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.

BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs-Appellants ("Plaintiffs"), the legitimate heirs of Margaret Kainer ("Margaret"), brought this action to recover a painting entitled *Danseuses* by Edgar Degas, c. 1896 (the "Painting"), which was stolen from the family twice: first by the Nazis and then, after Margaret's death, by her trusted family bankers, Defendants-Respondents here. These bankers fraudulently diverted Margaret's claim to the Painting from her estate to a sham foundation controlled by themselves. The fraud is proved by indisputable documentary evidence, including an agreement between the sham foundation and other, equally spurious, unrelated entities claiming rights to her estate, prompted by an openly-expressed concern that Margaret's real heirs might find out they were being swindled.

After the Painting surfaced, Defendants-Respondents, through yet a third transaction, conspired with Defendant Christie's, Inc. ("Christie's") to complete the theft by falsely legitimizing the sham foundation as Margaret's sole heir, purportedly restitituting the Painting to it and rendering it marketable. This purported "restitution" permitted the Painting to be sold twice in a suspicious sequence of events: first in a private sale brokered by Christie's for $6 million and then, just days later, at a public auction conducted by Christie's in New York for more than $10 million. Defendants were all enriched by the theft, and not a dime of the proceeds went to Plaintiffs, the Painting's rightful owners.

Plaintiffs brought this case in New York because no adequate alternative forum exists in which they can obtain relief. The Appellate Division acknowledged that there may be no alternative forum, but nonetheless affirmed an order dismissing this case on *forum non conveniens* grounds, as against all Defendants but Christie's, and staying the claim against Christie's – thus effectively requiring Plaintiffs to try the case twice, even if an adequate forum outside New York could be found.

The court's ruling was based on an unduly expansive reading of *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245 (1984), *cert. denied,* 469 U.S. 1108 (1985). *Pahlavi* establishes a rare exception to the principle that the *forum non conveniens* doctrine should not be invoked when it leaves a plaintiff with nowhere to bring the lawsuit. That exception is not applicable here, and the Appellate Division erred in holding otherwise.

The courts below ruled without even considering the special federal and state public policies designed to ensure that courts in the United States will help return Nazi-looted art to its heirs. The federal policy is reflected in the Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub.L. 114-308, 130 Stat 1524, which applies to this case. The motion court acknowledged that the HEAR Act may apply, but gave it no weight in its *forum non conveniens* rulings; the Appellate Division did not even mention the HEAR Act. And unmentioned by both courts were the New York public policies, reflected in many cases, to protect and compensate

victims of the Holocaust and to prevent the New York art market from becoming a haven for trafficking in stolen art. The decisions below deal a significant setback to these federal and state policies. As this Court has held, the failure to consider these special public policy factors is not only an abuse of discretion, but error as a matter of law.

Finally, the courts below also failed to correctly evaluate the factors normally considered on a *forum non conveniens* motion, even where an alternative forum is available and where no special public policy factors are present. The forum that Defendants-Respondents say should be preferred, Switzerland, is, apart from its unavailability, convenient only to Defendants-Respondents themselves. The Painting that is the subject of the action has, as far as the record shows, never been in Switzerland. The Painting was sold at a public auction in New York by a New York resident, co-conspirator and Defendant Christie's. Plaintiffs are scattered in countries around the globe, including Chile and Australia; one of them (now deceased) resided when this action was brought in Storrs Mansfield, Connecticut, 142 miles from the New York County courthouse. No Plaintiff resides in or near Switzerland. Relegating Plaintiffs to a Swiss forum, which notoriously places almost insurmountable obstacles to claimants seeking to recover Nazi looted art, if it were even available (which it is not), was in itself an abuse of discretion.

The decision below should be reversed.

QUESTIONS PRESENTED

1. Whether the Appellate Division committed an error of law and/or abused its discretion by dismissing this case on *forum non conveniens* grounds, without determining that an adequate alternative forum is available?

2. Whether the Appellate Division committed an error of law and/or abused its discretion by failing to even consider, much less give any weight to, federal and state public policies that favor making the courts available to plaintiffs seeking to recover stolen art, particularly art looted from Holocaust victims by the Nazis?

3. Whether the Appellate Division abused its discretion in evaluating the other factors normally considered on a *forum non conveniens* motion?

4. What corrective action is appropriate in light of the errors by the courts below?

5. Whether the courts below erred in considering the *forum non conveniens* issue without first deciding issues of jurisdiction?

JURISDICTION

The order of the Appellate Division (R. 925-32) affirmed an order of the motion court dismissing Plaintiffs' Second Amended Complaint ("SAC") on the ground of *forum non conveniens* against all Defendants except Christie's, and staying the action against Christie's until Plaintiffs obtain a "favorable final determination in the European court(s)." (R-35). By order dated June 23, 2020, this Court granted Plaintiffs' motion for leave to appeal as to all Defendants other than Christie's and dismissed the motion as to Christie's on the ground that the Appellate Division order did not finally detemine the action as to that Defendant within the meaning of the Constitution. (R-923).

This Court has jurisdiction of the appeal (as to all Defendants other than Christie's) pursuant to CPLR §5602(a)(1)(i). The appeal presents questions of law reviewable by this Court.

STATEMENT OF FACTS

The order appealed from dismissed Plaintiff's SAC on a pre-discovery motion. The allegations of the SAC are summarized below.

The Ownership And the First Theft Of The Painting

The Painting was part of a collection of enormous importance, including more than 400 works of art ("the Kainer Collection"), owned by Margaret, who was Jewish and lived in Germany. Margaret and her husband, Ludwig Kainer ("Ludwig"), left Germany in 1932 to travel. (R-142). The Nazis seized power in Germany in 1933, and the Kainers never returned. (R-142). The Nazis confiscated the Kainer Collection and in May 1935 sold it at a "Judenversteigerung" (a special auction for assets belonging to Jewish victims of the Nazi regime). (R-155).

The Kainers spent 1943 to 1946 as refugees in Switzerland, then relocated to France, where they lived for the remainder of their lives. (R- 155). Ludwig predeceased Margaret (R-156), and Margaret remained a French resident until her death in 1968. (R-155-56). Margaret had no children, but she had several heirs, whose descendants (or the estates of the descendants) are the Plaintiffs in this case. (R-156). The stolen paintings were not found before her death. (R. 156).

The Second Theft

Defendants-Respondents UBS AG ("UBS AG") and UBS Global Asset Management (Americas), Inc. ("UBS Global") (together "UBS") had acted for years

as the Kainer family's trusted bankers. (R-157). At Margaret's death, however, UBS saw an opportunity to divert her wealth to its own benefit.

UBS made no search for Margaret's heirs, even though some family members had previously contacted it. (R-158). Instead, falsely claiming that Margaret had no heirs, UBS executives formed a sham Swiss foundation under its own control, Defendant-Respondent Norbert Stiftung (formerly known as Norbert Levy Stiftung) (the "Foundation"), run by a UBS director, who was later replaced by another UBS Director, Defendant-Respondent Edgar Kircher ("Kircher"). (R-148, 159-63). (This brief will refer to UBS, the Foundation and Kircher as the "Foundation Defendants" and together with Christie's as "Defendants"). UBS diverted apparently all, or at least most, of Margaret's assets to the Foundation. (R-163). It does not appear that the Foundation has ever served any charitable purpose. (R-163). Evidently, its sole function was, and is, to keep Margaret's assets under UBS's management and control. (R-163).

The fig leaf for this fraud was a provision in the will of Margaret's father, Norbert Levy ("Norbert"), who died in 1928. (R-154). Norbert's will, dated 1927, provided that, if Margaret died single and without descendants, three-quarters of the property she had inherited from him should be used to set up a "Norbert Levy Foundation," which, in the words of the will, "shall grant support to impoverished, poor, dignified members of my family, for all purposes which seem appropriate to

the foundation's board. The board shall be appointed by the corresponding head of the Jewish community." (R-154).

The Foundation Defendants tried to disguise their newly-minted Foundation as the one Norbert had envisioned long ago, and in 1972 obtained a Partial Certificate of Inheritance ("Partial COI") naming it as the heir to Norbert's estate with respect to the reversionary interest.[1] (R-159-61). In fact, however, there is no remblance between the two foundations. (R-159-60). The new sham Foundation made no effort to find "poor, dignified members" of Norbert's family, but rather has claimed that family members have no entitlement to anything. (R-163). It did not invite any "head of the Jewish community" to appoint a board, but rather UBS appointed its own employees to it. (R-163). And the stated purpose of the new sham Foundation, created in 1971, reads like a grim and cynical joke. It was to provide financial assistance for the education of young people under 20 who met certain conditions, with preference to be given to "[c]hildren of Jewish heritage from pre-war Germany." (R-160). But in 1971, there were no such children "from pre-war Germany." Those who survived were adults.

The foundation referred to in Norbert's 1927 will, which was expressly to be

[1] Notably, there was nothing in the Partial COI that specifically identified what assets comprise the three-fourths of Norbert's estate referenced, no mention of Margaret's estate and no reference to any work of art, including the Painting. (R-161).

used to support "family members," and the sham Foundation UBS created more than forty years later to benefit itself had, as a German court later found, "nothing in common…apart from the name." *Order, Kammeregericht Berlin [Regional Supreme Court of Berlin], Case No. 6W 46/15,* dated December 30, 2015, p. 15 (in translation).[2] That court, as discussed below, retracted the Partial Certificate of Inheritance issued to the Foundation while this case was *sub judice* in the motion court.

Of the assets thus misappropriated by the Foundation Defendants, the most important were Margaret's rights to the works of art in the Kainer Collection, including the Painting at issue here. In addition, the Foundation Defendants ultimately succeeded in obtaining and appropriating millions of dollars for damages the Kainer family suffered as refugees affected by the actions of the German Reich. (R-159). Margaret's heirs received nothing, and were not informed of the Foundation Defendants' machinations.

The Deal With the Swiss Localities

Meanwhile, two more greedy interlopers, the Swiss Canton of Vaud ("Vaud") and City of Pully ("Pully"), entered the picture, and were successfully bought off by

[2] Moreover, some years after receiving the Partial COI, the UBS director acting as the sole trustee of the sham Foundation changed its name from "The Norbert Levy Stiftung" to simply the "Norbert Stiftung." While the records do not reveal the reason for this change, it was in direct contravention to the name specified in the Deed. Removing "Levy" from name of the Foundation would necessarily make it harder for any potential heir who was looking for Norbert Levy to know that the Foundation had anything to do with him. (R-157-61).

the Foundation Defendants – but created, in the process, a document that demonstrates the fraudulent nature of both their and the Foundation Defendants' claims of heirship.

As mentioned above, Margaret was a refugee in Switzerland from 1943 to 1946. (R-155). During that time, she established a bank account in Pully, a city within Vaud. (R-683). On this flimsy basis, Vaud and Pully asserted jurisdiction over Margaret's estate, falsely claiming that she had last been domiciled in Pully – even though she lived in France for the last 22 years of her life. (R-683). Because there was no will and purportedly no heirs, a Pully justice of the peace appointed none other than the same UBS director who was running the sham Foundation to manage the property of Margaret's estate. (R-161-62).

For unknown reasons, the case languished for decades, until 2002, when the Foundation asserted claims for the entire estate in both Germany and Switzerland. (R-161-62). Vaud and Pully challenged those claims, contending that they were entitled to her property by escheat because no heirs had been found. (R-161-62). By this time, there were millions of dollars at issue, including the reparations the Foundation had recovered in German proceedings (R-163). Although in 2003, a Swiss court issued a certificate of inheritance designating Vaud and Pully as Margaret's sole heirs, the dispute proceeded in Germany. (R-162). It ended in 2005, when the false claimants resolved it by divvying up Margaret's estate among

themselves. (R-162).

Publicly available evidence shows that this settlement was knowingly collusive and dishonest. A public document available on the internet entitled "Preliminary Opinion to the Municipal Council of the City of Pully Municipality seeking approval of the settlement (No. 8-2005 dated March 30, 2005)" (the "Settlement Opinion") states:

> Also, the opposing party [the Foundation] raised *a very sensitive point which our attorneys, for strategic reasons, had intentionally left out so far*: the issue of the domicile of Margret Kainer on the day of her death as well as the applicable law according to the last domicile. *At that point it could not be ruled out that French private international law could apply, which could call into question the status of heirs of the Canton of Vaud and the City of Pully*.
>
> ***
>
> [T]he parties agreed to join efforts to find and obtain compensation for paintings looted in 1933, either from Margret Kainer or from her husband, Ludwig Kainer. Currently, none of the paintings still being sought have been found. The parties opened a joint account with UBS SA to collect any resulting amounts. (R-162, 686; emphasis added).

Thus, without ever making any *bona fide* efforts to look for Margaret's heirs and knowing that the application of French law would void their claims, Vaud and Pully and the Foundation Defendants seized the reparations intended for Holocaust victims and the rights to the family's looted Paintings for themselves. (R-143-44, 162-63).

The Reappearance, Private Sale and New York Auction of the Painting

The events leading directly to this lawsuit were instigated from New York. In May 2009, a New York representative of Christie's, acting on behalf of a Japanese art gallery, contacted the Foundation with the news that the Painting was in the possession of that gallery, in Japan, and that the gallery wanted to arrange a "private sale." (R-166). By that time, the public attention that had been given to the many works of art looted by the Nazis had made such art unsaleable unless it was restored to its lawful owners, and databases were created in which an heir could identify itself as the owner of the missing artwork. (R164-165). Christie's contacted the Foundation because in 2000 the Foundation had listed itself as the heir for settlement of any claims related to all of the known paintings from the 1935 forced sale of the Kainer Collection. (R-166).

Christie's holds itself out as an expert in researching restitution claims and claims that it "takes very seriously its responsibility to ensure that we do not knowingly sell spoliated but unrestituted art works." (R. 165-66). But in truth, Christie's was only too ready to recognize and vouch for the Foundation's dubious claim of lawful ownership. (R166-167). A search of the public record would have shown that claim to be bogus as it would have disclosed, among other things, the corrupt 2005 deal the Foundation had made with Vaud and Pully. But Christie's apparently never bothered to make any such search. (R-167, 681-702). Moreover,

documents that must have been presented to Christie's made it unmistakeably clear that the Foundation had no connection to the Kainer family and that its charter set forth a bogus purpose. Christie's had to know that the Foundation's claim of heirship was highly questionable, at best. (R-167).

The Foundation Defendants and Christie's conspired to to keep the truth from coming out. They made a deal, ultimately embodied in a "Restitution Settlement Agreement" "(RSA"), in which the Foundation purported to renounce any claims of the "Heirs of Margaret and Ludwig Kainer" to the Painting in exchange for 30% of the net proceeds of the sale. (R-168). The Foundation received its cut on October 27, 2009 – $1.8 million, i.e., 30% of a $6,000,000 sale (which was Christie's estimate of the purchase price). (R-168). Astonishingly, *one week later*, Christie's offered the Painting at public auction in New York – only now it increased the estimated price to between $7,000,000 and $9,000,000. It did so with the express represention to the public that it was being "offered pursuant to a restitution settlement agreement with the heirs of Ludwig and Margret Kainer" and thereby vouching for the legitimacy of the sale. (R-169-170, 186). The Painting sold for $10,722,500 – an apparent profit of 78.7% for the anonymous buyer(s) who had the Painting for a matter of days, as well as additional commissions for Christie's. (R-186). Nothing in the record explains this very suspicious sequence of events.

Plaintiffs and Their Assertion of Their Rights

Plaintiffs are the descendants (or representatives of the estates of deceased descendants) of Margaret's cousins, on both her mother's and father's sides. Margaret's family, like so many others, suffered murder, persecution and dispersal at the Nazis' hands, and its surviving members are scattered around the globe. Plaintiffs reside in the United States (Kurt Beck, who recently died, was a resident of Storrs Mansfield, Connecticut and his heir and executor lives in Massachusetts); Australia (Peter Littman, who died in 2018, the Estate of Elli Alter, Janet Corden, Martin Corden, Simon Corden and Warner Max Corden); Chile (Firelei Magali Cortes Gruenberg, Matilde Labbe Gruenberg, Hernan Renato Cortes Ramos); and the Netherlands (Hernan Labbe Gruenberg). (R-654). Of the nine heirs who are, or whose estates are, Plaintiffs here, only Hernan Labbe Gruenberg lives in Europe. (R-654). All the rest reside between 7000 and 10,000 miles from Switzerland (except for the Massachussets resident who is, in comparision, a mere 3700 miles away).

Because Defendants chose to appropriate Margaret's property rather than search for her heirs, it was many years before Plaintiffs learned that they were those heirs and that her estate contained the Painting and other works of art. (R-157). When they did learn, they promptly obtained, in 2012, a French "acte de notoriété" (also referred to as the "French Certificate of Inheritance" or "French COI") establishing their rights as Margaret's lawful heirs. (R-150-151, 156, 482-487). The French COI

has never been challenged. (*See* R-31, 483).

Pursuant to their rights under the French COI, Plaintiffs began this action in New York County Supreme Court on January 3, 2013. (R-603). Their claims are summarized below (p. 20); in brief, Plaintiffs seek monetary relief for Defendants' conduct in depriving them of the Painting, and restoration of the Painting itself. (R-184).

The German and Swiss Proceedings

Some of the Plaintiffs also began a proceeding in Germany and two in Switzerland. None of the Defendants had any involvement in those proceedings except the Foundation, which was a defendant in the German proceeding and one of the Swiss proceedings. (R-490, 507). These proceedings do not raise the same issues as the present case. Nor can any of them be viewed as an adequate alternative forum for a plethora of reasons set forth below – as the Appellate Division effectively acknowledged. They furnish no valid reason for dismissing this action on *forum non conveniens* grounds.

The German Proceedings

As mentioned above, as part of the fraudulent seizure of Margaret's assets, the Foundation obtained a Partial COI in Germany (issued December 18, 1972). (R-160-61). On October 2, 2013, after the commencement of the present action, one of the Plaintiffs, Warner Max Corden ("Corden"), filed an action in Berlin to recall or

invalidate that Partial COI. (R-507). On November 26, 2014, a local court denied Corden's request, but a year later, while the Defendants' motions to dismiss this case were *sub judice*, a German Appellate Court annulled the decision of the local court and declared the Partial COI null and void. (R. 510, 797). The German Appellate Court found that the Swiss Foundation formed in 1971 was not the foundation described in Norbert Levy's will and that Norbert's clear intention was that "the circle of persons to be benefited according to his will" only included his family members (Margaret, then her children, and if she had none, other members of the family). It thus concluded that the Foundation could not be his heir, and nullified the Partial COI. *Order, Kammeregericht Berlin [Regional Supreme Court of Berlin], Case No. 6W 46/15,* dated December 30, 2015, pp. 14, 15, 16 (in translation).

This ruling was technically non-binding, in the sense that it could be challenged in other German proceedings. (R-516). The Foundation, however, has brought no such challenge and has never said it plans to do so.[3]

Thus, the German proceedings are over, and have terminated in Plaintiffs' favor, eliminating the only legal basis upon which the Foundation claimed to have a competing claim of heirship to that of Plaintiffs – the spurious claim that the Foundation is the heir under the reversionary provision under Norbert's 1927 will.

[3] Defendants relied heavily on the earlier local court decision in their initial motion papers, falsely arguing that the local German decision in its favor "is entitled to recognition and enforcement." Upon the reversal, however, Defendants fell silent. (R-713, 736, 752).

The German proceedings have not only nullified the Defendants' justification for their conspiratorial actions at issue in this lawsuit, but have also eliminated any valid objection to Plaintiffs' proceeding in this lawsuit on the basis of their unchallenged French COI.

The Swiss Proceedings

There were two Swiss proceedings, referred to in this record as the "Swiss Inheritance Claim" and the "Swiss COI Claim." (R-489). The Swiss Inheritance Claim, brought by the present Plaintiffs against Vaud, Pully and the Foundation, seeks recovery of the property and/or assets belonging to Margaret's estate that were misappropriated by those parties. (R-489-91). It also seeks a ruling that the reversionary provision of Norbert's will (by which three-quarters of Margaret's inheritance was to revert after her death to a foundation for the benefit of Norbert's family if she had no children) is null and void under German inheritance law. (R–490-91). Most significantly, there is no claim by the Foundation or anyone else seeking a determination as to whether the Foundation is an heir to either Margaret's or Norbert's estate.

The Swiss COI Proceeding was brought by Corden against only two parties, Vaud and Pully. (R-491). It sought to nullify a Swiss COI that Vaud and Pully obtained through the false representations that Margaret died a resident of Pully (a city in Vaud) and that she had no heirs. (R-489, 491). None of the Defendants in

this case is a party to the COI proceeding. (R-491). During the course of this proceeding, the Swiss COI Proceeding terminated without a determination in view of the pendency of the Swiss Inheritancy Claim.

Defendants claimed below that the Swiss proceedings provided an alternative forum justifying a *forum non conveniens* dismissal – an issue the Appellate Division did not decide. (*See* pp. 22, 24-25 below.) This is obviously wrong as to the Swiss COI Proceeding, since none of the Defendants here are parties in that case and it is no longer pending. And the record shows that the Swiss Inheritance Proceeding is not an adequate alternative forum either, for these reasons:

1. As the Appellate Division recognized, the Swiss Inheritance Proceeding may not reach any substantive issue, because at the same time the Defendants have been arguing to the New York courts that the conflicting claims of heirship will be decided there, the Foundation, Pully and Vaud were simultaneously all moving to dismiss that proceeding on jurisdictional or procedural grounds. (R–931). Counsel for the Foundation Defendants in the Swiss Inheritance Proceeding admitted this in an affirmation submitted below, saying that "whether the Foundation has any right in the estate of Norbert Levy" would "presumably" be decided by "the Lausanne [Switzerland] courts (*unless* the latter … dismiss the plaintiffs' claims

against the Foundation already on grounds of lack of standing to sue and/or prescription)."[4] (R–786; emphasis added).

2. Even if the merits of the Swiss Inheritance Proceedings are reached, the stated "presumption" of the Foundation (and the courts below) that a Swiss court can determine the Foundation's claimed inheritance rights is completely false because:

(a) there is no claim pending before the Swiss court as to whether the Foundation is an heir to the estate of Norbert Levy, much less to the estate of Margaret Kainer;

(b) the Foundation's purported rights were based on the German Partial COI, which has been nullified by a German Appellate Court, as explained above; the Partial COI is not before the Swiss court and the Swiss court lacks power to review the German determination; and

(c) in any event, the Swiss court lacks power to nullify the unchallenged French COI that has been issued to Plaintiffs. As an affidavit from Plaintiffs' counsel in the Swiss proceedings explained: "The validity of the French COI is not an issue in any of the Swiss Proceedings and cannot, in any event, be declared null and void by a Swiss judge or authority." (R-492). Counsel went

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

on to say: "even under the worst-case result in the Swiss Proceedings for Plaintiffs, Plaintiffs would still have valid French Certificates of Inheritance with all the rights attendant thereto." (R-489-490, 493).

In short, no outcome of the Swiss Inheritance Proceeding can result in a finding that the Foundation has any rights as an heir of either Norbert or Margaret – a key fallacy that underlies both the motion court's decision and the Appellate Division's affirmance.

3. Neither Christie's nor UBS Global is subject to jurisdiction in Switzerland, and neither will be bound by any result in the Swiss court. (R-490). Moroever, given the New York nexus of these claims, the Swiss courts would not be likely to accept jurisdiction even if Christie's and UBS Global consented to it (which they have not). (R-490). Thus, even if Plaintiffs could somehow obtain an adjudication of their claims in Switzerland against the Swiss Defendants, Christie's and UBS Global would be free to relitigate in New York every issue the Swiss court had decided.

4. A Swiss court cannot grant the relief Plaintiffs seek, which includes the return of the Painting. There is no evidence that the Painting has ever been in Switzerland. But the Painting was sold by Christie's in New York and, even if it has now been removed from the State, Christie's may well have a contractual right to

compel the buyer to return it (R-254, 479), a right that a New York court could compel Christie's to exercise.

In sum, the Swiss court does not and cannot provide an adequate forum for Plaintiffs' claims in this case.

THE PROCEEDINGS BELOW

Proceedings Before the Motion Court

This case was filed on January 3, 2013 against the Foundation Defendants and a number of "John Does." Christie's was added as a Defendant in the SAC, which is the operative pleading, filed November 4, 2014. (R-140-90). Plaintiffs assert claims in the SAC for unjust enrichment, conversion, and conspiracy (against all Defendants), breach of fiduciary duty, an accounting and unjust enrichment (against the Foundation Defendants), aiding and abetting breach of fiduciary duty and unjust enrichment (against Christie's) and replevin (against the unknown "John Doe" purchaser of the Painting). (R-172-83). Plaintiffs seek to recover the Painting or, if that is not possible, its monetary value. (R-184).

In December 2014, Defendants filed the motions that are the subject of this appeal. As of January 4, 2017, the motions still had not been decided; Plaintiffs advised the motion court of the recent passage of the HEAR Act, and the court permitted limited supplemental briefing on it. (R-849-887). On February 1, 2017,

Plaintiffs notified the Court of German Appellate Court decision nullifying the German Partial COI. (R-797).

The Motion Court's Decision

The motion court filed its decision on October 31, 2017:

- With respect to the Foundation Defendants, it declined to decide whether it had personal jurisdiction, though it assumed that the issue was sufficiently close to warrant jurisdictional discovery. It declined to permit Plaintiffs any discovery, and dismissed the SAC as against them on *forum non conveniens* grounds.

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

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

In granting the *forum non conveniens motions*, the motion court said that "a strong showing is made that a suitable alternative forum exists" in Switzerland, but did not expressly find that such a forum existed and quoted from *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 483, 467 N.E.2d 245 (1984)), *cert. denied,* 469 U.S. 1108 (1985): "Although the existence of a suitable alternative forum is a most important factor to be considered in applying the forum non conveniens doctrine, its alleged absence does not require the court to retain jurisdiction." (R–33).

The Appellate Division's Affirmance

On August 6, 2019, the Appellate Division, First Department issued the decision on appeal. (R-925-32). It held that the motion court had properly decided the *forum non conveniens* issue "without determining whether it had personal jurisdiction over all of the defendants." (R-927). It then affirmed the motion court's *forum non conveniens* dismissal, even though it recognized that there may be no suitable alternative forum, citing to the need to apply foreign law, hardships to the Defendants, and the pending litigation in Switzerland. (R-929-31). While it acknowledged that the Foundation is seeking to dismiss those Swiss proceedings for lack of jurisdiction and on statute of limitations grounds, it responded to those obstacles by saying: "while the existence of a suitable alternative forum is an important factor, its absence does not require a New York court to retain jurisdiction (see *Pahlavi*, 62 NY2d at 481)." (R-931).

ARGUMENT

POINT I

The Standard of Review

In *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137, 12 N.E.3d 456, 459 (2014), this Court set forth the standard of review of a *forum non conveniens* decision:

> In general, a decision to grant or deny a motion to dismiss on forum non conveniens grounds is addressed to a court's discretion (*Islamic Republic of Iran v. Pahlavi,* 62 N.Y.2d 474, 484, 478 N.Y.S.2d 597, 467 N.E.2d 245 [1984]), and we will review it only to decide whether discretion has been abused. But where an Appellate Division decision is premised on errors of law, this Court does not defer to it.

Upon concluding that the Appellate Division in that case had committed legal errors, this Court noted that it "must decide the appropriate corrective action." *Id*. at 138. In making that determination, it held: "If this were a case in which either result could be reached in a sound exercise of discretion, we would remit to the Appellate Division for reconsideration under the correct legal principles." *Id.* However, because it concluded that the *Mashreqbank* case was "one of the relatively uncommon ones in which dismissal on forum non conveniens grounds is required as a matter of law," this Court made that determination itself. *Id.*

For the reasons demonstrated below, this case is also one of the "relatively uncommon cases" where the application of the correct legal principles leaves no room for discretion, but rather here requires *retention* of this case as a matter of law.

Accordingly, this Court should not remand the *forum non conveniens* determination, but should outright deny the motions to dismiss this case on *forum non conveniens* grounds as a matter of law and/or as an abuse of discretion.

POINT II

The Appellate Division Improperly Dismissed This Case On *Forum Non Conveniens* Grounds Even Though It Acknowledged That There May Not Be Any Adequate Alternative Forum

Relying on this Court's decision in *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479, 467 N.E.2d 245 (1984), *cert. denied,* 469 U.S. 1108 (1985), the Appellate Division dismissed this case even though it made no finding that a suitable alternative jurisdiction exists where Plaintiffs can bring their claims. To the contrary, in noting that "the Foundation and the Swiss localities seek dismissal of the Swiss proceedings for lack of jurisdiction and on statute of limitations grounds," it acknowledged that there may be no suitable alternative jurisdiction. (R-931). Indeed, it is well established that a proposed alternative forum is not adequate if a statute of limitations bars the bringing of a case in that forum where no such bar would exist in the United States. *See, e.g*. *Gowen v. Helly Nahmad Gallery*, 60 Misc. 3d 963, 994, 77 N.Y.S.3d 605 (Sup. Ct. NY 2018), *aff'd*, 169 A.D.3d 580, 95 N.Y.S.3d 62 (2019) (holding that where claims involving Nazi-looted art may be barred under French and Swiss law, defendants cannot demonstrate there is an

adequate alternative forum to hear the matter); *Highgate Pictures v. De Paul,* 153 A.D.2d 126, 549 N.Y.S.2d 386 (1st Dep't 1990).[5]

Indeed, in no case other than *Pahlavi* has this Court permitted a *forum non conveniens* dismissal in the absence of an adequate alternative forum. Nor does *Pahlavi* provide a generalized exemption from satisfying the adequate alternative forum requirement. And it certainly does not justify doing so to deny the heirs of Holocaust survivors from proceeding to recover their looted property in the only juridiction in which they can obtain relief.

Pahlavi is a very unusual, perhaps *sui generis* case, involving a claim brought by a hostile nation in the New York courts. In *Pahlavi*, the Islamic Republic of Iran sought to sue its former ruler. It claimed that it was unable to bring its claim in its own country because of the political situation there. The reasons it presented supporting its choice of a New York forum were that it had acquired jurisdiction over the defendant in New York and some of his assets were located here. Arrayed

[5] While relying on *Pahlavi*, the Appellate Division also remarked, without elaboration, that the pending proceeding in Switzerland "appears" to be an alternate jurisdiction and that "France and Germany also may be possible alternatives." (R–930). But its recognition of the jurisdictional and procedural obstacles to a merits determination in Switzerland, as well as several other reasons, listed at page 18-21 above, precludes Switzerland, as a matter of law, from being deemed a viable alternative forum. The idea that Plaintiffs could bring their claims in France or Germany is equally without basis. Similar jurisdictional and procedural obstacles to a merits determination can be raised in those countries. Moreover, no party resides in either France or Germany; no Defendant has agreed to submit to jurisdiction in either country; and there is no reason to think that either the Painting or any living witness to the events in suit can be found in France or Germany. It would not make sense to send this case to a French or German forum.

against that, however, were not only the usual *forum non conveniens* factors – much stronger for dismissal in *Pahlavi* than here – but also one very unusual one:

> If the action cannot be maintained in Iran … under laws which result in judgments cognizable in the United States or other foreign jurisdictions where the Shah's assets may be found, then that failure must be charged to plaintiff. It is, after all, the government in power, not a hapless national victimized by its country's policies. Any infirmity in plaintiff's legal system should weigh against its claim of venue, not impose disadvantage on defendant or the judicial system of this State. 62 N.Y.2d at 483.

In addition to the rare situation of a government protesting the inadequacy of its own courts, this Court in *Pahlavi* relied on another factor not present here, finding a reason for permitting a *forum non conveniens* dismissal in the absence of an adequate alternative forum "when plaintiff's chosen forum [i.e., New York] is unable to afford the parties appropriate relief." This Court explained:

> Despite the fact that plaintiff's complaint requests monetary relief, it really seeks a sweeping review of the political and financial management of the Iranian government during the several years of the late Shah's reign with the object of accounting for and repossessing the nation's claimed lost wealth wherever it may be located throughout the world. For the reasons stated, that relief cannot properly be afforded by a New York forum with little if any nexus to the controversy and the taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its subject matter to the State of New York is so ephemeral. *Id.* at 483.

This case is the reverse of *Pahlavi* on this score. New York is the only forum in which Plaintiffs *can* hope to obtain appropriate relief. As explained throughout this brief, only in New York can Plaintiffs (i) sue all the Defendants in one place – which

is of particular importance given that this is a conspiracy case, (ii) benefit from the HEAR Act's provisions relating to statutes of limitations and other time-based defenses, (iii) a obtain a trial on the merits, (iv) obtain appropriate discovery from all parties – which is also of particular importance given that this is a fraud case in which information has been concealed from Plaintiffs, (v) compel the testimony of all parties and third party witnesses, (vi) benefit from laws that strongly recognize the rights of owners of stolen artwork, and (vii) obtain restitution of the Painting through any rights Christie's may have to undo the sale under its sales agreement. In addition, unlike *Pavlavi*, this case directly challenges transactions that took place in New York and involved Plaintiffs' stolen property and misrepresentations to the New York buying public.

The Court in *Pahlavi* also took note of other powerful reasons for dismissal, noting:

> the possibility that [the court's] judgment may be ineffectual because of its inability to impose a constructive trust on defendant's assets if they are not in New York. Moreover, 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. Indeed, plaintiff's counsel conceded on oral argument that ideally the action should be maintained in Iran but contended that New York was the better forum. *Id.* at 482.

None of these factors is present here.

Even in establishing an exception under the extraordinary circumstances in *Pahlavi*, this Court carefully made clear that the absence of an adequate alternative

forum is not a factor that can simply be shunted aside as an inconvenient impediment to dismissal. It took pains to say that "the existence of a suitable alternative forum is a *most important factor* to be considered in applying the *forum non conveniens* doctrine, *Id.* at 483; emphasis added. Here, as discussed below, it is an even more important factor than in the usual case because of the strong public interest in providing a forum for Holocaust victims like Plaintiffs to obtain an adjudication of their claims.

While this case bears no resemblance to *Pahlavi*, it is similar in important ways to another *forum non conveniens* decision of this Court, *Varkonyi v. S. A. Empresa De Viacao Airea Rio Grandense (Varig),* 22 N.Y.2d 333, 239 N.E.2d 542 (1968). In *Varkonyi*, this Court held that it was an error of law for the Appellate Division to dismiss the case on *forum non conveniens grounds* without considering the "special and unusual circumstances" presented by the case – even where the case was between non-residents and (unlike this case) had no nexus to New York. *Id.* at 338. One of those special circumstances was the absence of an alternative forum.

Varkonyi was a wrongful death claim arising out of an airplane crash in Lima, Peru. The parties were located in different parts of the world: the plaintiffs' decedents were citizens of Hungary, the United Kingdom and Mexico. The facts of the case had no relationship to New York. The Appellate Division had held that "neither the unavailability of another forum in which both of the moving defendants

could be joined nor the 'convenience of plaintiffs and their counsel' were sufficient factors to justify burdening our courts with these suits." *Id.* at 337. But this Court reversed, saying:

> Among the pertinent factors to be considered and weighed, in applying the doctrine of Forum non conveniens, are, on the one hand, the burden on the New York courts and the extent of any hardship to the defendant that prosecution of the suit would entail and, on the other, such matters as *the unavailability elsewhere of a forum in which the plaintiff may obtain effective redress* and the extent to which the plaintiff's interests may otherwise be properly served by pursuing his claim in this State… We held in the Taylor case (309 N.Y., at p. 636, 132 N.E.2d at p. 879) that, where 'there are special and unusual circumstances' favoring acceptance of a suit between nonresident parties based on an out-of-state tort, *it is error of law for the Appellate Division to exclude consideration of such circumstances in deciding whether to exercise its discretion in favor of accepting or of rejecting jurisdiction.* Similarly, in the cases before us, the special circumstances mentioned by Special Term*, particularly the absence of any other forum in which both of the moving defendants could be joined,* were factors which the Appellate Division was bound to take into account in exercising its discretion. In view of its disregard of these factors, its order cannot stand and the matter should be remitted to the Appellate Division for further consideration. *Id.* at 338; citations omitted; emphasis added.

Thus *Varkonyi* stands for the proposition that the absence of an adequate alternative forum may justify denying a *forum non conveniens* motion even where there is no other justification for bringing the case in New York. This case is *a fortitori* from *Varkonyi* – but more compelling in two ways. First, this case does have a New York nexus: it arises out of New York transactions, including a public auction of the Painting in New York based on false representations made to the New York buying public, and it is brought against two New York defendants, Christie's

and UBS Global. Second, here, there is not only the absence of any other forum in which all the moving defendants could be joined, but the absence of any other forum in which Plaintiffs could obtain the relief it seeks against any of them.

The Appellate Division should have applied *Varkonyi* and held that the absence of an adequate alternative forum mandates the denial of the motions, rather than using *Pahlavi* as a justification to slam the door on Plaintiffs. In addition, as set forth below, this case has other special circumstances that would require denial of the motions to dismiss, even if an alternate forum were available.

POINT III

The Appellate Division Erred As A Matter of Law By Failing to Consider the Public Policies That Mandate A Denial of the Motion

Apart from the unavailability of an adequate alternative forum, *Varkonyi's* admonition that it was an error of law for the Appellate Division to dismiss this case without considering the "special and unusual circumstances" applies to another unique factor in this case: significant policy considerations, recognized by Congress in the HEAR Act and by many decisions of New York courts, that strongly favor providing a merits determination and remedy to the victims of Nazi looting.[6]

[6] In *Varkonyi*, one judge, who concurred with the need to take into account the special circumstances, but dissented on the grounds that those circumstances had been established so the case need not be remanded for further consideration, specifically stated that special circumstances include "the interests of justice *or other significant policy considerations* [that] warrant the retention of jurisdiction." *Id*. at 676–77; emphasis added.

A. The HEAR Act

The purpose of the HEAR Act, Pub.L. 114-308, 130 Stat 1524, passed in December 2016, was to "ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner." (Sec. 3(2)). In particular, it seeks "to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties." (Sec. 2(5), quoting the Terezin Declaration issued in 2009 by the Holocaust Era Assets Conference in Prague). The statute applies to any "civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution." (Sec. 5(a)).

This is such a claim. Plaintiffs here seek to recover the Painting and, if this case is allowed to proceed in New York, may well succeed in doing so. Christie's form agreements for consigning works of art to auctions for sale contain rescission clauses which give an auction house broad discretion to undo an art sale – even years after the transaction – where there are questions of title that could pose a risk of liability. (R-480). Thus, Christie's may have a right to compel the buyer at the auction to return the Painting for delivery to Plaintiffs, its true owners, and a judgment of a New York court could compel Christie's to exercise that right.

The HEAR Act extends the statute of limitations in cases like this until six years following a claimant's discovery of "the identity and location" of the stolen artwork or of the claimant's interest in that artwork. (Sec. 5(a)). The motion court here said, after receiving supplemental briefing on the effect of the statute (enacted while the motions to dismiss were *sub judice*) that it "cannot find that the HEAR Act may not revive plaintiffs' causes of action against Christie's for aiding and abetting breach of fiduciary duty and conversion." (R–38).

However, the motion court gave no weight to the policies underlying the HEAR Act when it considered Defendants' motions to dismiss on *forum non conveniens* grounds, and the Appellate Division affirmed the motion court's finding without mentioning the HEAR Act at all. In this, the courts took too narrow a view of the policies underlying the federal statute. As held in *Reif v. Nagy*, 61 Misc. 3d 319 (Sup Ct. NY 2018), *aff'd as modified*, 175 A.D.3d 107 (1st Dep't. 2019), *leave to appeal dismissed*, 35 N.Y.3d 986, 148 N.E.3d 540 (2020):

> The HEAR Act compels us to help return Nazi-looted art to its heirs (HR Rep Vol 162, No 176, at H7332 [Dec. 7, 2016]) ("This legislation will help restore artwork and heritage stolen by the Nazis during the Holocaust to the rightful owners or heirs.").

See also, Maestracci v. Helly Nahmad Gallery, Inc., 155 A.D.3d 401, 404, 63 N.Y.S.3d 376 (1st Dep't 2017) (applying the HEAR Act).

To preclude Plaintiffs from proceeding here and relegate them to a forum in which the statute of limitations or other time-based defenses and obstacles are

permitted – and have already been raised – undermines the purpose of Congress in enacting the statute. Indeed, the D.C. Circuit emphasized in ***Philipp v. Fed. Republic of Germany***, 894 F.3d 406, 418 (D.C. Cir. 2018), *cert. denied,* No. 19-520, 2020 WL 3578682 (U.S. July 2, 2020), and *cert. granted,* No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020), that "the United States has repeatedly made clear that it *favors"* domestic litigation of Nazi-era art-looting claims, and then expressly noted that Congress, in the HEAR Act, "recently extended statutes of limitation for Nazi-era art-looting claims." (Emphasis in original).

B. <u>New York Public Policies</u>

The courts below also abused their discretion by failing to take account of the public policies of this State. New York decisions recognize the strong public interest in providing justice to victims of the Holocaust. *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605, 625 (Sup. Ct. 2018), *aff'd*, 169 A.D.3d 580, 95 N.Y.S.3d 62 (2019). *See also*, *Menzel v. List*, 49 Misc.2d 300, 315, 267 N.Y.S.2d 804 (Sup. Ct. NY 1966), *modified*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dep't 1967), *reversed on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742 (1969) (applying both New York and federal law to correct injustice to plaintiffs occasioned by Nazi pillage and plunder).

It is also a part of New York public policy to protect the integrity of the preeminent New York art market and provide remedies to the victims of stolen

artworks. In *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 320, 569 N.E.2d 426 (1991), this Court held that New York, as a matter of public policy, strongly protects the claims of the rightful owners of stolen art:

> [O]ur decision today is in part influenced by our recognition that New York enjoys a worldwide reputation as a preeminent cultural center. To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art.[7]

By contrast, Switzerland, in the words of the Second Circuit, places "significant hurdles to the recovery of stolen art, and almost 'insurmountable' obstacles to the recovery of artwork stolen by the Nazis from Jews and others during World War II and the years preceding it." *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010). In the instant case, involving a gross fraud perpetrated on victims of Nazi looting by trusted bankers, their agents and co-conspirators, it was an abuse of discretion to send this case to the home forum of the bankers, a forum long recognized as being hostile to such claims.

As *Varkonyi* made clear, in considering a *forum non conveniens* motion, the Appellate Division was required to take these important public policies into account and its failure to even consider them is error as a matter of law. Moreover, we submit

[7] This Court further noted that in implementing its ruling, it was appropriate for the lower court to consider the arguments directed to the "conscience of the court and its ability to bring equitable considerations to bear in the ultimate disposition of the painting." 77 N.Y.2d at 311. This ability to appeal to the conscience of the court and equitable considerations is another important right that is available to Plaintiffs in New York.

that their impact on this case is so determinative, that dismissal of this case in the face of the policies underlying the HEAR Act and New York's own public policies to correct the injustice faced by victims of the Holocaust and in preventing the trafficking in stolen art would be an error of law and/or an abuse of discretion.

POINT IV

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

Plaintiffs demonstrated in Points II and III above that this is not a garden-variety *forum non conveniens* case. The absence of an adequate alternative forum and the presence of important public policy concerns require denial of the motions to dismiss. But even if those factors were not present – even if this were a garden-variety *forum non conveniens* case – the courts below abused their discretion in dismissing it. In a case growing out of events in New York, Switzerland, Germany, France and Japan, with parties from New York, Connecticut, Switzerland, Australia, Chile and the Netherlands, no forum will be perfect or perfectly convenient, but here there is clearly no basis for nullifying Plaintiffs' choice of forum.

A. The Standard

It is well established that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed," *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), cited approvingly by this Court in *Varkonyi v. S. A. Empresa De Viacao Airea Rio*

Grandense (Varig), 22 N.Y.2d 333, 341-42, 239 N.E.2d 542 (*concurring in part*) (1968) and *Bata v. Bata*, 304 N.Y. 51, 56, 105 N.E.2d 623, 626 (1952). The burden of proof to establish that the forum chosen by plaintiff is inappropriate rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation. *Pahlavi*, 62 N.Y.2d at 478–79. That burden is a "heavy" one, *Banco Ambrosiano, S.P.A. v. Artoc Bank & Tr. Ltd.*, 62 N.Y.2d 65, 74, 464 N.E.2d 432 (1984), even where the plaintiffs are non-residents. *Travelers Cas. & Sur. Co. v. Honeywell Int'l Inc.*, 48 A.D.3d 225, 226, 851 N.Y.S.2d 426 (1st Dep't 2008); *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286, 810 N.Y.S.2d 172 (1st Dep't 2006).

! Among the factors that this Court has identified that are to be considered and weighed in applying the doctrine are:

> on the one hand, the burden on the New York courts and the extent of any hardship to the defendant that prosecution of the suit would entail and, on the other, such matters as the unavailability elsewhere of a forum in which the plaintiff may obtain effective redress and the extent to which the plaintiff's interests may otherwise be properly served by pursuing his claim in this State.

Varkonyi, 22 N.Y.2d at 338; *Pahlavi*, 62 N.Y.2d at 478–79.[8] While "[n]o one factor is controlling," "the existence of a suitable alternative forum is a most important

[8] In addition, "the court may also consider that both parties to the action are nonresidents…and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction." *Id.;* citations omitted.

factor." *Pahlavi*, 62 N.Y.2d at 478–79. Ultimately, "[t]he rule rests upon justice, fairness and convenience." *Id.*

B. <u>The Analysis of the Courts Below Was Fatally Flawed</u>

Here, the Appellate Division's analysis failed on all counts. It improperly placed the burden of proof on Plaintiffs, dismissed the fact that there is no other jurisdiction in which Plaintiffs can bring their claim, never even considered the important policy interests mandating that the action be retained, ignored the strong New York nexus, uncritically accepted Defendants' unsubstantiated claims regarding the scope of the proceeding and the location of witnesses and documents and deprived Plaintiffs of justice and fairness.

What appeared to be the most significant factor to both the motion court and the Appellate Division was the perceived need for a determination of Plaintiffs and the Foundation's "competing claims" of heirship under foreign law. The motion court, seemingly taken aback by some perhaps too-scholarly ("opaque" and "abstruse," in the court's words (R–30)) presentations from the parties' experts, found that "a forum non conveniens dismissal is strongly supported by the need to apply the laws of three foreign jurisdictions." (R–30). The Appellate Division, similarly, held that "[t]he burden on the New York court in applying Swiss and French estate law … is significant." (R–929).

The most glaring fallacy in this analysis is that there are no "competing claims" of heirship between Plaintiffs and the Foundation to be determined – here or anywhere else. As discussed above, during the pendency of these motions, the only legal claim of heirship held by the Foundation – the Partial German COI – was nullified on the basis that the Foundation was not and could not be the heir to Norbert's reversionary interest. (It never had any claim of being an heir to Margaret.) Indeed, since the cancellation, the Foundation has not challenged that ruling anywhere, and it never asserted a claim in the pending Swiss proceeding seeking a determination that it is an heir. Nor has the Foundation articulated any remaining basis whatsoever for any claim that it is an heir of Margaret's at all, much less point to any reason why it could possibly have a claim greater than that of Plaintiffs, Margaret's family. Indeed, the Foundation obtained the German Partial COI in the first place only by falsely claiming that Margaret and/or her father had no natural heirs (even though UBS's own files contained communications with family members). Thus, Plaintiffs are the only party to this proceeding who hold certificates of inheritance legally declaring them as Margaret's heirs, which give them both the standing and the right to bring this claim. *Maestracci v. Helly Nahmad*

Gallery, Inc., 155 A.D.3d 401, 63 N.Y.S.3d 376 (1st Dep't 2017); *Schoeps v. Andrew Lloyd Webber Art Found.*, 66 A.D.3d 137, 884 N.Y.S.2d 396 (2009).[9]

Moreover, it is undisputed that no one is challenging the French COI in the Swiss action or elsewhere. (R-31). Thus, no matter what happens in the Swiss proceedings, Plaintiffs will still be legal heirs under the French COI and entitled to all the rights conferred by it – including the right to bring this claim. (R-486, 492-493). Accordingly, nothing that happens in the Swiss proceeding will impact the viability of Plaintiffs' claims or pose any risk of "conflicting rulings. (R-493). No "abstruse"or "opaque" analysis of foreign law on these issues will be required.

While preoccupied with supposed issues of foreign law, both courts below failed to mention that the key issues in this case will be governed by New York law. This includes Christie's conduct in conspiring with the Foundation Defendants from New York, its investigation obligations governing the restitution transactions (including whether conscious avoidance of knowledge is the equivalent of participation in a fraudulent scheme), the burdens of proof and obligations relating to the sale of a stolen Painting in New York, the consequences of falsely telling the bidders at the New York auction that the sale of the Painting was pursuant to an

[9] The fact that a French (or German or Swiss) COI may be subsequently challenged under certain circumstances cannot be a basis to preclude Plaintiffs from proceeding based on the status and rights actually conferred on them. Their certificate is not now being challenged anywhere. If the theoretical possibility of a future challenge were a bar to enforcement, no one would ever be able to assert rights under the heirship documents of those countries.

agreement with "the heirs of Ludwig and Margret Kainer,"[10] and the right to retrieve the Painting from the buyer. It also includes the issues relating to the HEAR Act and statute of limitations which provide additional rights to Plaintiffs in New York. The New York law issues relating to the conspiracy between the Foundation Defendants and Christie's which lies at the heart of the case will require far more analysis than any legitimate issues of foreign law.

At a minimum, even accepting the premise of the courts below that the laws of Switzerland, Germany and perhaps France must also be considered, *any* court that adjudicates this dispute would have to apply the law of two or three foreign jurisdictions. Shifting this burden from one court to another does not advance the ends of "justice, fairness and convenience" that the doctrine of *forum non conveniens* is designed to serve. *Pahlavi*, 62 N.Y.2d at 478–79.

The courts below gave short shrift to *forum non conveniens* factors other than the applicable law, but the Appellate Division mentioned the location of the Foundation Defendants and the location of witnesses and documents in Switzerland

[10] The challenged representation – that the work was being "offered pursuant to a restitution settlement agreement with the heirs of Ludwig and Margret Kainer in 2009" (R-169-170) – had to mean that it was either (i) free of claims of *all* the Kainer heirs, or (ii) free of all claims of the Kainer heirs with *all the rights to Painting*. Otherwise the Painting would not have been marketable. Since Plaintiffs are also heirs and they received no restitution, that representation was false. It was that false representation, as Plaintiffs allege, that is at the heart of the scheme alleged here that purportedly legitimized the Foundation's status as the sole heir, permitted the sales of the Painting and made it more difficult, if not impossible, for Plaintiffs to ever recover it.

and Germany. The Appellate Division, however, simply accepted Defendants' exaggerated and vigorously disputed claims as to the scope of discovery, which witnesses and documents would be relevant, and what the relevant contacts were. (*See* R–928). And the Appellate Division completely ignored the fact that the most significant evidence is in New York: at Christie's, whose files and employees are critical to finding out what actually happened in the most significant – and mystifying – chapter of the case, the events of 2009, in which Christie's orchestrated a series of deals leading to the New York sale of the Painting for more than $10 million. (*See* pp. 12-13 above.) Moreover, when necessary witnesses and documents are located outside New York, the CPLR provides efficient and effective means of reaching them. No comparable procedures are available in Switzerland.

The Appellate Division gave no weight to Plaintiffs' convenience. Plaintiffs are all individuals and are widely dispersed. One is American, living close to New York. One lives in the Netherlands. The others live in Australia and Chile. It is true that all but one are distant from New York – but none is anywhere near the Swiss courthouse in Lausanne, and the court may take judicial notice that New York City is a more accessible destination than Lausanne, even for Chileans and Australians. The closest Plaintiff to Lausanne, Hernan Labbe Gruenberg, lives a ten-hour drive from the Lausanne courthouse.

While referring to "the potential hardships to the defendants of litigating in New York," (R–930), the Appellate Division did not mention the obvious fact that no forum could be more convenient than New York for Christie's. As for the Foundation Defendants, there can be no doubt that they will find Switzerland convenient, but the "hardships" they will suffer from traveling to New York will not be severe. UBS (which controls all the Foundation Defendants) not only has New York City offices – it has a large building named after it in that city. It would be surprising if its executives were not there frequently.

There is yet another important factor that the Appellate Division failed to discuss. The consequence of the *forum non conveniens* dismissal as against the Foundation Defendants and the retention of the case against Christie's is (i) a bifurcation of a conspiracy claim, and (ii) a need for two separate trials. The fact that dismissal would necessitate two trials litigating the same case against different defendants is, by itself, a reason to deny a *forum non convienens* motion. As the court stated in *F.D. Imp. & Exp. Corp. v. M/V Reefer Sun*, No. 02 CIV. 2936 SAS, 2003 WL 21396658, at *5 (S.D.N.Y. June 17, 2003), *modified on reconsideration,* No. 02 CIV 2936 SAS, 2003 WL 21512065 (S.D.N.Y. July 1, 2003):

> [L]itigating the case in two different courts presents a practical problem. Any final resolution would be difficult, time-consuming, and costly. Duplicative litigation in both Italy and Ecuador would be a waste of judicial resources and very expensive for F.D. Import. It is

> unlikely that nonparty witnesses would be willing to testify to the same facts at two trials, especially if they must travel to both Italy and Ecuador. Even if the witnesses were willing, the parties would have to pay for them to travel twice. It would be much more convenient and expeditious to have a single trial in a single forum.[11]

Argonaut P'ship, L.P. v. Bankers Tr. Co., No. 96 CIV. 1970 (MBM), 1997 WL 45521, at *19 (S.D.N.Y. Feb. 4, 1997) ["one trial here will be more efficient than two trials in separate countries"]. Indeed, in *Perkow v. Frank W. Winne & Sons, Inc.*, 36 A.D.3d 1189, 1190–91, 828 N.Y.S.2d 687, 689 (3d Dep't 2007), the Third Department, in refusing to grant a *forum non conveniens* motion that would require separate trials in New York and Pennsylvania, noted that New York "has an important stake in according full relief to those who must litigate here and in the shared interests of the several states in seeking the most efficient resolution of legal controversies." *See, Diamond v. Papreka*, 7 Misc. 3d 1006(A), 801 N.Y.S.2d 232 (Sup. Ct. Kings 2005) (refusing to sever plaintiff's causes of action for three separate trials in three counties on change of venue motion relating to separate pieces of property under dispute on the grounds that it would be "an unwarranted

[11] After denying the motion primarily based on its conclusion that the plaintiff "would be required to litigate separate actions in Italy and Ecuador" and "[t]his Court is the only forum where the entire case can be tried, thereby avoiding duplicative litigation," the Court granted reconsideration and granted the motion because it had overlooked a critical fact: prior to its order the defendants had *all agreed* to submit to a single alternative forum in either Italy or Ecuador. *F.D. Imp. & Exp. Corp. v. M/V Reefer Sun*, No. 02 CIV.2936 SAS, 2003 WL 21512065, at *1 (S.D.N.Y. July 1, 2003). Thus, it held "the practical problem of litigating the case in two different courts is obviated." *Id.* at *3. Obviously, that is not the case here.!

inconvenience, pose the threat of inconsistent verdicts and further neither the economy nor the interests of justice").

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

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

See, Globalvest Mgmt. Co. L.P. v. Citibank, N.A., 7 Misc. 3d 1023(A), 801 N.Y.S.2d 234 (Sup. Ct. NY 2005) (holding that the likely inability of a party to compel critical witnesses to testify in New York will unfairly prejudice a party's ability to present its case); *Weinberger v. S. A. Empresa De Viacao Airea Rio Grandense (Varig)*, 52 Misc.2d 357, 359, 275 N.Y.S.2d 453 (Sup. Ct. NY 1966) (holding that it is vital to have all possible defendants present, as otherwise each defendant may point to the

other as being responsible and essential witnesses may be beyond the process of the court).

In sum, in this multi-national case, there is no perfect forum, but the balance, even considering only the usual *forum non conveniens* factors, tips toward New York. At a minimum, the balance does not tip so far toward Switzerland that it justifies rejecting Plaintiffs' choice of forum. And when the special factors discussed in Points II and III above – the absence of an adequate alternative forum and the relevant public policies – are considered, the case for leaving Plaintiffs' choice of forum undisturbed is overwhelming.

POINT V

The Appropriate Corrective Action is Denial of the Motions to Dismiss

As shown above, the Appellate Division's failure to consider the public policy and other special considerations favoring the retention of jurisdiction are clear errors of law requiring reversal, and the other relevant considerations point largely in the same direction. On this record, considering that the burden rests on the party seeking dismissal, we submit that this is not a case in which dismissal could result from a sound exercise of discretion in light of all the relevant factors. For the reasons set forth above, only retention of this case can serve the goals of justice and fairness underlying the *forum non conveniens* doctrine.

This case has now been pending for seven years, during which two of the Plaintiffs have died. Every further day of delay diminishes the chance that the Painting will ever be recovered – including the increasing risk that, in reliance on Christie's false representations that the Painting was restituted and marketable, the Painting may disappear into the stream of commerce and be lost to Plaintiffs once again. Accordingly, this is one of those rare cases in which this Court should hold, as a matter of law, that dismissal on *forum non conveniens* grounds should be denied.

POINT VI

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

In the event that the Court does not hold that a *forum non conveniens* dismissal must be denied as a matter of law and, instead, decides to remand the case, Plaintiffs argue in the alternative that the lower courts erred in failing to determine jurisdiction before granting dismissal on the ground of *forum non conveniens.*

In *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 579, 404 N.E.2d 726 (1980), this Court explicitly held that the doctrine of *forum non conveniens* "has no application unless the court has obtained in personam jurisdiction of the parties." The First Department, citing to this Court's ruling in the *Ehrlich-Bober* case, has even long acknowledged that this is the rule. *See*, *Caribbean Const. Servs. & Associates, Inc. v. Zurich Ins. Co.*, 244 A.D.2d 156, 665 N.Y.S.2d 266 (1st Dep't 1997) ("The issue of inconvenient forum should not be addressed until it has first

been decided that jurisdiction exists (*cf., Ehrlich–Bober & Co. v. University of Houston,* 49 N.Y.2d 574, 579, 427 N.Y.S.2d 604, 404 N.E.2d 726)").[12]

Inexplicably, however, in this case the Appellate Division did not follow this rule, but instead held that "[t]he motion court properly dismissed this action on forum non conveniens grounds without first determining whether it had personal jurisdiction over all the defendants." (R-927). To do so, it ignored *Ehrlich-Bober*, as well as its own precedent, and instead chose to rely on *Sinochem Intl.Co. Ltd. v. Malaysia Intl. Shipping Corp*., 549 US 422, 127 S. Ct. 1184, 167 L.Ed.2d 15 (2007), a case deciding a question of federal law, which it deemed to be "persuasive authority." (R-927). That case held that it was permissible, under limited circumstances, for a Court to dismiss on *forum non conveniens* grounds before determining whether it has jurisdiction.

It is axiomatic that the Appellate Division must apply binding precedent of this Court and cannot choose not to do so on the grounds that some other law is more

[12] The First Department has repeatedly reiterated this rule – even at late as when this case was *sub judice* before the motion court. *See e.g., Prime Properties USA 2011, LLC v. Richardson*, 145 A.D.3d 525, 525, 44 N.Y.S.3d 18, 20 (2016); *Flame S.A. v. Worldlink Int'l (Holding) Ltd.*, 107 A.D.3d 436, 437, 967 N.Y.S.2d 328, 330 (1st Dep't 2013); *Wyser-Pratte Mgmt. Co. v. Babcock Borsig AG*, 23 A.D.3d 269, 808 N.Y.S.2d 3 (1st Dep't 2005); *Edelman v. Taittinger, S.A.*, 298 A.D.2d 301, 751 N.Y.S.2d 171 (1st Dep't 2002). There is also a long line of cases in which every other Appellate Division department has followed this rule. *Sanchez v. Major,* 289 A.D.2d 320, 734 N.Y.S.2d 211 (2d Dep't 2001); *I.F.S. Int'l, Inc. v. S.L.M. Software, Inc.,* 174 A.D.2d 811, 570 N.Y.S.2d 745 (3d Dep't 1991); *Cliffstar Corp. v. California Foods Corp*., 254 A.D.2d 760, 761, 677 N.Y.S.2d 864 (4th Dep't 1998).

persuasive. *Ehrlich-Bober* is the law of New York, and neither the motion court nor the Appellate Division should have considered, much less granted, Defendants' *forum non conveniens* motions before deciding whether they had jurisdiction over Defendants.

But that is what those courts did. Not only did they decide the *forum non conveniens* motions; they decided them incorrectly, as Plaintiffs have explained in this brief. And in doing so the lower courts have presented Plaintiffs and this Court with a practical problem.

It would be inappropriate and unfair, we respectfully submit, simply to invoke the *Ehrlich-Bober* rule now and and send this case back for jurisdictional discovery, without any review of the lower courts' erroneous *forum non conveniens* rulings. That would mean that the errors in those rulings would remain uncorrected during jurisdictional discovery, briefing and argument on jurisdictional issues, and possible appeals of any ruling on jurisdiction. And, after all that, if the Foundation Defendants were held subject to jurisdiction, Defendants would presumably renew their *forum non conveniens* motions and say to the lower courts, in effect: "You already decided this. Just reinstate your old decisions dismissing the case." If the lower courts accept that invitation, it could be several years before this Court has an opportunity to correct the lower courts' errors. To put this case, already seven years old, in limbo for that time would do no party any good, but it would be especially burdensome for

Plaintiffs. As mentioned, two Plaintiffs have died during the pendency of this case, and the others are not growing younger.

Plaintiffs ask the Court not to create this Catch-22 situation, and Plaintiffs expressly abandon reliance on *Ehrlich-Bober* to the extent that it could lead to the result we have described. Rather, we ask the Court to review the lower courts' *forum non conveniens* holdings, to reverse the order of the Appellate Division, and to deny the motions to dismiss. To the extent, however, that the Court does not deny the *forum non conveniens* motions, the *Ehrlich-Bober* rule should be applied. The Court should remand the case with the direction that further proceedings on the *forum non conveniens* motions be stayed until jurisdictional issues have been decided.

CONCLUSION

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

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October 8, 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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