Estate of Kainer v UBS AG, a Swiss Corp.
2017 NY Slip Op 32316(U)
October 30, 2017
Supreme Court, New York County
Docket Number: 650026/13
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK—PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

X

ESTATE OF MARGARET KAINER, and the following individuals as heirs of MARGARET KAINER: KURT BECK a/k/a CURT BECK as executor of the estate of Ann Beck, JANET CORDEN as executor of the estate of Gerald Corden, MARTIN CORDEN as executor of the estate of Gerald Corden, SIMON CORDEN as executor of the estate of Gerald Corden, WARNER MAX CORDEN, FIRELEI MAGALI CORTES GRUENBERG, MATILDE LABBE GRUENBERG, HERNAN LABBE GRUENBERG, PETER LITTMAN, HERNAN RENATO CORTES RAMOS, and EQUITY TRUSTEES LIMITED as executor of the estate of Elli Alter,

Index No. 650026/13

DECISION/ORDER

Plaintiffs,

-against-

UBS AG, a Swiss corporation, UBS GLOBAL ASSET MANAGEMENT (AMERICAS), INC., NORBERT STIFTUNG f/k/a NORBERT LEVY STIFTUNG, a purported Swiss foundation, EDGAR KIRCHER, CHRISTIE'S INC., and JOHN DOES 1-X, including a possessor of a painting entitled Danseuses, by Edgar Degas, c. 1896,

Defendants.

X

This action involves a dispute over ownership rights to an asset of the estate of Margaret Kainer (Kainer)— a Degas painting entitled Danseuses (the Painting). The Painting was part of an art collection that was looted in 1935 by the Nazi regime. Plaintiffs claim that defendants wrongfully agreed to the sale of the Painting after it resurfaced in 2008 or 2009, in derogation of plaintiffs' rights as heirs.

Plaintiffs allege that they are heirs pursuant to a French certificate of inheritance, issued in or about May 2012. (Second Amended Complaint, ¶¶ 23-33, 56 [Complaint or SAC].) Defendant Norbert Stiftung f/k/a Norbert Levy Stiftung (the Foundation) claims rights as an heir pursuant to a German "certificate of partial inheritance," issued in or about 1972. (Id., ¶ 75.) Defendant Edgar Kircher is a member and president of the board of trustees of the Foundation, and is also a director of defendant UBS AG in Switzerland. (Id., ¶ 37; Aff. Of Edgar Kircher In Supp. Of Norbert Stiftung/Kircher Motion to Dismiss, ¶ 3 [Foundation Motion] [Kircher Aff. In Supp.].) Defendants UBS AG and UBS Global Asset Management (Americas), Inc. (UBS Global) (collectively UBS) allegedly control the Foundation. (Id., ¶ 81.)

Defendant Christie's Inc. (Christie's), a New York corporation engaged in private sales and public auctions of artworks, was involved in two sales of the Painting in 2009. (SAC, ¶¶ 38, 97-106, 110-114.) In connection with a private sale of the Painting held by a client of Christie's, the Foundation entered into a "Restitution Settlement Agreement" in which it renounced its rights as heir to the Kainer estate, in exchange for a percentage of the proceeds of the sale. (Id., ¶¶ 97, 103-105.) The complaint alleges that the Foundation falsely claimed that it was Kainer's heir, and that the Foundation defendants[1] engaged in a conspiracy with Christie's to deprive plaintiffs, the lawful heirs, of their ownership interests in the Painting. (See SAC, ¶¶ 1-3.)

In motion sequence number 004, UBS moves to dismiss the complaint, pursuant to CPLR 327 (a), on the ground of forum non conveniens. In the alternative, UBS seeks dismissal of the complaint against UBS AG for lack of personal jurisdiction, and against UBS Global for failure to state a claim. In motion sequence number 005, the Foundation and Kircher move to dismiss the complaint on the grounds of forum non conveniens and lack of personal jurisdiction. In

[1] In this decision, the Foundation, Kircher, and UBS are collectively referred to as the Foundation defendants.

motion sequence number 006, Christie's moves to dismiss the complaint on the ground of forum non conveniens. In the alternative, Christie's seeks dismissal of the second cause of action (aiding and abetting breach of fiduciary duty) and fourth cause of action (conversion) based on the statute of limitations. Christie's also seeks dismissal of the sixth cause of action (unjust enrichment) and seventh cause of action ("conspiracy to obtain unjust enrichment") for failure to state a claim. In motion sequence number 007, plaintiffs move, pursuant to CPLR 2214 (c), to supplement the record.

Background

As alleged in the complaint, prior to 1932, Kainer and her husband, Ludwig Kainer, lived in Germany, where Kainer owned an art collection comprised of over 400 works of art, of which the Painting was a part. (SAC, ¶¶ 4, 45.) During the Holocaust, the Nazis confiscated the collection and sold it at a "Judenversteigerung," an auction of assets belonging to Jewish victims of the Nazi regime. (Id., ¶ 45.) After Kainer left Germany in 1932, she never returned. (Id., ¶ 4.) According to the complaint, Kainer lived in Switzerland from 1943 to 1946, and then relocated to France, where she remained until her death in 1968. (Id., ¶¶ 47, 50.)

The parties' claims as to their status as Kainer's heirs are sharply disputed. As noted above, plaintiffs assert that they are heirs pursuant to a French certificate of inheritance, issued in 2012.[2] Plaintiffs state that they "were unaware of the activities of the defendants, the Restitution Settlement Agreement, or the sales of the Paintings until 2011 and 2012." (SAC, ¶ 121.) The

[2] Plaintiffs also refer to the certificate of inheritance as an "acte notarial," which the complaint defines as "a quasi-judicial French legal proceeding in which the heirs of a decedent are determined." (SAC, ¶ 23 n 1.) The document itself is entitled "Acte de Notoriété Epoux Kainer (Mondex)" or, as translated, "Affidavit of Death and Heirship Spouse Kainer (Mondex). (Palmer Aff., Ex. L.)

complaint does not allege, and the record does not contain evidence as to, when plaintiffs first became aware of their status as heirs.

As also noted above, the Foundation claims status as an heir pursuant to a German "certificate of partial inheritance," issued in or about 1972. (SAC, ¶ 75.) This certificate by its terms states that the Foundation "has, since December 18, 1968, been a co-heir entitled to 3/4 of the estate of Councillor of Commerce Norbert Levy." (Kircher Aff. In Supp., Ex. 3.) The certificate does not identify the assets of the estate. (Id.) The complaint pleads that in his 1927 will, Norbert Levy, Margaret Kainer's father, named her as his "sole heir." (SAC, ¶¶ 5,40.) As quoted in the complaint, the will provided: "If my daughter dies alone, without leaving 'Leibeserben' [heirs by blood], with the exception of a fourth of her estate which she may freely dispose of, the estate left by her shall be used to set up" a Norbert Levy Foundation for the support of his family. (Id., ¶ 40.) As further pleaded in the complaint, Norbert Levy died in 1928, but in November 1927 had himself set up a foundation in Switzerland, called "Norbert Stiftung," for the purpose of supporting family members. (Id., ¶¶ 41, 44.) According to the complaint, UBS, acting through a UBS director (Dr. Albert Genner) who was also a member of the board of trustees of the Norbert Stiftung, purported in 1971 to convert that foundation to a Swiss public foundation, "to own and control the assets of Margaret's estate." (Id., ¶¶ 62, 69.) The Swiss public foundation is the defendant Foundation in this action.

The complaint pleads at length grounds on which plaintiffs challenge the legitimacy of the defendant Foundation and its alleged rights as an heir. Plaintiffs claim that "no 'conversion' [of the Norbert Stiftung] was possible" for the reasons, among others, that the Norbert Stiftung had ceased to exist, and that the new Foundation did not provide for the benefit of Kainer's heirs. (SAC, ¶¶ 62, 68-73.) Alternatively, the complaint pleads, on information and belief, that the

Norbert Levy Foundation referred to in Kainer's father's will "was to be founded in Berlin," and that the will provision regarding that foundation was, for specified reasons, invalid under German law from its inception. (Id., ¶ 54.) Plaintiffs assert that, "[a]ccordingly, Margaret's entire estate, including the assets she had inherited from Norbert, passed on the basis of intestacy to her next of kin." (Id.) The complaint further alleges that the new foundation that was established in 1971—i.e., defendant Foundation here—was devised by UBS as a means to appropriate assets that would otherwise go to Margaret's heirs. (Id., ¶¶ 68-69.)

The complaint also pleads that non-party Swiss localities, the Canton of Vaud and the City of Pully, claim status as heirs pursuant to a Swiss certificate of inheritance, issued in May 2003 by a Swiss court, which designated these two localities as Kainer's "sole legal heirs in equal halves as 'common owners.'" (SAC, ¶ 79.)

There has been extensive litigation in Europe between and among the heirs regarding their ownership rights in the estate. In 2002, the Foundation asserted claims in Germany and Switzerland for Kainer's entire estate. (SAC, ¶ 79.) At that point, the Canton of Vaud and City of Pully had asserted "jurisdiction" over the entire estate based on the claim, disputed by plaintiffs in the instant action, that Kainer had been domiciled in Pully, Switzerland. (Id., ¶¶ 78-79.) "Notwithstanding this certificate" (i.e., the Swiss certificate that had been issued to the Swiss localities), the litigation between the Foundation and those localities continued in Germany until 2005, when a settlement was reached to divide the Kainer estate among the Foundation, the Canton of Vaud, and the City of Pully, and "to join efforts to find and obtain compensation for paintings" looted from Kainer or her husband. (Id., ¶ 79.)

In addition, two related actions are active in Switzerland, and a third has been litigated in Germany. (Aff. of Philippe Dal Col [Swiss counsel to plaintiffs in the Swiss proceedings] In

Opp. To UBS/Foundation Motions, ¶ 3 [Dal Col Aff. In Opp.]; Aff. of Dr. Cato Dill [German counsel to plaintiff Warner Max Corden in the German proceeding], ¶ 8 [Dill Aff.].) All of the plaintiffs in the instant action are plaintiffs in two Swiss proceedings, which plaintiffs commenced contemporaneously with this action.[3] In the first, the "Swiss Inheritance Claim," plaintiffs "(i) seek[] to recover property and/or assets belonging to the estate of Margaret Kainer held by Swiss defendants Canton de Vaud, Commune de Pully and the Norbert Foundation [i.e., the Foundation that is the defendant here], and (ii) seek[] a determination as to the validity or the inapplicability of reversionary heirship mentioned in Norbert Levy's last will." (Dal Col Aff., ¶ 7.) The second, the "Swiss CoI [Certificate of Inheritance] Claim," "addresses the validity of the Swiss Certificate of Inheritance that was issued to the Canton de Vaud and Commune de Pully." (Id., ¶ 6.) According to plaintiffs' Swiss counsel, plaintiffs in the Swiss Inheritance Claim are seeking payments from the Swiss localities and the Foundation "based on the unjust enrichment law." (Id., ¶ 12.) The court has not been apprised of any final resolution of the issues in the Swiss proceedings.

In Germany, Warner Max Corden, a plaintiff in the instant action, brought a proceeding "to recall" and, alternatively, to "invalidate" the certificate of partial inheritance issued to the Foundation in 1972. (Dill Aff., ¶ 8.) On November 26, 2014, the German court "disallowed the recall and/or the cancellation" of the certificate. (Id., ¶ 15.) Corden's German counsel filed an appeal of this decision on December 23, 2014. (Id., ¶ 16.) By letter dated February 1, 2017 (NYSCEF No. 210), plaintiffs' counsel in the instant action informed the court that the November 26, 2014 decision had been annulled by a German Appellate Court and that the certificate of partial inheritance had been declared "void." As discussed further below, the court

[3] The complaint in this action was filed on or about January 3, 2013. Plaintiffs filed an "Application for Conciliation" in the Swiss proceedings, dated January 17, 2013. (Kircher Aff. In Supp., Ex. 1.)

has not been apprised as to whether further proceedings are pending in Germany, and plaintiff has not claimed that the appellate decision forecloses the Foundation's claims as an heir.

In the instant action, plaintiffs challenge the Foundation's assertion of rights as Kainer's heir to the proceeds of the sale of the Degas Painting. According to the complaint, in 2000, the Foundation "caused all of the known paintings from the 1935 forced sale of the Kainer art collection to be registered" in lost art databases for looted art, including the Art Loss Register and a database run by a German entity. (SAC, ¶ 91.) In May 2009, Christie's contacted the Foundation's attorney regarding Christie's client, a Japanese gallery "holding" the Painting in Japan. Christie's sought to facilitate an agreement between the client and the Foundation in connection with a private sale of the Painting. (Id., ¶ 97.) As further alleged by plaintiffs, because the Painting was listed on the Art Loss Register as art stolen from Kainer, "a release of any claim by her heirs was necessary to render the Painting saleable." (Id., ¶ 98.) The Foundation entered into a Restitution Settlement Agreement[4] in which it renounced its rights to the Painting in exchange for thirty percent of the proceeds of the sale. (Id., ¶¶ 11, 103.) Christie's arranged the private sale of the Painting in Japan for $6 million and the Foundation received $1.8 million. (Id., ¶¶ 11, 105.) On November 3, 2009, "just days" following that sale, Christie's offered the work for sale at a public auction in New York, with an estimated price of $7 to 9 million. (Id., ¶ 110.) The notice of the sale of the Painting stated: "This work is offered pursuant to a restitution settlement agreement with the heirs of Ludwig and Margaret Kainer in 2009." (Id., ¶¶ 11, 114.) The Painting sold for $10,722,500. (Id., ¶ 110.)

Although it is not alleged that the Foundation received any compensation from this sale, plaintiffs assert that a "serious question[]" exists in this regard based, among other things, on the

[4] The Restitution Settlement Agreement is not in the record before the court.

"extraordinarily short time period between [the] private sale and the public auction," and the facts that both the private sale and the public auction "were made pursuant to the Restitution Settlement Agreement," and the private sale price was well below the price realized at auction a few days later. (SAC, ¶ 120.)

Plaintiffs claim that the Foundation "falsely held itself out as the legitimate heir of [Kainer] for the settlement of any claims regarding the paintings" that had been looted from the Kainer estate. (SAC, ¶ 92.) According to the complaint, the Foundation defendants engaged in a conspiracy with Christie's "to falsely legitimize [the Painting's] title so that they could all profit therefrom to the detriment of Plaintiffs," "the lawful heirs [who] have received nothing" from the sale of the Painting. (Id., ¶ 11.) This conspiracy involved two acts: the Foundation's entry into the Restitution Settlement Agreement, which Christie's "solicit[ed]" and "facilitate[ed]"; and Christie's offer of the Painting at a public auction a few days later, pursuant to the Restitution Settlement Agreement. (Id.) Plaintiffs also claim that Christie's recognition of the Foundation as Kainer's heir has fostered the Foundation defendants' ability to continue to sell other paintings from the Kainer collection as they are discovered, by legitimizing the Foundation's claim as heir of the Kainer estate. (See id., ¶¶ 3, 125.)

Discussion

Personal Jurisdiction over the Foundation Defendants

As a threshold matter, the parties dispute whether this court must determine the claims of lack of personal jurisdiction, asserted by defendants UBS AG, the Foundation, and Kircher, before the court entertains these defendants' motion to dismiss on the ground of forum non

conveniens.[5] In Sinochem International Co. Ltd. v Malaysia International Shipping Corp. (549 US 422 [2007] [Sinochem]), the Supreme Court held that a court is not required to determine whether it has personal jurisdiction over the defendant before dismissing an action based on the common law forum non conveniens doctrine. The Court reasoned that because a forum non conveniens dismissal is not a dismissal on the merits, a court may "choose among threshold" non-merits grounds for dismissal. (Id. at 431 [internal quotation marks omitted].) The Court further held, however, that "judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum" favor the court's determination of the jurisdictional issue first, if the determination can "readily" be made and "will involve no arduous inquiry." (Id. at 436 [internal quotation marks and citation omitted].) In contrast, where personal jurisdiction "is difficult to determine, and forum non conveniens considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course" and may dismiss the action without a prior jurisdictional determination. (Id.)

In New York, there are two long-standing, conflicting lines of authority on this threshold issue. The first holds that the court must address the jurisdictional issue before deciding whether dismissal is warranted based on the forum non conveniens doctrine "'because, if a court lacks jurisdiction over a defendant, it is without power to issue a binding forum non conveniens ruling as to that defendant.'" (E.g. Prime Props. USA 2011, LLC v Richardson, 145 AD3d 525, 525 [1st Dept 2016] [quoting Flame S.A. v Worldlink Intl. (Holding) Ltd., 107 AD3d 436, 437 (1st Dept 2013), lv denied 22 NY3d 855]; Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG, 23 AD3d 269, 269 [1st Dept 2005] [holding that the motion court incorrectly dismissed the

[5] UBS Global is a subsidiary of UBS AG, and is a Delaware corporation that is registered to do business in New York. (SAC, ¶ 15.) UBS Global does not assert a defense of lack of personal jurisdiction. (UBS Memo. In Supp. Of UBS Motion To Dismiss at 1-2 [UBS Memo. In Supp.].)

complaint against certain defendants on the forum non conveniens ground "without first adjudicating their jurisdictional defenses"]; Edelman v Taittinger, S.A., 298 AD2d 301, 303 [1st Dept 2002].) The second holds that a court "presuming, without deciding jurisdiction," may address the issue of whether the action should be dismissed on the forum non conveniens ground. (E.g., Payne v Jumeirah Hospitality & Leisure [USA], Inc., 83 AD3d 518, 518 [1st Dept 2011]; American BankNote Corp. v Daniele, 45 AD3d 338, 339 [1st Dept 2007] [upholding the motion court's denial of a motion to dismiss on the forum non conveniens ground, notwithstanding that jurisdictional discovery had been authorized but not yet conducted]; Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd., 9 AD3d 171, 176 [1st Dept 2004] [holding that "on a motion to dismiss on the ground of forum non conveniens, jurisdiction over the defendant is presumed"]; Trio Indus., Inc. v Schal Assocs., Inc., 107 AD2d 570, 570-572 [1st Dept 1985] [reversing the motion court's decision denying a motion to dismiss on jurisdictional and forum non conveniens grounds with leave to renew upon completion of discovery, and dismissing on the latter ground]; Bader & Bader v Ford, 66 AD2d 642, 647 [1st Dept 1979], lv dismissed 48 NY2d 649 [holding that "[f]orum non conveniens presumes the fact of jurisdiction"].)

Although the weight of appellate authority in this Department requires a court to address jurisdictional issues before undertaking a forum non conveniens analysis, the Appellate Division decisions do not discuss the reasoning of Sinochem and do not discuss the conflicting lines of authority.[6] Based on a close reading of the cases, this court finds that the lines of authority do not appear to be reconcilable based on factual differences. The Court of Appeals has not addressed the issue, although dictum in a pre-Sinochem decision stated that the doctrine of forum

[6] It appears that Sinochem has been mentioned only by the dissent in American BankNote Corp. (45 AD3d at 346, n 3 [McGuire, J.]).

non conveniens is inapplicable unless personal jurisdiction has been obtained. (Ehrlich-Bober & Co., Inc. v University of Houston (49 NY2d 574, 579 [1980].)[7] Absent binding authority to the contrary, the court follows the second line of cases and Sinochem, which the court finds to be more persuasive. (See generally Rodriguez v City of New York, 142 A3d 778, 778 [1st Dept 2016] [following more persuasive precedents where conflict existed within the Department].)

Here, it is undisputed that the Foundation was founded under Swiss law and is domiciled in Switzerland. (Kircher Aff. In Supp., ¶ 15.) Mr. Kircher is a Swiss citizen and resident. (Id., ¶ 2.) UBS AG is a Swiss corporation. (SAC, ¶ 14; UBS Memo. In Supp. at 2.) Plaintiffs acknowledge that the record does not demonstrate personal jurisdiction over the Foundation, Kircher, and UBS AG and, as to these defendants, claims that a determination of jurisdiction cannot be made without first affording plaintiffs jurisdictional discovery and/or a hearing on the jurisdictional issue. (Pls.' Combined Memo. In Opp. To UBS and Foundation Motions To Dismiss at 6 [Pls.' Memo. In Opp.].)

Plaintiffs assert jurisdiction over the Foundation, Kircher, and UBS AG under CPLR 302 (a) (1), (2), and (3). (Pls.' Memo. In Opp. at 7.) The complaint pleads the following: a first

[7] It is noted that in Ehrlich-Bober & Co., Inc. v University of Houston (49 NY2d 574, supra]), the Court of Appeals reversed the Appellate Division's opinion to the extent that it dismissed the action on the ground of comity, but affirmed the decision to the extent that it denied dismissal of the action on the grounds of lack of personal jurisdiction and forum non conveniens. The Court of Appeals' decision was almost entirely addressed to the comity issue, with the Court reasoning on the personal jurisdiction and forum non conveniens issues as follows:

> ". . . Inasmuch as the [forum non conveniens] doctrine has no application unless the court has obtained in personam jurisdiction of the parties, the Appellate Division necessarily found that the requirements for the exercise of long-arm jurisdiction had been met.
>
> Preliminary to our consideration of the comity issue, we note our agreement with the conclusions reached by the Appellate Division that there was a proper basis for the exercise of long-arm jurisdiction and that the doctrine of forum non conveniens is inapplicable here."

(Id. at 579.) As the Court noted that a finding of personal jurisdiction had been made by the Appellate Division, the Court's statement that such a finding was a prerequisite to consideration of the forum non conveniens issue was dictum. To the extent that the Court made an independent finding as to jurisdiction, it expressly accepted "the facts alleged . . . as true for th[e] purpose" of its finding that a basis for long-arm jurisdiction existed under CPLR 302 (a) (1). (Id.)

cause of action against UBS, the Foundation, and Kircher for breach of fiduciary duty; a second cause of action against Christie's for aiding and abetting the breach of fiduciary duty; a third cause of action against UBS, the Foundation, and Kircher for an accounting; a fourth cause of action against all defendants for conversion; a fifth cause of action against UBS, the Foundation, and Kircher for unjust enrichment; a sixth cause of action against Christie's for unjust enrichment; a seventh cause of action against all defendants for "conspiracy to obtain unjust enrichment"; and an eighth cause of action against the "John Doe" possessors of the Painting, for replevin.

These causes of action are all premised on the same allegedly wrongful acts taken by defendants in derogation of plaintiffs' rights as heirs—the Foundation's assertion of an allegedly false claim that it was Margaret Kainer's heir or sole heir, and its entry into the Restitution Settlement Agreement with Christie's by which the Foundation purported to renounce its rights as heir in exchange for payment.

For example, the Breach of Fiduciary Duty claim alleges:

> "Each of the Foundation Defendants[8] have repeatedly breached their fiduciary duties to Plaintiffs by their efforts to deprive Plaintiffs of their rights to the Painting and to divert those rights to themselves, including among other things, (i) by wrongfully and falsely claiming that the UBS Foundation is Margaret's heir and/or the representative of Margaret's heirs and has the ownership rights to the Painting, (ii) by entering into the Restitution Settlement Agreement and purporting to renounce the rights of Margaret's heirs to the Painting and accepting payments for that renunciation, (iii) appropriating proceeds from the sale of the Painting, and (iv) by failing to provide Plaintiffs, the legitimate heirs, with relevant information regarding the Restitution Settlement Agreement, the sale(s) of the Painting and the funds received therefrom, the persons involved in these transactions and the buyer to whom the painting was sold."

[8] The Foundation Defendants are defined in the complaint as "UBS, the UBS Foundation and Kircher." The Foundation that is the defendant in this action is referred to as the "UBS Foundation." (SAC at 2.)

(SAC, ¶ 133.)

The Conversion claim alleges:

> "Defendants by their wrongful acts, agreed and entered into a conspiracy to illegally take, and did illegally take property which was rightfully owned by Plaintiffs and to convert such property for their own use and benefit. That property consists of the Painting and Plaintiffs' rights as heirs. The aim of the agreement and conspiracy was, and continues, to be to legitimize the UBS Foundation as the lawful heir so as to enable and enhance the ability of the Foundation Defendants to make claims or agreements for restitution in connection with the Painting and the discovery or sale [of] other paintings from the Kainer Collection and Christie's ability to sell them.
>
> Defendants' wrongful acts include, soliciting, facilitating and entering into the Restitution Settlement Agreement, selling the Painting and refusing to provide any information about the Painting or the sales to Plaintiffs, and profiting therefrom. . . .
>
> . . . The Foundation Defendants knew that the UBS Foundation was not the legitimate heir or the representative of the legitimate heirs. Upon information and belief, Christie's knew or should have known that the Foundation Defendants did not have the rights to the Painting and/or consciously avoided making any reasonable efforts to determine that they did, particularly given its claimed expertise with respect to spoliation and restitution issues. . . ."

(SAC, ¶¶ 155-157.)

The Unjust Enrichment claim against UBS, the Foundation, and Kircher alleges:

> "The Foundation Defendants have been enriched by their misappropriation of ownership rights to the Painting that belong to Plaintiffs and by any proceeds received therefrom or compensation related thereto.
>
> . . .
>
> The Foundation Defendants' enrichment is at Plaintiffs' expense in that Plaintiffs were and continue to be the sole rightful heirs and owners of the Painting."

(SAC, ¶¶ 163, 165.)

The Unjust Enrichment claim against Christie's alleges:

> "Christie's knew, should have known, or consciously avoided knowing that the UBS Foundation was not the legitimate heir to Margaret Kainer. . . .
>
> Christie's knew that the sale of the Painting upon a false representation that it was being made pursuant to a Restitution Settlement Agreement with the heirs of Margaret and Ludwig Kainer would be damaging to the legitimate heirs of Margaret.
>
> Christie's enrichment is at Plaintiffs' expense in that Plaintiffs were and continue to be the sole rightful heirs and owners of the Painting."

(SAC, ¶¶ 171-173.)

The conspiracy claim pleads:

> "Defendants, by their wrongful acts, agreed and entered into a conspiracy to illegally misappropriate, and did illegally misappropriate property which was rightfully owned by Plaintiffs and enrich themselves therefrom. That property consists of the Painting and Plaintiffs' rights as heirs. The aim of the agreement and conspiracy was, and continues to be, to legitimize the UBS Foundation as the lawful heir so as to enable and enhance the ability of the Foundation Defendants to make claims or agreements for restitution in connection with the Painting and the discovery or sale [of] other paintings from the Kainer Collection and Christie's ability to sell them.
>
> Defendants' wrongful acts include, soliciting, facilitating and entering into the Restitution Settlement Agreement, selling the Painting based upon a representation that it had secured a Restitution Settlement Agreement with the heirs of Margaret and Ludwig Kainer, and profiting therefrom.
>
> . . .
>
> Defendants planned and perpetrated these acts in concert and with reckless disregard of Plaintiffs' rights. The Foundation Defendants knew that the UBS Foundation was not the legitimate heir or the representative of the legitimate heirs. Upon information and belief, Christie's knew or should have known that the Foundation Defendants did not have the rights to the Painting and/or consciously avoided making any reasonable efforts to determine that they did, particularly given its claimed expertise with respect to spoliation and restitution issues."

(SAC, ¶¶ 179-180, 182.)

In seeking jurisdictional discovery, plaintiffs claim that the above transactions were all "effectuated through acts that took place in New York, including the negotiation and facilitation of the Restitution Settlement Agreement by Christie's on behalf of the . . . Foundation, and then the brokering of two sales" – i.e. the private sale and the subsequent auction. (Pls.' Memo. In Opp. at 13.) The Foundation defendants deny that they engaged in any acts in New York to effectuate the sale of the Painting. (UBS Memo. In Supp. at 15, 21; Kircher Aff. In Supp., ¶ 36.) Mr. Kircher states that in May 2009, Christie's contacted Dr. Von Trott, the Foundation's attorney in Berlin, on behalf of a client in Japan, seeking to conclude an agreement with the Foundation regarding a sale of the Painting. (Kircher Aff. In Supp., ¶ 34.) He claims that "[f]rom the Foundation's side, all of those discussions took place via phone, email and/or mail in Europe (i.e., Switzerland where the Foundation was located and Germany where the Foundation's counsel was located, and in London where the Art Law [sic] Register is located and Japan, where the Painting and its Japanese owner were." (Id., ¶ 36.) Mr. Kircher acknowledges that the Foundation agreed to renounce any claim of ownership to the Painting, and received approximately $1.8 million of the net proceeds of the private sale. (Id., ¶ 35.) He denies that he or "the Foundation knew of the auction until after it had taken place," and states that neither he nor the Foundation was "involved in or benefited by the auction sale of the Painting." (Id., ¶ 38.) He also acknowledges that, while in New York for personal reasons, he visited Christie's one week after the auction "to find out what had happened." (Kircher Aff. In Reply, ¶¶ 2-3.) Plaintiffs argue that the timing and circumstances of the public auction in relation to the first sale, and Kircher's visit to New York, are "extremely suspicious," and raise a question as to whether the Foundation was in fact benefited by the auction. (Pls.' Memo. In Opp. at 14.)

For purposes of this motion, the court assumes that plaintiffs have made a "sufficient start" to warrant jurisdictional discovery. (See Peterson v Spartan Indus., Inc., 33 NY2d 463, 467 [1974].) The court finds, however, that jurisdictional discovery would be unduly burdensome.

Plaintiffs seek extensive document discovery that would overlap to a significant extent with discovery on the merits of plaintiffs' claims that defendants and Christie's wrongfully interfered with plaintiffs' rights as heirs to the Painting. At oral argument, plaintiffs' counsel gave, as examples of documents they would seek, "Christie's file on the painting," including the Restitution Settlement Agreement and any drafts of the Agreement, as well as "any communications that [Christie's] had with . . . the Foundation relating to this painting or . . . whatever other dealings they may have had in New York." (Oral Argument Transcript at 45-46 [NYSCEF No. 197 [OA Tr.].) In addition, plaintiffs requested documents that reveal "the identity of who the painting was sold to, who the consignors were, [and] who the dealer that's mentioned in the [November 24, 2009] letter are,"[9] as well as where the painting is currently located. (Id. at 46.) Plaintiffs also sought to reserve the right to take the deposition of Christie's in connection with the jurisdictional discovery. (Id.)

As review of the complaint and these requests shows, the jurisdictional discovery would seek all communications between the Foundation and Christie's regarding the Restitution Settlement Agreement and the sale of the Painting. These communications would include communications regarding the Foundation's status and rights as heir, which are at the core of the parties' dispute in this action. Given the compelling case, discussed below, that is presented for dismissal of this action against the Foundation defendants on the forum non conveniens ground,

[9] This was a letter written to Mr. Kircher by Christie's, after his November 2009 meeting with Christie's, regarding the sale of the Painting at auction shortly after the private sale. (See Kircher Reply Aff., Ex. A; OA Tr. at 44.)

this court declines to order this extensive discovery, and will presume personal jurisdiction over these defendants. (See Sinochem, 549 US at 429.)

Forum Non Conveniens

It is well settled that "[t]he doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that 'in the interest of substantial justice the action should be heard in another forum' (CPLR 327)." (National Bank & Trust Co. of N. Am., Ltd. v Banco De Vizcaya, S.A., 72 NY2d 1005, 1007 [1988], cert denied 489 US 1067 [1989]; accord Elmaliach v Bank of China Ltd., 110 AD3d 192, 208 [1st Dept 2013].) The party seeking dismissal bears the "heavy burden of establishing that New York is an inconvenient forum and that a substantial nexus between New York and the action is lacking." (Id. [internal quotation marks and citations omitted].)

It is further settled that in applying the forum non conveniens doctrine, the court, "after considering and balancing the various competing factors,"

> "must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction."

(Islamic Rep. of Iran v Pahlavi, 62 NY2d 474, 479 [1984], cert denied 469 US 1108 [1985] [internal citations omitted].) "No one factor is controlling." (Id.)

A New York resident plaintiff's choice of forum "is presumptively favored," although not dispositive." (Wyser-Pratte Mgt. Co., 23 AD3d at 270; see Silver v Great Am. Ins. Co., 29 NY2d 356, 361 [1972]; Thor Gallery At S. DeKalb, LLC v Reliance Mediaworks [USA], Inc., 131 AD3d 431, 432 [1st Dept 2015] [noting that the residence of the plaintiff in New York "has

been held to generally be the most significant factor" militating against a forum non conveniens dismissal].) Here, however, none of the plaintiffs is a New York resident. Although the complaint does not set forth the residences of plaintiffs, review of the French certificate of inheritance (Palmer Ex. L), under which plaintiffs claim rights as heirs, shows that with one exception, plaintiffs reside outside the United States—in Australia, Great Britain, and Chile. The sole U.S. resident plaintiff resides in Connecticut.

Significantly, the central issue in this action is whether, or to what extent, plaintiffs and the Foundation have rights as heirs to property in Kainer's estate and, in particular, to the Painting. Plaintiffs do not dispute that foreign law governs the parties' rights as heirs. Nor do plaintiffs dispute that they have brought proceedings in Switzerland against the Foundation and Swiss localities, both of which claim rights as heirs of the Kainer estate under certificates of inheritance issued long before plaintiffs obtained their certificate of inheritance recognizing them as heirs.

In the pending Swiss proceedings, plaintiffs seek determination of claims regarding their status and rights as heirs, which overlap with the claims that must be determined in this action. As discussed above, plaintiffs' Swiss counsel, Philippe Dal Col, explains that in the Swiss Certificate of Inheritance proceeding, the plaintiffs, who are all of the plaintiffs here, seek a determination that the certificate of inheritance issued to the Swiss localities is invalid. In the Swiss Inheritance Claim proceeding, these same plaintiffs seek to recover property belonging to the Kainer estate that is held by the Swiss localities, as well as a determination that Kainer's father's will was ineffective to create a "reversionary heirship" in the Foundation defendant. (Dal Col Aff., quoted supra at 6.) The Application for Conciliation filed in these proceedings by plaintiffs' Swiss counsel seeks, among other things, a determination that plaintiffs are the "sole

heirs" of Margaret Kainer, a determination that the remainder contained in the testamentary disposition of Norbert Levy is null and void, and an order that the Swiss localities and the Foundation immediately return to plaintiffs "all of the property and/or assets originating from the estate of the deceased Margaret Kainer." (Application for Conciliation, Prayer for Relief at 4-5 [Ex. 1 to Kircher Aff. In Supp.].)

In contending that it is not necessary for this court to determine the parties' rights as heirs, plaintiffs characterize the "focus" of the action as the conspiracy among the defendants with respect to the 2009 Restitution Settlement Agreement and sales of the Painting. (Pls.' Memo. In Opp. at 20.) Plaintiffs assert that they "are not asking the Court here to determine any of the controversies that may exist between the parties or for any relief with respect to the events that predated 2009 and are the subject of the Swiss and German proceedings. The only purpose the allegations regarding events prior to 2009 in the SAC serve is to set forth what was known by the UBS Foundation Defendants and readily discoverable by Christie's as of 2009 when the Restitution Settlement Agreement was finalized and thereafter indicating that the claims and representations made with respect to the painting were false, or at a minimum, subject to serious question." (Id.)

Plaintiffs' contention ignores that in order to determine whether the Foundation defendants and/or Christie's committed any wrongful acts in connection with the May 2009 Restitution Settlement Agreement and the sales of the Painting, and whether plaintiffs were injured, the court would first have to determine the parties' status and rights as heirs. Put another way, plaintiffs' claims require an initial determination that plaintiffs are Kainer's lawful heirs with rights to the Painting, and that the Foundation was not also a legitimate heir or, if it was, that it did not have the authority to enter into the Restitution Settlement Agreement.

Determination of this issue, in turn, would potentially require application of the laws of France, Switzerland, and Germany.

It is well settled that "'[t]he applicability of foreign law is an important consideration in determining a forum non conveniens motion and weighs in favor of dismissal.'" (Flame S.A., 107 AD3d at 438 [quoting Shin-Etsu Chem. Co., Ltd., 9 AD3d at 178].) The pendency of a foreign proceeding involving the same or similar issues is also properly considered in determining whether a forum non conveniens dismissal is warranted. (See Prime Props. USA 2011, LLC, 145 AD3d at 526.) Although the applicability of foreign law is not dispositive (see Wilson v Dantas, 128 AD3d 176, 187 [1st Dept 2015], affd 29 NY3d 1051 [2017]), here, the need to apply the laws of three foreign jurisdictions, together with the pendency of foreign proceedings involving plaintiffs' and the Foundation's status and rights as heirs, weigh heavily in favor of a forum non conveniens dismissal.

The parties' discussion of the laws applicable in the Swiss proceedings points up the extremely difficult task this court would face in ascertaining and applying foreign law. Plaintiffs' Swiss counsel appears to opine that, in the Swiss Inheritance Claim proceeding, the Swiss court would apply the Swiss Private International law in initially determining the substantive law applicable to the parties' claims. (Id., ¶ 17.) In that proceeding, "[t]he Swiss plaintiffs are arguing that (i) French inheritance law applies to the estate of Margaret Kainer on the grounds that the last domicile of Margaret Kainer was in Paris, and that (ii) German inheritance law applies to the Reversionary Claim." (Id., ¶ 11.) Plaintiffs' Swiss counsel further appears to state that in the proceeding to invalidate the certificate of inheritance issued to the Swiss localities, the Swiss court would apply Swiss law, but only if the deceased was domiciled in Switzerland at the time of death or if there was "immovable property" located in Switzerland.

(Id., ¶ 14.) In a statement submitted on behalf of the Foundation, Christian Girod, its counsel in the Swiss proceedings, represented that the Foundation intended to challenge the application of French law to the Kainer estate and to argue in favor of the application of Swiss law. (Girod Reply Aff., ¶ 8.)

The parties not only dispute the applicable foreign law, but discuss the substance of the law they claim is applicable in a manner that is, at best, opaque. The opinions of the experts in foreign law that the parties offer on this motion thus further illustrate the difficult challenges this court would face in applying foreign law.[10]

In holding that a forum non conveniens dismissal is strongly supported by the need to apply the laws of three foreign jurisdictions to determine the parties' rights as heirs, the court notes plaintiffs' contention that the French certificate of inheritance evidences plaintiffs' status as heirs and is a sufficient basis on which to permit plaintiffs to proceed in the instant action. In

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[10] An example of plaintiffs' exposition of the governing law is as follows:

> "In matters of inheritance the Swiss judge applies the law applicable to the estate, i.e. the lex successionis which is the substantive to which the estate is subject to. In international matters like the one at hand he will apply the law commanded by the Swiss Private International law of December 18, 1987, as amended ('PILA'). On all substantive questions like what belongs to the estate, who is entitled to what portion, etc. the Swiss judge will apply the lex successionis [citations, including citation to PILA omitted]. However, protective measures and the distribution of the estate are subject to the law of the place of the authorities having jurisdiction. This includes the issuance of a certificate of inheritance. . . ."

(Dal Col Aff., ¶ 17.)

UBS's expert on Swiss law, Dr. Felix Dasser, offers similarly abstruse discussion of the applicable foreign law. For example, in explaining that the Lugano Convention excludes any disputes relating to rights in property arising out of wills and succession, he states:

> "This carve-out provision covers succession claims of a purported heir to a decedent's estate, but does not cover claims against a third party which already belonged to the decedent and, thus, form part of the decedent's estate. In this second case, only the purported heir's right to sue against the third party debtor is based on inheritance law; and this issue of hereditary law addresses, thus, only a precondition of the claim, a so-called preliminary question. [citations omitted.]"

(Dasser Aff., ¶¶ 27-28.)

support of this contention, plaintiffs' Swiss counsel states that the French certificate of inheritance is not at issue in the Swiss proceedings, and that a Swiss judge "is not authorized to cancel, modify or declare null and void a foreign certificate of inheritance." (Dal Col. Aff., ¶ 17.) Swiss counsel concludes: "Thus, even under the worst-case result in the Swiss Proceedings for Plaintiffs, Plaintiffs would still have valid French Certificates of Inheritance." (Id., ¶ 18.)

Plaintiffs' assertion that the French certificate of inheritance is not at issue, and could not be challenged, in the Swiss proceedings, does not appear to be disputed. Plaintiffs' reliance on the French certificate, however, ignores that the heirs assert competing claims to an ownership interest in the Painting, and that these claims must be determined, under the applicable foreign laws, in order to determine whether the Foundation wrongfully entered into the Restitution Settlement Agreement and wrongfully received the proceeds from the sale of the Painting. At most, the French certificate of inheritance may establish plaintiffs' standing for pleading purposes on this motion to dismiss. It does not eliminate the need to determine the parties' competing claims as heirs with rights to the Painting.[11]

Although it appears from the foreign law experts' statements submitted on these motions that European certificates of inheritance may constitute prima facie evidence of a party's status as an heir, it also appears to be undisputed that these certificates are not conclusive evidence of

[11] In claiming that plaintiffs' possession of the French certificate of inheritance permits them to proceed in this action, plaintiffs rely on Schoeps v Andrew Lloyd Webber Art Foundation (66 AD3d 137, 141-144 [1st Dept 2009]). In that case, the Court held that an asserted heir of a decedent who was forced to sell a painting under duress from the Nazis lacked standing to sue the current owner of the painting. The heir had not been appointed a personal representative of the decedent's estate and otherwise lacked any documentation of his status as heir, as required by New York Estates, Powers and Trusts Law § 13-3.5 (a) (1). In dictum, the Court considered whether an heir of a decedent from a foreign jurisdiction, in which an heir's ownership interest vests upon the decedent's death, could establish standing without obtaining an appointment as the decedent's representative. In particular, the Court considered whether standing could be established based on an acte de notoriété (or other similar document) and supporting proof by an expert in the law of the foreign jurisdiction concerning the means of establishing inheritance rights. Although receptive to such proof, the Court did not finally decide the issue.

More important, Schoeps did not involve the situation, presented here, which requires determination of the competing claims of heirs under the laws of several foreign jurisdictions.

such status, and may be invalidated in the jurisdictions that issued them. Thus, the Swiss certificates of inheritance issued to the Swiss localities are being challenged in the Swiss proceedings, and the German certificate of partial inheritance was challenged in the German proceeding. As plaintiffs' own counsel in the German proceeding represented to this court:

> "The German right of succession is characterized by universal succession. The heir becomes the legal successor, without having to formally accept and without any other recognizable external sign. The certificate of inheritance is proof of the line of succession that makes it possible for an heir to legitimate himself/herself against third parties and authorities. In Germany, one does not become an heir only because one is in possession of a certificate of inheritance. According to § 2361 BGB, the certificate of inheritance can be recalled at any time, even after decades and also has to be recalled officially [if] it is subsequently discovered that the preconditions for the issuance did not exist. The question of which of two people has indeed become heir has to be dealt with in litigious proceedings and not in the certificate of inheritance proceeding."

(Dill Aff., ¶ 27 [emphasis supplied].)[12] Plaintiffs have not claimed that the French certificate of inheritance is not similarly subject to challenge, under French law, in a formal litigation in France. On the contrary, Jerome Richardot, plaintiffs' counsel in the French proceeding to obtain the certificate of inheritance, states that "faith must be given to such 'acte de notoriété' [i.e., certificate of inheritance] until contrary evidence which generally may only be recognized using

[12] Indeed, Dr. Dill candidly explained that "[t]he purpose of the proceedings" he initiated on behalf of the plaintiffs in the German proceeding for a recall or cancellation of the 1972 certificate of inheritance issued to the Foundation was "to prevent the Norbert Foundation to masquerade itself in the future as heir of Norbert Levy or Margaret Kainer to third parties with reference to the certificate of inheritance. . . ." (Dill Aff., ¶ 27.)

As noted above (supra at 6), in the German certificate of inheritance proceeding, the 1972 certificate was initially upheld, then annulled by an appellate body. After plaintiffs' counsel informed this court of the annulment, by letter dated February 1, 2017, the court authorized, but never received, a supplemental submission setting forth the parties' positions on the effect of the annulment. Plaintiff has not asserted that the annulment negates the Foundation's rights as heirs. Nor, according to plaintiffs' counsel in the German certificate of inheritance proceeding, would that be the case, as the German certificate cannot be challenged in that proceeding, but only by litigation ("litigious proceedings"). In discussing the impact of the initial determination of the court in the German certificate of inheritance proceeding upholding the German certificate, plaintiffs' counsel in the instant action consistently represented to this court that the German proceeding is an investigative proceeding, not an adversary proceeding, and that the determination of German court in that proceeding "has absolutely no binding authority" and "is not on the merits." (OA Tr. at 27.)

a complex procedure (equivalent to challenging a legal ruling)." (Richardot Aff., ¶¶ 4, 7.)

Notably, also, notwithstanding their possession of the French certificate of inheritance, plaintiffs themselves initiated the Swiss proceedings for a determination of their rights as heirs. Thus, in the Swiss Inheritance Claim proceeding, they contend that they have rights as heirs which entitle them to recover property held by both the Swiss localities and the Foundation. Plaintiffs have not shown, or claimed, that the determination of their rights as heirs in the Swiss proceeding will not include a determination as to whether, and to what extent, they have an ownership interest in the Painting. Nor have they shown that there is not an available alternative forum for determination of these rights, in the event the pending Swiss proceedings prove inadequate for resolution of all of these issues. (See Flame, 107 AD3d at 438 ["[T]he burden of demonstrating that no alternative forum is available falls on plaintiff" [internal quotation marks, ellipsis, and brackets omitted], quoting Pahlavi, 62 NY2d at 481.)

"Although the existence of a suitable alternative forum is a most important factor to be considered in applying the forum non conveniens doctrine, its alleged absence does not require the court to retain jurisdiction." (Pahlavi, 62 NY2d at 483.) Here, however, a strong showing is made that a suitable alternative forum exists. The Foundation, which was founded under Swiss law and is domiciled in Switzerland (Kircher Aff. In Supp., ¶ 15), is already a party to the Swiss proceedings. Mr. Kircher is a Swiss resident, and it is not claimed that he is not amenable to jurisdiction in those proceedings. (Id., ¶ 2.) UBS AG, a Swiss corporation, and its subsidiary UBS Global, are not currently parties to the Swiss proceedings but have consented to jurisdiction in Switzerland. (UBS Memo. In Supp. at 13 n 7.) It is not disputed that the courts of Switzerland will afford plaintiffs a fair forum and "adequate process," as will the courts of France and Germany, if additional resort to those courts proves necessary to resolve the parties'

claims to rights as heirs. (See Wyser-Pratte Mgt. Co., 23 AD3d at 270 [holding, in dismissing action on forum non conveniens ground that German courts "afford[] adequate process"].)

After consideration of the forum non conveniens factors, the court concludes that the competing claims between the asserted heirs of Kainer's estate as to ownership rights in the Painting and other assets of the estate, and as to the proper distribution of proceeds from the sale of the Painting (or other damages as a result of its sale), should be determined in the foreign jurisdiction(s) whose laws will apply to the determination, and in which proceedings initiated by plaintiffs themselves are pending. (See Citigroup Global Mkts., Inc. v Metals Holding Corp., 45 AD3d 361, 362 [1st Dept 2007] [upholding forum non conveniens dismissal, where the action involved disputed ownership by foreign corporations of assets, the court reasoning that the action "cannot be determined without reference to the underlying issue of ownership—the very issue that is already being litigated abroad"].)

The claims between the heirs as to their ownership rights arise under European estate law and have a "substantial nexus" to Europe, but not to New York. Justice will best be served if the plaintiffs continue to litigate their status as heirs in the European courts to which they have already resorted, and which are fully conversant with the myriad of foreign laws that govern the plaintiffs' claims. Under these circumstances, the court exercises its discretion to dismiss the action as against the Foundation defendants on the foreign non conveniens ground. (See generally Silver, 29 NY2d at 361; accord Pahlavi, 62 NY2d at 483.)

Claims Against Christie's

Christie's joins in UBS's motion to dismiss the complaint on the forum non conveniens ground. (Christie's Memo. In Supp. Of Christie's Motion To Dismiss at 3 [Christie's Memo. In Supp.].) For the reasons set forth above, Christie's correctly argues that "the dispute as to

Plaintiffs' alleged rights to the Painting must be conclusively determined in proceedings abroad before any alleged liability on Christie's part in connection with the Painting can be litigated." (Christie's Reply Memo. at 15.)

Christie's has not, however, consented to submit to jurisdiction in the European courts and there is, in any event, a dispute as to whether the courts would accept jurisdiction over Christie's. (See Dal Col Aff., ¶¶ 19-33.) The European proceedings also do not involve claims regarding Christie's acts. In contrast, the complaint alleges acts specific to Christie's that establish a sufficient nexus to New York. As pleaded in the complaint, Christie's holds itself out as an expert in restitution issues, with a "responsibility to ensure that [it] do[es] not knowingly sell spoliated but unrestituted art works." (SAC, ¶¶ 95 [quoting Christie's website], 125.) Christie's solicitation of the Restitution Settlement Agreement and sale of the Painting are alleged to have been wrongful because Christie's "knew, should have known, or consciously avoided knowing that the UBS Foundation was not the legitimate heir to Margaret Kainer." (Id., e.g. ¶¶ 171, 101, 139.) Christie's sale of restituted art in New York furnishes the nexus with New York that militates against a forum non conveniens dismissal of the claims against it.

Plaintiffs' claims against Christie's in this action may thus proceed if plaintiffs obtain a favorable final determination in the European court(s) that they have rights as heirs to an ownership interest in the Painting. Christie's motion to dismiss on forum non conveniens grounds will accordingly be granted only to the extent of staying the action until plaintiffs receive such a determination. (See CPLR 327 [a] [authorizing the court, on a forum non conveniens motion, to "stay or dismiss the action in whole or in part on any conditions that may be just"].)

In holding that the action as against Christie's should be stayed, the court, on this motion,

rejects Christie's alternative contention that the complaint does not plead any viable cause of action against it. The court accordingly turns to the branch of Christie's motion seeking dismissal of the complaint pursuant to CPLR 3211.

Christie's argues that the sixth cause of action against it for unjust enrichment, and the seventh cause of action against it and the Foundation defendants for "conspiracy to obtain unjust enrichment," must be dismissed for failure to state a cause of action. (Christie's Memo. In Supp. at 8-10.) "The theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." (Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 [2012] [internal quotation marks, citations, and brackets omitted].) The complaint pleads that Christie's knew, should have known, or consciously avoided knowing that the Foundation was not the legitimate heir, not that Christie's knew of or had any relationship with plaintiffs. Plaintiffs' unjust enrichment cause of action must be dismissed, as it does not allege any "facts showing that plaintiffs had any relationship or connection to [defendant], let alone the 'sufficiently close relationship' necessary to sustain this claim." (Schroeder v Pinterest Inc., 133 AD3d 12, 27 [1st Dept 2015] [quoting Georgia Malone, 19 NY3d at 516].)

For the reasons discussed above, the conspiracy claim, to the extent based on alleged unjust enrichment, must be dismissed for failure to state a cause of action. Although the conspiracy claim is denominated one to "to obtain unjust enrichment," it is also based on the wrongdoing pleaded in the conversion cause of action, which alleges in terms that Christie's engaged in a "conspiracy" to misappropriate or convert the Painting by soliciting and facilitating the Restitution Settlement Agreement and by selling the Painting in violation of plaintiffs' rights as heirs. (See SAC, ¶¶ 155-156 [quoted supra at 13].) Affording the complaint the benefit of

"every possible favorable inference," as the court must do on a motion to dismiss, the court holds that the seventh cause of action pleads a claim to the extent premised on alleged conversion. (511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002] [internal citations omitted].) The timeliness of this claim is addressed below.

Christie's argues that the fourth cause of action for conversion is time barred, as is the second cause of action for aiding and abetting breach of fiduciary duty. (Christie's Memo. In Supp. at 5-8.) The court holds that these claims and the conspiracy claim, to the extent based on conversion, are time barred under the New York statute of limitations. The conversion claim is subject to CPLR 214 (3), which requires the action to be commenced within three years of the date of accrual. (Swain v Brown, 135 AD3d 629, 631 [1st Dept 2016].) Where, as here, the action is brought against an alleged "bad faith possessor," the statute "begins to run immediately from the time of wrongful possession, and does not require a demand and refusal." (Id., citing State of New York v Seventh Regiment Fund, 98 NY2d 249 [2002].) The fiduciary duty claim seeks monetary damages, and is therefore subject to the three-year statute of limitations imposed by CPLR 214 (4). (IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139-140 [2009], rearg denied 12 NY3d 889; Kaufman v Cohen, 307 AD2d 113, 118 [1st Dept 2003].)

As this action was brought in 2013, more than three years after the alleged wrongful acts, the aiding and abetting cause of action, and the causes of action based on conversion, are time barred under New York law. Since this action was commenced, Congress has enacted the Holocaust Expropriated Art Recovery Act of 2016 (Pub L 114-308, 130 US Stat 1524, amending 22 USC § 1621, et seq. [HEAR Act]). The enactment was based on a Congressional finding that victims of Nazi persecution and their heirs have faced significant procedural obstacles, due in part to State statutes of limitation, to lawsuits brought in the United States to recover

misappropriated artworks and other property, and that relief is necessary due to the unique and horrific circumstances of the Holocaust and the difficulty of documenting claims. (Id., § 2 [6]; Matter of Estate of Stettiner, 148 AD3d 184, 186-187 [1st Dept 2017].) The Act (subject to certain restrictions) accordingly extends state law statutes of limitations in civil actions "to recover any artwork . . . that was lost during the covered period because of Nazi persecution" for six years from "the actual discovery by the claimant" of the "identity and location of the artwork" and of "a possessory interest of the claimant in the artwork." (HEAR Act, § 5 [a].)

In supplemental briefing requested by the court after the submission of the motions, the parties dispute whether the Act is applicable and, in particular, whether a claim for damages against parties not in possession of the artwork is an action to "recover" artwork within the meaning of the Act. On the record as briefed, the court cannot find that the HEAR Act may not revive plaintiffs' causes of action against Christie's for aiding and abetting breach of fiduciary duty and conversion.[13] Final resolution of this important issue as to the scope of the Act would, however, be premature at this juncture. As held above, the causes of action against Christie's cannot proceed unless and until plaintiffs prevail in the European proceedings and obtain a final determination that plaintiffs are Kainer's lawful heirs with rights to the Painting, and that the

[13] In concluding that these causes of action may be viable, the court recognizes that Christie's alleged acts in facilitating the Restitution Settlement Agreement and selling the Painting occurred in 2009, and that plaintiffs did not obtain the French certificate of inheritance until 2012. The court cannot find as a matter of law on this record that these facts preclude any claim against Christie's for wrongdoing. The record on Christie's motion (and also on UBS's and the Foundation defendants' motions) contains no discussion of what legal obligations Christie's may have had in facilitating a Restitution Settlement Agreement, including what obligations it may have had to investigate the legitimacy of a party claiming to be an heir under a European certificate of inheritance, or to search for other heirs.

On a related point, it is noted that the complaint suggests that the 2005 settlement agreement between the Swiss localities and the Foundation (discussed supra at 5) was available on the internet and would have put Christie's on notice that Margaret Kainer's domicile on the day of her death was France and that French law could apply. (SAC, ¶ 101.) The portion of the settlement agreement that plaintiffs cite (id., ¶ 79) requires further explanation. Even accepting plaintiffs' contention that the settlement agreement could have put Christie's on notice not only that French law would apply and that the Swiss localities therefore might not have any rights as heirs, but also that there were possible French heirs, the significance of that fact cannot be determined without briefing, in the event this action proceeds, on Christie's investigative obligations in 2009.

Foundation was not also a legitimate heir or, if it was, that it did not have the authority to enter into the Restitution Settlement Agreement. In the event this action proceeds against Christie's, the court will undertake the interpretation of the Act on a more comprehensively briefed record than provided on the instant motions.

Plaintiffs' Motion to Supplement the Record

Plaintiffs purport to move, pursuant to CPLR 2214 (c), to supplement the record to demonstrate that a factual statement made by counsel for the Foundation at oral argument as to Kainer's domicile was "incorrect," and that her domicile at the time of her death was France, not Switzerland. In deciding these motions to dismiss, which were based on the forum non conveniens doctrine or, alternatively, the statute of limitations or the facial insufficiency of the complaint, it was not necessary for the court to make any factual finding as to Kainer's domicile. Nor did the court do so. This motion will therefore be denied.

Order

I. It is accordingly hereby ORDERED that the motion of defendants UBS AG and UBS Global Asset Management (Americas), Inc. (motion sequence no. 004) for an order dismissing the complaint is hereby granted to the extent of dismissing the complaint as against the said defendants, pursuant to CPLR 327, on the ground of forum non conveniens; and it is further

II. ORDERED that the motion of defendants Norbert Stiftung f/k/a Norbert Levy Stiftung (the Foundation) and Edgar Kircher (motion sequence no. 005) for an order dismissing the complaint is hereby granted to the extent of dismissing the complaint as against the said defendants, pursuant to CPLR 327, on the ground of forum non conveniens; and it is further

III. (a) ORDERED that the branch of the motion of defendant Christie's Inc. (motion sequence no. 006) for an order dismissing the complaint, pursuant to CPLR 327 on the ground of forum non conveniens, is granted to the extent of staying this action as against Christie's Inc. with leave to restore the action to the calendar in the event plaintiffs obtain a final determination in the European court(s) that plaintiffs are Kainer's lawful heirs with rights to the Painting, and that the Foundation was not also a legitimate heir or, if it was, that it did not have the authority to enter into the Restitution Settlement Agreement; and it is further

(b) ORDERED that the branch of the motion of defendant Christie's Inc. for an order dismissing the sixth cause of action against it for unjust enrichment and the seventh cause of action against it for conspiracy to obtain unjust enrichment, pursuant to CPLR 3211 for failure to state a cause of action, is granted to the following extent: The sixth cause of action is dismissed; and the seventh cause of action is dismissed to the extent premised on unjust enrichment; and it is further

(c) ORDERED that the branch of the motion of defendant Christie's Inc. for an order dismissing the second cause of action against it for aiding and abetting breach of fiduciary duty and the fourth cause of action against it for conversion, pursuant to CPLR 3211 based on the statute of limitations, is denied. Provided that: In the event this action is restored to the calendar pursuant to paragraph III (a) above, defendant Christie's Inc. may move, based on the statute of limitations, to dismiss these causes of action and the seventh cause of action for conspiracy to the extent premised on conversion. If such a motion is brought, it shall be supported by comprehensive briefing supporting defendant's claim that these causes of action are not timely under the HEAR Act; and it is further

IV. ORDERED that the motion of plaintiff to supplement the record (motion sequence no. 007) is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 30, 2017

MARCY FRIEDMAN, J.S.C.