New York County Clerk's Index No. 161799/15
Appellate Division, First Department Docket No. 2018-1658

Court of Appeals
of the
State of New York

TIMOTHY REIF and DAVID FRAENKEL, as Co-Executors of the Estate of Leon Fischer, and MILOS VAVRA,

Plaintiffs-Respondents,

– against –

RICHARD NAGY, RICHARD NAGY LTD., Artworks by the Artist Egon Schiele known as *WOMAN IN A BLACK PINAFORE* and *WOMAN HIDING HER FACE*,

Defendants-Appellants.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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STATE OF NEW YORK
COURT OF APPEALS

TIMOTHY REIF and DAVID FRAENKEL, as Co-Executors of the Estate of Leon Fischer, and MILOS VAVRA, Plaintiffs-Respondents, -against- RICHARD NAGY, RICHARD NAGY LTD., Artworks by the Artist Egon Schiele known as WOMAN IN A BLACK PINAFORE, and WOMAN HIDING HER FACE Defendants-Appellants.	New York County Index No. 161799/2015 **AFFIRMATION OF RAYMOND J. DOWD IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**

Raymond J. Dowd, an attorney authorized to practice law in the State of New York affirms subject to penalty of perjury as follows:

1. I am a member of Dunnington Bartholow & Miller LLP, attorneys for Plaintiffs-Respondents Timothy Reif and David Fraenkel as Co-Executors of the Estate of Leon Fischer and Milos Vavra, collectively the Heirs of Fritz Grunbaum ("the Heirs").

2. Annexed hereto as **Exhibit 1** is an article from *The Art Newspaper* dated February 4, 2020 discussing a recent German court ruling overturning the German Lost Art Foundation's decision to de-list artworks from the website www.lostart.de.

3. Annexed hereto as **Exhibit 2** is the Judgment in *Bakalr v. Vavra et al.,* 05-CV-3037 dated August 25, 2011. The Judgment applies solely to "the Egon Schiele drawing, dated 1917, known as 'Seated Woman with bent Left Leg (Torso).'"

4. Annexed hereto as **Exhibit 3** is the Court of Appeals for the Second Circuit's Summary Order in *Bakalr v. Vavra et al.,* 05-CV-3037 affirming the Judgment. Summary Orders issued by the Second Circuit "do not have precedential effect" pursuant to Local Rule 32.1.1. *See* http://www.ca2.uscourts.gov/clerk/case_filing/rules/title7/local_rule_32_1_1.html (last accessed February 24, 2020).

Dated: New York, New York
February 24, 2020

Raymond J. Dowd

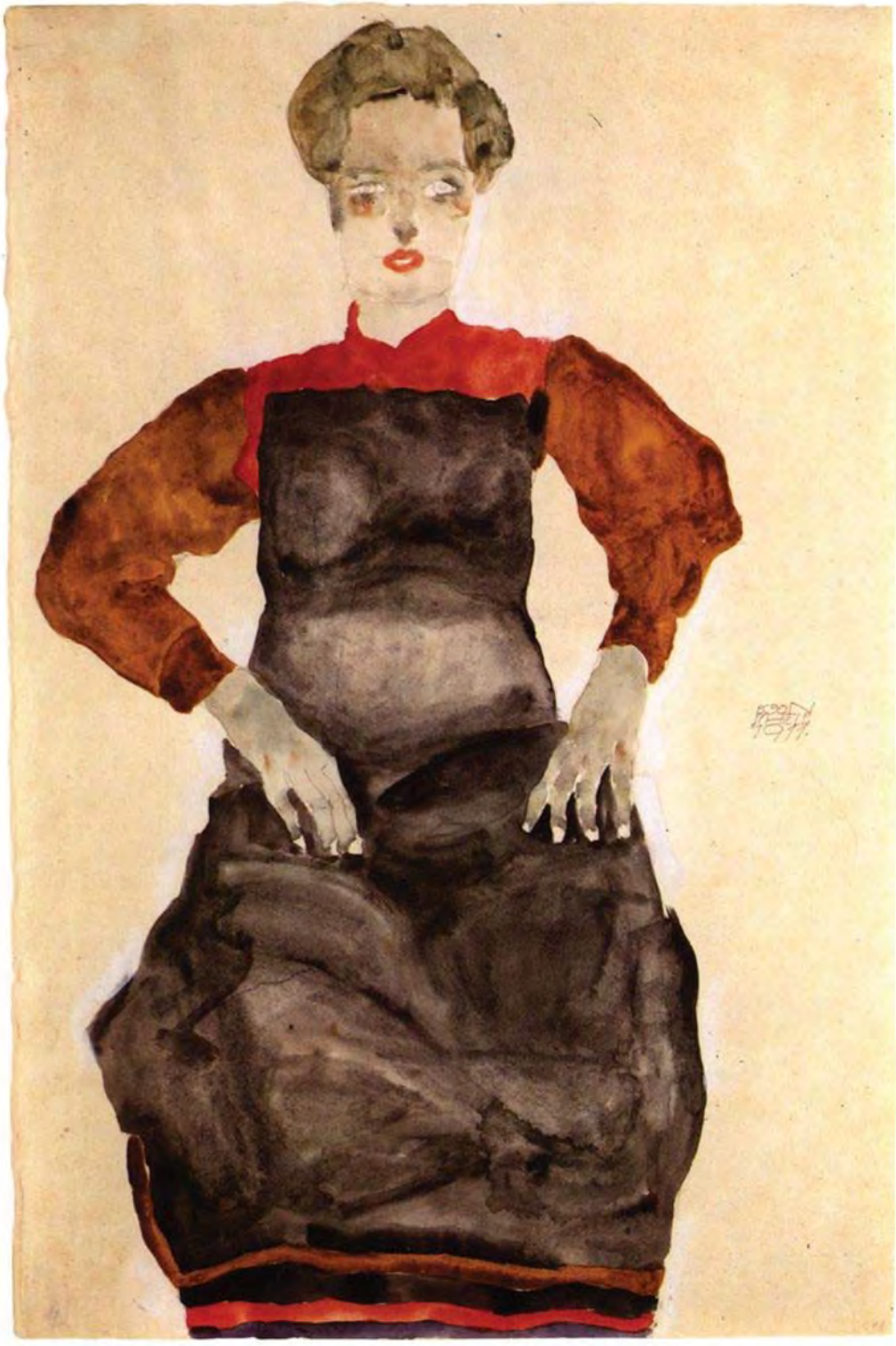
EXHIBIT 1

NEWS → NAZI LOOT

German court rules in favour of Nazi-looted art database, although owners say a listing makes works unsellable

Lostart.de is caught between the conflicting demands of claimants and the holders of disputed art

CATHERINE HICKLEY
4th February 2020 10:44 GMT



The disputed Woman in a Black Pinafore (1911) by Egon Schiele. At the request of three dealers, lostart.de removed 63 works by Schiele claimed by the heirs of Fritz Grünbaum, who perished at Dachau

Courtesy of Collection Grünbaum

A German court has ruled that the current possessor of a work of art cannot stop a claimant from registering it on a government database of Nazi-looted

art in the latest in a series of legal challenges to listings on lostart.de, a German website designed to help victims and their heirs recover cultural property lost due to Nazi persecution.

In 1999, Wolfgang Peiffer, a collector from Baden-Baden, bought a painting of a Sicilian landscape by Andreas Achenbach at auction, unaware that it was sold in 1937 by the Jewish dealer Max Stern, who was forced by the Nazis to liquidate his Dusseldorf gallery and flee Germany. The Max Stern Art Restitution Project listed the painting with lostart.de in 2016. But Peiffer has rejected requests to return Sicilian Landscape (1861), saying he believes Stern sold it in a "perfectly normal gallery transaction".

Peiffer's lawyer, Ludwig von Pufendorf, filed a suit in 2018 at the Magdeburg regional court, asking it to ban the Stern estate from claiming ownership of the painting or registering it on lostart.de. The listing makes the painting "unsellable in practical terms", the plaintiff contended. Last year, the court dismissed the complaint, saying a listing on lostart.de did not constitute an ownership claim. But Peiffer has appealed the ruling.

"If the plaintiff is successful, everyone who posts a loss on lostart.de would be exposed," says Ulf Bischof, the lawyer representing the Max Stern Art Restitution Project.

Lostart.de is administered by the government-run German Lost Art Foundation. It has on several occasions been caught between the conflicting demands of claimants and the holders of disputed art—and has been the target of two lawsuits. To qualify for the database, an entry must pass a "plausibility assessment". The foundation does not itself conduct provenance research into the items listed and relies on evidence presented by claimants.

The first legal case against lostart.de was eventually unsuccessful. In 2015, the Federal Administrative Court overturned a previous court ruling ordering lostart.de to delist a portrait of an elderly man in Oriental dress attributed to Rembrandt's circle that surfaced in Namibia. The current holder and one group of heirs had agreed to sell it and split the revenue.

There was, however, a second group of claimants. The pre-war Jewish owner of the work had sold it under duress to a Jewish banker, who was expropriated by the Nazis. Lostart.de refused to remove the listing without the approval of both sets of heirs, meaning the planned sale could not take place. The federal court upheld lostart.de's right to continue listing the painting "because it contains factually correct information about an ongoing suspicion that it is looted art".

Claims by heirs against private individuals to recover art invariably fail in German courts

Claims by heirs against private individuals to recover art invariably fail in German courts. The current holders are protected by statutes of limitation and a rule called Ersitzung, under which a good-faith buyer who has held a work of art for ten or more years gains the right of possession. Settlements can be negotiated on the basis of the 1998 Washington Principles on Nazi-looted art, but these were formulated with art in public collections in mind, not private collectors, and they are non-binding.

The absence of clear rules leaves many private collectors unsure of how to proceed, says Rupert Keim, the president of Germany's Federal Association of Art Auctioneers. He would support a new law governing cases where the art is in the possession of private collectors and believes the government should compensate good-faith buyers. "Consignors would be much more open to negotiating with claimants if the rules were clearer," he says.

"From the moment an artwork is listed in lostart.de, a serious art dealer cannot trade it," he says. "The seller is forced to find a solution with the claimant." Especially in cases where evidence supporting a listing on lostart.de is weak, a private holder "can feel that his work is being held to ransom", Keim says.

While database entries can elicit complaints from current holders, deletions

can be challenged by claimants. At the request of three dealers, Richard Nagy, Jane Kallir and Eberhard Kornfeld, lostart.de removed 63 works by Egon Schiele claimed by the heirs of Fritz Grünbaum, who perished at Dachau concentration camp. The heirs are trying to get the works re-listed on the register – especially after a New York court last year ordered Nagy to return two Schiele watercolours to Grünbaum's heirs (Nagy has since been granted the right to appeal).

"It's particularly shocking that an institution like lostart.de, which is supposed to provide support to families that were expropriated, is making it much more difficult for the family of Fritz Grünbaum to exert their claims," says Herbert Gruber, who has advised Grünbaum's heirs on recovering lost property since 1990. "The foundation is not a judge. It should serve as a mouthpiece for families who have suffered humiliation, murder and robbery."

Appeared in The Art Newspaper, 320 February 2020

More News Topics Restitution Germany Painting Art collection

EXHIBIT 2

Pauley J

~~UNITED STATES DISTRICT COURT~~
SOUTHERN DISTRICT OF NEW YORK

DAVID BAKALAR,	:	
	:	
Plaintiff and Counterclaim Defendant,	:	Index 05 Civ. 3037 (WHP) (ECF Case)
	:	
-against-	:	
	:	
MILOS VAVRA and LEON FISCHER,	:	**JUDGMENT**
	:	
Defendants and Counterclaimants.	:	

Pursuant to the Court's Memorandum and Order dated August 17, 2011, setting forth the findings of fact and conclusions of law on remand, Final Judgment shall be entered for the Plaintiff David Bakalar, concluding that he holds lawful title to the Egon Schiele drawing, dated 1917, known as "Seated Woman with Bent Left Leg (Torso)". Accordingly, Defendants' counterclaims for declaratory judgment, conversion and replevin are denied.

The Clerk of Court is directed to terminate all motions pending as of this date and mark the case closed.

Dated: New York, New York
August 25, 2011

Hon. William H. Pauley, III, U.S.D.J.

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

Date:

In Re:

-v-

Case #: ( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

Ruby J. Krajick, Clerk of Court

by: _____

, Deputy Clerk

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

NOTICE OF APPEAL

civ. ( )

----------X

Notice is hereby given that _____ (party) hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the _____ (day) day of _____ (month), _____ (year).

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____

( ) _____ - _____
(Telephone Number)

Note: You may use this form to take an appeal provided that it is received by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

civ. ( )

----------X

Pursuant to Fed. R. App. P. 4(a)(5), _____ respectfully
(party)
requests leave to file the within notice of appeal out of time. _____
(party)
desires to appeal the judgment in this action entered on _____ but failed to file a
(day)
notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

FORM 2

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

NOTICE OF APPEAL
AND
MOTION FOR EXTENSION OF TIME

civ. ( )

----------X

1. Notice is hereby given that _____ hereby appeals to
(party)
the United States Court of Appeals for the Second Circuit from the judgment entered on _____.
[Give a description of the judgment]

2. In the event that this form was not received in the Clerk's office within the required time

_____ respectfully requests the court to grant an extension of time in
(party)
accordance with Fed. R. App. P. 4(a)(5).

a. In support of this request, _____ states that
(party)
this Court's judgment was received on _____ and that this form was mailed to the
(date)
court on _____ .
(date)

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____- _____
(Telephone Number)

Note: You may use this form if you are mailing your notice of appeal and are not sure the Clerk of the District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 3

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

----------X

AFFIRMATION OF SERVICE

civ. ( )

I, _____, declare under penalty of perjury that I have served a copy of the attached _____

_____

upon _____

_____

whose address is: _____

_____

Date: _____
New York, New York

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

EXHIBIT 3

11-4042-cv
Bakalar v. Vavra

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of October, two thousand twelve.

PRESENT: DENNIS JACOBS,
Chief Judge,
ROBERT D. SACK,
Circuit Judge,
JOHN GLEESON,
District Judge.*

- -X
DAVID BAKALAR,
Plaintiff-Counter-Defendant-
Third-Party-Defendant-
Appellee,

-v.- 11-4042-cv

MILOS VAVRA, LEON FISCHER,
Defendants-Counter-
Claimants-Appellants.
- -X

* The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

FOR APPELLANT: Raymond J. Dowd, Luke McGrath, Thomas V. Marino, Dunnington, Bartholow & Miller LLP, New York, NY.

FOR APPELLEES: William L. Charron, Pryor Cashman LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Pauley III, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

This is an ownership dispute concerning a 1917 drawing by Egon Schiele (the "Drawing"), between David Bakalar, who seeks a declaration that he owns it by purchase from a dealer, and Milos Vavra and Leon Fischer, who are heirs of Austrian cabaret performer, Fritz Grunbaum, who owned it before he was murdered by the Nazis in 1941. The United States District Court for the Southern District of New York (Pauley III, J.) awarded judgment to Bakalar on the basis of laches. Bakalar v. Vavra, 819 F. Supp.2d 293, 307 (S.D.N.Y. 2011). "Following a bench trial, we set aside findings of fact only when they are clearly erroneous . . . . However, we review de novo the district court's conclusions of law and its resolution of mixed questions of law and fact." Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184, 199 (2d Cir. 2003) (citations omitted). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

[1] In a title action under New York law, a good faith purchaser of an artwork has the burden of proving that the work was not stolen. Bakalar v. Vavra, 619 F.3d 136, 147 (2d Cir. 2010) (citing Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 321 (1991)). Here, the district court found that the Drawing was not looted by the Nazis. Bakalar, 819 F. Supp. 2d at 298-99. Vavra and Fischer argue that the district court's finding is clearly erroneous and that the Nazis stole the Drawing. However, Bakalar traced

the provenance back to Mathilde Lukacs, Grunbaum's sister-in-law, who sold it to a gallery in 1956. Vavra and Fischer's hypothesis--that the Nazis stole the Drawing from Grunbaum only to subsequently return or sell it to his Jewish sister-in-law--does not come close to showing that the district court's finding was clearly erroneous.

After finding that the Drawing was not stolen by the Nazis, the district court extended its Lubell analysis by requiring Bakalar to show that Lukacs acquired proper title in the Drawing, and found that he could not. Bakalar, 819 F. Supp. 2d at 299-302. We do not decide whether Bakalar discharged his burden under Lubell by tracing the provenance back to Lukacs, who was a close relative of Grunbaum (she was sister to Mrs. Grunbaum, who survived Grunbaum before herself being murdered by the Nazis). The point was not pressed by Bakalar, and we affirm instead on the district court's ruling that the claim against Bakalar is defeated by laches.

This Court previously recognized that Bakalar could assert a laches defense under New York law. See Bakalar, 619 F.3d at 147. In order to prevail on laches, Bakalar had to show that "(1) [Vavra and Fischer] were aware of their claim [to the Drawing], (2) they inexcusably delayed in taking action, and (3) Bakalar was prejudiced as a result." Bakalar, 819 F. Supp. 2d at 303 (citing Ikelionwu v. United States, 150 F.3d 233, 237 (2d Cir. 1998)). The district court found that Vavra and Fischer's "ancestors were aware of--or should have been aware of--their potential intestate rights to Grunbaum property," and that the ancestors "were not diligent in pursuing their claims to the Drawing." Id. at 305-06.

Vavra and Fischer contend that the district court committed two errors of law bearing on the laches defense. First, they argue that the court erroneously "imputed knowledge of 'potential intestate rights' to [Vavra and Fischer] based upon previous actions or inactions of other family members." But it was obviously necessary for the court to do just that; the alternative was to reset the clock for each successive generation. See Bakalar, 819 F. Supp. 2d at 303 ("This inquiry focuses not only on efforts by the party to the action, but also on efforts by the

party's family.") (internal quotation omitted). Second, Vavra and Fischer argue that their families had no legal duty of diligence until they knew of the actual *location* of the Drawing. They rely on language in Lubell declining to "impose the additional duty of diligence before the true owner has reason to know where its missing chattel is to be found." 77 N.Y.2d at 320. However, though "[l]ack of diligence in locating the property" is not a consideration for a statute of limitations analysis, it is absolutely relevant "with respect to a laches defense." SongByrd, Inc. v. Estate of Grossman, 206 F.3d 172, 182 (2d Cir. 2000) (citing Lubell, 77 N.Y.2d at 321).

Vavra and Fischer's factual arguments are no more persuasive. Their theories about what their ancestors knew (or didn't know) are speculative, and we do not have a "'definite and firm conviction that a mistake has been committed.'" Mobil Shipping & Transp. Co. v. Wonsild Liquid Carriers Ltd., 190 F.3d 64, 67-68 (2d Cir. 1999) (quoting Anderson v. Bessemer City, 470 U.S. 564, 574 (1985)).

Next, Vavra and Fischer contest whether Bakalar was prejudiced by their ancestors' delay in pursuing the Drawing. There can be no serious dispute that the deaths of family members--Lukacs and others of her generation, and the next--have deprived Bakalar of key witnesses. See Sanchez v. Trustees of the Univ. of Pa., 2005 WL 94847, *3 (S.D.N.Y. Jan. 18, 2004) (noting that the death of potential witnesses is prejudicial) (citing Solomon R. Guggenheim Found. V. Lubell, 153 A.D.2d 143, 149 (1st Dep't 1990)). And while a "defendant's vigilance is as much in issue as [a] plaintiff's diligence," Lubell, 153 A.D.2d at 152, Vavra and Fischer's speculation has not established clear error in the district court's finding that Bakalar, a good faith purchaser, was prejudiced by the delay. See Bakalar, 819 F. Supp. 2d at 306-07.

In sum, there is no clear error in the findings that Vavra and Fischer's ancestors knew or should have known of a potential claim to the Drawing, that they took no action in pursuing it, and that Bakalar was prejudiced in this litigation as a result of that delay. It was therefore sound to recognize Bakalar's title on the basis of his laches defense.

[2] Citing little authority, Vavra and Fischer argue that the district court should have permitted them to supplement the record with additional expert testimony on remand. They misconstrue this Court's remand instruction that the district court *could* reopen discovery to mean that it was required to do so. See Bakalar, 619 F.3d at 147 ("[W]e vacate the judgment of the district court and remand the case for further proceedings, including, *if necessary*, a new trial.") (emphasis added). See also Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 73 (2d Cir. 1998) ("The decision whether to hear additional evidence on remand is within the sound discretion of the trial court judge."). The district court granted a six month extension for expert discovery before trial, but Vavra and Fischer failed to meet the revised deadline. See Bakalar v. Vavra, 851 F. Supp. 2d 489, at 491-92 (S.D.N.Y. 2011). The district court did not abuse its discretion in abiding by its discovery calendar, especially in light of its generous extension.

Finding no merit in Vavra and Fischer's remaining arguments, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

New York County Clerk's Index No. 161799/15
Appellate Division, First Department Docket No. 2018-1658

Court of Appeals
of the
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TIMOTHY REIF and DAVID FRAENKEL, as Co-Executors of the Estate of Leon Fischer, and MILOS VAVRA,

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RICHARD NAGY, RICHARD NAGY LTD., Artworks by the Artist Egon Schiele known as *WOMAN IN A BLACK PINAFORE* and *WOMAN HIDING HER FACE*,

Defendants-Appellants.

BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Plaintiffs-Respondents Timothy Reif and David Fraenkel, as Co-Executors of the Estate of Leon Fischer, and Milos Vavra as heirs of Franz Friedrich "Fritz" Grünbaum ("the Heirs" or "Respondents") oppose a motion of Defendants-Appellants Richard Nagy and Richard Nagy Ltd. (collectively "Nagy" or "Appellants") for leave to appeal to the Court of Appeals. Leave to appeal should be denied because the motion is untimely and for lack of jurisdiction. Additionally, leave to appeal should be denied because Nagy's proposed appeal seeks review of unanimous factual determinations and does not raise novel legal issues of collateral estoppel or any issue of public importance. Finally, the Holocaust Expropriated Art Act of 2016 ("HEAR") provides that the Heirs claims are to be heard on the merits and not that private dealers, like Nagy, are free to utilize the New York market to transact in stolen art.

A. Procedural History

On April 18, 2017, the Appellate Division, First Department affirmed the denial of Nagy's motion to dismiss on the grounds of laches via collateral estoppel ("April 18, 2017 Order") that, based upon the plain language of *Bakalar v. Vavra ("Bakalar")*,[1] there was (1) no adjudication of a collection of artworks and that (2)

[1] 851 F.Supp.2d 489 (S.D.N.Y.2011); *Bakalar v. Vavra,* 819 F.Supp.2d 293 (S.D.N.Y.2011), *aff'd.* 500 Fed. Appx. 6 (2d Cir.2012) *cert. denied* 569 U.S. 968 (2013)

Nagy could not demonstrate any prejudice having purchased the two relevant artworks by the artist Egon Schiele, *Woman in Black Pinafore* (1911) and *Woman Hiding Her Face* (1912) (the "Artworks"), with actual knowledge of the provenance issues and the Heirs' claims. Nagy's motion for reargument or leave to appeal was denied by the Appellate Division on August 1, 2017.

On July 9, 2019 the Appellate Division, First Department issued an order ("the July 9, 2019 Order") unanimously affirming a June 5, 2018 order and related April 6, 2018 decision of the Supreme Court, New York County (Hon. Charles E. Ramos, Ret.) ("the IAS Court"). The July 9, 2019 Order reaffirmed the factual findings made in the April 17, 2017 Order, including those pertaining to *Bakalar*, and declared the Heirs' ownership of the Artworks, fully determining the Heirs' conversion and replevin causes of action and dismissing all of Nagy's defenses and counterclaims. Therefore, the July 9, 2019 Order resolved all "claims" in this action including affirming the Heirs' entitlement to damages and prejudgment interest running from November 13, 2015 and remanded solely for ministerial action. The July 9, 2019 Order was a "final judgment" within the meaning of CPLR 5602(a)(1)(ii).

Nagy sought leave to reargue or appeal to the Court of Appeals for the July 9, 2019 Order. On October 22, 2019, the Appellate Division denied his motion for leave to appeal to this Court and Nagy did not move for leave to appeal from the

Appellate Division's Order, instead opting to seek severance of the "issue" – as opposed to "claim" – for damages. Because Nagy failed to timely seek leave directly from this Court, Nagy's motion seeking leave to appeal is untimely.

B. Nagy's Proposed Appeal Does Not Raise Any Issues Of Law Pertaining To Collateral Estoppel Or The Prejudice Prong Of Laches And The HEAR Act Also Precludes Nagy's Proposed Appeal Seeking Review Of Heirs' Timely Claims

In urging this Court's review, Nagy argues that the Appellate Division made two legal errors: (1) misapplication of the law of collateral estoppel and (2) misapplication of prejudice prong of the equitable defense of laches. However, as explained below, Nagy's arguments do not raise these or any reviewable issues of law. Instead, Nagy asks this this Court review the IAS Court's factual determinations that were unanimously affirmed in the Appellate Division's April 18, 2017 Order denying Nagy's motion to dismiss on collateral estoppel grounds and reaffirmed in their entirety in the July 9, 2019 Order. Tellingly, Nagy recognized the flaws in his own argument when, after the First Department denied his motion to dismiss on collateral estoppel grounds, Nagy altered his argument and alleged that the Heirs could not prove a Fritz Grünbaum provenance, even though Nagy's own claims necessarily depend on that provenance.

Nagy sought, unsuccessfully, at the motion to dismiss stage to preclude the Heirs' claims to the artworks in this litigation based on *Bakalar,* a federal action where the then-living heirs of Fritz Grünbaum were sued in the Southern District of

New York for a declaratory judgment of title by David Bakalar, a wealthy Massachusetts art collector. As a novice art collector, Bakalar purchased Egon Schiele's *Seated Woman With Bent Left Leg (Torso)* ("*Seated Woman*") without inquiring where it came from and possessed it from 1964 until 2004 when he tried to auction it at Sotheby's. In *Bakalar*, the District Court denied the Heirs' motion to certify a defendant class and restricted discovery to issue of *Seated Woman*; not a purported collection. The District Court, on remand, declined to grant extensions of time sufficient to permit the Heirs to put on expert testimony, including Dr. Jonathan Petropoulos' proposed testimony, which was considered by both the IAS Court and First Department herein, and handwriting expert Christian Farthofer. Discovery in *Bakalar* was co trained to *Seated Woman* and documents possessed by gallerist Eberhard Kornfeld in Switzerland that were, in large part, not produced and not examined. Thus, Bakalar succeeded in excluding all of the Heirs' experts and there can be no legitimate claim that the Heirs had a full and fair opportunity to litigate an entire collection.

The *Bakalar* court concluded that Fritz Grünbaum owned *Seated Woman*. The *Bakalar* court further concluded that Bakalar had failed to prove any voluntary transfer from Fritz Grünbaum during his lifetime that would give Mathilde Lukacs (or any other person), and therefore Bakalar, good title. However, invoking the equitable doctrine of laches based on Bakalar's almost fifty (50) years of possession

and, most importantly, Lukacs' death as well as the Heirs' purported inaction; Bakalar was awarded title of *Seated Woman* not as a result of his own claim but by successfully asserting laches in response to the Heirs' counterclaims. In conducting its laches analysis, the *Bakalar* District Court accused the Heirs and their predecessors-in-interest – such as family members behind the Iron Curtain – of failing to pursue rights to Grünbaum's estate and drew negative inferences from this purported inaction of deceased Holocaust victim's family members. However, there is nothing in the *Bakalar* record showing that the Heirs or their predecessors-in-interest knew that Grünbaum 's art collection, in whole or in part, survived World War II or that the Heirs knew of *Seated Woman's* location until it was located at Sotheby's in 2005.

By contrast, Nagy, a non-party in *Bakalar*, submitted testimony as a purported *amicus* to the Second Circuit supporting David Bakalar's laches defense. Nagy swore that he lacked an interest in or knowledge of the Artworks' location and even that he "voided" a prior interest in *Woman in a Black Pinafore* on account of issues with provenance. Nagy acquired both Artworks immediately after *Bakalar's* affirmance at heavily discounted prices in private sales; specifically insured against the Heirs' claims; marketed the Artworks in 2015 in New York; and rejected Heirs' demand for return (a necessary component of Heirs' claim) before attempting to secret the Artworks out of New York only to be stopped by the IAS Court's issuance

of a temporary restraining order served on Nagy's shipping agent. Nagy cannot possibly claim that he "stands in the shoes" of David Bakalar for purposes of a laches, and specifically prejudice, analysis as Nagy is a professional dealer and Schiele expert who purchased the Artworks with knowledge of the facts of *Bakalar* and the existence of Heirs' claims.

The Appellate Division properly and unanimously affirmed the IAS Court's factual finding that *Bakalar* was limited to a single artwork, *Seated Woman*, and that the facts giving rise to David Bakalar's affirmative defense of laches --- a loss of evidence over forty years of Bakalar's "innocent" possession of an artwork in Massachusetts unbeknownst to the Heirs --- were unlike the facts surrounding Nagy's acquisition of the artworks where Nagy knew of the Heirs' claims prior to purchasing the artworks. The Appellate Division also unanimously affirmed the IAS Court's finding that Nagy, a sophisticated art dealer, knew of the Heirs' claims prior to purchasing the artworks and had suffered no prejudice or loss of evidence between his 2013 purchase of the Artworks and the 2015 filing of this action. The evidence shows that Nagy was contacted by, among other, the Art Loss Register in 2004 and the Heirs in 2005 and concealed his knowledge of Grünbaum artworks from the Heirs. Unlike Bakalar, Nagy purchased the artworks at a substantial discount. Because these factual findings were unanimous and because Nagy can show no error of law, leave to appeal should be denied based on CPLR 5501(b) and Article 6,

Section 3(a) of the New York Constitution. Because this case involves two unique chattels and no issues affecting the public interest, leave to appeal should be denied.

Leave to appeal should also be denied because Nagy's description of the record and issues raised by this case is untrustworthy. As the IAS Court and the Appellate Division correctly determined, *Bakalar* did not adjudicate the Heirs' rights to the Grünbaum collection and was instead limited to a single artwork, *Seated Woman,* and a single purchaser, David Bakalar. The Second Circuit's affirmance in *Bakalar* was by non-precedential summary order, showing that the Second Circuit did not intend to bind any future litigants. Nagy's argument that *Bakalar* adjudicated the entire collection for purposes of permitting 50 holders of artworks that were stolen from Grünbaum to benefit from David Bakalar's laches defense through the doctrine of collateral estoppel is baseless and unprecedented. Both the IAS Court and Appellate Division held that Mathilde Lukacs, from whom Nagy claims to derive title, never had good legal title and that Nagy could not show good legal title. These conclusions are consistent with *Bakalar,* where David Bakalar was unable to show legal title in either Lukacs or himself. In *Bakalar*, the court, in balancing the equities, exercised its discretion to award Bakalar title because evidence had been lost during his decades-long "innocent" possession of the artwork, even though the Heirs did not know of the artwork's existence, did not know that Bakalar possessed

the artwork, and Bakalar had not investigated the artworks' provenance before buying it.

C. The HEAR Act Further Demonstrates The Futility Of The Proposed Appeal Which Seeks To Close The Courthouse Doors To Holocaust Victims With Timely And Meritorious Claims

On December 16, 2016 President Obama signed the HEAR Act into law providing Holocaust victims six years from the time heirs have knowledge of the location of artworks "lost" due to Nazi persecution. The HEAR Act undid the damage done by *Bakalar* as well as other cases, including *Detroit Institute of Arts v. Ullin,* a laches decision, as specifically referenced in the HEAR Act's text. In enacting the HEAR Act, Congress directed the courts, unlike the *Bakalar* court, to consider the historical circumstances in which Nazi art looting arose. See Hull, A., *"Shoring Up The HEAR Act: Proposed Amendments To Federal Legislation Designed To Assist Heirs and Claimants of Nazi-Looted Art,"* 28 J.L. & Pol'y 238, 243-244 (2019).

Bakalar unfairly stripped Holocaust victims of rights to artworks that they had not located and did not even know existed in favor of Bakalar, a wealthy collector who did not investigate the provenance of the artwork. Because of the HEAR Act, *Bakalar* is no longer good law to the extent it stands for the proposition that Holocaust victim families may be stripped of rights to stolen artworks by the mere passage of time when they have no knowledge where the artworks were located or

their rights to them. *Bakalar's* determination; that the Heirs' were not diligent as to a work they had no prior knowledge of was overruled because Congress has eliminated the 'blame the Holocaust victims' legal reasoning underpinning *Bakalar.* Therefore, collateral estoppel does not apply. *See* Restatement (Second) of Judgments § 28 (1982)("a new determination is warranted in order to take account of an intervening change in the applicable legal context"). The Heirs contended that *Bakalar* misapplied New York's laches doctrine in the first place and that, based on existing law, collateral estoppel is not warranted for the reasons relied on by the Appellate Division. Additionally, because new legal principles supplied by the HEAR Act now govern this controversy, collateral estoppel effect should not be given to *Bakalar.*

Additionally, Nagy's motion overlooks that applying collateral estoppel would be unfair due to new evidence uncovered since *Bakalar* available to and properly considered by the IAS Court and the Appellate Division without objection in concluding that Fritz Grünbaum 's art collection was stolen by the Nazis, including expert historian reports containing new scholarship and new revelations of links of the Swiss art dealer to the Nazis. Because the IAS Court and Appellate Division correctly concluded that, as a matter of fact, *Bakalar* does not bar the Heirs' claims and that Nagy failed to show any prejudice from any purported inaction on the part of the Heirs, leave to appeal should be denied.

COUNTERSTATEMENT OF LACK OF TIMELINESS

Nagy's proposed appeal is untimely and the Court lacks jurisdiction because the January 31, 2020 judgment is not a "final judgment" within the meaning of CPLR 5602(a)(1)(ii). Nagy's motion for leave is untimely because the July 9, 2019 Order of the Appellate Division disposed of all claims in this action and remitted only for ministerial action, making the July 9, 2019 Order the "final judgment" from which Nagy should have appealed, had he wished to do so. *Spodek v. Park Prop. Dev. Assocs.*, 96 N.Y.2d 577, 579, 759 N.E.2d 760, 761 (2001). Although Nagy sought leave to appeal to this Court from the Appellate Division, which denied the motion in its October 22, 2019 Order, he failed to timely seek leave from this Court directly.

COUNTERSTATEMENT OF LACK OF JURISDICTION

CPLR 5501(b) provides, in relevant part, that "[t]he court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered." Nagy's appeal raises challenges to factual findings of the IAS Court that were unanimously affirmed. Therefore, leave to appeal should be denied because this Court lacks jurisdiction to review unanimous factual findings.

COUNTERSTATEMENT OF LACK OF PUBLIC IMPORTANCE

New York has long had a strong public policy against transacting in stolen property and in favor of protecting true owners of stolen property. *Guggenheim v. Lubell,* 77 N.Y.2d 311 (1991). Nagy has correctly been found to be an art dealer and "Schiele expert" acting in bad faith, not a person asserting interests worthy of this Court's attention. Nagy's arguments that the Appellate Division announced new standards for collateral estoppel and laches are baseless. His arguments that there is any danger to the New York art market are also baseless. If fifty possessors of Grünbaum works wanted the certitude Nagy advocates, Nagy and those undisclosed persons should have cooperated with the Heirs' efforts to certify a defendant's class action in *Bakalar*. Instead, the evidence shows that Nagy, a professional art dealer, testified that he had no interest in the Artworks before immediately acquiring them after *Bakalar* and knowing the risks, sought to use the lucrative New York art market to transact in stolen goods and even bought an insurance policy to defend against the Heirs' claims to the Artworks. A thief cannot pass good title in New York, Nagy could not and never can prove good title, and Nagy was unable to show any prejudice attributable to any purported delay by the Heirs. Moreover, the federal and New York policy has been clearly established in the HEAR Act which supports merits based review of claims to avoid the results reached in cases like *Bakalar*. Leave to appeal should be denied because Nagy presents no issue of public importance and

instead asks this Court to issue a determination that directly opposes the federal policy embraced by New York courts.

COUNTER-QUESTIONS PRESENTED

1. Did the IAS Court and Appellate Division properly determine that collateral estoppel did not bar the Heirs' claims to the Artworks?

   Yes. Collateral estoppel requires (i) identity of issue and (ii) a full and fair opportunity to litigate. Nagy had knowledge of the *Bakalar* action and purchased the artworks afterwards at a substantial discount. The *Bakalar* judgment was limited to a single drawing. The Heirs had no full and fair opportunity to litigate because the *Bakalar* judge excluded all evidence from expert historians. David Bakalar was a novice collector who purchased *Seated Woman* in 1964 with no knowledge of its provenance and who possessed *Seated Woman* until he tried to auction it at Sotheby's in 2005. Here, Nagy was a sophisticated art dealer who knew of and insured himself specifically against the Heirs' claims prior to purchasing the Artworks. The IAS Court and the Appellate Division considered expert testimony and newly-discovered evidence showing that the Nazis looted Fritz Grünbaum 's art collection. The Artworks are different. Additionally, the HEAR Act superseded *Bakalar*. Based on well-established law, IAS Court and Appellate Division correctly determined that Nagy had failed to meet his establish the affirmative defense of collateral estoppel.

2. Did the IAS Court and Appellate Division properly determine that Nagy could not establish prejudice necessary to establish the affirmative equitable defense of laches where Nagy, a professional art dealer and Schiele expert subject to the UCC, purchased the Artworks in reliance on *Bakalar* and insured against the Heirs' claims after representing to the Second Circuit years earlier that he did not own or know of the location of the Artworks?

   Yes. Nagy suffered no prejudice because he is a sophisticated art dealer who knew of and insured himself specifically against the Heirs' claims prior to purchasing the Artworks, the Heirs' claims were timely, and Nagy knew of Lukacs' death prior to purchasing the Artworks. Unlike David Bakalar, Nagy had unclean hands and brought the Artworks to New York to sell them, knowing that he did not and never could have good legal title. Additionally,

the HEAR Act, enacted after *Bakalar*, gives the Heirs six years from the time of discovering the artwork's location to bring a claim, thus eliminating *Bakalar*'s rationale.

COUNTERSTATEMENT OF FACTS

A. The IAS Court And Appellate Division Determine Based On Record Evidence That Heirs Informed Nagy As Early As 2004 That They Were Searching For The Artworks And Nagy Acquired The Artworks With This Knowledge

Nagy, a professional art dealer and "Schiele expert" was put on notice in 1998 about the "potential provenance issues with Schiele artworks" when then New York County District Attorney, Robert Morgenthau, seized two Schiele artworks from the Museum of Modern Art. *Reif v. Nagy*, 175 A.D.3d 107, 112, 106 N.Y.S.3d 5 (1st Dept. 2019) *citing Matter of Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art,* 93 N.Y.2d 729, 732, 697 N.Y.S.2d 538, 719 N.E.2d 897 (1999). With specific respect to the Artworks, Nagy knew no later than October 2004, based upon an October 6, 2004 letter from the Art Loss Register, that *Woman in a Black Pinafore* was just one of many Schiele works owned by Fritz Grünbaum and that there was at least a possibility that a claim would be asserted against *Woman in a Black Pinafore.* (R. 389-390);[2] *Reif v. Nagy,* 175 A.D.3d at 124. Numerous other correspondences in 2004 and 2005, including correspondence from Heirs' counsel Raymond J. Dowd dated October 11, 2005, unequivocally demonstrate that Nagy

[2] Citations to "R. PAGE-PAGE" are to the Appellate Division Record on Appeal concerning the July 19, 2019 Order.

had actual knowledge that "Grünbaum 's heirs were searching for works that belonged to his estate." *Reif v. Nagy*, 61 Misc. 3d 319, 329, 80 N.Y.S.3d 629, 636 (N.Y. Sup. Ct. 2018), *aff'd as modified*, 175 A.D.3d 107, 106 N.Y.S.3d 5 (1st Dept. 2019).

Notwithstanding his actual knowledge of the Heirs' claims and efforts, Nagy acquired a half-interest in *Woman in a Black Pinafore* on February 24, 2005 – a day after an unsuccessful auction at Sotheby's – only to "void" his share on October 2011 "given the ambiguity and problems with the provenance." *Id.* at 118. Notably, Nagy acquired *Woman in a Black Pinafore* at a "steep discount." *Reif v. Nagy,* 61 Misc. 3d at 328, (£91,140 following a failed Sotheby's auction with estimates of £350,000-£450,000).

The Swiss art dealer Eberhard Kornfeld of Galerie Kornfeld similarly confirmed in a 2004 email to Nagy that *Woman Hiding Her Face* also originated with Grünbaum . *Reif v. Nagy,* 175 A.D. At 124. Nagy acquired *Woman Hiding Her Face* in a January 16, 2014 private sale after *Bakalar* and purchased title insurance because the Artwork "was registered as 'Lost Art' and that claims had been made by Grünbaum 's heirs that is was looted by the Nazis during World War II." *Id.* at 118. Thus, the First Department properly concluded that "Nagy was on notice of plaintiffs' claims to the Grünbaum collection prior to the purchase" of the Artworks. *Id.* at 130.

B. The Heirs Immediately Filed This Action Upon Learning of the Artworks' Location At The Park Avenue Armory In New York City

The Artworks were first discovered by the Heirs at the Park Avenue Armory in November 2015 and written demand was sent within hours on November 13, 2015 and this action immediately commenced upon Nagy's refusal to return them.[3] (R. 120-121, R. 255); *Reif v. Nagy*, 61 Misc. 3d 319, 322, 80 N.Y.S.3d 629, 631 (Sup. Ct. N.Y. Co. 2018). The IAS Court entered a temporary restraining order and the parties subsequently stipulated to have the Artworks remain in New York pending a final judgment before the preliminary injunction hearing. (Affirmation of William Charron ("Charron Aff.") at Ex. D, Aug. 4, 2016 Tr. at 3:9-18).

C. The IAS Court And Appellate Division Correctly Denied Nagy's Motion To Dismiss Based On Collateral Estoppel Because The Purchaser, The Pieces and The Time Over Which The Pieces Were Held Differ Significantly and That The Three Artworks Are Not Part of A Collection Unified In Legal Interest Such As To Impute The Status Of One To Another

a. Bakalar Concerned Only One Artwork Known As *Seated Woman* And Was Limited From The Discovery Phase Through Trial To *Seated Woman*, Not A Collection

Nagy moved to dismiss on the basis of collateral estoppel , arguing he was entitled to the same laches determination reached in *Bakalar*. As determined by the

[3] The demand and refusal is a necessary component of a replevin claim and the Heirs claim did not accrue until Nagy's refusal. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 318, 569 N.E.2d 426, 429 (1991)

District Court (Pauley, J.), David Bakalar purchased Egon Schiele's *Seated Woman* in "good faith" in 1964 as a novice art collector with no knowledge that it had been looted and held it for decades with no knowledge that its provenance might be tainted. *Bakalar v. Vavra*, 819 F. Supp. 2d at 295 *citing Bakalar v. Vavra,* 2008 WL 4067335, at *3 (S.D.N.Y. Sept. 2, 2008) *vacated and remanded,* 619 F.3d 136 (2d Cir. 2010). The Heirs not only counterclaimed for possession of *Seated Woman* but also sought to certify a class to recover "artworks that were part of the estate of Fritz Grünbaum." *Bakalar v. Vavra*, 237 F.R.D. 59, 61 (S.D.N.Y. 2006). The District Court denied the motion, finding that certification was unwarranted because, "[f]irst, an individual investigation is required to identify each untitled work. Second, good faith defenses would vary for each class member based on applicable law and the facts specific to each transfer." *Id.* at 67.

Importantly, the District Court refused, on remand, to permit the Heirs to engage in expert discovery and submit newly discovered evidence on timeliness grounds and the Heirs were therefore precluded from presenting expert evidence, specifically the expert report of Jonathan Petropoulos, that was considered by the IAS Court and Appellate Division herein. Compare *Bakalar v. Vavra*, 851 F. Supp. 2d 489 (S.D.N.Y. 2011) with *Reif v. Nagy*, 175 A.D.3d at 119. Similarly, Eberhard Kornfeld refused to produce and permit inspection of documents relevant here by Heirs handwriting expert (R. 71-73) and as determined by the Appellate Division

based upon a review of the evidence, "[p]lainly, Kornfeld's testimony that he did not know of the Grünbaum provenance of at least some of the Schieles in 1956 is false." *Reif v. Nagy*, 175 A.D.3d at 123.

Thus, Heirs discovery was constrained to issues pertaining to *Seated Woman* – including prejudice to David Bakalar specifically - not the entirety of Fritz Grünbaum 's collection as argued by Nagy. *Bakalar v. Vavra*, 2006 WL 2311113, at *4 (S.D.N.Y. Aug. 10, 2006) (denying Bakalar's motion for summary judgment on his laches defense). The Appellate Division, upon a complete review of the evidence, made factual findings as the parties requested having submitted cross-motions for summary judgment. Nagy's protestations of the result do not warrant leave to appeal to this Court.

b. *Bakalar* Holds That Lukacs Never Possessed Good Title To *Seated Woman* But That Bakalar Established The Affirmative Equitable Defense Of Laches And Entered Judgment Specific To *Seated Woman* And The Second Circuit Affirmed In A Non-Precedential Summary Order

Following his 1964 purchase of *Seated Woman,* David Bakalar held *Seated Woman* for almost fifty years before he attempted to auction it through Sotheby's in 2004. *Bakalar v. Vavra* 2008 WL 4067335 at *1 (S.D.N.Y. Sept. 2, 2008) *vacated and remanded,* 619 F.3d 136 (2d Cir. 2010). During that period, Mathilde Lukacs, to whom Nagy traces his alleged provenance of the Artworks, died in 1979. *Bakalar v. Vavra*, 819 F. Supp. 2d at 306. Following trial, the District Court held that Lukacs did not receive an *inter vivos* gift of or complete a sale transaction concerning *Seated*

Woman reasoning that "as even Bakalar concedes, there is simply no evidence as to how Lukacs acquired the Drawing" * * * "because there is no evidence as to how Lukacs acquired the Drawing, Bakalar cannot establish by a preponderance of the evidence that Grünbaum *voluntarily* relinquished possession of the Drawing, or that he did so intending to pass title." 819 F. Supp. 2d at 299-300. Thus, the District Court was compelled to conclude that "Bakalar cannot establish that Lukacs held title to the painting at the time it was sold to Galerie Gutekunst" eliminating any plausible allegation by Nagy that Lukacs transferred good title to the entire Grünbaum collection. *Id.* at 302.

Nevertheless, the District Court held that although "Bakalar cannot establish that Lukacs held title to the painting at the time it was sold to Galerie Gutekunst," that Nagy could prevail on the affirmative equitable defense of laches; most importantly the prejudice resulting from Lukacs' death. *Id.* at 302, 306. In sum, Mr. Bakalar did not prevail on his claims; he instead prevailed on his affirmative defense against the Heirs counterclaims. *Id.* at 303. ("Having failed to establish that Lukacs acquired valid title to the Drawing, this Court must address whether laches bars Defendants' claims").

The District Court, acknowledging that the laches determination would cause "a certain inequity on the losing party" and concluded that because Bakalar was a "an ordinary non-merchant purchaser of art" who acquired and held *Seated Woman*

for almost fifty (50) years that he would suffer prejudice do an absence of evidence, including "[o]f the greatest significance. . .the death of Mathilde Lukacs. . ." *Id.* at 305-306. Thus, the District Court's order held only that David Bakalar established the defense of laches vis-à-vis *Seated Woman* and made no determination as to Grünbaum 's art collection. *Id.* at 307.

In affirming, the Second Circuit unequivocally stated that it was not addressing the issue of Lukacs' alleged title as would be necessary for Bakalar to establish his own title because "we affirm instead on the district court's ruling that the claim against Bakalar is defeated by laches." 500 F. App'x at 8. The resulting final judgment in *Bakalar* applies only to "the Egon Schiele drawing, dated 1917, known as 'Seated Woman with bent Left Leg (Torso)'" and the Second Circuit affirmed in a non-precedential summary order, a fact that is not raised by Nagy in his proposed appeal. (Affirmation of Raymond J. Dowd Exs. 2-3). As set forth in the Appellate Division's Decision affirming the IAS Court's summary judgment order, the Second Circuit's decision was not published and is not precedential pursuant to Second Circuit Local Rule 32.1.1. *Reif v. Nagy,* 175 A.D.3d 117 at Note 15.[4]

[4] This Court has also taken notice of Second Circuit Local Rule 32.1.1 and the lack of precedential force of summary orders. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 551, 25 N.E.3d 928, 936 (2014).

c. Nagy Testifies To The Second Circuit That He Has No Interest In And No Knowledge Of The Artworks' Location

Nagy was not a party to *Bakalar,* although he did have knowledge of the litigation. Specifically, Nagy testified in *Bakalar*, purportedly as an amicus, to the Second Circuit Court of Appeals in a April 16, 2012 affidavit that he (a) voided his prior interest in the Artwork *Woman In Black Pinafore* and (b) "never sold, purchased, or acted as an agent in the sale of purchase of any works of art by Egon Schiele with the provenance of Mathilde Lukacs and Eberhard Kornfeld" and he did not know where the Artworks were and disclaimed any interest in them. (R. 1000-1001). Despite Nagy's testimony, the record shows that Nagy acquired the Artworks in private sales immediately after the United States Supreme Court denied *certiorari* in *Bakalar* in 2013 before marketing them in New York. *Reif v. Nagy*, 61 Misc. 3d at 322; *Reif v. Nagy*, 175 A.D.3d at, 118 *citing Bakalar,* 500 Fed. Appx. at 6.

D. The IAS Court And Appellate Division Correctly Denied Nagy's Motion To Dismiss Based On Collateral Estoppel Because The Purchaser, The Pieces and The Time Over Which The Pieces Were Held Differ Significantly and That The Three Artworks Are Not Part of A Collection Unified In Legal Interest Such As To Impute The Status Of One To Another

Justice Ramos found that *Bakalar* was limited to *Seated Woman.* (Charron at Ex. D, Tr. Oral Arg. Aug. 4, 2016, 5:15-5:19). Justice Ramos further held that the laches determination was individualized to David Bakalar and that Judge Pauley

declined to make any determinations about the collection as a whole. (Tr. Oral Arg., Aug. 4, 2016, 12:2-12:9) ("[W]e are dealing with a different owner and a different category of consumer, who is a consumer rather than a dealer, involving a different artwork. The only thing that's the same is that it apparently came out of the same estate.")

The Appellate Division, First Department unanimously affirmed in the April 18, 2017 Order and subsequently unanimously denied Nagy's motion for leave to appeal to this Court. (Charron Aff. Exs. C-E). Both the IAS Court and Appellate Division carefully considered *Bakalar* and determined that neither required element of collateral estoppel, (1) identity of issue and (2) a full and fair opportunity to litigate, were present. The IAS Court determined, in rejecting Nagy's argument, that "[t]he Second Circuit decision was always talking about this painting, this painting, this work of art, and made it very clear that they weren't applying this across the board to any claim being made with regard to this art collection" (Tr. Oral Arg., Aug 4, 2016 5:15-19). In affirming, the Appellate Division found that "the purchaser, the pieces, and the time over which the pieces were held differ significantly" and that "[t]he three works are not part of a collection unified in legal interest such to impute the status of one to another." *Reif v. Nagy*, 149 A.D.3d at 533.

On remand, the Heirs moved for summary judgment and, conceding that no further disclosure was necessary, Nagy cross-moved for summary judgment.

Interesting, Nagy retreated from his failed collateral estoppel and laches arguments that he seeks to resurrect here and argues "that there was a lack of evidence that Grünbaum ever owned the Artworks, and, rather, that the evidence showed that the Artworks were always possessed by Mathilde and never stolen by the Nazis. Nagy asserted that he was a good faith purchaser and that plaintiffs had failed to timely pursue their claim." *Reif v. Nagy,* 175 A.D.3d at 119. Both Heirs and Nagy submitted significant evidence and multiple expert opinions which were considered by the IAS Court. *Id.* Among these were the Expert Report of Jonathan Petropoulos submitted in support of Heirs' claims which had been excluded on timeliness grounds by the District Court in *Bakalar*. *Id,*

The IAS Court held that the Heirs were the lawful owners of the Artworks based upon their claims for replevin and conversion and denied Nagy's counterclaims. *Reif v. Nagy*, 61 Misc. 3d at 320 *aff'd as modified,* 175 A.D.3d 107, 120-130. The Appellate Division, First Department's July 19, 2019 Order reaffirmed the April 18, 2017 Order's analysis rejecting collateral estoppel. 175 A.D.3d at 118-119. The Appellate Division also carefully considered Nagy's laches arguments and found that because Nagy acquired the Artworks in 2013 with actual knowledge of the provenance issues and Heirs claims, he suffered no change in position and that no loss of evidence occurred between his acquisition and Heirs' demand. *Id.* at 130. Further, The Appellate Division found that the prejudice

suffered by Bakalar, the death of Lukacs,' was immaterial because she could not have passed good title and thus Nagy could never show good title. *Id.* at 131. Accordingly, the Appellate Division unanimously affirmed the IAS Court's factual and legal determinations, other than the award of legal fees. (Charron Aff. Ex. F). On October 22, 2019, the First Department denied Nagy's motion for leave to appeal to this Court. (Charron Aff. Ex. G).

E. *Bakalar* Was Superseded By The HEAR Act Which Prevents Holocaust Victims From Losing Rights To Artworks They Don't Know Exist And Which Was Enacted To Undo A Laches Decision In *Detroit Institute of Arts v. Ullin*

The HEAR Act was signed into law on December 16, 2016. PL 114-308, December 16, 2016, 130 Stat 1524. (R. 593-597). The Hear Act found that "hundreds of thousands of works of art" were looted during the Holocaust, that attempts were made to restitute stolen art, that United States policy is to return stolen art, that claimants encounter difficulty in recovering stolen art and that claimants should not be barred from pursuing claims on non-substantive grounds. HEAR Act § 2. Specifically, Congress took specific issue with the laches determination in *Detroit Institute of Arts v. Ullin,* 2017 WL 1016996 (E.D. Mich. Mar. 31, 2007) and stated that the HEAR Act was necessary because "[t]hese lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the

claims expired before World War II even ended. (*See, e.g., Detroit Institute of Arts v. Ullin*, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).)" Hear Act § 2(6).

The HEAR Act is broad and covers any artwork lost as a result of "Nazi persecution" between January 1, 1933 and December 31, 1945. Hear Act § 4. The HEAR Act imposes a six (6) year statute of limitations from the time of "actual discovery" of both the identity and location of the artworks and a possessory interest in the artwork. HEAR Act § 5.

As explained by the IAS Court:

> the "HEAR Act expanded the timeliness for actions to recover Nazi-looted artwork to six years from 'the actual discovery by the claimant' of the 'identity and location of the artwork' and of 'a possessory interest of the claimant in the artwork' (HEAR Act, § 5[a]). Congress has also instructed that actions brought within six years will be timely, '[n]otwithstanding any defense at law relating to the passage of time.' (*Id.*). Although defendants argue that the HEAR Act is inapplicable, this argument is absurd, as the act is intended to apply to cases precisely like this one, where Nazi-looted art is at issue. Since plaintiffs discovered the Artworks in November of 2015, their action is timely under the HEAR Act. The statute of limitations and laches defenses fail."

Reif v. Nagy, 61 Misc. at 327–28 *quoting Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401, 404-5, 63 N.Y.S.3d 376 (1st Dept. 2017). Under the HEAR Act that "the applicable statute of limitations is six years from the date of actual discovery." *Gowen v. Helly Nahmad Gallery, Inc.*, 60 Misc. 3d 963, 986, 77 N.Y.S.3d 605, 623 (Sup. Ct. N.Y. Co. 2018), *aff'd,* 169 A.D.3d 580, 95 N.Y.S.3d 62

(1st Dept. 2019). As set forth in the IAS Court's decision, it is undisputed that the Heirs' claims were timely.

F. Nagy Argues In 2016 That The Artworks Were Not Stolen By Misleading The Court Concerning The-Since Reversed Actions Of The German Lost Art Foundation

Notably, Nagy fails to inform this Court that the factual predicate of his original collateral estoppel argument in 2016 – that the relevant artworks were not stolen – has proven to be false. (Compare Charron Aff. Ex. D, Aug. 4, 2016 Tr. 8:20-9:8 with Dowd Aff. Ex. 1). Specifically, Nagy argued that because the Artworks were de-listed from the German Lost Art Foundation database, www.lostart.de, "that is direct evidence that the works were not stolen. . ." (Charron Aff. Ex. D, Tr. 9:7-8). Nagy persisted in this argument to the Appellate Division after the IAS Court denied his motion to dismiss. (R. 906).

However, Nagy failed to disclose to the IAS Court or Appellate Division that that Artworks were among sixty-three (63) Schiele works claimed by the Heirs of Fritz Grünbaum and de-listed by German Lost Art Foundation at the request, and threat of litigation, of Nagy and his supporters, Jane Kallir and Eberhard Kornfeld, collectively represented by German attorney Jutta Freifrau von Falkenhausen. (R. 3058). This Court may take judicial notice that a German court reversed the German Art Foundation's determination and the Artworks, as well as the Fritz Grünbaum

collection, are now free to be listed on the Foundation's website, www.lostart.de. (Dowd Aff. Ex. A).

ARGUMENT

I. Because The July 9, 2019 Finally Determined All Claims In This Action And Left Only Ministerial Acts This Untimely Motion For Leave To Appeal Should Be Denied

The proposed appeal is untimely and the Court lacks jurisdiction because the January 31, 2020 judgment is not the appropriate "final judgment" from which to appeal from within the meaning of CPLR 5602(a)(1)(ii). Nagy's motion for leave is untimely because the July 9, 2019 Order of the Appellate Division disposed of all claims in this action and remitted only for the ministerial action of calculating damages, costs and prejudgment interest running from November 13, 2015, making the July 9, 2019 Order the "final judgment" from which Nagy should have directly sought leave to appeal from this Court, had he wished to do so, following the Appellate Division's October 22, 2019 Order denying leave to reargue or to appeal. *Spodek v. Park Prop. Dev. Assocs.*, 96 N.Y.2d 577, 579, 759 N.E.2d 760, 761 (2001)("the appeal arises from the Appellate Division order which disposed of all issues in the case and remitted only for ministerial action. Thus, we have no occasion to address the final judgment."); *see* Karger, *The Powers of the New York Court of Appeals* (3d Ed. 2005) §4:10 (Order remitting case to tribunal below for further proceedings).

In support of timeliness, Nagy inaccurately argues that Justice Borrok's January 31, 2020 Order severed the "remaining and remanded claims." (Charron Aff. Ex. A). This is incorrect. In truth, all "claims" in this action were finally adjudicated in the July 9, 2019 Order. Justice Borrok's January 31, 2020 order severed and referred to a referee the ministerial "issue" of calculating costs, damages and prejudgment interest from November 13, 2015 to a referee. Because 22 NYCRR § 1250.16, as relied on by Nagy, is applicable to appellate decisions, orders and judgments whereas CPLR 5016 as applicable to Supreme Court judgments, Nagy's reliance is misplaced. *Wilmington Sav. Fund Soc'y, FSB v. John*, No. 69589/2019, 2020 WL 718959 (Sup. Ct. Westchester Co. Feb. 11, 2020)

II. Leave To Appeal Should Be Denied Because This Court Lacks Jurisdiction Over The Purely Factual Questions That Nagy Seeks To Review

CPLR 5501(b) provides, in relevant part, that "[t]he court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered."[5] Nagy's appeal raises challenges to factual findings of the IAS Court that

[5] "The Court of Appeals is the State's highest tribunal to settle the law; it sits in an appellate capacity primarily to review every question of law properly before it (Siegel, New York Practice (1978), p. 13; Cohen and Karger, Powers of the New York Court of Appeals, pp. 7, 29). 'In civil cases, the court is empowered to review the facts only when (1) the Appellate Division has reversed or modified (2) a final or interlocutory determination and (3) made new findings of fact and (4) a final determination 'pursuant thereto' has been entered. (7 Weinstein-Korn-Miller, N.Y.Civ.Prac.,

were unanimously affirmed. Therefore, leave to appeal should be denied because this Court lacks jurisdiction.

Bakalar did not make the factual or legal determinations that Nagy says it did. As the IAS Court correctly determined and the July 9, 2019 Order affirmed, the parties are different, the artworks are different, the periods that the artworks were held are different, and the artwork are not united in legal interest to form a collection. *See* Facts Point D, supra. Nagy is simply engaging in wishful thinking in trying to stretch a federal judgment in *Bakalar* far beyond its language or context. As such, Nagy raises no leave-worthy questions of New York law. Contrary to Nagy's contention, the IAS Court and Appellate Division simply applied the existing law of collateral estoppel and laches to the facts thus eliminating any basis for this Court's review. Nagy, a private dealer attempting to transact in looted art despoiled from Holocaust victims, should not be permitted to monopolize this Court's resources to review a question that has no bearing on anyone but the Heirs and Nagy.

The IAS Court and Appellate Division's factual determinations are beyond the scope of review. *Livreri v. Gargiulo*, 49 N.Y.2d 832, 833, 404 N.E.2d 1324, 1325 (1980) ("in light of the fact that both judgments of Supreme Court were affirmed by the Appellate Division, we may not review any claimed factual errors");

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par. 5501.14; see N.Y.Const., art. VI, s 3, subd. a; CPLR 5501, subd. (b))." *Town of Massena v. Niagara Mohawk Power Corp.*, 45 N.Y.2d 482, 491, 382 N.E.2d 1139, 1144 (1978)

Matter of Hofbauer, 47 N.Y.2d 648, 654, 393 N.E.2d 1009, 1013 (1979) ("our scope of review is narrow in a case, such as this, coming to us with affirmed findings of fact"). Here, the IAS Court and Appellate Division properly found facts and reliably applied them to the law. Specifically, (1) the Southern District and Second Circuit expressly limited the scope of the *Bakalar* litigation to *Seated Woman* in a non-precedential summary order; (2) the final judgment in *Bakalar* applied only to *Seated Woman*; (3) *Bakalar* was determined solely on the fact-specific defense of laches specific to David Bakalar, (4) any other determinations, actual or perceived, were not necessary to the judgment, and (5) given restrictions on discovery and the availability of evidence, the Heirs did not have a full and fair opportunity to litigate in *Bakalar* the fate of any of Grünbaum 's artworks other than *Seated Woman,* especially given the denial of class certification and corresponding limitations on the scope of fact and expert discovery.

III. Leave To Appeal Should Be Denied Because, Following Passage of the HEAR Act, *Bakalar* Is No Longer Good Law Because Holocaust Victims Must Now Have Actual "Knowledge" of Their Ownership of and the Location of Artworks Before Being Stripped of their Rights By Courts

The IAS Court correctly determined that the HEAR Act's provisions apply to the Artworks. (Charron Aff. Ex. D, April 6, 2018 Decision at 5-7, 12). The Appellate Division did not upset this finding and instead concluded that the HEAR Act was consistent with New York policy and its July 19, 2019 Order specifically. *Reif v.*

Nagy, 175 A.D. at 132. The HEAR Act was enacted in 2016, following *Bakalar*, due to Congressional outrage over Holocaust victim families being stripped of rights to artworks by Courts accusing them of inaction where none of the family members knew or had reason to know that artworks survived World War II or that any murdered family members owned particular artworks.

Because the HEAR Act protects and preserves the rights of Holocaust victims until they actually discover the location of the artworks and have ownership rights, the HEAR Act overrules *Bakalar*. Nagy's claim that the HEAR Act is inapplicable because the Artworks were never stolen is farcical. (Nagy Brief at 39). *Bakalar* expressly found that Lukacs could never obtain good legal title because Grünbaum never validly transferred *Seated Woman* in his lifetime. The HEAR Act applies to any "lost" artwork and Nagy's protestations that he cannot sell property belonging to Holocaust survivors does not warrant this Court's attention.

In *Bakalar*, none of the Heirs knew of *Seated Woman's* location until 2005, yet the *Bakalar* Court determined that long dead Holocaust victims should have done something more to pursue potential intestate rights and thus their Heirs lost those rights. Although *Bakalar* purported to apply New York law, its methodology and results are inconsistent with New York's law of decedent's estates and offensive to New York's public policy. At present, trial courts relying on Appellate Division precedent are applying the HEAR Act for its intended purpose. *Gowen v. Helly*

Nahmad Gallery, Inc., 60 Misc. 3d 963, 986, 77 N.Y.S.3d 605, 624 (Sup. Ct. N.Y. Co. 2018), *aff'd,* 169 A.D.3d 580, 95 N.Y.S.3d 62 (1st Dept. 2019) *citing Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401, 404, 63 N.Y.S.3d 376 (1st Dept. 2017).[6]

Happily, the HEAR Act has overruled *Bakalar.* Because the applicable law is different in this action from that applied in *Bakalar*, collateral estoppel should not be applied in the rigid and mechanical fashion advanced by Nagy which would strip the IAS Court of any right to consider the facts of this case. *Gilberg v Barbieri*, 53 NY2d 285, 292 (1981). This Court has continuously warned against application of collateral estoppel in situations where questions exist about either the identity of issue or the full and fair opportunity to litigate. *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 155, 527 N.E.2d 754, 757 (1988). *Bakalar* did not adjudicate the collection generally or Artworks specifically, did not adjudicate the issue of prejudice vis-à-vis Nagy, did not consider the same evidence and did not consider the same facts. General principles of New York law foreclose Nagy's

[6] "In the instant matter, the Appellate Division, First Department, has already decided to apply the HEAR Act's 6–year statute of limitations given that the HEAR Act preempts New York State Law. In 2011 Maestracci discovered who owned the Painting, started the 2011 federal action, then commenced this action in 2014 after withdrawing the federal action. Under the HEAR Act, this court finds the action is timely."

collateral estoppel and laches arguments. The HEAR Act now supplements those principles and mandates the same result.

IV. Leave To Appeal Should Be Denied Because The Decisions Below Do Not Change The Law Of Collateral Estoppel: Nagy Simply Failed To Meet His Burden Of Proving That *Bakalar* Adjudicated The Heirs' Rights To A "Collection"

The doctrine of collateral estoppel consists of two material elements: "(1) that the identical issue was necessarily decided in the prior proceeding and is decisive of the present action, and (2) that there was a full and fair opportunity to contest that issue in the prior proceeding. *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 665-66, 564 N.E.2d 634 76 N.Y.2d 659, 665, 564 N.E.2d 634, 637 (1990) (citations omitted). The burden of showing that the issue was identical and necessarily decided rests upon Nagy. *Schwartz v Pub. Adm'r of Bronx County*, 24 NY2d 65, 73 (1969). Stated differently, Nagy must establish that he "stands in the shoes" of David Bakalar in order to obtain the benefit of the decision. *D'Arata,* 76 N.Y.2d 665. Nagy cannot do so and is thus compelled to argue to this Court that *Bakalar* should be expanded far beyond its words and that the IAS Court and Appellate Division fundamentally changed the law of collateral estoppel where in fact both Courts carefully applied the facts to the law.

Point I of Nagy's argument Nagy argues that *Bakalar* adjudicated an entire art collection, not just *Seated Woman* as specified in the judgement. (Dowd Aff. Ex. 2). As explained in the Facts Section at Points A and C, above, this factual premise

is false, and as also set forth above, the argument must fail. As recently explained by this Court, "[i]ssue preclusion, also known as collateral estoppel, bars the relitigation of "an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment. *Paramount Pictures Corp. v. Allianz Risk Transfer AG,* 31 N.Y.3d 64, 72, 96 N.E.3d 737, 743 (2018). Thus, it is incumbent upon Nagy to establish that the "issue" of the Heirs' ownership of the each work comprising Grünbaum collection was actually litigated to a final judgment and that Nagy is entitled to benefit from that finding. *Jeffreys v. Griffin*, 1 N.Y.3d 34, 39, 801 N.E.2d 404, 407 (2003). The application of collateral estoppel is not "mechanical" and the Court must consider the "realities of the litigation" and "fairness" given the equitable nature of the defense. *Id.* (citations omitted). The IAS Court and Appellate Division each carefully considered *Bakalar,* applied the facts to the law and correctly rejected Nagy's collateral estoppel argument:

> Collateral estoppel requires the issue to be identical to that determined in the prior proceeding, and requires that the litigant had a full and fair opportunity to litigate the issue. Neither of those requirements has been shown here where the purchaser, the pieces, and the time over which the pieces were held differ significantly. The three works are not part of a collection unified in legal interest such to impute the status of one to another. *Reif v. Nagy*, 149 A.D.3d at 533.

The July 19, 2019 Order reaffirmed the foregoing and upheld the IAS Court's well-reasoned rejection of the laches defense.

The First Department did not create new law or depart from any standards announced by this Court. Instead, the First Department relied on this Court's decision in *Schwartz v. Public Adm'r of County of Bronx*, 24 NY2d 65 (1969), a seminal case announcing New York's modern collateral estoppel standard and *Poindexter v Cash Money Records*, 2014 WL 818955 (S.D.N.Y. 2014), a federal case, relied upon by Nagy, for the proposition that *Bakalar* did not apply to a purported collection.

In an effort to create a legal issue, Nagy inundates his brief with irrelevant and inapposite case law that, even if they stand for proper legal standards, are distinguishable. By way of example, *3 E. 54 St. New York, LLC v. Patriarch Partners Agency Servs. LLC,* 110 A.D.3d 516, 517, 972 N.Y.S.2d 549 (1st Dept. 2013) concerns only the ability of a non-party to invoke collateral estoppel; an issue that is not present on this propose appeal and is nothing more than a red herring. (Nagy Brief at 40). *GTF Mktg., Inc. v. Colonial Aluminum Sales, Inc.,* 108 A.D.2d 86, 90, 488 N.Y.S.2d 219 (2d Dept. 1985) *aff'd,* 66 N.Y.2d 965, 489 N.E.2d 755 (1985) concerned a finding that certain virtually identical contractual terms previously held to be unconscionable was binding after a full and fair opportunity to litigate. (Nagy Brief at 41). Similarly, *In re Armonk Snack Mart, Inc.,* No. 15-22375(RDD), 2018 WL 2225008, at *5 (S.D.N.Y. May 15, 2018) concerns successor liability in a bankruptcy, not an adjudication of an art collection as

suggested by Nagy. (Nagy Brief at 42). Nagy does not offer a single case to demonstrate that *Bakalar's* specific findings vis-à-vis *Seated Woman* and *Bakalar* are entitled to collaterally estop Heirs' claims herein. What Nagy challenges is a result he does not like based upon the application of facts to law and the Court should deny leave to appeal.

V. Leave To Appeal Should Be Denied Because The Heirs Experts' Exclusion From Testifying In Bakalar Shows That The Heirs Had No Full and Fair Opportunity To Litigate The Merits And Bakalar Was Not Decided On A Reliable Historical Record

As explained in the Facts Section at Points C-D *supra,* the Heirs did not have the opportunity to present expert evidence in Bakalar, depriving them of a full and fair opportunity to litigate. "The question as to whether a party has had a full and fair opportunity to contest a prior determination cannot be reduced to a formula. It cannot, for instance, be resolved by a finding that the party against whom the determination is asserted was accorded due process in the prior proceeding." *Gilberg v Barbieri*, 53 NY2d 285, 292 (1981)(the "point of the inquiry, of course, is not to decide whether the prior determination should be vacated but to decide whether it should be given conclusive effect beyond the case in which it was made"). "A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new

evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation." *Gilberg v Barbieri*, 53 NY2d 285, 292 (1981). "In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings." *Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 153 (1988).

As explained in Facts Section Points C-D, *supra,* the Heirs attempted repeatedly to have experts testify in *Bakalar* to explain evidence of Nazi looting of Grünbaum 's art collection when Grünbaum was in the Dachau Concentration Camp. These multiple attempts to open the District Court's eyes to the reality of mass murder and systematic spoliation included asking for extensions of time over six months before trial are described at *Bakalar v. Vavra*, 851 F. Supp.2d 489, 491-492 (S.D.N.Y. 2011). Despite describing this evidence of the Heirs' due diligence over a six-year period, the *Bakalar* Court concluded that "the probative value of the expert evidence is far outweighed by Defendants' lack of diligence and the resulting prejudice to Plaintiff." Because *Bakalar* turned a blind eye to evidence of spoliation of Holocaust victims, it was not a "full and fair" opportunity to litigate on the merits

and should not be afforded collateral estoppel effect. Stated differently, the decision was impacted by Bakalar's status as a novice art collector who held *Seated Woman* for more than forty (40) years and it is unlikely the same decision would be reached in favor of Nagy on the facts at hand.

By contrast, the IAS Court and the July 9, 2019 Order made additional factual findings relating to the Heirs presenting new evidence of Nazi looting of Grünbaum's art collection not considered by the *Bakalar* court, specifically Dr. Petropoulos' expert report. *Reif v. Nagy,* 175 A.D.3d 107, 121-124. The Appellate Division further found that Nagy, who cross-moved for summary judgment conceding a lack of triable facts, could not rebut Heirs' *prima facie* case including findings that his expert reports were speculative, contrary to facts conceded by Nagy and otherwise included in the record. *Id.* at 124-130, Moreover, this Court noted that the Second Circuit's *Bakalar* decision was expressly issued as non-precedential under the rules of that court and therefore not entitled to collateral estoppel treatment. *Id.* at Note 15. Leave to appeal should be denied. Because Bakalar was not decided on a reliable historical record, the Heirs were denied a full and fair opportunity to litigate.

VI. Leave To Appeal Should Be Denied Because The Decisions Below Do Not Change The Prejudice Prong of Laches: Nagy's Position As A Sophisticated Art Dealer With Knowledge Of The Heirs' Claims Prior To Purchasing The Artworks Is Simply Different From David Bakalar's Position As A Novice Art Collector Who Held The Artworks For Decades Without Knowledge

Nagy argues in Point II that the IAS Court and Appellate Division's Orders eliminated the element of prejudice from a laches defense. (Nagy Brief at 42-47). Specifically, Nagy asks this Court to find that the unavailability of evidence due to Lukacs' death permits him to assert a laches defense, even where he acquired the Artworks after Lukacs died with knowledge of and insured against the Heirs' claims. (Nagy Brief at 43-44). Nagy's argument, that Lukacs would have been entitled to the Artworks in an alternate fact pattern was correctly rejected as speculative, and is contrary to the *Bakalar* decision Nagy wishes this Court to apply. Thus, Point II of Nagy's argument is entirely without merit.

This Court defines "laches as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party. The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches." *Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 816, 798 N.E.2d 1047 (2003) (rejecting laches) "Nowhere in the present case, however, is there any indication that the delay in bringing this action has caused the slightest harm to the Tribe." *Id.* at 817. *Saratoga Cty.* remains good law. *101CO, LLC v. New York State Dep't of Envtl. Conservation*, 169 A.D.3d 1307, 1310, 95 N.Y.S.3d

404, 408 (3d Dept. 2019) *leave to appeal dismissed,* 34 N.Y.3d 1010, 138 N.E.3d 1089 (2019). Laches is a "fact based affirmative defense" unique to the party asserting it who must establish prejudice unique to them. *Id.* (citations omitted). Stated otherwise, "[t]he essential element of this equitable defense is delay prejudicial to the opposing party." *Capruso v. Vill. of Kings Point,* 23 N.Y.3d 631, 641, 16 N.E.3d 527, 532 (2014) *quoting Matter of Schulz v. State of New York,* 81 N.Y.2d 336, 615 N.E.2d 953 (1993). The IAS Court and Appellate Division did not depart from these standards and simply applied the facts to the law.

As explained by the Appellate Division:

> We reject defendants' argument that the defense of laches is a bar to plaintiffs' replevin and conversion claims. Nagy acquired both pieces in 2013. He suffered no change in position. Nor was any evidence lost between defendants' acquisition and plaintiffs' demand for the return of the Artworks. Significantly, Nagy was on notice of plaintiffs' claims to the Grünbaum collection prior to the purchase, as he filed a brief in the *Bakalar* action. Further, it is undisputed that Nagy purchased the Artworks at a substantial discount from the price sought by Sotheby's prior to the claim being publicized, and he obtained insurance for the very purpose of insuring title against plaintiffs' claims.
>
> The *Bakalar* court pointed to Mathilde's death as a prejudice. Mathilde, and other witnesses had died well before Nagy purchased the Artworks. In any event, as we already discussed, Mathilde could not have shown she had good title to the Artworks and her testimony would not have been probative.

Reif v. Nagy, 175 A.D.3d at 130–31 (*citing inter alia Saratoga Cty.*).

Thus, contrary to Nagy's argument, the Appellate Division did not "eliminate" prejudice, it considered all of the facts and reached a result with which

Nagy is not satisfied. In sum, the Appellate Division found as a matter of fact that Nagy acquired the Artworks with actual knowledge of the Heirs' claims and that, in any event, Mathilde Lukacs could not have passed good title and therefore Nagy could not have acquired good legal title. Thus, the Appellate Division did not change the law of laches but instead ruled, on the facts, that Nagy could not establish a laches defense. The Appellate Division saw through Nagy's assertions and realized, like the IAS Court at the motion to dismiss stage, that what Nagy truly seeks is to piggyback onto *Bakalar* without the facts necessary to establish a laches defense.

The case law advanced by Nagy is of no moment. Nagy's reliance on *In re Flamenbaum*, 22 N.Y.3d 962, 966, 1 N.E.3d 782, 784 (2013) is especially misplaced. In *Flamenbaum*, this Court held that laches was inapplicable because (1) it was impractical for the museum to search for every item in a collection; (2) there was no proof the museum would have located the subject tablet; (3) and the movant failed to establish the essential element of prejudice. The third point is the most important here given Nagy's argument. In *Flamenbaum,* the decedent's son had knowledge of the museum's claim and there was no evidence as to how the decedent could have shown good title to the tablet. The same is true here. Nagy had actual knowledge of the Heirs' claims and acquired the Artworks subject to his knowledge. Similarly, Nagy knew Lukacs could never prove good title yet elected to acquire the Artworks anyway.

CONCLUSION

Nagy's motion for leave to appeal should be denied because it is untimely as all of the claims in this action were determined in the July 9, 2019 Order that constitutes a final judgment. This Court lacks jurisdiction because Nagy seeks review of the IAS Court's factual determinations unanimously affirmed by the Appellate Division, First Department. Additionally, because New York protects true owners of stolen property, the IAS Court and Appellate Division's decisions are entirely consistent with this Court's precedents in the area of collateral estoppel and laches, and because the intervening HEAR Act superseded *Bakalar,* Nagy's proposed appeal raises no legal or policy issues of public importance worthy of consideration. Accordingly. Nagy's motion for leave to appeal should be denied.

Dated: New York, New York
February 25, 2020

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STATE OF NEW YORK)
SS.
COUNTY OF NEW YORK)

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BARRY BARON
354 VAN NAME AVE.
STATEN ISLAND, NY 10303, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or _____

_____.

That on the 25th day of February, 2020, deponent served the within

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

upon the attorneys, and by the method designated below, who represent the indicated parties in this action, and at the addresses below stated, which are those that have been designated by said attorneys for that purpose.

☑ By giving 2 true copies of same enclosed in a properly addressed wrapper to Federal Express for delivery to the parties listed below.

Names of attorneys served, together within the names of the clients represented and the attorney's designated addresses.

FOR OVERNIGHT DELIVERY

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Sworn to before me this
25th day of February, 2020

MATTHEW JAMES BAILEY
NOTARY PUBLIC, STATE OF NEW YORK
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Qualified in Queens County
Commission Expires February 28, 2023

ORIGINAL

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