Knoedler for $16,500. Schoenberg maintained the Painting in his collection in his hometown of St. Louis. A picture and detailed description of the Painting was included in an article written by Perry T. Rathbone, the then director of the St. Louis Art Museum, about the Schoenberg Collection in St. Louis. The article appeared in May 1954 in the London and New York editions of the *Connoisseur* magazine. The *Connoisseur* article did not mention Lilly or the Cassirer family. Trial Exhibit 26.

The Painting remained in the United States for approximately 25 years from 1951 to 1976.

IV. THE BARON'S PURCHASE AND POSSESSION OF THE PAINTING

A. The Baron's Purchase of the Painting from the Stephen Hahn Gallery in New York.

In 1975 or 1976, the Painting was sent to the Stephen Hahn Gallery in New York City on consignment, presumably by the Schoenberg estate. The Stephen Hahn Gallery was a prominent gallery, specializing in Impressionist and Modern Art, and due to its reputation, was able to command high prices from collectors. In or around October and November 1976, the Painting was publicly exhibited at the Stephen Hahn Gallery. Trial Exhibit 320.

In October 1976, Baron Hans Heinrich Thyssen-Bornemisza of Lugano, Switzerland (the "Baron") personally visited and saw the Painting at the Stephen Hahn Gallery in New York. The

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[4]A catalogue raisonné is an annotated publication of all of the known works of an artist, and usually includes provenance, bibliographic, and exhibition histories for each artwork.

[5]In a letter from E. Coe Kerr of Knoedler to Frank Perls dated February 24, 1951, there is a handwritten note regarding the Painting which states: "#1018 in Venturi & are you sure there is no wartime juggle? - it is not listed among the stolen pictures." Trial Exhibit 38. (The Painting was image #1018 in the 1939 Venturi Catalogue Raisonné). Several months later, in a letter from Kerr to Perls dated May 11, 1951, there is a handwritten note regarding an unnamed Pissarro which states: "I find it is in all the books," apparently a reference to being able to find that painting in the 1939 Venturi Catalogue Raisonné as well as other books. Trial Exhibit 39.

Baron was a collector of considerable wealth and standing who had an extensive knowledge of the art market gained over many years. He pored over catalogues and art books before purchasing art works, and employed curators and other experts to assist him in evaluating the works he was interested in acquiring. The Baron was undoubtedly aware that there had been massive looting of art by the Nazis, and it was "generally known" that the Baron's family (although not the Baron specifically) had a history of purchasing art and other property that had been confiscated by the Nazis. Trial Tr. at 81:25-82:6, 116:17-117:2.

The Baron offered Stephen Hahn $300,000 for the Painting. On October 27, 1976, Hahn wrote to the Baron and advised him that his offer of $300,000 was accepted. $25,000 of that purchase price was a commission that would be paid to Stephen Hahn. The Baron purchased three other artworks from the Stephen Hahn Gallery at the same time, specifically, paintings by Jean-Baptiste-Camille Corot, Paul Cézanne, and Fernando Léger.[6]

1. The Baron paid fair market value for the Painting.

The Court finds that the Baron paid fair market value for the Painting in 1976, and that the commission paid to Hahn (of just under 10% of the purchase price) was consistent with market norms.

Fair market value is established by market data comparison using similar and like works wherever possible which have been sold within a similar time frame. Attention is paid to medium, size, subject matter, date of the work, importance in the artist's oeuvre, and condition where it is known. The Painting was completed in 1897, measures 81 cm x 65 cm, and depicts a Parisian street scene in the rain. There is public information about three sales of comparable Pissarro paintings for the time frame in question (1976):

(1) On July 1, 1975, Camille Pissarro's *Soleil, après-midi, la rue de l'Épicerie, Rouen*, 81.9 cm x 65.4 cm (1898) was sold by Sotheby's London for £120,000 (or $262,800; £1=$2.19). This was the highest publicly reported price paid for a work by Pissarro in 1975.

(2) On March 17, 1976, Camille Pissarro's *La Mère Jolly raccommodant*, 103 cm x 80.7 cm (1874) was sold at Sotheby Parke Bernet for $230,000. This was the highest publicly reported price paid for a work by Pissarro in 1976. Although this work was completed earlier than the Painting, it is somewhat larger than the Painting.

(3) In May 1977, Camille Pissarro's *Boulevard de Montmartre, après-midi, temps de pluie*, 52.5 cm x 66 cm (1897), a work very comparable to the Painting, was sold by Christie's New York for $275,000. This was the highest publicly reported price paid for a Pissarro in 1977. It was completed in the same year as the Painting and

[6]With respect to the Cézanne, which the Baron purchased for $1.5 million, Baron was later quoted in an interview as saying "I neither remember where nor from whom I bought it, nor any story related to it, only that I always wanted to have a Cézanne and I believe I bought it in Paris." Trial Exhibit 343 at 34.

depicts the same meteorological conditions, namely the wet, glistening, Parisian streets after a rain. It is somewhat smaller than the Painting but depicts the more iconic Boulevard de Montmartre.

Based on these comparable Pissarro paintings, and the opinions expressed by TBC's expert, Guy Jennings, the Court finds that the price of $275,000 plus the $25,000 commission was "entirely in line with the prevailing prices at the upper end of the Pissarro market in the mid 1970s." Declaration of Guy Jennings [Docket No. 394] at ¶ 37.

The Court finds the contrary opinions of Plaintiffs' expert William H. Smith unpersuasive. Mr. Smith opined that the Baron paid far below fair market value for the Painting, and, specifically, that the Stephen Hahn Gallery should have sold the Painting to the Baron for between $510,000 to $600,000. Although Mr. Smith agreed that at least two of the above artworks were comparable to the Painting, he believed that, because the Painting was sold through a dealer, rather than at an auction, the fair market price should be much higher: "All dealers mark up the price of their artworks to sell at a profit. This is different from art work sold at auction, the price of which contains no additional mark up (because there is no dealer) . . . . [A] small gallery operating in a cheap location might charge a small percentage profit margin – commonly 30-40% on cost, while a gallery in an expensive location [like the Stephen Hahn Gallery] would likely charge 70-100% on cost." Declaration of William H. Smith [Docket No. 408] at ¶¶ 13 -14. However, as pointed out by TBC's expert Guy Jennings, Mr. Smith failed to take into account that the Painting was on consignment and that Stephen Hahn did not own the Painting. Declaration of Guy Jennings [Docket No. 394] at ¶¶ 31-36. According to Mr. Jennings, when an artwork is on consignment, "a commission of just under 10% for acting as an agent is entirely consistent with market norms." *Id.* at ¶ 38. Mr. Smith did not testify to the contrary. Instead, Mr. Smith completely disregarded the $25,000 commission as "irrelevant" because it appeared to be an "advisory commission" paid to a Lichtenstein entity "Art Council Establishment Vaduz," rather than a commission paid to Stephen Hahn. *See* Declaration of William H. Smith [Docket No. 408] at ¶ 18 n.1. However, as more recently discovered evidence demonstrates and as Plaintiffs' admit, the $25,000 commission was in fact a dealer's commission, rather than an "advisory commission." *See* Trial Exhibit 320; Stipulated Facts [Docket No. 377] at ¶ 27.

For the foregoing reasons, the Court finds that the Baron paid fair market value for the Painting in 1976.

2. The Baron likely saw the remnants of numerous labels on the verso of the Painting, including a partial remnant of a label from the Cassirer gallery.

The Baron likely inspected both the front and back (or verso) of the Painting before purchasing it. Trial Tr. 84:14-17. At the time the Baron inspected the Painting, there were remnants of numerous labels on the verso of the Painting,[7] including a remnant of a label from a gallery owned by members of the Cassirer family, specifically, a gallery run by Bruno and Paul

[7]When a master work of art goes to a gallery or exhibition, the establishment places a label on the verso (back) of the work, typically on the stretcher boards or frame.

Cassirer in Berlin, Germany.[8] The remnant of the label from the Bruno and Paul Cassirer Gallery bears the partial address "VICTO" of Victoriastrasse 35, refers to "BERLIN", and bears the partial German words "KUNST UND VE" (or fully Kunst Und Verlagsanstalt, or Art and Publishing Establishment), unique to the Bruno and Paul Cassirer Gallery operated between 1898 and 1901.[9] Although the partial label from the Cassirer Gallery referenced Berlin, the provenance information provided to the Baron did not indicate that the Painting had ever been located in Germany. Indeed, the provenance information provided by the Stephen Hahn Gallery only referenced the gallery Durand-Ruel in Paris, where the painting was exhibited in 1898 and 1899.

There were no Nazi labels, markings, writings, or suspicious customs stamps on the frame, verso, or any other part of the Painting. However, some of the labels on the verso of the Painting appear to have been intentionally torn off or removed. *See* Trial Exhibits 348, 379.

Despite the minimal provenance information provided to the Baron by the Stephen Hahn Gallery, the presence of what appear to be intentionally removed labels, and the presence of a torn label demonstrating that the Painting had been in Berlin, there is no evidence that the Baron made any inquiries regarding the Painting's provenance or conducted any investigation of the Painting's provenance before purchasing it.[10]

3. The Baron's employee mistakenly recorded that the Painting had been purchased in Paris.

On November 22, 1976, the Baron received an invoice from the Stephen Hahn Gallery in New York, reflecting his purchase of the Painting. However, in a notebook recording the Baron's purchases, an employee or agent of the Baron erroneously recorded the name of the Painting as

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[8]In 1898, Paul and Bruno Cassirer opened an art gallery and publishing house, "Bruno und Paul Cassirer, Kunst und Verlagsanstalt" at Victoriastrasse 35 in Berlin, Germany. In 1901, Bruno Cassirer left the business to open a separate publishing house, leaving Paul Cassirer to run the art gallery at Victoriastrasse 35. The Cassirer Gallery, which operated under varying names over the years, remained in business until 1935.

[9]Walter Feilchenfeldt, son of the original Cassirer gallerist Feilchenfeldt (also named Walter) did not recognize the partial label. Declaration of Laurie A. Stein [Docket No. 412] at ¶ 100. However, a Cassirer gallery scholar, Bernd Echte, recognized it as a partial label from the Bruno and Paul Cassirer gallery. *Id.* at ¶ 102.

[10]It does not appear that the Baron customarily conducted detailed investigations into the prior ownership or whereabouts of the artworks he acquired. According to a New York Times article, "[i]n 1972, the Italians custom police accused the Baron and some associates of having played a role in the illegal export of art works from Italy," but the charges were later dropped or suspended. Trial Exhibit 367. The Baron reportedly said, "I hope none of the pictures in my gallery was painted in Switzerland. They were all painted abroad. I buy the stuff in Switzerland and the United States, but how it gets there I don't know. I can't check all that." *Id.*

"*La Rue St. Honoré, effet de Soleil, Après-Midi, 1898*" (an entirely different Pissarro painting),[11] and as having been purchased from the "Hahn Gallery, Paris" (rather than the Stephen Hahn Gallery in New York). Trial Exhibit 322. There is a different gallery in Paris, "Galerie Joseph Hahn," owned by Stephen Hahn's father, Joseph Hahn. There is no evidence that the Baron ever owned Pissarro's *La Rue St. Honoré, effet de Soleil, Après-Midi, 1898"* and there is no evidence that the Painting was ever located at the Galerie Joseph Hahn in Paris.

Later, the provenance for the Painting in publications that accompanied certain of the Baron's exhibitions erroneously stated that the Painting was acquired from the "Galerie Joseph Hahn, Paris" or "Private Collection, Paris," rather than from the Stephen Hahn Gallery in New York. Trial Exhibits 172, 174, 176. The name of the Painting, however, had been corrected to reflect that the Painting was "Rue Saint-Honore, Afternoon: Effect of the Rain". *See, e.g.,* Trial Exhibit 172.

The Court finds that the mistaken or incorrect provenance recorded in the purchase notebook was unintentional, and was likely the result of carelessness. The initial incorrect provenance information likely resulted from the employee's confusion between the Stephen Hahn Gallery and the similarly-named gallery in Paris, the Galerie Joseph Hahn. That incorrect provenance information was then likely copied and repeated in subsequent publications.[12]

Moreover, an intentional misrepresentation regarding the provenance of the Painting is inconsistent with, and not supported by, other evidence. For example, on March 21, 1989, Irene Martin, the Administrative Director and Curator of the Baron's collection, wrote to John Rewald, a noted Pissarro expert, and invited him to curate an exhibition at Villa Favorita (scheduled for 1990) and to prepare a "scholarly and scientific" catalogue on certain paintings in the collection including the Painting. Trial Exhibit 210. Ms. Martin anticipated that it would take three years to complete the catalogue. *Id.* at 1-3. Mr. Rewald, a noted Pissarro expert, declined the invitation in a letter dated April 13,1989, stating that he could not commit to this task because of pre-existing commitments. *Id.* at 4. Had Mr. Rewald accepted Ms. Martin's offer, he might have discovered that the Baron had purchased the painting from the Stephen Hahn Gallery in New York, rather than in Paris (and, as discussed *infra*, might have even discovered that the Painting had been stolen from Lilly). Accordingly, had the Baron intended to misrepresent the provenance of the Painting, it is highly unlikely that he would have asked Rewald to research the Painting, which might have resulted in the discovery of his misrepresentation.

Furthermore, the provenance information for the other three paintings that the Baron purchased from the Stephen Hahn Gallery in October 1976 also incorrectly stated that the paintings were purchased from "Galerie Hahn, Paris" or "Galerie Joseph Hahn, Paris" and not from

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[11]"*La Rue St. Honoré, effet de Soleil, Apres-Midi, 1898*" reflects the "effect of sun" in the afternoon on St. Honoré street, whereas the Painting (*Rue St. Honoré, après midi, effet de pluie*) reflects the "effect of rain" in the afternoon on St. Honoré street.

[12]Although the Court recognizes that at least one publication stated that the Painting was acquired from a "Private Collection, Paris" (instead of from Galerie Joseph Hahn, Paris as recorded in the Baron's notebook), the Court does not find this misstatement any more significant than the misstatement that the Painting had been acquired from Galerie Joseph Hahn.

the Stephen Hahn Gallery in New York. Stipulated Facts [Docket No. 377] at ¶ 30.[13] There has been no claim that any of these three paintings had been looted by the Nazis, and, thus, no rational reason to obscure their provenance.

Accordingly, the Court finds that carelessness better explains the error in provenance, rather than intentional misrepresentation. As TBC's expert Laurie Stein states, "[s]ometimes, an error in documentation is a simple error in documentation." Declaration of Laurie A. Stein [Docket No. 412] at ¶ 153.

B. The Baron's Possession of the Painting

Once acquired by the Baron, the Painting was maintained as part of the Thyssen-Bornemisza Collection (the "TB Collection") at his Villa Favorita estate in Lugano, Switzerland until 1992, except when it was on public display in exhibitions outside of Switzerland.

In the July 1988 edition of Architectural Digest, The International Magazine of Fine Interior Design, a 9-page article titled "The Collectors: Baron Hans Heinrich Thyssen-Bornemisza, The Villa Favorita in Lugano," featured the Painting and specifically identified it as "Pissarro's *Rue Saint-Honoré, Effet de Pluie: Après-Midi, 1897.*" Trial Exhibit 327. At the time of the article in Architectural Digest, the Painting hung in the Baron's dressing room. Although the galleries at Villa Favorita had been opened to the public on weekends for seven months of the year and on weekdays when special exhibitions were on display, it is unclear whether visitors would have been allowed to tour the Baron's dressing room.

The Painting, however, was often publicly exhibited by the Baron. Specifically, it was featured in at least one exhibition at Villa Favorita in 1990 as well as several exhibitions around the world, including ones in Australia and New Zealand in 1979 and 1981; in Tokyo, Japan from May to July 1984; in London at the Royal Academy of Arts in 1984; in Florence, Italy at the Palazzo Pitti in 1985; in Dusseldorf and Nuremburg, Germany in 1985; in Paris, France at the City of Paris Modern Art Museum in 1985 to 1986; and in Spain from February 10 to April 6, 1986. The Painting was pictured in publications accompanying these exhibitions. As noted *supra*, the provenance for the Painting in certain of these publications, however, erroneously stated that the Painting was acquired from the "Galerie Joseph Hahn, Paris" or "Private Collection, Paris," rather than from the Stephen Hahn Gallery in New York. Trial Exhibits 172, 174, 176.

V. THE LOAN OF THE PAINTING TO THE KINGDOM OF SPAIN

In 1988, Favorita Trustees Limited ("Favorita"), an entity created by the Baron, and the Kingdom of Spain reached an agreement that the Baron would loan a large portion of the TB Collection (the "Loan Collection"), including the Painting, to the Kingdom of Spain, for a period of

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[13]The parties stipulated that *TBC's* provenance report for the four paintings that the Baron purchased from the Stephen Hahn Gallery in October 1976 (including the Painting) incorrectly stated that they were purchased from the Baron from "Galerie Hahn, Paris" or "Galerie Joseph Hahn Paris" and not from the Stephen Hahn Gallery in New York. Presumably, the incorrect provenance information in TBC's report came from provenance information provided by the Baron.

up to nine and a half years. Pursuant to that agreement (the "Loan Agreement"), the Kingdom of Spain created TBC[14] to maintain, conserve, publicly exhibit, and promote the Loan Collection's artworks (which consisted of 787 artworks). The Kingdom of Spain agreed to display the Loan Collection at the Villahermosa Palace in Madrid, Spain, which would be restored and redesigned for its new purpose as the Thyssen-Bornemisza Museum (the "Museum").[15] In addition, in consideration of the loan, the Kingdom of Spain agreed to pay Favorita $5 million U.S. dollars per year (that amount to be annually indexed to the U.S. Consumer Price Index).

In the Loan Agreement, Favorita expressly warranted to the Kingdom of Spain that it "owns the [p]aintings [being loaned] and is entitled to lend the [p]aintings." Trial Exhibit 83, Clause 32.3. In addition, as a condition precedent or "suspensive condition" to making the loan, Favorita was required to provide a certificate to the Kingdom of Spain stating that "it owns directly all [p]aintings forming part of the Loan Collection." *Id.* at Clause 5.1(c). The loan of the paintings was also conditioned on the Kingdom of Spain receiving legal opinions by its Bermuda, U.K., and Swiss advisors, among others, that Favorita had the authority to enter into and perform the Loan Agreement (i.e. deliver the paintings to the borrower). Stipulated Facts [Docket No. 377] at ¶ 57; Trial Exhibit 83, Clause 5.1(c).

Accordingly, in 1989, the Kingdom of Spain, through its legal counsel, conducted an investigation to verify that Favorita had clear and marketable title to the Loan Collection. The Kingdom of Spain's Swiss counsel was primarily responsible for the investigation of title because the majority of the artworks in the Loan Collection were located in Switzerland.

The Kingdom of Spain and its counsel decided to assume that Favorita had ownership of the works acquired prior to 1980, and only investigated works that were acquired after 1980. Counsel selected 1980 as a "root of title" based on the following factors:

(1) Counsel considered it "almost inconceivable that the family would have made fraudulent arrangements in regard to ownership of the paintings as far back as 1980 with the intention of frustrating a deal with the Kingdom of Spain eight years later." Trial Exhibit 84 at 2-3; *see also* Trial Exhibit 223 at 490.

(2) Counsel considered that "any fraud or theft affecting title to the paintings which had taken place before the paintings were acquired by the family would be unlikely to affect more than a single painting, or a small group of paintings," *see* Trial Exhibit 223 at 489-90, because "presumably [the paintings] will on the whole have been purchased on a 'piece meal' basis from different owners." Trial Exhibit 84 at 3.

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[14]TBC is an agency or instrumentality of the Kingdom of Spain, which the Ninth Circuit previously recognized in *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010). TBC's initial board of directors had five members appointed by the Kingdom of Spain and five members appointed by the Baron.

[15]The Kingdom of Spain spent approximately $27 million to refurbish the Villahermosa Palace and approximately $16 million for costs associated with acquiring and furnishing it with the necessary equipment, hardware, installations, IT, etc. Stipulated Facts [Docket No. 377] at ¶ 49.

(3) Swiss counsel advised that the paintings which belonged to the TB collection in 1980 (and the acquisition of which was regulated by Swiss law) could be assumed to be owned by Favorita pursuant to the Swiss laws of acquisitive prescription "if, despite an earlier irregularity, the Baron had acquired the paintings in good faith." Trial Exhibit 85. The five year limitation on any potential claims under Swiss law would have already expired in 1988, and assuming that the Baron had acquired the paintings in good faith, ownership over those paintings would have "definitely" been acquired. Trial Exhibit 85; *see also* Trial Exhibit 223 at 490.

(4) The Kingdom of Spain was "not actually buying the [paintings] themselves" and would have "an indemnity and certificate of ownership in any event." Trial Exhibit 84 at 2.

(5) The "documentary" title investigation (not including the physical inspection of the paintings) had to be completed within a short time frame (60 days) in order for the legal opinions to be issued as required by the Loan Agreement. *See* Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶ 50; Trial Exhibit 83, Clause 5.1.

Based on these factors, the Kingdom of Spain and its counsel decided not to conduct any investigation as to the artworks acquired before 1980. Because the Baron had acquired the Painting prior to 1980, the Kingdom of Spain and its counsel conducted no investigation of the Painting's provenance or title. The Kingdom of Spain and its counsel were aware, however, that if the Baron had acquired any of artworks (including the Painting) in "bad faith," or, in other words, if he "knew or should have known of the lacking right of the transferor," ownership could not have been acquired by him. Trial Exhibit 85 at 3. In such a case, "[t]he rightful owner keeps his rights at all times to claim recovery of the object." *Id.* The Kingdom of Spain assumed that the Baron acted in good faith, because "we simply had no reason to believe otherwise." Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶ 56.

Although no investigation was conducted with respect to artworks acquired prior to 1980, the Kingdom of Spain and its counsel did investigate artworks acquired after that date. Counsel inspected documents relating to transfers within the Baron's family structure since 1980 as well as records in Lugano for paintings acquired after January 1, 1980, including invoices, purchase agreements, internal memos, payment orders, bank transfers, and confirmation letters. Documentation regarding acquisitions made after 1983 were more closely scrutinized because the five-year limitation period on any potential claims under Swiss law had not yet expired. According to Mr. de la Sota, 164 paintings (50 old masters and 114 modern masters), roughly one fifth of the Loan Collection, were investigated. Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶ 96; Trial Exhibit 98; Trial Tr. at 25:20-27:8. None of these investigations revealed any evidence that the Baron had acted in bad faith.

On February 28, 1989, following their "documentary" investigation, Swiss counsel provided an opinion to the Kingdom of Spain that stated: "As at the date of hereof all the Paintings of the Loan Collection are owned by FAVORITA TRUSTEES LIMITED." Trial Exhibit 51 at 6. This opinion was specifically limited by the "qualification that it is based on the assumption that no third party outside of the group of entities controlled by [the Baron] has any claim under any applicable

law to recover an object on the basis of prior theft, embezzlement, abuse of trust and similar reasons or on the acquisition or possession in bad faith by [the Baron] or the entities he controls." *Id*. at 7.

On June 22, 1992, the Museum received the Painting. TBC's art experts inspected and analyzed the condition of the Painting on June 26, 1992, which included an inspection of the front and back of the Painting. Tr. Transcript 33:13-34:17; Trial Exhibit 217. The purpose of the inspection was to determine if the Painting had been damaged during its transfer from Switzerland to Spain. Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶¶ 67-69; Trial Tr. 33:13-35:12.

On October 10, 1992, the Museum opened to the public with the Painting on display.

VI. TBC'S PURCHASE AND POSSESSION OF THE PAINTING

The Kingdom of Spain later sought to purchase the Loan Collection (hereinafter, the "Collection"). On June 18, 1993, the Spanish cabinet passed Real Decreto-Ley 11/1993, authorizing the government to enter into a contract allowing TBC to purchase the 775 artworks that comprised the Collection. In accordance with Real Decreto-Ley 11/1993, on June 21, 1993, the Kingdom of Spain, TBC, and Favorita entered into an Acquisition Agreement, by which Favorita sold the Collection, including the Painting, to TBC.

A. TBC's Purchase Price and the Value of the Collection

Pursuant to the Acquisition Agreement, TBC purchased the Collection for $338,216,958.09. The total purchase price was $350,000,000, but the amount paid in connection with the loan (approximately $12,000,000) was subtracted from that price. TBC's purchase of the Collection was entirely funded by the Kingdom of Spain.

In addition to the purchase price, TBC also incurred several onerous obligations, including, for example, that it would: (1) use the Palace Villahermosa as the "Thyssen-Bornemisza Museum" in perpetuity; (2) not sell, exchange, charge, pledge, or otherwise alienate, encumber, or dispose of *any* artwork in the Collection in any manner whatsoever; (3) with limited exceptions, exhibit the whole of the Collection to the public at the Museum; (4) with limited exceptions, not exhibit any work of art which does not form part of the Collection with the Collection at the Museum; (5) keep the Museum up to standards consistent with best practices of European museums of international standing, and ensure that the promotion and publicity of the Collection would always be consistent with the highest standards of artistic merit; (6) arrange for up to ten exhibitions of paintings from the Collection at the Villa Favorita in Lugano, Switzerland; and (7) maintain specific and exacting standards for the environmental conditions of the Museum, including restrictions on light, humidity, temperature, air ventilation and filtration, vibration levels, and security. Trial Exhibit 96. In addition, as part of the Acquisition Agreement, TBC agreed to amend its by-laws such that: (1) the Thyssen family would be entitled to appoint one third of the positions on the board of trustees of TBC in perpetuity; and (2) those Thyssen trustees would have veto power over a number of matters including the standards of the Museum and the amendment of the by-laws where their rights were affected.

Prior to entering into the Acquisition Agreement, both Favorita and TBC requested opinions as to the value of the Collection. At the request of Favorita, Sotheby's prepared a mid-estimate auction value of the Collection as of January 1, 1993, taking into account TBC's obligations to purchase, maintain, and house the Collection together as a unit. To arrive at the appraised value, Sotheby's began by considering the total "insurance value" for each painting in the Collection as of 1990. The 1990 insurance value of the Collection was $1,692,659,500. Trial Exhibits 214, 342. Sotheby's then applied several correcting factors. First, Sotheby's converted insurance values for each artwork into mid-auction values as follows: Old Masters and British Pictures pre-1980, Continental paintings, Prints, and Modern British paintings were discounted by 40% of the insurance value; Impressionist and Contemporary paintings were discounted by 30% of the insurance value; and Early American and Contemporary-American paintings were discounted by 25% of the insurance value. Trial Exhibit 214. The 1990 mid-auction values were then adjusted to reflect the general downtown in the art market between 1990 and 1993 (the date of the new appraisal) as follows: Contemporary paintings were given a 35% discount; Prints and Contemporary-American paintings were given a 30% discount; and Impressionist and Continental paintings were given a 25% discount, including the Painting. Trial Exhibit 214. The 1993 mid-auction value was then adjusted to reflect the restrictions placed on the purchase of the Collection, including that the Collection had to be purchased, maintained, and housed together as a unit. Sotheby's determined that these restrictive conditions would reduce the total value by some 30 to 50%. Trial Exhibits 214, 229. As a result of these correcting factors, Sotheby's appraised the value of the Collection between $495 million and $693 million. Trial Exhibits 229, 241. Sotheby's emphasized that "whilst this opinion has been reached after careful consideration, we are not aware of any directly comparable property disposals on which to base this opinion." Trial Exhibit 229 at 2.

The Sotheby's valuation was independently verified, in whole and part, by three internationally recognized experts selected and appointed by the Kingdom of Spain. One expert, William B. Jordan, valued the Old Masters. He opined, in relevant part:

> The question of the collection's value becomes something else when taking into account the conditions of this particular sale – that it must be executed *en bloc* and that no paintings may ever be sold by the buyer. . . . . Sotheby's estimate of a 30%-50% discount in the value of the collection to account for the purchase *en bloc* and the conveyance of restricted title seems to me entirely justified.

Trial Exhibit 230 at 3. Another expert, Theodore E. Stebbins, provided an opinion on the American paintings in the Collection, both Early and Contemporary. He opined that the 30% reduction for Contemporary American Paintings is reasonable and that the Sotheby's reduction for Early American paintings should be reduced further. He also opined that: "[t]he[ ] very onerous conditions [in the Acquisition Agreement] would significantly reduce the monetary value of the Collection. In my opinion, a further deduction for these conditions of fifty percent (50%) would be entirely reasonable." Trial Exhibit 234 at 1. Another expert, François Daulte, was asked to consider the impressionist, post-impressionist, and modern paintings in the collection (excepting those paintings by American artists). Daulte stated in a letter to the Spanish Minister of Culture that the proposed sale price of $350,000,000 seems "realistic and justified." He based this opinion on the same factors considered by Sotheby's as well as TBC's additional obligation to refurbish

and use the Palace Villahermosa as a museum for the collection, and the fact that the Baron and his family would be members on TBC's board with significant rights. Trial Exhibit 232.

The Kingdom of Spain also asked Juan G. Dominguez Macias, a prominent Spanish registered auditor, to calculate the value of the main additional obligations which Spain and TBC had agreed to undertake (other than the purchase price), such as, for example, the refurbishment of the Palace Villahermosa and its use for the Museum on a permanent basis. Macias established the value of these additional obligations at roughly 27 billion Spanish pesetas (over $200 million). Trial Exhibit 238.

Based on the foregoing opinions on valuation, the parties represented and warranted in the Acquisition Agreement that they each, having been separately advised, "independently formed the view that the consideration for the purchase of the [Collection] provided by [TBC] is a fair arm's length consideration having regard to that advice and the substantial obligations undertaken by [TBC] under and pursuant to this Agreement and the documents entered into this Agreement and comprised in the consideration provided by it and all other relevant factors." Trial Exhibit 96 at 26 (Clause 11.6.6); *see also id.* at 5.

Based on the evidence, the Court finds that the purchase price paid by TBC for the Collection – in light of the other commitments and restrictions agreed to by TBC – was fair and reasonable. The Court rejects Plaintiffs' claimed valuation of $1 to 2 billion, because it fails to take into account the additional commitments and restrictions undertaken by TBC.[16]

B. Favorita's Representations and Warranties Regarding Ownership and the "Pledge" or "Prenda"

As part of the Acquisition Agreement, Favorita represented and warranted to TBC that it was "the legal owner" of the artworks in the Collection and that TBC would become "the absolute beneficial owner" of those artworks, including the Painting. Trial Exhibit 96, Clause 11.1.1; Stipulated Facts [Docket No. 377] at ¶ 69. Favorita also represented and warranted that "[i]t is not engaged in any litigation or arbitration proceedings which could in any way directly or indirectly

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[16]Plaintiffs did not retain an expert to independently value the Collection (as of 1993), but instead merely rely on: (1) a printout from TBC's website which states that the Collection had an estimated value of "between one and one and a half billion dollars;" and (2) an article from the Los Angeles Times, which states that the Collection was valued at $2 billion. Trial Exhibits 53, 132 at 6. However, neither of these sources takes into account TBC's additional obligations. In fact, TBC's website expressly acknowledges that the valuation of one to one and a half billion does not take into account TBC's additional obligations: "At that time, the collection was said to have an estimated value of between one and one and a half billion dollars, a figure calculated taking into account the prices paid for acquisitions and applying complex indices, comparing them with insurance figures, looking at transactions on the open market for similar works of art, etc. However, the Spanish state was no ordinary purchaser, but would acquire a series of obligations concerning the future of the collection, including the most important obligation: an agreement not to sell any of the works purchased." Trial Exhibit 132 at 6.

affect title to or right to quiet enjoyment" of TBC "to any of the Paintings or any of the provenance files or the right or title of [Favorita] to the consideration hereunder and it does not know of any such proceedings pending or threatened or anything which is likely to lead to such proceedings." Trial Exhibit 96, Clause 11.6.4. In addition, Favorita represented and warranted that "[n]one of the Paintings has, to [Favorita's] actual knowledge (without its having made any enquiry) been illegally exported from Spain in the past." Trial Exhibit 96, Clause 11.1.3. Favorita, however, refused to make any representation or warranty as to "the absence (or otherwise) of knowledge of illegal exports from any jurisdiction other than Spain." Trial Exhibit 223 at 487.

In addition, as part of the Acquisition Agreement, Favorita executed a "deed of pledge" or "*prenda*" for paintings not included in the Collection with a total value of $10 million as security for Favorita's performance under the terms of the Acquisition Agreement. TBC and the Kingdom of Spain requested this pledge, in part, in order to protect themselves against the risk that there might be a painting or small group of paintings that could have a title issue. The term of the pledge – three years – intentionally corresponded to Spain's three-year good faith acquisitive prescription period as provided in Article 1955 of Spain's Civil Code. Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶ 101.

C. TBC's 1993 Title Investigation

The Acquisition Agreement included a condition precedent or "suspensive condition" that the Kingdom of Spain and TBC receive, and be reasonably satisfied with, legal opinions from its Swiss counsel and its UK counsel, among others. Trial Exhibit 96, Clause 4.1.6. It also included a condition precedent or "suspensive condition" that the Kingdom of Spain and TBC be satisfied that "inspection of the relevant provenance files and title documents and other investigations have not given rise to serious doubt about [Favorita's] ability . . . to complete the sale of any of the Paintings . . . ." Trial Exhibit 96, Clause 4.1.2.

Accordingly, as contemplated by the Acquisition Agreement, the Kingdom of Spain and TBC conducted a further investigation of title in connection with the purchase of the Collection. The 1989 title investigation was used as a starting point. The Kingdom of Spain's and TBC's counsel again generally assumed that the Baron had acted in good faith and that Favorita owned the works acquired prior to 1980 based on the Swiss laws of acquisitive prescription. Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶¶ 96-106; Trial Exhibits 54, 98. Counsel believed that their assumption regarding ownership was reasonable, given that four additional years had elapsed since the 1989 investigation and there had been no claims challenging title to the artworks during that time. Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶ 97; Trial Tr. 46:20-47:15.

Counsel decided that the 1993 title investigation should cover four main categories of artworks: (1) paintings which had been transferred between members of the Thyssen family or group after 1980 but which had not been covered by the 1989 title investigation (affecting approximately 50 paintings); (2) paintings which had been added to the Collection between 1989 and 1993; (3) paintings which would be subject to the pledge by Favorita (even if those paintings were acquired before 1980); and (4) the 30 most iconic paintings of the Collection (even if those

paintings were acquired before 1980) (the "Iconic Paintings").[17] Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶ 103; Trial Tr. 28:18-25, 29:25-30:7; 31:3-9. The investigation of the Iconic Paintings and the paintings subject to the pledge included an examination of provenance files and title documents. Trial Exhibits 54, 254 In addition, for all paintings acquired after 1988 for which counsel could not rely on the Swiss laws of acquisitive prescription, counsel searched the Art Loss Register to determine whether any of the paintings had been registered as stolen. Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶ 103. All of the searches were "clear" – none of the paintings acquired after 1988 had been registered as stolen. *Id.*

The Painting was not included in any of the categories of artworks investigated by counsel in 1993. Although counsel's 1993 title investigation revealed some minor issues,[18] no evidence of the Baron acting in bad faith came to light.

On August 2, 1993, following the 1993 title investigation, Swiss counsel provided an opinion to TBC and the Kingdom of Spain, which stated that:

> 1. As of the date hereof, all the paintings of the Permanent Collection (Schedule 1 and 2 of the Agreement) as well as all paintings listed in Appendix 3 of this legal opinion and which are to be subject to the notarial deed of Prenda are owned by [Favorita].
>
> 2. [Favorita] has title to transfer the ownership of the Permanent Collection to [TBC] and to put in pledge the paintings which are to be subject to the notarial deed of Prenda.

Trial Exhibit 54 at 7. The Painting was included on Schedule 2.

Swiss counsel's opinions, however, were expressly based on an assumption that the Baron had acquired the artworks in good faith. Indeed, the opinion stated: "All acquisitions are *assumed* to have occurred in good faith, bad faith never having been indicated to, nor discovered by us." *Id.* at 11 (emphasis added). Swiss counsel's opinions were also subject to the following "reservation:" "No opinion is expressed as to title to any painting of the Permanent Collection and to any painting selected to be subject to the Prenda which on the basis of bad faith or by reasons not disclosed to us is subject to any encumbrance or right of third parties to which the painting may be subject in the hands of [Favorita]." *Id.* at 13.

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[17]27 of the 30 Iconic Paintings were acquired before 1980. Trial Tr. 30:9-10, 31:10-12.

[18]For example, there was no proof of acquisition for two of the Iconic Paintings but TBC did not consider this lack of proof problematic because both had been acquired by the Baron's father and had appeared in the 1937 catalogue of the TB Collection. Declaration of Fernando J. Pérez de la Sota [Docket No. 405] at ¶ 105.

D. TBC's Possession of the Painting

The Painting has been on public display at TBC's Museum in Madrid, Spain since the Museum's opening on October 10, 1992, except when on public display during a 1996 exhibition outside of Spain; while on loan at the Caixa Forum in Barcelona, Spain from October 2013 to January 2014; and once again while on loan at the Caixa Forum in Barcelona from October 2016 to February 2017.

Since TBC purchased the Painting in 1993, the Painting's location and TBC's "ownership" have been identified in several publications including: (1) Wivel, Mikael: Ordrupgaard. Selected Works. Copenhague, Ordrupgaard, 1993, p. 44; (2) Rosenblum, Robert: "Impressionism. The City and Modern Life". En Impressionists in Town. [Cat. Exp.]. Copenhague, Ordrupgaard, 1996, n. 17, pp. 16-17, il. 61.; (3) Llorens, Tomas; Borobia, Mar y Alarcó, Paloma: Obras Maestras. Museo Thyssen-Bornemisza. Madrid, Fundación Collectión Thyssen-Bornemisza, 2000, p. 156, il. p. 157; and (4) Perez-Jofre, T.: Grandes obras de arte. Museo Thyssen-Bornemisza. Colonia, Tascnen, 2001, p. 540, il. p. 541. Declaration of Evelio Acevedo Carrero [Docket No. 411] at ¶ 32.

Even though TBC possessed the invoice showing that the Baron had purchased the Painting from the Stephen Hahn Gallery in New York, TBC published the same incorrect provenance information as the Baron, i.e., that the Painting had been purchased from the Galerie Joseph Hahn in Paris. Trial Exhibits 57, 109. TBC did not correct the provenance information for the Painting until after this action was filed.

TBC's provenance report for the other three paintings that the Baron purchased from Stephen Hahn in October 1976, all of which were acquired by TBC, also incorrectly states that the paintings were purchased from "Galerie Hahn, Paris" or "Galerie Joseph Hahn, Paris" and not from the Stephen Hahn Gallery in New York. Stipulated Facts [Docket No. 377] at ¶ 30. There has never been a claim that any of these three paintings had been looted by the Nazis.

To date, TBC has receive no claims against any artworks in the Collection, other than the Painting.

VII. AVAILABLE INFORMATION REGARDING THE PROVENANCE OF THE PAINTING IN 1976 AND 1993

As indicated *supra*, neither the Baron nor TBC conducted any investigation into the provenance of the Painting in 1976 or 1993. However, even if they had, the Court finds that it would have been extraordinarily difficult for the Baron or TBC to have determined that the Painting was stolen or looted property.

As an initial matter, the Court finds that the partial label for the Cassirer gallery on the verso of the Painting would not have led the Baron or TBC to discover that the Painting had been stolen from the Cassirer family. At most, the Baron and TBC would have been able to trace the label to the Bruno and Paul Cassirer Gallery operated between 1898 and 1901 in Berlin. However, that partial label, even if traced to the Bruno and Paul Cassirer Gallery, would not necessarily have demonstrated that the Cassirer family had even owned the Painting, let alone that it had been

looted by the Nazis more than thirty years later. Indeed, the Cassirer gallery exhibited a large number of works in the period around 1900, and many of those works would have had a label from the Cassirer gallery. More importantly, had TBC or the Baron contacted the son of the original Cassirer gallerist, Walter Feilchenfeldt, they would have learned that there were no Cassirer records from that early period, and that there were no existing records indicating that the Cassirer gallery had ever acquired or owned the Painting. Declaration of Laurie A. Stein [Docket No. 412] at ¶¶ 100-101.

Moreover, in 1976 and 1993, there was limited published, or accessible, information about the Painting's prior ownership. Indeed, despite the fact that the Cassirer family had owned the Painting for thirty-nine years before the Painting was looted by the Nazis, the 1939 Catalogue Raisonné for Camille Pissarro, by Lionello Venturi and Ludovic Rodo Pissarro, only mentioned the early exhibitions of the Painting at the gallery Durand-Ruel in 1898 and 1899. Trial Exhibit 32. It did not include any reference to Lilly Cassirer Neubauer, the Cassirer Gallery in Berlin, or any other member of the Cassirer family in the provenance or exhibition history of the Painting.

In the immediate post war years, hundreds of lists and inventories of losses, recoveries, claims, and missing works were created by the Allied Collection Points (where looted art was gathered), the recuperation agencies of each country, and investigatory agencies. The Painting was not on the French lists published during 1947-49, known as *Le Répertoire des biens spoliés en France durant la guerre 1939-1945*, nor was it on the lists created by the Munich, Wiesbaden, and associated Collection Points. The Painting was also not included in any "Stolen Art Alerts," the Art Loss Register, or on any other databases of lost or looted art as of 1976 or 1993.

The Painting was included in two 1950 publications about Camille Pissarro (by Gotthard Jedlicka and Thadée Natanson), but no provenance or ownership history was provided. Although a picture and detailed description of the Painting was included in the May 1954 article in *Connoisseur* magazine about the Schoenberg Collection in St. Louis, it did not mention the Cassirer family or Lilly.

Moreover, although the 1954 CORA decision confirmed that Lilly owned the Painting, the published law reporter containing the decision was not widely available (except in specialized law libraries) and was not a typical resource for provenance researchers. More importantly, the reporter was indexed by party name (e.g., Lilly Neubauer), not by the name of the artwork or property at issue, making a search for the Painting in the 12 volume reporter a virtual impossibility in 1976 and 1993. Unless the investigator knew the name of the parties involved in the case, there was no practical method to search for the Painting in this set of reporters. Moreover, even if one recognized the Cassirer label on the back of the Painting, the 1954 CORA decision refers to Lilly as "Lilly Neubauer" or "Neubauer;" it makes no reference to the name Cassirer.

The CORA decision in the Neubauer case was described by Walter Schwarz in his book, Rückerstattung nach den Gesetzen der Alliierten Mächte (Restitution under the laws of the Allied Powers), published by C.H. Beck in 1974. Trial Exhibit 314. However, the book's description of the Neubauer case refers only to an untitled Pissarro, and the litigants are not referred to by name but only as "A" and "B." The CORA source for the decision is merely cited in a footnote. No mention is made of Lilly or the Cassirer family.

A photo card among the Frick Art Library Photo Archive[19] resources in New York City references Schoenberg's ownership of the Painting and refers to the *Connoisseur* article. Again, there is no mention of Lilly or the Cassirer family.

In 1974, John Rewald of the Museum of Modern Art in New York published a study called *Camille Pissarro*. The Painting is shown in this book as Figure 41. There is no reference in this book to Lilly, or the Cassirer family's ownership of the Painting. However, had the Baron or TBC contacted Rewald, a noted expert on Pissarro, it is *possible* that they would have learned that the Painting had been stolen from Lilly. Rewald was responsible for updating the 1939 *Catalogue Raisonné*, which he took over from Pissarro's son, Ludovic Rodo Pissarro ("Rodo Pissarro"), who had passed away in 1952. After Rodo Pissarro's death, Rewald inherited his Pissarro archives, including a "Photo Card" for the Painting, which noted in handwritten French that the Painting "was stolen from Madame Lilly Neubauer (Jewish, during the war in Germany), currently 18 Norham Rd, Oxford." Trial Exhibit 143 at 2. The source of the information is not recorded on the card. It is not known if John Rewald ever reviewed Rodo Pissarro's Photo Cards or if he was aware of the notations on the Photo Card. However, had the Baron or TBC asked Rewald for provenance information with respect to the Painting, it is possible that Rewald would have reviewed the Photo Card and advised that the Painting had been stolen from Lilly.

John Rewald died in 1994, and the project to update the 1939 Catalogue Raisonné was not completed until the publication of the updated Catalogue Raisonné by Claire Durand-Ruel Snollaerts and Joachim Pissarro, who jointly worked on the project with the Wildenstein Institute in Paris, in 2005. The updated 2005 Catalogue Raisonné references the Cassirer family and Lilly in the provenance information for the Painting, as well as the Nazis' looting of the Painting. Snollaerts had discovered the Photo Card referencing the theft of the Painting from Lilly Neubauer in the late 1990s in Rodo Pissarro's archives (which had been acquired by the Wildenstein Institute after Rewald's death). Other than the reference on the Photo Card, there were no other references to Lilly Neubauer (or the Cassirers) in the Pissarro archives or materials located at the Wildenstein Institute. According to Snollaerts, she did not become aware of any connection between Neubauer and the Cassirer family until late 2000, when she was contacted at the Wildenstein Institute by Connie Lowenthal and Evie Joselow of the Commission for Art Recovery, with inquiries about the provenance of the Painting.

Significantly, except for the 1954 CORA decision, there was no published information about Lilly's ownership of the Painting prior to the 2005 publication of the updated Catalogue Raisonné.

VIII. CLAUDE CASSIRER'S DISCOVERY OF THE WHEREABOUTS OF THE PAINTING AND THE ENSUING LITIGATION

Neither Lilly nor any of her heirs attempted to locate the Painting between 1958 and late 1999, because they believed that the Painting had been lost or destroyed during the war. Claude Cassirer, Lilly's heir, discovered that the Painting was on display at the Museum sometime in 2000.

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[19]The Frick Art Library Photo Archive is one of the principal sources for provenance research.

On May 3, 2001, Claude Cassirer filed a Petition with the Kingdom of Spain and TBC, seeking return of the Painting. On May 10, 2005, after his Petition to return the Painting was rejected, Claude Cassirer filed this action against the Kingdom of Spain and TBC, seeking the return of the Painting, or an award of damages in the event the Court is unable to order the return of the Painting.[20]

CONCLUSIONS OF LAW AND ULTIMATE FINDINGS

It is undisputed that the Nazis stole the Painting from Lilly. Under California law and common law, thieves cannot pass good title to anyone, including a good faith purchaser. *See Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951, 960 (9th Cir. 2017). However, as this Court held, and the Ninth Circuit agreed, California law and common law do not apply in this case. *Id*. at 960-64. Instead, the Court must apply Spanish law. *Id.* And, under Spanish law, TBC is the lawful owner of the Painting.

I. THE BARON DID NOT POSSESS THE PAINTING IN GOOD FAITH UNDER SWISS LAW AND THUS DID NOT PASS GOOD TITLE TO TBC.

TBC argues that it acquired ownership of the Painting based on a conveyance from the Baron (via the 1993 Acquisition Agreement). The effect of the Baron's conveyance to TBC is governed by Spanish law, and, under Spanish law, a consensual transfer of ownership requires title and transfer of possession. *Cassirer*, 862 F.3d at 974. At the time of the 1993 Acquisition Agreement, possession of the Painting had already been transferred to TBC pursuant to the Loan Agreement. Accordingly, as the Ninth Circuit held, "*if the Baron had good title to the Painting* when he sold it to TBC, then TBC became the lawful owner of the Painting through the acquisition agreement." *Cassirer*, 862 F.3d at 974. Because Spain applies the law of the situs for movable property, Spanish law would look to Swiss law to determine whether the Baron acquired title to the Painting while he possessed it in Switzerland between 1976 and 1992. *Id.*

TBC argues that the Baron acquired title to the Painting through the Swiss law of acquisitive prescription. "Under Swiss law, to acquire title to movable property through acquisitive prescription, a person must possess the chattel in good faith for a five-year period." *Cassirer*, 862 F.3d at 975; *see also* Swiss Civil Code (ZGB) Art. 728. As the Ninth Circuit held, "[t]he Baron completed the five-year period of possession between 1976 and 1981." *Cassirer*, 862 F.3d at 975.

However, in order for the Baron to have acquired title to the Painting through acquisitive

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[20]Claude Cassirer died on September 25, 2010, and David Cassirer, Ava Cassirer, and United Jewish Federation of San Diego County were substituted as plaintiffs in this action. Ava Cassirer died on March 2, 2018, and the Estate of Ava Cassirer, Egidijus Marcinkevicius, Administrator WWA, was substituted as a plaintiff in this action. Pursuant to the stipulation of the parties, the Kingdom of Spain was dismissed without prejudice in August 2011.

prescription, he must have also possessed the Painting in good faith during the relevant time period. Under Swiss law, "good faith" is presumed. Swiss Civil Code (ZGB) Art. 3(1). But good faith can be rebutted by showing that a person "failed to exercise the diligence required by the circumstances." *See* Swiss Civil Code (ZGB) Art. 3(2). Plaintiffs have the burden of demonstrating that the Baron failed to exercise the diligence required by the circumstances. Declaration of Dr. Wolfgang Ernst [Docket No. 396] at ¶ 38; Swiss Federal Court Judgment of 18 April 2013, BGE 139 III 305, E 3.2.2.

"The degree of attention, which can be demanded from the buyer, is determined by the circumstances. What this means in a particular case is largely a matter of discretion." Swiss Federal Court Judgment of 18 April 2013, BGE 139 III 305, E 3.2.2 (English translation). In general, under Swiss law, a purchaser does not have a duty to conduct inquiries as to the seller's title; he only has such a duty if there are actual and concrete reasons for suspicion. *See, e.g.,* Swiss Federal Court Judgment of 29 March 2018, 5A_962/2017 E. 5.1. In determining whether there are actual and concrete reasons for suspicion, the Court only considers the circumstances existing at the time of the transaction. Declaration of Dr. Wolfgang Ernst [Docket No. 396] at ¶¶ 42-43.

A. There were sufficient suspicious circumstances or "red flags", such that the Baron had a duty to investigate.

The Court finds that there were sufficient suspicious circumstances or "red flags" which should have prompted the Baron to conduct additional inquiries as to the seller's title. Specifically, the Court finds that the following circumstances, when considered together, should have caused the Baron, a sophisticated art collector, to conduct additional inquiries: (1) the presence of intentionally removed labels and a torn label demonstrating that the Painting had been in Berlin; (2) the minimal provenance information provided by the Stephen Hahn Gallery, which included no information from the crucial World War II era and which, contrary to the partial label, did not show that the Painting had ever been in Berlin or Germany;[21] (3) the well-known history and pervasive nature of the Nazi looting of fine art during the World War II; and (4) the fact that Pissarro paintings were often looted by the Nazis.

Most importantly, the Court finds that the presence of intentionally-removed labels should have been suspicious to the Baron. According to Plaintiffs' expert Dr. Jonathan Petropoulos, "[t]here is no legitimate reason to tear off [ ] labels as they serve the dual purpose of fortifying an artwork's authenticity and increasing its value. The removal of such labels is like filing off the serial number on a stolen gun – clear cause for concern." Declaration of Jonathan Petropoulos [Docket No. 417] at ¶ 114. According to TBC's expert Lynn Nicholas, on the other hand, the fact that "some labels have been removed or have fallen off in the course of the 100 years since the Painting was created" is "normal." Declaration of Lynn Nicholas [Docket No. 399] at ¶ 42. "Labels

[21]The Court acknowledges that the minimal provenance information provided by Stephen Hahn, by itself, would not be cause for concern. In the 1970s, provenance was usually only referenced if tied to a distinguished or remarkable collection. *See* Declaration of Laurie A. Stein [Docket No. 412] at ¶¶ 30, 145.

are affixed for many reasons. They are not proof of ownership, exhibition or sale. Many dealers put one on each time a work passes, even temporarily, through their hands in order to keep track of inventory. Other labels are affixed for exhibitions and shipping, by conservators, for estate purposes and for auctions. Museums normally have their own labels placed by their registrars." Declaration of Lynn Nicholas [Docket No. 399] at ¶ 43. Ms. Nicholas, however, never satisfactorily explained why such labels would be intentionally removed.

Likewise, TBC's expert Laurie A. Stein never satisfactorily explained why labels would be intentionally removed. According to Ms. Stein, "[i]n provenance research, any trace information from extant labels and markings is an important source of information, a bonus that can lead to key findings on occasion. However, given the nature of the label materials and the passage of time, loss of labels and illegibility of verso information is not considered a 'red flag.'" Declaration of Laurie A. Stein [Docket No. 412] at ¶ 185. Ms. Stein's direct testimony was limited to the "loss of labels" and "illegibility of verso" information, and failed to specifically address the intentional removal of labels. In addition, when cross-examined, Ms. Stein carefully worded her answers in an effort to avoid this issue. When asked if people regularly "remove" labels from paintings, she testified, "[i]n my experience, over the hundred years or so that – of a painting's existence and the many places that a painting has been, where it has been exhibited or who's had it, there are many instances where labels are *no longer present that were once present.*" Trial Tr. at 123:8-14 (emphasis added). When asked if it would be suspicious if labels were removed from a painting, Ms. Stein testified, "[n]ot necessarily, no." Trial Tr. at 123:2-7. Ultimately, she conceded that a label which is removed or scraped off *could* be suspicious under certain circumstances, and that one would have to investigate or learn why those labels had been removed, where the work had been, and what those labels might have been. Trial Tr. at 123:15-124:12. Based on Dr. Petropoulos's unequivocal testimony and the failure of TBC's experts to directly confront this issue, the Court finds that an intentionally removed or torn label should have, at the very least, raised some suspicion in the Baron, especially in the post-World War II era. That suspicion should have been heightened by the fact that there was a torn label demonstrating that the Painting had been in Berlin, that the minimal provenance information provided by the Stephen Hahn Gallery did not mention that the Painting had ever been in Germany, and that there was no provenance information available for the World War II period.

In addition, the fact that the Painting was painted by Camille Pissarro should have also heightened the Baron's suspicions. According to Plaintiffs' expert Dr. Petropolous, Pissarro paintings were "immediately of suspect provenance" because they were favored by European Jewish collectors and often looted by the Nazis. Declaration of Jonathan Petropolous [Docket No. 417] at ¶¶ 86-96. Indeed, as noted by Dr. Petropolous, the French Ministry of Culture in 1947 published a compendium of French cultural losses during World War II that included forty-six works by Pissarro that were looted by the Nazis (and have yet to be recovered).[22] *Id.* at ¶ 93.

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[22]Although TBC's expert Lynn Nicholas disputed the fact that Pissarro paintings were "immediately of suspect provenance," the Court finds that her opinion was not well supported. For example, she claimed that "[a]nalysis of collections worldwide do not indicate that Pissarro's works have been collected more by Jews than by others." Declaration of Lynn Nicholas [Docket No. 399] at ¶ 60. However, a current analysis of collections worldwide does not necessarily mean that

Finally, it is undisputed that the Baron was a very sophisticated art collector. The Baron's "familiarity with [the art] segment is important with regard to the diligence requirements imposed on him." Swiss Federal Court Judgment of 18 April 2013, BGE 139 III 305, E. 5.2.2 (English translation). Because he was a sophisticated art collector, the Baron would have recognized and understood the suspicious circumstances surrounding the Painting.

After carefully considering all of the evidence presented on this issue, the Court concludes that there were sufficiently suspicious circumstances to trigger a duty to investigate under Swiss law. Indeed, the Court finds it especially significant that these same facts known to the Frank Perls Gallery and Knoedler in 1951 (in addition to Frank Perls' knowledge that the Painting was being sold from Herr Urban's collection in Munich, Germany) appear to have been sufficient to trigger their suspicions, and led them to inquire as to whether the Painting was a looted or stolen artwork. The Court acknowledges that there were other circumstances surrounding the sale of the Painting that were not suspicious, including, for example, the respected reputation of the Stephen Hahn Gallery at the time[23] and the price that the Baron paid for the Painting. However, these circumstances, while they tend to demonstrate that the Baron did not have actual knowledge that the Painting was stolen, do not outweigh the other suspicious circumstances triggering a duty to investigate.

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B. The Baron failed to exercise the diligence required by the circumstances

Despite the Baron's duty to inquire further regarding the provenance of the Painting, there is no evidence that the Baron took *any* steps to allay any suspicions that he may have had. However, "the failure to pay due attention is only important, if it is causal for the lack of knowledge about the defect of title; otherwise, it is negligible." Swiss Federal Court Judgment of 18 April 2013, BGE 139 III 305, E. 3.2.2 (English translation). In other words, "[a]ccording to decisions of the Federal Supreme Court of Switzerland, failure to undertake research may only be construed as the lack of good faith, if the applicable precautions would have led to uncovering the deficient disposal authorization of the seller." *Id*. at E. 5.4.2. This causation requirement has been interpreted to mean that the "research measure under consideration must be objectively *suitable* to discover the defect in the disposal authorization." *Id.* at E 5.4.2 and E 5.4.3 (emphasis added).

Pissarro works were not historically favored by European Jewish collectors, especially considering that more than 70 years have passed since the end of World War II and, even more importantly, that works belonging to European Jewish collectors were plundered during the war. She also claimed that "evidence does not support the allegation that more Pissarros were stolen by the Nazis than anything else," citing the fact that, in the *Répertoire des Bien Spoliés*, the 715 page listing of art looted in France, there are 66 works by Renoir (who, unlike Pissarro, was not Jewish) and 46 by Pissarro. Declaration of Lynn Nicholas [Docket No. 399] at ¶ 61. Without knowing how prolific each of the artists were, this does little to demonstrate that Pissarro works were not more frequently looted by the Nazis than Renoir works. Moreover, this evidence may simply mean that Renoir works were also often frequently looted by the Nazis.

[23]The Stephen Hahn Gallery has sold at least one other work looted by the Nazis. However, that fact would not have been known to the Baron in 1976.

See also Swiss Federal Court Judgment of 29 March 2018, 5A_962/2017 E. 5.2; Declaration of Dr. Wolfgang Ernst [Docket No. 396] at ¶¶ 89, 91. "However, the hypothetic result of such investigations does not matter. It may very well be that the objectively suitable investigations could not have solidified the suspicions. In other words, the one, who does not undertake seemingly suitable and reasonable measures, cannot rely on his good faith." Swiss Federal Court Judgment of 29 March 2018, 5A_962/2017 E. 5.2 (English translation).

The Court finds that the Baron failed to conduct suitable and reasonable inquiries in order to discover the seller's lack of title. Specifically, it would have been suitable and reasonable for the Baron (or one of his employees) to contact John Rewald, a noted expert on Pissarro, in an attempt to determine if the Painting had been stolen. Rewald would have been a logical source of information as he had recently published a study called *Camille Pissarro* and was responsible for updating the 1939 Catalogue Raisonné. Rewald was known to the Baron, as Rewald visited the Baron's collection at the Baron's home in Switzerland in July 1976, just three months before the Baron purchased the Painting.[24] None of TBC's experts dispute that it would have been reasonable for the Baron to contact Rewald. *Cf.* Declaration of Lynn Nicholas [Docket No. 399] at ¶¶ 138-139; Declaration of Laurie A. Stein [Docket No. 412] at ¶ 197; Declaration of Wolfgang Enrst [Docket No. 396] at ¶¶ 88-109.

Had the Baron contacted Rewald (or even another art expert who might have referred the Baron to Rewald), he might have learned that the Painting was stolen from Lilly by the Nazis. Whether such an inquiry would have, in fact, revealed that the Painting was stolen will never be known, but it is also irrelevant. Because the Baron did not undertake such a suitable and reasonable measure, he cannot rely on his good faith. *See* Swiss Federal Court Judgment of 29 March 2018, 5A_962/2017 E. 5.2 (English translation) ("Whether such inquiries would have substantiated the suspicion or not, does not need to be clarified because the Defendant, who did not undertake any measures, which would have seemed adequate and reasonable, cannot rely on his good faith.").

Indeed, the Federal Supreme Court of Switzerland, in a case involving the stolen painting, "Diener mit Samowar" by Russian artist Kasimir Malewitsch, concluded as follows:

> In this case, the primary issue is the question whether appellee had to engage H. or other experts for further clarifications.
>
> Contrary to the appraisal of the appellate court, this is the case. After appellee heard from H., who he engaged himself as art expert, of a rumor about a painting of Malewitsch, which had been stolen but which is on the market, there would not be any question but to ask H. or any other expert for more information about this rumor or to research this matter further. The measures H. would have undertaken are

[24]In fact, as noted *supra*, in 1989, Irene Martin, the Administrative Director and Curator of the Baron's collection, contacted Rewald, inviting him to curate an exhibition at Villa Favorita and to prepare a "scholarly and scientific" catalogue on certain paintings in the collection, including the Painting.

> immaterial in this context; retrospectively, it can only be speculated about them. In addition, it does not matter that he did not know N. (an expert, who verifiably knew about the theft). It is sufficient that at that former point in time, engaging one or several experts would have been objectively a suitable (if not even the best) and reasonable action to take in order to find out more about the rumor and any deficiencies concerning seller's authorization to sell. Appellee at least knew H. as expert, who – if she could not take care of the respective mandate of appellee would like to engage someone else for it – could have referred him without any problems to another expert, provided he, as art collector, did not already know them. This hypothetic result of such research does not matter as it can be the case that such investigations would not have substantiated the rumor and its connection with the painting "Diener mit Samowar". Appellee would have then trusted this information even if they would have been objectively wrong. If this would have dispelled and should have dispelled his concerns, his good faith would have had to be protected because he applied all necessary diligence to investigate the rumor. If, on the other hand, he would have found out that the rumor actually concerns the painting "Diener mit Samowar", then appellee – if he did not want to restrain from the purchase under these circumstances – would have demand [*sic*] precise proof that seller is entitled to sell despite the earlier theft of the work (e.g., good faith purchase abroad).
>
> Because appellee did not undertake this measure, which seems suitable and reasonable, must lead to the conclusion that he cannot base it on his good faith.

Swiss Federal Court Judgment of 18 April 2013, BGE 139 III 305, E 5.4.3 (English translation).

Similarly, because the Baron did not undertake any reasonable and suitable measures, such as contacting Rewald or another art expert to allay any suspicions he may (and should) have had, the Court concludes that the Baron did not possess the Painting in good faith and thus the Baron (and Favorita) did not acquire good title to the Painting under Swiss law. Accordingly, because the Baron (and Favorita) did not have good title to the Painting at the time of TBC's purchase, the Court concludes that TBC did not become the lawful owner of the Painting via the 1993 Acquisition Agreement.[25]

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[25]The Court does not address the many other measures that the Baron could have taken, such as asking the Stephen Hahn Gallery for more information regarding the Painting's provenance, investigating the partial label from the Cassirer gallery on the verso of the Painting, or searching lists of stolen artworks, because the Court finds that such measures would not have led the Baron in 1976 to discover that the Painting was stolen from Lilly. "[T]he failure to pay due attention is only important, if it is causal for the lack of knowledge about the defect of title; otherwise, it is negligible." Swiss Federal Court Judgment of 18 April 2013, BGE 139 III 305, E. 3.2.2 (English translation). In any event, there is no evidence that the Baron undertook any of these measures, and thus TBC cannot rely on them. *See* Declaration of Dr. Wolfgang Ernst [Docket No. 396] at ¶ 89 ("The good-faith presumption cannot be relied upon, if measures of inquiry were omitted, which at the time would have been considered 'apparently suitable and reasonable' . . . . If this were the case, the counter-argument, relying on a counter-factual hypothetical, that such inquiry would have led to nothing, is not heard.").

II. TBC ACQUIRED OWNERSHIP OF THE PAINTING UNDER SPAIN'S LAWS OF ACQUISITIVE PRESCRIPTION.

However, the Court concludes, based on all of the evidence, that TBC acquired lawful ownership of the Painting under Spain's laws of acquisitive prescription.

Spanish Civil Code Article 1955 provides in relevant part: "Ownership of movable property prescribes by three years of uninterrupted possession in good faith. Ownership of movable property also prescribes by six years of uninterrupted possession, without any other condition. . . ." Spanish Civil Code Art. 1955 (English translation). Possession is defined in Article 1941, which states: "Possession must be in the capacity of the owner, and must be public, peaceful, and uninterrupted." Spanish Civil Code Art. 1941 (English translation).

"Read alone, Article 1955 would seem to vest title in one who gained possession, even absent good faith, after six years, so long as the possession was in the capacity as owner, public peaceful, and uninterrupted." *Cassirer*, 862 F.3d at 965. As the Court held in its Order Granting TBC's Motion for Summary Judgment on June 4, 2015 [Docket No. 315], and as the Ninth Circuit held in *Cassirer,* 862 F.3d at 965, TBC has possessed the property as owner publicly, peacefully, and without interruption for more than 6 years (from 1993 to at least 1999). "Thus, Article 1955, read in isolation, would seem to bar the Cassirers' action for recovery of the Painting." *Cassirer*, 862 F.3d at 965.

"But the very next article in the Spanish Civil Code, Article 1956, modifies how acquisitive prescription operates." *Id.* Article 1956 provides:

> Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories [*encubridores*], unless the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations.

Spanish Civil Code Art. 1956 (English translation). "Therefore, as to any principals, accomplices, or accessories . . . to a robbery or theft, Article 1956 extends the period of possession necessary to vest title to the time prescribed by Article 1955 *plus* the statute of limitations on the original crime and the action to claim civil liability." *Cassirer*, 862 F.3d at 966 (citing Spanish Supreme Court decision of 15 July 2004 (5241/2004)).

Plaintiffs claim that TBC was an accessory (or *encubridor*) to the theft of the Painting. The Ninth Circuit concluded:

> For the crime of *encubrimiento* (accessory after the fact) and the crime of receiving stolen property, the two crimes the Cassirers argue TBC committed when it purchased the Painting from the Baron in 1993, the criminal limitations period is five years, 1973 Penal Code Articles 30, 113, 546(bis)(a) and 1995 Penal Code Articles 131, 298, and the civil limitations period is fifteen years, Judgment of January 7, 1982 (RJ 1982/184) and Judgment of July 15, 2004 (no. 5241/2004). Thus, if Article 1956 applies, including the six-year period from Article 1955, TBC would need to possess the Painting for twenty six years after 1993, until 2019, to acquire title via acquisitive

> prescription. Since the Cassirers petitioned TBC for the Painting in 2001 and filed this action in 2005, *if Article 1956 applies*, TBC has not acquired prescriptive title to the Painting.

Cassirer, 862 F.3d at 966 (emphasis in original) (footnote omitted). Accordingly, if Article 1956 applies, Plaintiffs own the Painting. If Article 1956 does not apply, TBC owns the Painting.

For the reasons that follow, the Court concludes that Article 1956 does not apply and that TBC owns the Painting pursuant to Article 1955.

A. TBC is not an "accessory" or *encubridor* under Article 1956.

"Article 1956 extends the time of possession required for acquisitive prescription only as to those chattels (1) robbed or stolen [or otherwise misappropriated] from the rightful owner (2) as to the principals, accomplices or accessories after the fact ('*encubridores*') with actual knowledge of the robbery or theft." *Cassirer*, 862 F.3d at 966 (footnote omitted). The parties agree that the first requirement is satisfied, i.e., that the Painting was misappropriated from Lilly by Scheidwimmer and the Nazis. With respect to the second requirement, the parties disagree as to whether TBC is an "accessory" or "*encubridor*" within the meaning of Article 1956.[26]

As the Ninth Circuit held, the term "accessory" or "*encubridor*" in Article 1956 has the meaning that term was given it in Spain's 1870 Penal Code. *Cassirer*, 862 F.3d at 967-68. Under the 1870 Penal Code, "a person can be *encubridor* within the meaning of Article 1956 if he knowingly receives and benefits from stolen property." *Id.* TBC has clearly benefitted from its possession of the Painting by displaying it at the Museum. The Court, however, must resolve, based on the evidence presented at trial, whether TBC knowingly received stolen property, and more specifically, whether TBC had *actual* knowledge that the Painting was the product of robbery or theft. *See Cassirer*, 862 F.3d at 968 n.17 (citing Spanish Supreme Court decision of 23 December 1986 (RJ 1986/7982)). Plaintiffs have the burden of proving TBC's actual knowledge.

Actual knowledge requires "willful intent" (*dolo*) and may be proven directly (*dolo directo*) or indirectly (*dolo eventual*).[27] *See, e.g.*, Declaration of Adriana de Buerba [Docket No. 402] at ¶ 57; Declaration of Alfredo Guerrero Righetto [Docket No. 431] at § 3.1. As the Spanish Supreme Court has held, the crime of receiving stolen property "is a crime that is necessarily carried out with intent, and may be committed both by direct intent (certain knowledge of the illegal origin of the items) and by future malicious intent, when the recipient of stolen goods acts despite it being considered highly probable that the goods have their origin in a property crime or socioeconomic crime; in other words, when the illegal origin of the stolen goods received appears to be highly

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[26]it is undisputed that TBC was not a principal or accomplice to the 1939 misappropriation of the Painting.

[27]For the reasons stated in the Declaration of Adriana de Buerba [Docket No. 402] at ¶¶ 57-64, the Court rejects Alfredo Guerrero Righetto's opinion that "gross negligence" or "recklessness," (i.e., *imprudencia temeraria*) may be sufficient to demonstrate actual knowledge, to the extent that his use of those terms implies a standard less than "*dolo eventual*" or "willful blindness".

probable, in light of the circumstances involved." Spanish Supreme Court Judgment of May 19, 2016 (no. 429/2016)) (English translation). "The Spanish Supreme Court does not require exact, thorough or comprehensive knowledge about the previous offense but a state of certainty which entails knowing beyond mere suspicion or conjecture." Declaration of Adriana de Buerba [Docket No. 402] at ¶ 55 (citing Supreme Court Judgment of June 9, 1993 (no. 3818/1993), and Supreme Court Judgment of November 20, 1995 (no. 5853/1995)). *See also* Declaration of Alfredo Guerrero Righetto [Docket No. 431] at § 3.3(A).

"Willful blindness" may also satisfy the actual knowledge requirement. In order to prove willful blindness, Plaintiffs must prove that: (1) TBC was aware that there was a high risk or likelihood that its conduct was illegal; (2) TBC completely disregarded that risk and did not act with the minimum diligence required; and (3) TBC obtained economic profit and therefore wished to remain ignorant. Declaration of Adriana de Buerba [Docket No. 402] at ¶ 65. *See also* Spanish Supreme Court Judgment of March 16, 2012 (RJ 2012/5012).

1. TBC did not have "actual knowledge" that the Painting was stolen.

After considering all of the evidence presented by the parties, the Court concludes that Plaintiffs have failed to demonstrate that TBC had actual knowledge that the Painting was stolen property. The Court finds that TBC lacked actual knowledge, especially in light of the following evidence: (1) but for the 1954 CORA decision (which would have been virtually impossible to find), there was no published information about Lilly's prior ownership of the Painting or that the Nazis had looted it at the time TBC acquired the Painting; (2) the Kingdom of Spain (and TBC) obtained legal opinions from reputable law firms to ensure that the Baron held good title and that the conveyance was lawful; (3) the Kingdom of Spain and TBC (and their counsel) were not aware of any facts demonstrating that the Baron had acted in bad faith in acquiring any of the paintings in the Collection; (4) with respect to the paintings that counsel did investigate, counsel did not discover any evidence that the paintings were stolen or that the Baron had acquired them in bad faith; (5) the Kingdom of Spain and TBC were aware that the Baron had publicly displayed and exhibited the Collection, and yet were not aware of any adverse title claims having been made on any of the paintings in the Collection; (6) Favorita represented and warranted to TBC that it was "the legal owner" of the artworks in the Collection and that TBC would become "the absolute beneficial owner" of those artworks, including the Painting; (7) the $350 million paid for the entire Collection, including the Painting, was reasonable taking into account the restrictions placed on the purchase and sale of the Collection and TBC's obligations under the Acquisition Agreement; and (8) TBC has publicly exhibited the Painting at the Museum since 1992 (with the expectation that the Museum would have millions of visitors).

This evidence fails to demonstrate that TBC had *dolo directo* or *dolo eventual*, or that TBC was willfully blind. Indeed, although TBC's legal counsel decided not to conduct any investigation into the title or provenance of the Painting, it does not appear that they made that decision because they were afraid of learning the truth or because they believed (or the circumstances demonstrated) that there was a high risk or probability that the Painting was stolen. Rather, legal counsel made this decision after careful consideration of various options for the scope of their title investigation. They believed that the risk was *low* that pre-1980 paintings had title issues because: (1) the Baron would have acquired ownership of those paintings via the Swiss laws of acquisitive

prescription if he had acquired them in good faith; and (2) "any fraud or theft affecting title to the paintings which had taken place before the paintings were acquired by the family would be unlikely to affect more than a single painting, or a small group of paintings," *see* Trial Exhibit 223 at 489-90, because "presumably [the paintings] will on the whole have been purchased on a 'piece meal' basis from different owners," *see* Trial Exhibit 84. Plaintiffs heavily criticize the Kingdom of Spain and TBC's counsel for assuming that the Baron acted in good faith without conducting any investigation. The Court finds, however, that counsel had a sound basis for that assumption. Indeed, even though the Baron had publicly displayed and exhibited the Collection, there were no adverse title claims made on any of the paintings in the Collection at the time. Moreover, with respect to the paintings that counsel did investigate, counsel did not discover any evidence that the paintings were stolen or that the Baron had acquired them in bad faith.

The Kingdom of Spain and TBC's counsel did recognize that there was a risk that a painting or small number of paintings could have a title issue, and decided to cover that "hypothetical" risk by obtaining the pledge or *prenda*. But recognizing that a minor risk exists does not equate to *dolo eventual* or "willful blindness." The evidence presented at trial simply failed to demonstrate that TBC was aware of, or that the circumstances demonstrated, a high risk or probability that a painting or the Painting was stolen.

Moreover, the Court concludes that, although the presence of the "red flags" identified *supra* (i.e., the intentionally removed labels, the minimal provenance information provided, the partial label demonstrating that the Painting had been in Berlin, and the fact that Pissarros were frequently the subject of Nazi looting) might have been sufficient to raise TBC's *suspicions* with respect to the Painting, they fall well short of demonstrating TBC's "actual knowledge," i.e. that TBC had *certain knowledge* that the Painting was stolen, or that there was a *high risk or probability* that the Painting was stolen. In other words, although failing to investigate the provenance of the Painting may have been irresponsible under these circumstances, the Court concludes that it certainly was not criminal.

2. The Baron did not have "actual knowlege" that the Painting was stolen.

Plaintiffs argue, under Spanish law, that the Baron's actual knowledge can be imputed to TBC. The Court need not resolve that issue of Spanish law, because the Court finds that the Baron did not have actual knowledge that the Painting was stolen. Specifically, the following evidence amply supports the Court's finding that the Baron lacked actual knowledge: (1) the Baron paid fair market value for the Painting in 1976; (2) the Baron purchased the Painting from the Stephen Hahn Gallery, which was a reputable art dealer; (3) the Painting was part of a public exhibition at the Stephen Hahn Gallery when the Baron purchased it; (4) the Baron publicly and frequently exhibited the Painting in various locations around the world; and (5) in 1976, but for the 1954 CORA decision (which would have been virtually impossible to find), there was no published information about Lilly's prior ownership of the Painting or that the Nazis had looted it. Again, although the "red flags" should have raised the Baron's *suspicions*, they fall well short of demonstrating the Baron's "actual knowledge," i.e. that the Baron had *certain knowledge* that the Painting was stolen, or that there was a *high risk or probability* that the Painting was stolen.

Because the Court finds that neither TBC, nor the Baron, had actual knowledge that the

Painting was stolen, the Court concludes that TBC is not an "accessory" (or *encubridor*) and that Article 1956 is not applicable. Because Article 1956 is not applicable, the Court concludes that TBC acquired ownership of the Painting under Article 1955. *See* Order Granting TBC's Motion for Summary Judgment on June 4, 2015 [Docket No. 315]; *Cassirer*, 862 F.3d at 965.

B. TBC's Remaining Arguments Regarding the Applicability of Article 1956 Fail as a Matter of Law.

In light of the Court's determination that TBC is not an accessory or *encubridor* for the purposes of Article 1956, the Court need not address TBC's remaining arguments as to why Article 1956 is inapplicable. However, given that the parties will certainly pursue additional appellate review, and in the interest of a complete record, the Court considers TBC's remaining legal arguments.

TBC argues that Article 1956 cannot apply as a matter of law because: (1) it has not been charged with, or convicted of, a predicate crime; and (2) it is a legal person, rather than an individual.[28]

1. Article 1956 does not require a criminal conviction.

The Court concludes that Article 1956 does not require a criminal conviction. Indeed, the clear statutory language demonstrates that a criminal conviction is not required. As noted *supra*, Article 1956 provides:

> Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories, *unless the crime or misdemeanor, or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations.*

Spanish Civil Code Art. 1956 (2013) (English translation) (emphasis added).

In accordance with the Spanish rules of statutory construction, the Court construes Article 1956 "according to the proper meaning of [its] wording and in connection with the context, with [its] historical and legislative background and with the social reality of the time in which [it is] to be applied, mainly attending to [its] spirit and purpose." Spanish Civil Code Art. 3.1 (English Translation). The Court concludes that Article 1956 does not require a conviction according to the "proper meaning of [its] wording." Indeed, as persuasively argued by Amici Curiae Comunidad Judía de Madrid and Federación de Comunidades Judías de España, the express language of Article 1956 differentiates between two scenarios:

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[28]TBC did not raise these issues as to the inapplicability of Article 1956 until TBC's Petition for Rehearing and Rehearing *En Banc* or until after the most recent remand to this Court. Plaintiffs claim that the Court's consideration of these two new arguments are barred by the mandate rule, the law of the case doctrine, and/or because TBC waived or forfeited these arguments. The Court need not address whether TBC's new arguments are precluded by any of these doctrines because the Court concludes that TBC's new arguments fail as a matter of law.

i. If there is no criminal conviction yet, the statute of limitation to *prosecute* the crime or misdemeanor must have elapsed; or

ii. If there is a criminal conviction, the statute of limitation to *enforce* the sentence of guilt for a crime or misdemeanor must have elapsed.

Brief of Amici Curiae Comunidad Judía de Madrid and Federación de Comunidades Judías de España [Docket No. 401-1] at 12.[29] "In both cases, the statute of limitations to claim civil liability arising from the crime or misdemeanor must also have elapsed. . . ." *Id*.

The Court recognizes that no Spanish court has applied Article 1956 in absence of a criminal conviction. However, prominent Spanish legal scholars and commentators agree that no criminal conviction is required. *See, e.g. ,* Manuel Albaladejo García, *Comentarios Al Código Civil y Complicaciones Forales*, Tomo XXV, Vol. 1 (1993) ("these individuals are prevented from consummating such acquisition until the statute of limitations on the crime has expired; if there was no prosecution for the crime, then the time-barring of the sentence, which was not imposed, does not come into play . . . ."); Bercovitz Rodríguez-Cano, R. (Coord.), *Comentario al Código Civil*, Thomson Reuters Aranzadi (4th ed.) (2013), comment on Article 1956, at 2529 (English translation) ("In order for [the Article 1956] prohibition to be in effect, no firm conviction is required in the criminal scope. The dismissal of the criminal process or its extinction by a ruling other than a sentence will not prevent a civil judge from declaring, if applicable, the existence of a theft or robbery, though naturally only for civil purposes.").

For the foregoing reasons, the Court concludes, as a matter of law, that Article 1956 does not require a criminal conviction.

2. Article 1956 applies to both natural persons and legal persons.

TBC also argues that a "legal person" or legal entity cannot be declared to be an accessory or *encubridor* for the purposes of Article 1956 of the Spanish Civil Code.

As a general rule (except with respect to a limited number of offenses not at issue here), only individuals – and not legal entities – can be held *criminally* liable under Spanish criminal law. However, Article 1956 is a provision of the Spanish *Civil* Code. And, the provisions of the Spanish Civil Code regulating acquisitive prescription, including Article 1956, apply to both natural *and* legal persons. *See* Spanish Civil Code Art. 38 (English translation) ("Legal entities may acquire and possess property of all kinds, and contract obligations and exercise civil and criminal actions, in accordance with the laws and internal regulations."); *id.* at Art. 1931 ("Persons with the capacity to

[29]Article 1956's adoption of these two alternatives for determining when a principal, accomplice, or accessory can acquire property through acquisitive prescription is not surprising, given that the Spanish Penal Code identifies prescription of the crime and prescription of the sentence as different ways of extinguishing criminal liability. Specifically, Article 132 of the 1870 Spanish Penal Code, Article 112 of the 1973 Spanish Penal Code, and Article 130 of the 1995 Spanish Penal Code all provide that criminal liability is extinguished by both prescription of the crime and prescription of the sentence.

acquire property or rights by other legitimate means may also acquire them by prescription.").

Moreover, if TBC's interpretation of Article 1956 were correct, a thief could entirely escape the implications of Article 1956 simply by making the acquisitions through a legal entity. Under Spanish rules of statutory construction, such an absurd interpretation must be rejected. *See* Teresa Asunción Jiménez París, Supplementary Sources of Law and Application of Legal Rules at 88; Spanish Supreme Court Judgment of November 21, 1994 (RJ 1994/8542).

Accordingly, the Court concludes, as a matter of law, that Article 1956 can apply to legal entities.

III. LACHES

Finally, TBC argues that Plaintiffs' claims are barred by laches or the similar doctrine under Spanish law, "*Verwirkung*."[30] The Ninth Circuit apparently concluded that Spanish law applies to this defense. *See Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951, 977 (9th Cir 2017). The Ninth Circuit, however, also considered whether TBC was entitled to summary judgment on its laches defense in the event that California law applied. The Court concludes that, no matter what law the Court applies to resolve this issue, Plaintiffs' claims are not barred.

Verwirkung, like laches, is based on a plaintiff's unreasonable or "objectively unfair" delay in bringing a claim. *See* Spanish Supreme Court Judgment of April 26, 2018 (EDJ 2018/54808) (English translation); Declaration of Mariano Yzquierdo Tolsada [Docket No. 409] at 25 n.10; Antoni Vaquer, *Verwirkung Versus Laches: A Tale of Two Legal Transplants*, 21 Tul. Eur. Civ. L.F. 53, 61-66 (2006). The doctrine is premised on the understanding that "[r]ights must be exercised in accordance with the requirements of good faith." Spanish Civil Code Art. 7.1 (English translation). *See also* Spanish Supreme Court Judgment of April 26, 2018 (EDJ 2018/54808). In order to apply this doctrine, three requirements must be met:

> (1) The passage of a long period of time, during which the holder of the right remained inactive without exercising it. Nevertheless, unlike what occurs with the statute of limitations . . ., the mere passage of time is not enough, but rather must be accompanied by circumstances that make the delay in exercise of the right unfair.
>
> (2) Inactivity by the holder of the right during that period of time, when they could have exercised it.
>
> (3) And lastly, . . . a legitimate confidence in the passive subject that the right would not be exercised. It must be the holder of the right that inspires this confidence, which implies more than mere inactivity.

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[30]Plaintiffs argue that the Court may not consider TBC's argument that Plaintiffs' claims are barred by laches or *Verwirkung* because: (1) the Ninth Circuit concluded that Spanish law applies, not California law; and (2) TBC had previously only raised a laches defense under California law, not Spanish law. The Court need not resolve this issue, because the Court concludes, on the merits, that Plaintiffs' claims are not barred by laches or *Verwirkung.*

Spanish Supreme Court Judgment of April 26, 2018 (EDJ 2018/54808) (English translation).

Similarly, "[t]o establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself." *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1983 (9th Cir. 2000) (per curiam). "Ultimately, as an equitable doctrine, the denial of relief on the basis of laches is not determined by simple rules of thumb or rigid legal rules. Rather, it is determined by a consideration of the circumstances of each particular case and a balancing of the interests and equities of the parties." *Saul Zaentz Co. v. Wozniak Travel, Inc.*, 627 F. Supp. 2d 1096, 1109 (N.D. Cal. 2008) (quotations and citations omitted).

The Court finds that Plaintiffs' delay in filing suit was not unfair or unreasonable, and that the balance of equities favors Plaintiffs. Indeed, the Cassirers moved quickly to enforce their rights. Three years after the war ended, Lilly sought physical restitution of the Painting. Ultimately, she dropped her claim for restitution, and after ten years of litigation, settled her claim for monetary compensation in the 1958 Settlement Agreement. Importantly, the parties to that settlement agreement *all* believed that the Painting had been lost or destroyed during the war and that it was not available for restitution. Accordingly, it was reasonable for Claude Cassirer to continue to rely on that belief and, thus, not to search for the Painting. Moreover, once Claude Cassirer learned that the Painting was not lost or destroyed, he acted promptly by filing a Petition with the Kingdom of Spain and TBC in 2001, and then, after that Petition was denied, an action in this Court in 2005. Finally, based on the evidence that TBC failed to conduct *any* investigation into the provenance of the Painting, the Court finds that Plaintiffs' actions did not "inspire legitimate confidence" in TBC that no one would seek the Painting's return.

Accordingly, the Court concludes that the doctrine of laches or *Verwirkung* does not bar Plaintiffs' claim for return of the Painting.

CONCLUSION

In December 1998, forty-four countries, including the Kingdom of Spain, committed to the Washington Principles on Nazi-Confiscated Art (the "Washington Principles"). These non-binding principles appeal to the moral conscience of participating nations and recognize: "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 that this may vary according to the facts and circumstances surrounding a particular case."

In 2009, forty-six countries, including the Kingdom of Spain, reaffirmed their commitment to the Washington Principles by signing the Terezin Declaration. The Terezin Declaration reiterated that the Washington Principles "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." The Terezin Declaration also "encouraged all parties including public and private institutions and individuals to apply [the Washington Principles] as well."

TBC's refusal to return the Painting to the Cassirers is inconsistent with the Washington Principles and the Terezin Declaration. However, the Court has no alternative but to apply Spanish law and cannot force the Kingdom of Spain or TBC to comply with its moral commitments. Accordingly, after considering all of the evidence and the arguments of the parties, the Court concludes that TBC is the lawful owner of the Painting and the Court must enter judgment in favor of TBC.

Counsel shall meet and confer and prepare a joint proposed Judgment consistent with these Findings of Fact and Conclusions of Law. The joint proposed Judgment shall be lodged with the Court on or before **May 6, 2019**. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a declaration outlining their objections to the opposing party's version on or before **May 6, 2019**.

IT IS SO ORDERED.

Initials of Deputy Clerk sr

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID CASSIRER; AVA CASSIRER; UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY, a California non-profit corporation, *Plaintiffs-Appellees*, v. THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain, *Defendant-Appellant.*	No. 15-55550 15-55977 D.C. No. 2:05-cv-03459-JFW-E

DAVID CASSIRER; AVA CASSIRER; UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY, a California non-profit corporation, *Plaintiffs-Appellants*, v. THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain, *Defendant-Appellee.*	No. 15-55951 D.C. No. 2:05-cv-03459-JFW-E OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted December 5, 2016
Pasadena, California

Filed July 10, 2017

Before: Consuelo M. Callahan, Carlos T. Bea,
and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Bea

SUMMARY*

Foreign Sovereign Immunities Act / Holocaust Expropriated Art Recovery Act

The panel reversed the district court's grant of summary judgment, on remand, in favor of Thyssen-Bornemisza Collection Foundation, the defendant in an action under the Foreign Sovereign Immunities Act concerning a Camille Pissarro painting that was forcibly taken from the plaintiffs' great-grandmother by an art dealer who had been appointed by the Nazi government to conduct an appraisal.

The panel held that the Holocaust Expropriated Art Recovery Act of 2016 supplied the statute of limitations for the plaintiffs' claims. The claims were timely because they were filed within six years of the date of the plaintiffs' actual discovery of the artwork's location.

The panel held that when jurisdiction is based on the FSIA, federal common law, which follows the approach of the Restatement (Second) of Conflict of Laws, applies to the choice of law rule determination. Under the Second Restatement, Spain's substantive law governed defendant TBC's claim that it was the rightful owner of the painting.

The panel held that the district court erred in deciding that, as a matter of law, TBC had acquired title to the painting through Article 1955 of the Spanish Civil Code. The panel held that there was a triable issue of fact whether TBC was an *encubridor*, or accessory, to the theft of the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

painting within the meaning of Civil Code Article 1956. In Section III.C.1 of its opinion, the panel considered the following Spanish rules of statutory interpretation: (i) proper meaning of wording; (ii) context; (iii) historical and legislative background, including (a) definition of *encubridor* in the 1870 Penal Code, and (b) the 1950 Law; and (iv) social reality at the time of enactment. The panel concluded that an *encubridor* within the meaning of Article 1956 could include someone who, with knowledge that the good had been stolen from the rightful owner, received stolen goods for his personal benefit. The panel concluded that TBC had not established, as a matter of law, that it lacked actual knowledge that the painting was stolen property. The district court therefore erred in granting summary judgment on the grounds that, as a matter of law, TBC acquired the painting through acquisitive prescription.

The panel rejected TBC's other arguments for affirming the grant of summary judgment. First, the panel held that TBC was not entitled to summary judgment based on its claim that Baron Hans Heinrich Thyssen-Bornemisza, from whom it bought the painting, had lawful title under Swiss law. The panel concluded that there was a triable issue of fact as to the Baron's good faith in his possession of the painting. Second, the panel held that TBC was not entitled to summary judgment based on a laches defense under California law. Third, the panel held that the plaintiffs' claims were not foreclosed by their great-grandmother's acceptance of a 1958 settlement agreement with the Nazi art appraiser, the heir of another Jewish victim, and the German government.

The panel also concluded that the plaintiffs' other arguments against applying Article 1955 were without merit. The panel held that Spain's Historical Heritage Law did not

prevent TBC from acquiring prescriptive title to the painting. The panel also affirmed the district court's conclusion that the application of Article 1955 to vest TBC with title to the painting would not violate the European Convention on Human Rights.

The panel reversed the district court's judgment and remanded the case to the district court for further proceedings.

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OPINION

BEA, Circuit Judge, with whom Judge Callahan concurs. Judge Ikuta concurs except as to Sections III.C.1.iii.b and III.C.1.iv:

In 1939 Germany, as part of the "Aryanization" of the property of German Jews, Lilly Neubauer ("Lilly")[1] was forced to "sell" a painting by Camille Pissarro (the "Painting"), a French Impressionist, to Jackob Scheidwimmer ("Scheidwimmer"), a Berlin art dealer. We

[1] In our two prior opinions, this Court has referred to Lilly Neubauer, the great-grandmother of Plaintiffs David Cassirer and Ava Cassirer, as "Lilly." *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc); *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013).

use quotation marks around "sell" to distinguish the act from a true sale because Scheidwimmer had been appointed to appraise the Painting by the Nazi government, had refused to allow Lilly to take the Painting with her out of Germany, and had demanded that she sell it to him for all of $360 in Reichsmarks, which were to be deposited in a blocked account. Lilly justifiably feared that unless she sold the Painting to Scheidwimmer she would not be allowed to leave Germany. The district court found, and the parties agree, that the Painting was forcibly taken from Lilly.

The history of how the Cassirer family came to own the Painting, as well as the application of the Foreign Sovereign Immunity Act ("FSIA") which resulted in recognition of our jurisdiction to deal with the claims to the Painting, are detailed in our earlier en banc opinion.[2] What primarily concerns us now is the sale of the Painting by the Baron Hans Heinrich Thyssen-Bornemisza (the "Baron") to the Thyssen-Bornemisza Collection ("TBC") in 1993, its display at TBC's museum in Madrid ever since, and what effect, if any, that possession has had on the claims of title by the parties to this action.

In short, in this third appeal to this Court, we are called upon to decide whether the district court correctly granted summary judgment to TBC based on TBC's claim that it acquired good title to the Painting through the operation of Spain's law of prescriptive acquisition (or "usucaption") as a result of TBC's public, peaceful, and uninterrupted possession in the capacity as owner of the Painting from 1993 until the Cassirers filed a petition requesting the return of the Painting in 2001. Second, although not ruled upon by the district court, we consider whether the Baron's purchase

[2] *Kingdom of Spain*, 616 F.3d at 1023–24.

of the Painting, and his possession of it for years, vested him with good title under Swiss law—title he could validly pass to TBC in the 1993 sale. Third, we consider TBC's arguments that the Cassirers' claims are barred by laches or by Lilly's acceptance of a post-war settlement agreement with the German government. Finally, we consider the Cassirers' arguments that Spain's Historical Heritage Law and the European Convention on Human Rights prevent TBC from acquiring prescriptive title. Ultimately, we reverse the order which granted summary judgment and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY[3]

A. The 1958 Settlement Agreement

After the Nazis forced Lilly to sell the Painting to Scheidwimmer in 1939, Scheidwimmer then forced another Jewish collector, Julius Sulzbacher ("Sulzbacher"), to exchange three German paintings for the Painting. Sulzbacher was also seeking to escape Nazi Germany. After the Sulzbacher family fled Germany, the Gestapo confiscated the Painting.

After the war, the Allies established a process for restoring property to the victims of Nazi looting. Military Law No. 59 ("MGL No. 59") authorized victims to seek restitution of looted property. In 1948, Lilly filed a timely claim against Scheidwimmer under MGL No. 59 for restitution of, or compensation for, the Painting. Sulzbacher also filed claims under MGL No. 59 seeking restitution of,

[3] As noted above, much of the factual history of this case is described in *Kingdom of Spain*, 616 F.3d at 1023–24. We include only such factual background as necessary to explain our decision in this case.

or compensation for, the Painting and the three German paintings. In 1954, the United States Court of Restitution Appeals ("CORA") published a decision confirming that Lilly owned the Painting.

Although they knew Lilly was the owner of the Painting, Lilly, Sulzbacher, and Scheidwimmer believed the Painting was lost or destroyed during the war. In 1957, after the German Federal Republic regained its sovereignty, Germany established a law governing claims relating to Nazi-looted property known as the Brüg. Lilly then dropped her restitution claim against Scheidwimmer and initiated a claim against Germany for compensation for the wrongful taking of the Painting. Grete Kahn, Sulzbacher's heir, was also a party in this action.

The parties to the action against Germany were unaware of the location of the Painting and only two of the German paintings originally owned by Sulzbacher were still available for return. In 1958, the parties reached a settlement agreement (the "1958 Settlement Agreement"). This agreement provided that: (1) Germany would pay Lilly 120,000 Deutschmarks (the Painting's agreed value as of April 1, 1956); (2) Grete Kahn would receive 14,000 Deutschmarks from the payment to Lilly; and (3) Scheidwimmer would receive two of Sulzbacher's three German paintings.

B. The Painting's Post-War History

After the Nazis confiscated the Painting from Sulzbacher, it allegedly was sold at a Nazi government auction in Dusseldorf. In 1943, the Painting was sold by an unknown consignor at the Lange Auction in Berlin to an unknown purchaser for 95,000 Reichsmarks. In 1951, the Frank Perls Gallery of Beverly Hills arranged to move the

Painting out of Germany and into California to sell the Painting to collector Sidney Brody for $14,850. In 1952, Sydney Schoenberg, a St. Louis art collector, purchased the Painting for $16,500. In 1976, the Baron purchased the Painting through the Stephen Hahn Gallery in New York for $275,000. The Baron kept the Painting in Switzerland as part of his collection until 1992, except when it was on public display in exhibitions outside Switzerland.

C. TBC's Purchase of the Painting

In 1988, Favorita Trustees Limited, an entity of the Baron, and Spain reached an agreement that the Baron would loan his art collection (the "Collection"), including the Painting, to Spain. Pursuant to this agreement, Spain created TBC[4] to maintain, conserve, publicly exhibit, and promote the Collection's artwork. TBC's initial board of directors had five members acting on behalf of the Spanish government and five members acting on behalf of the Baron and his family. Spain agreed to display the Collection at the Villahermosa Palace in Madrid, Spain, and to restore and redesign the palace as a museum (the "Museum"). After the Villahermosa Palace had been restored and redesigned as the Museum, in 1992, pursuant to the loan agreement, the Museum received a number of paintings from Favorita Trustees Limited, including the Painting, and the Museum opened to the public. In 1993, the Spanish government passed Real Decreto-Ley 11/1993, which authorized and funded the purchase of the Collection. Spain bought the Collection by entering into an acquisition agreement with Favorita Trustees Limited. The Real Decreto-Ley 11/1993

[4] TBC is an agency or instrumentality of the Kingdom of Spain, which this Court previously recognized in *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010).

classified the Collection as part of the Spanish Historical Heritage, which made the property subject to the provisions of the Spanish Historical Heritage Law. TBC paid the Baron $350 million for the Collection. The estimated value of the Collection at that time was somewhere between $1 billion and $2 billion.

In 1989, after the 1988 loan agreement, Spain and TBC investigated title to the works in the Collection. In 1993, Spain and TBC did a second title investigation in connection with the purchase agreement.

D. Procedural History

In 2000, Claude Cassirer, a photographer, learned from a client that the Painting was in the Museum. TBC does not dispute that Mr. Cassirer had "actual knowledge" of the Painting's location by 2000. On May 3, 2001, the Cassirer family filed a petition in Spain seeking the return of the Painting. After that petition was denied, in 2005, Claude Cassirer filed this action in the United States District Court for the Central District of California seeking the return of the Painting.[5]

As noted above, this case has been before this Court in two prior appeals. After the second remand to the district court, TBC filed a motion for summary adjudication. TBC moved for summary adjudication of the following issues:

> (1) Plaintiffs' predecessor-in-interest, Lilly, waived her rights to the Pissarro Painting in the 1958 Settlement Agreement; (2) the

[5] Claude Cassirer died in 2010. David and Ava Cassirer, his children, and the United Jewish Federation of San Diego County succeed to his claims. Collectively, we refer to these plaintiffs as "the Cassirers."

> Court lacks jurisdiction because any "taking in violation of international law" has already been remedied by Germany; and (3) the tenets of U.S. policy on Nazi-looted art require honoring the finality of the 1958 Settlement Agreement.

In a written order, the district court denied TBC's motion on the grounds that Lilly did not waive her right to physical restitution by accepting the Settlement Agreement, which also meant that the court retained jurisdiction under the FSIA and the Cassirers' claims do not conflict with federal policy. TBC filed an interlocutory appeal of that portion of the order which denied TBC's claim of sovereign immunity, as to which the district court denied TBC a certificate of appealability on the grounds that TBC's attempted interlocutory appeal was frivolous and/or waived because of this Court's decision in 2010, which determined that the district court could properly exercise jurisdiction pursuant to the FSIA. The district court thereby retained jurisdiction of the case pursuant to *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992). TBC now cross-appeals the district court's order denying its motion for summary adjudication based on the 1958 Settlement Agreement.

After its summary adjudication motion was denied, TBC moved for summary judgment on the grounds that it had obtained ownership of the Painting pursuant to Spain's law of acquisitive prescription as stated in Spain Civil Code Article 1955 ("Article 1955"). The Cassirers filed a motion for summary adjudication asking the court to hold that California law, not Spanish law, governs the merits of the case. The district court granted summary judgment in favor of TBC and denied the Cassirers' motion for summary adjudication. The district court concluded that Spanish law

governed TBC's claim that it owned the Painting pursuant to acquisitive prescription and that TBC owned the Painting because TBC had fulfilled the requirements of Article 1955. Before the district court, the Cassirers argued that their claims were timely pursuant to California Code of Civil Procedure § 338(c)(3)(A) ("§ 338(c)(3)(A)"), California's special statute of limitations for actions "for the specific recovery of a work of fine art brought against a museum . . . in the case of an unlawful taking or theft[.]" California enacted § 338(c)(3)(A) in 2010, five years after the Cassirers filed suit, but § 338(c)(3)(A) states that it applies to cases that are pending, *see* Cal. Civ. Proc. Code § 338(c)(3)(B). The district court held that, since TBC had acquired ownership of the Painting under Spanish law prior to the California legislature's enactment of § 338(c)(3)(A), retroactive application of that special statute of limitations would violate TBC's due process rights.

The district court entered judgment in favor of TBC. The Cassirers timely appealed.

TBC cross-appealed the summary judgment order to the extent that it did not address two arguments advanced in TBC's motion for summary judgment. First, that the Baron had acquired ownership of the Painting under Swiss law through prescriptive acquisition and had subsequently conveyed good title to TBC. Second, that the Cassirers' claims are barred by the equitable defense of laches. TBC also cross-appealed "any interlocutory decisions or orders adverse to [TBC]" and the motions filed by TBC that were

denied as moot by the district court following the district court's entry of judgment.[6]

This Court consolidated the parties' appeals. In summary, the following appeals on the merits are before this Court: (1) the Cassirers' appeal of the order which granted summary judgment in favor of TBC on the grounds that under applicable Spanish law, TBC acquired title to the Painting by prescriptive acquisition (usucaption), (2) TBC's appeal of the order which denied TBC's motion for summary adjudication, based on the assertion that Lilly waived her ownership rights to the Painting pursuant to the 1958 Settlement Agreement and that the district court lacked jurisdiction under the FSIA, (3) TBC's cross-appeal of the summary judgment order in its favor, for failure to consider and rule upon its claim under Swiss law and its defense of laches.

[6] These motions are TBC's Motion for Certification and TBC's Motion for Review and Reconsideration of the Magistrate Judge's Discovery Order. The motion for certification, which asked the district court to certify for interlocutory appeal TBC's claims relating to the 1958 Settlement Agreement are moot since we consider those claims in this opinion. In TBC's discovery motion, TBC sought reversal of the magistrate judge's denial of TBC's motion to compel production of thirteen letters between Lilly and her attorney. The motion is no longer moot in light of our decision in this opinion to reverse and remand this case. However, the district court did not consider this motion on the merits, and trial courts have "broad discretion" to permit or deny discovery, *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (quoting *Goehring v. Brophy*, 94 F.3d 1294, 1305 (9th Cir. 1996)). Therefore, we will allow the district court to consider this discovery motion in the first instance on remand. *See Bermudez v. Duenas*, 936 F.2d 1064, 1068 (9th Cir. 1991) (remanding to the district court to consider in the first instance a discovery motion that was denied as moot after a grant of summary judgment).

II. JURISDICTION AND STANDARD OF REVIEW

The FSIA, 28 U.S.C. § 1330(a), gave the district court jurisdiction. 28 U.S.C. § 1291 gives this Court jurisdiction over this appeal.

This Court reviews an appeal from summary judgment de novo. *Jones v. Union Pac. R.R. Co.*, 968 F.2d 937, 940 (9th Cir. 1992). This Court reviews a district court's choice of law analysis de novo. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). A district court's interpretation of foreign law is a question of law that this Court reviews de novo. *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995). "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1.

III. ANALYSIS

A. The Cassirers' claims are timely within the statute of limitations recently enacted by Congress to govern claims involving art expropriated during the Holocaust.

Before the district court, the parties and the district court agreed that California, as the forum, supplied the statute of limitations for the Cassirers' claims. California Code of Civil Procedure § 338(c)(3)(A) requires that "an action for the specific recovery of a work of fine art" brought against a museum in the case of an "unlawful taking" be commenced within "six years of the actual discovery by the claimant" of the "identity and whereabouts of the work of fine art" and "[i]nformation or facts that [were] sufficient to indicate that the claimant ha[d] a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen." Cal.

Civ. Proc. Code § 338(c)(3)(A)(i)–(ii). The primary issue below was whether retroactive application of § 338(c)(3)(A), which was passed in 2010, five years after the Cassirers filed suit, would violate TBC's due process rights. The district court held that, since TBC "acquired ownership of the Painting under Spanish law prior to [the] California Legislature's retroactive extension of the statute of limitations" and the Cassirers' claims were time barred before the legislature passed § 338(c)(3)(A), retroactive application of § 338(c)(3)(A) would violate TBC's due process rights. On appeal, TBC contends that retroactive application of § 338(c)(3)(A) would violate its due process rights.

However, while these appeals were pending before us, Congress passed, and the President signed, the Holocaust Expropriated Art Recovery Act of 2016 ("HEAR"), H.R. 6130. For the reasons stated below, we conclude that HEAR supplies the statute of limitations to be applied in this case in federal court and that the Cassirers' claims are timely under this law.

HEAR states:

> 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.

Id. § 5(a). Thus, HEAR creates a six-year statute of limitations period that commences on the date of actual discovery of the artwork's location by the claimant. *Id.* § 5(a). Lilly suffered the taking of the Painting in 1939, which is during the "covered period" of HEAR (January 1, 1933, and ending on December 31, 1945). *See id.* § 4(3). The six-year statute of limitations applies to any claims that are pending on the date of HEAR's enactment, which was December 16, 2016, including claims on appeal such as the Cassirers'. *See id.* § 5(d)(1) ("Subsection (a) shall apply to any civil claim or cause of action that is . . . 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 . . . .").

Viewing the facts in the light most favorable to the Cassirers, as we must on an appeal from an order which granted summary judgment, *Am. Int'l Grp., Inc. v. Am. Int'l Bank*, 926 F.2d 829, 831 (9th Cir. 1991), the Cassirers acquired actual knowledge of the Painting's location in 2000 when Claude Cassirer learned from a client that the Painting was in the Museum.[7] After the Cassirer family's 2001 petition in Spain was denied, the family filed this action on May 10, 2005. Since the lawsuit appears to have been filed within six years of actual discovery, the Cassirers' claims are timely under the statute of limitations created by HEAR.

[7] Of course, the date of acquisition of actual knowledge is a fact subject to proof, and possible rebuttal, in proceedings before the district court.

B. This Court applies the Second Restatement of the Conflict of Laws to determine which state's substantive law applies in deciding the merits of this case. The Second Restatement directs this Court to apply Spain's substantive law.

Although Congress has directed federal courts to apply HEAR's six-year statute of limitations for claims involving art expropriated during the Holocaust, HEAR does not specify which state's substantive law will govern the merits of such claims. Under California law, thieves cannot pass good title to anyone, including a good faith purchaser. *Crocker Nat'l Bank v. Byrne & McDonnell*, 178 Cal. 329, 332 (1918). This is also the general rule at common law. *See Kingdom of Spain*, 616 F.3d at 1030, n.14 (quoting Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631, 633–34 (2000)) ("One who purchases, no matter how innocently, from a thief, or all subsequent purchasers from a thief, acquires no title in the property. Title always remains with the true owner."). This notion traces its lineage to Roman law (*nemo dat quod non habet*, meaning "no one gives what he does not have").[8]

But the application of our choice of law jurisprudence requires that we not apply such familiar rules, under the circumstances of this case. As we shall see, Spain's property

[8] Spanish law has some similar provisions. "Possession of movable property acquired in good faith is equivalent to title. Notwithstanding the foregoing, any person who has lost movable property or has been deprived of it illegally may claim it from its possessor." Civil Code Article 464, Ministerio de Justicia, *Spain Civil Code* 66 (2009) (English translation). However, the Spanish Civil Code must be read in its entirety, including those articles which provide that title to chattels may pass through qualified, extended possession, such as Article 1955.

laws will determine whether the Painting has passed to TBC via acquisitive prescription.

This Court has held that, when jurisdiction is based on the FSIA, "federal common law applies to the choice of law rule determination. Federal common law follows the approach of the Restatement (Second) of Conflict of Laws." *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) (citations omitted). The district court recognized this precedent, but believed that language from this Court's decision in *Sachs v. Republic of Austria*, 737 F.3d 584, 600 n.14 (9th Cir. 2013) (en banc), *rev'd on other grounds by OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), called *Schoenberg*'s holding into question.

Sachs does not clearly overrule the *Schoenberg* precedent. In *Sachs*, the plaintiff had been injured trying to board a train in Austria operated by a railroad ("OBB") that was owned by the Austrian government. *Id.* at 587. The district court granted OBB's motion to dismiss on the grounds of a lack of subject-matter jurisdiction, holding that OBB was immune from suit under the FSIA. *Id.* Sitting en banc, this Court reversed and held that it had subject matter jurisdiction pursuant to the commercial-activity exception to sovereign immunity in the FSIA. *Id.* at 603. In footnote 14 of the *Sachs* opinion, this Court held that California law governed the plaintiff's negligence claim. *Id.* at 600 n.14. This Court assumed that California law applied because the railroad ticket was purchased in California and Sachs' action was brought in California. *Id.* ("[W]e think it is a permissible view of Supreme Court precedent to look to California law to determine the elements of Sachs's claims[]" without engaging in a formal choice of law analysis.). However, this Court then cited *Schoenberg* and took into consideration the Second Restatement choice of

law test. *See id.* ("Even if we should make a separate conflicts analysis under the Restatement, that conflicts analysis supports the same conclusion that California law applies to Sachs's claims."). Since *Sachs* did not expressly overrule *Schoenberg* and the Supreme Court has not overruled or effectively overruled *Schoenberg*, we must apply *Schoenberg* to determine which state's substantive law applies. *See Miller v. Gammie*, 335 F.3d 889, 896–900 (9th Cir. 2003). And, as noted above, *Schoenberg* instructs us to apply the Second Restatement. To the extent *Sachs* calls into doubt the need to apply the Second Restatement in certain FSIA cases, *Sachs* is distinguishable because in *Sachs* the plaintiff purchased her railroad ticket in California, *Sachs*, 737 F.3d at 587, while in this case TBC purchased the Painting in Spain and claims to have acquired prescriptive title by possessing the Painting in Spain. Therefore, we apply *Schoenberg* and the Second Restatement.[9]

The Second Restatement includes jurisdiction-selecting rules and a multi-factor inquiry in Section 6, which provides choice of law factors that a court should apply in the absence of a statutory directive to decide the applicable rule of law. In addition to considering any specific jurisdiction-selecting rule, a court is supposed to apply the Section 6 factors to

[9] The district court concluded that under *both* the Second Restatement and California's choice of law test (known as the governmental interest or comparative impairment test), Spain's substantive law applies to this case. Since we conclude that the Second Restatement test applies because *Schoenberg* controls, we do not apply California's choice of law test. We note that the courts in *Schoenberg* and *Sachs* both did not apply the forum's choice of law test. *Schoenberg*, 930 F.2d at 782–83; *Sachs*, 737 F.3d at 600 n.14.

decide which state has *the most significant relationship* to the case.[10] These factors are:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Second Restatement § 6(2). These factors are not listed in order of importance. Second Restatement § 6, cmt. C. Instead, "varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law." *Id.*

Chapter 9 of the Second Restatement is focused on the choice of law considerations most relevant to property cases. Section 222 sets forth how the general choice of law principles stated in § 6 are applicable to real and personal property:

> The interest of the parties in a thing are determined, depending upon the circumstances, either by the "law" or by the "local law" of the state which, with respect to the particular issue, has the most significant

[10] For this reason, the Second Restatement's approach is often called the "most significant relationship" test.

> relationship to the thing and the parties under the principles stated in § 6.

Second Restatement § 222. This general principle is "applicable to all things, to all interests in things and to all issues involving things. Topic 2 (§§ 223–243) deals with interests in immovables and Topic 3 (§§ 244–266) with interests in movables." Second Restatement § 222, cmt. a. Section 222 thus clarifies the subject of the § 6 "most significant relationship" inquiry: A court should consider which state "has the most significant relationship *to the thing and the parties* under the principles in § 6."[11] Second Restatement § 222 (emphasis added). Moreover, the commentary to § 222 notes the following about this "most significant relationship" inquiry:

> In judging a given state's interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case. The fact that these courts would have applied this rule may indicate that an important interest of that state would be served if the rule were applied by the forum.

Second Restatement § 222, cmt. e. In addition, the commentary to § 222 clarifies that "[i]n contrast to torts, protection of the justified expectations of the parties is of

[11] In addition to citing § 6 in the text itself, the commentary to § 222 also clarifies that "the principles stated in § 6 underlie all rules of choice of law . . . ." Second Restatement § 222, cmt. b.

considerable importance in the field of property." Second Restatement § 222, cmt. b (citation omitted).

The Second Restatement also has a specialized rule for a claim of acquisition by adverse possession or prescription of an interest in chattel. Second Restatement § 246 states, "Whether there has been a transfer of an interest in a chattel by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the state where the chattel was at the time the transfer is claimed to have taken place." The Second Restatement provides the following rationale for this rule:

> The state where a chattel is situated has *the dominant interest* in determining the circumstances under which an interest in the chattel will be transferred by adverse possession or by prescription. The local law of this state is applied to determine whether there has been such a transfer and the nature of the interest transferred.

Second Restatement, § 246, cmt. a (emphasis added).

After considering these sections of the Second Restatement and the relevant interests at stake, we conclude that this Court ought to apply Spanish law to decide whether TBC has title to the Painting. Although some of the § 6 factors suggest California law should apply, on balance, these factors indicate Spanish law should apply because Spain is the "state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6." Second Restatement § 222. We note at the outset that the courts of Spain would apply their own property laws to adjudicate TBC's claim that it owns the Painting because Spain uses a

law of the situs rule for movable property. *See* Civil Code Article 10.1, Ministerio de Justicia, *Spain Civil Code* 4 (2009) (English translation). As the commentary to § 222 notes, the fact that Spain would apply its own law suggests that an important interest of Spain may be served by applying Spanish law.

Also, as the district court recognized, the situs rule furthers the needs of the international system by encouraging certainty, predictability, and uniformity of result. Considering the relevant policies of "interested states," Spain's interest in having its substantive law applied is significant. In a highly publicized sale, Spain provided TBC public funds to purchase the Collection, including the Painting. TBC, an instrumentality of Spain, has possessed the Painting for over twenty years and displayed it in the Museum. In terms of protecting justified expectations, the 1993 Acquisition Agreement between TBC and the Baron states that English law governs the purchase of the Collection. But, the legal opinion provided by TBC's counsel stated that, under English law, Spanish law would govern the effect of the transfer. The Cassirers do not dispute this reading of English law.

Cutting in favor of the choice of California law is the fact that the forum, California, has a strong interest in protecting the rightful owners of fine arts who are dispossessed of their property. In fact, as noted in Part III.A, California has created a specific statute of limitations for cases involving an unlawful taking or theft of fine art. We also acknowledge that it is more difficult for a federal court to discern, determine, and apply Spanish law than California law.

Factor 6(e), which requires a court to consider the basic policies underlying property law, is arguably inconclusive. The property laws of both Spain and California seek to create

certainty of title, discourage theft, and encourage owners of stolen property to seek return of their property in a timely fashion. Although these states have chosen different rules for movable property, both sets of rules further the basic polices underlying property law.

On the other hand, § 246 indicates that Spain has the "dominant interest" in determining whether the Painting was transferred to TBC via acquisitive prescription because the Painting was bought in Spain and has remained in Spain. The Cassirers' arguments to the contrary are not persuasive. First, the Cassirers argue there is a bad faith exception to the law of the situs rule when an adverse possessor acquired property "which was known or should have been known to have been stolen." However, since the Cassirers rely only on a 1980 English court decision in support of this proposition, the argument is unpersuasive. Second, the Cassirers argue that the law of the situs rule is "outdated (not revised in 45 years), and is now inconsistent with modern choice of law principles." However, the Cassirers cite cases in which courts have abolished the law of the situs rule for *tort actions*. As a district court stated when applying § 246 in a stolen art case:

> The refusal by the New York Court of Appeals to apply the "place of injury" test in the tort field does not dictate a different result here. This is because the choice of law rule advanced in the cited cases and adopted in Section 246 of the Restatement incorporates the concept of the "significant relationship."

Kunstammlungen Zu Wimar v. Elicofon, 536 F. Supp. 829, 846 (E.D.N.Y. 1981) (citation omitted).

In sum, after applying the Second Restatement § 6 factors and the law of the situs rule of § 246, we conclude that Spanish law governs TBC's claim that it is the rightful owner of the Painting.

The Cassirers argue in a letter submitted to this Court pursuant to Federal Rule of Appellate Procedure 28(j) that we should not apply Spain's law because of HEAR. According to the Cassirers, HEAR indicates that the application of Spain's substantive law in this case would be "truly obnoxious" to federal policy. However, HEAR does not specify which state's rules of decision should govern the merits of claims involving art expropriated during the Holocaust. HEAR simply supplies a statute of limitations during which such claims are timely. Thus, HEAR does not alter the choice of law analysis this Court uses to decide which state's law will govern TBC's claim of title to the Painting based on acquisitive prescription.

C. The district court erred in deciding that, as matter of law, TBC had acquired title to the Painting through Article 1955 of the Spanish Civil Code because there is a triable issue of fact whether TBC is an *encubridor* (an "accessory") within the meaning of Civil Code Article 1956.[12]

1. An *encubridor* can be a knowing receiver of stolen goods.

After correctly determining that Spanish substantive law applied, the district court granted summary judgment in

[12] In interpreting Spanish law, we have relied on the record below, submissions from the parties and amici, and our own independent research. *See* Federal Rule of Civil Procedure 44.1 ("In determining

favor of TBC based on the district court's analysis of Spain's law of acquisitive prescription. Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As noted above, we view the evidence "in the light most favorable to the party opposing the motion," here, the Cassirers. *Am. Int'l Grp.*, 926 F.2d at 831.

The district court concluded that TBC had acquired title to the Painting because TBC had fulfilled the requirements of Article 1955, which states in relevant part, "Ownership of movable property prescribes by three years of uninterrupted possession in good faith. Ownership of movable property also prescribes by six years of uninterrupted possession, without any other condition." Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation). Possession is defined in Civil Code Article 1941, which states, "Possession must be in the capacity of the owner, and must be public, peaceful, and uninterrupted." Ministerio de Justicia, *Spain Civil Code* 219 (2009) (English translation).

As an initial matter, we reject the Cassirers' argument that TBC's defense of acquisition of prescriptive title through usucaption based on Article 1955 is foreclosed by HEAR. HEAR addresses when a suit may be commenced and creates a six-year statute of limitations that applies "notwithstanding any defense at law relating to the passage of time." HEAR § 5(a). Because of the time periods mentioned in Article 1955, TBC's defense based on Article 1955 could be at first glance considered "a defense at law

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foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.")

relating to the passage of time." However, TBC's Article 1955 defense is a defense on the merits: that TBC has *acquired title to the Painting based on Spain's property laws*. *See* Article 1955 ("*Ownership* of personal property prescribes by . . .") (emphasis added), Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation). Read in context, HEAR's § 5(a) language that the six-year statute of limitations applies "notwithstanding any defense at law relating to the passage of time" is meant to prevent courts from applying defenses that would have the effect of shortening the six-year period in which a suit may be commenced. HEAR does not bar claims based on the substantive law that vests title in a possessor, that is, the substantive law of prescription of title. Therefore, HEAR does not foreclose the possibility that TBC is entitled to summary judgment because TBC has acquired title to the Painting via Article 1955.

Read alone, Article 1955 would seem to vest title in one who gained possession, even absent good faith, after six years, so long as the possession was in the capacity as owner, public, peaceful, and uninterrupted. TBC took possession of the Painting in the capacity of an owner in 1993. TBC's claim was not challenged until the Cassirers' petition was filed in 2001. Although the Cassirers argue otherwise, TBC has established the "public" element because it is undisputed TBC publicly displayed the Painting in the Museum as part of the permanent collection it owned. Also, information about the Painting's location appeared in multiple publications between 1993 and 1999, the relevant six-year period. The parties agree TBC's possession was peaceful from 1993 until 1999. Finally, TBC's possession was uninterrupted during this time period. Thus, Article 1955, read in isolation, would seem to bar the Cassirers' action for recovery of the Painting.

But the very next article in the Spanish Civil Code, Article 1956, modifies how acquisitive prescription operates. Article 1956 reads:

> Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories [*encubridores*], until the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations.

Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation). Therefore, as to any principals, accomplices, or accessories (*encubridores*) to a robbery or theft, Article 1956 extends the period of possession necessary to vest title to the time prescribed by Article 1955 *plus* the statute of limitations on the original crime and the action to claim civil liability. *See* Spanish Supreme Court decision of 15 July 2004 (5241/2004).

The Cassirers argue that TBC is an accessory (*encubridor*) to the theft of the Painting because TBC knew the Painting had been stolen when TBC acquired the Painting from the Baron. For the crime of *encubrimiento* (accessory after the fact) and the crime of receiving stolen property, the two crimes the Cassirers argue TBC committed when it purchased the Painting from the Baron in 1993, the criminal limitations period is five years, 1973 Penal Code Articles 30, 113, 546(bis)(a) and 1995 Penal Code Articles 131, 298, and the civil limitations period is fifteen years, Judgment of January 7, 1982 (RJ 1982/184) and Judgment of July 15, 2004 (no. 5241/2004). Thus, if Article 1956 applies, including the six-year period from Article 1955,

TBC would need to possess the Painting for twenty six years after 1993, until 2019, to acquire title via acquisitive prescription. Since the Cassirers petitioned TBC for the Painting in 2001 and filed this action in 2005, *if Article 1956 applies*, TBC has not acquired prescriptive title to the Painting.[13]

Article 1956 extends the time of possession required for acquisitive prescription only as to those chattels (1) robbed or stolen from the rightful owner (2) as to the principals, accomplices or accessories after the fact ("*encubridores*")[14] with actual knowledge of the robbery or theft.

The parties agree the first requirement is satisfied because the forced sale of the Painting by Scheidwimmer and the Nazis is a misappropriation crime within the meaning of Article 1956. As for the second requirement, no one claims that TBC had any hand in that forced sale; TBC is not a principal or accomplice to the 1939 misappropriation of the Painting.

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[13] The Cassirers also argue that TBC has not acquired title because, under Spanish law, there is no statute of limitations for a crime against humanity and a crime against property during armed conflict. Since resolving this claim would not change the result in this case, we decline to decide this issue.

[14] When Article 1956 was adopted in 1889, the contemporary dictionary meaning of *encubridor* was "one who covers something up." *See* 1884 Diccionario de la Lengua Castellana, Real Academia Española. The 1888 General Etymological Dictionary of the Spanish Language by the prestigious linguist Eduardo Echegaray mirrors the definition of the Real Academia. No legal meaning appears in the dictionaries. However, in an official translation of Article 1956 from Spain's Ministry of Justice, "*encubridores*" is translated as "accessories."

The primary dispute between the parties is whether TBC is an accessory (*encubridor*) as that term is used in Article 1956. The district court accepted TBC's interpretation of Spanish law and found that TBC was not an *encubridor*. The district court decided that the term "*encubridor*" in Civil Code Article 1956 should be defined by reference to the Penal Code that was in effect when TBC acquired the Painting. In 1993, Article 17 of the Penal Code of 1973 (the Penal Code then in effect) defined *encubridor* to include only persons who, after the commission of the underlying crime, acted in some manner to aid those who committed the crime avoid penalties or prosecutions.[15] Before the district court, the Cassirers argued that TBC was an *encubridor* because TBC concealed the looting of the Painting to prevent the 1939 crime from being discovered. The district court held that TBC was not an *encubridor* within the meaning of Article 1956 because "there is absolutely no evidence that the Foundation purchased the Painting (or performed any subsequent acts) with the intent of preventing

[15] Article 17 of the 1973 Spanish Criminal Code defines *encubridores*:

> [T]hose who, aware of the perpetration of a punishable offense, without having had involvement in it as principals or accessories, are involved subsequent to its execution in any of the following ways:
>
> 1. Aiding and abetting the principals or accomplices to benefit from the felony or misdemeanors.
>
> 2. Hiding or destroying the evidence, effects or instruments of the felony or misdemeanor, to prevent it being discovered.
>
> 3. Harboring, concealing, or aiding the escape of suspected criminals . . . .

Scheidwimmer's or the Nazis' criminal offenses from being discovered." The district court concluded that, since Article 1956 did not apply, TBC had acquired title to the Painting under Article 1955.

On appeal, the Cassirers offer a new reason TBC is an Article 1956 accessory [*encubridor*]: According to the Cassirers, TBC knowingly received stolen property when TBC acquired the Painting from the Baron. The Cassirers advocate using the definition of *encubridor* from the 1870 Spanish Penal Code, which was in force when Article 1956 of the Civil Code was enacted in 1889. Article 16 of the 1870 Penal Code stated:

> Those who, with knowledge of the perpetration of the felony, and not having participated in it as perpetrators or accomplices, intervene after its execution in any of the following modes, are guilty of concealment: . . .
>
> 2. By obtaining benefit for themselves, or aiding the perpetrators to benefit from the effects of the crime.[16]

That definition of *encubridor* includes one who knowingly benefits himself from stolen property. The Cassirers argue that the 1889 legislature had the 1870 Penal Code definition

[16] "Son encubridores los que, con conocimiento de la perpetracion del delito, sin haber tenido participacion en él como autores ní cómplices, intervienen con posterioridad á su ejecucíon de alguno de los modos siguientes. Aprovechándose por si mismos ó auxiliando á los delincuentes para que se aprovechen de los efectos del delito."

in mind when the legislature enacted Article 1956. Article 1956 has not been modified since 1889.

TBC asserts that the Cassirers' new argument on appeal, that TBC is an *encubridor* based on the 1870 Penal Code definition because TBC, knowing of the theft, received the stolen painting, is "waived" because the Cassirers not did present it below. However, the Cassirers' new argument asks this Court to interpret the term "*encubridor*" in Article 1956. To do so, this Court must interpret the relevant sources of Spanish law. Therefore, the meaning of *encubridor* is a pure issue of law. Under this Court's precedent, we may consider a new argument on appeal which presents a pure issue of law even though it was not raised below. *In re Mercury Interactive Corp. Sec. Lit.*, 618 F.3d 988, 992 (9th Cir. 2010).

For the reasons stated below, we agree with the Cassirers that the term "*encubridor*" in Article 1956 has the meaning that term was given it in the 1870 Penal Code. We thus conclude that a person can be *encubridor* within the meaning of Article 1956 if he knowingly receives and benefits from stolen property.[17]

Since our jurisprudence requires us to apply Spanish substantive law, it stands to reason we should apply Spanish rules of statutory interpretation. Article 3.1 of the Spanish Civil Code ("Article 3.1") states, "Rules shall be construed according to the proper meaning of their wording and in connection with the context, with their historical and

[17] Article 1956 requires that the *encubridor* must have actual knowledge the chattel was the product of robbery or theft. *See* Spanish Supreme Court decision of 23 December 1986 (RJ 1986/7982).

legislative background and with the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose." [18] Ministerio de Justicia, *Spain Civil Code* 1 (2009) (English translation).

i. Proper Meaning of Wording

To determine the definition of "*encubridor*" in Article 1956, Article 3.1 first directs us to consider the "proper meaning of [its] wording." As noted above, dictionaries contemporary to the 1889 Civil Code shed little light on any legal meaning for the term *encubridor*. The 1884 Diccionario de la Lengua Castellana, Real Academia Española defines "*encubridor*" as one who practices "*encubrimiento*," which in turn is defined as "the action and effect of hiding a thing or not manifesting it."[19] The 1888 General Etymological Dictionary of the Spanish Language by the prestigious linguist Eduardo Echegaray mirrors the definition of the Real Academia.[20] Neither discusses the meaning of *encubridor* in legal terms or as used in the law. There is no mention of such elements as whether to be an *encubridor* the person need have knowledge of a prior crime or be motivated by a desire to help others or only himself.

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[18] "Las normas se intepretarán según el sentido propio de sus palabras, en relación con el contexto, los antecedentes históricos y legislativos, y la realidad social del tiempo en que han de ser aplicadas, atendiendo fundamentalmente al espíritu y finalidad de aquellas."

[19] **Encubridor**: Que encubre. **Encubrir**: Ocultar una cosa ó no manifestarla.

[20] **Encubridor, ra:** Que encubre alguna cosa. Usase también como sustantivo. **Encubrir:** Ocultar una cosa ó no manifestarla.

Of course, if an *encubridor* hides the chattel, he cannot fulfill the open, public display of the chattel, in the capacity of an owner, which Article 1955 requires for usucaption. Does it follow that if he displays the chattel sufficiently to satisfy usucaption possession he is not an *encubridor*? Certainly, TBC displayed the Painting to the public and acted as the owner of the Painting.

This logic could be accepted if the word *encubridor* was used in Spanish law to mean only a person who conceals or hides or fails to manifest. But that is not what has been found to be the case, as we will see when we apply the second rule of interpretation prescribed by Article 3.1.

ii. Context

Second, Article 3.1 instructs us to determine the meaning of a rule "in connection with the context." "*Encubridor*" in Article 1956 is used in a legal context. Hence, what does *encubridor* mean in Spanish law?

Both parties agree that the Penal Code is the proper place to look for the legal meaning of the term *encubridor*. However, while the Cassirers urge this Court to use the 1870 Penal Code definition, which includes a receiver of stolen goods who acts for his own benefit, TBC urges this Court to use the 1973 Penal Code definition, which TBC claims excludes such a receiver. Under the 1973 Penal Code, only accessories after the fact acting in aid of the perpetrators or accomplices of the original crime are expressly declared *encubridores* under Article 17.1.

iii. Historical and Legislative Background

These conflicting positions require us to go to the third canon of interpretation stated in Article 3.1: "the historical and legislative background."

a. Definition of "*encubridor*" in the 1870 Penal Code

Looking to "the historical and legislative background" of Article 1956, we conclude that the term "*encubridor*" should be construed consistently with the definition of "*encubridor*" in the 1870 Penal Code. The parties agree that the content of the term "*encubridor*" in the Civil Code should be determined by reference to the Penal Code. The 1870 Penal Code was in effect when Article 1956 of the Civil Code was enacted in 1889, and Article 1956 has not been amended since its enactment. Under the 1870 Penal Code, "[t]hose who, with knowledge of the perpetration of a crime," intervene after its execution "[b]y obtaining benefit for themselves, or aiding the perpetrators to benefit from the effects of the crime" are *encubridores*. Thus, if the 1870 Penal Code definition of "*encubridor*" applies for Civil Code Article 1956, an *encubridor* includes someone who knowingly benefits from stolen property, including a person who knowingly receives stolen property.

However, TBC claims that the Law of May 9, 1950 ("1950 Law") removed from the Penal Code's definition of *encubridor* a person who, with knowledge of the theft or robbery which produced the stolen chattel, took the chattel into his possession solely for his own benefit and not for the benefit of the perpetrators of the theft or robbery and that this law changed the definition of "*encubridor*" in Civil Code Article 1956 as well. There are two reasons this is not so.

First, Article 3.1's instruction to evaluate a statute's "historical and legislative background," Ministerio de Justicia, *Spain Civil Code* 1 (2009) (English translation), refers to the history that occurred before Article 1956 was enacted in 1889, not subsequent developments. Although the Spanish legislature modified *the Penal Code* through the 1950 Law, it did not alter *the Civil Code*, including Article 1956. Therefore, the 1870 Penal Code provides the pertinent definition of the term "*encubridor*" in Article 1956.

b. The 1950 Law

Second, even if the 1950 Law should affect how we interpret the term "*encubridor*" in Article 1956, we reject TBC's suggestion that the enactment of the 1950 Law changed the definition of "*encubridor.*" True, in its enactment of Article 17.1, the 1950 Law *eliminated Article 16.1* of the 1870 Penal Code and that portion of the definition of *encubridor* that included an accessory after the fact acting for his own benefit. The 1950 law enacted Article 17.1, which restricted *encubridor* to include only accessories after the fact acting on behalf or in aid of the original thieves and accomplices. But the 1950 Law did not eliminate altogether from the Penal Code the 1870 definition of *encubridor* that included a person acting for his own benefit, motivated by lucre. First, the 1950 Law recited in its preamble an intention *not* to change the venerable law regarding accessories: "[I]t does not seem prudent to radically change this institution, that is now in Division I of the common Criminal Code, a penalizing law that is a homogeneous piece mounted on a venerable and correct classic. And it does not seem advisable until one day the general lines of our old Code are changed, if need be." Second, *it simply moved the 1870 definition of encubridor elsewhere* in enacting the new statute that made it a crime to receive goods known to be

stolen. Article 2 of the 1950 Law created the crime of receiving stolen property as Article 546(bis)(a) of the Penal Code with the title "Del encubrimiento con ánimo de lucro y de la receptación" (meaning "Regarding acting as the accessory [*encubrimiento*] with the purpose of obtaining profit or receiving stolen property [*receptación*]"). Thus, *encubrimiento* in the Penal Code was *still* described as including acting as an accessory by receiving stolen goods for one's own benefit.

The preamble to the 1950 Law in fact also states that the purpose of the law is procedural: to allow independent criminal prosecutions for receivers of stolen goods even when the principals of, or accomplices to, the theft or robbery cannot be located. Under Spanish law at the time, accessories after the fact could not be charged by themselves. They were subject only to a joint proceeding in which they were joined as defendants with principals and accessories, if any.

The language of Article 546(bis)(a) of the Penal Code, as adopted at the time, reflects the fact that receiving stolen goods had long been considered a form of *encubrimineto* (acting as an accessory):

> Who with knowledge of the commission of a felony against property takes advantage for himself of the product of the [felony], will be punished with minor jail and fined from 5,000 to 50,000 pesetas. In no case can a sentence which deprives one of liberty exceed that established *for the felony concealed* ["*al delito encubierto*"].

Specifically, the use of the adjective "*encubierto*" to describe the activities of a receiver of stolen goods acting for

his own benefit implies that the receiver is himself an *encubridor*. Thus, the historical and legislative background of the term *encubridor* in the Spanish Penal Code suggests that someone who knowingly receives and benefits from stolen property can qualify as an *encubridor* for purposes of Civil Code Article 1956.

iv. Social Reality at Time of Enactment

Turning to the fourth canon in Article 3.1, this Court should consider "the social reality of the time" in which Article 1956 is to be applied. In 1993, when TBC acquired the Painting, the crime of receiving property known to be stolen and the crime of acting as accessory after the fact of theft by possessing such property were interchangeable in practice. This fact is demonstrated by the Judgment 1678/1993 of July 5 (RJ 1993/5881) that is cited in the amicus brief of Comunidad Judía de Madrid and Federación de Comunidades Judías de España. In that case, the appeal to the Supreme Court of Spain was on the basis of what we call a "variance" between the indictment and the crime of conviction. The appellant had been *accused of receiving stolen goods*, but was *convicted of being an accessory after the fact*. The Spanish Supreme Court found that the perpetrator's actions in receiving stolen jewelry to sell and keep the proceeds were sufficiently laid out in the accusatory pleading to allow the defendant to mount an adequate defense to the charge of being an accessory after the fact, even if he was convicted of a crime strictly not charged. There was no mention of the defendant acting in aid of the persons who had committed the original jewelry theft. As the court stated, "Thus then, we must say that here we find ourselves before two homogeneous felonies, with identity of rights protected and in fact adjudged, and as the sentence imposed was less [than that of the crime laid out in the

accusation] it is clear that the principle of [fair notice] accusation was lawfully respected."

The Spanish Supreme Court also recognized the interchangeability of the crimes of receiving stolen goods and of being an accessory after the fact (*encubridor*) in Judgment 77/2004, of 21 January (RJ2004/485). [21] In this case, a boat was stolen in Germany and the defendant knew it was stolen. After trying to sell the boat to a good faith purchaser, the defendant was accused of being a receiver of stolen goods (*receptador*) by accusatory pleading, but then was convicted under Article 17.1 as an accessory after the fact (*encubridor*). The court found no fatal "variance" between the accusatory pleading under Article 546(bis)(a) and the conviction under Article 17.1 because the defendant was given fair notice of all the "points" on which conviction would depend at trial, and hence could mount a complete defense. According to the Supreme Court, both crimes require (1) knowledge of the prior felony and the stolen nature of the goods in question and (2) possession of those goods by the accused. Again, there was no mention that the defendant acted as an accessory after the fact by concealing, in aid of the boat's thief.

[21] In 1995, the Penal Code was updated and the crime of receiving stolen goods was moved to Article 298 of the Penal Code. Of note, in specifying sentencing, Article 298 retains the language used in the old Article 546(bis)(a), "Under no circumstances whatsoever may a sentence of imprisonment be imposed that exceeds that set for the felony concealed." In Spanish, "En ningún caso podrá imponerse pena privativa de libertad que exceda de la señalada al delito encubierto." This was the same language that was used in Article 546(bis)(a) in force from 1950 to 1995.

Our conclusion that the terms "accessory motivated by lucre" and "receiver of stolen goods" are interchangeable and have been preserved in the Spanish Penal Code following the 1950 Law is not novel. This seems to have been the interpretation given that portion of the 1950 Law by Cuello Calón in his annual report on criminal law: "*Anuario*: Annual of Penal Law and Penal Sciences (1951), modifications introduced in the Penal Code as to accessory [liability] by the Law of 9 May, 1950."[22] As Calón states, "Better fortune [as to the survival of the terms after the 1950 law] has occurred to the so-called '*receptación*' or '*encubrimiento*' for both expressions are used as synonyms by the new law."[23]

In sum, after applying the four methods of interpretation set forth in Article 3.1, we conclude that the meaning of *encubridor* (accessory after the fact) in the 1889 Civil Code is that of the 1870 Penal Code and that later legislation has not changed that meaning. Thus, an Article 1956 *encubridor* can be someone who acts as accessory after the fact of the crime committed, and who acts for his own benefit—to gain lucre. A detailed reading of the 1950 Law tells us this meaning of *encubridor* was not intended to be changed nor was in fact changed by that Law. That law rearranged the

[22] Anuario de Derecho Penal y Ciencias Penales (1950), Modificaciones introducidas en el Codigo penal en materia de encubrimiento por la Ley de 9 de Mayo, 1950, p. 346, Eugenio Cuello Calón ("Anuario, 1950"). *See also* Cuello Calón, *Derecho Penal* 672 (C. Camargo Hernandez rev. 18th ed. 1981) (explaining that concealment is a crime separate and distinct from the original theft and robbery which provided the stolen chattel).

[23] "Mejor suerte ha cabido a la llamada 'receptación o encubrimiento, con ánimo de lucro' pues ambas expresiones son usadas como sinónimas por la nueva ley."

concept of an accessory after the fact acting for his own benefit into the receipt of stolen goods for procedural convenience: to allow prosecution of the suspect without the necessity of a joint prosecution of the principals and accomplices, if any, of the underlying crime. But a knowing receiver of stolen goods could still be prosecuted as an accessory after the fact to the theft even if he benefited only himself. The meaning of "*encubridor*" is considered interchangeable with "*receptador*" (receiver of goods known to be stolen) as shown by the title and text of Article 2 of the 1950 Law. Also, this reading of the Law of May 9, 1950, is confirmed by Spanish Supreme Court decisions which describe the two terms as interchangeable and homogeneous. Last, this homogeneity is recognized by the official annual report written by Cuello Calón contemporaneously with the adoption of the 1950 Law.

2. TBC has not established, as a matter of law, that it did not have actual knowledge the Painting was stolen property.

Assuming Article 1956 applies to someone who knowingly benefits from stolen property, TBC has not established as a matter of law that it acquired title to the Painting through acquisitive prescription. Clearly, TBC benefited from having the Painting in its museum. As for the required actual knowledge element of Article 1956, we review the evidence proffered by the Cassirers with all inferences in their favor as required by our summary judgment rules, to see if the Cassirers have produced sufficient evidence to create a triable issue of fact that TBC knew the Painting had been stolen from its rightful owner(s) when TBC acquired the Painting from the Baron.

Dr. Jonathan Petropoulos, the Cassirers' expert and a professor of European History who has published on the

subject of Nazi art looting, declared that numerous so-called "red flags" would have indicated to TBC (and to the Baron) that the Painting was stolen.[24] The provenance information given by the Stephen Hahn Gallery to the Baron in 1976 did not mention a previous owner, only the gallery Durand-Ruel in Paris, where the painting was said to have been exhibited in 1898 and 1899.[25] The Painting contained a partial label on the back that said "Berlin" and part of two words "Kunst– und Ve . . ." that may be German for "art and publishing establishment" ("Kunst und Verlagsanstalt"). This label may be from the Cassirers' art gallery. Although this label was on the back of the Painting, the Painting had no documentation showing a voluntary transfer of the Painting out of Berlin. Also, according to Dr. Petropoulos, Pissarro paintings were "immediately suspect" because they were favored by European Jewish collectors and often looted by the Nazis. Dr. Petropoulos noted that the French Ministry of Culture in 1947 published a compendium of French cultural losses during World War II that includes forty-six works by Pissarro that were looted by the Nazis and have yet to be recovered. The CORA decision confirming Lilly's rightful ownership of the Painting had been published and made available to the public.[26]

[24] TBC started investigating the Baron's collection in 1989. Thus, TBC had time to discover these red flags before the 1993 purchase.

[25] Julius Cassirer, who was Lilly's father-in-law, bought the Painting from Paul Durand-Ruel in Paris in 1898.

[26] Dr. Petropoulos provided some evidence that suggests TBC may have been aware of this decision: the CORA decision was cited in a 1974 book about Allied restitution laws published by a prestigious German publisher that received reviews in English language periodicals.

How TBC purchased the Painting also provides some evidence that TBC knew the Painting was stolen. While TBC held the collection on loan, in an official publication in 1992, *Modern Masters* by Jose Alvarez Lopera, TBC published incorrect provenance history that stated the Baron had acquired the Painting through the Joseph Hahn Gallery in Paris when in fact the Baron purchased the Painting through the Stephen Hahn Gallery in New York. The Cassirers argue that TBC sought to conceal the Painting's provenance because the Stephen Hahn Gallery sold at least one other work looted by the Nazis. Also, when investigating the Baron's collection, TBC's lawyers decided to assume the Baron acquired his collection in good faith. By assuming good faith, *TBC chose to investigate only artwork that was acquired by the Baron after 1980*. One possible inference is that TBC knew the Painting was stolen and did not want to create documentation that reflected this history.

TBC paid $338 million for the Baron's Collection that included the Painting when the Collection's estimated value was between one and two billion dollars. Although TBC offers a number of innocent explanations for this below-market price, this fact may indicate that TBC knew the Painting and other works in the collection were stolen. William Smith, an expert in 16th to 20th century European paintings who filed a declaration on behalf of the Cassirers, opined that the Painting was sold *to the Baron* at a discount of 41.2%–50% of the estimated gallery retail price. TBC argues that the Baron did not purchase the Painting at a suspiciously low cost, but we must consider this clash of evidence in the light most favorable to the Cassirers. TBC's knowledge of the below-market price the Baron acquired the Painting for may also suggest TBC knew the Painting was stolen.

In conclusion, when all of the evidence is considered in the light most favorable to the Cassirers, the Cassirers have created a triable issue of fact whether TBC knew the Painting was stolen from Lilly when TBC purchased the Painting from the Baron. TBC acquired the Painting for its own benefit, and TBC may have known the Painting was stolen. If so, TBC can be found by the trier of fact to be an *encubridor* who could not have acquired title to the Painting through acquisitive prescription until 2019 since an Article 1956 *encubridor* can be someone who knowingly benefits from the receipt of stolen property. Therefore, the district court erred in granting summary judgment on the grounds that, as a matter of law, TBC acquired the Painting through acquisitive prescription.[27]

D. TBC is not entitled to summary judgment based on its claim that the Baron had lawful title to the Painting under Swiss law.

In TBC's cross-appeal of the summary judgment order, TBC argues that "it is the lawful owner of the Painting because [TBC] purchased the Painting in a lawful conveyance from a party (the Baron) who had valid title to convey." Since the district court granted summary judgment in favor of TBC on the basis of Spanish law, the district court did not consider TBC's argument that the Baron gained

[27] The Cassirers make a similar argument that TBC "purloined" the Painting within the meaning of Article 1956 and therefore could not have acquired the Painting through acquisitive prescription. In support of this argument, the Cassirers cite Spanish authorities suggesting the term "purloin" in Article 1956 can include knowing receipt of stolen goods. Therefore, whether interpreting "*encubridor*" or "purloin," the Cassirers' argument turns on whether someone who receives and benefits from goods known by him to be stolen is delayed in taking prescriptive title because of Article 1956.

lawful title before transferring the Painting to TBC. Nonetheless, "if the district court's order can be sustained on any ground supported by the record that was before the district court at the time of the ruling, we are obliged to affirm the district court." *Jewel Cos., Inc. v. Pay Less Drugs Stores Nw. Inc.*, 741 F.2d 1555, 1564–65 (9th Cir. 1984) (citing *Calnetics Corp v. Volkswagen of Am., Inc.*, 532 F.2d 674, 682 (9th Cir. 1976)).

We begin our analysis by considering which state's law governs the effect of the conveyance from the Baron to TBC. As noted in Part III.B, based on the principles set forth in the Second Restatement of the Conflict of Laws, this Court should apply Spanish property law to adjudicate TBC's claim that it is the rightful owner of the Painting. Also, § 245 of the Second Restatement states, "The effect of a conveyance [from the Baron to TBC] upon a pre-existing interest in a chattel of a person [Cassirer] who was not a party to the conveyance will usually be determined by the law that would be applied by the courts of the state where the chattel was at the time of the conveyance." The Painting was in Spain when TBC and the Baron entered into the acquisition agreement on June 21, 1993, because TBC had held the Painting as part of the prior loan agreement. As noted in Part III.B, Spain uses the law of the situs rule for movable property. *See* Civil Code Article 10.1, Ministerio de Justicia, *Spain Civil Code* 4 (2009) (English translation). This means Spain would apply its own property laws to decide the effect of the conveyance from the Baron to TBC. Thus, the Second Restatement directs us to apply Spanish law to determine whether TBC acquired ownership of the Painting via the 1993 acquisition agreement.

Under Spanish law, a consensual transfer of ownership requires title and the transfer of possession. *See* Civil Code

Article 609, Ministerio de Justicia, *Spain Civil Code* 83 (2009) (English translation). As noted, when the acquisition agreement was entered into, possession of the Painting had already been transferred to TBC pursuant to the loan agreement. Therefore, *if the Baron had good title to the Painting* when he sold it to TBC, then TBC became the lawful owner of the Painting through the acquisition agreement.

TBC argues that the Baron had good title to convey because the Baron acquired good title to the Painting either through the Baron's purchase of the Painting in 1976 from the Stephen Hahn Gallery in New York or through Switzerland's law of acquisitive prescription. Since Spain applies the law of the situs for movable property, Spanish law would look to New York law to determine the effect of the 1976 conveyance in New York, and Swiss law to determine whether the Baron acquired title to the Painting when he possessed it in Switzerland between 1976 and 1992.

Under New York law, "a thief cannot pass good title." *See Bakalar v. Vavra*, 619 F.3d 136, 140 (2d. Cir. 2010) (citing *Menzel v. List*, 267 N.Y.S. 2d 804 (N.Y. Sup. Ct. 1966)). "This means that, under New York law, . . . absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods." *Id.* (internal quotation marks omitted). Here, even if the Stephen Hahn Gallery (the gallery from which TBC alleges the Baron purchased the Painting) had no knowledge that the Nazis stole the Painting, the conveyance did not confer good title on the Baron under New York law.

As noted, TBC also argues that the Baron acquired title to the Painting through the Swiss law of acquisitive

prescription. Under Swiss law, to acquire title to movable property through acquisitive prescription, a person must possess the chattel in good faith for a five-year period. Swiss Civil Code Article 728. The Baron completed the five-year period of possession between 1976 and 1981. Even though the Baron exhibited the Painting during a tour of Australia and New Zealand in 1979 and 1981, TBC's Swiss law expert stated that this exhibition abroad "did not create a legally relevant interruption, since the Painting was bound to return to [Switzerland]." In briefing to this Court, the Cassirers do not dispute that the Baron possessed the Painting for a sufficient amount of time.

However, the Baron acquired title through acquisitive prescription only if he possessed the Painting *in good faith*. The Cassirers assert there is a triable issue of fact as to whether the Baron possessed the Painting in good faith. Swiss law presumes good faith. *See* Swiss Civil Code Article 3.1. But good faith can be rebutted by showing that a person "failed to exercise the diligence required by the circumstances." *See* Swiss Civil Code Article 3.2. According to Dr. Wolfgang Ernst, TBC's Swiss law expert, the finding of good faith or bad faith in an individual case is considered to be an issue of fact.

In determining whether a purchaser acted in good faith or not, the Swiss Supreme Court has considered factors such as: (1) whether the purchaser should have considered the stolen or looted origin of the object at least as a possibility; (2) the fact that specific circumstances, such as war, required a high degree of attention; and (3) the general public knowledge of the circumstances in which the works of art were taken from their legitimate owners. *See Paul Rosenberg v. Theodore Fisher et al.*, Swiss Supreme Court June 3, 1948. Thus, a good faith purchaser is one who is

honestly and reasonably convinced that the seller is entitled to transfer ownership.

After reviewing the record developed before the district court, we conclude that there is a triable issue of fact as to the Baron's good faith. As noted in Part III.C, the Stephen Hahn Gallery from which the Baron purchased the Painting sold at least one other work looted by the Nazis. William Smith, the Cassirers' expert in European paintings, stated that the $275,000 price the Baron paid for the Pissarro in 1976 "was approximately half of what would have been expected in a dealer sale, and that there is no reasonable explanation for this price other than dubious provenance."[28]

Furthermore, Dr. Jonathan Petropoulos' "red flags" analysis of the Painting's background provides some evidence that suggests the Baron did not possess the Painting in good faith.[29] To recap these alleged "red flags," the Nazis looted many Pissarro paintings, which were a favorite among European Jewish collectors. Moreover, the Painting had a torn label on the back from a gallery in Berlin (the Cassirers' gallery), but no documentation showing a voluntary transfer of the Painting out of Berlin. The published CORA decision identified Lilly's ownership of

[28] Although TBC's expert, Dr. Ernst, stated that he was "not aware of any evidence that this price was conspicuously low so as to indicate eventual problems regarding the provenance/title situation[,]" we must view this conflict of evidence in the light most favorable to the non-moving party, the Cassirers.

[29] As Dr. Petropoulos declared, "In my opinion, if the Baron and TBC did not in fact know of the faulty provenance of the Painting and the high likelihood that they were trafficking in Nazi looted art, they were willfully blind to this risk and ignored very obvious 'red flags' that no reasonable buyer would have ignored."

the Painting. Also, Dr. Petropoulos stated that Ardelia Hall and Ely Maurer at the United States State Department collected CORA decision reports and warned museums, university art facilities, and art dealers about looted artworks entering the United States and that, had the Baron contacted these individuals about the Painting, the CORA decision would have been discovered. When the Baron purchased the Painting, the Stephen Hahn Gallery provided minimal provenance information: no previous owner was mentioned, only the gallery Durand-Ruel in Paris, where the painting was said to have been exhibited in 1898 and 1899. Dr. Petropoulos states that the Baron's "highly distinguished cohort of experts" failed to "undertake a serious investigation" to determine the provenance of the Painting. Another expert for the Cassirers, Marc-André Renold, a professor at the University of Geneva Law School who specializes in international art law, stated that he "would have expected someone of the Baron's sophistication to have undertaken a more diligent search into the provenance of the Painting."

This evidence indicates there is a triable issue of fact whether the Baron was a good faith possessor under Swiss law. Therefore, we cannot affirm the district court's grant of summary judgment on the basis that, as a matter of law, the Baron acquired title to the Painting under Swiss law.[30]

[30] The triable issue of fact whether the Baron held the Painting in good faith is another reason TBC cannot establish as a matter of law that the Baron acquired title to the Painting through the 1976 conveyance from the Stephen Hahn Gallery. Even if the Painting was purchased in Switzerland and the conveyance was governed by Swiss law, under Swiss law, only a good faith purchaser can acquire title to a chattel through a conveyance. *See* Swiss Civil Code Article 936 ("A person that

E. TBC is not entitled to summary judgment based on its laches defense.

TBC also argues in its cross-appeal of the summary judgment order that the Cassirers' claims are barred by laches. TBC raises its laches argument under California law. Since the district court granted summary judgment on the basis of Spanish law, the district court did not consider TBC's laches defense. As noted above, we also conclude that Spanish law applies.

However, even if California law applied, this Court has stated: "To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself. Because the application of laches depends on a close evaluation of all the particular facts in a case, it is seldom susceptible to resolution by summary judgment." *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000) (per curiam) (citations omitted). There is at least a genuine dispute of material fact as to whether any delay was unreasonable. After the war, Lilly sought physical restitution of the Painting, but her unsuccessful efforts involving litigation lasting a decade ended with the 1958 Settlement Agreement. Thus, Claude Cassirer could have reasonably believed the Painting was lost or destroyed in the war.

Thus, TBC is not entitled to summary judgment based on its laches defense.

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has not acquired a chattel in good faith may be required by the previous possessor to return it at any time.").

F. Lilly's acceptance of the 1958 Settlement Agreement does not foreclose the Cassirers' claims.

In TBC's appeal of the district court's order denying its motion for summary adjudication on the grounds that Lilly waived her ownership rights to the Painting in the 1958 Settlement Agreement, TBC repeats the same arguments that the district court rejected. As noted in Part I.A, the 1958 Settlement Agreement was between Lilly, Scheidwimmer (the Nazi art appraiser), Grete Kahn (the heir of the other Jewish victim, Sulzbacher), and the German government. The Settlement Agreement provided that: (1) Germany would pay Lilly 120,000 Deutschmarks (the Painting's estimated value as of April 1, 1956); (2) Grete Kahn would receive 14,000 Deutschmarks from the payment to Lilly; and (3) Scheidwimmer would receive the two German paintings. Grete Kahn expressly waived any right to restitution of the Painting. However, Lilly did not expressly waive her right to physical restitution. Instead, as for Lilly, the Settlement Agreement just notes that the settlement settles "all mutual claims among the parties." The whereabouts of the Painting was unknown, no party possessed it.

Neither party has expressly argued which sovereign's law should be used to interpret the Settlement Agreement. However, the district court applied German law, and the parties do not contest this conclusion on appeal. Accordingly, any choice-of-law issue has been waived, *Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th Cir. 1996), and we apply German law in interpreting the Settlement Agreement.

TBC argues that Lilly's acceptance of the Settlement Agreement defeats the Cassirers' claims for three reasons. First, TBC argues that Lilly implicitly waived her right to

seek physical restitution when she accepted the Settlement Agreement. Second, TBC argues the Settlement Agreement remedied and resolved the "taking in violation of international law," and pending litigation of a claim involving a taking is required for FSIA jurisdiction. Third, TBC argues that federal policy on Nazi-looted art requires honoring the finality of the Settlement Agreement.

In support of its first argument, TBC notes that the Settlement Agreement states that it "settles all mutual claims among the parties." However, Lilly knew that none of the parties had possession of the Painting or knowledge of its whereabouts, and the agreement purported to settle claims only *among the parties*. Also, the Settlement Agreement expressly waives Grete Kahn's right to physical restitution, but not Lilly's.

The district court noted that the Bundesgerichtshof (Germany's Supreme Court) recently issued a ruling favorable to the Cassirers' interpretation of the Settlement Agreement. In that case, the Nazis misappropriated a valuable poster collection belonging to a German Jew, Dr. Sachs. *Peter Sachs v. Duetsches Historisches Museum*, BGH, Mar. 16, 2012, V ZR (279/10) (Ger.). In 1961, Dr. Sachs accepted a settlement agreement through the same program that Lilly had used, the Brüg, and Dr. Sachs' settlement agreement stated that it provided "compensation for all claims asserted in this proceeding." When Dr. Sachs' son discovered the posters still existed and were being held by the German Historical Museum in East Berlin, he sought physical restitution. The German high court ordered the German Historical Museum to return the poster collection even though Dr. Sachs had accepted his settlement agreement. The German Supreme Court held that Dr. Sachs' claim for physical restitution was not waived by accepting

his settlement agreement because his property was considered lost at the time he accepted the payment. The court also held that Sachs' right to physical restitution was not waived because he had not made an "unambiguous act" renouncing the right.

The *Sachs* precedent is on all fours with Lilly's case. Therefore, Lilly too did not waive her right to physical restitution of the Painting by accepting the 1958 Settlement Agreement. Two other sources of German law support this conclusion. First, Germany's Commissioner of the Federal Government for Matters of Culture and the Media has stated that, for claims of restitution of artwork in which an earlier payment under the Brüg was provided, "earlier compensation payments are not an obstacle to the return of cultural assets, provided that the amount paid earlier is reimbursed[.]" Second, the Cassirers provided a declaration from a German attorney specializing in restitution law who stated his expert opinion that the Settlement Agreement did not waive Lilly's right to physical restitution.

TBC cites to the District Court of Munich's decision acknowledging the 1958 Agreement as evidence Neubauer waived her ownership rights to the painting. But this decision undermines, rather than advances, TBC's argument. The District Court of Munich specifically noted that Lilly "*only waived the restitution claim against Scheidwimmer* as a result of the settlement of 2.28.1958" (emphasis added). Thus, the German court acknowledged that Lilly waived any claims against Scheidwimmer, who was determined not to have possession of the Painting, but it noted that was the only claim Neubauer waived. This further supports our conclusion that Lilly did not waive her right to physical restitution of the Painting.

TBC's second argument is that the Settlement Agreement remedied and resolved the "taking in violation of international law," which means this Court does not have subject matter jurisdiction under the FSIA expropriation exception to sovereign immunity, 28 U.S.C. § 1605(a)(3). This section states that a foreign government's sovereign immunity is abrogated when:

> Rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). According to TBC, the Settlement Agreement deprives this court of jurisdiction under the FSIA because the Settlement Agreement provided Lilly compensation for the loss of the Painting, and therefore no right in property is still at issue because the Settlement Agreement resolved the taking in violation of international law.

TBC is wrong because one of the Cassirers' "rights in property taken in violation of international law" remains at issue. As explained above, the 1958 Settlement Agreement did not extinguish Lilly's right to physical restitution of the Painting. Therefore, the Cassirers still have a property right (physical restitution) that remains at issue.

TBC's third argument starts from the premise that this Court has recognized that U.S. federal policy favors respecting the finality of appropriate actions taken in foreign countries to restitute Nazi-confiscated artwork. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d

712, 721 (9th Cir. 2014). According to TBC, allowing the Cassirers to continue their suit would "disregard" the German restitution proceedings and therefore conflict with federal policy. However, this argument mistakenly assumes Lilly waived her right to seek physical restitution of the Painting when she accepted the Settlement Agreement and that Germany considers the Settlement Agreement to have extinguished her claim to physical restitution.

G. Spain's Historical Heritage Law does not prevent TBC from acquiring prescriptive title to the Painting.

The Cassirers make yet another new argument on appeal: TBC could not have acquired title to the Painting through acquisitive prescription because of Spain's Historical Heritage Law ("SHHL"). TBC argues that the Cassirers' new argument based on the SHHL is also waived because it too was not argued below. However, this argument is also not waived because this Court may consider pure issues of law on appeal even when not raised below. *Mercury*, 618 F.3d at 992.

The SHHL law creates a comprehensive program for ensuring that cultural artifacts (including buildings, artwork, and archeological artifacts) are maintained in Spain for viewing by future generations of Spaniards. *See* Preliminary Title, General Clauses. The Painting was designated part of Spain's historical heritage in Real Decreto-Ley 11/1993, which also authorized and funded the purchase of the Collection.

Article 28 of the SHHL contains restrictions on the transfer of movable property that is part of the Spanish Historical Heritage. Article 28 has three parts. Article 28.1 states, "Movable property declared of cultural interest and

included in the General Inventory that is in the possession of ecclesiastical institutions . . . may not be transferred, whether with consideration or as a gift, or ceded to individuals or commercial entities. Such property may only be transferred or ceded to the State, to entities that are a creation of Public Law, or to other ecclesiastical institutions." Article 28.2 and 28.3 state:

> 2. Movable property that forms part of the Spanish Historical Heritage may not be transferred by the Public Administration, except for transfers between public administrative entities and as provided for in articles 29 and 34 of this Law.
>
> 3. The property that this article refers to will not be subject to the statute of limitations. Under no circumstance shall the provisions of Article 1955 of the Civil Code be applied to this property.

According to the Cassirers, SHHL Article 28.3 prevents TBC from using Civil Code Article 1955 to acquire title to the Painting.

The phrase in Article 28.3, "[t]he property that this article refers to" references property described in Article 28.1 and 28.2. Article 28.1 regulates "movable property" that has two qualities. First, that property must be "declared of cultural interest and included in the General Inventory[.]" Second, that property must be "in the possession of ecclesiastical institutions, in any of their facilities or branches[.]" Article 28.1 prohibits ecclesiastical institutions from transferring that property to individuals or commercial entities. Article 28.2 regulates "movable property that forms

part of the Spanish Historical Heritage." Article 28.2 prohibits public administrations from transferring this property, except via specific transfers authorized by Articles 29 and 34.

Read in context, *Article 28.3 constitutes an additional limitation on the ability of ecclesiastical institutions and state institutions to alienate movable property of Spanish historical heritage*. Article 28.3 prevents churches or state entities from losing title to historical heritage property through the expiration of the statute of limitations, which confers a substantive right under Spanish law, or through Article 1955 acquisitive prescription. Therefore, churches and state institutions cannot evade the restrictions on transfer described in Articles 28.1 and 28.2 by allowing a private individual to take possession of the regulated property for the statutory period. Article 28.3 also preserves public access to historical heritage property in case churches or state administrations carelessly fail to take or maintain possession of that property in a timely fashion. Since Article 28.3 is designed to prevent churches and state institutions from losing title to historical heritage property, the provision should not be interpreted to prevent TBC, a state institution, from asserting title to the Painting through acquisitive prescription.

H. The district court correctly found that the application of Article 1955 to vest TBC with title to the Painting would not violate the European Convention on Human Rights.

As a last salvo, the Cassirers argue, "[a]sssuming Spanish law strips the Cassirers' ownership of the Painting, the law is void under Article 1 of Protocol 1 ("Article 1") of the European Convention on Human Rights (the "Convention")." Spain is a party to the Convention,

including Protocol 1. The Convention is supreme over Spanish domestic law. Article 1 of Protocol 1 states:

> Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In *Case of J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. The United Kingdom*, 46 EHRR 1083 (2007) ("*Pye*"), a British court had awarded title through adverse possession to land on which the Grahams had grazed their animals for twelve years after the grazing agreement with neighboring real estate developers had expired. *Pye* ¶ 10–22. The former landowners asked the European Court of Human Rights ("ECHR") to review this decision, and the ECHR, sitting en banc, ruled that the prescriptive acquisition did not violate Article I. Specifically, the court held that the application of Britain's adverse possession law amounted to a permissible "control of use" of land within the meaning of the second paragraph of Article 1. *Pye* ¶ 66. The court also held that this adverse possession law was legitimate and in the "general" (public) interest. *Pye* ¶ 75. The court further considered whether the decision struck a fair balance between "the demands of the general interest and the interest of the individuals concerned." *Pye* ¶ 75. After considering

many factors, including the fact that English adverse possession laws are long established and support reasonable social policies, the ECHR concluded that the British court decision did strike a fair balance. *Pye* ¶ 75–85. The court noted that "the State enjoys a wide margin of appreciation" in setting rules for its property system unless these rules "give rise to results which are so anomalous as to render the legislation unacceptable." *Pye* ¶ 83.

The district court correctly applied *Pye* and correctly concluded that "Spain's laws of adverse possession do not violate [Article 1]." As in *Pye*, the operation of Spain's acquisitive prescription laws is a permissible "control of use" of property under Article I that serves the general or public interest by ensuring certainty of property rights.

Finally, deciding that TBC has acquired title to the Painting through acquisitive prescription would have struck a "fair balance" between "the demands of the general interest and the interest of the individuals concerned." Admittedly, the *Pye* decision was close (ten to seven), and some of the factors considered by the *Pye* court do not favor TBC's position that Spain's acquisitive prescription laws strike a "fair balance." Nonetheless, Article 1955 is over a century old and supports reasonable social policies, including providing a level of protection for possessors. Spain's acquisitive prescription laws are not so anomalous as to render them unacceptable under the European Convention on Human Rights. But they must be taken as a whole and when one applies Article 1956, as we must, there is a triable issue of fact whether title in the Painting vested in TBC.

IV. CONCLUSION

The district court correctly determined that Spain's substantive law determines whether TBC can claim title to

the Painting via acquisitive prescription. However, we conclude that the district court interpreted Spain Civil Code Article 1956 too narrowly. An *encubridor* within the meaning of Article 1956 can include someone who, with knowledge that the goods had been stolen from the rightful owner, received stolen goods for his personal benefit. Since there is a genuine dispute of material fact whether TBC knew the Painting had been stolen when TBC acquired the Painting from the Baron, the district court erred in granting summary judgment in favor of TBC on the basis of Spain's law of acquisitive prescription since the longer period for an *encubridor* to acquire title had not yet run when the Cassirers brought this action for restitution of the Painting. At the same time, we conclude that TBC's other arguments for affirming the grant of summary judgment that are raised in TBC's cross-appeals are without merit. Finally, we conclude that the Cassirers' other arguments against applying Article 1955 in this case are without merit. Given these holdings, we **REVERSE** and **REMAND** to the district court for proceedings consistent with this opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 05-3459-JFW (Ex)** Date: June 4, 2015

Title: David Cassirer *-v-* Thyssen-Bornemisza Collection Foundation

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER GRANTING THYSSEN-BORNEMISZA COLLECTION FOUNDATION'S MOTION FOR SUMMARY JUDGMENT [filed 3/23/2015; Docket No. 249];**

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION RE: CHOICE OF CALIFORNIA LAW [filed 3/23/2015; Docket No. 251]

On March 23, 2015, Defendant Thyssen-Bornemisza Collection Foundation (the "Foundation") filed a Motion for Summary Judgment [Docket No. 249]. On April 20, 2015, Plaintiffs David Cassirer, Ava Cassirer, and United Jewish Federation of San Diego County (collectively, "Plaintiffs") filed their Opposition [Docket No. 273]. On May 4, 2015, the Foundation filed a Reply [Docket No. 289].[1] On March 23, 2015, Plaintiffs filed a Motion for Summary Adjudication Re Choice of California Law [Docket No. 251]. On April 20, 2015, the Foundation filed an Opposition [Docket No. 271]. On May 4, 2014, Plaintiffs filed a Reply [Docket No. 288].

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's May 18, 2015 hearing calendar and the parties were

[1]On May 11, 2015, Plaintiffs filed an *Ex Parte* Application for Leave to File Supplemental Declaration of Alfredo Guerrero and to Respond to Defendant's Evidentiary Objections to Plaintiffs' Expert Declarations ("*Ex Parte* Application") [Docket No. 298]. On May 12, 2015, the Foundation filed an Opposition [Docket No. 300]. On May 12, 2015, Plaintiffs filed a Reply [Docket No. 301]. For good cause shown and because there is no prejudice to the Foundation, the Court **GRANTS** Plaintiff's *Ex Parte* Application.

given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

In this action, Plaintiffs seek to recover the painting, *Rue St. Honoré, après midi, effet de pluie*, by French impressionist Camille Pissarro (the "Painting"), that was wrongfully taken from their ancestor, Lilly Cassirer Neubauer ("Lilly"),[3] by the Nazi regime.

Lilly inherited the Painting in 1926. As a Jew, she was subjected to increasing persecution in Germany after the Nazis seized power in 1933. In 1939, in order for Lilly and her husband Otto Neubauer to obtain exit visas to flee Germany, Lilly was forced to transfer the Painting to Jakob Scheidwimmer, a Nazi art appraiser. In "exchange," Scheidwimmer transferred 900 Reichsmarks (around $360 at 1939 exchange rates), well below the actual value of the painting, into a blocked account that Lilly could never access. After the war, Lilly filed a timely restitution claim. Because the location of the Painting was unknown, Lilly ultimately settled her claim for monetary compensation with the German government, but did not waive her right to seek restitution or return of the Painting. *See* Order dated March 13, 2015 [Docket No. 245].

Without Lilly's knowledge, the Painting surfaced in the United States in 1951. In July 1951, the Painting was sold to collector Sydney Brody in Los Angeles, California through art dealers M. Knoedler & Co. in New York and Frank Perls Gallery in Beverly Hills, California. The Frank Perls Gallery earned a commission of $3,105 for arranging the sale of the Painting to Sydney Brody. Less than a year later, in May 1952, Sydney Schoenberg, an art collector in St. Louis, Missouri, purchased the Painting from M. Knoedler & Co., on consignment from the Frank Perls Gallery, for $16,500.[4]

More than twenty years later, on November 18, 1976, Baron Hans-Heinrich Thyssen-Bornemisza of Lugano, Switzerland (the "Baron") purchased the Painting through New York art dealer Stephen Hahn for $275,000. The Painting was maintained as part of the Thyssen-Bornemisza Collection in Switzerland until 1992, except when on public display in exhibitions outside Switzerland.

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[2]Because of the narrow focus of the parties' motions, the Court only discusses the undisputed facts relevant to its decision on the present motions. To the extent any of these facts are disputed, they are not material to the disposition of these motions. In addition, to the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court.

[3]The Court adopts Plaintiffs' preferred designation and refers to Lilly Cassirer Neubauer as "Lilly" in this Order.

[4]Brody apparently only kept the Painting a few months before returning the painting to the Frank Perls Gallery for re-sale.

In 1988, the Baron and Spain agreed that the Baron (through one of his entities, Favorita Trustees Limited) would loan his art collection (the "Collection"), including the Painting, to the Kingdom of Spain. Pursuant to the 1988 Loan Agreement, Spain established the Foundation, a non-profit, private cultural foundation to maintain, conserve, publicly exhibit, and promote artwork from the Collection. The Spanish government agreed to display the Collection at the Villahermosa Palace in Madrid, Spain, which would be restored and redesigned for its new purpose as the Thyssen-Bornemisza Museum (the "Museum"). On June 22, 1992, the Museum received the Painting, and, on October 10, 1992, opened to the public with the Painting on display.

Spain later sought to purchase the Collection. On June 18, 1993, the Spanish cabinet passed Real Decreto-Ley 11/1993, authorizing the government to sign a contract allowing the Foundation to purchase the 775 artworks that comprised the Collection. In accordance with Real Decreto-Ley 11/1993, on June 21, 1993, the Kingdom of Spain, the Foundation, and Favorita Trustees Limited entered into an Acquisition Agreement, by which Favorita Trustees Limited sold the Collection to the Foundation.[5] The Foundation's purchase of the Collection for $338 million was entirely funded by Spain.

The Painting has been on public display at the Foundation's Museum in Madrid, Spain since the Museum's opening on October 10, 1992, except when on public display in a 1996 exhibition outside of Spain and while on loan at the Caixa Forum in Barcelona, Spain from October 2013 to January 2014. Since the Foundation purchased the Painting in 1993, the Painting's location and the Foundation's "ownership" have been identified in several publications including: (1) Wivel, Mikael: Ordrupgaard. Selected Works. Copenhague, Ordrupgaard, 1993, p. 44; (2) Rosenblum, Robert: "Impressionism. The City and Modern Life". En Impressionists in Town. [Cat. Exp.]. Copenhague, Ordrupgaard, 1996, n. 17, pp. 16-17, il. 61.; (3) Llorens, Tomas; Borobia, Mar y Alarcó, Paloma: Obras Maestras. Museo Thyssen-Bornemisza. Madrid, Fundación Collectión Thyssen-Bornemisza, 2000, p. 156, il. p. 157; and (4) Perez-Jofre, T.: Grandes obras de arte. Museo Thyssen-Bornemisza. Colonia, Tascnen, 2001, p. 540, il. p. 541. Declaration of Evelio Acevedo Carrero [Docket No. 249-2] at ¶ 18.

Neither Lilly nor any of her heirs attempted to locate the Painting between 1958 and late 1999, and Claude Cassirer, Lilly's heir, did not discover that the Painting was on display at the Museum until sometime in 2000. On May 3, 2001, he filed a Petition with the Kingdom of Spain and the Foundation, seeking return of the Painting. On May 10, 2005, after his Petition to return the Painting was rejected, Claude Cassirer filed this action against the Kingdom of Spain and the

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[5]In 1989 and 1993, in connection with the loan and ultimate purchase of the Collection, Spain and the Foundation commissioned an investigation of title to verify that the Baron and his relevant entities had clear and marketable title to the Collection. Plaintiffs claim that the investigation was incomplete and that Spain and the Foundation ignored red flags concerning the Painting's provenance, including, for example, that: (1) the Stephen Hahn Gallery had been affiliated with Nazi looting; (2) paintings by Pissarro were known to be the frequent subjects of Nazi looting; and (3) the back of the Painting has a "Berlin" label traceable to the Cassirer Gallery and the provenance documentation provided no explanation for that label. However, this disputed issue as to the Foundation's alleged "bad faith" is not material or relevant to the Court's decision on these motions.

Foundation,[6] seeking the return of the Painting, or an award of damages in the event the Court is unable to order the return of the Painting. From 1980 to the time of his death on September 25, 2010, Claude Cassirer lived in California.

After extensive motion practice, including two appeals to the Ninth Circuit, the Foundation now moves for summary judgment on the grounds that: (1) under Swiss or Spanish law, the Foundation is the owner of the Painting; (2) California Code of Civil Procedure § 338(c), as amended in 2010, violates the Foundation's due process rights by retroactively depriving the Foundation of its vested property rights; and (3) Plaintiffs' claims are barred by laches. Plaintiffs move for summary adjudication, seeking an order declaring that the substantive law of the State of California governs, and that the law of Spain does not govern, the merits of this dispute.

II. LEGAL STANDARD

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party."

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[6]Unfortunately, Claude Cassirer died on September 25, 2010, and David Cassirer, Ava Cassirer, and United Jewish Federation of San Diego County were substituted as plaintiffs in this action. In addition, pursuant to the stipulation of the parties, the Kingdom of Spain was dismissed without prejudice in August 2011.

American International Group, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. DISCUSSION

Based on the undisputed facts, the Court concludes that the Foundation is the owner of the Painting pursuant to Spain's laws governing adverse possession. Because the Court concludes that the Foundation acquired ownership of the Painting by adverse possession under Spanish law, it need not address whether the Baron acquired ownership of the Painting by adverse possession under Swiss law (and thus conveyed good title to the Foundation) or whether Plaintiffs' claims are barred by laches.

A. Choice of Law

As an initial matter, the Court must determine whether California law or Spanish law governs the Foundation's claim that it acquired ownership of the Painting by adverse possession. In order to make this determination, the Court must first determine whether it should apply California or federal common law choice-of-law rules. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir, 1991). Where, as here, federal court jurisdiction is premised on the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330, *et seq.*, the Ninth Circuit has held that federal common law choice-of-law rules govern. *See, e.g., Schoenberg*, 930 F.2d at 782. However, the Ninth Circuit recently called its holding into question in an en banc decision in *Sachs v. Republic of Austria*, 737 F.3d 584 (9th Cir. 2013), stating that it may be permissible to apply the forum state's choice-of-law rules. *Id.* at 600 n.14 (en banc), *cert. granted sub nom. OBB Personenverkehr AG v. Sachs*, 135 S. Ct. 1172 (2015). Although the Ninth Circuit in *Sachs* did not overrule its prior case law, the Court, out of an abundance of caution, will conduct a choice-of-law analysis under both federal common law and California law.

1. Federal Common Law Choice-of-Law Rules

Federal common law follows the approach of the Restatement (Second) of Conflict of Laws (the "Restatement"). *See, e.g., Schoenberg*, 930 F.2d at 782. Restatement § 222 sets forth the general choice-of-law principle applicable to interests in both real and personal property:

> The interest of the parties in a thing are determined depending upon the circumstances, either by the "law" or by the "local law" of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles in § 6.

Restatement § 222. The factors relevant to the determination of which state has the most significant relationship to the "thing and the parties" are set forth in § 6, which include:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of

those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Restatement § 6. In addition to these general principles, the Restatement also provides specialized conflict of law rules for specific legal issues, that "courts have evolved in accommodation" of the factors in § 6. Restatement, § 6 (comment on Subsection (2)). Restatement § 246 sets forth the specialized conflict of law rule for a claim of "acquisition by adverse possession or prescription of interest in chattel":

> Whether there has been a transfer of an interest in a chattel by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the state where the chattel was at the time the transfer is claimed to have taken place.

Restatement § 246. The Restatement's comment to this section provides the following rationale for this rule: "The state where a chattel is situated has the dominant interest in determining the circumstances under which an interest in the chattel will be transferred by adverse possession or by prescription. The local law of this state is applied to determine whether there has been such a transfer and the nature of the interest transferred." Restatement § 246, comment.

Applying the Restatement's principles and rules, the Court concludes that, under federal common law, the law of Spain governs the Foundation's claim that it acquired ownership of the Painting by adverse possession. The Court finds no reason to depart from the rule set forth in Restatement § 246, i.e., that the "local law of the state where the chattel was at the time the transfer is claimed to have taken place" should apply. In accordance with that rule, Spain has the dominant interest in determining the circumstances under which ownership of the Painting may be acquired by adverse possession or prescription. Indeed, "[i]n contrast to torts . . ., protection of the justified expectations of the parties is of considerable importance in the field of property" and "[t]he situs [of the property] . . . plays an important role in the determination of the law governing the transfer of interests in tangible . . . movables." Restatement § 222, comment. Applying the "local law of the state where the chattel was at the time the transfer is claimed to have taken place" facilitates simple identification of the applicable law and leads to certainty, predictability, and uniformity of result. *See* Declaration of Professor Alfonso-Luis Calvo Caravaca [Docket No. 249-24], Exhibit 50 at ¶ 5.

Moreover, in this case, the Painting has been in the possession of the Foundation, an instrumentality of the Kingdom of Spain, and it has been located in Madrid, Spain for more than twenty years. In contrast to Spain's significant relationship to the Painting and the Foundation, California's relationship to the Painting and the parties is limited to the following facts: (1) Claude Cassirer moved to California in 1980; (2) the Frank Perls Gallery in Beverly Hills, California arranged a sale of the Painting to Sydney Brody in Los Angeles, California in July 1951; and (3) less than a year later, in May 1952, the Frank Perls Gallery in Beverly Hills, California was involved in the sale of the Painting to Sydney Schoenberg in St. Louis, Missouri. Although Plaintiffs' relationship to California is significant, the Painting's relationship to California is not.

After balancing all of the factors (including the factors discussed *infra* under the California governmental interest test), the Court concludes that Spain has the most significant relationship to the Painting and the parties. Accordingly, the Court concludes that, under federal common law, the law of Spain governs the Foundation's claim of ownership by adverse possession.

2. California Governmental Interest Test

The Court also concludes that the application of California's choice-of-law rules leads to the same result, i.e., the law of Spain governs the Foundation's claim that it acquired ownership of the Painting by adverse possession. California applies the three-step "governmental interest" test to resolve choice-of-law issues:

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied.

Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 107-108 (2006) (quotations and citations omitted). "The party advocating the application of a foreign state's law bears the burden of identifying the conflict between that state's law and California's law on the issue, and establishing that the foreign state has an interest in having its law applied." *Pokorny v. Quixtar*, 601 F.3d 987, 995 (9th Cir. 2010) (citing *Wash. Mutual Bank, FA v. Superior Court*, 24 Cal. 4th 906, 920 (2001)).

a. Spanish law differs from California law.

First, the Court concludes that the Spanish law differs from California law regarding the acquisition of personal property by adverse possession or prescription. California has not extended the doctrine of adverse possession to personal property. *See San Francisco Credit Clearing House v. C.B. Wells*, 196 Cal. 701, 707-08 (1925); *Society of Cal. Pioneers v. Baker*, 43 Cal. App. 4th 774, 784 n.13 ("The court in [*San Francisco Credit Clearing House v. Wells*, 196 Cal. 701, 707 (1925)] suggested that the doctrine of adverse possession would not apply to personal property, and no California case has been cited in support of such an application.").[7] In contrast, Spain, as discussed *infra*, has adopted laws that expressly permit the acquisition of ownership of personal property by adverse possession (or acquisitive prescription or *usucapio*). Spanish Civil Code Article 1955 provides in relevant part: "Ownership of movable property prescribes by three

[7]Even if California were to recognize the applicability of the doctrine of adverse possession to personal property, the elements of such a claim, and the time period necessary for a possessor to acquire ownership, would be significantly different than the elements and time period under Spanish law. *See* Cal. Civ. Code § 1006; Cal. Civ. Proc. Code § 338(c)(3).

years of uninterrupted possession in good faith. Ownership of movable property also prescribes by six years of uninterrupted possession, without any other condition." *See* Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38.

b. A true conflict exists.

Second, the Court concludes that a true conflict exists, i.e., each jurisdiction has an interest in having its own law applied.

"To assess whether either or both states have an interest in applying their policy to the case, we examine the governmental policies underlying each state's laws." *Scott v. Ford Motor Company*, 224 Cal. App. 4th 1492, 1504 (2014) (quotations and citations omitted). "In conducting this inquiry, we may make our own determination of the relevant policies and interest, without taking evidence as such on the matter." *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1203 (2011) (quotations and citations omitted).

Generally, laws relating to adverse possession of personal property serve the important interests of certainty of title, protecting defendants from stale claims, and encouraging plaintiffs not to sleep on their rights. *See, e.g.,* Declaration of Carlos M. Vazquez in Support of Plaintiffs' Motion for Summary Adjudication, at Exhibit 510 [Docket No. 251-5]; Scottish Law Commission, Discussion Paper on Prescription and Title to Moveable Property, available at http://www.scotlawcom.gov.uk/files/5413/3666/0832/rep228.pdf. Spain unquestionably has an interest in serving these policy goals and applying its law of adverse possession to the Foundation's claim of ownership, especially given that the Foundation is an instrumentality of the Kingdom of Spain and the Painting has been located within its borders for over twenty years.

Likewise, California unquestionably has an interest in applying its law to this action. California's decision not to extend the doctrine of adverse possession to personal property recognizes the difficulties faced by owners in discovering the whereabouts of personal property even when held openly and notoriously, and serves to protect the interests of the "rightful owner" over subsequent possessors. It also serves to encourage subsequent purchasers to determine the true owner of property before purchasing that property. California's interest in serving these policy goals is especially strong in the context of stolen art. Indeed, in 2010, the California Legislature amended its general statute of limitations governing personal property -- California Code of Civil Procedure § 338 -- to provide greater protections for the recovery of stolen art.[8] In amending the

[8]Specifically, California Code of Civil Procedure § 338, as amended, (1) retroactively extends the statute of limitations for specific recovery of a work of fine art from three to six years if the action is brought against a museum, gallery, auctioneer or dealer; and (2) clarifies that such claims do not accrue until "actual discovery" rather than "constructive discovery" of both the identity and whereabouts of the work and information supporting a claim of ownership. The amended statute also exempts claims for the specific recovery of a work of fine art from California's borrowing statute, California Code of Civil Procedure § 361, which directs California courts to borrow the statute of limitations or statute of repose of a foreign jurisdiction under certain circumstances. *See* Cal. Civ. Proc. Code § 361 ("When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be

statute, the California Legislature expressly found and declared, in relevant part: (1) "California's interest in determining the rightful ownership of fine art is a matter of traditional state competence, responsibility, and concern;" (2) "Because objects of fine art often circulate in the private marketplace for many years before entering the collections of museums or galleries, existing statutes of limitation, which are solely the creatures of the Legislature, often present an inequitable procedural obstacle to recovery of these objects by parties that claim to be their rightful owner;" and (3) "The application of statutes of limitations and any affirmative defenses to actions for the recovery of works of fine art . . . should provide incentives for research and publication of provenance information about these works, in order to encourage the prompt and fair resolution of claims." *See* 2010 Cal. Stat. ch. 691, § 1.

In addition, California has a legitimate interest in applying its laws governing personal property to "rightful owners" who reside within its borders. *See, e.g., McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 95 (2010) ("California has an interest in having this statute applied to a person, like plaintiff, who is a California resident at the time the person discovers that he or she is suffering from an asbestos-related injury or illness, even when the person's exposure to asbestos occurred outside California."); *Castro v. Budget Rent-A-Car System, Inc.*, 154 Cal. App. 4th 1162, 1182 (2007) ("California . . . does have a legitimate governmental interest in having its . . . statute applied based on Castro's status as a California resident."). Given that Claude Cassirer resided in California from 1980 until the time of his death in September 2010, discovered the whereabouts of the Painting while he was a resident of California, and filed this action while he was a resident of California, California clearly has in interest in the application of its laws concerning adverse possession and stolen art in this case.[9]

Accordingly, the Court concludes that each jurisdiction (Spain and California) has an interest in having its own laws apply.

c. Spain's interest would be substantially more impaired if its policy were subordinated to the policy of California.

Third, and finally, the Court concludes that Spain's interest would be substantially more impaired if its policy were subordinated to the policy of California.

Under the third step of California's governmental interest test, the Court must "carefully evaluate and compare the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 96-97 (2010) (quotations and citations omitted). In conducting this evaluation, the California Supreme Court has instructed:

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maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.").

[9]The substituted Plaintiffs also have strong ties to California. *See* Declaration of David Cassirer in Support of Plaintiffs' Motion for Summary Adjudication [Docket No. 251-2] at ¶¶ 2-5, 11.

> [I]t is important to keep in mind that the court does not "weigh" the conflicting governmental interests in the sense of determining which conflicting law manifested the "better" or the "worthier" social policy on the specific issue. An attempted balancing of conflicting state policies in that sense is difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish. Instead, the process can accurately be described as a problem of allocating domains of law-making power in multi-state contexts—by determining the appropriate limitations on the reach of state policies—as distinguished from evaluating the wisdom of those policies. Emphasis is placed on the appropriate scope of conflicting state policies rather than on the "quality" of those policies.

Id. at 97 (quotations and citations omitted). The emphasis, on the appropriate scope of conflicting policies, rather than on the quality of those policies, is equally as important, if not more important, in the context of international disputes. Moreover, "[a]lthough California no longer follows the old choice-of-law rule that generally called for application of the law of the jurisdiction in which a defendant's allegedly tortious conduct occurred *without regard to the nature of the issue that was before the court*, California choice-of-law cases nonetheless continue to recognize that a jurisdiction ordinarily has 'the predominant interest' in regulating conduct that occurs within its borders, and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future." *McCann*, 48 Cal.4th at 97-98 (internal citations omitted).

In this case, the original unlawful taking of the Painting occurred in Germany from Plaintiffs' ancestor, Lilly, who, at the time, resided there. Although the Painting passed through California in 1951, it was present in California for less than a year before it was sent to Missouri. In contrast, the Painting was located in Switzerland for sixteen years and Spain for more than twenty years. Most importantly, the Painting has been in the possession of an instrumentality of the Kingdom of Spain in Madrid, Spain since 1992, and that possession in Spain provides the basis for the Foundation's claim of ownership. Spain has a strong interest in regulating conduct that occurs within its borders, and in being able to assure individuals and entities within its borders that, after they have possessed property uninterrupted for more than six years, their title and ownership of that property are certain.

If Spain's interest in the application of its law were subordinated to California's interest, it would rest solely on the fortuitous decision of Lilly's successor-in-interest to move to California long after the Painting was unlawfully taken by the Nazis and the fact that he happened to reside there at the time the Foundation took possession of the Painting. Subjecting a defendant within Spain to a different rule of law based on the unpredictable choice of residence of a successor-in-interest would significantly undermine Spain's interest in certainty of title. *Cf. McCann*, 48 Cal. 4th at 98 ("Because a commercial entity protected by the Oklahoma statute of repose has no way of knowing or controlling where a potential plaintiff may move in the future, subjecting such a defendant to a different rule of law based upon the law of a state to which a potential plaintiff ultimately may move would significantly undermine Oklahoma's interest in establishing a reliable rule of law governing a business's potential liability for conduct undertaken in Oklahoma.").

In contrast, if the Court applies Spanish law, the impairment of California's interest is significantly less based on the facts and circumstances of this case. Although California has a fundamental interest in protecting its residents and specifically has an interest in protecting its residents claiming to be rightful owners of stolen art, that interest is far less significant where the original victim did not reside in California, where the unlawful taking did not occur within its borders, and where the defendant and the entity from which the defendant purchased the property were not located in California. Moreover, California's interest in the application of its laws related to adverse possession of personal property (or lack thereof) is not as strong as Spain's interest, given that neither a California statute nor case law *expressly* prohibits a party from obtaining ownership of personal property through adverse possession. In contrast, Spain has enacted laws, as part of its Civil Code, that specifically and clearly govern adverse possession of movable property. Furthermore, although the California Legislature's 2010 amendment to California Code of Civil Procedure § 338 is certainly relevant to demonstrate California's interest in protecting "rightful owners" of stolen art, the Court considers it significant that the California Legislature did *not* create a new claim for relief or attempt to statutorily restrict the Court's choice of substantive law in this area. Instead, the California Legislature merely expressed its interest in eliminating inequitable procedural obstacles to recovery of fine art by extending the statute of limitations for claims seeking such recovery. Unlike a statute of limitations, the law of adverse possession does not present a procedural obstacle, but rather concerns the *merits* of an aggrieved party's claim.

Accordingly, the Court concludes that, under the California governmental interest test as well as federal common law, Spanish law governs the Foundation's claim of ownership by adverse possession.[10]

B. Under Spain's Laws of Adverse Possession, the Foundation is the Owner of the Painting.

The Court concludes that, based on the undisputed facts, the Foundation acquired ownership of the Painting by adverse possession (also known as *usucapio* or acquisitive prescription) under Spanish law.[11]

Spain's adverse possession laws regarding "movable property" require that the possessor: (1) possess the property for the statutory period, i.e. three years if in "good faith" ("ordinary adverse possession") or six years if in "bad faith" ("extraordinary adverse possession") (Spanish Civil Code Article 1955); (2) possess the property as owner (Article 1941), and (3) possess the

[10]Under Spain's choice of law rules, ownership of the Painting is likewise governed by Spanish law. *See* Declaration of Professor Alfonso-Luis Calvo Caravaca [Docket No. 249-24], Exhibit 50 at ¶¶ 3-10; Spanish Civil Code Article 10.1.

[11]Pursuant to Federal Rule of Civil Procedure 44.1, "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rule of Evidence. The court's determination must be treated as a ruling on a question of law."

property publicly, peacefully and without interruption (Articles 1941-1948).[12] *See* Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38.

Plaintiffs do not seriously dispute that the Foundation has met the general requirements for extraordinary adverse possession (under the longer six-year period). Indeed, in their Opposition to the Foundation's Motion for Summary Judgment, Plaintiffs do not even address the Foundation's arguments that it possessed the Painting as owner publicly, peacefully, and without interruption for more than six years. Nonetheless, the Court will examine each required element.

1. Possession as Owner

"Anyone who projects an external image of being the owner has *possession as owner*. The person may believe that he is the owner or know that he is not (this is a question of good faith or bad faith), but, even if a person knows that he is not the owner of what he bought (precisely because he bought it from someone who was not the owner either), a person who performs acts relating to the asset which those that witness them will see as typical of ownership possesses said asset as the owner." Declaration of Professor Alfonso-Luis Calvo Caravaca [Docket No. 249-24], Exhibit 50 ("Foundation's Spanish Report") at ¶ 35; *see also* Isabel V. González Pacanowska & Carlos Manuel Díez Soto, *National Report on the Transfer of Movables in Spain*, *in National Report on the Transfer of Movables in Europe*, Volume 5: Sweden, Norway and Denmark, Finnland, Spain 393, 646 (Wolfgang Faber & Brigitta Lurger eds. 2011) ("[T]he requirement of possession in the capacity of owner does not relate to the internal intention of the subject, but external behaviour consistent with the character of being the actual owner.").

The Court concludes that the Foundation has possessed the Painting as owner since June 21, 1993, when it purchased the Painting from Favorita Trustees Limited, because it has projected an external image of ownership since that date. Indeed, the Foundation has publicly displayed the Painting in its Museum without any contrary indication of ownership, and loaned the Painting to others for public exhibition consistent with its claim of ownership.

2. Possession of the Painting Publicly, Peacefully, and Without Interruption

In addition, the Court concludes that the Foundation's possession of the Painting as owner has been "public, peaceful, and uninterrupted." Spanish Civil Code Article 1941.

First, the Court concludes that, under Spanish law, the Foundation's possession has been "public." "[T]he possessor must show by means of ostensible acts that he possesses the asset: without supreme effort but with reasonable and ongoing publicity, said reasonableness being

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[12]Generally, in order to validly transfer ownership under Spanish law, there must be: (1) "title," usually a contract evidencing the sale or exchange (in this case, the Acquisition Agreement dated June 21, 1993 by which Favorita Trustees Limited sold the Collection to the Foundation); and (2) a "mode" or "means," which is the transfer of possession in a variety of forms permitted by the law. *See* Declaration of Professor Alfonso-Luis Calvo Caravaca [Docket No. 249-24], Exhibit 50 at ¶¶ 10, 20-21. When the seller does not have ownership of the goods that he purports to sell, the buyer may obtain ownership through the "mode" of *usucapio* or adverse possession. *Id.*

considered based on the nature of use of the asset in question." Foundation's Spanish Report at ¶ 36. "The requirement of publicity regards not only possession as such, but also the capacity in which it is held, and is considered necessary so that the real owner has the possibility of defending his or her right against another's acts." González Pacanowska & Díez Soto, *supra*, at 647. "On the other hand, it is not necessary for the person claiming to be 'the real owner' to have full knowledge of third party possession, but such knowledge is at least possible for that person using average diligence." Foundation's Spanish Report at ¶ 36; *see also* Declaration of Alfredo Guerrero [Docket No. 279], Exhibit 55 ("Plaintiffs' Spanish Report") at p. 39 ("[I]t must be noted that a possession has public character when the actual owner would be able to have knowledge of such possession using a standard diligence although it does not have any knowledge in the reality."). In this case, the Painting has been on public display at the Museum from October 10, 1992 until the present (except when on public display in a 1996 exhibition outside of Spain and while on loan at the Caixa Forum in Barcelona, Spain from October 2013 to January 2014). Moreover, since the Foundation's purchase of the Painting in 1993, the Foundation's "ownership" and the Painting's location in Spain have been identified in the several publications including: (1) Wivel, Mikael: Ordrupgaard. Selected Works. Copenhague, Ordrupgaard, 1993, p. 44; (2) Rosenblum, Robert: "Impressionism. The City and Modern Life". En Impressionists in Town. [Cat. Exp.]. Copenhague, Ordrupgaard, 1996, n. 17, pp. 16-17, il. 61.; (3) Llorens, Tomas; Borobia, Mar y Alarcó, Paloma: Obras Maestras. Museo Thyssen-Bornemisza. Madrid, Fundación Collectión Thyssen-Bornemisza, 2000, p. 156, il. p. 157; and (4) Perez-Jofre, T.: Grandes obras de arte. Museo Thyssen-Bornemisza. Colonia, Tascnen, 2001, p. 540, il. p. 541. Declaration of Evelio Acevedo Carrero [Docket No. 249-2] at ¶ 18. As a result, the Court concludes, as a matter of Spanish law, that the Foundation's possession was sufficiently public to satisfy this element of adverse possession. Indeed, as the Foundation's experts in Spanish law state, the permanent exhibition of the Painting at the Museum "is the best example of publicity imaginable in cases of items like the one in question. Precisely for a case of adverse possession of works of art, the Judgment of the Supreme Court of 28 November 2008 based the 'manifest publicity' on appearances in the press and public exhibitions." Foundation's Spanish Report at ¶ 36; *see also* STS 6657/2008, Nov. 28, 2008 (ECLI:ES:TS: 2008:6657).

Second, the Court concludes that the Foundation's possession as owner was "peaceful" from June 21, 1993 until at least May 3, 2001. Indeed, the Foundation acquired the Painting in a peaceful manner and possessed the Painting without any challenge or dispute as to its "ownership" until May 3, 2001 (when Claude Cassirer filed a Petition with the Kingdom of Spain and the Foundation, seeking return of the Painting).

Third, and finally, the Court concludes that the Foundation's possession as owner was "uninterrupted" from June 21, 1993 until at least May 3, 2001. Possession may be interrupted when: (1) for any reason, such possession should cease for more than one year; (2) as a result of the judicial summons to the possessor; (3) "an act of conciliation"; and (4) "[a]ny express or implied recognition by the possessor of the owner's right. Spanish Civil Code Articles 1943 to 1948. None of these events occurred during the time period between June 21, 1993 and May 3, 2001.

3. Possession of the Property for the Statutory Period

Spanish Civil Code Article 1955 provides in relevant part:

> Ownership of movable property prescribes by three years of uninterrupted possession in good faith. Ownership of movable property also prescribes by six years of uninterrupted possession, without any other condition. . . .[13]

Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38. The Court finds it unnecessary to address whether the Foundation acquired ownership of the Painting under the shorter three-year time period for ordinary adverse possession, because it concludes that, even if the Foundation acquired the Painting in "bad faith," i.e., knowing that there was a defect which invalidates its title or manner of acquisition (Spanish Civil Code Article 433), the Foundation acquired ownership under the longer six-year time period for extraordinary adverse possession. Indeed, as discussed *supra*, the Foundation has possessed the property as owner publicly, peacefully, and without interruption from at least June 21, 1993 until at least May 3, 2001.

As noted, Plaintiffs fail to argue that the Foundation has not satisfied these general requirements for adverse possession. Instead, Plaintiffs' *only* arguments in opposition to the Foundation's claim that it obtained ownership by extraordinary adverse possession are that: (1) Spanish Civil Code Article 1956 bars the application of adverse possession because the Foundation was an "accessory" to a crime against humanity or a crime against property in the event of armed conflict; and (2) Spain's adverse possession laws violate the European Convention on Human Rights. The Court addresses each of these arguments *infra*.

4. Spanish Civil Code Article 1956 is inapplicable.

Plaintiffs argue that, pursuant to Spanish Civil Code Article 1956, the Foundation cannot obtain ownership of the Painting by adverse possession because the Foundation was an "accessory" to a crime against humanity or a crime against property in the event of armed conflict.

Spanish Civil Code Article 1956 provides: "Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories, unless the crime or misdemeanor or its sentence, and the action to claim civil liability arising

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[13]Spanish Civil Code Article 1955 further provides: "The provisions of article 464 of this Code shall apply as related to the owner's right to claim movable property which has been lost or of which he has been unlawfully deprived . . . ." Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38. Article 464 provides in relevant part: "Possession of movable property, acquired in good faith, is equivalent to title. Notwithstanding the foregoing, any person who has lost movable property or has been deprived of it illegally may claim it from its possessor." Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 31. Despite the language in Article 464, the Spanish Civil Code clearly contemplates, and both parties' Spanish law experts apparently agree, that a possessor of stolen or lost property can acquire ownership of that property by adverse possession under Article 1955. Indeed, the very next article of the Spanish Civil Code provides: "Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories, *unless* the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations." Spanish Civil Code Article 1956 (emphasis added) (Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38).

therefrom, should have become barred by the statute of limitations." Spanish Civil Code Article 1956 (Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38). In order for Article 1956 to bar the acquisition of ownership by adverse possession, three requirements must be satisfied: (1) there must be a crime of theft or robbery (or other similar crime relating to the misappropriation of movable property); (2) the possessor of the movable property must be a principal, accomplice, or accessory of the crime committed; and (3) the statute of limitations for the crime committed or for an action claiming civil liability arising from that crime must not have expired. Plaintiffs' Spanish Report at p. 45.

The parties agree that the looting of the Painting by Scheidwimmer and the Nazis constitutes a misappropriation crime for the purposes of Article 1956, and that, under the current Spanish Criminal Code, it would be considered a crime against humanity or crime against property in the event of armed conflict which has no statute of limitations.[14] However, in order for Article 1956 to have any application, the Foundation must also be a principal, accomplice, or accessory to the crime committed. In other words, the Foundation must be "criminally responsible" for the offense committed by the Nazis in looting the Painting. *See* 1973 Spanish Criminal Code Article 12 ("Those criminally responsible for felonies and misdemeanours are the following: 1. Principals. 2. Accomplices. 3. Accessories."). It is undisputed that the Foundation was not a "principal" or "accomplice" to the crime committed by the Nazis. Accordingly, the Court will only address whether the Foundation can be considered an "accessory" to the crime committed by the Nazis under Spanish law.

Assuming the facts in the light most favorable to Plaintiffs, the Court concludes, as a matter of Spanish law, that the Foundation was not an "accessory" to the crime committed by the Nazis. Under the 1973 Spanish Criminal Code, in effect at the time the Foundation acquired the Painting, "accessories" (or accessories after the fact) were defined as follows:

> Accessories are those who, aware of the perpetration of a punishable offence, without having had involvement in it as principals or accomplices, are involved subsequent to its execution in any of the following ways:
>
> 1. Aiding and abetting the principals or accomplices to benefit from the felony or misdemeanour.
>
> 2. Hiding or destroying the evidence, effects or instruments of the felony or misdemeanour, to prevent it being discovered.
>
> 3. Harbouring, concealing or aiding the escape of suspected criminals, whenever any of the following circumstances concur:
>
> One. When the accessory has acted in abuse of his public functions.

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[14]The parties disagree as to whether the statute of limitations (or, more accurately, lack thereof) can be applied retroactively to crimes committed prior to the effective date of the current Spanish Criminal Code. The Court finds it unnecessary to resolve this question, because it concludes that Article 1956 is inapplicable on other grounds.

> Two. When the principal has committed the offences of treason, murder of the head of State or his successor, parricide, murder, unlawful detention for ransom or imposing any other condition, unlawful detention with simulation of public functions, deposit of weapons or ammunition, possession of explosives and criminal damage.

1973 Spanish Civil Code Article 17 (Declaration of Adriana De Buerba [Docket No. 289-1] at Exhibit 111A).[15]

Plaintiffs argue that the Foundation was an "accessory" to the looting of the Painting by Scheidwimmer and the Nazis, because the Foundation hid the evidence, effects or instruments of the crime "to prevent it being discovered." However, as the clear and unambiguous language of the Spanish Criminal Code provides, and as the relevant Spanish case law holds, the intent or purpose of the accessory's misconduct must be to prevent the offense or crime from being discovered. *See* 1973 Spanish Criminal Code Article 17 (emphasis added) ("Accessories are those who, aware of the perpetration of a punishable offence, without having had involvement in it as principals or accomplices, are involved subsequent to its execution in . . . [h]iding or destroying the evidence, effects or instruments of the felony or misdemeanour, *to prevent it being discovered*."; Declaration of Adriana De Buerba [Docket No. 289-1], Exhibit 111 ("De Buerba Expert Report") at ¶ 4 (translation of Judgment of the Spanish Supreme Court no. 62/2013, January 29, 2013) ("The action must have an impact on the evidence, effects or instruments of the criminal offence and the intent of these misconducts must be to prevent the criminal offence or its

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[15]Under the current Spanish Criminal Code, "accessories," as defined in the 1973 Spanish Criminal Code, are no longer considered "criminally responsible" for the original criminal offense. Rather, similar participation or involvement subsequent to the execution of the original offense is now defined as an independent criminal offense, i.e., "covering up," which is defined in Article 451. Article 451 provides in relevant part:

> Whoever has knowledge of a felony committed and, without having intervened in it as a principal, subsequently intervenes in its execution, in any of the following manners, shall be punished with a sentence of imprisonment of six months to three years:
>
> 1. Aiding the principals or accomplices to benefit from the gains, product or price of the offence, without intended personal profit;
>
> 2. Hiding, altering or destroying the evidence, effects or instruments of an offence, to prevent it being discovered;
>
> 3. Aiding the suspected criminals to avoid investigation by the authority or its agents, or to escape search or capture, whenever any of the following circumstances concur . . .

Spanish Criminal Code Article 451 (Declaration of Adrian De Buerba [Docket No. 289-1] at Exhibit 111B).

relevant legal aspects from being discovered.").[16] In this case, there is absolutely no evidence that the Foundation purchased the Painting (or performed any subsequent acts) with the intent of preventing Scheidwimmer's or the Nazis' criminal offenses from being discovered. Indeed, Scheidwimmer had already been convicted and sentenced after the war, and the 1939 forced sale had already been the subject of civil proceedings in Germany from 1948 to 1958 in which both Lilly and Scheidwimmer were parties. *See* Declaration of Jonathan Petropoulos [Docket No. 277], Exhibit 71, at ¶¶ 55-56; Court's Order Denying Thyssen-Bornemisza Collection Foundation's Motion for Summary Adjudication filed on March 13, 2015 [Docket No. 245].

Contrary to the clear definition of "accessory" in the Spanish Criminal Code, Plaintiffs' Spanish legal expert, Alfredo Guerrero Righetto, creatively opines that one who has committed the independent crime of receiving stolen property is "included within" the concept of an "accessory". Supplemental Declaration of Alfredo Guerrero [Docket 298-1], Exhibit 1 at 7. The Court disagrees. As clearly explained by the Foundation's expert in Spanish criminal law, the receipt of stolen goods is an independent crime, and one who commits that crime is not necessarily "criminally responsible" for the previous crime perpetrated by others as an "accessory".[17] De Buerba Expert Report at ¶¶ 21-26.

Because the Foundation was not an accessory to the crimes committed by Scheidwimmer and the Nazis, as defined in the Spanish Criminal Code, the Court concludes that Article 1956 of the Spanish Civil Code is inapplicable.

5. Spain's Adverse Possession Laws Do Not Violate the European Convention

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[16]The Court rejects the contrary conclusion reached by Plantiffs' Spanish legal expert, Alfredo Guerrero Righetto. In his initial declaration filed on April 20, 2015 [Docket No. 279], he relied on the following inaccurate translation of Spanish Criminal Code Article 451: "Those who with knowledge of the commission of a crime and without having participated in it as a perpetrator or accomplice, intervene after execution of any of the following ways . . . concealing, altering or disabling the body, effects or instruments of a crime, to prevent *their detection*". In contrast, the official translation by the Spanish Ministry of Justice provides: "Whoever has knowledge of a felony committed and, without having intervened in it as a principal, subsequently intervenes in its execution, in any of the following manners . . . [h]iding, altering or destroying the evidence, effects or instruments of an offence, to prevent *it* being discovered." Guerrero Righetto's inaccurate translation results in his erroneous opinion that the Foundation is an "accessory" to the Nazis' crime, because he believes that the intent of the misconduct under Article 451 must be to prevent the evidence, effects or instruments of the offense from being discovered rather than to prevent the criminal offense itself from being discovered. Although Mr. Guerrero Righetto adheres to his opinion in his Supplemental Declaration filed on May 11, 2015 [Docket No. 298-1] even after his translation error was pointed out by the Foundation's expert, the Court, after conducting its own research, concludes that his interpretation of Article 451 (and Article 17 in the 1973 Spanish Criminal Code) is plainly wrong.

[17]It does not appear, nor do the parties argue, that the crime of receiving stolen property is itself a misappropriation crime covered by Article 1956.

on Human Rights

Lastly, Plaintiffs, in an effort to avoid summary judgment, urge the Court to take the unprecedented and drastic step of invalidating Spain's adverse possession laws under Article 1 of Protocol No. 1 of the European Convention on Human Rights. Although Plaintiffs devote less than half of a page in their Opposition to this argument, the Court concludes that it is appropriate to address this argument.

Spain is a party to the European Convention on Human Rights, including its Protocol No. 1. Article 1 of Protocol No. 1 provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

As the European Court of Human Rights summarized:

> Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest . . . The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule."

Case of J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. The United Kingdom, no. 44302/02 (/sites/eng/pages/search.aspx#{"appno":["44302/02"]}), § 52, ECHR 30 August 2007 (hereinafter "*Pye*") (citations omitted). "In order to be compatible with the general rule set forth in the first sentence of the first paragraph of Article 1, an interference with the right to the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." *Id.* at § 53 (citations omitted). "In respect of interferences which fall under the second paragraph of Article 1 of Protocol No. 1, with its specific reference to 'the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .', there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this respect, States enjoy a wide margin of appreciation with regard

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both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question." *Id.* at § 55.

In *Pye,* the European Court of Human Rights held that the English adverse possession law applicable to land did not violate Article 1 of Protocol No. 1 of the European Convention on Human Rights. Specifically, it held in relevant part: (1) the loss of ownership pursuant to a generally applicable English land law was properly characterized as a "control of use" of land within the meaning of the second paragraph of Article 1, rather than a "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1; (2) the law pursued a legitimate aim in the general interest; and (3) the law struck a fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights, and there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realized. *Id.* at §§ 64-84.

The Court likewise concludes that Spain's laws of adverse possession do not violate Article 1 of Protocol No. 1 of the European Convention on Human Rights. "It is characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local conception of the importance and role of property." *Id.* at § 74. As discussed above, Spain's adverse possession laws serve the legitimate interests of certainty of title, protecting defendants from stale claims, and encouraging plaintiffs not to sleep on their rights. Moreover, in determining that a fair balance exists, the Court recognizes that Spain enjoys a "wide margin of appreciation," with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. Spain's adverse possession laws are long-standing, generally applicable laws, which fall within Spain's margin of appreciation, "unless they give rise to results which are so anomalous as to render the legislation unacceptable." *Id.* at § 83. The Court concludes that the results are not so anomalous as to render Spain's laws of adverse possession unacceptable.

Accordingly, the Court concludes that, under Spain's adverse possession laws, the Foundation acquired ownership of the Painting as of June 21, 1999, six years after it purchased the Painting from the Baron.

C. To the Extent that Amended California Code of Civil Procedure § 338(c) Would Result in Depriving the Foundation of its Ownership of the Painting, It Violates the Foundation's Due Process Rights.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). As the Supreme Court stated in *Campbell v. Holt*:

> It may . . . very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a

> legislative act passed after the bar has become perfect, that such act deprives the party of his property without due process of law. The reason is that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law.

Campbell v. Holt, 115 U.S. 620, 623 (1885).

In this case, the Court has concluded that the Foundation acquired ownership of the Painting under Spanish law prior to California Legislature's retroactive extension of the statute of limitations in 2010. Moreover, it is undisputed that, before the California Legislature retroactively extended the statute of limitations in 2010, Plaintiffs' claims were time-barred under the prior version of California Code of Civil Procedure § 338. Accordingly, to the extent that application of amended California Code of Civil Procedure § 338(c) would result in depriving the Foundation of its ownership of the Painting, the statute violates the Foundation's due process rights.[18] Indeed, there is no persuasive argument that the statute is narrowly tailored to serve a compelling state interest.

IV. CONCLUSION

For the foregoing reasons, the Foundation's Motion for Summary Judgment is **GRANTED**. Plaintiffs' Motion for Summary Adjudication Re Choice of California Law is **DENIED**. The parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before June 11, 2015. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a declaration outlining their objections to the opposing party's version no later than June 11, 2015.

Although the Foundation has now prevailed in this prolonged and bitterly contested litigation, the Court recommends that, before the next phase of litigation commences in the Ninth Circuit, the Foundation pause, reflect, and consider whether it would be appropriate to work towards a mutually-agreeable resolution of this action, in light of Spain's acceptance of the Washington Conference Principles and the Terezin Declaration, and, specifically, its commitment to achieve "just and fair solutions" for victims of Nazi persecution.

IT IS SO ORDERED.

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[18] In any event, under California law, it does not appear that the retroactive extension of the statute of limitations would result in depriving the Foundation of ownership of the Painting. *See, e.g., In re Marriage of Klug*, 130 Cal. App. 4th 1389, 1399 (2005) ("Statutes of limitation are legislative enactments that limit the time period in which a plaintiff can bring his or her cause of action in court. They do not alter the legal obligation and injury underlying plaintiff's claim.").

APPENDIX E

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID CASSIRER *et al.*, Plaintiffs-Appellants, v. THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain, Defendant-Appellee.	No. 19-55616 D.C. No. 2:05-cv-03459-JFW-E ORDER

Before: CALLAHAN, BEA, and IKUTA, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Accordingly, the petition for panel rehearing and rehearing en banc (Dkt No. 67) is DENIED.

APPENDIX F

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1602

§ 1602. Findings and declaration of purpose

Currentness

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

Notes of Decisions (110)

28 U.S.C.A. § 1602, 28 USCA § 1602
Current through PL 117-11 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1603

§ 1603. Definitions

Effective: February 18, 2005
Currentness

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub.L. 109-2, § 4(b)(2), Feb. 18, 2005, 119 Stat. 12.)

Notes of Decisions (376)

28 U.S.C.A. § 1603, 28 USCA § 1603
Current through PL 117-11 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1604

§ 1604. Immunity of a foreign state from jurisdiction

Currentness

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

Notes of Decisions (157)

28 U.S.C.A. § 1604, 28 USCA § 1604
Current through PL 117-11 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1605

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

Effective: December 16, 2016
Currentness

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

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

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[**(e), (f)** Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) Jurisdictional immunity for certain art exhibition activities.--

(1) In general.--If--

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) Exceptions.--

(A) Nazi-era claims.--Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and--

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) Other culturally significant works.--In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and--

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) Definitions.--For purposes of this subsection--

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means--

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub.L. 100-640, § 1, Nov. 9, 1988, 102 Stat. 3333; Pub.L. 100-669, § 2, Nov. 16, 1988, 102 Stat. 3969; Pub.L. 101-650, Title III, § 325(b)(8), Dec. 1, 1990, 104 Stat. 5121; Pub.L. 104-132, Title II, § 221(a), Apr. 24, 1996, 110 Stat. 1241; Pub.L. 105-11, Apr. 25, 1997, 111 Stat. 22; Pub.L. 107-77, Title VI, § 626(c), Nov. 28, 2001, 115 Stat. 803; Pub.L. 107-117, Div. B, § 208, Jan. 10, 2002, 115 Stat. 2299; Pub.L. 109-304, § 17(f)(2), Oct. 6, 2006, 120 Stat. 1708; Pub.L. 110-181, Title X, § 1083(b)(1), Jan. 28, 2008, 122 Stat. 341; Pub.L. 114-222, § 3(b)(2), Sept. 28, 2016, 130 Stat. 853; Pub.L. 114-319, § 2(a), Dec. 16, 2016, 130 Stat. 1618.)

Notes of Decisions (1101)

28 U.S.C.A. § 1605, 28 USCA § 1605
Current through PL 117-11 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1606

§ 1606. Extent of liability

Effective: November 26, 2002
Currentness

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894; amended Pub.L. 105-277, Div. A, § 101(h) [Title I, § 117(b)], Oct. 21, 1998, 112 Stat. 2681-480, 2681-491; Pub.L. 106-386, Div. C, § 2002(g)(2), formerly § 2002(f)(2), Oct. 28, 2000, 114 Stat. 1543, renumbered § 2002(g)(2), Pub.L. 107-297, Title II, § 201(c)(3), Nov. 26, 2002, 116 Stat. 2337.)

Notes of Decisions (102)

28 U.S.C.A. § 1606, 28 USCA § 1606
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