To be Argued by:
GERI S. KRAUSS
(Time Requested: 15 Minutes)

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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Preliminary Statement

Defendants 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") submit three separate briefs on this appeal, all adopting the others' arguments.[1] Yet in those many pages, they barely address the fundamental errors Plaintiffs identified in their main brief that require reversal of the IAS Court's dismissal of the Second Amended Complaint ("SAC").

The one key infirmity Defendants do discuss is the IAS Court's inexcusable failure to follow the controlling rule reaffirmed by this Court while this case was *sub judice*: jurisdiction must be decided before *forum non conveniens*. The defense Defendants offer is stunning. First, they disavow that there is any such rule – even though they cite a case that could not state that rule more clearly. They then go one step further and contend that there is "no controlling law" unless every decision of every panel of this Court addressing the issue is unanimous. That proposition they support with two cases that say nothing of the sort. In truth, there is no defense to IAS Court's decision to chart its own course in the face of this Court's contrary directions. On this basis alone, a reversal is warranted.

[1]Since each of the Defendants incorporated the others' arguments, Plaintiffs will generally refer to all arguments herein as made by Defendants jointly.

As to the three fundamental errors requiring reversal of the *forum non conveniens* ruling itself, Defendants strikingly say very little. They do not deny that the Foundation has already asserted both jurisdictional and statute of limitations defenses in the existing Swiss proceedings which the IAS Court held was an adequate alternate forum. Nor do they deny that even conditioning the dismissal on waivers of those defenses would cure the problem, as other parties in that case have also asserted those same defenses which will equally benefit the Foundation. Rather, they simply belittle the availability of an adequate alternative forum as merely one factor to consider.

These already asserted jurisdictional and statute of limitations defenses also undermine the central basis of the IAS Court's ruling: its conclusion that the Swiss proceedings will determine Plaintiffs' status and rights as heirs. In fact, that may never get decided. Nor are the Swiss courts likely to ever accept the conspiracy claim Plaintiffs seek to litigate here. Defendants' answer to these disqualifying factors was simply to deny them, citing nothing to support that denial.

None of the Defendants even addressed the fact that the IAS 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 destroyed Plaintiffs' right to litigate it at all, and at the very least, enormously prejudiced their ability to do so effectively.

The most striking indictment of the IAS Court's ruling, however, is revealed by the Foundation Defendants' requests that this Court should determine jurisdiction from the record on this appeal. This request completely repudiates their vociferous defense of the IAS Court's decision to make the *forum non conveniens* decision without addressing jurisdiction because that issue raises "potentially difficult questions" that are so "complicated" and would require "unduly burdensome" discovery. (UBS pp. 11, 15, 20). Even worse, they ask this Court to make that determination based just on their own self-serving statements and self-selected documents, without affording Plaintiffs any discovery at all. Such duplicitous claims should not be endorsed.

The recently passed Holocaust Expropriated Art Recovery Act of 2016, Pub L No 114-308 (the "HEAR Act") was passed specifically to ensure that victims of the Nazi persecution who had their valuable artwork looted from them would have an opportunity to have their case heard on the merits. This case alleges a conspiracy that more than 70 years after the painting *Danseuses* by Edgar Degas, c. 1896 (the "Painting") looted by the Nazis from Plaintiffs' ancestor was found, the Defendants here looted it again, only now purportedly giving it the imprimatur of legitimacy. The decision below completely eviscerates Plaintiffs rights under the HEAR Act and effectively precludes Plaintiffs from ever having their claims heard and recovering the Painting.

Argument

The IAS Court's Failure To First Determine That It Had Jurisdiction Requires Reversal Of Its *Forum Non Conveniens* Decision

Defendants do not – and cannot – deny that *Prime Properties USA 2011, LLC v. Richardson,* 145 A.D.3d 525 (1st Dep't 2016) and *Flame S.A. v. Worldlink Intl. [Holding] Ltd.,* 107 A.D.3d 436 (1st Dep't 2013) are the most recent decisions of this Court on the dispositive issue here. Together with a long line of cases behind them, they clearly establish the rule that a Court must first find that it has jurisdiction over Defendants before it has the power to issue a binding *forum non conveniens* ruling. Nor do they deny that the IAS Court failed to follow that rule.

To defend the IAS Court's decision to instead choose what it thought was a better rule, Defendants stretch so far as to challenge the bedrock proposition that an IAS Court is required to apply the most recent controlling decision of this Court. (Brief submitted by UBS AG and UBS Global Asset Management (Americas), Inc. ("UBS") p.19n). The disingenuousness of this claim is manifest not only from Defendants' failure to cite any authority to support it, but one of their own cited cases holds precisely the opposite: "A trial court is required to apply the most recent controlling decisions of the Appellate Division in which it is located." *Robert Plan Corp. v. Onebeacon Ins.*, 10 Misc. 3d 1053(A), 809 N.Y.S.2d 483 (Sup. Ct. Nassau 2005) (UBS p. 19n). This lack of candor permeates Defendants' briefs.

However, the main thrust of Defendants' arguments is to claim that the crystal clear statement of law in *Prime Properties, Flame* and the long line of their antecedents are not "controlling authority" because they found a handful of older cases in which a panel of this Court affirmed a *forum non conveniens* dismissal where the trial court had not first determined its jurisdiction.[2] (UBS p.16). They, and the IAS Court, claim these few aberrant cases created a "second line of authority" which allowed the IAS Court to ignore what it acknowledged was the "weight of appellate authority in this Department," including the most recent decisions in *Prime Properties* and *Flame* and chart its own course. (R-19). This claim cannot be sustained.

To begin with, in none of the cases that Defendants cited which supposedly established this "second line of authority" did this Court expressly address, much less reject, the rule that the trial court must find that it has personal jurisdiction over the parties before addressing any *forum non conveniens* claim.[3] To the contrary,

[2] Defendants' claim that there are "many" such cases is untrue. (UBS p.16). Both they and the IAS Court cited barely a handful.

[3] In fact, virtually all of the cases Defendants cite as the purported "second line of authority" actually applied the rule as this Court was able to make the requisite determination of jurisdiction from the record to support the consideration of the *forum non conveniens* defense or, conversely, to support a dismissal for lack of jurisdiction. *See, e.g., Adamowicz v. Besnainou*, 58 A.D.3d 546 (1st Dep't 2009) (finding of no jurisdiction); *Martin-Trigona v Waaler & Evans*, 539 N.Y.S.2d 9 (1st Dep't 1989) (finding of no jurisdiction); *Shin-Etsu Chem. Co. v. 3033 ICICI Bank Ltd*., 9 A.D.3d 171 (1st Dep't 2004) (finding of jurisdiction). Alternatively, the rule was irrelevant. *Nordkap Bank AG v. Standard Chartered Bank*, 32 Misc. 3d 1216(A) (Sup.Ct. NY 2011) (finding of jurisdiction); *Stoomhamer Amsterdam N.V. v. CLAL (Israel) Ltd.*, 204 A.D.2d 186 (1st Dep't 1994) (no claim of lack of jurisdiction); *Trio Indus., Inc. v. Schal Assocs., Inc.*, 107 A.D.2d 570 (1st Dep't 1985) (plaintiff defaulted on the appeal). No such jurisdictional determination can be made on the record here.

whenever this Court has actually addressed this rule, it has consistently reaffirmed and reiterated it. Indeed, in order to sustain the claim that there is no controlling law, they insist that one after the other of this Court's clear statements of the law are just "dicta." (UBS pp.18, 19n; R-19). It is unclear what their definition of "dicta" is, but certainly where this Court repeats the same rule over and over – and enforces it – it clearly means for it to be followed. Most significantly, Defendants have cited no authority whatsoever that holds that a few outlier cases which never expressly address the rule create a "second line of authority" which excuses an IAS court from its obligation to follow this Court's most recent controlling authority which did.[4]

In *People v. Hobson*, 39 N.Y.2d 479, 487 (1976), Judge Brietel explains why so holding would ride "roughshod over Stare decisis." In that case, the issue was

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[4] Defendants do – disingenuously – cite two cases which they claim support the quite remarkable proposition that there is "no controlling law" if even a single appellate division decision on the issue conflicts with the rest. (UBS p.19). *Robert Plan Corp. v. Onebeacon Ins.*, 10 Misc.3d 1053(A) (Sup. Ct. Nassau 2005), as noted above, states the opposite: "a trial court is required to apply the most recent controlling decisions of the Appellate Division in which it is located." It imposes no limitation on that rule, much less one, as Defendants claim, that it applies only "where there was no conflict within the Second Department on the issue." (UBS p.19n). Nor does *Vanilla v. Moran*, 188 Misc. 325 (Sup. Ct. Albany), *aff'd*, 272 A.D. 859 (3d Dep't 1947), *aff'd*, 298 N.Y. 796 (1949) stand for the proposition that a court is only required to follow appellate authority where "all authorities" are contrary to requested ruling. (UBS p.19n). It not only imposes no such limitation, but also expressly rejects what the trial court did here – substitute its own view of a better rule instead of following appellate authority:

> Neither the fact that the Court of Appeals has not passed upon the question, if that be the fact, nor doubt of the soundness of the decisions of the Special Terms of the Supreme Court and the Appellate Division thereof, even if such doubtfulness were conceded, afford any basis for this court to refuse or fail to follow the authority of those decisions. *Id*. at 334.

what constituted controlling precedent for the Court of Appeals itself where there was a well-established and articulated rule, but three relatively recent cases had "departed from the evident rule:" *Id.* at 485. In those three cases, "[t]he reasons for the departure were never made explicit, but nice distinctions were used, if the fact of departure was mentioned at all." *Id.* The question Judge Brietel posed is instructive here:

> The problem this departure from a deliberately elaborated line of cases raises is: What is required of a stable court in applying the eminently desirable and essential doctrine of *stare decisis*. Which is the *stare decisis:* The odd cases or the line of development never fully criticized or rejected? *Id.* at 487.

Drawing on views of esteemed legal scholars, he concluded that the odd case (particularly where it contains no articulation of its reasoning) cannot change the controlling effect of the well-articulated and established rule:

> The nub of the matter is that *stare decisis* does not spring full-grown from a "precedent" but from precedents which reflect principle and doctrine rationally evolved. Of course, it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel. *Id.* at 488.

See, Falso v. State Liquor Auth., 43 N.Y.2d 721, 725 (1977) ("As a matter of sound judicial policy, stable and recently redeclared decisional law should not be lightly cast aside lest the court create conflicting and contradictory precedent, disjointing the necessary continuity in law.")

As applied here, there can be no valid claim that the older, outlier cases identified by the IAS Court or Defendants, which never even addressed the dispositive issue, created a "second line of authority" to the well-articulated and recently reiterated controlling law of *Prime Properties* and *Flame.*

Even if, however, there were a basis for the IAS Court to ignore *Prime* and *Flame* in order to apply *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) (which there was not), Defendants do not – and cannot – deny that *Sinochem* itself endorses the general rule and holds that a determination of *forum non conveniens* prior to jurisdiction is a limited exception. That exception only applies where (i) discovery on the jurisdictional issue is "unduly burdensome," and (ii) there is no need to condition any *forum non conveniens* dismissal on a waiver of any statute of limitations claim. *Id.* at 436. Defendants do not even discuss these exceptions in urging for *Sinochem'*s application – both of which are applicable here.[5]

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[5] During the oral argument of Plaintiffs' motion for permission to file the SAC, Plaintiffs requested jurisdictional discovery. During that argument, the Court specifically acknowledged the law that required deciding the jurisdictional issue prior to *forum non conveniens*:

> THE COURT: Plaintiff has cited law that I cannot reach the forum non conveniens issue until I decide the jurisdictional issue. I will tell you up front I haven't read those cases yet. What is your position on that issue? (Ex. A to King Affidavit on Motion for Leave to Supplement the Record on Appeal ("Ex. A") p.14).

It then initially concluded:

> THE COURT: Let me tell you, quite frankly, I am considering the possibility of granting leave to amend, leave to serve a renewed motion to dismiss, but in the interim authorizing limited jurisdictional discovery. (Ex. A p.18).

Then, inexplicably, the Court changed its mind:

The IAS Court's Fundamental Errors Require Reversal Of Its *Forum Non Conveniens* Decision

Plaintiffs identified three fundamental errors that require a reversal of the *forum non conveniens* dismissal. Defendants barely even address these dispositive factors.

The first fundamental error is the IAS Court's finding that the Swiss proceedings were an adequate forum even though the Foundation is seeking to dismiss those proceedings for lack of jurisdiction and as barred by the statute of limitations. Defendants brush off this failure claiming, disingenuously, that (i) the claims "may" be subject to these defenses (when in fact they have already been asserted), (ii) Plaintiffs have the burden of showing that those defenses would bar the claim (when it is Defendants who have the burden of proof as to an alternative forum), and (iii) it was Plaintiffs' obligation to ask for any waiver of those defenses (even though none of the Defendants consented to any such waivers and do not do so here). (UBS pp. 32-33).

> the Court does have serious questions about some of the jurisdictional issues which is why the Court has decided to defer at this time ordering jurisdictional discovery, and the Court has substantial questions about the forum non conveniens defense. It is the Court's request that the parties take every reasonable step in researching the case law on this issue when they brief whether the forum non conveniens issue can be reached prior to determination of the jurisdictional issues. (Ex. A pp.24-25).

Thus, before the Second Amended Complaint or the renewed motions to dismiss were even filed, the Court reversed itself on jurisdictional discovery and gave every indication that it wanted to find a way to address the *forum non conveniens* issue first.

Equally cavalierly, Defendants dispense with this Court's admonition that the failure to impose conditions that will ensure the existence of an alternative forum is "a fundamental failure to implement basic *forum non conveniens* policy, to do justice and further fairness and convenience." *Highgate Pictures v. DePaul*, 153 A.D.2d 126, 128–129 (1st Dep't 1990). They claim, without any basis, that this was only meant to apply to "straightforward" claims. (UBS p. 32). This Court has never said any such thing. To the contrary, it has repeatedly conditioned the granting of the motion on waivers of jurisdiction and statutes of limitations – even if the lower court had not. *See, e.g.*, *New Bridgeland Warehouses, LLC v. Home Depot U.S.A., Inc.*, 73 A.D.3d 402 (1st Dep't 2010); *Hudson's Bay New York, Inc. v. U.S. Fid. & Guar. Co.*, 246 A.D.2d 389 (1st Dep't 1998); *New Bridgeland Warehouses, LLC v. Home Depot U.S.A., Inc.*, 73 A.D.3d 402 (1st Dep't 2010); *Healy v. Renaissance Hotel Operating Co.*, 282 A.D.2d 363 (1st Dep't 2001). Defendants' refusal to accept such conditions reveals that their real goal is to prevent Plaintiffs from ever litigating their claims and a basis for denial of the motion in its entirety.

The dismissal of this case where Plaintiffs is faced with jurisdiction and the statute of limitations defenses in the purported alternate forum is particularly egregious in light of the HEAR Act. The HEAR Act is specifically designed to provide what Defendants (and the IAS Court below) have prevented: to afford a forum for Plaintiffs to have their claims for restitution of Nazi looted art heard on the merits by precluding any statute of limitations or time-based defenses under any

applicable law. While the Foundation Defendants summarily dismiss the HEAR Act as having no application to this case, even the IAS Court did not share Defendants' distain.[6] (R-36-37). It held that the HEAR Act is an "important issue" which could not be determined on the record. (R-38). Indeed, allowing Plaintiffs the protection of this law is particularly compelling here: it was as a result of the alleged conspiracy by Defendants to legitimize the Painting and its sale by Christie's at auction in New York that enabled the looted Painting – more than 70 years after it was finally found – to be hidden again from Plaintiffs, only this time with Christie's imprimatur of legitimacy. The IAS Court's dismissal not only deprives Plaintiffs of the benefits of the HEAR Act, but dismisses the claims Plaintiffs allege here – which cannot be litigated in Switzerland – in their entirety against the Foundation Defendants.[7] It also severely prejudices Plaintiffs' ability to proceed against Christie's – even if the preconditions the IAS Court imposed ever come to pass. (UBS p. 30).

The second fundamental error – and the central basis of the IAS Court's decision – is that this case cannot proceed until there is a "determination as to Plaintiffs' status and rights as heirs…with rights to the Painting" and "the pending Swiss proceedings will make such a determination." (R-28, 33). Defendants relegate

[6] Below, Plaintiffs contested every one of the claims Defendants assert here with respect to the application and interpretation of the Act. (R-856-865).

[7] The reason the claims asserted here cannot be litigated in Switzerland is not, as Defendants' claim, merely because Christie's is not subject to jurisdiction. (UBS p. 30n). It is also because the Swiss courts will not likely accept them given their New York nexus. (R-490).

their response to this key point to a footnote. (UBS p. 31n). There, they blithely assert that the affidavit that Plaintiffs submitted from their European Counsel expressly attesting that the IAS Court's conclusion that the Swiss proceeding will do so is "false," although they cite nothing that contradicts him.[8]

Most importantly, Defendants do not dispute the key facts that demonstrate the statement is true. No matter what happens in the Swiss proceedings, at their end Plaintiffs will at least be in the same position that they are now: heirs under a valid French Certificate of Inheritance. As long as that is valid – and it is not being challenged anywhere – the Swiss proceedings will not be dispositive. Moreover, if Defendants were to succeed on their pending motions to dismiss the Swiss proceedings, no determinations at all will be made. While Defendants (and the IAS Court) try to dismiss the existence of the French Certificate of Inheritance as not sufficient to eliminate the need to determine the parties' competing claims (UBS p. 31n; R-31), the converse is equally true: the existence of the French Certificate also precludes any final determination of the parties' competing claims in the Swiss proceedings. Moreover, as Plaintiff's European Counsel further stated, the conspiracy claims – which are the essence of this action – cannot be litigated there or in any other Swiss proceeding. (R-490). Thus, out of a concern that some

[8] Contrary to Defendants' claims (UBS p. 31n), this affidavit expressly denies that either their status and rights as heirs or their rights to the Painting will be definitiely resolved in the Swiss Proceedings. (R-488).

determination may need to be made with respect to the parties' rights (determinations New York Courts make all the time even under foreign law), the IAS Court has totally foreclosed Plaintiffs from ever litigating their claims against the Foundation Defendants.

The third fundamental error is that by dismissing the claims against the Foundation Defendants in their entirety, as well as staying the case against Christie's, the IAS Court has severely undercut Plaintiffs' ability to proceed against Christie's – even if the stay were ever lifted. Indeed, none of the Defendants denied (or even addressed) this prejudice. Not surprisingly, Christie's applauds the IAS' Court *forum non conveniens* dismissal of its co-defendants precisely because, we submit, of the prejudice this will heap on Plaintiffs. (Brief submitted by Christie's ("CB") p.11). That prejudice includes depriving Plaintiffs of the ability to obtain discovery or compel testimony from the co-conspirators, the impact of the delay on memories and the availability of witnesses and evidence, and the risk that the Painting will be further disposed of (which may foreclose the possibility that Plaintiffs may ever recover it).

These factors – not denied by Defendants – profoundly illustrate how the IAS Courts' decision, in the guise of a *forum non conveniens* ruling, actually eviscerates Plaintiffs' ability to bring its claims against *any* of the Defendants.

A Proper Analysis of The *Forum Non Conveniens* Factors Requires Reversal Of The IAS Court's Decision

Defendants' entire analysis of the *forum non conveniens* factors is based on a claim that "the gravamen of their Complaint is that Defendants allegedly acted in derogation of Plaintiffs' purported rights as heirs through actions they took in Germany and Switzerland over decades." (UBS p. 21). To this end, they all spend pages and pages of their various briefs reciting what they claim to be the "lion's share of Plaintiffs' allegations span[ning] 40-plus years" and "events that occurred in Europe." (UBS pp. 6, 1-5, 9, 21-29, 35; Brief submitted by Stiftung and Kircher ("FB") pp. 1-3, 5-6; CB pp. 11, 12).

These claims are a knowing mischaracterization of the SAC. As Plaintiffs have repeatedly emphasized, the SAC only seeks relief with respect to an unlawful conspiracy among Defendants to falsely legitimize the Foundation as the heir and render the Painting marketable to Plaintiffs' detriment. This was all effectuated through acts which occurred in New York in 2009. The Restitution Settlement Agreement ("RSA") and the sales of the Painting pursuant thereto – acts which are all centered in New York – are the acts that are the gravamen of the Complaint.

While the SAC does contain allegations that precede 2009, Plaintiffs are not seeking to have any of the controversies that may exist between the parties with respect to the events that predate 2009 determined in this action. They are the subject of the Swiss proceedings. The only purpose the allegations regarding events prior to

2009 in the SAC serve here is to set forth what was known by the Foundation Defendants and what was readily discoverable by Christie's as of 2009 when the RSA was finalized. It is Plaintiffs' contention that based on that available information, the claims and representations made with respect to the Painting were false, or at a minimum, subject to serious question: (i) the Foundation's claim that it had the right to release and waive the claims of all of the Heirs of Margaret and Ludwig Kainer with respect to the Painting, and (ii) the sales premised on the representations that the Painting had been restituted to the Heirs of Margaret and Ludwig Kainer. In short, the issues and relief requested in this lawsuit all relate to what occurred with respect to the RSA and the private and public sales effectuated by Christie's, all of which are centered in New York.

Defendants' entire analysis of the *forum non conveniens* factors pertains to the allegations relating to the claims that are being litigated in Switzerland, not the claims that are actually being asserted here. For this reason, alone, it is fatally flawed.

Thus, their analysis as to the need for foreign law is premised on a claim that the validity of all the transactions going back to 1928 in Europe will be litigated here and will require the determination of complicated questions of German, Swiss and French law. (UBS pp. 22-24). Those claims, however, are to be determined as part of the Swiss litigation, not here. Accordingly, this purported burden is baseless. What law will be applicable to what claim in this case has not been addressed, but

to the extent that, for example, the obligations of a fiduciary may need to be determined under foreign law, that is hardly a difficult task. The resolution of the key issue the IAS Court focused on – determining who has the rights as heir – may or may not ever be resolved in the Swiss litigation. But that should not preclude Plaintiffs from pursuing their rights as they are entitled to under their French Certificate of Inheritance which is not being challenged anywhere. *See*, *Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401, 403–04 (1st Dep't 2017). As it stands now, Defendants have no claim to heirship as the document on which they were relying was annulled during the course of this litigation.[9] (R-6, 32n). Thus, the question of heirship for purposes of this litigation is not complicated.

Similarly, Defendants' analysis regarding witnesses focuses on those people involved in the underlying events in Germany and Switzerland. (UBS, pp. 24-27). Those witnesses are pertinent to the issues being determined in the Swiss litigation, not here. In contrast, many of the witnesses and documents pertinent to the claims actually being asserted here are in New York.

Defendants' claims regarding the Swiss forum as an adequate alternative are equally infected by this effort to amalgamate the two proceedings. Citing no law, Defendants claim that Plaintiffs are "estopped" from contesting the adequacy of the Swiss forum because they brought related proceedings there. (UBS p. 28). Those proceedings were brought in Switzerland to determine the events that took place in

[9] If the issue does get resolved in the Swiss litigation, it can then be applied here.

Europe because it was appropriate and necessary to do so. By the same token, Plaintiffs brought this claim here because it was the most appropriate and necessary place to do so. The claims in this action are focused here, all the Defendants can be joined here and, most critically, these claims cannot be litigated in Switzerland because a Swiss Court would not likely accept them. (R-490). Defendants and the IAS Court ignore this.

In this regard, Defendants contend that what is required to satisfy the alternate forum criteria is that "Plaintiffs *could* bring [the] claims" there, adding "there is nothing stopping Plaintiffs from suing UBS, the Foundation, and Kircher for the claims asserted here – whether or not they are already part of the Swiss litigation." (UBS pp. 30, 32, 36). But there is, since the Swiss court will not likely accept them. (R-490). Thus, on Defendants' own criteria, Switzerland would not be an adequate alternate forum for these claims. Moreover, Plaintiffs could not sue Christie's there, so Plaintiffs, at best, would be faced with two separate proceedings, at double cost, on two sides of the ocean, over the same claims, and without having live testimony of critical witnesses in either trial.[10]

As to the residency factor, Defendants acknowledge that everyone lives in different places. (USB pp. 33-35). Under such circumstances, the Court should defer to Plaintiffs' choice of forum, particularly where one of the Defendants is here, many

[10] The fact that Plaintiffs originally chose not to sue Christie's is irrelevant. (UBS pp. 30-35). The claims must be addressed as they are.

witnesses are here, and the transaction was centered here. *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013) ("Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed…even where the plaintiff is not a resident of New York").

Defendants' analysis regarding the nexus of this lawsuit again focuses on the Swiss claims, not the New York. (UBS pp. 35-36). Even they concede, however, that if the focus is on the 2009 events, the relevant witnesses and documents are in NY. (UBS p. 36).[11]

Accordingly, Defendants have failed to meet their heavy burden to establish that New York is an inappropriate forum or that Plaintiffs' choice of forum should be disturbed. *Highgate Pictures, Inc. v. De Paul*, 153 A.D.2d 126, 129 (1st Dep't 1990).

Defendants' Request That This Court Grant Their Motion To Dismiss For Lack Of Jurisdiction Must Be Denied

The Foundation Defendants ask this Court to do what even the IAS Court would not do – rule purely based on their own self-serving statements and self-selected documents that there is no jurisdiction over them. (R-191-198; 644-652; UBS p. 39; FB p. 19). At the same time, they justify the IAS Court's determination

[11] After basing their nexus argument on the 40 years of wrongdoing in Europe, Defendants acknowledge that "[t]he auction of the Painting at Christie's following its private sale in Japan is the only tie to NewYork' – which they then characterize as "just one manifestation of the years of alleged wrongdoing overseas." (UBS pp. 35-36). But it is that manifestation that is the crux of the SAC.

of *forum non conveniens* prior to jurisdiction because they claim the determination of jurisdiction would require the Court to "wade through potentially difficult questions of personal jurisdiction," engage in a "complicated jurisdictional analysis," and require "unduly burdensome" discovery. (UBS pp. 11, 15, 20). They cannot have it both ways.

Indeed, by asking this Court to rule on the jurisdictional issue, the Foundation Defendants have effectively repudiated the entire justification the IAS Court gave for not determining jurisdiction prior to determining *forum non conveniens.* In short, Defendants will say whatever it takes to get a dismissal of this case – including irreconcilable contradictions in the same brief. Doing so strips away any bona fides to their claims.

In any event, their claims that this Court should rule on the jurisdictional issue have no merit. Their initial arguments regarding jurisdiction can be easily dispensed with. The fact that Plaintiffs acknowledge that the record does not demonstrate personal jurisdiction over them is hardly dispositive. (UBS p.16). That is precisely why Plaintiffs are seeking jurisdictional discovery. And, as shown below, since they are entitled to it, no ruling as to jurisdiction can be made on this record. This is especially so since the "facts" Defendants proffer upon which they ask the Court to make that ruling are not only disputed, but some are demonstrably false.[12] (R-239-

[12] Defendants point to "facts," they claim Plaintiffs have "conceded." (FB pp. 10, 17). That is simply not the case. Some of the "facts" they cite are merely admissions Defendants themselves have made that Plaintiffs have actually disputed. In all cases, however, Defendants do not tell the

243). Their claims with respect to due process suffer the same infirmity. Accordingly, that determination too will also need to await discovery. Defendants' arguments with respect to general jurisdiction are irrelevant as Plaintiffs do not assert general jurisdiction. (UBS p. 39).

Finally, the claim that there is no allegation that UBS Global did anything wrong is not true. (UBS p. 48). Plaintiffs have asserted their claims against UBS based on documentary evidence that UBS was intimately involved in the operation of the UBS Foundation and the management of its funds. (R-13, 147-149). They have included UBS Global because that is where Kircher works and where the assets of this type are generally managed. (R-13, 147-149). Accordingly, there is a reasonable basis for these joint allegations which can only be clarified through discovery.

Plaintiffs Are Entitled To Jurisdictional Discovery

Defendants' claims that Plaintiffs have failed to assert sufficient facts to entitle them to jurisdictional discovery are baseless. While the IAS Court stated that it only "assumed" that Plaintiffs had made a sufficient showing for jurisdictional discovery, the logic of its opinion dictates otherwise.[13] (R-25). Indeed, if Plaintiffs

whole story. For example, they argue that there is no jurisdiction merely because the Foundation Defendants did not "initiate" contact with Christie's. (FB p.17). But what is still unknown is anything about what else happened during the negotiations and sales happened, where it happened, who the participants were or where they were located. Nor have Plaintiffs ever been able to obtain a copy of the RSA which could well have venue or other provisions relevant to jurisdiction in it.

[13] Defendants' assertion that Plaintiff's request for jurisidictional discovery was denied for the failure to "establish the requisite 'sufficient start,'" is untrue. (UBS pp.11, 45).

had not made a sufficient showing, the IAS Court could have easily so concluded on the papers and it could have dismissed the case for lack of jurisdiction. Since it did not, it clearly was persuaded that Plaintiffs had met their burden for discovery, as it was the prospect of such discovery that the IAS Court claimed (wrongly) justified its departure from this Court's rule that jurisdictional discovery must be determined first, including any discovery needed to make that determination.

Defendants' efforts to challenge the showing Plaintiffs made in their main brief are, once again, premised on false assertions. To begin with, they claim that Plaintiffs' cannot rely on any conspiracy allegations because the trial court "dismissed the only cause of action in the SAC based on conspiracy." (FB pp. 8, 22). That is flatly untrue. A key claim for relief is Plaintiffs' Fourth Claim For Relief, which not only asserts a conversion claim against all Defendants but also alleges a conspiracy to illegally misappropriate property.[14] (R-38).

Defendants' claim that the conspiracy allegations "add nothing to the analysis" fails to recognize the true impact of those allegations. (FB p. 23). Those allegations do not, as Defendants seem to suggest, focus solely on the Foundation Defendants' activities. Rather, they permit the actions Christie's took as part of the conspiracy – in New York – to be imputed to the non-New York conspirators for

[14] It is perfectly proper to allege a conspiracy claim in the same cause of action as the underlying tort. *All-Boro Air Conditioning Corp. v. Wales & Ward, Inc.*, 92 A.D.2d 486, 487, 459 N.Y.S.2d 79, 80 (1st Dept 1983).

jurisdictional purposes. Both alone and together, their actions in connection with the RSA and the sales of the Painting were all accomplished through Christie's in New York. As set forth on pages 49-50 of Plaintiffs' main brief, all the requirements for conspiracy jurisdiction are met.

Equally unavailing are Defendants' efforts to focus on what Plaintiffs knew or did or how they were harmed in 2009. (FB pp. 24-25). The issue is that the Defendants together conspired to restitute the Painting on behalf of *all the Kainer Heirs* when the Foundation Defendants knew that they did not have those rights and Christie's, if it did any due diligence, should have known that as well. They therefore necessarily knew they were impairing the rights of the true heirs or any other heirs – whether they had yet been identified or not.

Astoundingly, the Foundation's claim as to why their actions did nothing to impair Plaintiffs' rights is tantamount to an admission that they are not the heir and the RSA and the sales made in reliance on it were all a conscious fraud. In this respect, the Foundation Defendants claim that all they did was "waive any potential right to the Painting" and never bought, sold or sought possession of the Painting. (UBS p. 25). (This, of course, neglects the fact that they admit to receiving $1.8 million on account of the first sale which was purportedly payment for waiving the actual rights of all the heirs (R-648-649)). They then describe the sellers and buyers from the RSA through the auction and state: "If in fact Plaintiffs-Appellants are entitled to the Painting, their rights have not been lost since a Seller who does not

own an object cannot convey good title." (UBS p. 25). If none of the sellers who purchased in reliance on the RSA owned the object that can only mean that the Foundation Defendants are admitting that nothing was restituted by the RSA because they had no potential right to waive! (UBS p. 25). This admission eliminates the issue of competing claims of ownership that the IAS Court was so troubled by.

In short, as set forth in Plaintiffs' main brief and in the record below, Plaintiffs have met the "sufficient start" criteria because (i) the jurisdictional facts are within the exclusive control of the Defendants, (ii) the factual averments made by Defendants are demonstrably false, deliberately misleading, contradict admitted statements contained in publicly available documents, and otherwise lack credibility, and (iii) there were admitted contacts with New York, including the negotiation of the RSA with Christie's, payments received from a sale effectuated by Christie's and a visit by Kircher to Christie's in relation to the auction sale. (R-239-243).

Finally, contrary to Defendants' claims, the bulk of the discovery Plaintiffs are seeking is in New York, not Europe. Nor are Plaintiffs seeking "extensive categories" of documents and numerous depositions. In any event, the Court can certainly limit any discovery it deems to be unnecessary.

Plaintiffs' Claims Against Christie's For Unjust Enrichment Should Not Have Been Dismissed

Christie's challenges the relationships or connections Plaintiffs have identified as insufficient to state an unjust enrichment claim. While they protest that Plaintiffs have only identified one additional case to that cited below which finds the imputation of one conspirators' relationship to the other as sufficient, they cite nothing that says it cannot be done. Nor do they even address Plaintiffs' contention that Christie's certainly knew its actions were intended to impact the Kainer Heirs, even if it did not know their specific identities.

In addition, Christie's focuses its opposition on the claim that Plaintiffs personally must have bestowed the benefit on Defendants. (CB pp.5-6). The cases it cites, however, involve unjust enrichment claims that fall into the quasi-contract or *quantum meruit* categories. Here, the basis of the claim is restitution of stolen property. In such cases, "[w]hat is required, generally, is that a party hold property "under such circumstances that in equity and good conscience he ought not to retain it'" even where it had no relationship with the plaintiff. *Simonds v. Simonds*, 45 N.Y.2d 233, 242 (1978) ("[a] bona fide purchaser of property upon which a constructive trust would otherwise be imposed takes free of the constructive trust, but a gratuitous donee, however innocent, does not").

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.

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