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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MAREI VON SAHER, Plaintiff, vs. NORTON SIMON MUSEUM OF ART AT PASADENA, et al., Defendants.	CASE NO. 07-2866-JFW(JTLx) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) Date: June 1, 2015 Time: 1:30 p.m. Courtroom: 16 Pre-Trial Conf.: March 11, 2016 Trial: March 29, 2016 Honorable John F. Walter

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I. INTRODUCTION

The Norton Simon Museum of Art and the Norton Simon Art Foundation (collectively, "the Museum"), respectfully move the Court for an Order certifying its April 2, 2015 Order for immediate appeal under 28 U.S.C. § 1292(b).

The Court's April 2, 2015 Order addressed a "difficult" question of unsettled California law: whether an expired statute of limitations begins to run anew when allegedly stolen property is transferred to a new possessor. (Apr. 2, 2015 Order (ECF No. 119) at 8-9.) The Court resolved that question in favor of Plaintiff, holding the statute of limitations in California Code of Civil Procedure section 338(c)(3) begins to run anew when property is transferred, even if it expired while the property was in the hands of a prior possessor. (*Id.* at 10-11.) A contrary holding on this "open question" of California law (*id.* at 8) would either end or significantly narrow Plaintiff's lawsuit. Because there is "substantial ground for difference of opinion" on this difficult limitations issue, and because it is a "controlling question of law" that could "materially advance the ultimate termination of the litigation," the Museum respectfully requests that the Court certify the issue for interlocutory appeal under 28 U.S.C. § 1292(b).

The requested relief will not result in undue delay, and is consistent with this Court's directive that the case "should move forward expeditiously." (Feb. 18, 2015 Order (ECF No. 105) at 2, n.1.) The Museum does *not* seek an accompanying stay of the proceedings in this Court, which means any interlocutory appeal would proceed parallel to the district court litigation unless and until the Ninth Circuit grants review. Only in that event—with a potentially dispositive issue accepted for review—would the Museum request a stay.

The statute of limitations issue resolved by the Court's April 2, 2015 Order is uniquely suited for an interlocutory appeal because it turns on an open question of *California* law, most appropriately resolved by the California Supreme Court. The California Supreme Court is specifically authorized to decide, on certification by the

U.S. Court of Appeals, potentially dispositive questions of California law on which "[t]here is no controlling precedent." Cal. R. Ct. 8.548(a)(2). The Ninth Circuit has not hesitated to certify issues to the California Supreme Court when, as in this instance, the case could be resolved by a California law issue of first impression. *See, e.g. Pooshs v. Phillip Morris USA, Inc*., 561 F.3d 964, 965 (9th Cir. 2009) (California statute of limitations question). Because "the determinative matter here turns … on an issue of California law susceptible to certification to the California Supreme Court," "[g]ranting an interlocutory appeal should not represent an undue burden on the Ninth Circuit." *Brewster v. Cnty. of Shasta*, 112 F. Supp. 2d 1185, 1192 & n.18 (E.D. Cal. 2000). Should this Court allow the appeal, the Museum would seek certification to the California Supreme Court, in the first instance, in its 1292(b) petition before the Circuit.

II. BACKGROUND

On remand from the Ninth Circuit earlier this year, this Court held that the Museum was entitled to renew its 2011 motion to dismiss with respect to the issues that had not been reached by this Court in its 2012 order granting that motion—including whether Plaintiff's claims were barred by the statute of limitations set forth in California Code of Civil Procedure section 338(c)(3). (Feb. 18, 2015 Order (ECF No. 105) at 2.) On March 2, 2015, the Museum filed a narrow motion on the statute of limitations ground. The Museum argued that on the face of Plaintiff's Complaint her claims expired decades ago, when Plaintiff's predecessor Desi Goudstikker discovered all the information about the Cranachs required by Section 338(c)(3)'s generous "actual discovery" accrual rule—including that the Dutch Government was holding the Cranachs—and deliberately chose not to bring a claim.

After the Museum's motion was fully briefed, Court ordered the parties to submit supplemental briefs on the following issue:

> Does each new possession of a stolen item trigger a new statute of limitations under California Code of Civil

> Procedure § 338(c)(3)? *See Soc'y of California Pioneers v. Baker*, 43 Cal. App. 4th 774, 783 n.9 (1996) ("[W]e need not decide whether a purchaser who acquired the item after the statute expired would be subject to renewal of the limitations period.").

(Mar. 25, 2015 Minute Order (ECF No. 115) at 1.)

On April 2, 2015, the Court denied the Museum's renewed motion to dismiss. The Court first rejected "Plaintiff's specious argument that Desi [Goudstikker]'s actual discovery of the identity and whereabouts of the Cranachs is irrelevant under California Code of Civil Procedure § 338(c)(3), because she, not Desi, is the actual or current 'claimant.'" (Apr. 2, 2015 Order (ECF No. 119) at 6.) The Court held that Plaintiff stands in Desi's shoes and is charged with Desi's knowledge. (*See id.* at 6-8.) The Court further agreed that, from the allegations of the First Amended Complaint, "it appears that Desi actually discovered that the Cranachs were in the possession of the Dutch government some time between 1946 and 1952." (*Id.* at 9 n.6.) The Court then addressed the dispositive "open question in California whether a subsequent possessor who acquires stolen property after the statute of limitations has already expired is subject to a renewed limitations period." (*Id.* at 8-9.) The Court determined that each acquisition by a new purchaser of allegedly stolen property is "a new conversion," and "[b]ecause a new tort has occurred, the owner is entitled to a new limitations period." (*Id.* at 10.) The Court thus held that "Plaintiff's claims against [the Museum] are timely, even if the statute of limitations has expired as to Plaintiff's claims against the Dutch government." (*Id.* at 11).

After the Court denied the Museum's motion, the parties exchanged initial disclosures, the Museum filed its answer to Plaintiff's Complaint (ECF No. 120), and both the Museum and Plaintiff served discovery requests.

III. ARGUMENT

Section 1292(b) authorizes certification of orders for immediate appeal where (1) the decision involves a controlling question of law, (2) on which there is

substantial ground for a difference of opinion, and (3) immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). The Court's April 2, 2015 Order meets all three requirements.

A. There Is a Substantial Ground for Difference of Opinion as to Whether Section 338(c)(3) Began to Run Anew upon Transfer When It Had Already Run Against a Prior Possessor

As this Court recognized, whether one who acquires allegedly stolen property after the statute has run against the prior possessor is subject to a renewed limitations period "is an open question in California" and "the most difficult issue presented by Defendants' Motion to Dismiss." (Apr. 2, 2015 Order (ECF No. 119) at 8.) For example, the California Supreme Court went out of its way in *San Francisco Credit Clearing House v. Wells*, 196 Cal. 701 (1925), to qualify its conclusion that the statute of limitations did not bar the claim at issue by noting that the defendant's predecessors had only possessed the property for "fragmentary portions of the statutory period." *Id.* at 707; *see also id.* at 708-09 (statute of limitations unavailable to defendant because no predecessor had "possessed or occupied said property for the period required by [section 338]"). That question remains open, and there remain substantial grounds for disagreement about how it ought to be resolved, especially as applied to the particular statute at issue here. *Cf. Resolution Trust Corp. v. Smith*, 879 F. Supp. 1059, 1061 (D. Or. 1995) (certifying order applying a delayed accrual rule to a state statute of limitations when Oregon state courts "ha[d] neither adopted nor rejected" the rule), *perm. app. granted*, No. 95-35312 (9th Cir. Apr. 7, 1995), *question certified sub nom. F.D.I.C. v. Smith*, 83 F.3d 1051, 1053 (9th Cir. 1996).

1. Substantial Precedent Supports the Conclusion that the Statute Does Not Begin to Run Anew Upon Each Act of Conversion, Particularly When the Statute Has Already Lapsed for a Prior Possessor

As this Court noted, under California tort law, an acquisition of stolen property by a bona fide purchaser generally constitutes an act of conversion. (*See*

Apr. 2, 2015 Order at 8.) That is not in dispute. But the Court—as it had to do to decide an open question—went beyond that established principle when it held that "[b]ecause a new tort has occurred, the owner is entitled to a new limitations period." (*Id.* at 10.[1]) That is the critical question: whether it follows from the fact that a new tort has occurred that a new limitations period must begin to run. Cases and authorities in California, as well as the many other jurisdictions that follow the same common law rules, cast significant doubt on that conclusion and at a minimum, those authorities furnish strong grounds for disagreeing with it.

In California, as in other jurisdictions, "an act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein" constitutes an act of conversion as a matter of tort law. *Gruber v. Pacific States Savings & Loan Co.*, 13 Cal. 2d 144, 148 (1939). It is not just a party's acquisition of property without the true owner's authorization that constitutes conversion under this definition. California courts have recognized that a party's *sale* of property without the true owner's authorization, and a party's *refusal to return* property upon a true owner's demand, also constitute acts of conversion. *See, e.g.*, *Wade v. Markwell & Co.*, 118 Cal. App. 2d 410, 433 (1953) (recognizing successive acts of conversion, and holding that defendant's "exercise of total dominion over plaintiff's property by its act of resale, even though believing it had the right to do so, constituted a conversion"); *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 143 (1913) (sale of another's property constitutes conversion); *see also* 5 Witkin, Summary of Cal. Law, Torts § 711(2) (10th ed. 2005) ("An unauthorized sale or other transfer of property is a conversion.") (collecting authorities); *id.* § 712(2)

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[1] *See also id.* at 10 n.8 ("Under California law, each transfer of stolen property constitutes a new act of conversion or new tort *which triggers a new statute of limitations.*" (emphasis added).)

("[W]here the person entitled to possession demands it, the unjustified refusal to give it up is a conversion.") (collecting authorities).[2]

The California Supreme Court has squarely rejected the notion that each such act of conversion necessarily triggers a new statute of limitations. In *Harpending v. Meyer*, 55 Cal. 555 (1880), the plaintiff brought her action more than three years after the defendants had acquired the property from someone with no right to convey it, but *less than three years* after the defendants had *sold* the property and refused to return it or its value on demand. *Id.* at 557. Notwithstanding that these later acts also constituted acts of conversion under tort law, the court held the action untimely. It rejected the argument that the statute should not commence running until defendants "*sold or otherwise converted* the goods." *Id.* at 561 (emphasis added). Instead, it held that the statute was triggered by the *first* act of conversion—the acquisition—and did not begin to run anew upon the subsequent acts. *Id.* Since *Harpending*, other California courts have likewise rejected arguments that a defendant's subsequent acts of conversion re-trigger the statute. *See, e.g.*, *Bell v. Bayly Bros. of Cal.*, 53 Cal. App. 2d 149, 152, 158-59 (1942) (rejecting argument that statute was re-triggered by defendants' subsequent transfer of misappropriated property); *Traverso v. Dep't of Transp.*, 87 Cal. App. 4th 1142, 1150-51 (2001)

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[2] This is not unique to California. The common law recognizes that a party may engage in multiple acts of conversion with regard to the same property—for example, first by acquiring it from someone without the right to sell it, and subsequently by refusing to surrender the property on demand. *See, e.g.*, Restatement (Second) of Torts § 229, cmt. e (1965) ("[O]ne receiving a chattel from a third person with intent to acquire a proprietary interest in it is liable without a demand for its return by the person entitled to possession …. The mere receipt of the possession of the goods under such circumstances is a conversion. A subsequent refusal to surrender the chattel on demand may constitute a separate act of conversion and make the actor liable…. In such a case, the person entitled to the possession of the goods may elect to treat the actor as a converter either for the receipt of the goods or for his refusal to deliver them on demand.").

1 (rejecting argument that statute re-triggered by defendant's subsequent refusal to
2 return property on demand); *First Nat'l Bank in Richmond v. Thompson*, 60 Cal.
3 App. 2d 79, 81-82 (1943) (action untimely when brought more than three years from
4 defendant's acquisition but within three years of demand and refusal).
5 These cases involve subsequent acts of conversion *by the same party*, and
6 they do not decide the open question presented here: whether subsequent acts of
7 conversion by a *different* party cause the statute to run anew. But these cases
8 demonstrate that it does not follow as a matter of tort law that each act of conversion
9 triggers a new statute of limitations. Rather, these cases have analyzed the question
10 of what triggers the statute of limitations—including whether a subsequent act of
11 conversion results in the statute running anew—as one to be decided by the law
12 governing the applicable statute of limitations, including its accrual rule.
13 Moreover, the *reasoning* of these cases make it reasonable to conclude that
14 California would *not* hold that an acquisition by a new party causes the statute to
15 begin running anew. These cases rejected re-triggering because otherwise "there
16 would be no statute of limitations for wrongful takings"; a plaintiff could wait
17 indefinitely to bring her claim, such that "[s]ettled expectations would be disrupted
18 in contravention of [a] basic policy underlying statutes of limitation." *Traverso*, 87
19 Cal. App. 4th at 1150-51. As *Bell* explained, if a plaintiff could "skip[] lightly" over
20 the first tortious breach and base her action on "some subsequent conduct in line
21 with it," then "the process could be repeated every time one who converted property
22 exchanged it for something else, and thus the operation of the statute of limitations
23 could be entirely defeated." 53 Cal. App. 2d at 159. *Cf. Wilshire Westwood Assocs.*
24 *v. Atl. Richfield Co.*, 20 Cal. App. 4th 732, 739-40 (1993) (having statute of
25 limitations run anew for each new owner of property "would wholly disregard the
26 repose function of statutes of limitations"). This Court's resolution of the open
27 question of California law is in tension with the reasoning of these cases, because it
28 effectively eliminates the statute of limitations for a wrongful taking—and with it

1 the notions of repose and stability in property rights. Even after the statute has run
2 against a person holding allegedly stolen property, a claim perpetually lies in wait.
3 The property holder someday will die or transfer the property, and each time the
4 property transfers, the statute begins anew—on and on until the property ceases to
5 exist.
6 Further, the only California case of which the Museum is aware to have ever
7 considered the running of Section 338 in this context—where the transfer to the
8 defendant occurred *after* the statute had fully run in the hands of the prior
9 possessor—was decided contrary to this Court's ruling. In *Strasberg v. Odyssey*
10 *Group, Inc.*, 51 Cal. App. 4th 906 (1996), the court held that the plaintiff's
11 predecessor's knowledge in the 1960s of the alleged conversion by the defendant's
12 predecessor—if proven—would bar the claim, notwithstanding that the property was
13 not transferred to the defendant until the 1990s (after the plaintiff's predecessor had
14 died). *Id.* at 911-14, 919-20. Although the court did not expressly discuss the issue
15 of whether the transfer to the defendant would cause the statute to run anew, it is
16 clearly implicit in the court's holding that it would not; otherwise, it would have
17 made no sense for the court to say that the predecessor's knowledge would bar the
18 claim against the defendant under the statute of limitations.
19 Authorities from other jurisdictions that follow the same common law rules as
20 California also support the conclusion that a new act of conversion does not restart
21 the statute of limitations on a lapsed claim. California is by no means unique in
22 treating a bona fide purchaser's acquisition of property from one without the
23 authority to transfer it as a tortious act of conversion. That is the rule adopted by the
24 Second Restatement, which describes it as the majority rule in the United States by a
25 wide margin. *See* Restatement (Second) of Torts § 229 & cmts. b & d (1965) ("One
26 who receives possession of a chattel from another with the intent to acquire for
27 himself or for a third person a proprietary interest in the chattel which the other has
28 not the power to transfer is subject to liability for conversion to a third person then

1 entitled to the immediate possession of the chattel."); *see also id.* cmt. h (acquisition
2 by a bona fide purchaser is not an act of conversion only in "a small minority of
3 jurisdictions."). Yet the Second Restatement, in its provision dealing with the
4 statute of limitations for conversion, provides that the statute does *not* begin to run
5 anew on each acquisition. *See* Restatement (Second) of Torts § 899 cmt. c (1979)
6 ("A cause of action for the conversion of chattels is complete when the chattel is
7 first tortiously taken or retained by the defendant …. In some cases the statute of
8 limitations begins to run *before the defendant took possession, as when a previous*
9 *taker converted the chattel and later transferred possession to the defendant*."
10 (emphasis added)).

11 The debate in the New Jersey Supreme Court's decision in *O'Keeffe v.*
12 *Snyder*, 83. N.J. 478 (1980) likewise demonstrates that this issue presents a
13 substantial question. Like this Court, Justice Handler in dissent would have held
14 that the defendant's acquisition of stolen art "starts the statute of limitations running
15 either initially or 'anew'" because "the predominant view [is] that subsequent
16 transfers of a stolen chattel constitute separate acts of conversion." *Id.* at 511. *See*
17 *also id.* ("As a tortious act, a subsequent conversion … would constitute the accrual
18 of a cause of action and would trigger the running of the statute of limitations.").
19 The majority did not dispute the basic common law principle that each subsequent
20 transfer constituted a separate act of conversion. But on the critical question—
21 whether it followed from that common law principle that the statute of limitations
22 would start anew for a subsequent purchaser even when the statute had already run
23 against a prior possessor—the majority came out the other way. In the majority's
24 view, the dissent's reasoning—and thus this Court's reasoning—represented an
25 unsupported *extension* of the common law:

26 > At common law, apart from the statute of limitations, a subsequent transfer of a converted chattel was considered
27 > to be a separate act of conversion. In his dissent, Justice
28 > Handler seeks to *extend* the rule so that it would apply *even if the period of limitations had expired before the*

> *subsequent transfer*. Nonetheless, the dissent does not cite any authority that supports the position that the statute of limitations should run anew on an act of conversion already barred by the statute of limitations. Adoption of that alternative would tend to undermine the purpose of the statute in quieting titles and protecting against stale claims.

Id. at 503 (emphasis added).

A court applying California law reasonably could side with the *O'Keefe* majority's view on this issue, especially because the majority's reasoning resonates with the concerns articulated by California courts when refusing to restart statutes of limitations for subsequent acts of conversion by the same defendant. Indeed, after reviewing the history of this issue in California, the court in *Society of California Pioneers v. Baker*, 43 Cal. App. 4th 774 (1996) specifically cited this passage from *O'Keeffe* for the proposition that "it would be an extension of common law doctrine to hold that a subsequent transfer revives an action already barred by the statute of limitations." *Baker*, 43 Cal. App. 4th at 783 n.9. It is true, as this Court noted, that the *O'Keeffe* majority went on to adopt a rule allowing the "tacking" of multiple periods of possession by different parties—each individually less than the limitations period—to bring a claim within the bar, *O'Keeffe*, 83 N.J. at 503-04, and that the California Supreme Court rejected such tacking in *Wells*, 196 Cal. at 707-08. But the question presented by this case does not involve tacking. *Wells* expressly left open whether the statute would run anew upon a transfer occurring after the statute has fully expired in the hands of the prior possessor. On *that* question, the *O'Keeffe* majority's position is persuasive and consistent with California precedent.

2. There Are Substantial Grounds for the Conclusion that Section 338(c)(3)'s Actual Discovery Rule Further Supports the Conclusion that the Statute of Limitations Does Not Run Anew upon a Transfer

In holding that tort law mandates a new statute of limitations for a new conversion, this Court in particular rejected the Museum's argument that Section

338(c)(3)'s use of a discovery rule—as opposed to a traditional accrual rule—further supported the conclusion that this statute does not run anew upon transfer.[3] As discussed above, California cases cast serious doubt on the conclusion that each act of conversion causes the statute of limitations to run anew as a general matter of substantive tort law. In addition, there is a substantial ground for difference of opinion on the further issue of whether the statute's accrual rule affects the re-triggering of the statute.

Under the traditional accrual rule applied in cases such as *Harpending*, *Wells*, and *Baker*, the relevant inquiry for a statute of limitations is whether the plaintiff brought her claim "within three years after the right of action accrued." *Harpending*, 55 Cal. at 558; *see also* Cal. Civ. Proc. Code § 312. Specifically, under the traditional rule, the "cause of action accrues when, *under the substantive law*, the wrongful act is done and liability arises, *i.e.*, when a suit may be brought." *Menefee v. Ostawari*, 228 Cal. App. 3d 239, 245 (1991) (emphasis added); *see also Osborn v. Hopkins*, 160 Cal. 501, 506 (1911) ("[T]he statute of limitations begins to run upon the accrual of the right of action, that is, when a suit may be maintained."); 3 Witkin, Cal. Proc., Actions § 493 (5th ed. 2008) (collecting cases). Thus, cases applying the traditional accrual rule in conversion cases naturally focus on the substantive law of torts to determine when the conversion occurred.

By contrast, where statute or case law establishes that a *discovery rule* applies, the inquiry is fundamentally different. *See Brisbane Lodging, L.P. v. Webcor Builders, Inc.*, 216 Cal. App. 4th 1249, 1257 (2013). A discovery rule is intended to ameliorate the harsh effect of the traditional rule "'where it is manifestly

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[3] *See, e.g.*, Apr. 2, 2015 Order at 10 & n.8 ("Under California law, each transfer of stolen property constitutes a new act of conversion or new tort which triggers a new statute of limitations. Contrary to Defendants' argument, such a rule is not a common-law accrual rule that acts as an alternative to the discovery rule, but rather it is based on the substantive law of torts." (citations omitted)).

unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured,'" so as to "protect[] a plaintiff who is 'blamelessly ignorant' of his cause of action." *Id.* The focus shifts from when the cause of action was complete to when the plaintiff could or should have discovered sufficient information to bring the claim, and the plaintiff must bring the claim within the statutory period following that actual or constructive discovery. *Id.* Indeed, the statute at issue here is explicit that "an action for the specific recovery of a work of fine art … *shall be commenced* within six years of the actual discovery by the claimant or his or her agent" of two key pieces of information. Cal. Civ. Proc. Code § 338(c)(3)(A) (emphasis added).

California cases applying the traditional accrual rule have held that—where no prior possessor held the property for the full statutory period—the statute begins to run anew upon a transfer to the defendant because this would "afford some protection to persons as to their ownership of personal property which is of an ambulatory and movable character, and easy of concealment," and because the law should "require a fixedness or stability of possession before an owner of property, without fault on his part, could be deprived of its use and enjoyment." *Wells*, 196 Cal. at 708. That rationale is completely inapplicable here, where the statutory discovery rule provides that the statute did not begin to run until the plaintiff actually discovered the whereabouts of the artwork, and where the artwork was thereafter fixedly in the possession of the Dutch Government for well more than the six years required by the statute. It is thus no surprise that the only two cases of which the Museum is aware to have considered the running of a *discovery rule* statute of limitations in this context—where property was transferred to the defendant after the plaintiff's discovery of her claim—have rejected (explicitly or implicitly) the notion that the statute would begin running anew upon the transfer. *See Strasberg*, 51 Cal. App. 4th at 916-17, 919-20 (implicitly rejecting re-triggering

under discovery rule); *O'Keeffe*, 83. N.J. at 502-04 (explicitly rejecting re-triggering under discovery rule).

3. Competing Rationales Supply Substantial Grounds for Differences of Opinion on This Open Question

In reaching its conclusion, this Court relied in part on two general maxims of common law applicable in California (and elsewhere): (1) that a thief cannot convey good title and a buyer of personal property is accordingly subject to the doctrine of *caveat emptor*; and (2) statutes of limitation generally bar the remedy but not the right.[4] But California cases have articulated competing rationales for statutes of limitation that cut strongly against the Court's conclusion here—that Section 338(c)(3) began to run anew when the artworks at issue were transferred to the Museum many years after Plaintiff's predecessor made a deliberate decision to forgo a claim against the Dutch Government for their return.

Statutes of limitation "give defendants reasonable repose, thereby protecting parties from defending stale claims," "stimulate plaintiffs to pursue their claims diligently," "ensure prompt assertion of known claims," "protect[] settled expectations, giv[e] stability to transactions, encourage[e] the prompt enforcement of substantive law, [and] avoid[] the retrospective application of contemporary standards." 43 Cal. Jur. 3d, Limitation of Actions § 2 (2015) (citing cases).

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[4] As the Court acknowledged, this latter rationale does not apply when adverse possession has occurred. *See* Cal. Civ. Code § 1007 ("Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all ...."); 3 Witkin, Cal. Proc., Actions § 442(1) (5th ed. 2008) ("Compliance with the conditions of adverse possession for the statutory period vests title in the possessor and divests the true owner of his substantive property right."). The Court's Order expressly reserves whether adverse possession applies here (Apr. 2, 2015 Order at 10 n.7), and if necessary the Museum will demonstrate that it does at the appropriate time. *See, e.g.*, 13 Witkin, Summary of Cal. Law, Personal Property § 123 (10th ed. 2005) (California statutes "would seem to establish the right to acquire title to personal property by adverse possession").

> Statutes of limitation are intended to enable defendants to marshal evidence while memories and facts are fresh and to provide defendants with repose for past acts; their underlying legislative goal is to require diligent prosecution of known claims so that legal affairs can have their necessary finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh. Thus, they are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared, presenting unfair handicaps. The statutes, accordingly, serve a distinct public purpose, preventing the assertion of demands which, through the unexcused lapse of time, have been rendered difficult or impossible to defend.

Id. (footnotes omitted).

All of these rationales furnish "substantial ground[s]" for disagreement over whether Plaintiff's claims should proceed under California law. *Cf.* 28 U.S.C. § 1292(b). When a plaintiff actually knows of her potential claim against a possessor of property and deliberately chooses not to assert it for many years, the rationale of *caveat emptor*—that a buyer of the property from that prior possessor should figure out that there may be a claim to the property by the plaintiff—is at its nadir. A buyer may reasonably infer that the failure to bring a claim over that long period of time demonstrates the non-existence or forfeiture of such claim, and the buyer's ability to investigate such stale claims is greatly reduced. On the other hand, society's interest in repose, protecting settled expectations, and giving stability to transactions is at its zenith. If the plaintiff's deliberate decision not to assert a timely claim against the prior possessor forever bars her claim against that possessor, why should that possessor's right to alienate the property be diminished, and the plaintiff's right to recover the property spring back into existence upon the fortuity of a transfer? In the words of the California Supreme Court in *Wells*, the "fixedness or stability of possession" required "before an owner of property, without fault on his part, could be deprived of its use and enjoyment" has at that point come and gone. 196 Cal. at 708. *See also Traverso*, 87 Cal. App. 4th at 1150-51

(importance of protecting settled expectations in analogous context); *Wilshire Westwood Assocs.*, 20 Cal. App. 4th at 739-40 (importance of repose function in analogous context).

In sum, a court considering this issue reasonably could conclude: (1) that the Museum's acquisition of the allegedly stolen artwork constituted a new act of conversion as a matter of tort law does not mean that the statute of limitations necessarily began to run anew; and (2) precedent both within and outside of California, as well as the nature of the actual discovery rule at issue and the rationale behind statutes of limitation in California generally, support the conclusion that Section 338(c)(3) did not begin to run anew upon the transfer of the artworks to the Museum.

B. Immediate Appeal "May Materially Advance the Ultimate Termination of the Litigation"

Certification of an order for immediate appeal is appropriate where it "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Certification of an order deciding a close question on interpretation of a statute of limitations is likely to do precisely this. As the Ninth Circuit has explained:

> Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit. Examples of such questions are those relating to jurisdiction or a statute of limitations which the district court has decided in a manner which keeps the litigation alive but which, if answered differently on appeal, would terminate the case.

United States v. Woodbury, 263 F.2d 784, 787 (9th Cir. 1959).

Consistent with this observation, the Ninth Circuit and its district courts have often invoked § 1292(b) to permit interlocutory review of questions turning on an interpretation of a statute of limitations or a defense to a statute of limitations that have a chance of "terminat[ing] the case" if decided differently. *See Estate of*

Amaro v. City of Oakland, 653 F.3d 808, 809 (9th Cir. 2011) (interlocutory appeal on question "whether the doctrine of equitable estoppel" applied); *Ford v. Pliler*, 590 F.3d 782, 786 (9th Cir. 2009) (interlocutory appeal on question whether otherwise untimely claims asserted by habeas petitioner could be equitably tolled); *Beaver v. Tarsadia Hotels*, 29 F. Supp. 3d 1323, 1337 (S.D. Cal. 2014) (certifying orders resolving question of which limitations period applied to plaintiff's claim); *Jones v. Henry*, No. 2:05-cv-1067-GEB-GGH-P, 2007 WL 512422, at *4 (E.D. Cal. Feb. 12, 2007) (certifying order resolving timeliness of habeas petitioner's claims); *Resolution Trust*, 879 F. Supp. at 1061 (certifying order applying a delayed accrual rule to a state statute of limitations when Oregon state courts "ha[d] neither adopted nor rejected" the rule); *see also Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1520 (9th Cir. 1987) (interlocutory appeal on statute of limitations issue); *Capitan Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 466 (9th Cir. 1975) (same).

The Court's April 2, 2015 Order falls squarely in line with these decisions. A ruling in favor of the Museum on the question whether Section 338(c)(3) begins to run anew when allegedly stolen property is transferred to a new owner is likely to result in outright dismissal of Plaintiff's claims as time-barred.[5] As this Court noted, on the face of the Complaint, it appears that Plaintiff's predecessor Desi Goudstikker actually discovered her claim to the Cranachs and their identity and whereabouts in the hands of the Dutch Government by 1952 at the latest, meaning that any claims against the Dutch Government expired in 1958 at the latest. (*See* Apr. 2, 2015 Order at 9 n.6.) Plaintiff's inherited claim would thus be untimely if

[5] Plaintiff contends Section 338(c)(3) governs the timeliness of all of her claims. *See, e.g.*, Pl.'s Opp'n. to Mot. to Dismiss (ECF No. 79) at 26-27. The Museum contends that Section 338(c)(3) at most applies to Plaintiff's claim for replevin, and that her damages claims are barred under the prior version of Section 338. *See* Joint Rule 26(f) Report (ECF No. 102) at 5. A ruling in favor of the Museum would bar all of Plaintiff's claims under either of these statutes of limitation.

the statute of limitations were determined not to have begun running anew when the Museum acquired the Cranachs. (*See id*. at 11.)

It follows that an appeal on this potentially case-dispositive issue could obviate the need for "lengthy and costly" litigation. *Advanced Analogic Techs., Inc. v. Linear Tech. Corp.*, No. C-06-00735-MMC, 2006 WL 2850017, at *3 (N.D. Cal. Oct. 4, 2006) (granting motion for interlocutory appeal where "the parties and the Court would greatly benefit" from appellate decision "before embarking on potentially lengthy and costly litigation"). The Court should permit the Museum to seek the Ninth Circuit's guidance now so as to avoid what may be a "needless expenditure of judicial resources" if the Ninth Circuit later concludes that it disagrees with this Court's resolution of this threshold statute of limitations issue. *Mattel, Inc. v. Bryant*, 441 F. Supp. 2d 1081, 1099 (C.D. Cal. 2005), *aff'd*, 446 F.3d 1011 (9th Cir. 2006).

Although permitting an interlocutory appeal would avoid burdensome expenditures that may turn out to be unnecessary, the Museum recognizes the need to ensure that proceedings in this Court are not delayed by the Museum's attempt to obtain review from the Ninth Circuit. For that reason, the Museum does not seek a stay of proceedings in this Court concurrently with this motion. The Museum does not intend to seek a stay unless and until the Ninth Circuit agrees to review this issue. In addition, the Museum intends to ask the Ninth Circuit to certify the question directly to the California Supreme Court, whose ruling on the statute of limitations issue will be conclusive as a matter of state law. The Museum believes that by forgoing an immediate stay, and by asking the Ninth Circuit to send this question to the California Supreme Court, any resulting interlocutory appeal will be structured as efficiently as possible for the parties and the Court, in furtherance of the goal that an interlocutory appeal "advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

1 **C. The Court's Order Involves a "Controlling Question of Law"**

2 The Court must also consider whether the April 2, 2015 Order involved a
3 "controlling question of law." 28 U.S.C. § 1292(b). This does not require that
4 reversal of the Court's order terminate the litigation (although here, it is quite likely
5 that reversal would do so). *In re Cement Antitrust Litig.* (MDL No. 296), 673 F.2d
6 1020, 1026 (9th Cir. 1982). "Rather, all that must be shown in order for a question
7 to be 'controlling' is that resolution of the issue on appeal could *materially affect* the
8 outcome of litigation in the district court." *Id.* (emphasis added); *Woodbury*, 263
9 F.2d at 787 ("[W]e do not hold that a question brought here on interlocutory appeal
10 must be dispositive of the lawsuit in order to be regarded as controlling.").

11 The statute of limitations issue addressed in the Court's April 2, 2015 Order is
12 controlling because it is critical to assessing the timeliness of Plaintiff's claims.
13 *Mattel*, 441 F. Supp. 2d at 1099 (granting certification of order for interlocutory
14 appeal when order resolved a "controlling question of law critical to the court's
15 exercise of jurisdiction"); *see also Resolution Trust*, 879 F. Supp. at 1061 (order
16 concluding that claims "were not barred by the applicable state statute of
17 limitations" involved a "controlling question[] of law"). As noted above, a reversal
18 on the question whether California's stolen-property statutes of limitation began to
19 run anew upon transfer of allegedly stolen property is likely to result in dismissal of
20 Plaintiff's claims. *Supra* at 16-17 & n.5.

21 Plaintiff may renew her "attempts to distance herself from the allegations in
22 her Complaint" (Apr. 2, 2015 Order at 9 n.6), and argue that the statute of
23 limitations never expired while the Cranachs were in the hands of the Dutch
24 Government. That would require Plaintiff to plead and prove, contrary to the
25 allegations in her First Amended Complaint, that Desi Goudstikker and her agents
26 did not know that the Dutch Government had recovered a set of paintings including
27 the Cranachs. (*See* Defs.' Reply Br. ISO Mot. to Dismiss (ECF No. 114) at 11.)
28 Even if an appellate court were to accept that strained reading of the Complaint or

the statute, a different ruling on the statute of limitations issue would unquestionably narrow this lawsuit. It would allow the parties to focus on the critical factual question of when Desi Goudstikker and/or her agents discovered that the Dutch government had the Cranachs. Under any reading of Plaintiff's complaint, reversal of this Court's ruling would "materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.* 673 F.2d at 1026.

D. The Criteria for Certification to the California Supreme Court are Met

The Museum expects that if permitted to file a 1292(b) petition, it will ask the Ninth Circuit to certify the question addressed in the Court's April 2, 2015 Order to the California Supreme Court.[6] There are strong grounds for the Ninth Circuit to grant that request. The California Rules of Court authorize the California Supreme Court to decide, upon certification by a United States Court of Appeals, questions of California law in instances where the decision "could determine the outcome of a matter pending in the requesting court" and "[t]here is no controlling precedent." Cal. R. Ct. 8.548(a)(1)-(2). Both criteria are satisfied in this case for the reasons discussed *supra* at 16-20, and in the Court's Order, which noted that "to determine whether Plaintiff's action is timely" it needed to examine an "open question" of California law. (Apr. 2, 2015 Order at 8.)

[6] The Ninth Circuit has certified issues to the California Supreme Court that came to the Ninth Circuit through an interlocutory appeal, *e.g.*, *Nordyke v. King*, 229 F.3d 1266, 1268-70 (9th Cir. 2000), *certified question answered*, 27 Cal. 4th 875 (2002); *Asmus v. Pac. Bell*, 159 F.3d 422, 424-25 (9th Cir. 1998), *certified question answered*, 23 Cal. 4th 1 (2000), and has certified issues to other state supreme courts in the same procedural posture, as well. *See F.D.I.C. v. Smith*, 83 F.3d 1051, 1053 (9th Cir. 1996) (certifying to the Oregon Supreme Court the novel statute of limitations issue that was the subject of the interlocutory order certified in *Resolution Trust*, 879 F. Supp. 1059, cited *supra* at 5, 17, 19), *certified question answered*, 328 Or. 420 (1999).

1 The Ninth Circuit readily exercises its discretion to certify issues to the
2 California Supreme Court when faced with dispositive questions of state law on
3 which there is no controlling precedent, including questions related to the operation
4 of statutes of limitation. *See, e.g.*, *Pooshs*, 561 F.3d at 965-67 (certifying the
5 question: "Under California law, may two separate physical injuries—both caused
6 by a plaintiff's use of tobacco—be considered 'qualitatively different' for the
7 purposes of determining when the applicable statute of limitations begins to run?").
8 The Ninth Circuit has also expressed a preference for certifying issues of "great
9 practical importance." *Retired Employees Ass'n of Orange Cnty., Inc. v. Cnty. of*
10 *Orange*, 610 F.3d 1099, 1102 (9th Cir. 2010); *see also Los Angeles Unified Sch.*
11 *Dist. v. Garcia*, 669 F.3d 956, 962-63 (9th Cir. 2012) (certifying question that
12 "could have a significant fiscal impact" on California educational agencies). The
13 question presented by this case is of widespread practical importance not only to
14 museums and other art institutions, but also to all personal property claimants and
15 defendants, because the answer will determine whether transferees of personal
16 property may ever avail themselves of the defense that the applicable statute of
17 limitations expired when the property was in the hands of a former owner. *See*
18 *supra* at 8-9.

19 **IV. <u>CONCLUSION</u>**

20 The Museum respectfully requests that this Court certify its April 2, 2015
21 Order for interlocutory appeal by amending that order to state and support the
22 grounds under 28 U.S.C. § 1292(b). *See* Fed. R. App. Proc. 5(a)(3); 16 Wright &
23 Miller, Federal Prac. & Proc. Juris. § 3930 (3d ed. 2015).
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