

to take over his affairs.

71. Mendelssohn-Bartholdy's sisters had no knowledge of the fate of the five Picasso artworks Mendelssohn-Bartholdy relinquished to Thannhauser. They did not live with Mendelssohn-Bartholdy. They were suffering under Nazi persecution themselves, and at least one had left Nazi Germany at or around this time. Another was eventually sent to a concentration camp. Mendelssohn-Bartholdy placed the artworks on consignment in or around October 1934. Moreover, Mendelssohn-Bartholdy's role as a protector of the family and its assets made him disinclined to reveal financial distress, so he would have had no incentive to advise his sisters of the circumstances of his sale of art.

72. None of Mendelssohn-Bartholdy's sisters ever made any statement that would indicate any awareness of the fate of the five Picasso artworks Mendelssohn-Bartholdy lost to Thannhauser. As a result, none of the current Mendelssohn-Bartholdy heirs had any knowledge of the paintings Mendelssohn-Bartholdy consigned to Thannhauser in Nazi Germany until relevant information was discovered on the NEPIP System in 2005, nor could they reasonably be expected to have obtained such information.

**A "Wall of Silence" Has Denied Holocaust Claimants -- Such as the Mendelssohn-Bartholdy Heirs -- Access to Information that Would Allow Them to Investigate and Reclaim Lost Property**

73. Until recently, Holocaust claimants had great difficulty identifying and investigating artworks lost as a consequence of Nazi persecution because documents and information relating to such losses were inaccessible. This historical deficiency has been widely recognized. For example, on July 27, 2006, Ambassador Stuart E. Eizenstat testified before Congress that before the 1990's there was a "**Wall of Silence**" regarding information and documents necessary to discover and develop claims for Holocaust art recovery. (See July 27, 2006 testimony of Stuart E. Eizenstat,

former Special Representative of the President and Secretary of State for Holocaust-era Issues, on "The Status of Art Restitution Worldwide," before the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology, Committee on Financial Services, U.S. House of Representatives (Eizenstat Testimony).

**The U.S. Congress, U.S. Department of State, and State of New York Began Intensive Efforts in the Late 1990's to Tear Down the "Wall of Silence," that is, To Make Information and Documents Available to Holocaust Claimants so that They Could Develop and Prosecute Claims for the Recovery of Property Lost During the Nazi Era**

74. In the late 1990's, the U.S. Congress, U.S. Department of State, and the State of New York began intensive efforts to advance Holocaust art restitution and -- as a crucial first step -- to give Holocaust victims and their heirs access to information and documents that were previously unavailable so they could develop claims to recover their property. For example:

- a. In 1998, Congress passed three statutes providing Holocaust claimants with access for the first time to extensive information and documents in the possession of federal agencies and tax-exempt organizations. The "The Nazi War Crimes Disclosure Act" (Disclosure Act), Public Law No. 105-567, 114 Stat. 2865 (1998) made available to victims of Nazi persecution records in the possession of the U.S. government concerning, among other things, assets confiscated during the period 1933-1945. "The Holocaust Victims Redress Act" (Redress Act), Public Law No. 105-158, 112 Stat. 15 (1998) provided five million dollars for archival research and translation of documents to assist Holocaust art restitution. "The U.S. Holocaust Assets Commission Act of 1998" (Commission Act), Public Law No. 105-567 established a Presidential Commission which, among other things, investigated

and reported on the fate of any Nazi-confiscated assets that came into the possession or under the auspices of the U.S. government.

- b. In 1998, at Congressional hearings, U.S. Congressman James Leach pressured a representative of the Association of American Museum Directors (AAMD) to have that organization formulate guidelines for dealing with Nazi-confiscated art in U.S. museum collections. In response, the AAMD created guidelines in June 1998 calling for U.S. museums to perform provenance (ownership history) research and publish information relating to art that may have a Nazi-era provenance (“AAMD guidelines”);
- c. In 1998, the U.S. Department of State organized international meetings and conferences on Nazi-era art, met with foreign officials, and lobbied them intensely to facilitate Holocaust art recovery in their countries and accept the AAMD guidelines calling for provenance research and the publication of information helpful to Holocaust claimants. As a result, many European countries began publishing art provenance information, releasing documents and archival materials from the Nazi era, passing laws facilitating art restitution, and searching for Nazi victims and their heirs when looted art was located;
- d. In 1998, the Department of State organized the Washington Conference on Holocaust Era Assets (Washington Conference), for the purpose, among other things, of promoting the release of Nazi-era information and archives worldwide, and of gaining international acceptance of the AAMD guidelines. Officials from 44 countries attended. Upon meeting some initial resistance to acceptance of the AAMD guidelines, State Department representatives re-drafted

the guidelines and eventually succeeded in having all 44 countries at the Washington Conference accept the re-packaged AAMD principles, which became known as the “Washington Principles”; the Washington Principles led to increased worldwide publication of information relating to art lost during World War II, and the release of records to assist Holocaust claimants to recover art;

- e. The Presidential Commission, created by the Commission Act of 1998, negotiated an agreement with the AAMD and the American Association of Museums (AAM) that committed member museums to research extensively artworks in their collections to identify those that may have been confiscated as a proximate consequence of Nazi persecution and to publish the provenance of these artworks. This agreement led to the creation of the NEPIP System. MoMA’s Provenance Research Project (PRP) web pages are part of the NEPIP System, and the PRP is connected to NEPIP by hyperlink. Schoeps, through his agents, discovered on MoMA’s PRP that Mendelssohn-Bartholdy had transferred *Boy Leading a Horse* to Thannhauser in Nazi Germany -- thereby making this action possible by starting the investigation into Picasso artworks Mendelssohn-Bartholdy lost in Nazi Germany due to Nazi persecution.
- f. In the late 1990’s, the U.S. Department of State established a special office to help return to rightful owners property lost as a consequence of Nazi persecution, called "The Office of the Special Envoy for Holocaust Issues" (Office). The Office has worked extensively -- and with significant success -- to persuade foreign governments to open Nazi era archives and to make documents

available to help Holocaust victims and their heirs to develop claims for the recovery of confiscated property.

- g. In 1997, Governor George Pataki created the Holocaust Claims Processing Office (HCPO) of the New York State Banking Department, to provide institutional assistance to individuals seeking to recover Holocaust-looted assets. The mission of the Office is, among other things, to recover lost or looted art. The HCPO investigates claims for Nazi victims, performs provenance research, finds and translates pertinent documents, and acts as an advocate for Holocaust claimants attempting to retrieve lost art -- all free of charge to the claimant. Further, the HCPO is a New York office with a worldwide mission -- it will assist claimants from anywhere in the world, and will pursue art restitution regardless of where the art is now located.

**This' Action Was Made Possible Only by the Concerted, Public-Policy Driven Initiatives of the U.S. Government and the State of New York -- Beginning in the Late 1990's -- to Make Relevant Information and Documents Accessible to Holocaust Claimants to Enable Them to Develop and Prosecute Claims to Recover Property Lost as a Consequence of Nazi Persecution**

75. This action was made possible only by information disclosed as a result of the intensive efforts of the U.S. government and State of New York to assist Holocaust claimants. In 2005, Professor Schoeps first discovered that Mendelssohn-Bartholdy sold *Boy Leading a Horse* to Thannhauser in Nazi Germany from information published on MoMA's Provenance Research Project. PRP is part of the NEPIP System, and is connected to the NEPIP website by hyperlink. *Boy Leading a Horse* is also listed on NEPIP.

76. The NEPIP System has received federal funding and arose as a direct result of the

Presidential Commission created by the 1998 Commission Act. Also, the State of New York played an important role in the development of the NEPIP system, since the New York HCPO actively participated in the AAM's task force that created NEPIP. Accordingly, since Schoeps' claim to recover the Painting is based on crucial information originally discovered on MoMA's PRP -- an integral part of the NEPIP System -- it is indisputable that this action was made possible by the efforts of the U.S. government and State of New York to tear down the "Wall of Silence" regarding Holocaust art, and to provide Holocaust victims and their heirs with access to documents and information to enable them to develop claims.

**Schoeps, Through His Agents, Has Acted Diligently Throughout 2005-2008 to Complete the Investigation of Mendelssohn-Bartholdy's Loss of Art in Nazi Germany**

77. Once Schoeps discovered Mendelssohn-Bartholdy's sale of paintings to Thannhauser in Nazi Germany on MoMA's PRP, he has acted diligently in 2005-2008 to complete his investigation and bring forward this claim. The investigation has determined, among other things, the full scope of Nazi persecution of Mendelssohn-Bartholdy, his art collection, his relationship with Thannhauser, the circumstances of his loss of art under Nazi duress, and other matters which have enabled him to make this claim. Schoeps, through his agents, performed archival research in the United States, Germany, Russia, Denmark, and other countries, interviewed witnesses, and retained investigators and attorneys in Germany, the United States and other countries. In addition, Schoeps and his agents worked to locate and contact all of the heirs of Mendelssohn-Bartholdy's sisters and Elsa's heirs -- who have a potential ownership interest in the disputed Paintings -- regarding this claim.

**The Fundamental Policies of the United States and the State of New York to Make Information Available to Holocaust Claimants and to Restitute Holocaust Art Will be Frustrated if Schoeps Action is Barred on Laches Grounds. Accordingly, the Equitable Defense of Laches Is Not Available to the Museums**

78. U.S. and New York policies to make information available to Holocaust claimants and to restitute lost art are international, strong, manifest, and continuing. As set forth supra, the efforts of the federal government and State of New York over the last ten years have been Herculean and the results have been commensurate with the effort: (a) Holocaust claimants have unprecedented access to long-withheld archives and information worldwide -- including U.S. museum information through the NEPIP System; and (b) art restitution to Holocaust victims and their heirs has risen dramatically in the U.S. and internationally.

79. To permit the Museums to raise the defense of laches, on the other hand, would frustrate U.S. and New York policies to restitute art lost due to Nazi persecution. Therefore the application of the equitable defense of laches is precluded.

80. The Museums' raising of a laches defense would also frustrate New York policies protecting its world-renowned art market.

**The Museums' Disregarded "Red Flags" in the Provenance Which Strongly Indicated That the Painting had been Lost as a Result of Nazi Persecution**

81. As discussed in detail below, the Museums acquired the Paintings in total disregard of the "red flags" in the history and provenance of the Paintings which suggested strongly that they were lost as a result of Nazi persecution. The Museums did not fulfill their obligation "to inquire about the validity of title before completing the transaction." U.S. v. Crawford Technical Services, 2004 WL 744670, \*5 (S.D.N.Y. 2004). See discussion infra. The Museums' failure to investigate the Nazi-era provenance of the Paintings is more egregious in light of repeated U.S. government warnings and admonitions to museums and others about Nazi-confiscated art coming into the U.S. art market, and the substantial press coverage of the issue since the 1940s.

**Following the War, the U.S. Government repeatedly cautioned museums and the international art market about acquiring Nazi-**

### **confiscated art**

82. Due to Nazi persecution of Jews throughout Europe, there was enormous displacement of art. Since the United States emerged from World War II as the richest country in the world, much of the art came into the U.S. market. As a result, the U.S. government took steps to alert the art world to be on guard for art lost due to Nazi persecution. For example, the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (also known as the “Roberts Commission” after its Chairman, Supreme Court Justice Owen J. Roberts), sent circulars in 1945 on the subject to “museums, art and antique dealers, and auction houses.” This warning included the observation, “It is, of course, obvious, that no clear title can be passed on objects that have been looted from public or private collections abroad.” (American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, Circular to Museums, Art and Antiques Dealers, and Auction Houses).

83. In 1951, the U.S. Department of State issued a second circular letter to the U.S. art industry reiterating this warning.

84. The U.S. Department of State tasked Ardelia Hall to alert members of the art world to these issues, and she was extraordinarily energetic in her work throughout the 1950s and 1960s.

### **The Museums’ disregard of the “red flags” in the provenance of the Paintings is even more egregious in light of the considerable coverage of the issue of Nazi looted art in the New York press from the end of World War II to the present**

85. There has always been considerable coverage of the issue of Nazi art looting in the press, especially in New York. Journalist Janet Flanner covered the topic in a celebrated 1947 article “Annals of Crime: The Beautiful Spoils,” in *The New Yorker* 40 (22 February 1947), as well as in her 1957 book, *Men and Monuments* (New York: Harper and Row, 1957). Former OSS



officer and member of the Art Looting Investigation Unit James Plaut wrote a piece, “Hitler’s Capital: Loot from the Master Race,” that appeared in *The Atlantic* (October 1946), 75-80.

86. Other key figures in the Allies’ restitution effort also wrote memoirs, including James Rorimer, *Survival: The Salvage and Protection of Art in War* (New York: Abelard, 1950); and Thomas Carr Howe, *Salt Mines and Castles: The Discovery and Restitution of Looted European Art* (Indianapolis: Bobbs-Merrill, 1946).

87. That Rorimer later headed the Metropolitan Museum of Art in New York and that Howe became the director of the San Francisco Legion of Honor only increased the visibility of these books, which recounted both the Nazis’ plundering operations, and also the challenges of restitution work.

88. Many Americans who had served as Monuments Officers assumed leading positions in U.S. museums in the postwar period: this phenomenon has recently been documented by the scholarship of Robert Edsel. (See Robert Edsel’s list of Monuments Officers who assumed positions in the American museum establishment can be found at [http://www.rescuingdavinci.com/HelpSolve/list\\_cultins.aspx](http://www.rescuingdavinci.com/HelpSolve/list_cultins.aspx)).

89. On November 16, 1964, Milton Estrow wrote in the *New York Times* an article entitled “Europe is Still Hunting Its Plundered Art.” Esterow made an important observation when he noted, “From Greece to California, hundreds of art scholars, museum directors, private galleries, and police organizations, including Interpol, the international police organization, are watching for the reappearance of works stolen from museums, churches, libraries, galleries and private collections.”

90. Indeed, from the late-1940s through the 1990s, when the issue emerged in a more public way, certain victims of Nazi persecution did pursue artworks looted from them and their

families. There was a steady stream of restitution cases throughout the postwar period that should have served to put members of the art world on alert.

91. In light of the State Department warnings, press coverage, and cases of families seeking restitution of art lost due to Nazi persecution, the Museums clearly would have been aware of the dangers of acquiring Nazi-confiscated art when the Paintings were donated.

92. While there was widespread knowledge within the art world from the 1940s to 1990s of the issues surrounding Nazi looted art, there was also a willful disregard for the subject on the part of most art dealers and museum officials.

**For more than 35 years, New York courts have condemned how casually art is acquired on the international market, and have announced a policy to protect victims of art theft in order to safeguard the commercial integrity of the New York City art market**

93. Since 1969, New York courts have rebuked the indifference with which those acquiring artworks in the New York City art market have acted, and have cautioned those in the art market to take precautions against trading in Nazi-confiscated and other stolen materials. See, e.g., Menzel v. List, 24 N.Y.2d 92, 298 N.Y.S.2d 979, 983 (1969) (dismissing the contention of art dealer that holding him accountable for the appreciated value of a Nazi-confiscated artwork that he sold some 14 years earlier would subject him to "potentially ruinous liability", and instructing that "this 'potential ruin' is not beyond the control of the seller since he can take steps to ascertain the status of title so as to satisfy himself that he himself is getting good title"); Porter v. Wertz, 416 N.Y.S.2d 254, 259 (N.Y. App. Div. 1979), aff'd 421 N.E.2d 500 (N.Y. 1981) (reproaching the "fantasy land of marketing in the fine arts" and observing that "in an industry whose transactions cry out for verification of ... title ... it is deemed poor practice to probe;" the court also said that "commercial indifference to ownership or the right to sell facilitates the traffic in stolen art ...").

94. In 1991, the New York Court of Appeals, in the landmark decision Solomon R. Guggenheim Foundation v. Lubell, 569 N.E.2d 426, 429 (1991), made clear that "New York long has protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good faith purchaser for value", and instructed that this principle is specifically calculated to protect the commercial probity of New York's international art market. Id. at 431.

**MoMA has "unclean hands" since it disregarded the suspicious Nazi-era provenance of *Boy Leading a Horse* when it accepted the painting into its collection.**

95. In 1964, William S. Paley donated *Boy Leading a Horse* to MoMA, but retained a life estate in the painting. In 1990, MoMA acquired purported full ownership of the painting upon the death of Paley. In 1964 and again in 1990, MoMA disregarded suspicious the Nazi-era provenance of *Boy Leading a Horse* and accepted the painting into its collection. As a result, MoMA has unclean hands and is not entitled to assert a laches defense in this action.

**In August 1936, Thannhauser sold *Boy Leading a Horse* to William S. Paley in a manner that strongly suggested that the Painting had been lost as a result of Nazi persecution**

96. In August 1936, Thannhauser worked in Switzerland with Albert Skira - - a Swiss art dealer later known for trafficking in Nazi looted art - - to sell *Boy Leading a Horse* to William S. Paley (Paley), the developer of the Columbia Broadcasting System (CBS). Paley was a sophisticated art collector, and later held positions as a trustee and president of MoMA. Paley was fully aware of events in Nazi Germany.

97. By 1936, Switzerland was already a known haven for traffickers in art lost by Nazi victims in forced sales. Moreover, it was common knowledge that the infamous Nuremberg Laws, enacted in Germany by the Nazis in September 1935, had increased the number of artworks in the

marketplace lost by Jews due to Nazi persecution.

98. In August 1936, Skira phoned Paley, who was in St. Moritz, Switzerland, staying at the Palace Hotel. Skira told Paley: “I’ve got a great painting here [Geneva]. You must come right down and see it.” Paley told Skira he was too tired, but Skira “insisted.” When Paley still refused to travel to Geneva to look at the Painting, Skira drove the entire length of Switzerland through the Alps with *Boy Leading a Horse*, arriving in St. Moritz the next day in a truck to present the Painting to Paley. Skira used a truck because *Boy Leading a Horse* was too large to fit into a car. 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.

99. Skira pulled his truck up in front of the Palace Hotel where Paley was staying, and brought the Painting into the lobby for Paley. Id.

100. Paley liked the Painting. Paley asked Skira the price, and found that it was -- in Paley’s words -- “**quite modest.**” Paley immediately told Skira: “That’s fine. I’ll buy it.” Paley described the Painting as “priceless.” Id.

101. Paley asked Skira who owned *Boy Leading a Horse*, and **Skira refused to tell him.** Skira stated: “That’s the one thing I can’t tell you. I’m sworn to secrecy.” Id.

102. Paley proceeded with the sale even though Skira: (a) refused to identify the owner of the Painting; (b) was offering a “priceless” painting at a “quite modest” price; (c) was apparently desperate to conclude the sale immediately; and (d) was operating one year after passage of the Nuremberg Laws in a country bordering Nazi Germany that was a known haven for trafficking in Nazi looted art. Clearly, Paley was put on notice that there was a good possibility that he was purchasing confiscated art, and yet Paley proceeded with the sale.

**Paley’s knowledge of the suspicious provenance of *Boy Leading a Horse* may be imputed to MoMA, since Paley was a Trustee of MoMA from 1937-1990**

103. Paley had an extremely close relationship with MoMA from shortly after he purchased the Painting in 1936 until his death. Paley was a Trustee of MoMA from 1937 until his death in 1990. In addition, Paley was President from 1968-1972; Chair from 1972-1985; and Chair Emeritus from 1985 until his death in 1990. Indeed, Paley stated that as of September 1968, he became, in effect, the CEO of MoMA: “After due consideration, I accepted the invitation to become president of the museum [MoMA]. I was elected to that office and became, in effect, its chief executive officer in September 1968.” *Id.* at 391.

104. In light of Paley’s close relationship and powerful positions within MoMA from 1937-1990, Paley’s knowledge can be imputed to MoMA of the suspicious circumstances and “red flags” regarding his purchase of *Boy Leading a Horse* which strongly suggested that a Jew lost the Painting in Nazi Germany due to Nazi persecution.

**MoMA continued to ignore the Nazi-era Provenance of the Painting from 1964 up to its acquisition of purported full title in 1990 after Paley’s death**

105. In 1990, Paley passed away, and MoMA published “*The William S. Paley Collection*,” by William Rubin and Matthew Armstrong, describing the collection Paley had left to MoMA. *See* William Rubin and Matthew Armstrong, *The William S. Paley Collection* (Museum of Modern Art, New York 1992). The preface described the suspicious and urgent circumstances under which Paley acquired *Boy Leading a Horse*:

Nineteen thirty-six was a remarkable year [for Paley], marked by the acquisition of... by far the best-known work in the Paley Collection, Picasso's *Boy Leading a Horse*. Only later did Mr. Paley realize how lucky he was to have gotten a crack at [*Boy Leading a Horse*]. It had been smuggled to Switzerland out of Nazi Germany by the dealer Justin Thannhauser, and was being hurriedly and secretly offered for sale through [Albert] Skira. There was no time to wait for a Geneva visit from Paley, who was skiing in Saint-Moritz. Skira trucked the large canvas to the Palace Hotel and carried it into the lobby. Paley bought it on the spot.

William Rubin and Matthew Armstrong, *The William S. Paley Collection*, Preface, p. x (Museum of Modern Art, New York 1992) (Emphasis added) (using Paley's "*As It Happened*" as a source).

106. In *The William S. Paley Collection*, Rubin and Armstrong also provide the provenance of the Painting, and identify Paul von Mendelssohn-Bartholdy as the owner, immediately followed by Justin K. Thannhauser. Accordingly, MoMA was fully informed by 1992 that a person with a recognizably Jewish last name -- Mendelssohn -- made the sale in Nazi Germany to Thannhauser before Thannhauser supposedly "smuggled" the Painting out of the country and "hurriedly and secretly" offered it for sale through a known trafficker in Nazi confiscated art [Skira] in a country known as a haven for looted art sales [Switzerland].

107. Thus, despite MoMA's increasing knowledge of prior owners -- including the Jewish Paul von Mendelssohn-Bartholdy as the owner immediately before Thannhauser in Nazi Germany -- and the "red flags" indicating that the Painting likely was lost due to Nazi persecution, MoMA conducted no further provenance research and accepted Paley's donation with "no questions asked."

108. By accepting Paley's gift of *Boy Leading a Horse* in disregard of its obvious Holocaust provenance -- and in violation of its fiduciary duties as a public trustee to take informed precautions against accepting Nazi-confiscated and stolen artworks into its collection -- and then purposely ignoring additional evidence that Paul von Mendelssohn-Bartholdy lost the artwork due to Nazi persecution, MoMA has "unclean hands" and cannot raise the equitable defense of laches.

**The Guggenheim has "unclean hands" since it disregarded the suspicious Nazi-era provenance of *Le Moulin de la Galette* when it accepted the painting into its collection.**

**In or around 1978, the Guggenheim Museum disregarded provenance information which strongly suggested that Paul von Mendelssohn-Bartholdy lost *Le Moulin de la Galette* due to Nazi persecution, and accepted the artwork**

**into its collection. Accordingly, the Guggenheim never had a commercially reasonable expectation or good faith reliance interest that it had acquired good title to the *Le Moulin de la Galette***

109. In or around 1972, Justin K. Thannhauser bequeathed Pablo Picasso's *Le Moulin de la Galette* and other artworks to the Guggenheim.

110. In or around 1972, the Guggenheim began investigating the provenance and history of artworks Thannhauser had bequeathed to it, including *Le Moulin de la Galette*. This research was conducted in preparation for a book to be published regarding artworks that Thannhauser was donating to the Guggenheim, and was not intended to determine if any artworks had been stolen, looted or confiscated. In fact, the book was eventually published in 1978 -- two years after Thannhauser's 1976 death -- and was entitled *The Guggenheim Museum: Justin K. Thannhauser Collection*, by Vivian Endicott Barnett.

111. In or around 1972, Guggenheim researchers gave typed documents to Thannhauser containing provenance and other information they had developed regarding the artworks he had bequeathed to the Guggenheim. Thannhauser *himself* reviewed these documents, and -- where appropriate -- made corrections and additions in his own hand on the documents.

112. In or around 1972, Guggenheim researchers presented Thannhauser with a document that contained, among other things, the provenance research information they had developed relating to Pablo Picasso's *Le Moulin de la Galette*. Thannhauser wrote on this document in his own hand that he had acquired *Le Moulin de la Galette* from Paul von Mendelssohn-Bartholdy in around 1935, or specifically "ca. 1935." (See document entitled "JKT Notes, Dec. 1972," from the Solomon R. Guggenheim Museum Archive, attached hereto as Exhibit 4).

113. In March 1975, Guggenheim researcher Daniel Catton Rich (Rich) interviewed Thannhauser with additional questions regarding the provenance of *Le Moulin de la Galette* and

other artworks. During this interview, Rich used typed documents, with information and questions about the artworks Thannhauser was donating based, upon information and belief, on Thannhauser's 1972 annotations. The document relating to *Le Moulin de la Galette* sets forth Paul von Mendelssohn-Bartholdy's ownership as "c. 1910-1935," followed by "Justin K. Thannhauser." This document appears clearly to be based in part on Thannhauser's 1972 notes.

114. In March 1975, Rich recorded that Thannhauser told him that the Painting was on consignment in Buenos Aires in 1934. Rich, in his 1975 handwritten notes of his conversation with Thannhauser, drew a line from Mendelssohn-Bartholdy's "1910-1935" ownership dates, and added:

"[C]onsignment; sent to B-Aires in 1934."

(See document entitled "DCR Notes Mar. '75, JKT Provenances for Picasso," from the Solomon R. Guggenheim Museum Archive, attached hereto as Exhibit 5).

115. Thus, Thannhauser's 1972 handwritten notes and his 1975 statements to Rich establish that: (1) Mendelssohn-Bartholdy had placed *Le Moulin de la Galette* on consignment with Thannhauser when it was exhibited in Buenos Aires in October 1934; and (2) Thannhauser claimed he acquired ownership of *Le Moulin de la Galette* from Mendelssohn-Bartholdy some time after the Buenos Aires exhibition and around 1935.

116. Vivian Endicott Barnett, in *The Guggenheim Museum: Justin K. Thannhauser Collection* (1978), stated that Thannhauser acquired of *Le Moulin de la Galette* from Mendelssohn-Bartholdy in or around 1935:

"[P]urchased from Moderne Galerie [owned by Thannhauser family] by Paul von Mendelssohn-Bartholdy, Berlin, c. 1910; **repurchased from Bartholdy by J.K. Thannhauser, c. 1935.**"

117. By 1975, the Guggenheim was aware that:



- a. Paul von Mendelssohn-Bartholdy was Jewish, based, among other reasons, upon the fact that “Mendelssohn” is a recognizably Jewish name;
- b. Mendelssohn-Bartholdy was from Berlin in Nazi Germany (see document entitled “JKT Notes” regarding another Pablo Picasso artwork, *Head of a Woman*, that Mendelssohn-Bartholdy sold under duress to Thannhauser, and that Thannhauser bequeathed to the Museum, where Thannhauser has written “coll. Paul v. Mendelssohn-Bartholdy, **Berlin**” [emphasis added], a copy of which is attached as Exhibit 6);
- c. Nazi persecution of Jews began immediately after the Nazis took power in 1933, and increased in intensity throughout 1933-1935;
- d. Mendelssohn-Bartholdy was selling *Le Moulin de la Galette* and at least one other artwork during this period, that is, Pablo Picasso’s *Head of A Woman* (see Exhibits 4-6);
- e. In addition, minimal additional research would have revealed:
  - (1) the Mendelssohn family suffered tremendous persecution during the Nazi era; and
  - (2) the remarkable fact that Mendelssohn-Bartholdy had ***five*** Pablo Picasso artworks on consignment in Buenos Aires in October 1934, further evidence that Mendelssohn-Bartholdy was selling his art under duress; and
- f. U.S. State Department “circular letters” warned museums that Nazi confiscated artworks were entering the U.S. marketplace, and urged them to take precautions against acquiring such works. Moreover, stories regarding Nazi

looted art being in the U.S. art market were regularly in the New York press.

118. The background and provenance for *Le Moulin de la Galette* is a paradigm for a prototypical “forced sale” or forced consignment and theft. Paul von Mendelssohn-Bartholdy was a Jew living in Berlin making multiple sales of Picasso artworks in a time period close to when the Nazis passed the Nuremberg Laws of 1935. Therefore, the Guggenheim's acceptance of the Painting in or around 1978 without performing additional research into Mendelssohn-Bartholdy's transfer to Thannhauser left it with no commercially reasonable expectation or good faith reliance interest that it had good title or that the true owner would not come forward to claim the Painting.

**The Guggenheim has Ignored the Nazi-Era Provenance of *Le Moulin de la Galette* from 1972 up to the present time, despite being placed on notice of Thannhauser's trafficking in Nazi-confiscated art**

119. On November 9, 1997, the Boston Globe published an article on its front page entitled, “*Murky Histories Cloud Some Local Art*,” by Maureen Goggin and Walter V. Robinson. (See Exhibit 1). The article described Justin K. Thannhauser's participation in the fraudulent sale of an artwork that may have been looted by the Nazis from a Jewish family. In addition, the article notes that Thannhauser's business partner in this sale was Cesar Mange de Hauke -- a notorious trafficker in Nazi looted art that the U.S. State Department later denied an immigration visa because of his Nazi complicity. The article states the following regarding Thannhauser's background:

US archival records, coupled with Swiss government records, suggest that both Thannhauser and de Hauke had much to hide. Thannhauser was a business associate of [Hans] Wendland, the German dealer and art looter who funneled so many artworks into the black market, and may have stored paintings for Wendland during the war.

120. The front-page Boston Globe article placed the Guggenheim on further notice of Thannhauser's dealings in Nazi-era art, and the need to investigate the provenance of the

artworks in the so-called “Thannhauser Collection” at the Museum to ascertain whether they were Nazi-confiscated.

121. As the Art Loss Register stated with regard to *Boy Leading a Horse*: “the name [Thannhauser in the provenance] generally does not mean good things.” (See Exhibit 2).

122. Despite the Guggenheim’s increasing knowledge of Thannhauser, it performed no additional research regarding the possibility that Mendelssohn-Bartholdy lost the Painting due to Nazi persecution.

**The Guggenheim did not place *Le Moulin De La Galette* on the Nazi-Era Provenance Internet Portal (NEPIP) -- Even though it clearly comes within the scope of items which should be included -- until it was contacted by the Mendelssohn-Bartholdy heirs**

123. The Guggenheim did not place *Le Moulin de la Galette* on NEPIP or its own website as having a Nazi era provenance until the Mendelssohn-Bartholdy heirs contacted the Guggenheim about the painting. *Le Moulin de la Galette* clearly met the criteria for inclusion on NEPIP, that is, any objects that:

- were created before 1946 and acquired after 1932,
- underwent a change of ownership between 1932 and 1946, and
- were or might reasonably be thought to have been in Continental Europe between those dates

124. By accepting Thannhauser’s gift of *Le Moulin de la Galette* in disregard of its obvious Holocaust provenance -- and in violation of its fiduciary duties as a public trustee to take informed precautions against accepting Nazi-confiscated and stolen artworks into its collection -- and then purposely ignoring additional evidence that Paul von Mendelssohn-Bartholdy lost the artwork due to Nazi persecution, the Guggenheim has “unclean hands” and cannot raise the

equitable defense of laches. In addition, the Guggenheim had placed some artworks on NEPIP, but had purposely withheld artworks from the Thannhauser Collection -- including *Le Moulin de la Galette*. This concealment of potentially Nazi-looted art is another example of the Guggenheim's "unclean hands" in this matter.

### **COUNT ONE (Conversion)**

125. Counterclaim-Plaintiffs reassert and reallege each and every preceding averment in this Complaint as if fully set forth herein.

126. At all times relevant hereto, the law has prohibited any person from wrongfully detaining property that belongs to another or in which another person has a superior legal possessory interest. When the possessor of such property refuses the demand of a person with a superior possessory interest in such property to return it, the law makes the wrongful possessor of such property liable to the other for conversion.

127. At all times relevant to the proceeding, and for the reasons stated herein, Schoeps has been a rightful owner of the Paintings and has had a legal possessory interest in the Paintings that is superior to the Museums'. In the alternative, at all times relevant to the proceeding, and for the reasons stated herein, Ms. Lavergne-Peguilhen and Dr. Kesselstatt have been the rightful owners of the Paintings and have had a legal possessory interest in the Paintings that is superior to the Museums'.

128. Before this action was commenced -- and on or about November 1, 2007 -- the heirs of Paul von Mendelssohn-Bartholdy and Elsa, through their attorneys, demanded that the Museums return the Paintings. The Museums, through their attorneys, refused the demand on December 7,

2007.

129. The Museums have wrongfully detained the Paintings in violation of the heirs' ownership rights and superior legal possessory interest, and have wrongfully refused to return them. The Museums wrongful conversion of the Paintings has caused damages in an amount of more than four hundred million (US) dollars (\$400 million).

**COUNT TWO  
(Replevin)**

130. The Counterclaim-Plaintiffs reassert and reallege each and every preceding averment in this Complaint as if fully set forth herein.

131. The Paintings are unique. When the above-entitled action was commenced, and at all times relevant hereto, the heirs of Paul von Mendelssohn-Bartholdy -- including Schoeps -- were and still are the legal owners, and have a superior possessory right to, and are entitled to the immediate possession of, the Paintings. In the alternative, when the above-entitled action was commenced, and at all times relevant hereto, Ms. Lavergne-Peguilhen and Dr. Kesselstatt were and still are the legal owners, and have a superior possessory right to, and are entitled to the immediate possession of, the Paintings.

132. The value of the Paintings exceeds four hundred million (US) dollars (\$400 million).

133. The Paintings are currently in the possession of the Museums. The Museums have wrongfully detained and still detain the Paintings in violation of the Counterclaim-Plaintiffs' ownership rights and superior legal possessory interest.

134. The Museums' detention of the Paintings is wrongful for the reasons alleged herein.

135. Before this action was commenced -- and on or about November 1, 2007 -- the heirs of Paul von Mendelssohn-Bartholdy and Elsa, through their attorneys, demanded that the

Museums return the Paintings. The Museums, through their attorneys, refused the demand on December 7, 2007, and continue to refuse this demand.

136. The Museums' wrongful detention of the Paintings has caused the Counterclaim-Plaintiffs and the other Mendelssohn-Bartholdy heirs to sustain damages in an amount of more than four hundred million (US) dollars (\$400 million).

**COUNT THREE**  
**(Request for Declaratory Relief under Fed.R.Civ.P. 57 and 28 U.S.C. § 2201)**

137. Counterclaim-Plaintiffs reassert and reallege each and every preceding averment in this Complaint as if fully set forth herein.

138. At all times relevant to this proceeding, the law has permitted any court of the United States, upon the filing of an appropriate pleading, to declare the rights and other legal relations of any interested party seeking such declaration, regardless whether further relief is or could be sought.

139. The heirs of Paul von Mendelssohn-Bartholdy's sisters, including Schoeps, are the lawful and rightful owners of the Paintings, and the Museums are in inequitable possession of them. In the alternative, Ms. Lavergne-Peguilhen and Dr. Kesselstatt are the lawful and rightful owners of the Paintings, and the Museums are in inequitable possession of them. An actual controversy exists as to this right.

140. The Counterclaim-Plaintiffs seek a declaratory judgment and order declaring that the rightful owners of the Paintings are either the heirs of Mendelssohn-Bartholdy's sisters or the heirs of Elsa.

**PRAYER FOR RELIEF**

Wherefore, the Counterclaim-Plaintiffs seek:

a) an order adjudging that the heirs of Mendelssohn-Bartholdy's sisters, including Professor Schoeps, are the owners and entitled to the immediate possession of the Paintings, and that the Paintings be delivered to Schoeps, and in case possession thereof cannot be given to

Schoeps, that Schoeps have judgment against the Museums for the sum of no less than four hundred million (US) dollars (\$400 million) with interest thereon; or, in the alternative, the Counterclaim-Plaintiffs seek an order adjudging that Ms. Lavergne-Peguilhen and Dr. Kesselstatt are the owners and entitled to the immediate possession of the Paintings, and that the Paintings be delivered to them, and in case possession thereof cannot be given to them, that they have judgment against the Museums for the sum of no less than four hundred million (US) dollars (\$400 million) with interest thereon;

b) an order declaring the heirs of Mendelssohn-Bartholdy's sisters, including Schoeps, to be the lawful and rightful owners of the Paintings in accordance with applicable U.S. and New York law, and declaring the Museums possession of the Paintings to be inequitable, and resulting in unjust enrichment to the Museums; or, in the alternative, an order declaring that Ms. Lavergne-Peguilhen and Dr. Kesselstatt are the lawful and rightful owners of the Paintings in accordance with applicable U.S. and New York law, and declaring the Museums' possession of the Paintings to be inequitable, and resulting in unjust enrichment to the Museums;

c) an order requiring the Museums to make restitution of the Paintings to the heirs of Mendelssohn-Bartholdy's sisters, including Schoeps, in accordance with applicable New York and U.S. law; or, in the alternative, an order requiring the Museums to make restitution of the Paintings to the Ms. Lavergne-Peguilhen and Dr. Kesselstatt, in accordance with applicable New York and U.S. law;

d) an order imposing a constructive trust upon the Paintings for the benefit of Schoeps in accordance with applicable New York and U.S. law, and requiring the Museums to return the Paintings to Schoeps; in the alternative, an order imposing a constructive trust upon the Paintings for the benefit of Ms. Lavergne-Peguilhen and Dr. Kesselstatt in accordance with applicable New

York and U.S. law, and requiring the Museums to return the Paintings to them.

e) an award of the Counterclaim-Plaintiffs' costs, expenses and interest, and;

f) such further and other relief as the Court may deem appropriate and just.

**COUNTERCLAIM PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL FACTS AND ISSUES.**

Dated: New York, New York  
June 2, 2008

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