

10-257-CV

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT



MARTIN GROSZ, LILIAN GROSZ,

Plaintiffs-Appellants,

against

THE MUSEUM OF MODERN ART, HERRMANN-NEISSE WITH COGNAC,
PAINTING BY GROSZ, SELF-PORTRAIT WITH MODEL, PAINTING BY GROSZ,
REPUBLICAN AUTOMATONS, PAINTING BY GROSZ,

Defendants-Appellees.

*On Appeal from the United States District Court
for the Southern District of New York*

BRIEF FOR DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for appellees certifies that The Museum of Modern Art, a not-for-profit organization, has no parent corporation(s) and there are no publicly-held corporations that own ten (10) percent or more of its stock.

Dated: September 30, 2010
New York, NY

Respectfully Submitted,

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The artist George Grosz emigrated from Germany to New York City before the Nazis took power. He lived in Bayside, Queens and then in Huntington, Long Island until 1959, teaching during much of that period at the Art Students League in Manhattan. Despite the passage of time, the loss of records, and the death of every possible witness, documentary evidence confirms that by 1953 Grosz knew that some of his work was owned by The Museum of Modern Art, and that he saw at least one of his works exhibited at MoMA. Although he lived in New York for six years thereafter, Grosz never asserted any claim against MoMA concerning title to his works in its collection, including the three works at issue, which MoMA acquired in 1946, 1952, and 1954.

Nonetheless, fifty years after his death – and seventy-six years after Grosz moved to New York, having long ago parted with the works at issue – the artist’s son and daughter-in-law commenced this suit to obtain possession of those works. The question presented on appeal is whether the district court properly dismissed the claims as time-barred on a motion to dismiss, relying on undisputed letters to or from plaintiffs that were integral to the Complaint.

STATEMENT OF THE CASE

Plaintiffs Martin and Lilian Grosz (“plaintiffs” or the “Grosz heirs”), the son and daughter-in-law of the German artist George Grosz, want MoMA to relinquish

to them three works by Grosz that MoMA has proudly owned and exhibited for roughly sixty years: *Portrait of the Poet Max Herrmann-Neisse with Cognac* (“*Poet*”), *Self-Portrait with Model* (“*Self-Portrait*”), and *Republican Automaton* (“*Automaton*”) (collectively, the “works”).

Although the plaintiffs try to cast this as a “looted art” case, the Complaint itself belies the description. The works were not stolen from Grosz by the Nazis or anyone else. On the contrary, as pleaded, Grosz, who died in 1959, consigned the works to his art dealer, Alfred Flechtheim, in the 1920s, years *before* the Nazis seized power in 1933 (¶¶ 38-39, 110, Ex. 26; *see also* ¶¶ 16, 37).¹ Flechtheim had no connection to the Nazis (¶ 1). As alleged, none of the works was ever physically seized by the Nazis. Indeed, as alleged, two left Germany under Flechtheim’s control and were sold at auction in Holland two years before it came under Nazi domination (¶¶ 16, 48, 51, 56-57, Exs. 7-8).

That this is not a “looted art” case is clear from the 2007 decision of a German court, considering an almost identical case brought by these same Grosz heirs seeking “restitution” of a different painting by Grosz, *Blind Beggar*, which rejected their argument that the painting was looted art. IA203-205, ¶¶ 23-26 &

¹ The First Amended Complaint and its exhibits (the “Complaint”) appear in the first volume of the Appendix at 21-186. Citations to paragraphs and exhibits in this section are solely to the paragraph numbers and exhibits at those pages. Because each volume of the appendices is paginated beginning at 1, citations otherwise take the form IA#, IIA#, or SPA#.

IA233. That painting too was never physically confiscated by the Nazis but was voluntarily transferred by Grosz to Flechtheim and sold in the same 1938 Holland auction in which *Self-Portrait* and *Automatons* were sold. The German court rejected the Grosz heirs' claims as time-barred (IA234-235), as did Judge McMahan here.

The Complaint alleges that the three works have been in MoMA's possession for nearly six decades (§§ 16, 56, 59, 90). From early January 1933 until his departure for West Berlin in 1959 months prior to his death, Grosz lived in New York (§§ 46, 91, 105, Ex. 25). As to one of the works specifically (*Poet*), the Complaint alleges that Grosz actually knew that MoMA owned it as of 1953 (§ 105). Grosz never advised MoMA of any alleged concerns or sought the return of any of the works (§ 107). Nor did Grosz's itemized post-war claims for reparation of "loss of assets and property" during World War II make any mention of the works (§§ 108-109, Ex. 25). Grosz made no claim against MoMA; neither can his heirs now.

For the motion, MoMA accepted as true the well-pleaded, factually based allegations of the Complaint. There were precious few of those. Instead, with direct sources of proof long dead or destroyed, the Grosz heirs rely on general, conclusory innuendo and on headline-catching accusations whose only purpose is to invoke the powerful but wholly irrelevant specter of the Holocaust. Thus the

Complaint alleges that Grosz “died a victim not only of Nazi persecution, but of an international network of unscrupulous art dealers” (¶ 2), that it was “in this atmosphere that the Museum of Modern Art acquired three [of the works]” (¶ 9), and that “a combination of sham transactions” was at work (¶ 18), including the operation of a “sham Dutch auction,” since, the Complaint says, “[t]he Dutch art market historically lacked any moral compass” (¶ 14).

The days are over when a plaintiff can open the courthouse door and force a defendant to the extraordinary expense and dislocation of a litigation of this size, complexity, and historical reach, at the mere drop of a complaint that fails to include well-pleaded factual averments that, when taken as true, establish the plausibility of the causes of action pursued. Vague and conclusory allegations are to be disregarded. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009). As the district court properly concluded, once the Complaint is shorn of its vague and conclusory allegations and considered in light of the entirety of the undisputed correspondence between plaintiffs’ representative and MoMA, plaintiffs’ claims are plainly time-barred.

1. The Allegations in the Complaint

Allegations Applicable to All Claims. MoMA is a New York not-for-profit corporation, currently in possession of the works (¶¶ 34-35). Plaintiffs Martin and

Lilian Grosz allege that they are the only living heirs of the late George Grosz (¶¶ 32-33).

The artist George Grosz consigned much of his artwork, including the works, to Galerie Flechtheim (¶¶ 38-39, 48, Ex. 26). In December 1931, Galerie Flechtheim cancelled its consignment agreement with Grosz, and Grosz's artwork remained in the possession of Galerie Flechtheim (¶ 41, Ex. 3). In May 1932, Flechtheim and Grosz corresponded regarding a new consignment agreement but did not reach terms (¶ 43, Exs. 4-5). Flechtheim allegedly never accounted to Grosz for the works (¶ 44), and left Germany in the early 1930s (¶ 53).

On January 12, 1933, before the Nazis came to power, Grosz emigrated from Germany to New York (¶ 46). Grosz and Flechtheim continued to correspond concerning the artworks in Flechtheim's possession (¶ 48, Ex. 7). On March 11, 1937, Flechtheim died in London (¶ 53). Grosz died in Germany in July 1959 (¶ 110).

During his lifetime, Grosz knew MoMA had the works – at least that MoMA owned and was exhibiting *Poet* (¶ 105) – but he did nothing to recover them. When Grosz submitted compensation claims to Germany for damages for loss of assets and property, he made no mention of the works (¶¶ 108-109, Ex. 25).

Allegations Specific to Poet. Grosz consigned *Poet* to Galerie Flechtheim on April 24, 1928 (¶ 38). By April 12, 1937, Charlotte Weidler was in possession

of *Poet* (¶ 75). Weidler claimed to have inherited *Poet* from Flechtheim, but the Complaint alleges that this claim was false (¶¶ 75-76). On or about April 10, 1952, Weidler, through Curt Valentin, sold *Poet* to MoMA (¶ 90). Although Weidler's identity allegedly remained undisclosed (¶ 90), MoMA allegedly had "actual notice" of the painting's "suspect provenance" when it bought *Poet* (¶ 129). (See also ¶¶ 20, 70-71, 88, 165-166, for additional allegations regarding MoMA's alleged bad faith in acquiring *Poet*).

When MoMA acquired *Poet*, Grosz was living in New York (¶¶ 90-91). MoMA publicly exhibited *Poet* in 1953 (¶¶ 92, 105). Grosz was aware of MoMA's possession of *Poet* by at least January 8, 1953 (¶ 105). In letters to both his brother-in-law and friend, Grosz stated that a painting exhibited at the "Modern Museum," presumably *Poet*, "was stolen from me" (¶ 105).

Allegations Specific to Self-Portrait. Grosz consigned *Self-Portrait* to Flechtheim in 1929 (¶ 39), while a consignment agreement existed between Grosz and Flechtheim (¶ 147). The agreement terminated (*id.*). At some point thereafter, Flechtheim sent *Self-Portrait* to the Gallerie Billiet in Paris, where it failed to sell (¶¶ 149, 151). Paintings sent to the Gallerie Billiet in Paris were subject to a security interest by Flechtheim (¶ 137, Ex. 7).

In 1936, Flechtheim sent *Self-Portrait* from Galerie Billiet to the Kunstzaal van Lier in Amsterdam, where it again failed to sell during an exhibition in July and August 1936 (¶¶ 51, 151).

After Flechtheim's death, in early 1938, van Lier brought *Self-Portrait* to an auctioneer in Amsterdam and purchased *Self-Portrait* for himself at the auction (¶¶ 14, 56, 155). The auction was allegedly a "sham" (*id.*). Two months after the auction, van Lier sold *Self-Portrait* to Leo Lionni (¶¶ 56, 156). Lionni gave *Self-Portrait* to MoMA as a gift in 1954 (¶ 56). No bad faith by Lionni or the subsequent acquirer, MoMA, is alleged as to this painting (*see* ¶¶ 56, 156).

Allegations Specific to Automatons. The Complaint alleges that Grosz consigned *Automatons* to Flechtheim between 1927 and 1928 (Ex. 26). Flechtheim consigned *Automatons* to Mayor Gallery in London in 1934 (¶ 16). After Flechtheim's death, it is alleged that van Lier arranged for the transfer of the work from London to Amsterdam (*id.*). The Complaint alleges *Automatons* was sold to an individual named Brandt at the same "sham" Dutch auction (¶¶ 16, 57). Brandt then sold *Automatons* to Dr. Herbert Tannenbaum in 1939 (¶¶ 16, 58), who sold it to Dr. William Landman in Toronto (¶ 58). MoMA purchased *Automatons* from Dr. Landman in February 1946 (¶ 59). No bad faith is alleged concerning Brandt, Tannenbaum, Landman, or MoMA (*see* ¶¶ 57-59).

Plaintiffs' Demand for Possession of the Works, and MoMA's Refusal.

By letter dated November 24, 2003, the Grosz heirs demanded possession of the works from MoMA (¶ 117, Ex. 26). The Complaint attaches the demand letter and an April 12, 2006 letter from MoMA (Ex. 27), but not the intermediate letters between the parties, each transmitted prior to April 2006, which confirm MoMA's refusal to transfer the works to plaintiffs by July 2005. (IA187-188, the July 20, 2005 letter from MoMA Director, Glenn Lowry, to plaintiffs' representative, Ralph Jentsch, in which Lowry writes that "the available evidence does not lead to any definitive conclusion that challenges the Museum's ownership of the picture [*Poet*]" and that "we [MoMA] cannot reach the conclusion that restitution of either of this picture [*Self-Portrait*] or of the drawing, Republican Automaton, would be appropriate at this time." See also IA189-193, IA323-4, IA442, IA450-452).

Dead or Lost Sources of Proof. Grosz and Flechtheim, the two individuals most likely to know the true facts, are long dead (¶¶ 110, 53), as are all the other individuals who would have had direct and personal knowledge about the disposition or transfers of one or more of the works and of the accusations made in the Complaint, including Weidler, Valentin, van Lier, Eva Grosz (¶ 112), Betty Flechtheim (¶ 54), Alfred Barr, Brandt, Tannenbaum, and Lionni. Critical documentary proof is also long since lost or destroyed.

2. The Proceedings Below

MoMA moved to dismiss the Complaint as time-barred under New York's three-year statute of limitations or, alternatively, on the German substantive law (accrual and repose principles) that New York would borrow for *Poet*, and the German or Dutch accrual and repose principles that New York would borrow for *Self-Portrait* and *Automatons*. (The Complaint pleaded that German substantive law applies (¶ 24), as plaintiffs still maintain. *See Br.* at 51.)

The Complaint had alleged some of the correspondence between MoMA and the Grosz heirs (or their representative), and on its motion MoMA submitted four additional, intermediate portions of the correspondence between it and the Grosz heirs that the Complaint had omitted. Plaintiffs' opposition to the motion to dismiss disagreed with MoMA's reading of those letters, but did not contend that the letters were inauthentic or not properly submitted and considered on the motion.² Indeed, plaintiffs themselves submitted an additional letter, dated January 18, 2006, in support of their opposition brief. Docket No. 24. MoMA did not object to the court's consideration of that letter.

Without reaching the issue of what substantive law should apply, and ignoring plaintiffs' allegation that German substantive law applied, the district

² *See* Plaintiffs' Memorandum in Opposition (Docket No. 23 at 10); *see also id.* at 22-23 (complaining of reliance on the Katzenbach report and expert declarations, but not of the intermediate correspondence between MoMA and plaintiffs' agent Jentsch).

court granted the motion on the ground that the claims were untimely under New York substantive law (which is considerably more favorable to claimants than German or Dutch law). SPA3-31. Judge McMahon noted this Court's holdings that she was entitled to consider "documents that are quoted in the complaint or documents that the plaintiff either possessed, or knew about and relied upon in bringing the suit." SPA5. The court concluded that New York's limitations period for "an action to recover a chattel or damages for the taking or detaining of a chattel" applied to all of plaintiffs' claims. SPA14-15. Holding that unreasonable delay applies is pertinent only to laches, the court rejected MoMA's contention that plaintiffs' claims accrued under New York law not at the date of refusal after due demand, but much earlier, in view of the undisputed delay of Grosz and his heirs in seeking return of the works that they knew were in the public collection of MoMA. SPA16-18.

Two weeks after the court granted the motion to dismiss, plaintiffs moved to amend their now-dismissed Complaint and for reconsideration. IA16-17 (docket items 61-66). The court denied that motion on March 3, 2010 (SPA33-51), noting, among other things, that plaintiffs had not objected to MoMA's submission of the intermediate correspondence; had not argued that it was not "integral to the Complaint"; had themselves submitted additional intermediate correspondence; and had at no time argued that the court would have to convert the motion to one

for summary judgment in order to consider that correspondence. SPA35, SPA44-47. In view of the concession of plaintiffs' representative Ralph Jentsch, on deposition, that he had "reach[ed] the conclusion that MoMA was not returning these works of art" by July 20, 2005 (SPA49), Judge McMahon denied the motion to amend as futile (SPA50). Although the notice of appeal expressly noted an appeal from the denial of reconsideration, nothing in plaintiffs' appellate brief raises that issue, presumably to avoid discussion of Jentsch's concession.

Plaintiffs' brief also complains of the district court's "reversible error by denying discovery into MoMA's defenses" (Br. 3), but the ruling complained of was made by the magistrate, and plaintiffs neither completed any appeal to the district court nor obtained the district court's ruling prior to the January 6 dismissal of plaintiffs' claims, which mooted the discovery motion. *See* SPA2, SPA31.

SUMMARY OF ARGUMENT

The judgment below should be affirmed. The district court properly dismissed the Grosz heirs' claims as time-barred under New York's three-year statute of limitations (CPLR 214(3)), which the court rightly determined was applicable to all of the counts pleaded in the Complaint. In applying the statute of limitations, the court correctly considered the undisputed pre-litigation correspondence between the parties, which was integral to the Complaint, and not just the letters plaintiffs cherry-picked for inclusion. The full correspondence definitively

showed that MoMA had refused plaintiffs' demand for the works by July 20, 2005, triggering the statute of limitations, which expired on July 20, 2008, nine months before plaintiffs' initial complaint was filed. None of the "kitchen-sink" arguments plaintiffs proffer on appeal as to why the district court was wrong is sound, and in any event almost every one of those arguments was waived. Point I.

MoMA presented to the district court additional grounds for dismissing the case as time-barred, each of which provides an alternative ground for affirmance.

First, with respect to *Poet*, New York law barred the Grosz heirs' claims well before the Grosz heirs even issued their demand in 2003, for two separate and independent reasons: first, because plaintiffs claim that MoMA obtained *Poet* in bad faith, their claim accrued at the time of MoMA's alleged bad faith possession (1952), and thus was barred three years later (1955); and second, because Grosz himself knew not later than 1953 that *Poet* was at MoMA, and yet he and his heirs failed to demand its return for 50 years, the unreasonable delay in seeking the return of the work bars plaintiffs' claim. Point II.

Second, with respect to all of the works, the Grosz heirs' claims were extinguished long ago under German law, which applies to this action by operation of New York statutory law (CPLR 202) and common law (choice of law principles). Point III.

Finally, plaintiffs' claim that the district court committed "reversible error by denying discovery into MoMA's defenses" is meritless. The ruling complained of was made by the magistrate, and plaintiffs neither completed any appeal to the district court nor obtained the district court's ruling prior to the January 6 dismissal, which mooted the discovery motion. In any event, any error would constitute, at most, harmless error under FED. R. CIV. P. 61, since plaintiffs did not resist the motion to dismiss by relying on Rule 12(d) (or Rule 56(f)), and the district court did not rely on matters outside the pleadings. Point IV.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED ALL OF THE GROSZ HEIRS' CLAIMS AS TIME-BARRED BY 2008

It is entirely appropriate on a motion to dismiss for a district court to consider whether a plaintiff has pled timely claims. Here, although plaintiffs' claims were long ago extinguished by German substantive law (as we explain further below, *see* Point III, *infra*), they are also barred by operation of New York's three year statute of limitations (CPLR 214(3)), which the district court correctly applied. In doing so, the district court was entitled to and did consider the undisputed pre-litigation correspondence between the parties, which was integral to the Complaint. That correspondence showed, as a matter of law, that MoMA had refused plaintiffs' demand for the works by July 20, 2005, thus triggering the three year statute of limitations under New York law, which expired on

July 20, 2008 – nine months *before* plaintiffs filed their initial complaint on April 10, 2009.

This was the district court’s analysis, and it was proper.

Plaintiffs now appeal arguing essentially that they should be permitted to hide from the district court certain links in the very chain of correspondence upon which they rely. That is not the law in this Circuit (*see* Point I.C, *infra*). Nor is it consistent with post-*Twombly* and *Iqbal* pleading standards.

Recognizing the weakness of this argument, plaintiffs argue several alternatives, throwing in any argument they can conceive (with little regard to its support in law) to save their claims from dismissal. This effort is futile. Not only are the claims legally insufficient, but almost every argument plaintiffs make has been waived by their failure to raise it in the initial briefing on the motion to dismiss.

A. The District Court Appropriately Decided the Affirmative Defense of Statute of Limitations – and Specifically When the Grosz Heirs’ Cause of Action Accrued – on a Rule 12(b)(6) Motion to Dismiss

A motion to dismiss is appropriate to challenge claims that are time-barred by applicable statutes of limitations or repose. *P. Stolz Family P’ship, L.P. v. Daum*, 355 F.3d 92, 106 (2d Cir. 2004) (finding, on a motion to dismiss, that plaintiffs’ claims were time-barred).

Indeed, as the district court recognized:

The lapse of a limitations period is an affirmative defense that a defendant must plead and prove. Fed. R. Civ. P. 8(c)(1). However, a defendant may raise an affirmative defense in a pre-answer rule 12(b)(6) motion if the defense appears on the face of the complaint. McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004) (affirmative defense of qualified immunity); see also 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1226 (3d ed. 2004) (“[T]he current trend in the cases is to allow [the statute of limitations defense] to be raised by a motion to dismiss under Rule 12(b)(6) when the defect appears on the face of the complaint.”). Timeliness is “material when testing the sufficiency of a pleading.” Fed. R. Civ. P. 9(f).

(SPA5-6).

The Grosz heirs cite no contrary standard, yet they claim that the district court committed error by analyzing the date the action accrued for purposes of applying the statute of limitations, insisting that the district court should have accepted as true the date of accrual as alleged in the Complaint. Br. 31-32. This argument misapprehends the fundamental rule that the date a cause of action accrues is a question of law for the court to decide, not an issue of fact that the court must accept as true on a motion to dismiss. *See, e.g., Van Wormer v. City of Rensselaer*, 293 Fed. Appx. 783, 783-784 (2d Cir. 2008) (affirming dismissal by district court, which had determined, as a matter of law, that date of accrual was prior to the date of accrual alleged by the plaintiff) (summary order). The court was under no obligation to credit as true the Grosz heirs’ (false) assertion that their causes of action did not accrue until April 12, 2006.

The sole case the Grosz heirs cite in support of their argument – *In re Issuer Plaintiff Initial Pub. Offering Antitrust Litig.* (Br. 32) – is no authority to the contrary. There the plaintiffs admitted to filing their complaint after the limitations period had expired, but argued that their claims were not barred because, *inter alia*, defendants’ fraudulent concealment tolled the statute of limitations. Finding that plaintiffs had pled the facts necessary to establish fraudulent concealment, the court declined to consider the factual dispute defendants sought to raise and denied the motion to dismiss.

On this motion to dismiss, there was no *factual* dispute regarding the Grosz heirs’ demand and MoMA’s refusal. The dates of the correspondence are clear. The sole dispute is when, as a matter of law, the Grosz heirs’ claims accrued, and it was well within the district court’s power to make that determination.

B. Application of the Three Year Statute of Limitations to *All* of the Grosz Heirs’ Claims Was Proper

MoMA moved to dismiss all of the Grosz heirs’ claims as time-barred. The Grosz heirs’ argument to the contrary (Br. 43-44) is directly contradicted by the record (*see* Notice of Motion, Docket No. 13, reflecting MoMA’s motion “for an Order . . . dismissing with prejudice the Amended Complaint and each of the causes of action set forth therein”). The district court considered this argument, summarily rejected it, and correctly applied the three year statute of limitations to each claim in the Complaint. Plaintiffs contend that this too was error, asserting

that a six year statute of limitations should apply to their claims for declaration of title and unjust enrichment. This argument is wrong, since plaintiffs admitted in the Complaint that CPLR 214(3) applies (IA30, ¶ 31), and in any event a plaintiff cannot plead around the statute of limitations by asserting equitable claims.

CPLR 214(3) applies a three-year period to every “action to recover a chattel or damages for the taking or detaining of a chattel.” That is an accurate characterization of each of plaintiffs’ claims. However the Grosz heirs label their claims – whether for a declaratory judgment, conversion, replevin, the imposition of a constructive trust, an “equitable servitude” (*see* IA56, ¶ 169), or unjust enrichment – the claims are all “to recover a chattel or damages for the taking or detaining of a chattel” and therefore had to be brought within three years of accrual. *See, e.g., Norris v. Grosvenor Mktg., Ltd.*, 803 F.2d 1281, 1287-1288 (2d Cir. 1986) (3-year limitations period barred equitable claims; “[a]n equitable claim cannot proceed where the plaintiff has had and let pass an adequate alternative remedy at law”); *Mindel v. Phoenix Owners Corp.*, 17 A.D.3d 227, 228 (1st Dep’t 2005) (3-year period barred declaratory relief); *Gold Sun Shipping Ltd v. Ionian Transp. Inc.*, 245 A.D.2d 420, 421 (2d Dep’t 1997) (3-year limitations period barred constructive trust remedy); *Schreibman v. Chase Manhattan Bank*, 15 A.D.2d 769, 770 (1st Dep’t 1962) (3-year limitations period barred equitable claims; “[w]hen a legal and

an equitable remedy exist[] as to the same subject-manner, the latter is under the control of the same statutory bar as the former”).

Plaintiffs’ citation to *Mirvish v. Mott* is inapposite. 901 N.Y.S.2d 603 (1st Dep’t 2010). There, in a claim seeking return of an artwork, the First Department applied a three year statute of limitations to the action, explicitly holding that “this proceeding is subject to the three-year statute of limitations for [conversion and replevin] claims (*see* CPLR 214[3]).” *Id.* at 607 (“[I]f the underlying dispute could have been resolved through an action or proceeding for which a specific, shorter limitations period governs, then such shorter period must be applied.”). The footnote plaintiffs rely on does not establish that the court applied a six-year statute of limitations to the constructive trust claim, and indeed there is no discussion of the limitations period applicable to that claim. Moreover, because the court dismissed the constructive trust claim as a matter of law, finding it deficient for lack of any “allegation of a confidential or fiduciary relationship between the parties” (a deficiency in plaintiffs’ Complaint as well), any discussion of the timeliness of the constructive trust claim was *dicta*. *Id.* at 608 n.1.

In any event, if *Mirvish v. Mott* could be read to permit a longer limitations period for plaintiffs’ constructive trust claim, which it cannot, it would be contrary to established legal precedent. The New York Court of Appeals long ago made clear that where, as here, both “a legal and an equitable remedy exist[] as to the

same subject-matter, the latter is under the control of the same statutory bar as the former.” *Keys v. Leopold*, 241 N.Y. 189, 193 (1925).

C. The District Court Properly Considered Pre-Litigation Correspondence Between the Parties That Was Integral to the Complaint Without Converting MoMA’s Motion to Dismiss into a Motion for Summary Judgment

The Court was entitled to consider undisputed pre-litigation correspondence between the parties on the motion to dismiss because the correspondence was integral to the Complaint – and certainly integral to the very correspondence annexed to the Complaint or affirmatively submitted by the Grosz heirs in opposition to MoMA’s motion.

When deciding a motion to dismiss, established case law provides that courts may consider “documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit.” *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000). *See also San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 808 (2d Cir. 1996) (holding district court was entitled to consider documents integral to the complaint). The Grosz heirs did not contest this point in their opposition to the motion to dismiss or in their motion for reconsideration. *See* Docket No. 23 at 10, 22-23; Docket No. 65 at 8.

Although the Grosz heirs argued on reconsideration that they “had no notice that MoMA would persuade the Court to consider [the July 20, 2005 Lowry-to-Jentsch] letter” and “did not rely” on the letter (Docket No. 65 at 8), that claim is absurd, as

MoMA raised the letter in its motion to dismiss, and the Grosz heirs addressed the letter without procedural objection in their opposition to MoMA's motion. Docket No. 23 at 10 (arguing that MoMA's refusal did not occur until April 2006 because the July 2005 letter was "not a clear refusal"). Furthermore, the Grosz heirs had implicitly relied on the entire course of back-and-forth correspondence between the parties in framing their Complaint, claiming that refusal was delayed until April 2006. IA30, ¶ 31.

The entirety of the correspondence is integral to the Complaint because the Grosz heirs relied on its full effect to allege the timing of accrual of the causes of action. While the Grosz heirs attached to the Complaint only the first and last pieces of the correspondence, they possessed all of the correspondence, and MoMA's submission of additional, intermediate letters properly provided the district court with the context to consider the timing of accrual. *See San Leandro*, 75 F.3d at 808-809 (considering context of statements quoted in complaint); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 44 (2d Cir. 1991) ("Plaintiffs' failure to include matters of which as pleaders they had notice and which were integral to their claim – and that they apparently most wanted to avoid – may not serve as a means of forestalling the district court's decision on the motion."), *cert. denied sub nom. Cortec Indus. v. Westinghouse Credit Corp.*, 503 U.S. 960 (1992); *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*, 936 F.2d

759, 762 (2d Cir. 1991) (refusing to “close our eyes to the contents of the [document submitted by defendant] and to create a rule permitting a plaintiff to evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the [document] to the complaint or to incorporate it by reference”).

This conclusion is underscored by the fact that, in their opposition to MoMA’s motion to dismiss, the Grosz heirs themselves submitted an additional piece of correspondence – the letter from MoMA to Jentsch dated January 18, 2006 (IA323). *See* Docket No. 23 at 12; Docket No. 24. That letter too adverts to prior communications and correspondence between the parties, and Jentsch’s response to that letter – dated January 20, 2006 – refers to and quotes from the July 20, 2005 letter (IA323). Having relied on the correspondence when it suited their purpose, the Grosz heirs cannot now legitimately complain that the court considered these letters. *Magellan Int’l Corp. v. Salzgitter Handel GmbH*, 76 F. Supp. 2d 919, 923 (N.D. Ill. 1999) (“When parties engage in a chain of correspondence . . . , and then one party detaches and presents only certain links of the chain in its effort to state a claim for relief, the [defending party] is entitled to fill in the skeletal outline thus presented by the complaining party by adding the missing links.”). This follows not only as matter of basic fairness (*id.*) but under the Supreme Court’s decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009), in order for the

Court to test the “plausibility” of the Complaint’s allegations on a motion to dismiss.

Relatedly, the district court recognized that by the time of the January 18, 2006 letter from Lowry to Jentsch (IA323), submitted *by the Grosz heirs* in their opposition papers, “litigation was clearly warranted” (SPA30). This letter was properly considered by the court because it was submitted by the Grosz heirs, who argued that the “January 18, 2006 letter equitably tolls the statute of limitations *because the Heirs reasonably relied on it.*” Docket No. 23 at 12 (emphasis added). The Grosz heirs thus conceded that the January 18 letter was integral to the Complaint, relied on it in establishing the accrual date argued in the Complaint, and waived any objection to its consideration on the motion to dismiss.

Finally, plaintiffs’ argument – having not been raised in their original opposition to MoMA’s motion to dismiss the Complaint – has been waived, as discussed more fully under Point I.E.2, *infra*.

D. The District Court Correctly Concluded That New York’s Demand-and-Refusal Rule Bars the Grosz Heirs’ Claims

The district court properly considered the pre-litigation correspondence submitted by both parties on the motion to dismiss and concluded that the Grosz heirs’ claims were all time-barred. SPA20-25. As is clear from its written decision, the district court considered every plausible scenario in plaintiffs’ favor before coming to the inescapable conclusion that plaintiffs’ claims were time-

barred; the Grosz heirs' claims having accrued by virtue of MoMA's words and deeds no later than July 20, 2005.

1. Under New York Law, Conversion-Related Claims Against a Good Faith Possessor Accrue After the Possessor Refuses the Putative-Owner's Demand

Under New York law, the date of accrual for conversion-related claims occurs either at the time of possession, if the defendant knowingly acquired the property in bad faith, or at the time the owner's demand is refused, if the defendant acquired the property in good faith. *Close-Barzin v. Christie's, Inc.*, 51 A.D.3d 444, 444 (1st Dep't 2008) ("Plaintiff's conversion claim is time-barred, since she alleges bad faith and the action was commenced more than three years after the alleged taking of the property occurred. Given plaintiff's allegation . . . a demand and refusal was not a prerequisite to commencement of an action for conversion."); *The Richard Avedon Found. v. Nabokov*, Index No. 601062/2007, 2007 NY Slip Op 33588(u), at *5 (N.Y. Sup. Ct. Oct. 31, 2007) (alleged owner's claims accrued against possessor who was not a good faith purchaser at the time of conversion). *See also Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 182-183 (2d Cir. 2000) (demand-and-refusal rule inapplicable where the possessor is not in good faith and treats the chattel as its own); *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 488-489 (1983) (accrual at the time dominion exercised over the chattel); *see Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-318 (1991).

Notably, and as discussed further below (*see* Point II.A, *infra*), the Complaint alleges that MoMA obtained one of the works, *Poet*, in bad faith. On that allegation, the Grosz heirs' claims to *Poet* accrued in 1952 at the latest, at the time MoMA took possession (IA40, ¶ 90), and were barred three years later, *i.e.* in 1955. *Close-Barzin*, 51 A.D.3d at 444.

In the briefing on the motion to dismiss, the Grosz heirs backpedaled from these allegations and the district court analyzed the claims on the assumption that MoMA had taken possession to all three works in good faith. *See* SPA18, n.3. This led the district court to apply New York's unique "demand and refusal" rule to determine – as it did correctly – that the Grosz heirs' claims were barred by 2008 because MoMA refused the Grosz heirs' demand in 2005.

2. The Grosz Heirs' Demand and MoMA's Refusal

On November 24, 2003, the Grosz heirs, by letter from their authorized representative Ralph Jentsch, demanded "return" of the works (IA183). In order for plaintiffs' claims (filed April 10, 2009) to be timely, MoMA's refusal must have been later than April 10, 2006. The Grosz heirs argue that MoMA did not refuse to return the works until April 12, 2006, and attach a letter of that date, written by MoMA to Jentsch, to support their claim (IA44, IA186, ¶ 118, Ex. 27). But April 2006 was not the first time MoMA refused the Grosz heirs' demand for the works.

Under New York law, “a refusal need not use the specific word ‘refuse’ so long as it clearly conveys an intent to interfere with the demander’s possession or use of his property.” *Feld v. Feld*, 279 A.D.2d 393, 395 (1st Dep’t 2001) (citation omitted) (holding that a letter conditioning the return of property on resolution of other disputes was a refusal as it was “inconsistent with plaintiff’s claim of ownership”). MoMA manifested its intent to continue to “interfere” with the Grosz heirs’ possession very shortly after the 2003 demand, by not transferring the works and retaining them in its collection. Several letters that pre-date the April 2006 correspondence the Grosz heirs rely on confirm the earlier accrual of the Grosz heirs’ claims, and the time-barred nature of this action. The pre-suit letters evidence MoMA’s continuing intent “to interfere with the demander’s possession or use of his property” well before April 10, 2006. *Id.* at 395.

The allegations of the Complaint, together with the correspondence between the parties, demonstrate that the Grosz heirs had made an unconditional demand for the works in 2003 and that MoMA let pass the deadlines which the Grosz heirs unilaterally established for “return” of the works (IA187, IA450). The Grosz heirs’ authorized representative describes the 2003 demand as the “*initial* restitution claim” (IA191, emphasis supplied).

Then, on July 20, 2005, MoMA again refused to return the works in a letter that is clearly inconsistent as a matter of law with the Grosz heirs’ claim of

ownership to the works, as the district court concluded. Addressing all three works, the letter confirms MoMA's refusal to transfer the works to the Grosz heirs, stating definitively that "we have now reached a point where it appears that no more information [is] currently available for us to consider." As to *Poet*, the letter refuses any return and states:

We have . . . reached somewhat different conclusions about the results of our extensive study of the provenance of *Portrait of the Poet Max Herrman Neisse*: we believe that the available evidence does not lead to any definitive conclusion that challenges the Museum's ownership of the picture.

In fact, much of what we know argues in favor of MoMA's clear title.

(IA187).

The same letter also refused the Grosz heirs' claims for both *Self-Portrait* and *Automatons*:

I think our greatest difference of opinion, however, concerns *Self-Portrait with a Model*. Although we are aware of the restitution of a painting with similar provenance, based on the material that you have shared with us, and on our own extensive research – much of which we have done in collaboration with Yale University – we cannot reach the conclusion that restitution of either of this picture, or of the drawing, *Republican Automaton*, would be appropriate at this time.

(IA188).

As the Grosz heirs' authorized representative later admitted under oath, in this July 20, 2005 letter MoMA "*outright declined restitution*" and "*stated that there [was] no available evidence that would challenge the Museum's ownership*"

(IA192, emphasis supplied). MoMA unqualifiedly rejected the Grosz heirs' "initial restitution claim" by July 2005.

Responding to the July 20, 2005 letter less than three weeks later, Jentsch unequivocally showed that he understood exactly what he was being told, responding: "on what basis do you *deny restitution* . . . ?" (IA451, emphasis supplied). In correspondence written several months later, the Grosz heirs again acknowledged their understanding that MoMA refused their demand in July (IA192, "In this [the July 20, 2005] letter you . . . stated that there were no available evidence that would challenge the Museum's ownership of" *Poet*). It was therefore certain, without doubt, based on the very words of the plaintiffs' representative, that on receipt of the July 20, 2005 letter, plaintiffs had "reasonably concluded" that MoMA had refused plaintiffs' demand for the works, thus triggering the running of the statute of limitations. *See Borumand v. Assar*, 01-CV-6258P, 2005 U.S. Dist. LEXIS 5496, at *43 (W.D.N.Y. Mar. 31, 2005) (conversion claim time-barred; accrual occurs at the time the plaintiff should have "reasonably concluded" defendant's conduct in failing to turn over a chattel amounts to a refusal).

To be sure, plaintiffs continued to press for return of the works notwithstanding their understanding that MoMA refused their demand by July 20, 2005. After meeting with MoMA on January 5, 2006, Jentsch dispatched another two

letters that same day. In one letter, Jentsch recaps the meeting, in which admittedly MoMA issued yet another clear refusal (IA190, “*You rejected the demand and advised that the works would not be returned by this date [February 3, 2006] or any date,*” emphasis supplied). In the second letter, Jentsch made another “request [for] the unconditional return” of the Grosz works (IA442). Jentsch describes this second set of demands as the Grosz heirs’ “*repeated claim of unconditional return*” (IA191, emphasis supplied), which led to a *second written refusal* by MoMA on January 18, 2006 (IA323). Thus, even ignoring MoMA’s refusal of plaintiffs’ demand on July 20, 2005, it certainly had repeated that refusal by January 5, 2006, or at the latest by January 18, 2006.³ See SPA 30. Even if MoMA’s refusal were not to have occurred until the later dates, plaintiffs’ claims are still time-barred.

Even assuming *arguendo* that none of these letters was integral to the Complaint (which they were, see Point I.C, *supra*), the date of MoMA’s refusal was well prior to April 20, 2006, as a matter of law. In an unmistakable rejection of the Grosz heirs’ initial 2003 demand, MoMA had never “returned” or transferred possession of the works to the Grosz heirs. Thus, even putting aside the

³ In addition, the district court considered (and rejected) February 3, 2006 as an alternative date for accrual of the claims. (SPA26 n.7: “If we were to ignore everything that went before, and accept February 3, 2006, as the date of the Museum’s refusal (of plaintiffs’ demand that the Paintings be returned by that date), this lawsuit was still filed more than two months too late. However, that is not the conclusion the Court has reached.”)

clear words of refusal MoMA made in its correspondence to the Grosz heirs, MoMA had made its position clear by retaining possession of the works for years in the face of plaintiffs' demand. MoMA's "interference" with the Grosz heirs' putative right to the works was clear certainly after a year or two of failing to "return" the works after the 2003 demand. Even without resorting to the pre-litigation correspondence, the mere lapse of time from plaintiffs' initial demand and the fact that MoMA continued to possess the works past each of the deadlines the Grosz heirs' set for their "return" are sufficient, without more, to constitute a refusal well prior to April 10, 2006. Indeed, the district court found that MoMA's failure to return the works for more than a year and a half after the Grosz heirs demanded them constituted a refusal as a matter of law:

If MoMA's failure to return the Paintings for more than a year and a half after the Grosz heirs demanded them did not constitute a refusal as a matter of law (*and this Court thinks that it did*), then the July 20, 2005 letter – in which the defendant clearly communicated its intent to keep all three works despite plaintiffs' demand – was an act utterly inconsistent with plaintiffs' claim of right. It thus constituted the sort of refusal contemplated by the demand and refusal rule.

SPA21 (emphasis added).

Because the Grosz heirs filed this lawsuit more than three years after MoMA refused their demand to "return" *Poet*, *Self-Portrait* and *Automatons*, the Grosz heirs' claims are time-barred. CPLR 214(3).

E. The Grosz Heirs’ “Kitchen-Sink” of Arguments as to Why the District Court Was Wrong All Fail and Have Been Waived

The Grosz heirs pursue five meritless arguments in their attempt to obscure the clear analysis necessary to calculate the statute of limitations for this matter, and this Court should reject all of them. We address each of these arguments below, but only after first explaining why the Court need not even consider them – they all have been waived.

1. Various Arguments Pressed by the Grosz Heirs on Appeal Were Not Briefed on the Motion to Dismiss and Thus Have Been Waived

The Grosz heirs raise several new theories on this appeal that were not raised in the initial briefing on the motion to dismiss. Whether they were raised for the first time in the motion for reconsideration or on appeal, they are still waived. *Diaz v. Paterson*, 547 F.3d 88, 94-95 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2789 (2009) (refusing to consider issue raised for the first time on appeal); *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 159 (2d Cir. 2003) (party waived argument raised for first time on motion for reconsideration); *Nat’l Union Fire Ins. Co. v. Stroh Cos.*, 265 F.3d 97, 115 (2d Cir. 2001) (party may not advance new facts, issues, or arguments not previously presented to the court on motion for reconsideration).

Notably, after the motion to dismiss was granted, the Grosz heirs submitted to the district court a proposed Second Amended Complaint, which they often refer

to throughout their brief as “the Complaint.” *See* Br. 23, 26, 30, 34, 38-39 (asserting certain allegations of the “Complaint” that appear only in the proposed Second Amended Complaint). The Grosz heirs’ failure to move for leave to amend their Complaint before disposition of the fully briefed motion to dismiss, and belated request to do so only *after* the district court granted MoMA’s motion to dismiss, was deliberate and improper. That proposed, amended pleading was not based on any “newly discovered evidence” but on evidence plaintiffs had for months and had known existed for years but failed to diligently pursue. Thus, it was proper for the district court to refuse their belated desire to amend. *See In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 120 (2d Cir. 2010) (denying motion to amend; a court may “exercise its discretion more exactingly” when a plaintiff waits until after judgment to seek to amend); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 273 F. Supp. 2d 351, 391-92 (S.D.N.Y. 2003) (leave to amend “procedurally improper”; plaintiffs did not seek leave to amend until after dismissal of claims on statute of limitations grounds, despite passing reference to amendment in its opposition papers), *aff’d sub nom. Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005), *cert. denied*, 546 U.S. 935. But more importantly, none of the new material submitted in the so-called Second Amended Complaint would alter the district court’s analysis, as the district court properly

ruled in the motion for reconsideration (SPA47-51), and as we discuss further below.

2. The Grosz Heirs Did Not Object to the Correspondence as Extrinsic to the Complaint

The Grosz heirs waived any right to object to the pre-suit correspondence as outside the pleadings, first by not objecting in a timely fashion, and second by affirmatively relying on the correspondence.

The Grosz heirs never objected to MoMA's demonstration in its motion below that the correspondence was integral to the Complaint. They did not argue that the district court could not consider the correspondence, or that it should convert the motion to dismiss to a summary judgment motion under Rule 12(d), or that the correspondence MoMA submitted was extrinsic to the Complaint, or that the correspondence could not be considered by the district court under the Federal Rules of Civil Procedure or Federal Rules of Evidence. *See* Docket No. 23. Instead, the Grosz heirs simply argued that MoMA was providing an incomplete record of the parties' correspondence and the Grosz heirs *provided additional correspondence* for the district court's consideration, *see* Docket No. 24.

In doing so, the Grosz heirs waived the objection they make now that the district court was required to convert MoMA's motion to dismiss into a motion for summary judgment. *See Dellefave v. Access Temps.*, 2001 WL 286771, at *3 (S.D.N.Y. Mar. 22, 2001), *aff'd*, 37 Fed. Appx. 23, 27 (2d Cir. 2002) (rejecting

party's argument, first raised post-decision, that the court should have converted a motion to dismiss to a motion for summary judgment).

Even if the Grosz heirs had not waived objections to the letters by their failure to object at the motion to dismiss stage, they unquestionably waived their objection by appending these letters as exhibits to their proposed Second Amended Complaint. The Grosz heirs attach to that proposed pleading *not only* the July 20, 2005 letter *but also* the January 18, 2006 letter. *See* Docket No. 65, proposed Second Amended Complaint, Exs. 42-43. In appending these documents to the Second Amended Complaint, the Grosz heirs admit to their reliance on them in pleading their claims, thereby dooming the argument that these letters were not integral to their Complaint.

3. The Letters Are Not Inadmissible Settlement Communications and the District Court Properly Relied Upon Them in Establishing the Legal Effect of the Communications

The Grosz heirs' evidentiary objection based on Federal Rule of Evidence 408 is meritless. First and foremost, there is no basis for the Grosz heirs' claim that the challenged letters constitute settlement communications. *See* IA187-193, IA323-4, IA442, IA450-452.

Moreover, even assuming they did, Rule 408 allows the courts to consider statements made in settlement negotiations if offered for a purpose other than establishing "liability for, invalidity of, or amount of a claim." FED. R. EVID.

408(a)(2).⁴ Courts have broad discretion in making this determination. *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 293 (2d Cir. 1999). Here, the purpose of submitting the correspondence was not to seize on any admission as to the merits but only to establish when MoMA itself denied plaintiffs' demand. Therefore, even under the Grosz heirs' misguided theory, MoMA was entitled to submit the letters under Rule 408(b) to establish when the cause of action accrued. *See Kraft v. St. John Lutheran Church*, 414 F.3d 943, 946-47 (8th Cir. 2005) (court properly considered settlement negotiations in order to determine when the cause of action accrued); *United States v. J.R. LaPointe & Sons*, 950 F. Supp. 21, 22-23 (D. Me. 1996) (admitting settlement offer as evidence that action was timely, where offer acknowledged debt and thus triggered accrual of 6-year statute of limitations). Thus, it was proper for the district court to rely on the correspondence. *See, e.g., PRL USA Holdings, Inc. v. United States Polo Ass'n*, 520 F.3d 109, 113 (2d Cir. 2008) (district court properly admitted evidence of settlement negotiations under FRE 408 to establish estoppel).

Plaintiffs also waived this argument by appending these so-called "settlement communications" to their proposed Second Amended Complaint. *See*

⁴ *Amici* misread Rule 408 and argue (Br. at 7) that settlement communications can "be used only to *negate* a contention of undue delay." That is not the language of the rule, which explicitly states that negating a contention of undue delay is but one example of a permissible purpose for considering such communications. FED. R. EVID. 408(b).

Docket No. 65, proposed Second Amended Complaint, Exs. 42-43. Plaintiffs cannot capitalize on these contradictory positions.

4. Lowry Had Authority to Refuse Plaintiffs' Demand, as the Grosz Heirs' Representative Clearly Understood

The Grosz heirs also have waived the argument that MoMA Director, Glenn Lowry, did not have actual authority to refuse their demand. Br. 29-30, 39. Lowry did have such authority (*see* IIA560), but in any event, the issue is what a reasonable person would have believed. Moreover, the Grosz heirs never made the argument that he lacked such authority in their opposition to the motion to dismiss. Instead, in opposition to that motion, they argued that Lowry's January 18, 2006 letter, which stated that "any decision on a matter like this must be considered by the Museum's Trustees," was evidence that "MoMA *had not arrived at a decision* to refuse the Heirs' claims" (*see* Docket No. 23 at 11) (emphasis added) – an argument the district court considered and rejected. *See* SPA27-30.

Even were it true (it is not), as the Grosz heirs argue, that "Lowry had no authority to refuse the Grosz Heirs' claims" (Br. at 29), that would be irrelevant, since Jentsch's own letters confirm that Jentsch himself had concluded (as any reasonable person would have) that MoMA had refused the demand well prior to April 2006. He memorialized this understanding in letters to MoMA that the district court relied upon in its January 6 Decision. (*See* SPA26 (citing the January 5, 2006 letter, where "Jentsch wrote . . . 'I presented to you [Lowry] a letter

authorized by the George Grosz heirs demanding return of the two works by February 3, 2006. *You rejected the demand and advised that the works would not be returned by this date or any date*” and the January 20, 2006 letter, where “Jentsch not only reiterated his understanding that MoMA was not going to return the Paintings, but acknowledged that MoMA had ‘outright declined restitution’ of the works in Lowry’s ‘letter to me, July 20, 2005’ . . . and went on to question ‘. . . on what basis MoMA would *deny restitution*’”). The reasonable conclusion, which Jentsch himself reached, that MoMA had refused plaintiffs’ demand by July 20, 2005, triggers accrual of their claims. *Borumand*, 2005 U.S. Dist. LEXIS 5496, at *43 (accrual occurs when plaintiff should have “reasonably concluded” refusal).

Plaintiffs attempt to bolster their argument that Lowry lacked authority by appending to the Proposed Second Amended Complaint snippets of deposition testimony from the Grosz heirs’ representative, Ralph Jentsch. IIA531-538. Were that pleading to be tested on a motion to dismiss, the court would also consider the remainder of that deposition, in which Jentsch testified (before being woodshedded by his counsel) that he understood the demand had been refused on July 20, 2005 (IIA546-548 (Jentsch Tr.: 132:18-133:2)) and that upon receiving MoMA’s July 20, 2005 letter, his understanding was that “MoMA never had the intention to return [the works] or accept [the Grosz heirs’] claim” (IIA550-552 (Jentsch Tr.:

143:11-24)). Based on these outright concessions, a court would properly disregard the subsequent self-serving testimony that the Grosz heirs now proffer.

Rosner v. Codata Corp., 917 F. Supp. 1009, 1019 (S.D.N.Y. 1996) (disregarding plaintiff's statement about his knowledge of facts that would start running of statute of limitations when it contradicted earlier testimony).

5. The Grosz Heirs Did Not Consent to MoMA's Possession; There Is No Support in Law or Logic for Plaintiffs' Theory That Subsequent Events May Cause a Claim to "Unaccrue"

The Grosz heirs raise for the first time on appeal the argument that MoMA could not have converted the works prior to April 12, 2006 because the Grosz heirs had "consented" to MoMA's possession thereby causing plaintiffs' conversion related claim to "unaccrue." Br. 30-31, 34-35. This argument is belied by the correspondence of the parties, contrary to the allegations of the Complaint, and wholly devoid of legal support.

Plaintiffs cannot simply undo their November 24, 2003 demand for the works and now take the position that there was some subsequent agreed "bailment" of the works. The correspondence between the parties is entirely inconsistent with the fantasy that the plaintiffs entrusted the works to MoMA's continued possession. *See* IA187-193, IA323-324, IA442, IA450-452.

Nor is there any support in any of the authority plaintiffs cite (nor are we aware of any) that some event occurring subsequent to accrual can "set[] the statute

of limitations clock to zero.” Br. 31. There is simply no support in law – or logic – that a claim can “unaccrue” after it arises.

6. Further Investigation into Title Does Not Prevent Conversion-Related Claims from Accruing

Plaintiffs’ legal argument that conversion does not accrue during a period of reasonable investigation into title is facially deficient. Br. 33-34. The authority the Grosz heirs offer in support, *Ball v. Liney*, 48 N.Y. 6 (1871), is over 130 years old and wholly distinguishable. In *Ball*, the court refused to find that a conversion had occurred in order to protect a bailee from liability “for a brief period” (in that case a matter of months) where it needed to determine the rightful owner of the property in its possession before turning it over to the rightful owner. *Id.* at 12-13. The case has nothing to do with when the statute of limitations accrues on a conversion claim. *See, e.g., Menzel v. List*, 49 Misc. 2d 300 (N.Y. Sup. Ct. 1966); *Lubell*, 77 N.Y.2d 311.

This argument also has been waived. The Grosz heirs never made this argument in their opposition to the motion to dismiss; they first raised it in their motion for reconsideration. *See* Docket No. 65 at 11-12. Having failed to raise this argument in the original briefing on the motion to dismiss, it is now waived. *See* cases cited *supra* at Point I.E.1.

F. There Is No Basis to Equitably Toll the Running of the Statute of Limitations, Which Has Now Barred the Grosz Heirs' Claims

The Grosz heirs also claim that the district court acted improperly in not considering their equitable tolling argument. Br. 40. Unlike the litany of new theories discussed *supra*, this argument was at least raised below (*see* Docket No. 23 at 12), and thoroughly considered by the district court before being rejected. *See* SPA27-30. For the reasons addressed by the district court, the Grosz heirs' equitable tolling argument is meritless.

Equitable tolling applies only in a "rare and exceptional circumstance." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (affirming district court's rejection of an equitable tolling claim). This Court recognized in *Smith* that equitable tolling requires not only reasonable diligence, but also a specific showing that "extraordinary circumstances prevented" compliance with the statute of limitations. *Id.* at 18. The Grosz heirs wholly ignore these requirements. So-called "enticements" (Br. at 42) are hardly "extraordinary circumstances." And nothing MoMA did "prevented" the Grosz heirs from timely filing their Complaint after their 2002 "discovery" that the works were allegedly "stolen" (IA44, ¶ 116). Plaintiffs try to concoct "misrepresentations" (Br. at 41) from the January 18, 2006 letter, claiming that Lowry confirmed no refusal had occurred, but the letter makes no such representation. Rather, it states clearly that plaintiffs' "assertion of title" was "unsubstantiated" (IA323).

Even if MoMA's January 18, 2006 letter confused plaintiffs (and of course it did not, as their response two days later confirms, *see* IA191), the Grosz heirs admit that their claimed confusion disappeared by April 12, 2006 (the date of refusal alleged in the Complaint (IA30, ¶ 31)). At best, that would toll the statute for a little less than three months – from January 18, 2006 to April 12, 2006. Under this scenario, the statute of limitations would have expired at the latest by October 13, 2008 (three years plus the period of time the statute was tolled after the claims accrued on July 20, 2005). *See* SPA29. But the Grosz heirs waited another six months to file their initial complaint. Their claims are therefore barred.

II. NEW YORK LAW BARRED ANY CLAIM TO *POET* EVEN BEFORE THE GROSZ HEIRS DEMANDED *POET*'S "RETURN"

In addition to the argument, accepted by the district court, that plaintiffs' claims accrued by July 2005 under New York's demand-and-refusal rule and were therefore barred by New York's statute of limitations, MoMA presented two additional grounds for dismissal under New York law, each of which presents an independent and alternative ground for affirmance with respect to *Poet*.⁵

The demand-and-refusal rule was far more generous than the plaintiffs deserved. New York law barred the Grosz heirs' claims to *Poet* long ago for two reasons: (i) first, because the Grosz heirs alleged that MoMA obtained *Poet* in bad

⁵ We present under Point III below additional grounds for affirming the district court's decision with respect to all three works under German law.

faith, their claim for *Poet* expired in 1955; and (ii) second, because Grosz knew not later than 1953 that *Poet* was at MoMA and yet he, and then his heirs, delayed unreasonably for more than fifty years before demanding its “return.” The district court addressed only the second of these arguments, erroneously concluding that “the issue of unreasonable delay is relevant only to the defense of laches” and not to the issue of the accrual of the cause of action. SPA16-18.

A. Based on MoMA’s Alleged Bad Faith, the Grosz Heirs’ Claims to *Poet* Were Barred in 1955

Under New York law, if the defendant acquired property in bad faith, accrual of conversion-related claims occurs at the time of conversion. *Close-Barzin*, 51 A.D.3d at 444 (“Plaintiff’s conversion claim is time-barred, since she alleges bad faith and the action was commenced more than three years after the alleged taking of the property occurred. Given plaintiff’s allegation . . . a demand and refusal was not a prerequisite to commencement of an action for conversion”); *Lubell*, 77 N.Y.2d at 317-318 (demand-and-refusal rule applies to good-faith purchasers only); *Richard Avedon*, 2007 NY Slip Op 33588(u), at *5 (alleged owner’s claims accrued against possessor who was not a good faith purchaser at the time of conversion). *See also Songbyrd*, 206 F.3d at 183 (“New York has not required a demand and refusal for the accrual of a conversion claim against a possessor who openly deals with the property as its own”); *Sporn*, 58 N.Y.2d at 488-489 (accrual at the time bad-faith dominion exercised over the chattel).

The Complaint (IA21 *et seq.*) repeatedly alleges that MoMA took possession of *Poet* in bad faith. See ¶ 129 (“[A]t the time MoMA acquired [*Poet*] in 1952, MoMA had actual notice of its suspect provenance”); ¶ 166 (“At all relevant times, MoMA knew or should have known that Valentin and Weidler were thieves trafficking in stolen artworks.”); ¶ 20 (“Grosz never voluntarily parted with title to the Paintings. MoMA knew or should have known this, but chose to either actively conceal the evidence or look the other way and deal under suspicious circumstances with disreputable dealers who provided doctored or missing provenances”); ¶ 71 (“Clearly, Barr was protecting MoMA’s source of Nazi-looted artwork.”); ¶ 88 (“Barr clearly knew Weidler was trying to sell a stolen Grosz to him.”).

On those allegations of MoMA’s bad faith, the Grosz heirs’ claims to *Poet* accrued in 1952 when MoMA came into possession of *Poet*, and were barred in 1955. *Close-Barzin*, 51 A.D.3d at 444.

B. The Grosz Heirs’ Unreasonable Delay in Demanding Return of *Poet* Bars Their Claims

The claim for *Poet* is also long barred by the corollary to New York’s demand-and-refusal rule, ignored by plaintiffs, under which a claimant cannot unreasonably delay demanding return of the chattel and thereby forestall the accrual of the action when he or she knows who is in possession of the allegedly improperly acquired object. *Lubell*, 77 N.Y.2d at 318 (noting the long-established rule), *aff’g* 153 A.D.2d 143, 147 (1st Dep’t 1990); *SongByrd*, 206 F.3d at 183

(delay in withholding demand for seventeen years “was clearly unreasonable” where the plaintiff has actual knowledge of the facts necessary to make a demand”); *Herrington v. Verrilli*, 151 F. Supp. 2d 449, 461 (S.D.N.Y. 2001) (holding 5-year delay in demand unreasonable and dismissing claim); *Heide v. Glidden Buick Corp.*, 188 Misc. 198 (1st Dep’t 1947) (cited approvingly in *Lubell*, holding 15-year delay in demand unreasonable and dismissing claim). Those decisions apply the “unreasonable delay” concept as part of the analysis of when legal claims accrue.

The Complaint alleges that Grosz knew exactly where *Poet* was located, and yet nonetheless he (and then his heirs) delayed *for over fifty years* before demanding its return from MoMA. See IA42, IA44, ¶¶ 105, 117. Whatever might have been the conclusion had the delay been far shorter, delaying for more than fifty-five years after Grosz himself saw *Poet* at MoMA is unreasonable as a matter of law.

Although the Court of Appeals in *Lubell* refused to trigger accrual where a plaintiff acted without reasonable diligence in searching for a work whose whereabouts were unknown, it reaffirmed that *New York law “already recognizes that the true owner, having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property.”* *Lubell*, 77 N.Y.2d at 319 (citing *Heide, supra*) (emphasis added). The

limitations period takes into account the full period during which the plaintiff has actual knowledge, and does not look exclusively to the later date of demand-and-refusal, as a matter of fairness and compliance with the policies underlying statutes of limitations in the first place, and to prevent claimants from adopting a wait-and-see hedge to determine whether the value of the chattel exceeds the costs and time being spent by the institution with possession. *Lubell, supra; see also Songbyrd, supra; Greek Orthodox Patriarchate v. Christie's, Inc.*, 98 Civ. 7664, 1999 U.S. Dist. LEXIS 13257, at *17 (S.D.N.Y. Aug. 18, 1999) (addressing the “undisputed duty to make a demand for return within a reasonable time after the current possessor is identified”).

The district court’s view that unreasonable delay applies only to laches and not to statutes of limitation, relying on *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 46 (S.D.N.Y. 1990), was error, squarely contrary to the later discussion in *Lubell* and other New York cases. *See Martin v. Briggs*, 235 A.D.2d 192, 199 (1st Dep’t 1997) (examining unreasonable delay as part of an accrual analysis, not only as part of laches analysis).

III. GERMAN LAW ALSO BARS THE GROSZ HEIRS’ CLAIMS TO THE WORKS

If the Court agrees with Judge McMahon’s holding that plaintiffs’ claims are time-barred under New York law, there is no need to address the reasons why German law also bars the Grosz heirs’ claims. However, if for any reason the

Court does not affirm the district court's judgment finding the claims barred under New York law, then it should affirm on the basis that the claims are barred under German law. The Grosz heirs themselves invoked German substantive law in the Complaint (IA29, ¶ 24), and MoMA made these arguments below, although the district court did not reach them.

A. German Statutory Time Restrictions Are Applicable to Bar the Grosz Heirs' Claims

As explained further in Point III.B, German law recognizes statutory time restrictions which operated long ago to bar the Grosz heirs' claims, as a German court has already recently held in litigation brought by the Grosz heirs themselves. These time restrictions are applicable to the instant suit (a) by operation of New York's borrowing statute, CPLR 202; and/or (b) under a choice of law analysis. But this Court need not decide whether the German statutes in issue apply under CPLR 202 or a choice of law analysis; either way, plaintiffs' claims are untimely.⁶

⁶ See *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 528 (1999); *Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 53 (1999); *Warin v. Wildenstein & Co.*, Index No. 115143/99, 2001 N.Y. Misc. LEXIS 542, at *19-20 (N.Y. Sup. Ct. Sept. 4, 2001) (declining to address whether the French statutes at issue were statutes of limitation or repose and recognizing that "if the proceeding is time-barred under French law, it must be dismissed irrespective of whether it is otherwise permitted to go forward under New York law"). See also *Yonkers Contracting Co., Inc. v. Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375, 378 (1999). The German statutes at issue here are substantive time restrictions that operated to extinguish Grosz's rights after accrual (IA199-201, Ernst ¶¶ 16-19).

1. CPLR 202 Dictates That German Statutory Time Limitations Apply to the Claims

CPLR 202 provides in pertinent part that “[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.”⁷

Under that provision, an action accruing outside of New York to a non-New York resident is timely only if it is timely under *both* New York law *and* the law of state where the cause of action accrued. *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 416 (2010). This action is timely under neither law.

The “generally accepted construction” of the word “accrued” means “the time when, and the place where, the plaintiff first had the right to bring the cause of action.”⁸ *Global Fin.*, 93 N.Y.2d at 528. The New York Court of Appeals has “consistently employed the traditional definition of accrual – a cause of action

⁷ Although CPLR 202 was not enacted until 1962, the text of the rule has been substantially unchanged since its 1902 predecessor, section 13 of the Civil Practice Act. *Global Fin.*, 93 N.Y.2d at 528-529.

⁸ Although the plaintiffs in this suit are Grosz’s heirs, who are also non-residents of New York (IA30, ¶¶ 32-33), this Court must evaluate the claims based on the time and place where they first accrued to Grosz, not based on when and where they accrued to plaintiffs, who are “not entitled to stand in a better position than [their predecessor in interest].” *Portfolio Recovery*, 14 N.Y.3d at 416 (barring claims under the borrowing statute).

accrues at the time and in the place of the injury – in tort cases involving the interpretation of CPLR 202.” *Id.* at 529.

Based on the allegations of the Complaint, there can be no question that the claims at issue here first accrued in Germany to a German resident, Grosz. Grosz created the works in Germany in 1920 (*Automatons*), 1928 (*Poet*) and 1929 (*Self-Portrait*) (IA25-27, ¶¶ 11, 13, 15). In addition, Grosz allegedly consigned the works to his dealer, Flechtheim, in Germany, well before the Nazi regime was instituted (IA25-31, IA183, ¶¶ 11, 14, 16, 38-39, 41, Ex. 26). By 1931, however, Flechtheim cancelled the alleged consignment contract with Grosz, stopped making monthly support payments, and yet retained possession of the works (IA31, ¶ 41). It was at this time – when Flechtheim allegedly retained the works – that any claims Grosz may have had to the works first accrued (IA201, Ernst ¶ 19). Because, as further discussed below, Grosz did not timely pursue any claim to the works (even though under German law he had thirty years to do so, including fourteen years between the end of the war and his death in Germany in 1959), his claims (and those of his heirs) are now barred.

2. Choice of Law Analysis Dictates That German Substantive Law Applies to This Dispute

Under a choice of law analysis, the same German statutory time restrictions operate to bar Grosz’s claims because German law applies to this dispute (as plaintiffs concede, IA29, ¶ 24).

Because German law applies to this dispute, so do German substantive law principles, including accrual and statutes of repose (IA200, IA206, Ernst ¶¶ 17-18, 30), and the New York rule of accrual referred to in the Complaint (IA30, ¶ 31) – the “demand-and-refusal” rule – would not apply, for that rule is applicable only if New York and not German substantive law applies. *See Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982); *Tanges, supra*, 93 N.Y.2d at 53 (“Accrual is a substantive concept”). New York commands application of foreign statutes of repose where non-New York law substantive law applies to the claims. *Id.*

As recently stated by this Court in *Bakalar v. Vavra*, under New York’s choice-of-law jurisprudence in property dispute cases, the traditional situs rule has been replaced in favor of an interest analysis. Docket No. 08-5119-cv, 2010 U.S. App. LEXIS 18343, at *20 (2d Cir. Sept. 2, 2010). According to *Bakalar*, “[t]he interest analysis . . . begins with an examination of the contacts each jurisdiction has with the event giving rise to the cause of action.” *Id.* “In property disputes, if a conflict is identified, New York choice of law rules require the application of an ‘interests analysis,’ in which ‘the law of the jurisdiction having the greatest interest in the litigation [is] applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular

law in conflict.” *Id.* at *21, quoting *Kahara Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002).

However, because the main issue in dispute is the allegedly tortious conversion of Grosz’s property, the jurisdiction with the main interest in this dispute is the one where the tort allegedly occurred (here, Germany), and the Court should apply the law of that jurisdiction, absent extraordinary circumstances. *Hacohen v. Bolliger, Ltd.*, 108 A.D.2d 357, 360 (1st Dep’t 1985) (holding that for conduct-regulating torts such as conversion, “New York recognizes that ‘*lex loci delicti*’ remains the general rule in tort cases to be displaced only in extraordinary circumstances’.”) (citation omitted); *Warin, supra* at *19-20 (concluding under New York’s “interest analysis” that French law applies to plaintiffs’ conversion claims where the manuscripts in issue were stolen from plaintiffs in France, even though they had been in New York for a number of years). *See also Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 74 (1993) (recognizing that, under the interest analysis, where conduct-regulating torts are at issue, the analysis is “greatly simplified, for the traditional rule of *lex loci delicti* almost invariably obtains”); *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699 (1978); *Lund’s, Inc. v. Chemical Bank*, 870 F.2d 840, 845-846 (2d Cir. 1989). No extraordinary circumstances exist here.

That Germany's interest in this dispute is superior to that of any other jurisdiction is clear. Indeed, Germany's interest as the place where the tort allegedly occurred is but one of many critical interests it has in this dispute. According to the Complaint, Grosz was living in Germany when he created each of the works in the 1920s and allegedly consigned them to Flechtheim in Berlin (IA25-31, IA183, ¶¶ 11, 14, 16, 38-39, 41, Ex. 26). It is also undisputed that Grosz was a German domiciliary (IA29, ¶ 24). Moreover, the crux of this dispute is whether Grosz transferred title to Flechtheim, as is clear from plaintiffs' allegations. See IA32 *et seq.*, ¶ 44 ("Flechtheim never accounted to Grosz for the artworks sold"); p. 25 ("Galerie Flechtheim Never Owned the Paintings"); ¶ 131 ("[*Poet*]'s title could not possibly have been transferred to Galerie Flechtheim as an offset against debt"); ¶ 138 ("There is no evidence that Grosz ever pledged [*Poet*] as security for a debt"); ¶ 153 ("At Flechtheim's death, George Grosz retained all right, title and interest to *Self-Portrait with Model*."); ¶ 160 ("At Flechtheim's death, George Grosz retained all right, title and interest to *Republican Automatons*."). It is the nature of that business relationship, which was formed in Germany between two Germans and which was, according to plaintiffs, subject to a consignment agreement formed in Germany, that is the critical question in this litigation.

The interests of any other jurisdiction in this dispute are minimal. Plaintiffs here are domiciled in New Jersey and Pennsylvania (IA30, ¶¶ 32-33), which have

no other interest in this dispute. New York's interest in this dispute is also inferior, where the merits turn on what the pre-war arrangements were between Grosz and Flechtheim. Of all the parties and players involved, MoMA is the only domiciliary of New York and the fact that the works have been located at MoMA for the last sixty years does not necessarily militate in favor of applying New York law under these circumstances. *See Warin, supra*. (It would be improper to hold that the decision of Grosz and his heirs not to bring suit in the 1950s, instead waiting until 2009, gives New York a greater interest than it would have had if Grosz had sued MoMA during the period between when he knew MoMA had *Poet* in 1953 and his death in 1959.) On this motion, the main issue of contention is the accrual of Grosz's conversion claim, not the merits of his heirs' claim to title. Accordingly, New York's interest analysis requires application of German substantive law to the Grosz heirs' claims.

To be sure, in *Bakalar*, this Court departed from the general rule of *lex loci delicti* in applying the law of New York to that dispute. There, the Court recognized certain extraordinary circumstances in New York's interest in not becoming a marketplace for artwork looted by the Nazis. *Bakalar, supra* at *23. This concern does not arise here regarding whether Grosz transferred title to Flechtheim because the works in this dispute were not "looted." Indeed, as a German court already has recognized in litigation brought by the same plaintiffs here, Grosz's

voluntary transfer of his artwork to his dealer Flechtheim removes any specter from this case that the works in question were “looted” art. IA203-205, IA228-241, Ernst ¶¶ 23-26 & Ex. C (explaining and attaching a German court’s 2007 decision against the Grosz heirs in a case they brought in Germany to “recover” the work *Blind Beggar*, which had also allegedly been consigned to Flechtheim, and sold at the same auction in Holland as *Self-Portrait* and *Automatons*). For this reason, the concerns at issue in *Bakalar* are not present here, and German law clearly applies.

If this Court were to ignore that German law operated long ago to bar plaintiffs’ claims to the works and allow them to revive now because MoMA has possession of the works in New York, it would reward Grosz’s (and his heirs’) unreasonable delay in claiming title and grossly undermine the ownership rights of MoMA to the works in its collection. Indeed, it is only the decision of first Grosz, and then his heirs, not to bring suit for almost eighty years that has given rise to the extended time that MoMA has possessed the works in this jurisdiction. There is no compelling justification to apply New York law to this dispute.

B. The German Law of Prescription Barred Plaintiffs’ Claims to the Works by 1961

German law recognizes several statutes of repose – time restrictions that condition a party’s right to recover a chattel (IA199, Ernst ¶ 16). Based on the allegations of the Complaint, at least one such legal concept, Prescription (or

“Verjaehrung”), long ago extinguished Grosz’s and the heirs’ right to claim title to the works (IA201, Ernst ¶ 19). “Verjaehrung” (Prescription) extinguishes any claim for the transfer of physical property 30 years after the claim accrues (IA200, Ernst ¶ 17, citing BGB § 195 (old), BGB § 197(1) (new)). Under German law, the running of the period of Prescription fundamentally changes the right or claim itself, not the remedy associated with the exercise of the right or claim (IA200, Ernst ¶ 18). Prescription is therefore a substantive limitation under New York choice of law rules, *see Tanges and Yonkers, supra*, and is so regarded under German law, where it is included in the German Civil Code, not the German Code of Civil Procedure (IA200, Ernst ¶ 18). Prescription operates to preclude a claim regardless of the manner in which the property was acquired – *i.e.*, even if allegedly by theft, fraud, sham, looting, *etc.* (IA199, Ernst ¶ 17; *accord* IA228-241, Ernst Ex. C (*Blind Beggar* decision)).

Poet. In this case, the 30-year Prescription period for *Poet* commenced on the date of accrual – the date when Flechtheim allegedly terminated or breached the consignment agreement in 1931 (IA201, IA209, Ernst ¶¶ 19, 38). The 30 years expired in 1961, 48 years before suit was commenced (IA201, Ernst ¶ 19).

That more than one individual was in possession of *Poet* does not toll the 30-year Prescription period (*id.*). Prescription employs the principle of “tacking” so that the period continues to run uninterrupted from the date of accrual from one

possessor to another (IA201, Ernst ¶ 20). Once Prescription extinguished the claim, it would not revive upon transfer of the chattel to a new possessor (IA202, Ernst ¶ 21). Whether one of the transferees in the chain possessed the painting in bad faith is irrelevant to Prescription (IA200, Ernst ¶ 17).

Self-Portrait and Automaton. As with *Poet*, plaintiffs' argument that German law applies dooms their claims to *Self-Portrait* and *Automaton*; moreover, New York choice of law would in any event apply German accrual law and statutes of repose. The Grosz heirs' right to claim title to *Self-Portrait* and *Automaton* was long ago extinguished by the German accrual rules and the German legal principle of Prescription.

Plaintiffs allege that Flechtheim's possession of *Self-Portrait* and *Automaton* was wrongful (see IA26-46, ¶¶ 14, 16, 41, 43-44, 56-57, 127). Therefore, Grosz's right to restitution for *Self-Portrait* and *Automaton* first accrued when Flechtheim terminated or breached the consignment agreement in 1931 in Germany (IA31-32, ¶¶ 41, 43-44) (IA201, Ernst ¶ 19).

As with *Poet*, the German substantive legal principle of "Verjaehrung" or Prescription extinguishes any claim for the transfer of *Self-Portrait* and *Automaton* 30 years after the claims accrued, regardless of the manner in which they were acquired (BGB § 197(1); IA200-201, Ernst ¶¶ 17, 19). Grosz's putative claims to *Self-Portrait* and *Automaton* accrued in 1931 – when Flechtheim

terminated or breached the consignment agreement, and thereby allegedly wrongfully retained possession – and were barred by operation of German law in 1961 (IA201, Ernst ¶ 19).

IV. THE DISTRICT COURT DID NOT DENY THE GROSZ HEIRS ANY DISCOVERY, AND THE MAGISTRATE JUDGE’S DISCOVERY RULING WAS NOT REVIEWED BY THE DISTRICT COURT AND WOULD CONSTITUTE, AT MOST, HARMLESS ERROR

Plaintiffs’ claim that the district court committed “reversible error by denying discovery into MoMA’s defenses” (Br. 3) is not properly before this Court. The ruling complained of was made by the magistrate, and plaintiffs neither completed any appeal to the district court nor obtained the district court’s ruling prior to the January 6 dismissal of plaintiffs’ claims, which mooted the discovery motion. *See* SPA2, 31. As such, the attempt to appeal from the magistrate’s discovery orders is improper. *LoSacco v. City of Middletown*, 71 F.3d 88, 91-92 (2d Cir. 1995) (attempted appeal of magistrate order; appeal dismissed).

In any event, the argument is barred by the harmless error rule of FED. R. CIV. P. 61. Plaintiffs did not resist the motion to dismiss by relying on Rule 12(d) (or Rule 56(f)), and the district court did not rely on matters outside the pleadings, so the alleged denial of discovery is not pertinent to the grounds of dismissal. Since the district judge relied only on matters referenced in and integral to the Complaint, and the plaintiffs neither complained of the submission of the undisputed intervening correspondence, nor completed any appeal to the district judge

from the magistrate's ruling, nor sought time to submit more factual materials, the magistrate's discovery ruling is not subject to appeal, as its reversal would not affect the validity of the judgment on appeal. *See* FED. R. CIV. P. 61; *ITIS Holdings Inc. v. Southridge Capital Mgmt. LLC*, 329 Fed. Appx. 299, 300 (2d Cir. 2009) (“[W]e need not decide whether the District Court’s dismissal of Plaintiffs’ suits as a discovery sanction was warranted because any error in this regard was in any event harmless in view of Plaintiffs’ opportunity to present affirmative defenses raising substantially the same claims and the District Court’s proper grant of summary judgment . . . as against those defenses.”) (summary order).

Finally, assuming *arguendo* that this Court were to remand this case, nothing that occurred in the district court below merits the extraordinary relief of reassignment. *United States v. Cole*, 496 F.3d 188, 195 (2d Cir. 2007) (“Reassignment of a case on remand should occur only when the facts might reasonably cause an objective observer to question the judge’s impartiality.”). Here, Judge McMahon did nothing to prompt any question about her impartiality.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

September 30, 2010
New York, NY

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Charles S. Sims certifies that:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 13,396 words, excluding those portions of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font in Times New Roman type style.

Dated: September 30, 2010

/s/ Charles S. Sims

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