To Be Argued By: MARSHALL R. KING
Time Requested: 15 minutes

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

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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,

Appellate Case No.: 2018-968

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 UBS AG and UBS GLOBAL ASSET MANAGEMENT (AMERICAS), INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes

Rules

Defendants-Respondents UBS AG and UBS Global Asset Management (Americas), Inc. ("UBS Global Asset Management" and, together with UBS AG, "UBS" or the "UBS Defendants") respectfully submit this brief in opposition to the appeal by Plaintiffs-Appellants from the decision and order of the Supreme Court, New York County (Friedman, J.) granting the Defendants' motions to dismiss the claims against UBS and others on the ground of *forum non conveniens*.

PRELIMINARY STATEMENT

The claims in this action arise out of contested claims to the estate of a Jewish woman forced to abandon her home and her possessions in Germany in the 1930s. As alleged in Plaintiffs' Second Amended Complaint (the "Complaint"), after the 1968 passing of Margaret Kainer, who was born in Germany and later resided in Switzerland and France, certain Defendants engaged in a decades-long effort to deny Plaintiffs recognition as the rightful heirs to Kainer's estate, and instead to vest ownership of Kainer's assets in the hands of Defendant Norbert Stiftung, a Swiss foundation located in Switzerland (the "Foundation"). The wrongdoing alleged by Plaintiffs covers events occurring in Switzerland, Germany, and France over a period of forty years. The *sole* connection Plaintiffs' claims have to New York is that a single piece of artwork that was allegedly part of Kainer's estate, an 1896 painting by Edgar Degas (the "Painting"), was ultimately sold at auction by Defendant Christie's Inc. ("Christie's") in New York in 2009.

As the trial court correctly recognized, the mere sale of the Painting comes nowhere near justifying the litigation of Plaintiffs' claims here.

Plaintiffs' Complaint cried out for dismissal on *forum non conveniens* grounds: The key witnesses and documents are in Switzerland and Germany; Plaintiffs are simultaneously pursuing litigation in Switzerland regarding the same underlying conduct and assets; only one Defendant is alleged to reside in New York, and none of the Plaintiffs resides here; this case will require the court presiding over it to interpret complicated (and potentially conflicting) issues of Swiss, French, and German law; and Defendants, most of whom are not subject to personal jurisdiction in New York, would be hard-pressed to effectively litigate this case here from a practical standpoint. Above all, Plaintiffs' case does not have the requisite "substantial nexus" to New York, and that is especially true regarding the claims against the UBS Defendants, which hinge entirely on conduct that occurred in Germany and Switzerland. Indeed, Plaintiffs do not allege any wrongful conduct by the UBS Defendants with respect to the Painting, nor, in fact, any wrongful conduct by them in New York whatsoever.

In a 32-page opinion, the trial court painstakingly applied the proper *forum non conveniens* factors and dismissed this case in its sound discretion. The trial court also properly rejected Plaintiffs' request for jurisdictional and "forum-

related" discovery in light of the "compelling case" that Defendants presented for *forum non conveniens* dismissal.

Plaintiffs' arguments on appeal largely ignore the important factors dictating that litigation in Switzerland against UBS, the Foundation, and Defendant Edgar Kircher would be far more convenient, efficient, and appropriate than litigation in New York. Instead, Plaintiffs misconstrue the reasoning of the court below, misstate the record, and ignore their own allegations. Plaintiffs have offered no sound reason for reversing the trial court's decision, and the dismissal of Plaintiffs' claims against the UBS Defendants should be affirmed for the reasons set forth below.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the court below properly exercise its discretion by dismissing the claims against UBS on the ground of *forum non conveniens*, where only one of the parties is a resident of New York, the claims arise out of events occurring in Europe over several decades and will be governed by Swiss, German, and French law, the documents and witnesses relevant to the issues are located primarily in Switzerland, and the Plaintiffs have already commenced related litigation in Switzerland?

The trial court weighed the *forum non conveniens* factors and properly dismissed the claims against UBS.

2. Should the order below be affirmed on the alternative grounds that the Plaintiffs failed to establish personal jurisdiction over Defendant UBS AG and failed to state a claim against Defendant UBS Global Asset Management?

The court below did not reach these issues.

COUNTERSTATEMENT OF FACTS

A. Summary Of Allegations

The alleged wrongdoing at the heart of Plaintiffs' case is that the Swiss Foundation misappropriated the assets of the estate of Margaret Kainer, a former resident of Germany, Switzerland, and France. Plaintiffs contend that the Swiss administrator of Kainer's estate failed to conduct a proper search for Kainer's heirs after she died in 1968; that the Foundation improperly gained recognition from Swiss and German courts and governmental authorities as the rightful heir to her estate; and that, years later, in 2009, the Foundation improperly benefitted by receiving a payment in exchange for disclaiming an interest in a painting by Edgar Degas that was privately sold in Japan. R24, R142-144, R153-163, R164-171. The Painting was later sold at auction by Christie's. R24, R142, R169.

More specifically, Plaintiffs' Complaint tells a long and winding saga that begins in the 1920s, when Kainer's father, Norbert Levy, set out his last will. R153-154. According to Plaintiffs, Levy established a "Swiss Family Foundation" to provide for his heirs upon his passing. R154. Plaintiffs assert that because Levy

and UBS had a "longstanding confidential relationship," Levy required that at least one member of the board of trustees of his Swiss Family Foundation also be a director of UBS. *Id*. Plaintiffs further allege that Levy's daughter, Margaret Kainer, the "sole heir" of Levy's estate upon his death in 1928, owned more than 400 artworks, including the Painting, that were stolen and sold at auction by the Nazis in the 1930s. R155.

The Complaint then alleges that the Swiss Family Foundation either "ceased to exist by operation of law" in the 1940s, or at the latest when Kainer died in 1968. R156, R159. Plaintiffs also claim that Levy's will, which included a reversionary provision in favor of a separate foundation, was "invalid" under German law from the time it was signed, or in any event by 1958, because of other provisions of German law. R156.

Plaintiffs claim that following Margaret's death in 1968, the Swiss Family Foundation, its trustees, and the administrator of Kainer's estate failed to search for Kainer's lawful heirs; wrongfully prevented Kainer's estate from being administered by French authorities; "took steps in Germany and Switzerland to seize full control over her assets for themselves and without any benefit to the heirs"; "'convert[ed]' the Swiss Family Foundation . . . into a Swiss public foundation under UBS' direction and control," in violation of Swiss law and the

intentions of Levy as set out in his will;[1] and, in 1972, "falsely asserted to a German court that Margaret had no heirs and then presented the UBS Foundation as the purported heir of Norbert, claiming three-quarters of his estate that rightfully belonged to Margaret's heirs." R158-161. Plaintiffs go on to describe how the Swiss Canton of Vaud and the City of Pully (the "Swiss Localities") obtained a certificate of inheritance from a Swiss court designating them as Kainer's sole legal heirs, and then entered into an allegedly "collusive" settlement in 2005 with the Foundation, in which the participants divvied up Kainer's estate among themselves. R162; Pls.' Br. at 8. According to Plaintiffs, notwithstanding the various certificates of inheritance issued in Germany and Switzerland to others, they alone are Kainer's "lawful heirs," "heirs of her heirs," or "their executors." R156.

The lion's share of Plaintiffs' allegations span the course of 40-plus years and are based on events that occurred in Europe. *See* R142-144, R153-163. As such, the merits of this dispute involve many issues of fact and law that require the application of foreign law to resolve. For instance, based solely on Plaintiffs' allegations, a court will have to determine: (a) whether "French substantive law governs the disposition of [Kainer's] estate" (R156); (b) whether the Swiss Family

[1] Plaintiffs allege that the converted foundation is the Defendant Foundation here. R159.

Foundation created by Norbert Levy in 1927 "ceased to exist by operation of [Swiss] law in the mid-1940's" or in 1968 (*id.*; *see also* R159); (c) whether a provision of Levy's will was "invalid under German law from the moment it was signed" or became invalid in 1958 pursuant to other provisions of German estate law (R156); (d) whether a French *acte notarial* validly establishes Plaintiffs as Kainer's "lawful heirs" "[u]nder French law" (R163; *see also* R156); (e) whether the issuance of a certificate of partial inheritance by a German court in 1972 was based on statements "falsely asserted to [the] German court" (R160-161); (f) whether UBS owed fiduciary duties to Plaintiffs under Swiss law based on the fact that Levy "during his lifetime . . . entrusted UBS to manage his assets" or that Kainer "during her lifetime . . . entrusted UBS to manage her assets" (R172); and (g) whether any such duties were breached by conduct taking place in Switzerland or Germany over the course of several decades. All of the documentary evidence relevant to these underlying issues is located in Switzerland or Germany, and is written in either French or German, and all of the key witnesses relevant to the claims against the UBS Defendants—including many non-party witnesses who were the key actors in the tale recounted by Plaintiffs—reside in Switzerland. R191, R193-195, R197-198, R643, R646-647.

The *only* actions that are alleged to have taken place in New York are: (1) "Christie's solicitation and facilitation of the Restitution Settlement

Agreement" and (2) the subsequent sale of the Painting at a "public auction at Christie's in New York." R145-146. Neither of the UBS Defendants are alleged to have done anything in connection with either the Restitution Settlement Agreement or the sale of the Painting at Christie's. *See* R164-171. Plaintiffs attempt to connect UBS to the Restitution Settlement Agreement and the sale of the Painting by improperly lumping UBS together with the Foundation and Edgar Kircher, one of its trustees, as the "Foundation Defendants" and disingenuously referring to the Foundation as the "UBS Foundation." R142, R165, R167. But Plaintiffs do not allege any facts that support their conclusory assertions that UBS has some involvement with the Foundation beyond the fact that some of UBS AG's employees happened to sit on the Foundation's board of trustees in their personal capacities (and *not* as representatives of UBS AG). R193. And Plaintiffs allege no facts at all about *any* involvement of UBS Global Asset Management, other than a bogus allegation—premised on an "internet directory" (R148-149, R185)—that Defendant Kircher worked for that entity. That allegation is patently untrue. R643.

In any event, lumping UBS together with the Foundation and its trustee only serves to underscore the absence of any allegations that UBS did *anything* in connection with either the Restitution Settlement Agreement or the sale of the Painting. And the sale of the Painting is relevant only if the Plaintiffs can

successfully prove the alleged wrongdoing that occurred in Europe over the course of four decades.

B. Procedural History

On January 3, 2013, Plaintiffs filed this case in New York against UBS, the Foundation, and Kircher. R603. Within days of filing their complaint, the same 11 Plaintiffs in the case at bar—residents of Australia, Chile, Great Britain, and Connecticut (R27)—brought two cases in Switzerland regarding the Kainer estate (together, the "Swiss Litigation"). *See* R488, R649; R654. In the Swiss Litigation, Plaintiffs claim that the Foundation, together with the Swiss Localities, improperly appropriated Kainer's assets. R655. There, Plaintiffs seek as relief "all of the property and/or assets originating from the estate of the deceased Margaret Kainer" "or . . . the amounts that these parties unjustly enriched themselves with" (R655, R658)—which, by definition, includes the Painting. Plaintiffs also seek "a determination as to the validity or the inapplicability of reversionary heirship mentioned in Norbert Levy's last will" and to invalidate the Swiss Localities' Swiss certificate of inheritance. R489. The Swiss Litigation is pending in the Chambre Patrimoniale Cantonale in Lausanne. R118, R654.

On July 15, 2013, while motions to dismiss were pending, Plaintiffs amended their complaint in this case and, subsequently, with the motions deemed addressed to the amended pleading, Plaintiffs sought and were granted leave to file

a Second Amended Complaint adding Christie's as a defendant, which they did on November 4, 2014. R140. Against UBS, Plaintiffs assert claims for breach of fiduciary duty, an accounting, conversion, unjust enrichment, and conspiracy to obtain unjust enrichment. R172, R175, R177, R179, R181.

On December 19, 2014, Defendants moved to dismiss the Complaint. R101; R636; R798. All Defendants argued that the trial court should dismiss the Complaint on *forum non conveniens* grounds. R214-224; R735-736; R805-807. UBS AG, the Foundation, and Kircher further challenged the assertion of personal jurisdiction over them, and UBS Global Asset Management argued that the case against it should be dismissed for failure to state a claim. R224-233; R736-739.

In a decision and order dated October 30, 2017 and entered on October 31, 2017, the trial court granted Defendants' *forum non conveniens* motion, first finding that "a court 'presuming, without deciding jurisdiction,' may address the issue of whether the action should be dismissed on [] *forum non conveniens* ground[s]." R19-20. Considering the *forum non conveniens* factors, including the residencies of the parties and the "strong showing . . . that a suitable alternative forum exists" in Switzerland, and recognizing the "extremely difficult task [the] court would face in ascertaining and applying foreign law," the trial court found that Plaintiffs' claims do not have a substantial nexus to New York and exercised its discretion to dismiss the claims against UBS, the Foundation, and Kircher.

R27, R29, R33, R34, R39. The trial court granted Christie's motion to dismiss on the ground of *forum non conveniens* to the extent that it stayed the action against Christie's with leave to restore if, in European proceedings, the Plaintiffs are determined to be Kainer's lawful heirs with rights to the Painting *and* the Foundation is determined to not also be a legitimate heir or is found to have lacked the authority to enter into the Restitution Settlement Agreement. R35, R40.

Further, because the trial court dismissed the case on *forum non conveniens* grounds, it did not reach UBS AG's motion to dismiss for lack of personal jurisdiction or UBS Global Asset Management's motion to dismiss for failure to state a claim. It did, however, deny Plaintiffs' request for jurisdictional and "forum-related" discovery. The trial court acknowledged Plaintiffs' concession that "the record does not demonstrate personal jurisdiction over the Foundation, [Edgar] Kircher, and UBS AG" (R20), and found that discovery would be "unduly burdensome" in light of the "compelling case" for dismissal on *forum non conveniens* grounds. R25.

Plaintiffs noticed their appeal of the trial court's decision on December 1, 2017 and perfected it nine months later, on September 4, 2018.

ARGUMENT

I. The Trial Court Properly Dismissed This Case Under the Doctrine Of *Forum Non Conveniens*

Because all of the factors considered by New York courts in a *forum non conveniens* analysis dictate that Switzerland—where Plaintiffs have already brought litigation regarding the same issues giving rise to the present dispute—would be a far more convenient forum for resolution of Plaintiffs' claims against UBS, the Foundation, and Kircher, and because New York bears almost no connection to the underlying events, dismissal of the claims was warranted.

A. The Standard Of Review For *Forum Non Conveniens*

Under the doctrine of *forum non conveniens*, a trial court may dismiss a case "lacking a substantial nexus with New York." *Martin v. Mieth*, 35 N.Y.2d 414, 418 (1974). Dismissal is warranted if, on "balancing the interests and conveniences of the parties and the court," it is determined that an action "could better be adjudicated in another forum." *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 360 (1972); *see also* CPLR 327(a) (authorizing dismissal if "the court finds that in the interest of substantial justice the action should be heard in another forum"). Some of the factors to be considered in a *forum non conveniens* analysis are "the burden on the New York courts, the potential hardship to the defendant[s], [] the unavailability of an alternative forum in which plaintiff may bring suit[, . . .] 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." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984).

While this Court has occasionally stated that it may choose to exercise independent discretion in reviewing *forum non conveniens* rulings, *see, e.g.*, *Ghose v. CNA Reins. Co. Ltd.*, 43 A.D.3d 656, 660 (1st Dep't 2007) (reversing lower court's denial of motion to dismiss on *forum non conveniens* grounds), in recent years, and consistent with its sister departments, it has regularly affirmed *forum non conveniens* rulings where the trial court considered the relevant factors and did not abuse its own discretion. *See, e.g.*, *Payne v. Jumeirah Hosp. & Leisure (USA), Inc.*, 83 A.D.3d 518, 518 (1st Dep't 2011) ("The motion court . . . providently exercised its discretion in dismissing the action on *forum non conveniens* grounds."); *Prime Props. USA 2011, LLC v. Richardson*, 145 A.D.3d 525, 526 (1st Dep't 2016) (same result); *Dogmoch Int'l Corp. v. Dresdner Bank*, 304 A.D.2d 396, 397 (1st Dep't 2003) (same result); *see also Swaney v. Acad. Bus Tours of N.Y., Inc.*, 158 A.D.3d 437, 438 (1st Dep't 2018) (explaining that the Appellate Division will not disturb a *forum non conveniens* determination unless the trial court "improvidently exercised its discretion or failed to consider the relevant factors").[2]

[2] *See also Chang Jin Park v. Cho*, 153 A.D.3d 1311, 1312 (2d Dep't 2017) ("A court's determination of a motion to dismiss on the ground of *forum non conveniens* will not be disturbed on appeal unless the court failed to properly

That said, whether this Court reviews the decision below for abuse of discretion, or chooses to exercise its own independent discretion, it should reach the same conclusion: that dismissal on *forum non conveniens* grounds was proper under the circumstances of this case.

B. The Trial Court Properly Dismissed On *Forum Non Conveniens* Grounds Before Ruling On Personal Jurisdiction

On appeal, Plaintiffs insist that the trial court committed reversible error by deciding to dismiss on the basis of *forum non conveniens* without first deciding whether to dismiss for lack of personal jurisdiction over Defendants UBS AG, the Foundation, and Kircher. But whether the trial court assumed jurisdiction for the limited purpose of ruling on *forum non conveniens*—as Justice Friedman saw fit to do (R20)—or first addressed the personal jurisdiction motions before reaching the *forum non conveniens* question, the outcome here would be the same: dismissal of Plaintiffs' Complaint, either for lack of personal jurisdiction or on *forum non conveniens* grounds. Either way, Plaintiffs' claims would be dismissed, and they would be left to pursue their claims in another jurisdiction, like Switzerland, where jurisdiction could be obtained over the Swiss defendants.

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consider all the relevant factors or improvidently exercised its discretion in deciding the motion."); *Gozzo v. First Am. Tit. Ins. Co.*, 75 A.D.3d 953, 955 (3d Dep't 2010) (finding that Supreme Court did not "abuse[] its discretion" in dismissing complaint on *forum non conveniens* grounds); *Brown v. Dataw Is. Realty*, 151 A.D.2d 1044 (4th Dep't 1989) (same).

As this case makes abundantly clear, an order of operations that would require a court to first wade through potentially difficult questions of personal jurisdiction before considering—and eventually dismissing on—*forum non conveniens* would burden the court and the parties with "expense and delay . . . all to scant purpose." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp*., 549 U.S. 422, 435 (2007). For this reason, the U.S. Supreme Court recognized in *Sinochem* that where the jurisdictional analysis is complex and the *forum non conveniens* analysis clear-cut, the "court [should] properly take[] the less burdensome course" of dismissing on *forum non conveniens* grounds without first determining whether it has jurisdiction because, in these cases, "[j]udicial economy is disserved by continuing litigation." *Id.* at 435-36.[3]

[3] Plaintiffs attempt to distinguish *Sinochem* as involving the "power and procedure of federal courts," and as having "nothing to do with state courts." Pls.' Br. at 21. But Plaintiffs offer no explanation of why that distinction matters. It is no less burdensome for a state court to be forced to grapple with potentially difficult questions of personal jurisdiction when the outcome of the case will be dismissal in any event. *See, e.g*., *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1183 (R.I. 2008) (finding, quoting *Sinochem*, 549 U.S. at 423, that "a court may 'dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant'"); *Holland v. Lincoln Gen. Hosp.*, 48 So.3d 1050, 1054 (La. 2010) (approving of Louisiana appellate court rulings following *Sinochem* allowing dismissal on *forum non conveniens* grounds, prior to addressing venue); *Vinmar Trade Fin., Ltd. v. Util. Trailers de Mex., S.A. de C.V.*, 336 S.W.3d 664, 671-72 (Tex. Ct. App. 2010) (adopting holding in *Sinochem* despite contrary Texas Supreme Court precedent). Plaintiffs also note that *Sinochem* suggested that a court that fails first to establish its jurisdiction could not condition a *forum non*

This Court has affirmed many *forum non conveniens* determinations where the lower court took the approach advocated by *Sinochem*. *See, e.g.*, *Payne*, 83 A.D.3d at 518 ("The motion court, presuming, without deciding jurisdiction, providently exercised its discretion in dismissing the action on *forum non conveniens* grounds." (citation omitted)); *Stoomhamer Amsterdam v. CLAL (Israel)*, 204 A.D.2d 186, 186 (1st Dep't 1994) ("Assuming, arguendo, that New York courts have personal jurisdiction over [the] defendants . . . , the totality of the circumstances demonstrate that the trial court did not abuse its discretion in determining that New York is not a convenient forum."); *American BankNote Corp. v. Daniele*, 45 A.D.3d 338, 339-40 (1st Dep't 2007) (affirming lower court, which had resolved *forum non conveniens* question before determining personal jurisdiction).

Contrary to Plaintiffs' contentions, this State's Court of Appeals and First Department precedents do not require a ruling on personal jurisdiction prior to dismissing on the basis of *forum non conveniens*. Plaintiffs wildly mischaracterize *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 579 (1980), which

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conveniens dismissal on the defendant's waiver of certain defenses in the alternative forum. Pls.' Br. at 24. As in *Sinochem*, however, that concern is irrelevant here, because the court below did not place any conditions on dismissal, because UBS AG is subject to jurisdiction in Switzerland and UBS Global Asset Management consented to such jurisdiction (R116-117, R221), and because Plaintiffs did not request any additional conditions.

they say "explicitly held that the doctrine of *forum non conveniens* 'has no application unless the court has obtained *in personam* jurisdiction of the parties.'" Pls.' Br. at 19. As Justice Friedman pointed out (*see* R20), the quoted language was only dicta, because the Appellate Division in *Ehrlich-Bober* had "concluded that dismissal would not obtain on *forum non conveniens* grounds." 49 N.Y.2d at 579. Thus, whether the issue was decided before or after personal jurisdiction was decided was irrelevant. Moreover, *Ehrlich-Bober* did not present the situation that is present here and was present in *Sinochem—i.e.*, where "*forum non conveniens* considerations weigh heavily in favor of dismissal." *Sinochem*, 549 U.S. at 436. Plaintiffs similarly misinterpret *Banco Ambrosiano v. Artoc Bank & Trust* , 62 N.Y.2d 65, 73 (1984), as having "applied" the *Ehrlich-Bober* "rule." *See* Pls.' Br. at 21. *Banco Ambrosiano* did not mandate addressing personal jurisdiction first, nor even cite to *Ehrlich-Bober*. 62 N.Y.2d at 73. And, as with *Ehrlich-Bober*, the lower courts in *Banco Ambrosiano* declined to dismiss on the ground of *forum non conveniens*, thus making that case distinguishable.[4]

[4] As the U.S. Supreme Court held in *Sinochem*, in explaining away a statement similar to that in *Ehrlich-Bober* from an earlier Supreme Court case, "it is of course true that once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account. In that scenario '*forum non conveniens* can never apply.'" 549 U.S. at 434 (quoting and distinguishing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947)). But none of *Gulf Oil*, *Ehrlich-Bober*, or *Banco Ambrosiano* presented the question applicable here—*i.e.*, whether a court "can dismiss under the *forum non conveniens* doctrine before definitively ascertaining its own jurisdiction." *Id.*

Likewise, the First Department cases on which Plaintiffs rely do not compel this Court to analyze personal jurisdiction first. *See* Pls.' Br. at 18-19. Plaintiffs' central case, *Prime Properties*, devotes a single sentence to this issue: "The court should have addressed 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." 145 A.D.3d at 525 (quoting *Flame S.A. v. Worldlink Intl. (Holding) Ltd.*, 107 A.D.3d 436, 437 (1st Dep't 2013)).[5] That language was merely dicta, because the court went on to hold that it did in fact have personal jurisdiction over defendants. *Id.* What is more, the *Prime Properties* court found that the lower court "providently exercised its discretion by granting the [] *forum non conveniens* motion," *id*. at 526, and affirmed dismissal on *forum non conveniens* grounds. It did not, in other words, reverse a *forum non conveniens* dismissal *because* the trial court did not first decide personal jurisdiction. And, in deciding *Prime Properties*, this Court

(finding that *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 suit").

[5] The Appellate Division's statement in *Flame* quoted by the *Prime Properties* court is also dicta. *Flame*, 107 A.D.3d at 437. Though the *Flame* court found that the trial court should have considered the issue of personal jurisdiction before ruling on *forum non conveniens*, it nonetheless held that "the motion court properly dismissed based on *forum non conveniens*." *Id.* at 438.

did not overrule its prior authority that permits courts to assume personal jurisdiction for purposes of the *forum non conveniens* analysis. *See supra* p. 16.[6]

More to the point, the results of the cases on which Plaintiffs rely most—cases where appellate courts determine personal jurisdiction after the lower courts

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[6] In support of their argument that this Court is bound to follow *Prime Properties* because it is the most recent controlling decision in this Department, Plaintiffs cite *only* to Supreme Court and Surrogate's Court cases, because there is no binding appellate authority requiring that approach. *See* Pls.' Br. at 18. Further, the majority of cases Plaintiffs cite on this point are from trial courts that were asked to stay a case pending appeal on the ground that the relevant law could change—and it was in *that specific context* that those cases discussed the importance of "follow[ing] the last decision of the controlling appellate court." *In re Weinbaum's Estate*, 51 Misc. 2d 538, 539 (Surr. Ct. Nassau Cty. 1966) (denying a stay pending the determination of a Court of Appeals case); *see also, e.g.*, *People ex rel. Schneiderman v. Coll. Network, Inc.*, 53 Misc. 3d 1210(A) (Sup. Ct. Albany Cty. 2016) (unpublished) ("It is axiomatic that this Court is bound by the determination of the Appellate Division, First Department . . . and it must not hold an adjudication in abeyance, or impede the course of litigation, pending a change in the law which may occur at some future date."); *Miller v. Miller*, 109 Misc. 2d 982, 983 (Sup. Ct. Suffolk Cty. 1981).

In addition, because recent First Department decisions take differing approaches on whether personal jurisdiction must be definitively decided before addressing *forum non conveniens*, there is no "controlling law" here that must be applied, which further distinguishes Plaintiffs' cases. *See Robert Plan Corp. v. Onebeacon Ins.*, 10 Misc. 3d 1053(A) (Sup. Ct. Nassau Cty. 2005) (unpublished) (finding court had to apply the "most recent controlling decisions" of the Appellate Division where there was no conflict within the Second Department on the issue); *see also Vanilla v. Moran*, 188 Misc. 325, 334 (Sup. Ct. Albany Cty. 1947), *aff'd*, 272 A.D. 859 (3d Dep't 1947), *aff'd*, 298 N.Y. 796 (1949) (finding that the court was bound to "follow the authority" of appellate court decisions where "all authorities [were] . . . contrary" to plaintiff's position).

failed to do so, only to subsequently affirm dismissal on *forum non conveniens* grounds—underscore the inefficiency and irrationality of the approach Plaintiffs advocate. *See, e.g.*, *Prime Props.*, 145 A.D.3d at 525-26 (finding that the lower court had specific jurisdiction over defendants before affirming *forum non conveniens* dismissal); *Flame*, 107 A.D.3d at 437-38 (same); *cf. Edelman v. Taittinger, S.A.*, 298 A.D.2d 301, 303 (1st Dep't 2002) (finding that the court could not reach the *forum non conveniens* question "in the face of an unresolved jurisdictional question awaiting discovery," but noting that "New York does not appear to be a convenient forum since the contacts with this jurisdiction are tenuous at best"). Here, whether the court below found personal jurisdiction or not, the result would be identical: dismissal of the claims against UBS and against the Foundation and Kircher.

To the extent there is a bona fide split of authority on this issue in the First Department, this Court can and should follow *Sinochem's* approach. This is a "textbook case for immediate *forum non conveniens* dismissal." *Sinochem*, 549 U.S. at 435. Compelling the court and the parties to engage in a potentially complicated jurisdictional analysis at the outset, only to subsequently dismiss the case on *forum non conveniens* grounds even if the court *finds* jurisdiction, would frustrate the very purpose of the *forum non conveniens* doctrine, which itself is

driven by a policy of efficiency and is meant to limit unnecessary "financial and administrative burdens" on the New York courts. *Pahlavi*, 62 N.Y.2d at 478.

C. The Trial Court Properly Exercised Its Discretion And Found That The *Forum Non Conveniens* Factors Support Dismissal

On the merits, every one of the *forum non conveniens* factors weighs heavily in favor of dismissal: Hearing this case would substantially burden New York courts, Defendants, and key witnesses; only one of the parties (and none of the Plaintiffs) is a New York resident; Switzerland, a forum where Plaintiffs are already voluntarily litigating related claims, offers an adequate alternative forum for Plaintiffs' claims; and, above all, the central alleged misconduct stems from events that occurred outside of the United States and that are governed by Swiss, German, and French law. The trial court considered all of these factors and providently exercised its discretion in dismissing the case on *forum non conveniens* grounds. *See, e.g.*, *Payne*, 83 A.D.3d at 518; *Swaney*, 158 A.D.3d at 438.

On appeal, as below, Plaintiffs are unable to effectively refute each of the factors as they stack up against them. Instead, they ignore the bulk of the allegations in their Complaint and attempt to recast the dispute as merely about the sale of the Painting, while also misstating the record and mischaracterizing the holding of the court below. But Plaintiffs cannot escape the fact 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—actions for which the proof, if any, would be located outside of this country.

1. Trying This Case In New York Would Unnecessarily And Unduly Burden New York Courts

First, as the trial court found, adjudicating this case in New York would impose significant, unjustifiable burdens on the court, including the need to interpret and apply foreign law. *See* R29. That foreign law governs is one "important consideration" and tips the balance towards dismissal. *Shin-Etsu Chem. Co., Ltd. v. ICICI Bank Ltd.*, 9 A.D.3d 171, 178 (1st Dep't 2004). In fact, the "*mere likelihood* that foreign law will apply weighs in favor of dismissal." *Cavlam Bus. Ltd. v. Certain Underwriters at Lloyd's, London*, 2009 WL 667272, at *8 (S.D.N.Y. Mar. 16, 2009) (emphasis added). And Plaintiffs do not dispute that foreign law governs their rights as heirs and the merits of their claims against the UBS Defendants.

Specifically, trying this case would require New York courts to interpret and apply Swiss, German, and French law, as well as to resolve potential conflicts of law among those jurisdictions. R29-30. The court would inevitably require expert testimony to that end—another consideration that weighs in favor of dismissal. *See Neuter Ltd. v. Citibank*, 239 A.D.2d 213, 213 (1st Dep't 1997) (finding the fact that "[t]he action is governed by Swiss law, as to which expert testimony will be required" weighed in favor of *forum non conveniens* dismissal); *see also*

Schertenleib v. Traum, 589 F.2d 1156, 1165 (2d Cir. 1978) (holding that the need to apply Swiss law favored *forum non conveniens* dismissal because it "necessitates the introduction of inevitably conflicting expert evidence on numerous questions of Swiss law, and it creates the uncertain and time-consuming task of resolving such questions by an American judge unversed in civil law tradition"); *Peters v. Peters*, 101 A.D.3d 403, 403 (1st Dep't 2012) (affirming dismissal of claims against UBS AG on *forum non conveniens* grounds in part because "Swiss law would apply to the claims").

The trial court called sorting through the "at best, opaque" foreign laws in play an "extremely difficult task," with good reason. *See* R29-30. For example, Plaintiffs' allegations that a relevant provision of Levy's will "was invalid under German law" (R156), and that, under "Swiss law," the Swiss Family Foundation "dissolved in or around 1944 for lack of funds" or in 1968 upon Kainer's death (R159), will necessarily require the application of German and Swiss law. Further, as the trial court explained, Plaintiffs contend that *French* substantive law is applicable to the underlying question of whether they are the proper heirs to Kainer's estate. R29, R656-657. That contention conflicts with the existence of German and Swiss certificates of inheritance issued in the names of the Foundation and the Swiss Localities. R160-162. Additionally, Plaintiffs' claims regarding UBS's alleged breach of its fiduciary duties and UBS's role in the alleged

misconduct leading to the purported misappropriation of Kainer's assets are likely governed by Swiss contract and tort laws since Switzerland is where the alleged relationships between UBS and Levy and Kainer were centered, and where UBS's alleged conduct took place. *See* R118-122, R172. Accordingly, Switzerland has "the greatest interest in regulating behavior within its borders." *Atsco Ltd. v. Swanson*, 29 A.D.3d 465, 466 (1st Dep't 2006) (quoting *Cooney v. Osgood Mach.*, 81 N.Y.2d 66, 72 (1993)); *see also Corporacion Tim, S.A. v. Schumacher*, 418 F. Supp. 2d 529, 533 (S.D.N.Y. 2006) (finding that Dominican Republic law was most likely to govern breach of fiduciary duty and other tort claims where "the predominant contacts of the parties and the underlying events occurred in the Dominican Republic"). Disentangling and applying the relevant Swiss, German, and French laws would be less burdensome for a Swiss court, as Swiss courts regularly apply German and French law in addition to Swiss law. *See* R110-111 ("German and French law, in particular, are applied by Swiss courts basically as a matter of course, normally without the need of expert witnesses.").

In addition, conducting discovery and trying this case would be particularly onerous for a New York court and the parties. The parties would need to translate extensive documentary evidence written in German or French. R195, R646; *see Troni v. Banca Popolare Di Milano*, 129 A.D.2d 502, 503-04 (1st Dep't 1987) (affirming dismissal on *forum non conveniens* grounds where "the need to translate

documents from a foreign language" weighed in favor of dismissal). In addition, that much of the documentary evidence and many of the witnesses are located abroad favors dismissal. *See Irrigation & Indus. Dev. Corp. v. Indag S.A.*, 37 N.Y.2d 522, 526 (1975).

2. Litigating This Case In New York Would Cause Defendants Substantial Hardship

Because the relevant witnesses and documents are located in Switzerland and Germany, and most of the pertinent evidence is outside the control of the New York courts, litigating this case in New York would severely impede the defendants' ability to defend themselves. *See Pahlavi*, 62 N.Y.2d at 482 (affirming dismissal for *forum non conveniens* in part because "defendant probably cannot defend this claim in any realistic way because the witnesses and evidence are located in Iran under plaintiff's control and are not subject to the mandate of New York's courts").

Plaintiffs' Complaint (along with earlier iterations of that pleading) identified a handful of individuals who were allegedly employed by UBS and who were involved in the key underlying events in Germany and Switzerland—including Defendant Kircher, Eric Külling, Albert Genner, Theophil von Sprecher, and Mario Simmen. *See, e.g.*, R155, R157-163, R619-21. Of these individuals, only Kircher was, at the time the Complaint was filed, a current UBS AG employee; the others are no longer employed by UBS, and those who are alive

reside in Switzerland. R191, R193-195, R197-198. None of these non-parties is under UBS's control.

As a practical matter, UBS would be powerless to require any of the relevant non-party witnesses to appear in New York, and the New York courts would be unable to compel their presence. *See Fresh del Monte Produce N.V. v. Eastbrook Caribe A.V.V.*, 5 Misc. 3d 1019(A) (Sup. Ct. N.Y. Cty. Sept. 22, 2004) (unreported) ("A nonparty witness who is not a resident of the State of New York cannot be served with a subpoena.") (citing *Wiseman v. Am. Motors Sales Corp.*, 103 A.D.2d 230, 234 (2d Dep't 1984)). This further supports dismissal. *See Hormel Int'l Corp. v. Arthur Andersen & Co.*, 55 A.D.2d 905, 906 (2d Dep't 1977) (dismissing complaint on *forum non conveniens* grounds where defendant's witnesses were located in another jurisdiction). Plaintiffs pay no attention to this reality in their appellate briefing.

In addition, Swiss bank privacy laws and other legal provisions restrict the disclosure of information located on Swiss soil in connection with non-Swiss proceedings. R123-126; *see also Peters v. Peters*, 2011 WL 11076564, at *12 (Sup. Ct. N.Y. Cty. July 12, 2011) (discussing "the conflict between New York discovery practices and Swiss bank secrecy laws, which could involve litigation in the Swiss courts anyway and subject the witnesses to criminal penalties if they responded without authorization by a Swiss court"). These restrictions will affect

both the taking of oral testimony from witnesses located in Switzerland and the production of documents located in Switzerland. On appeal, Plaintiffs ignore these limitations, too. Yet their own expert on Swiss law agreed that because Switzerland is a signatory state to the 1970 Hague Evidence Convention, "any discovery from Switzerland in connection with a US action would have to proceed by a Letter of Request." R500.

On appeal, Plaintiffs blithely suggest that "a large international bank" with "ample resources" could never be unduly burdened to defend itself in New York. Pls.' Br. at 42. But, of course, the mere fact that a defendant is a bank does not render the *forum non conveniens* doctrine inapplicable. *See, e.g.*, *Peters*, 2011 WL 11076564, at *12 (finding hardship to defendant UBS AG weighed in favor of dismissal on *forum non conveniens* grounds where "virtually all of the non-party witnesses [were] in Switzerland," seven of the UBS AG witnesses were alleged to have worked in Switzerland, and "nearly all of the documentary evidence" was in Switzerland); *Shin-Etsu*, 9 A.D.3d at 180 (reversing lower court's denial of motion to dismiss case against banking institution on *forum non conveniens* grounds); *Neuter*, 239 A.D.2d at 213 (same). That is especially so where the key witnesses regarding the wrongdoing alleged against UBS, covering the forty years following Kainer's death, are *not* employed by UBS, and therefore are beyond UBS's control. As Plaintiffs themselves concede, the inability to obtain live testimony

from crucial witnesses located abroad is a factor strongly supporting *forum non conveniens* dismissal. *See* Pls.' Br. at 38 (quoting *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1233 (2d Cir. 1996), and citing *Globalvest Mgmt. Co. L.P. v. Citibank, N.A.*, 7 Misc. 3d 1023(A) (Sup. Ct. N.Y. Cty. 2005)).

3. Switzerland Provides An Alternative Forum For Plaintiffs' Claims

Although an alternative forum is not required for *forum non conveniens* dismissal in New York, *see Pahlavi*, 62 N.Y.2d at 481, there is one here: Switzerland, where Plaintiffs themselves have already chosen to bring proceedings involving their alleged rights as heirs to the Kainer estate. *See* R33; *see also Flame*, 107 A.D.3d at 438 ("[T]he burden of demonstrating that [no alternative forum] is available . . . fall[s] on plaintiff." (quoting *Pahlavi*, 2 N.Y.2d at 481)). In the Swiss Litigation, as the trial court explained, Plaintiffs seek to determine their "status and rights as heirs, which overlap with the claims that must be determined in this action." R27. Plaintiffs have asked the Swiss court to find that they are the "sole heirs" to the Kainer estate, return to Plaintiffs "all of the property and/or assets originating from the [Kainer] estate," and declare that the Swiss certificate of inheritance is null and void. R27-28; *see also* R490-491; R655-658. Plaintiffs are estopped from disputing that Switzerland is an adequate alternative forum for resolving their claims because they are vigorously pursuing almost identical claims there.

The fact that Plaintiffs are pursuing a parallel action in Switzerland strongly favors dismissal. *Datwani v. Datwani*, 121 A.D.3d 449, 449 (1st Dep't 2014) (affirming dismissal on *forum non conveniens* grounds in favor of litigating in India where several other actions were pending); *see also World Point Trading PTE v. Credito Italiano*, 225 A.D.2d 153, 161 (1st Dep't 1996) ("The significance of the action pending before the Italian courts is not limited to the obvious availability of another forum. It presents the attendant risk that conflicting rulings might be issued by courts of two jurisdictions. It involves duplication of effort . . . ."); *Romania v. Former King Michael*, 212 A.D.2d 422, 423 (1st Dep't 1995); *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 139 (2014) (dismissing on *forum non conveniens* grounds because, *inter alia*, alternative fora were available and there were "a number of related investigations or litigations pending in several foreign countries").

As contrasted with New York, where none of the Plaintiffs resides, and where none of the critical witnesses are located, Switzerland is already overseeing a case to which the Plaintiffs and the Foundation are parties. Further, Defendant Kircher lives in Switzerland (R643), UBS AG is incorporated and headquartered there (R136), and UBS Global Asset Management has consented to jurisdiction there (R221). *See Shin-Etsu*, 9 A.D.3d at 178-79 (an adequate forum is one where defendants are "amenable to process" (quoting *Piper Aircraft Co. v. Reyno*, 454

U.S. 235, 254 n.22 (1981))). Switzerland has a greater interest than New York in hearing Plaintiffs' claims in part because it is the domicile and residence of the majority of the parties to this case "and the place where the allegedly [wrongful] conduct occurred." *Mashreqbank*, 23 N.Y.3d at 138.

Plaintiffs nonetheless insist that Switzerland is an inadequate forum because the Painting is "not an issue in the Swiss proceedings." Pls.' Br. at 32. This is wrong on multiple fronts. First, the availability of an alternative adequate forum certainly does not hinge on whether there is *already-existing* litigation regarding the exact claims at issue. Rather, all that is required is that Plaintiffs *could* bring claims in an alternate forum, and 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.[7] In other words, dismissal on *forum non conveniens* grounds in favor of litigating in Switzerland would still be warranted here even if there were no other actions pending in Switzerland.

[7] Plaintiffs claim that they cannot litigate the conspiracy claim in Switzerland because of the absence of Christie's. *See* Pls.' Br. at 30-31. But (1) conspiracy is only one of the numerous claims that Plaintiffs allege against the UBS Defendants, and (2) Plaintiffs never explain why that claim cannot proceed against some of the alleged conspirators in Switzerland, even in the absence of other alleged conspirators. Plaintiffs' protest that trying their case in New York against "Christie's alone" would be "prejudicial" (Pls.' Br. at 4) rings especially hollow given that they themselves *omitted* Christie's from their original and first amended complaints, and added Christie's only after UBS, the Foundation, and Kircher had moved to dismiss on the basis of *forum non conveniens*. *See id.* at 15-16.

Second, Plaintiffs' statement is factually wrong: The relief they request in Switzerland is that the Foundation return "all of the property and/or assets originating from the estate of the deceased Margaret Kainer." R658. That sweeping claim already encompasses the Painting, assuming Plaintiffs' allegations about the Painting are true. Indeed, as the trial court made clear, Plaintiffs have not shown that the Swiss court's determination of their rights as heirs, if any, "will not include a determination as to whether, and to what extent, they have an ownership interest in the Painting." R33.[8] Moreover, as the trial court explained, even if the Painting were not a part of the relief Plaintiffs seek in the Swiss Litigation, Plaintiffs have not shown that Switzerland would be an inadequate forum for litigation about the Painting. *See* R33 ("Plaintiffs have not shown . . .

[8] Plaintiffs' brief asserts that they presented evidence from their counsel in the Swiss Litigation "unequivocally denying any claim that those proceedings will definitively determine the status and rights of Plaintiffs as heirs or their rights to the Painting." Pls.' Br. at 13. But that is false. The affidavit cited by Plaintiffs *only* addresses whether the French certificate of inheritance through which they claim rights as heirs is at issue in Switzerland, and does *not*—contrary to Plaintiffs' contention—deny that their "rights to the Painting" will be adjudicated in Switzerland. *See* R488-489, R492. As Justice Friedman explained, Plaintiffs' single-minded focus on the validity of the French certificate of inheritance "ignores that [Plaintiffs and the Foundation] assert competing claims to an ownership interest in the Painting, and that these claims must be determined, under the applicable foreign laws, in order to determine whether the Foundation wrongfully entered into the Restitution Settlement Agreement and wrongfully received the proceeds from the sale of the Painting. At most, the French certificate of inheritance may establish plaintiffs' standing . . . . It does not eliminate the need to determine the parties' competing claims as heirs with rights to the Painting." R31.

that there is not an available alternative forum for determination of these rights, in the event the pending Swiss proceedings prove inadequate for resolution of all of these issues."). In short, even if the existing Swiss Litigation fails to resolve the competing claims to the Painting, separate Swiss proceedings provide "an available alternative forum for determination of these rights." *Id.*

Finally, Plaintiffs contend that Switzerland is an inadequate forum because claims they have asserted there against the Foundation and the Swiss Localities may be subject to certain affirmative defenses, and the court below failed to condition its dismissal on the waiver of those defenses. Pls.' Br. at 26-27. Plaintiffs, however, did not ask the lower court to set conditions on dismissal, and they make no showing that their claims against the UBS Defendants would be barred if brought in Switzerland. Moreover, Plaintiffs misread the case law on which they rely. First, Plaintiffs cite *Highgate Pictures v. De Paul*, 153 A.D.2d 126, 129 (1st Dep't 1990)—in that court's words, a "relatively simple breach of contract/tort claim between two New York residents"—for the proposition that a "failure of the [trial] court to ensure the existence of an alternative forum . . . represents a fundamental failure to implement basic *forum non conveniens* policy, to do justice and further fairness and convenience." *Id*. at 129; Pls.' Br. at 27. *Highgate* was a dispute among exclusively New York parties over a contract "for the most part negotiated in California, executed in California, [and] governed by

California law" and contractual breaches and torts that were alleged to have occurred in London and India. *Highgate*, 153 A.D.2d at 128. In *Highgate*, the First Department highlighted the "straightforward" nature of the dispute in finding that it should *not* have been dismissed on *forum non conveniens* grounds, or at the least, that the granting of the motion should have been conditioned on the waiver of any statute of limitations defense and submission to personal jurisdiction in California or England. *Id*. at 129. In *Gowen v. Helly Nahmad Gallery, Inc.*, 60 Misc. 3d 963 (2018) (Sup. Ct. N.Y. Cty. 2018), that plaintiff's claims "may" have been barred in another jurisdiction was merely one consideration: There, the defendant's *forum non conveniens* motion was denied because, *inter alia*, the court did not need to apply foreign law there "at all"; because two defendants and the plaintiff were New York residents; and because the defendants had limited to no "ties" to the jurisdictions that they argued were more convenient fora. *Id.* at 993-96. The case at bar stands in sharp contrast to both *Highgate* and *Gowen*—it is between non-residents, necessarily requires the application of foreign law, and requires a "sweeping review" of more than forty years of events that took place in Europe. *Pahlavi*, 62 N.Y.2d at 480 (upholding *forum non conveniens* dismissal).

4. The Parties' Residencies Weigh In Favor Of Dismissal

Further, and as the trial court described, "plaintiffs reside outside the United States—in Australia, Great Britain, and Chile," with the sole U.S. resident Plaintiff

living in Connecticut. R27. That fact alone counsels in favor of dismissal. *See, e.g.*, *Phat Tan Nguyen v. Banque Indosuez*, 19 A.D.3d, 292, 294 (1st Dep't 2005) (reversing denial of *forum non conveniens* dismissal and finding a "barely discernible" connection to New York where "[o]nly one of seven named plaintiffs live[d] in New York"); *see also, e.g.*, *Confederación Sudamericana de Fútbol v. International Soccer Mktg., Inc.*, 161 A.D.3d 581, 582 (1st Dep't 2018) (affirming dismissal where no party resided or had its principal place of business in New York); *Mensah v. Moxley*, 235 A.D. 910, 911 (3d Dep't 1997) (finding it was foreign plaintiff's "burden to demonstrate that special circumstances existed warranting retention of the case in New York").

As to Defendants, neither the Foundation nor Kircher are, nor have ever been, residents of New York. R643; R645-646. The Foundation has no New York office and has no employees or agents in New York. R646. Kircher resides in Switzerland; was, at the time the Complaint was filed, employed by UBS AG in Switzerland; and does not maintain, nor has he ever maintained, an office in New York. R643. That there are UBS offices in this State does not warrant litigating the case here: All of the allegations relating to UBS AG concern conduct that occurred overseas over the course of several decades, and the Complaint does not allege that UBS Global Asset Management did anything at all—much less anything wrongful. *See infra* Section III; *Neuter*, 239 A.D.2d at 213 (dismissing

on *forum non conveniens* grounds even though defendant was headquartered in New York because alleged misconduct occurred in its Zurich branch). Further, that one party, Christie's, is headquartered in this State, does not negate that its auction of the Painting is the only event alleged to have taken place in New York, and the claims against UBS, the Foundation, and Kircher can proceed independent of the claims against Christie's. *See, e.g.*, *Millicom Intl. Cellular v. Simon*, 247 A.D.2d 223, 223 (1st Dep't 1998). Indeed, Plaintiffs themselves commenced this case against UBS, the Foundation, and Kircher *without* Christie's as a defendant, and added Christie's only in their Second Amended Complaint. R140, R603.

5. There Is No Substantial Nexus To New York

All of the above factors point inexorably towards Justice Friedman's conclusion that the case should be dismissed because "[t]he claims between the heirs as to their ownership rights arise under European estate law and have a 'substantial nexus' to Europe, but not to New York." R34. As is clear from even a cursory review of the Complaint, the underlying allegations of wrongdoing are based on more than 40 years of events that occurred in Europe. The crux of Plaintiffs' claims is that UBS maintained control over the Foundation for decades through the position of a UBS employee on the Foundation's board of trustees and that UBS and Kircher breached their alleged fiduciary duties to Levy, Kainer, and Plaintiffs. The auction of the Painting at Christie's, following its private sale in

Japan, is the only tie to New York, and that fact alone does not satisfy the substantial nexus requirement: It is just one manifestation of the years of alleged wrongdoing overseas. *See Islamic Republic of Iran v. Pahlavi*, 99 A.D.2d 1009, 1009-10 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 831 (1985); *State of Romania v. Former King Michael*, 212 A.D.2d 422, 423 (1st Dep't 1995).[9]

Plaintiffs contend that the passage of the Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (codified as amended at 22 U.S.C. § 1621 (2016)), demonstrates a public policy favoring the retention of this case in New York. *See* Pls.' Br. at 40-41. This argument is misguided. Not only do Plaintiffs fail to show any impediment to bringing claims against the UBS Defendants in Switzerland, but the HEAR Act does not apply to this case by its plain terms. The HEAR Act prescribes a six-year statute of limitations period from the time of actual discovery of the identity and location of Nazi-looted artwork or property and the possessory interest of the claimant for any "civil claim or cause of action against a defendant *to recover any artwork or other property*." HEAR Act § 5 (emphasis added). Plaintiffs' claims against the UBS

[9] To the extent there are relevant witnesses or documents in New York (*see* Pls.' Br. at 42), they would relate only to the 2009 auction of the Painting, and not to the prior 40 years of alleged wrongdoing. And Plaintiffs could obtain relevant evidence here for use in Switzerland through an application under 28 U.S.C. § 1782 (authorizing federal courts to order testimony or production of documents by U.S. residents "for use in a proceeding in a foreign or international tribunal").

Defendants do not seek to "recover" the Painting—nor could they, since the UBS Defendants do not possess the Painting—but rather seek money damages for various torts allegedly committed by UBS that harmed the Plaintiffs. The original Senate bill for the statute demonstrates that Congress considered but decided against extending this new statute of limitations to claims "*for damages* for the taking or detaining of any artwork or cultural property." S. 2763, 114th Cong. (as reported by S. Comm. on the Judiciary, Sept. 29, 2016) (emphasis added). The text and legislative history of the HEAR Act thus make abundantly clear that Congress intentionally declined to extend it to cases, such as the one at bar, where claimants seek money damages for the appropriation of artwork or property. *Cf. Reif v. Nagy*, 61 Misc. 3d 319 (Sup. Ct. N.Y. Cty. 2018) (finding that HEAR Act applied to actions for replevin and conversion against the possessor of the artwork); *Gowen*, 60 Misc. 3d at 970, 986 (Sup. Ct. N.Y. Cty. 2018) (finding that HEAR Act applied to an "action seeking the return of the Painting").[10]

[10] To the extent Plaintiffs' Complaint sounds in replevin at all, it is only as to the "John Doe" defendants, whom they identify as "a possessor" of the Painting. Justice Friedman stayed the action as against Christie's and granted leave to restore the action "in the event plaintiffs obtain a final determination in the European court(s)" conveying that Plaintiffs alone have rights in the Painting or that the Foundation lacked authority to enter into the Restitution Settlement Agreement. R40. Justice Friedman further ordered that in that event, Christie's could move based on the statute of limitations to dismiss the surviving claims against it and requested "comprehensive briefing" in that scenario regarding the HEAR Act. *Id.*

II. Alternatively, The Complaint Against UBS AG Should Be Dismissed For Lack of Jurisdiction

A. Plaintiffs' Allegations Do Not Establish Jurisdiction Over UBS AG

While the dismissal of Plaintiffs' claims on the ground of *forum non conveniens* is proper and well-founded in both fact and law, this Court may also affirm the order below with respect to UBS AG on the alternative ground that the Court lacks personal jurisdiction over UBS AG.[11] The court below did not reach Defendants' arguments on personal jurisdiction, but dismissal is also proper for failure to satisfy CPLR 301 or 302.

Courts may exercise jurisdiction only where they are authorized to do so by the state's long-arm statute and where the exercise of jurisdiction does not exceed the limits of due process. *Shaffer v. Heitner*, 433 U.S. 186, 212-14 (1977); *Ehrenfeld v. Bin Mahfouz*, 9 N.Y. 3d 501, 508 (2007). The Complaint's allegations purporting to establish jurisdiction over UBS AG fall far short of these requirements. Indeed, as the trial court found, Plaintiffs conceded below that the

[11] This Court may affirm on any ground presented by the record. *See Sega v. State of N.Y.*, 60 N.Y.2d 183, 190 n.2 (1983) ("On appeal, a respondent may proffer in support of affirmance any legal argument that may be resolved on the record, regardless of whether it has been argued previously, if the matter is one which could not have been countered by the appellant had it been raised in the trial court."); *First Capital Asset Mgt. v. N.A. Partners*, 260 A.D.2d 179, 181-82 (1st Dep't 1999).

Complaint failed to establish personal jurisdiction over UBS AG, either on a general or long-arm basis. *See* R20. On appeal, Plaintiffs do not argue otherwise.

First, in light of the Supreme Court's ruling in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the Complaint's allegation that UBS AG is "regularly doing business in New York" (R147) does not suffice to establish general jurisdiction under CPLR 301. In *Daimler*, the Court held that the test for general jurisdiction over a foreign corporation is "whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.'" 571 U.S. at 139 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). UBS AG is not "at home" in New York under *Daimler* and its progeny. It is a Swiss bank, organized under Swiss law, with its principal place of business in Switzerland. R136-137. While UBS AG maintains licensed branches in California, Connecticut, Florida, and Illinois, in addition to New York (R137), the fact that it is "incorporated and headquartered elsewhere" controls. *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014); *see also SPV OSUS Ltd. v. UBS AG*, 882 F.3d 333, 343-44 (2d Cir. 2018) (holding that UBS AG is not subject to general jurisdiction in New York). Accordingly, the Court may not exercise general jurisdiction over UBS AG.

Second, the allegations purporting to establish specific jurisdiction pursuant to CPLR 302(a) are utterly insufficient. *See* R147. Plaintiffs allege that UBS AG

is "regularly doing business in New York" and thus subject to jurisdiction under CPLR 302(a)(1). *Id.* But CPLR 302(a)(1) applies only where there is an "articulable nexus between the business transacted [within the State] and the cause of action sued upon," *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981), and the requisite "nexus" exists only if there is a "substantial relationship . . . between a defendant's transactions in New York and a plaintiff's cause of action." *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005) (internal quotation marks omitted). None of the purported wrongdoing by UBS AG alleged in the Complaint took place in New York. R143-144, R158-163. Rather, the Complaint alleges wrongdoing by UBS AG that took place in Germany and Switzerland. *Id.* The only allegations connecting UBS AG to New York are that it is "listed on the New York Stock Exchange," "maintains offices in New York," and has its "U.S. corporate headquarters . . . in New York City." R147. Because these allegations fail to establish a "nexus" between Plaintiffs' claims and UBS AG's conduct of business in New York, CPLR 302(a)(1) is not satisfied.

Plaintiffs' allegation that UBS AG is "subject to jurisdiction under C.P.L.R. 302(a) because, by itself and in conspiracy with the other defendants, it committed tortious acts within the state" is also deficient. *See* R147. For a defendant to be subject to jurisdiction under CPLR 302(a)(2), the allegedly tortious act must be committed *in New York* and the defendant must be physically present within the

state when the tortious act is committed. *See Kramer v. Vogl*, 17 N.Y.2d 27, 31 (1966); *Pramer S.C.A. v. Abaplus Intl. Corp.*, 76 A.D.3d 89, 97 (1st Dep't 2010). Nowhere in the Complaint do Plaintiffs allege that UBS AG committed any tortious acts in New York.

Unable to escape that their claims against UBS AG are based on alleged activity that took place in Europe, Plaintiffs attempt to gin up a conspiracy to establish jurisdiction. *See* R147; Pls.' Br. at 48-50. Yet Plaintiffs fail to allege any facts that show there was a conspiracy or that would support the imposition of jurisdiction over UBS AG based on such a conspiracy. First, Plaintiffs do not make a *prima facie* showing of a conspiracy by alleging *specific facts* warranting the inference that UBS AG was a member of the conspiracy, as required. *Mosaic Caribe, Ltd. v. AllSettled Grp., Inc.*, 117 A.D.3d 421, 423-24 (1st Dep't 2014) (affirming conclusion that court lacked personal jurisdiction over non-domiciliaries because "[a]bsent a valid conspiracy claim, no personal jurisdiction exists over [proposed defendants] based on such a conspiracy"); *Singer v. Bell*, 585 F. Supp. 300, 303 (S.D.N.Y. 1984). Plaintiffs also do not "come forward with some definite evidentiary facts to connect the defendant with transactions occurring in New York." *Singer*, 585 F. Supp. at 303 (quoting *Socialist Workers Party v. Att'y General*, 375 F. Supp. 318, 322 (S.D.N.Y. 1974)); *Lamarr v. Klein*, 35 A.D.2d 248, 249-51 (1st Dep't 1970). Plaintiffs only vaguely assert that "Defendants"

entered into a conspiracy "to illegally misappropriate . . . property which was rightfully owned by Plaintiffs" and that the "aim" of the conspiracy was to "legitimize the UBS Foundation as the lawful heir" to enable "the Foundation Defendants to make claims or agreements for restitution in connection with the Painting and the discovery or sale [of] other paintings from the Kainer Collection and Christie's ability to sell them." R181. Nowhere do Plaintiffs point to any facts connecting UBS AG to the sale of the Painting at auction. Instead, Plaintiffs disingenuously lump the UBS Defendants, the Foundation, and Kircher together as the "Foundation Defendants" (R141), and allege, *inter alia*, that "the Foundation Defendants interacted with representatives of both Christie's and Sotheby's" (R165), that "the Foundation Defendants falsely represented to Christie's" that the Foundation was the "legitimate heir" (R167), and that "the Foundation Defendants and Christie's agreed to and conspired together to negotiate the Restitution Settlement Agreement" (R167-168). These conclusory allegations do not make the *prima facie* showing of a conspiracy required to allow the Court to find that UBS AG was a member of a conspiracy (it was not) and that it had some connection to the sale of the Painting at auction at Christie's in New York (it did not).

That said, even if Plaintiffs had properly alleged a conspiracy, a separate inquiry still must be made before long-arm jurisdiction can be exercised on that basis. Plaintiffs must show, with *specific facts as to each defendant*, that "(1) the

out-of-state co-conspirator had an awareness of the effects of the activity in New York, (2) the New York co-conspirators' activity was for the benefit of the out-of-state conspirators, and (3) that the co-conspirators in New York acted at the behest of or on behalf of, or under the control of the out-of-state conspirators." *Heinfling v. Colapinto*, 946 F. Supp. 260, 265 (S.D.N.Y. 1996); *see also Grove Press, Inc. v. Cent. Intelligence Agency*, 483 F. Supp. 132, 136-38 (S.D.N.Y. 1980) (finding no personal jurisdiction over defendants as to whom plaintiffs made "no specific showing" connecting them to the wrongful conduct that allegedly took place in New York).

The Complaint alleges no such facts with respect to UBS AG. Plaintiffs do not allege that UBS AG was aware of any effects of its actions in New York, nor that UBS AG benefited from any activity occurring in New York. Indeed, UBS AG is not even mentioned in the parts of the Complaint discussing the Restitution Settlement Agreement and there are no allegations that UBS AG received any of the proceeds of the sale of the Painting at auction. R168-169. Finally, UBS AG does not control either the Foundation or Christie's, and there are no allegations that any defendant did anything in New York "at the behest of" or "on behalf of" or "under the control of" UBS AG. The Complaint's conclusory allegations of conspiracy fall far short of satisfying the test for the requisite relationship between an out-of-state defendant and its alleged New York co-conspirators to establish

long-arm jurisdiction pursuant to CPLR 302(a)(2).[12]

For all of these reasons, long-arm jurisdiction under CPLR 302(a)(2) is unavailable. *See, e.g.*, *De Capriles v. Lopez Lugo*, 293 A.D.2d 405, 405-06 (1st Dep't 2002) (finding that plaintiffs failed to establish long-arm jurisdiction under CPLR 302(a)(2) based on allegations of conspiracy); *Aramid Entm't Fund Ltd. v. Wimbledon Fin. Master Fund, Ltd.*, 2012 N.Y. Slip Op. 33190(U) (Sup. Ct. N.Y. Cty. Feb. 24, 2012) (unpublished), *aff'd*, 105 A.D.3d 682 (1st Dep't 2013) (stating that "bland or conclusory assertions of a conspiracy are insufficient to establish jurisdiction" and dismissing as to one defendant because plaintiffs were unable to plead the elements of a conspiracy).

Finally, because the Complaint does not allege any "injury to person or property" in New York and Plaintiffs cannot establish that they suffered any injury in New York, jurisdiction is not available under CPLR 302(a)(3). *See Fantis Foods v. Standard Importing Co.*, 49 N.Y.2d 317, 325 (1980) (plaintiff must show "injury to [itself] in New York"). Section 302(a)(3) limits the exercise of

[12] Plaintiffs' dubious decision to assert claims against UBS Global Asset Management does not salvage their inability to tie UBS AG to New York. The minimal allegations in the Complaint about UBS Global Asset Management—that it does business in New York and is a subsidiary of UBS AG, and that Defendant Kircher is employed there (although he indisputably is not, *see* R643)—even combined with the same ineffective, conclusory allegations of conspiracy alleged as to UBS AG, do not suffice to concoct a basis for the Court to exercise jurisdiction over UBS AG.

jurisdiction to circumstances where a tortious act is committed "without the state causing *injury to person or property within the state*." CPLR 302(a)(3) (emphasis added). Where, as here, "an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." *Proforma Partners v. Skadden Arps Slate Meagher & Flom*, 280 A.D.2d 303, 303 (1st Dep't 2001) (citation omitted). None of the Plaintiffs resides in New York and nothing in the Complaint suggests that any of them sustained any loss in New York. Without an injury in New York, CPLR 302(a)(3) does not apply.

B. The Trial Court Properly Denied Plaintiffs' Request For "Forum-Related" And Jurisdictional Discovery

Plaintiffs' request for jurisdictional and "forum-related" discovery was properly denied, both because the case for *forum non conveniens* dismissal was so "compelling," R25, *see also supra* Section I.C., and because Plaintiffs' hollow allegations regarding personal jurisdiction do not establish the requisite "sufficient start" warranting discovery in any event.

As an initial matter, Plaintiffs' contention that they are due discovery in part to help them convince the Court that *forum non conveniens* dismissal was error reveals that *forum non conveniens* dismissal was warranted in the first place. *See* Pls.' Br. at 44; *id*. at 46 n.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.").

Indeed, Plaintiffs profess that they should have been granted discovery of materials that are located in Europe to defeat the contention that the case should be tried in Europe because, in part, the relevant documents and witnesses are located there. That is at best circular, if not absurd.[13]

Even if *forum non conveniens* were not at issue, Plaintiffs all but admit that their request for "jurisdictional discovery" was really a covert search for proof on the merits. *See, e.g.*, Pls.' Br. at 51 ("Moreover, Defendants have exclusive control of critical documents and information relevant to both jurisdiction *and the conspiracy* . . ." (emphasis added)). Plaintiffs requested extensive categories of documents, and even depositions of Defendants Kircher, UBS, Christie's, and unspecified "lawyers." *See* Nov. 15, 2018 King Aff., Ex. A (Oct. 16, 2014 Hearing Tr.) at 9:22-11:21. Even now, Plaintiffs fail to articulate any reasonable limit to the discovery they claim they should have received, asserting vaguely that they "just sought documents relating to the jurisdictional and *forum non conveniens* issues." Pls.' Br. at 23. The trial court acted well within its discretion in denying Plaintiffs' "extensive" and "unduly burdensome" discovery requests. R25-26. *See SNS Bank v. Citibank*, 7 A.D.3d 352, 353 (1st Dep't 2004) (finding

[13] For instance, Plaintiffs ignore that any such discovery would have to be conducted within the confines of the restrictions on the taking of evidence in Switzerland. *See supra* Section I.C.2.

the trial court "properly exercised its discretion in denying plaintiff's request for jurisdictional discovery").

To the extent that Plaintiffs legitimately sought discovery in connection with personal jurisdiction, "leave . . . was properly denied because [P]laintiffs did not show that facts may exist which would warrant the denial of [D]efendants' motion [to dismiss for lack of personal jurisdiction]." *De Capriles*, 293 A.D.2d at 406 (citing *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 466-67 (1974)); *see also Aramid*, 105 A.D.3d at 683; *FIMbank P.L.C. v. Woori Fin. Holdings Co. Ltd.*, 104 A.D.3d 602, 603 (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 Entertainment Corp.*, 215 A.D.2d 455, 455 (2d Dep't 1995); *SNS Bank*, 7 A.D.3d at 353-54. Plaintiffs failed to make this showing.

As explained at *supra* Section II.A, Plaintiffs' jurisdictional allegations consist entirely of conclusory allegations, devoid of any facts. Plaintiffs improperly lump together the two UBS Defendants with the Foundation and Kircher as the "Foundation Defendants," and make broad, undifferentiated allegations against all four of them together. These pleading machinations do not constitute "tangible evidence" amounting to a "sufficient start," and fail to justify

the fishing expedition Plaintiffs seek. *See, e.g.*, *BGC Partners, Inc. v. Avison Young (Canada) Inc.*, 46 Misc. 3d 1202(A) (Sup. Ct. N.Y. Cty. Dec. 15, 2014) (unreported). Accordingly, the trial court acted well within its discretion in denying Plaintiffs' request for jurisdictional discovery.

III. Alternatively, The Claims Against UBS Global Asset Management Should Be Dismissed For Failure To State A Claim

Finally, while the trial court did not rule on UBS Global Asset Management's argument for dismissal on failure to state a claim grounds, the Complaint is completely devoid of any allegations that UBS Global Asset Management engaged in any wrongdoing. A complaint that alleges nothing about a defendant's purported misconduct, and instead relies on a recitation of conclusory allegations, must be dismissed. *See Whitfield-Ortiz v. Dep't of Educ. of City of N.Y.*, 116 A.D.3d 580, 581 (1st Dep't 2014) (granting defendants' motion to dismiss pursuant to CPLR 3211(a)(7) where the complaint contained "no allegations" that defendants engaged in the alleged wrongdoing and the complaint's "conclusory allegations" were insufficient to support a claim). Plaintiffs allege only that UBS Global Asset Management does business in New York and is a subsidiary of UBS AG, and that defendant Kircher is employed there (although he is not and never has been (R643)), and then merely repeat the same insufficient, conclusory allegations of conspiracy alleged as to UBS AG. Plaintiffs allege nothing more about UBS Global Asset Management, simply calling it one of

the undifferentiated "Foundation Defendants" and concluding—without pleading any factual basis—that Kircher acted on its behalf. R147-148. That one conclusory and unsupported assertion is patently insufficient to state a claim against UBS Global Asset Management, and the trial court should have, in the alternative, dismissed the claims against it for that reason.

CONCLUSION

For all of the foregoing reasons, the order dismissing all claims against UBS AG and UBS Global Asset Management (Americas), Inc. should be affirmed.

Dated: New York, New York
November 15, 2018

Respectfully submitted,

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I hereby certify pursuant to 22 NYCRR § 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word and a proportionally-spaced typeface. The typeface is Times New Roman. The brief is in 14 point type, the line spacing is double, and inclusive of point headings and footnotes, the brief contains 12,201 words as counted by Microsoft Word.

Dated: New York, New York
November 15, 2018

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