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

APL-2020-0090
New York County Clerk's Index No. 650026/13

Court of Appeals

of the

State of New York

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 and EDGAR KIRCHER,

Defendants-Respondents,

– and –

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

Defendants.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Defendants-Respondents' brief makes clear what is at stake on this appeal: whether Plaintiffs, the heirs of a Holocaust survivor whose art was stolen by the Nazis and whose rights to the art were then misappropriated by her trusted bankers, will ever be able to have their case against those bankers decided on the merits.[1] The record shows that that can happen only in New York, and that the Swiss forum Defendants-Respondents prefer is for that reason inadequate.

Nothing in Defendants-Respondents' brief suggests that they have a viable defense on the merits of the case. Not only is there compelling documentary evidence of Defendants-Respondents' misconduct, but Plaintiffs' rights as heirs have already been established by a French Certificate of Inheritance and by a German decision annulling the Foundation's German Partial Certificate of Inheritance. Defendants-Respondents do not explain how, in light of these two developments, they could possibly claim rights superior to Plaintiffs with respect to the *Danseuses* Painting (the "Painting").

Also conspicuously absent from Defendants-Respondents' brief is any attempt to deny or explain away the procedural defenses that they have already

[1] Defendants-Respondents are UBS AG ("UBS AG") and UBS Global Asset Management (Americas), Inc. ("UBS Global") (together "UBS") and Norbert Stiftung (formerly known as Norbert Levy Stiftung) (the "Foundation") and Edgar Kircher ("Kircher") (all together the "Defendants-Respondents," and together with Christie's "Defendants").

claimed stand as a barrier to the assertion of Plaintiffs' claims in Switzerland – principally, the arguments that the claims are time-barred under Swiss law and the Swiss courts lack jurisdiction. By contrast, under the Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub.L. 114-308, 130 Stat 1524 Act, the claims are not time-barred in New York. The motion court concluded that it could not find the HEAR Act to be inapplicable, and the Appellate Division did not question that ruling.

The real goal of Defendants-Respondents' *forum non conveniens* motion is to force Plaintiffs into a forum where it is well known that claims of Holocaust survivors' face significant barriers so that they can keep their ill-gotten gains. Only in a New York forum will Plaintiffs be able to have their case decided on the merits – which is the very goal of the strong public policies and applicable legislation the courts below ignored.

THE RELEVANT FACTS

Defendants-Respondents' "counterstatement" of the facts is designed to create the false impression that this case cannot be litigated without a massive inquiry into a "complicated narrative" of events that occurred many years ago in Europe. Their presentation obscures key facts. To the extent that any of the European events of distant decades have any relevance, proceedings that have already occurred – specifically, the issuance of a French Certificate of Inheritance (which is not

contested), and the annulment of the Foundation's German Partial Certificate of Inheritance (which Defendants-Respondents are no longer litigating) – have determined the legal consequences of those events. Plaintiffs are Margaret Kainer's lawful heirs. Defendants do not state, and cannot make, a coherent argument to the contrary.

The issues that remain to be litigated center primarily on Defendants-Respondents' 2009 conspiracy with Christie's: a conspiracy to falsely legitimize the status of the Foundation as Margaret Kainer's heir and create purportedly marketable title with respect to the *Danseuses* Painting for their mutual profit. That conspiracy is closely connected to New York.

Defendants-Respondents try to minimize the importance of the 2009 New York events by saying:

> [T]he sale of the Painting is relevant only if Plaintiffs can successfully prove the alleged wrongdoing that they claim occurred in France, Germany, and Switzerland over the course of four decades—because if the Foundation had a legitimate ownership interest in the Painting at the time of the Restitution Settlement Agreement, then its disclaimer of rights could not give rise to any claims. Respondents' Br. "Resp. Br." at 12.

However, in this carefully crafted explanation, Defendants-Respondents do not assert that its "competing claim" of heirship remains to be determined, or that the Foundation now has, or had in 2009, any valid claim to being the heir to Margaret or her father. They vaguely say that the Foundation had a "legitimate ownership

interest" in the Painting, but support that statement only with the cryptic remark, in a footnote, that that interest "arose, at least in part, through its settlement with the Swiss Localities."[2] Resp. Br. at 23n. That settlement, as Plaintiffs' main brief ("Pltf. Br.") explains, was a collusive one whose fraudulent nature was virtually admitted in the public record. Pltf. Br. at 11; R-162, 686. And in any event, the idea that Defendants-Respondents acquired a valid claim from the Swiss localities is ridiculous. The localities' only claim was that they acquired Margaret's rights to the Kainer Collection by escheat, because Margaret died without heirs – an untrue assertion that the French Certificate of Inheritance refutes, as indeed does Plaintiffs' very existence.

When this case is viewed in its reality, the only substantial merits issues to be litigated relate to the conspiracy claim pleaded in Plaintiffs' Second Amended Complaint ("SAC"). That claim raises the question as to what representations Defendants-Respondents made in 2009 with respect to their right to act on behalf of all Margaret and Ludwig Kainers' heirs and what Christie's knew, should have known, or consciously avoided knowing with respect to that claim as a self-

[2] By contrast, The Defendants-Respondents' arguments in both courts below were premised on their claim that the Foundation had competing rights to Plaintiffs as an heir and ownership rights arising from those competing claims of heirship. That was the issue both courts mentioned as raising an impediment to Plaintiffs' claims – an impediment that is now removed. *See* R-34 ("competing claims between the asserted heirs of Kainer's estate") and R-13n ("Christie's conduct is at issue only if the Foundation is found not to be the sole lawful heir").

proclaimed expert with respect to restitution issues. R-174. Plaintiffs' fiduciary duty claims similarly relate to the breaches of fiduciary duty that occurred in connection with the 2009 transactions.

Thus, what is relevant is (i) what Defendants-Respondents did or should have disclosed with respect to their relationship with Margaret and Ludwig Kainer and the legitimacy of the Foundation's claim that it was the sole heir or otherwise had the right to restitute the Painting to the exclusion of the rights of any other heir, (ii) what Christie's knew, did or should have done to verify the legitimacy of those claims, and (iii) whether any actions or inactions breached duties or rights owed to Plaintiffs at that time. While the SAC describes background facts relating to pre-2009 conduct that raised serious questions as to the legitimacy of the Foundation's claim which should have been disclosed or investigated, proof of those facts is not essential to establishing the 2009 conspiracy. The critical issues in this case center on what happened, largely in New York, in 2009.

ARGUMENT

POINT I

The Appellate Division's Dismissal on the Basis of *Pahlavi* Was Incorrect

Defendants-Respondents attempt to defend the Appellate Division's dismissal of this case on the basis of *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, *cert. denied,* 469 U.S. 1108 (1985) in three ways. First, they contend that a finding was made below, binding on this Court, that there were "alternative forums" available for Plaintiffs to litigate these claims, so the *Pahlavi* exception is not relevant. Second, they contend that if the adequacy of the forum is relevant, that is an issue on which Plaintiffs have the burden of proof. Third, they argue that even if there is no adequate alternative forum, *Pahlavi* is not a unique case but rather settled precedent establishing that an adequate alternative jurisdiction is merely one of many pertinent discretionary factors to be considered in any *forum non conveniens* case. Resp. Br. at 36-41.

Defendants-Respondents conspicuously fail to make one argument: They nowhere assert, or try to demonstrate, that an adequate alternative forum, meaning one in which all Defendants can be joined, the court will accept jurisdiction and Plaintiffs would not be barred by procedural defenses from litigating the merits of their claims, actually exists.

Each of the contentions Defendants-Respondents do make is ill-founded.

There Was No Finding of an Adequate Alternative Forum, and the Record Could Not Support Such a Finding

Defendants-Respondents claim that the motion court's statement that "a strong showing is made that a suitable alternative forum exists" is a dispositive finding of fact. Resp. Br. at 27-28. In context, however, that statement was not a finding, but a comment on an issue that the motion court did not think it needed to reach. The gist of the motion court's decision was that, because of *Pahlavi*, it did not need to decide whether an adequate alternative forum existed, though it thought Defendants' showing on that issue was strong. R-33.

In any event, in believing Defendants' showing to be "strong," the motion court made a mistake of law. It missed, among other things, an important legal proposition: a forum cannot be "adequate" where the claim is subject to serious procedural obstacles not present in the plaintiff's chosen forum. *See* Pl. Br. at 25-26. Specifically, an alternative forum is not adequate where the claim, timely in the plaintiff's chosen forum, may be time-barred or face jurisdictional challenges in the forum the defendant advocates. *Id.* The motion court's opinion does not mention this principle. Defendants-Respondents' brief does not dispute it. Nor do Defendants-Respondents dispute that, as shown in our main brief, plaintiffs seeking to recover Nazi looted art in Switzerland face "significant hurdles" and "'insurmountable' obstacles." *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010).

The motion court's view that Defendants-Respondents' showing was "strong" was also premised on the Court's understanding that "[i]t is not disputed that the courts of Switzerland will afford plaintiffs a fair forum and 'adequate process,' as will the courts of France and Germany." R-33. This statement is without support in the record. Plaintiffs sharply disputed that any of those courts were an adequate alternative and submitted extensive expert evidence as to why not. *See, e.g.* R-67, 490, 493-501, 517-518. Accordingly, if the motion court had found Switzerland (or France or Germany) to be an adequate forum, that finding could not be sustained.

Defendants-Respondents' claim that the Appellate Division affirmed the motion court's supposed finding that alternative adequate forums exist is baseless. Resp. Br. at 36. The Appellate Division neither endorsed the motion court's "strong showing" remark nor analyzed the issue, stating only that "Switzerland *appears* to be an available forum" and "France and Germany *may* be possible alternatives." R-930; emphasis added. And after saying that, the Appellate Division acknowledged a countervailing factor: Plaintiffs' (undisputed) claim that "the Foundation and the Swiss localities seek dismissal of the Swiss proceedings for lack of jurisdiction and on statute of limitations grounds." R-931. This is the apparent reason why the Appellate Division relied on *Pahlavi's* statement that the absence of such an alternative is not critical; the Appellate Division thought it did not need to decide the adequacy issue. R-931.

It Was Defendants' Burden to Show the Existence of an Adequate Alternative Forum

As noted above, Defendants-Respondents do not dispute the proposition that an alternative forum cannot be adequate if it presents serious procedural obstacles not present in the forum chosen by the plaintiff. Nor do Defendants-Respondents assert that such obstacles to a claim do not exist in Switzerland. They say, instead, that it is Plaintiffs' burden to prove the existence of such obstacles, and they have not done so. Resp. Br. at 3, 20. In fact, Plaintiffs have proven them abundantly, as shown above and in Plaintiffs' main brief. Pltf. Br. at 18-19. But Defendants-Respondents are also wrong about the burden of proof.

Defendants-Respondents' theory that proving the inadequacy of an alternative forum is Plaintiffs' burden is premised on this Court's statement in *Pahlavi* that if it "were to hold that the motion should be denied if no alternative forum is available, then the burden of demonstrating that fact should fall on plaintiff." 62 N.Y.2d. at 481. But *Pahlavi*, in this respect as in others, was a *sui generis* case. The plaintiff there, the Islamic Republic of Iran, literally owned the courthouse where, it was arguing, no adequate alternative forum could be found. Iran was uniquely equipped to obtain evidence as to the adequacy or inadequacy of its own courts, and it made complete sense to place on Iran the burden of doing so. But the *Pahlavi* Court did not purport to announce a general rule that the burden on that issue should always, or normally, fall on the plaintiff.

Such a general rule would not make sense. In the typical *forum non conveniens* case, as in this one, a defendant is seeking to have the case referred to its own home forum. There is no reason why the plaintiff should have to prove that forum an inadequate one; the defendant is in a better position to obtain evidence on that issue. Thus it would be anomalous to make forum adequacy an exception to the rule, found in *Pahlavi* itself, that, when a *forum non conveniens* motion is made, the burden of proof is on the party seeking to invoke the doctrine: "The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation." 62 N.Y.2d at 479. Indeed, *Norex Petroleum Ltd. v. Blavatnik*, 48 Misc. 3d 1226(A) (N.Y. Sup. Ct. 2015), *aff'd,* 151 A.D.3d 647 (1st Dep't 2017) expressly held that "the interpretation that *Pahlavi* shifted the burden to plaintiffs to show the unavailability of an alternate forum is incorrect." *See also*, *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286, 287 (2006).

If the burden of proof is placed where it belongs, Defendants-Respondents cannot possibly prevail on the adequacy issue. They do not even suggest that they would not assert the most significant of their procedural defenses – "prescription," i.e., a time bar, or that they would waive that defense. Their procedural defenses are the whole reason why Defendants-Respondents want to litigate in Switzerland. They know that if any court ever reaches the merits of this case, they will lose.

Pahlavi Is a Sui Generis Exception to the Rule That an Adequate Alternative Forum Is Necessary

Defendants-Respondents' contention that *Pahlavi* permits the dismissal of this case mischaracterizes *Pahlavi*. As demonstrated in our main brief, in *Pahlavi,* every factor heavily favored a *forum non conveniens* dismissal – except for the claim by the government of Iran that its own legal system did not provide an adequate alternative. 62 N.Y.2d 479-80, 482. In holding, after reciting the extreme and unique facts of that case, that the lack of an adequate alternative is not a prerequisite, this Court still emphasized that it was "a most important factor to be considered." 62 N.Y.2d 479-80, 481.

Defendants-Respondents deny that there was anything unique about *Pahlavi*. They claim that it created a generalized exception from the adequate alternative forum requirement subject only to a court's non-reviewable discretion. Resp. Br. at 40-41. They even go so far as to claim that it is "settled precedent" on which courts have relied for "decades" to dismiss cases without constraint even where there is no alternative suitable forum, and that Plaintiffs' objections to its application herein were all answered in *Pahlavi*. Resp. Br. at 3, 40. They are wrong.

Other than by Defendants-Respondents, it is widely accepted that *Pahlavi* is a unique case and the exception it permits is directly related to its very unusual facts. *See, e.g.*, *Binder v. Shepard's Inc.*, 2006 OK 17, ¶ 9, 133 P.3d 276, 279–80, *as corrected* (Mar. 21, 2006) (*Pahlavi* arose under "extreme conditions," "has never

been adopted outside of New York and, in practical terms, has been limited to its facts"); *Vicknair v. Phelps Dodge Indus., Inc.*, 2009 ND 113, ¶¶ 10-11, 767 N.W.2d 171, 178–79, *as corrected* (July 21, 2009) ("The facts in *Pahlavi* were extremely unusual," it was an "'outlier case,'" not found to have been adopted by any jurisdiction outside of New York and "limited to its own facts by lower New York courts"); *Shewbrooks v. A.C. & S. Inc.*, 529 So. 2d 557, 563 (Miss. 1988) (In *Pahlavi*, the New York Court of Appeals found all of the other factors "overwhelmingly arrayed against the contention that there was not an alternative forum"); *In re OxyContin II*, 23 Misc. 3d 974, 984–85, (Sup. Ct. 2009), *rev'd on other grounds*, 76 A.D.3d 1019 (2d Dep't 2010) (*Pahlavi* was not controlling because its facts "are so dramatically different" and "no deliberative state court would have ever retained such a case").

None of the cases Defendants-Respondents cite supports their claim that *Pahlavi* is not unique or that it is widely applied, much less applied in any circumstances comparable to the facts in this case. In each of those cases cited in footnote 12 on page 40 of their brief, the courts found that, as in *Pahlavi*, virtually

every other factor favored another jurisdiction.[3] Defendants-Respondents cite no case which has adopted the reading of *Pahlavi* they propose as establishing a generalized exemption from the requirement of an adequate alternative forum subject only to a court's non-reviewable discretion.

[3] *Primus Pac. Partners 1, LP v. Goldman Sachs Grp., Inc.*, 175 A.D.3d 401, 402 (1st Dep't 2019) (case involved whether "one Malaysian bank (nonparty Hong Leong Bank) corruptly took over another Malaysian bank" – a claim in which it held Malaysia has a greater interest and Malaysian law would apply); *Norex Petroleum Ltd. v. Blavatnik*, 151 A.D.3d 647, 647–48, (1st Dep't 2017) (claim was that "plaintiff (a Cypriot corporation with an office in Canada) should have received dividends from Yugraneft (a Russian company that owns an oil field in Siberia)" and "[t]he key events underlying the claim took place in Russia, where the bulk of the witnesses and documents are located"); *Payne v. Jumeirah Hosp. & Leisure (USA), Inc.*, 83 A.D.3d 518, 518–19 (1st Dep't 2011) (action for "personal injuries sustained in an aquatic amusement park in Dubai," where "the core team of consultants who performed services with respect to the amusement park were residents of Dubai or the United Kingdom" and foreign law would be applied); *Ungar v. Fisher*, 24 A.D.3d 108, 109 (1st Dep't 2005) (claim arose out of car accident in New York near the Canadian border, "[a]ll of the parties are Canadian residents, the car was leased and insured in Canada, the car rental company does not do business in New York, all but emergency medical treatment was rendered in Canada, the trip began and was to end in Canada, there were no eyewitnesses to the accident, and Canadian law applies"); *A & M Exports, Ltd. v. Meridien Int'l Bank, Ltd.*, 207 A.D.2d 741, 741–42 (1st Dep't 1994) (Transactions in dispute occurred in Liberia, involved mostly Liberian parties, and claim that Liberia is not a viable alternative forum was "too speculative"); *Manaster v. Northstar Tours Inc.*, 193 A.D.2d 651, 651–53 (2d Dep't 1993) (action for personal injuries where "plaintiff is a resident of Quebec, that the accident occurred in Quebec, that documentary evidence and potential witnesses are located in Quebec," "all medical treatment was rendered in Quebec," Quebec law was likely to apply, a Quebec forum was available, and the dismissal was conditioned on the defendants' consent to Canadian jurisdiction and not to challenge plaintiff's capacity to sue); *Moezinia v. Moezinia*, 124 A.D.2d 571, 571–72 (2d Dep't 1986) ("[A]ction between Iranian nationals involves the sale of real property located in Iran with payment made in Iranian currency drawn on an Iranian bank" and sale was made pursuant to an alleged oral contract entered into in Iran").

POINT II

The Appellate Division's Failure to Consider Applicable Legislation and Public Policies Was Error as a Matter of Law

As our main brief demonstrates, in *Varkonyi v. S. A. Empresa De Viacao Airea Rio Grandense (Varig),* 22 N.Y.2d 333 (1968), this Court unambiguously held that it was a reversible error of law for the Appellate Division to dismiss a case on *forum non conveniens* grounds without considering the "special and unusual circumstances" presented by the case (including policy considerations, the interests of justice and the lack of an available forum). Pltf. Br. 29-31. Finding that the Appellate Division had failed to do so, the *Varkonyi* Court remanded the case for a consideration of those factors.

Defendants-Respondents do not – and cannot – challenge either this crystal clear ruling of *Varkonyi* or the fact that Plaintiffs have raised just such circumstances. Nor do they deny that there is not a word said about these public policy and interests of justice issues raised in either lower court opinion. Rather, all they proffer in response to Plaintiffs' reliance on *Varkonyi* is the argument that the courts below must be deemed to have performed the analysis required by *Varkonyi* "*sub silento*." To support this preposterous claim they point to the Appellate Division's boilerplate statement at the end of its decision: "We have considered plaintiffs' remaining contentions and find them unavailing." R-932.

Whatever "remaining contentions" this sentence referred to, it cannot substitute for the analysis *Varkonyi* requires. In fact, the analysis this Court found inadequate in *Varkonyi* itself was more detailed. In the decision that this Court reversed, the Appellate Division in *Varkonyi* acknowledged the rule regarding special circumstances, and said: "We find no such circumstances here that should impel the courts of this State to accept jurisdiction of these actions." *Varkonyi v. S. A. Empresa De Viacao Airea Rio Grandense (Varig)*, 27 A.D.2d 731, 732, (1967), *rev'd,* 22 N.Y.2d 33 (1968). That was insufficient consideration to preclude reversal; *a fortiori*, saying nothing whatsoever about the issue, as the Appellate Division did here, is not enough.[4]

The remainder of Defendants-Respondents' arguments are irrelevant to a determination that reversal is required by *Varkonyi.* Defendants-Respondents devote most of their brief on this point to arguing that neither the HEAR Act nor the public policies Plaintiffs cite apply to this case on the merits, or, if they do, they are not dispositive for purposes of this motion. Resp. Br. at 42-47.

The HEAR Act was passed while this motion was *sub judice* and the motion court permitted limited briefing on its applicability. R-849-87. Only Plaintiffs and

[4] There is nothing stated in *Nat'l Bank & Tr. Co. of N. Am. v. Banco De Vizcaya, S.A.*, 72 N.Y.2d 1005, 1007 (1988), relied upon by Defendants-Respondents on page 45 of their brief, that indicates that the factors at issue in that case were, as here, policy and other issues of such importance that a failure to consider them would be held to be reversible error as a matter of law.

Christie's submitted briefs. The Defendants-Respondents did not. Even on that limited record the motion court was sufficiently convinced that the HEAR Act may apply to revive Plaintiffs' causes of action, and that a more comprehensive record and briefing would be required to determine that issue at the appropriate time. R-38. At a minimum, the same is true now. There is no rule that requires a determination of an issue in favor of Plaintiffs before it can be considered as a reason to deny *forum non conveniens*, and Defendants-Respondents cite no case that so holds. On the contrary, in *Gowen v. Helly Nahmad Gallery, Inc.*, 60 Misc. 3d 963, 994 (N.Y. Sup. Ct. 2018), *aff'd,* 169 A.D.3d 580 (2019), the Court found that the possibility that the claims asserted "*may* be barred" under both French and Swiss law is sufficient to demonstrate those jurisdictions are not an adequate alternative forum. (Emphasis added). Similarly here, the strong likelihood that, as Plaintiffs' main brief demonstrates, the HEAR Act renders this case timely in New York – though it may be time-barred in Switzerland – is sufficient to warrant denial of the *forum non conveniens* motion. Pltf. Br. at 32-34; *see also*, R-856-65, 884-87.

POINT III

A Proper Analysis of the *Forum Non Conveniens* Factors Requires that Dismissal be Denied

Defendants-Respondents' analysis of the *forum non conveniens* factors (largely adopted by the courts below) is fatally flawed, and fails to confront the factors that cry out for retention of this case.

The flaw in Defendants-Respondents' analysis of the factors they do address is that it is premised on a gross mischaracterization. Defendants-Respondents say: "the gravamen of [Plaintiffs'] complaint is that UBS AG, the Foundation and Kircher allegedly acted in derogation of Plaintiffs' purported rights as heirs through actions taken in Germany and Switzerland over the course of forty years prior to [2009]." Resp. Br. at 19, 35. As explained above, this is incorrect. The focus of this case is on the events of 2009 – the conspiracy with Christie's, the entry into the RSA and the sales of the Painting in NY. Each of the causes of action (including the breach of fiduciary duty claims) arises from those events, which Defendants-Respondents essentially concede do have a New York nexus. Resp. Br. at 12, 35. Thus, Defendants-Respondents have failed to meet their heavy burden to deprive Plaintiffs' not only of their *choice* of forum – but the *only* forum in which they can litigate these claims.

Defendants-Respondents identify six factors that they claim make this a "textbook case" for a *forum non conveniens* Resp. Br. at 1:

First, they claim the key witnesses and documents are in Switzerland and Germany. But they do not say specifically what witnesses they plan to call, or expect Plaintiffs to call; they even rely on the location of witnesses who may be dead. Resp. Br. at 1, 25. The primary witnesses and documents, in fact, are the representatives of Christie's involved in each of these transactions and its files pertaining to them. These are presumably in New York. It is only the testimony and documents maintained by Defendants-Respondents and anyone who acted on their behalf with respect to the 2009 events that are located in Europe.

Second, they claim the court will be required to interpret "complicated (and potentially conflicting) issues of Swiss, French, and German law." Resp. Br. at 1, 20-24. No such issues are identified relating to the 2009 claims, except perhaps the definition of fiduciary duty. In addition, Defendants-Respondents ignore all the key issues in this case that will be governed by New York law. (*See*, Pltf. Br. 40-41).

Defendants-Respondents identify eight issues that, they say, require foreign law determinations, non-party foreign witnesses or decades worth of French and German documents. Resp. Br. at 11. Five of them relate to whether Plaintiffs or the Foundation are heirs of Margaret Kainer. But, as we have explained, a determination that the Foundation is not an heir has already been made, and the Foundation is not challenging it. A determination has also been made that Plaintiffs are the heirs, and nothing in Defendants-Respondents' brief suggests any basis for arguing otherwise.

The Foundation currently has no status as an heir, no basis to claim that it is an heir and no pending proceedings in which it is seeking a determination that it is an heir. The French Certificate of Inheritance confers on Plaintiffs both the rights of heirs and the standing to sue to enforce those rights in the Courts of New York.[5] *Schoeps v. Andrew Lloyd Webber Art Found.,* 66 A.D.3d 137, 143–144 (1st Dept. 2009); *Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401, 404 (1st Dep't 2017). Nowhere is that Certificate being challenged by anyone.

The other three issues Defendants-Respondents identify involve whether Defendants-Respondents owed fiduciary duties to Plaintiffs and whether actions taken "over several decades" breached them. But now that it is established – as it has been – that the Foundation is not an heir, what possible quirk of "fiduciary duty" law could establish that the Foundation was entitled to appropriate Plaintiffs' property? Defendants-Respondents articulate no argument they could conceivably make, under any country's law, that makes it legal for banks to misappropriate their clients' assets. To repeat: the events of distant years in Europe are not the center of the present litigation. The fiduciary breaches at issue here are those relating to the 2009 transactions.

[5] Plaintiffs also submitted an affidavit from French counsel attesting to the rights conferred upon Plaintiffs by the French Certificate of Inheritance. R-482-86.

Third, Defendants-Respondents claim that the litigation now pending in Switzerland involves the "same events and assets" as this case Resp. Br. at 1, 30. It does not. The events relating to the 2009 transactions are not part of the Swiss litigation, nor is the conspiracy claim – and Plaintiffs' present claims could not be brought in the Swiss proceedings. R-490, 493-98.

Fourth, Defendants-Respondents contend that none of the Plaintiffs reside in New York. Resp. Br. at 1, 32. One does, however, reside in the United States and all but one reside closer to New York than to Switzerland.

Fifth, Defendants-Respondents say that it will be difficult for them to "effectively litigate" this case in New York because "most" of the Defendants are not subject to personal jurisdiction in New York. Resp. Br. at 1-2, 25-27. The motion court's decision, however, which the Appellate Division affirmed, was predicated on a presumption that there was jurisdiction over all the Defendants – two of which, Christies and UBS Global, are New York residents. It will be far more difficult for all the eleven Plaintiffs from all over the world to have to litigate in Europe than for the three interrelated non-New York entities (all of whom did business in New York in connection with these transactions) to litigate here.

Sixth, Defendants-Respondents argue "above all" that this case does not have the requisite nexus to New York, especially the fiduciary duty claims that they say hinge on conduct in Germany and Switzerland. Resp. Br. at 2, 35. But the only

fiduciary breaches Plaintiffs are asserting here are those that arose in connection with the 2009 transactions. There can be no dispute that those events have a substantial New York nexus.

More significant than the factors Defendants-Respondents choose to address are factors that they, like the courts below, do not address – factors that weigh heavily in favor of retaining jurisdiction. Of first importance are the public policy issues addressed above and in Plaintiffs' main brief, including the availability of the HEAR Act to ensure Plaintiffs will have their case heard on the merits and the strong interest New York has in protecting its art market from sales of stolen artworks through the kinds of machinations the Defendants employed here. Pltf. Br. at 32-36.

Also of critical importance is the fact that Christie's cannot be sued on this transaction in Switzerland. By granting Defendants-Respondents' *forum non conveniens* motion and staying the action as to Christie's, the lower courts in effect bifurcated the case, making it impossible for Plaintiffs to obtain relief without two trials on separate continents. Such a procedure is at best burdensome and wasteful, and here there are other strong reasons why there should be one trial with all the Defendants in one place, among them: (i) their acts are imputed to each other, (ii) unless all conspirators are parties and present, each can blame the other with

impunity, and (iii) Plaintiffs need the ability to get discovery from all the conspirators and compel their testimony. Only in New York is this a possibility.

Finally, there is what this Court has held to be "a most important factor" – the unavailability of an adequate alternative jurisdiction. While the courts below did consider this factor, as demonstrated above, they got it wrong.

In sum, apart from the convenience of Defendants, every other factor favors retention of the case in New York. The lower courts abused their discretion in deciding otherwise.

POINT IV

The Appropriate Corrective Action Is Denial of the Motions to Dismiss

Plaintiffs' main brief demonstrated that, if the order appealed from is reversed, the appropriate corrective action is denial of Defendants-Respondents' motion to dismiss. Pltfs' Br. 46-47. This is true for two reasons. First, it is clear as a matter of law, because of the time-bar and other procedural obstacles that Plaintiffs would face in Switzerland, that there is no adequate alternative forum. Since this case does not present the unique *Pahlavi* situation, this factor alone requires denial of the motion.

Second, even when factors other than the adequacy of the alternative forum are taken into account, this case is, like *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros.,* 23 N.Y.3d 129 (2014), one of the relatively uncommon ones in which Court can and should decide a *forum non conveniens* motion as a matter of

law. Defendants-Respondents claim *Mashreqbank* should not apply because in that case dismissal was granted, rather than denied, as a matter of law. That is a distinction without a difference. The relevant point is that here, as in *Mahreqbank*, a sound exercise of discretion can lead to only one conclusion.

POINT V

The Appellate Division Improperly Failed To Determine Jurisdiction Before Addressing *Forum Non Conveniens*

Defendants-Respondents argue that this Court should adopt the rule in *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 424 (2007) as the rule of this state, to permit a dismissal "'under the *forum non conveniens* doctrine before definitively ascertaining its own jurisdiction,'" at least where a determination of jurisdiction would be burdensome and *forum non conveniens* considerations militate in favor of dismissal. Resp. Br. at 50, 52, 56. They argue that this Court's ruling in *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574 (1980) that a court lacking jurisdiction is without power to issue a binding *forum non conveniens* ruling is incorrect. Resp. Br. at 51. Indeed, they say that there is "no sound policy reason" to hold otherwise. Resp. Br. at 56. They forget that the doctrine of *stare decisis*, itself based on sound policy considerations, is normally reason enough for this Court to follow its own precedent. But there are other reasons to follow *Ehrlich-Bober* here.

Sinochem itself sets forth the reason why this court's ruling in *Ehlrich-Bober* should be followed, at least under the facts of this case. The *Sinochem* Court noted that there was one situation in which its rule raises a specific concern: that a court failing first to establish its jurisdiction could not condition a *forum non conveniens* dismissal on the defendant's waiver of any statute of limitations defense or objection to the foreign forum's jurisdiction, and thus could not shield the plaintiff against a foreign tribunal's refusal to entertain the suit. 549 U.S. at 435. Since that issue was not implicated on the *Sinochem* facts, the court held it did not have to decide it. That issue is, however, is squarely implicated in this case. *Id*. Given their failure to decide jurisdiction, the courts below did not impose any condition on dismissal, even though a claimed time-bar and other procedural defenses had already been raised in the one pending Swiss action. Instead, the courts below, relying on *Pahlavi*, dismissed the case unconditionally, not providing Plaintiffs with even minimal assurance that they can get an adjudication of their claims elsewhere. By following *Ehrlich-Bober,* they might have avoided this error.

Plaintiffs' main brief states their willingness to abandon reliance on *Ehrlich-Bober* if the Court concludes that an analysis of the *forum non conveniens* factors mandate a denial of the motion as a matter of law. Pltfs. Br. at 50. Contrary to Defendants-Respondents' assertion, this is not a "bait and switch"; Plaintiffs are presenting here the same issues, in the same order, as those raised in their motion for

leave to appeal. Nor are Plaintiffs making any concession on the merits of the *Ehrlich-Bober* issue. Plaintiffs' position is merely a practical consequence of the error committed by the courts below. This case has already been pending for seven years without an answer to the complaint, and if this Court were to decide this appeal on *Ehrlich-Bober* grounds without first correcting the erroneous *forum non conveniens* dismissal, the case may drag on for seven more years before that error can be undone. Defendants-Respondents may welcome that result, but the Court should not.

CONCLUSION

For all the foregoing additional reasons, it is respectfully requested that the decision of the Appellate Division be reversed and that this Court deny Defendants-Respondents' motion to dismiss on the grounds of *forum non conveniens*, as a matter of law and/or as an abuse of discretion.

Dated: New York, N.Y.
December 10, 2020

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using WordPerfect.

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Dated: New York, N.Y.
December 9, 2020

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on
the 9th day of December 2020.

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2021

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