

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 AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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STATEMENT OF JURISDICTION¹

The United States District Court, Southern District of New York (the “District Court”) had subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1332(a)(2) because the matter in controversy is a claim to title and possession of three paintings valued in excess of \$75,000 and is between citizens of different states. *Portrait of the Poet Max-Hermann Neisse (with Cognac)* (“*Poet*”), *Self-Portrait with Model* (“*Model*”) and *Republican Automatons* (together, “the Paintings”), all by George Grosz, are located in New York county at the Museum of Modern Art (“MoMA”). Plaintiff Lilian Grosz is a citizen of New Jersey and Plaintiff Martin Grosz is a citizen of Pennsylvania (together, the “Grosz Heirs”). Defendant MoMA is a New York not-for-profit corporation.

This Court has jurisdiction over this appeal from a final order and judgment pursuant to 28 U.S.C. § 1291. The Grosz Heirs appeal from a Decision and Order by the Honorable Colleen McMahon dismissing this action pursuant to Fed. R. Civ. P. 12(b) dated January 6, 2010 (SPA-3) and the subsequent judgment dated January 11, 2010 (SPA-32). A notice of appeal was timely filed on January 21, 2010. (Vol.I, A-17). The Grosz Heirs further appeal from a decision of the Honorable Colleen McMahon dated March 3, 2010 denying motions for

¹ Documents in the Joint Appendix and cited as “Vol.____, A-____.” Documents in the Special Appendix are appended to this Brief and cited as “SPA-____”.

reconsideration and to supplement the record (SPA-33). An amended notice of appeal was timely filed on March 19, 2010 (Vol.II, A-598).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in dismissing as time-barred claims filed April 10, 2009, for replevin of stolen property, where the Complaint² alleges that MoMA had lawful possession of the Paintings during a joint investigation into title until MoMA refused to return the Paintings on April 12, 2006?
2. Where a pleading asserts that MoMA refused to return the Paintings by letter dated April 12, 2006, did the District Court err, on a Rule 12(b)(6) motion to dismiss, in looking outside the pleadings at inadmissible documents and in determining disputed issues of fact to find an earlier refusal?
3. Where MoMA represented to the Grosz Heirs that its Board of Trustees had sole authority to refuse to return the Paintings and that no refusal occurred prior to April 12, 2006, did the District Court err in overlooking such misrepresentations to find an earlier date of refusal rather than applying the doctrine of equitable estoppel?

² The “Complaint” refers to the First Amended Complaint filed by the Grosz Heirs on May 28, 2009 (Vol.I, A-21-186). “Proposed Second Amended Complaint” refers to the Proposed Second Amended Complaint submitted to the District Court on January 19, 2010 (Vol.II, A-441-487).

4. Where New York provides a six-year limitations period for unjust enrichment, did the District Court commit reversible error by applying a three-year limitations period to bar the claim?
5. Did the District Court commit reversible error by denying discovery into MoMA's defenses regarding the alleged 1933 Nazi spoliation of the inventory of Jewish art dealer Alfred Flechtheim and did the District Court make premature credibility determinations warranting reassignment on remand by finding on a Rule 12(b)(6) motion to dismiss that Flechtheim's financial problems were his own fault?

STATEMENT OF THE CASE

This is the first stolen art case in New York history dismissed pursuant to Rule 12(b)(6) based on a court finding that a limitations period for conversion was triggered by a museum's retention of artworks even though the parties had agreed that the museum would hold artworks during consensual, extensive, confidential, and what the Grosz Heirs believed to be good faith settlement negotiations. The District Court correctly assumed MoMA to be a good faith purchaser of the Paintings for the purposes of this motion. The District Court, however, then confused the accrual rule for simple conversion with the accrual rule for replevin of stolen property. If upheld on this appeal, this new "implied refusal" rule would undermine settlement efforts, reward races to the courthouse and encourage

gamesmanship by holders of stolen property hoping to achieve a windfall by stalling.

The District Court's conclusion that a conversion claim can never "unaccrue" and that the Grosz Heirs were required by New York law to sue while MoMA's investigator Nicholas Katzenbach was conducting his investigation lacks any legal basis. Mutual consent to MoMA's possession started the statute of limitations clock back to zero and each consent by the Grosz Heirs to reasonable requests for extensions of time to investigate kept it at zero.

The District Court's play-by-play analysis of inadmissible settlement communications, finding "conversion" each time a party issues an ultimatum is anathema to federal and state treatment of confidential settlement communications and common sense. By ignoring New York Court of Appeals decisions requiring a "refusal" to be unequivocal, the District Court has transformed settlement discussions into a game of chance. In fact, MoMA's own counsel admitted on June 26, 2008 that the "refusal" occurred on April 12, 2006 – the same day alleged in the Complaint – and accordingly this Court should not endorse a new rule that contradicts the parties' mutual understanding of when MoMA refused the Grosz Heirs' claims.

From the adoption of the Nazi Party's 1920 platform vowing to exclude Jews economically, culturally and physically from Germany, an unrelenting and

growing assault of Jews by private thugs grew into a national wave of terror. Upon Hitler seizing power in 1933, Nazi assaults and exclusion of Jews and the “modern art” Hitler associated with Jewish degeneracy became official policy. As the Weimar Republic's premier dealer in contemporary art with artists like Picasso, Braque and Klee in his stable, Jewish art dealer Alfred Flechtheim symbolized everything Nazis hated and was a Nazi target well before Hitler took over the Reichstag. From 1933-1937, Nazis and non-Jews calling themselves "Aryans" stole, through official government measure, relentless boycotts and private plunder, every scrap of Jewish property they could find.

In 1933 George Grosz fled Germany leaving his artworks in the care of his Jewish art dealer, Alfred Flechtheim. Flechtheim fled Germany shortly thereafter. A Nazi named Alexander Vömel took over Flechtheim's gallery in March 1933 and worked with an accountant named Alfred Schulte to liquidate Flechtheim's assets for Aryan creditors. The Paintings in controversy are original artworks created by George Grosz and were part of Flechtheim's inventory stolen by Vömel and Schulte.

In 2003, art historian Ralph Jentsch discovered documents showing that the Paintings were stolen. He wrote to MoMA on behalf of the Grosz Heirs demanding the Paintings' return.

In response to the letter, the Grosz Heirs and MoMA agreed that MoMA would hold the Paintings and that MoMA would work with Jentsch to investigate the Paintings' title. On April 11, 2006, MoMA's Board of Trustees voted to refuse to return the Paintings. On April 12, 2006, notice of MoMA's refusal was sent to the Grosz Heirs. On April 10, 2009, within three years of MoMA's refusal, the Grosz Heirs timely filed this action within New York's three-year statute of limitations for replevin of stolen property and within the six-year limitations period for unjust enrichment.

MoMA moved to dismiss the action pursuant to Rule 12(b)(6), claiming it was time-barred. In support of its motion, MoMA attached settlement communications between Jentsch and MoMA's Executive Director Glenn Lowry. The Grosz Heirs objected to consideration of material outside the Complaint and particularly settlement communications on a Rule 12(b)(6) motion.

Relying on these extraneous and inadmissible materials, the District Court found that one of the settlement letters, read in conjunction with the fact that MoMA still held the Paintings, could imply a "refusal" of the Grosz Heirs claims. Stating "actions, as we all know, sometimes speak louder than words", the District Court committed reversible error by finding that the MoMA's possession triggered the statute of limitations on July 20, 2005, and dismissing the Complaint as time-barred.

Unfortunately, the District Court's first decision overlooked the Grosz Heirs' objections to consideration of materials extraneous to the Complaint and to inadmissible settlement communications. Even though a motion to reconsider pointed out these timely objections, the District Court failed to acknowledge the objections and, in fact, asserted in a *second* opinion that the Grosz Heirs had never objected to consideration of the improper materials. This too is reversible error.

The District Court's decision does not follow Rule 12(b)(6)'s requirement of taking facts alleged in the Complaint to be true. Rather than assuming the truth of well-pleaded facts, it characterizes the Grosz Heirs' claims as "speculation" and attacks the allegations, supported in part by decades-old correspondence, as based on "rank hearsay." It overlooks the well-pleaded allegation that Lowry had no authority to refuse claims to the Paintings prior to April 12, 2006, and decides this disputed fact, among numerous others, against the Grosz Heirs.

Most troubling, instead of drawing all inferences in the light most favorable to the plaintiffs, the District Court belittles allegations of the Nazi looting of Flechtheim's gallery and of Charlotte Weidler and Curt Valentin trafficking in Nazi looted art. Notwithstanding the dismissive and at times sarcastic, treatment of this serious matter in the District Court's opinion, Valentin's role in trafficking Nazi loot is well recognized and noted in a famous 1946 U.S. War Department Art Looting Investigation Unit Report. Flechtheim's Aryanization is similarly known

to scholars in this field. Despite the District Court's skepticism, MoMA has admitted many of the underlying allegations in both formal admissions and depositions.

Nonetheless, the District Court erroneously determined that Flechtheim's financial troubles (i.e. the Aryanization of his galleries) were self-inflicted, rather than a result of Nazi boycotts, attacks and extortion. The District Court should have granted the Grosz Heirs leave to amend the Complaint and should have permitted discovery into Flechtheim, Weidler and Valentin documents, or, in the alternative, stricken MoMA's defenses. On a Rule 12(b)(6), the Grosz Heirs should have been entitled to all reasonable inferences flowing from the well-pleaded facts in the Complaint.

PROCEDURAL BACKGROUND

This action was commenced on April 10, 2009. (Vol.I, A-7). An amended Complaint was filed on May 28, 2009. (Vol.I, A-21). On July 1, 2009, MoMA's motion to dismiss was fully briefed and submitted (Vol.I, A-11-12).

From May 2009 through December 2009 document discovery and depositions, including art history expert and foreign legal expert discovery, was completed with the exception of outstanding disputes over *inter alia* MoMA's refusal to permit inspection of provenance documentation of Nazi-era artworks in

its collection from Flechtheim's inventory and from Charlotte Weidler and Curt Valentin, the art dealers who sold *Poet* to MoMA.

On July 29, 2009, prior to the issuance of MoMA's expert reports, Magistrate Judge Katz denied discovery into Flechtheim, Weidler and Valentin works at MoMA as marginally relevant to the Grosz Heirs' claims. (Vol.I, A-534). Yet following the Grosz Heirs' unsuccessful attempts to obtain this discovery on July 15, July 29, August 21, August 24, September 10 and November 30, 2009, MoMA's proposed experts, relying on the very evidence denied to the Grosz Heirs, advanced theories that Flechtheim owned *Poet* and gifted it to Weidler. (Vol.I, A-686; Vol.II, A-28-29; 67-71; 73; 83; 120-121; 135; 144; 155). MoMA's proposed art history experts further opined that the liquidation of Flechtheim's gallery appeared legal. (Vol.I, A-685; Vol.II, A-18; 104-107; 137; 143). Additionally, MoMA argued that Valentin was a legitimate art dealer, not a Nazi-authorized trafficker in stolen art. (Vol.I, A-690-695; Vol.II, A-24-25; 77-78; 84-85; 118-119; 152). In response to the newly-proffered theories, the Grosz Heirs once more sought production of MoMA's documents related to Flechtheim's inventory, or, in the alternative, that MoMA's defenses be precluded (Vol.II, A-163). On December 21, 2009, Magistrate Judge Katz denied the application. (Vol.II, A-282). The Grosz Heirs timely filed objections with the District Court on December 30, 2009. (Vol.I, A-16). On January 6, 2010, the District Court dismissed the

Complaint as barred by the statute of limitations, refused leave to amend the complaint and deemed the discovery objections moot (SPA-31). Following a motion, the District Court denied reconsideration and supplementation of the record (SPA-51). This appeal followed.

STATEMENT OF FACTS

In February, 1920, the Nazi Party adopted a platform deeming Jews to be non-Germans and to exclude them from the German Reich. (Vol. II, A-497). By 1933, the Nazi Party had banned all other political parties, taken complete control of the government, excluded Jews from the legal, accounting and arts professions and instituted a complete boycott of commerce with Jews (Vol. II, A-501, 503, 505-506, 514). The boycotts extended as far as preventing Jews from making purchases of food and medical supplies (Vol. II, A-506). The boycotts rendered Jewish-owned property worthless. (Vol. II, A-514). In March, 1933 the *New York Times* reported that all communications from Germany were subject to rigorous Nazi censorship. (Vol.II, A-488). From 1933 through 1937, the Nazis undertook a massive campaign of expropriating, extorting and exporting Germany's Jews. (Vol. II, A-497-514).

Aryanizations were seemingly “voluntary” surrenders by Jews of their property, but in reality were forced by economic boycotts or personal threats (Vol.II, A-497-514). Dean, Martin, *Robbing the Jews: The Confiscation of Jewish*

Property in the Holocaust, 1933-1945 at 7-12, 28-30 (U.S. Holocaust Memorial Museum 2008)(discussing “voluntary Aryanization”). In reality, from the 1920’s, the Nazis engaged in a pattern of ever increasing violence against Jews culminating when, upon gaining power, the Nazis put the force and administrative apparatus of the German state behind the campaign to systematically target with violence and an economic boycott all Jewish businesses, forcing Jews to surrender their businesses to Nazis, or at least to non-Jews who had started calling themselves Aryans (Vol. II, A-492-516). This total Aryanization of the German economy is well documented by historians. Reflecting this reality, after World War II, transfers of property of Nazi persecutees 1933-1945 were deemed presumptively involuntary unless the recipient could prove otherwise. (Vol.I, A-44; 410-413). This presumption invalidating 1933-1945 transfers of persecutee property, originally crafted by the Allied Military Government, persists in German law today. (Vol.I, A-44; A-412).

George Grosz was a world-renowned artist and fierce critic and caricaturist of Hitler, mocking Hitler prior to his rise to power. (Vol.I, A-22). After narrow escapes from Nazi violence, Grosz and his wife Eva fled Berlin in January 1933 to teach at the Art Students League in New York City. (Vol.I, A-32). When Grosz fled Berlin, he left his artworks, including the Paintings, with Flechtheim, his Jewish art dealer. (Vol.I, A-21). MoMA concedes that the Paintings were part of

Flechtheim's inventory. (Vol.II, A-423). Grosz was never paid for the artworks that he left with Flechtheim. (Vol.I, A-28) After World War II, Grosz and his family made claims against Germany for the loss of these artworks. (Vol. I, A-43; 413; Vol.II, A-30).

In March 1933, following Grosz's departure from Nazi Germany, Flechtheim's gallery, a Jewish business, was "Aryanized" by S.A. (a predecessor of the infamous S.S.) member Alexander Vömel, a known Nazi (Vol.II, A-205).

Prior to Hitler's rise to power in 1933, Flechtheim, Weimar Germany's most prominent modern art dealer, was personally targeted in Nazi propaganda as "the Art Jew Flechtheim." (Vol.II, A-204). From 1933-1937, the Nazis organized "Schreckenskammern" or "Chambers of Horrors" in museums throughout Germany which featured photographs of Flechtheim and artworks of Grosz, and which attacked Flechtheim, Grosz and German museum directors who had paid "Bolshevist Jewry" to fill German museums with the "degenerate" and "diseased" modern art (Vol.I, A-41).

In October 1933 Flechtheim fled Nazi persecution and went to Paris, leaving behind his galleries in Berlin and Dusseldorf. (Vol.I, A-47). Flechtheim died of blood poisoning in 1937. (Vol.I, A-34). Flechtheim's 1933 inventory has never been traced, although numerous works have appeared in MoMA's collection.

(Vol.II, A-214). The District Court denied discovery into the Flechtheim works at MoMA. (Vol.II, A-268-275).

Post-World War II Compensation Claims

After World War II, the Grosz family made claims for the loss of Grosz's artworks. (Vol.I, A-43; 413; Vol.II, A-30). The compensation form stated that the artworks had been left in Grosz's studio or with Flechtheim's gallery. (Vol.I, A-166). Some of Grosz's artworks had been publicly burned by the Nazis. (Vol.I, A-41). Germany awarded his family 50,000.00 Marks for the loss of the artworks. (Vol.I, A-181). Under German law, compensation does not prevent recovery of a stolen object. (Vol.I, A-45).

The Provenance Path of *Poet*

George Grosz's career as an artist launched in 1918. Grosz painted *Poet* in 1927 and consigned it to Flechtheim in 1928. (Vol.I, A-31). *Poet* went missing when Grosz fled Nazi Germany and left it with Flechtheim. (Vol.I, A-47). Flechtheim's gallery was taken over in March 1933 by Alexander Vömel. (Vol.II, A-205; A-454). During Nazi rule, the Flechtheim galleries were liquidated by Alfred Schulte, an accountant (Vol.I, A-32; A-600-601). In an official Swiss government report, the Independent Commission of Experts Switzerland (ICE), also known as the Bergier Commission, concluded that the Flechtheim gallery was raided, boycotted and Aryanized by the Nazis. (Vol. II, A-205).

In 1941, on the eve of her deportation to a concentration camp, Flechtheim's wife Betty committed suicide. (Vol.I, A-34; Vol.II, A-424). Following her death, Nazis confiscated and sold the contents of Betty's apartment. (Vol.II, A-64; 183).

Poet surfaced in the early 1950's in the hands of Charlotte Weidler, who claimed she inherited *Poet* from Flechtheim. (Vol.I, A-25). Weidler had obtained artworks from Nazi Germany and sold them in the United States during the late 1930's. (Vol.I, A-605-606). Flechtheim's sole testamentary heir was Heinz Hulisch, who never gave *Poet* to Weidler (Vol.I, A-96). Based on Flechtheim's will, Weidler's story of inheriting *Poet* is impossible as a matter of German law. (Vol.I, A-48; 421). The Flechtheim estate has acknowledged that *Poet* belonged to Grosz and was never Flechtheim's property. (Vol.I, A-28).

In the early 1950's, Weidler gave *Poet* to Curt Valentin, an art dealer who sold works for the Nazi Propaganda Ministry. (Vol.I, A-40). Valentin was the partner of Karl Buchholz, one of Goebbels' four authorized dealers for the sales of art deemed "degenerate" by the Nazis. (Vol.I, A-35). Among the 12 works that MoMA's website shows were confiscated in Nazi Germany and sold to MoMA through Valentin are *Around the Fish* by Paul Klee and *Self-Portrait* by Oskar Kokoschka. Despite the specificity of the requests, the District Court denied discovery into the provenance of these works. (Vol.I, A-548). Provenance documentation of works from Flechtheim's inventory will show that Nazis

systematically liquidated Flechtheim's collection and that Weidler and Valentin were involved in trafficking these stolen works.

In 1952, MoMA's Director, Alfred Barr, purchased *Poet* from Valentin for \$775. (Vol.I, A-40; Vol.II, A-426). MoMA's files show no evidence that MoMA investigated the provenance of *Poet* before purchasing it. (Vol.I, A-40; 608).

The Provenance Path of *Model* and *Republican Automatons*

Grosz left *Model* and *Republican Automatons* with Flechtheim when he fled Germany in January 1933. (Vol.I, A-50). Flechtheim remained in Germany until he fled later in 1933. (Vol.I, A-47). Under German Law, leaving property in the care of a safekeeper who was also persecuted is deemed to be an involuntary loss of possession due to persecution. (Vol.I, A-412). Following Flechtheim's death, a Dutch auctioneer, without knowledge or consent from Grosz or his heirs, put *Model* and *Republican Automatons* up for auction and bought one back himself for a nominal sum. (Vol.I, A-34). This auction, unauthorized by Flechtheim's heirs, was an illegal sham under both German and Dutch law. (Vol.I, A-34). The circumstances of the sham Dutch auction were concealed until Ralph Jentsch obtained the auction records in 2003 (Vol.II, A-532-536).

MoMA purchased *Republican Automatons* in 1946 from Dr. William Landman. (Vol.I, A-28; Vol.II, A-425). MoMA acquired *Model* in 1954 as a gift of Leo Lionni. (Vol.I, A-34). MoMA's files show no evidence that MoMA

investigated the provenances of *Model* and *Republican Automaton*s prior to acquisition. (Vol.I, A-52; A-636).

The Demand and the Investigation Leading to the Refusal on April 12, 2006

In 2003, Ralph Jentsch, an art historian engaged by the Grosz Heirs, discovered documents showing that the Paintings, now in MoMA's collection, were stolen. (Vol.I, A-44). In November 2003, Jentsch, a non-lawyer, wrote to MoMA, demanding the return of the Paintings. (Vol.I, A-44; 183-184).

The Grosz Heirs (including Peter Grosz, Lilian's late husband) and a team from MoMA, including Lowry, agreed to a confidential provenance investigation to try to resolve ownership issues. (Vol.II, A-469). MoMA promised to investigate and determine title. (Vol.II, A-469). In return, the Grosz Heirs consented to MoMA's custody of the Paintings and to forbear from suing (Vol.II, A-469). The investigation involved document exchanges and many meetings among provenance researchers. (Vol.II, A-469-470).

Confidential Settlement Communications Prior To April 12, 2006 and the Lowry Letter

During the course of the investigations, Lowry wrote to Jentsch that he "continue[s] to appreciate the frank and open dialogue that we have created together in order to deal with the Grosz estate's questions..." (Vol.I, A-187). Lowry referred to "differing interpretations" of the evidence and of the possibility of a kind of "shared ownership" of the Paintings:

If further research produced conclusive facts, one way or another, either the [Grosz Heirs] or MoMA could withdraw ownership claims. If no new or conclusive evidence comes to light, the shared arrangement could continue, more or less in perpetuity.” (Vol.I, A-187).

In the Lowry Letter, Lowry indicated that he had gone over Jentsch’s head to arrange a discussion directly with the Grosz Heirs:

I think the best course of action would be for us to meet together with Peter Grosz and his brother if he is available, to review the facts and determine an appropriate course of action. I have taken the liberty of talking to Peter [Grosz], who is amenable to such a discussion. (Vol.I, A-187).

During the investigation, Lowry repeatedly assured Jentsch that he had no authority to refuse the Grosz Heirs’ claims and assured Jentsch only MoMA’s Trustees could refuse the claims. (Vol.I, A-323; Vol.II, A-537-538). On January 5, 2006, Jentsch, wrote to Lowry complaining that he had not been given access to the Weidler papers in MoMA’s possession and asking Lowry on what basis Lowry would reject the Grosz Heirs’ demands for the Paintings (Vol.I, A-190).

On January 18, 2006, Lowry responded, denying that he had rejected the Grosz Heirs’ claims, informing Jentsch that MoMA had decided to hire Nicholas Katzenbach to conduct a further investigation, and that there would be “no communications until the Trustees make a decision” [on whether or not to refuse the Grosz Heirs’ claims]. (Vol.I, A-323). On January 20, 2006, Jentsch consented to Katzenbach’s investigation and pledged his full cooperation. (Vol.I, A-193).

On April 11, 2006, Katzenbach delivered his findings to MoMA's Trustees. (Vol.II, A-381). On April 12, 2006, Lowry wrote a letter to Jentsch stating that the Trustees had met and rejected the Grosz Heirs' claims to *Poet* and *Model* (Vol.I, A-186). Attached to the April 12, 2006 letter was a copy of the Katzenbach Report. (Docket No. 15, Exhibit E)³. In 2008, MoMA's legal counsel reconfirmed the refusal date of April 12, 2006 to the Grosz heirs newly appointed counsel. (Vol.II, A-540).

The Katzenbach Report Leading To the April 12, 2006 Refusal

According to the Katzenbach Report, “[a]fter many years crucial documents are missing and the thousands of pages of records and correspondence reviewed often do not provide clear answers.” (Docket No. 15, Exhibit E) .Katzenbach found no record of the Dutch dealer van Lier having authority to auction *Republican Automaton*s or *Model*. According to Katzenbach: “Exactly when, where and from whom Weidler acquired the painting [*Poet*] is unknown.” (Docket No. 15, Exhibit E at 6).

MoMA's Provenance Theories Relating to Flechtheim and Valentin and the Denial of Discovery into These Theories

Although the District Court did not explicitly rely on MoMA's expert reports, the District Court appears to have adopted their arguments. As reflected in

³ Documents contained in the record are cited with the Docket Number (“Docket No. __ at __”)

MoMA's proposed expert reports, MoMA's theory of the case is that the post-March 1933 sales of Flechtheim's inventory were legal, that the Dutch sales of Flechtheim's estate was legal, and that Weidler received *Poet* as an inheritance from Flechtheim's estate or as a gift from Flechtheim's wife Betty after his death. (Vol.II, A-26-28; A-70; A-83; A-143).

During discovery, the Grosz Heirs tried to explore MoMA's documents related to Flechtheim's inventory and into artworks acquired through Weidler and Valentin and were blocked. (Vol.I, A-548). In stark contrast, MoMA's purported expert art historians had free reign of MoMA's documents during discovery. (Vol.II, A-153). Despite having limited credentials relating to art history, MoMA's purported experts claimed that the liquidation of Flechtheim's gallery was a perfectly normal business transaction. (Vol.I, A-685; Vol.II, A-18; 104-107; 137; 143). They further opined that Weidler's claim to have inherited *Poet* is legitimate, that Weidler had an "anti-Nazi reputation" and that the Dutch auction was legitimate. (Vol.I, A-686-690; Vol.II, A-24-25; 120-121; 152). All of these claims were purportedly based on a review of MoMA's files: a universe of documents not made available to the Grosz Heirs. (Vol.II, A-175).

On October 30, 1939, Charlotte Weidler wrote from Berlin to the Carnegie Institute, "They are nice in the Propaganda Ministry and they told me again that they are much interested in the Carnegie Institute and because your sales will bring

dollars in the country.” (Vol.II, A-462). This was after the Nazis had invaded Poland.

In 1998, U.S. museums, including MoMA, promised to make provenance records available to any serious researchers. (Vol.II, A-480). Thus, provenance records are by definition not confidential. It is standard, and indeed required, practice in provenance research to research all items in a lost art collection to understand the circumstances of its dispersal (Vol.II, A-174). MoMA’s website shows five artworks that were in Alfred Flechtheim’s inventory in 1933 (Vol.II, A-214). Yet the Grosz Heirs were denied discovery into MoMA’s documentation of the provenance of these artworks. (Vol.I, A-548).

Warnings to MoMA Against Acquiring Stolen Art and The Continuing Duty To Return Looted Art To Victims of Nazism

New York’s museums have been under a continuing duty, as a matter of federal and state law, to zealously guard against acquisitions of Nazi-looted art, to thoroughly research provenances, and to return stolen artworks to the victims or heirs. (Vol.I, A-24; 626-628). At the 1998 Washington Conference on Holocaust-Era Assets, museums of the world agreed to publish provenances, welcome potential claimants, engage in “equitable” and mutual discussions and to return stolen art, in order to avoid regulation by Congress. (Vol.I, A-24; 626-628). MoMA claims adherence to the Washington Conference principles.

In 1936, New York courts found that, as early as 1933, the Nazis stripped Jews of all private property rights and had completely abandoned the rule of law in favor of a totalitarian state whose existence served only Hitler's political purposes. *Holzer v. Deutsche Reichsbahn Gesellschaft*, 159 Misc. 830, 290 N.Y.S. 181 (N.Y. Sup. Ct. 1936) *aff'd sub nom. Holzer v. Deutsche Reichsbahn-Gesellschaft*, 252 A.D. 729, 299 N.Y.S. 748 (N.Y. App. Div. 1937) *aff'd in part, modified in part*, 277 N.Y. 474, 14 N.E.2d 798 (1938)). In *Holzer*, the court relied on the *Letter of Resignation of James G. McDonald, High Commissioner for Refugees (Jewish and others)*, dated London, 27 December 1935 (Vol. II, A-497-513). In resigning, McDonald, made worldwide headlines by describing how Jews were expropriated on a massive scale and stripped of virtually all property, and how Jewish businesses were violently boycotted as of April 1933 (Vol.II, A-505-506, 514-518).

In 1943, the U.S. joined all Allied Powers in issuing the “London Declaration”, warning anyone who acquired artworks, that such acquisitions would not be recognized as lawful. (Vol.I, A-627). In 1945, the Roberts Commission, chaired by Supreme Court Justice Owen Roberts, issued written warnings to U.S. museums against acquiring stolen artworks and asked for cooperation in researching and returning artworks.

In 1946, the Art Looting Investigation Unit of the U.S. War Department issued a Final Report listing Curt Valentin and Karl Buchholz as “red flag” names. (Vol.I, A-615-616). On December 11, 1950, the U.S. State Department’s Division of Libraries and Institutes wrote to all museums, art dealers and auction houses asking for their help in spotting and returning artworks stolen from European public and private collections. (Vol.II, A-443). In 1964, the *New York Times* reported that the U.S. State Department and other U.S. federal agencies recovered 3,978 stolen European artworks in the U.S. At all relevant times, receiving or concealing stolen property has been a crime in the United States. 18 U.S.C. § 2315.

SUMMARY OF ARGUMENT

The Court should vacate the District Court’s judgment and reassign the case to a new district judge for five reasons.

First, the District Court committed reversible error by misconstruing the allegation that the Grosz Heirs consented to MoMA’s possession of the Paintings until April 12, 2006. To constitute conversion, a possession must lack the owner’s consent. After a demand by a true owner, New York law permits retention by a possessor of stolen property for a reasonable time to ascertain ownership, even where the owner does not consent. Since the Grosz Heirs consented to MoMA’s possession and the duration of MoMA’s investigation of complex facts was perfectly reasonable, the District Court determination that MoMA’s possession of

the Paintings before April 12, 2006, constituted a “conversion” was reversible error.

Second, the Complaint alleged timely claims. On a Rule 12(b)(6) motion to dismiss, the alleged fact that MoMA refused the Grosz Heirs’ claims on April 12, 2006, refusal should have been deemed true. Instead, the District Court committed reversible error by entertaining MoMA’s statute of limitations argument, and then compounded the error by improperly relying on extraneous and inadmissible settlement materials and, finally, by improperly resolving disputed fact issues as to when the “refusal” occurred.

Third, the Complaint’s allegation that Lowry had no authority to refuse the Grosz Heirs claims should have been accepted as true. Instead, the District Court incorrectly assumed Lowry had actual authority. Lowry wrote to Jentsch and repeatedly told him that he had no authority to refuse the Grosz Heirs’ claims. Equitable estoppel would bar MoMA from reaping a windfall of stolen property based on litigation delays caused by untruthful statements by its Executive Director.

Fourth, the District Court erred by applying a three-year, rather than New York’s six-year statute of limitations to an unjust enrichment claim.

Fifth, the District Court made critical errors regarding the evidentiary presumptions, burdens of proof, amendment of the Complaint and denial of

discovery that should be addressed by this Court prior to remand. Discovery into artworks in MoMA's collection is critical to test MoMA's theory that Flechtheim's liquidation was legitimate. The District Court decisions reflect numerous prejudgments of the credibility of the Complaint's allegations sufficient to warrant reassignment on remand.

STANDARD OF REVIEW

Review of a district court's dismissal of a complaint pursuant to Rule 12(b)(6) is *de novo*. *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir. 2004).

A federal court sitting in a diversity case applies the substantive law of the forum state on outcome determinative issues. *McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d Cir. 1997) *citing* *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Determination of New York law is *de novo*, affording the greatest weight to decisions of the New York Court of Appeals. *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 650 (2d Cir. 1994). "Where the substantive law of the forum state is uncertain or ambiguous, the job of the federal courts is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity." *Travelers Ins. Co. v. 633 Third Associates*, 14 F.3d 114, 119 (2d Cir. 1994).

“Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.” *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 141 -142 (2d Cir. 2008) *cert. granted*, 129 S. Ct. 2160, 173 L. Ed. 2d 1155 (U.S. 2009) and *rev'd*, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (U.S. 2010) and *rev'd*, *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010).

A district court abuses its discretion when discovery is so limited as to affect a party’s substantial rights. *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 795 (2d Cir. 1985). A district court abuses its discretion when decisions are premised on errors of law. *India.Com, Inc. v. Dalal*, 412 F.3d 315, 320 (2d Cir. 2005).

ARGUMENT

I. SINCE THE GROSZ HEIRS CONSENTED TO MOMA’S POSSESSION OF THE PAINTINGS UNTIL APRIL 12, 2006, AND MOMA’S INVESTIGATION WAS REASONABLE, THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FINDING AN EARLIER CONVERSION

The District Court correctly assumed, for purposes of the motion to dismiss, that MoMA was a good faith purchaser of stolen property. The District Court committed reversible error by misconstruing the appropriate accrual rule. The accrual rule for simple conversion cases may be triggered under New York law by a detention of property. *McGough v. Leslie*, 65 A.D.3d 895, 884 N.Y.S.2d 756,

757-758 (N.Y. App. Div. 2009) In contrast, the accrual rule for replevin of stolen property cases which requires an unequivocal, authorized “refusal” to trigger conversion. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-318, 569 N.E.2d 426 (1991). Instead of following New York law, which requires a refusal to be unequivocal and from an authorized representative, the District Court erroneously looked to a “temporizing” settlement offer and implied a “refusal” from MoMA’s continued retention of the Paintings while it investigated. The Grosz Heirs objected timely to consideration of extraneous materials and inadmissible settlement communications. Point I assumes *arguendo* that the District Court’s consideration of these materials was proper.

The Complaint alleged that the Grosz Heirs’ consented to MoMA’s possession of the Paintings during the investigation. Assuming this allegation to be true on a Rule 12(b)(6) motion, the Complaint alleged a lawful bailment. Even if the heirs had not consented to MoMA’s possession, New York law deems MoMA’s reasonable investigation to be lawful. Even if, as the District Court opines, MoMA’s investigation somehow became clouded by the parties’ squabbling, Jentsch’s January 20, 2006, reaffirmance in writing of unequivocal consent to Katzenbach’s investigation would lift any such cloud and move the statute of limitations clock back to zero.

A. The District Court Erred By Confusing Simple Conversion Cases Which Are Triggered By Unauthorized Retention of Property With Replevin of Stolen Property Cases Which Require an Unequivocal, Authorized Refusal By the Holder

The District Court erred by applying accrual rules applicable to simple conversion. Simple conversion cases may imply a refusal from detention of property. On the other hand, replevin of stolen property cases require an unequivocal “refusal” authorized by the possessor to render a good faith purchaser’s possession unlawful. This “demand and refusal” rule “is the rule that affords the most protection to the true owners of stolen property”. *Solomon R. Guggenheim Found.*, 77 N.Y.2d, 317-318.

To determine whether the accrual rule for simple conversion or the accrual rule for replevin of stolen property applies, the New York Court of Appeals requires a trial court to make a finding of fact as to whether the holder was a good faith purchaser and will remand where the trial court fails to make such a finding. *State v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 774 N.E.2d 702 (2002).

Although the District Court correctly assumed for the purpose of the motion to dismiss that MoMA’s purchase was in good faith, the District Court committed reversible errors by implying a refusal from a detention of property and an ongoing investigation, which is not appropriate in replevin or stolen property cases.

1. The District Court Erred By Overlooking The Requirement That A “Refusal” Must Be Unqualified

The District Court implied a refusal from a letter it characterized as “temporizing”. For a refusal to constitute conversion under New York law, it must be “unqualified”. *Susi v. Belle Acton Stables, Inc.*, 360 F.2d 704, 713 (2d Cir. 1966) citing *Everett v. Saltus*, 1836 WL 2711 (N.Y. Sup. Ct. 1836) *aff’d sub nom. Saltus & Saltus v. Everett*, 1838 WL 3100 (N.Y. 1838). Determination of whether a refusal occurred is a fact-specific inquiry inappropriate at the early stage of a proceeding. See, e.g., *In re Saft*, 24 Misc. 3d 1214(A), 897 N.Y.S.2d 672 (N.Y. Sur. 2009) citing *Estate of Davis v. Trojer*, 99 CIV. 11056(JSM), 2001 WL 1645916 (S.D.N.Y. Dec. 21, 2001).

The District Court interprets “Lowry’s temporizing language” as a means to “entice plaintiffs to continue negotiating and to prevent the dispute from becoming public or escalating into litigation.” (SPA-24). Lowry offers potential shared ownership of *Poet* with the Grosz Heirs, opining that “an agreement to share the picture would best serve George Grosz’s artistic legacy”. (Vol.I, A-188). This language is not hostile to Plaintiffs’ claims. Lowry expresses a desire to meet to “review the facts and determine the appropriate course of action”. (Vol.I, A-188). Lowry “continue[s] to appreciate the frank and open dialogue that we have created together in order to deal with the Grosz estate’s questions...” (Vol.I, A-187). Beyond Lowry’s recognition of “differing interpretations” of the evidence and the

possibility of “shared ownership” of the Paintings, Lowry even proposes to withdraw MoMA’s ownership claims.

This communication, is not an interference with the Grosz Heirs’ ownership rights. Instead, it is an acknowledgement of legitimate differences and a proposal to accommodate potential future proof of their ownership interest. The District Court erred on a motion to dismiss pursuant to Rule 12(b)(6) by making, at best, premature findings that this equivocal settlement proposal made during an ongoing investigation was a “refusal”.

2. The District Court Erred By Overlooking the Requirement That a Refusal Be “Authorized”

New York requires that a servant have actual authority from a master for the servant’s refusal to transform the master’s possession into conversion. *Goodwin v. Wertheimer*, 99 N.Y. 149, 1 N.E. 404 (1885) *cited with approval in Solomon R. Guggenheim Found.*, 77 N.Y.2d 311. The Proposed Second Amended Complaint alleges that Lowry had no authority to refuse the Grosz Heirs’ claims prior to April 12, 2006. (Vol.II, A-482). On January 18, 2006, Lowry represented to Jentsch that only MoMA’s Board of Trustees could make the decision to reject claims. (Vol.I, A-323). In its Decision and Order, the District Court erred by assuming that MoMA gave Lowry the power to refuse the Grosz Heirs’ claims when in fact the Grosz Heirs had disputed his authority to do so. This was reversible error.

What facts and circumstances warrant a presumption of authority is for the jury. *Hartford & N.Y. Transp. Co. v. Plymmer*, 120 F. 624 (2d Cir. 1903) citing *Mott v. Consumers' Ice Co.*, 73 N.Y. 543 (1878). On a Rule 12(b)(6) motion to dismiss, the District Court committed reversible error by failing to accept the allegations of Lowry's lack of authority as true by resolving a disputed fact and by finding one of his pre-April 12, 2006 communications to be a refusal.

B. The District Court Erred By Overlooking the Complaint's Allegation That the Grosz Heirs Consented To MoMA's Investigation and Finding Conversion Because Conversion Requires A Lack of Consent From the True Owner

The District Court erred by finding that MoMA's possession of the Paintings during a consensual investigation was conversion because conversion requires the lack of an owner's consent. *Estate of Davis*, 2001 WL 1645916 citing *MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co.*, 193 N.Y. 92, 101, 85 N.E. 801 (1908).

Shortly after November 24, 2003, when the Grosz Heirs demanded the return of the Paintings, the Grosz Heirs and MoMA agreed to engage in confidential settlement negotiations to resolve the Grosz Heirs' claims. (Vol.II, A-469). The negotiations lasted until April 12, 2006, when MoMA rejected the Grosz Heirs' claims. (Vol.II, A-468-469). Because the Complaint alleges a consensual possession, MoMA's possession of the Paintings from November 24, 2003 until April 12, 2006, was lawful. It is "the element of lawful possession,

however created, and the duty to account for the thing as the property of another that creates the bailment.” *Martin v. Briggs*, 235 A.D.2d 192, 663 N.Y.S.2d 184, 187 (N.Y. App. Div. 1997) (citation omitted); *Pagliari v. Del Re*, 34 F. App'x. 36 (2d Cir. 2002).

MoMA agreed to “account”—i.e. report its findings and consider the evidence as a condition of the bailment. Accordingly, MoMA’s possession was lawful during the investigation period and a bailment arose, setting the statute of limitations clock to zero.

C. The District Court Erred By Failing To Assume The Truth of The April 12, 2006 Refusal and By Permitting MoMA To Dispute These Facts on A Motion To Dismiss

The District Court erred by failing to assume the truth of the well-pleaded allegations of the Complaint that a refusal triggering New York’s statute of limitations occurred because the Grosz Heirs attached the actual refusal letter to the Complaint.

A statute-of-limitations defense may be raised in a motion to dismiss under Rule 12(b)(6) only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *Ortiz v. Cornetta*, 867 F.2d 146 (2d Cir. 1989). The reviewing court is required to accept all allegations in the complaint as true. *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). [I]t is

sufficient that the actual allegations raise the right to relief above the speculative level. *Arista Records, LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010).

Courts may not determine facts concerning the accrual or expiration of a statute of limitations period on a motion to dismiss. *See, e.g., In re Issuer Plaintiff Initial Pub. Offering Antitrust Litig.*, 00 CIV. 7804 (LMM), 2004 WL 487222 (S.D.N.Y. Mar. 12, 2004).

The Complaint alleged that MoMA refused the Grosz Heirs claims on April 12, 2006. (Vol.I, A-44). On April 12, 2006, Lowry wrote to the Grosz Heirs that the Trustees had met and refused to return *Poet* and *Model* (Vol.I, A-186). In 2008, MoMA's legal counsel reconfirmed the refusal date of April 12, 2006. (Vol.II, A-540).

As properly alleged in the Complaint, the plain language of MoMA's April 12, 2006, letter to the Grosz Heirs indicated that it was MoMA's first and only refusal of the Grosz Heirs' claims. (Vol.I, A-186). The letter is written in the present tense, showing the allegations of the April 12, 2006 refusal were well-grounded in objective fact and thus assumed to be true on a Rule 12(b)(6) motion to dismiss.

D. Even If the Grosz Heirs Had Not Consented, MoMA's Possession Was Also Lawful Because New York Permits A Holder of Stolen Property A Reasonable Time To Investigate Title

The District Court erred by finding that MoMA's extensive investigation into title was akin to a refusal. Even if the Grosz Heirs had not consented, MoMA's possession prior to April 12, 2006 is lawful because New York law authorizes "reasonable detentions" to enable the holder to determine who has right to possession. 61 A.L.R. 621 (collecting cases from all jurisdictions); *Ball v. Liney*, 48 N.Y. 6, 12 -13 (1871); *Restatement (Second) Torts* § 240 (1965).

The District Court correctly noted: "Matters of provenance are notoriously complicated, and the circumstances under which the Paintings made their way to MoMA (as alleged by the Plaintiffs) made the museum's investigation difficult." (SPA-39). But the District Court erroneously concluded that the length of MoMA's investigation could not be justified as a matter of law. Adopting the rationale that "actions speak louder than words," the District Court incorrectly found that the Grosz Heirs should have intuited MoMA's refusal from the length of the provenance investigation together with the lack of encouragement in Lowry's settlement communications. (SPA-18-23). There is no case law supporting this position, which is anathema to federal and state practices encouraging settlements.

The District Court's conclusion that MoMA "surely" delayed is simply incompatible with the realities of complex Holocaust-era provenance research.

(SPA-42). Since the Complaint alleges a consensual, reasonable investigation, the District Court committed reversible error by concluding that the length of the investigation triggered a conversion.

E. The District Court Committed Reversible Error By Not Recognizing That Each Consent to Possession Restarts the Statute of Limitations Clock For Conversion Anew

The District Court committed reversible error by assuming that a statute of limitations clock on conversion cannot be stopped by mutual consent of the parties. The District Court reasoned that “the Board’s action [in hiring Katzenbach] did not cause a claim that accrued 182 days earlier to “unaccrue” and restart the limitations clock at Day One. (SPA-29). The District Court is incorrect. Mutual consent to possession vitiates a conversion.

On January 20, 2006, Jentsch wrote to Lowry indicating his *consent* and full *cooperation* with Katzenbach’s investigation. (Vol.I, A-193). If MoMA wanted to retain any time it had accrued on the statute of limitations clock, it would have had to enter a tolling agreement preserving such accrued time. By failing to do so, MoMA’s consent to hold the property and jointly investigate set any potentially-triggered conversion clock at zero.

Since MoMA’s possession was consensual and for a lawful purpose until MoMA’s April 12, 2006 refusal to return the Paintings, the Judgment should be

vacated because this action was timely filed on April 10, 2009, within three years of the refusal.

II. SINCE THE COMPLAINT ALLEGED TIMELY CLAIMS, THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY CONSULTING SETTLEMENT COMMUNICATIONS TO RESOLVE DISPUTED FACT ISSUES

The argument made in Point I assumed *arguendo*, without conceding that the District Court's consideration of settlement communications on a Rule 12(b)(6) motion to dismiss was proper. The District Court's consideration of the Lowry letter to dispute the allegations of the Complaint was improper for three reasons. *First*, on a Rule 12(b)(6) a court must assume the well-pleaded allegations of the Complaint to be true. *Second*, consideration of materials extraneous to the Complaint is improper on a Rule 12(b)(6) motion to dismiss. *Third*, Fed. R. Evid. 408 bars the use of settlement communications to create a liability.

A. The District Court Erred By Failing To Assume The Truth of The Allegations Relating To the Statute of Limitation on a Rule 12(b)(6) Motion

The Complaint was filed on April 10, 2006, within three years of MoMA's April 12, 2006 refusal. (Vol.I, A-7). For the reasons set forth in Points I(A) & I(C), *supra*, the District Court's inquiry should have ended there on a Rule 12(b)(6) motion to dismiss, rather than permitting MoMA to controvert the allegations of the Complaint using the Lowry Letter.

B. The District Court Erred By Considering Materials Extraneous To the Complaint On a Motion To Dismiss

The District Court committed reversible error by permitting MoMA to dispute the April 12, 2006 refusal date by using affidavits containing materials extraneous to the Complaint on a Rule 12(b)(6) motion. For example, the Lowry Letter which the District Court concluded was a “refusal” was not an exhibit to the Complaint nor incorporated by reference nor relied on in any way. (Vol.I, A-21-186; Vol.II, A-308). A grant of a Rule 12(b)(6) motion to dismiss is error where it relies on facts not found in the complaint. *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774 (2d Cir. 1984). In considering a motion to dismiss, a court may consider only documents either incorporated into the complaint by reference or attached to the complaint as exhibits. Fed. R. Civ. P. 12(d); *Blue Tree Hotels Inv. (Canada), Ltd.*, 369 F.3d 212 (2d Cir. 2004); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)

In opposing MoMA’s motion to dismiss, the Grosz Heirs objected to the District Court considering MoMA’s additional factual allegations and materials contained in defendant’s memorandum of law and affidavits. (Docket No. 23 at 3). *citing Raffaele v. Designers Break, Inc.*, 750 F. Supp. 611, 612 (S.D.N.Y. 1990). In the same opposition papers, the Grosz Heirs further urged that the District Court “must limit itself to a consideration of the facts alleged on the face of the complaint” (Docket No. 23 at 3) and that the affirmative defense of statute of

limitations “would raise issues of fact not appearing on the face of a prior pleading...” and had to be separately pleaded and proven by the defendant. (Docket No. 23 at 12).

Yet even after a motion to reconsider pointed out to the District Court these timely objections, the District Court wrote “Plaintiff did not object to MoMA’s submission of this correspondence.” (SPA-35). Referring to the Grosz Heirs, the District Court wrote: “They failed to object to MoMA’s submission of the portions of the parties’ correspondence that it deemed relevant to the limitations issue; and they submitted additional portions of the correspondence for the Court’s consideration as part of their response to defendant’s motion.” (SPA-45). Since the Grosz Heirs indeed timely objected to extraneous materials, the District Court’s characterizations of the record are not reliable. The District Court committed reversible error by failing to sustain the Grosz Heirs timely objections to consideration of extraneous material on a Rule 12(b)(6).

C. The District Court Erred By Relying On Settlement Communications Barred By Rule 408 of the Rules of Evidence

Not only were the materials relied on by the District Court extraneous, they were settlement communications inadmissible under Fed. R. Evid. 408. “[T]he rule forbidding...use of settlement negotiations is a matter of fundamental policy.” *Rein v. Socialist People's Libyan Arab Jamahiriya*, 568 F.3d 345, 352 (2d Cir.

2009). Fed. R. Evid. 408 forbids a court from basing adverse findings on a party's settlement negotiations. *Id.* at 351 (2d Cir. 2009) *discussing* Fed. R. Evid. 408.

MoMA's reply did not dispute, and thus conceded by silence, the Grosz Heirs' timely argument that the Lowry Letter was a settlement communication. Applying Fed. R. Evid. 408, this Court should vacate the Judgment because without this letter, there is no "refusal," making the Grosz Heirs claims timely.

III. SINCE THE COMPLAINT ALLEGED THAT LOWRY HAD NO AUTHORITY TO REFUSE THE GROSZ HEIRS CLAIMS PRIOR TO APRIL 12, 2006, THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FINDING HE HAD SUCH AUTHORITY AND BY PRECLUDING THE GROSZ HEIRS FROM SHOWING EQUITABLE ESTOPPEL BASED ON LOWRY'S LETTERS TO THEM CLAIMING HE HAD NO AUTHORITY TO REFUSE

The District Court erred by concluding on a Rule 12(b)(6) motion that equitable doctrines could not possibly toll MoMA's anticipated statute of limitations defense. The District Court's decision was reversible error for two reasons. *First*, to conclude that Lowry's letter was a "refusal", the District Court would have to resolve the disputed issue of Lowry's authority to issue a refusal prior to April 12, 2006. Resolving this disputed issue of fact is not appropriate on a motion to dismiss and the District Court overlooked the Grosz Heirs' timely request to convert the motion to a summary judgment motion if it intended to resolve disputed fact issues. *Second*, Lowry's claims that he had no authority to

refuse prior to April 12, 2006, together with the Grosz Heir's reliance thereon warrant application of equitable estoppel under New York law.

A. The District Court Should Have Accepted The Complaint's Allegation That Lowry Had No Authority as True and Erred By Failing To Grant The Grosz Heirs' Request To Convert The Motion Under Rule 56 If It Intended To Resolve Disputed Issues of Fact

As set forth in Point I(A)(2) *supra*, the Proposed Second Amended Complaint alleges that Lowry had no authority to refuse the Grosz Heirs' claims prior to April 12, 2006. (Vol.II, A-482). As argued therein, Lowry's authority was a disputed issue of fact not to be resolved on a motion to dismiss.

1. The Grosz Heirs Timely Requested An Opportunity To Address Disputed Issues of Fact Under Rule 56 of the Federal Rules of Civil Procedure

On December 1, 2009, well before the District Court decided the motion to dismiss that had been fully briefed and submitted to the District Court since July 1, 2009, Grosz Heirs requested the opportunity to submit additional evidence if the District Court considered summary judgment under Fed. R. Civ. P. 56. (Vol.II, A-429). The District Court denied the request. (SPA-1).

2. The District Court Erred By Overlooking The Grosz Heirs' Request For Relief Under Rule 56

But, entirely overlooking this request, the District Court wrote "At no time did Plaintiffs argue that the Court would have to convert the motion to dismiss into one for summary judgment in order to consider any of these documents." (SPA-35)

and “...Plaintiffs did not make this suggestion until after the motion was decided against them.” (SPA-45). The District Court’s statements that the Grosz Heirs never sought relief under Fed. R. Civ. P. 56 is controverted by the record, which shows that the request was made on December 1, 2009.

B. The District Court Erred By Resolving Disputed Issues of Fact Related to Whether Equitable Estoppel Bars MoMA From Asserting a Refusal Date Prior to April 12, 2006

On November 25, 2009, the Grosz Heirs wrote to the District Court arguing that the doctrine of equitable estoppel barred MoMA from claiming a refusal date earlier than April 12, 2006. (Vol.II, A-375-376). Rather than permitting the Grosz Heirs opportunity to show that the doctrine of equitable estoppel should bar MoMA from asserting a refusal date prior to April 12, 2006, the District Court dismissed the case. To do so without a hearing was error. *Bolarinwa v. Williams*, 593 F.3d 226, 232 (2d Cir. 2010). Under New York law, the doctrines of equitable tolling or equitable estoppel may to defeat a statute of limitations defense when the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action. *Bisson v. Martin Luther King Jr. Health Clinic*, 07-5416-CV, 2008 WL 4951045 (2d Cir. Nov. 20, 2008); *Abbas v. Dixon*, 480 F.3d 636, 642 (2d Cir. 2007). Even where the face of the complaint discloses a failure to file within the time allowed, the plaintiff may come forward with allegations explaining the

delay. *Hoover v. Langston Equip. Associates, Inc.*, 958 F.2d 742, 744 (6th Cir. 1992).

In New York, a defendant is estopped from pleading the statute of limitations defense where (1) defendant misrepresented some important facts; (2) plaintiff relied upon the misrepresentation; (3) and this reliance caused plaintiff to delay filing the lawsuit within the applicable limitations period; and (4) plaintiff thereafter commenced the action “within a reasonable time after the facts giving rise to the estoppel have ceased to be operational” *Lipp v. Con Edison*, 158 Misc. 2d 633, 636, 601 N.Y.S.2d 659 (N.Y. Civ. Ct. 1993).

For the following reasons, equitable estoppel bars MoMA from asserting a refusal date prior to April 12, 2006.

1. MoMA Misrepresented Important Facts

On January 18, 2006 Glenn Lowry wrote a letter reconfirming that no refusal of the Grosz Heirs claims had occurred. (Vol.I, A-323). If indeed an earlier refusal occurred, Lowry’s statement was a misrepresentation, and was relied on by the Grosz Heirs. Lowry wrote: “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”. (Vol.I, A-323). Lowry indicated that he would not communicate with Jentsch “until after the Museum’s Trustees receive Mr. Katzenbach’s report and have made a decision.” (Vol.I, A-324). Jentsch and the

Grosz Heirs understood Lowry's language to signify that only MoMA's Board of Trustees could refuse to return the Paintings. (Vol.I, A-30; Vol.II, A-538 at 296:1-3). Thus, if Lowry had actual authority to refuse the Grosz Heirs claims, his statements on January 18, 2006 were intended to and did mislead the Grosz Heirs into believing that no rejection occurred prior to the rejection authorized by MoMA's Board of Trustees on April 12, 2006.

2. The District Court Correctly Found That MoMA Enticed The Grosz Heirs Into Not Filing a Lawsuit

The District Court decided that "Lowry's temporizing language was almost certainly designed to entice plaintiffs to continue negotiating and to prevent the dispute from becoming public or escalating into litigation". (SPA-24). The District court has already correctly determined that MoMA enticed the Grosz Heirs into not filing a lawsuit earlier. Given that the Grosz Heirs filed this action two days before expiry of the statute of limitations from the refusal date given by MoMA, a finder of fact would reasonably conclude that the Grosz Heirs relied on MoMA's representations.

3. The Reliance on MoMA's Enticements Caused The Purported Delay

Here, MoMA's promises and Lowry's repeated "temporizing" overturned lulled the Grosz Heirs into thinking that MoMA was dealing with them in good faith. During the time leading up to the April 12, 2006, refusal, their representatives cause the Grosz Heirs to refrain from filing suit. Instead, the Grosz

Heirs simply used the time allotted by the statute of limitations to exhaust every non-litigation means of trying to resolve the matter. Accordingly, the Grosz Heirs' reliance on MoMA's assurances caused the purported "delay".

4. Plaintiffs Commenced The Action Prior To The Time The Facts Giving Rise To The Estoppel Became Operational

The first time that MoMA asserted that a "refusal" of the Grosz Heirs' claims occurred prior to April 12, 2006 was on its motion to dismiss. Prior to the April 10, 2009 filing of this action, MoMA never asserted that it had refused the Grosz Heirs claims prior to April 12, 2006. Accordingly, the Grosz Heirs have satisfied the fourth prong of equitable estoppel by filing the action prior to even having any notice that MoMA would assert an earlier refusal date.

MoMA's repeated statements, conduct and assurances that the operative date of refusal was April 12, 2006, and the Grosz Heirs' reasonable reliance and prompt action taken thereon warrant this Court vacating the Judgment to permit the finder of fact to apply the doctrine of equitable estoppel to MoMA's anticipated affirmative defense of statute of limitations.

IV. NEW YORK PROVIDES A SIX-YEAR LIMITATIONS PERIOD FOR UNJUST ENRICHMENT, THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY *SUA SPONTE* APPLYING A THREE-YEAR LIMITATIONS PERIOD AND DISMISSING THE CLAIMS

MoMA's motion to dismiss was silent as to the First Claim for declaration of title and the Fourth Claim for unjust enrichment. The District Court *sua sponte*

applied a three-year, rather than New York's six-year limitations period to dismiss these claims. The District Court reasoned that because conversion and replevin could have provided a remedy, the shorter limitations period should be borrowed. (SPA-14-15). As set forth below, the District Court erred in applying New York's common law analysis.

Where a trustee abuses the property of a trust to acquire stolen property, New York law will imply a fiduciary or trust relationship where none exists, as long as the stolen property is ascertainable. *Newton v. Porter*, 69 N.Y. 133 (1877). On April 11, 2006, MoMA's trustees were confronted with evidence that the Paintings, stolen property, were among the assets for which they exercise trust powers. Instead of rejecting the illegal acquisition, they voted to ratify it. *Cologne Life Reinsurance Co. v. Zurich Reinsurance (N. Am.), Inc.*, 286 A.D.2d 118, 128, 730 N.Y.S.2d 61 (N.Y. App. Div. 2001) citing *New York State Med. Transporters Ass'n, Inc. v. Perales*, 77 N.Y.2d 126, 566 N.E.2d 134 (1990). This ratification of an illegal act gives rise to a constructive trust. Restatement of Agency §104; Section 160 of the Restatement of Restitution (1937) (“(w)here a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it a constructive trust arises.”). The essence an unjust enrichment cause of action is that one party is in possession of money or property that rightly belongs to another

(see *Paramount Film Distrib. Corp. v. State*, 30 N.Y.2d 415, 285 N.E.2d 695 (1972); *Clifford R. Gray, Inc. v. LeChase Const. Services, LLC*, 31 A.D.3d 983, 819 N.Y.S.2d 182 (N.Y. App. Div. 2006)). The statute of limitations for unjust enrichment is six years (*Matter of Lamb*, 145 A.D.2d 935, 536 N.Y.S.2d 613 (N.Y. App. Div. 1988)).

A. The District Court Erred In Confusing Constructive Trust Claims With Conversion and Replevin Claims

The District Court erred by simply equating conversion and replevin claims with constructive trust claims without further analysis. In a case involving an attempt to recover an artwork, New York's Appellate Division, First Department recently found conversion and replevin claims to be time-barred, but noted explicitly that constructive trust claims based on the same operative facts would *not* be time-barred if a constructive trust had been pleaded. *Mirvish v. Mott*, 2577, 2010 WL 2104543 (N.Y. App. Div. May 27, 2010) FN 1 (First Dep't May 27, 2010).

In applying the statutes of limitations, New York courts look at the essence of the claim. A claim for constructive trust sounds in contract and is based on an implied or active breach of a promise or duty. On the other hand, claims for conversion or replevin are based upon a tortious act and are actions *ex delicto*. *Bernheimer v. Hartmayer*, 50 A.D. 316, 63 N.Y.S. 978 (N.Y. App. Div. 1900). Because claims for replevin and conversion are based on tort, and constructive

trust sounds in contract, the claims are not duplicative, and have different statutes of limitations.

At all relevant times, receiving and concealing stolen property was both a state and federal crime. 18 U.S.C. § 662; NY C.P.L.R. §165.45. Grosz and his family timely filed compensation claims for the loss of his artworks in Germany following the war. (Vol.I, A-43). The German government granted the Grosz family's compensation claims following Grosz's death. (Vol.I, A-44). Grosz's claims included that his works were looted by the Nazis from his studio and from his Jewish dealer, Alfred Flechtheim. Grosz never voluntarily relinquished title to any of the artworks in question. (Vol.I, A-28).

B. New York Law Would Impress A Constructive Trust Under These Circumstances to Avoid MoMA's Unjust Enrichment With Stolen Property

As set forth above, the Grosz Heirs have alleged that MoMA holds stolen property in its collection and is retaining it under conditions that render such retention unfair. (Vol.I, A-35-36). Plaintiffs have alleged that property is held under circumstances that render unconscionable and inequitable the continued holding of the property and that the remedy is essential to prevent unjust enrichment.

Based on the foregoing, the District Court's decision should be vacated and reversed because the claims for unjust enrichment and declaration of title claims was brought within the applicable six-year statute of limitations.

V. SINCE FLECHTHEIM, VALENTIN AND WEIDLER ARE RELEVANT TO MOMA ESTABLISHING ITS BURDEN OF PROOF THAT IT OBTAINED LAWFUL TITLE TO THE PAINTINGS, THE DISTRICT COURT DEPRIVED THE GROSZ HEIRS OF SUBSTANTIAL RIGHTS BY SHIFTING THE BURDEN OF PROOF AND DENYING DISCOVERY INTO MOMA ARTWORKS FROM FLECHTHEIM'S, VALENTIN'S AND WEIDLER'S INVENTORIES

On remand, significant problems with the District Court's erroneous discovery rulings remain that ought in fairness be resolved by this Court.

Although the District Court did not directly address these issues in dismissing the case, for the reasons set forth below, guidance from this Court is necessary. *First*, the District Court should have granted the Grosz Heirs' motion to amend the Complaint, which was supported by a Proposed Second Amended Complaint that incorporated MoMA's formal admissions. (Vol.II, A-441). The failure to do so was reversible error. *Second*, the District Court's errors in denying discovery and misinterpretations of the presumptions and burdens of proof were so significant as to have deprived the Grosz Heirs of substantial rights. This Court should remand with instructions to strike MoMA's defenses if the discovery sought is not produced. Rather than promptly deciding a motion to dismiss fully submitted on July 1, 2009, the District Court permitted discovery to proceed and referred discovery disputes to Magistrate Judge Katz. When the Grosz Heirs sought relief from MoMA's complete failure to provide discovery into artworks from Flechtheim, Valentin and Weidler in MoMA's collection by filing Objections to

Magistrate Judge Katz's denial of the Grosz Heirs' motion to compel, or, in the alternative, preclude, dated December 30, 2009, the District Court responded by dismissing the entire case and deeming the discovery issues moot.

Rule 26(b)(1) provides that "...[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense..." *Stephens v. 1199 SEIU*, CV 07-596 JFB/AKT, 2009 WL 2568517 (E.D.N.Y. Aug. 19, 2009).

On November 25, 2009, counsel for the Grosz Heirs wrote to the District Judge, responding to a letter from MoMA claiming that the claims to the Paintings were "meritless". The letter informed the District Court that the issues for trial had narrowed considerably based on MoMA's admissions made in response to requests for admissions. The letter brought to the District Judge's attention MoMA's following formal admissions:

- (1) Alfred Flechtheim was Jewish and persecuted by the Nazis;
- (2) Grosz fled Nazi Germany;
- (3) From 1933-1945 Hitler pursued the destruction or sale of "degenerate" or Jewish art;
- (4) During the time Hitler was in power, the Nazis forced some Jews to liquidate their property and took the proceeds for the Reich, either directly or through confiscatory flight taxes;
- (5) During October 1933, Grosz's dealer Flechtheim fled Nazi persecution and moved to Paris, leaving behind Flechtheim's galleries in Dusseldorf and Berlin;

(6) Grosz's artworks were "degenerate art" banned by Hitler and subject to a 1938 confiscation order;

(7) On November 14, 1936, the Reich Chamber of Visual Arts issued a letter to Curt Valentin, Alfred Flechtheim's former assistant, to sell German artworks in America;

(8) On February 20, 1937 Galerie Alfred Flechtheim G.m.b.H was officially dissolved and removed from Berlin's commercial registry;

(9) Alfred Flechtheim died on March 11, 1937;

(10) Grosz's consignments of the Paintings to Flechtheim and various Nazi-era transactions in the Paintings.

(11) In 1941 Betty Flechtheim committed suicide in Berlin due to Nazi persecution;

(12) MoMA's provenance of *Poet* indicates that it was owned by Galerie Flechtheim prior to Charlotte Weidler;

(Vol. II, A-423-427).

On December 2, 2009, the District Judge endorsed a letter from MoMA with the following: "All of these letters are being thrown in the trash. I do not read such letters or pay them any mind. So stop sending them. I will not augment the record on the motion." (SPA-1). Since MoMA's admissions were brought to the District Court's attention almost four months after the motion to dismiss had been fully briefed and submitted, it was reversible error for the District Court to throw MoMA's admissions in the trash, rather than directing MoMA to make a motion for summary judgment under Fed. R. Civ. P. 56 if MoMA wished to raise affirmative defenses based on disputed facts.

A. Since MoMA's Admissions Establish A *Prima Facie* Case For The Grosz Heirs To Recover The Paintings, District Court Erred By Disregarding MoMA's Admissions And Refusing The Grosz Heirs An Opportunity To Supplement The Record

Rather than crediting as true the allegations of the Complaint on a motion to dismiss, the District Court wrote a lengthy opinion attacking the allegations of the Complaint, indeed, scoffing at the allegations that the Paintings were stolen from Flechtheim. (SPA-3-31). The District Court, having ignored the motion to dismiss for months, abused its discretion by ignoring MoMA's formal admissions which establish the Grosz Heirs *prima facie* case for recovery, by ignoring the Grosz Heirs' pleas for the opportunity to fairly present their case, and by writing a subsequent decision that controverts MoMA's own admissions.

In New York, when an original owner of a unique chattel reclaims such unique chattel the burden of proof shifts to the possessor of the unique chattel to prove that the property was acquired lawfully. *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 153, 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). To state a claim for replevin, the Grosz Heirs needed to allege only that (1) Grosz owned the artworks when he fled Nazi Germany; (2) Grosz did not abandon the artworks; and (3) the artworks were never returned to Grosz or one of his legal heirs. *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804, 809 -810 (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).

New York law presumes that Grosz did not transfer title to his art to anyone 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).

B. New York Law Applies German Law To the Question of Whether Flechtheim and Grosz Were Dispossessed of the Paintings

New York choice of law principles provide that the law that characterizes the nature of the dispossession is that of a place where the dispossession occurred. *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 839-46 (E.D.N.Y. 1981) *aff'd*, 678 F.2d 1150 (2d Cir. 1982). The evidentiary presumption under German law is that if a Nazi persecutee can show a transaction between 1933 and 1945, such transaction is presumed to be a duress transaction, unless the holder of property can show the contrary. German law is consistent with New York law. Under German law, if a person involuntarily relinquished property due to Nazi persecution, the relinquished property is deemed lost property under German Civil Law §935 BGB (SPA-62), together with § 1 (6) 1 VermG, § 51 (1) BEG (SPA-53) Cf. *Menzel*, 49 Misc. 2d 300 (relinquishment due to Nazis was no more voluntary than relinquishment of property during a holdup). Subsequent possessors therefore cannot transfer valid title to lost or stolen property under German law. The same is true under New York law. *Menzel*, 49 Misc. 2d 300 (a thief conveys no title against the true owner) (quoting Military Government Law No. 59, “Provisions of law for the protection of purchasers in good faith which would defeat restitution

[of Nazi confiscations] shall be disregarded.”) The provisions of Military Government Law No. 59 were incorporated into post-war German compensation and restitution laws that include the presumption that property transfers of Nazi persecutees are presumptively void, i.e. §1(6)1VermG, §51(1)BEG. (SPA-53) The Grosz Heirs brought this German law to the District Court’s attention by letter dated December 1, 2009. (Vol.II, A-428-431).

C. Since New York Presumes Against A Gift or Inheritance and MoMA Bears The Burden of Proving Lawful Title

MoMA claims it took title to *Poet* through a gift or inheritance from the Flechtheims. (Vol.I, A-687-688). In the case of an alleged gift, New York law shifts to MoMA the burden of proving a voluntary transfer during Alfred Flechtheim’s lifetime and MoMA must prove donative intent and actual delivery. *In re Kelly's Estate*, 285 N.Y. 139, 148-49, 33 N.E.2d 62 (1941). New York law never presumes a gift. *In re Bolin*, 136 N.Y. 177, 32 N.E. 626 (1892). Possession by a family member or anyone else 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.

Katzenbach found no record of the Dutch dealer van Lier having authority to auction *Republican Automaton* or *Model*. According to Katzenbach: “Exactly when, where and from whom Weidler acquired the painting [*Poet*] is unknown.”

D. Since MoMA Bears The Burden of Showing Good Title Once a *Prima Facie* Case Is Established, The District Court Committed Reversible Error By Denying The Grosz Heirs Discovery of Documents Necessary To Refute MoMA's Proposed Defenses

MoMA's purported art history experts propound the following theories:

- (1) the Nazi-era liquidation of Flechtheim's gallery was not a spoliation (Vol.II, A-143);
- (2) Charlotte Weidler was an anti-Nazi heiress of Flechtheim (Vol.I, A-687-688);
- (3) the Dutch auctions of Flechtheim's inventory were legitimate (Vol.I, A-697-698);
- (4) Valentin was a legitimate art dealer, rather than a Nazi agent (Vol.II, A-83).

Applying New York's presumptions, the District Court should have permitted discovery into artworks in MoMA's collection that came from Flechtheim, Weidler and Valentin to permit the Grosz Heirs to demonstrate that (1) other works from Flechtheim's inventory passed through Nazi channels without compensation to Flechtheim or Grosz rebutting MoMA's defense that Flechtheim's liquidation was legitimate; (2) Weidler peddled other Nazi-sourced works and stole Paul Westheim's collection, part of which is now at MoMA, rebutting MoMA's claim that she was a reputable anti-Nazi; and (3) Valentin bought artworks from the Nazi Propaganda Ministry for MoMA, remitted the funds to the Nazi Reich and transacted in artworks taken from persecuted Jews, including Flechtheim.

Although the Grosz Heirs proffered a list of works coming from Flechtheim's 1933 inventory in MoMA's collection, no documents were provided. (Vol.II, A-214).

MoMA's experts were given free reign in MoMA's archives to select whatever documents they wanted. The Grosz Heirs' expert requested access to documents permitting him to analyze the provenance path of Flechtheim's 1933 inventory, MoMA's transactions with Weidler and Valentin, and other artworks from the Dutch source. The Grosz Heirs were denied all of these documents. For any historian to arrive at sound conclusions in conformance with accepted scholarly practices, it is necessary in provenance research to look at all available records of an art dealer or collector to determine the sources and paths of the artworks. (Vol.I, A-591). MoMA's stated policy is to provide provenance documents relating to artworks in its collection to all "serious researchers".

Under Rule 26, MoMA should have provided the Grosz Heirs with this discovery, which is relevant to MoMA's defenses. This Court should remand with an instruction to either direct MoMA to provide the discovery sought, or to strike MoMA's defenses.

E. The District Court's Premature Credibility Determinations Make Reassignment Appropriate

The District Court committed reversible error by making a series of premature credibility determinations. It is a matter of established history of which a court may take judicial notice that when Adolf Hitler came to power in March

1933 he immediately stripped Jews of all legal rights and that Jews were systematically targeted with boycotts, threats of violence, attacks, and massive expropriation. Fed. R. Evid. 201. (Vol. II, A-497-513).

The Complaint alleges that the Paintings belonging to George Grosz and left with Flechtheim in 1933 were stolen. (SPA-6). The District Court improperly speculated that certain documents attached to the Complaint “suggest” that Flechtheim’s problems were his own fault. (“These documents suggest that Flechtheim’s liquidation was precipitated by his acute financial troubles, going back as far as 1931, before the Nazis came to power.”) (SPA-8); (“Notwithstanding his financial missteps, Flechtheim continued to consign Grosz’s works on an ad hoc basis until his death in London in 1937”). (SPA-9)

The District Court’s skepticism remained impervious even after the Grosz Heirs proffered evidence showing that independent scholars and experts had concluded that Flechtheim’s gallery was Aryanized. (Vol.I, A-600-601; Vol.II, A-187-214; 205). The District Court heaped ridicule upon the Grosz Heirs’ allegations, labeling them “speculation” and characterizing them as being based on “rank hearsay”. (SPA-8; 11) Despite having this evidence of independent scholarship brought again to its attention on a motion to reconsider, the District Court refused to vacate the decision blaming Flechtheim’s “financial missteps” for the disappearance of this art collection. (Vol.I, A-492-518; Vol.II, A-187-213) and

instead accused the Grosz Heirs of having tried to “obliquely” argue that there should be a Holocaust exception to New York’s statute of limitations. (SPA-44). No such argument was ever made.

The District Court’s observations about Flechtheim are premature at best. It is clear that the District Judge has formed premature determinations as to the credibility of the allegations that are so deep-seated as to create the appearance of a lack of partiality. By repeatedly mischaracterizing the record to the detriment of the Grosz Heirs, by adopting an adverse view of the claims of the true owners in the face of Fed. R. Civ. P. 12(b)(6), which mandates that well-pleaded facts be assumed true, and by turning New York’s law of presumptions on its head in its attacks on the Grosz Heirs’ claims to the Paintings, the District Judge has shown a lack of partiality warranting reassignment.

Where a district judge makes premature credibility determinations, reassignment to a new judge is warranted to preserve the appearance of justice. *Cullen v. United States*, 194 F.3d 401, 407-08 (2d Cir. 1999). Where a judge has made detailed findings based on evidence erroneously admitted or factors erroneously considered, the circumstances sometimes are such that upon remand he or she either cannot reasonably be expected to erase the earlier impressions from his or her mind or may tend to lean over backwards or overreact in an effort to be fair and impartial. A new fact-finder would not labor under any such

handicap. *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977). The seriousness of this problem in any particular case will depend upon a number of factors, including the nature of the proceeding, the firmness of the judge's earlier-expressed views or findings, and the reasons for the reversal. *Robin*, 553 F.2d, 10. Even where there is no personal bias of the district judge, remand to a different judge may better satisfy “the appearance of justice”. *United States v. Leung*, 40 F.3d 577, 587 (2d Cir. 1994). In determining whether to reassign the case to a different judge on remand, this Circuit considers the following factors

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 142 (2d Cir. 2007) quoting *Robin*, 553 F.2d, 10).

All three factors favor reassignment. *First*, the District Court’s reliance on inadmissible evidence such as the Lowry Letter and the unwarranted expression of clearly negative views of the allegation that Flechtheim was spoliated would be very difficult for the District Judge to put out of her mind. *Second*, given the District Court’s strong negative feelings regarding Flechtheim’s “financial missteps” a perception has been created that the District Court is hostile to the

plaintiffs' claims. *Third*, the matter was resolved at the motion to dismiss stage without any personal appearances before the District Judge, so little or no duplication would occur. For the foregoing reasons this matter should be reassigned to a different judge on remand.

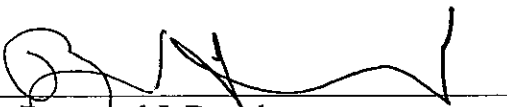
CONCLUSION

The Grosz Heirs consented to MoMA's possession of the Paintings to permit a provenance investigation. MoMA's possession of the Paintings during the investigation was entirely lawful, and would have been during a good-faith investigation into title even if the Grosz Heirs had not consented. The District Court erred by looking to materials extraneous to the Complaint to contradict the Complaint's allegation that a refusal occurred on April 12, 2006, compounding the error by relying on inadmissible settlement communications. Implying a "refusal" was contrary to New York substantive law requiring a refusal to be authorized and unequivocal, was procedurally inappropriate because it resolved disputed issues of fact, and even if there had been a refusal, the continued agreement to investigate mooted it. The District Court exhibited a prejudgment of the credibility of the Complaint's allegations by unwarranted attacks on the evidentiary basis for the allegations, by repeated mischaracterizations of the record, and by its persistent, openly-expressed skepticism of the allegations of Nazi spoliation of a Jewish art dealer, despite being confronted with contrary evidence. For the foregoing reasons,

the Judgment should be vacated and the case reassigned on remand with instructions to permit discovery into documents relating to Flechtheim, Valentin and Weidler, or, in the alternative, strike MoMA's defenses. and to grant leave to amend the complaint.

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