

Nos. 06-56325 and 06-56406
IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

CLAUDE CASSIRER,
Plaintiff/Appellee

v.

KINGDOM OF SPAIN, a foreign state, and THYSSEN-BORNEMISZA
COLLECTION FOUNDATION, an agency or instrumentality
of the Kingdom of Spain,
Defendants/Appellants

On Appeal From The United States District Court
For The Central District Of California
Honorable Gary Allen Feess
District Court No. CV-05-03469-GAF

**APPELLANTS-DEFENDANTS KINGDOM OF SPAIN AND THYSSEN-
BORNEMISZA COLLECTION FOUNDATION'S RESPONSE TO
ORDER TO FILE SIMULTANEOUS BRIEFS AS TO WHETHER
THIS MATTER SHOULD BE HEARD EN BANC**

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TABLE OF CONTENTS

I. INTRODUCTION 1

**II. APPELLEE’S CLAIMS ARE SUBJECT TO CALIFORNIA
CODE OF CIVIL PROCEDURE SECTION 338’S STATUTE OF
LIMITATIONS..... 1**

**III. APPELLEE’S CLAIMS ARE TIME-BARRED BY CALIFORNIA
CODE OF CIVIL PROCEDURE SECTION 338..... 3**

IV. CONCLUSION 7

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Ace Prop. & Cas. Ins. Co. v. Superior Boiler Works, Inc.</i> 504 F. Supp. 2d. 1154 (D. Kan. 2007).....	2
<i>Adler v. Taylor</i> No. CV 04-8472-RGK, 2005 U.S. Dist LEXIS 5862 (C.D. Cal. Feb. 2, 2005)	2
<i>Costello v. Atlas Corp.</i> 297 F. Supp. 19 (N.D. Cal. 1967).....	2
<i>Orkin v. Taylor</i> 487 F.3d 734 (9th Cir. 2007)	2, 5, 6
<i>Russell v. Landrieu</i> 621 F. 2d 1037 (9th Cir. 1980)	7
<i>Saher v. Norton Simon Museum of Art</i> 578 F.3d 1016 (9th Cir. 2009)	1, 3, 4
CALIFORNIA CASES	
<i>Day v. Greene</i> 380 P.2d 385 (Cal. 1963).....	2, 7
<i>Jolly v. Eli Lilly & Co.</i> 245 Cal. Rptr. 658 (Cal. 1988)	5
<i>Naftzger v. American Numismatic Society</i> 49 Cal. Rptr. 2d 784 (Ct. App. 1996)	4, 5
<i>Society of California Pioneers v. Baker</i> 50 Cal. Rptr. 2d 865 (Ct. App. 1996)	5
FEDERAL STATUTES	
28 U.S.C. § 1605(a)(3).....	1

CALIFORNIA STATUTES

California Code of Civil Procedure § 338*passim*

California Code of Civil Procedure § 354.3 2

In accordance with this Court's October 6, 2009 Order, Defendants/Appellants Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation ("Appellants") submit the following joint brief.

I. Introduction

Appellants request that the Court not rehear this matter en banc because Appellants intend to file, as soon as permitted, a motion to dismiss the complaint on the ground that the claims are time-barred under the August 2009 decision of this Court in *Saher v. Norton Simon Museum of Art*, 578 F.3d 1016 (9th Cir. 2009). En banc review of this case is therefore unnecessary and would be a waste of this Court's resources since the motion to dismiss under this Court's ruling in *Saher* will dispose of the case in its entirety.¹

II. Appellee's Claims Are Subject to California Code of Civil Procedure Section 338's Statute of Limitations

Plaintiff/Appellee Claude Cassirer's ("Appellee") claims are time-barred because they were filed beyond the three years allotted in section 338 of the California Code of Civil Procedure. California provides a three-year

¹ Given the expenditure of resources required if the Court should decide to take this matter en banc, Appellants would nevertheless respectfully call the Court's attention to their disagreement with the panel's holding regarding the applicability of the "expropriate exception" of Foreign Sovereign Immunities Act ("FSIA") 28 U.S.C. § 1605(a)(3), and refer the Court to the extensive briefing already on file in this appeal.

statute of limitations for any action arising from the “taking, detaining, or injuring” of any “goods or chattels,” including an article of “historical, interpretive, scientific, or artistic significance.” Cal. Civ. Proc. Code § 338(c). Appellee’s constructive trust, possession, and conversion claims are subject to section 338’s limitation because they relate to the alleged “taking, detaining, or injury” of the painting at issue in this case. *Id.*; *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007); *Adler v. Taylor*, No. CV 04-8472-RGK, 2005 U.S. Dist LEXIS 5862 (C.D. Cal. Feb. 2, 2005); *Costello v. Atlas Corp.*, 297 F. Supp. 19, 22 (N.D. Cal. 1967); *see also Day v. Greene*, 380 P.2d 385, 389 (Cal. 1963).²

Appellee cannot assert that California Code of Civil Procedure section 354.3 applies to extend the statute of limitations here. Section 354.3 allowed suits for the recovery of Holocaust-era artwork against “any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance,” Cal. Civ. Proc. Code § 354.3(a)(1), and extended the statute of limitations for § 354.3 claims until December 31,

² Because Appellee’s state law claims are subject to section 338’s three-year statute of limitations, his declaratory relief claim is similarly untimely if filed beyond the three-year statute of limitations. *See Ace Prop. & Cas. Ins. Co. v. Superior Boiler Works, Inc.*, 504 F. Supp. 2d. 1154, 1159-60 (D. Kan. 2007).

2010. *See* Cal. Civ. Proc. Code § 354.3(c). However, this statute was found unconstitutional two months ago by this Court. *See Saher*, 578 F.3d at 1027.

Because California Code of Civil Procedure section 338 applies to Appellee's claims, the district court will have to determine whether Appellee's claims were filed within the three-year statute of limitations.

III. Appellee's Claims Are Time-barred by California Code of Civil Procedure Section 338

At the time the Foundation acquired the Painting in 1976, section 338 provided a strict three-year statute of limitations. *See* Cal. Civ. Proc. Code § 338(c).³ Under the version of California Code of Civil Procedure section 338 in effect at the time Defendant acquired the Painting, Appellee's predecessor-in-interest had three years to bring "[a]n action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property." Cal. Code Civ. Proc. § 338 (1976). Appellee inherited his alleged claim to the Painting in 1962, when his grandmother died. (Joint Excerpts of Record ("EOR") filed 02/02/2007, at 011.) Because Appellee did not file a complaint seeking return of the painting until 2005 –

³ In 1988, section 383(3) was renumbered as section 383(c). 1988 Cal. Legis. Serv. 1186 (West). All subsequent references refer to subsection (c) for simplicity's sake.

long after section 338's three-year statute of limitations expired in 1965 – Appellee's claims are barred.⁴

Appellee may argue that his claim should not be bound by section 338's strict pre-1983 standard but, instead, by the more relaxed standard set forth in the current version of section 338. In 1983, the section was amended to incorporate a discovery rule:

[T]he cause of action in the case of theft, as defined in § 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.⁵

Cal. Civ. Proc. Code § 338(c); 1982 Cal. Legis. Serv. 3401 (West).

“Decisions from California's intermediate appellate court have reached differing conclusions as to when the statute of limitations under section 338 begins to run for property stolen prior to 1983.” *Saher*, 578 F.3d at 1030. In *Naftzger v. American Numismatic Society*, 49 Cal. Rptr. 2d 784 (Ct. App. 1996), the court held that a cause of action for the return of property stolen before the amendment “accrue[s] when the owner discovered the identity of

⁴ Appellee's grandmother, Lilly Cassirer, died in the United States in 1962. (EOR at 011.) Appellee asserts that his grandmother's will designated him as her sole heir. (EOR at 011.)

⁵ In 1989, the phrase “art or artifact” was replaced with “article of historical, interpretive, scientific, or artistic significance.” Cal. Civ. Proc. Code § 338(c) (West 1989); 1989 Cal. Legis. Serv. 467 (West).

the person in possession of the stolen property, and not when the theft occurred.” *Id.* at 786. The *Naftzger* court concluded that “there was a discovery rule of accrual implicit in the prior version of section 338.” *Id.* In *Society of California Pioneers v. Baker*, 50 Cal. Rptr. 2d 865 (Ct. App. 1996), however, the court held that before the amendment, “the statute of limitations began to run anew against a subsequent purchaser.” *Id.* at 869-70. The *Pioneers* court specifically noted its disagreement with *Naftzger*. *See id.* at 870 n.10.

Although the California Supreme Court has not yet addressed the issue, that court has “specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive notice.” *Orkin*, 487 F.3d at 741 (citing *Jolly v. Eli Lilly & Co.*, 245 Cal. Rptr. 658 (1988)). As this Court recognized, “under the discovery rule, a [pre-1983 section 338] cause of action accrues when the Appellee discovered or reasonably could have discovered her claim to and the whereabouts of her property.” *Id.* at 741. In other words, Appellee’s cause of action began to accrue when he discovered or reasonably could have discovered his claims to the Painting and the Painting’s whereabouts. *See id.*

In *Orkin*, this Court concluded that the plaintiffs’ claims were time-barred because the face of the complaint established facts that foreclosed any

showing of reasonable diligence. *See Orkin*, 487 F.3d at 742. In 2003, the plaintiffs sought return of a painting from the defendant, a private owner. The plaintiffs conceded that the defendant had purchased the painting in question at a publicized auction in 1963, that she was listed as the owner in a catalogue raisonné publicly available in 1970, that the painting had been exhibited publicly at the Metropolitan Museum of Art in New York from November 1986 to March 1987, and that the defendant had offered the painting for sale at an auction in 1990. *See id.* at 737-38, 741-42. This Court noted that because the defendant's "acquisition of the painting was certainly discoverable at least by 1990, when she held it out for sale in an international auction, and most probably as early as 1963," the plaintiffs' claims, brought in 2003, were time-barred by § 338(c). *Id.* at 741-42.

The facts in this case are even more straightforward. On the first page of his complaint, Appellee acknowledges that in 2000, he "learned that the [P]ainting was in the collection of the Thyssen-Bornemisza Museum" (EOR at 002.) This admission is reiterated on page 11, where Appellee states, "In 2000, Appellee learned that the Painting was on display in Madrid at the Thyssen-Bornemisza Museum." (EOR at 012.) Appellee's complaint, however, was not filed until May 10, 2005. (EOR at 016.) Even if the district court were to assume that Appellee learned of the Painting's whereabouts on

December 31, 2000, the complaint was still filed at least one year after section 338's three-year statute of limitations had run.

IV. Conclusion

Appellee's claims are subject to California Code of Civil Procedure section 338's three-year statute of limitations because they involve the alleged "taking, detaining, or injury" of an "article of historical, interpretive, scientific, or artistic significance." Cal. Civ. Proc. Code § 338(c); *see also Day*, 29 Cal. Rptr. at 789. Appellee's claims are time-barred because he filed his complaint beyond the three-year statute of limitations. Because this fatal flaw is evident from the face of the complaint, the district court will dismiss Appellee's complaint. *See Russell v. Landrieu*, 621 F. 2d 1037, 1039 (9th Cir. 1980). Consequently, any en banc activity is an impediment to the ultimate and quick resolution of this case in the district court.

Dated: October 27, 2009

Respectfully submitted,

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s/ Thaddeus J. Stauber

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Dated: October 27, 2009

Respectfully submitted,

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s/ Thaddeus J. Stauber

Thaddeus J. Stauber

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Bornemisza Collection Foundation

(New Form 7/1/2000)

CERTIFICATE OF SERVICE

I, hereby certify that on October 27, 2009, I electronically filed the foregoing APPELLANTS-DEFENDANTS KINGDOM OF SPAIN AND THYSSÉN-BORNEMISZA COLLECTION FOUNDATION'S RESPONSE TO ORDER TO FILE SIMULTANEOUS BRIEFS AS TO WHETHER THIS MATTER SHOULD BE HEARD EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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s/ Thaddeus J. Stauber
