No. 24-

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

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

OPINION OF THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (APRIL 30, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 05-3459-JFW (Ex)

DAVID CASSIRER, et al.

v.

THYSSEN-BORNEMISZA
COLLECTION FOUNDATION

Filed April 30, 2019,
Decided April 30, 2019

PROCEEDINGS (IN CHAMBERS):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRESENT:

HONORABLE JOHN F. WALTER,
UNITED STATES DISTRICT JUDGE.

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

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

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) 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.

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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.

Supplemental Appendix

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

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.

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.

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

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.

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 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):

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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.

Supplemental Appendix

(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 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 Cassirer in Berlin, Germany.[8] The remnant of the label from the

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.

8. In 1898, Paul and Bruno Cassirer opened an art gallery and publishing house, "Bruno und Paul Cassirer, Kunst und

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

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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.

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 "*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

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.*

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.

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]

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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.

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 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,"

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.

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 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

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.

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.

(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.

Supplemental Appendix

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]

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.

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 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

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

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.

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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.

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.

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

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

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.

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.

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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.

Supplemental Appendix

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 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

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.

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 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.

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

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 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.

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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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.

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). *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

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.

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 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]

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

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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

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 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

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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".

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 knowledge" 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]

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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*

Supplemental Appendix

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

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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.

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:

> 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.*

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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.

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 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:

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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*.

> (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.

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.