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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.

DEFENDANTS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

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TREATISE

BRIEF FOR DEFENDANTS-APPELLANTS IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

Defendants-Appellants Richard Nagy and Richard Nagy Ltd. (collectively, "Nagy"), by their attorneys, Pryor Cashman LLP and Nixon Peabody LLP, submit this Memorandum in support of their motion pursuant to CPLR 5602(a)(1)(ii) for permission to appeal to the Court of Appeals from the Judgment of Supreme Court, New York County dated February 5, 2020 and entered and filed in the Office of the Clerk of Court on February 5, 2020 (the "Severed Final Judgment"), which Severed Final Judgment entitles Nagy to seek permission to appeal the following orders of the Appellate Division, First Department, as such orders necessarily affect the Severed Final Judgment:

(i) the Decision and Order of the Appellate Division, First Department of April 18, 2017, (149 AD3d 532 [1st Dept 2017]), which affirmed the denial of Nagy's Rule 3211 motion to dismiss the claims of plaintiffs-respondents Timothy Reif and David Fraenkel as co-executors of the estate of Leon Fischer, and Milos Vavra (collectively, "Vavra and Fischer") on the basis of collateral estoppel (the "Collateral Estoppel Decision"); and

(ii) the Decision and Order of the Appellate Division, First Department of July 9, 2019, (175 AD3d 107 [1st Dept 2019]), which affirmed the award of Rule 3212 summary judgment to Vavra and Fischer, denied Nagy's cross-motion for summary judgment, and remanded the case to the Supreme Court, New York

County for an inquest on the issue of Vavra's and Fischer's claimed damages and prejudgment interest (the "Summary Judgment Decision"; referred to collectively with the Collateral Estoppel Decision as the "Appellate Division Decisions").

PROCEDURAL HISTORY AND SHOWING OF TIMELINESS

Vavra's And Fischer's Commencement Of This Action

This case is about the ownership of two works of art (drawings) by the Austrian artist Egon Schiele. Schiele, an early-20th century artist who died in 1918, "is one of the leading figures of Austrian Expressionism."[1] Schiele created the works at issue in this case in the early-1910s; specifically: a drawing entitled *Woman in a Black Pinafore* (1911), and a drawing entitled *Woman Hiding Her Face* (1912) (together, the "Drawings").[2]

Vavra and Fischer commenced this action on November 13, 2015, alleging that Nagy had converted and was in wrongful possession of the Drawings. Vavra and Fischer allege that the Drawings were stolen from their ancestor, a Viennese Holocaust victim named Franz Friederich ("Fritz") Grunbaum, by Nazis following the Anschluss in 1938. Fritz Grunbaum was a collector of Schiele's art. Nagy, who is an art dealer, acquired the Drawings in good faith commercial transactions in 2013, 75 years after the alleged Nazi theft, and more than 100 years after the

[1] (https://www.sothebys.com/en/articles/21-facts-about-egon-schiele [accessed Feb. 5, 2020]).

[2] Images of the Drawings can be seen at: https://bit.ly/37YcsrQ [accessed Feb. 5, 2020]; https://bit.ly/2Os31cs [accessed Feb. 5, 2020].

Drawings were created. Because Vavra and Fischer allege thefts within the chain of title of the Drawings, they sued to divest Nagy of his ownership and to have their own title to the Drawings declared.

Specifically, in their complaint, which was amended as of right on March 18, 2016, Vavra and Fischer asserted claims for replevin of the Drawings, conversion, and a declaratory judgment that "the [Drawings] are the property of Plaintiffs." (R.122-127 ¶¶ 67-107.)[3]

Nagy's Rule 3211 Motion To Dismiss On The Basis Of Collateral Estoppel

As explained in detail below, the Drawings are part of a 53-work collection of Schiele art (the "Collection") that was acquired by a Swiss art dealer from a woman named Mathilde Lukacs ("Lukacs") in the mid-1950s. Lukacs was Fritz Grunbaum's sister-in-law, and she is known to have escaped Vienna in 1938 with her husband and with a considerable amount of property, including art.

In 2005, Vavra and Fischer sought title to another Schiele drawing from the same Collection known as *Seated Woman With Bent Left Leg (Torso)*.[4] *Torso* was owned at the time by a collector named David Bakalar. Bakalar litigated against Vavra and Fischer for over eight years before every level of the federal judiciary,

[3] Unless otherwise noted, record citations correspond to the Record on Appeal from the Summary Judgment Decision.

[4] (http://www.sothebys.com/en/auctions/ecatalogue/2014/impressionist-modern-art-evening-sale-n09219/lot.66.html [accessed Feb. 5, 2020]).

between 2005-2013 (when the U.S. Supreme Court denied Vavra's and Fischer's petition for a writ of *certiorari*), in a case called *Bakalar v. Vavra*.

The federal courts in *Bakalar* determined, after exhaustive international discovery, a full trial, and multiple appeals, that the Collection of 53 works that Lukacs had sold to the Swiss art dealer in the mid-1950s – including *Torso* and also including the Drawings at issue in this case – had *not* been stolen by Nazis from Fritz Grunbaum in 1938; the federal courts determined that the sister-in-law of Fritz Grunbaum (Lukacs) would not have possessed the Collection after World War II if Nazis had stolen the Collection from Grunbaum in 1938.

The federal courts also ruled that New York's laches doctrine barred an alternative claim by Vavra and Fischer that Lukacs herself had been an 'estate thief' by taking more than her intestate share of Fritz Grunbaum's art (Grunbaum died at the hands of the Nazis without a will and without issue).

Accordingly, the *Bakalar* case resolved: (a) that Nazis did not steal the Collection from Fritz Grunbaum; and (b) that Vavra and Fischer were barred from asserting that Lukacs stole the Collection from the Grunbaum estate. On the basis of the rulings in *Bakalar* and the doctrine of collateral estoppel, Nagy moved Supreme Court, New York County (Ramos, J.) under Rule 3211 to dismiss Vavra's and Fischer's claims in this action. Supreme Court denied that motion, and on April 18, 2017, the Appellate Division, First Department, issued the non-final

Collateral Estoppel Decision affirming Supreme Court's denial. (R.587-592.) As explained below, the Collateral Estoppel Decision is erroneous and results in new and highly problematic collateral estoppel law being created in this State with respect to property collections. On August 1, 2017, the Appellate Division denied Nagy's motion pursuant to CPLR 5602(b) for permission to appeal the Collateral Estoppel Decision to this Court. (*Reif v. Nagy*, 2017 NY Slip Op 81362(U) [1st Dep't 2017]).

The Parties' Rule 3212 Cross-Motions For Summary Judgment

The parties subsequently cross-moved for summary judgment. Supreme Court substantially granted Vavra's and Fischer's motion and denied Nagy's cross-motion, awarding title and possession of the Drawings to Vavra and Fischer, and ruling that their additional claim for damages and prejudgment interest would be determined by a later exchange of expert discovery and an inquest. (R.15-104.)

On July 9, 2019, the Appellate Division issued the non-final Summary Judgment Decision, which affirmed the grant of summary judgment to Vavra and Fischer "on their claims of replevin and conversion and directing defendants to return the [Drawings] to plaintiffs," and remanded Vavra's and Fischer's claim for additional damages for discovery and a determination by inquest. (*Reif v. Nagy*, 175 AD3d 107, 132 [1st Dep't 2019]). As explained below, the Summary Judgment Decision is erroneous because it (a) reaffirms the erroneous Collateral

Estoppel Decision, and (b) creates a new law of laches in New York that effectively eliminates the defense. On October 22, 2019, the Appellate Division denied Nagy's motion pursuant to CPLR 5602(b) for permission to appeal the Summary Judgment Decision to this Court. (*Reif v. Nagy*, 2019 NY Slip Op 82326(U) [1st Dep't 2019]).

Nagy's Rule 603 Motion To Sever The Remanded Claims So That This Court Would Have Jurisdiction To Hear This Motion For Leave

On January 10, 2020, Supreme Court (Borrok, J.) granted Nagy's motion pursuant to CPLR 603 to sever Vavra's and Fischer's remaining and remanded claims so that, upon the clerk's entry of judgment, the otherwise non-final Appellate Division Decisions discussed above would be capable of review by this Court under CPLR 5602(a)(1)(ii) (the "Severance Decision"). (*See* Affirmation of William L. Charron dated February 10, 2020 (the "Charron Aff.") at Exhibit A; *see also Michigan Nat'l Bank-Oakland v. American Centenniel Ins. Co. (In re Liquidation of Union Indem. Ins. Co.)*, 224 AD2d 319, 319-20 [1st Dept 1996] ("The severance was a proper exercise of discretion in order to create finality and promote judicial economy…. [B]y generating a final judgment and thus a jurisdictional basis for review by the Court of Appeals, the severance could moot what is a complex claim ….").) Notice of Entry of the Severance Decision was served by electronic filing on January 10, 2020. (Charron Aff. at Exhibit A.)

On February 5, 2020, Supreme Court entered the Severed Final Judgment, with Notice of Entry served that same day by electronic filing. (*Id.* at Exhibit B.) Because the otherwise non-final Appellate Division Decisions discussed above necessarily affect the Severed Final Judgment, Nagy may now seek permission from this Court to appeal from the Severed Final Judgment and the Appellate Division Decisions. (CPLR 5602[a][1][ii]).

This motion has been made within 30 days of Notice of Entry of the Severed Final Judgment, and is therefore timely under 22 NYCRR § 1250.16(d)(1).

STATEMENT OF JURISDICTION

This Court has jurisdiction over the proposed appeal pursuant to CPLR 5602(a).

STATEMENT OF PUBLIC IMPORTANCE

Leave-worthy issues include those that "are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." (22 NYCRR Part 500.22[b][4]). All of these issues are presented here. As discussed below, the Appellate Division Decisions create novel rules of collateral estoppel and laches in this State that conflict with prior decisions of this Court and with other Appellate Division rulings. Moreover, the purported new rules created by the Appellate Division Decisions are of public importance, particularly with respect to the New York art

community. New York is recognized as the preeminent center for international art and collectibles exhibitions, sales and auctions. The availability of the defenses of laches and collateral estoppel are critical to provide certainty to the New York marketplace, especially when dealing with collections of art and other property that may be sold in distinct parcels to multiple buyers.

The Court of Appeals has rare occasions to rule on significant cases that are of significance to the art world. A leave grant here will clarify what defenses are available in ownership disputes, which arise with regularity as World War II-era restitution claims continue to be asserted. More specifically, a leave grant will provide necessary guidance to the owners of the other 50 artworks in the Schiele Collection at issue.

QUESTIONS PRESENTED

1. Where a prior federal lawsuit involving the same plaintiffs resolved that a Collection of art had been sold by a seller to an art dealer after World War II, and that the Collection had not been stolen by Nazis from the seller's family during the war, and further resolved that any questions about how the seller specifically came to possess any particular work from the Collection could not be reasonably answered due to the loss of necessary evidence over time such that laches bars any claim that the seller possessed the works with bad title, are the New York State

Courts free to disregard the federal lawsuit's resolution and draw their own, directly contrary findings of fact and conclusions of law on the same factual record?

Nagy would argue that the Appellate Division created new and erroneous law in this State that the collateral estoppel doctrine does not bar the re-litigation of factual and legal issues regarding the alleged earlier theft of a property collection when different works from the collection are later sold to different buyers. Those are immaterial distinctions. Whether a collection of more than 50 works of art was stolen at some point in the past should not be litigated more than 50 – or even two – different times in multiple forums. The question of the Collection's provenance was raised and was fully and fairly litigated in a prior federal action by the same plaintiffs. Collateral estoppel should have applied.

2. Did the Appellate Division erroneously rewrite the law of laches by announcing that the element of "undue prejudice" may reset with each subsequent transferee of allegedly stolen property, thereby rendering harmless the loss of evidence that results from a plaintiff's undue delay in bringing suit prior to the current transferee's possession?

Nagy would argue that the Appellate Division created new laches law that contradicts uniform precedent. Laches in the context of claims for replevin and conversion requires proof that: (1) the plaintiff or the plaintiff's predecessors knew of the existence of a claim to allegedly stolen property but unduly delayed in

bringing a claim, thereby allowing critical evidence to disappear; and (2) the loss of evidence unduly prejudices the current possessor's ability to prove the property's historical ownership so as to rebut the assertion of theft.

The Summary Judgment Decision rejects Nagy's laches defense because the loss of evidence in this case occurred before Nagy acquired the works of art at issue. Nagy's acquisition date is immaterial. What matters is that the evidence necessary for either side to reasonably prove the specific chain of title to each of the works within the Collection is gone. That evidence is gone due to the decisions by Vavra's and Fischer's predecessors (i.e., their preceding family members) not to bring any legal claims when the necessary evidence still existed. The undue prejudice caused by the loss of necessary evidence does not disappear when allegedly stolen property later changes hands. The laches defense does not, and should not, reset with each successive owner of allegedly stolen property, such that the defense will necessarily become unavailable to later transferees or donees.

PRELIMINARY STATEMENT

The Appellate Division permitted the re-litigation of *the exact same facts and legal questions* that had previously been thoroughly but unsuccessfully litigated by the same plaintiffs herein, using the same counsel, on the same factual record, before the United States federal courts (the "Federal Courts") over the course of more than eight years in a case called *Bakalar v. Vavra*, including

through a bench trial, multiple appeals, and ultimately the U.S. Supreme Court's denial of *certiorari*.

The Appellate Division – in the absence of a trial and on the basis of papers laden with misrepresentations by Vavra and Fischer about what was addressed in *Bakalar* – reached completely opposite conclusions from the Federal Courts about the provenance of the 53-work Collection of Schiele art that was at issue in both this case and in *Bakalar*. The result is directly conflicting decisions from the federal and State courts arising out of the *same factual record* and the *same legal arguments*.[5]

Most notably, the Federal Courts ultimately dismissed Vavra's and Fischer's claims based upon the laches defense, but the Appellate Division rejected that same defense on the same factual record. Even more problematically, the Appellate Division announced new law that effectively *eliminates* the laches defense where evidence necessary to prove or disprove a theft disappeared prior to the current possessor's acquisition of the allegedly stolen property.

The Summary Judgment Decision holds that a previous owner of challenged property *may* assert a laches defense, but a later owner of the same property may *not* assert that same defense. This novel announcement of law, which enables the

[5] The Federal Action, concerning one work from the Collection, went all the way to the U.S. Supreme Court (*cert denied*). This action, concerning the *same* facts and law with regard to two more works from the Collection, may go to the highest Court in New York. The next case, concerning the same facts and law with regard to another work from the same Collection, could go to the highest court in another state. This is not how our system is supposed to work.

laches defense to reset as allegedly stolen property changes hands, effectively eviscerates the defense; and, indeed, this is *not* how the laches defense has been applied by the Appellate Division, or other New York courts – including this Court – in other cases arising out of the same context. To the contrary, this Court has specifically declared that laches is an important defense to claims involving art given New York's otherwise lenient demand-and-refusal rule, which uniquely shifts the burden to possessors of allegedly stolen art to *disprove* theft. (*Solomon R. Guggenheim Found. v. Lubell*, 77 NY2d 311, 321 [1991]).

The authors of this brief are highly sensitive and compassionate to the State's interest in returning artwork stolen by the Nazi regime to their rightful owners. Nevertheless, the Federal Courts found, through an indisputably full and fair process, including trial and multiple appeals, that the Collection was *not* Nazi-looted property, and that laches otherwise barred Vavra's and Fischer's claims. The Appellate Division has, in essence, summarily reversed the findings of the Federal Courts, and created deep uncertainty about the laws of collateral estoppel and laches in disputes over the provenance of European artwork during the time period of Nazi activity and World War II. The availability and validity of these defenses is of major importance to the art world, and particularly to the New York art community since New York is recognized as an international hub for museum

exhibitions, sales and auctions of art and other types of valuable collector items. Leave to appeal should be granted.

STATEMENT OF FACTS

This case, at its core, concerns the history of a collection of art by the artist Egon Schiele (*i.e.*, the Collection), which was acquired and individually re-sold by a Swiss art dealer named Eberhard Kornfeld ("Kornfeld") more than 60 years ago. The two Schiele Drawings at issue in this case are part of the Collection.

Vavra and Fischer claim that the Drawings were stolen by Nazis or were transferred under duress from their predecessor-in-interest, Fritz Grunbaum, who was a Holocaust victim. Vavra and Fischer, using the same counsel and same factual record, made the same claims concerning another drawing from the Collection (*i.e.*, *Torso*) in *Bakalar*. The provenance of the Collection, as best it could be determined from what evidence remains, was the subject of a full and fair (but ultimately unsuccessful) litigation effort by Vavra and Fischer in *Bakalar*.

Kornfeld had sold *Torso* to a gallery in the late-1950s, and that gallery later sold *Torso* to a man named David Bakalar in 1963. Vavra's and Fischer's theories concerning *Torso* primarily tested the credibility of Kornfeld's records and account of how he acquired *Torso*, which he claimed to have purchased, *along with the rest of the Collection*, in the mid-1950s from Mathilde Lukacs. Lukacs was Fritz

Grunbaum's sister-in-law. Kornfeld testified and produced documents showing that Lukacs sold him *Torso*, as well as the entirety of the Collection.

In *Bakalar*, Vavra and Fischer tried to prove that Kornfeld lied, that his records were "fabrications," and that he had actually acquired the Collection – including *Torso* and the Drawings – from Nazis. Alternatively, Vavra and Fischer tried to prove that, if Lukacs had indeed sold the Collection to Kornfeld, then she did so with bad title. These are the *exact* same claims that the Appellate Division erroneously permitted Vavra and Fischer to re-litigate in this action.

Bakalar was litigated over the course of more than eight years through every level of the federal court system. The Southern District of New York, following international discovery that included Hague Convention procedures and a bench trial, *rejected* the same factual assertions and legal claims that Vavra and Fischer asserted successfully (and without a trial) in this action.

In particular, the federal district court found that Kornfeld did, in fact, purchase all of the works from the Collection (including *Torso* and the Drawings) from Lukacs in the mid-1950s. Lukacs's possession and sale of the Collection to Kornfeld after the war was the single most important fact that was litigated in *Bakalar*: that fact is what established that Nazis had not stolen the Collection and fenced it through Kornfeld, as Vavra and Fischer had primarily claimed.

The federal district court's decision was fully affirmed by the Second Circuit U.S. Court of Appeals, and the U.S. Supreme Court denied Vavra's and Fischer's petition for a writ of *certiorari*. Nevertheless, having lost in the federal courts, Vavra and Fischer made the *same* arguments in this case upon the *same* factual record, where they inconsistently prevailed. Those two sets of decisions cannot peacefully co-exist, especially where there are 50 remaining works from the Collection whose owners' previously settled rights are now re-thrown into limbo.

Vavra and Fischer made alternative arguments in *Bakalar*, each of which was resolved against them as follows:

A. The Federal Courts Resolved That The Collection Was Not Stolen By Nazis

As they did in this case, Vavra and Fischer primarily claimed in *Bakalar* that Kornfeld had fabricated his records and his account of having acquired *Torso*, as part of the Collection, from Lukacs. (*Bakalar v. Vavra*, 2008 WL 4067335, *2-5 [SD NY Sept. 2, 2008, No. 05-cv-3037 (WHP)], *vacated in part* 619 F3d 136 [2d Cir 2010] ("*Bakalar I*")); (*Bakalar v. Vavra*, 819 F Supp 2d 293, 295, 298 [SD NY 2011] (re-asserting same findings of fact), *affd* 500 Fed Appx 6 [2d Cir 2012] ("*Bakalar II*")). (*See also* R.1236 at ¶ 106; R.1245-46 at ¶¶ 165-67; R.1258 at ¶¶ 265-70; R.1260 at ¶¶ 282-83; R.1281 at ¶ 120; R.1304 ¶¶ 271-72.)

Vavra and Fischer claimed that Kornfeld invented a story about Lukacs and that he had never actually dealt with her. (*Id.*) They claimed that Kornfeld forged

his purported correspondence with Lukacs (which included numerous letters and spanned *five years*, from 1952-1957). (*Id.*) They claimed that all of the works in the Collection had once belonged to Fritz Grunbaum and that the Nazis had stolen those works and fenced them through Kornfeld. (*Id.*) Vavra's and Fischer's theory put the provenance of the entirety of the Collection into dispute: either Kornfeld acquired the Collection from Lukacs, as he claimed, or he did not.

1. The Federal Courts Rejected Vavra's And Fischer's Theory Of Nazi Theft And Credited Kornfeld's Documents And Testimony Showing That He Acquired Each Work In The Collection From Mathilde Lukacs In The Mid-1950s

The Federal Courts inferred Grunbaum provenance to *Torso* on the basis of Kornfeld's records. Critically in this regard, Kornfeld's records reflect that the Collection also included a Schiele painting known as *Dead City III* (a/k/a *Town on a River*), which is the *only* work among the Collection that is known to have been in Grunbaum's apartment at the time of his arrest according to an inventory taken of his apartment's contents in July 1938 (the "Inventory"). (R.178; R.497; R.544.) The Inventory identifies five Schiele paintings by title (including *Dead City III*) and 75 "drawings" by Schiele in Grunbaum's apartment at the time of his arrest; but, unlike the paintings, none of the drawings is identified by title. (R.178-179.)[6]

[6] Schiele made over 2,700 drawings. (*Bakalar I*, 2008 WL 4067335, *1). Schiele's works are not themselves titled, and thus the titles to his works change over time based on each successive owner's description of them (*e.g.*, *Town on a River* later became known as *Dead City III*; *Torso* was previously known as *Woman Sitting, With Left Leg Drawn Up*; the Drawings were previously known as *Woman, Sitting With Hands Resting on Hips* and *Model, Hiding Face*).

In September 1956, Kornfeld published a catalog of Schiele works for sale (the "Catalog"). (R.483-577.) One of the works in the Catalog was *Dead City III* (Catalog item no. 1). The other works in the Catalog included the Collection (*Torso* is Catalog item no. 51; the Drawings are Catalog item nos. 21 and 22) and a number "graphic works" (such as lithographs and etchings) that did not belong to Grunbaum according to the Inventory. (*Id.*)

Following extensive fact and expert discovery and a trial, the federal district court in *Bakalar* inferred that the coincidence of *Dead City III* and *Torso* being sold by the same source to Kornfeld within the same Collection more likely than not meant that *Torso* was once owned by Fritz Grunbaum as well. (*Bakalar I*, 2008 WL 4067335, *4-5, *Bakalar II*, 819 F Supp 2d at 295). The Summary Judgment Decision infers the same with respect to the Drawings. (*Reif*, 175 AD3d at 124). Indeed, as with *Torso*, there is *no* evidence that directly links either of the Drawings with Grunbaum, and there is no evidence that Grunbaum owned either of the Drawings at the time of his arrest – at most, one can infer prior Grunbaum ownership to works in the Collection solely because of Kornfeld's records and his account that he acquired the entirety of the Collection from Lukacs.

(*See Bakalar v. Vavra*, 237 FRD 59, 65 [SD NY 2006]). With the exception of *Dead City III*, it is impossible to prove or disprove whether Grunbaum owned any of the specific works in the Collection at the time of his arrest. (*Bakalar II*, 819 F Supp 2d at 300-01).

The authenticity of Kornfeld's documents and the veracity of his testimony was litigated by Vavra and Fischer at length in *Bakalar*, and the federal district court ultimately "credit[ed]" Kornfeld's evidence as genuine and truthful. (*Bakalar I*, 2008 WL 4067335, *2-3 ("credit[ing] Kornfeld's testimony" and finding that Kornfeld purchased 8 works from the Collection from Lukacs in September 1955, 20 works from Lukacs in February 1956, and 26 works from Lukacs in May 1956, and further finding that, "[b]ecause Lukacs possessed the Drawing *and the other Schiele works she sold to Kornfeld* in 1956, Kornfeld was entitled to presume that she owned them.") (emphasis supplied)); (*accord Bakalar II*, 819 F Supp 2d at 295, 298-300, *affd* 500 Fed Appx at 7-9).[7]

Because the district court found, on the basis of Kornfeld's records and testimony, that Lukacs possessed and sold him the Collection, including *Torso*, after the war, the court rejected Vavra's and Fischer's primary claim that Kornfeld had acquired the Collection from Nazis during the war. (*Bakalar II*, 819 F Supp 2d at 298-99). That same finding necessarily applies to the Drawings.

[7] Vavra and Fischer used days of trial time in *Bakalar* trying to establish Grunbaum provenance to works in the Collection through expert testimony, without having to rely on Kornfeld's records. (The trial testimony of Jane Kallir and Herbert Gruber is of public record and has been reproduced at pages A-433 through A-482 and pages A-538 through A-569 in the Record on Appeal filed with the Second Circuit in *Bakalar*. The Record on Appeal in *Bakalar* can be accessed on the Public Access to Court Electronic Records website – www.pacer.gov – under Case No. 11-4042 at Dkt Nos. 40-47. The Court may take judicial notice of these public records.) Their effort failed, but it was not for their lack of trying. The Appellate Division erroneously permitted Vavra and Fischer to re-litigate the *same* arguments in this case.

The Appellate Division made opposite findings in this case. Without even conducting a trial, the Appellate Division found that Kornfeld's documentation was "purported," "alleged" and "inconclusive," and further endorsed the possibility that Kornfeld obtained the Collection from Nazis, not from Lukacs. (*Reif*, 175 AD3d at 121-124). The Summary Judgment Decision cannot be reconciled with *Bakalar*.[8]

2. To Avoid Application Of Collateral Estoppel, Vavra And Fischer Misrepresented The Scope Of Discovery They Took In *Bakalar*, Which Concerned The Entire Collection, Not "Only" *Torso*

Vavra and Fischer materially misrepresented to Supreme Court and the Appellate Division in this case that their discovery in *Bakalar* had been "circumscribed" and that they "were only permitted to ask about that one work" (*i.e.*, *Torso*) in *Bakalar*. (R.872 at 14:23-26, 15:6-18.) Those representations were made by Vavra and Fischer for the strategic purpose of avoiding application of collateral estoppel in this case, but they were flatly false.

Vavra and Fischer aggressively pursued discovery in *Bakalar* into the provenance of the *entirety* of the Collection, trying but failing to trace even one work to the Nazis, in the hope of discrediting Kornfeld's records. As part of Vavra's and Fischer's expansive discovery requests, Kornfeld voluntarily produced

[8] The Appellate Division *assumed* that Fritz Grunbaum owned all of the art in the Collection at the time of his arrest. (*See id.* at 120-30). There is *no* evidence to prove that. As the Federal Courts found, it is impossible to know what works from the Collection, if any, Fritz Grunbaum owned at the time of his arrest other than *Dead City III*. (*Bakalar II*, 819 F Supp 2d at 300-01).

all of his correspondence with Mathilde Lukacs between 1952 and 1957, which included all of his art transactions with her (which exceeded the Collection). (R.993 at ¶ 26; R.1436 at 76:4-11; R.1324-1346; R.1514-17; R.1525-34; R.1549-56; R.1560-63; R.1570-73; R.1596-1603; R.1610-13; R.1624-31; R.3047-54.)

Kornfeld's documents included such things as postcards; stamps and postmarks that have not existed for decades; a letter from Lukacs complaining that her new mailbox was too small to accommodate Kornfeld's catalogues; and colored stationery bearing writing in colored pencil. (R.1325-27; R.1514-1631; R.3047-3054; R.1444-46 at Tr. 84:4-86:21.) Kornfeld also produced his complete inventory ledger from the mid-1950s, which reflected his purchase of all of the works from the Collection from Lukacs. (R.1325-1327; R.3047-3054.)

In addition, Kornfeld voluntarily sat for a deposition in Switzerland (the laws of Switzerland protected him from having to do so), which lasted a full day and was conducted in part by the same counsel representing Vavra and Fischer in this case. (R.994 at ¶ 30; R.1362-1512.) Contrary to their assertion in this case that they were "only permitted" in *Bakalar* to ask about *Torso*, Vavra's and Fischer's counsel asked questions about the entirety of the Collection:

- Vavra's and Fischer's counsel's first question to Kornfeld about a specific artwork was not about *Torso* but was about *Dead City III*. (R.994 at ¶ 31(a); R.1481-82 at 121:21-122:9.)

- Counsel's second question about a specific artwork was not about *Torso* but was about *Schriftsteller TOM*, a different artwork in the Collection. (R.994-95 at ¶ 31(b); R.1483 at 123:5-13.)

- Counsel's first overall line of questioning of Kornfeld established – with respect to all of the works that Kornfeld acquired from Lukacs (*i.e.*, the Collection) – that "everything from 1 through 53 has the same provenance". (R.995 at ¶ 31(c); R.1481 at 121:5-20.)

- Counsel attempted to establish that all of the works in the Collection had been laundered by Nazis through Kornfeld, not by Kornfeld having acquired them from Lukacs. (R.995 at ¶ 31(d); R.1488, R.1492-95 and R.1499 at 128:15-24, 132:2-135:4, 139:19-21.)

- With respect to all of the works from the Collection, counsel asked Kornfeld to "describe how Mathilde Lukacs first delivered these art works to you," and counsel explored the specific deliveries of the art from the Collection to Kornfeld in depth. (R.995 at ¶ 31(d)(ii); R.1488 and R.1492-95 at 128:15-24, 132:11-135:4.)

- Counsel asked Kornfeld: "When she [Lukacs] said that *these works* came from her family, did you ask her whether any of her other family members had ownership rights in *these works*?" (R.995 at ¶ 31(d)(iii); R.1499 at 139:19-21 (emphases supplied).)

- Counsel asked Kornfeld: "Other than what you have produced to us here and the documents that we have seen [spanning Kornfeld's entire course of dealings with Lukacs between 1952 and 1957], did you take any other notes about your meetings with Mathilde Lukacs?" (R.995 at ¶ 31(d)(iv); R.1492 at 132:2-5.)

- Counsel obtained a Hague Convention commission entitling Vavra and Fischer to have a handwriting expert examine Kornfeld's documents at his deposition; but counsel elected not to bring a handwriting expert to that deposition. (R.993-94 at ¶¶ 28-29 & R.1735-37.)

Vavra and Fischer had a full and fair opportunity in *Bakalar* to take, and they did take, discovery into the provenance of the Collection as a whole. The

Federal Courts' resolution in *Bakalar* that Kornfeld acquired *Torso* – and, thus, the entirety of the Collection (including the Drawings) – from Lukacs in the mid-1950s, and the corollary finding that there had been no Nazi theft of the Collection, should have been controlling in this case under the doctrine of collateral estoppel.

3. To Avoid Application Of Collateral Estoppel, Vavra and Fischer Also Misrepresented The Class Certification Denial Stage From *Bakalar*

Vavra and Fischer had also tried in *Bakalar* to certify a class action of owners of all 450 works (by various artists) identified in the Inventory as having once been owned by Fritz Grunbaum. The class that Vavra and Fischer sought to certify far exceeded owners of the Collection of works that Lukacs sold to Kornfeld. (*Bakalar*, 237 FRD at 64-65).

The federal district court rejected this effort by Vavra and Fischer. (*Id.* at 66-68). Kornfeld's acquisition of the Collection from Lukacs implicated a number of facts and issues that were particular to that subset of Schiele art, but were not applicable to owners of the other 400 works of art by other artists. (*Id*.)

To try to avoid the collateral estoppel effect of *Bakalar*, Vavra and Fischer misrepresented in this case that the class certification denial in *Bakalar* constituted a ruling that Vavra and Fischer were "only permitted" to elicit discovery about *Torso* alone. (R.873 at 15:8-18.) That is false. As explained above, Vavra and Fischer conducted extensive discovery in *Bakalar* into the entirety of the

Collection (*i.e.*, works with Lukacs-Kornfeld provenance) *following* the class certification denial decision.

B. The Federal Courts Resolved That Vavra And Fischer Were Barred By Laches From Claiming That Lukacs Lacked Good Title To The Collection

Vavra and Fischer alternatively claimed in *Bakalar* that Lukacs could not have acquired good title to *Torso* for either of two reasons: (a) because it was allegedly transferred from Fritz Grunbaum pursuant to a power of attorney that he signed while in custody in favor of his wife, Elisabeth; or (b) because Lukacs was only entitled to a partial interest in Fritz's property pursuant to Austrian intestacy laws (Fritz and Elisabeth died without wills and without issue). (*Bakalar II*, 819 F Supp 2d at 300-302). The Federal Courts rejected both arguments due to the absence of necessary evidence to prove either theory. (*Id.*, *affd* 500 Fed Appx at 7-9). Vavra and Fischer nonetheless successfully asserted the same claims in this case with respect to the Drawings, even though the absence of necessary evidence is the same. That was erroneous.

1. The Federal Courts Found That The Power Of Attorney Could Not Establish Bad Title To The Collection, And That Vavra's And Fischer's Claims To The Contrary Are Barred By Laches

Despite the tragedy that befell the Grunbaums, the federal district court in *Bakalar* found that the power of attorney did not result in Nazi theft because, again, Kornfeld acquired the Collection from Lukacs, not from Nazis. (*Bakalar*, 819 F

Supp 2d at 300-301). Thus, this situation could not be likened to any of the legal duress cases relied upon by Vavra and Fischer, where *Nazis* appropriated property through theft or forced sales. (*Id.*).

Moreover, the federal district court found that it cannot reasonably be determined, beyond "pure speculation," whether Mathilde Lukacs obtained any particular works from Fritz Grunbaum prior to the war and prior to his execution of the power of attorney (*e.g.*, such as through an *inter vivos* gift), because the evidence necessary to prove or disprove such potential ownership by Lukacs no longer exists. (*Bakalar II*, 819 F Supp 2d at 300-301). Thus, Bakalar could not meet his burden of proving that Fritz Grunbaum voluntarily transferred *Torso* to Lukacs (*e.g.*, as an *inter vivos* gift or sale). (*Bakalar II*, 819 F Supp 2d at 299).

But, just as critically, Vavra and Fischer also could not meet their burden of proving that Fritz Grunbaum involuntarily transferred *Torso* to Lukacs under duress because it is unknown when and how Lukacs acquired that work (which is true with respect to all of the works in the Collection). (*Id.* at 300-301). It was for this reason that the federal district court in *Bakalar* ultimately applied the laches doctrine. (*Id.* at 303-07; 500 Fed Appx at 7-9).

The parties extensively litigated the question of whether Vavra's and Fischer's predecessors (*i.e.*, their respective preceding family members) knew of Lukacs's possession of the Collection and decided not to challenge her possession.

The federal district court found that to be the case and found that Vavra's and Fischer's predecessors' inactivity caused necessary evidence to disappear, including documents and, most importantly, Lukacs herself, who died in 1979. (*Bakalar II*, 819 F Supp 2d at 303-307). Lukacs could have explained precisely how and when she obtained each of the individual works in the Collection. (*Id.* at 306). Thus, the combination of undue delay by Vavra's and Fischer's predecessors, plus the undue prejudice realized through the loss of necessary evidence, rendered the laches defense dispositive of Vavra's and Fischer's claims. (*Id.* at 303-307).

The issues of undue delay and undue prejudice were fully and fairly litigated in *Bakalar*. The key facts supporting those findings include:

i. Vavra's and Fischer's predecessors chose not to make claims against Lukacs, which caused evidence not to be preserved (*Bakalar II*, 819 F Supp 2d at 303-06); and

ii. the evidence necessary to explain how Lukacs acquired each individual work within the Collection, beyond the point of speculation, does not exist (*id.* at 300-02, 306-07).

Vavra and Fischer should not have been allowed to re-litigate those issues.[9]

C. The Appellate Division's Contrary Findings In The Decision

Nagy exercised good faith due diligence into the provenance of the Drawings by communicating with both the Art Loss Register and Sotheby's auction house, and by following the *Bakalar* proceedings through that case's

[9] Likewise, there should not be as many as 50 more cases conducted to litigate the same issues.

resolution. (*E.g.*, R.1148-1151 ¶¶ 75-84.) Nagy acquired the Drawings in December 2013, *after* the U.S. Supreme Court had denied Vavra's and Fischer's petition for *certiorari* in *Bakalar*. (R.468.)

The fact that Nagy acquired the Drawings after Lukacs had already passed away, and that no evidence was "lost between [Nagy's] acquisition and [Vavra's and Fischer's] demand for the return of the [Drawings]," is totally irrelevant to the laches analysis but forms the basis for the Appellate Division's erroneous laches holding. (*Reif*, 175 AD3d at 130). It is the fact that necessary evidence already had been lost at the time of Nagy's acquisitions of the Drawings that matters to the laches analysis (as discussed further below).

The Appellate Division additionally made a clearly erroneous finding that is contrary to the finding in *Bakalar*: "Mathilde could not have shown she had good title to the Artworks and her testimony would not have been probative." (*Id.* at 131). The Federal Courts in *Bakalar* reached precisely the opposite conclusion.

Lukacs, of course, could have explained the circumstances by which she acquired each individual work within the Collection before she sold the Collection to Kornfeld, including *Torso* and including each of the Drawings. (*Bakalar II*, 819 F Supp 2d at 300-301, 306). As the district court in *Bakalar* found, the power of attorney may have had nothing to do with Lukacs's acquisition of any particular work within the Collection (other than perhaps *Dead City III*), and it is "pure

speculation" to assert otherwise. (*Id.*). The Appellate Division's lack of appreciation for this point is difficult to understand.

Moreover, even if the transfer did occur after the power of attorney was executed, and even if one were to deem such a transfer void *ab initio* such that one should deem Grunbaum's property to have remained in his name through the time of his death, it is undisputed that Grunbaum's surviving family members – including Lukacs – would have inherited his property through intestacy. Laches also controlled this analysis because the other family members (*i.e.*, Vavra's and Fischer's respective preceding family members) all agreed or acquiesced that Lukacs could keep the entire Collection: they all more likely than not knew about, and *never* challenged, Lukacs's possession of the Collection. (*Bakalar II*, 819 F Supp 2d at 303-307).

Thus, laches is a dispositive outcome with respect to the Collection (including the Drawings) *even if* one were to assume legal duress based upon the power of attorney. If transfers of the Drawings are voided *ab initio* and deemed to have remained the property of Fritz Grunbaum, that property still ended up in his estate, and Mathilde Lukacs indisputably was entitled to at least a share of Fritz Grunbaum's estate property through Austria's laws of intestacy. The laches ruling in *Bakalar*, which, upon the exact same factual record as existed here, barred Vavra's and Fischer's alternative claim that Mathilde Lukacs had been an 'estate

thief' by taking more than her share of the Collection (including the Drawings), should have been equally dispositive in this case.

The Appellate Division Decisions should be reversed and this Court should clarify the correct rules of collateral estoppel and laches in this State.

ARGUMENT

I. THIS CASE MERITS REVIEW BECAUSE THE COLLATERAL ESTOPPEL DECISION ERRONEOUSLY CHANGES THE LAW OF COLLATERAL ESTOPPEL IN THIS STATE WITH REGARD TO PROPERTY COLLECTIONS

The Collateral Estoppel Decision is highly consequential to the outcome of this case, and it is erroneous. The Appellate Division found:

> 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 [Nagy], the pieces [the Drawings], and the time over which the pieces were held differ significantly [from the facts in *Bakalar*]. The three works [*i.e.*, the Drawings and *Torso*] are not part of a collection unified in legal interest such to impute the status of one to another.

(*Reif v. Nagy*, 149 AD3d 532, 533 [1st Dept 2017]).[10]

The Appellate Division concluded that collateral estoppel did not bar Vavra's and Fischer's re-litigation of *all of the same questions* that were fully and fairly litigated by Vavra and Fischer (unsuccessfully) in *Bakalar*; then, through the Summary Judgment Decision, the Appellate Division made findings of fact and

[10] The Summary Judgment Decision re-adopts this same finding. (*Reif*, 175 AD3d at 118-19).

conclusions of law that are directly at odds with the findings and conclusions in *Bakalar*. The result is a sharp divide between how the Federal Courts previously resolved these issues, and how the New York State Courts have now re-resolved the same issues. This cannot be the correct or desirable outcome.

The impact of the divide between the New York federal and State Courts will not merely be felt by Nagy (who acquired the Drawings in reasonable reliance on the finality of *Bakalar*). There are 50 more works from the Collection with different current owners throughout different jurisdictions. There should not be 50 more cases revolving around the *exact same facts and legal arguments*. Collateral estoppel should have prevented the Appellate Division from creating this untenable situation. (*See, e.g.*, *Milione v. City Univ. of N.Y.*, 153 AD3d 807, 809 [2d Dept 2017] (applying collateral estoppel to bar the re-litigation of issues that the plaintiff previously asserted, unsuccessfully, in a New York federal court)); (*Polur v. Raffe*, 912 F2d 52, 55 [2d Cir 1990] (applying collateral estoppel to bar the re-litigation of issues that the plaintiff had previously asserted, unsuccessfully, in a New York State Court)); (*cf. Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 NY3d 64, 80 [2018] (holding that subsequent state action was barred because same party had already litigated related matters in prior federal action).)

Owners and dealers of other property collections (including but not limited to art) will also take note of how New York will apparently now permit the re-

litigation of questions concerning title to property collections, which will upend the market for collections of property, such as art. (*See, e.g.*, *Solomon R. Guggenheim Found. v. Lubell*, 77 NY2d 311, 320 [1991] ("New York enjoys a worldwide reputation as a preeminent cultural center.").) New York should not be fostering such uncertainty. Leave to appeal should be granted.

A. There Is No Material Distinction Between The Drawings And *Torso* For The Purpose Of Applying Collateral Estoppel

The Appellate Division's conclusion that "[t]he three works [*i.e.*, the Drawings and *Torso*] are not part of a collection unified in legal interest such to impute the status of one to another," is erroneous. (*Reif*, 149 AD3d at 533; *Reif*, 175 AD3d at 118-19). The fact that the specific work of art at issue in *Bakalar* was *Torso*, and the specific works of art at issue in this case are the Drawings, is no reason for the Appellate Division to have disregarded collateral estoppel where all of the works are part of the same Collection, the provenance of which was fully and fairly litigated in *Bakalar*. The case of *Galin v. United States*, 2008 WL 5378387 [ED NY Dec. 23, 2008, No. 08-cv-2508 (JFB)], is instructive.

In *Galin*, the plaintiff sued the U.S. alleging a wrongful levy upon real property that she claimed to partially own with her ex-husband according to a theory of equitable ownership. (*Id.* at *6-9). In a prior action in Connecticut, however, a federal court had rejected the plaintiff's contention that she partially owned another parcel of property with her ex-husband according to her same

equitable ownership theory. (*Id.*) The court in *Galin* thus applied collateral estoppel to bar the plaintiff's claim against the U.S.:

> Although the case before this Court involves a different property from that at issue before the District of Connecticut, *the facts plaintiff cites to support both equitable ownership rights are identical* …. In the case before the District of Connecticut, plaintiff asserted "her equitable interest in the property on the grounds of her long marriage to Dr. Galin; her good faith belief in his representations that the property was purchased jointly; and her award of all marital property resulting from her divorce action."… *These are the same arguments raised here on the same facts* ….

(Id. at *7 (emphases supplied; citation omitted)). That same reasoning should have applied here: Vavra's and Fischer's case theories in this action were identical to, and litigated upon the same factual record as, their theories in *Bakalar*.

Another apt case is *Poindexter v. Cash Money Records*, 2014 WL 818955 [SD NY Mar. 3, 2014, No. 13-cv-1155 (RWS)]. In that case, the plaintiff alleged copyright infringement of a master recording that he claimed to own pursuant to a 1988 agreement. (*Id.* at *3-6). Another court had previously rejected the same claim by the plaintiff with respect to a different master recording subject to the same agreement, finding that the terms of the agreement gave the plaintiff no ownership rights in any of the subject master recordings. (*Id.*) The court in *Poindexter* thus applied collateral estoppel and dismissed the plaintiff's claim, finding that he had "necessarily raised the issue of his ownership of [all of] the recordings governed by the 1998 Agreement when he sued EMI for copyright

infringement regarding one of these works." (*Id.* at *4); (*accord Lefkowitz v. McGraw-Hill Global Educ. Holdings, LLC*, 23 F Supp 3d 344, 360-63 [SD NY 2014] (same result in case involving alleged ownership of photographs, and explaining that it was "irrelevant that the images at issue in the two cases may be different, because the court's ruling in the [prior action] is based on the same agreements on which Plaintiff relies here ….")).

These authorities, which deal with collections of property governed by common, controlling facts, are on-point. There was no justification for the Appellate Division to have treated this case as if Vavra and Fischer could argue upon any different set of facts than existed in *Bakalar*, simply because the works of art are not themselves identical, and because David Bakalar and Richard Nagy are different good faith possessors who held challenged art for different periods of time. Those distinctions are not meaningful to the collateral estoppel analysis: Vavra's and Fischer's theory of Nazi theft is not advanced one inch because Nagy purchased the Drawings at a later date than Bakalar, or because Nagy is a merchant, or because Nagy has held the art for less time than Bakalar had *Torso*. Nor do such distinctions affect the laches analysis: Nagy's acquisition of the Drawings does not impact either the undue delay by Vavra's and Fischer's predecessors, or the loss of necessary evidence caused by that delay.

The Appellate Division focused on immaterial distinctions to justify its avoidance of the (thoroughly litigated and well-reasoned) result in *Bakalar*. In so doing, the Appellate Division made new and erroneous law that does away with the principle of "finality" in cases involving collections of property, and destabilizes the public's trust and reliance on judicial processes. The art market and museum community in this State rely on the integrity and finality of federal court proceedings that adjudicate art title disputes, including Holocaust-era disputes, without fear that the New York State Courts will deem themselves free to reexamine and unsettle those results. This Court should grant leave to review. (*Cf. Greenfield v. Philles Records, Inc.*, 98 NY2d 562, 573 [2002] ("However sympathetic plaintiffs' plight, we cannot resolve the case on that ground under the guise of contract construction. Our guiding principle must be to neutrally apply the rules of contract interpretation because only in this way can we ensure stability in the law ….")).

B. The Dispositive Factual And Legal Issues In *Bakalar* Are Identical To The Dispositive Issues In This Case

1. *Bakalar* Resolved That The Collection Was Not Stolen By Nazis

The critical issue that was litigated in *Bakalar* was whether Kornfeld was telling the truth about when, how and from whom he acquired the Collection. The Federal Courts found, after a full trial inclusive of testimony from Kornfeld, that

Kornfeld's documents and account were credible that he acquired *Torso* – and, thus, the entirety of the Collection – from Lukacs. (*Bakalar I*, 2008 WL 4067335, *2-5); (*Bakalar II*, 819 F Supp 2d at 295). *Bakalar* accordingly resolved (by rejecting) Vavra's and Fischer's primary theory that Kornfeld had acquired the Collection as Nazi loot and not from Lukacs. (*Bakalar II*, 819 F Supp 2d at 298-99). The Second Circuit affirmed this finding:

> 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.

(500 Fed Appx at 7-8).

As explained above, Vavra and Fischer exercised their full and fair opportunity to litigate the provenance of the Collection in *Bakalar*, through every level of federal appeals. The finding in *Bakalar* that the Collection (including the Drawings) had been purchased by Kornfeld from Lukacs in good faith, and had not been stolen by Nazis and fenced through Kornfeld, should have collaterally estopped Vavra and Fischer from re-litigating that identical issue in this case. *See, e.g.*, *Milione*, 153 AD3d at 809; *Polur*, 912 F2d at 55.[11]

[11] The fact that Vavra and Fischer lost certain procedural motions in *Bakalar* does not mean that they lacked a full and fair opportunity to litigate the issues. (*E.g.*, *Brooks v. Green's Appliances*

2. *Bakalar* Resolved That Vavra And Fischer Failed To Prove Duress

The issue of Fritz Grunbaum's power of attorney granted to his wife was also fully and fairly litigated by Vavra and Fischer in *Bakalar*. They lost this argument on two different grounds: one legal, and one factual.

a. *Bakalar* Resolved That There Was No Duress Because There Was No Nazi Seizure

Vavra and Fischer argued in *Bakalar* that, if *Torso* was transferred to Lukacs from Grunbaum pursuant to the power of attorney (*i.e.*, via Grunbaum's wife, Elisabeth), then that transfer should be deemed a theft. The federal district court considered Vavra's and Fischer's legal authorities on this point, which all involved "indisputable evidence of Nazi seizure." (*Bakalar II*, 819 F Supp 2d at 300 (citations omitted)). Because that situation did not exist with respect to the Collection – *i.e.*, it was established that the Collection *avoided* the Nazis and remained in the Grunbaum family – Vavra and Fischer failed to prove duress as a legal matter:

> Here, however, there is no similar evidence that the Nazis ever possessed the Drawing, and therefore unlike [Vavra's and Fischer's legal authorities], this Court cannot infer duress based on Nazi seizure. Indeed, as discussed above, Lukacs's possession of the Drawing

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Inc., 259 AD2d 893, 894 [3d Dept 1999]). The *same* expert report relied upon by the Appellate Division was excluded in *Bakalar* for cause. (*Bakalar II*, 500 Fed Appx at 9). Vavra and Fischer nonetheless submitted the same report in this case (without even changing it to mention the Drawings). Collateral estoppel should have barred them from doing so. (*E.g.*, *Brooks*, 259 AD2d at 894).

> establishes by a preponderance of the evidence that the Nazis *did not* appropriate the Drawing.

(*Id.*); (*see also Zuckerman v. Metropolitan Museum of Art*, 307 F Supp 3d 304, 317 [SD NY 2018, Preska, J.] ("Here, Plaintiff's allegation that Leffmann 'was forced by the *circumstances* in Fascist Italy to sell' the Painting in 1938 is insufficient to plead duress") (emphasis in original), *affd* 928 F3d 186, 193-97 [2d Cir 2019] (affirming on the basis of laches and not reaching the question of duress)).

Having had a full and fair opportunity to argue this issue in the Federal Courts, including through the denial of *certiorari* by the Supreme Court, Vavra and Fischer should not have been permitted to reargue the issue as if the New York State Courts were some further level of appeal over the federal judicial system.

b. *Bakalar* Alternatively Resolved That Vavra And Fischer Could Not Prove Duress Because They Could Only "Speculate" When And How Lukacs Came To Possess Art From Grunbaum

Separately, the federal district court in *Bakalar* found that Vavra and Fischer could not prove duress because Lukacs may have acquired *Torso* prior to Grunbaum's execution of the power of attorney, and thus the power of attorney may have played no role in the transfer of that work. The district court explained:

> [A]ssuming *arguendo* that a transfer of property to a family member subsequent to a compelled power of attorney is void as a product of duress, the concurrence overlooks the fact that there is no way of knowing whether the Drawing was in fact transferred pursuant to the power of attorney. It is equally possible the Lukacs obtained the Drawing *before* the power of attorney was executed….

> Accordingly, absent any evidence as to when Lukacs acquired the Drawing, [Vavra and Fischer] cannot meet their burden to establish that the Drawing was transferred under duress. Any contrary holding would be pure speculation.

(Bakalar II, 819 F Supp 2d at 300-01).

That same reasoning and finding necessarily applies with respect to the entirety of the Collection (with the possible exception of *Dead City III*, which is the *only* work from the Collection that is known to have been in Fritz Grunbaum's apartment after he executed the power of attorney). As the district court in *Bakalar* found with respect to *Torso*, it would be "pure speculation" to conclude that Lukacs acquired the Drawings, or either of them, after Fritz's execution of the power of attorney. (*See Bakalar II*, 819 F Supp 2d at 301). That conclusion is inescapable. (*See, e.g.*, *Chisholm-Ryder Co. v. Sommer & Sommer*, 78 AD2d 143, 144 [4th Dept 1980] (collateral estoppel will "foreclose issues *which were necessarily decided in the first action*, litigated or not … either by actual determination *or necessary implication*") (emphases supplied; internal citations omitted)); David D. Siegel, *New York Practice* § 464 [6th ed. June 2019 Update] ("Where a judgment of a particular kind can be accounted for only by the existence of a certain combination of findings, each of those findings will be deemed established by the judgment.")).

Collateral estoppel should have barred Vavra's and Fischer's re-litigation of these same issues. (*See, e.g.*, *David v. Biondo*, 92 NY2d 318, 322 [1998] ("Part of the [collateral estoppel] doctrine's justification is the unfairness and inefficiency of otherwise permitting a party to relitigate an issue which has previously been decided against that person")); (*accord Mayers v. D'Agostino*, 58 NY2d 696, 698 [1982]); (*People v. Fagan*, 104 AD2d 252, 256 [4th Dept 1984], *affd* 66 NY2d 815 [1985]).

i. The Appellate Division's Reliance On The HEAR Act Was Misplaced

The Appellate Division suggested that, in departing from the result in *Bakalar*, it was "informed by the intent and provisions of the [Holocaust Expropriated Art Recovery ('HEAR') Act, 22 USC § 1621 [2016]] which highlights the context in which plaintiffs, who lost their rightful property during World War II, bear the burden of proving superior title to specific property in an action under the traditional principles of New York law." (175AD3d at 132). The HEAR Act, however, does not in any way vitiate the effect of collateral estoppel arising out of the Federal Courts' adjudication of *Bakalar*.

For one thing, the HEAR Act is a federal statute of limitations enactment only; it provides no substantive rights or causes of action, and it does not lessen a claimant's burden of proof. (Pub. L. 114–308, 130 Stat. 1524, at Sec. 5[f] [114th

Cong Dec. 16, 2016] ("Nothing in this Act shall be construed to create a civil claim or cause of action under Federal or State law.").)

Moreover, the HEAR Act expressly applies to "pending" cases only, not to those finally resolved through all appeals – such as *Bakalar*. (*Id.* at Sec. 5[d]). The HEAR Act should not have been interpreted by the Appellate Division as a license to disregard the doctrine of collateral estoppel.

Furthermore, the HEAR Act applies by its terms to "claims to Nazi-confiscated art." (*Id.* at Sec. 3[1]). The authorities cited in the Summary Judgment Decision addressing the HEAR Act involved situations of Nazi seizure of art, which *Bakalar* already established did not occur here. (*Philipp v. Federal Republic of Germany*, 248 F Supp 3d 59, 70 [SD NY 2017] (pleadings-based decision where plaintiff alleged Nazi theft), *affd* 894 F.3d 406 [DC Cir 2018]); (*De Csepel v. Republic of Hung.*, 859 F3d 1094, 1097 [DC Cir 2017] (finding that the "Hungarian government and its Nazi collaborators seized" art collection), *cert denied* – US –, 139 S Ct 784 [2019]).

The HEAR Act has no role in this case except with regard to timeliness. The findings of fact and law in *Bakalar* should have controlled.

3. *Bakalar* Resolved That Vavra And Fischer Were Otherwise Barred By Laches From Challenging Lukacs's Title To The Collection

Vavra's and Fischer's further alternative case theory in *Bakalar* was that Lukacs could not have acquired good title to works in the Collection that once belonged to Grunbaum. (*Bakalar II*, 819 F Supp 2d at 303-07). This was not a claim that Vavra's and Fischer's predecessors, who were Lukacs's contemporaries, ever asserted against Lukacs.

In particular, *Bakalar* established that Vavra's predecessor, a woman named Elise Zozuli, who was Fritz Grunbaum's sister, had started a proceeding to claim Fritz Grunbaum's assets, but she withdrew her claim after learning that Lukacs had already made a claim to his property. (*Id.* at 296, 306). And Fischer's predecessor, Max Herzl, who was Lukacs's and Elisabeth Grunbaum's brother, remained close with the Lukacses after saving them from Austria in 1938, and his family never made any estate claims either (prior to the claims of his grandson, Fischer, over 60 years later). (*Id.* at 296-97, 305).

The district court in *Bakalar* thus found that Vavra's and Fischer's predecessors had knowledge of possible claims and chose not to act. (*Id.* at 303-06). Those findings of fact should have been binding on Vavra and Fischer in this action. (*See, e.g., 3 E. 54th St. N.Y. LLC v. Patriarch Partners Agency Servs.*, 110 AD3d 516, 516-17 [1st Dept 2013] ("[O]nly the party sought to be collaterally

estopped must have been a party to the action when the prior determination was made.") (citations omitted)); *GTF Mktg., Inc. v. Colonial Aluminum Sales, Inc.*, 108 AD2d 86, 91 [2d Dept], *affd* 66 NY2d 965 [1985] (same)).

The consequence of Vavra's and Fischer's predecessors' failure to act was the loss of evidence necessary to reasonably prove how Lukacs came to possess each individual work within the Collection that she ultimately sold to Kornfeld. (*Bakalar II*, 819 F Supp 2d at 306). Without such evidence, the district court found that Bakalar could not prove the possibility that Lukacs had obtained *Torso* through a voluntary transfer by Grunbaum before he executed the power of attorney (*e.g.*, by *inter vivos* gift). (*Id.* at 300-01, 306).

Likewise, even assuming a transfer from Grunbaum after the power of attorney, Bakalar could not prove the possibility that the other family members (*i.e.*, Vavra's and Fischer's predecessors), who would have inherited Grunbaum's art after his death along with Lukacs, had agreed that Lukacs could have *Torso* (and the entirety of the Collection) from Grunbaum's estate. (*Id.* at 301-03, 306). Thus, *even if one were to credit the Appellate Division's finding of duress based upon the power of attorney*, laches still ultimately disposes of Vavra's and Fischer's claims because Lukacs was entitled to property from Fritz Grunbaum's estate, and the Federal Courts established in *Bakalar* that Vavra and Fischer were barred by laches from complaining that Lukacs may have taken more than her intestate share.

That exact same analysis and conclusion applies with respect to the remainder of the Collection, including the Drawings. Collateral estoppel should have barred Vavra and Fischer from re-litigating these findings as well. (*See, e.g.*, *Chisholm-Ryder*, 78 AD2d at 144; *In re Armonk Snack Mart, Inc.*, 2018 WL 2225008, *5 [SD NY May 15, 2018, No. 16-cv-5887 (NSR)] ("A court must determine, first, whether the issues presented by this litigation are in substance the same as those resolved in the prior litigation") (citation & quotations omitted)).

II. THIS CASE MERITS REVIEW BECAUSE THE SUMMARY JUDGMENT DECISION HAS REWRITTEN THE LAW OF LACHES TO ELIMINATE THE ELEMENT OF "PREJUDICE" WHEN ALLEGEDLY STOLEN PROPERTY IS RESOLD AFTER CRITICAL EVIDENCE HAS ALREADY BEEN LOST

The law of laches is well-established in this State in the context of claims for replevin and conversion of allegedly stolen chattel, such as art. A good faith possessor of allegedly stolen property must demonstrate: (1) that the claimant was aware of a claim and inexcusably failed to exercise diligence and to take action; and (2) the good faith possessor has been unduly prejudiced by the consequential loss of evidence necessary to defend title and to rebut an assertion of theft beyond the point of speculation. (*E.g.*, *In re Flamenbaum*, 22 NY3d 962, 965 [2013]); (*In re Peters v. Sotheby's Inc.*, 34 AD3d 29, 37-38 [1st Dept 2006]); (*Wertheimer v. Cirker's Hayes Storage Warehouse*, 300 AD2d 117, 118 [1st Dept 2002]); (*Bakalar II*, 819 F Supp 2d at 303-07, *affd* 500 Fed Appx at 7-9); (*Sanchez v.*

Trustees of the Univ. of Pa., 2005 WL 94847, *2-3 [SD NY Jan. 18, 2004, No. 04-cv-1253 (JSR)]). If both of those conditions exist, then laches should bar claims for replevin and conversion. Contrary to the erroneous new rule of law created by the Appellate Division, neither of those conditions depends in *any* way on when the current possessor acquired the property in question.

In *Bakalar*, Vavra and Fischer argued that the requirement of "diligence" reset with each successive generation of claimants, and that their respective predecessors' failure to have brought claims against Lukacs should not be imputed to them personally. The Federal Courts rejected this argument. (*Bakalar II*, 819 F Supp 2d at 305 citing *Wertheimer*, 300 AD2d at 118 (relying on claimant's grandfather's lack of diligence)); (*Sanchez*, 2005 WL 94847, *3 (same)). The Second Circuit specifically explained:

> Vavra and Fischer … 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*.

(Bakalar II, 500 Fed Appx at 8 (emphasis supplied)).[12]

In this case, Vavra and Fischer made a similar argument, but this time contended that the element of "prejudice" should reset with each successive owner

[12] The Summary Judgment Decision notes that the Second Circuit's decision in *Bakalar* is a non-precedential summary order. (*Reif*, 175 AD3d at 117 n15). "Non-precedential" does not mean that a decision is exempt from the rules of collateral estoppel.

of allegedly stolen property. The Appellate Division erroneously adopted this argument as new law in this State, explaining:

> 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*.

(Reif, 175 AD3d at 130 (emphasis supplied; internal citation omitted)). This holding fundamentally changes the defense of laches in New York with respect to claims for replevin and conversion.

Prior to the Summary Judgment Decision, "undue prejudice" for laches purposes uniformly depended on a showing that necessary evidence, which could have been preserved had a claimant acted sooner, no longer exists. (*E.g.*, *Bakalar II*, 500 Fed Appx at 8 (finding undue prejudice because "[t]here 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.")); (*Flamenbaum*, 22 NY3d at 966 (finding no undue prejudice because, "[w]hile the Estate argued that it had suffered prejudice due to the Museum's inaction, … we can perceive of no scenario whereby the decedent could have shown that he held title to this antiquity.")); (*Peters*, 34 AD3d at 38 ("If, as the parties seem to accept, the documentary evidence is insufficient to establish Albert Otten's legitimate ownership of the work, the Otten family will sustain prejudice resulting from the

inability to establish that it acquired good title.") (citation omitted)); (*Wertheimer*, 300 AD2d at 118 ("Because the Wertheimer family's lack of due diligence in seeking the return of the painting … substantially prejudiced de Sarthe by making it virtually impossible for de Sarthe to prove that any of its predecessors in interest acquired good title, the IAS court properly granted de Sarthe's motion for summary judgment dismissing the complaint on grounds of laches")); (*Zuckerman v. Metropolitan Museum of Art*, 928 F3d 186, 194 [2d Cir 2019] ("[W]e conclude that the Met has been prejudiced by the more than six decades that have elapsed since the end of World War II. This time interval has resulted in 'deceased witness[es], faded memories, … and hearsay testimony of questionable value,' as well as the likely disappearance of documentary evidence…. No witnesses remain who could testify on behalf of the Met that the Sale was voluntary, or indeed on behalf of the Plaintiff that the Painting was sold 'involuntar[ily].'") (citations omitted)).

The question of prejudice has *never* been measured by whether the necessary evidence, which could have been preserved, ceased to exist prior to the good faith possessor's acquisition of the allegedly stolen chattel. Nor does such a rule make sense because it renders the loss of critical evidence harmless if property changes hands after the evidence has already been lost. The rights of more recent possessors of challenged property would be eviscerated by a rule that permits the

existence of prejudice to 'reset' each time the property changes hands: the laches defense would become unavailable to successive owners and donees (including but not limited to museums, which depend on donations for the public benefit), notwithstanding that the same defense would have been available to their predecessors. The laches defense does not, and should not, operate this way. (*See Bakalar II*, 500 Fed Appx at 7-9).

This Court made clear in *Lubell* that laches is a real and necessary equitable defense in New York to stolen art claims, particularly given the leniency of this State's demand-and-refusal rule:

> We agree with the Appellate Division that the arguments raised in the appellant's summary judgment papers are directed at the conscience of the court and its ability to bring equitable considerations to bear in the *ultimate disposition of the painting*. As noted above, although appellant's statute of limitations argument fails, her contention that the museum did not exercise reasonable diligence in locating the painting *will be considered by the trial judge in the context of her laches defense*.

(77 NY2d at 321 (emphases supplied)). The laches defense must be recognized and respected by the courts as a means to quiet title to challenged property: that is a foundational point of *Lubell*, which the Summary Judgment Decision severely undermines.

As explained above, critical evidence was lost in this case due to the inactivity of Vavra's and Fischer's predecessors. The Appellate Division's effort to liken this case to *Flamenbaum* by finding that "Mathilde could not have shown

she had good title to the Artworks and her testimony would not have been probative," (*Reif*, 175 Ad3d at 131), is simply incorrect and is at odds with the Federal Courts' finding in *Bakalar* that it would "pure speculation" to conclude, one way or another, whether Lukacs acquired the works in the Collection before or after Fritz Grunbaum executed the power of attorney. (*See Bakalar II*, 819 F Supp 2d at 300-01, *affd* 500 Fed Appx at 7-9).

The Appellate Division's erroneous rewriting of laches law had a dispositive impact on the outcome of this case, regardless of the role the power of attorney may have had in Lukacs's possession of the Collection. As explained above, even if one credits the Appellate Division's finding of duress based upon the power of attorney, such that the Drawings should be deemed to have remained Fritz Grunbaum's property through his death, it is undisputed that Lukacs was entitled to receive a portion of Fritz's property through the laws of intestacy. The Federal Courts in *Bakalar* determined, upon a full record and trial, that laches barred Vavra's and Fischer's claim that Lukacs "stole" more than her share of property from Fritz's estate. That same result absolutely should have been reached here. The Appellate Division erred by changing the law of laches to avoid reaching such a result.[13]

[13] The Appellate Division did not adopt Vavra's and Fischer's alternative argument that the HEAR Act bars Nagy's laches defense. A recent decision from the Second Circuit explains in detail why that argument is incorrect. (*Zuckerman*, 928 F3d at 196 ("While the HEAR Act

CONCLUSION

Appellants-Defendants respectfully request that this Court grant leave to appeal to determine the continued viability of the defenses of collateral estoppel and laches when artwork or collections pass to subsequent purchasers with unavailable documentation regarding provenance due to the passage of time. These issues are of paramount concern to New York owners of art who have made a substantial monetary investment, museums, art galleries and sellers seeking to transfer title to works or collections, and auction houses that make representations regarding the provenance of works or collections.

For the reasons discussed above, this Court should grant leave to appeal.

Dated: New York, New York
February 10, 2020

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revives claims that would otherwise be untimely under state-based statutes of limitations, it allows defendants to assert equitable defenses like laches. The statute explicitly sets aside 'defense[s] *at law* relating to the passage of time.' HEAR Act § 5(a) (emphasis added). It makes no mention of defenses *at equity*. '[A] major departure from the long tradition of equity practice should not be lightly implied.' *eBay Inc. v. MercExchange, L.L.C.*, 547 US 388, 391 [2006]. Moreover, a key Senate committee report accompanying the statute … unequivocally indicates that the Act does not preclude equitable defenses. S Rep No 114-394, at 7.")).

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