*To be Argued by:*
WILLIAM M. BARRON
*(Time Requested: 15 Minutes)*

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# 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 DEFENDANTS-RESPONDENTS NORBERT STIFTUNG AND EDGAR KIRCHER

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Defendants-Respondents Edgar Kircher ("Kircher") and the Norbert Stiftung (the "Foundation") (collectively, the "Foundation Defendants") submit this brief in opposition to the appeal by Plaintiffs-Appellants from the trial court's dismissal of their Second Amended Complaint ("SAC" or "Complaint") on *forum non conveniens* grounds.

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the trial court properly dismiss the claims against the Foundation Defendants on the ground of *forum non conveniens* where none of the parties resides in New York, all but one Plaintiff reside outside the United States, no assets of the estate of which plaintiffs claim to be heirs are alleged to be in the United States, the claims arose out of activities and events in Europe over more than the past 80 years, the claims call for the application of the laws of Switzerland, Germany and France, Plaintiffs are already pursuing litigation on related claims in Switzerland that they commenced at the same time they commenced this case, most if not all documents and witnesses are located in Switzerland, and the trial court determined that the courts of Switzerland, Germany and France will afford Plaintiffs a fair forum and adequate process to resolve the parties' claims and rights? Yes.

2. Did the trial court correctly follow decisions of this Court and the United States Supreme Court in dismissing this action on *forum non conveniens* grounds without a prior jurisdictional determination? Yes.
3. Should this Court affirm the trial court's dismissal on the alternative ground that an exercise of jurisdiction over the Foundation Defendants would be unlawful and would violate due process, where there is no allegation of any purposeful contact or deliberate activity by the Foundation Defendants with New York or in New York, and the Plaintiffs have repeatedly confirmed in their court filings that the Foundation Defendants' only contact with this forum was because they were contacted in Europe by Christie's from New York to solicit an agreement concerning a transaction in Japan? Yes.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### The Plaintiffs-Appellants and the Foundation Defendants

Plaintiffs-Appellants are the estate and 11 alleged heirs of Margaret Kainer. None of them resides in or has any connection with New York and all but one reside outside the United States. Edgar Kircher is a citizen and resident of Switzerland and the Foundation is a Swiss entity located in Switzerland. None of the Foundation Defendants has any operations, property or other presence in New York.

**The Foundation and the Deaths of Norbert Levy and Margaret Kainer**

The history of the Foundation begins in pre -World War II Germany where Norbert Levy, father of Margaret Kainer, owned an art collection that included a painting by Edgar Degas called "Danseus" (the "Painting"). On Norbert Levy's death in Germany in 1928 his assets, including the art collection, passed to his daughter, but his will provided that if she died alone without heirs by blood, 3/4 of the estate was to be "conversed" into a Norbert Levy Foundation. (R 13, 153-54, 706). Norbert Levy had formed a Foundation under Swiss law in 1927 (R 645). (It was later renamed the Norbert Levy Stiftung and subsequently changed back to the Norbert Stiftung (R 645 and 646)).

The SAC recites that in 1935 Nazi authorities confiscated the art collection Margaret Kainer had received from her father and that it was sold at an auction. (R 12, 155). Margaret's husband predeceased her and she died in 1968 in France, childless and with no will. (R 142-43). Her death certificate by the French authorities stated that her last domicile was in Pully, Switzerland. (R 904).

**The Foundation Registered the Painting in 2000 with the Art Loss Register in London and Received Inquiries Later From the Art Loss Register and from Christie's**

In 2000 the Foundation registered all known paintings of the Kainer collection with the Art Loss Register in London. The Painting was included in the registration. (R 647). In 2008 the Foundation's Berlin attorney, who had assisted in

the registration, was contacted by the Art Loss Register. He was advised that the owner of the Painting in Japan was interested in settling any claim the Foundation had to the Painting. (R 648).

In 2009, the Foundation's Berlin lawyer was contacted by Christie's on behalf of the Japanese owner of the Painting seeking to conclude an agreement regarding a sale of the Painting in Japan. It was the Foundation's understanding that the Japanese owner wanted to make a private sale in Japan to an art dealer. (R 648). The agreement solicited by Christie's was made, and the Foundation agreed to renounce any ownership claim to the Painting for 30 percent of the net proceeds of the private sale in Japan and received approximately $1.8 million after it was sold. (R 648).

**The Foundation Learned of the Christie's Subsequent Auction of the Painting Only After It Had Occurred**

Kircher came to New York in November 2009 because of a personal invitation to an Award Ceremony honoring a friend. (R 793). He read an article in a Swiss newspaper about art auctions in New York, and it referred to several sales by Christie's, including the Painting. He was surprised to see it auctioned so soon after the private sale in Japan, and decided to visit Christie's while he was in New York to find out what had happened. *Id*. He went to Christie's the day after the Award Ceremony, and asked to meet with whomever had been responsible for the auction. He met with three people, none of whom he had ever met or talked with before. Several days later he received a letter from one of them summarizing what he was

told at the meeting. (*Id* and R 795-96). He never had any further contact with those people or with Christie's. (R 793). The auction sale was to an anonymous buyer, and neither the Foundation nor Mr. Kircher was aware of, involved in or benefitted from that sale. (R 649).

**The Extensive Litigation in Europe Regarding Ownership Rights**

In 2003, the Swiss Canton of Vaud and the City of Pully claimed to be heirs of Margaret Kainer pursuant to a Swiss certificate of inheritance issued to them that year based on the assertion that Margaret had been domiciled in Pully, Switzerland, when she died without a will. Litigation between the Foundation and these localities continued until 2005, when it was settled with an agreement to join efforts to find and obtain compensation for looted paintings. (R 14.)

In January 2013, all of the Plaintiffs in the present New York action commenced two Swiss proceedings. In the first, the "Swiss Inheritance Claim", plaintiffs "(i) seek to recover property and/or assets belonging to the estate of Margaret Kainer held by Swiss defendants Canton de Vaud, Commune de Pully" and the Foundation and "(ii) seek a determination as to the validity or the inapplicability of the reversionary heirship mentioned in Norbert Levy's last will". (R 15). The second Swiss proceeding by the Plaintiffs-Appellants here, the "Swiss CoI [Certificate of Inheritance] Claim", "addresses the validity of the Swiss Certificate of Inheritance that was issued to the Canton de Vaud and Commune de

Pully". Plaintiffs also seek payments from the Swiss localities and the Foundation "based on the unjust enrichment law." (R 14-15).

A Plaintiff in this New York action, Warner Max Corden, brought a proceeding in Germany to "recall" or "invalidate" the certificate of partial inheritance issued to the Foundation in 1972. The German court in 2014 "disallowed the recall and/or cancellation" of the certificate, but in a February 1, 2017, letter to the trial court here Plaintiffs-Appellant's counsel stated that the 2014 decision had been annulled by a German Appellate Court and that the certificate of partial inheritance had been declared "void." (R 15-16). Plaintiffs-Appellants have not asserted that the appellate decision forecloses the Foundation's claims as heir. *Id*.

**The Present Action in New York**

This action was filed in January 2013, the same month as the two Swiss proceedings referenced above were filed. Plaintiffs-Appellants here assert a right to the Painting. The rights to the Painting are also the subject of the two Swiss proceedings.

Plaintiffs-Appellants allege that defendants misappropriated assets that should have been part of the estate of Margaret Kainer, who lived her whole life in Europe. None of those assets are alleged to be in New York or even in the United States. Nor do the Plaintiffs seek the recovery of the Painting from any of the Defendants-Respondents; the SAC seeks recovery of the Painting only from a "John

Doe", who is unknown. (R 183). Aside from the fact that two of the Defendants-Respondents (UBS AG and UBS Global Asset Management (Americas), Inc., (the "UBS Defendants")) are large companies with some operations located in New York, the only connection of this lawsuit to New York is that the Painting was sold by someone unknown to the Foundation Defendants to an unknown anonymous buyer in a New York auction by Defendant Christie's in 2009.

**Procedural History Here**

After the court allowed Plaintiffs-Appellants to file the SAC, motions to dismiss were filed by all Defendants-Respondents, including motions by the Foundation Defendants to dismiss on grounds of *forum non conveniens* and lack of personal jurisdiction. The trial court, per Justice Marcy S. Friedman, in her 31-page Decision/Order of October 30, 2017 (R 9-41), thoroughly analyzed the ongoing Swiss proceedings, the parties' arguments and the evidence concerning applicable foreign laws and French, German and Swiss Certificates of Inheritance. (including R 27- 34).

The trial court did not decide the issue of personal jurisdiction, but said that it would "presume personal jurisdiction" for purposes of the pending *forum non conveniens* motion. (R 26). The trial court dismissed the complaint as against the Foundation Defendants and the UBS Defendants on *forum non conveniens* grounds. (R 10-41). Plaintiffs-Appellants now appeal that dismissal. In its decision, the trial

court made the following finding: "Plaintiffs acknowledge that the record does not demonstrate personal jurisdiction over the Foundation, Kircher and UBS AG." (R 20).

Because Plaintiffs-Appellants had sought leave to take jurisdictional discovery (R 20–24), the trial court then stated that "for purposes of this motion [for *forum non conveniens* dismissal], the court assumes that plaintiffs have made a 'sufficient start' to warrant jurisdictional discovery." (R 25). The court then held that "jurisdictional discovery would be unduly burdensome" (R 25) and stated that, "Given the compelling case…presented for dismissal of this action against the Foundation defendants on the forum non conveniens ground, this court declines to order this extensive discovery…." (R 25-26). The court proceeded to dismiss the SAC on *forum non conveniens* grounds (R 26-34) and dismissed the claims against all Defendants except Christie's. As to Christie's, the court dismissed the cause of action for unjust enrichment and the sole conspiracy claim in the SAC (also for unjust enrichment) and stayed the action pending a determination of rights in the European proceedings.

## SUMMARY OF ARGUMENTS

This Court should affirm the trial court's dismissal of the action on grounds of *forum non conveniens.* The claims against the Foundation Defendants have little or no nexus with New York, none of the Plaintiffs resides in New York, all but one of

them reside outside the United States, no assets of the estate of which plaintiffs claim to be heirs are alleged to be in the United States, the claims arose out of activities and events in Europe over many decades, the claims call for the application of the laws of Switzerland, Germany and France, Plaintiffs are already pursuing litigation on related claims in Switzerland that they commenced at the same time they commenced this case, most if not all documents and witnesses are located in Switzerland, and the trial court expressly determined that the courts of Switzerland, Germany and France will afford Plaintiffs a fair forum and adequate process to resolve the parties' claims and rights.

If this Court does not affirm the trial court's *forum non conveniens* dismissal, this Court should affirm the dismissal on the clear record showing a lack of personal jurisdiction over the Foundation Defendants. The record shows that the Foundation Defendants lack the "minimum contacts" with this forum necessary to exercise personal jurisdiction over them. Repeated admissions by Plaintiffs-Appellants and their counsel in their court filings confirm that there was no purposeful act by the Foundation Defendants to enter or do business in New York, and the assertion of personal jurisdiction over them would violate due process. Their only contact with this forum was that Christie's reached out to them in Europe from New York to solicit an agreement concerning a transaction in Japan.

There is no basis for Plaintiffs-Appellants' request for jurisdictional discovery. No amount of discovery can overcome Plaintiffs' own explicit admissions that the Foundation Defendants' only connection with New York was that they received the inquiry and solicitation from Christie's regarding a foreign transaction.

## ARGUMENT

## POINT I

### THE TRIAL COURT PROPERLY DETERMINED THAT A PERSONAL JURISDICTION ANALYSIS IS NOT A PREREQUISITE TO A DISMISSAL ON *FORUM NON CONVENIENS* GROUNDS

The Foundation Defendants adopt and incorporate by reference the arguments presented in the Brief for the UBS Defendants as to why the trial court properly dismissed of the SAC on *forum non conveniens* grounds without determining that personal jurisdiction existed.

The Foundation Defendants also offer the following points. Plaintiffs argue that it is incumbent upon a New York court to make a threshold determination that personal jurisdiction exists before undertaking a *forum non conveniens* analysis, but this view carries the holdings of some New York courts at least one bridge too far. The approach urged by Plaintiffs conflicts with the First Department's willingness to undertake and decide *forum non conveniens* motions in instances where a personal jurisdiction defense remains unresolved, or where the court has determined that

personal jurisdiction does not exist. For example, in *Trio Industries, Inc. v. Schal Associates, Inc.* 483 N.Y.S.2d 309 (1st Dep't 1985), the First Department held that dismissal of the action on *forum non conveniens* grounds was appropriate even though a determination as to personal jurisdiction had not been rendered. The trial court had denied defendant's motion to dismiss for lack of personal jurisdiction, without prejudice, on the basis that "all the facts upon which jurisdiction was based had not yet been explored," and permitted the defendant to renew the motion following further discovery. *Id* at 310. The trial court also denied the *forum non conveniens* motion since the court believed that a *forum non conveniens* argument assumed that jurisdiction existed. *Id.* On appeal, the First Department reversed, holding that dismissal was warranted on *forum non conveniens* grounds where the examination of the record showed that there was a pending action in an Illinois federal court, and the case had little or no nexus with New York. *Id*. Quoting from the Court of Appeals' decision in *Silver v. Great American Ins. Co.* 29 N.Y.2d 356 (1972), the First Department stated that "courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus to New York." *Trio Industries*, 483 N.Y.S.2d at 311. Although neither the trial court nor the Appellate Division determined that personal jurisdiction existed over the defendant, dismissal on *forum non conveniens* grounds was granted.

In both *Adamowicz v. Besnainou*, 872 N.Y.S.2d 47 (1st Dep't 2009) and *Martin-Trigona v Waaler & Evans*, 539 N.Y.S.2d 9 (1st Dep't 1989), the First Department dismissed actions on the grounds of *forum non conveniens* as well as lack of personal jurisdiction, further contradicting the argument that *forum non conveniens* doctrine has no application unless the court has personal jurisdiction over the defendant. In *Shin-Etsu Chemical Co., Ltd. v 33 ICICI Bank Ltd.*, 777 N.Y.S.2d 69 (1st Dep't 2004), the First Department ruled that the trial court erred when it considered the existence of personal jurisdiction over the defendant as a relevant factor in its *forum non conveniens* analysis, "since on a motion to dismiss on the ground of *forum non conveniens*, jurisdiction over the defendant is presumed" (citing *Islamic Republic of Iran v Pahlavi*, 62 N.Y.2d 474 (1984)). *See also Nordkap Bank AG v. Standard Chartered Bank*, 2011 WL 2764279, *3 [Sup. Ct. N.Y., May 6, 2011, No. 650105/2010] (stating "[p]ersonal jurisdiction is assumed on a motion to dismiss for *forum non conveniens*"])[citation omitted].

In 2007, the United States Supreme Court issued a unanimous decision that because *forum non conveniens* is a non-merits basis for dismissal, a trial court may issue a *forum non conveniens* dismissal without first resolving questions of subject matter and personal jurisdiction. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 432 (2007). The Supreme Court held that "a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisdiction) or

personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case." *Id* at 425. The Supreme Court explained seemingly conflicting statements that were made in the seminal case, *Gulf Oil Corp. v Gilbert,* 330 U.S. 501 (1947), which are similar to those found in New York's *forum non conveniens* jurisprudence. *Sinochem*, 549 U.S. at 433-34. The Court concluded that its decision in *Gulf Oil* "said nothing that would negate a court's authority to presume, rather than dispositively decide, the propriety of the forum in which the plaintiff filed suits." *Id* at 434.

In the present case, the trial court thoroughly reviewed the sometimes conflicting lines of authority in New York on the issue, one holding that the court must first address the jurisdiction issue and the second holding that the court may presume jurisdiction without deciding it, and then address the *forum non conveniens* issue. (R. 8-11). The trial court decided to follow the second line of New York cases and *Sinochem*, presuming jurisdiction for purposes of the motion without deciding. (R 11). This Court should adopt the same analysis and conclusion.

## POINT II

### THE TRIAL COURT PROPERLY DISMISSED THE CASE ON *FORUM NON CONVENIENS* GROUNDS

The Foundation Defendants adopt and incorporate by reference the arguments presented in the Brief for the UBS Defendants as to why the SAC was properly dismissed by the trial court on *forum non conveniens* grounds.

## POINT III

### IF THIS COURT DOES NOT AFFIRM THE TRIAL COURT'S DISMISSAL ON *FORUM NON CONVENIENS* GROUNDS, THIS COURT MAY AFFIRM THE DISMISSAL ORDER ON ANY OTHER GROUND SUPPORTED BY THE RECORD

As set forth below, it is well established that this appellate court may affirm a trial court's dismissal on any alternative ground supported by the record. When a party's motion to dismiss is granted, one of the grounds asserted in the motion may be rejected or remain undecided by the trial court. If the dismissal order is appealed, the portion of the motion to dismiss that remains undecided or was rejected by the trial court is deemed to be before the Appellate Division, and may be reviewed by this Court as an alternative ground for sustaining the dismissal.

For the reasons explained in Point IV below, this principle mandates that if for any reason this Court does not affirm the trial court's *forum non conveniens* dismissal, it should still affirm the trial court's dismissal because of the absence of personal jurisdiction over the Foundation Defendants.[1]

In *Town of Massena v. Niagara Power Corp.*, the appellant argued that the respondent could not raise alternative arguments for affirming a dismissal because

[1] As noted above, the trial court did not decide the issue of personal jurisdiction, but said that it would "presume personal jurisdiction" for purposes of the pending *forum non conveniens* motion (R 26.)

those arguments had been rejected by the trial court when it granted respondent's dismissal motion. 45 N.Y.2d 482, 488 (1978). The Court of Appeals rejected the appellant's argument, stating:

> *At trial level, [respondent] was the prevailing party and it secured the relief it sought, the dismissal of the petition. Although County Court rejected these arguments, the adjudicative provisions of the judgment made no mention of them and instead merely rendered a determination in favor of [respondent]. Thus, [respondent] was not aggrieved by the judgment and could not cross-appeal to the Appellate Division . . . However, since [respondent] was entitled to raise these two points in the Appellate Division as alternative grounds for sustaining the County Court judgment, they were properly before the Appellate Division and are now before this court on the question certified.*

*Id.* Thus under *Town of Massena*, where a party who prevailed at the trial level in securing dismissal raised several other grounds for dismissal, some of which were rejected by the trial court, that party is not aggrieved by the trial court's judgment and may not cross-appeal to the Appellate Division. However, in the event of an appeal, the un-aggrieved party is entitled to raise those arguments rejected by the trial court as alternative grounds for affirming the trial court's dismissal. As stated by the Court of Appeals, those alternative arguments are "properly before the Appellate Division." *Id*. Accord*, Parochial Bus Sys., Inc. v. Bd. of Educ. of City of New York* 60 N.Y.2d 539, 546 (1983); *Nieves v. Martinez* 728 N.Y.S.2d 453, 454 (1st Dep't 2001); *Panetta v. Tonetti*, 582 N.Y.S.2d 303, 304 (3d Dep't 1992); *Giaimo v. Roller Derby Skate Corp*, 650 N.Y.S.2d 791, 792 (2d Dep't 1996); *Menorah Nursing Home, Inc. v. Zukov* 548 N.Y.S.2d 702, 707 (2d Dep't 1989).

Directly on point here is also this Court's decision in *Edelman v. Taittinger, S.A.* There, the trial court had granted a dismissal motion by one defendant grounded solely on *forum non conveniens,* but this Court instead held that the record showed no basis for jurisdiction over that defendant and modified the order and judgment accordingly. 751 N.Y.S.2d 171 (1st Dep't 2002).

## POINT IV

## DISMISSAL OF THE SAC SHOULD BE AFFIRMED BECAUSE THE RECORD SHOWS (A) NO BASIS FOR PERSONAL JURSIDICTION OVER THE FOUNDATION DEFENDANTS, (B) THAT ASSERTING PERSONAL JURISDICTION OVER THE FOUNDATION DEFENDANTS WOULD VIOLATE DUE PROCESS, AND (C) THERE IS NO BASIS FOR GRANTING PLAINTIFFS-APPELLANTS JURISDICTIONAL DISCOVERY

### A. THE RECORD DOES NOT SHOW ANY BASIS FOR PERSONAL JURISDICTION OVER THE FOUNDATION DEFENDANTS

The trial court specifically found that Plaintiffs-Appellants "acknowledge that the record does not demonstrate personal jurisdiction over the Foundation, Kircher or UBS AG." (R 20.) Plaintiffs-Appellants do not contest this finding by the trial court.

### B. ASSERTING PERSONAL JURISDICTION OVER THE FOUNDATION DEFENDANTS WOULD VIOLATE DUE PROCESS

Plaintiffs-Appellants argue that they need broad jurisdictional discovery, apparently hoping that they will uncover something that might provide a basis for

jurisdiction. (Brief for Plaintiffs-Appellants 44-52.) Their arguments for discovery overlook the fact that asserting personal jurisdiction over the Foundation Defendants would violate due process. No amount of discovery can overcome this due process impediment, because the relevant facts on the point have been confirmed by the Plaintiffs themselves: Plaintiffs have repeatedly conceded that the Foundation Defendants in Europe took no intentional steps, or deliberate activity or otherwise initiated any contact with New York. They only received a contact initiated by Christie's in New York which solicited the Foundation in Switzerland to enter into an agreement to resolve the Foundation's restitution claims in a Japanese transaction Christie's was trying to arrange. E.*g.*, Brief for Plaintiffs-Appellants at 1 ("…solicited by Christie's…." ) and 10 ("a representative of Christie's contacted the attorney for the Foundation….); R 145 ("…Christie's solicitation and facilitation of the Restitution Settlement Agreement…."); R 240 ("…the UBS Foundation was solicited by Christie's through the UBS Foundation's German counsel…."); and R 553 ("… which a representative of Christie's in New York solicited from the UBS Foundation…."). Plaintiffs-Appellants make no allegation or suggestion to the contrary.

Due process requires a showing of purposeful activity by a foreign defendant in the forum, and a showing that the defendant has deliberately engaged in significant activity within the state. Two recent United States Supreme Court

decisions have confirmed and clarified the constitutional limits of personal jurisdiction over foreign defendants. In *Daimler AG v. Bauman*, the Supreme Court unanimously reversed the Ninth Circuit's finding of general jurisdiction over a German corporation. The Supreme Court stated that only in an "exceptional case" might a foreign corporation be deemed to be doing business to such an extent that it could be sued in a forum other than its formal place of incorporation or principal place of business. 571 U.S. 117, 138 (2014). The Court in *Daimler* also noted "that the transnational context of this dispute bears attention . . . [and that] The Ninth Circuit . . . paid little heed to the risks to international comity in its expansive view of general jurisdiction posed." *Id* at 139-40. In a concurring opinion, Justice Sotomayor stated, "no matter how extensive Daimler's contacts with California, that State's exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available." *Id* at 144.

In *Walden v. Fiore*, 571 U.S. 277 (2014), the Supreme Court unanimously reversed a Circuit Court decision that had sustained jurisdiction over a foreign defendant who had allegedly committed a tort out of the state with the knowledge it would affect persons in Nevada (causing them "foreseeable harm" in Nevada). The Supreme Court held that it is instead the defendant himself, and not the location of the plaintiff or third parties, which must create contacts with the forum state. The

Supreme Court specifically noted that the constitutional analysis of "minimum contacts" looks to the defendant's contacts with the forum state "not the defendant's contacts with persons who reside there." *Id* at 285. *Walden* mandates dismissal of this case as to the Foundation Defendants on due process grounds, and no pretrial discovery could overcome the impediment of Plaintiffs' own admissions.

*Walden* significantly held, "[d]ue process requires that a defendant be haled into a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." 571 U.S. at 286 (citation omitted). Plaintiffs here present no evidence of any relevant affiliation or contact with New York by either the Foundation or Mr. Kircher. Neither defendant does business in New York, and neither maintains any office, property, or other activity here to indicate a presence in New York. Plaintiffs repeatedly confirm that it was Christie's that contacted the Foundation in Switzerland (via its attorney in Berlin) and sought an agreement in effect quitclaiming any rights to a Degas painting to be sold in Japan. There is no allegation or suggestion to the contrary. In sum, there was no purposeful act by the Foundation Defendants to initiate any contact with New York or to do business (or anything else) in New York. Any contact that Mr. Kircher or the Foundation had with New York entities was responsive in nature, which is not the quality of purposeful contact with New York necessary to confer personal jurisdiction. *See*

*Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 378 (2014) (stating "defendants' contacts with plaintiff . . . were responsive in nature, and not the type of interactions that demonstrate the purposeful availment necessary to confer personal jurisdiction over these out-of-state defendants.") Thus, exercising personal jurisdiction over these defendants "would offend due process, as there has been no indication that defendants 'purposefully availed themselves of the New York forum.'" *Swift Transp. Co. of Arizona, LLC v RTL Enterprises, LLC*, 2015 WL 457641, *4, [ND NY, Feb. 3, 2015, No. 1:14-cv-902 (GLS/CFH)]. It was Christie's, an unrelated party in New York, that sought out and contacted the Foundation in Switzerland. There was not any contact initiated by the Foundation with anyone in New York or concerning anything in New York. The Painting was then sold in Japan by a foreign seller in a private sale to an anonymous buyer of unknown nationality. The contact initiated by Christie's to reach out to the Foundation occurred in Europe and cannot support jurisdiction in New York, as it was precisely the kind of "random, fortuitous or attenuated" contact between a person affiliated with the State and a foreign defendant that the Supreme Court has declared does not satisfy the requirements of due process.

The existence of foreseeable effects in the forum does not suffice to meet the requirements of due process. There has to be something intentionally done by the foreign defendant that actually seeks to take advantage of coming into New York.

See *7 West 57th Street Realty Co. v. Citigroup*, 2015 WL 1514539, *8 [SD NY, Mar. 31, 2015, No. 13 Civ.981(PGG)] where the court observed, "…the relationship [between the defendant's suit-related conduct and the forum] must arise out of contacts that the defendant *himself* creates with the forum." (emphasis in original) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). "It is not sufficient that conduct incidentally had an effect in the forum or even that effects in the forum were foreseeable…. Instead, the defendant must have intentionally caused - i.e., expressly aimed to cause – an effect in the forum through his conduct elsewhere." *Id*. See also *Williams v. Beemiller, Inc*., 72 N.Y.S.3d 276 (4th Dep't 2018); *Waggaman v. Arauzo*, 985 N.Y.S.2d 281 (2d Dep't 2014); *Delfasco, LLC v. Powell*, 30 N.Y.S.3d 513, 515-16 (Sup. Ct. Kings. 2016).

### C. PLAINTIFFS-APPELLANTS COULD NOT AND DID NOT MAKE A "SUFFICIENT START" TO JUSTIFY DISCOVERY

Plaintiffs have failed to assert facts making a "sufficient start" to entitle them to jurisdictional discovery. Such discovery is appropriate only where a plaintiff can show that "facts may exist which would warrant the denial of defendants' motion." *De Capriles v. Lupez Lugo*, 740 N.Y.S.2d 623, 623 (1st Dep't 2002) (citing *Peterson v. Spartan Indus*., 33 N.Y.2d 463, 466-67 (1974)); see also *Aramid Entm't Fund Ltd. v. Wimbledon Fin. Master Fund Ltd*., 965 N.Y.S.2d 26, 28 (1st Dep't 2013); *Fimbank P.L.C. v. Woori Fin. Holdings Co*., 962 N.Y.S.2d 114, 116 (1st Dep't 2013). "A party must come forward with some tangible evidence which would

constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous." *Mandel v. Busch Entm't Corp*., 626 N.Y.S.2d 270, 271 (2d Dep't 1995); *SNS Bank, N.V. v. Citibank*, 777 N.Y.S.2d 62, 64 (1st Dep't 2004).

Plaintiffs fail to make this showing. Plaintiffs tried to concoct a basis for jurisdiction over the Foundation Defendants based on a theory of conspiracy, but offered no "tangible evidence" amounting to the "sufficient start" required before the Court may grant jurisdictional discovery in this international case. Plaintiffs offered only speculative, conclusory assertions that the Foundation and Kircher conspired with Christie's. Plaintiffs' contentions are patently insufficient to justify the fishing expedition they seek.

First, the trial court's Order on page 31 (R. 40) dismissed the only cause of action in the SAC based on conspiracy (Seventh Claim for Relief) ("Conspiracy to Obtain Unjust Enrichment) (Against All Defendants)" (R 181-82) for failure to state a cause of action. Even if that sole conspiracy cause of action had not been dismissed, the cause of action for unjust enrichment cannot support personal jurisdiction based on an alleged conspiracy: as a matter of law, where a plaintiff asserts "conspiracy jurisdiction" a cause of action for unjust enrichment cannot be asserted as the predicate tort for jurisdiction. *Norex Petroleum Ltd. v. Blavatnik*,

2015 WL 5057693, *19 [Sup. Ct. N.Y., Aug. 25, 2015, No. 650591/2011], aff'd, 59 N.Y.S.3d 11 (1st Dep't 2017).

In *BGC Partners, Inc. v. Avison Young (Canada) Inc*., the trial court disallowed jurisdictional discovery where the plaintiffs' "wholly conclusory allegation falls far short of a 'sufficient start' warranting discovery" and where plaintiffs failed to allege facts to satisfy the test for jurisdiction based on conspiracy. 2014 WL 7201754, *4 [Sup. Ct. N.Y., Dec. 15, 2014, No. 652669/2012].

In the present case, Plaintiffs' conspiracy claims add nothing to the jurisdictional analysis. Notably, Plaintiffs have not disclosed when they first came to believe they were heirs of Margaret Kainer (R 12-13) nor have they disclosed how they became aware of that supposed fact. Without disclosing that factual information, there is no showing as to how the Foundation Defendants could have known of Plaintiffs-Appellants' alleged rights, much less conspired to defeat those rights when the Painting was sold in Japan in 2009.

Even if Plaintiffs had given notice of their alleged claims before 2009, their attempt to premise long-arm jurisdiction on an alleged conspiracy to commit tortious acts having an effect in New York must set forth that the out-of-state alleged conspirators knew their conduct would have an effect in New York. *Marie v. Altshuler*, 817 N.Y.S.2d 261 (1st Dep't 2006). They make no such allegation in the SAC, nor can they since the private sale in Japan was the only transaction and place

of any conceivable "effect" that was foreseeable to the Foundation Defendants. The subsequent auction of the Painting in New York did not involve the Foundation Defendants nor did they benefit from it or even know of it until afterwards. (R 649, 793, 795).

As the court explained in *BGC Partners Inc. v. Avison Young (Canada) Inc., supra,* there are five points that a plaintiff has to establish or at least show a sufficient factual start in order to have any basis for seeking discovery on a conspiracy claim. On all five points, Plaintiffs here have failed to make a "sufficient start". In summary, those five points are that there must be: (1) A corrupt agreement (2) Intentional participation by the parties in the conspiracy (3) Damage to the claimant (4) Foreseen effects in New York of the conspiracy.[2] (5) Control of the conspiracy by the foreign defendant or defendants. 2014 WL 7201754, *5 [Sup. Ct. N.Y., Dec. 15, 2014, No. 652669/2012].

With respect to the first test that must be satisfied, Plaintiffs need to show the existence of a corrupt agreement as of the time of the Japanese sale in 2009. There is no such a showing. The second test requires intentional participation in the corrupt

[2] As set forth above, in order to also satisfy the due process requirements explained by the U.S. Supreme Court in *Walden v. Fiore* 571 U.S. 277 (2014), the mere existence of foreseeable effects in the forum is not enough. For due process purposes, there must be some action by which the foreign defendant has engaged in purposeful acts to come into New York to take advantage of doing business under the laws of New York. No such activity is alleged.

agreement: that by definition would have required knowledge in 2009 of the corrupt agreement and knowledge that it was corrupt. There is no such allegation.

Test number three requires damage to the Plaintiffs-Appellants. They would have to show not only that they were entitled to the Painting in 2009 but that a conspiracy then intentionally deprived them of that right to the Painting. But even if all parties were somehow aware that Paintiffs-Appellants had a right to the Painting, none of the Foundation Defendants did anything to interfere with that right. All the Foundation did was to waive any potential right to the Painting. The Foundation and Mr. Kircher did not sell the Painting; nor did they buy the Painting or seek possession of it. The only person who claimed to own the Painting was the Japanese gallery that sold it in 2009 in Japan and then, after the sale, the buyer in that Japanese transaction. Then next persons claiming ownership were the unknown seller and the anonymous buyer at the subsequent 2009 auction. 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. Thus, the Plaintiffs-Appellants' title, if they are entitled to the Painting, has not been impaired by anything recited in the complaint.

Fourth, the existence of foreseen effects in New York is a requirement of the conspiracy theory of personal jurisdiction because CPLR long-arm jurisdiction requires that a foreign party engaged in international commerce commit a tort that has foreseeable consequences in New York. As noted above, the United States

Supreme Court teaches in *Walden* that just the likelihood of effects in the forum does not suffice to meet the requirements of due process. There has to be something intentionally done by the foreign defendant that was "expressly aimed" to cause an effect in New York. There is no such allegation.

The last of the tests is that the foreign defendant must be in control of the corrupt illegal conspiracy. There is no such allegation. To the contrary, there is a stipulation throughout the plaintiff's papers that the agreement waiving or quitclaiming the rights of the Foundation was solicited by Christie's and related not to New York but to the sale of the Painting in Japan.

The conspiracy allegations in the SAC fall woefully short of stating a conspiracy claim, and certainly not a claim that entitles the Plaintiffs-Appellants to jurisdictional discovery.

## CONCLUSION

For all the foregoing reasons, it is respectfully requested that this Court affirm the trial court's *forum non conveniens* dismissal, or alternatively dismiss the case for lack of personal jurisdiction over Defendants-Respondents Norbert Stiftung and Edgar Kircher, and that they be granted such other and further relief as the Court deems just and proper.

Dated: New York, New York
November 15, 2018

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## PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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