To be Argued by:
GERI S. KRAUSS

New York County Clerk's Index No. 650026/13

New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2018-968

ESTATE OF MARGARET KAINER, and the following individuals as heirs of MARGARET KAINER: KURT BECK a/k/a Curt Beck as Executor of the Estate of ANN BECK, JANET CORDEN as Executor of the ESTATE of GERALD CORDEN, MARTIN CORDEN as Executor of the Estate of GERALD CORDEN, SIMON CORDEN as Executor of the Estate of GERALD CORDEN, WARNER MAX CORDEN, FIRELEI MAGALI CORTES GRUENBERG, MATILDE LABBE GRUENBERG, HERNAN LABBE GRUENBERG, PETER LITTMAN, HERNAN RENATO CORTES RAMOS and EQUITY TRUSTEES LIMITED as Executor of the Estate of ELLI ALTER,

Plaintiffs-Appellants,

– against –

UBS AG, a Swiss corporation, UBS GLOBAL ASSET MANAGEMENT (AMERICAS), NORBERT STIFTUNG f/k/a Norbert Levy Stiftung, a purported Swiss foundation, EDGAR KIRCHER and CHRISTIE'S INC.,

Defendants-Respondents,

– and –

JOHN DOES 1-X, including a possessor of a painting entitled *Danseuses* by Edgar Degas, c. 1896

Defendants.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Preliminary Statement

Plaintiffs, the lawful heirs of Margaret Kainer ("Margaret"), brought this action seeking redress for an unlawful conspiracy on the part of UBS AG and UBS Global Asset Management (Americas), Inc. (together "UBS"), Norbert Stiftung f/k/a Norbert Levy Stiftung, a purported Swiss foundation (the "Foundation"), Edgar Kircher ("Kircher") (UBS, the Foundation and Kircher referred to together as "the Foundation Defendants") and Christie's Inc. ("Christie's") (together "Defendants") to deprive Plaintiffs of their rights to recover works of art owned by Margaret (the "Kainer Collection"), which were first looted from Margaret by the Nazis and then again by Defendants.

The crux of this litigation involves a conspiracy between the Foundation Defendants and Christie's to falsely legitimize the Foundation's status as the heir of Margaret Kainer for restitution purposes to create marketable title to the Kainer Collection for their mutual profit. It involves two transactions that were centered in New York: (i) a Restitution Settlement Agreement (the "RSA"), solicited by Christie's from the Foundation, in which it purportedly released the claims of all the Kainer heirs to a stolen painting from the Kainer Collection entitled *Danseuses* by Edgar Degas, c. 1896 (the "Painting"), and (ii) two sales of the Painting effectuated by Christie's for millions of dollars in which it vouched for and legitimized that false claim. Plaintiffs seek to recover the Painting or its monetary value.

In avowed disregard of controlling decisions of this Court and the Court of Appeals, the lower court dismissed this case on a pre-answer motion as against the Foundation Defendants on *forum non conveniens* grounds without first – or ever – determining whether it had jurisdiction over them. While this case was *sub judice*, this Court, in *Prime Properties USA 2011, LLC v. Richardson*, 145 A.D.3d 525 (1st Dep't 2016), unequivocally reiterated its longstanding rule that the issue of personal jurisdiction must be addressed before *forum non conveniens* as otherwise the court does not have the power to issue a binding order. The lower court, though citing to *Prime Properties*, chose not to follow it. That failure constitutes reversible error.

The lower court's decision on the merits of the *forum non conveniens* decision equally violates well-established law. Most fundamentally, it deemed pending proceedings in Switzerland to be an "adequate alternative forum" even though (i) the Foundation (the only defendant here that is a party to those proceedings) is seeking to dismiss those proceedings on jurisdictional and statute of limitations grounds, and (ii) there is no jurisdiction there over co-conspirator Christie's. It did not even condition the dismissal on waiver of those defenses.[1] Under this Court's decisions, the lower court's ruling was an abuse of discretion

[1] This would not be curative, however, as parties who are not Defendants here are also seeking dismissal of those proceedings on the same grounds which, if successful, would result in a dismissal as to all parties.

and a fundamental failure to implement the basic *forum non conveniens* policies of justice, fairness and convenience.

While either of these factors, by themselves, mandate reversal, the driving force behind the lower court's decision is simply wrong. Essentially, the lower court concluded that this case cannot proceed without a determination of "the parties' status and rights as heirs," and it then presumed that would be determined in the pending Swiss proceedings between Plaintiffs and the Foundation. Further assuming that Plaintiff's rights relating to the Painting would also be resolved in those proceedings, it dismissed this case against the Foundation Defendants in its entirety. It stayed the case against Christie's, but conditioned its reopening upon Plaintiffs obtaining a ruling with respect to the competing heirship claims in the Swiss proceedings.

The fundamental error of the ruling below is that the Swiss proceedings will not definitively resolve the heirship issue or rights to the Painting – nor do they need to for this case to proceed. Plaintiffs' status and rights as heirs are fixed and enforceable through a valid French Certificate of Inheritance ("COI"). That certificate is not being challenged in the Swiss proceedings or anywhere else. Thus, whatever the disposition is in those cases, Plaintiffs will still be legal heirs. Moreover, given the Foundation's and other parties' efforts to dismiss those

proceedings on jurisdictional and statute of limitation grounds, a decision on the merits may never be rendered.

Most critically, the issues in this case – the conspiracy between the Defendants relating to the Painting and to legitimize the Foundation's claims of heirship – are not (and cannot be) an issue in the Swiss proceedings. Thus, the lower court's dismissal effectively precludes Plaintiffs from *ever* bringing this claim against the Foundation Defendants. Rather, Plaintiffs are left only with the possibility – if the conditions the lower court imposed ever come to pass – of trying a conspiracy case against Christie's alone. This is extraordinarily prejudicial as it impedes Plaintiffs' ability to obtain essential discovery and live testimony from the co-conspirators and imposes a prejudicial delay during which the Painting may be further transferred and lost to Plaintiffs forever.

Preventing Plaintiffs from litigating this conspiracy claim with clear ties to New York is particularly egregious in light of the passage of the Holocaust Expropriated Art Recovery Act of 2016, Pub. L 114–308, December 16, 2016, 130 Stat 1524 (the "HEAR Act"). The HEAR Act was passed specifically to ensure that victims of the Holocaust and their heirs can bring claims in federal and state courts and obtain a determination on the merits without being unfairly barred by statutes of limitations. By choosing to dismiss this case, the lower court has wrongfully denied Plaintiffs the benefits conferred by this legislation, deprived them of their chosen

forum and relegated them to a forum which, in the words of the Second Circuit, places "'almost insurmountable' obstacles to the recovery of artwork stolen by the Nazis." *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010).

Questions Presented

1. Whether the court erred in refusing to follow controlling law which requires a determination of personal jurisdiction before even considering a *forum non conveniens* motion?

2. Whether the court erred in holding that a pending proceeding in a foreign forum is an adequate alternative for a *forum non conveniens* dismissal where the defendant is seeking to dismiss that proceeding on jurisdictional and statute of limitation grounds, and no conditions of waiver of such defenses were or could adequately be imposed?

3. Whether the court erred in dismissing a conspiracy case with a nexus to New York involving plaintiffs' efforts to recover Nazi-looted art on *forum non conveniens grounds* where the alternative forum recognizes time-barred defenses and the HEAR Act would bar such defenses in this forum?

4. Whether the court erred in foreclosing plaintiffs from proceeding with their case on the basis of a French COI which was not being challenged in any pending proceeding?

5. Whether the court erred in refusing plaintiffs any discovery whatsoever on contested issues of jurisdiction and *forum non conveniens* in the face of evidence that specific claims made by the defendants were untruthful?

6. Whether the court erred in *sua sponte* staying this five-year old case against the one remaining defendant pending a determination in an alternate forum (which may never occur) where such delay will prejudice plaintiffs' ability to take discovery, try their case and recover their property?

Factual Statement

The Ownership And Looting Of The Painting

Margaret, who lived in Germany, owned a substantial and valuable art collection. (R-155). During the Holocaust, the Nazis illegally confiscated the collection and in May 1935 sold it at a "Judenversteigerung" (a special auction for assets belonging to Jewish victims of the Nazi regime). (R-155).

Margaret and her husband Ludwig left Germany in 1932 to travel. (R-142). After the Nazis seized power in 1933, they never returned. (R-142). They spent 1943 to 1946 as refugees in Switzerland, then relocated to France where Margaret lived until her death in 1968. (R-155). Ludwig predeceased Margaret. (R-156). Margaret was childless at her death, but she had multiple heirs. (R-156). The stolen paintings were not found prior to her death. (R. 156).

UBS was the trusted manager of the Kainer family assets. (R-157). In breach of its fiduciary obligations, instead of searching for Margaret's heirs (some of whom had previously contacted it), the Foundation Defendants (all of whom are related to or controlled by UBS) embarked upon a scheme to misappropriate her assets so that they could continue to manage them for a profit and deprive the lawful heirs of their rights. (R-158-163).

Margaret's assets consisted of her own assets and assets she had inherited from her father Norbert Levy ("Norbert"). (R-156). Norbert's will contained a

reversionary provision that if Margaret died without heirs, three-quarters of the assets he had bequeathed to her were to be used to set up a specifically designated foundation. (R-154). The Foundation Defendants used the reversionary provision in Norbert's will to effectuate their scheme. (R-159-161). To that end, they established the Foundation, which they then falsely claimed was the foundation designated under Norbert's will. (R-160-161). In fact, the Foundation was a sham, had a bogus purpose, and contained no provision for the benefit of Margaret's heirs, should they be found.[2] (R-159-160). This directly contradicted Norbert's intentions in his will, which were to benefit his family. (R-160).

The Foundation Defendants then took steps to have the Foundation designated as the heir entitled to Margaret and Ludwig's assets, including their reparations claim. (R-159). In 1972, falsely claiming that Margaret had no heirs, the Foundation made a claim to a German Court that it was the heir pursuant to the reversionary provision of Norbert's will. (R-160-161). It obtained a one page "Certificate of Partial Inheritance" which stated that the Foundation "has, since December 18, 1968 been a co-heir entitled to 3/4 of the estate of Councillor of Commerce Norbert Levy." (R-160-161). There is nothing in the decree that specifically identifies what assets

[2] The purpose was to provide financial assistance for the education of young people under 20 who met certain conditions with preference to be given to "[c]hildren of Jewish heritage from pre-war Germany." (R-160). In 1971, when the Foundation was established, all Jewish children born before World War Il were adults.

comprised the three-fourths of Norbert's estate referenced, nor is there any mention of Margaret's estate or any work of art. (R-161).

Meanwhile, in Switzerland, according to public documents, the Canton of Vaud ("Vaud") and the City of Pully ("Pully") asserted jurisdiction over Margaret's estate based on a claim that she had allegedly been domiciled in Pully. (R-161). In May 2003, a Swiss Court issued a certificate of inheritance designating Vaud and Pully as Margaret's sole legal heirs in equal halves as "common owners." (R-162). By this time, there were millions of dollars at issue, including the reparations the Foundation had claimed and recovered in earlier German proceedings in Margaret and Ludwig's names. (R-163). The Foundation challenged the claim that Vaud and Pully were Margaret's heirs, and in 2005 they ended up settling the dispute by divvying up Margaret's estate among themselves. (R-162).

Evidence that this settlement was collusive and questionable was contained in a public document available on the internet entitled "Preliminary Opinion to the Municipal Council of the City of Pully Municipality seeking approval of the settlement (No. 8-2005 dated March 30, 2005)" (the "Settlement Opinion"):

> Also, the opposing party [the Foundation] raised a very sensitive point which our attorneys, for strategic reasons, had intentionally left out so far: the issue of the domicile of Margret Kainer on the day of her death as well as the applicable law according to the last domicile. *At that point it could not be ruled out that French private international law could apply, which could call into question the status of heirs of the Canton of Vaud and the City of Pully*.
>
> ***

> In addition, the parties agreed to join efforts to find and obtain compensation for paintings looted in 1933, either from Margret Kainer or from her husband, Ludwig Kainer. Currently, none of the paintings still being sought have been found. The parties opened a joint account with UBS SA to collect any resulting amounts. (R-162; emphasis added).

Thus, without ever making any bona fide efforts to look for Margaret's heirs and knowing that the application of French law would void their claims, the Swiss municipalities and the Foundation Defendants – hardly victims of the Holocaust – seized the reparations and rights to restitution of the looted Paintings intended for such victims and now seek to deprive the true victims – Margaret's legitimate heirs – of their rights. (R-143-144).

Plaintiffs Are Margaret's Lawful Heirs

Given the circumstances of the Holocaust, the looting of the Kainer Collection by the Nazis and the murder, persecution and dispersal of the family, it was years before Plaintiffs learned that they were Margaret's heirs and that her estate contained the Painting and other works of art. (R-157). They promptly established their status as Margaret's lawful heirs by obtaining a French "acte de notariété" on or about May 25, 2012.[3] (R-150-151, 156, 482-487). As Margaret's lawful heirs, ownership of her entire estate passed directly to Plaintiffs and they are the only ones to whom restitution can be made for looted artworks. (R-156-157, 486).

[3] An "acte de notoriété" is a quasi-judicial French legal proceeding in which heirs of a decedent are determined. (R-483).

The Need To Legitimize Title To Art Stolen By The Nazis

Beginning in the 1990's, as the volume of the theft by the Nazis from Jewish collectors became known, the victims of these thefts and their heirs sought to recover the stolen artworks. (R-164). To assist in identifying and recovering the stolen artworks, lost art databases were established. (R-164).

These events had a serious impact on the art market. (R-164). If there were any clue that a painting might have been seized by the Nazis between 1933 and 1945, it was unsaleable. (R-164). Thus, it became critical to determine whether a painting put up for sale fell in that category, and if so, to legitimize title to the painting. (R-164).

The Restitution Settlement Agreement

In May 2009, a representative of Christie's contacted the attorney for the Foundation on behalf of its client, a Japanese Gallery holding the Painting in Japan, seeking to conclude an agreement between its client and the Foundation regarding a proposed private sale of the painting. (R-166). Since the Foundation had listed the Painting in the lost art databases as stolen and identified itself as the heir, Christie's needed to restitute the Painting to render it saleable. (R-166).

The Foundation Defendants and Christie's negotiated the RSA which Christie's claimed renounced the claims of the "Heirs of Margaret and Ludwig Kainer" in the Painting in exchange for 30% of the net proceeds of the sale

(estimated to be $6,000,000). On October 27, 2009, the Foundation received $1.8 million dollars pursuant to the RSA. (R-168). Christie's, Plaintiffs allege, also received a fee or commission on account of the sale and/or for obtaining the RSA. (R-168).

The Sale Of The Painting At Auction In New York

Just days later, on November 3, 2009, Christie's offered the work for sale at public auction in New York with an estimated price of $7,000,000 to $9,000,000. (R-169). Given that the Painting's provenance indicated that it was sold in Berlin in 1935, the RSA was essential to the sale. (R-169). The Painting was sold pursuant to a prominent "Saleroom Notice," which was repeated by the auctioneer during the auction, stating:

> "This work is offered pursuant to a restitution settlement agreement with the heirs of Ludwig and Margret Kainer in 2009." (R-169-170, 186).

The purpose of the statement was to assure the purchaser that Christie's had vetted and vouched for the restitution of the Painting to the heirs of Ludwig and Margaret Kainer so that title to the Painting would be legitimate. (R-170). The Painting actually sold that day in New York for $10,722,500. (R-169).

Facts Relating To Christie's Knowledge Or Conscious Avoidance Of Knowledge That The Foundation's Claim To Heirship Was False Or Seriously Questionable

On its website, Christie's touts its expertise with respect to restitution issues:

With the benefit of experience and insight developed over more than a

> decade, Christie's takes very seriously its responsibility to ensure that we do not knowingly sell spoliated but unrestituted art works. We are also committed to the ongoing research and identification of such objects, and in helping resolve restitution claims for works consigned for sale. (R-165-166).

Given this claimed expertise and research ability, Christie's should have discovered and recognized from both the publicly available documents and the documents it presumably was given by the Foundation that there were serious questions as to the legitimacy of its claim that it was the heir or had any right to act on behalf of all of the heirs. (R-167, 174, 178, 182). These included, at a minimum:

- The Partial COI which, on its face, only conferred rights to Norbert's estate, not Margaret's, and to only three-quarters of it. There is nothing that indicates that the Painting was included in that three-quarter interest.

- The Foundation's Charter, which revealed a bogus purpose.

- The Foundation had no connection to the Kainer family or provided any benefit to any family member.

- The Settlement Opinion, which reveals the collusive nature of the settlement and the fear that if French law were applied their status as heirs would be invalid.(R-167).

Defendants' Deliberate Concealment Of Their Activities From Plaintiffs

Plaintiffs were unaware of the auction, the RSA, or the sale of the Painting until 2011 and 2012. (R-171). Since then, Plaintiffs have put Defendants on notice that they are the legitimate heirs of Margaret and that the Foundation is not. (R-171).

Plaintiffs have repeatedly sought to obtain information from Defendants regarding the RSA and the other agreements pertaining to the Painting, the identity of the parties to those agreements, and the owners of the Painting, including the purchaser at the auction. (R-171). Defendants have intentionally refused to provide them with any information or investigate their claims. (R-171-172).

Based on these acts, Plaintiffs assert claims in the SAC for unjust enrichment, conversion, and conspiracy relating to both (against all Defendants), breach of fiduciary duty, an accounting and unjust enrichment (against the Foundation Defendants), aiding and abetting breach of fiduciary duty and unjust enrichment (against Christie's) and replevin (against the unknown "John Doe" purchaser of the Painting). Plaintiffs seek to recover the Painting or its monetary value. (R-172-183).

The Swiss Proceedings

Plaintiffs presented affidavits from their counsel in the Swiss proceedings unequivocally denying any claim that those proceedings will definitively determine the status and rights of Plaintiffs as heirs or their rights to the Painting:

> The Defendants claim that the Swiss Proceedings involve the same claims as this New York proceeding and will definitively resolve the issue as to whether Plaintiffs are the heirs of Margaret Kainer or have rights to the Degas *Danseuses* painting (the "Painting"). They are incorrect.
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> ***
>
> The validity of the French COI is not an issue in any of the Swiss Proceedings and cannot, in any event, be declared null and void by a Swiss judge or authority. (R-488-89, 492).

Thus, counsel concludes, "even under the worst-case result in the Swiss Proceedings for Plaintiffs, Plaintiffs would still have valid French Certificates of Inheritance with all the rights attendant thereto." (R-489-490).

Plaintiffs' French counsel confirms that the French COI can only be challenged through a complex legal procedure in a French court, and no such proceedings have been filed. (R-483).

Moreover, the Foundation Defendants' counsel in the Swiss proceedings admitted that the Foundation, Pully and Vaud had filed motions to preclude any determination as to the status and rights of Plaintiffs and the Foundation as heirs in the Swiss proceedings:

> Based on the submissions filed by the plaintiffs in New York, any such court would presumably also have to decide whether the Foundation has any right in the estate of Norbert Levy or does not, as contended by plaintiffs. The same issue will have to be examined by the Berlin courts and *the Lausanne courts (unless the latter, after limiting the proceedings as requested by Vaud and Pully, dismiss the plaintiffs' claims against the Foundation already on grounds of lack of standing to sue and/or prescription*[4]**).** (R-786; emphasis added).

Plaintiffs expressly argued to the lower court that the assertion of these jurisdictional and time-barred defenses required a denial of the motion. (R-67, 72-74).

[4] Prescription is a time-based defense used to cut off a claimant's rights comparable to a statute of limitations.

Further, the claims that the lower court dismissed cannot be brought in the Swiss Proceedings. As Plaintiffs' Swiss counsel states:

> Moreover, the Swiss Proceeding would not be an alternative forum to raise these claims because (i) neither Christie's nor UBS Global are subject to jurisdiction in Switzerland, and (ii) given the New York nexus of these claims, and particularly the fact that the Painting was vetted, brokered, restituted, sold and auctioned by Christie's in New York, the Swiss Courts would not be likely to accept jurisdiction even if Christie's and UBS Global were willing to consent to jurisdiction. (R-490).

The New York Nexus Of This Case

The focus of this case is a conspiracy that was effectuated through the RSA, initiated, negotiated and carried out by Christie's in New York, for the purpose of recognizing the Foundation as the sole heir and rendering the Painting saleable. It was sold twice in New York pursuant to the RSA. The first sale effectuated through Christie's resulted in a payment to the Foundation of $1.8 million and the second sale, just days later, was at a public auction. At the auction, Christie's falsely represented to the buying public in New York that the Painting was sold pursuant to an agreement fully restituting the Painting to Margaret's heirs and therefore had marketable title. Kircher came to New York and met with Christie's about the sale just days later.

The Proceedings And Decision Below

This case was filed on January 3, 2013 against the Foundation Defendants. In April 2013, all Defendants moved to dismiss the Complaint asserting either lack of

personal jurisdiction or *forum non conveniens*. In July 2013, Plaintiffs filed an Amended Complaint and the motions were deemed addressed to it.

While those motions were still *sub judice*, at Plaintiffs' request, the court issued an order, dated April 14, 2014, holding the motions in abeyance and permitting Plaintiffs to move for leave to file a Second Amended Complaint ("SAC") to narrow the scope of the claims to those relating to New York and adding Christie's as a defendant. In May 2014, Plaintiffs so moved, and at a hearing on October 28, 2014, the court granted Plaintiffs leave to file the SAC and Defendants leave to serve motions to dismiss it. It denied Plaintiffs' request to take jurisdictional discovery prior to having to respond to Defendants' renewed motions.

In December 2014, Defendants all filed the motions that are the subject of this appeal. The motions were argued on May 14, 2015. In July 2015, Plaintiffs moved to supplement the record with documentary evidence demonstrating that a factual statement made by the Foundation Defendants' counsel at oral argument was incorrect. The purpose of the motion was to provide further evidence that Defendants' representations were not credible and the need for discovery.

As of January 4, 2017, the motions still had not been decided, and Plaintiffs advised the court of the recent passage of the HEAR Act, and the court permitted very limited supplemental briefing on it. (R-849-855). On February 1, 2017, Plaintiffs notified the Court that the German 1972 Partial COI that the Foundation

claimed established its rights had been annulled, leaving it with no evidence or determination that it is an heir. (R-32). With the issuance of the annulment, the pending German proceedings addressed by the parties and the Court below ended.

By decision filed October 31, 2017, the lower court issued the decision below in which:

- With respect to the Foundation Defendants, it declined to decide the jurisdictional issues, declined to permit Plaintiffs any discovery, and dismissed the SAC as against them on *forum non conveniens* grounds.

- With respect to Christies, it (i) granted the motion to dismiss on *forum non conveniens* grounds, to the extent of *sua sponte* staying the action with leave to restore in the event Plaintiffs "obtain a favorable final determination in the European court(s) that they have rights as heirs to an ownership interest in the Painting," (ii) dismissed the causes of action for unjust enrichment and conspiracy to obtain unjust enrichment for failure to state a claim, and (iii) otherwise denied the motion with leave to move again for dismissal on statute of limitations grounds and the impact of the HEAR Act if the case is restored.

- It denied Plaintiffs' motions to supplement the record and for discovery. (R-8-41).

Argument

POINT I

THE TRIAL COURT AVOWEDLY FAILED TO FOLLOW CONTROLLING LAW AND DISMISSED THIS CASE ON *FORUM NON CONVENIENS* GROUNDS WITHOUT FIRST DETERMINING THAT JURISDICTION EXISTS

It is axiomatic that an IAS court is required to apply the most recent controlling decisions of the Appellate Division in which it is located unless that determination has been overruled by the Court of Appeals. *People ex rel. Schneiderman v. Coll. Network, Inc.*, 53 Misc.3d 1210(A) (Sup. Ct. N.Y. 2016); *Robert Plan Corp. v. Onebeacon Ins.*, 10 Misc.3d 1053(A) (Sup. Ct. Nassau 2005); *Miller v. Miller*, 109 Misc.2d 982, 983 (Sup. Ct. Suffolk 1981); *In re Weinbaum's Estate*, 51 Misc.2d 538, 539 (Surr. Nassau Co. 1966). It must do so even if that decision is diametrically opposed to an earlier expression by the same court. 1 Carmody-Wait 2d § 2:337. Moreover, that a lower court may have doubt as to the soundness of a controlling Appellate Division decision affords it no basis to refuse to follow it. *In re Weinbaum's Estate*, 51 Misc.2d 538, 539 (Surr. Nassau 1966); *Vanilla v. Moran*, 188 Misc. 325 (Sup. Ct. Albany 1947), *affd.*, 272 App.Div. 859 (3d Dep't 1947), *affd*., 298 N.Y. 796 (1949).

The most recent controlling decision of this Court on the dispositive issue here unequivocally held that a court must address "the issue of personal jurisdiction before *forum non conveniens* because, if a court lacks jurisdiction over a defendant,

it is without power to issue a binding *forum non conveniens* ruling as to that defendant." *Prime Properties USA 2011, LLC v. Richardson*, 145 A.D.3d 525, 525 (1st Dep't 2016), citing *Flame S.A. v. Worldlink Intl. [Holding] Ltd.*, 107 A.D.3d 436, 437 (1st Dep't 2013), *lv. denied*, 22 N.Y.3d 855 (2013). Notably, *Prime Properties* was decided while the motion that is the subject of this appeal was *sub judice*, and it reaffirmed *Flame*, the case Plaintiffs argued below was controlling. The Court of Appeals has also explicitly held that the doctrine of *forum non conveniens* "has no application unless the court has obtained *in personam* jurisdiction of the parties." *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 579 (1980).[5]

Further, this Court has made clear that if a determination of jurisdiction requires discovery or a hearing, the plaintiff must be afforded such discovery before any jurisdictional or *forum non conveniens* analysis can proceed. *Edelman v. Taittinger, S.A.*, 298 A.D.2d 301 (1st Dep't 2002); *I.F.S. Int'l, Inc. v. S.L.M. Software, Inc.*, 174 A.D.2d 811, 811-12 (3d Dep't 1991). Notably, in *Edelman*, this Court emphasized the need to permit jurisdictional discovery and to make the jurisdictional finding even where it preliminarily noted that New York did not appear

[5] These decisions confirmed a long line of other cases in which the First Department and every other department has similarly so held. *Wyser-Pratte Mgmt. Co. v. Babcock Borsig AG*, 23 A.D.3d 269 (1st Dep't 2005); *Edelman v. Taittinger, S.A.*, 298 A.D.2d 301 (1st Dep't 2002); *Caribbean Const. Servs. & Associates, Inc. v. Zurich Ins. Co.*, 244 A.D.2d 156 (1st Dep't 1997); *Sanchez v. Major*, 289 A.D.2d 320 (2d Dep't 2001); *I.F.S. Int'l, Inc. v. S.L.M. Software, Inc.*, 174 A.D.2d 811 (3d Dep't 1991); *Cliffstar Corp. v. California Foods Corp.*, 254 A.D.2d 760, 761 (4th Dep't 1998).

to be a convenient forum and other factors militated strongly against retention of the action in New York. 298 A.D.2d at 303.

The lower court not only violated bedrock principles in ignoring this well-established controlling authority, but justified its decision to do so by reasons that do not withstand scrutiny. Thus, the lower court openly acknowledged that its conclusion that it could dismiss on *forum non conveniens* grounds without determining jurisdiction was contrary to *Prime Properties, Flame*, and what it acknowledged was "the weight of appellate authority in this Department." (R-19). Nonetheless, it attempted to justify its decision to disregard this recent and controlling authority in three ways. (R-17-20).

First, it suggested that there were "two conflicting lines of authority on this threshold issue," based on a handful of decisions of this Court which addressed *forum non conveniens* claims "presuming, without deciding jurisdiction." (R-18-19). Those decisions, however, all predated *Prime Properties* and *Flame*. Moreover, none of those cases reflected any dispute over the propriety of that "presumption" or even indicated any awareness of the long line of decisions prohibiting it. Thus, these cases provide no basis for the lower court to ignore the rule that it must apply the most recent controlling authority.

Second, the lower court attempted to dismiss the Court of Appeals' clear statement of law in *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 579

(1980) by inexplicably deeming it "dicta." (R-20). Notably, the Court of Appeals again applied this rule in its subsequent decision in *Banco Ambrosiano, S.P.A. v. Artoc Bank & Tr. Ltd.*, 62 N.Y.2d 65, 73 (1984). There was no legitimate basis for the lower court to ignore the clear and uncontradicted statement of the Court of Appeals on this issue.

Third, based upon its two (erroneous) conclusions that there were two lines of authority in this Court and only "dicta" from the Court of Appeals, it declared that there was no binding authority and it was therefore free to follow the decision of the U.S. Supreme Court in *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007), which it stated it "finds to be more persuasive." (R-19-20). That case, which was limited to the power and procedure of federal courts, also confirmed that "judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum" favor the court's determination of the jurisdictional issue first. *Id.* at 436. However, it further held that a federal court may properly dismiss an action based on *forum non conveniens* without first determining that it has jurisdiction over the defendants "where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal." *Id*.

Even though *Sinochem* had nothing to do with state courts, the lower court went so far as to suggest that *Sinochem* cast doubt on the soundness of the contrary rule established by the "weight of appellate authority" because none of those cases

discussed the reasoning of *Sinochem* (or what it had deemed the "conflicting lines of authority"). (R-19-20). In fact, as the lower court even acknowledged, this Court was aware of *Sinochem* as it was referenced in the dissent in *Am. BankNote Corp. v. Daniele*, 45 A.D.3d 338 (1st Dep't 2007), and only the one dissenting Justice thought it should be followed. (R-19). In any event, the lower court's suggestion that it could disregard this Court's clear and repeated post-*Sinochem* declarations of longstanding law merely because the reasoning of a case that does not even apply to state courts was not discussed, makes no sense. Moreover, even if *Sinochem* were viewed as casting doubt as to the soundness of existing decisions in this Court, it would still not be a legitimate basis for the lower court – or even this Court – to change the law in derogation of clear Court of Appeals law to the contrary.[6]

Even if *Sinochem* could properly be considered, it could not be applied here, under its own terms, for two reasons. First, *Sinochem* held that a determination of *forum non conveniens* prior to jurisdiction is a *limited exception* to what it deemed the proper course of determining jurisdiction first:

> If, however, a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground. In the mine run of cases, jurisdiction "will involve no arduous inquiry" and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum "should impel the

[6] Even if the Court of Appeals disagrees with its own prior holding, it "would nonetheless be bound to follow it under the doctrine of stare decisis." *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 25 N.Y.3d 799, 819 (2015).

> federal court to dispose of [those] issue[s] first." ... But where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course. 549 U.S. at 436.

Recognizing that its choice to apply *Sinochem* had to be premised on a conclusion that discovery on jurisdictional issues would be "unduly burdensome," the lower court so concluded. (R-18, 25). That is simply not the case, even based on the lower court's own description of what Plaintiffs were seeking. (R-25, 86-87, 254-255). From Christie's, Plaintiffs essentially sought one file, Christie's file on the Painting, and possibly its deposition. That file would presumably contain its notes, relevant documents and communications with the Foundation relating to the RSA, the Agreement itself, and documents relating to the subsequent sales of the Painting. From the Foundation Defendants, Plaintiffs just sought documents relating to the jurisdictional and *forum non conveniens* issues, such as where and how the RSA was negotiated and their contacts with New York. That is about as limited discovery as one could ask for. Indeed, specifically to avoid any claim that Plaintiffs' discovery demands would be perceived as overreaching, Plaintiffs stated that they were "willing to address the discovery needed for purposes of these motions in stages, with each stage dependent upon the results of the last." (R-86, 254-255). Moreover, the lower court could have limited the discovery if it believed Plaintiffs were requesting too much. *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 467–68, (1974) (reversing order precluding jurisdictional discovery even where the request

was "overbroad" indicating defendants could seek a protective order); *Mariner Pac., Ltd. v. Sterling Biotech Ltd.*, 106 A.D.3d 667 (1st Dep't 2013) (same).[7]

Secondly, *Sinochem* expressed doubt as to whether making a *forum non conveniens* determination prior to a jurisdictional one would be proper where, as here, there was an issue regarding jurisdiction or the statute of limitations in the foreign forum. In such a case, the *Sinochem* Court acknowledged, there is a concern that a court "failing first to establish its jurisdiction could not condition a *forum non conveniens* dismissal on the defendant's waiver of any statute of limitations defense or objection to the foreign forum's jurisdiction." 549 U.S. at 435.

In short, none of the reasons given by the lower court support its conclusion that *Prime Properties*, *Flame* and *Ehrlich-Bober* are not binding authority and there is no justification for it not to have applied them. For that reason, alone, the decision below should be reversed.

[7] The lower court also denied discovery because it would "overlap" with discovery on the merits. (R-25). This objection is perplexing. Since both specific jurisdiction and *forum non conveniens* depend upon a showing of the relationship between the Defendants and New York on the underlying claim, it is hard to conceive of any discovery that would not overlap.

POINT II

THE TRIAL COURT'S *FORUM NON CONVENIENS* DISMISSAL SHOULD BE REVERSED ON THE MERITS

A. The Fundamental Errors Made By The Trial Court

The lower court's *forum non conveniens* dismissal was also wrong on the merits. The key basis for its decision was its conclusion that (i) "in order to determine whether the Foundation Defendants and/or Christie's committed any wrongful acts in connection with the May 2009 Restitution Settlement Agreement and the sales of the Painting, and whether plaintiffs were injured, the court would first have to determine the parties' status and rights as heirs" and, (ii) pending proceedings in Switzerland in which Plaintiffs and one of the Foundation Defendants are parties (or some other potential proceeding in a European court) are adequate alternative forums to resolve that question, as well as the other claims raised in this case. (R-28, 33). In reaching this conclusion, the lower court made three fundamental errors.

Most significantly, the lower court's dismissal of this conspiracy case against the Foundation Defendants in its entirety and staying it as against Christie's, with conditions, has effectively eviscerated Plaintiffs' right to litigate it at all, and at the very least, enormously prejudiced their ability to do so effectively.

The First Error: Finding That A Foreign Proceeding In Which the Foundation Defendants Are Asserting Jurisdictional And Statute Of Limitations Defenses Is An Adequate Alternative Forum

The lower court completely ignored the fact that the Foundation (which is the only defendant that is a party to the pending Swiss lawsuits), as well as Vaud and Pully, are *seeking to dismiss the Swiss proceedings for lack of jurisdiction and as barred by the statute of limitations.* (R-786, 67, 72-74). It is well established that where a claim may be barred by a statute of limitations in the alternative forum, that forum is not an adequate alternative forum. *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605 (Sup.Ct. NY 2018) (denying *forum non conveniens* dismissal on grounds that there was no adequate alternative forum for filing a claim involving Nazi-looted art where the defendants had argued that claims may be barred under both French and Swiss law).

Moreover, despite the Foundation's acknowledgement that it was asserting jurisdictional and statute of limitations bars in the Swiss alternate forum, the lower court did not even condition its *forum non conveniens* dismissal on the Foundation's agreement to abandon those claims. In *Highgate Pictures, Inc. v. De Paul*, 153 A.D.2d 126, 129 (1st Dep't 1990), this Court held that this failure, alone, requires reversal:

> Thus, the IAS court, at the very least, abused its discretion in not conditioning the grant of the motion on a stipulation by defendant to waive any Statute of Limitations defense and to submit to the personal jurisdiction of the California courts (or those of Great Britain).

As this Court noted, "[t]he availability of an alternative forum for plaintiff, although no longer controlling, remains one of the primary considerations in determination of a *forum non conveniens* motion."[8] *Id.* at 128-129. Thus, it held that the "failure of the IAS court to ensure the existence of an alternative forum in this straightforward case represents a fundamental failure to implement basic *forum non conveniens* policy, to do justice and further fairness and convenience." *Id.* at 129; *See*, *Ortalano v. Yu He*, 138 A.D.3d 520, 521 (1st Dep't 2016). In fact, here, even a waiver would not solve the problem in view of the Foundation Defendants' counsel admission that Plaintiffs' claims against the Foundation in the Swiss Proceedings could be dismissed on *a pending motion by Vaud and Pully* – parties this Court has no control over. (R-786). Accordingly, the lower court's dismissal here is fundamentally unfair to Plaintiffs and rewards the Foundation Defendants' efforts to deprive Plaintiffs from ever litigating their claims against them on the merits in any forum in clear violation of this Court's directive in *Highgate*.

This error is even more egregious in light of the passage of the HEAR Act while this motion was *sub judice*, which was passed specifically to ensure that claims

[8] It further noted that *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1984), *cert denied* 469 US 1108 (1985), the case in which the Court of Appeals concluded that the availability of another suitable forum was not an absolute prerequisite, involved a dispute between nonresidents and sought a sweeping review of the conduct of a foreign sovereign during his 38–year reign pursuant to problematic Iranian Law. That is a unique circumstance and hardly the case here.

by victims of the Holocaust and their heirs to Nazi-looted property are not unfairly barred by statutes of limitations or other time based defenses preventing them from having their cases determined on their merits. (R-851-855). Section 3 of the HEAR Act ("Purposes") states:

> (1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.
>
> (2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

It achieves this goal by (i) enacting a six-year statute of limitations which applies notwithstanding any other provision of Federal or State law or *any defense at law relating to the passage of time*, and (ii) measuring the accrual of the statute from the time the plaintiff has actual knowledge of both the identity and location of the artwork at issue and its possessory interest in it. The statute, by its terms, applies to pending cases and, as Plaintiffs contended below, their claims fall squarely within it. Thus, it would preclude any statute of limitations or time-based defenses raised by the Foundation Defendants under any applicable law. Notably, in considering this statute in connection with the statute of limitations defenses raised by Christie's below, the lower court held that it "could not find" that the HEAR Act did not apply to this case and that it was "premature" to do so. (R-37-38).

To preclude Plaintiffs from proceeding here with respect to their claims relating to a Painting that was lost into the stream of commerce by actions taken in New York and relegate them instead to a forum in which the statute of limitations or other time based defenses have been raised contradicts strong and longstanding federal and state public policies and undermines the rights afforded to Plaintiffs under the HEAR Act. *See*, *Philipp v. Fed. Republic of Germany*, 894 F.3d 406, 418 (D.C. Cir. 2018). Both state and federal courts in New York have regularly held that this public policy militates strongly against dismissal of cases brought by plaintiffs seeking to recover Nazi-looted art. For example, in *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605, 625 (Sup. Ct. N.Y. 2018), the Court recently refused to dismiss a Nazi-looted art case on various grounds stating that "the United States and the State of New York have historical and public policy driven interests in adjudicating claims involving artwork looted during the Nazi regime."[9] Particularly on point is the Second Circuit statement in *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010) in rejecting the application of Swiss law to determine ownership of a Nazi looted work of art: "we simply note the obvious: Swiss law places significant hurdles to the recovery of stolen art, and almost 'insurmountable' obstacles to the recovery

[9] In support of this statement it listed the numerous actions, statutes and cases that have enunciated and enforced this policy, including (i) determinations "by New York Courts that the Act of State Doctrine has no application concerning art looted by the Nazis," (ii) the 1998 Holocaust Victims Redress Act, (iii) the HEAR Act, and (iv) the New York and federal case law that "supports litigating Nazi looted art." 77 N.Y.S.3d at 625–26.

of artwork stolen by the Nazis from Jews and others during World War II and the years preceding it." *See, Menzel v. List*, 49 Misc.2d 300, 315 (Sup. Ct. N.Y. 1966), *mod.*, 28 A.D.2d 516 (1st Dep't 1967), *rev'd on other grounds*, 24 N.Y.2d 91 (1969) (applying both New York and federal law to correct injustice to plaintiff occasioned by Nazi pillage and plunder). Under these circumstances, the lower court should not have deprived Plaintiffs of their choice of a New York forum. *Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401, 404 (1st Dep't 2017) (applying the HEAR Act).

Although the lower court was ostensibly dismissing the case against the Foundation Defendants for a determination of what it claimed to be an underlying preliminary issue of heirship, it actually dismissed the claim Plaintiffs have asserted here against them *in its entirety*: (i) the conspiracy between the Foundation Defendants and Christie's to legitimize the Foundation's claim as the sole heir for restitution purposes and to render the Painting marketable so that they both could profit from its sale, and (ii) the impact their actions have had on the loss of the Painting to Plaintiffs and the Foundation's ability to seek restitution with respect to other discovered Paintings to the detriment of Plaintiffs. The conspiracy claim is not part of the Swiss litigation. Nor could it be litigated in Switzerland both because of its New York nexus and because Christie's – whose acts are central to the claims – is not subject to jurisdiction there. (R-493-499). Thus, the lower court's dismissal

has effectively deprived Plaintiffs of *any* right to litigate its New York based conspiracy claim against the Foundation even if, under the lower court's logic, they did obtain a favorable ruling on the merits from the Swiss court regarding the parties' status as heirs. This, too, is clearly a violation of *Highgate*.

The Second Error: Finding That The Swiss Proceedings Will Be Determinative Of Plaintiffs' Rights As Heirs And To The Painting And That Determination Is Necessary For This Case To Proceed

The second error of the lower court was its conclusion that (i) this case could not proceed without a determination as to Plaintiffs' status and rights as heirs and to the Painting, and (ii) the pending Swiss proceedings will make such a determination. (R-28, 33).[10] In this respect, the lower court's statement that "[p]laintiffs have not shown, or claimed, that the determination of their rights as heirs in the Swiss proceeding will not include a determination as to whether, and to what extent, they have an ownership interest in the Painting" is not true. (R-33).

On the contrary, Plaintiffs' Swiss and French counsel expressly stated in an affidavit submitted below that any claim that the Swiss proceedings *will definitively resolve these issues is incorrect*. (R-486, 488-489, 492-493). The reasons are, first, as discussed above, the Foundation and other parties in the Swiss proceedings are

[10] *Citigroup Glob. Markets, Inc. v. Metals Holding Corp.*, 45 A.D.3d 361, 362, 845 N.Y.S.2d 282, 283 (2007), cited by the lower court, does not lend support to its conclusion here that the underlying issue of ownership supports dismissal. That case was an interpleader action, neither of the parties had selected New York as the forum and the case had no nexus to New York.

actively seeking to preclude such a ruling by moving to dismiss those proceedings on jurisdictional and statute of limitations grounds. Second, even if those proceedings did reach the merits, nothing that may transpire in those proceedings can invalidate Plaintiff's status as heirs pursuant to the French COI that forms the basis of their claims here. Nor has the French COI been challenged anywhere. (R-486, 489-490). Third, the Painting is not an issue in the Swiss proceedings. (R-488-489).

This Court has held that Plaintiffs' possession of the French COI confers upon them the right to bring this lawsuit. *Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401 (1st Dep't 2017); *Schoeps v. Andrew Lloyd Webber Art Found.*, 66 A.D.3d 137 (2009). Notwithstanding these rulings, the lower court rejected Plaintiffs' reliance on the French COI because in this case "there are competing claims to heirship under the laws of several jurisdictions."[11] (R-31). That ruling misunderstands the validity which is to be accorded to the French COI and the relevance of the Foundation's competing claim. The lower court acknowledged that no one is challenging the French COI in the Swiss action or elsewhere. (R-31). Thus, no matter what happens in the Swiss proceedings, Plaintiffs will still be heirs under the French COI and entitled to all the rights conferred by it – including the right to

[11] The lower court's second objection to Plaintiffs' reliance on these documents was that *Schoeps* was just *dicta*. (R-31). That objection was resolved by this Court's decision in *Maestracci*.

bring this claim. (R-486, 492-493). In contrast, the document that the Foundation was relying on to confer heirship on it has been annulled and it currently has *nothing* that it can point to that confers heirship on it. (R-32).

If the Swiss proceedings (over the Foundation's objection) actually do address the merits, they cannot invalidate Plaintiffs' French COI. (R-486, 492-493). Thus, at the conclusion of those proceedings, Plaintiffs will either be the sole heirs (if they win) or the Foundation or Pully or Vaud may also be heirs (if Plaintiffs lose). Under no scenario would the Foundation be the sole heir or authorized to represent all the heirs – which was the false representation made that purportedly legitimized its status, permitted the sales and made it more difficult, if not impossible, for Plaintiffs to ever recover the Painting.

To explain more fully, the challenged representation – that the work was being "offered pursuant to a restitution settlement agreement with the heirs of Ludwig and Margret Kainer in 2009" (R-169-170, 186) – had to mean that it was either (i) free of claims of *all* the Kainer heirs, or (ii) free of all claims of the Kainer heirs with *all the rights to Painting*. Otherwise the Painting would not have been marketable. Neither the RSA, the representation, the effort to legitimize the Foundation's status as an heir, nor the impact that has had on Plaintiffs' ability to recover the Painting (and potentially other paintings) will be addressed, much less resolved, in the Swiss proceedings. Both are at issue here. Thus, even if there is more than one set of heirs,

any claim that the Painting was fully restituted to the Kainer heirs (meaning all of the heirs that could make a claim to it) was untrue because it did not restitute anything to Plaintiffs (who are heirs and are making a claim). The representation would also be false unless there were proof that the Foundation had the right to represent all the heirs or had exclusive rights to the Painting – neither of which, as Plaintiffs contend, it can prove. Either way, Plaintiffs have a claim.

Thus, contrary to the lower court's finding, there is no additional determination that needs to be made with respect to Plaintiffs' status as heirs to proceed with their claim.[12] Whether the Foundation's status actually needs to be determined for Plaintiffs to win this case is open to question. In this respect, it is Plaintiffs' position that based on the facts that were known or could reasonably have been discovered by Christie's at the time of the sale, it should have known that the Foundation's claim that it was the sole heir with rights to the Painting was false, or at least subject to serious question. Thus, it should not have facilitated the RSA or sold the Painting in reliance on it and the Foundation accepted the proceeds from the sale under false pretences. Moreover, the Partial COI the Foundation (and presumably Christie's) relied on has been annulled, clearly giving the Foundation

[12] The fact that the French (or German or Swiss) COI allows subsequent challenges under certain circumstances cannot be a basis, as the lower court found, not to allow Plaintiffs to proceed based on the status and rights actually conferred on them by such a certificate that is not being challenged anywhere. (R-31-33). If that were the case, no one would be able to assert their rights in courts here under the heirship documents of those countries.

no current status as an heir. This may be all the determinations that there ever may be – particularly if the Foundation, Vaud or Pully succeed in obtaining a dismissal of the Swiss proceedings. Alternatively, if a resolution does emerge, it can be dealt with at that time. Given that Plaintiffs have the right to proceed at this time, there is no reason to preclude them from doing so – especially with respect to a stolen artwork that had been missing for decades and there is a statute of limitations running.

In any event, to the extent that any status determinations do need to be made, Plaintiffs may well face a statute of limitations bar in any Swiss or other European court. That bar is lifted here. Since this lawsuit involves a conspiracy regarding the restitution and sale of a painting in New York in conspiracy with a New York party, Plaintiffs should be allowed to proceed in their choice of forum and afforded the benefit intended by the HEAR Act of having their claim heard on the merits.

The Third Error: Precluding A Trial Of All Of The Co-Conspirators In One Forum By Bifurcating The Case, Dismissing It Against The Foundation Defendants And Staying It Against Christie's

The third error of the lower court was its failure to consider that this is a conspiracy case in which the claims against all of the Defendants are intertwined, their actions are admissible against each other, live testimony is essential, and discovery is needed with respect to all the participants. By dismissing the Foundation Defendants from the case, it has not only, as set forth above, absolved

them of ever being held to account for their actions, but it has (i) deprived Plaintiffs of their chosen forum in which they can have one trial against all the co-conspirators, and (ii) completely undercut their ability to bring the case against Christie's even if the stay were ever lifted.

This is the only forum where Plaintiffs can sue all the Defendants in one case. Christie's is not subject to jurisdiction at all in Switzerland and the Swiss courts would likely not even accept jurisdiction even if Christie's were to consent to it (which Christie's has not). (R-493-498). Indeed, this fact, by itself, renders the lower court's determination that Switzerland is an adequate alternative jurisdiction improper. *Reid v. Ernst & Young Glob. Ltd.*, 13 Misc.3d 1242(A) (Sup.Ct. NY 2006) (refusing to dismiss for *forum non conveniens* where obtaining personal jurisdiction over all the present defendants in the alternative forum was uncertain).

Notably, the lower court concluded that the SAC alleges acts specific to Christie's that establish a sufficient nexus to New York that "militates against a *forum non conveniens* dismissal of the claims against it." (R-35). Given that this case is a conspiracy case, which, as Plaintiffs demonstrate below, meets the standard that permits all Defendants to be held to Christie's acts, this finding also militates against dismissing the claims against the Foundation Defendants – particularly since this is the only forum where the claims can be tried together.

Bifurcating the case and then staying it as against Christie's is also unfairly prejudicial against Plaintiffs. With respect to the stay, the lower court stated that Plaintiffs would only be allowed to proceed "if plaintiffs obtain a favorable final determination in the European court(s) that they have rights as heirs to an ownership interest in the Painting." (R-35). As discussed above, Plaintiffs already have rights as heirs and to bring this claim, and a determination from the Swiss court, or any other European court, is not necessary. Moreover, given the jurisdictional and statute of limitations defenses being raised in those proceedings, Plaintiffs may not be able to get a merits ruling there. Under the HEAR Act, they could, if necessary, do so here. Thus, the condition the lower court imposed on the stay may well deprive Plaintiffs of ever being able to litigate their claims against Christie's as well.

The delay occasioned by the stay is also seriously prejudicial. Delay affects memories and the availability of witnesses and evidence – factors which are particularly important where the acts at issue occurred nearly a decade ago and the case involves Nazi-looted art. Moreover, the actions that are the basis of the Plaintiffs' claim purportedly rendered the Painting marketable. This can permit further sales of the Painting and make locating or recovering it more difficult or even impossible. In this respect, agreements consigning works of art to Christie's for sale have contained rescission clauses which give it broad discretion to undo an art sale – even years after the transaction – where there are questions of title that could pose

a risk of liability. (R-474). Absent discovery, we cannot know if the agreements Christie's entered into with any of the consignors or purchasers of the Painting contained such a clause. If it did, then Christie's – even up until today – could rescind the transaction and repossess the painting. Any delay increases the possibility of a sale which forecloses that possibility.

Lastly, even if Plaintiffs were eventually able to meet the lower court's criteria and proceed against Christie's, their ability to present their case would be extremely prejudiced. With the dismissal of the Foundation Defendants as parties, Plaintiffs would be forced to try a conspiracy case against Christie's without any of its co-conspirators. Since the co-conspirators (except UBS AG) are all located outside the jurisdiction, Plaintiffs may not even be able to obtain critical discovery from them or compel their live testimony at trial. As the Second Circuit emphasized in *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1233 (2d Cir. 1996):

> In *Allstate Life*, we observed that the live testimony of key witnesses was necessary where the plaintiffs alleged that the defendants had conspired to defraud them. We deemed such testimony necessary for the jury to assess the witnesses' credibility.

See, Globalvest Mgmt. Co. L.P. v. Citibank, N.A., 7 Misc. 3d 1023(A) (Sup. Ct. NY 2005) (holding that the likely inability of a party to compel critical witnesses to testify in New York will unfairly prejudice a party's ability to present its case); *Weinberger v. S. A. Empresa De Viacao Airea Rio Grandense (Varig),* 52 Misc.2d 357, 359 (Sup.Ct. NY 1966) (holding that it is vital to have all possible defendants

present, as otherwise each defendant may point to the other as being responsible and essential witnesses may be beyond the process of the court).

B. A Proper Analysis Of The Factors For *Forum Non Conveniens* Requires Denial Of The Motions

In evaluating the lower court's ruling as to *forum non conveniens*, this Court is not limited to deciding whether the lower court abused its discretion; rather, it "may exercise its discretion independently." *Ghose v. CNA Reinsurance Co.*, 43 A.D.3d 656, 660 (1st Dep't 2007); *Intertec Contracting A/S v. Turner Steiner Int'l, S.A.*, 6 A.D.3d 1, 4 (1st Dep't 2004); *Holness v. Mar. Overseas Corp.*, 251 A.D.2d 220, 224–25 (1st Dep't 1998); *Highgate Pictures, Inc. v. De Paul*, 153 A.D.2d 126, 129 (1st Dep't 1990). Thus, if this Court does not reverse this case on the factors set forth above and does further consider the lower court's *forum non conveniens* ruling, it should exercise its discretion and reverse the dismissal and the stay.

As this Court has held, "[i]t is well established that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed,'" *Waterways Ltd. v. Barclays Bank PLC*, 174 A.D.2d 324, 327 (1st Dep't 1991). The burden of proof to establish that the forum chosen by plaintiff is inappropriate is on the defendant and that burden is a "heavy" one. *Travelers Cas. & Sur. Co. v. Honeywell Int'l Inc.*, 48 A.D.3d 225, 226 (1st Dep't 2008); *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286 (1st Dep't 2006). That heavy burden remains even where plaintiffs are non-residents. *Id.*

The factors to be considered are:

> "The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation," among which are "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit . . . . The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction."

Travelers Cas. & Sur. Co. v. Honeywell Int'l Inc., 48 A.D.3d 225, 225-226 (2008), citing *Islamic Republic of Iran v Pahlavi*, 62 N.Y.2d 474, 479 (1984), *cert. denied*, 469 U.S. 1108 (1985); *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286, 287 (2006). *Forum non conveniens* is a "highly flexible concept" and "no one factor is controlling." *Intertec Contracting A/S v. Turner Steiner Int'l, S.A.*, 6 A.D.3d 1, 4 (1st Dep't 2004). However, as discussed above, the availability of an adequate alternative forum for Plaintiffs to bring their claims remains one of the primary considerations in determination of a *forum non conveniens* motion.

As already demonstrated, none of the factors the lower court relied on in support of its determination withstand scrutiny. Moreover, the lower court failed to give proper weight to those factors that militate strongly in favor of retaining jurisdiction, including (i) the pending jurisdictional and statute of limitations issues asserted in the Swiss proceedings rendering it an inadequate forum, (ii) the HEAR Act which reflects a strong public policy to provide a forum here where Plaintiffs'

claim can be decided on the merits, and (iii) the unavailability of any other forum in which all Defendants can be subject to jurisdiction.

In its ruling, the lower court failed to even address the additional reasons why Plaintiffs explained they intentionally chose New York as the forum to address the claims asserted in this action. (R-250-253). Those were: (i) the challenged events were centered, orchestrated and effectuated in New York, (ii) New York is the only forum which provides an effective means of obtaining information relating to these issues (which has been deliberately concealed from Plaintiffs), and (iii) New York permits claims, remedies and procedures that are not equally available elsewhere, including laws and public policies that strongly protect the claims of the rightful owners of stolen and Nazi-looted art. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 320 (1991). Switzerland is at the opposite end of the spectrum.

Thus, the focus of this action is an unlawful conspiracy among the Defendants with respect to the RSA and the sales of the Painting – acts which were all centered and effectuated in New York. This scheme is not being litigated in any Swiss proceedings and neither UBS nor Christie's are defendants (nor could they be made defendants) in such proceedings. (R-489-498).

The private interests favor New York. New York is the only forum which has the procedures which will afford Plaintiffs the ability to obtain the discovery they need. It is not available in Switzerland. (R-499-501). Key witnesses and documents

with respect to the relevant 2009 transactions are located in New York. One of these is Christie's, whose files and employees are critical to finding out what actually transpired with respect to the RSA and the sales of the Painting. (R-255). Sotheby's, the other auction house regularly dealing with restitution issues is also located in New York, as is the individual responsible for such issues at Sotheby's with whom the Foundation has previously dealt and whose testimony may be necessary. (R-275-280). While discovery required from outside New York could be obtained in this forum, it would not be available in Switzerland. (R-499-501). As to claims of purported hardship, where, as here, the foreign parties are or are controlled by a large international bank with an office in New York and ample resources to bring witnesses to New York if needed, New York courts have found any hardship to be minimal. *Mionis v. Bank Julius Baer & Co.*, 9 A.D.3d 280 (1st Dep't 2004); *Nordkap Bank AG v. Standard Chartered Bank*, 32 Misc.3d 1216(A) (Sup. Ct. NY 2011).

The public interests also favor New York. The false representations regarding the restitution and marketability were made to the buying public in New York. New York, as the leading international art market, clearly has an interest in protecting the integrity of that market. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 320 (1991). It also has a strong public interest in providing justice to victims of the Holocaust. *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605, 625 (Sup. Ct. 2018). Thus, there is a substantial nexus between New York and Plaintiffs' claims

to justify Plaintiffs' choice of forum. *Intertec Contr. A/S v. Turner Steiner Intl., S.A.*, 6 A.D.3d 1, 6 (1st Dep't 2004).

To the extent that foreign law may be relevant, this Court has routinely held that the courts of this State are fully capable of applying the law of foreign jurisdictions. *See, e.g. Mionis v. Bank Julius Baer & Co.*, 9 A.D.3d 280, 282 (1st Dep't 2004) ("the courts of this State are fully capable of applying Greek law"); *Yoshida Printing Co., Ltd. v. Aiba*, 213 A.D.2d at 275 (1st Dep't 1995) ("Neither the fact that plaintiff is a Japanese corporation, whose witnesses may speak Japanese, nor the potential necessity of applying Japanese law, renders New York an inconvenient forum"). *Intertec Contr. A/S v. Turner Steiner Intl., S.A.*, 6 A.D.3d 1, 6 (1st Dep't 2004) (Application of Sri Lankan law does not render New York an inconvenient forum).

In short, Defendants failed to meet their heavy burden of demonstrating that Plaintiffs' selection of New York is not in the interest of substantial justice. The *forum non conveniens* rulings should be reversed.

POINT III

THE COURT SHOULD HAVE PERMITTED PLAINTIFFS DISCOVERY BEFORE ENTERTAINING ANY JURISDICTIONAL OR *FORUM NON CONVENIENS* MOTIONS

The lower court steadfastly refused to allow plaintiffs to take any discovery whatsoever – despite repeated requests – during the five years this action has been pending. It never even permitted Plaintiffs to obtain a copy of the RSA that forms the basis of the complaint. During that same time frame, it permitted Defendants to make two motions to dismiss – one against the amended complaint, which was mooted after Plaintiffs filed a motion to amend the complaint, and then one against the SAC. Plaintiffs asked, at the time that its motion to file the SAC was granted, that it be permitted limited discovery on the jurisdictional and *forum non conveniens* issues before Defendants were permitted to refile their motions to dismiss. The lower court refused that request. Plaintiffs asked again in their opposition to the refiled motions that are the subject of this appeal for such discovery prior to their determination. (R-86-87; 254-255; 556-566). Again, the lower court denied the request. (R-25-26).

As Plaintiffs argued below, discovery was necessary because (i) information that was essential to defend against these motions has been concealed from Plaintiffs, and (ii) the Foundation Defendants were making representations and selectively tendering documents to the lower court about their contacts with New

York with respect to the RSA and the Painting. (R-239-250; 556-566). In this respect, Plaintiffs presented evidence to the lower court as to why those representations were suspect and, in certain instances demonstrably untrue, and protested that Plaintiffs were denied any opportunity to discover the documents that Defendants did not choose to proffer. (R-239-250). In fact, when Plaintiffs fortuitously found a document that demonstrated the lack of veracity of one of Defendants' counsel's representations to the Court, it moved to supplement the record so the Court would recognize that Plaintiff needed to be afforded the right to challenge Defendants' claims.[13] (R-888-898). The lower court denied the motion to supplement (as well as discovery). (R-25-26, 39-40).

The only reason the lower court ever gave for its denial was that the discovery sought was purportedly "extensive" and "overlapped" with the merits. (R-25). As demonstrated above, that simply was not the case, and if it were, the lower court could have limited it. Since Plaintiffs rely on specific jurisdiction under the long-arm provisions of CPLR 302(a)(1), (2) and/or (3) that are premised on actions taken related to the transaction in New York, any jurisdictional discovery would

[13] The lower court held that it was unnecessary to address the motion to supplement because it made no finding regarding that particular untrue statement. (R-39). That misses the point of the motion which was to show why the Foundation Defendants' factual claims could not be accepted without allowing Plaintiffs discovery. (R-892).

necessarily involve the merits. In short, neither of the lower court's objections were valid reasons to preclude Plaintiffs from all discovery.

Rather, all plaintiffs have to show to be entitled to jurisdictional discovery is that facts "may exist" to exercise personal jurisdiction over the defendant, or that they have made a "sufficient start" and shown "their position not to be frivolous."[14] *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 467 (1974); *Shore Pharm. Providers, Inc. v. Oakwood Care Ctr., Inc.*, 65 A.D.3d 623, 624 (2d Dep't 2009); *BGC Partners, Inc. v. Avison Young (Canada) Inc.*, 46 Misc.3d 1202(A) (Sup. Ct. NY 2014); *Van Damme v. Gelber, Nahum & Gasiunasen Gallery of Palm Beach, Inc.*, 18 Misc. 3d 1120(A) (Sup.Ct. NY 2008). This is a very modest showing that does not even "entail making a prima facie showing of personal jurisdiction." *Bunkoff Gen. Contractors Inc. v. State Auto. Mut. Ins. Co.*, 296 A.D.2d 699, 701 (3d Dep't 2002). Indeed, this standard permits discovery even where plaintiffs have failed to demonstrate that a particular defendant engaged in activity in New York sufficient to subject it to the jurisdiction of the court where, as here, (i) the plaintiffs' assertion of jurisdiction is based on allegations that the agreement at issue was negotiated in part in New York, and (ii) they have been "deliberately kept in the dark" regarding the agreement at issue. *Taberna Preferred Funding II, Ltd. v.*

[14] If the lower court had followed this Court's rules and afforded Plaintiffs' jurisdictional discovery, Plaintiffs would have also had the benefit of that discovery to respond to the *forum non conveniens* motion.

Advance Realty Grp. LLC, 45 Misc.3d 1204(A) (Sup. Ct. NY 2014). As the Court of Appeals made clear in *Amigo Foods Corp. v. Marine Midland Bank-New York*, 39 N.Y.2d 391, 396 (1976), discovery is desirable where "the critical facts are as yet obscure or in dispute."

Rather than analyze the showing Plaintiffs made supporting their contention that they had made a "sufficient start" to warrant jurisdictional discovery, the lower court "assume[d]" that they had but denied it anyway on the (unjustified) grounds that it would be "unduly burdensome." (R-25). In fact, Plaintiffs clearly did meet the "sufficient start" standard, and this Court should reverse the *forum non conveniens* determination made prior to a jurisdictional determination and direct that Plaintiffs be entitled to jurisdictional discovery.

In making this determination, the Court (i) must "accept[] the facts as alleged in the complaint as true and accord[] plaintiff the benefit of every possible favorable inference," *Tucker v. Sanders*, 75 A.D.3d 1096, 1097 (4th Dep't 2010); *Exclaim Associates Ltd. v. Nygate*, 10 Misc.3d 1063(A) (Sup. Ct. NY 2005), and (ii) mere denials on the part of the Defendants are an insufficient basis upon which to deny discovery. *Akodes v. Pyatetsky*, 31 Misc.3d 1238(A) (Sup.Ct. Kings 2011).

Here, the facts alleged by Plaintiffs (which must be accepted as true) are clearly sufficient to satisfy the requirements of specific jurisdiction.

- With respect to CPLR 302(a)(1), the SAC alleges a substantial relationship between the New York transactions (the RSA and the sales of the Painting)

and the causes of action asserted against the non-New York defendants (all of which are based on those New York transactions).

- With respect to CPLR 302(a)(2), the allegations of the acts of conspiracy include allegations of acts that occurred in New York, that the scheme was carried out by Christie's and the Foundation Defendants (and that UBS and Kircher as its employee controlled the Foundation) and that all of the Defendants were aware of and benefited from the New York activities.

- With respect to CPLR 302(a)(3), Plaintiffs have alleged that the foreign Defendants committed tortious acts within and outside New York, expected or should have reasonably expected those acts to have consequences in New York and derive substantial revenue from international commerce. (R-147-149, 242-243, 245, 535-540).

- Plaintiffs also alleged specific injury that occurred in New York: the sale of the Painting under a false claim that it had been restituted. Moreover, the injury is not just economic. The conversion is of the Painting, a unique asset. There also may be provisions in Christie's contracts which will permit rescission of the sale which could allow recovery of the Painting. (R-479).

Further, the SAC alleges a conspiracy and the acts of a co-conspirator or agent in New York can be attributed to the non-resident domiciliary for purposes of acquiring personal jurisdiction over a non-resident – both under the New York long arm statute and in compliance with due process. *BGC Partners, Inc. v. Avison Young (Canada) Inc.*, 46 Misc.3d 1202(A) (Sup. Ct. NY 2014); *Karsh v. Karsh*, 62 Misc.2d 783 (Sup. Ct. Bronx 1970); *Am. Broad. Companies, Inc., v. Hernreich*, 40 A.D.2d 800 (1st Dep't 1972); *Tucker v. Sanders*, 75 A.D.3d 1096 (4th Dep't 2010); *Akodes v. Pyatetsky*, 31 Misc. 3d 1238(A) (Sup. Ct. Kings 2011).

Plaintiffs allege throughout the SAC that Defendants acted in conspiracy with Christie's, and thus Christie's acts in furtherance of the conspiracy, all of which are

alleged to have taken place in New York, are attributable to Defendants. Significantly, where a conspiracy is alleged (i) there is no requirement that the non-resident defendant ever set foot in New York so long as the co-conspirator engaged in an act in furtherance of the conspiracy in New York, and (ii) "the alleged tortious act committed in New York need not be committed upon the plaintiff" so long as "the plaintiff suffer[ed] damage or injury as a result of a tortious act committed in New York." *Exclaim Associates Ltd. v. Nygate*, 10 Misc.3d 1063(A) (Sup. Ct. NY 2005); *Travelers Indem. Co. v. Inoue*, 111 A.D.2d 686 (1st Dep't 1985); *Karsh v. Karsh*, 62 Misc.2d 783 (Sup. Ct. Bronx 1970).

To show a sufficient relationship between a defendant and the conspiracy to warrant the inference that a defendant was a member of the conspiracy for jurisdictional purposes, a plaintiff must show that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted 'at the direction or under the control,' or 'at the request of or on behalf of' the out-of-state defendant." *Andre Emmerich Gallery, Inc. v. Segre*, 96 CIV. 889 (CSH), 1997 WL 672009 *6 (S.D.N.Y. Oct. 29, 1997); *Lawati v. Montague Morgan Slade Ltd.*, 102 A.D.3d 427, 428 (1st Dep't 2013).

The conspiracy Plaintiffs have alleged meets all of these criteria. Specifically, Plaintiffs allege a conspiracy between the Foundation Defendants and Christie's to create purportedly marketable title to the stolen Painting and deceive the buying public in New York for their mutual profit and to Plaintiffs' injury. (R-141). This scheme was effectuated through acts that took place in New York, including the negotiation and facilitation of the RSA by Christie's on behalf of the Foundation, and the brokering of two sales – one of which resulting in a $1.8 million payment to the Foundation. The scheme was effectuated through express and false representations made to potential and actual buyers that the Painting was being sold pursuant to the RSA and therefore free of any claim of the Kainer heirs. (R-166-170). Christie's actions in negotiating the RSA and brokering the first sale were both on behalf of and for the benefit of the Foundation Defendants as the Foundation was the party to the RSA who was entitled to (and received) $1.8 million pursuant thereto upon the sale. (R-166-168). Christie's also conferred a benefit on the Foundation Defendants by putting its imprimatur on the Foundation's claim as heir and purportedly legitimizing that claim. (R-171). Plaintiffs have also expressly alleged that the Foundation Defendants were aware that their activity would have effects in New York. (R-147-148). Specifically, they knew both the first sale (which was brokered by Christie's in New York) and the scheduled auction in New York were expressly made pursuant to the RSA. (R-168-170). Indeed, Kircher admitted that

during his visit to New York one week after the sale he met with Christie's to discuss the auction. (R-170).

In the face of these allegations, all the Foundation Defendants submitted below were bald denials or claims of "undisputed jurisdictional facts" – many of which Plaintiff did in fact dispute. (R-136-137,191-199, 643-651, 239-250). For example, Plaintiffs averred that they had met with the owner of the Japanese Gallery that had possessed the Painting prior to the alleged "private" sale and he had indicated that statements made by Defendant Kircher in his affidavit were untrue. (R-239). These untruthful statements included the amount the Foundation was paid for the restitution – but he would not disclose the true facts absent a court order. (R-239). Moreover, Defendants have exclusive control of critical documents and information relevant to both jurisdiction and the conspiracy, including, among other things, the RSA, the details of the sales, and the names and addresses of the sellers and buyers, which they have refused to disclose. Where, as here, the jurisdictional facts are within the exclusive control of the Defendants, the right to pursue jurisdictional discovery is especially important. *Peterson v. Spartan Indus., Inc.,* 33 N.Y.2d 463, 467 (1974); *Exclaim Associates Ltd. v. Nygate,* 10 Misc. 3d 1063(A) (Sup. Ct. NY 2005).

Thus, the facts that Plaintiffs have alleged clearly meet the "sufficient start" criteria for jurisdiction under a conspiracy theory and Plaintiffs should have been

afforded discovery. *See, e.g., Akodes v. Pyatetsky*, 31 Misc.3d 1238(A) (Sup. Ct. Kings 2011) (plaintiffs met "sufficient start" and entitled to depositions based merely upon allegations by the individual defendants that they were members of the corporate defendant which may have conspired with a New York defendant and unjustly benefitted from the alleged fraud even in the face of denials by the two individual defendants that they ever met the New York defendant); *Andre Emmerich Gallery, Inc. v. Segre*, 96 CIV. 889 (CSH), 1997 WL 672009 (S.D.N.Y. Oct. 29, 1997) (sufficient jurisdictional showing made with respect to the non-resident defendant – who did not commit any acts in New York – in a case alleging a conspiracy between a non-resident defendant and his non-party son to defraud the art market and inflate the value of a piece of artwork through false representations, on the bases that (i) he was advised by his co-conspirator son of the sales agreement that the son signed containing the false representations (which were repeated in subsequent sales), (ii) he ran the business that fabricated the artwork, and (iii) the sale of the artwork in New York benefited the defendant both financially and from the realization of the goals of the conspiracy).

POINT IV

THE TRIAL COURT ERRED IN DISMISSING THE CLAIMS AGAINST CHRISTIE'S FOR UNJUST ENRICHMENT AND CONSPIRACY TO OBTAIN UNJUST ENRICHMENT

The lower court denied Christie's motion to the extent it sought to dismiss any of the causes of action asserted against it except for the sixth cause of action for unjust enrichment and the seventh cause of action for conspiracy to obtain unjust enrichment. (R-36-37). The basis of the dismissal was that the SAC did not allege any "facts showing that plaintiffs had any relationship or connection to [defendant], let alone the 'sufficiently close relationship' necessary to sustain this claim," citing *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 27 (1st Dep't 2015), quoting *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012). (R-36). In so holding, the lower court failed to consider the conspiracy allegations of the SAC.

Thus, it is well established that:

> New York law permits allegations of conspiracy when they "serve to enable a plaintiff to connect a defendant with the acts of his co-conspirators *where without it he could not be implicated*"…, *i.e.*, when they "connect a defendant to an otherwise actionable tort."

Hoag v. Chancellor, Inc., 246 A.D.2d 224, 230 (1st Dep't 1998) (Citation omitted, emphasis added); *Cuker Indus., Inc. v. William L. Crow Const. Co.*, 6 A.D.2d 415, 417 (1st Dep't 1958). This means that a co-conspirator is liable for all wrongful acts

committed by any of its co-conspirators. *Nederlandsche Handel-Maatschappij N.V. v. Schreiber*, 17 A.D.2d 783 (1962).

There can be no question that a sufficient relationship has been alleged with respect to the Foundation Defendants and Plaintiffs – a fiduciary relationship. (R-157-158). By virtue of the conspiracy, that relationship and the actions of the Foundation Defendants are connected to and imputed to Christie's as part of a common scheme. In *Philips Int'l Investments, LLC v. Pektor*, 117 A.D.3d 1 (1st Dep't 2014), this Court held that an imputed relationship is sufficient to satisfy the close relationship requirement. In that case, the Court sustained a claim of unjust enrichment by the plaintiff against two defendant partnerships that had been created by other defendants with whom the plaintiff had formed a joint venture and used to appropriate business opportunities of the joint venture. The defendant partnerships had been concealed from the plaintiff and the plaintiff had no dealings with them. Nonetheless, this Court held that the plaintiff had alleged a sufficient relationship with the partnership defendants to survive a motion to dismiss. That relationship was that:

> its joint venturers, the Pektors, created the partnership defendants as vehicles to appropriate the venture's business opportunity of buying the viable properties. All of the Pektors' knowledge and scheming is, under this theory, imputable to the partnership defendants. *Id*. at 7.

See, L.I. City Ventures LLC v. Sismanoglou, 158 A.D.3d 567, 568, 71 N.Y.S.3d 462 (1st Dep't 2018) (knowledge of one defendant, who was aware of plaintiff's status as exclusive broker, imputable to the remaining defendants because of the nature of their relationships in the alleged scheme to deprive plaintiff of a commission). Similarly here, the relationship of the Foundation Defendants to Plaintiffs is imputable to Christie's.

With respect to the individual claim against Christie's, it is true that Plaintiffs and Christie's did not have any direct dealings at the time the RSA and the sales of the Painting occurred. Nonetheless, Plaintiffs submit that the connection here is not "too attenuated" for purposes of a claim of unjust enrichment because Christie's enrichment was premised on a claim that it did have a relationship or connection with the "heirs of Margaret and Ludwig Kainer." It arranged for the RSA with the "heirs of Margaret and Ludwig Kainer." It expressly sold the Painting based on its representation that the sale was pursuant to an RSA with the "heirs of Margaret and Ludwig Kainer," thereby vouching for the fact that the agreement was with the "heirs of Margaret and Ludwig Kainer." Moreover, the only way the Painting would be marketable is if the restitution was with *all* of the heirs of Margaret and Ludwig Kainer. As set forth in the SAC, Christie's knew or consciously avoided knowing that the Foundation was not the legitimate heir, or at a minimum, did not represent all of the heirs. (R-180). It knew that any falsity with respect to the restitution and

sales pursuant thereto would seriously impact the true heirs or any additional heirs – irrespective as to whether they knew those heirs by name or at the time of the transaction had any direct dealings with them. Accordingly, this case raises none of the concerns of imposing any "burdensome obligation in commercial transactions" that underlay the majority's decision in *Georgia Malone*.

Conclusion

For all the foregoing reasons, it is respectfully requested that the *forum non conveniens* dismissal be vacated, the stay be lifted, jurisdictional discovery be permitted and all claims against all parties be reinstated.

Dated: New York, New York
September 4, 2018

KRAUSS PLLC

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APPELLATE DIVISION – FIRST DEPARTMENT
PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
September 4, 2018

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 60

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ESTATE OF MARGARET KAINER, and the following individuals as heirs of MARGARET KAINER: KURT BECK a/k/a CURT BECK as executor of the estate of Ann Beck, JANET CORDEN as executor of the estate of Gerald Corden, MARTIN CORDEN as executor of the estate of Gerald Corden, SIMON CORDEN as executor of the estate of Gerald Corden, WARNER MAX CORDEN, FIRELEI MAGALI CORTES GRUENBERG, MATILDE LABBE GRUENBERG, HERNAN LABBE GRUENBERG, PETER LITTMAN, HERNAN RENATO CORTES RAMOS, and EQUITY TRUSTEES LIMITED as executor of the estate of Elli Alter,

Plaintiffs,

-against-

UBS AG, a Swiss corporation, UBS GLOBAL ASSET MANAGEMENT (AMERICAS), NORBERT STIFTUNG f/k/a NORBERT LEVY STIFTUNG, a purported Swiss foundation, EDGAR KIRCHER, CHRISTIE'S INC., and JOHN DOES 1-X, including a possessor of a painting entitled Danseuses by Edgar Degas, c. 1896,

Defendants.

----------x

Index No: 650026/13
(Friedman, J.)

PRE-ARGUMENT STATEMENT

Pursuant to § 600.17 of the Rules of the Appellate Division, First Department, plaintiffs-appellants by and through their attorneys, Krauss PLLC, respectfully submits the following Pre-Argument Statement:

1. Title of the Action:

   ESTATE OF MARGARET KAINER, and the following individuals as heirs of MARGARET KAINER: KURT BECK a/k/a CURT BECK as executor of the estate of Ann Beck, JANET CORDEN as executor of the estate of Gerald Corden, MARTIN CORDEN as executor of the estate of Gerald Corden, SIMON CORDEN as executor

of the estate of Gerald Corden, WARNER MAX CORDEN, FIRELEI MAGALI CORTES GRUENBERG, MATILDE LABBE GRUENBERG, HERNAN LABBE GRUENBERG, PETER LITTMAN, HERNAN RENATO CORTES RAMOS, and EQUITY TRUSTEES LIMITED as executor of the estate of Elli Alter v. UBS AG, a Swiss corporation, UBS GLOBAL ASSET MANAGEMENT (AMERICAS), ASSET MANAGEMENT (AMERICAS), INC., NORBERT STIFTUNG f/k/a NORBERT LEVY STIFTUNG, a purported Swiss foundation, EDGAR KIRCHER, CHRISTIE'S INC., and JOHN DOES 1-X, including a possessor of a painting entitled Danseuses by Edgar Degas, c. 1896.

2. Full names of original parties and any change in the parties:

   The full names of the original parties are set forth in the title of the action. There have been no changes.

3. Name, address and telephone number of counsel for appellants or petitioners:

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5. Court and county, or administrative body, from which appeal is taken.

   Supreme Court of the State of New York, County of New York

6. Nature and object of the cause of action or special proceeding (e.g., contract-personal services, sale of goods; tort — personal injury, automobile accident, malpractice, equity — specific performance, injunction, etc.):

   Recovery of work of art, conversion, unjust enrichment, conspiracy to obtain unjust enrichment and conversion, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, replevin, and accounting.

7. Result reached in the court or administrative body below:

   Motion of defendants UBS AG, UBS, Norbert Stiftung f/k/a Norbert Levy Stiftung and Edgar Kircher to dismiss the complaint granted on the ground of *forum non conveniens*, motion of Christie's Inc. to dismiss the complaint granted to the extent that it stayed the action as against Christie's Inc., dismissed the causes of action for unjust enrichment and conspiracy to obtain unjust enrichment and imposed a condition on its denial of dismissal of the remaining causes of action against Christie's Inc., motion of plaintiffs' to supplement the record denied and all discovery precluded.

8. Grounds for seeking reversal, annulment or modification.

   1. A determination with respect to forum non conveniens could not have been made prior to a determination of jurisdiction and discovery should have been permitted with respect to the jurisdictional and *forum non conveniens* issues.
   2. The grounds for dismissal on *forum non conveniens* were not met.
   3. The action should not have been stayed, and the basis for doing so was incorrect.
   4. The stayed causes of action are timely under the HEAR Act.
   5. The complaint adequately stated a cause of action for unjust enrichment and conspiracy to obtain unjust enrichment.
   6. The motion to supplement the record to include information relevant to the motion should have been granted.
   7. Discovery should have been permitted.

9. Related action or proceeding now pending in any court of this or any jurisdiction, and if so, the status of the case.

Dated: New York, NY
December 1, 2017

KRAUSS PLLC

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