To be Argued by:
MARSHALL R. KING
(Time Requested: 15 Minutes)

APL-2020-00090
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 DEFENDANTS-RESPONDENTS

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Date Completed: November 20, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f), Defendants-Respondents state the following:

The parent company of UBS AG is UBS Group AG, a publicly traded corporation.

UBS AG further states that as of December 31, 2019, it has the following significant or otherwise material direct or indirect subsidiaries:

- UBS Americas Holdings LLC
- UBS Asset Management AG
- UBS Americas Inc.
- UBS Bank USA
- UBS Europe SE
- UBS Financial Services Inc.
- UBS Securities LLC
- UBS Switzerland AG
- UBS Asset Management (Hong Kong) Limited
- UBS Asset Management (Japan) Ltd
- UBS Asset Management Life Ltd
- UBS Asset Management Switzerland AG
- UBS Business Solutions US LLC
- UBS Credit Corp.
- UBS (France) S.A.
- UBS Fund Advisor, L.L.C.
- UBS Fund Management (Luxembourg) S.A.
- UBS Fund Management (Switzerland) AG
- UBS (Monaco) S.A.
- UBS Realty Investors LLC
- UBS Securities (Thailand) Ltd
- UBS Securities Australia Ltd
- UBS Securities Japan Co., Ltd.
- UBS Securities Pte. Ltd.

UBS Global Asset Management (Americas), Inc., now known as UBS Asset Management (Americas), Inc., is a subsidiary of UBS Americas Inc., which is itself a subsidiary of UBS AG.

Norbert Stiftung is a foundation, not a corporation or other business entity. It has no parents, subsidiaries, or affiliates.

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PRELIMINARY STATEMENT

This case concerns contested claims to property from the estate of Margaret Kainer, a Jewish woman who was forced to abandon her home and possessions in Germany in the 1930s and later resided in Switzerland and France. Plaintiffs-Appellants claim to be Kainer's heirs and brought this action alleging that certain Defendants engaged in a decades-long effort to deny Plaintiffs recognition as rightful heirs in order to vest ownership of Kainer's assets in Defendant-Respondent Norbert Stiftung, a Swiss foundation located in Switzerland (the "Foundation"). Plaintiffs' allegations of wrongdoing arise from events that occurred in Switzerland, Germany, and France over a period of forty years. The *sole* connection Plaintiffs' claims have to New York is that one piece of art that was allegedly part of Kainer's estate—an 1896 painting by Edgar Degas (the "Painting")—was ultimately sold at auction by Defendant Christie's Inc. ("Christie's") in New York in 2009.

Plaintiffs' case is a textbook case for dismissal on *forum non conveniens* grounds: The key witnesses and documents are in Switzerland and Germany; Plaintiffs are simultaneously pursuing litigation in Switzerland regarding the same events and assets; none of the Plaintiffs resides in New York; this case will require the court presiding over it to interpret complicated (and potentially conflicting) issues of Swiss, French, and German law; and it would be difficult from a practical standpoint (if not impossible) for Defendants, most of whom are not subject to

personal jurisdiction in New York, to effectively litigate this case in New York. Above all, Plaintiffs' case does not have the requisite "substantial nexus" to New York, and that is especially true regarding the claims against Defendants-Respondents UBS AG, UBS Global Asset Management (Americas), Inc. (together with UBS AG, "UBS" or the "UBS Defendants"), the Foundation, and Edgar Kircher, the Foundation's trustee, all of which hinge on conduct that occurred in Germany and Switzerland.

In a 32-page opinion, the motion court painstakingly applied the proper *forum non conveniens* factors, applying the law to found facts, and dismissed this case in its sound discretion. The Appellate Division affirmed in full, agreeing with the motion court's factual findings—including that Defendants had made a "strong showing" that Plaintiffs had multiple alternative forums available to them in which to litigate their claims—and the motion court's application of the law on every factor relevant to a *forum non conveniens* analysis.

With this appeal, Plaintiffs do not deny that application of the *forum non conveniens* doctrine is a matter conferred to the lower courts' sound discretion. Opening Br. at 24. Nor do they deny that merely challenging the lower courts' balancing of the *forum non conveniens* factors, or arguing that they failed to give dispositive weight to certain factors, does not justify disturbing the lower courts' determinations. *See, e.g.*, *Brooke Grp. v. JCH Syndicate 488*, 87 N.Y.2d 530, 535

(1996). Instead, although Plaintiffs challenge the lower courts' application of the relevant factors, the bulk of Plaintiffs' brief tries to conjure up legal errors for this Court to review. Each of those arguments fails. Plaintiffs misconstrue the record, the reasoning of the lower courts, and this Court's precedent. The Appellate Division should be affirmed in full.

First, Plaintiffs argue that the Appellate Division dismissed Plaintiffs' claims without determining that an adequate alternative forum exists. This argument is wrong on the facts and the law. As to the facts, the Appellate Division expressly affirmed Supreme Court's factual findings that there are *at least three* possible alternative forums available to Plaintiffs. R930. As to the law, even had the lower courts not found those forums available, this Court expressly held in *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1984), that the absence of an alternative forum is not a *per se* bar to dismissing an action on *forum non conveniens* grounds. Plaintiffs proffer no legitimate reason whatsoever to justify ignoring that settled precedent.

Second, Plaintiffs suggest that the Appellate Division ruled without considering various public policies that Plaintiffs contend are embedded within the federal Holocaust Expropriated Art Recovery ("HEAR") Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (codified as amended at 22 U.S.C. § 1621 (2016)), and New York case law. But the Appellate Division made clear that it considered all of

Plaintiffs' contentions and found them "unavailing," R932, and it denied Plaintiffs' motion for reargument, which contended that the court had ignored the HEAR Act, R924. Moreover, the HEAR Act applies only to claims seeking the return of stolen property—not to the claims Plaintiffs advance against Defendants here: tort claims for monetary damages, rather than the return of the Painting, which no named Defendant is alleged to possess. More broadly, neither the HEAR Act nor the state public policies Plaintiffs cite somehow eliminates a court's discretion to dismiss based on the doctrine of *forum non conveniens*. As this Court explained in *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros.*, 23 N.Y.3d 129, 137 (2014), even compelling state policies do not "trump" the other *forum non conveniens* factors or mandate retention of a case that has little-to-no nexus with New York.

Third, Plaintiffs argue that the lower courts erred by dismissing this case based on *forum non conveniens* without first determining that they had personal jurisdiction over each of the Defendants. Although Plaintiffs featured this argument prominently in their motion for leave to appeal and in the lower courts, they now assert it as an afterthought and in the alternative, arguing that this Court should reach this issue *only* if the Court otherwise declines to hold that the lower courts abused their discretion in applying the *forum non conveniens* doctrine to the facts of this case. Bait-and-switch aside, Plaintiffs fail to establish that the Appellate Division's

approach was contrary to law. Applying the reasoning of Justice Ginsburg's unanimous opinion for the United States Supreme Court in *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), the Appellate Division recognized that a mandatory order of operations requiring a court to first wade through potentially difficult questions of personal jurisdiction (and possibly extensive jurisdictional discovery) before considering and dismissing on the basis of *forum non conveniens* would burden New York courts and parties with unnecessary expense and cause significant delay, all to no meaningful purpose. R927-28. Contrary to Plaintiffs' contentions, no decision of this Court requires that rigid approach. This Court should reaffirm that trial courts in this State have the same "leeway" that federal courts have "'to choose among threshold grounds for denying audience to a case on the merits.'" *Sinochem*, 549 U.S. at 431 (citations omitted). Plaintiffs offer no basis in law or policy to adopt a rule to the contrary.

In sum, the lower courts properly exercised their discretion in dismissing this action on *forum non conveniens* grounds. They carefully, thoroughly, and thoughtfully applied the flexible factors this Court has long articulated as relevant to the facts of the case and held that this case has at best a tenuous connection to New York State and that there are multiple available alternative forums. This Court should affirm.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Issue 1: Whether the Appellate Division abused its discretion in holding that Plaintiffs' claims against Defendants-Respondents should be dismissed on the ground of *forum non conveniens*, where those claims arise from events that occurred in Europe over the course of four decades and will require the court to apply the law of at least three foreign jurisdictions, where the relevant documents and witnesses are located primarily in Switzerland, where Plaintiffs have already commenced related litigation in Switzerland, and where no Plaintiff resides in New York.

Answer: No. After considering the relevant factors—including the burden on the court and the parties, the availability of an alternative forum, the applicable law, the location of witnesses and documents, public policy, and the lack of any substantial nexus between Plaintiffs' claims and New York—the Appellate Division properly exercised its discretion in affirming Supreme Court's dismissal on *forum non conveniens* grounds.

Issue 2: Whether the Appellate Division correctly held that the motion court was entitled to dismiss Plaintiffs' claims against Defendants-Respondents on *forum non conveniens* grounds without first deciding whether it had personal jurisdiction over each of those Defendants.

Answer: Yes. Adopting Justice Ginsburg's persuasive decision for a unanimous U.S. Supreme Court in *Sinochem*, the Appellate Division properly

affirmed the motion court's determination that it could dismiss Plaintiffs' claims under the *forum non conveniens* doctrine without definitively ascertaining its own jurisdiction where, as here, the issue of personal jurisdiction is more complicated to resolve than the straightforward application of the *forum non conveniens* doctrine.

COUNTERSTATEMENT OF FACTS

I. Plaintiffs' Action

The alleged wrongdoing at the heart of Plaintiffs' case is that the Foundation and UBS AG allegedly misappropriated the assets of the estate of Margaret Kainer, a woman who resided in Germany, Switzerland, and France and whose family property was stolen by the Nazis during the 1930s.[1] Plaintiffs allege that, after Kainer's death in 1968, the Swiss administrator of her estate failed to conduct a proper search for her heirs; that the Foundation improperly gained recognition from Swiss and German courts and governmental authorities as the rightful heir to her estate; and that, more than forty years later, the Foundation was unjustly compensated in exchange for disclaiming an interest in a painting by Edgar Degas that was privately sold in Japan. R24, R142-44, R153-71. Christie's later sold the Painting at auction in New York. R24, R142, R169.

Plaintiffs' complaint sets forth a complicated narrative beginning in the 1920s, when Kainer's father, Norbert Levy, set out his last will in Germany. R153-54. According to Plaintiffs, Levy established a "Swiss Family Foundation" to provide

[1] Plaintiffs' complaint frequently fails to distinguish among the actions of each of the separate Defendants-Respondents, improperly lumping them together as the "Foundation Defendants." R141. While Defendants-Respondents object to that approach and contend that it fails to adequately state a claim against each such Defendant, the distinction among the Defendants is not determinative on this appeal.

for his heirs upon his passing. R154. Because Levy "had a longstanding confidential relationship with UBS," Levy required that at least one member of the board of trustees of his Swiss Family Foundation also "be a director of UBS." *Id*. Plaintiffs further assert that Kainer was the "sole heir" of Levy's estate when he died in 1928 and that she owned more than 400 artworks, including the Painting, that were wrongfully seized by the Nazis and sold off at auction in 1935. R155.

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

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

in violation of Swiss law and Levy's intentions as set out in his will;[2] and, in 1972, "falsely asserted to a German court that Margaret had no heirs and then presented the [new] Foundation as the purported heir of Norbert, claiming three-quarters of his estate that rightfully belonged to Margaret's heirs." R158-61.

Plaintiffs then describe how the Swiss Canton of Vaud and the City of Pully (the "Swiss Localities") obtained a certificate of inheritance from a Swiss court designating them as Kainer's sole legal heirs, and then entered into an allegedly "collusive" settlement with the Foundation in 2005 in which the participants divvied up Kainer's estate among themselves. R162-63; *see* Opening Br. at 9-11. According to Plaintiffs, notwithstanding the various certificates of inheritance issued in Germany and Switzerland to others, they alone are Kainer's "lawful heirs, heirs of her heirs, or their executors." R156.

Although Plaintiffs' opening brief in this Court studiously avoids noting where the relevant events occurred, Plaintiffs' allegations arise almost exclusively from events that occurred in Europe. *See* R142-44, R153-63. This dispute therefore raises many issues requiring the application of foreign law. For instance, based on Plaintiffs' allegations, to resolve this action, a court will have to determine: (a) whether "French substantive law governs the disposition of [Kainer's] estate"

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

(R156); (b) whether the Swiss Family Foundation created by Levy in 1927 "ceased to exist by operation of [Swiss] law in the mid-1940's" or in 1968 (R156; *see also* R159); (c) whether a provision of Levy's will was "invalid under German law from the moment it was signed" or became invalid in 1958 pursuant to other provisions of German estate law (R156); (d) whether a French *acte notarial* establishes Plaintiffs as Kainer's "lawful heirs" "[u]nder French law" (R163; *see also* R156); (e) whether the issuance of a certificate of partial inheritance by a German court in 1972 was based on statements "falsely asserted to [the] German court" (R160-61); (f) whether UBS owed fiduciary duties to Plaintiffs under Swiss law because Levy or Kainer "during [their] lifetime[s] . . . entrusted UBS to manage [their] assets" (R172); (g) whether the Foundation and Kircher owed fiduciary duties to Plaintiffs under Swiss law because "Plaintiffs were the intended beneficiaries" of Levy, Kainer, and the Swiss Family Foundation (R173); and (h) whether actions Defendants took in Switzerland and Germany over several decades breached any such fiduciary duties. Similarly, all of the documentary evidence relevant to these issues is located in Switzerland or Germany and written in French or German, and all of the key witnesses relevant to the claims against the UBS Defendants, the Foundation, and Kircher—including many non-party witnesses who were the key actors in the tale recounted by Plaintiffs—reside in Switzerland. R191, R193-95, R197-98, R643, R646-47.

The only actions alleged to have taken place in New York are: (1) "Christie's solicitation and facilitation of the Restitution Settlement Agreement," which resulted in the ultimate disclaimer of the Foundation's rights to the Painting, allowing it to be sold privately in Japan; and (2) the subsequent sale of the Painting at a "public auction at Christie's in New York." R145-46, R166.[3] But the 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.

II. Procedural History

Plaintiffs filed this action in the Supreme Court for New York County against all Defendants other than Christie's on January 3, 2013. R603. Plaintiffs twice amended their complaint and now assert claims against the UBS Defendants, the Foundation, and Kircher for breach of fiduciary duty, an accounting, conversion, unjust enrichment, and conspiracy to obtain unjust enrichment. R172, R175, R177, R179, R181. Except for their accounting claim, Plaintiffs seek only money damages and no other form of relief from Defendants. R173-75, R178-80, R183. In their

[3] Neither UBS Defendant is alleged to have done anything in connection with either the Restitution Settlement Agreement or the sale of the Painting at Christie's. *See* R164-71.

final cause of action, Plaintiffs assert a claim for replevin—but only against "John Doe, a possessor of [the P]ainting." R183. Plaintiffs do not allege that any existing Defendant has possession of the Painting.

Days after filing this case, the same 11 Plaintiffs—residents of Australia, Chile, Great Britain, and Connecticut (R27)—brought two cases in Switzerland regarding the Kainer estate (together, the "Swiss Litigation"). *See* R488, R649; *see also* R654.[4] In the Swiss Litigation, Plaintiffs claim that the Foundation, together with the Swiss Localities, improperly appropriated Kainer's assets. R655. There, Plaintiffs seek as relief "all of the property and/or assets originating from the estate of the deceased Margaret Kainer" or "the amounts that these parties unjustly enriched themselves with" (R655, R658)—which, if Plaintiffs' allegations are accepted, includes the Painting. Plaintiffs also seek "a determination as to the validity or the inapplicability of reversionary heirship mentioned in Norbert Levy's last will" and to invalidate the Swiss Localities' Swiss certificate of inheritance. R489. The Swiss Litigation is pending in the Chambre Patrimoniale Cantonale in Lausanne, Switzerland. R118, R654.

On December 19, 2014, after Plaintiffs twice amended their complaint and added Christie's as a defendant, Defendants moved to dismiss. R101, R636, R798.

[4] Plaintiffs now reside in Australia, Chile, the Netherlands, and Massachusetts. Opening Br. at 14.

Defendants each argued that the motion court should dismiss on *forum non conveniens* grounds. R214-24, R735-36, R805-07. UBS AG, the Foundation, and Kircher further challenged the assertion of personal jurisdiction over them, and UBS Global Asset Management argued that Plaintiffs failed to state a claim against it. R224-33, R736-40.[5]

In a decision and order dated October 30, 2017, Supreme Court (Friedman, J.) dismissed the action on *forum non conveniens* grounds. R39, R41. It first found that "a court 'presuming, without deciding jurisdiction,' may address the issue of whether the action should be dismissed on [] *forum non conveniens* ground[s]." R19-20. The court then considered the *forum non conveniens* factors, including the residencies of the parties and Defendants' "strong showing . . . that a suitable alternative forum exists" in Switzerland, as well as the "extremely difficult task [the] court would face in ascertaining and applying foreign law." R27, R29, R33-34, R39. Ultimately, the court concluded that Plaintiffs' claims lack a substantial nexus to New York and exercised its discretion to dismiss the claims against UBS, the Foundation, and Kircher. R34. The court stayed certain claims against Christie's with leave to restore if a European court determines that (1) Plaintiffs are Kainer's lawful heirs with rights to the Painting and (2) the Foundation is not also a legitimate

[5] Christie's additionally moved to dismiss for failure to state a claim and on the basis of the statute of limitations. R798-99.

heir or lacked the authority to enter into the Restitution Settlement Agreement. R35, R40.

On August 6, 2019, a panel of the Appellate Division, First Department, unanimously affirmed. R926. The Appellate Division concluded that the *forum non conveniens* "factors clearly demonstrate that New York is an inconvenient forum" because: (a) "Plaintiffs' rights as heirs to the painting arose in Germany and France"; (b) the "burden on the New York court in applying Swiss and French estate law" would be "significant"; (c) the "potential hardships to the defendants of litigating in New York are clear"; (d) "many relevant nonparty witnesses and documents are located in Switzerland and Germany, and UBS would be powerless to compel their attendance in New York"; and (e) "Switzerland appears to be an available alternative forum" and "France and Germany also may be possible alternatives." R929-30. The Appellate Division noted that Plaintiffs seek an order in the Swiss Litigation that all assets originating from Kainer's estate (including the Painting) be returned to them, and that a New York court would also need to decide the issue of ownership in this case, raising the "risk of conflicting rulings." R930-31 (explaining that Plaintiffs' "French certificates of inheritance . . . do not conclusively resolve the question" of ownership). The Appellate Division further held that the "motion court properly dismissed this action on forum non conveniens grounds without first determining whether it had personal jurisdiction over all the

defendants." R927-28. Finally, the Appellate Division noted that it had "considered plaintiffs' remaining contentions and f[ou]nd them unavailing." R932.

On November 14, 2019, the Appellate Division denied Plaintiffs' motion for reargument or, in the alternative, for leave to appeal to this Court after "due deliberation having been had thereon." R924.

On June 23, 2020, this Court granted Plaintiffs' motion for leave to appeal as against UBS, the Foundation, and Kircher. R923. This Court denied Plaintiffs' motion insofar as it sought leave to appeal against Christie's, holding that "the order sought to be appealed from does not finally determine the action as to [Christie's] within the meaning of the Constitution." *Id.*

ARGUMENT

This Court should affirm the Appellate Division's decision in its entirety. The lower courts properly exercised their broad discretion in applying the flexible *forum non conveniens* doctrine to the facts of this case, and the alleged legal errors Plaintiffs assert in this Court are either expressly foreclosed by this Court's precedent or are otherwise just plain wrong. Similarly, Plaintiffs' assertion that the lower courts erred in failing to undertake a potentially complex and burdensome assessment of whether the motion court has personal jurisdiction before the court could dismiss on *forum non conveniens* grounds lacks merit. As the unanimous U.S.

Supreme Court explained in *Sinochem*, such a rigid order of operations is neither required nor sensible. This Court should affirm in full.

I. The Lower Courts Properly Exercised Their Discretion In Dismissing This Case Under The *Forum Non Conveniens* Doctrine

Under the *forum non conveniens* doctrine, a court may dismiss a case "lacking a substantial nexus with New York." *Martin v. Mieth*, 35 N.Y.2d 414, 418 (1974). The *forum non conveniens* doctrine is flexible and involves consideration of various factors, including "the burden on the New York courts, the potential hardship to the defendant[s], [] the unavailability of an alternative forum in which plaintiff may bring suit[, . . .] that both parties to the action are nonresidents[,] and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction." *Pahlavi*, 62 N.Y.2d at 479. A court may dismiss a case if, after "balancing the interests and conveniences of the parties and the court," it determines that the case "could better be adjudicated in another forum." *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 360 (1972); *see also* CPLR 327(a) (authorizing dismissal if "court finds that in the interest of substantial justice the action should be heard in another forum").

"Whether to dismiss an action on the ground of *forum non conveniens* is a matter of discretion." *Belachew v. Michael*, 59 N.Y.2d 1004, 1006-07 (1983); *see Mollendo Equip. Co. v. Sekisan Trading Co.*, 43 N.Y.2d 916, 917 (1978) ("[T]he Appellate Division has been granted considerable discretion in this area."). Unless

the Appellate Division's decision to affirm a dismissal on *forum non conveniens* grounds was "premised on errors of law," this Court reviews that decision "only to decide whether discretion has been abused." *Mashreqbank*, 23 N.Y.3d at 137; *see also Irrigation & Indus. Dev. Corp. v. Indag S.A.*, 37 N.Y.2d 522, 525 (1975) (This Court "will not ordinarily interfere with the Appellate Division's exercise of discretion."). Complaints that the Appellate Division incorrectly balanced the various *forum non conveniens* factors, or failed to give dispositive weight to certain factors, do not permit a disturbance of the Appellate Division's discretionary decision. *See, e.g.*, *Brooke*, 87 N.Y.2d at 535; *Westwood Assocs. v. Deluxe Gen., Inc.*, 53 N.Y.2d 618, 619 (1981).

Here, Plaintiffs offer no reason why this Court should "substitute" its judgment for the Appellate Division's "evaluation of the weight to be attached to [the *forum non conveniens*] factors, singly or in combination." *Hadjioannou v. Avramides*, 40 N.Y.2d 929, 931 (1976). In fact, Plaintiffs admit that the lower courts considered the various factors "normally considered on a *forum non conveniens* motion." Opening Br. at 3. Plaintiffs simply complain that the lower courts "failed to correctly evaluate" those factors or to assign dispositive weight to facts (or asserted facts) that Plaintiffs contend require litigation in New York. *Id.* Plaintiffs also complain that the Appellate Division "improperly placed the burden of proof on Plaintiffs," *id.* at 37, by which they apparently mean that the Appellate Division

did not blindly accept their mischaracterizations of the record and that the result of the Appellate Division's thoughtful balancing did not favor Plaintiffs, *see* R929-32.

Here, as they did below, Plaintiffs try to reframe their case as merely about the sale of the Painting in 2009. But Plaintiffs cannot escape the fact that the gravamen of their 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 that. Despite Plaintiffs' protestations, the lower courts properly exercised their discretion in holding that each of the *forum non conveniens* factors weighs heavily in favor of dismissal here. *First*, trying this case in New York would substantially burden the New York courts, particularly given the complexity of this action and the need to apply numerous bodies of foreign law and address potential conflicts among foreign laws. *Second*, forcing Defendants to defend this action in New York would cause substantial hardship; almost all relevant documents and key witnesses are located abroad, and discovery of evidence pertaining to foreign activities over *decades* will be substantially burdensome. *Third*, Plaintiffs have numerous alternative, adequate forums available to them in Germany, France, or Switzerland and have even launched parallel proceedings in Switzerland to litigate related claims. *Fourth*, almost none of the parties reside in New York, a factor that weighs heavily in favor of dismissal. *Fifth*, this case lacks any substantial nexus with New York where the

central alleged misconduct stems from events that occurred outside the United States and will be governed by Swiss, German, and/or French law. *See Pahlavi*, 62 N.Y.2d at 478-79. In short, Plaintiffs do not establish that the lower courts incorrectly analyzed or weighed any factor, much less that they abused their "considerable" discretion in dismissing Plaintiffs' claims. *Mollendo*, 43 N.Y.2d at 918. This Court should affirm.

A. Trying This Case In New York Would Substantially Burden The New York Courts

Whether foreign law governs is an "important consideration" in determining whether an action will substantially burden New York courts and therefore whether the action should be dismissed on *forum non conveniens* grounds. *Shin-Etsu Chem. Co. v. ICICI Bank Ltd.*, 9 A.D.3d 171, 178 (1st Dep't 2004); *see Peters v. Peters*, 101 A.D.3d 403, 403 (1st Dep't 2012) (affirming dismissal of claims against UBS AG in part because "Swiss law would apply to the claims"). Indeed, the "*mere likelihood* that foreign law will apply weighs in favor of dismissal." *Cavlam Bus. Ltd. v. Certain Underwriters at Lloyd's, London*, 2009 WL 667272, at *8 (S.D.N.Y. Mar. 16, 2009) (emphasis added); *see First Union Nat'l Bank v. Paribas*, 135 F. Supp. 2d 443, 453-54 (S.D.N.Y. 2001) (granting *forum non conveniens* dismissal where there was "at least a possibility that th[e] Court would be obliged to apply English law to at least part of the dispute").

As both lower courts recognized, resolving this case would require New York courts to interpret and apply the law of multiple foreign jurisdictions. R29, R929-30. Specifically, the court would have to interpret and apply "at best, opaque" Swiss, German, and French laws and resolve potential conflicts among them—an "extremely difficult task." R29-30.[6] Plaintiffs' allegations that Levy's will was partially "invalid under German law" (R156), and that the Swiss Family Foundation "dissolved in or around 1944 for lack of funds" or in 1968 upon Kainer's death (R159), will necessarily require the application of German and Swiss law. Plaintiffs also contend that French law governs the underlying question of whether they are the proper heirs to Kainer's estate. R29, R656-57.

In addition, Plaintiffs' claims against Defendants-Respondents, which are premised on Defendants' roles in the conduct leading to the alleged misappropriation of Kainer's assets, are likely governed by Swiss contract and tort laws. *See* R118-22, R172-73. Because Switzerland is where the relevant relationships were centered and where Defendants' alleged conduct took place, Switzerland has "the greatest interest in regulating behavior within its borders," and Swiss law would therefore apply. *Atsco Ltd. v. Swanson*, 29 A.D.3d 465, 466 (1st Dep't 2006) (quoting *Cooney*

[6] Plaintiffs suggest that the motion court was simply "taken aback" by the "perhaps too-scholarly" presentations by the parties' experts on the relevant foreign laws, Opening Br. at 38, but nowhere do Plaintiffs suggest that applying those laws would be simple or would not require expert testimony.

v. Osgood Mach., 81 N.Y.2d 66, 72 (1993)); *see Kashef v. BNP Paribas SA*, 442 F. Supp. 3d 809, 819-21 (S.D.N.Y. 2020) (finding Swiss law governed tort claims because "the bulk of tortious conduct" occurred there); *Corporacion Tim, S.A. v. Schumacher*, 418 F. Supp. 2d 529, 533 (S.D.N.Y. 2006) (finding Dominican Republic law would likely govern breach of fiduciary duty and other tort claims where "the predominant contacts of the parties and the underlying events occurred in the Dominican Republic").

Plaintiffs argue that there are no real competing claims of heirship to the Painting and suggest that their French *acte notarial* obviates the need for any analysis of foreign law. Opening Br. at 39-40; R30-31. Not so. As the Appellate Division explained, the *acte notarial* "merely confer[s] standing to sue, and do[es] not conclusively resolve the question, in Switzerland or New York, of whether the Foundation has rights to the painting." R931-32 (citing *Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401, 403-04 (1st Dep't 2017)); *see also* Opening Br. at 39 (arguing only that the *acte notarial* gives Plaintiffs "the standing . . . to bring this claim"). Plaintiffs' single-minded focus on the validity of the *acte notarial* "ignores that [Plaintiffs and the Foundation have] assert[ed] competing claims to an ownership interest in the Painting, and that these claims must be determined, under the applicable foreign laws, in order to determine whether the Foundation

wrongfully entered into the Restitution Settlement Agreement and wrongfully received the proceeds from the sale of the Painting." R31.[7]

Even if Plaintiffs were correct that "there are no 'competing claims' of heirship between Plaintiffs and the Foundation," Opening Br. at 39, Plaintiffs do not dispute that Swiss law would govern the bulk of Plaintiffs' claims against UBS, the Foundation, and Kircher. Indeed, Plaintiffs contend that "key issues in this case will be governed by New York law" but discuss only "Christie's conduct," which relates at most to Plaintiffs' conspiracy claim. Opening Br. at 40-41. As alleged in Plaintiffs' own complaint, all of UBS's alleged actions took place in Europe—allegations Plaintiffs either downplay or ignore outright.

Plaintiffs also suggest that New York courts must retain jurisdiction here because "*any* court that adjudicates this dispute would have to apply the law of two or three foreign jurisdictions." Opening Br. at 41. This argument ignores uncontroverted evidence that disentangling and applying the relevant Swiss, German, and French laws would be less burdensome for a Swiss court than for a

[7] Plaintiffs erroneously attribute to the lower courts the (allegedly fallacious) view that there are "'competing claims' of heirship" between Plaintiffs and the Foundation. Opening Br. at 38-39. In fact, what the motion court said was that there were "competing claims to an ownership interest in the Painting"—which is undeniably true, regardless of whether the Foundation claims to be Kainer's heir. R31. In any event, Plaintiffs are wrong because the Foundation's interest in the Painting arose, at least in part, through its settlement with the Swiss Localities, and the Swiss Localities do assert a "competing claim" to Kainer's heirship. R161-63, R655-68.

New York court unversed in European law. *See* R110-11 ("German and French law, in particular, are applied by Swiss courts basically as a matter of course, normally without the need of expert witnesses.").

Even setting aside the need to apply foreign law, conducting discovery and trying this case here would be onerous for the court and the parties. The parties would have to translate extensive documentary evidence written in German or French. R195, R646; *see Troni v. Banca Popolare Di Milano*, 129 A.D.2d 502, 503-04 (1st Dep't 1987) (affirming dismissal in part due to "the need to translate documents from a foreign language"). And, critically, as the Appellate Division recognized and as Plaintiffs do not dispute, much of the relevant documentary evidence and many party and nonparty witnesses are located abroad. R930; *see Irrigation & Indus. Dev. Corp.*, 37 N.Y.2d at 526; *see also infra* Section I.B. To the extent there are any relevant witnesses or documents in New York, they would relate only to "the events of 2009" (*i.e.*, the auction of the Painting by Christie's) and not to the prior forty years of alleged wrongdoing in Europe on which Plaintiffs' claims depend. Opening Br. at 42. And Plaintiffs could obtain any relevant evidence located in New York for use in Switzerland through an application under 28 U.S.C. § 1782, which authorizes federal courts to order testimony or production of documents by U.S. residents "for use in a proceeding in a foreign or international tribunal."

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

As the Appellate Division recognized, "[t]he potential hardships to the defendants of litigating in New York are clear." R930. UBS AG, the Foundation, and Kircher all reside in Switzerland. And because the relevant witnesses and documents are located in Switzerland and Germany and most pertinent evidence is outside the control of New York courts, litigating this case in New York would severely impede the defense. *See Pahlavi*, 62 N.Y.2d at 482.

Defendants would be hamstrung in presenting live witness testimony. Plaintiffs' complaint identified certain individuals allegedly employed by UBS and involved in the underlying events in Germany and Switzerland—including Defendant Kircher, Eric Külling, Albert Genner, Theophil von Sprecher, and Mario Simmen. *See, e.g.*, R155, R157-63, R619-21. Of these individuals, only Kircher was a UBS AG employee when the complaint was filed. The others are no longer employed by UBS, and those who are alive reside in Switzerland. R191, R193-95, R197-98. As a practical matter, UBS could not require any of the relevant non-party witnesses to appear in New York, and the New York courts would be unable to compel their presence. *See* N.Y. Judiciary Law § 2-b(1) (authorizing courts only to "issue a subpoena requiring the attendance of *a person found in the state* to testify" (emphasis added)); *Wiseman v. Am. Motors Sales Corp*., 103 A.D.2d 230, 234 (2d Dep't 1984) ("[S]ervice of a subpoena on a nonparty witness outside this State is

void because no authorization for such service exists."); *Peterson v. Spartan Indus.*, 40 A.D.2d 807, 807-08 (1st Dep't 1972) (holding "out-of-State service of . . . subpoenas on a nonresident was unauthorized and void").[8]

In addition, Swiss bank privacy and criminal laws restrict the disclosure of information located on Swiss soil in connection with non-Swiss proceedings. R123-26; *see also Peters v. Peters*, 2011 WL 11076564, at *9 (Sup. Ct. N.Y. Cty. July 12, 2011) (discussing "the conflict between New York discovery practices and Swiss bank secrecy laws, which could involve litigation in the Swiss courts anyway and subject the witnesses to criminal penalties if they responded without authorization by a Swiss court"). These restrictions would affect both the taking of oral testimony from witnesses located in Switzerland and the production of documents located in Switzerland. And as Plaintiffs' own expert on Swiss law explained, Switzerland is a signatory state to the 1970 Hague Evidence Convention, meaning that "any discovery from Switzerland in connection with a US action would have to proceed by a Letter of Request." R500. Such procedures would be cumbersome, at best.

On appeal, Plaintiffs continue to ignore all of these legal and practical limitations. Instead, they suggest that "traveling to New York" to litigate this case

[8] Plaintiffs themselves acknowledge the critical importance of presenting live testimony from witnesses at trial. Opening Br. at 45. Yet the only non-party witnesses mentioned by name in the complaint are located in Switzerland, and Plaintiffs failed to identify even a single witness who is located in New York. R194-95.

will not impose "severe" hardships on the Foundation or UBS AG because UBS "has New York City offices" and "[i]t would be surprising if its executives were not there frequently." Opening Br. at 43. But the Appellate Division explicitly acknowledged that "UBS has a New York office." R930. It exercised its broad discretion to conclude that this fact alone does not render the *forum non conveniens* doctrine inapplicable where, as here, none of Plaintiffs' allegations relate to UBS's presence in New York (or any other U.S. state) and most relevant witnesses and documents are located abroad, are beyond Defendants' control, and might be unobtainable for use in U.S. litigation because of Swiss bank secrecy laws. *See, e.g.*, *Peters*, 2011 WL 11076564, at *9 (finding hardship to defendant UBS AG weighed in favor of *forum non conveniens* dismissal where "virtually all of the non-party witnesses [were] in Switzerland," seven of the UBS AG witnesses were alleged to have worked in Switzerland, and "nearly all of the documentary evidence" was in Switzerland); *see also Shin-Etsu*, 9 A.D.3d at 180 (reversing denial of motion to dismiss case against banking institution on *forum non conveniens* grounds); *Neuter Ltd. v. Citibank*, 239 A.D.2d 213, 213 (1st Dep't 1997) (same).

C. Switzerland Provides An Adequate Alternative Forum For Plaintiffs' Claims

Although the lack of an adequate alternative forum does not preclude a *forum non conveniens* dismissal, *see infra* Section II.A, as both Supreme Court found and the Appellate Division affirmed, there are multiple adequate alternative forums here:

Switzerland, where Plaintiffs themselves already initiated proceedings that implicate their alleged rights to the assets of Kainer's estate, as well as Germany and France. *See* R33-34 (motion court describing Defendants' "strong showing . . . that a suitable alternative forum exists"); R930 (Appellate Division holding that "Switzerland appears to be an available alternative forum" and that "France and Germany also may be possible alternatives"). Plaintiffs offer no basis as to how this Court can reject these affirmed factual findings, which are fully supported in the record. *See, e.g.*, *Congel v. Malfitano*, 31 N.Y.3d 272, 293-94 (2018). Plaintiffs' efforts to manufacture a purported error of law in the lower courts' analysis are equally unavailing. *See infra* Section II.A.

Tellingly, Plaintiffs *admit* that they are pursuing the Foundation in Switzerland—where Kircher resides (R643), where UBS AG is incorporated and headquartered (R136), and where UBS Global Asset Management has consented to jurisdiction (R221).[9] And Plaintiffs do not point to anything in the record to show they cannot bring in Switzerland the claims they are attempting to bring against the

[9] Plaintiffs suggest that UBS Global Asset Management will not consent to jurisdiction in Switzerland. Opening Br. at 20. That is incorrect; UBS Global Asset Management has represented that it will consent to jurisdiction in Switzerland if necessary. R221. And even if, contrary to the evidence presented below, R111-17, the Swiss court refused to accept jurisdiction over it, there is no need for UBS Global Asset Management to appear as a defendant in Switzerland because Plaintiffs allege no wrongdoing (or any other conduct) by that entity.

UBS Defendants, the Foundation, and Kircher in New York. *See Flame S.A. v. Worldlink Int'l (Holding) Ltd.*, 107 A.D.3d 436, 438 (1st Dep't 2013) ("[T]he burden of demonstrating that [no alternative forum is available] . . . fall[s] on plaintiff." (alterations in original) (quoting *Pahlavi*, 62 N.Y.2d at 481)); *see also Travelers Indem. Co. v. S/S Alca*, 713 F. Supp. 129, 132 (S.D.N.Y. 1989) ("The burden of demonstrating that no alternative forums are available . . . falls upon plaintiffs."). Indeed, Switzerland has a greater interest than New York in hearing those claims in part because it is the domicile and residence of the majority of the parties to this case "and the place where the allegedly [wrongful] conduct occurred." *Mashreqbank*, 23 N.Y.3d at 138.

Plaintiffs' parallel proceedings in Switzerland weigh strongly in favor of dismissal. "The significance of the action pending before the [Swiss] courts is not limited to the obvious availability of [that] forum"—"[i]t presents the attendant risk that conflicting rulings might be issued" and "involves the duplication of effort." *World Point Trading PTE v. Credito Italiano*, 225 A.D.2d 153, 161 (1st Dep't 1996); *see Mashreqbank*, 23 N.Y.3d at 139 (dismissing for *forum non conveniens* where alternative forums were available and there were "a number of related investigations or litigations pending in several foreign countries"); *Datwani v. Datwani*, 121 A.D.3d 449, 449 (1st Dep't 2014) (affirming dismissal in favor of litigating in India, where several other actions were pending).

Plaintiffs insist that Switzerland is not an adequate alternative forum primarily because the existing Swiss Litigation (allegedly) will not determine the Foundation's inheritance rights. Opening Br. at 18-19. That argument misses the mark for at least two reasons. *First*, the Swiss Litigation *will* determine Plaintiffs' "status *and rights* as heirs, which overlap with the claims that must be determined in this action." R27 (emphasis added). Regardless of who is or is not technically an "heir," the Swiss Litigation will determine what "rights" the parties possess—*i.e.*, "whether, and to what extent, [Plaintiffs] have an ownership interest in the Painting" (R33)—which is the critical issue that overlaps with the claims asserted by Plaintiffs in this action. Plaintiffs have asked the Swiss court to find that they are the "sole heirs" to the Kainer estate and have the right to recover "all of the property and/or assets originating from the [Kainer] estate"—which, assuming Plaintiffs' allegations are true, includes the Painting. R27-28; *see also* R490-91, R655-58.

Second, Plaintiffs' argument incorrectly conflates the adequacy of the *forum* with the adequacy of *proceedings already pending* in that forum. *See* Opening Br. at 18 (arguing the particular Swiss "Proceeding[s]" are not adequate alternative forums). The adequacy of an alternative forum does not depend on whether there is an existing case that will adjudicate the exact claims at issue or provide all requested relief. The relevant inquiry is whether Plaintiffs *could* bring in Switzerland the claims they attempt to bring against UBS, the Foundation, and Kircher in New

York—and Plaintiffs have not shown that they are unable to do so. In other words, dismissal on *forum non conveniens* grounds would be warranted here even if there were no other actions currently pending in Switzerland or if the Swiss Litigation fails to resolve the competing claims to the Painting. *See* R33 ("Plaintiffs have not shown . . . that there is not an available alternative forum for determination of these rights, in the event the pending Swiss proceedings prove inadequate for resolution of all these issues.").

Plaintiffs also suggest that Switzerland is an inadequate forum because claims they asserted there against the Foundation and the Swiss Localities may be subject to certain affirmative defenses. Opening Br. at 18-19. But Plaintiffs make no showing that the affirmative defenses asserted by the Foundation or Swiss Localities will be successful—much less that their distinct claims for breach of fiduciary duty, an accounting, conversion, unjust enrichment, and conspiracy to obtain unjust enrichment against the UBS Defendants, the Foundation, and Kircher would be barred if asserted in Switzerland. Indeed, Plaintiffs presented no evidence whatsoever to the motion court regarding the applicable statutes of limitations for such claims.

Finally, Plaintiffs claim that a Swiss court will be unable to order the return of the Painting because Christie's may not be subject to jurisdiction in Switzerland. Opening Br. at 20-21 (speculating that Christie's "may" have the right to compel the

return of the Painting from its buyer). But Christie's is no longer part of this appeal (R923), Plaintiffs do not assert their replevin claim against Christie's or any other named Defendant (R183), and Plaintiffs will not be precluded from pursuing Christie's in New York in the event Plaintiffs receive a favorable ruling in Europe, because the motion court has only stayed the claims against Christie's and those claims are subject to restoration (R35, R40).

D. The Parties' Residencies Weigh In Favor of Dismissal

That no Plaintiff resides in New York strongly weighs in favor of dismissal. As the lower courts described, and as Plaintiffs admit, "[n]o plaintiffs [in this case] reside in New York." R927; *see* R27. "Plaintiffs are scattered in countries around the globe," including Australia, Chile, and the Netherlands. Opening Br. at 3; *id.* at 42 (acknowledging that Plaintiffs "are widely dispersed" and "all but one are distant from New York"); *id*. at 14. The lower courts did not abuse their discretion by recognizing that this fact counsels in favor of *forum non conveniens* dismissal. R27; *see, e.g.*, *Phat Tan Nguyen v. Banque Indosuez*, 19 A.D.3d 292, 294 (1st Dep't 2005) (reversing denial of *forum non conveniens* dismissal and finding a "barely discernible" connection to New York where "[o]nly one of seven named plaintiffs live[d] in New York"); *see also, e.g.*, *Mensah v. Moxley*, 235 A.D.2d 910, 911 (3d Dep't 1997) (finding it the foreign plaintiff's "burden to demonstrate that special circumstances existed warranting retention of the case in New York").

As for Defendants, neither the Foundation nor Kircher are (or have ever been) residents of New York. R643, R645-46. The Foundation has no New York office or any employees or agents in New York. R646. Kircher resides in Switzerland, was employed by UBS AG in Switzerland when the complaint was filed, and has never maintained an office in New York. R643. That there are UBS offices in New York does not warrant litigating the case here: All of the allegations about UBS AG concern conduct that occurred overseas and will require proof that is located overseas, and Plaintiffs do not allege that UBS Global Asset Management did anything at all—much less anything wrongful. *See supra* Section I.B; *Neuter*, 239 A.D.2d at 213 (dismissing for *forum non conveniens* even though defendant was headquartered in New York because alleged misconduct occurred in defendant's Zurich branch). That Christie's is headquartered in New York does not negate that its auction of the Painting is the only event alleged to have taken place here, and the claims against UBS, the Foundation, and Kircher can proceed independently of the claims against Christie's. *See, e.g.*, *Millicom Int'l Cellular v. Simon*, 247 A.D.2d 223, 223 (1st Dep't 1998).[10] Indeed, Plaintiffs did not add Christie's as a defendant

[10] Plaintiffs complain that the Appellate Division failed to specifically "mention the obvious fact that no forum could be more convenient than New York for Christie's." Opening Br. at 43. But the Appellate Division expressly acknowledged that Christie's is "a New York auction house" that is "incorporated in New York and has a principal place of business in New York City." R927. Ultimately, the court concluded those facts alone did not warrant forcing the Swiss Defendants to litigate this case in New York, and, in any event, the motion

until they filed their Second Amended Complaint—indicating that they, too, believed that such claims could proceed without Christie's. R140, R603.

Plaintiffs claim that the lower courts were required to retain jurisdiction over UBS, the Foundation, and Kircher because dismissal "bifurcat[es]" Plaintiffs' conspiracy claim and creates the "need for two separate trials." Opening Br. at 43. But conspiracy is only one of the numerous claims that Plaintiffs allege against Defendants-Respondents, and Plaintiffs do not explain why that claim—and their other claims—cannot proceed against some of the alleged conspirators in Switzerland without the presence of Christie's.[11] Nor would litigation in Switzerland or another European forum necessarily be "duplicative" or "necessitate two trials" (Opening Br. at 43-44): As the Appellate Division explicitly recognized, "Christie's conduct is at issue *only* if the Foundation is found not to be the sole lawful heir, with authorization to release claims to the painting." R932 n.1 (emphasis added); *see also* CPLR 327(a) (authorizing courts to "stay or dismiss [an] action in whole or in part" based on *forum non conveniens*).

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court stayed any claims against Christie's. R932 (explaining that the *forum non conveniens* factors "favor dismissal against UBS, Kircher, and the Foundation, and a stay of the proceedings against Christie's pending a determination favorable to plaintiffs in the foreign courts").

[11] Plaintiffs' purported concern about the possibility of multiple trials is belied by the fact that they themselves chose to commence separate actions in both New York and Switzerland that arise out of the same factual narrative and seek overlapping relief.

E. There Is No Substantial Nexus With New York

The lower courts properly concluded that this case lacks any substantial nexus with New York. *See* R34; *see also Islamic Republic of Iran v. Pahlavi*, 99 A.D.2d 1009, 1009-10 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 831 (1985); *State of Romania v. Former King Michael*, 212 A.D.2d 422, 423 (1st Dep't 1995). Plaintiffs' allegations are based on more than forty years of events that occurred in Europe. The crux of Plaintiffs' complaint is that UBS allegedly controlled the Foundation for decades through an employee on the Foundation's board of trustees and that UBS and Kircher breached their alleged fiduciary duties to Levy, Kainer, and Plaintiffs. The auction of the Painting at Christie's, following its private sale in Japan, is the only alleged tie to New York—a tie that the Appellate Division explicitly considered and properly rejected as insufficient to establish any substantial nexus with New York. *See* R929 ("Plaintiffs' rights as heirs to the painting arose in Germany and France, although the painting was allegedly wrongfully sold in New York."); *see also, e.g., Millicom*, 247 A.D.2d at 223 (a "single act in New York" not a sufficient nexus to New York). Plaintiffs are simply wrong in contending that the Appellate Division "ignored" this "New York nexus." Opening Br. at 38.

* * *

Plaintiffs invite this Court to re-weigh the *forum non conveniens* factors *de novo* and to substitute its discretion for that of the Appellate Division. Even if that

invitation were appropriate (it is not), Plaintiffs have failed to establish that any factor favors the retention of jurisdiction—let alone that the balance of the *forum non conveniens* factors tips decisively in their favor. This Court should affirm the Appellate Division's valid exercise of discretion.

II. The Lower Courts Did Not Commit Any Legal Error In Their *Forum Non Conveniens* Analysis

Recognizing that they face nearly insurmountable obstacles to demonstrate that the lower courts abused their considerable discretion, Plaintiffs argue that the lower courts made two legal errors. *First*, they claim that the lower courts erred in dismissing this action where no alternative forum is available to Plaintiffs. *Second*, they argue that public policy requires the lower courts to retain this case. Both contentions lack merit.

A. The Appellate Division Correctly Affirmed Supreme Court's Factual Finding That Plaintiffs Had Available Alternative Forums

Plaintiffs first argue that the Appellate Division erred by dismissing this case despite making "no finding that a suitable alternative jurisdiction exists." Opening Br. at 25. Plaintiffs are wrong on both the facts and the law.

Contrary to Plaintiffs' protestations, the Appellate Division properly affirmed Supreme Court's factual finding that Plaintiffs have available to them *multiple* alternative forums in which to litigate their claims. Looking to the factual record before it, Supreme Court concluded that "a *strong* showing is made that a suitable

alternative forum exists" in Switzerland, Germany, and France—all of which have courts that "afford plaintiffs a fair forum and 'adequate process.'" R33 (emphasis added). The Appellate Division affirmed those factual findings, concluding that "Switzerland appears to be an available forum" and that "France and Germany also may be possible alternatives." R930. The Appellate Division reached this conclusion despite expressly acknowledging that the defendants in the Swiss Litigation were seeking dismissal of those proceedings "for lack of jurisdiction and on statute of limitations grounds." R931. As explained above, however, whether or not Plaintiffs' claims in the existing Swiss Litigation are viable does not dictate the adequacy of Switzerland as an alternative forum for the distinct tort claims that Plaintiffs seek to bring against Defendants-Respondents. *See supra* Section I.C. And Plaintiffs—who bore the burden to prove the *lack* of an alternative forum, *Pahlavi*, 62 N.Y.2d at 481—did not even present evidence, much less prove, that any defenses that might be asserted if the present claims in New York were refiled in Switzerland (or France or Germany) would be successful.

Plaintiffs' argument appears to rest on the contention that, despite finding that a "strong showing" of an alternative forum had been made, the motion court did not "*expressly*" find that such a forum existed. Opening Br. at 22 (emphasis added). That hyper-technical parsing of the lower court's language simply ignores the obvious import of the court's opinion in context. *See People v. Walker*, 265 A.D.2d

192, 192 (1st Dep't 1999) (reading lower court's ruling "in context," concluding that "the clear implication . . . is that [the court] accepted" certain testimony); *People v. Hofler*, 64 A.D.2d 656, 657 (2d Dep't 1978) ("[T]he opinion of the [lower] court contains implicit [factual] findings and we sustain them."). Plaintiffs' argument is even more dubious considering that the burden of proof on this issue was on Plaintiffs. *See Travelers Indem. Co.*, 713 F. Supp. at 132. Plainly, the lower courts did *not* "expressly" find that Plaintiffs had met their burden of proving the lack of an adequate alternative forum.

Because there is ample evidence in the record to show that an alternative forum exists, *see supra* Section I.C, this Court should affirm. It is well-established that "[t]his Court is without power to review findings of fact if such findings are supported by evidence in the record." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 391 (1995); Arthur Karger, *Powers of the N.Y. Court of Appeals* § 13.10 (2016) (This Court's "power to review questions of fact . . . does not extend to unreversed findings of fact and . . . such findings are conclusive and binding on the Court if supported by legally sufficient evidence."). Indeed, the undisputed fact that Plaintiffs have actually commenced litigation in these foreign forums is strong evidence in support of the lower courts' factual findings that there are available alternative forums, as numerous courts have held. *See, e.g.*, *Datwani*, 121 A.D.3d at 449; *Sidaoui v. Aboumrad*, 104 A.D.3d 573, 573 (1st Dep't 2013); *Finance & Trading Ltd. v.*

Rhodia S.A., 28 A.D.3d 346, 347 (1st Dep't 2006); *World Point Trading PTE*, 225 A.D.2d at 161; *Former King Michael*, 212 A.D.2d at 423.

Recognizing that "'[i]n a case such as this, with affirmed findings of fact, [this Court's] scope of review is narrow,'" *Congel*, 31 N.Y.3d at 293-94 (quoting *Humphrey v. State*, 60 N.Y.2d 742, 743 (1983)), Plaintiffs try to conjure up a legal question for review by falsely contending that "the Appellate Division dismissed this case even though it made *no finding that a suitable alternative jurisdiction exists*," Opening Br. at 25 (emphasis added). But even if Plaintiffs *had* proven that Switzerland, France, *and* Germany were unavailable alternative forums, Plaintiffs' manufactured claim of legal error is wrong, too. There exists no *per se* rule that the lack of an alternative forum necessitates denial of a motion to dismiss on *forum non conveniens* grounds. And for good reason: The doctrine is "flexible, requiring the balancing of many factors," *Nat'l Bank & Tr. Co. v. Banco de Vizcaya, S.A.*, 72 N.Y.2d 1005, 1007 (1988), rendering *per se* rules particularly inappropriate.

As this Court explained decades ago in *Pahlavi*, although "the availability of another suitable forum is *a* most important factor to be considered[,] . . . we have never held that it was a prerequisite for applying the *conveniens* doctrine." *Pahlavi*, 62 N.Y.2d at 481 (emphasis added). In fact, Plaintiffs' argument on appeal is the exact question this Court considered in *Pahlavi*: whether "the availability of an alternative forum is not merely an additional factor for the court to consider but

constitutes an absolute precondition to dismissal on *conveniens* grounds." *Id.* at 480. Analyzing decades of authority, including U.S. Supreme Court precedent, scholarly treatises, and prior decisions by this Court on this question, *id.* at 480-81, this Court held four decades ago that, although "the availability of an alternative forum [i]s a 'pertinent factor,'" it is not dispositive, *id.* at 481 (citing *Varkonyi v. S.A. Empresa De Viacao Airea Rio Grandense (Varig)*, 22 N.Y.2d 333, 338 (1968)).[12]

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[12] Plaintiffs do not argue that *Pahlavi* should be overruled, nor should it. *See Hinton v. Village of Pulaski*, 33 N.Y.3d 931, 932-33 (2019) ("As the identical question has been long since resolved by this Court, the present case involves the application of settled precedent."). The lower courts have been applying *Pahlavi* for decades, belying Plaintiffs' contention that *Pahlavi* is *sui generis* or limited to its unique facts. Opening Br. at 26; *see, e.g.*, *Primus Pacific Partners 1, LP v. Goldman Sachs Grp.*, 175 A.D.3d 401, 402 (1st Dep't 2019) (affirming dismissal, noting that "[c]ontrary to plaintiff's contention, New York law does not require an alternative forum to be available") (citing *Pahlavi*); *Norex Petroleum Ltd. v. Blavatnik*, 151 A.D.3d 647, 648 (1st Dep't 2017) (affirming dismissal, explaining "[c]ontrary to plaintiff's argument, 'the availability of another suitable forum' is not 'a prerequisite for applying the *conveniens* doctrine'") (quoting *Pahlavi*); *Payne v. Jumeirah Hosp. & Leisure (USA), Inc.*, 83 A.D.3d 518, 518-19 (1st Dep't 2011) ("The action was properly dismissed, even though plaintiff may have no alternative forum.") (citing *Pahlavi*); *Ungar v. Fisher*, 24 A.D.3d 108, 109 (1st Dep't 2005) (holding action "properly dismissed on the ground of forum non conveniens," even though "Quebec's no-fault law effectively deprive[d] [plaintiff] of an alternative forum"); *A & M Exports, Ltd. v. Meridien Int'l Bank, Ltd.*, 207 A.D.2d 741, 742 (1st Dep't 1994) (affirming dismissal despite "plaintiff's contention that Liberia is not a viable alternative forum," and noting that "even if true, [it was] not dispositive given a New York connection that at best [wa]s only marginal") (citing *Pahlavi*); *Manaster v. Northstar Tours Inc.*, 193 A.D.2d 651, 652 (2d Dep't 1993) (affirming dismissal, noting "the availability of another suitable forum is not a prerequisite for applying the conveniens doctrine, nor a precondition to dismissal") (citing *Pahlavi*); *Moezinia v. Moezinia*, 124 A.D.2d 571, 572 (2d Dep't 1986) (affirming dismissal,

Plaintiffs go to great pains trying to distinguish *Pahlavi* on its facts. That merely illustrates that dismissal despite the (alleged) absence of an alternative forum is not legal error, but merely part of the considerable discretion conferred on the lower courts to weigh *all* of the relevant factors in their good judgment. For similar reasons, *Varkonyi*—a case on which Plaintiffs rely—requires only that the lower court "take into account" the availability or unavailability of an alternative forum "in exercising its discretion." 22 N.Y.2d at 338. The alleged lack of an alternative forum—even if Plaintiffs had demonstrated such—does not, contrary to Plaintiffs' contention, "mandate[] the denial of the motions." Opening Br. at 31; *see also supra* Section I.C.

At bottom, the legal question Plaintiffs try to muscle into this case has been asked and answered—and in a manner contrary to the rule for which Plaintiffs advocate. Whether an alternative forum is available is *not* a prerequisite to a trial court's grant of a motion to dismiss on *forum non conveniens* grounds. And even if it were, Supreme Court's factual findings that multiple alternative forums do exist, as affirmed by the Appellate Division, have ample support in the record and therefore should be affirmed. *See, e.g.*, *Congel*, 31 N.Y.3d at 293-94 (discussing this Court's "narrow" review of affirmed factual findings).

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explaining "the fact that an alternate forum may not be available" is "not controlling") (citing *Pahlavi*).

B. Neither The Federal HEAR Act Nor New York Public Policy Mandates Retention Of Jurisdiction In This Case

Plaintiffs next contend that "significant policy considerations," as expressed in the federal HEAR Act and New York case law, require the retention of this case in New York as a matter of law. *See* Opening Br. at 31-36. Plaintiffs are wrong.

As an initial matter, the HEAR Act simply does not guarantee a trial on the merits for every case involving Holocaust-era art claims. By its plain terms, the HEAR Act does not apply to Plaintiffs' claims seeking monetary damages from the named Defendants—none of whom are alleged to possess the Painting. The statute prescribes a six-year limitations period from the time of actual discovery of "the identity and location of the [Nazi-looted] artwork or other property" and the "possessory interest of the claimant" for any "civil claim or cause of action against a defendant *to recover any artwork or other property*." HEAR Act § 5 (emphasis added). The Senate bill for the statute demonstrates that Congress considered—but decided against—applying this new limitations period to claims "for *damages* for the taking or detaining of any artwork or cultural property." S. 2763, 114th Cong. (as reported by S. Comm. on the Judiciary, Sept. 29, 2016) (emphasis added). The text and legislative history of the HEAR Act thus make clear that Congress intentionally declined to extend the statute to cases, such as this one, where claimants seek money damages for the appropriation of artwork or property. *See* Herbert I. Lazerow, *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of*

2016, 51 Int'l Law. 195, 232 (2017) (explaining that HEAR Act "applies to actions to recover property" but not "to actions to recover damages for being deprived of that property"); Emily J. Cunningham, Note, *Justice on the Merits: An Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 69 Case W. Res. L. Rev. 427, 441 (2018) ("[C]laimants may use HEAR only when attempting to recover property from the party in actual possession of the work."); *cf. Reif v. Nagy*, 61 Misc. 3d 319, 324-25 (Sup. Ct. N.Y. Cty. 2018) (finding HEAR Act applied to actions for replevin and conversion against artwork's possessor), *aff'd as modified*, 175 A.D.3d 107 (1st Dep't 2019); *Gowen v. Helly Nahmad Gallery, Inc.*, 60 Misc. 3d 963, 970, 985-87 (Sup. Ct. N.Y. Cty. 2018) (finding HEAR Act applied to an "action seeking the return of the Painting"), *aff'd*, 169 A.D.3d 580 (1st Dep't 2019).[13]

Here, Plaintiffs seek money damages for various torts allegedly committed by Defendants. They do not seek to "recover" the Painting from the named Defendants—nor could they, as Defendants do not possess the Painting. To the extent the complaint sounds in replevin at all, it is only as to certain "John Doe" defendants not party to this appeal. Plaintiffs speculate that they could someday amend their complaint if discovery demonstrates that Christie's has a "right of

[13] *See also Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 197 (2d Cir. 2019) ("'Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.'" (quoting *Russello v. United States*, 464 U.S. 16, 23-24 (1983))).

rescission" to undo the sale of the Painting years later, *see* Opening Br. at 32, but the fact remains that none of the current Defendants are alleged to be in possession of the Painting.[14]

In any event, this Court need not resolve the scope of the HEAR Act[15] because Plaintiffs misstate its relevance to the doctrine of *forum non conveniens*. Even if the HEAR Act applied to Plaintiffs' claims, its sole effect would be to extend the limitations period on those claims—not make those claims immune from a *forum non conveniens* dismissal. In other words, the HEAR Act does not somehow eliminate a court's discretion to dismiss on the basis of *forum non conveniens* when the balance of factors weighs in favor of dismissal.

Plaintiffs argued the relevance of the HEAR Act and its underlying purpose extensively in the Appellate Division, *see* Defendants-Respondents' Addendum at 12-13, 35-38, 76, 83-84, 103-06, 111-13, and the Appellate Division nevertheless held that the traditional *forum non conveniens* factors "clearly demonstrate that New York is an inconvenient forum," R929. There is no indication that the Appellate

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[14] Moreover, "only a party or privy to a contract may bring an action" for "rescission and cancellation" of the contract. *Matter of Grossman v. Herkimer Cty. Indus. Dev. Agency*, 60 A.D.2d 172, 180 (4th Dep't 1977).

[15] Justice Friedman ordered that, in the event Plaintiffs obtain a favorable final determination in Europe and are permitted to restore their claims against Christie's, Christie's could move to dismiss based on the statute of limitations and requested "comprehensive briefing" on the HEAR Act in that scenario. R40.

Division excluded consideration of the policies purportedly underlying the HEAR Act—to the contrary, the Appellate Division explicitly noted that it had "considered [P]laintiffs' remaining contentions and f[ound] them unavailing." R932. The Appellate Division then denied Plaintiffs' motion for reargument, R924, which contended that the court had erroneously ignored the HEAR Act, Defendants-Respondents' Addendum at 103-06, 111-13. "On this record," the fact that the Appellate Division chose not "to explicitly address the [HEAR Act] in its written decision does not establish that [it] refused to consider" Plaintiffs' arguments. *Nat'l Bank & Tr. Co.*, 72 N.Y.2d at 1007.

Plaintiffs also claim that the lower courts "fail[ed] to take account" of various New York public policies, including the State's interest in "providing justice to victims of the Holocaust" and "to protect the integrity of the preeminent New York art market." Opening Br. at 34-35. According to Plaintiffs, these policies should have had a "determinative" effect on the lower courts' analysis and foreclosed application of the *forum non conveniens* doctrine. *Id.* at 36. If Plaintiffs were correct, New York courts would be obligated to hear *every* case involving artwork that was allegedly looted by the Nazis or that once passed through the New York art market—no matter how tangentially the dispute or parties are otherwise connected to New York, and no matter how the other *forum non conveniens* factors might be weighed. That is not and cannot be the law.

This Court's decision in *Mashreqbank* is instructive. 23 N.Y.3d at 137-38. In *Mashreqbank,* the Appellate Division reversed a *forum non conveniens* dismissal as to a third-party defendant in a case that involved a series of financial transactions executed in New York. 101 A.D.3d 1, 3-4 (1st Dep't 2012). Citing "[t]he Court of Appeals holding in *J. Zeevi & Sons v. Grindlays Bank (Uganda)*," the Appellate Division held that the trial court should have retained jurisdiction because New York has a "compelling interest in the protection of [its] banking system from misfeasance." *Id.* at 8-9; *see id.* at 4 (noting New York's interest in "adjudicating controversies that implicate its preeminent position in the international banking system"). On appeal, this Court held that the Appellate Division had "erroneously read *Zeevi* as holding that any passage of funds through New York banks automatically implicates" New York's interest in its banking system "and thus provides a weighty argument against forum non conveniens dismissal." 23 N.Y.3d at 137-38 (explaining that *Zeevi* was a "choice of law case, not a forum non conveniens case," and "should not be read to imply that every party aggrieved by [a transaction] may bring its grievance to the New York courts"). New York's admittedly compelling interest in its banking system, this Court explained, "is not a trump to be played whenever a party . . . seeks to use our courts for a lawsuit with little or no apparent contact with New York." *Id.* at 137 (quoting *Paribas,* 135 F. Supp. at 453). Because "no relevant conduct apart from the execution of fund

transfers occurred in New York," and the *forum non conveniens* factors otherwise favored dismissal, this Court reinstated the trial court's decision. *Id.* at 138-39.

In this case, as in *Mashreqbank*, Plaintiffs argue that a single transitory contact with New York—the sale of the Painting in 2009—triggers the public policies of this state and eliminates a New York court's discretion to decline jurisdiction. Opening Br. at 34-36. None of the cases that Plaintiffs cite discussed New York's public policies in the context of *forum non conveniens*. *See Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010) (deciding whether New York or Swiss law applied to ownership dispute over drawing); *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311 (1991) (deciding when replevin claim accrues for purposes of the statute of limitations); *Gowen*, 60 Misc. 3d at 987-90 (deciding whether the act of state doctrine applied); *Menzel v. List*, 49 Misc. 2d 300 (Sup. Ct. N.Y. Cty. 1966) (deciding whether defendants' status as bona fide purchasers for value precludes claim for replevin). As this Court made clear in *Mashreqbank*, these policies are not "trump[s] to be played" where, as here, a dispute has a substantial nexus with a foreign jurisdiction but "little or no" nexus with New York. 23 N.Y.3d at 137.[16]

[16] Plaintiffs also argue that Swiss law places unspecified "hurdles" or "obstacles" in front of plaintiffs seeking to recover stolen art. Opening Br. at 35; *see id.* at 3. That New York law may be more favorable than that of Switzerland is irrelevant because a New York court would likely apply Swiss law to Plaintiffs' claims against the UBS Defendants, the Foundation, and Kircher. *See supra* Section I.A. In any event, a difference in substantive law, "even one that would be less favorable to plaintiffs, 'should ordinarily not be given conclusive or even

C. The Appropriate Corrective Action For The Claimed "Legal Error" Would Be Remittal, Not Denial Of Defendants' Motions To Dismiss

Plaintiffs cannot establish that the New York courts are *required* as a matter of law to adjudicate Plaintiffs' claims, which arise from events and conduct that occurred in Europe and have no substantial nexus with New York. Plaintiffs also cannot establish that the Appellate Division failed to consider any factor relevant to a *forum non conveniens* determination. But in the event this Court concludes that the Appellate Division erred by "fail[ing] to consider" a pertinent *forum non conveniens* factor, Opening Br. at 46-47, this Court should remit the case so that the Appellate Division may exercise its discretion and consider the effect of that factor in the first instance. This Court did precisely that in *Varkonyi*, a case on which

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substantial weight' in the scope of a forum non conveniens inquiry.'" *Emslie v. Recreative Indus., Inc.*, 105 A.D.3d 1335, 1337 (4th Dep't 2013) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981)). To the extent Plaintiffs suggest that a Swiss court would be biased in favor of "the bankers," Opening Br. at 35, that suggestion is utterly unsupported and unfairly impugns the Swiss judicial system. "For this Court to credit [Plaintiffs'] argument would require it effectively to pass value judgments on the adequacy of justice and the integrity of another sovereign state's judicial system on the basis of no more than bare denunciations and sweeping generalizations." *Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 384-85 (S.D.N.Y. 2001), *aff'd*, 311 F.3d 488 (2d Cir. 2002); *see also FIMBank P.L.C. v. Woori Fin. Holdings Co.*, 104 A.D.3d 602, 602 (1st Dep't 2013) (finding Korea an adequate alternative forum and explaining that "[m]eager and conclusory allegations are insufficient to support a finding of bias by a foreign court").

Plaintiffs extensively rely.[17] In remitting to the Appellate Division, this Court found it "hardly necessary to add" that the Appellate Division "w[ould] be free to make its own judgment [about the application of the *forum non conveniens* doctrine] on the basis of all the relevant factors." 22 N.Y.2d at 338. As in *Varkonyi*, to the extent this Court concludes the lower courts erred at all, the Appellate Division should be given the opportunity to evaluate, weigh, and balance any factor this Court finds was overlooked. *See id.*; *see also People ex rel. McCanliss v. McCanliss*, 255 N.Y. 456, 462 (1931) (Cardozo, C.J.) ("With the case thus remitted to it for a consideration of the merits, the Appellate Division will be free to exercise its large discretionary powers."); *accord* CPLR 5613 ("The court of appeals, upon reversing or modifying a determination of the appellate division, where it appears or must be presumed that questions of fact were not considered by the appellate division, shall remit the case to that court for determination of questions of fact raised in the appellate division.").

[17] Plaintiffs repeatedly claim that this case is "similar" to *Varkonyi* but neglect to mention that the *Varkonyi* Court remitted the case to the Appellate Division for further consideration. *See* Opening Br. at 29-31. In the only other authority Plaintiffs cite in support of their flawed argument that this Court should deny Defendants' motions to dismiss rather than remit for further consideration, this Court held that *dismissal* on the ground of *forum non conveniens* was required as a matter of law. *Mashreqbank*, 23 N.Y.3d at 138-39; *see* Opening Br. at 24. Plaintiffs point to no case in which this Court determined that *retention* of jurisdiction was required as a matter of law.

III. The Lower Courts Properly Followed The Reasoning Of The U.S. Supreme Court In *Sinochem* In Dismissing Based On *Forum Non Conveniens* Before Determining Personal Jurisdiction

Finally, Plaintiffs argue, in the alternative, that the lower courts erred in dismissing this action before determining whether the lower courts had personal jurisdiction over each of the Defendants. This is incorrect. Citing the U.S. Supreme Court's decision in *Sinochem*, 549 U.S. 422, the lower courts correctly concluded that it is entirely proper to dismiss an action on *forum non conveniens* grounds prior to, and without deciding, personal jurisdiction. As the Appellate Division explained: "To be sure, as the *Sinochem* Court noted, if a court can readily determine that it lacks personal jurisdiction over a defendant, the proper course is to dismiss on that ground. However, where personal jurisdiction is difficult to determine, and forum non conveniens considerations clearly militate in favor of dismissal, a court may dismiss on the latter ground." R928. The Appellate Division then correctly concluded: "As it could not readily determine, without allowing significant discovery, that it had personal jurisdiction over all the defendants, the motion court properly considered the defendants' arguments that New York is an inconvenient forum." *Id*. This Court should affirm.

In *Sinochem*, the U.S. Supreme Court held that a trial court "has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection," including personal and even subject-matter

jurisdiction. 549 U.S. at 425. Justice Ginsburg, writing for a unanimous Court, explained that trial courts have "leeway 'to choose among threshold grounds for denying audience to a case on the merits'" because, ultimately, a court need consider its jurisdiction "'only if the court proposes to issue a judgment on the merits.'" *Id.* at 431 (citations omitted). Because a *forum non conveniens* dismissal is not a dismissal on the merits—rather, "it is a determination that the merits should be adjudicated elsewhere"—trial courts may dismiss an action on *forum non conveniens* grounds "bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." *Id.* at 432; *id.* at 433 ("Resolving a *forum non conveniens* motion does not entail any assumption by the court of substantive 'law-declaring power.'").

The U.S. Supreme Court's reasoning is directly applicable here. As the Appellate Division recognized, an order of operations that would require a court to first wade into potentially difficult questions of personal jurisdiction before considering, and eventually dismissing on the basis of, an obvious *forum non conveniens* defense would burden the court and the parties "with expense and delay . . . all to scant purpose." *Id.* at 435; *see* R927 (citing and quoting *Sinochem*). In the end, whether the lower courts first considered jurisdiction or first considered *forum non conveniens*, the outcome would be the same: Plaintiffs' claims would be

dismissed, and they would be left to pursue their claims in another forum, like Switzerland, where jurisdiction could be obtained over the Swiss Defendants.

Nothing about the Appellate Division's common-sense approach in this case conflicts with any holding of this Court. Contrary to Plaintiffs' contention, *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574 (1980), does not mandate that a court first decide a potentially difficult challenge to personal jurisdiction before dismissing on the basis of a straightforward application of *forum non conveniens*. Although *Ehrlich-Bober* noted that *forum non conveniens* "has no application unless the court has obtained in personam jurisdiction of the parties," that statement was *dicta*, because the Court concluded that dismissal was not warranted based on *either forum non conveniens* or lack of jurisdiction. *Id*. at 579. Thus, the order of deciding those two issues was irrelevant to the outcome of that case. *Ehrlich-Bober* did not present the issue that was before the courts here and in *Sinochem—i.e.*, whether a court "can dismiss under the *forum non conveniens* doctrine before definitively ascertaining its own jurisdiction." *Sinochem*, 549 U.S. at 434.

Sinochem itself, in fact, addressed and declined to adopt similar *dicta* from the U.S. Supreme Court's prior decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Like this Court in *Ehrlich-Bober*, the U.S. Supreme Court in *Gulf Oil* stated in *dicta* that "'the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction,' and that 'in all cases in which *forum non conveniens* comes

into play, it presupposes at least two forums in which the defendant is amenable to process.'" *Sinochem*, 549 U.S. at 433-44 (quoting *Gulf Oil*, 330 U.S. at 504, 506-07) (alterations and citations omitted); *see Ehrlich-Bober*, 49 N.Y.2d at 579 (noting in *dicta* that *forum non conveniens* "has no application unless the court has obtained in personam jurisdiction of the parties"). The U.S. Supreme Court explained away each of these "statements from *Gulf Oil*" and noted that they were "perhaps less than 'felicitously' crafted": *Gulf Oil*'s *dicta* did not "negate a court's authority to presume, rather than dispositively decide, the propriety of the forum in which the plaintiff filed suit" for *forum non conveniens* purposes, and "*Gulf Oil* did not present the question . . . whether a federal court can dismiss under the *forum non conveniens* doctrine before definitively ascertaining its own jurisdiction." 549 U.S. at 434. Like the Supreme Court's assessment of its own *Gulf Oil* case, this Court should find its *dicta* in *Ehrlich-Bober* "no hindrance to the decision" it reaches here. *Id.* at 435.

Contrary to Plaintiffs' contentions, the lower courts have not universally deemed *Ehrlich-Bober*'s *dicta* the law of this State. In fact, the First Department in *Primus Pacific Partners*, 175 A.D.3d at 402, recently affirmed a dismissal on *forum non conveniens* grounds, expressly citing *Sinochem* and concluding that requiring the trial courts to determine jurisdiction first would be "unduly burdensome"—an "arduous inquiry" that no case or sound policy requires. *Accord William L. v. Therese L.*, 66 Misc. 3d 1228(A), at *6 (Sup. Ct. N.Y. Cty. Feb. 7, 2020) (citing

Sinochem for the proposition that "it is appropriate for this court to address defendant's motion to dismiss this action on forum non conveniens grounds without first determining whether it had acquired personal jurisdiction").

Similarly, none of Plaintiffs' cases provide any analysis justifying *why Ehlrich-Bober*'s *dicta* should become law. The closest a case comes is *Wyser-Pratte Management Co. v. Babcock Borsig AG*, 23 A.D.3d 269 (1st Dep't 2005), in which the First Department explained that personal jurisdiction should be considered before *forum non conveniens* because a court lacking jurisdiction is "without power to issue a binding forum non conveniens ruling," *id.* at 269. But a "binding" *forum non conveniens* ruling is no different from a binding personal jurisdiction ruling: Both dismiss the action, and neither says anything about the case's merits. The artificial order of operations Plaintiffs propose would therefore do nothing more than cause the very needless "expense and delay" the U.S. Supreme Court recognized in *Sinochem* was for "scant purpose: [the trial court] inevitably would dismiss the case without reaching the merits" anyway. 549 U.S. at 435.

Indeed, Plaintiffs' own brief well articulates the wastefulness of the procedure that Plaintiffs advocate. Forcing the lower courts to first decide personal jurisdiction may require "jurisdictional discovery" and "briefing and argument on jurisdictional issues," followed by "possible appeals of any ruling on jurisdiction." Opening Br. at 49. To the extent Plaintiffs' claims survived such motions, Defendants would

"renew their *forum non conveniens* motions and say to the lower courts, in effect: 'You already decided this. Just reinstate your old decisions dismissing this case.'" *Id.* And since the lower courts *have* decided that *forum non conveniens* dismissal is appropriate, Plaintiffs would be left in exactly the same position they are today, with their claims dismissed in favor of litigation in Switzerland, or possibly Germany or France—except that all of the parties and the courts would have been subjected to cost and delay. None of that is rational. And none of it is consistent with the purposes of the *forum non conveniens* doctrine, which aims to make litigation more efficient and convenient.[18]

To the extent this Court declines to adopt the U.S. Supreme Court's unanimous holding in *Sinochem*, it should not, as Plaintiffs request, Opening Br. at 49-50, address *forum non conveniens* now but rather should remit for the motion court to assess personal jurisdiction in the first instance. That is the exact order of operations Plaintiffs seek. In order to subvert that order in this case, Plaintiffs state that they will "abandon reliance on *Ehrlich-Bober*" and ask this Court to review the

[18] The results of the cases on which Plaintiffs rely (*see* Opening Br. at 48 n.12)—cases where appellate courts determined personal jurisdiction after the lower courts failed to do so, only to subsequently affirm dismissal on *forum non conveniens* grounds—underscore the inefficiency and irrationality of the approach Plaintiffs advocate. *See, e.g.*, *Prime Props. USA 2011, LLC v. Richardson*, 145 A.D.3d 525, 525-26 (1st Dep't 2016) (finding that lower court had specific jurisdiction over defendants before affirming *forum non conveniens* dismissal); *Flame S.A.*, 107 A.D.3d at 437-38 (same).

lower courts' *forum non conveniens* decision *before* any court assesses personal jurisdiction. *Id.* at 50. That concession fundamentally dooms their position and reliance on cases like *Wyser-Pratte*, which provide the only (albeit flawed) analysis in support of Plaintiffs' position. The sole possible justification for the order of operations Plaintiffs seek is that a court must consider jurisdiction first because a court without jurisdiction lacks "power to issue a binding forum non conveniens ruling." *Wyser-Pratte*, 23 A.D.3d at 269. But if Plaintiffs can "abandon" *Ehrlich-Bober*, plainly courts *do* have the power to consider *forum non conveniens* before they consider jurisdiction. Adopting that order is permissible, and often desirable in the interests of efficiency, and should not be foreclosed by the rigid rule Plaintiffs request here if they are unsuccessful in convincing the Court to rebalance the *forum non conveniens* factors in Plaintiffs' favor.

In short, Plaintiffs identify no holding of this Court requiring trial courts to undertake needless and often burdensome inquiries into personal jurisdiction before determining that an action can be dismissed on often more straightforward *forum non conveniens* grounds. Nor do Plaintiffs identify any sound policy reason for requiring the lower courts to go through those gyrations. There is none, *see Pahlavi*, 62 N.Y.2d at 478 ("[O]ur courts are not required to add to their financial and administrative burdens by entertaining litigation which does not have any connection with this State.")—and particularly not in this case, where, as the Appellate Division

recognized, "Plaintiffs concede that they currently do not have a basis for personal jurisdiction in New York over any defendant except Christie's." R928. Like the U.S. Supreme Court, this Court should preserve the authority and discretion of the lower courts to manage their dockets and efficiently and expeditiously do justice.

The lower courts got it right. This Court should affirm.

CONCLUSION

For all of the foregoing reasons, the decision of the Appellate Division should be affirmed in full.

Dated: New York, New York
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Respectfully submitted,

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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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