

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MARTIN GROSZ and LILIAN GROSZ,

Index No.: 09-CV-3706 (CM)(THK)

Plaintiffs,

ECF CASE

-against-

THE MUSEUM OF MODERN ART,

Defendant,

HERRMANN-NEISSE WITH COGNAC ,
SELF-PORTRAIT WITH MODEL
and REPUBLICAN AUTOMATONS,
Three Paintings by Grosz,

Defendants-in-rem.
-----X

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE AMENDED COMPLAINT**

Dated: New York, New York
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Plaintiffs, Martin Grosz and Lilian Grosz, the heirs of George Grosz (“the Heirs”), respectfully submit this memorandum of law in opposition to defendant Museum of Modern Art (“MoMA”)’s motion to dismiss the First Amended Complaint (“Complaint”).

This case involves three artworks by the deceased artist George Grosz (“Grosz”), *Max-Herrmann Neisse with Cognac*, *Self-Portrait with Model* and *Republican Automaton* (together “the Paintings”). The Paintings are currently in MoMA’s possession and located in the City of New York. Shorn of its factual backdrop, the Complaint, verified by Lilian Grosz, alleges that the Paintings were lost or stolen from Grosz or his art dealer when they fled Nazi Germany in 1933 and never returned to Grosz or his heirs. The Complaint makes four claims: (1) declaration of title; (2) conversion; (3) replevin; and (4) constructive trust.

Under New York law, a good-faith purchaser of a stolen object has no valid title, because “a purchaser cannot acquire good title from a thief. “Only the true owner’s own conduct, or the operation of law...can act to divest that true owner of title in his property...” *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 833 (E.D.N.Y. 1981) *aff’d*, 678 F.2d 1150 (2d Cir. 1982).

Grosz was directly persecuted by the Nazis for his anti-totalitarian artworks and courageous political stances. Nazi persecution included intimidating purchasers of his artworks and rendering them valueless and unsellable. He fled Nazi Germany and lost all of the artworks that he placed in the care of his Jewish art dealer, who in turn, was persecuted and died. MoMA purchased three Paintings that had been lost or stolen in Grosz’s flight from persecution.

MoMA argues that because actual Nazis did not steal the Paintings, the allegations of the Complaint are implausible. Whether the Dutch art dealer and German art critic who stole Paintings from Grosz were Nazis, Buddhists or Christian Scientists is irrelevant to title.

This action was commenced on April 10, 2009. MoMA now moves to dismiss, arguing: (1) German and Dutch accrual rules bar conversion claims; (2) New York's three-year statute of limitations has run because MoMA refused to return the Paintings prior to April 12, 2006, triggering New York's "demand and refusal rule"; and (3) accrual rules relating to bad faith acquisitions bar claims to *Hermann-Neisse with Cognac*.

A recent decision by Judge Rakoff involving a very similar fact scenario, *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009) puts to bed most of MoMA's arguments. Judge Rakoff rejected many of the arguments raised by MoMA's expert Wolfgang Ernst (the same expert in that case), and permitted claims to proceed under the same theories advanced by the Heirs. On a motion to dismiss, MoMA's expert declarations should be disregarded entirely. Below, we explain why Judge Rakoff's analysis in *Schoeps*, 594 F. Supp. 2d 461 was correct and why MoMA's arguments on this motion are wrong.

Standard Applicable To Motion To Dismiss

MoMA asserts that Rule 9(b) of the Federal Rules of Civil Procedure ("FRCP") requires a heightened pleading standard to this action. Fed. R. Civ. P. 9(b) applies only to actions based on fraud or mistake. The Heirs claim no fraud or mistake. Fed. R. Civ. P. 9(b) is inapplicable.

Fed. R. Civ. P. 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary; the statement need only “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). When ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atl. Corp.*, 550 U.S. 544 Even where recovery appears very remote, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), or difficult to prove, *Limited and Aberdeen Inv. Ltd.*, --- F.3d ---, 2009 WL 1587870 (2d Cir. June 9, 2009), dismissal is not an appropriate remedy.

On a motion to dismiss, the district court must limit itself to a consideration of the facts alleged on the face of the complaint, *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989); *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984), and only to documents attached as exhibits or incorporated by reference. *Chapman v. New York State Div. for Youth*, 546 F.3d 230, 234 (2d Cir. 2008)(citations omitted). “[A]dditional factual allegations contained in defendant's memorandum of law and affidavits will be disregarded.” *Raffaele v. Designers Break, Inc.*, 750 F. Supp. 611, 612 (S.D.N.Y. 1990).

Choice of Law Applicable To Motion To Dismiss

The Complaint at ¶ 24 sets forth the applicable choice of law analysis:

Since this court sits in diversity, under the *Erie* Doctrine, this court looks to New York law to determine title to the Paintings. N.Y. Est. Powers & Trusts Law § 3-5.1(b)(2) (McKinney) in turn, looks to the domicile of the decedent Grosz, here Germany, to determine title and descent of personal property.

Under the *Erie* Doctrine, New York's statute of limitations, burdens of proof, and procedural remedies apply.

A choice of law analysis is unnecessary absent an actual conflict between the laws of two relevant jurisdictions. *Schoeps*, 594 F. Supp. 2d 461 *citing Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005).

I. CONVERSION CLAIMS LIMITED BY CPLR 214 ACCRUE UNDER NEW YORK LAW ONLY UPON DEMAND BY THE TRUE OWNER AND THE POSSESSOR'S REFUSAL IN NEW YORK

The Heirs assert claims under New York law for conversion and replevin. (Complaint ¶¶ 24, 154-157, 158-163). Demand and refusal are substantive elements of a New York cause of action for conversion and replevin. The statute of limitations in New York Civil Practice Rules and Procedure ("CPLR") 214 accrues only upon refusal, not when the right to make a demand arises. *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982); *Stone v. Williams*, 970 F.2d 1043, 1050 (2d Cir. 1992). Replevin lies when the true owner of an object demands its return and is refused. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-18, 569 N.E.2d 426 (1991). To successfully plead a claim for replevin, the Heirs must allege facts showing a "superior right of possession".

The Heirs have pleaded (1) Grosz owned the Paintings when he fled Germany; (2) Grosz did not abandon the Paintings; and (3) the Paintings were never returned to Grosz or one of his legal heirs (Complaint ¶ 17, 38-39). Grosz's actions for conversion accrued only at the moment MoMA refused the Heirs' demand. Together with the allegations of

demand and refusal, the Heirs have pleaded a claim for replevin. *Menzel v. List*, 267 N.Y.2d 804, 819 (Sup. Ct. NY. Co. 1966), *modified Menzel v. List*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967) *rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742 (1969).

II. THE HEIRS HAVE NOT ALLEGED CLAIMS FOR CONVERSION UNDER GERMAN AND DUTCH LAW, THEREFORE GERMAN AND DUTCH ACCRUAL RULES DO NOT APPLY TO CLAIMS ALLEGED IN THE COMPLAINT

MoMA argues that the Heirs' claims should be dismissed because New York's borrowing statute, CPLR 202, imports German or Dutch principles of accrual and statutes of repose. This is incorrect. CPLR 202 applies only to "causes of action accruing without the state." MoMA's refusal occurred and accrued where the chattels are located, in the City of New York.

A. Under the Declaratory Judgment Act, the Heirs' Replevin Remedy Arises Under New York Law

As properly alleged in the Complaint, the Heirs are entitled to both a declaration of title and replevin under the Declaratory Judgment Act (Complaint ¶¶ 28, 150-153; 28 U.S.C.A. §§ 2201-2202 (West) (creation of remedy, further relief)). MoMA ignores the Declaratory Judgment Act. Fed. R. Civ. P. 64 provides:

(a) Remedies Under State Law-In General.

At the commencement of and throughout an action, **every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment.** But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies.

The **remedies available** under this rule **include the following-however designated** and regardless of whether state procedure requires an independent action: arrest; attachment; garnishment; **replevin**; sequestration; and other corresponding or equivalent remedies.

Fed. R. Civ. P. 64 (emphasis supplied). Under Rule 64, replevin for chattels in New York is governed by CPLR Article 71. *Southland Corp. v. Froelich*, 41 F. Supp. 2d 227, 248 (E.D.N.Y. 1999). Rule 64 makes replevin available under New York law in an action for declaration of title.

B. MoMA's Analysis of Unasserted German and Dutch Law Claims Is Irrelevant and Untrustworthy Because CPLR 209 Was Enacted in 1948 To Toll Nazi Persecutee Wartime Claims in Germany

MoMA's motion is based on a fancy accrual chart that lays out dates of purported accrual of foreign law and other claims. Although scientific in appearance, it is a complete work of fiction. For example, it contains accrual dates in the 1930's. CPLR 209, entitled "War" was enacted by New York's legislature in 1948 for the express purpose of tolling claims arising in a foreign country during the period of wartime and occupation. CPLR 209 tolled any Grosz claims accruing during the Allied Occupation of Germany. *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 173 F.2d 71, 74 (2d Cir. 1949) (claims based on indirect duress transactions based on Nazi persecution tolled as a result of New York legislative action); *see also Bernstein v. N V Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 117 F. Supp. 898, 899 (S.D.N.Y. 1953) (U.S. policy that Act of State Doctrine does not apply to Nazis). This period includes the time that U.S. Allies were at war.

Under New York law, "limitations are suspended when there is no tribunal competent to adjudge." *Lord Day & Lord v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549, 565 -566 (S.D.N.Y. 2001); *Oswego & S.R. Co. v. State*, 226 N.Y. 351, 362, 124 N.E. 8 (1919) (citing *Parmenter v. State*, 135 N.Y. 154, 163, 31 N.E. 1035 (1892)). *See also Jacobus v. Colgate*, 217 N.Y. 235, 111 N.E. 837 (1916) (same) (citations omitted).

Indeed, “it would [be] absurd to hold there was a statute of limitations within which a claim must be sued, when there [was no] court or tribunal before which the [defendant] could be summoned to answer the suit.” *Parmenter*, 135 N.Y. at 163 (citations omitted).

Under German Law, the statute of limitations is tolled under § 206 BGB in connection with § 939 BGB if the claimant is prevented from prosecuting his rights. Hasselblatt ¶ 68). Grosz was stripped of property rights and his bank accounts seized in 1933, his books and artworks were burned in public. He was rendered stateless by 1938. Under German law accrual could not have occurred during this entire period of intense persecution – he had no access to German courts (FAC ¶¶ 97, 98, 99, 102). Putting dates in an accrual chart during that period denies not only the realities of the Holocaust, but the well-pleaded allegations of the Complaint. Such factual disputes are not proper on a motion to dismiss.

George Grosz’s mental state, persecutee status and the Allied occupation of Berlin during his lifetime may warrant equitable tolling or statutory tolling as a matter of law under CPLR 209. *Boos v. Runyon*, 201 F.3d 178, 184 (2d Cir. 2000); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *see also Mandarino v. Mandarino*, 180 Fed.Appx.252 (2d Cir. 2006) (unpublished) (reversing dismissal on statute of limitations grounds for failing to permit plaintiff to show equitable tolling).

As set forth below, the Complaint has nothing to do with claims that accrued in Germany or Holland and thus MoMA’s accrual chart is completely irrelevant. The claims asserted accrued under a New York statute in New York on April 12, 2006.

C. In New York, Accrual and Expiration of Conversion Claims In Germany or Holland Against The Original Thief Is Irrelevant To Calculate Statutes of Limitations Against A Current Good Faith Purchaser

As the New York Court of Appeals stated:

Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful (*see, e.g., Gillet v. Roberts*, 57 N.Y. 28, 30-31 (1874); *Menzel v. List*, 49 Misc. 2d 300, 304-305, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966) *modified*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967) *rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742 (1969)). **Although seemingly anomalous, a different rule applies when the stolen object is in the possession of the thief. In that situation, the Statute of Limitations runs from the time of the theft** (*see, Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 487-488, 448 N.E.2d 1324 (1983)), even if the property owner was unaware of the theft at the time that it occurred (*see, Varga v. Credit-Suisse*, 5 A.D.2d 289, 292-293, 171 N.Y.S.2d 674 (N.Y. App. Div. 1958) *aff'd sub nom. Varga v. Credit Suisse*, 5 N.Y.2d 865, 155 N.E.2d 865 (1958)). *Solomon R. Guggenheim Found.*, 77 N.Y.2d, 318.

Since MoMA was a good faith purchaser of the Paintings and possessed them in New York at the time of the demand and refusal, (Complaint ¶¶ 142-145), expiration of conversion claims against the original thieves or middlemen of good or bad faith that have accrued and lapsed is irrelevant. In every case of stolen property, there is an original thief. If the expiration of a conversion claim cut off rights of a true owner, that would void New York's entire statutory scheme of demand and refusal against subsequent good faith purchasers.

Thus, the remainder of the "accrual" dates in MoMA's chart are both fictional and irrelevant.

D. MoMA's Reliance on Cases Involving Statutes of Repose is Misplaced

MoMA based its arguments on cases that discuss statutes of repose. These cases have nothing to do with statutes of limitations. *Contrast Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 710 N.E.2d 250 (1999).

III. THIS ACTION WAS TIMELY COMMENCED WITHIN THREE YEARS OF MoMA'S REFUSAL TO RETURN PAINTINGS BELONGING TO THE HEIRS

The Complaint at ¶ 31 alleges:

Under New York law, a cause of action against a possessor of stolen property first arises upon defendant's refusal to convey the chattel upon demand by the true owner. MoMA refused to return the Paintings on April 12, 2006. This action is timely because it was commenced within three years of MoMA's refusal to return the Paintings.

Allegations of ownership and date of refusal are the only relevant factors in applying

New York's statute of limitations. *Solomon R. Guggenheim Found.*, 77 N.Y.2d, 318.

MoMA's letter to the Heirs clearly shows that there was no refusal until April 12, 2006.

A. Determining Disputed Accrual Issues Is Not Appropriate on a Motion To Dismiss

MoMA cites no authority for resolving disputed accrual issues on a motion to dismiss. MoMA mistakenly relies on post-trial decision and one summary judgment case.

Miles v. New York State Teamsters Conference Pension & Ret. Fund Employee Pension Ben. Plan, 698 F.2d 593, 598 (2d Cir. 1983). *Miles* involved a post-trial claim for

attorneys fees in which the Second Circuit upheld a finding of fact that plaintiffs did not receive clear notice that defendant had repudiated the claims, thus a six-year statute of

limitations did not start running. In *Auscape Intern. v. Nat'l Geographic Soc.*, 409 F.

Supp. 2d 235 (S.D.N.Y. 2004), Judge Kaplan decided on cross-motions for summary

judgment questions relating to accrual of copyright infringement actions. *Id.* at 241-242.

B. MoMA Refused To Return The Paintings On April 12, 2006

The Complaint alleges that MoMA refused to return the Paintings on April 12, 2006 (Complaint ¶ 118). MoMA disputes this date. MoMA asserts that it refused to

return the Paintings prior to April 12, 2006 and that the Heirs simply “cherry-picked” a date (Motion at 17-18).

C. Lowry Wrote to Jentsch that There Was No Refusal Until MoMA’s Board Made A Final Determination

MoMA presents four letters purportedly demonstrating MoMA’s clear refusal of the Heirs’ claims. MoMA’s excerpts are misleading and do not show a refusal.

MoMA’s first letter dated July 20, 2005, states “we have now reached a point where it appears no more information [is] currently available for us to consider”. MoMA argues that “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, 720 N.Y.S.2d 35, 37 (N.Y. App. Div. 2001). But MoMA’s July 20, 2005 letter continues:

Our goal, like yours, is to do what is right and to do so in a manner that best serves the needs of George Grosz. To this end, I think the best course of action would be for use to meet together with Peter Grosz and his brother, if he is available, to determine the appropriate course of action.

(Solomon Decl. Ex. A) (emphasis supplied). The July 20, 2005 letter shows **no** intent to interfere with the Heirs’ possession and use of the Paintings. In *Feld*, 279 A.D.2d 393, relied on by MoMA, a son wrote to his parents in 1971 and 1974 demanding the return of property. His father wrote back refusing and stating claims to property in the son’s possession. The parents died in 1995. The *Feld* letter was an unequivocal refusal to surrender property, found to be clear enough to be determined on a motion to dismiss. *Feld*, 279 A.D.2d 393. Lowry’s July 20, 2005 letter evidences an intent to respect Grosz’s property rights and to investigate claims and is not a clear refusal. Applying the teachings of *Feld*, MoMA’s argument fails.

MoMA then cites letters of Ralph Jentsch dated January 5, 2006 and January 20, 2006 as proof that Jentsch had conceded MoMA's refusal (Motion at 18). MoMA excerpts misleading snippets. On January 5, 2006 Jentsch states:

“You stated I would be receiving a formal letter setting forth MoMA's position regarding the two works.”

(Solomon Decl. Ex. C). The plain language of Jentsch's January 5, 2006 letter to Lowry clearly demonstrates that Jentsch was unaware of MoMA's position and waiting for a decision from MoMA.

Most importantly, MoMA conceals from the Court the letter of Lowry to Jentsch dated January 18, 2006 stating:

“As I have told you many times, including at our meeting in early January, **any decision on a matter like this must be considered by the Museum's Trustees**”

Lowry then explains to Jentsch that Katzenbach would be reporting to MoMA's Board and Lowry did

“not intend to communicate with you until after the Museum's Trustees receive Mr. Katzenbach's report **and have made a decision.**”

(Dowd Decl. Ex. 1)(emphasis supplied). Lowry's January 18 letter clearly indicates that MoMA had not arrived at a decision to refuse the Heirs' claims.

D. MoMA Communicated a Final Refusal To Return The Paintings on April 12, 2006

As Lowry himself indicates, any correspondence prior to April 12, 2006 was simply part of compromise negotiations. As the Complaint accurately recites, MoMA's Board decision was communicated on April 12, 2006 (Complaint ¶ 118). Thus, the present action was filed on April 10, 2009, within New York's three-year statute of

limitations for replevin. As in *Miles*, this Court should find that there was no clear refusal until April 12, 2006. 698 F.2d, 598

E. Equitable Tolling Based on Lowry's Assurances That There Was No Refusal

If the Court does not agree that MoMA did not refuse the Heirs' claims until April 12, 2006, the Heirs argue in the alternative that equitable tolling is warranted during the period of compromise negotiations from 2003 through April 12, 2006. On January 18, 2006, Lowry wrote to the Heirs telling them to wait and assuring them that MoMA had not refused their claims until the Board considered the Katzenbach report and made their decision. Lowry's January 18, 2006 letter equitably tolls the statute of limitations because the Heirs reasonably relied on it. Equitable tolling is appropriate where a plaintiff has "acted with reasonable diligence throughout the period he seeks to toll." *Smith*, 208 F.3d, 17 (per curiam). *Lord Day & Lord*, 134 F. Supp. 2d, 567. From 2003 to 2006 the letter exchanges with MoMA show diligence by the Heirs. Thus equitable tolling is appropriate and warranted.

IV. CPLR 3018 REQUIRES MoMA TO PLEAD AND PROVE AFFIRMATIVE DEFENSES SUCH AS STATUTE OF LIMITATIONS, COLLATERAL ESTOPPEL, ADVERSE POSSESSION, AND PLAINTIFFS' CULPABLE CONDUCT

Affirmative defenses are not a plaintiff's burden to prove as part of the cause of action and are thus a defendant's burden to broach, to plead and to prove. Siegel, *New York Practice* § 223 Affirmative Defenses (West 1999). CPLR 3018 requires a party to plead "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading...." MoMA vehemently disputes the allegation of the Complaint. Its motion papers are devoted largely to arguing potential affirmative defenses under German, Dutch

and New York law and falsely accusing the Heirs of delay. Consideration of these affirmative defenses is inappropriate on a motion to dismiss.

A. MoMA Has Not Established The Affirmative Defense of a Clear Chain of Title

Even where a court in New York applies the substantive law of a foreign forum, it applies New York's burdens of proof. *See, e.g., Woodling v. Garrett Corp.*, 813 F.2d 543, 552 (2d Cir. 1987). Burdens of proof are regarded by New York law as procedural questions to which the law of the forum applies. *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1205 (2d Cir. 1995) *opinion modified on denial of reh'g*, 85 F.3d 49 (2d Cir. 1996). Thus, New York law governs burdens of proof.

New York gives greater protection to an object's true owner than to its good-faith purchaser, because doing otherwise would "encourage illicit trafficking in stolen art." *Solomon R. Guggenheim Found.*, 77 N.Y.2d at 320. When an original owner of a unique chattel reclaims the chattel, New York law shifts the burden of proof to the possessor of the unique chattel to prove it was acquired lawfully. *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 550 N.Y.S.2d 618, 624 (N.Y. App. Div. 1990) *aff'd*, 77 N.Y.2d 311, 569 N.E.2d 426 (1991). "We recognize this burden to be an onerous one, but it well serves to give effect to the principle that '[p]ersons deal with the property in chattels or exercise acts of ownership over them at their peril.'" *Id.*

B. MoMA's Attacks on Grosz's Purported Inaction Defeat MoMA's Title Because New York Does Not Presume A Gift From Inaction

Once Grosz's ownership of the Paintings is established, New York law shifts the burden of proving a voluntary transfer to the MoMA. If MoMA seeks to prove that Grosz intended to make a donation by this purported inaction, MoMA must prove

donative intent and actual delivery to alienate title from Grosz. *In re Kelly's Estate*, 285 N.Y. 139, 148-49, 33 N.E.2d 62 (1941). New York law never presumes a gift. *Matter of In re Bolin*, 136 N.Y. 177, 32 N.E. 626 (1892). Possession by MoMA does not rebut New York's presumption that title remains in a decedent's estate. *In re Kelly's Estate*, 285 N.Y. at 150. New York law presumes that Grosz did not transfer title to his art collection to MoMA or anyone else unless MoMA proves such a transfer of title by "clear and convincing" evidence. *Gruen v. Gruen*, 68 N.Y.2d 48, 53, 496 N.E.2d 869 (1986). Fed. R. Evid. 302 (applying state law evidentiary presumptions).

MoMA's howls about purported missing evidence only increases the likelihood that the Heirs will prevail on the merits. The Court can take judicial notice of the fact that MoMA has not been hit with any earthquakes or floods since its inception. The burden is now upon MoMA to prove a valid legal transaction that would give MoMA good title.

C. MoMA Has Not Established The Affirmative Defense of Laches

The Heirs have alleged diligent actions following Grosz's death and hired a researcher to track down records for almost 20 years. (Complaint ¶ 17).

MoMA expressly states that its motion to dismiss is not based on the doctrine of laches. Laches is not a defense to a legal action. *See Hilgendorff v. Hilgendorff*, 241 A.D.2d 481, 660 N.Y.S.2d 150 (N.Y. App. Div. 1997). Issues relating to purported delay or prejudice are thus irrelevant on this motion. MoMA peppers its submission with derogatory allusions to purported delay or prejudice. This is an attempt to "poison the well" with irrelevant slanders. MoMA's conclusory claim that "Critical documentary proof is also long since destroyed" (Motion at 6), is baseless posturing. MoMA has

excellent records but has simply refused to turn them over. Fed. R. Evid. 803(6) and (7) are designed specifically to handle missing business records. Fed. R. Evid. 803(6) & (7).

In *Schoeps v. MoMA*, Judge Rakoff found that disputed questions of delay could not be decided on summary judgment. MoMA relies on *Songbyrd, Inc. v. Estate of Grossman*, 2006 F.3d 172 (2d. Cir. 2000) to claim that the Heirs delayed unreasonably. But *Songbyrd* was not a motion to dismiss and involved an exercise of domain over a copyright. *Songbyrd* involved a master tape that a defendant exploited. A decedent knew of the exploitation and had made an unanswered demand for the return of the master tapes that was ignored in 1975. 2006 F.3d 172, 183. His executor made another demand for return of the master tapes in 1995. *Songbyrd* was reviewed by the Second Circuit after protracted litigation. Since the Heirs have pleaded diligent research efforts and missing information, the question is not to be resolved on a motion to dismiss.

D. MoMA Has Not Established That The Statute of Limitations Applicable To Bad Faith Acquisitions Bars The Heirs' Claims To *Herrmann-Neisse with Cognac*

MoMA argues: “the Grosz Heirs allege that MoMA obtained [*Herrmann-Neisse with Cognac*] in bad faith.” (Motion at 15). But the words “bad faith” do not appear in the Complaint nor should they be inferred. The relevant allegations are:

New York courts have found that title to property left behind and lost due to Nazi persecution cannot be conveyed as against the rightful owners. (Complaint ¶142).

Grosz involuntarily left *Herrmann-Neisse with Cognac* behind in Germany when he left in January 1933 as a result of Nazi persecution. (Complaint ¶ 143).

Under New York law, no one who purchases from a thief, or any subsequent purchasers from the thief, can acquire good title. This also applies to property that was lost due to Nazi persecution. (Complaint ¶ 144)

Accordingly, MoMA could not acquire good title from Weidler because she never had title, as the *Herrmann-Neisse with Cognac* was lost due to Nazi persecution.

Under German law, title to lost property cannot pass even if the recipient acts in good faith. (Complaint ¶ 145).

Thus, the Complaint does not allege a bad faith acquisition by MoMA. Judge Rakoff permitted conversion and replevin claims to proceed against MoMA under identical circumstances in *Schoeps*, 594 F. Supp. 2d 461 stating:

Summary judgment is inappropriate at the (*sic*) stage because genuine questions of fact exist as to, *inter alia*, whether [a deceased potential claimant] knew she had a potential claim during her lifetime and whether the Museums, as Claimants argue, **had reasons to know the Paintings were misappropriated and so are barred from invoking laches by the doctrine of unclean hands.** *Id.* at 468 (emphasis supplied).

MoMA concedes that under New York law, the date for accrual of conversion claims arises “at the time the owner’s demand is refused, if the defendant acquired the property in good faith”. (Motion at 15 *citing Close-Barzinex rel. de Bekessy v. Christie's, Inc.*, 51 A.D.3d 444, 857 N.Y.S.2d 545, 546 (N.Y. App. Div. 2008)). The Complaint alleges only that MoMA was on notice of facts warranting investigation because it knew the Paintings had been held on consignment by Flechtheim, a Jew persecuted by the Nazis (Complaint ¶ 129). If MoMA did indeed acquire the works in actual bad faith, this would have to be proven by MoMA as part of the affirmative defense. As in *Schoeps*, 594 F. Supp. 2d 461, the claims should proceed.

E. MoMA Has Failed to Establish Collateral Estoppel

MoMA urges this Court to follow a decision by a Stuttgart court involving a preliminary injunction application by the Grosz Heirs (Motion at 13, 22). The decision found that **the Dutch dealer van Lier could not have acquired title to Grosz artworks under German Civil Code § 932 BGB.** (Ernst, Ex. C). This is the Dutch dealer whom

the Heirs alleged conducted “sham” actions of *Republican Automatons* and *Self-Portrait with Model*.

The above-referenced statement is highly favorable to the Heirs’ case and is an accurate statement of German law. But since it is part of a preliminary injunction decision, it cannot be relied on in relation to past or present facts. (Hasselblatt ¶ 52)¹. Stuttgart court found that a German good faith purchaser who bought an artwork stolen by van Lier acquired good title through adverse possession. (Ernst, Ex. C. at 7).

This court should reject MoMA’s invitation to follow the Stuttgart decision. Preliminary injunction applications under German law are not final adjudications on the merits and do not provide binding precedent for other cases, nor are such cases deemed as *res judicata* or collateral estoppel which would prevent a party from seeking other relief. (Hasselblatt ¶ 50). At trial, or “main proceedings” (“Hauptsacheverfahren”), such decisions are not binding on a court that has a full record before it. Issues of duress were not raised or addressed in the Stuttgart proceeding. *Id.* ; compare *Schoeps*, 594 F. Supp. 2d, 466 (permitting duress claims to proceed).

It would be anomalous for this Court to grant “comity” and agree to be bound by a German court decision which has zero precedential weight or binding power. Comity may be appropriate for certain final judgments. *Diorinou v. Mezitis*, 237 F.3d 133, 139-140 (2d Cir. 2001)(discussing comity in context of final judgments).

¹ The Heirs have submitted two expert declarations by Dr. Jonathan Petropoulos (“Petropoulos”) and Dr. Gordian Hasselblatt (“Hasselblatt”) to refute MoMA’s improper submission. If the Court accepts MoMA’s filings, the Heirs’ respectfully incorporate the Petropoulos and Hasselblatt Declarations herein by reference and submit that they effectively rebut the findings of MoMA’s experts.

F. MoMA Has Failed To Establish the Affirmative Defenses of Adverse Possession, Forfeiture and Prescription

Common law countries like the United States do not recognize adverse possession of chattels. New York's case law has rejected all attempts to apply foreign statutes of repose to personal property sitting in New York for decades.

Kunstsammlungen Zu Weimar, 678 F.2d 1150. The applicable Restatement of Conflicts

Second provides:

§ 246. Acquisition By Adverse Possession Or Prescription Of Interest In Chattel

Whether there has been a transfer of an interest in a chattel by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the state where the chattel was at the time the transfer is claimed to have taken place.

Kunstsammlungen Zu Weimar, 536 F. Supp., 846 (applying Rest.Confl.2d § 246).

The argument that German or Dutch law of adverse possession or prescription applies to paintings sitting in MoMA's collection in New York City is frivolous. The Second Circuit plainly rejected a similar theory in *Elicofon*. The Complaint states no facts which could warrant application of doctrines of German adverse possession, forfeiture or prescription to the Paintings. (Hasselblatt ¶ 34, 74).

Foreign law does not apply to the accrual of a conversion claim in New York or to the availability of New York's statutory replevin remedy. As set forth below and as the declaration of Dr. Hasselblatt makes clear, the Complaint alleges facts which, if true, would give the Heirs title to the Paintings under German law. Additionally, Dr. Hasselblatt discredits entirely Dr. Wolfgang Ernst's German legal analysis.

V. THE CLAIM FOR DECLARATION OF TITLE IS NOT TIME-BARRED

MoMA claims the Complaint “admits” that each claim must be brought within three years of MoMA’s refusal. (Motion at 8 citing Complaint ¶ 31). The Complaint says no such thing. A declaratory judgment action is equitable in nature and the Complaint pleads a controversy stating a claim for an action for declaration of title under the Declaratory Judgment Act. (Complaint ¶¶ 150-153); 28 U.S.C.A. § 2201. The Declaratory Judgment Act states:

§ 2201. **Creation of remedy**

(a) In a case of actual controversy within its jurisdiction, [...] any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, **whether or not further relief is or could be sought**. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C.A. § 2201 (emphasis supplied). When determining whether a declaratory judgment is proper, the court must ask the following: (1) whether the judgment serves a useful purpose in explaining or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty. *Venugopal v. Sharadha Terry Products, Ltd.*, 07-CV-00484C, 2009 WL 1468462 (W.D.N.Y. May 22, 2009); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 389 (2d Cir. 2005) (citing *Broadview Chem. Corp. v. Loctite Corp.*, 417 F.2d 998, 1001 (2d Cir. 1969).

MoMA fails to argue that a statute of limitations is applicable to a declaration of title. *Kamat v. Kurtha, United States v. Beltran-Aguilar*, 08-20106-KHV, 2009 WL 103642 (D. Kan. Jan. 14, 2009) (Wood, J.) (defendant bears burden of showing plaintiff had no title to obtain dismissal of declaration of title action). Since the Complaint seeks

the imposition of a constructive trust not subject to CPLR 214's limitations period, a claim for declaration of title is timely.

VI. THE CLAIMS FOR CONSTRUCTIVE TRUST, EQUITABLE SERVITUDE AND UNJUST ENRICHMENT ARE NOT TIME-BARRED

MoMA argues that the Complaint "admits" that each claim must be brought within three years of MoMA's refusal. (Motion at 8 citing Complaint ¶ 31). The Complaint says no such thing. Paragraph 31 relates only to a legal action for conversion and replevin. Museums claim that they hold property "in trust" for the public. A bedrock principle of equity is that the public trust can never be augmented by stolen property.

A. The Complaint Alleges Circumstances Warranting Imposition of a Constructive Trust

A court of equity in imposing a constructive trust is not bound by any unyielding formula. Rather, the equity of the transaction shapes the measure of relief. *Simonds v. Simonds*, 45 N.Y.2d 233, 243, 380 N.E.2d 189 (1978); *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378 (1919)).

A constructive trust will be erected whenever necessary to satisfy the demands of justice. Since a constructive trust is merely 'the formula through which the conscience of equity finds expression' its applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them. Nothing short of true and complete justice satisfies equity, and, always assuming these allegations to be true, there seems no way of achieving total justice except by the procedure used here. *Latham v. Father Divine*, 299 N.Y. 22, 27, 85 N.E.2d 168, 170 (1949)(citation omitted).

The purpose of the constructive trust is to prevent unjust enrichment. *Sharp v. Kosmalski*, 40 N.Y.2d 119, 351 N.E.2d 721 (1976). Unjust enrichment does not require the performance of a wrongful act by the one enriched. What is required, generally, is

that a party hold property “under such circumstances that in equity and good conscience he ought not to retain it” *Miller v. Schloss*, 218 N.Y. 400, 407, 113 N.E. 337 (1916).

B. Equitable Servitude

One having a contract right which is specifically enforceable against the promisor because recognized in equity as unique may secure specific enforcement thereof against a transferee of the property, taking with notice of the contract relating thereto. *Kelly v. Cent. Hanover Bank & Trust Co.*, 11 F. Supp. 497, 510 (S.D.N.Y. 1935). Barr had knowledge as of 1935 that Flechtheim had lost all of his stock (Petropoulos ¶¶ 77, 87). MoMA documents relating to the acquisition of the Paintings that would permit a full expert analysis have not been turned over in discovery (Petropoulos ¶¶ 13-14, 98).

Depending on the facts adduced in discovery, this equitable doctrine may be applicable because MoMA’s Alfred Barr knew that Flechtheim was Grosz’s dealer (Complaint ¶ 40), (Petropoulos ¶ 89); knew Flechtheim had lost his inventory of Grosz’s works while fleeing the Nazis (Complaint ¶ 49), (Petropoulos ¶¶ 77, 87); and Barr was in a position to determine whether the Paintings were subject to contractual agreements before buying them (Petropoulos ¶¶ 90-91, 93).

VII. NEW YORK’S CHOICE OF LAW APPLIES GERMAN LAW TO QUESTIONS OF TITLE TO THE PAINTINGS

MoMA’s motion misstates applicable choice of law on title to Grosz’s property. Decedents’ estates is the only substantive area in New York law governed by a choice of law statute, codified in New York’s Estates Powers and Trusts Law (“EPTL”) Section 3.5-1. With respect to a decedent’s personal property, New York’s EPTL 3.5-1 (b) (2) provides that the law of a decedent’s domicile governs questions of title, descent and transfers of the decedent’s personal property.

New York thus applies German law to questions of title relating to Grosz's personal property before, during and after his death, including whether subsequent transfers could remove such property from his estate. *Se. Bank, N.A. v. Lawrence*, 66 N.Y.2d 910, 912, 489 N.E.2d 744 (1985), *accord United States v. Portrait of Wally, A Painting By Egon Schiele*, 99 CIV. 9940 (MBM), 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002) (applying Austrian law to "analytically prior issues of (a) whether any person or entity has a property interest in the item such that it can be stolen, and (b) whether the receiver of the item has a property interest in it"); *Kunstsammlungen Zu Weimar*, 536 F. Supp., 839-46. As Dr. Hasselblatt makes clear, German law entitles the Heirs to the Paintings.

VIII. MoMA'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE IT RELIES ON INAPPROPRIATE MATERIALS THAT SHOULD BE DISREGARDED

MoMA bombarded the Court with materials relating almost exclusively to the Defendant's potential affirmative defenses.

MoMA's Ernst declaration raises many of the same German legal arguments rejected by Judge Rakoff in *Schoeps*, 594 F. Supp. 2d 461. Ernst lacks candor in not informing the court of Judge Rakoff's rejection of his theory that restitution is unavailable in German courts, so U.S. courts should therefore deny claims.

While falsely accusing the Heirs of "cherry-picking," MoMA's counsel failed to bring *Schoeps* to the Court's attention. Shockingly, MoMA carefully excised the January 18, 2006 Lowry letter from its submission to the Court. The Court should not be subjected to such misleading and incomplete submissions on a motion to dismiss.

A. MoMA's Katzenbach Report is Inaccurate, Unreliable, Misleading, Inadmissible and Should Be Disregarded

To add insult to injury, MoMA has submitted an undated "report" from Nicholas Katzenbach (written prior to April 12, 2006) to MoMA's Board of Trustees which opines that the doctrine of laches and statute of limitations bar the Heirs claims to the artworks at issue in this lawsuit. This "report" is little more than an error-riddled stream of consciousness take on Katzenbach's feelings about restitution. MoMA's submission of this irrelevant and immaterial "report" is an attempt to improperly bias the court with MoMA's fancy political connections. Critically, as Dr. Petropoulos sets out, Katzenbach gets most basic facts wrong. (Petropoulos ¶¶ 100, 102, 104, 107, 115-116, 130-131, 133-134, 139-140, 146-147). For example, Katzenbach opines that MoMA purchased *Hermann-Neisse with Cognac* from Weidler, while the MoMA claims this work was purchased from Curt Valentin. (Petropoulos ¶ 107). MoMA's unsolicited submission of this drivel without any legal basis to do so is truly an affront to the Court.

IX. **MoMA'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE LOSS OR THEFT OF THE PAINTINGS FROM GEORGE GROSZ IS PLAUSIBLE AND THUS SATISFIES RULE 8**

Rule 8 requires pleadings that state plausible claims. The Heirs' claim the Paintings were lost or stolen from Grosz and his Jewish art dealer while they fled Nazi persecution. No subsequent transfers gave the MoMA good title to the lost or stolen works (Complaint ¶ 22, 142-145).

A. The Complaint's Allegations are Plausible, Grounded in Historical Documentation and Supported by an Expert Opinion

In an attempt to fabricate a lack of plausibility, MoMA argues that the Heirs attempt to cast this as a Nazi “looted art” case (Motion at 1). Judge Rakoff rejected similar arguments in *Schoeps v. MoMA*, permitting duress claims to proceed to trial:

While the record regarding the transfers of these Paintings is meagre, it is informed by the historical circumstances of Nazi economic pressures brought to bear on “Jewish” persons and property, or so a jury might reasonably infer, and, in this context, the Court concludes that Claimants have adduced competent evidence sufficient to create triable issues of fact as to whether they have satisfied the elements of a claim under BGB § 138 and/or BGB § 123 [duress under German Civil Code]. For example, Claimants have adduced competent evidence that [the decedent] never intended to transfer any of his paintings and that he was forced to transfer them only because of threats and economic pressures by the Nazi government. 594 F. Supp. 2d at 466.

As creator and as consignee, Grosz had title to the artworks. The Complaint alleges that in one instance his artworks were stolen by a Dutch dealer, (Complaint ¶¶ 56-59), and in another case by a German art critic, (Complaint ¶¶ 75, 86-87, 90), both without Grosz's knowledge. MoMA's purchase of stolen artworks from middlemen or thieves gave MoMA void title. The claims asserted in the Complaint being entirely plausible and confirmed by one of the world's most prominent historians on this topic, Rule 8 is satisfied.

CONCLUSION

In *Schoeps v. MoMA*, Judge Rakoff got it right. The Heirs claims are timely and New York law permits replevin and conversion claims and may block MoMA from asserting laches if it has unclean hands.

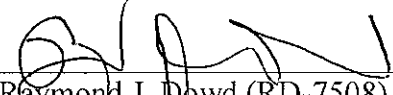
For the reasons set forth in this Memorandum of Law and the accompanying exhibits, this Court should deny MoMA's motion to dismiss in its entirety. In the alternative, the Heirs respectfully request leave to amend in conformance with the Declaration of Dr. Jonathan Petropoulos.

Dated: New York, New York
June 25, 2009

Respectfully submitted,

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