

Now comes the Counterclaim-Plaintiffs Professor Julius H. Schoeps (“Professor Schoeps” or “Schoeps”), Edelgard von Lavergne-Peguilhen (“Ms. Lavergne-Peguilhen” or “Lavergne-Peguilhen”), and Florence Kesselstatt (“Dr. Kesselstatt” or “Kesselstatt”), in their personal capacities and by their attorneys, BYRNE GOLDENBERG & HAMILTON, PLLC, for their Counterclaim against Counterclaim-Defendants the Museum of Modern Art (MoMA) and the Solomon R. Guggenheim Foundation (Guggenheim Foundation), and herein allege upon

knowledge as to their own acts and upon information and belief as to the acts of others:

INTRODUCTION

1. Paul von Mendelssohn-Bartholdy (Mendelssohn-Bartholdy) was a wealthy Berlin banker of Jewish descent who lost many artworks in Nazi Germany as a direct and intended consequence of Nazi persecution, through forced consignments and either duress sales or thefts. Accordingly, no good title to these works was ever transferred to subsequent possessors, and Mendelssohn-Bartholdy's heirs and assigns are the true owners.

2. This Counterclaim seeks the restitution of two paintings that Mendelssohn-Bartholdy lost in Nazi Germany: (a) Pablo Picasso's painting *Boy Leading a Horse*, oil on canvas, approximately 220 x 130.6 cms., completed approximately 1906 (*Boy Leading a Horse*), currently located at MoMA; and (b) Pablo Picasso's *Le Moulin de la Galette*, oil on canvas, approximately 88.2 x 115.5 cms., completed approximately 1900 (*Le Moulin de la Galette*), currently located at the Solomon R. Guggenheim Museum (Guggenheim Museum), which is owned and operated by the Guggenheim Foundation. The Guggenheim Foundation and Guggenheim Museum may be referred to jointly as the "Guggenheim." *Boy Leading a Horse* and *Le Moulin de la Galette* may be referred to jointly as the "Paintings." MoMA and Guggenheim may be referred to jointly as the "Museums."

3. Mendelssohn-Bartholdy died in Nazi Germany in May 1935. He was married to Elsa von Mendelssohn-Bartholdy (Elsa) at the time of his death, and was also survived by four sisters: Kathe Wach; Enole von Schwerin; Charlotte Hallin; and Marie Busch. Marie Busch was Schoeps' grandmother. Mendelssohn-Bartholdy left all of his estate in varying interests to his widow, Elsa, and his sisters. In 1935, a Certificate of Inheritance was issued reflecting that his heirs were his widow (life estate) and surviving sisters (residual estate).

4. Counterclaim-Plaintiffs are proceeding on alternative theories of recovery and inheritance, which is necessary due to ambiguities regarding ownership of the Paintings which came about due to the Nazi persecution suffered by both Paul von Mendelssohn-Bartholdy and Elsa because of Mendelssohn-Bartholdy's Jewish background, as discussed immediately below.

5. Paul von Mendelssohn-Bartholdy had accumulated an impressive art collection at the time of his marriage to Elsa in 1927, including the Paintings and many other works by prominent artists. There is no evidence in or around 1927 that Mendelssohn-Bartholdy transferred any part of his art collection to Elsa at that time.

6. Mendelssohn-Bartholdy never sold any art before January 1933, when the Nazis came to power. Then, in 1934, after suffering more than a year of unrelenting Nazi persecution, Mendelssohn-Bartholdy began selling integral parts of his collection, including many of his most valuable paintings. For example, in or around October 1934, Mendelssohn-Bartholdy placed on consignment for sale the Paintings and three other Picasso artworks with art dealer Thannhauser. Mendelssohn-Bartholdy alone dealt with Thannhauser regarding these artworks.

7. On February 8 1935, Mendelssohn-Bartholdy executed a "Contract for the Disposition of Property," which under German law is an alternative to a Will. In his Contract for the Disposition of Property, Mendelssohn-Bartholdy inserted a statement that he had given his "paintings" to Elsa as a wedding gift in 1927. Upon information and belief, Mendelssohn-Bartholdy inserted this provision in his Contract of Inheritance to protect his artworks from Nazi predation, and in fact Mendelssohn-Bartholdy never had given such a gift to his wife. In addition, even if this bequest created an *inter vivos* gift of Mendelssohn-Bartholdy's art collection to Elsa as of February 8, 1935, Mendelssohn-Bartholdy did not intend to transfer to Elsa art that he had already sold or that he had placed on consignment for sale in his name. Therefore, recoverable artwork that Mendelssohn-

Bartholdy lost in the Nazi period would have been “choses in action” that were part of Elsa’s life estate after Mendelssohn-Bartholdy’s death in 1935, and then became part of Mendelssohn-Bartholdy’s residual estate inherited by Professor Schoeps and the other heirs of Mendelssohn-Bartholdy’s sisters at the time of Elsa’s death in 1986.

8. In the alternative, if Mendelssohn-Bartholdy’s Contract for the Disposition of Property created a transfer of the Paintings to Elsa as of 1927 or as of February 8, 1935 (the date of the Contract), then the owners of the Paintings are Elsa’s heirs, Ms. Lavergne-Peguilhen and Dr. Kesselstatt.

9. In any event, the heirs of Mendelssohn-Bartholdy’s sisters as well as Elsa’s heirs are aware of their competing ownership claims to the Paintings, but have decided to jointly pursue restitution of the Paintings.

10. In violation of the affirmative fiduciary duties that the Museums owe the people of New York and the U.S. as charitable, tax-exempt entities and public trustees, the Museums acquired the Paintings in reckless disregard of the likelihood that they may have been lost as a direct and intended consequence of Nazi persecution either in prototypical forced sales or by theft. Accordingly, the Museums never entertained a reasonable, good faith, or legally valid expectation or reliance interest that they owned either Painting or that the true owners would not come forward at any time and seek to reclaim them.

THE PARTIES

11. Counterclaim-Plaintiff Professor Julius H. Schoeps is an individual residing in Berlin, Germany. Professor Schoeps is the director of the Moses Mendelssohn Center for European-Jewish Studies at the University of Potsdam in Potsdam, Germany. Schoeps is a tenured professor and is one of the founders of the University of Potsdam. Schoeps is Paul von

Mendelssohn-Bartholdy's great-nephew, and German court records establish that he is an heir to 12.5% of the estate of Paul von Mendelssohn-Bartholdy. Schoeps brings this action in his personal capacity as an heir of Mendelssohn-Bartholdy. In addition, Mendelssohn-Bartholdy's sisters and widow, Elsa, are all deceased. All of the living heirs of Mendelssohn-Bartholdy's sisters (Kathe Wach, Enole von Schwerin, Charlotte Hallin, and Marie Busch) are aware of this litigation and currently do not wish to participate in it.

12. Counterclaim-Plaintiffs Ms. Lavergne-Peguilhen and Dr. Kesselstatt are individuals residing in Munich, Germany. They are the sole heirs of Elsa von Mendelssohn-Bartholdy, who died in Switzerland in 1986. Dr. Kesselstatt is the adopted daughter of Elsa, and Ms. Lavergne-Peguilhen is Elsa's niece.

13. Upon information and belief, counterclaim-defendant MoMA is and at all relevant times was a not-for-profit New York education corporation, organized and operated under the laws of the State of New York as an art museum open to the public, with its principal place of business located at 11 West 53rd Street, New York, New York 10019-5497.

14. Upon information and belief, counterclaim defendant the Solomon R. Guggenheim Foundation is and at all relevant times was a not-for-profit New York education corporation, organized and operated under the laws of the State of New York. The Solomon R. Guggenheim Foundation owns and operates the Guggenheim Museum, and has its principal place of business at 1071 Fifth Avenue, New York, New York 10128.

15. The Museums are tax-exempt organizations under ' 501(c)(3) of the Internal Revenue Code (26 U.S.C. ' 501(c)(3)). As charitable, tax-exempt entities, the Museums operate as public trustees and owe the same fiduciary duties of loyalty and care to the public that the trustee of a private trust owes the trust beneficiaries. These duties include taking affirmative precautions to

ensure that the trust has valid legal ownership of any asset that the trust acquires, and that the trust acquires only such assets as are appropriate for the specific purposes and objectives of the trust. The Museums must operate both according to the law as well as clarion public policies of the U.S. and New York State. These policies include the return to rightful owners of artworks that were stolen or lost as a direct and intended consequence of Nazi persecution. As tax-exempt entities, the Museums are forbidden to operate in a manner that violates the law, such as by abdicating their fiduciary duties as public trustees to take affirmative precautions against acquiring stolen or Nazi-confiscated artworks for their publicly-supported collections. In addition, the Museums are prohibited from operating in a manner that violates public policy by encouraging or facilitating criminal activity, such as trafficking in stolen or Nazi-confiscated artworks or illicit cultural property.

JURISDICTION & VENUE

16. This Court has jurisdiction over the subject matter of the claims set forth hereunder pursuant to federal diversity jurisdiction under Article III, Section 2 and Article I, Section 9 of the United States Constitution, and under 28 U.S.C. § 1332 because the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and there is complete diversity of citizenship. Counterclaim-Plaintiffs Professor Schoeps, Ms. Lavergne-Peguilhen, and Dr. Kesselstatt are residents and citizens of a foreign state, the Federal Republic of Germany, and the Museums reside in the State of New York.

17. This Court has personal jurisdiction over each of the Museums under the doctrines of general jurisdiction, based on their substantial and continuous contacts with New York, the forum state, and their offices located in this state, and, alternatively, based on specific personal jurisdiction

because the substance of this case relates to the Museums' business activities, that is, the wrongful continued possession of the Paintings in New York and within this judicial district, which activities constitute, at least in part, their actions, or failures to act, leading to the filing of this Counterclaim.

18. The Court also has *in rem* jurisdiction to determine claims of ownership to property located within this State.

19. Venue is proper in this judicial district under 28 U.S.C. § 1391(a) because the Museums reside in this judicial district, a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, and the properties that are the subject matter of this action -- the Paintings -- are situated in this judicial district.

SUMMARY AND OVERVIEW

The Official Policies of Nazi Germany to Politically Persecute and Economically Devastate Germany's Jews Compelled Paul von Mendelssohn-Bartholdy to Begin His Efforts to Sell His Artworks Under Duress in Berlin

20. Paul von Mendelssohn-Bartholdy was born on September 14, 1875 in Berlin to a famous German family of Jewish descent. The composer Felix Mendelssohn, and the Enlightenment philosopher, Moses Mendelssohn, were members of this illustrious family, which distinguished itself in the arts, business, finance and philosophy. Family members founded Mendelssohn & Co. bank in 1795. Mendelssohn & Co. had become one of the largest private banks in Germany when the National Socialist German Worker's Party ("Nazis" or "Nazi party") came to power in January 1933.

21. Paul von Mendelssohn-Bartholdy was part owner and co-manager of Mendelssohn & Co. Mendelssohn-Bartholdy's inheritance and success as a private banker afforded him a lifestyle in Berlin befitting a man of dynastic wealth. Mendelssohn-Bartholdy lived in a downtown mansion near the Reichstag Building at Alsenstrasse 3 & 3a (Alsenstrasse) with his wife and a large staff that maintained the premises, and spent summers at a sprawling country estate named Gutshaus Boernicke (Boernicke). Mendelssohn-Bartholdy also was the Royal Consul General for Denmark,

and held many other prestigious social and professional positions.

22. In addition, before the Nazi takeover of Germany, Mendelssohn-Bartholdy owned one of the great European private art collections, which included many paintings by Pablo Picasso and Vincent van Gogh, as well as works by Manet, Renoir, Monet, Degas, Tiepolo and others.

23. Paul von Mendelssohn-Bartholdy based his self-identity in material part upon his status as a preeminent collector of modern art. Upon information and belief, Paul von Mendelssohn-Bartholdy never sold, or attempted to sell, **any** art before the Nazis came to power in 1933.

24. When Adolf Hitler became Chancellor of Germany on January 30, 1933, Mendelssohn-Bartholdy became an immediate target of persecution. As a wealthy private banker from a prominent Jewish family living in a mansion in downtown Berlin close to the Reichstag building, Mendelssohn-Bartholdy epitomized everything that the Nazis hated. And he suffered the full brunt of Nazi abuse and torment from January 1933 until his untimely death of a heart attack in May 1935.

25. The Nazis resented private Jewish-owned banks like Mendelssohn & Co., which they blamed for Germany's economic misfortunes and loss of World War I. After several months of Nazi rule, many cities and districts refused to do business with Jewish-owned banks. As a result, these banks lost the municipal bond business, which was an important source of revenue for private banks. Accordingly, the decline of Jewish-owned banks began almost immediately after the Nazi takeover. Starting in late 1933, the Nazis discussed summarily extinguishing all Jewish-owned banks. Nazi intimidation, pressure, and rhetoric led Mendelssohn & Co. -- like other Jewish-owned banks -- to fear that the Nazis would terminate them at any moment.

26. Official Nazi policies wreaked havoc upon Paul von Mendelssohn-Bartholdy. In a period of less than two and one half years, Mendelssohn-Bartholdy: sustained significant banking losses because Mendelssohn & Co. was a Jewish-owned bank; suffered a precipitous decline in personal net worth; lost prestigious and invaluable positions in business, professional, and social organizations; fled his spacious downtown home for a garden house out of fear of the Nazis; had an "Aryan" employee quit under Nazi party pressure because the Nazis objected to the employee

working for a Jew; agreed to surrender land he owned to the Nazi government under apparent Nazi pressure; placed financial encumbrances (Grundschulden) on both his residences to protect them from Nazi expropriation; and, as a Jew, was designated an “alien” under Nazi citizenship laws (January 1934). Finally -- and consistent with his debilitated status and desolate future -- Mendelssohn-Bartholdy began selling into a depressed market many prized paintings from his extraordinary collection.

27. In or around October 1934, Mendelssohn-Bartholdy placed on consignment for sale with Berlin art dealer Justin K. Thannhauser the Paintings along with three other Pablo Picasso artworks: *The Absinthe Drinker (Angel Fernandez de Soto)*(1903); *Portrait of Mme. Soler* (1903); and *Head of a Woman* (1903). Mendelssohn-Bartholdy made the consignments as a direct and intended consequence of the unremitting Nazi persecution set forth in the preceding paragraph. In addition, Mendelssohn-Bartholdy acted personally and without the assistance or knowledge of any other family member in his attempts to sell the artworks through Thannhauser.

28. In or around October 1934, Thannhauser attempted to sell the five Picasso artworks owned by Mendelssohn-Bartholdy at an exhibition in Buenos Aires, Argentina. No sales were made.

29. Following the failed attempt to sell Mendelssohn-Bartholdy’s Picasso artworks in Buenos Aires, Thannhauser either (a) purchased them from Mendelssohn-Bartholdy for a price far below market value, or (b) stole the Paintings.

30. As noted, Mendelssohn-Bartholdy never sold **any** works from his private collection until after the Nazis came to power. Then -- precipitously -- and only after nearly two years of unrelenting and intensifying Nazi persecution, he began the process of selling integral components of his collection which included many of his gems into a depressed market that was ever more saturated with artworks from other Jewish collectors reeling from Nazi persecution. That Mendelssohn-Bartholdy, who derived immense personal fulfillment from his status as a prominent collector of modern art, let go so many valuable paintings under these circumstances -- and only after discriminatory Nazi policies and relentless pressure had devastated him financially,

professionally and socially -- confirm that Nazi persecution alone induced these transactions, and that his heirs are the true owners of the Paintings under New York and U.S. law.

31. After Paul von Mendelssohn-Bartholdy relinquished *Boy Leading a Horse* to Thannhauser in Nazi Germany, Thannhauser sold it to William S. Paley in 1936 in Switzerland in a manner, as discussed infra, that was overtly suspicious and that put Paley on clear notice of the likelihood that the *Boy Leading a Horse* had been lost due to Nazi persecution. Paley was not a good faith purchaser. Thannhauser had Albert Skira (a notorious trafficker in Nazi-looted art) make the sale to Paley in Switzerland (a country bordering Nazi Germany that was infamous for traffickers in Nazi-confiscated property) for an artificially low price after the infamous Nuremberg Laws were in effect in Germany. When Paley asked Skira who the owner of *Boy Lead a Horse* was, Skira refused to tell him.

32. Paley returned *Boy Leading a Horse* to New York after completing his purchase from Skira. In or around 1964, Paley executed papers purportedly donating *Boy Leading a Horse* to MoMA, but retained a supposed life estate for himself. Paley died in 1990, and MoMA then acquired purported full ownership of *Boy Leading a Horse*. MoMA -- ignoring its fiduciary duties to the public as a tax-exempt charitable entity and public trustee to take affirmative precautions against introducing Nazi-confiscated, stolen, or other contraband artworks into publicly-supported collections -- accepted Paley's gift into its collection in reckless disregard of the provenance of the artwork that strongly suggested that Mendelssohn-Bartholdy lost it due to Nazi persecution. Accordingly, MoMA never had a commercially reasonable, good faith, or legally defensible expectation or reliance interest that it had acquired good title to *Boy Leading a Horse* or that the true owners would not step forward to reclaim it.

33. In or around 1940, Thannhauser emigrated to the United States. He settled in New York, and arranged for *Le Moulin de la Galette* to be brought to New York. *Le Moulin de la Galette* has remained in New York for most of the time since then.

34. In or around 1976, Thannhauser passed away and left *Le Moulin de la Galette* as a bequest to the Guggenheim. In or around 1978, the Guggenheim -- in similar violation of its

fiduciary duties as a public trustee -- accepted Thannhauser's gift into its collection in reckless disregard of the provenance of *Le Moulin de la Galette* that strongly suggested that Mendelssohn-Bartholdy lost it due to Nazi persecution. Accordingly, the Guggenheim never had a commercially reasonable, good faith, or legally defensible expectation that it had acquired good title to *Le Moulin de la Galette* or that the true owner would not step forward to reclaim it.

The Heirs of Mendelssohn-Bartholdy's Sisters and the Heirs of Elsa Demanded the Return of the Paintings on November 1, 2007, and the Museums refused to return The Paintings on December 7, 2007

35. On November 1, 2007, the heirs of Mendelssohn-Bartholdy's sisters and the heirs of Elsa, through their attorneys, demanded the return of the Paintings. The Museums, through their attorneys, refused to return the Paintings on December 7, 2007.

BACKGROUND: NAZI PERSECUTION OF THE JEWS

Nazi Persecution of Jews Became Official State Policy in 1933, and intensified up to the time of Paul von Mendelssohn-Bartholdy's death in May 1935

36. The Nazis' campaign to banish Jews from the economic life of Germany began in earnest immediately after Hitler became Chancellor in January 1933 and was inexorable. In the first months after January 1933, the Nazi government promulgated more than 400 discriminatory laws and decrees against its Jewish citizens. On April 1, 1933 the Nazis orchestrated a boycott of Jewish businesses with demonstrations in the streets of Berlin. On April 7, 1933 Germany enacted the Law for the Restoration of the Professional Civil Service which expelled "non-Aryans" from their positions as instructors in all public educational institutions, as officials of public works, public banks, insurance companies, as employees of public or semi-public agencies, and from other civil service positions. In May 1933, Germany revoked the licenses of non-Aryans as tax consultants, judges, professors, and as instructors and lecturers in universities and colleges. Jews were later expelled from professions, trades and educational institutions.

37. In January 1934, citizenship laws divided the German population into four categories.

Jews were placed in category 4 as “aliens.”

38. In May 1934, the Nazi Government transformed the Reich Flight Tax of 1931 (Flight Tax) -- which was originally enacted to prevent the flight of capital abroad -- into a legal instrument for plundering Jewish property. Avraham Barkai, "From Boycott to Annihilation: The Economic Struggle of German Jews 1933-43" (University of New England) (1989) at 99. In essence, the Flight Tax forced emigrants to give 25% of their assets to the German state. The Nazis expanded the scope of the tax by, among other things, reducing the asset value to which the tax applied from 200,000RM to 50,000RM, and making incomes of over 10,000RM subject to the tax. When Nazi tax officials suspected that a person was planning to emigrate, they were authorized to demand that the person provide a security deposit equal to the foreseeable Flight Tax. Further, the Nazis compounded the effects of the Flight Tax by, among other things, requiring prospective emigrants -- even after paying the tax -- to deposit their money in blocked accounts for the purchase of foreign currency. The Nazi Reichsbank then used a confiscatory exchange rate to pay emigrants a fraction of the value of their money. The Reich's Flight Tax created compelling disincentives for Jews with assets -- like Mendelssohn-Bartholdy -- to emigrate and effectively anchored them in German to deal, as best they could, with the ever intensifying hostility and confiscatory policies of the Nazi government.

During the years 1933-1935, the Nazi Government Resolved to Eventually Eradicate Private Jewish-Owned Banks -- Such as Mendelssohn & Co. -- and Officially Monitored Their Decline

39. From the outset, the Nazi government targeted private Jewish-owned banks. The Nazis blamed Jewish-owned banks for Germany's loss in World War I and for its economic depression. But because the Nazis considered Jewish-owned banks too important to the German economy to eradicate immediately, they intimidated, persecuted, and tormented them judiciously, while awaiting the opportune moment to terminate them altogether.

40. The Nazis pressured private Jewish-owned banks persistently, and formally monitored their decline. The Nazi-owned and controlled Reichsbank maintained charts detailing the steady

decline of the five largest Jewish-owned German banks -- including Mendelssohn & Co. One such chart showed that the balance sheet totals of the five largest Jewish-owned banks fell 36.28 percent between 1932 and June 1935.

Increasingly Intensive Official Persecution After 1933 Created Ubiquitous Despair Among Jews, and Informed the Decisions of Many Jewish Private Collectors to Surrender Valuable Artworks into a Depressed Market

41. A sense of hopelessness accompanied the loss of employment and increasing exclusion from German economic and national life, and framed the outlook and decision-making of targeted Nazi victims. As Holocaust historian Avraham Barkai observed, "a consciousness of imminent poverty, which seized hold of more and more previously prosperous individuals, is clearly evident from contemporary publications. And that consciousness says far more about the economic situation of German Jews at the time than any statistical tabulations."

42. The Nazi campaign against "Jewish bankers" was so virulent it extended to Jews who worked for privately owned banks that were not Jewish owned. On April 9, 1933 -- just more than two months after Hitler took power -- Georg Solmsen, a spokesman of the managing board of Deutsche Bank, wrote a letter to the chairman of the supervisory board of that bank describing his concerns as a Jewish banker. Solmsen's feelings were no doubt shared by other Jewish bankers like Mendelssohn-Bartholdy about the aggressive Nazi campaign against them. In particular, Solmsen anticipated the economic and moral extermination of the "Jewish race" in Germany, a "hopeless" situation, and his premonition that he too might eventually become a victim of the Nazi's "cleansing campaign":

Dear Mr. Urbig,

The **expulsion of Jews from the civil service**, now enshrined in law, prompts one to ask what further consequences for the private sector will flow from measures that even the educated section of the population has accepted almost as a matter of course. **I fear we are only at the beginning of a development that is deliberately aimed, in accordance with a well-thought-out plan, at the economic and moral**

extermination of all members of the Jewish race living in Germany . . .
[T]he dead silence that greets the ignominy and shame irremediably
inflicted on those who, albeit innocent, find the foundations of their honor
and livelihood undermined from one day to the next -- **all this points to
a situation so hopeless** that it would be wrong not to look matters in the
face without apply any makeup, as it were . . . I have the feeling that, at the
same time as I seem to be regarded as someone whose work is valued as
an asset and who is perhaps respected as embodying what is now a 70-
year-old tradition, **I too would be dropped as soon as the call came
from outside in a decisive manner that I should be included in the
“cleansing campaign.”**

(Emphasis added).

43. From 1933 on, many artworks that Jewish collectors liquidated in Germany as a consequence of Nazi-induced coercion and pressure swelled the art markets in Switzerland, London, and New York. International art dealers and private collectors profited -- correspondingly -- from the orchestrated financial ruin of Jewish collectors in Nazi Germany during these years.

**NAZI PERSECUTION DEVASTATED PAUL VON MENDELSSOHN-BARTHOLDY
PERSONALLY, PROFESSIONALLY, AND FINANCIALLY AND FORCED HIM TO
SELL THE PAINTING**

44. The official policies of Nazi Germany to politically persecute, economically marginalize, and socially ostracize its Jewish citizens eviscerated Mendelssohn-Bartholdy. Nazi coercion and duress forced him to begin efforts to sell the Paintings and other works from his private collection into a depressed art market engulfed with artworks that countless other victims of Nazi persecution had been forced to relinquish.

45. From when the Nazis assumed power in January 1933 until he died in May 1935, Mendelssohn-Bartholdy:

- (a) sustained significant banking losses from the operation of Mendelssohn & Co., including the "Aryanization" of Akzeptbank, a successful private bank that Mendelssohn & Co. owned in part;
- (b) endured persistent, menacing threats from Nazi banking authorities, beginning in

1934, that Mendelssohn & Co. and other private Jewish-owned banks would be terminated; in early 1934, a Mendelssohn & Co. representative took the extraordinary step of meeting with a government official, the Bank Commissar, and specifically asked if the Jewish-owned banks like Mendelssohn & Co. had any future in the German economy. (The fear of Mendelssohn & Co. was well-founded since, in 1938, the Nazi government "Aryanized" Mendelssohn & Co. and transferred full ownership of the bank's assets to the "Aryan" Deutsche Bank.)

- (c) withstood the intimidation of Nazi authorities, including the investigation of a Jewish manager of Mendelssohn & Co.;
- (d) suffered a precipitous collapse of his personal net worth;
- (e) declined to petition for an entitled reduction of his alimony obligations based upon changed financial circumstances because a public disclosure of his depreciated economic status would have eroded even further the competitive viability of Mendelssohn & Co.;
- (f) agreed to surrender, under Nazi pressure, extensive land from his country estate (Boernicke) to the Nazi Kulturstiftung (Cultural Office);
- (g) placed financial encumbrances (Grundschulden) upon both his residential properties, Alsenstrasse and Boernicke, in an attempt to protect them from Nazi confiscation;
- (h) had his "Aryan" chauffeur, whose family lived with Mendelssohn-Bartholdy at Alsenstrasse in the staff quarters, resign under direct Nazi Party pressure because of Mendelssohn-Bartholdy's Jewish background;
- (i) lost prestigious and invaluable positions in business, professional, and social organizations that constricted his professional opportunities and foretold a bleak economic future, including membership on the boards of directors of the Central Association of the German Bank and Bankers' Profession and of the "Reichsversicherungsgesellschaft für Angestellte," a primary German annuity insurance

institution;

- (j) was compelled to flee his spacious Berlin residence (Alsenstrasse) near the Reichstag building in central Berlin -- the site of intensively vocal anti-Jewish protests -- for a modest "garden house" further way, out of fear of the Nazis;
- (k) in January 1934, was categorized as an "alien" in Germany under Nazi citizenship laws;
- (l) as a practical matter, Mendelssohn-Bartholdy could not leave Nazi Germany because of the onerous "Flight Tax," whose May 1934 amendments meant that Mendelssohn-Bartholdy would have lost a disproportionate amount of his remaining wealth and property -- including Mendelssohn & Co. -- if he decided to flee; and
- (m) finally, and consistent with his diminished station and bleak future -- and consonant with many other formerly prosperous Jewish collectors staggering from Nazi persecution -- Mendelssohn-Bartholdy began selling in a dismal market many prized paintings from his private collection.

46. As a direct result of the unrelenting Nazi persecution set forth above, in or around October 1934 Mendelssohn-Bartholdy consigned the Paintings -- along with three other Picasso artworks -- to Berlin art dealer Justin K. Thannhauser. Thannhauser, through his gallery, either purchased the artworks from Mendelssohn-Bartholdy for a price significantly below fair market value some time before Mendelssohn-Bartholdy's death in May 1935 or, in the alternative, Thannhauser stole the artworks and never paid anything to Mendelssohn-Bartholdy, Mendelssohn-Bartholdy's estate, or Elsa.

47. Thannhauser trafficked in stolen and Nazi-looted art during his career as a dealer. Both during and after World War II, Thannhauser partnered with art dealers such as Nazi Cesar Mange

de Hauke and Albert Skira, both of whom the U.S. State Department and others identified as traffickers in Nazi-looted art. (See, e.g., front page Boston Globe article, dated November 9, 1997, entitled “Murky Histories Cloud Some Local Art,” describing Thannhauser’s attempt to fraudulently sell a painting with de Hauke, copies of relevant pages are attached as Exhibit 1; see also September 18, 2001 letter from the Art Loss Register (ALR) to MoMA regarding *Boy Leading a Horse*, where the ALR states that the name Thannhauser in the provenance “generally does not mean good things,” and Skira is described as a “red flag list name,” a copy of which is attached hereto as Exhibit 2).

48. Indeed, the historical record in this case creates a strong probability that Thannhauser stole the Paintings. As discussed infra, neither Elsa nor any other member of the Mendelssohn-Bartholdy family was aware of Paul von Mendelssohn-Bartholdy’s consignment of the five Picasso artworks to Thannhauser. When Mendelssohn-Bartholdy died unexpectedly in May 1935 of a heart attack, he had no opportunity to give his family an accounting of his affairs or advise them of his consignment or Thannhauser’s possession of the artworks. Thannhauser, then, after a period of time when no one contacted him about the consignment or the artworks in his possession, believed he could steal the art without fear of detection. His actions after Mendelssohn-Bartholdy’s death substantiate this probability. First, as described herein, Thannhauser’s 1936 sale of *Boy Leading a Horse* to William S. Paley in Switzerland reads like a textbook example of a “fencing” operation for stolen merchandise and a conspiracy to traffic in stolen art. (See William S. Paley, *As It Happened, A Memoir by William S. Paley, Founder and Chairman, CBS* (Garden City, New York: Doubleday, 1979), p. 107. Thannhauser -- while peering through a window outside watching the sale go down -- used Swiss art dealer Albert Skira (who later developed a reputation as a notorious trafficker in Nazi-looted art) to make the sale to Paley in Switzerland, already widely known as a

venue for unloading Nazi-looted art. In addition, Skira seemed desperate to make the sale. He and Thannhauser were offering *Boy Leading a Horse* for an artificially low price, and Skira even refused to tell Paley who the owner was. (Id.) Yet, somehow the “modest” price for *Boy Leading a Horse* enabled Skira, Thannhauser -- and possibly another dealer, Rosengart -- to make enough of a profit that it was worth driving the entire length of Switzerland through the Alps to make sure the sale occurred. Within weeks of the sale to Paley in 1936, Thannhauser sold *Portrait of Angel Fernandez de Soto* to M. Knoedler & Co. in New York. Despite requests, Knoedler has been unwilling to provide any information Thannhauser gave them at the time of this sale. Moreover, any time Thannhauser was asked about the provenance of these five significant Picasso artworks he obtained from the well-known Mendelssohn-Bartholdy, Thannhauser was uncharacteristically vague and non-specific. For example, in 1964 when he sold *Madame Soler* to the Pinakothek der Moderne Museum in Munich, Thannhauser provided detailed information regarding the history of *Madame Soler*. However, when it came to past owners (provenance), Thannhauser merely inserted “Sammlung (collection) Paul von Mendelssohn-Bartholdy” without providing any dates -- the only entry on the page with no dates. (See document from Pinakothek der Moderne, given to the museum by Thannhauser in or around 1964, copies of which are attached as Exhibit 3). When Thannhauser donated *Le Moulin de la Galette* and *Head of a Woman* to the Guggenheim, he was equally vague. Thannhauser stated that he acquired *Le Moulin de la Galette* from Mendelssohn-Bartholdy “ca. [around] 1935.” (See copy of Guggenheim records reflecting information provided by Thannhauser, a copy of which is attached as Exhibit 4 & 5). As to *Head of a Woman*, Thannhauser could only provide a range of dates “1935-1936” for his acquisition. (See copy of Guggenheim records reflection information Thannhauser provided to them about *Head of a Woman*, copies of which are attached as Exhibits 5 & 6).

49. In addition, Thannhauser's records make clear that he dealt exclusively with Mendelssohn-Bartholdy regarding the five Picasso artworks that Mendelssohn-Bartholdy placed on consignment with him. There is no mention of Elsa anywhere. Indeed, the Museums' claims that Mendelssohn-Bartholdy gifted all of his art collection to Elsa in 1927 at the time of their wedding is far-fetched. There is no record of such a gift any time near the wedding. Indeed, the only evidence of any Mendelssohn-Bartholdy transfer of art to Elsa is Mendelssohn-Bartholdy's February 1935 Contract for the Disposition of Property, which was a device to protect the Paintings from Nazi predation by creating a false impression that Elsa was the owner from 1927 forward.

50. In any event, whether by an actual forced sale at an artificially low price or a forced consignment followed by Thannhauser's theft, the loss of the Paintings marked a milestone well along the path of the Nazi government's premeditated annihilation of Mendelssohn-Bartholdy's property and private fortune. For example, Mendelssohn & Co. was "Aryanized" in 1938 and all of its assets and buildings were transferred to the "Aryan" Deutsche Bank. Thus, Mendelssohn & Co., founded in 1795 by family members and perhaps Germany's premier private bank at the time of the Nazi takeover, was destroyed. Also, in 1938, Hitler and the Nazis forced Mendelssohn-Bartholdy's widow to sell the downtown mansion at Alsenstrasse for a modest price so that they could proceed with their plan to build "Germania," a proposed group of imperial buildings in downtown Berlin.

FOLLOWING THE WAR, THE U.S. CONSISTENTLY PURSUED POLICIES TO INVALIDATE THE COERCIVE TRANSFERS OF PROPERTY THAT OCCURRED UNDER NAZI AUTHORITY AND TO RESTITUTE SUCH PROPERTY TO RIGHTFUL OWNERS

Military Government Law No. 59 (MGL No. 59) -- the Centerpiece of Post-War U.S. Restitution Policy

51. U.S. policy for the restitution of artworks and other property dislodged from victims of Nazi persecution during the years 1933-45 became crystallized in 1947 when Military Government Law Number 59 (MGL No. 59) was promulgated. 12 Fed. Reg. 7983 (November 29, 1947). MGL

No. 59 announced as its purpose "to effect to the largest extent possible the speedy restitution of identifiable property...to persons who were wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism." § 3.75(a)(1). MGL No. 59 applied in the American "Occupation Zone" of Germany.

52. MGL No. 59 achieved its objectives for restitution through the recurring, operative terms "confiscated property" and "acts of confiscation" which the statute defined broadly. § 376(a). MGL No. 59 established a presumption that any sale of personal property that a Jewish resident of Germany made after Hitler became Chancellor of Germany on January 30, 1933 was an "act of confiscation". See § 375(b) entitled "Article 3: presumption of confiscation."

53. Nazi persecution of its Jewish citizens was so intense and all-encompassing that MGL No. 59 prescribed that the presumption of confiscation could only be rebutted, in the "absence of other factors proving an act of confiscation," where it could be shown that: (a) the transferor was paid a fair purchase price; and (b) the transferor had the free right of disposal of the purchase price. In Germany today, museums typically acknowledge that no Jew had the "free right of disposal of the purchase price" in Nazi Germany, and therefore limit the inquiry as to whether a Jew made the sale within the Nazi period.

54. MGL No. 59 required even persons in innocent possession of confiscated property to return it: "(p)roperty shall be restored to its former owner or to his successor in interest...even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where Law No. 59 provides otherwise."

55. MGL No. 59 established a relaxed evidentiary burden that was specifically calculated to respond to the dislocation and destruction of both the Holocaust and World War II: "(t)his shall particularly apply where the producing of evidence has been rendered difficult or impossible through the loss of documents, the death or unavailability of witnesses, the residence abroad of the claimant, or similar circumstances." § 382(a)(2).

The U.S. Actively and Successfully Promoted the Adoption of MGL No. 59's Restitution Principles As its "Official Policy" to the British and French for Application in Their Respective "Occupation Zones" and in Berlin. Ultimately, the Germans Themselves Incorporated the Restitution Principles of MGL No. 59 Into Their Substantive Law For Application in All of Germany

56. The U.S. actively promoted as its "official policy" the adoption of restitution laws with MGL No. 59's substantive rights for Nazi victims. For example, in 1949, the U.S. National Security Council (NSC) drafted the "*Policies of the Government of the United States of America Relating to the National Security* (NSC Policy Report)." President Truman was the chair of the NSC. In its directive to the U.S. High Commissioner for Germany, the NSC punctuated that MGL No. 59 embodied the official policy of the U.S. to return property to victims of Nazi persecution, and that the High Commissioner should enlist the aid of the British and French to help persuade the German government to enact a restitution law modeled on MGL No. 59:

With respect to internal restitution, **it is the policy of your Government** that persons and organizations deprived of their property as a result of [Nazi] racial, religious, or political discrimination should either **have identifiable property returned to them** or be compensated therefore, . . . **To carry out this policy, you should seek agreement from your British and French colleagues to persuade the German Government** to enact without delay a Uniform Internal Restitution Law, **which should grant to claimants, to the greatest possible extent, all substantive rights now available to them under United States Military Government Law No. 59.**

NSC Policy Report, p. 70. (Emphasis added). Further, on March 15, 1949, the U.S. State Department wrote a letter to the British Ambassador requesting that the British pass a restitution law in their Occupation Zone as soon as possible, noting that "the United States has no reason to doubt that the British Government is basically in accord with [U.S. occupation policy]" that "property taken by the Nazis from their victims should be returned to the rightful owners, their heirs, or successors to the maximum extent possible and within the shortest period of time." (See

March 15, 1949 letter from the U.S. State Department to the Ambassador of Great Britain). As discussed below, the British enacted British Military Law 59 shortly thereafter, modeled after MGL No. 59.

57. Due largely to U.S. efforts, the restitution principles of MGL No. 59 became, in effect, a post-War “common law” for formerly Nazi-occupied Europe, and served as the model for similar restitution legislation among the Allied governments, many countries that the Nazi had controlled, and ultimately Germany itself. For example:

- a. **The Berlin Restitution Law of 1949.** MGL No. 59 was the controlling law for the U.S. Occupation Zone in Germany after 1947, but did not apply to Berlin. Berlin was divided into four “quadrants,” and the U.S., Britain, France and the Soviet Union each controlled a quadrant. To address restitution issues within Berlin, the Allies passed the Berlin Restitution Law of 1949, which is almost identical to Military Law. No. 59. The provisions regarding the “presumption of confiscation” and potential rebuttal thereof are virtually identical.
- b. **Britain and France passed restitution laws in their “Occupation Zones” similar to MGL No. 59.** Britain and France passed laws in their individual German Occupation Zones that were similar to MGL No. 59 and the Berlin Restitution Law. (See British Military Law 59, and currently applicable provisions of French law (article 1, paragraph 1 of order No. 45-770, dated April 21, 1945 and decree No-1344 dated September 30, 1949).
- c. **In the so-called “Treaty of Transition” of 1954, the U.S. and the Allies entered into a Treaty with West Germany making the Allies’ restitution**

law part of German law. In the so-called 1954 “Treaty of Transition,” or Überleitungsvertrag, the Germans agreed to make the Allies’ restitution laws part of the laws of Germany.

d. **German restitution laws and principles are virtually the same as MGL No. 59.**

(1) After the Allies left the Federal Republic of Germany (West Germany), and pursuant to the above-identified Treaty of Transition, the West Germans enacted a restitution statute in or around 1957 that incorporated the restitution principles and presumptions of confiscation for Jewish sellers of property in Nazi Germany contained in MGL No. 59, the Berlin Restitution Law of 1949, and the British and French restitution laws. (See “*Bundesrückerstattungsgesetz*” (BRüG), BGBl. 1957 I, 734).

(2) In 1990, the Communist government of the Democratic Republic of Germany (East Germany) fell, and Germany was reunited. The newly united Germany passed a restitution law, The Property Settlement Act of 1990, that applied to the former East Germany. The Property Settlement Act specifically incorporated the presumption of confiscation provisions contained in the Berlin Restitution Law of 1949 -- which are, of course, virtually the same as MGL No. 59.

58. The restitution principles contained in U.S. MGL No. 59 -- which the U.S. government pioneered and then advocated for acceptance by other countries -- are applied today on a regular basis in Germany, where it is part of German law, and throughout Europe. See, e.g.,

Gentili di Gusieppe v. Musee Du Louvre, Court of Appeals of Paris 1st Division, Section A (1999) (French court applied currently applicable provision of French law similar to MGL no. 59 [article 1, paragraph 1 of order No. 45-770 dated April 21, 1945 and decree No. 1344 dated 30th September 1949], and required the Louvre museum to return five paintings to the heirs of a victim of Nazi persecution); Report Of British Spoliation Advisory Panel In Respect Of A Painting Now In The Possession Of Glasgow City Council, The Right Honourable Sir David Hirst, *Ordered by the House of Commons to be printed 24 November 2004* (British Advisory Panel recommended that Jewish claimants be restituted for paintings lost in a forced sale in Nazi Germany, based on claimants position that “restitution principles adopted by the Allies after the war, epitomised in **British Military Law No 59**, which lays down that it shall be presumed in favour of a claimant that a transaction entered into between January 1933 and May 1945 which involves any transfer or relinquishment of property during a period of persecution by any person who was directly exposed to persecutory measures on racial grounds shall be presumed to constitute an act of confiscation”); Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (2006 Report) (Dutch National Policy, adopted from Ekkart Committee, provides that all sales of works of art by Jewish private persons in Nazi Germany from 1933 onwards “be treated as forced sales, unless there is express evidence to the contrary”).

Under New York choice of law rules, German restitution principles and law -- adopted from the U.S. MGL No. 59 and its progeny -- will apply to the transfer of the Paintings from Mendelssohn-Bartholdy to Thannhauser in Nazi Germany.

59. New York choice of law principles provide that the law that characterizes the nature of a dispossession is that of the place where the dispossession occurred. Kunstsamlungen zu

Weimar v. Elicofon, 536 F.Supp. 829, 839-46 (E.D.N.Y. 1981), *aff'd* 678 F.2d 1150 (2d Cir. 1982); see also Angela Joy Davis, *Beyond Repatriation: A Proposal for the Equitable Restitution of Cultural Property*, 33 UCLA L. Rev. 642 (1985) (discussion of case where New York Attorney General argued for application of MGL No. 59 restitution principles to transfer in Nazi Germany, Abrams v. Sotheby Parke Bernet, Inc., No. 42255, slip op. (N.Y. Sup. Ct. Aug. 15, 1984), where case was settled before issue was resolved; author advocates application of these restitution principles in U.S. courts). In this case, of course, the German laws that apply in the analysis of the transfer of the Paintings from Mendelssohn-Bartholdy to Thannhauser are the German restitution laws that specifically apply to transactions in Nazi Germany. These German laws, of course, were adopted from MGL No. 59 and its progeny.

60. The restitution principles of MGL No. 59 and German law should also apply in this case as the “dominant policy” of the United States. In re Muller’s Estate, 199 Misc. 745, 104 N.Y.S.2d 133 (Sur. Ct. Kings County 1951) (evaluating validity of legacy renunciations by German nationals in 1946, the court stated that it was required to give effect to Military Government Law No. 53, not only by choice of law principles, but because the military law was “an expression of the dominant policy of the United States” and the courts could not impede the full effectuation of the dominant federal policy expressed in the military law). Schoeps has set forth, supra, the efforts of the U.S. to advance the restitution principles of MGL No. 59 and its progeny. In addition, these efforts extended to actions brought in U.S. courts. For example, State Department Press Release No. 296 of April 27, 1949 entitled “Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers” (Press Release), states that it is the policy of the Executive “with respect to claims asserted in the United States for restitution” to relieve American courts “from any restraint upon the exercise of their jurisdiction to

pass upon the validity of the acts of Nazi officials.” Further, tracking in part the language of MGL No. 59, the Press Release repeated "this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls," and stated that “it is this Government's policy to undo the forced transfers and restitute identifiable property to victims of Nazi persecution wrongfully deprived of such property.”

61. The Press Release reproduces in full an April 13, 1949 letter from Jack B. Tate (Tate Letter), the Acting Legal Advisor, U.S. State Department, to the attorneys for the plaintiff in Civil Action No. 31-555 in this Court, that is, the United States District Court for the Southern District of New York. The Tate Letter was also sent to the presiding judge in the case, U.S. District Judge Sylvester J. Ryan, and the attorneys representing all the parties. In referring to the case pending in this Court, the Tate Letter instructs the Court and the parties that MGL No. 59 exemplifies U.S. policy regarding the restitution of Nazi-confiscated property:

Of special importance is Military Government Law No. 59 which shows this Government's policy of undoing forced transfers and restituting identifiable property to persons wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Article 1 (1). It should be noted that this policy applies generally despite the existence of purchasers in good faith. Article 1 (2).

See Bernstein v. N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) (Second Circuit specifically relied on and followed the Press Release and Tate Letter, noting that they contained a “supervening expression of Executive Policy” to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials).

62. Accordingly, under the restitution principles that are part of German law as well as

the consistent and dominant policy of the United States, Mendelssohn-Bartholdy's duress consignment of the Paintings to Thannhauser as a direct result of Nazi persecution, and Thannhauser's later acquisition of the Paintings either by (a) payment to Mendelssohn-Bartholdy far below market value, or (b) theft, were Nazi confiscations, and Mendelssohn-Bartholdy's heirs and assigns are the true owners of the Paintings. In addition, under Schoeps alternative theory that Thannhauser stole the Paintings, under any U.S. or German law Thannhauser did not obtain good title to the Paintings, and under New York law Thannhauser could not transfer good title to any third party.

THE MUSEUMS CANNOT RAISE A PROPER LACHES DEFENSE TO THE MENDELSSOHN-BARTHOLDY HEIRS' CLAIMS

63. The defense of laches has been raised regularly by defendants in stolen art and Nazi-confiscated art cases in New York. See, e.g., Bakalar v. Vavra, 2006 WL 2311113, *3 (S.D.N.Y. 2006), instructing that to establish a laches defense in a Holocaust art restitution action, the defendant must demonstrate: (1) the heirs knew of their claim; (2) they delayed in taking action without excuse; and (3) defendant suffered prejudice as a result. See also Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 321, 567 N.Y.S.2d 623, 628 (1991), where the court ruled that the conduct of both the theft victim and the current possessor of the art will be relevant to any consideration of the equitable defense of laches. Further, laches involves "a fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities," and such issues "are often not amenable to resolution on a motion for summary judgment, let alone a motion to dismiss." U.S. v. Portrait of Wally, A Painting By Egon Schiele, 2002 WL 553532, *22 (S.D.N.Y. 2002) (citing Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d at 321, 567 N.Y.S.2d at 628; and Solomon R. Guggenheim Foundation v. Lubell, 153

A.D.2d 143, 151-52, 550 N.Y.S.2d 618, 623 (1990). In addition, the “unclean hands” of a defendant precludes the application of the laches defense. Uciechowski v. Ehrlich, 221 A.D.2d 866, 634 N.Y.S.2d 251 (App.Div. 3d Dept. 1995). Finally, the application of the laches defense is precluded where imposing it would frustrate public policies. See Manitou Sand & Gravel Co., Inc. v. Town of Ogden, 2005 WL 2312450, *6 (N.Y. Sup. 2005).

64. The Museums cannot raise a valid laches defense because, among other reasons: (a) the Mendelssohn-Bartholdy heirs have not delayed unreasonably in asserting their claim because -- in the exercise of reasonable diligence -- they did not know until they completed their recent investigation that Mendelssohn-Bartholdy lost the Paintings as a direct and intended consequence of Nazi persecution; (b) the Museums have suffered no prejudice attributable to any putative delay of the Mendelssohn-Bartholdy heirs because both Museums have known from inception that they likely were acquiring artworks that were lost as a consequence of Nazi persecution in paradigmatic "forced sales" or that otherwise may have been stolen; (c) the Museums -- whose conduct is relevant in any laches analysis under New York law -- have "unclean hands" because they violated their fiduciary duties as public trustees to take reasonable and informed precautions against introducing stolen or "Nazi-confiscated" artworks into their collections, and knowingly accepted suspicious materials; (d) the strong New York and federal policies that favor the return to rightful owners of artworks lost during the Holocaust and that discourage tax-exempt museums from breaching their fiduciary duties as trustees and from recklessly trafficking in contraband artworks preclude the application of a laches defense in this case.

The Mendelssohn-Bartholdy Heirs have not Unreasonably Delayed Making Their Demands, Since They Were Not Aware of Their Rights to the Paintings until The Efforts of the U.S. Government and State of New York Made Necessary Information Available to Them

Overview and Summary

65. Until 2005, no Mendelssohn-Bartholdy heir knew -- or reasonably should have been aware -- that Paul von Mendelssohn-Bartholdy had sold or otherwise lost the Paintings in Nazi Germany. As discussed infra, Mendelssohn-Bartholdy died suddenly in May 1935 and none of his heirs were aware of the status of the Paintings. Moreover, locating Nazi confiscated art was exceedingly difficult after World War II, since governments and the international art community were unwilling to make their records available for Holocaust survivors and their heirs to examine. Starting in the 1990s, the U.S. government and State of New York spearheaded a campaign to at last make information and documents in government archives and museums worldwide available to potential Holocaust claimants so they could finally investigate possible claims.

66. The efforts of the U.S. government and state of New York resulted, among other accomplishments, in the development of the Nazi-Era Provenance Internet Portal (NEPIP, located at www.nepip.org), which went online in or around September 2003 and provides a searchable registry of objects in U.S. museum collections that changed hands in Continental Europe during the Nazi era (1933-1945). By providing a single point of contact to dozens of U.S. museum collections, NEPIP helps people seeking objects lost as a result of Nazi persecution. Once an item is located on NEPIP, a claimant may then go by hyperlink to individual museum websites where specific provenance information is found. The NEPIP website and the hyperlinked individual museum provenance websites may be referred to jointly as the “NEPIP System”.

67. In 2005, Schoeps discovered on the NEPIP System that Mendelssohn-Bartholdy transferred *Boy Leading a Horse* to Thannhauser in Nazi Germany. This launched an

investigation which revealed that Mendelssohn-Bartholdy lost many invaluable artworks before his death in Nazi Germany as a direct result of Nazi persecution.

No Mendelssohn-Bartholdy Heir Knew -- or Reasonably Should Have Known -- of Mendelssohn-Bartholdy's Loss of Art in Nazi Germany Until Relevant Information Was Discovered on the NEPIP System in 2005

68. No Mendelssohn-Bartholdy heir was aware that Mendelssohn-Bartholdy had lost Picasso artworks -- or any other paintings -- to Thannhauser in Nazi Germany until the information was discovered on the NEPIP System in 2005.

69. Mendelssohn-Bartholdy's widow, Elsa von Mendelssohn-Bartholdy (Elsa), was unaware of the fate of the five Picasso artworks Mendelssohn-Bartholdy relinquished under duress to Thannhauser. Mendelssohn-Bartholdy had owned the five Picasso artworks for a long period of time prior to marrying Elsa. Mendelssohn-Bartholdy was approximately 23 years older than Elsa, and was very protective of her. They had a very traditional marriage. Mendelssohn-Bartholdy dealt exclusively with all issues relating to money or finance. Moreover, as Nazi persecution savaged his estate, Mendelssohn-Bartholdy attempted to shield Elsa from the extent of his losses. Based on their customary mode of interaction, Mendelssohn-Bartholdy would not have told Elsa about his attempts to sell the Paintings. Nor did Mendelssohn-Bartholdy leave any records by which his estate could have made these determinations. Moreover, Elsa never made any statements to anyone for the rest of her life that would indicate that she was aware of the loss of the five Picasso artworks to Thannhauser.

70. Paul von Mendelssohn-Bartholdy died of a heart attack on May 10, 1935. His sudden, unexpected death prevented him from giving his wife an accounting of his business affairs. In fact, Elsa was shocked at the extent of Mendelssohn-Bartholdy's financial decline when she was forced