APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 10, 2017]

No. 15-55550
15-55977

D.C. No. 2:05-cv-03459-JFW-E

DAVID CASSIRER; AVA CASSIRER; UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY, a California non-profit corporation,
Plaintiffs-Appellees,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain,
Defendant-Appellant.

No. 15-55951

D.C. No. 2:05-cv-03459-JFW-E

DAVID CASSIRER; AVA CASSIRER; UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY, a California

non-profit corporation,)
Plaintiffs-Appellants,)
)
v.)
)
THYSSEN-BORNEMISZA)
COLLECTION FOUNDATION,)
an agency or instrumentality of the)
Kingdom of Spain,)
Defendant-Appellee.)
_____)

OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted December 5, 2016
Pasadena, California

Filed July 10, 2017

Before: Consuelo M. Callahan, Carlos T. Bea, and
Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Bea

SUMMARY*

Foreign Sovereign Immunities Act / Holocaust Expropriated Art Recovery Act

The panel reversed the district court's grant of summary judgment, on remand, in favor of Thyssen-Bornemisza Collection Foundation, the defendant in an action under the Foreign Sovereign Immunities Act concerning a Camille Pissarro painting that was forcibly taken from the plaintiffs' great-grandmother by an art dealer who had been appointed by the Nazi government to conduct an appraisal.

The panel held that the Holocaust Expropriated Art Recovery Act of 2016 supplied the statute of limitations for the plaintiffs' claims. The claims were timely because they were filed within six years of the date of the plaintiffs' actual discovery of the artwork's location.

The panel held that when jurisdiction is based on the FSIA, federal common law, which follows the approach of the Restatement (Second) of Conflict of Laws, applies to the choice of law rule determination. Under the Second Restatement, Spain's substantive law governed defendant TBC's claim that it was the rightful owner of the painting.

The panel held that the district court erred in deciding that, as a matter of law, TBC had acquired title to the painting through Article 1955 of the Spanish Civil Code. The panel held that there was a

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

triable issue of fact whether TBC was an *encubridor*, or accessory, to the theft of the painting within the meaning of Civil Code Article 1956. In Section III.C.1 of its opinion, the panel considered the following Spanish rules of statutory interpretation: (i) proper meaning of wording; (ii) context; (iii) historical and legislative background, including (a) definition of *encubridor* in the 1870 Penal Code, and (b) the 1950 Law; and (iv) social reality at the time of enactment. The panel concluded that an *encubridor* within the meaning of Article 1956 could include someone who, with knowledge that the good had been stolen from the rightful owner, received stolen goods for his personal benefit. The panel concluded that TBC had not established, as a matter of law, that it lacked actual knowledge that the painting was stolen property. The district court therefore erred in granting summary judgment on the grounds that, as a matter of law, TBC acquired the painting through acquisitive prescription.

The panel rejected TBC's other arguments for affirming the grant of summary judgment. First, the panel held that TBC was not entitled to summary judgment based on its claim that Baron Hans Heinrich Thyssen-Bornemisza, from whom it bought the painting, had lawful title under Swiss law. The panel concluded that there was a triable issue of fact as to the Baron's good faith in his possession of the painting. Second, the panel held that TBC was not entitled to summary judgment based on a laches defense under California law. Third, the panel held that the plaintiffs' claims were not foreclosed by their great-grandmother's acceptance of a 1958 settlement agreement with the Nazi art appraiser, the heir of another Jewish victim, and the German government.

The panel also concluded that the plaintiffs' other arguments against applying Article 1955 were without merit. The panel held that Spain's Historical Heritage Law did not prevent TBC from acquiring prescriptive title to the painting. The panel also affirmed the district court's conclusion that the application of Article 1955 to vest TBC with title to the painting would not violate the European Convention on Human Rights.

The panel reversed the district court's judgment and remanded the case to the district court for further proceedings.

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OPINION

BEA, Circuit Judge, with whom Judge Callahan concurs. Judge Ikuta concurs except as to Sections III.C.1.iii.b and III.C.1.iv:

In 1939 Germany, as part of the "Aryanization" of the property of German Jews, Lilly Neubauer ("Lilly")[1] was forced to "sell" a painting by Camille Pissarro (the "Painting"), a French Impressionist, to Jackob Scheidwimmer ("Scheidwimmer"), a Berlin art dealer.

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[1] In our two prior opinions, this Court has referred to Lilly Neubauer, the great-grandmother of Plaintiffs David Cassirer and Ava Cassirer, as "Lilly." *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc); *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013).

We use quotation marks around "sell" to distinguish the act from a true sale because Scheidwimmer had been appointed to appraise the Painting by the Nazi government, had refused to allow Lilly to take the Painting with her out of Germany, and had demanded that she sell it to him for all of $360 in Reichsmarks, which were to be deposited in a blocked account. Lilly justifiably feared that unless she sold the Painting to Scheidwimmer she would not be allowed to leave Germany. The district court found, and the parties agree, that the Painting was forcibly taken from Lilly.

The history of how the Cassirer family came to own the Painting, as well as the application of the Foreign Sovereign Immunity Act ("FSIA") which resulted in recognition of our jurisdiction to deal with the claims to the Painting, are detailed in our earlier en banc opinion[2] What primarily concerns us now is the sale of the Painting by the Baron Hans Heinrich Thyssen-Bornemisza (the "Baron") to the Thyssen-Bornemisza Collection ("TBC") in 1993, its display at TBC's museum in Madrid ever since, and what effect, if any, that possession has had on the claims of title by the parties to this action.

In short, in this third appeal to this Court, we are called upon to decide whether the district court correctly granted summary judgment to TBC based on TBC's claim that it acquired good title to the Painting through the operation of Spain's law of prescriptive acquisition (or "usucaption") as a result of TBC's public, peaceful, and uninterrupted possession in the capacity as owner of the Painting from 1993 until the Cassirers

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[2] *Kingdom of Spain*, 616 F.3d at 1023–24.

filed a petition requesting the return of the Painting in 2001. Second, although not ruled upon by the district court, we consider whether the Baron's purchase of the Painting, and his possession of it for years, vested him with good title under Swiss law—title he could validly pass to TBC in the 1993 sale. Third, we consider TBC's arguments that the Cassirers' claims are barred by laches or by Lilly's acceptance of a post-war settlement agreement with the German government. Finally, we consider the Cassirers' arguments that Spain's Historical Heritage Law and the European Convention on Human Rights prevent TBC from acquiring prescriptive title. Ultimately, we reverse the order which granted summary judgment and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY[3]

A. The 1958 Settlement Agreement

After the Nazis forced Lilly to sell the Painting to Scheidwimmer in 1939, Scheidwimmer then forced another Jewish collector, Julius Sulzbacher ("Sulzbacher"), to exchange three German paintings for the Painting. Sulzbacher was also seeking to escape Nazi Germany. After the Sulzbacher family fled Germany, the Gestapo confiscated the Painting.

After the war, the Allies established a process for restoring property to the victims of Nazi looting. Military Law No. 59 ("MGL No. 59") authorized victims

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[3] As noted above, much of the factual history of this case is described in *Kingdom of Spain*, 616 F.3d at 1023–24. We include only such factual background as necessary to explain our decision in this case.

to seek restitution of looted property. In 1948, Lilly filed a timely claim against Scheidwimmer under MGL No. 59 for restitution of, or compensation for, the Painting. Sulzbacher also filed claims under MGL No. 59 seeking restitution of, or compensation for, the Painting and the three German paintings. In 1954, the United States Court of Restitution Appeals ("CORA") published a decision confirming that Lilly owned the Painting.

Although they knew Lilly was the owner of the Painting, Lilly, Sulzbacher, and Scheidwimmer believed the Painting was lost or destroyed during the war. In 1957, after the German Federal Republic regained its sovereignty, Germany established a law governing claims relating to Nazi-looted property known as the Brüg. Lilly then dropped her restitution claim against Scheidwimmer and initiated a claim against Germany for compensation for the wrongful taking of the Painting. Grete Kahn, Sulzbacher's heir, was also a party in this action.

The parties to the action against Germany were unaware of the location of the Painting and only two of the German paintings originally owned by Sulzbacher were still available for return. In 1958, the parties reached a settlement agreement (the "1958 Settlement Agreement"). This agreement provided that: (1) Germany would pay Lilly 120,000 Deutschmarks (the Painting's agreed value as of April 1, 1956); (2) Grete Kahn would receive 14,000 Deutschmarks from the payment to Lilly; and (3) Scheidwimmer would receive two of Sulzbacher's three German paintings.

B. The Painting's Post-War History

After the Nazis confiscated the Painting from Sulzbacher, it allegedly was sold at a Nazi government auction in Dusseldorf. In 1943, the Painting was sold by an unknown consignor at the Lange Auction in Berlin to an unknown purchaser for 95,000 Reichsmarks. In 1951, the Frank Perls Gallery of Beverly Hills arranged to move the Painting out of Germany and into California to sell the Painting to collector Sidney Brody for $14,850. In 1952, Sydney Schoenberg, a St. Louis art collector, purchased the Painting for $16,500. In 1976, the Baron purchased the Painting through the Stephen Hahn Gallery in New York for $275,000. The Baron kept the Painting in Switzerland as part of his collection until 1992, except when it was on public display in exhibitions outside Switzerland.

C. TBC's Purchase of the Painting

In 1988, Favorita Trustees Limited, an entity of the Baron, and Spain reached an agreement that the Baron would loan his art collection (the "Collection"), including the Painting, to Spain. Pursuant to this agreement, Spain created TBC[4] to maintain, conserve, publicly exhibit, and promote the Collection's artwork. TBC's initial board of directors had five members acting on behalf of the Spanish government and five members acting on behalf of the Baron and his family. Spain agreed to display the Collection at the

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[4] TBC is an agency or instrumentality of the Kingdom of Spain, which this Court previously recognized in *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010).

Villahermosa Palace in Madrid, Spain, and to restore and redesign the palace as a museum (the "Museum"). After the Villahermosa Palace had been restored and redesigned as the Museum, in 1992, pursuant to the loan agreement, the Museum received a number of paintings from Favorita Trustees Limited, including the Painting, and the Museum opened to the public. In 1993, the Spanish government passed Real Decreto-Ley 11/1993, which authorized and funded the purchase of the Collection. Spain bought the Collection by entering into an acquisition agreement with Favorita Trustees Limited. The Real Decreto-Ley 11/1993 classified the Collection as part of the Spanish Historical Heritage, which made the property subject to the provisions of the Spanish Historical Heritage Law. TBC paid the Baron $350 million for the Collection. The estimated value of the Collection at that time was somewhere between $1 billion and $2 billion.

In 1989, after the 1988 loan agreement, Spain and TBC investigated title to the works in the Collection. In 1993, Spain and TBC did a second title investigation in connection with the purchase agreement.

D. Procedural History

In 2000, Claude Cassirer, a photographer, learned from a client that the Painting was in the Museum. TBC does not dispute that Mr. Cassirer had "actual knowledge" of the Painting's location by 2000. On May 3, 2001, the Cassirer family filed a petition in Spain seeking the return of the Painting. After that petition was denied, in 2005, Claude Cassirer filed this action in the United States District Court for the Central

District of California seeking the return of the Painting.[5]

As noted above, this case has been before this Court in two prior appeals. After the second remand to the district court, TBC filed a motion for summary adjudication. TBC moved for summary adjudication of the following issues:

> (1) Plaintiffs' predecessor-in-interest, Lilly, waived her rights to the Pissarro Painting in the 1958 Settlement Agreement; (2) the Court lacks jurisdiction because any "taking in violation of international law" has already been remedied by Germany; and (3) the tenets of U.S. policy on Nazi-looted art require honoring the finality of the 1958 Settlement Agreement.

In a written order, the district court denied TBC's motion on the grounds that Lilly did not waive her right to physical restitution by accepting the Settlement Agreement, which also meant that the court retained jurisdiction under the FSIA and the Cassirers' claims do not conflict with federal policy. TBC filed an interlocutory appeal of that portion of the order which denied TBC's claim of sovereign immunity, as to which the district court denied TBC a certificate of appealability on the grounds that TBC's attempted interlocutory appeal was frivolous and/or waived because of this Court's decision in 2010, which determined that the district court could properly

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[5] Claude Cassirer died in 2010. David and Ava Cassirer, his children, and the United Jewish Federation of San Diego County succeed to his claims. Collectively, we refer to these plaintiffs as "the Cassirers."

exercise jurisdiction pursuant to the FSIA. The district court thereby retained jurisdiction of the case pursuant to *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992). TBC now cross-appeals the district court's order denying its motion for summary adjudication based on the 1958 Settlement Agreement.

After its summary adjudication motion was denied, TBC moved for summary judgment on the grounds that it had obtained ownership of the Painting pursuant to Spain's law of acquisitive prescription as stated in Spain Civil Code Article 1955 ("Article 1955"). The Cassirers filed a motion for summary adjudication asking the court to hold that California law, not Spanish law, governs the merits of the case. The district court granted summary judgment in favor of TBC and denied the Cassirers' motion for summary adjudication. The district court concluded that Spanish law governed TBC's claim that it owned the Painting pursuant to acquisitive prescription and that TBC owned the Painting because TBC had fulfilled the requirements of Article 1955. Before the district court, the Cassirers argued that their claims were timely pursuant to California Code of Civil Procedure § 338(c)(3)(A) ("§ 338(c)(3)(A)"), California's special statute of limitations for actions "for the specific recovery of a work of fine art brought against a museum . . . in the case of an unlawful taking or theft[.]" California enacted § 338(c)(3)(A) in 2010, five years after the Cassirers filed suit, but § 338(c)(3)(A) states that it applies to cases that are pending, *see* Cal. Civ. Proc. Code § 338(c)(3)(B). The district court held that, since TBC had acquired ownership of the Painting under Spanish law prior to the California legislature's enactment of § 338(c)(3)(A), retroactive application of

that special statute of limitations would violate TBC's due process rights.

The district court entered judgment in favor of TBC. The Cassirers timely appealed.

TBC cross-appealed the summary judgment order to the extent that it did not address two arguments advanced in TBC's motion for summary judgment. First, that the Baron had acquired ownership of the Painting under Swiss law through prescriptive acquisition and had subsequently conveyed good title to TBC. Second, that the Cassirers' claims are barred by the equitable defense of laches. TBC also cross-appealed "any interlocutory decisions or orders adverse to [TBC]" and the motions filed by TBC that were denied as moot by the district court following the district court's entry of judgment.[6]

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[6] These motions are TBC's Motion for Certification and TBC's Motion for Review and Reconsideration of the Magistrate Judge's Discovery Order. The motion for certification, which asked the district court to certify for interlocutory appeal TBC's claims relating to the 1958 Settlement Agreement are moot since we consider those claims in this opinion. In TBC's discovery motion, TBC sought reversal of the magistrate judge's denial of TBC's motion to compel production of thirteen letters between Lilly and her attorney. The motion is no longer moot in light of our decision in this opinion to reverse and remand this case. However, the district court did not consider this motion on the merits, and trial courts have "broad discretion" to permit or deny discovery, *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (quoting *Goehring v. Brophy*, 94 F.3d 1294, 1305 (9th Cir. 1996)). Therefore, we will allow the district court to consider this discovery motion in the first instance on remand. *See Bermudez v. Duenas*, 936 F.2d 1064,

This Court consolidated the parties' appeals. In summary, the following appeals on the merits are before this Court: (1) the Cassirers' appeal of the order which granted summary judgment in favor of TBC on the grounds that under applicable Spanish law, TBC acquired title to the Painting by prescriptive acquisition (usucaption), (2) TBC's appeal of the order which denied TBC's motion for summary adjudication, based on the assertion that Lilly waived her ownership rights to the Painting pursuant to the 1958 Settlement Agreement and that the district court lacked jurisdiction under the FSIA, (3) TBC's cross-appeal of the summary judgment order in its favor, for failure to consider and rule upon its claim under Swiss law and its defense of laches.

II. JURISDICTION AND STANDARD OF REVIEW

The FSIA, 28 U.S.C. § 1330(a), gave the district court jurisdiction. 28 U.S.C. § 1291 gives this Court jurisdiction over this appeal.

This Court reviews an appeal from summary judgment de novo. *Jones v. Union Pac. R.R. Co.*, 968 F.2d 937, 940 (9th Cir. 1992). This Court reviews a district court's choice of law analysis de novo. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). A district court's interpretation of foreign law is a question of law that this Court reviews de novo. *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995). "In

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1068 (9th Cir. 1991) (remanding to the district court to consider in the first instance a discovery motion that was denied as moot after a grant of summary judgment).

determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1.

III. ANALYSIS

A. The Cassirers' claims are timely within the statute of limitations recently enacted by Congress to govern claims involving art expropriated during the Holocaust.

Before the district court, the parties and the district court agreed that California, as the forum, supplied the statute of limitations for the Cassirers' claims. California Code of Civil Procedure § 338(c)(3)(A) requires that "an action for the specific recovery of a work of fine art" brought against a museum in the case of an "unlawful taking" be commenced within "six years of the actual discovery by the claimant" of the "identity and whereabouts of the work of fine art" and "[i]nformation or facts that [were] sufficient to indicate that the claimant ha[d] a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen." Cal. Civ. Proc. Code § 338(c)(3)(A)(i)–(ii). The primary issue below was whether retroactive application of § 338(c)(3)(A), which was passed in 2010, five years after the Cassirers filed suit, would violate TBC's due process rights. The district court held that, since TBC "acquired ownership of the Painting under Spanish law prior to [the] California Legislature's retroactive extension of the statute of limitations" and the Cassirers' claims were time barred before the legislature passed § 338(c)(3)(A), retroactive application of § 338(c)(3)(A) would violate

TBC's due process rights. On appeal, TBC contends that retroactive application of § 338(c)(3)(A) would violate its due process rights.

However, while these appeals were pending before us, Congress passed, and the President signed, the Holocaust Expropriated Art Recovery Act of 2016 ("HEAR"), H.R. 6130. For the reasons stated below, we conclude that HEAR supplies the statute of limitations to be applied in this case in federal court and that the Cassirers' claims are timely under this law.

HEAR states:

> Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—(1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property.

Id. § 5(a). Thus, HEAR creates a six-year statute of limitations period that commences on the date of actual discovery of the artwork's location by the claimant. *Id.* § 5(a). Lilly suffered the taking of the Painting in 1939, which is during the "covered period" of HEAR (January 1, 1933, and ending on December 31, 1945). *See id.*

§ 4(3). The six-year statute of limitations applies to any claims that are pending on the date of HEAR's enactment, which was December 16, 2016, including claims on appeal such as the Cassirers'. *See id.* § 5(d)(1) ("Subsection (a) shall apply to any civil claim or cause of action that is . . . pending in any court on the date of enactment of this Act, including any civil claim or cause of action that is pending on appeal . . . .").

Viewing the facts in the light most favorable to the Cassirers, as we must on an appeal from an order which granted summary judgment, *Am. Int'l Grp., Inc. v. Am. Int'l Bank*, 926 F.2d 829, 831 (9th Cir. 1991), the Cassirers acquired actual knowledge of the Painting's location in 2000 when Claude Cassirer learned from a client that the Painting was in the Museum.[7] After the Cassirer family's 2001 petition in Spain was denied, the family filed this action on May 10, 2005. Since the lawsuit appears to have been filed within six years of actual discovery, the Cassirers' claims are timely under the statute of limitations created by HEAR.

B. This Court applies the Second Restatement of the Conflict of Laws to determine which state's substantive law applies in deciding the merits of this case. The Second Restatement directs this Court to apply Spain's substantive law.

Although Congress has directed federal courts to apply HEAR's six-year statute of limitations for claims

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[7] Of course, the date of acquisition of actual knowledge is a fact subject to proof, and possible rebuttal, in proceedings before the district court.

involving art expropriated during the Holocaust, HEAR does not specify which state's substantive law will govern the merits of such claims. Under California law, thieves cannot pass good title to anyone, including a good faith purchaser. *Crocker Nat'l Bank v. Byrne & McDonnell*, 178 Cal. 329, 332 (1918). This is also the general rule at common law. *See Kingdom of Spain*, 616 F.3d at 1030, n.14 (quoting Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631, 633–34 (2000)) ("One who purchases, no matter how innocently, from a thief, or all subsequent purchasers from a thief, acquires no title in the property. Title always remains with the true owner."). This notion traces its lineage to Roman law (*nemo dat quod non habet*, meaning "no one gives what he does not have").[8]

But the application of our choice of law jurisprudence requires that we not apply such familiar rules, under the circumstances of this case. As we shall see, Spain's property laws will determine whether the Painting has passed to TBC via acquisitive prescription.

This Court has held that, when jurisdiction is based on the FSIA, "federal common law applies to the choice

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[8] Spanish law has some similar provisions. "Possession of movable property acquired in good faith is equivalent to title. Notwithstanding the foregoing, any person who has lost movable property or has been deprived of it illegally may claim it from its possessor." Civil Code Article 464, Ministerio de Justicia, *Spain Civil Code* 66 (2009) (English translation). However, the Spanish Civil Code must be read in its entirety, including those articles which provide that title to chattels may pass through qualified, extended possession, such as Article 1955.

of law rule determination. Federal common law follows the approach of the Restatement (Second) of Conflict of Laws." *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) (citations omitted). The district court recognized this precedent, but believed that language from this Court's decision in *Sachs v. Republic of Austria*, 737 F.3d 584, 600 n.14 (9th Cir. 2013) (en banc), *rev'd on other grounds by OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), called *Schoenberg*'s holding into question.

Sachs does not clearly overrule the *Schoenberg* precedent. In *Sachs*, the plaintiff had been injured trying to board a train in Austria operated by a railroad ("OBB") that was owned by the Austrian government. *Id.* at 587. The district court granted OBB's motion to dismiss on the grounds of a lack of subject-matter jurisdiction, holding that OBB was immune from suit under the FSIA. *Id.* Sitting en banc, this Court reversed and held that it had subject matter jurisdiction pursuant to the commercial-activity exception to sovereign immunity in the FSIA. *Id.* at 603. In footnote 14 of the *Sachs* opinion, this Court held that California law governed the plaintiff's negligence claim. *Id.* at 600 n.14. This Court assumed that California law applied because the railroad ticket was purchased in California and Sachs' action was brought in California. *Id.* ("[W]e think it is a permissible view of Supreme Court precedent to look to California law to determine the elements of Sachs's claims[]" without engaging in a formal choice of law analysis.). However, this Court then cited *Schoenberg* and took into consideration the Second Restatement choice of law test. *See id.* ("Even if we should make a separate conflicts analysis under the Restatement, that

conflicts analysis supports the same conclusion that California law applies to Sachs's claims."). Since *Sachs* did not expressly overrule *Schoenberg* and the Supreme Court has not overruled or effectively overruled *Schoenberg*, we must apply *Schoenberg* to determine which state's substantive law applies. *See Miller v. Gammie*, 335 F.3d 889, 896–900 (9th Cir. 2003). And, as noted above, *Schoenberg* instructs us to apply the Second Restatement. To the extent *Sachs* calls into doubt the need to apply the Second Restatement in certain FSIA cases, *Sachs* is distinguishable because in *Sachs* the plaintiff purchased her railroad ticket in California, *Sachs*, 737 F.3d at 587, while in this case TBC purchased the Painting in Spain and claims to have acquired prescriptive title by possessing the Painting in Spain. Therefore, we apply *Schoenberg* and the Second Restatement.[9]

The Second Restatement includes jurisdiction-selecting rules and a multi-factor inquiry in Section 6, which provides choice of law factors that a court should apply in the absence of a statutory directive to decide the applicable rule of law. In addition to considering any specific jurisdiction-selecting rule, a court is supposed to apply the Section 6 factors to decide which

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[9] The district court concluded that under *both* the Second Restatement and California's choice of law test (known as the governmental interest or comparative impairment test), Spain's substantive law applies to this case. Since we conclude that the Second Restatement test applies because *Schoenberg* controls, we do not apply California's choice of law test. We note that the courts in *Schoenberg* and *Sachs* both did not apply the forum's choice of law test. *Schoenberg*, 930 F.2d at 782–83; *Sachs*, 737 F.3d at 600 n.14.

state has *the most significant relationship* to the case.[10] These factors are:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Second Restatement § 6(2). These factors are not listed in order of importance. Second Restatement § 6, cmt. C. Instead, "varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law." *Id.*

Chapter 9 of the Second Restatement is focused on the choice of law considerations most relevant to property cases. Section 222 sets forth how the general choice of law principles stated in § 6 are applicable to real and personal property:

> The interest of the parties in a thing are determined, depending upon the circumstances, either by the "law" or by the "local law" of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6.

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[10] For this reason, the Second Restatement's approach is often called the "most significant relationship" test.

Second Restatement § 222. This general principle is "applicable to all things, to all interests in things and to all issues involving things. Topic 2 (§§ 223–243) deals with interests in immovables and Topic 3 (§§ 244–266) with interests in movables." Second Restatement § 222, cmt. a. Section 222 thus clarifies the subject of the § 6 "most significant relationship" inquiry: A court should consider which state "has the most significant relationship *to the thing and the parties* under the principles in § 6."[11] Second Restatement § 222 (emphasis added). Moreover, the commentary to § 222 notes the following about this "most significant relationship" inquiry:

> In judging a given state's interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case. The fact that these courts would have applied this rule may indicate that an important interest of that state would be served if the rule were applied by the forum.

Second Restatement § 222, cmt. e. In addition, the commentary to § 222 clarifies that "[i]n contrast to torts, protection of the justified expectations of the parties is of considerable importance in the field of property." Second Restatement § 222, cmt. b (citation omitted).

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[11] In addition to citing § 6 in the text itself, the commentary to § 222 also clarifies that "the principles stated in § 6 underlie all rules of choice of law . . . ." Second Restatement § 222, cmt. b.

The Second Restatement also has a specialized rule for a claim of acquisition by adverse possession or prescription of an interest in chattel. Second Restatement § 246 states, "Whether there has been a transfer of an interest in a chattel by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the state where the chattel was at the time the transfer is claimed to have taken place." The Second Restatement provides the following rationale for this rule:

> The state where a chattel is situated has *the dominant interest* in determining the circumstances under which an interest in the chattel will be transferred by adverse possession or by prescription. The local law of this state is applied to determine whether there has been such a transfer and the nature of the interest transferred.

Second Restatement, § 246, cmt. a (emphasis added).

After considering these sections of the Second Restatement and the relevant interests at stake, we conclude that this Court ought to apply Spanish law to decide whether TBC has title to the Painting. Although some of the § 6 factors suggest California law should apply, on balance, these factors indicate Spanish law should apply because Spain is the "state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6." Second Restatement § 222. We note at the outset that the courts of Spain would apply their own property laws to adjudicate TBC's claim that it owns the Painting because Spain uses a law of the

situs rule for movable property. *See* Civil Code Article 10.1, Ministerio de Justicia, *Spain Civil Code* 4 (2009) (English translation). As the commentary to § 222 notes, the fact that Spain would apply its own law suggests that an important interest of Spain may be served by applying Spanish law.

Also, as the district court recognized, the situs rule furthers the needs of the international system by encouraging certainty, predictability, and uniformity of result. Considering the relevant policies of "interested states," Spain's interest in having its substantive law applied is significant. In a highly publicized sale, Spain provided TBC public funds to purchase the Collection, including the Painting. TBC, an instrumentality of Spain, has possessed the Painting for over twenty years and displayed it in the Museum. In terms of protecting justified expectations, the 1993 Acquisition Agreement between TBC and the Baron states that English law governs the purchase of the Collection. But, the legal opinion provided by TBC's counsel stated that, under English law, Spanish law would govern the effect of the transfer. The Cassirers do not dispute this reading of English law.

Cutting in favor of the choice of California law is the fact that the forum, California, has a strong interest in protecting the rightful owners of fine arts who are dispossessed of their property. In fact, as noted in Part III.A, California has created a specific statute of limitations for cases involving an unlawful taking or theft of fine art. We also acknowledge that it is more difficult for a federal court to discern, determine, and apply Spanish law than California law.

Factor 6(e), which requires a court to consider the basic policies underlying property law, is arguably inconclusive. The property laws of both Spain and California seek to create certainty of title, discourage theft, and encourage owners of stolen property to seek return of their property in a timely fashion. Although these states have chosen different rules for movable property, both sets of rules further the basic polices underlying property law.

On the other hand, § 246 indicates that Spain has the "dominant interest" in determining whether the Painting was transferred to TBC via acquisitive prescription because the Painting was bought in Spain and has remained in Spain. The Cassirers' arguments to the contrary are not persuasive. First, the Cassirers argue there is a bad faith exception to the law of the situs rule when an adverse possessor acquired property "which was known or should have been known to have been stolen." However, since the Cassirers rely only on a 1980 English court decision in support of this proposition, the argument is unpersuasive. Second, the Cassirers argue that the law of the situs rule is "outdated (not revised in 45 years), and is now inconsistent with modern choice of law principles." However, the Cassirers cite cases in which courts have abolished the law of the situs rule for *tort actions*. As a district court stated when applying § 246 in a stolen art case:

> The refusal by the New York Court of Appeals to apply the "place of injury" test in the tort field does not dictate a different result here. This is because the choice of law rule advanced in the cited cases and adopted in Section 246 of the

> Restatement incorporates the concept of the "significant relationship."

Kunstammlungen Zu Wimar v. Elicofon, 536 F. Supp. 829, 846 (E.D.N.Y. 1981) (citation omitted).

In sum, after applying the Second Restatement § 6 factors and the law of the situs rule of § 246, we conclude that Spanish law governs TBC's claim that it is the rightful owner of the Painting.

The Cassirers argue in a letter submitted to this Court pursuant to Federal Rule of Appellate Procedure 28(j) that we should not apply Spain's law because of HEAR. According to the Cassirers, HEAR indicates that the application of Spain's substantive law in this case would be "truly obnoxious" to federal policy. However, HEAR does not specify which state's rules of decision should govern the merits of claims involving art expropriated during the Holocaust. HEAR simply supplies a statute of limitations during which such claims are timely. Thus, HEAR does not alter the choice of law analysis this Court uses to decide which state's law will govern TBC's claim of title to the Painting based on acquisitive prescription.

C. The district court erred in deciding that, as matter of law, TBC had acquired title to the Painting through Article 1955 of the Spanish Civil Code because there is a triable issue of fact whether TBC is an *encubridor* (an "accessory") within the meaning of Civil Code Article 1956.[12]

1. An *encubridor* can be a knowing receiver of stolen goods.

After correctly determining that Spanish substantive law applied, the district court granted summary judgment in favor of TBC based on the district court's analysis of Spain's law of acquisitive prescription. Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As noted above, we view the evidence "in the light most favorable to the party opposing the motion," here, the Cassirers. *Am. Int'l Grp.*, 926 F.2d at 831.

The district court concluded that TBC had acquired title to the Painting because TBC had fulfilled the requirements of Article 1955, which states in relevant part, "Ownership of movable property prescribes by three years of uninterrupted possession in good faith. Ownership of movable property also prescribes by six

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[12] In interpreting Spanish law, we have relied on the record below, submissions from the parties and amici, and our own independent research. *See* Federal Rule of Civil Procedure 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.")

years of uninterrupted possession, without any other condition." Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation). Possession is defined in Civil Code Article 1941, which states, "Possession must be in the capacity of the owner, and must be public, peaceful, and uninterrupted." Ministerio de Justicia, *Spain Civil Code* 219 (2009) (English translation).

As an initial matter, we reject the Cassirers' argument that TBC's defense of acquisition of prescriptive title through usucaption based on Article 1955 is foreclosed by HEAR. HEAR addresses when a suit may be commenced and creates a six-year statute of limitations that applies "notwithstanding any defense at law relating to the passage of time." HEAR § 5(a). Because of the time periods mentioned in Article 1955, TBC's defense based on Article 1955 could be at first glance considered "a defense at law relating to the passage of time." However, TBC's Article 1955 defense is a defense on the merits: that TBC has *acquired title to the Painting based on Spain's property laws*. *See* Article 1955 ("*Ownership* of personal property prescribes by . . .") (emphasis added), Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation). Read in context, HEAR's § 5(a) language that the six-year statute of limitations applies "notwithstanding any defense at law relating to the passage of time" is meant to prevent courts from applying defenses that would have the effect of shortening the six-year period in which a suit may be commenced. HEAR does not bar claims based on the substantive law that vests title in a possessor, that is, the substantive law of prescription of title. Therefore, HEAR does not foreclose the possibility that TBC is

entitled to summary judgment because TBC has acquired title to the Painting via Article 1955.

Read alone, Article 1955 would seem to vest title in one who gained possession, even absent good faith, after six years, so long as the possession was in the capacity as owner, public, peaceful, and uninterrupted. TBC took possession of the Painting in the capacity of an owner in 1993. TBC's claim was not challenged until the Cassirers' petition was filed in 2001. Although the Cassirers argue otherwise, TBC has established the "public" element because it is undisputed TBC publicly displayed the Painting in the Museum as part of the permanent collection it owned. Also, information about the Painting's location appeared in multiple publications between 1993 and 1999, the relevant six-year period. The parties agree TBC's possession was peaceful from 1993 until 1999. Finally, TBC's possession was uninterrupted during this time period. Thus, Article 1955, read in isolation, would seem to bar the Cassirers' action for recovery of the Painting.

But the very next article in the Spanish Civil Code, Article 1956, modifies how acquisitive prescription operates. Article 1956 reads:

> Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories [*encubridores*], until the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations.

Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation). Therefore, as to any principals,

accomplices, or accessories (*encubridores*) to a robbery or theft, Article 1956 extends the period of possession necessary to vest title to the time prescribed by Article 1955 *plus* the statute of limitations on the original crime and the action to claim civil liability. *See* Spanish Supreme Court decision of 15 July 2004 (5241/2004).

The Cassirers argue that TBC is an accessory (*encubridor*) to the theft of the Painting because TBC knew the Painting had been stolen when TBC acquired the Painting from the Baron. For the crime of *encubrimiento* (accessory after the fact) and the crime of receiving stolen property, the two crimes the Cassirers argue TBC committed when it purchased the Painting from the Baron in 1993, the criminal limitations period is five years, 1973 Penal Code Articles 30, 113, 546(bis)(a) and 1995 Penal Code Articles 131, 298, and the civil limitations period is fifteen years, Judgment of January 7, 1982 (RJ 1982/184) and Judgment of July 15, 2004 (no. 5241/2004). Thus, if Article 1956 applies, including the six-year period from Article 1955, TBC would need to possess the Painting for twenty six years after 1993, until 2019, to acquire title via acquisitive prescription. Since the Cassirers petitioned TBC for the Painting in 2001 and filed this action in 2005, *if Article 1956 applies*, TBC has not acquired prescriptive title to the Painting.[13]

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[13] The Cassirers also argue that TBC has not acquired title because, under Spanish law, there is no statute of limitations for a crime against humanity and a crime against property during armed conflict. Since resolving this claim would not change the result in this case, we decline to decide this issue.

Article 1956 extends the time of possession required for acquisitive prescription only as to those chattels (1) robbed or stolen from the rightful owner (2) as to the principals, accomplices or accessories after the fact ("*encubridores*")[14] with actual knowledge of the robbery or theft.

The parties agree the first requirement is satisfied because the forced sale of the Painting by Scheidwimmer and the Nazis is a misappropriation crime within the meaning of Article 1956. As for the second requirement, no one claims that TBC had any hand in that forced sale; TBC is not a principal or accomplice to the 1939 misappropriation of the Painting.

The primary dispute between the parties is whether TBC is an accessory (*encubridor*) as that term is used in Article 1956. The district court accepted TBC's interpretation of Spanish law and found that TBC was not an *encubridor*. The district court decided that the term "*encubridor*" in Civil Code Article 1956 should be defined by reference to the Penal Code that was in effect when TBC acquired the Painting. In 1993, Article 17 of the Penal Code of 1973 (the Penal Code then in effect) defined *encubridor* to include only persons who,

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[14] When Article 1956 was adopted in 1889, the contemporary dictionary meaning of *encubridor* was "one who covers something up." *See* 1884 Diccionario de la Lengua Castellana, Real Academia Española. The 1888 General Etymological Dictionary of the Spanish Language by the prestigious linguist Eduardo Echegaray mirrors the definition of the Real Academia. No legal meaning appears in the dictionaries. However, in an official translation of Article 1956 from Spain's Ministry of Justice, "*encubridores*" is translated as "accessories."

after the commission of the underlying crime, acted in some manner to aid those who committed the crime avoid penalties or prosecutions.[15] Before the district court, the Cassirers argued that TBC was an *encubridor* because TBC concealed the looting of the Painting to prevent the 1939 crime from being discovered. The district court held that TBC was not an *encubridor* within the meaning of Article 1956 because "there is absolutely no evidence that the Foundation purchased the Painting (or performed any subsequent acts) with the intent of preventing Scheidwimmer's or the Nazis' criminal offenses from being discovered." The district court concluded that, since Article 1956 did not apply, TBC had acquired title to the Painting under Article 1955.

On appeal, the Cassirers offer a new reason TBC is an Article 1956 accessory [*encubridor*]: According to the Cassirers, TBC knowingly received stolen property when TBC acquired the Painting from the Baron. The

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[15] Article 17 of the 1973 Spanish Criminal Code defines *encubridores*:

> [T]hose who, aware of the perpetration of a punishable offense, without having had involvement in it as principals or accessories, are involved subsequent to its execution in any of the following ways:
>
> 1. Aiding and abetting the principals or accomplices to benefit from the felony or misdemeanors.
>
> 2. Hiding or destroying the evidence, effects or instruments of the felony or misdemeanor, to prevent it being discovered.
>
> 3. Harboring, concealing, or aiding the escape of suspected criminals . . . .

Cassirers advocate using the definition of *encubridor* from the 1870 Spanish Penal Code, which was in force when Article 1956 of the Civil Code was enacted in 1889. Article 16 of the 1870 Penal Code stated:

> Those who, with knowledge of the perpetration of the felony, and not having participated in it as perpetrators or accomplices, intervene after its execution in any of the following modes, are guilty of concealment: . . .
>
> 2. By obtaining benefit for themselves, or aiding the perpetrators to benefit from the effects of the crime.[16]

That definition of *encubridor* includes one who knowingly benefits himself from stolen property. The Cassirers argue that the 1889 legislature had the 1870 Penal Code definition in mind when the legislature enacted Article 1956. Article 1956 has not been modified since 1889.

TBC asserts that the Cassirers' new argument on appeal, that TBC is an *encubridor* based on the 1870 Penal Code definition because TBC, knowing of the theft, received the stolen painting, is "waived" because the Cassirers not did present it below. However, the Cassirers' new argument asks this Court to interpret the term "*encubridor*" in Article 1956. To do so, this

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[16] "Son encubridores los que, con conocimiento de la perpetracion del delito, sin haber tenido participacion en él como autores ní cómplices, intervienen con posterioridad á su ejecucíon de alguno de los modos siguientes. Aprovechándose por si mismos ó auxiliando á los delincuentes para que se aprovechen de los efectos del delito."

Court must interpret the relevant sources of Spanish law. Therefore, the meaning of *encubridor* is a pure issue of law. Under this Court's precedent, we may consider a new argument on appeal which presents a pure issue of law even though it was not raised below. *In re Mercury Interactive Corp. Sec. Lit.*, 618 F.3d 988, 992 (9th Cir. 2010).

For the reasons stated below, we agree with the Cassirers that the term "*encubridor*" in Article 1956 has the meaning that term was given it in the 1870 Penal Code. We thus conclude that a person can be *encubridor* within the meaning of Article 1956 if he knowingly receives and benefits from stolen property.[17]

Since our jurisprudence requires us to apply Spanish substantive law, it stands to reason we should apply Spanish rules of statutory interpretation. Article 3.1 of the Spanish Civil Code ("Article 3.1") states, "Rules shall be construed according to the proper meaning of their wording and in connection with the context, with their historical and legislative background and with the social reality of the time in which they are to be applied, mainly attending to their

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[17] Article 1956 requires that the *encubridor* must have actual knowledge the chattel was the product of robbery or theft. *See* Spanish Supreme Court decision of 23 December 1986 (RJ 1986/7982).

spirit and purpose."[18] Ministerio de Justicia, *Spain Civil Code* 1 (2009) (English translation).

i. Proper Meaning of Wording

To determine the definition of "*encubridor*" in Article 1956, Article 3.1 first directs us to consider the "proper meaning of [its] wording." As noted above, dictionaries contemporary to the 1889 Civil Code shed little light on any legal meaning for the term *encubridor*. The 1884 Diccionario de la Lengua Castellana, Real Academia Española defines "*encubridor*" as one who practices "*encubrimiento*," which in turn is defined as "the action and effect of hiding a thing or not manifesting it."[19] The 1888 General Etymological Dictionary of the Spanish Language by the prestigious linguist Eduardo Echegaray mirrors the definition of the Real Academia.[20] Neither discusses the meaning of *encubridor* in legal terms or as used in the law. There is no mention of such elements as whether to be an *encubridor* the person need have knowledge of a prior crime or be motivated by a desire to help others or only himself.

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[18] "Las normas se intepretarán según el sentido propio de sus palabras, en relación con el contexto, los antecedentes históricos y legislativos, y la realidad social del tiempo en que han de ser aplicadas, atendiendo fundamentalmente al espíritu y finalidad de aquellas."

[19] **Encubridor**: Que encubre. **Encubrir**: Ocultar una cosa ó no manifestarla.

[20] **Encubridor, ra:** Que encubre alguna cosa. Usase también como sustantivo. **Encubrir:** Ocultar una cosa ó no manifestarla.

Of course, if an *encubridor* hides the chattel, he cannot fulfill the open, public display of the chattel, in the capacity of an owner, which Article 1955 requires for usucaption. Does it follow that if he displays the chattel sufficiently to satisfy usucaption possession he is not an *encubridor*? Certainly, TBC displayed the Painting to the public and acted as the owner of the Painting.

This logic could be accepted if the word *encubridor* was used in Spanish law to mean only a person who conceals or hides or fails to manifest. But that is not what has been found to be the case, as we will see when we apply the second rule of interpretation prescribed by Article 3.1.

ii. Context

Second, Article 3.1 instructs us to determine the meaning of a rule "in connection with the context." "*Encubridor*" in Article 1956 is used in a legal context. Hence, what does *encubridor* mean in Spanish law?

Both parties agree that the Penal Code is the proper place to look for the legal meaning of the term *encubridor*. However, while the Cassirers urge this Court to use the 1870 Penal Code definition, which includes a receiver of stolen goods who acts for his own benefit, TBC urges this Court to use the 1973 Penal Code definition, which TBC claims excludes such a receiver. Under the 1973 Penal Code, only accessories after the fact acting in aid of the perpetrators or accomplices of the original crime are expressly declared *encubridores* under Article 17.1.

iii. Historical and Legislative Background

These conflicting positions require us to go to the third canon of interpretation stated in Article 3.1: "the historical and legislative background."

a. Definition of "*encubridor*" in the 1870 Penal Code

Looking to "the historical and legislative background" of Article 1956, we conclude that the term "*encubridor*" should be construed consistently with the definition of "*encubridor*" in the 1870 Penal Code. The parties agree that the content of the term "*encubridor*" in the Civil Code should be determined by reference to the Penal Code. The 1870 Penal Code was in effect when Article 1956 of the Civil Code was enacted in 1889, and Article 1956 has not been amended since its enactment. Under the 1870 Penal Code, "[t]hose who, with knowledge of the perpetration of a crime," intervene after its execution "[b]y obtaining benefit for themselves, or aiding the perpetrators to benefit from the effects of the crime" are *encubridores*. Thus, if the 1870 Penal Code definition of "*encubridor*" applies for Civil Code Article 1956, an *encubridor* includes someone who knowingly benefits from stolen property, including a person who knowingly receives stolen property.

However, TBC claims that the Law of May 9, 1950 ("1950 Law") removed from the Penal Code's definition of *encubridor* a person who, with knowledge of the theft or robbery which produced the stolen chattel, took the chattel into his possession solely for his own benefit and not for the benefit of the perpetrators of the theft

or robbery and that this law changed the definition of "*encubridor*" in Civil Code Article 1956 as well. There are two reasons this is not so.

First, Article 3.1's instruction to evaluate a statute's "historical and legislative background," Ministerio de Justicia, *Spain Civil Code* 1 (2009) (English translation), refers to the history that occurred before Article 1956 was enacted in 1889, not subsequent developments. Although the Spanish legislature modified *the Penal Code* through the 1950 Law, it did not alter *the Civil Code*, including Article 1956. Therefore, the 1870 Penal Code provides the pertinent definition of the term "*encubridor*" in Article 1956.

b. The 1950 Law

Second, even if the 1950 Law should affect how we interpret the term "*encubridor*" in Article 1956, we reject TBC's suggestion that the enactment of the 1950 Law changed the definition of "*encubridor.*" True, in its enactment of Article 17.1, the 1950 Law *eliminated Article 16.1* of the 1870 Penal Code and that portion of the definition of *encubridor* that included an accessory after the fact acting for his own benefit. The 1950 law enacted Article 17.1, which restricted *encubridor* to include only accessories after the fact acting on behalf or in aid of the original thieves and accomplices. But the 1950 Law did not eliminate altogether from the Penal Code the 1870 definition of *encubridor* that included a person acting for his own benefit, motivated by lucre. First, the 1950 Law recited in its preamble an intention *not* to change the venerable law regarding accessories: "[I]t does not seem prudent to radically change this institution, that is now in Division I of the common Criminal Code, a penalizing law that is a

homogeneous piece mounted on a venerable and correct classic. And it does not seem advisable until one day the general lines of our old Code are changed, if need be." Second, *it simply moved the 1870 definition of encubridor elsewhere* in enacting the new statute that made it a crime to receive goods known to be stolen. Article 2 of the 1950 Law created the crime of receiving stolen property as Article 546(bis)(a) of the Penal Code with the title "Del encubrimiento con ánimo de lucro y de la receptación" (meaning "Regarding acting as the accessory [*encubrimiento*] with the purpose of obtaining profit or receiving stolen property [*receptación*]"). Thus, *encubrimiento* in the Penal Code was *still* described as including acting as an accessory by receiving stolen goods for one's own benefit.

The preamble to the 1950 Law in fact also states that the purpose of the law is procedural: to allow independent criminal prosecutions for receivers of stolen goods even when the principals of, or accomplices to, the theft or robbery cannot be located. Under Spanish law at the time, accessories after the fact could not be charged by themselves. They were subject only to a joint proceeding in which they were joined as defendants with principals and accessories, if any.

The language of Article 546(bis)(a) of the Penal Code, as adopted at the time, reflects the fact that receiving stolen goods had long been considered a form of *encubrimineto* (acting as an accessory):

> Who with knowledge of the commission of a felony against property takes advantage for himself of the product of the [felony], will be punished with minor jail and fined from 5,000 to

> 50,000 pesetas. In no case can a sentence which deprives one of liberty exceed that established *for the felony concealed* ["*al delito encubierto*"].

Specifically, the use of the adjective "*encubierto*" to describe the activities of a receiver of stolen goods acting for his own benefit implies that the receiver is himself an *encubridor*. Thus, the historical and legislative background of the term *encubridor* in the Spanish Penal Code suggests that someone who knowingly receives and benefits from stolen property can qualify as an *encubridor* for purposes of Civil Code Article 1956.

iv. Social Reality at Time of Enactment

Turning to the fourth canon in Article 3.1, this Court should consider "the social reality of the time" in which Article 1956 is to be applied. In 1993, when TBC acquired the Painting, the crime of receiving property known to be stolen and the crime of acting as accessory after the fact of theft by possessing such property were interchangeable in practice. This fact is demonstrated by the Judgment 1678/1993 of July 5 (RJ 1993/5881) that is cited in the amicus brief of Comunidad Judía de Madrid and Federación de Comunidades Judías de España. In that case, the appeal to the Supreme Court of Spain was on the basis of what we call a "variance" between the indictment and the crime of conviction. The appellant had been *accused of receiving stolen goods*, but was *convicted of being an accessory after the fact*. The Spanish Supreme Court found that the perpetrator's actions in receiving stolen jewelry to sell and keep the proceeds were sufficiently laid out in the accusatory pleading to allow the defendant to mount an

adequate defense to the charge of being an accessory after the fact, even if he was convicted of a crime strictly not charged. There was no mention of the defendant acting in aid of the persons who had committed the original jewelry theft. As the court stated, "Thus then, we must say that here we find ourselves before two homogeneous felonies, with identity of rights protected and in fact adjudged, and as the sentence imposed was less [than that of the crime laid out in the accusation] it is clear that the principle of [fair notice] accusation was lawfully respected."

The Spanish Supreme Court also recognized the interchangeability of the crimes of receiving stolen goods and of being an accessory after the fact (*encubridor*) in Judgment 77/2004, of 21 January (RJ2004/485).[21] In this case, a boat was stolen in Germany and the defendant knew it was stolen. After trying to sell the boat to a good faith purchaser, the defendant was accused of being a receiver of stolen goods (*receptador*) by accusatory pleading, but then was convicted under Article 17.1 as an accessory after the fact (*encubridor*). The court found no fatal "variance" between the accusatory pleading under Article 546(bis)(a) and the conviction under Article 17.1 because the defendant was given fair notice of all the

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[21] In 1995, the Penal Code was updated and the crime of receiving stolen goods was moved to Article 298 of the Penal Code. Of note, in specifying sentencing, Article 298 retains the language used in the old Article 546(bis)(a), "Under no circumstances whatsoever may a sentence of imprisonment be imposed that exceeds that set for the felony concealed." In Spanish, "En ningún caso podrá imponerse pena privativa de libertad que exceda de la señalada al delito encubierto." This was the same language that was used in Article 546(bis)(a) in force from 1950 to 1995.

"points" on which conviction would depend at trial, and hence could mount a complete defense. According to the Supreme Court, both crimes require (1) knowledge of the prior felony and the stolen nature of the goods in question and (2) possession of those goods by the accused. Again, there was no mention that the defendant acted as an accessory after the fact by concealing, in aid of the boat's thief.

Our conclusion that the terms "accessory motivated by lucre" and "receiver of stolen goods" are interchangeable and have been preserved in the Spanish Penal Code following the 1950 Law is not novel. This seems to have been the interpretation given that portion of the 1950 Law by Cuello Calón in his annual report on criminal law: "*Anuario*: Annual of Penal Law and Penal Sciences (1951), modifications introduced in the Penal Code as to accessory [liability] by the Law of 9 May, 1950."[22] As Calón states, "Better fortune [as to the survival of the terms after the 1950 law] has occurred to the so-called '*receptación*' or '*encubrimiento*' for both expressions are used as synonyms by the new law."[23]

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[22] Anuario de Derecho Penal y Ciencias Penales (1950), Modificaciones introducidas en el Codigo penal en materia de encubrimiento por la Ley de 9 de Mayo, 1950, p. 346, Eugenio Cuello Calón ("Anuario, 1950"). *See also* Cuello Calón, *Derecho Penal* 672 (C. Camargo Hernandez rev. 18th ed. 1981) (explaining that concealment is a crime separate and distinct from the original theft and robbery which provided the stolen chattel).

[23] "Mejor suerte ha cabido a la llamada 'receptación o encubrimiento, con ánimo de lucro' pues ambas expresiones son usadas como sinónimas por la nueva ley."

In sum, after applying the four methods of interpretation set forth in Article 3.1, we conclude that the meaning of *encubridor* (accessory after the fact) in the 1889 Civil Code is that of the 1870 Penal Code and that later legislation has not changed that meaning. Thus, an Article 1956 *encubridor* can be someone who acts as accessory after the fact of the crime committed, and who acts for his own benefit—to gain lucre. A detailed reading of the 1950 Law tells us this meaning of *encubridor* was not intended to be changed nor was in fact changed by that Law. That law rearranged the concept of an accessory after the fact acting for his own benefit into the receipt of stolen goods for procedural convenience: to allow prosecution of the suspect without the necessity of a joint prosecution of the principals and accomplices, if any, of the underlying crime. But a knowing receiver of stolen goods could still be prosecuted as an accessory after the fact to the theft even if he benefited only himself. The meaning of "*encubridor*" is considered interchangeable with "*receptador*" (receiver of goods known to be stolen) as shown by the title and text of Article 2 of the 1950 Law. Also, this reading of the Law of May 9, 1950, is confirmed by Spanish Supreme Court decisions which describe the two terms as interchangeable and homogeneous. Last, this homogeneity is recognized by the official annual report written by Cuello Calón contemporaneously with the adoption of the 1950 Law.

2. TBC has not established, as a matter of law, that it did not have actual knowledge the Painting was stolen property.

Assuming Article 1956 applies to someone who knowingly benefits from stolen property, TBC has not established as a matter of law that it acquired title to the Painting through acquisitive prescription. Clearly, TBC benefited from having the Painting in its museum. As for the required actual knowledge element of Article 1956, we review the evidence proffered by the Cassirers with all inferences in their favor as required by our summary judgment rules, to see if the Cassirers have produced sufficient evidence to create a triable issue of fact that TBC knew the Painting had been stolen from its rightful owner(s) when TBC acquired the Painting from the Baron.

Dr. Jonathan Petropoulos, the Cassirers' expert and a professor of European History who has published on the subject of Nazi art looting, declared that numerous so-called "red flags" would have indicated to TBC (and to the Baron) that the Painting was stolen.[24] The provenance information given by the Stephen Hahn Gallery to the Baron in 1976 did not mention a previous owner, only the gallery Durand-Ruel in Paris, where the painting was said to have been exhibited in 1898 and 1899.[25] The Painting contained a partial label

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[24] TBC started investigating the Baron's collection in 1989. Thus, TBC had time to discover these red flags before the 1993 purchase.

[25] Julius Cassirer, who was Lilly's father-in-law, bought the Painting from Paul Durand-Ruel in Paris in 1898.

on the back that said "Berlin" and part of two words "Kunst–und Ve . . ." that may be German for "art and publishing establishment" ("Kunst und Verlagsanstalt"). This label may be from the Cassirers' art gallery. Although this label was on the back of the Painting, the Painting had no documentation showing a voluntary transfer of the Painting out of Berlin. Also, according to Dr. Petropoulos, Pissarro paintings were "immediately suspect" because they were favored by European Jewish collectors and often looted by the Nazis. Dr. Petropoulos noted that the French Ministry of Culture in 1947 published a compendium of French cultural losses during World War II that includes forty-six works by Pissarro that were looted by the Nazis and have yet to be recovered. The CORA decision confirming Lilly's rightful ownership of the Painting had been published and made available to the public.[26]

How TBC purchased the Painting also provides some evidence that TBC knew the Painting was stolen. While TBC held the collection on loan, in an official publication in 1992, *Modern Masters* by Jose Alvarez Lopera, TBC published incorrect provenance history that stated the Baron had acquired the Painting through the Joseph Hahn Gallery in Paris when in fact the Baron purchased the Painting through the Stephen Hahn Gallery in New York. The Cassirers argue that TBC sought to conceal the Painting's provenance because the Stephen Hahn Gallery sold at least one

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[26] Dr. Petropoulos provided some evidence that suggests TBC may have been aware of this decision: the CORA decision was cited in a 1974 book about Allied restitution laws published by a prestigious German publisher that received reviews in English language periodicals.

other work looted by the Nazis. Also, when investigating the Baron's collection, TBC's lawyers decided to assume the Baron acquired his collection in good faith. By assuming good faith, *TBC chose to investigate only artwork that was acquired by the Baron after 1980*. One possible inference is that TBC knew the Painting was stolen and did not want to create documentation that reflected this history.

TBC paid $338 million for the Baron's Collection that included the Painting when the Collection's estimated value was between one and two billion dollars. Although TBC offers a number of innocent explanations for this below-market price, this fact may indicate that TBC knew the Painting and other works in the collection were stolen. William Smith, an expert in 16th to 20th century European paintings who filed a declaration on behalf of the Cassirers, opined that the Painting was sold *to the Baron* at a discount of 41.2%–50% of the estimated gallery retail price. TBC argues that the Baron did not purchase the Painting at a suspiciously low cost, but we must consider this clash of evidence in the light most favorable to the Cassirers. TBC's knowledge of the below-market price the Baron acquired the Painting for may also suggest TBC knew the Painting was stolen.

In conclusion, when all of the evidence is considered in the light most favorable to the Cassirers, the Cassirers have created a triable issue of fact whether TBC knew the Painting was stolen from Lilly when TBC purchased the Painting from the Baron. TBC acquired the Painting for its own benefit, and TBC may have known the Painting was stolen. If so, TBC can be found by the trier of fact to be an *encubridor* who could

not have acquired title to the Painting through acquisitive prescription until 2019 since an Article 1956 *encubridor* can be someone who knowingly benefits from the receipt of stolen property. Therefore, the district court erred in granting summary judgment on the grounds that, as a matter of law, TBC acquired the Painting through acquisitive prescription.[27]

D. TBC is not entitled to summary judgment based on its claim that the Baron had lawful title to the Painting under Swiss law.

In TBC's cross-appeal of the summary judgment order, TBC argues that "it is the lawful owner of the Painting because [TBC] purchased the Painting in a lawful conveyance from a party (the Baron) who had valid title to convey." Since the district court granted summary judgment in favor of TBC on the basis of Spanish law, the district court did not consider TBC's argument that the Baron gained lawful title before transferring the Painting to TBC. Nonetheless, "if the district court's order can be sustained on any ground supported by the record that was before the district court at the time of the ruling, we are obliged to affirm

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[27] The Cassirers make a similar argument that TBC "purloined" the Painting within the meaning of Article 1956 and therefore could not have acquired the Painting through acquisitive prescription. In support of this argument, the Cassirers cite Spanish authorities suggesting the term "purloin" in Article 1956 can include knowing receipt of stolen goods. Therefore, whether interpreting "*encubridor*" or "purloin," the Cassirers' argument turns on whether someone who receives and benefits from goods known by him to be stolen is delayed in taking prescriptive title because of Article 1956.

the district court." *Jewel Cos., Inc. v. Pay Less Drugs Stores Nw. Inc.*, 741 F.2d 1555, 1564–65 (9th Cir. 1984) (citing *Calnetics Corp v. Volkswagen of Am., Inc.*, 532 F.2d 674, 682 (9th Cir. 1976)).

We begin our analysis by considering which state's law governs the effect of the conveyance from the Baron to TBC. As noted in Part III.B, based on the principles set forth in the Second Restatement of the Conflict of Laws, this Court should apply Spanish property law to adjudicate TBC's claim that it is the rightful owner of the Painting. Also, § 245 of the Second Restatement states, "The effect of a conveyance [from the Baron to TBC] upon a pre-existing interest in a chattel of a person [Cassirer] who was not a party to the conveyance will usually be determined by the law that would be applied by the courts of the state where the chattel was at the time of the conveyance." The Painting was in Spain when TBC and the Baron entered into the acquisition agreement on June 21, 1993, because TBC had held the Painting as part of the prior loan agreement. As noted in Part III.B, Spain uses the law of the situs rule for movable property. *See* Civil Code Article 10.1, Ministerio de Justicia, *Spain Civil Code* 4 (2009) (English translation). This means Spain would apply its own property laws to decide the effect of the conveyance from the Baron to TBC. Thus, the Second Restatement directs us to apply Spanish law to determine whether TBC acquired ownership of the Painting via the 1993 acquisition agreement.

Under Spanish law, a consensual transfer of ownership requires title and the transfer of possession. *See* Civil Code Article 609, Ministerio de Justicia, *Spain Civil Code* 83 (2009) (English translation). As

noted, when the acquisition agreement was entered into, possession of the Painting had already been transferred to TBC pursuant to the loan agreement. Therefore, *if the Baron had good title to the Painting* when he sold it to TBC, then TBC became the lawful owner of the Painting through the acquisition agreement.

TBC argues that the Baron had good title to convey because the Baron acquired good title to the Painting either through the Baron's purchase of the Painting in 1976 from the Stephen Hahn Gallery in New York or through Switzerland's law of acquisitive prescription. Since Spain applies the law of the situs for movable property, Spanish law would look to New York law to determine the effect of the 1976 conveyance in New York, and Swiss law to determine whether the Baron acquired title to the Painting when he possessed it in Switzerland between 1976 and 1992.

Under New York law, "a thief cannot pass good title." *See Bakalar v. Vavra*, 619 F.3d 136, 140 (2d. Cir. 2010) (citing *Menzel v. List*, 267 N.Y.S. 2d 804 (N.Y. Sup. Ct. 1966)). "This means that, under New York law, . . . absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods." *Id.* (internal quotation marks omitted). Here, even if the Stephen Hahn Gallery (the gallery from which TBC alleges the Baron purchased the Painting) had no knowledge that the Nazis stole the Painting, the conveyance did not confer good title on the Baron under New York law.

As noted, TBC also argues that the Baron acquired title to the Painting through the Swiss law of acquisitive prescription. Under Swiss law, to acquire title to movable property through acquisitive prescription, a person must possess the chattel in good faith for a five-year period. Swiss Civil Code Article 728. The Baron completed the five-year period of possession between 1976 and 1981. Even though the Baron exhibited the Painting during a tour of Australia and New Zealand in 1979 and 1981, TBC's Swiss law expert stated that this exhibition abroad "did not create a legally relevant interruption, since the Painting was bound to return to [Switzerland]." In briefing to this Court, the Cassirers do not dispute that the Baron possessed the Painting for a sufficient amount of time.

However, the Baron acquired title through acquisitive prescription only if he possessed the Painting *in good faith*. The Cassirers assert there is a triable issue of fact as to whether the Baron possessed the Painting in good faith. Swiss law presumes good faith. *See* Swiss Civil Code Article 3.1. But good faith can be rebutted by showing that a person "failed to exercise the diligence required by the circumstances." *See* Swiss Civil Code Article 3.2. According to Dr. Wolfgang Ernst, TBC's Swiss law expert, the finding of good faith or bad faith in an individual case is considered to be an issue of fact.

In determining whether a purchaser acted in good faith or not, the Swiss Supreme Court has considered factors such as: (1) whether the purchaser should have considered the stolen or looted origin of the object at least as a possibility; (2) the fact that specific circumstances, such as war, required a high degree of

attention; and (3) the general public knowledge of the circumstances in which the works of art were taken from their legitimate owners. *See Paul Rosenberg v. Theodore Fisher et al.*, Swiss Supreme Court June 3, 1948. Thus, a good faith purchaser is one who is *honestly and reasonably* convinced that the seller is entitled to transfer ownership.

After reviewing the record developed before the district court, we conclude that there is a triable issue of fact as to the Baron's good faith. As noted in Part III.C, the Stephen Hahn Gallery from which the Baron purchased the Painting sold at least one other work looted by the Nazis. William Smith, the Cassirers' expert in European paintings, stated that the $275,000 price the Baron paid for the Pissarro in 1976 "was approximately half of what would have been expected in a dealer sale, and that there is no reasonable explanation for this price other than dubious provenance."[28]

Furthermore, Dr. Jonathan Petropoulos' "red flags" analysis of the Painting's background provides some evidence that suggests the Baron did not possess the Painting in good faith.[29] To recap these alleged "red

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[28] Although TBC's expert, Dr. Ernst, stated that he was "not aware of any evidence that this price was conspicuously low so as to indicate eventual problems regarding the provenance/title situation[,]" we must view this conflict of evidence in the light most favorable to the nonmoving party, the Cassirers.

[29] As Dr. Petropoulos declared, "In my opinion, if the Baron and TBC did not in fact know of the faulty provenance of the Painting and the high likelihood that they were trafficking in Nazi looted

flags," the Nazis looted many Pissarro paintings, which were a favorite among European Jewish collectors. Moreover, the Painting had a torn label on the back from a gallery in Berlin (the Cassirers' gallery), but no documentation showing a voluntary transfer of the Painting out of Berlin. The published CORA decision identified Lilly's ownership of the Painting. Also, Dr. Petropoulos stated that Ardelia Hall and Ely Maurer at the United States State Department collected CORA decision reports and warned museums, university art facilities, and art dealers about looted artworks entering the United States and that, had the Baron contacted these individuals about the Painting, the CORA decision would have been discovered. When the Baron purchased the Painting, the Stephen Hahn Gallery provided minimal provenance information: no previous owner was mentioned, only the gallery Durand-Ruel in Paris, where the painting was said to have been exhibited in 1898 and 1899. Dr. Petropoulos states that the Baron's "highly distinguished cohort of experts" failed to "undertake a serious investigation" to determine the provenance of the Painting. Another expert for the Cassirers, Marc-André Renold, a professor at the University of Geneva Law School who specializes in international art law, stated that he "would have expected someone of the Baron's sophistication to have undertaken a more diligent search into the provenance of the Painting."

This evidence indicates there is a triable issue of fact whether the Baron was a good faith possessor under Swiss law. Therefore, we cannot affirm the

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art, they were willfully blind to this risk and ignored very obvious 'red flags' that no reasonable buyer would have ignored."

district court's grant of summary judgment on the basis that, as a matter of law, the Baron acquired title to the Painting under Swiss law.[30]

E. TBC is not entitled to summary judgment based on its laches defense.

TBC also argues in its cross-appeal of the summary judgment order that the Cassirers' claims are barred by laches. TBC raises its laches argument under California law. Since the district court granted summary judgment on the basis of Spanish law, the district court did not consider TBC's laches defense. As noted above, we also conclude that Spanish law applies.

However, even if California law applied, this Court has stated: "To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself. Because the application of laches depends on a close evaluation of all the particular facts in a case, it is seldom susceptible to resolution by summary judgment." *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000) (per curiam) (citations omitted). There is at least a genuine dispute of material fact as to whether any delay was

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[30] The triable issue of fact whether the Baron held the Painting in good faith is another reason TBC cannot establish as a matter of law that the Baron acquired title to the Painting through the 1976 conveyance from the Stephen Hahn Gallery. Even if the Painting was purchased in Switzerland and the conveyance was governed by Swiss law, under Swiss law, only a good faith purchaser can acquire title to a chattel through a conveyance. *See* Swiss Civil Code Article 936 ("A person that has not acquired a chattel in good faith may be required by the previous possessor to return it at any time.").

unreasonable. After the war, Lilly sought physical restitution of the Painting, but her unsuccessful efforts involving litigation lasting a decade ended with the 1958 Settlement Agreement. Thus, Claude Cassirer could have reasonably believed the Painting was lost or destroyed in the war.

Thus, TBC is not entitled to summary judgment based on its laches defense.

F. Lilly's acceptance of the 1958 Settlement Agreement does not foreclose the Cassirers' claims.

In TBC's appeal of the district court's order denying its motion for summary adjudication on the grounds that Lilly waived her ownership rights to the Painting in the 1958 Settlement Agreement, TBC repeats the same arguments that the district court rejected. As noted in Part I.A, the 1958 Settlement Agreement was between Lilly, Scheidwimmer (the Nazi art appraiser), Grete Kahn (the heir of the other Jewish victim, Sulzbacher), and the German government. The Settlement Agreement provided that: (1) Germany would pay Lilly 120,000 Deutschmarks (the Painting's estimated value as of April 1, 1956); (2) Grete Kahn would receive 14,000 Deutschmarks from the payment to Lilly; and (3) Scheidwimmer would receive the two German paintings. Grete Kahn expressly waived any right to restitution of the Painting. However, Lilly did not expressly waive her right to physical restitution. Instead, as for Lilly, the Settlement Agreement just notes that the settlement settles "all mutual claims among the parties." The whereabouts of the Painting was unknown, no party possessed it.

Neither party has expressly argued which sovereign's law should be used to interpret the Settlement Agreement. However, the district court applied German law, and the parties do not contest this conclusion on appeal. Accordingly, any choice-of-law issue has been waived, *Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th Cir. 1996), and we apply German law in interpreting the Settlement Agreement.

TBC argues that Lilly's acceptance of the Settlement Agreement defeats the Cassirers' claims for three reasons. First, TBC argues that Lilly implicitly waived her right to seek physical restitution when she accepted the Settlement Agreement. Second, TBC argues the Settlement Agreement remedied and resolved the "taking in violation of international law," and pending litigation of a claim involving a taking is required for FSIA jurisdiction. Third, TBC argues that federal policy on Nazi-looted art requires honoring the finality of the Settlement Agreement.

In support of its first argument, TBC notes that the Settlement Agreement states that it "settles all mutual claims among the parties." However, Lilly knew that none of the parties had possession of the Painting or knowledge of its whereabouts, and the agreement purported to settle claims only *among the parties*. Also, the Settlement Agreement expressly waives Grete Kahn's right to physical restitution, but not Lilly's.

The district court noted that the Bundesgerichtshof (Germany's Supreme Court) recently issued a ruling favorable to the Cassirers' interpretation of the Settlement Agreement. In that case, the Nazis misappropriated a valuable poster collection belonging to a German Jew, Dr. Sachs. *Peter Sachs v. Duetsches*

Historisches Museum, BGH, Mar. 16, 2012, V ZR (279/10) (Ger.). In 1961, Dr. Sachs accepted a settlement agreement through the same program that Lilly had used, the Brüg, and Dr. Sachs' settlement agreement stated that it provided "compensation for all claims asserted in this proceeding." When Dr. Sachs' son discovered the posters still existed and were being held by the German Historical Museum in East Berlin, he sought physical restitution. The German high court ordered the German Historical Museum to return the poster collection even though Dr. Sachs had accepted his settlement agreement. The German Supreme Court held that Dr. Sachs' claim for physical restitution was not waived by accepting his settlement agreement because his property was considered lost at the time he accepted the payment. The court also held that Sachs' right to physical restitution was not waived because he had not made an "unambiguous act" renouncing the right.

The *Sachs* precedent is on all fours with Lilly's case. Therefore, Lilly too did not waive her right to physical restitution of the Painting by accepting the 1958 Settlement Agreement. Two other sources of German law support this conclusion. First, Germany's Commissioner of the Federal Government for Matters of Culture and the Media has stated that, for claims of restitution of artwork in which an earlier payment under the Brüg was provided, "earlier compensation payments are not an obstacle to the return of cultural assets, provided that the amount paid earlier is reimbursed[.]" Second, the Cassirers provided a declaration from a German attorney specializing in restitution law who stated his expert opinion that the

Settlement Agreement did not waive Lilly's right to physical restitution.

TBC cites to the District Court of Munich's decision acknowledging the 1958 Agreement as evidence Neubauer waived her ownership rights to the painting. But this decision undermines, rather than advances, TBC's argument. The District Court of Munich specifically noted that Lilly "*only waived the restitution claim against Scheidwimmer* as a result of the settlement of 2.28.1958" (emphasis added). Thus, the German court acknowledged that Lilly waived any claims against Scheidwimmer, who was determined not to have possession of the Painting, but it noted that was the only claim Neubauer waived. This further supports our conclusion that Lilly did not waive her right to physical restitution of the Painting.

TBC's second argument is that the Settlement Agreement remedied and resolved the "taking in violation of international law," which means this Court does not have subject matter jurisdiction under the FSIA expropriation exception to sovereign immunity, 28 U.S.C. § 1605(a)(3). This section states that a foreign government's sovereign immunity is abrogated when:

> Rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). According to TBC, the Settlement Agreement deprives this court of jurisdiction under the FSIA because the Settlement Agreement provided Lilly compensation for the loss of the Painting, and therefore no right in property is still at issue because the Settlement Agreement resolved the taking in violation of international law.

TBC is wrong because one of the Cassirers' "rights in property taken in violation of international law" remains at issue. As explained above, the 1958 Settlement Agreement did not extinguish Lilly's right to physical restitution of the Painting. Therefore, the Cassirers still have a property right (physical restitution) that remains at issue.

TBC's third argument starts from the premise that this Court has recognized that U.S. federal policy favors respecting the finality of appropriate actions taken in foreign countries to restitute Nazi-confiscated artwork. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014). According to TBC, allowing the Cassirers to continue their suit would "disregard" the German restitution proceedings and therefore conflict with federal policy. However, this argument mistakenly assumes Lilly waived her right to seek physical restitution of the Painting when she accepted the Settlement Agreement and that Germany considers the Settlement Agreement to have extinguished her claim to physical restitution.

G. Spain's Historical Heritage Law does not prevent TBC from acquiring prescriptive title to the Painting.

The Cassirers make yet another new argument on appeal: TBC could not have acquired title to the Painting through acquisitive prescription because of Spain's Historical Heritage Law ("SHHL"). TBC argues that the Cassirers' new argument based on the SHHL is also waived because it too was not argued below. However, this argument is also not waived because this Court may consider pure issues of law on appeal even when not raised below. *Mercury*, 618 F.3d at 992.

The SHHL law creates a comprehensive program for ensuring that cultural artifacts (including buildings, artwork, and archeological artifacts) are maintained in Spain for viewing by future generations of Spaniards. *See* Preliminary Title, General Clauses. The Painting was designated part of Spain's historical heritage in Real Decreto-Ley 11/1993, which also authorized and funded the purchase of the Collection.

Article 28 of the SHHL contains restrictions on the transfer of movable property that is part of the Spanish Historical Heritage. Article 28 has three parts. Article 28.1 states, "Movable property declared of cultural interest and included in the General Inventory that is in the possession of ecclesiastical institutions . . . may not be transferred, whether with consideration or as a gift, or ceded to individuals or commercial entities. Such property may only be transferred or ceded to the State, to entities that are a creation of Public Law, or to other ecclesiastical institutions." Article 28.2 and 28.3 state:

> 2. Movable property that forms part of the Spanish Historical Heritage may not be transferred by the Public Administration, except for transfers between public administrative entities and as provided for in articles 29 and 34 of this Law.
>
> 3. The property that this article refers to will not be subject to the statute of limitations. Under no circumstance shall the provisions of Article 1955 of the Civil Code be applied to this property.

According to the Cassirers, SHHL Article 28.3 prevents TBC from using Civil Code Article 1955 to acquire title to the Painting.

The phrase in Article 28.3, "[t]he property that this article refers to" references property described in Article 28.1 and 28.2. Article 28.1 regulates "movable property" that has two qualities. First, that property must be "declared of cultural interest and included in the General Inventory[.]" Second, that property must be "in the possession of ecclesiastical institutions, in any of their facilities or branches[.]" Article 28.1 prohibits ecclesiastical institutions from transferring that property to individuals or commercial entities. Article 28.2 regulates "movable property that forms part of the Spanish Historical Heritage." Article 28.2 prohibits public administrations from transferring this property, except via specific transfers authorized by Articles 29 and 34.

Read in context, *Article 28.3 constitutes an additional limitation on the ability of ecclesiastical institutions and state institutions to alienate movable property of Spanish historical heritage*. Article 28.3

prevents churches or state entities from losing title to historical heritage property through the expiration of the statute of limitations, which confers a substantive right under Spanish law, or through Article 1955 acquisitive prescription. Therefore, churches and state institutions cannot evade the restrictions on transfer described in Articles 28.1 and 28.2 by allowing a private individual to take possession of the regulated property for the statutory period. Article 28.3 also preserves public access to historical heritage property in case churches or state administrations carelessly fail to take or maintain possession of that property in a timely fashion. Since Article 28.3 is designed to prevent churches and state institutions from losing title to historical heritage property, the provision should not be interpreted to prevent TBC, a state institution, from asserting title to the Painting through acquisitive prescription.

H. The district court correctly found that the application of Article 1955 to vest TBC with title to the Painting would not violate the European Convention on Human Rights.

As a last salvo, the Cassirers argue, "[a]sssuming Spanish law strips the Cassirers' ownership of the Painting, the law is void under Article 1 of Protocol 1 ("Article 1") of the European Convention on Human Rights (the "Convention")." Spain is a party to the Convention, including Protocol 1. The Convention is supreme over Spanish domestic law. Article 1 of Protocol 1 states:

> Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the

> public interest and subject to the conditions provided for by law and by general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In *Case of J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. The United Kingdom*, 46 EHRR 1083 (2007) ("*Pye*"), a British court had awarded title through adverse possession to land on which the Grahams had grazed their animals for twelve years after the grazing agreement with neighboring real estate developers had expired. *Pye* ¶ 10–22. The former landowners asked the European Court of Human Rights ("ECHR") to review this decision, and the ECHR, sitting en banc, ruled that the prescriptive acquisition did not violate Article I. Specifically, the court held that the application of Britain's adverse possession law amounted to a permissible "control of use" of land within the meaning of the second paragraph of Article 1. *Pye* ¶ 66. The court also held that this adverse possession law was legitimate and in the "general" (public) interest. *Pye* ¶ 75. The court further considered whether the decision struck a fair balance between "the demands of the general interest and the interest of the individuals concerned." *Pye* ¶ 75. After considering many factors, including the fact that English adverse possession laws are long established and support reasonable social policies, the ECHR concluded that the British court decision did strike a

fair balance. *Pye* ¶ 75–85. The court noted that "the State enjoys a wide margin of appreciation" in setting rules for its property system unless these rules "give rise to results which are so anomalous as to render the legislation unacceptable." *Pye* ¶ 83.

The district court correctly applied *Pye* and correctly concluded that "Spain's laws of adverse possession do not violate [Article 1]." As in *Pye*, the operation of Spain's acquisitive prescription laws is a permissible "control of use" of property under Article I that serves the general or public interest by ensuring certainty of property rights.

Finally, deciding that TBC has acquired title to the Painting through acquisitive prescription would have struck a "fair balance" between "the demands of the general interest and the interest of the individuals concerned." Admittedly, the *Pye* decision was close (ten to seven), and some of the factors considered by the *Pye* court do not favor TBC's position that Spain's acquisitive prescription laws strike a "fair balance." Nonetheless, Article 1955 is over a century old and supports reasonable social policies, including providing a level of protection for possessors. Spain's acquisitive prescription laws are not so anomalous as to render them unacceptable under the European Convention on Human Rights. But they must be taken as a whole and when one applies Article 1956, as we must, there is a triable issue of fact whether title in the Painting vested in TBC.

IV. CONCLUSION

The district court correctly determined that Spain's substantive law determines whether TBC can claim

title to the Painting via acquisitive prescription. However, we conclude that the district court interpreted Spain Civil Code Article 1956 too narrowly. An *encubridor* within the meaning of Article 1956 can include someone who, with knowledge that the goods had been stolen from the rightful owner, received stolen goods for his personal benefit. Since there is a genuine dispute of material fact whether TBC knew the Painting had been stolen when TBC acquired the Painting from the Baron, the district court erred in granting summary judgment in favor of TBC on the basis of Spain's law of acquisitive prescription since the longer period for an *encubridor* to acquire title had not yet run when the Cassirers brought this action for restitution of the Painting. At the same time, we conclude that TBC's other arguments for affirming the grant of summary judgment that are raised in TBC's cross-appeals are without merit. Finally, we conclude that the Cassirers' other arguments against applying Article 1955 in this case are without merit. Given these holdings, we **REVERSE** and **REMAND** to the district court for proceedings consistent with this opinion.

APPENDIX B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

Case No. CV 05-03459-JFW (Ex)

[Filed June 12, 2015]

DAVID CASSIRER, AVA CASSIRER, and UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY, a California non-profit corporation,

Plaintiffs,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or

instrumentality of the Kingdom of Spain,)
)
Defendant.)
_____)

Judge: Hon. John F. Walter
Crtrm.: 16

JUDGMENT

The Court has ordered that the plaintiffs recover nothing and that the action be dismissed on the merits.

This action was decided by Judge John F. Walter on a motion for summary judgment on June 4, 2015.

Dated: June 12, 2015

/s/John F. Walter
Hon. John F. Walter
Judge, United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 05-3459-JFW (Ex)** Date: June 4, 2015

Title: David Cassirer *-v-* Thyssen-Bornemisza Collection Foundation

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None

ATTORNEYS PRESENT FOR DEFENDANTS:
None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING THYSSEN-BORNEMISZA COLLECTION FOUNDATION'S MOTION FOR SUMMARY JUDGMENT [filed 3/23/2015; Docket No. 249];

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY

ADJUDICATION RE: CHOICE OF CALIFORNIA LAW [filed 3/23/2015; Docket No. 251]

On March 23, 2015, Defendant Thyssen-Bornemisza Collection Foundation (the "Foundation") filed a Motion for Summary Judgment [Docket No. 249]. On April 20, 2015, Plaintiffs David Cassirer, Ava Cassirer, and United Jewish Federation of San Diego County (collectively, "Plaintiffs") filed their Opposition [Docket No. 273]. On May 4, 2015, the Foundation filed a Reply [Docket No. 289].[1] On March 23, 2015, Plaintiffs filed a Motion for Summary Adjudication Re Choice of California Law [Docket No. 251]. On April 20, 2015, the Foundation filed an Opposition [Docket No. 271]. On May 4, 2014, Plaintiffs filed a Reply [Docket No. 288].

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's May 18, 2015 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

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[1] On May 11, 2015, Plaintiffs filed an *Ex Parte* Application for Leave to File Supplemental Declaration of Alfredo Guerrero and to Respond to Defendant's Evidentiary Objections to Plaintiffs' Expert Declarations ("*Ex Parte* Application") [Docket No. 298]. On May 12, 2015, the Foundation filed an Opposition [Docket No. 300]. On May 12, 2015, Plaintiffs filed a Reply [Docket No. 301]. For good cause shown and because there is no prejudice to the Foundation, the Court **GRANTS** Plaintiff's *Ex Parte* Application.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

In this action, Plaintiffs seek to recover the painting, *Rue St. Honoré, après midi, effet de pluie*, by French impressionist Camille Pissarro (the "Painting"), that was wrongfully taken from their ancestor, Lilly Cassirer Neubauer ("Lilly"),[3] by the Nazi regime.

Lilly inherited the Painting in 1926. As a Jew, she was subjected to increasing persecution in Germany after the Nazis seized power in 1933. In 1939, in order for Lilly and her husband Otto Neubauer to obtain exit visas to flee Germany, Lilly was forced to transfer the Painting to Jakob Scheidwimmer, a Nazi art appraiser. In "exchange," Scheidwimmer transferred 900 Reichsmarks (around $360 at 1939 exchange rates), well below the actual value of the painting, into a blocked account that Lilly could never access. After the war, Lilly filed a timely restitution claim. Because the location of the Painting was unknown, Lilly ultimately settled her claim for monetary compensation with the German government, but did not waive her right to

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[2] Because of the narrow focus of the parties' motions, the Court only discusses the undisputed facts relevant to its decision on the present motions. To the extent any of these facts are disputed, they are not material to the disposition of these motions. In addition, to the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court.

[3] The Court adopts Plaintiffs' preferred designation and refers to Lilly Cassirer Neubauer as "Lilly" in this Order.

seek restitution or return of the Painting. *See* Order dated March 13, 2015 [Docket No. 245].

Without Lilly's knowledge, the Painting surfaced in the United States in 1951. In July 1951, the Painting was sold to collector Sydney Brody in Los Angeles, California through art dealers M. Knoedler & Co. in New York and Frank Perls Gallery in Beverly Hills, California. The Frank Perls Gallery earned a commission of $3,105 for arranging the sale of the Painting to Sydney Brody. Less than a year later, in May 1952, Sydney Schoenberg, an art collector in St. Louis, Missouri, purchased the Painting from M. Knoedler & Co., on consignment from the Frank Perls Gallery, for $16,500.[4]

More than twenty years later, on November 18, 1976, Baron Hans-Heinrich Thyssen-Bornemisza of Lugano, Switzerland (the "Baron") purchased the Painting through New York art dealer Stephen Hahn for $275,000. The Painting was maintained as part of the Thyssen-Bornemisza Collection in Switzerland until 1992, except when on public display in exhibitions outside Switzerland.

In 1988, the Baron and Spain agreed that the Baron (through one of his entities, Favorita Trustees Limited) would loan his art collection (the "Collection"), including the Painting, to the Kingdom of Spain. Pursuant to the 1988 Loan Agreement, Spain established the Foundation, a non-profit, private cultural foundation to maintain, conserve, publicly

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[4] Brody apparently only kept the Painting a few months before returning the painting to the Frank Perls Gallery for re-sale.

exhibit, and promote artwork from the Collection. The Spanish government agreed to display the Collection at the Villahermosa Palace in Madrid, Spain, which would be restored and redesigned for its new purpose as the Thyssen-Bornemisza Museum (the "Museum"). On June 22, 1992, the Museum received the Painting, and, on October 10, 1992, opened to the public with the Painting on display.

Spain later sought to purchase the Collection. On June 18, 1993, the Spanish cabinet passed Real Decreto-Ley 11/1993, authorizing the government to sign a contract allowing the Foundation to purchase the 775 artworks that comprised the Collection. In accordance with Real Decreto-Ley 11/1993, on June 21, 1993, the Kingdom of Spain, the Foundation, and Favorita Trustees Limited entered into an Acquisition Agreement, by which Favorita Trustees Limited sold the Collection to the Foundation.[5] The Foundation's purchase of the Collection for $338 million was entirely funded by Spain.

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[5] In 1989 and 1993, in connection with the loan and ultimate purchase of the Collection, Spain and the Foundation commissioned an investigation of title to verify that the Baron and his relevant entities had clear and marketable title to the Collection. Plaintiffs claim that the investigation was incomplete and that Spain and the Foundation ignored red flags concerning the Painting's provenance, including, for example, that: (1) the Stephen Hahn Gallery had been affiliated with Nazi looting; (2) paintings by Pissarro were known to be the frequent subjects of Nazi looting; and (3) the back of the Painting has a "Berlin" label traceable to the Cassirer Gallery and the provenance documentation provided no explanation for that label. However, this disputed issue as to the Foundation's alleged "bad faith" is not material or relevant to the Court's decision on these motions.

The Painting has been on public display at the Foundation's Museum in Madrid, Spain since the Museum's opening on October 10, 1992, except when on public display in a 1996 exhibition outside of Spain and while on loan at the Caixa Forum in Barcelona, Spain from October 2013 to January 2014. Since the Foundation purchased the Painting in 1993, the Painting's location and the Foundation's "ownership" have been identified in several publications including: (1) Wivel, Mikael: Ordrupgaard. Selected Works. Copenhague, Ordrupgaard, 1993, p. 44; (2) Rosenblum, Robert: "Impressionism. The City and Modern Life". En Impressionists in Town. [Cat. Exp.]. Copenhague, Ordrupgaard, 1996, n. 17, pp. 16-17, il. 61.; (3) Llorens, Tomas; Borobia, Mar y Alarcó, Paloma: Obras Maestras. Museo Thyssen-Bornemisza. Madrid, Fundación Collectión Thyssen-Bornemisza, 2000, p. 156, il. p. 157; and (4) Perez-Jofre, T.: Grandes obras de arte. Museo Thyssen-Bornemisza. Colonia, Tascnen, 2001, p. 540, il. p. 541. Declaration of Evelio Acevedo Carrero [Docket No. 249-2] at ¶ 18.

Neither Lilly nor any of her heirs attempted to locate the Painting between 1958 and late 1999, and Claude Cassirer, Lilly's heir, did not discover that the Painting was on display at the Museum until sometime in 2000. On May 3, 2001, he filed a Petition with the Kingdom of Spain and the Foundation, seeking return of the Painting. On May 10, 2005, after his Petition to return the Painting was rejected, Claude Cassirer filed this action against the Kingdom of Spain and the

Foundation,[6] seeking the return of the Painting, or an award of damages in the event the Court is unable to order the return of the Painting. From 1980 to the time of his death on September 25, 2010, Claude Cassirer lived in California.

After extensive motion practice, including two appeals to the Ninth Circuit, the Foundation now moves for summary judgment on the grounds that: (1) under Swiss or Spanish law, the Foundation is the owner of the Painting; (2) California Code of Civil Procedure § 338(c), as amended in 2010, violates the Foundation's due process rights by retroactively depriving the Foundation of its vested property rights; and (3) Plaintiffs' claims are barred by laches. Plaintiffs move for summary adjudication, seeking an order declaring that the substantive law of the State of California governs, and that the law of Spain does not govern, the merits of this dispute.

II. LEGAL STANDARD

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly

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[6] Unfortunately, Claude Cassirer died on September 25, 2010, and David Cassirer, Ava Cassirer, and United Jewish Federation of San Diego County were substituted as plaintiffs in this action. In addition, pursuant to the stipulation of the parties, the Kingdom of Spain was dismissed without prejudice in August 2011.

made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable

inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. DISCUSSION

Based on the undisputed facts, the Court concludes that the Foundation is the owner of the Painting pursuant to Spain's laws governing adverse possession. Because the Court concludes that the Foundation acquired ownership of the Painting by adverse possession under Spanish law, it need not address whether the Baron acquired ownership of the Painting by adverse possession under Swiss law (and thus conveyed good title to the Foundation) or whether Plaintiffs' claims are barred by laches.

A. Choice of Law

As an initial matter, the Court must determine whether California law or Spanish law governs the Foundation's claim that it acquired ownership of the Painting by adverse possession. In order to make this determination, the Court must first determine whether it should apply California or federal common law choice-of-law rules. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir, 1991). Where, as here, federal court jurisdiction is premised

on the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330, *et seq.*, the Ninth Circuit has held that federal common law choice-of-law rules govern. *See, e.g., Schoenberg*, 930 F.2d at 782. However, the Ninth Circuit recently called its holding into question in an en banc decision in *Sachs v. Republic of Austria*, 737 F.3d 584 (9th Cir. 2013), stating that it may be permissible to apply the forum state's choice-of-law rules. *Id.* at 600 n.14 (en banc), *cert. granted sub nom. OBB Personenverkehr AG v. Sachs*, 135 S. Ct. 1172 (2015). Although the Ninth Circuit in *Sachs* did not overrule its prior case law, the Court, out of an abundance of caution, will conduct a choice-of-law analysis under both federal common law and California law.

1. Federal Common Law Choice-of-Law Rules

Federal common law follows the approach of the Restatement (Second) of Conflict of Laws (the "Restatement"). *See, e.g., Schoenberg*, 930 F.2d at 782. Restatement § 222 sets forth the general choice-of-law principle applicable to interests in both real and personal property:

> The interest of the parties in a thing are determined depending upon the circumstances, either by the "law" or by the "local law" of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles in § 6.

Restatement § 222. The factors relevant to the determination of which state has the most significant relationship to the "thing and the parties" are set forth in § 6, which include:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Restatement § 6. In addition to these general principles, the Restatement also provides specialized conflict of law rules for specific legal issues, that "courts have evolved in accommodation" of the factors in § 6. Restatement, § 6 (comment on Subsection (2)). Restatement § 246 sets forth the specialized conflict of law rule for a claim of "acquisition by adverse possession or prescription of interest in chattel":

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

Restatement § 246. The Restatement's comment to this section provides the following rationale for this rule: "The state where a chattel is situated has the dominant interest in determining the circumstances under which an interest in the chattel will be transferred by adverse

possession or by prescription. The local law of this state is applied to determine whether there has been such a transfer and the nature of the interest transferred." Restatement § 246, comment.

Applying the Restatement's principles and rules, the Court concludes that, under federal common law, the law of Spain governs the Foundation's claim that it acquired ownership of the Painting by adverse possession. The Court finds no reason to depart from the rule set forth in Restatement § 246, i.e., that the "local law of the state where the chattel was at the time the transfer is claimed to have taken place" should apply. In accordance with that rule, Spain has the dominant interest in determining the circumstances under which ownership of the Painting may be acquired by adverse possession or prescription. Indeed, "[i]n contrast to torts . . ., protection of the justified expectations of the parties is of considerable importance in the field of property" and "[t]he situs [of the property] . . . plays an important role in the determination of the law governing the transfer of interests in tangible . . . movables." Restatement § 222, comment. Applying the "local law of the state where the chattel was at the time the transfer is claimed to have taken place" facilitates simple identification of the applicable law and leads to certainty, predictability, and uniformity of result. *See* Declaration of Professor Alfonso-Luis Calvo Caravaca [Docket No. 249-24], Exhibit 50 at ¶ 5.

Moreover, in this case, the Painting has been in the possession of the Foundation, an instrumentality of the Kingdom of Spain, and it has been located in Madrid, Spain for more than twenty years. In contrast to

Spain's significant relationship to the Painting and the Foundation, California's relationship to the Painting and the parties is limited to the following facts: (1) Claude Cassirer moved to California in 1980; (2) the Frank Perls Gallery in Beverly Hills, California arranged a sale of the Painting to Sydney Brody in Los Angeles, California in July 1951; and (3) less than a year later, in May 1952, the Frank Perls Gallery in Beverly Hills, California was involved in the sale of the Painting to Sydney Schoenberg in St. Louis, Missouri. Although Plaintiffs' relationship to California is significant, the Painting's relationship to California is not.

After balancing all of the factors (including the factors discussed *infra* under the California governmental interest test), the Court concludes that Spain has the most significant relationship to the Painting and the parties. Accordingly, the Court concludes that, under federal common law, the law of Spain governs the Foundation's claim of ownership by adverse possession.

2. California Governmental Interest Test

The Court also concludes that the application of California's choice-of-law rules leads to the same result, i.e., the law of Spain governs the Foundation's claim that it acquired ownership of the Painting by adverse possession. California applies the three-step "governmental interest" test to resolve choice-of-law issues:

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue

> in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied.

Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 107-108 (2006) (quotations and citations omitted). "The party advocating the application of a foreign state's law bears the burden of identifying the conflict between that state's law and California's law on the issue, and establishing that the foreign state has an interest in having its law applied." *Pokorny v. Quixtar*, 601 F.3d 987, 995 (9th Cir. 2010) (citing *Wash. Mutual Bank, FA v. Superior Court*, 24 Cal. 4th 906, 920 (2001)).

a. Spanish law differs from California law.

First, the Court concludes that the Spanish law differs from California law regarding the acquisition of personal property by adverse possession or prescription. California has not extended the doctrine of adverse possession to personal property. *See San Francisco Credit Clearing House v. C.B. Wells*, 196 Cal. 701, 707-08 (1925); *Society of Cal. Pioneers v. Baker*, 43 Cal. App. 4th 774, 784 n.13 ("The court in [*San*

Francisco Credit Clearing House v. Wells, 196 Cal. 701, 707 (1925)] suggested that the doctrine of adverse possession would not apply to personal property, and no California case has been cited in support of such an application.").[7] In contrast, Spain, as discussed *infra*, has adopted laws that expressly permit the acquisition of ownership of personal property by adverse possession (or acquisitive prescription or *usucapio*). Spanish Civil Code Article 1955 provides in relevant part: "Ownership of movable property prescribes by three years of uninterrupted possession in good faith. Ownership of movable property also prescribes by six years of uninterrupted possession, without any other condition." *See* Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38.

b. A true conflict exists.

Second, the Court concludes that a true conflict exists, i.e., each jurisdiction has an interest in having its own law applied.

"To assess whether either or both states have an interest in applying their policy to the case, we examine the governmental policies underlying each state's laws." *Scott v. Ford Motor Company*, 224 Cal. App. 4th 1492, 1504 (2014) (quotations and citations omitted). "In conducting this inquiry, we may make our own determination of the relevant policies and interest,

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[7] Even if California were to recognize the applicability of the doctrine of adverse possession to personal property, the elements of such a claim, and the time period necessary for a possessor to acquire ownership, would be significantly different than the elements and time period under Spanish law. *See* Cal. Civ. Code § 1006; Cal. Civ. Proc. Code § 338(c)(3).

without taking evidence as such on the matter." *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1203 (2011) (quotations and citations omitted).

Generally, laws relating to adverse possession of personal property serve the important interests of certainty of title, protecting defendants from stale claims, and encouraging plaintiffs not to sleep on their rights. *See, e.g.,* Declaration of Carlos M. Vazquez in Support of Plaintiffs' Motion for Summary Adjudication, at Exhibit 510 [Docket No. 251-5]; Scottish Law Commission, Discussion Paper on Prescription and Title to Moveable Property, available at http://www.scotlawcom.gov.uk/files/5413/3666/0832/rep228.pdf. Spain unquestionably has an interest in serving these policy goals and applying its law of adverse possession to the Foundation's claim of ownership, especially given that the Foundation is an instrumentality of the Kingdom of Spain and the Painting has been located within its borders for over twenty years.

Likewise, California unquestionably has an interest in applying its law to this action. California's decision not to extend the doctrine of adverse possession to personal property recognizes the difficulties faced by owners in discovering the whereabouts of personal property even when held openly and notoriously, and serves to protect the interests of the "rightful owner" over subsequent possessors. It also serves to encourage subsequent purchasers to determine the true owner of property before purchasing that property. California's interest in serving these policy goals is especially strong in the context of stolen art. Indeed, in 2010, the California Legislature amended its general statute of

limitations governing personal property -- California Code of Civil Procedure § 338 -- to provide greater protections for the recovery of stolen art.[8] In amending the statute, the California Legislature expressly found and declared, in relevant part: (1) "California's interest in determining the rightful ownership of fine art is a matter of traditional state competence, responsibility, and concern;" (2) "Because objects of fine art often circulate in the private marketplace for many years before entering the collections of museums or galleries, existing statutes of limitation, which are solely the creatures of the Legislature, often present an inequitable procedural obstacle to recovery of these objects by parties that claim to be their rightful owner;" and (3) "The application of statutes of limitations and any affirmative defenses to actions for the recovery of works of fine art . . . should provide incentives for

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[8] Specifically, California Code of Civil Procedure § 338, as amended, (1) retroactively extends the statute of limitations for specific recovery of a work of fine art from three to six years if the action is brought against a museum, gallery, auctioneer or dealer; and (2) clarifies that such claims do not accrue until "actual discovery" rather than "constructive discovery" of both the identity and whereabouts of the work and information supporting a claim of ownership. The amended statute also exempts claims for the specific recovery of a work of fine art from California's borrowing statute, California Code of Civil Procedure § 361, which directs California courts to borrow the statute of limitations or statute of repose of a foreign jurisdiction under certain circumstances. *See* Cal. Civ. Proc. Code § 361 ("When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.").

research and publication of provenance information about these works, in order to encourage the prompt and fair resolution of claims." *See* 2010 Cal. Stat. ch. 691, § 1.

In addition, California has a legitimate interest in applying its laws governing personal property to "rightful owners" who reside within its borders. *See, e.g., McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 95 (2010) ("California has an interest in having this statute applied to a person, like plaintiff, who is a California resident at the time the person discovers that he or she is suffering from an asbestos-related injury or illness, even when the person's exposure to asbestos occurred outside California."); *Castro v. Budget Rent-A-Car System, Inc.*, 154 Cal. App. 4th 1162, 1182 (2007) ("California . . . does have a legitimate governmental interest in having its . . . statute applied based on Castro's status as a California resident."). Given that Claude Cassirer resided in California from 1980 until the time of his death in September 2010, discovered the whereabouts of the Painting while he was a resident of California, and filed this action while he was a resident of California, California clearly has in interest in the application of its laws concerning adverse possession and stolen art in this case.[9]

Accordingly, the Court concludes that each jurisdiction (Spain and California) has an interest in having its own laws apply.

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[9] The substituted Plaintiffs also have strong ties to California. *See* Declaration of David Cassirer in Support of Plaintiffs' Motion for Summary Adjudication [Docket No. 251-2] at ¶¶ 2-5, 11.

c. Spain's interest would be substantially more impaired if its policy were subordinated to the policy of California.

Third, and finally, the Court concludes that Spain's interest would be substantially more impaired if its policy were subordinated to the policy of California.

Under the third step of California's governmental interest test, the Court must "carefully evaluate and compare the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 96-97 (2010) (quotations and citations omitted). In conducting this evaluation, the California Supreme Court has instructed:

> [I]t is important to keep in mind that the court does not "weigh" the conflicting governmental interests in the sense of determining which conflicting law manifested the "better" or the "worthier" social policy on the specific issue. An attempted balancing of conflicting state policies in that sense is difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish. Instead, the process can accurately be described as a problem of allocating domains of law-making power in multi-state contexts—by determining the appropriate limitations on the reach of state policies—as distinguished from evaluating the wisdom of those policies. Emphasis is placed on

> the appropriate scope of conflicting state policies rather than on the "quality" of those policies.

Id. at 97 (quotations and citations omitted). The emphasis, on the appropriate scope of conflicting policies, rather than on the quality of those policies, is equally as important, if not more important, in the context of international disputes. Moreover, "[a]lthough California no longer follows the old choice-of-law rule that generally called for application of the law of the jurisdiction in which a defendant's allegedly tortious conduct occurred *without regard to the nature of the issue that was before the court*, California choice-of-law cases nonetheless continue to recognize that a jurisdiction ordinarily has 'the predominant interest' in regulating conduct that occurs within its borders, and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future." *McCann*, 48 Cal.4th at 97-98 (internal citations omitted).

In this case, the original unlawful taking of the Painting occurred in Germany from Plaintiffs' ancestor, Lilly, who, at the time, resided there. Although the Painting passed through California in 1951, it was present in California for less than a year before it was sent to Missouri. In contrast, the Painting was located in Switzerland for sixteen years and Spain for more than twenty years. Most importantly, the Painting has been in the possession of an instrumentality of the Kingdom of Spain in Madrid, Spain since 1992, and that possession in Spain provides the basis for the

Foundation's claim of ownership. Spain has a strong interest in regulating conduct that occurs within its borders, and in being able to assure individuals and entities within its borders that, after they have possessed property uninterrupted for more than six years, their title and ownership of that property are certain.

If Spain's interest in the application of its law were subordinated to California's interest, it would rest solely on the fortuitous decision of Lilly's successor-in-interest to move to California long after the Painting was unlawfully taken by the Nazis and the fact that he happened to reside there at the time the Foundation took possession of the Painting. Subjecting a defendant within Spain to a different rule of law based on the unpredictable choice of residence of a successor-in-interest would significantly undermine Spain's interest in certainty of title. *Cf. McCann*, 48 Cal. 4th at 98 ("Because a commercial entity protected by the Oklahoma statute of repose has no way of knowing or controlling where a potential plaintiff may move in the future, subjecting such a defendant to a different rule of law based upon the law of a state to which a potential plaintiff ultimately may move would significantly undermine Oklahoma's interest in establishing a reliable rule of law governing a business's potential liability for conduct undertaken in Oklahoma.").

In contrast, if the Court applies Spanish law, the impairment of California's interest is significantly less based on the facts and circumstances of this case. Although California has a fundamental interest in protecting its residents and specifically has an interest

in protecting its residents claiming to be rightful owners of stolen art, that interest is far less significant where the original victim did not reside in California, where the unlawful taking did not occur within its borders, and where the defendant and the entity from which the defendant purchased the property were not located in California. Moreover, California's interest in the application of its laws related to adverse possession of personal property (or lack thereof) is not as strong as Spain's interest, given that neither a California statute nor case law *expressly* prohibits a party from obtaining ownership of personal property through adverse possession. In contrast, Spain has enacted laws, as part of its Civil Code, that specifically and clearly govern adverse possession of movable property. Furthermore, although the California Legislature's 2010 amendment to California Code of Civil Procedure § 338 is certainly relevant to demonstrate California's interest in protecting "rightful owners" of stolen art, the Court considers it significant that the California Legislature did *not* create a new claim for relief or attempt to statutorily restrict the Court's choice of substantive law in this area. Instead, the California Legislature merely expressed its interest in eliminating inequitable procedural obstacles to recovery of fine art by extending the statute of limitations for claims seeking such recovery. Unlike a statute of limitations, the law of adverse possession does not present a procedural obstacle, but rather concerns the *merits* of an aggrieved party's claim.

Accordingly, the Court concludes that, under the California governmental interest test as well as federal

common law, Spanish law governs the Foundation's claim of ownership by adverse possession.[10]

B. Under Spain's Laws of Adverse Possession, the Foundation is the Owner of the Painting.

The Court concludes that, based on the undisputed facts, the Foundation acquired ownership of the Painting by adverse possession (also known as *usucapio* or acquisitive prescription) under Spanish law.[11]

Spain's adverse possession laws regarding "movable property" require that the possessor: (1) possess the property for the statutory period, i.e. three years if in "good faith" ("ordinary adverse possession") or six years if in "bad faith" ("extraordinary adverse possession") (Spanish Civil Code Article 1955); (2) possess the property as owner (Article 1941), and (3) possess the property publicly, peacefully and without interruption (Articles 1941-1948).[12] *See* Declaration of Javier

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[10] Under Spain's choice of law rules, ownership of the Painting is likewise governed by Spanish law. *See* Declaration of Professor Alfonso-Luis Calvo Caravaca [Docket No. 249-24], Exhibit 50 at ¶¶ 3-10; Spanish Civil Code Article 10.1.

[11] Pursuant to Federal Rule of Civil Procedure 44.1, "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rule of Evidence. The court's determination must be treated as a ruling on a question of law."

[12] Generally, in order to validly transfer ownership under Spanish law, there must be: (1) "title," usually a contract evidencing the

Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38.

Plaintiffs do not seriously dispute that the Foundation has met the general requirements for extraordinary adverse possession (under the longer six-year period). Indeed, in their Opposition to the Foundation's Motion for Summary Judgment, Plaintiffs do not even address the Foundation's arguments that it possessed the Painting as owner publicly, peacefully, and without interruption for more than six years. Nonetheless, the Court will examine each required element.

1. Possession as Owner

"Anyone who projects an external image of being the owner has *possession as owner*. The person may believe that he is the owner or know that he is not (this is a question of good faith or bad faith), but, even if a person knows that he is not the owner of what he bought (precisely because he bought it from someone who was not the owner either), a person who performs acts relating to the asset which those that witness them will see as typical of ownership possesses said asset as the owner." Declaration of Professor Alfonso-

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sale or exchange (in this case, the Acquisition Agreement dated June 21, 1993 by which Favorita Trustees Limited sold the Collection to the Foundation); and (2) a "mode" or "means," which is the transfer of possession in a variety of forms permitted by the law. *See* Declaration of Professor Alfonso-Luis Calvo Caravaca [Docket No. 249-24], Exhibit 50 at ¶¶ 10, 20-21. When the seller does not have ownership of the goods that he purports to sell, the buyer may obtain ownership through the "mode" of *usucapio* or adverse possession. *Id.*

Luis Calvo Caravaca [Docket No. 249-24], Exhibit 50 ("Foundation's Spanish Report") at ¶ 35; *see also* Isabel V. González Pacanowska & Carlos Manuel Díez Soto, *National Report on the Transfer of Movables in Spain*, *in National Report on the Transfer of Movables in Europe*, Volume 5: Sweden, Norway and Denmark, Finnland, Spain 393, 646 (Wolfgang Faber & Brigitta Lurger eds. 2011) ("[T]he requirement of possession in the capacity of owner does not relate to the internal intention of the subject, but external behaviour consistent with the character of being the actual owner.").

The Court concludes that the Foundation has possessed the Painting as owner since June 21, 1993, when it purchased the Painting from Favorita Trustees Limited, because it has projected an external image of ownership since that date. Indeed, the Foundation has publicly displayed the Painting in its Museum without any contrary indication of ownership, and loaned the Painting to others for public exhibition consistent with its claim of ownership.

2. Possession of the Painting Publicly, Peacefully, and Without Interruption

In addition, the Court concludes that the Foundation's possession of the Painting as owner has been "public, peaceful, and uninterrupted." Spanish Civil Code Article 1941.

First, the Court concludes that, under Spanish law, the Foundation's possession has been "public." "[T]he possessor must show by means of ostensible acts that he possesses the asset: without supreme effort but with reasonable and ongoing publicity, said reasonableness

being considered based on the nature of use of the asset in question." Foundation's Spanish Report at ¶ 36. "The requirement of publicity regards not only possession as such, but also the capacity in which it is held, and is considered necessary so that the real owner has the possibility of defending his or her right against another's acts." González Pacanowska & Díez Soto, *supra*, at 647. "On the other hand, it is not necessary for the person claiming to be 'the real owner' to have full knowledge of third party possession, but such knowledge is at least possible for that person using average diligence." Foundation's Spanish Report at ¶ 36; *see also* Declaration of Alfredo Guerrero [Docket No. 279], Exhibit 55 ("Plaintiffs' Spanish Report") at p. 39 ("[I]t must be noted that a possession has public character when the actual owner would be able to have knowledge of such possession using a standard diligence although it does not have any knowledge in the reality."). In this case, the Painting has been on public display at the Museum from October 10, 1992 until the present (except when on public display in a 1996 exhibition outside of Spain and while on loan at the Caixa Forum in Barcelona, Spain from October 2013 to January 2014). Moreover, since the Foundation's purchase of the Painting in 1993, the Foundation's "ownership" and the Painting's location in Spain have been identified in the several publications including: (1) Wivel, Mikael: Ordrupgaard. Selected Works. Copenhague, Ordrupgaard, 1993, p. 44; (2) Rosenblum, Robert: "Impressionism. The City and Modern Life". En Impressionists in Town. [Cat. Exp.]. Copenhague, Ordrupgaard, 1996, n. 17, pp. 16-17, il. 61.; (3) Llorens, Tomas; Borobia, Mar y Alarcó, Paloma: Obras Maestras. Museo Thyssen-Bornemisza. Madrid, Fundación Collectión Thyssen-Bornemisza, 2000, p.

156, il. p. 157; and (4) Perez-Jofre, T.: Grandes obras de arte. Museo Thyssen-Bornemisza. Colonia, Tascnen, 2001, p. 540, il. p. 541. Declaration of Evelio Acevedo Carrero [Docket No. 249-2] at ¶ 18. As a result, the Court concludes, as a matter of Spanish law, that the Foundation's possession was sufficiently public to satisfy this element of adverse possession. Indeed, as the Foundation's experts in Spanish law state, the permanent exhibition of the Painting at the Museum "is the best example of publicity imaginable in cases of items like the one in question. Precisely for a case of adverse possession of works of art, the Judgment of the Supreme Court of 28 November 2008 based the 'manifest publicity' on appearances in the press and public exhibitions." Foundation's Spanish Report at ¶ 36; *see also* STS 6657/2008, Nov. 28, 2008 (ECLI:ES:TS: 2008:6657).

Second, the Court concludes that the Foundation's possession as owner was "peaceful" from June 21, 1993 until at least May 3, 2001. Indeed, the Foundation acquired the Painting in a peaceful manner and possessed the Painting without any challenge or dispute as to its "ownership" until May 3, 2001 (when Claude Cassirer filed a Petition with the Kingdom of Spain and the Foundation, seeking return of the Painting).

Third, and finally, the Court concludes that the Foundation's possession as owner was "uninterrupted" from June 21, 1993 until at least May 3, 2001. Possession may be interrupted when: (1) for any reason, such possession should cease for more than one year; (2) as a result of the judicial summons to the possessor; (3) "an act of conciliation"; and (4) "[a]ny

express or implied recognition by the possessor of the owner's right. Spanish Civil Code Articles 1943 to 1948. None of these events occurred during the time period between June 21, 1993 and May 3, 2001.

3. Possession of the Property for the Statutory Period

Spanish Civil Code Article 1955 provides in relevant part:

> Ownership of movable property prescribes by three years of uninterrupted possession in good faith. Ownership of movable property also prescribes by six years of uninterrupted possession, without any other condition. . . .[13]

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[13] Spanish Civil Code Article 1955 further provides: "The provisions of article 464 of this Code shall apply as related to the owner's right to claim movable property which has been lost or of which he has been unlawfully deprived . . . ." Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38. Article 464 provides in relevant part: "Possession of movable property, acquired in good faith, is equivalent to title. Notwithstanding the foregoing, any person who has lost movable property or has been deprived of it illegally may claim it from its possessor." Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 31. Despite the language in Article 464, the Spanish Civil Code clearly contemplates, and both parties' Spanish law experts apparently agree, that a possessor of stolen or lost property can acquire ownership of that property by adverse possession under Article 1955. Indeed, the very next article of the Spanish Civil Code provides: "Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories, *unless* the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations." Spanish

Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38. The Court finds it unnecessary to address whether the Foundation acquired ownership of the Painting under the shorter three-year time period for ordinary adverse possession, because it concludes that, even if the Foundation acquired the Painting in "bad faith," i.e., knowing that there was a defect which invalidates its title or manner of acquisition (Spanish Civil Code Article 433), the Foundation acquired ownership under the longer six-year time period for extraordinary adverse possession. Indeed, as discussed *supra*, the Foundation has possessed the property as owner publicly, peacefully, and without interruption from at least June 21, 1993 until at least May 3, 2001.

As noted, Plaintiffs fail to argue that the Foundation has not satisfied these general requirements for adverse possession. Instead, Plaintiffs' *only* arguments in opposition to the Foundation's claim that it obtained ownership by extraordinary adverse possession are that: (1) Spanish Civil Code Article 1956 bars the application of adverse possession because the Foundation was an "accessory" to a crime against humanity or a crime against property in the event of armed conflict; and (2) Spain's adverse possession laws violate the European Convention on Human Rights. The Court addresses each of these arguments *infra*.

Civil Code Article 1956 (emphasis added) (Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38).

4. Spanish Civil Code Article 1956 is inapplicable.

Plaintiffs argue that, pursuant to Spanish Civil Code Article 1956, the Foundation cannot obtain ownership of the Painting by adverse possession because the Foundation was an "accessory" to a crime against humanity or a crime against property in the event of armed conflict.

Spanish Civil Code Article 1956 provides: "Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories, unless the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations." Spanish Civil Code Article 1956 (Declaration of Javier Martínez Bavíere [Docket No. 249-22] at ¶ 5, Exhibit 38). In order for Article 1956 to bar the acquisition of ownership by adverse possession, three requirements must be satisfied: (1) there must be a crime of theft or robbery (or other similar crime relating to the misappropriation of movable property); (2) the possessor of the movable property must be a principal, accomplice, or accessory of the crime committed; and (3) the statute of limitations for the crime committed or for an action claiming civil liability arising from that crime must not have expired. Plaintiffs' Spanish Report at p. 45.

The parties agree that the looting of the Painting by Scheidwimmer and the Nazis constitutes a misappropriation crime for the purposes of Article 1956, and that, under the current Spanish Criminal Code, it would be considered a crime against humanity

or crime against property in the event of armed conflict which has no statute of limitations.[14] However, in order for Article 1956 to have any application, the Foundation must also be a principal, accomplice, or accessory to the crime committed. In other words, the Foundation must be "criminally responsible" for the offense committed by the Nazis in looting the Painting. *See* 1973 Spanish Criminal Code Article 12 ("Those criminally responsible for felonies and misdemeanours are the following: 1. Principals. 2. Accomplices. 3. Accessories."). It is undisputed that the Foundation was not a "principal" or "accomplice" to the crime committed by the Nazis. Accordingly, the Court will only address whether the Foundation can be considered an "accessory" to the crime committed by the Nazis under Spanish law.

Assuming the facts in the light most favorable to Plaintiffs, the Court concludes, as a matter of Spanish law, that the Foundation was not an "accessory" to the crime committed by the Nazis. Under the 1973 Spanish Criminal Code, in effect at the time the Foundation acquired the Painting, "accessories" (or accessories after the fact) were defined as follows:

> Accessories are those who, aware of the perpetration of a punishable offence, without having had involvement in it as principals or

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[14] The parties disagree as to whether the statute of limitations (or, more accurately, lack thereof) can be applied retroactively to crimes committed prior to the effective date of the current Spanish Criminal Code. The Court finds it unnecessary to resolve this question, because it concludes that Article 1956 is inapplicable on other grounds.

accomplices, are involved subsequent to its execution in any of the following ways:

1. Aiding and abetting the principals or accomplices to benefit from the felony or misdemeanour.

2. Hiding or destroying the evidence, effects or instruments of the felony or misdemeanour, to prevent it being discovered.

3. Harbouring, concealing or aiding the escape of suspected criminals, whenever any of the following circumstances concur:

   One. When the accessory has acted in abuse of his public functions.

   Two. When the principal has committed the offences of treason, murder of the head of State or his successor, parricide, murder, unlawful detention for ransom or imposing any other condition, unlawful detention with simulation of public functions, deposit of weapons or ammunition, possession of explosives and criminal damage.

1973 Spanish Civil Code Article 17 (Declaration of Adriana De Buerba [Docket No. 289-1] at Exhibit 111A).[15]

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[15] Under the current Spanish Criminal Code, "accessories," as defined in the 1973 Spanish Criminal Code, are no longer considered "criminally responsible" for the original criminal offense. Rather, similar participation or involvement subsequent to the execution of the original offense is now defined as an independent criminal offense, i.e., "covering up," which is defined

Plaintiffs argue that the Foundation was an "accessory" to the looting of the Painting by Scheidwimmer and the Nazis, because the Foundation hid the evidence, effects or instruments of the crime "to prevent it being discovered." However, as the clear and unambiguous language of the Spanish Criminal Code provides, and as the relevant Spanish case law holds, the intent or purpose of the accessory's misconduct must be to prevent the offense or crime from being discovered. *See* 1973 Spanish Criminal Code Article 17 (emphasis added) ("Accessories are those who, aware of the perpetration of a punishable offence, without having had involvement in it as principals or accomplices, are involved subsequent to its execution in . . . [h]iding or destroying the evidence, effects or

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in Article 451. Article 451 provides in relevant part:

> Whoever has knowledge of a felony committed and, without having intervened in it as a principal, subsequently intervenes in its execution, in any of the following manners, shall be punished with a sentence of imprisonment of six months to three years:
>
> 1. Aiding the principals or accomplices to benefit from the gains, product or price of the offence, without intended personal profit;
>
> 2. Hiding, altering or destroying the evidence, effects or instruments of an offence, to prevent it being discovered;
>
> 3. Aiding the suspected criminals to avoid investigation by the authority or its agents, or to escape search or capture, whenever any of the following circumstances concur . . .

Spanish Criminal Code Article 451 (Declaration of Adrian De Buerba [Docket No. 289-1] at Exhibit 111B).

instruments of the felony or misdemeanour, *to prevent it being discovered*."; Declaration of Adriana De Buerba [Docket No. 289-1], Exhibit 111 ("De Buerba Expert Report") at ¶ 4 (translation of Judgment of the Spanish Supreme Court no. 62/2013, January 29, 2013) ("The action must have an impact on the evidence, effects or instruments of the criminal offence and the intent of these misconducts must be to prevent the criminal offence or its relevant legal aspects from being discovered.").[16] In this case, there is absolutely no evidence that the Foundation purchased the Painting

[16] The Court rejects the contrary conclusion reached by Plantiffs' Spanish legal expert, Alfredo Guerrero Righetto. In his initial declaration filed on April 20, 2015 [Docket No. 279], he relied on the following inaccurate translation of Spanish Criminal Code Article 451: "Those who with knowledge of the commission of a crime and without having participated in it as a perpetrator or accomplice, intervene after execution of any of the following ways . . . concealing, altering or disabling the body, effects or instruments of a crime, to prevent *their detection*". In contrast, the official translation by the Spanish Ministry of Justice provides: "Whoever has knowledge of a felony committed and, without having intervened in it as a principal, subsequently intervenes in its execution, in any of the following manners . . . [h]iding, altering or destroying the evidence, effects or instruments of an offence, to prevent *it* being discovered." Guerrero Righetto's inaccurate translation results in his erroneous opinion that the Foundation is an "accessory" to the Nazis' crime, because he believes that the intent of the misconduct under Article 451 must be to prevent the evidence, effects or instruments of the offense from being discovered rather than to prevent the criminal offense itself from being discovered. Although Mr. Guerrero Righetto adheres to his opinion in his Supplemental Declaration filed on May 11, 2015 [Docket No. 298-1] even after his translation error was pointed out by the Foundation's expert, the Court, after conducting its own research, concludes that his interpretation of Article 451 (and Article 17 in the 1973 Spanish Criminal Code) is plainly wrong.

(or performed any subsequent acts) with the intent of preventing Scheidwimmer's or the Nazis' criminal offenses from being discovered. Indeed, Scheidwimmer had already been convicted and sentenced after the war, and the 1939 forced sale had already been the subject of civil proceedings in Germany from 1948 to 1958 in which both Lilly and Scheidwimmer were parties. *See* Declaration of Jonathan Petropoulos [Docket No. 277], Exhibit 71, at ¶¶ 55-56; Court's Order Denying Thyssen-Bornemisza Collection Foundation's Motion for Summary Adjudication filed on March 13, 2015 [Docket No. 245].

Contrary to the clear definition of "accessory" in the Spanish Criminal Code, Plaintiffs' Spanish legal expert, Alfredo Guerrero Righetto, creatively opines that one who has committed the independent crime of receiving stolen property is "included within" the concept of an "accessory". Supplemental Declaration of Alfredo Guerrero [Docket 298-1], Exhibit 1 at 7. The Court disagrees. As clearly explained by the Foundation's expert in Spanish criminal law, the receipt of stolen goods is an independent crime, and one who commits that crime is not necessarily "criminally responsible" for the previous crime perpetrated by others as an "accessory".[17] De Buerba Expert Report at ¶¶ 21-26.

Because the Foundation was not an accessory to the crimes committed by Scheidwimmer and the Nazis, as defined in the Spanish Criminal Code, the Court

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[17] It does not appear, nor do the parties argue, that the crime of receiving stolen property is itself a misappropriation crime covered by Article 1956.

concludes that Article 1956 of the Spanish Civil Code is inapplicable.

5. Spain's Adverse Possession Laws Do Not Violate the European Convention on Human Rights

Lastly, Plaintiffs, in an effort to avoid summary judgment, urge the Court to take the unprecedented and drastic step of invalidating Spain's adverse possession laws under Article 1 of Protocol No. 1 of the European Convention on Human Rights. Although Plaintiffs devote less than half of a page in their Opposition to this argument, the Court concludes that it is appropriate to address this argument.

Spain is a party to the European Convention on Human Rights, including its Protocol No. 1. Article 1 of Protocol No. 1 provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

As the European Court of Human Rights summarized:

> Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest . . . The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule."

Case of J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. The United Kingdom, no. 44302/02 (/sites/eng/pages/search.aspx#{"appno":["44302/02"]}), § 52, ECHR 30 August 2007 (hereinafter "*Pye*") (citations omitted). "In order to be compatible with the general rule set forth in the first sentence of the first paragraph of Article 1, an interference with the right to the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." *Id.* at § 53 (citations omitted). "In respect of interferences

which fall under the second paragraph of Article 1 of Protocol No. 1, with its specific reference to 'the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .', there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this respect, States enjoy a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question." *Id.* at § 55.

In *Pye,* the European Court of Human Rights held that the English adverse possession law applicable to land did not violate Article 1 of Protocol No. 1 of the European Convention on Human Rights. Specifically, it held in relevant part: (1) the loss of ownership pursuant to a generally applicable English land law was properly characterized as a "control of use" of land within the meaning of the second paragraph of Article 1, rather than a "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1; (2) the law pursued a legitimate aim in the general interest; and (3) the law struck a fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights, and there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realized. *Id.* at §§ 64-84.

The Court likewise concludes that Spain's laws of adverse possession do not violate Article 1 of Protocol

No. 1 of the European Convention on Human Rights. "It is characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local conception of the importance and role of property." *Id.* at § 74. As discussed above, Spain's adverse possession laws serve the legitimate interests of certainty of title, protecting defendants from stale claims, and encouraging plaintiffs not to sleep on their rights. Moreover, in determining that a fair balance exists, the Court recognizes that Spain enjoys a "wide margin of appreciation," with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. Spain's adverse possession laws are long-standing, generally applicable laws, which fall within Spain's margin of appreciation, "unless they give rise to results which are so anomalous as to render the legislation unacceptable." *Id.* at § 83. The Court concludes that the results are not so anomalous as to render Spain's laws of adverse possession unacceptable.

Accordingly, the Court concludes that, under Spain's adverse possession laws, the Foundation acquired ownership of the Painting as of June 21, 1999, six years after it purchased the Painting from the Baron.

C. To the Extent that Amended California Code of Civil Procedure § 338(c) Would Result in Depriving the Foundation of its Ownership of the Painting, It Violates the Foundation's Due Process Rights.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). As the Supreme Court stated in *Campbell v. Holt*:

> It may . . . very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, that such act deprives the party of his property without due process of law. The reason is that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law.

Campbell v. Holt, 115 U.S. 620, 623 (1885).

In this case, the Court has concluded that the Foundation acquired ownership of the Painting under Spanish law prior to California Legislature's retroactive extension of the statute of limitations in 2010. Moreover, it is undisputed that, before the California Legislature retroactively extended the statute of limitations in 2010, Plaintiffs' claims were time-barred under the prior version of California Code of Civil Procedure § 338. Accordingly, to the extent that application of amended California Code of Civil Procedure § 338(c) would result in depriving the Foundation of its ownership of the Painting, the statute violates the Foundation's due process rights.[18] Indeed, there is no persuasive argument that the statute is narrowly tailored to serve a compelling state interest.

IV. CONCLUSION

For the foregoing reasons, the Foundation's Motion for Summary Judgment is **GRANTED**. Plaintiffs' Motion for Summary Adjudication Re Choice of California Law is **DENIED**. The parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before June 11, 2015. In the unlikely event that counsel are unable to agree upon a joint

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[18] In any event, under California law, it does not appear that the retroactive extension of the statute of limitations would result in depriving the Foundation of ownership of the Painting. *See, e.g., In re Marriage of Klug*, 130 Cal. App. 4th 1389, 1399 (2005) ("Statutes of limitation are legislative enactments that limit the time period in which a plaintiff can bring his or her cause of action in court. They do not alter the legal obligation and injury underlying plaintiff's claim.").

proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a declaration outlining their objections to the opposing party's version no later than June 11, 2015.

Although the Foundation has now prevailed in this prolonged and bitterly contested litigation, the Court recommends that, before the next phase of litigation commences in the Ninth Circuit, the Foundation pause, reflect, and consider whether it would be appropriate to work towards a mutually-agreeable resolution of this action, in light of Spain's acceptance of the Washington Conference Principles and the Terezin Declaration, and, specifically, its commitment to achieve "just and fair solutions" for victims of Nazi persecution.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-55550
15-55977
15-55951

D.C. No. 2:05-cv-03459-JFW-E
Central District of California, Los Angeles

[Filed December 5, 2017]

DAVID CASSIRER; et al.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain,	)
	)
Defendant-Appellant.	)

ORDER

Before: CALLAHAN, BEA, and IKUTA, Circuit Judges.

The panel has voted to deny Defendant-Appellant's petition for panel rehearing. The panel has also voted to deny Defendant-Appellant's petition for rehearing en

banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-55550
(Consolidated with Nos. 15-55951, 15-55977)

[Filed September 7, 2017]

DAVID CASSIRER, AVA CASSIRER, and UNITED JEWISH FEDERATION OF SAN DIEGO, a California non-profit corporation, Plaintiffs/Appellants/Cross-Appellees	)
v.	)
THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain Defendant/Appellee/Cross-Appellant	)

Decided July 10, 2017
(Circuit Judges Consuelo M. Callahan,
Carlos T. Bea, and Sandra S. Ikuta)

On Appeal from the United States District Court
for the Central District of California,
Honorable John F. Walter
District Court No. CV-05-03469-JFW

DEFENDANT-APPELLEE/CROSS-APPELLANT'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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* * *

[*Table of Contents and Table of Authorities Omitted in the Printing of this Appendix*]

INTRODUCTION AND FRAP 35(B) STATEMENT[1]

This petition raises two related challenges. The first challenge, invoking Rule 40, identifies the "point of law or fact . . . overlooked or misapprehended" by the Panel when it reversed the district court's order granting summary judgment on one of two grounds raised for the first time on appeal. Fed. R. App. P. 40(a)(2). The Foundation does not dispute that, where there have been findings of criminal (and derivative civil) liability, Article 1956 may abrogate Article 1955's six-year acquisitive prescription period by extending Article 1962's six-year statute of limitations.[2] Article 1956, however, can apply only where there has been a *declaration* by a court of criminal liability.

Under Spanish law, the statute of limitations for bringing charges against the Foundation as an accessory-after-the-fact expired in 1998, five years after the 1993 purchase. The Foundation, however, was never charged nor found to be criminally liable, and the criminal statute of limitations has run. Thus, Article 1956 *cannot* apply and the Foundation became the absolute and unchallengeable owner of the Painting in 1999, at the latest – six years after the expiration of Spain's substantive statute of limitations for moveable property claims (Article 1962) and after six years of

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[1] This petition uses the following abbreviations: "Op." (Opinion); "ER" (Excerpt of Record); "FOB" (Foundation's Opening Brief); "AOB" (Plaintiffs' Opening Brief); "ADD" (Addendum); "APP" (Appendix).

[2] Unless otherwise noted, all referenced "Articles" are found in the Spanish Civil Code.

peaceful, uncontested possession which vested property rights in the Foundation (Article 1955). Because Article 1956 cannot abrogate Article 1955 where there are simply *allegations* of wrongdoing made *years after* expiration of the criminal statute of limitations, the Panel erred.

The second challenge centers on Rule 35(b)(1)(A) and (B) and Circuit Rule 35-1, drawing the Court's attention to the clear conflict with Supreme Court and Ninth Circuit precedent that will be generated if the Panel's decision stands uncorrected. Under very limited and "exceptional" circumstances, appellate courts *may* consider challenges that were not raised before the district court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *In re Mortg. Store, Inc*., 773 F.3d 990, 998 (9th Cir. 2014); *Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985). Where, for example, a party raises an issue of that is "purely one of law" for the first time on appeal, the appellate court has the discretion to consider the argument. *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978). But central to that narrow exception is the principle that "such an issue *should not be decided* if it would prejudice the other party." *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (emphasis added); *see also Patrin*, 575 F.2d at 712.

Here, the Panel did not simply consider a straightforward issue of "pure law" – it undertook a complicated analysis of *law and facts* – scrutinizing Spanish history, Spanish law, the evolution of Spanish criminal and civil codes, and Plaintiffs' new allegations of wrongdoing. To adjudicate Plaintiffs' new claim, the Panel necessarily assumed the plausibility of factual

allegations not raised below. Had Plaintiffs raised this claim in the district court, the Foundation's experts could have augmented their reports to rebut forcefully Plaintiffs' new factual and legal allegations, explaining in detail – and with full reference to Spanish law – why Article 1956 cannot apply, as a matter law, and why a Spanish court would not use a superseded penal code to define a modern civil claim.

But rather than recognize Plaintiffs' new "accessory-after-the-fact" claim as waived – or remand the action to permit a district court to consider the claim with proper briefing – the Panel made legal findings that are erroneous *as a matter of law*, as Article 1956 cannot apply absent the requisite underlying *finding* of criminal liability and the Foundation has not been found – and cannot be found – criminally liable because the criminal statute of limitations expired. Moreover, the Panel's finding – that the 1870 penal code affirmatively *applies* to define "accessory" in Article 1956 of the Civil Code – is effectively unchallengeable, as the Panel remanded the action on the limited question of whether the Foundation actually *meets* the 1870 penal code definition of "accessory." Because binding precedent makes clear that a panel should not consider a waived challenge where, as here, the party against whom the issues is raised will be prejudiced, rehearing *en banc* is necessary if the Panel fails to correct the opinion.

THIS PETITION SHOULD BE GRANTED

I. The Panel Erred in Finding that Article 1956 *May* Apply to Delay Application of Article 1955's Six-Year Acquisitive Prescription Period

On July 10, 2017, the Panel issued a lengthy opinion addressing Plaintiffs' appeal, the Foundation's cross-appeal, and the three motions for summary judgment and/or adjudication that were considered by the district court. Nearly twenty of the opinion's sixty-one pages are devoted to one of two legal challenges raised by Plaintiffs for the first time on appeal. Premised largely on its own research, the Panel engaged in an extensive discussion of Spanish statutory construction, the evolution of Spanish codes, and the "social realities" of Spain to make a legal determination that the superseded 1870 Spanish Penal Code definition *affirmatively applies* to determine whether the Foundation is a modern-day accessory (or "encubridor") under the Spanish Civil Code. As discussed in the subsequent section, the Panel erred in adjudicating this complicated issue, as Plaintiffs could provide no "exceptional" circumstance to justify their failure to raise their claim properly and the Foundation was prejudiced as it was denied the opportunity to show the district court that Plaintiffs' legal argument was fatally flawed.

But the more fundamental problem, and the reason why review under Rule 40 is necessary, is that the Panel's analysis – detailed as it may have been – is premised on fundamental legal errors that led the Panel to miscalculate the applicable statute of limitations periods. Article 1956 *cannot* apply – *as a*

matter of law – to extend Article 1962's six-year statute of limitations and, thereby, delay application of Article 1955's six-year acquisitive prescription period. By its own language – and as recognized by Spanish courts – Article 1956 applies only where the possessor *has previously been found criminally liable* as a principle, accomplice, or accessory – not simply where a Plaintiff levies an *accusation* of criminal wrongdoing decades later.

The Foundation argued below – and the district court agreed – that the Foundation became the "absolute" owner of the Painting in 1999, when Article 1955's six-year acquisitive prescription period and Article 1962's six-year statute of limitations period had both run. ER 16-19. The Panel agreed that the Foundation's possession satisfied the requirements to demonstrate ownership through acquisitive prescription. *See* Op. 28 (noting the Foundation's peaceful and uninterrupted possession between 1993 and 1999, as required by Article 1955). Thus, the Panel recognized, if Article 1955 applies alone, the Foundation has demonstrated ownership through acquisitive prescription.

As recognized by the Panel, Article 1956 can, in some cases, modify the application of Article 1955, to extend the applicable statute of limitations period to account for criminal and civil liability and to delay the running of Article 1955. The Panel reasoned that *if*, under Plaintiffs' new theory, Article 1956 *did apply*, the Foundation would not obtain prescriptive ownership under Article 1955 until after additional statutes of limitation (authorized by Article 1956) had run:

> The Cassirers argue that TBC is an accessory (*encubridor*) to the theft of the Painting because TBC knew the Painting had been stolen when TBC acquired the Painting from the Baron. For the crime of *encubrimiento* (accessory after the fact) and the crime of receiving stolen property, the two crimes the Cassirers argue TBC committed when it purchased the Painting from the Baron in 1993, the **criminal limitations period is five years**, 1973 Penal Code Articles 30, 113, 546(bis)(a) and 1995 Penal Code Articles 131, 298, **and civil limitations period is fifteen years**, Judgment of January 7, 1982 (RJ 1982/184) and Judgment of July 15, 2004 (no. 5241/2004). Thus, if Article 1956 applies, including the six-year period from Article 1955, **TBC would need to possess the Painting for twenty six years** after 1993, until 2019, to acquire the title via acquisitive prescription. Since the Cassirers petitioned TBC for the Painting in 2001 and filed this action in 2005, *if article 1956 applies*, TBC has not acquired prescriptive title of the Painting.

Op. 29-30 (bold emphasis added). But in its haste to construct an expert opinion on Spanish statutory construction, the Panel "overlooked and misapprehended," Fed. R. App. P. 40(a)(2), two crucial legal principles.

A. Article 1956 Can Apply *Only* Where the Possessor Was Previously Found Liable for Committing a Crime

Article 1956 – by its own terms and as interpreted by Spanish courts – applies to extend the otherwise applicable statute of limitations period based on criminal liability (and derivative civil liability) *only where the possessor was previously found criminally liable by a court.* That article provides:

> Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories [*encubridores*], **until the crime or misdemeanor or its sentence, and the action to claim civil liability arising** therefrom, should have become barred by the statute of limitations.

Op. 29 (bold emphasis added). But here, there was no *declaration or finding* of criminal liability (or derivative civil liability) to extend Article 1962's six-year statute of limitations and delay application of Article 1955, both of which ran or expired *in 1999*.[3]

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[3] Spain's six-year statute of limitations for actions involving moveable property (Article 1962) is substantive: it not only extinguishes a party's ability to make a claim, it extinguishes a non-possessor's rights in the property. FOB at 63-65. Thus, the Foundation acquired "absolute title" to the Painting on June 21, 1999 – as the Foundation became the owner of the Painting under Article 1955 and any competing ownership claims were extinguished under Article 1962. A 2016 *assertion* of criminal liability cannot strip the Foundation of the absolute title it acquired six years after it took public, undisturbed, unchallenged

Spanish case law makes clear that Article 1956 applies only where a court has previously made formal findings of criminal wrongdoing. ADD82-88("Case law shows that there can be no crime in the absence of a guilty verdict nor, therefore, can any civil liability derive from the offence."); ADD96. In Supreme Court Judgment 915/2004, of July 15, 2004 (RJ2004/4209), referenced by the Panel, the appellant, *convicted of criminal fraud* in 2002 (for collecting pension payments for her deceased mother-in-law from 1980-2000) challenged the lower court's determination that she was required to compensate the Spanish government for the money she fraudulently obtained. The Spanish Supreme Court rejected her appeal. ADD98-109. The court found that a further fifteen-year statute of limitations applied, because, unlike in this case, the appellant had been found criminally liable, thus permitting the court to timely extend the statute of limitations to account for derivative civil liability. Similarly, in Supreme Court Judgment of January 7, 1982 (RJ1982/184), also referenced by the Panel, the statute of limitations was extended fifteen years precisely because it was derived from a criminal offense declared in a previous judgment. ADD110-121.

In those two cases and in *all other cases cited* by Plaintiffs, Amici, and the Panel, the otherwise applicable statute of limitations was extended because there had been formal findings of criminal liability. *See, e.g.*, Dkt. No. 29-3(APP12-16); Dkt. No. 29-3(APP114-23). Indeed, the Spanish Supreme Court has firmly rejected the possibility of derivative civil liability

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ownership of the Painting on June 21, 1999, approximately two years *before* Plaintiffs made *any* claim to the Painting.

without a previous criminal court declaration of a criminal offense.

> We may note in the first place that an action to establish *ex delicto* civil liability cannot be based, as the claim does, on any grounds other than the presence of a prior judgment in the criminal courts establishing the existence of an offence. This is established, inter alia, by the Judgment of this Chamber of 31 January 2004, which reasons that "application of an ex delicto remedy" requires the existence of a guilty verdict and that such remedy cannot apply in cases of acquittal, dismissal or stay of proceedings, as a judicial ruling to that effect is necessary and derivative civil action cannot arise, as a consequence of the absence of any criminal wrongdoing inherent in the complaint (Judgments of 26.10.1993, 10.5.1994, 19.5.1997, 14.4.1998 and 20.11.2001).

ADD127. The Supreme Court has consistently recognized that without a finding of criminal liability, only a claim for general civil liability could be brought. *See, e.g.*, ADD130-137; ADD138-147; ADD148-154. A claim asserting general civil liability, (under Article 1902) is subject to a one year statute of limitations and would not trigger application of Article 1956 as there was no underlying criminal finding.[4]

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[4] Article 1968 of the Spanish code provides a limited carve out for actions asserting civil liability in the absence of a formal criminal finding:

> The following shall be barred by statute of limitations upon the lapse of one year:

Thus, the five-year criminal statute of limitations period permitted by the Penal Code cannot not apply. As acknowledged by the Panel, and recognized by the district court, the Foundation cannot satisfy the 1973 Penal Code definition of "encubridor" because "there is absolutely no evidence that the Foundation purchased the Painting (or performed any subsequent acts) with the intent of preventing Scheidwimmer's or the Nazis' criminal offenses from being discovered." *Id.* at 31-32 (quoting ER 22)).

Nor do Plaintiffs' new *allegations* – that the Foundation is an "encubridor" under the 1870 penal code ("accessory-after-the-fact" under the 1973 penal code) or a "receptador" (receiver of stolen property) – permit the Panel to tack on five years because there were no requisite criminal charges, much less *findings*, of accessory-after-the-fact or receiver-of-stolen-goods liability.

Because the Foundation *cannot* be liable as an "encubridor" under the 1973 penal code, as recognized by this Panel, and *was not* found criminally liable as an "encubridor," under the 1870 penal code, or as a

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1. The action to recover or retain possession.

2. The action to claim civil liability as a result of insults or slander, and for obligations resulting from fault or negligence as provided in article 1,902, from the date on which the injured party became aware of them.

Article 1968 (available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=221319#LinkTarget _6372). But this statute of limitations runs one year from the date on which the action *could* have been brought which, in this case, was in 1994 – one year after the Foundation purchased of the collection.

"receptador," the Panel erred in adding the criminal five-year statute of limitations to Article 1962's already expired six-year statute of limitations. And because there was no declaration of criminal liability, there can be no derivative civil liability – no "action to claim civil liability arising therefrom" – to extend Article 1962's six-year statute of limitations an additional fifteen years. ADD95-96.

B. The Foundation Cannot Now Be Found Criminally Liable as an Accessory-After-the-Fact Because the Criminal Statute of Limitations Expired

Moreover, the Panel's finding that Article 1956 *might* apply based on Plaintiffs' assertion that the Foundation *may* be criminally liable is mistaken, *as a matter of law*, as the statute of limitations for asserting criminal liability has long since expired.

As in the United States, Spanish law mandates that criminal actions for property crimes are governed by statutes of limitation. Under Spanish law, a criminal action alleging that a party was an encubridor or a receptador must be brought within five years of the alleged crime. Op. 29 (citing 1973 Penal Code Articles 30, 113, 546(bis)(a) and 1995 Penal Code Articles 131, 298). As anticipated by the Panel, were the Foundation found criminally liable, Article 1956 could add five years to the six-year statute of limitations provided by Article 1962. And the statute of limitation could only then be extended further, pursuant to Article 1956, until expiration of the derivative civil liability statute of limitations.

But the Foundation was never charged nor found criminally liable of any crime in connection with its acquisition of the Painting.[5] And the statute of limitations for charging the Foundation with criminal liability expired *in 1998*, five years after the Foundation's 1993 purchase. This means that the Foundation *cannot, as a matter of law*, be found criminally liable as an encubridor or receptador – now or in the future. And there is no reason to wait for expiration of the statute of limitations for derivative civil liability – with no criminal liability, there can be no derivative civil liability.

Therefore, the Foundation's absolute title to the Painting vested in 1999 – when Article 1962's six-year statute of limitations period extinguished any adverse claim *and* Article 1955's six-year acquisitive prescription ran – years before Plaintiffs' claim and almost two decades before Plaintiffs raised this new claim *alleging* criminal wrongdoing by the Foundation. Article 1955, must, therefore, be "read in isolation," Op. 28, and, as a result, "the Cassirers' action for recovery of the Painting," *id*., is barred *as a matter of law*.

The Panel "overlooked and misapprehended," Fed. R. App. P. 40(a)(2), the clear limitations on the language of Article 1956 and supporting Spanish case law – which recognize that Article 1956 cannot apply in

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[5] Plaintiffs' assertion that the Panel "must assume[] for summary judgment purposes" that the Foundation "is a criminal receiver of stolen property," AOB at 28, is erroneous. Because there was no court *finding* that the Foundation is a "criminal receiver of stolen property," Article 1956 was not triggered to delay the acquisitive prescription period that vested absolute title in the Foundation in 1999.

the absence of a finding of criminal liability. The Panel further erred in presuming that new *allegations* of criminal conduct could trigger Article 1956, when the criminal statute of limitations expired long ago, precluding the Foundation from being found criminally liable now. Therefore, that portion of the Panel's decision reversing the district court's summary judgment order must be corrected and reversed.

II. *En Banc* Review is Warranted as Binding Precedent Precludes Consideration of Waived Challenges Where the Party Against Whom the Challenge is Made Would be Prejudiced

As a general rule, this Court will not consider an issue raised for the first time on appeal. *United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983). This Court has recognized three limited exceptions to this rule: in the "exceptional" case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, *see id.*, when a new issue arises while appeal is pending because of a change in the law, *see United States v. Whitten*, 706 F.2d 1000, 1012 (9th Cir. 1983), or when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed, *see Patrin*, 575 F.2d at 712.

Although this Court *may* review an issue that has been raised for the first time on appeal when it raises no factual issues and is purely one of law, "such an issue *should not be decided* if it would prejudice the other party." *Kimes*, 84 F.3d at 1126 (emphasis added); *see also In re Mortg. Store, Inc.*, 773 F.3d at 998 ("We have discretion to consider arguments raised for the

first time on appeal, but do so only if there are 'exceptional circumstances.'") (citation omitted); *Bolker*, 760 F.2d at 1042. Plaintiffs offer no "exceptional circumstances" – no explanation *at all* – for failing to raise their "accessory after the fact" claim properly. Further, Plaintiffs' waived claim does not center on an "issue conceded or neglected in the trial court" that is "purely one of law and [where] the pertinent record has been fully developed." *Patrin*, 575 F.2d at 712. The parties did not *concede* – and the district court did not *neglect* – Plaintiffs' new claim. It simply was never raised. What is clear from the Panel's lengthy analysis, is that this is a complex issue – not a straightforward issue of "pure law" that can be easily resolved. Accordingly, it *should not* be resolved here. *Quinn v. Robinson*, 783 F.2d 776, 814-15 (9th Cir. 1986) (rejecting government's new appellate argument which, while raising issue of pure law, presented a statute of limitations challenge that was "quite complex").

Plaintiffs' assertions of accessory-after-the-fact criminal and civil liability, premised on a superseded 1870 Penal Code definition, necessarily assume the plausibility of factual issues that are not in the record. At the district court, Plaintiffs asserted that that the Foundation was "willfully" blind, that its lawyer's due diligence was "plainly inadequate," and that the Foundation took a "risk" in acquiring the Baron's collection. But these allegations relate only to whether the Foundation's acquisition was made in good faith (subject to a three-year acquisitive prescription period) or made in the absence of good faith (subject to the six-year acquisitive prescription period).

Now, Plaintiffs "offer a new reason [the Foundation] is an Article 1956 accessory," premised on a new legal theory and new factual allegations that the Foundation "*knowingly* received stolen property when [the Foundation] acquired the Painting from the Baron," Op. 32 (emphasis added), and "obtain[ed] benefit for [itself]" "with knowledge of the perpetration of the felony," *id.* (citation omitted). Absent from the parties' combined statements of material facts is any evidence, or mere assertion, to support a theory of criminal accessory-after-the-fact wrongdoing.[6] Because an appellate court may not entertain new legal arguments premised on new factual allegations, the Panel erred in considering Plaintiffs' waived challenge. *See International Union of Bricklayers & Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) ("In the absence of such [exceptional] circumstances, appellants may not upset an adverse summary judgment by raising an issue of fact on appeal that was not plainly disclosed as a genuine issue before the trial court."); *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 655-56 (9th Cir. 1984) (per curiam).

Where, as here, a party "might have tried his case differently either by developing new facts in response to or advancing distinct legal arguments against the

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[6] Of the 45 statements of undisputed fact listed by Plaintiffs in connection with their Motion for Summary Adjudication (ER 870-924) and the 139 statements of undisputed fact listed by Plaintiffs in connection with the Foundation's Motion for Summary Judgment (ER 704-867), none assert that the Foundation was an accessory of any stripe or that the Foundation had actual "knowledge" that could rise to a level of criminal culpability.

issue, [the new argument] should not be permitted to be raised for the first time on appeal." *Patrin*, 575 F.2d at 712; *see also Singleton*, 428 U.S. at 120; *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *United States v. Gabriel*, 625 F.2d 830, 832 (9th Cir. 1980). Had Plaintiffs asked the district court to consider whether the Foundation could be deemed a criminal accessory-after-the-fact or a receiver of stolen property, the Foundation could have provided authoritative *Spanish* law experts to speak to the proper interpretation – and historical application – of Spanish law in this context.

But instead, the Panel, relying on amici and undefined "independent research," Op. 26 n.12, usurped the role of the district court to hold *as a matter of Spanish law* that the term "encubridor" in Article 1956 *is* defined by the superseded 1870 Penal Code, leaving for the district court on remand the narrower question of whether – *as a matter of law* the Foundation had – or lacked – *actual knowledge* that the Painting was stolen when it purchased the collection 1993. To deny a sovereign entity the opportunity to explain the proper application *of its own laws* is to wholly disregard the respect "for the 'power and dignity' of the foreign sovereign," to which the Foundation is entitled. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (citation omitted).

Because Plaintiffs' waived claim does not present "exceptional circumstances" or a question of pure law, but instead raises and relies on complex factual issues that are not in the record, the Panel abused its discretion by considering Plaintiffs' waived arguments. Moreover, because the Foundation is clearly prejudiced by the Panel's erroneous and unchallengeable legal

findings, the Panel's adjudication of Plaintiffs' waived claim violates Ninth Circuit precedent and *en banc* review is warranted. *See Patrin*, 575 F.2d at 712; *Gabriel*, 625 F.2d at 832.[7]

CONCLUSION

For the reasons set forth above, the Petition for Panel Rehearing should be granted. If the Panel declines to grant the petition, rehearing *en banc* is necessary to maintain the uniformity of the Circuit's decisions and prevent the prejudice to the Foundation that resulted from the Panel's adjudication of Plaintiffs' waived challenge.

Date: September 7, 2017

Respectfully submitted,

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[7] This Court can affirm summary judgment on the basis of "any ground supported by the record." *Crowley v. Nevada ex rel. Nevada Sec'y of State*, 678 F.3d 730, 734 (9th Cir. 2012). The inverse principle applied by the Panel – *reversing* summary judgment on a ground *not* supported by the record – is neither recognized nor permitted. *See Spokane Cty. v. Air Base Hous.*, Inc., 304 F.2d 494, 497 (9th Cir. 1962) ("There is no such general rule authorizing an appellate court to reverse on grounds other than those urged in the trial court.").

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* * *

[*Certificate of Compliance and Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-55550
(Consolidated with Nos. 15-55951, 15-55977)

[Filed September 18, 2017]

DAVID CASSIRER, AVA CASSIRER, and UNITED JEWISH FEDERATION OF SAN DIEGO, a California non-profit corporation,
Plaintiffs/Appellants/Cross-Appellees

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain
Defendant/Appellee/Cross-Appellant

Decided July 10, 2017
(Circuit Judges Consuelo M. Callahan, Carlos T. Bea, and Sandra S. Ikuta)

On Appeal from the United States District Court
for the Central District of California,
Honorable John F. Walter
District Court No. CV-05-03469-JFW

BRIEF OF *AMICI CURIAE* THE KINGDOM OF SPAIN IN SUPPORT OF DEFENDANT-APPELLEE/CROSS-APPELLANT'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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* * *

[*Table of Contents and Table of Authorities Omitted in the Printing of this Appendix*]

BRIEF OF *AMICI CURIAE*

I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici the Kingdom of Spain is a sovereign state committed to the rule of law, including the correct interpretation, application, and enforcement of its laws. As part of its commitment to the rule of law, the Government enacted laws to protect its citizens' natural rights to obtain and possess property. The Government also enacted laws to provide its citizens with finality, certainty, and predictability in property disputes.

The Government is also committed to the collection, display, and preservation of artistic works for the discovery, enjoyment, and education of its citizens and its visitors. Indeed, Spain is home to many world-renowned art museums that see millions of visitors each year. These museums include The Prado Museum, the Reina Sofía National Museum, and the Thyssen-Bornemisza, which is managed by the Foundation and which has displayed the Painting, undisturbed, since 1993.

The Government's identity and interest are set forth in greater detail in the accompanying motion for leave to file this brief. In addition, pursuant to California Rules of Court 8.520(f)(4) and Fed. R. App. P. 29(a)(4)(E), the Government certifies that no portion of its Amicus Brief was authored by any party or by counsel for any party in this matter. The Government also certifies that no one other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

The Government submits the instant Amicus Brief in support of the Foundation's Petition for Rehearing and Rehearing *En Banc* (the "Petition"). The Petition challenges the Panel's reversal of the district court's order granting summary judgment on two grounds: (i) the Panel's misinterpretation and application of Article 1956 of the Spanish Civil Code to the facts of this case; and (ii) the Panel's prejudicial consideration of new facts, issues, and law on appeal. This Amicus Brief focuses on the former. That is, the narrow question of whether Article 1956 abrogates the six-year acquisitive prescription period (Article 1955) by extending the six-year statute of limitations for acquisitive prescription claims (Article 1962). The Government submits that, as a matter of law, if a party does not obtain a judicial declaration of criminal liability, Article 1956 cannot apply and the answer therefore is: NO.

II. ARGUMENT

A. As a Matter of Law, Article 1956 *May* Only Abrogate the Applicable Acquisitive Prescription Period If There Has Been a Declaration of Criminal Liability by a Spanish Court

Article 1956 states:

> Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories, **until the crime or misdemeanor or its sentence, and the action to claim civil liability arising** therefrom, should have become barred by the statute of limitations.

The Panel erred when it reversed the district court's order granting summary judgment because to reach its decision, the Panel overlooked the provision in Article 1956 that requires a finding of criminal liability in connection with the Foundation's possession of the Painting. The importance of this provision cannot be overstated because, in point of fact, there has been no declaration of criminal liability relating to the Foundation's possession of the Painting.

Consequently, the Panel's analysis of Article 1956 should have stopped there, and it should not have reached the issues of whether: (i) Article 1956 extended the applicable statute of limitations; and/or (ii) whether the Foundation's conduct invalidated the acquisitive prescription statute.

B. The Provision in Article 1956 That Requires a Declaration of Criminal Liability Is Rooted in the Government's Constitutional Principle That All People Are Presumed Innocent

As set forth more fully in the attached legal opinion regarding Article 1956 by Spain's Ministry of Education, Culture, and Sports, an individual's right to possess property under the acquisitive prescription statute can only be disturbed pursuant to Article 1956 if there is a finding of criminal liability by the adverse possessor. (Appendix 00001-00026.) The basis of this provision in Article 1956 is the bedrock Constitutional principle found in article 24.2 of the final paragraph of the Spanish Constitution of 1978: "furthermore, everyone has the right… to the presumption of innocence." (Appendix 00002.)

The Government incorporated this principle and made it inseparable from Article 1956 because without it, the net result would be a proliferation of lawsuits for the recovery of property without end. Indeed, the purpose of the statute and the related statute of limitations (Article 1962) is to provide the Government's citizens with finality, predictability, and certainty in relation to property disputes. Any other view of the Government's statutory scheme – including the Panel's view – would turn the acquisitive prescription statutes on their head and would result in unending claims for the recovery of property regardless of time and regardless of purported wrongdoing in possessing the property in dispute. **The Government's acquisitive prescription statutes do not allow for such a result. Consequently, the Panel erred in finding that Plaintiffs may avail themselves of Article 1956 to extend the applicable statute of limitations of the acquisitive prescription statute**.

III. CONCLUSION

It is undisputed that, where there have been findings of criminal (and derivative civil) liability, Article 1956 may abrogate Article 1955's six-year acquisitive prescription period by extending Article 1962's six-year statute of limitations. But it is also undisputed that Article 1956 will only abrogate Article 1955's acquisitive prescription period where there has been a declaration of criminal liability by a Spanish court. (Addendum 82-88; 96; 98-109.) There has been no such declaration. Therefore, the Panel erred when it overlooked the plain language of Article 1956 and

reversed the district court's order granting summary judgment.

The Government acknowledges Plaintiffs' and the Painting's history. That being said, the Government enacted its laws for the reasons set forth above and they must be followed. Therefore, the Government respectfully requests that the Court grant the Petition.

Dated: September 18, 2017

Respectfully submitted,

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* * *

[*Certificate of Compliance and Certificate of Service Omitted in the Printing of this Appendix*]

Appendix to Amicus Curiae Brief[1]

Appendix Number

[1] For each authority, the English translation is immediately followed by the Spanish original.

[*The following text appears in the bottom right-hand corner of page one: Plaza del Rey, 1; 28004 Madrid; TEL: 91 701.72.51/54; FAX: 91 701.72.53*]

[*The following text appears on the bottom right-hand corner of pages 2-16:* MINISTRY OF EDUCATION, CULTURE, AND SPORTS

[There appears the coat of arms of the Spanish state]
MINISTRY OF EDUCATION, CULTURE, AND SPORTS

SECRETARY
OFFICE OF STATE ATTORNEYS
SECRETARY OF STATE OF CULTURE

MINISTRY OF EDUCATION, CULTURE, AND SPORTS
OFFICE OF STATE ATTORNEYS
13 September 2017
DOCUMENT No.: 1024/2017

Case 17.1.188 CA/
Subject: Application of the special adverse possession rule under art. 1956 of the Spanish Civil Code.

The Office of State Attorneys in the Culture Department has examined your enquiry as to whether in order to apply the special adverse possession rule under art. 1956 of the Spanish Civil Code, a judgment not subject to appeal must first be handed down by a criminal court, convicting the person seeking to acquire property through adverse possession. With regard to this enquiry, this Office of State Attorneys issues the following report:

I

In order to properly resolve the issue set forth above, we must begin with the factual and legal situation providing the basis for the rule in art. 1956 of the Spanish Civil Code. Article 1956 states that *"title to stolen movable property may not be obtained through adverse possession by those who stole such property, or by their accomplices or accessories after the fact, unless the felony or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by statute of limitations."*

The rule set forth in such provision directly relates to one of the three requirements that must be met by the possession providing the basis for the adverse possession. These requirements are laid out in Roman law: *Nec vi, nec clam, nec precario* possession. This means that possession is without violence (peaceful possession), without secrecy (public possession), and as of right (the possessor — the adverse possessor — must

not only be subjectively considered the owner, but must act and behave to the outside world as the owner of the property).

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Obviously, the rule under art. 1956 concerns the first of the aforementioned requirements for possession, i.e., that possession must be peaceful. It is understood that possession is not peaceful when the possession by the party seeking title through adverse possession results from a criminal offence, whether a summary only, either-way or indictable only offence, for which such party is criminally liable.

Under Roman law, violence (possession that is not peaceful due to an unlawful act) definitively vitiated the possession, so preventing the adverse possession and, therefore, the acquisition of title. However, under modern law, violence vitiates possession only temporarily. This means that the possession enabling acquisition of the title may begin once the violence has ceased (see art. 2.233.2 of the French Civil Code; art. 1163 of the Italian Civil Code 1942). The Spanish Civil Code does not establish this as explicitly, but it leads to the same conclusion, not only by the rule under art. 460.4 (*"the possessor may lose possession: ... 4. due to the possession by another party, even if against the will of the former possessor, if the new possession has lasted more than one year"*), but also, very clearly, by the rule established in art. 1956.

Article 1956 is based on criminal conduct (the provision refers to stolen property; the possession vitiated by the criminal offence refers to not only to the perpetrator, but also to the accomplice and accessory after the fact

– the adverse possessors – as subject to the rule set forth therein; and finally, the provision refers to the expiration of the statute of limitations for the summary only, either-way or indictable only offence, the penalty for such offence, and the civil action arising from the summary only, either-way or indictable only offence).

Under the above premise – the conduct constituting a criminal offence as the basis for the adverse possession rule under the provision in question – it is necessary to examine, first, the application of the constitutional principle of presumption of innocence enshrined in art. 24.2, final section, of the Spanish Constitution 1978 (*"furthermore, everyone has the right ... to not admit guilt and to the presumption of innocence"*). This is because it would make no sense if the rule in the aforementioned provision could be applied in the absence of a judicial ruling finding, and declaring, that the criminal offence was committed, when such criminal offence gave rise to the possession that is the basis for the adverse possession by the person involved therein, who is criminally liable for such offence. It must be emphasized that this constitutes the basis for the application of the civil rule, certainly special, on the adverse possession of movable property set forth in the aforementioned provision.

In order to render invalid the principle of the presumption of innocence, the relevant judicial ruling (conviction) must absolutely be handed down, after a proceeding has been conducted with full due process of law, in which sufficient evidence for the prosecution has been presented. In this regard, the Constitutional Court judgment 45/1997 of 11 March stated the following in its fourth legal ground:

"With regard to the right to the presumption of innocence, we held in Constitutional Court Judgment 120/1994 that 'the presumption of innocence is only destroyed when an independent, impartial Tribunal that has been established by Law declares the guilt of a person after a proceeding conducted with full due process of law (art. 6.1 and 2 of the 1950 European Convention), in which sufficient evidence for the prosecution is presented'. Thus, the presumption of innocence is an essential procedural principle that also operates in applying the administrative punitive authority (Constitutional Court Judgments 73/1985 and 1/1987) ..."

More specifically, and given that as has been stated, the conduct providing the basis for the rule in art. 1956 of the Spanish Civil Code is conduct constituting a criminal offence, we must take into consideration the case law set forth in Constitutional Court Judgment No. 3/1990, of 15 January, whose legal ground no. 1 states the following:

"It is well known that, according to the repeated case law of this Court – Constitutional Court Judgments 31/1981, 101/1985, 80/1986, 82/1988, 254/1988, and 44/1989, inter alia – in order to render invalid the presumption of innocence, evidence for the prosecution must be presented with due process of law, and such evidence must allow for a reasoned and reasonable determination of the defendant's guilt. In principle, such evidence must be presented during the oral proceedings, in order to fulfil the principles of the oral nature of proceedings, immediacy, and the right to object to the other party's evidence. Moreover, the courts may not issue their conviction based on police reports

drafted prior to the preliminary investigation in the case, since these only have the value of a criminal complaint, except when pre-trial evidence is submitted that has been properly gathered and presented."

Lastly, in the case at hand, the legal effect connected to the commission of a criminal offence is a civil effect, which is the application of the special and very burdensome adverse possession rule (that obviously hampers the acquisition of title through adverse possession). It must be stated this does not provide grounds for not applying the constitutional principle of the presumption of innocence and the requirements thereof, since this principle also operates in areas other than the imposition of penalties. In this regard, Constitutional Court Judgment 52/1989, of 22 February, in its sixth legal ground, states the following:

"The possibility of extending the presumption of innocence beyond the scope of criminal courts has been recognized on several occasions by this Court – *Constitutional Court Judgments 13/1982, of 1 April; 24/1984, of 23 February; and 36/1985, of 8 March; inter alia. This Court has demonstrated that such fundamental right cannot be understood to be strictly confined to proceedings involving alleged criminal conduct. Rather, it must also apply to the issuance of any administrative or judicial ruling relating to persons' condition or conduct, the determination of which results in a sanction or a limitation of the person's rights. However, the above does not imply that the aforementioned fundamental right simply applies to all civil proceedings, and the weighing of the evidence therein, as the appellant seems to understand in the statement of claim. This is because this right may only*

be applied to the area of civil evidence and, consequently, an amparo *action may only be filed before the Constitutional Court to protect such right, in exceptional cases and after weighing the unique characteristics present in each case."*

II

The above section implies that for art. 1956 of the Civil Code to apply, there must have previously been a criminal proceeding with full due process of law, in which the defendant was informed of the specific charges against him or her, the defendant was able to use the relevant pleadings and evidence for his or her defense, and that ended in a non-appealable conviction. If these requirements are not met, it would violate the fundamental right to effective remedy and would imply a clear violation of the right to legal defense.

It must be recalled, as has been stated, that the fundamental right to the presumption of innocence is set forth in the final section of paragraph 2 of art. 24 of the Spanish Constitution. This must not be construed in isolation from the rest of the article, which reads as follows:

"1. All persons have the right to obtain effective protection from judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a violation of the right to legal defense.

2. Likewise, all persons have a right to the ordinary judge established by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full due process of law; to the use of evidence

appropriate to their defense; not to self-incriminate; to not plead guilty; and to the presumption of innocence.“

It must be noted that art. 1956 of the Civil Code has rarely been applied in Spanish law by the civil jurisdiction. Thus, the Spanish Supreme Court Judgment of 15 July 2004 (RJ 2004\4209), cited by the United States Court of Appeals for the Ninth Circuit judgment of 10 July 2017, was issued by the Criminal Chamber of the Supreme Court, in a case in which the Court handed down a conviction for the offence of fraud and applied the aforementioned art. 1956 of the Civil Code in dealing with the question of civil liability arising from the offence.

In that judgment, the Supreme Court indeed held that art. 1956 of the Civil Code applied (in response to the defendant's arguments that she was not required to repay the money obtained through fraud because she had acquired it by virtue of the adverse possession of movable property set forth in art. 1955 of the Civil Code). The Court held that "in these cases, the periods for the ordinary or extraordinary adverse possession of movable property must begin to be calculated after the expiration of the statute of limitations for criminal prosecution, as well as the statute of limitations extinguishing a right under civil law. The relevant action would be that set forth in art. 1092, that is to say the specific action arising from the felony or misdemeanor, that of 15 years set forth in art. 1964 according to what we have stated above. That is, the period for extraordinary adverse possession for movable property, set at six years by paragraph 2 of art. 1955, may only begin to be calculated when the other two periods have successively expired: the period

set forth in of art. 131 of the Spanish Criminal Code for the statute of limitations for criminal offences (the five years provided for "other serious offences") and the aforementioned fifteen years set forth in art. 1964. A total of 26 years (...)".

However, these arguments by the Court are in the fourth and final legal ground of the Judgment, considering the civil liability arising from the offence. The Court devoted the previous three legal grounds, which constitute the main part of the Judgment, to examining the defendant's criminal liability. The Court held her to have committed an offence of fraud and confirmed the sentence of two and a half years' imprisonment issued by the lower court judgment. Thus, it is clear from this judgment that for art. 1956 of the Spanish Civil Code to apply, there must have previously been a non-appealable judicial ruling in the criminal jurisdiction that convicts the adverse possessor as criminally liable for an offence, where the adverse possessor is seeking to invoke the periods under art. 1955 in order to acquire property through adverse possession based on the possession obtained as a result of the offence.

For these purposes, it is irrelevant whether the criminal offence involves acting as an accessory after the fact to the offence of robbery or theft (as under art. 1956); an analogous property offence such as the offence of fraud (which is the subject of the conviction of the judgment of 15 July 2004); or a separate offence of receiving stolen goods, which case law has deemed to be analogous to acting as an accessory.

Indeed, the United States Court of Appeals for the Ninth Circuit judgment of 10 July 2017 states that

"The Spanish Supreme Court also recognized the interchangeability of the offences of receiving stolen goods and of being an accessory after the fact in Judgment 77/2004, of 2 January (RJ2004/485)." Such Spanish Supreme Court judgment reviews the case law previously established in the judgment of 5 July 1993 (RJ 1993/5881), also cited by the United States Court. Such judgment had held that *"we find ourselves before two interchangeable offences, with the same rights protected and in fact dealt with in the proceeding; given that the sentence imposed was less (than that of the offence laid out in the charge), it is clear that the principle of (fair notice of the) charge was lawfully respected."*

However, while this is true, it is also true that the two aforementioned judgments handed down by the Criminal Chamber of the Spanish Supreme Court refer to cases in which, in any event, a criminal judgment was issued convicting the defendant of an offence, even if the defendant was at first charged with a different offence. That is to say, the aforementioned interchangeability between offences (the offence with which the defendant was changed and the offence for which the defendant was eventually convicted) does not exclude the need in both cases for a non-appealable judgment setting forth such conviction.

The judgment of 21 January 2004 specifically states that the *"prohibition of violation of the right to legal defense constitutes the true basis for the limits that the adversarial principle imposes on the court giving judgment in these cases, in which there is a charge for one offence and a conviction Jot another."* This refers to a case in which, even though the offences are different

but interchangeable, there is at least a formal charge and a subsequent conviction by a court giving judgment. For such a case, the Court established as a limit the prohibition of a violation of the right to legal defense. Thus, there can be no doubt that the right to legal defense is violated, with a clear violation of the adversarial principle, in those cases in which not only is there no criminal conviction, but there is not even an open proceeding with an initial formal charge against which the person charged with the offence may raise a defense.

On this matter, it must be noted that a criminal conviction (whether for acting as an accessory after the fact for a robbery or theft committed by a third party, or for committing a separate offence such as that of receiving stolen goods) must refer directly and personally to the current possessor of the movable property who is seeking to claim adverse possession. This follows from art. 1956 of the Spanish Civil Code (which states that *"title to stolen movable property may not be obtained through adverse possession by those who stole such property, or by their accomplices or accessories after the fact..."*). Furthermore, any more extensive construal would again violate the fundamental rights set forth in art. 24 of the Spanish Constitution.

In conclusion, given that the requirement for applying the special adverse possession rule set forth in art. 1956 of the Spanish Civil Code is the existence of conduct constituting a criminal offence, for which the possessor of the movable property is directly criminally liable, and that, as stated above, and in compliance with the constitutional right to effective remedy and

the presumption of innocence, a conviction for such conduct must have been issued in a non-appealable criminal judgment, in the absence of the enabling fact for the application of the aforementioned special rule, there are not grounds sufficient to justify not applying the general rule for the adverse possession of movable property set forth in art. 1955 of the Spanish Civil Code. Paragraph 2 of art. 1955 establishes that adverse possession of movable property takes place after six years of uninterrupted possession, with no requirement for any other condition to be met.

III

Article 1956 of the Spanish Civil Code requires that there be a previous criminal judgment holding that the adverse possessor is criminally liable as indicated in the previous section of this report. Furthermore, it should be noted that the offences mentioned above have a statute of limitations of five years from the commission of the alleged criminal offence, under substantive Spanish criminal law. This was recognized by the United States Court of Appeals for the Ninth Circuit judgment of 10 July 2017, which stated that *"For the offence of "encubrimiento" (accessory after the fact) and the offence of receiving stolen property, the two offences the Cassirers argue TBC committed when it purchased the Painting from the Baron in 1993, the criminal limitations period is five years, 1973 Spanish Criminal Code arts. 30, 113, 546(bis)(a) and 1995 Spanish Criminal Code arts. 131, 298."*

Since art. 130.1 of the 1995 Spanish Criminal Code establishes that *"criminal liability is extinguished: 6. Due to the expiration of the statute of limitations for the offence"* (as was also established by art. 112.1.6 of the

1973 Spanish Criminal Code), any criminal proceeding that today sought to begin to prosecute offences already barred by the statute of limitations would necessarily end with a dismissal or, if applicable, with an acquittal.

The statute of limitations for the penalty referred to in art. 1956 of the Civil Code may not be taken into account, either, because *nulla poena sine lege* is a fundamental principle of Spanish law. Thus, in the absence of a judicial ruling on the commission of an offence, it is not possible to discuss the existence of a penalty, or, therefore, the statute of limitations for such penalty.

Finally, neither is it possible to apply the statute of limitations for an action claiming civil liability for the offence, also referred to by art. 1956 of the Civil Code. Such statute of limitations period, which the US court set at fifteen years with a citation of Spanish case law, requires that there be a previous criminal judgment holding that an offence was committed, which would give rise to the obligation of the civil liability.

Article 1089 of the Civil Code lists the sources of civil obligations in Spanish law, stating that *"obligations arise from law, contracts, quasi-contracts, and unlawful acts and omissions involving any kind of willful misconduct or negligence."* Later, art. l 092 states that *"civil obligations arising from offences or violations shall be governed by the provisions of the Spanish Criminal Code."* A different article is then dedicated to obligations *"arising from acts or omissions involving willful misconduct or negligence that are not punished by law,"* which shall be subject to the provisions of arts. 1902 et seq. of the Spanish Civil Code.

Article 1956 of the Spanish Civil Code specifically refers to the *"action to claim civil liability arising from the felony or misdemeanor."* That is to say, it refers exclusively to the action provided for in art. 1092, transcribed above, which in turn refers to the provisions of the Spanish Criminal Code.

Article 109 of the 1995 Spanish Criminal Code, in keeping with the Spanish criminal law tradition, establishes that *"the commission of an act described by the law as an offence creates an obligation to provide redress for the harm caused thereby, as established by law."* The Spanish Criminal Code then states in art. 110 that *"the liability established in the previous article includes: 1. Restitution. 2. Redress for the harm. 3. Compensation for economic and non-economic harm."*

The action to claim civil liability arising from the offence may be combined with the criminal proceeding, or it may be reserved to be brought before a civil court, given that art. 109.2 states that *"the injured party may choose, in any event, to claim civil liability before a civil court."* However, in the latter case, for there to be a ruling that such civil liability exists, there absolutely must be a previous criminal conviction holding that an offence was committed and by whom it was committed.

This is clear from the judgment of the Civil Chamber of the Supreme Court of 20 September 1996 (RJ 1996\6818):

"(..) thus, it is necessary to uphold the Provincial Court judgment holding that once an "ex delicto" *civil liability claim has been brought, no other action maybe heard. It must be dismissed because there is no criminal conviction, an essential requirement in order for civil*

liability to arise. It is clear under art. 114 of the Spanish Criminal Procedure Act (Ley de Enjuiciamiento Penal) that when the facts give rise to criminal proceedings, such proceedings suspend the possibility of bringing a civil claim or suspend any proceeding that may have begun, until a non-appealable judgment is handed down. Such provision requires courts to extend the possibility of bringing civil claims to situations of the definitive dismissal of proceedings and even the provisional dismissal or discontinuance of proceedings (Judgments of 16 November 1985, 20 October 1987, 30 November 1989, or 20 January 1992). However, in these cases, the civil claim that is brought must be that under art. 1902, a claim that is statute barred after one year according to art. 1968, and not an 'ex delicto' *claim, which requires the existence of a conviction. Such conviction exists in the case of the pardon or death of the convicted offender, but not when the case is dismissed or discontinued without a previous conviction, since the presumption of innocence continues to exist before a conviction.*"

This case law of the Civil Chamber of the Supreme Court has been consistently upheld in subsequent judgments, such as that of 23 January 2009 (RJ 2009\1269), which stated the following:

Firstly, it should be noted that the action may not be based on the existence *of "ex delicto"* civil liability, as was the case in the statement of claim, without there being a previous criminal judgment holding that the criminal offence was committed. This is established, inter alia, by the Judgment of this Court of 31 January 2004, holding that "in order for an *'ex delicto* 'claim to apply, there must be a conviction, not a situation of

acquittal, dismissal, or discontinuance, because a criminal judgment is required for an *'ex delicto'* claim to apply. The resulting civil claim may not be brought if the facts contained in the statement of claim involve no criminal offence. (Judgments of 26/10/1993, 10/5/1994, 19/5/1997, 14/4/1998, and 20/11/2001)."

More recently, the judgment of 27 March 2015 (RJ 2015\2688) confirmed the same line of case law:

"The most recent case law of this Court is expressed in the judgment that prompted such opinion, cited in the judgment of 23 January 2009. This judgment stated that 'in order for an 'ex delicto' *claim to apply, there must be a conviction, not a situation of acquittal, dismissal, or discontinuance, because a criminal judgment is required for an 'ex delicto' claim to apply. The resulting civil claim may not be brought if the facts contained in the statement of claim involve no criminal offence. (Judgments of 26/10/1993, 10/5/1994, 19/5/1997, 14/4/1998, and 20/11/2001).'*

This has not taken place in this case, in which the defendant was not convicted in the criminal proceeding, which was discontinued due to the subsequent statement of claim by the accused."

Therefore, the existence of a previous criminal conviction is an essential requirement for recognizing the existence of an action to claim civil liability arising from the offence (and, therefore, for assessing the statute of limitations of such claim).

In fact, the two judgments cited by the United States Court of Appeal of the Ninth Circuit judgment of 10 July 2017, in order to demonstrate that the statute of limitations for the action to claim civil liability arising

from the offence, referred to by art. 1956 of the Civil Code, is fifteen years under art. 1964 of the Civil Code[1],

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[1] The wording of art. 1964 of the Spanish Civil Code was amended by the first final provision of Law 42/2015, of 5 October, reforming Spanish Law 1/2000, of 7 January, on Civil Procedure (Official Gazette of the Spanish State [*BOE*] 6 October), which came into force on 7 October 2015. Under the reform, the statute of limitations for personal actions for which a special statute of limitations has not been established was reduced from fifteen to five years:

"Article 1964:
1. (...).

2. Personal actions for which a special statute of limitations has not been established have a statute of limitations of five years from when compliance with the obligation may be claimed. In continuing obligations to act or to refrain from acting, the statute of limitations shall begin each time such obligations are breached."

The fifth transitional provision of Spanish law 42/2015, of 5 October, establishes that the statute of limitations for personal actions for which a special statute of limitations has not been established, and that arose before the date of its entry into force, 7 October 2015, shall be governed by the provisions of art. 1939 of the Spanish Civil Code:

"Article 1939.

The statutes of limitations that began prior to the publication of this Code shall be established by the laws existing prior to such publication. But if the entire period established herein for the statute of limitations elapses after this Code enters into force, this statute of limitations shall take effect, even if the previous laws required a longer period of time."

As a consequence of the aforementioned reform, the current statute of limitations for an action to claim civil liability arising from a crime is five years and not fifteen, without prejudice to the special rule under art. 1939 for actions arising prior to the entry into force of the reform.

are judgments based on the premise of the prior existence of a criminal conviction.

Thus, the judgment of 7 January 1982 (RJ 1982\184), which effectively holds that actions to claim civil liability arising from an offence have a statute of limitations of fifteen years, was issued by the Civil Chamber of the Supreme Court in a case in which a criminal proceeding had already occurred and had ended in a conviction. This is expressly stated in the factual background of the judgment:

"WHEREAS. In order to properly hear this appeal, we must establish the following findings of fact, which have been accepted by the parties, have been held to be proven by the lower court, or may be concluded from a review of the proceedings: A) (..) died in a traffic accident. This was followed by preliminary proceedings in which a judgment was handed down by the Court of First Instance of Algeciras on 11 July 1975, which was held to be non-appealable on 1 September of that year. Such judgment held that an offence of simple recklessness was committed, with a violation of regulations and with death as the result. The defendant Maria Teresa C.T. was held liable as the perpetrator, and in addition to the sentence for the offence imposed on the defendant, she was required to pay, inter alia, damages for the death of Antonio V.V. (...)."

The case covered by the report does not consider the new statute of limitations for civil actions arising from criminal offence, since it is based on the premise that the action has not arisen insofar as there has not been a previous conviction finding the commission of a crime and by whom it was committed.

On the other hand, in its judgment of 15 July 2004 (RJ 2004\4209), the Criminal Chamber of the Supreme Court applied art. 1956 of the Civil Code to render the adverse possession invalid under art. 1955, which the defendant had cited in order to avoid repaying the amounts claimed. The Court did so at the end of its judgment, considering civil liability, after analyzing the defendant's criminal responsibility and upholding the judgment given by the lower court, which had convicted her as "the criminally liable perpetrator of a continuing offence of fraud, (...) and *sentenced her to two years and six months' imprisonment(...).*"

It clearly should be concluded that in cases where criminal prosecution of an alleged offence is barred by the statute of limitations (it should be remembered that, in the case at hand in this report, such period is five years), it is not possible to apply the statute of limitations of fifteen years for actions to claim civil liability arising from such offence, given that such civil action does not arise without a previous ruling on the offence.

In these situations, the case law set forth in the Supreme Court (Civil Chamber) judgment of 31 January 2004 (RJ 2004\444) applies. Such judgment held the following:

"This is not an 'ex officio' *action· under art. 1092, as was included in the statement of claim, because there is no criminal offence. This is because the acquittal issued made the facts in the complaint disappear, by ruling that such facts were extinguished by application of the statute of limitations, and thus any possible criminal liability with respect thereto was also extinguished. This means that art. 1092 in relation to art. 1964 does*

not apply, since the action does not arise from the summary only, either-way or indictable only offence but rather from the facts, which serve as elements of the summary only, either-way or indictable only offence. In order for an 'ex delicto' *claim to apply, there must be a conviction, not a situation of acquittal, dismissal, or discontinuance, because a criminal judgment is required for an* 'ex delicto ' *claim to apply. The resulting civil claim may not be brought if the facts contained in the statement of claim involve no criminal offence. (Judgments of 26/10/1993 [sic], 10/5/1994, 19/5/1997, 14/4/199, and 20/11/2001)."*

This case law criterion continues to be applied today by Spanish courts. We can refer to the Navarra Provincial Court judgment of 12 December 2014 (AC 2014\255), which, in addition to transcribing the above-mentioned Supreme Court judgment of 31 January 2014, repeated that "case law establishes that there is no 'ex delicto' claim when the criminal judgment is for acquittal due to the expiration of the statute of limitations for the offence and, therefore, the civil claim is subject to the ordinary statute of limitations." This excludes the statute of limitations of fifteen years under art. 1964 of the Civil Code in relation to art. 1092, and stated that in such case "only a claim for tort liability under art. 1902 of the Civil Code may be brought"; the statute of limitations for such claim is one year, as set forth in art. 1968.2.

In light of all of the foregoing, this Office of State Attorneys submits the following for your consideration:

CONCLUSION

The application of the special adverse possession rule established by art. 1956 of the Spanish Civil Code absolutely requires: that a proceeding be conducted with full due process of law, in which sufficient evidence has been presented; that a non-appealable judgment be handed down, finding that conduct constituting a criminal offence was committed; that such judgment convict the person for this criminal offence, where such person is seeking to obtain property by adverse possession based on possession resulting from such offence.

Madrid, 13 September 2017
THE HEAD STATE ATTORNEY

María del Carmen Acedo Grande

HEAD OF THE AREA OF EDUCATION, CULTURE, AND SPORTS

Mrs. Mª Soledad Valcárcel Conde, Sworn English Translator-Interpreter, designated by the Ministry of Foreign Affairs and Cooperation, hereby certifies that the foregoing is an accurate and complete translation into English of a document written in Spanish. **Madrid, 18 September 2017.** **Signed: Mª Soledad Valcárcel Conde**	**Doña Mª Soledad Valcárcel Conde, Traductor-Intérprete Jurado de Inglés, nombrado por el Ministerio de Asuntos Exteriores y de Cooperación, certifica que la que antecede es una traducción fiel y completa al inglés de un documento redactado en español.** **En Madrid, a 18 de septiembre de 2017.** **Firmado: Mª Soledad Valcárcel Conde**

MINISTERIO DE EDUCACIÓN, CULTURA Y DEPORTE

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MINISTERIO DE EDUCACIÓN, CULTURA Y DEPORTE

ABOGACÍA DEL ESTADO

13de septiembre de 2017

SALIDA Nº: 1024/2017

Exp. 17.1.188 CA/
Asunto: Aplicación regla especial de prescripción adquisitiva del artículo 1956 del Código Civil.

La Abogacía del Estado en la Secretaría de Estado de Cultura ha examinado su consulta sobre si la aplicación de la regla especial de prescripción adquisitiva que establece el artículo 1956 del Código Civil español exige que previamente se haya dictado sentencia firme del orden jurisdiccional penal por la que se condene a quien pretende adquirir por dicho título. En relación con dicha consulta, esta Abogacía del Estado emite el siguiente informe:

-I -

La adecuada resolución de la cuestión reseñada en el encabezamiento del presente informe ha de partir necesariamente del supuesto fáctico-jurídico sobre el que descansa la regla del artículo 1.956 del Código Civil español, conforme al cual: *"las cosas muebles hurtadas o robadas no podrán ser prescritas por los que las hurtaron o robaron, ni por los cómplices o encubridores, a no haber prescrito el delito o falta, o su pena, y la acción para exigir la responsabilidad civil, nacida del delito o falta"*.

La regla que sanciona este precepto enlaza directamente con una de las tres exigencias o requisitos que ha de cumplir la posesión que sirve de base a la prescripción adquisitiva y que se formulan ya en el Derecho Romano: possessio nec vi, nec *clam,* nec precario, esto *es,* que la posesión lo sea sin violencia (posesión pacífica), sin clandestinidad (posesión pública) y a título de dueño (el poseedor -prescribiente- no sólo ha de considerarse subjetivamente dueño, sino

que ha de actuar y comportarse externamente como dueño de la cosa).

Obviamente, la regla del artículo 1.956 atañe al primer requisito o exigencia de la posesión de los indicados, es decir, que la posesión sea pacífica, entendiendo que no lo es cuando la situación posesoria del que pretende adquirir por usucapión es la posesión resultante de un ilícito penal, sea a título de delito o a título de falta, que le sea imputable penalmente.

Ahora bien, frente al régimen del Derecho Romano en el que la violencia (posesión no pacífica por resultar de un acto ilícito) viciaba definitivamente la posesión, imposibilitando así la consumación de la usucapión y, por tanto, la adquisición del dominio, en el Derecho moderno la violencia vicia la posesión sólo transitoriamente, posibilitando así que, una vez cesada la violencia, se inicie una posesión hábil o útil para adquirir el dominio (cfr. artículo 2.233.2 del Código Civil francés; artículo 1163 del Código Civil italiano de 1942). El Código Civil español no lo establece de una forma tan expresa, pero conduce a la misma conclusión no sólo por la regla del artículo 460.4 *("el poseedor puede perder la posesión:... 4º por la posesión de otro, aun contra la voluntad del antiguo poseedor, si la nueva posesión hubiere durado más de un año")*, sino, y muy claramente, por la regla que establece el artículo 1.956.

El artículo 1.956 tiene por base, pues, una conducta delictiva (el precepto alude a cosas hurtadas o robadas, refiere la situación posesoria viciada por el ilícito penal no sólo al autor, sino también al cómplice y encubridor como destinatarios de la regla que establece –prescribientes- y, finalmente, alude a la prescripción

del delito o falta su pena y a la acción civil nacida del delito o falta).

Partiendo de la anterior premisa -la conducta constitutiva de ilícito penal como base de la regla de prescripción adquisitiva que establece el precepto en cuestión-, resulta necesario examinar, en primer término, la aplicación del principio constitucional de presunción de inocencia que sanciona el artículo 24.2, inciso final, de la Constitución Española de 1978 *("asimismo, todos tienen derecho... a no confesarse culpables y a la presunción de inocencia")*, y ello por cuanto que no tendría sentido alguno que pudiera aplicarse la regla del precepto de continua referencia si no existiese un pronunciamiento judicial que apreciase, y así lo declarase, la comisión del ilícito penal del que deriva la posesión en que se fundamenta la prescripción adquisitiva de quien intervino en aquél, siéndole imputable, lo que, ha de insistirse, constituye la base fundamento de la aplicación de la regla civil, ciertamente especial, de prescripción adquisitiva de cosas muebles que establece el precepto de continua referencia.

Pues bien, el principio de presunción de inocencia exige ineludiblemente para poder ser desvirtuada la oportuna declaración judicial (sentencia condenatoria), tras haberse seguido un proceso con todas las garantías y en el que haya tenido lugar una prueba suficiente de cargo. En este sentido, la sentencia del Tribunal Constitucional nº 45/1997, de 11 de marzo, fundamento jurídico cuarto, declara lo siguiente:

"*Por lo que se refiere en concreto al derecho a la presunción de inocencia, hemos declarado en STC 120/1994 que «la presunción de inocencia sólo se*

destruye cuando un Tribunal independiente, imparcial y establecido por la Ley declara la culpabilidad de una persona tras un proceso celebrado con todas las garantías (art. 6.1y 2 del Convenio Europeo de 1950), al cual se aporte una suficiente prueba de cargo», de suerte que la presunción de inocencia es un principio esencial en materia de procedimiento que opera también en el ejercicio de la potestad administrativa sancionadora (SSTC 73/1985 y 1/1987)...”

Más particularmente, y puesto que, como se viene reiterando, son conductas constitutivas de ilícito penal las que están en la base de la regla del artículo 1.956 del Código Civil, debe tenerse en cuenta la doctrina recogida en la sentencia del Tribunal Constitucional nº 3/1990, de 15 de enero, en cuyo fundamento jurídico 1 se dice lo siguiente:

“*Bien es sabido que, conforme a reiterada doctrina de este Tribunal -SSTC 31/1981, 101/1985, 80/1986, 82/1988, 254/1988 y 44/1989, entre otras-, la presunción de inocencia exige para poder ser desvirtuada una actividad probatoria de cargo producida con las debidas garantías procesales y de las que pueda deducirse razonada y razonablemente la culpabilidad del acusado, debiendo, en principio, realizarse tal actividad probatoria, para dar cumplimiento a los principios de oralidad, inmediación y contradicción que presiden el proceso penal, en el acto del juicio oral, sin que, de otro lado, los órganos judiciales puedan formar su convicción acudiendo a atestados policiales realizados con anterioridad a la fase sumarial, ya que gozan solamente del valor de una denuncia, excepto cuando incorporan pruebas*

preconstituidas debidamente realizadas y reproducidas".

Finalmente, y como quiera que en el caso de que se trata el efecto jurídico que se anuda a la comisión de una infracción penal, cual es la aplicación del especial y muy gravoso régimen de prescripción (lo que, obviamente, dificulta la adquisición de domino por usucapión), es civil, resulta necesario indicar que no por ello puede prescindirse de la aplicación del principio constitucional del principio de inocencia y de las exigencias que comporta, ya que la funcionalidad de este principio se extiende a otros ámbitos distintos del sancionador. Así, la sentencia del Tribunal Constitucional nº 52/1989, de 22 de febrero, en su fundamento jurídico sexto, declara lo siguiente:

"La posibilidad de extender la presunción de inocencia fuera del ámbito de la jurisdicción penal ha sido reconocida en diversas ocasiones por este Tribunal -SSTC 13/1982, de 1 de abril; 24/1984, de 23 de febrero, y 36/1985, de 8 de marzo, entre otras-, quien ha puesto de manifiesto que dicho derecho fundamental no puede entenderse reducido al estricto campo del enjuiciamiento de conductas presuntamente delictivas, sino que ha de referirse también a la adopción de cualquier resolución, tanto administrativa como jurisdiccional, relativa a la condición o conducta de las personas, de cuya apreciación se derive un resultado sancionatorio o limitativo de sus derechos. No obstante, de ello no puede deducirse la aplicación del mencionado derecho fundamental, sin más, a todos los procesos civiles, y a la apreciación de la prueba en ellos, como parece entender el recurrente en la demanda, pues la extensión del mismo al ámbito probatorio civil y, en

consecuencia, la posibilidad de su enjuiciamiento en vía de amparo constitucional, sólo procede en supuestos excepcionales y tras ponderar las singularidades que en cada caso concurran".

-II-

De lo expuesto en el anterior apartado se desprende que para que resulte de aplicación el artículo 1956 del Código Civil es requisito necesario que previamente se haya tramitado un proceso penal con todas las garantías, en el que el acusado haya podido conocer el concreto delito que se le imputa y utilizar las alegaciones y los medios de prueba pertinentes para su defensa, y que dicho proceso haya concluido mediante una sentencia condenatoria firme y no susceptible de recurso, puesto que lo contrario vulneraría el derecho fundamental a la tutela judicial efectiva y le causaría una evidente indefensión.

Debe recordarse que el derecho fundamental a la presunción de inocencia se establece, como se ha indicado, en el inciso final del párrafo 2 del artículo 24 de la Constitución Española, y no puede interpretarse de forma aislada a lo que dispone el resto del precepto, que es del siguiente tenor literal:

"1. Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión.

2. Asimismo, todos tienen derecho al Juez ordinario predeterminado por la ley, a la defensa y a la asistencia de letrado, a ser informados de la acusación formulada contra ellos, a un proceso público sin dilaciones indebidas y con todas las garantías, a utilizar los

medios de prueba pertinentes para su defensa, a no declarar contra sí mismos, a no confesarse culpables y a la presunción de inocencia".

Debe destacarse que el artículo 1956 del Código Civil apenas ha sido aplicado en el Derecho español por el orden jurisdiccional civil, siendo así que la sentencia del Tribunal Supremo español de 15 de julio de 2004 (RJ 2004\4209), que se cita por la resolución del Tribunal de Apelación de los Estados Unidos del Noveno Distrito de 10 de julio de 2017, se dictó precisamente por la Sala de lo Penal de dicho Tribunal Supremo, en un asunto en el que impuso una condena por un delito de estafa y en el que aplicó el citado artículo 1956 del Código Civil al tratar la cuestión de la responsabilidad civil derivada del delito.

En dicha sentencia el Alto Tribunal considera efectivamente que resulta aplicable el artículo 1956 del Código Civil (frente a las alegaciones de la acusada, que invocaba que no estaba obligada a devolver el dinero estafado por haberlo adquirido en virtud de la figura de la usucapión de bienes muebles prevista en el artículo 1955 del Código Civil), y establece que "en estos casos los plazos para la usucapión ordinaria o extraordinaria de cosas muebles han de comenzar a computarse una vez transcurrido el plazo para la prescripción penal y, además, el relativo a la prescripción extintiva civil, teniendo en cuenta que la acción correspondiente habría de ser la del artículo 1092, es decir la específica derivada del delito o falta cometidos, la de 15 años del artículo 1964 conforme a lo que acabamos de exponer. Esto es, el plazo de usucapión extraordinaria para los bienes muebles, fijado en seis años por el párrafo 2º del artículo 1955,

sólo puede comenzar a computarse cuando hayan transcurrido sucesivamente otros dos: el correspondiente del artículo 131 CP para la prescripción del delito (los cinco años previstos para "los restantes delitos graves") y los quince antes referidos del artículo 1964. Total, 26 años (...)".

Pero dichas argumentaciones del Tribunal se contienen en el fundamento jurídico cuarto y último de la sentencia, en sede de responsabilidad civil derivada del delito, habiendo dedicado los tres fundamentos jurídicos anteriores, que constituyen la parte principal de la sentencia, a examinar la responsabilidad criminal de la acusada, a la que declara autora de un delito de, estafa, confirmando la pena de dos años y medio de prisión que le había sido impuesta por la sentencia del Tribunal de instancia. Por tanto, lo que se desprende de dicha sentencia es precisamente que la aplicación del artículo 1956 del Código Civil exige la existencia de una previa declaración judicial firme del orden jurisdiccional penal que condene como criminalmente responsable de un delito al usucapiente que pretende invocar los plazos del artículo 1955 para adquirir por prescripción con fundamento en la posesión obtenida precisamente por razón del hecho delictivo.

Es irrelevante a estos efectos que el ilícito penal consista en el encubrimiento de un delito de robo o de hurto (según la dicción literal del artículo 1956), en un delito patrimonial análogo como el de estafa {por el que condena la sentencia de 15 de julio de 2004), o de un delito autónomo de receptación, que la jurisprudencia considera análogo al encubrimiento.

En efecto, la resolución del Tribunal de Apelación de los Estados Unidos del Noveno Distrito de 10 de julio de

2017 señala que *"El Tribunal Supremo de España reconoció también la posibilidad de intercambiar los delitos de receptación de bienes robados y de ser un encubridor del hecho en la sentencia 77/2004, de 2 de enero (RJ 2004\485)*". En dicha sentencia del Tribunal Supremo español se recoge la doctrina previamente sentada en la sentencia de S de julio de 1993 (RJ 1993\5881), también citada por el Tribunal de Estados Unidos, que había establecido que "*nos encontramos ante dos delitos homogéneos, con identidad de derechos protegidos y de hecho juzgados, y como la condena impuesta era menor (que la del delito establecido en la acusación) está claro que el principio de la acusación (de aviso justo) fue legalmente respetado*".

Pero, siendo ello cierto, no lo es menos que las dos citadas sentencias dictadas por la Sala de lo Penal del Tribunal Supremo español están refiriéndose a supuestos en los que en todo caso se ha dictado una sentencia penal que condena al acusado por un delito, por más que en un inicio se le acusara por un delito distinto. Es decir, la aludida homogeneidad entre delitos (aquél por el que se acusa y aquél por el que finalmente se condena) no excluye la necesidad de que en ambos casos exista una sentencia firme que contenga dicha condena.

La propia sentencia de 21 de enero de 2004 establece expresamente que "*la proscripción de la indefensión constituye el verdadero fundamento de los límites que el principio acusatorio impone al Tribunal sentenciador en estos casos en que hay acusación por un delito y condena por otro*", refiriéndose a un caso en el que, aun tratándose de delitos distintos pero homogéneos, cuando menos hay una acusación formal y una

posterior condena por un tribunal sentenciador. Si en ese supuesto el Tribunal establece como límite la proscripción de indefensión, qué duda cabe de que dicha indefensión se produce, con manifiesta infracción del principio acusatorio, en aquellos casos en los que no sólo no hay condena penal, sino ni que ni siquiera existe un proceso abierto con una acusación formal inicial de la que pueda defenderse la persona a la que se le imputa el ilícito criminal.

Debe destacarse en este punto que la condena penal (sea por encubrimiento de un robo o hurto cometido por un tercero, sea por la autoría de un delito autónomo como el de receptación) debe referirse directa y personalmente al actual poseedor de la cosa mueble que pretende invocar la usucapión, por desprenderse así del tenor literal del artículo 1956 del Código Civil (*"las cosas muebles hurtadas o robadas no podrán ser prescritas por los que las hurtaron o robaron, ni por los cómplices o encubridores ..."*), y porque otra interpretación más extensiva violaría de nuevo los derechos fundamentales establecidos en el artículo 24 de la Constitución Española.

En conclusión, dado que la premisa de la aplicación de la regla especial de prescripción contenida en el artículo 1956 del Código Civil es la existencia de una conducta constitutiva de un ilícito criminal imputable directamente al poseedor de la cosa mueble, que, como ha quedado dicho y por respeto al derecho constitucional a la tutela judicial efectiva y a la presunción de inocencia, debe haber sido declarada por sentencia penal firme, no habiéndose producido el supuesto de hecho habilitante de la aplicación de la citada norma especial no existe razón suficiente que

justifique el desplazamiento de la aplicación de la norma general de usucapión de bienes muebles prevista en el artículo 1955 del Código Civil, que establece en su párrafo segundo que se prescribe el dominio de los bienes muebles por la posesión no interrumpida de seis años, sin necesidad de ninguna otra condición.

- III -

Sentado que la aplicación del artículo 1956 del Código Civil exige la previa existencia de una sentencia penal que declare que el prescribiente es responsable criminalmente en la forma indicada en el apartado anterior de este informe, debe destacarse que los delitos que se han citado tienen un plazo de prescripción de cinco años desde la comisión del hecho presuntamente delictivo conforme al Derecho Penal sustantivo español. Así se reconoce en la resolución del Tribunal de Apelación de los Estados Unidos del Noveno Distrito de 10 de julio de 2017, que señala que "*Para el delito de encubrimiento y el delito de recibir bienes robados, los dos delitos que los Cassirer sostienen que la CTB cometió al comprar la pintura del barón en 1993, el período de prescripción penal es de cinco años, los artículos 30, 113, 546 (bis) (a) del Código Penal de 1973 y los artículos 131, 298 del Código penal de 1995*".

Dado que el artículo 130. 1 del Código Penal de 1995 establece que "*la responsabilidad criminal se extingue: 6º Por la prescripción del delito*" (en idéntico sentido se pronunciaba el artículo 112.1. 6º del Código Penal de 1973), cualquier procedimiento penal que pretendiera iniciarse hoy para perseguir unos delitos ya prescritos habría de terminar necesariamente con un

sobreseimiento o, en su caso, con una sentencia absolutoria.

Tampoco puede tenerse en consideración el plazo de prescripción de la pena a que se refiere el artículo 1956 del Código Civil, ya que es principio básico del Derecho español el de nulla poena sine crimine, de modo que, a falta de declaración judicial de la existencia de un delito no cabe hablar de la existencia de una pena, ni, por tanto, de la prescripción de ésta.

Por último, tampoco es posible tener en cuenta el plazo de prescripción de la acción para exigir la responsabilidad civil derivada del delito a que también se refiere el artículo 1956 del Código Civil. Dicho plazo, que la resolución del tribunal estadounidense fija en quince años con cita de jurisprudencia española, exige la previa existencia de una sentencia penal que declare la existencia de un delito del que habría de nacer la obligación en que consiste la responsabilidad civil.

El artículo 1089 del Código Civil enumera las fuentes de obligaciones civiles en el Derecho español, estableciendo que "*las obligaciones nacen de la ley, de los contratos y cuasi contratos, y de los actos y omisiones ilícitos o en que intervenga cualquier género de culpa o negligencia*". Más adelante, el artículo 1092 dispone que "*Las obligaciones civiles que nazcan de los delitos o faltas se regirán por las disposiciones del Código Penal*", dedicando a continuación un artículo diferente a las obligaciones "*que se deriven de actos u omisiones en que intervenga culpa o negligencia no penadas por la ley*", que quedarán sometidas a las disposiciones contenidas en los artículos 1902 y siguientes del propio Código Civil.

Pues bien, el artículo 1956 del Código Civil alude específicamente a la *"acción para exigir la responsabilidad civil, nacida del delito o falta"*, es decir, exclusivamente a la prevista en el artículo 1092 antes transcrito, que a su vez se remite a lo que disponga el Código Penal.

El artículo 109 del Código Penal de 1995, siguiendo la tradición penalista española, establece que *"la ejecución de un hecho descrito por la ley como delito obliga a reparar, en los términos previstos en las leyes, los daños y perjuicios por él causados",* señalando a continuación el artículo 110 que *"la responsabilidad establecida en el artículo anterior comprende: 1º La restitución. 2º La reparación del daño. 3º La indemnización de perjuicios materiales y morales"*.

La acción para exigir la responsabilidad civil derivada del delito se puede ejercer en el proceso penal de forma acumulada a la acción criminal, o reservarse para ejercerla ante la jurisdicción civil, dado que el artículo 109.2 establece que "*el perjudicado podrá optar, en todo caso por exigir la responsabilidad civil ante la jurisdicción Civil"*. Pero en este segundo caso es de todo punto imprescindible, para que sea apreciada la existencia de dicha responsabilidad civil, la previa condena penal que declare la comisión de un delito y su autoría.

Así se desprende claramente de lo establecido por la Sala de lo Civil del Tribunal Supremo en su sentencia de 20 de septiembre de 1996 (RJ 1996\6818):

"(...) ha de confirmarse, pues, la doctrina de la Audiencia de que ejercitada la acción de responsabilidad civil «ex delicto» ninguna otra puede

ser estudiada, debiendo desestimarse por no existir sentencia penal condenatoria, presupuesto indeclinable para el nacimiento de aquélla. Es claro que cuando los hechos dan lugar a actuaciones penales éstas paralizan la posibilidad de actuar en vía civil o el proceso que haya comenzado, al imponerlo así el art. 114 de la LECrim, hasta que recaiga sentencia firme, obligando tal precepto a la jurisprudencia a extender la apertura de la vía civil a los supuestos de sobreseimiento libre e incluso a los de sobreseimiento provisional o al archivo de diligencias (SS. 16 noviembre 1985 20 octubre 1987, 30 noviembre 1989, o 20 enero 1992), pero en tal caso la acción civil que se ejercite ha de ser la del art. 1902, que prescribe al año conforme al art. 1968, mas no la «ex delicto» que requiere la existencia de condena así declarándolo, condena que existe en los supuesto de indulto o de muerte del reo, pero no cuando se produce el sobreseimiento o el archivo sin previa condena, ya que antes de la condena pervive la presunción de inocencia".

Esta doctrina jurisprudencial de la Sala de lo Civil del Tribunal Supremo se ha mantenido invariablemente en sentencias posteriores, como la de 23 de enero de 2009 (RJ 2009\1269), que dispuso lo siguiente:

Debe señalarse, en primer término, que no cabe basar la acc1on en la existencia de responsabilidad civil "ex delicto", como se hace en la demanda, sin que exista una previa sentencia que en el orden penal declare la existencia del hecho delictivo. Así se recoge, entre otras, en la Sentencia de esta Sala de 31de enero de 2004, cuando razona que «para aplicar la acción "ex delicto", se requiere la existencia de condena y no en los supuestos tanto de absolución, sobreseimiento, como archivo, al resultar precisa declaración penal al efecto

y mal puede surgir la acción civil derivada, en relación a la ausencia de ilicitud penal de los hechos denunciados (Sentencias de 26-10-1993, 10-5-1994, 19-5-1997, 14-4-1998 y 20-11-2001)»

Y de forma más reciente, la sentencia de 27 de marzo de 2015 (RJ 2015\2688) confirma la misma línea jurisprudencial:

"La doctrina más reciente de esta Sala viene expresada en la sentencia de la que dicho voto trae causa, citada en la de 23 de enero 2009, cuando razona que «para aplicar la acción "ex delicto", se requiere la existencia de condena y no en los supuestos tanto de absolución, sobreseimiento, como archivo, al resultar precisa declaración penal al efecto y mal puede surgir la acción civil derivada, en relación a la ausencia de ilicitud penal de los hechos denunciados (Sentencias de 26-10-1993, 10-5-1994, 19-5-1997, 14-4-1998 y 20-11-2001)», lo que no ocurre en este caso en que el demandado no ha sido condenado en la causa penal que fue archivada por denuncia sobrevenida del acusado."

Es, por tanto, requisito inexcusable para apreciar la existencia de una acción para exigir la responsabilidad civil derivada del delito (y, por ende, para valorar el período de prescripción de la misma), la existencia de una previa sentencia condenatoria penal.

De hecho, las dos sentencias que se citan en la resolución de Tribunal de Apelación de los Estados Unidos del Noveno Distrito de 10 de julio de 2017 para fundamentar que el plazo de prescripción de la acción para exigir la responsabilidad civil derivada del delito a que se refiere el artículo 1956 del Código Civil es de quince años conforme al artículo 1964 del mismo

Código[1] son sentencias que parten de la premisa de la

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[1] La redacción del artículo 1964 del Código Civil fue modificada por la disposición final primera de la Ley 42/2015, de 5 de octubre, de reforma de la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil («B.O.E.» 6 octubre), que entró en vigor el 7 octubre 2015. En virtud de la reforma, el plazo de prescripción de las acciones personales que no tienen establecido un plazo especial se ha reducido de quince a cinco años:

"Artículo 1964
1.(...).

2. Las acciones personales que no tengan plazo especial prescriben a los cinco años desde que pueda exigirse el cumplimiento de la obligación. En las obligaciones continuadas de hacer o no hacer, el plazo comenzará cada vez que se incumplan".

La disposición transitoria quinta de la Ley 42/2015, de 5 de octubre, establece que el tiempo de prescripción de las acciones personales que no tengan señalado término especial de prescripción, nacidas antes de la fecha de su entrada en vigor, 7 de octubre de 2015, se regirá por lo dispuesto en el artículo 1939 del Código Civil:

"Artículo 1939

La prescripción comenzada antes de la publicación de este código se regirá por las leyes anteriores al mismo; pero si desde que fuere puesto en observancia transcurriese todo el
tiempo en él exigido para la prescripción, surtirá ésta su efecto, aunque por dichas leyes
anteriores se requiriese mayor lapso de tiempo".

Como consecuencia de la citada reforma, en la actualidad el plazo de la acción para exigir la responsabilidad civil derivada del delito es de cinco años y no de quince, sin perjuicio de la norma especial del artículo 1939 para los supuestos de acciones nacidas antes de la entrada en vigor de la reforma.

En el caso objeto de informe no se tienen cuenta el nuevo régimen de prescripción de las acciones civiles derivadas del delito puesto

previa existencia de una condena penal.

Así, la sentencia de 7 de enero de 1982 (RJ 1982\184), que efectivamente considera que la acción para exigir la responsabilidad civil derivada del delito tiene un plazo de prescripción de quince años, se dicta por la Sala de lo Civil del Tribunal Supremo en un asunto en el que previamente se había tramitado un proceso penal que había finalizado por sentencia condenatoria. Así se hace constar expresamente en los antecedentes fácticos de la sentencia:

"CONSIDERANDO. Que, para un adecuado enjuiciamiento del presente recurso, procede establecer los siguientes antecedentes que han sido admitidos por las partes o declarados probados por la Sala de instancia o resultan del examen de las actuaciones: A) en accidente de circulación (...) resultó muerto aquél; siguiéndose Diligencias preparatorias resueltas por sentencia recaída en el Juzgado de Instrucción de Algeciras en fecha 11 julio 1975, declarada firme el1septiembre siguiente, en la que se apreció la existencia de un delito de imprudencia simple con infracción de reglamentos y resultado de muerte de que se conceptuó responsable, en el concepto de autora, a la demandada María Teresa C.T., concretándose, aparte de imponerle las penas correspondientes al delito, entre otras indemnizaciones, la pertinente al óbito de Antonio V.V.(...)".

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que se parte de la premisa de que dicha acción no ha nacido en la medida en que no ha habido una previa sentencia penal condenatoria que declare la existencia de un delito y su autoría.

Por otro lado, en la sentencia de 15 de julio de 2004 (RJ 2004\4209) la Sala de lo Penal del Tribunal Supremo aplica el artículo 1956 del Código Civil para enervar la usucapión del artículo 1955 que había alegado la acusada con el fin de evitar la devolución de las cantidades que se le reclamaban, pero lo hace al final de la sentencia, en sede de responsabilidad civil, después de haber analizado la responsabilidad penal de la acusada y de haber confirmado la sentencia dictada por el tribunal de instancia, que la había condenado "como autora criminalmente responsable de un delito continuado de estafa, (...) a l*a pena de dos años y seis meses de prisión(...)"*.

En definitiva, debe concluirse que en los casos en los que ha prescrito la acción penal para perseguir un presunto delito (recordemos que en el supuesto objeto de informe dicho plazo es de cinco años), no puede tenerse en consideración el plazo de prescripción de quince años de la acción para exigir la responsabilidad civil derivada de ese delito, puesto que sin la previa declaración del delito picha acción civil no llega a nacer.

En estos supuestos resulta de aplicación la doctrina establecida en la sentencia del Tribunal Supremo (Sala de lo Civil) de 31de enero de 2004 (RJ 2004\444) que dispone lo siguiente:

"No estamos en presencia de una acción «ex delicto» del artículo 1092 que se integró en la demanda, ya que no se da ilícito penal, pues recayó sentencia absolutoria que hizo desaparecer los hechos denunciados, al decretar su extinción, por aplicación del instituto de la prescripción, y con ello la posible responsabilidad penal respecto a los mismos, lo que no autoriza la aplicación del artículo 1092 en relación al1964, ya que la acción no

surge del delito o falta sino más bien de los hechos, que actúan como configurantes. Para aplicar la acción «ex delicto», se requiere la existencia de condena y no en los supuestos tanto de absolución, sobreseimiento, como archivo, al resultar precisa declaración penal al efecto y mal puede surgir la acción civil derivada, en relación a la ausencia de ilicitud penal de los hechos denunciados (Sentencias de 26-10-1993 [sic], 10-5-1994,19-5-199,14-4-199 y 20-11-2001)".

Este criterio jurisprudencial sigue siendo a fecha de hoy el aplicado por los tribunales españoles, pudiendo destacarse la sentencia de la Audiencia Provincial de Navarra de 12 de diciembre de 2014 (AC 2014\255) que, además de transcribir la citada sentencia del Tribunal Supremo de 31de enero de 2014, reitera que "la jurisprudencia establece que no hay acción "ex delicto" cuando la sentencia penal es absolutoria por prescripción del delito y, por tanto, la acción civil está sometida a los plazos ordinarios de prescripción", excluyendo la prescripción de quince años del artículo 1964 del Código Civil en relación con el artículo 1092, y considerando que en este caso "sólo podía ejercitarse la acción de responsabilidad civil extracontractual del artículo 1902 CC", cuyo plazo de prescripción es el de un año del artículo 1968.2.

En atención a todo lo expuesto, esta Abogacía del Estado somete a su consideración la siguiente:

CONCLUSIÓN

La aplicación de la regla especial de prescripción adquisitiva que establece el artículo 1956 del Código Civil español exige inexcusablemente que, tras haberse seguido un proceso con todas las garantías y en el que

haya tenido lugar una prueba suficiente de cargo, se haya dictado sentencia firme que declare la existencia de una conducta constitutiva de un ilícito penal por razón de la cual condene a quien pretende adquirir por usucapión con fundamento en la posesión resultante de dicho ilícito.

Madrid a, 13 de septiembre de 2017
LA ABOGADA DEL ESTADO-JEFE

María del Carmen Acedo Grande

SR. SUBSECRETARIO DE EDUCACIÓN, CULTURA Y DEPORTE

_____
MINISTERIO
DE EDUCACIÓN,
CULTURA Y DEPORTE

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-55550
(Consolidated with Nos. 15-55951, 15-55977)

[Filed September 18, 2017]

DAVID CASSIRER, AVA CASSIRER, and UNITED JEWISH FEDERATION OF SAN DIEGO, a California non-profit corporation,
Plaintiffs/Appellants/Cross-Appellees

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain
Defendant/Appellee/Cross-Appellant

Decided July 10, 2017
(Circuit Judges Consuelo M. Callahan, Carlos T. Bea, and Sandra S. Ikuta)

On Appeal from the United States District Court
for the Central District of California,
Honorable John F. Walter
District Court No. CV-05-03469-JFW

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE THE KINGDOM OF SPAIN (BRIEF OF AMICUS CURIAE FILED CONCURRENTLY HEREWITH)

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I. INTRODUCTION

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court and Federal Rule of Appellate Procedure 29(b), proposed *Amicus Curiae* the Government of the Kingdom of Spain (the "Government") respectfully submits the attached Amicus Brief in support of Defendant-Appellee/Cross-Appellant Thyssen-Bornemisza Collection Foundation's (the "Foundation") Petition for Rehearing and Rehearing *En Banc*.

Pursuant to Ninth Circuit Rule 29-3, on September 13, 2017, counsel for the Government emailed counsel for plaintiffs David Cassirer, Ava Cassirer, and the United Jewish Federation of San Diego (collectively, "Plaintiffs") to request consent to the filing of the proposed amicus brief. Plaintiff's counsel declined to consent prior to the filing of the instant Petition and proposed Amicus Brief.

Pursuant to California Rules of Court 8.520(f)(4) and Fed. R. App. P. 29(a)(4)(E), the Government certifies that no portion of its Amicus Brief was authored by any party or by counsel for any party in this matter. The Government also certifies that no one other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

II. THE AMICUS CURIAE AND ITS INTEREST

The Kingdom of Spain (the "Government" and/or "Spain") is a sovereign state committed to the rule of law, including the correct interpretation, application, and enforcement of its laws.

It has been a longstanding view of the Government that its citizens have natural rights to possess property. These rights are sacrosanct and must not be disturbed absent exceptional circumstances. To that end, the Government enacted laws that set forth specific guidelines to protect and challenge its citizens' property rights, as well as laws to provide its citizens with finality, certainty, and predictability in property disputes.

The Government is also committed to the display and preservation of artistic works for the discovery, enjoyment, and education of its citizens and its visitors. In 1988, the Government established the Thyssen-Bornemisza Collection Foundation (the "Foundation"), which is responsible for the management of artworks acquired by the Government.

In 1993, the Government purchased the Thyssen-Bornemisza Collection, which consists of world-class artworks, including a painting by Camille Pissarro entitled, *Rue Saint-Honore, Apres-Midi, Effet de Pluie* (the "Painting"). The Government also provided the Foundation with the Villahermosa Palace in Madrid to display, among other works, the Painting.

Plaintiffs brought the instant action against the Foundation to challenge the Foundation's and therefore the Government's property rights in the Painting. Indeed, Plaintiffs seek to recover the Painting from the Foundation and the Government. Consequently, the Government has been, and will continue to be affected by judicial decisions in California affecting the Foundation's and the Government's property rights in the Painting.

The Government is deeply concerned about the Panel's failure to correctly interpret and apply provisions of the Spanish Civil Code, including Articles 1955 (Spain's six-year acquisitive prescription period for personal property), 1956 (the exception to the six-year acquisitive prescription statute), and 1962 (the six-year statute of limitations for personal property claims). As set forth more fully in the attached *Amicus Curiae* Brief, the plain language of the foregoing statutes must be construed together and considered in the context of the Government's statutory framework as a whole. In other words, the foregoing Spanish Civil Code sections cannot be read in isolation.

The proposed brief and attached report from the Ministry of Education, Culture, and Sports set forth the Government's official views on the history, policy, interpretation, and application of the foregoing laws, which the Government believes the Panel misinterpreted and applied incorrectly.

It is vitally important that the Government's voice be heard and its position considered since the Panel discussed, interpreted, and applied the Government's acquisitive prescription laws. As the drafter of its own laws, the Government believes that its brief will provide a unique first-hand understanding of the laws which the Panel misconstrued, and that the brief will provide valuable assistance to this Court in its consideration of the applicable laws.

III. CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court accept the

accompanying brief for filing and consideration in this case.

Dated: September 18, 2017

Respectfully submitted,

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[*Certificate of Service Omitted in the Printing of this Appendix*]

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

Case No. CV 05-03459-JFW (Ex)

[Filed April 20, 2015]

DAVID CASSIRER, AVA CASSIRER, and UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY, a California non-profit corporation,

Plaintiffs,

v.	)
	)
THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain,	)
	)
Defendant.	)
_____	)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Judge: Hon. John F. Walter
Date: May 18, 2015
Time: 1:30 p.m.
Dept.: 16

* * *

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I. INTRODUCTION

Legal principles and disputed issues of fact preclude TBC's motion for summary judgment. Regardless of whether the Court applies California, Swiss, or Spanish law, TBC's claim that it has obtained title to the Painting fails.

First, as to the Baron's acquisition, TBC presents no serious argument that the 1976 transfer from the Stephen Hahn Gallery ("SHG") to the Baron passed valid title given that the SHG did not have good title to convey. (Dkt. 249, TBC Br. at 14:6-9.)

Second, TBC argues that the Baron obtained title by the Swiss law of acquisitive prescription. (TBC Br. at 14-15.) At a minimum, however, disputed issues of fact preclude granting summary judgment to TBC on this basis. It is undisputed that the Baron must have had good faith in order for Swiss law of acquisitive prescription to apply. TBC Ex. 46 at ¶ 8 (TBC's expert: "The possessor has to be in good faith."). Abundant evidence supports a finding that the Baron did not act in good faith. TBC's ongoing willful blindness in the face of numerous red flags and TBC's lack of diligence does not justify summary judgment.

Third, as the Baron did not have valid title to convey, the 1993 acquisition agreement could not transfer good title. TBC Ex. 50 at 18-19, ¶¶ 24-25.

Fourth, TBC cannot succeed based on Spanish law of adverse possession or statute of limitations, for at least two reasons:

(a) Under the Spanish Criminal Code, there is no period of prescription for crimes against humanity or

genocide, including for acts of concealment. The elimination of the period of prescription for crimes against humanity likewise prevents TBC from obtaining title by way of acquisitive prescription. *See generally* Declaration of Alfredo Guerrero Righetto. At a minimum, genuine issues of material fact exist as to these matters as a result of TBC's falsification of provenance information, concealment of the Berlin label and missing labels, and withholding relevant information concerning the Baron's lack of good faith from the attorneys who conducted TBC's title investigations.

(b) Applying the Spanish law of adverse possession to dispossess Plaintiffs of the Painting would violate the property protections of the European Convention on Human Rights. *See generally* Declaration of Prof. Carlos M. Vázquez filed 3/23/15 (Ex. 104 to 4/20/15 Phillis Decl.). As TBC has the burden of proof and has submitted no evidence that application of Spanish law of adverse possession to deprive Plaintiffs of their property would comply with Spain's international obligations, TBC cannot succeed on its motion for summary judgment, even if Spanish law applied.

Fifth, applying California law, Plaintiffs claims are not barred because, as this Court recently recognized in the *von Saher* case, (1) a thief cannot transfer title; (2) each new conveyance constitutes a new act of conversion; and (3) California has never recognized the validity of transfers by adverse possession for moveable property, much less in the case of bad faith acquirers like the Baron and TBC.

*Sixth, w*hile the analysis presented here shows why there is no true conflict between Swiss, Spanish, and

California law in that the law of each of these jurisdictions points to the validity of Plaintiffs' claims and denial of the motion, were the Court to find a conflict, both California and federal choice-of-law principles point to the application of California substantive law to this case, and as noted in point five above, TBC's defenses fail under California law.

Seventh, because there has been no valid transfer of title to TBC, the due process clause does not bar application of California's statute of limitations to this case. Even if title had transferred under Spanish or Swiss law, the due process clause would not present a barrier to Plaintiffs' claims.

Finally, TBC's one-page after-thought discussion of laches also fails to meet TBC's burden on the fact-intensive questions of prejudice and unjustified delay.

This motion should be denied, and trial should proceed in July 2015.

II. BACKGROUND AND DISPUTED ISSUES OF FACT

A. The Nazis Confiscated The Painting From Lilly

In brief, the Nazis unlawfully confiscated the Painting from Lilly in 1939. GIMF ¶35. At the end of the war in 1945, the U.S. military authorities occupying Germany declared such transfers void and forbade taking such property out of Germany. *Id.* ¶36. In 1948, Lilly timely filed a claim to the Painting. *Id.* ¶37.

B. California Residents Were Responsible For Lilly's Inability To Obtain Possession Of The Painting After The War

In 1951, the California art dealer Frank Perls was having financial difficulties. *Id.* ¶38. In defiance of U.S. Military Law, the Frank Perls Gallery ("FPG") in Beverly Hills, arranged to traffic the Painting out of Germany via a sale from "Herr Urban" of Munich, and to fly the Painting to California. *Id.* ¶39. FPG earned a commission of $3,105 for arranging to sell the Painting to Sydney Brody of Los Angeles. *Id.* ¶40. Brody possessed the Painting in California. *Id.* ¶41.

Months later, FPG arranged for another sale, this time to Sydney Shoenberg in Missouri. *Id.* ¶¶42-43. The sale was shady. Provenance information was shared only by phone. *Id.* ¶44. FPG and its collaborator E. Coe Kerr, Jr. of the Knoedler Gallery discussed a commercially unreasonable process of shipping the Painting to New York and then shipping it back to California again with no reason provided. *Id.* ¶45.

Neither the Cassirers nor any of the parties then involved in the ownership dispute in Germany knew that any of this was happening. *Id.* ¶46. Lilly diligently prosecuted her claim in Germany. *Id.* ¶47. A June 1, 1954 published opinion of the U.S. Court of Restitution Appeals ("CORA") addressed Lilly's claim in detail, establishing her as the owner of the Painting. *Id.* ¶48. Earlier proceedings in the action were to the same effect. *Id.* ¶50. The CORA opinion identified the Painting by name. *Id.* ¶49. After years of further legal proceedings, the claimants to the Pissarro reached a settlement in 1958. *Id.* ¶51. Lilly maintained her claim of ownership. *Id.* ¶52; *see also* Dkt. 245.

C. The Baron Obtained Possession Of The Painting In 1976 For A Below-Market Price And Despite Numerous Red Flags

Meanwhile, back in the United States, Sydney Shoenberg and/or SHG held the Painting for 24 years until 1976. GIMF ¶54. In 1976, SHG in New York sold the Painting to the Baron for substantially below market value. *Id.* ¶62. Under both New York and Missouri law, where the Painting presumably was located at the time of the sale to the Baron, the transfer to the Baron was void. *See infra* at 13 n.6.

The Baron faced numerous red flags in connection with the acquisition, included the following: (1) the documentation provided by SHG was minimal and showed no prior provenance, GIMF ¶64; (2) SHG had been affiliated with Nazi looting, *id.* ¶65; (3) Pissarros in general were known to be the frequent subjects of Nazi looting (Pissarro himself was Jewish and Jewish collectors in Europe before the rise of Hitler frequently owned his works), i*d.* ¶66; (4) the back of the Painting has a "Berlin" label traceable to the Cassirer Gallery, and the provenance documentation provided no explanation for that label, i*d.* ¶ 68; (5) it was widely known by 1976 that the Jewish population of cities like Berlin had been the targets of Nazi genocide and looting, i*d.* ¶67; and (6) the back of the Painting showed evidence of other missing labels, which should have raised suspicions, i*d.* ¶69.

The Baron proceeded despite these red flags, acquiring the Painting for below market value. *Id.* ¶62. Other than faulty provenance, there was no other reason for this low price. *Id.* ¶63. Had the Baron performed due diligence at the time, his advisors

and/or the SHG could have traced provenance back to the unlawful transportation out of Germany either by directly contacting Knoedler or Perls through whom Shoenberg had purchased the Painting or by finding the published CORA opinion, or by contacting the Wildenstein Institute or the State Department, any one of which would have been sources for the relevant information. *Id.* ¶71.

After the Baron obtained possession of the Painting, he engaged in non-arms'-length transactions concerning the Painting with various entities under his or his family's control. *Id.* ¶72. TBC has introduced no evidence that any of these transactions included due diligence. *Id.* ¶73. Rather, they were tainted by the same bad faith that plagued the original transaction between SHG and the Baron. *Id.* ¶74. TBC has submitted no evidence identifying the individuals or entities that purported to hold title to the Painting after the Baron's acquisition in 1976 and prior to a transfer by an unknown transferor to the Stichting sometime before February 1989. *Id.* ¶75. Nor has TBC provided evidence that whatever entity or entities were in this position intended to return the Painting to Switzerland throughout the many extended periods in which the Painting was not in Switzerland. *Id.* ¶76. From 1976 to 1992, neither the Baron nor any of his entities exhibited or caused the exhibition of the Painting in the United States. *Id.* ¶81.

D. TBC Acquired The Baron's Collection For Below-Market Value And In The Face Of Numerous Red Flags Concerning The Painting

TBC entered a loan agreement with one of the Baron's entities in 1988, *id.* ¶83, took possession of the Painting in 1992, *id.* ¶84, and entered an acquisition agreement with another of the Baron's entities in 1993, *id.* ¶85.

Throughout this time, Claude Cassirer was a resident of California. *Id.* ¶88. He had no ties either to Spain or to Switzerland. *Id.* ¶89. TBC did not give Mr. Cassirer notice of its possession of the Painting or its intent to acquire title by adverse possession. *Id.* ¶90. The newspaper article about the transaction that TBC has placed into the record did not mention the Painting. *Id.* ¶91.

In 1989 and again in the early 1990s, TBC engaged counsel in connection the loan and acquisition agreements. *Id.* ¶92. TBC limited the scope of the title investigations and the information provided to its attorneys. *Id.* ¶95. The lawyers were not given the paintings to physically inspect. *Id.* ¶96. Nor were they given access to the paltry provenance materials that the Baron had provided to TBC concerning the Painting. *Id.* ¶97. Such documents would have revealed red flags and lack of diligence on the Baron's part, including the below-market price the Baron had paid, the Berlin label, and the unexplained transportation of the Painting out of Germany and to the United States. *Id.* ¶¶62-71, 103. The Baron and his representatives were heavily involved in the governance of TBC at the time of the transaction. *Id.* ¶104. The implicit purpose

of limiting the lawyers' access to information was to create a veneer of respectability to what was in fact a bad faith, non-arms'-length transaction. *Id.* ¶¶62-71, 103-104.

The limited information TBC gave its lawyers was not without consequence. TBC's lawyers expressly disclaimed any opinions regarding the validity of the Baron's title in the event of bad faith or a past forced sale. *Id.* ¶¶98-99.

TBC's Swiss lawyers warned TBC it had reason to worry: "If the acquisition occurred in bad faith, in other words, if the acquirer knew or should have known of the lacking right of the transferor, ownership cannot be acquired. The rightful owner keeps his right at all times to claim recovery of the object." *Id.* ¶100. TBC's German counsel opined: "a good faith purchase will be prohibited under German law" if "the painting has been stolen from, or lost by, the lawful owner." *Id.* ¶101.[1] Sullivan & Cromwell, asked to give an opinion on New York and California law, also would not bless the deal: "We have not attempted to determine whether the original purchasers in the Thyssen-Bornemisza group of a painting from a third party acquired valid title to the painting, or whether any of the paintings in

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[1] TBC's lawyers expressly asserted that to the extent they were opining that the Baron had valid title with respect to works in the Baron's collection prior to 1980, the opinion was not based on any actual case-by-case due diligence with respect to works in question but was instead premised on Swiss law of acquisitive prescription and an *assumption* that the Baron had acted in good faith. GIMF ¶ 99. The assumption, however, was unjustified given the information substantiating the Baron's lack of good faith that was available at the time. *Id.* ¶62-71, 103-104.

question remain subject to claims by third parties . . . Further, at your instructions, we have limited our consideration to the general questions presented and have not attempted to trace the transfer of individual paintings." *Id.* ¶102.

TBC had access to both the Painting, including the back of the work, showing the Berlin label, and the Baron's provenance materials showing the below-market price, which would have alerted any reasonable acquirer to the title defects. *Id.* ¶103. The Baron and his representatives were deeply involved in TBC's governance at the time. *Id.* ¶104. TBC knew the risks but took its chances. *Id.* ¶113.

The red flags facing TBC were the same as those facing the Baron. (1) the documentation provided by SHG to the Baron and from the Baron to TBC was minimal and showed no prior provenance, *id.* ¶64; (2) SHG had been affiliated with Nazi looting, *id.* ¶65; (3) Pissarros in general were known to be the frequent subjects of Nazi looting (Pissarro himself was Jewish and Jewish collectors in Europe before the rise of Hitler frequently owned his works), *id.* ¶66; (4) the back of the Painting has a "Berlin" label traceable to the Cassirer Gallery, and the provenance documentation provided no explanation for that label, *id.* ¶68; (5) it was widely known by 1976 that the Jewish population of German cities like Berlin had been targeted for Nazi genocide and looting, *id.* ¶67; (6) the back of the Painting showed evidence of other missing labels, which should have raised suspicions, *id.* ¶69; and (7) the Thyssen family was known for selling steel and arms to the Nazis and for financing Hitler's rise to power; it was

unlikely that the Baron would be diligent in avoiding possession of Nazi-looted art, *id.* ¶105.

Like the Baron, TBC bargained for a deep discount price for the Collection: $350 million, compared to the $1 billion - $1.5 billion that TBC admits was the appropriate fair market value (and the $2 billion market price some commentators attributed to the deal). *Id.* ¶108. The risks were factored into the transaction.

The Painting was only one of ***775 artworks*** in the transaction. *Id.* ¶111. In mathematical terms 1 ÷ 775 = .00129. The Collection as a whole was second only to that of Queen Elizabeth. *Id.* ¶150. TBC has provided no evidence that the Painting was material to the acquisition, including with respect to price or the requirement to remodel a 48-room Madrid palace, that would have been part of the deal regardless of whether TBC was acquiring 775 works or 774. *Id.* ¶112.

TBC has concealed the provenance of the Painting and its ties to Nazi genocide and crimes against humanity. *Id.* ¶¶125-129. TBC has falsely asserted that the Baron had obtained the Painting from Galerie Joseph Hahn in Paris, although TBC knew the Baron had obtained the Painting through the Stephen Hahn Gallery in New York. *Id.* ¶125. TBC concealed other U.S. transfers of the Painting. *Id.* ¶126. TBC concealed the Berlin and Cassirer Gallery provenance of the Painting. *Id.* ¶127. The concealment of the German and U.S. provenance of the Painting combined with the false statements about Joseph Hahn were designed to suggest that the Painting had never travelled out of France prior to the Baron's acquisition, which TBC knew to be false. *Id.* ¶128. TBC concealed information

from its own lawyers relating to the Baron's bad faith, including that the Baron had acquired the Painting for well below market value and other evidence that the Painting had been the subject of Nazi looting. *Id.* ¶129.

The acquisition agreement for the collection is dated June 21, 1993. *Id.* ¶130. Less than three years later, in 1995, Spain eliminated the statute of limitations for crimes against humanity and for genocide, including crimes of concealment. *Id.* ¶131. As explained below, that change eliminated under Spanish law TBC's ability to obtain title by way of acquisitive prescription. *See infra* section IV.D.

E. Claude Promptly Pursued His Claims

Claude Cassirer learned of TBC's possession of the Painting in 2000. GIMF 115. He promptly petitioned the Spanish government and TBC in 2001, *id*. ¶116, and pursued resolution through diplomatic and other voluntary channels, *id*. ¶¶117-119. He promptly filed this action on May 10, 2005, when those efforts proved futile. *Id.* ¶116. That Claude did not learn of the Painting's whereabouts earlier was perfectly reasonable under the circumstances. *Id.* ¶120. *See infra* section IV.G.-H.[2]

III. Procedural Background

Claude filed this action on May 10, 2005. Dkt. 1. Motion practice and appeals delayed this action for

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[2] Additional background is set forth in Plaintiffs' Motion for Summary Adjudication re Choice of California Law, Dkt 251 at 3-10 & 251-1 to 251-19, which is incorporated by reference in full herein.

nine years. TBC answered the Complaint on August 22, 2014. Dkt. 189. On October 31, 2014, Judge Feess ruled that most of TBC's affirmative defenses were barred as a matter of law. Dkt. 206. On January 20, 2015, TBC moved for summary adjudication contending that the 1958 Agreement barred this action. Dkt. 223. The Court denied that motion and held that Lilly did not give up her claim of ownership. Dkt. 245.[3]

On March 23, 2015, Plaintiffs filed a motion seeking summary adjudication that the substantive law of California governs this action. Dkt. 251. TBC filed this motion the same day invoking Spanish and Swiss law. Dkt. 249. As demonstrated below, TBC's motion lacks merit.

IV. ARGUMENT

A. TBC Faces A Heavy Burden

"Summary judgment is appropriate only if, taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. An issue of material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party." *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015) (reversing grant of summary judgment) (citations and internal quotation marks omitted).

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[3] This Court has certified as frivolous and/or waived a notice of appeal that TBC filed on April 10, 2015. Dkt. 264. Accordingly, this Court retains jurisdiction.

"[I]f the defendant is moving for summary judgment based on an affirmative defense for which it has the burden of proof, the defendant must establish beyond peradventure *all* of the essential elements of the ... defense to warrant judgment in his favor." *Cooper v. Hungry Buzzard Recovery, LLC*, No. C11-0280-JCC, 2011 WL 5299422, at *1 (W.D. Wash. Nov. 4, 2011) (citations and internal quotation marks omitted); *see also Clark v. Capital Credit & Collection Servs.,* 460 F.3d 1162, 1177 (9th Cir. 2006) (recognizing that a defendant bears the burden of proof at summary judgment with respect to an affirmative defense).

When a defendant moves for summary judgment on an affirmative defense, the elements of which the defendant must prove by clear and convincing evidence, the non-moving party must simply produce enough evidence to allow a rational trier of fact to find that there is not clear and convincing evidence. *Chiron Corp. v. Abbott Labs.*, No. C-93-4380 MHP, 1996 WL 209717, at *2 (N.D. Cal. Apr. 23, 1996). The non-moving party's burden to come forward with evidence to prevent summary judgment is "less stringent" than that normally placed on a non-moving party. *Id.* If adverse possession were available as a defense in this case, it would be an affirmative defense with a heightened burden of proof. *See Soc'y of Cal. Pioneers v. Baker*, 43 Cal. App. 4th 774, 779 (1996); *Mosk v. Summerland Spiritualist Ass'n*, 225 Cal. App. 2d 376, 381-82 (1964) ("[T]he burden of proving all of the essential elements of adverse possession rests upon the person relying thereon and it cannot be made out by inference but only by clear and positive proof."); *see infra* at 11 (defense unavailable for conversion of chattel). Laches is an affirmative defense as to which

the defendant has the burden of proof and the burden of production. *Miller v. Eisenhower Med. Ctr.*, 27 Cal. 3d 614, 624 (1980).

This Opposition first explains why TBC's motion must be denied as to the issue of ownership regardless of whether the law of California, Switzerland or Spain applies. Were the Court required to resolve the choice-of-law issues presented here, California law would control. After addressing these issues in turn, this Opposition addresses why TBC's last-ditch arguments – due process and laches – fail.

B. TBC Is Not Entitled To Summary Judgment Concerning Ownership Under California Law

This Court is familiar with the law in California concerning transfers of title to stolen property, the statute of limitations relating to claims against museums and galleries, and the law of adverse possession of moveable property. *von Saher v. Norton Simon Museum of Art*, No. 2:07-cv-02866 (Apr. 2, 2015 Order, Dkt. 119) ("*von Saher* 2015 Order"). In brief, under California law, a thief cannot transfer good title. *von Saher* 2015 Order at 9 (citing *Naftzger v. American Numismatic Soc'y*, 42 Cal. App. 4th 421, 432 (1996); *Harpending v. Meyer*, 55 Cal. 555, 560 (1880); *Strasberg v. Odyssey Group, Inc.*, 51 Cal. App. 4th 906, 921 (1996)). Each time stolen property is transferred, a new tort or act of conversion has occurred.[4] No

[4] *See von Saher* 2015 Order at 9-10 (citing *Harpending v. Meyer*, 55 Cal. 555 (1880); *Culp v. Signal Van & Storage*, 142 Cal. App. 2d Supp. 859, 861 (1956); *See, e.g., Soc'y of California Pioneers v.*

California case has extended the doctrine of adverse possession to personal property obtained by a *bone fide good faith* purchaser.[5] A fortiori California law does not allow for acquisition by adverse possession when the would-be acquirer (like the Baron or TBC) obtained possession of moveable property in *bad faith*.

For claims seeking the recovery of artwork from galleries or museums, the statute of limitations is six years from the date of actual discovery of the museum's possession. Cal. Code Civ. Proc. § 338(c)(3)(A). The statute of limitations, enacted by the Legislature in 2010, applies retroactively. *Id.* at § 338(c)(3)(B). Even where the prior statute of limitations had expired before enactment of the current version of section 338(c)(3), such expiration does not cause title to pass to a defendant in possession of the work. *von Saher* 2015 Order at 10 ("Expiration of the statute of limitations under California law does not divest the owner of title or convey title to the thief or possessor.") (citing *Western Coal and Mining Co. v. Jones*, 27 Cal. 2d 819, 828 (1946) ("The general rule is that the running of the statutory period does not extinguish the cause of action…")). There is no unfairness in applying section 338(c)(3) retroactively to museums. Museums are "sophisticated entities that are well-equipped to trace

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Baker, 43 Cal. App. 4th 774, 782-83 (1996); *San Francisco Credit Clearing House v. Wells*, 196 Cal. 701, 707 (1925)).

[5] *See San Francisco Credit Clearing House v. C.B. Wells*, 196 Cal. 701, 707-08 (1925); *Soc'y of California Pioneers*, 43 Cal. App. 4th at 785 n.13 ("The court in *San Francisco Credit C. House v. Wells*, *supra*, 196 Cal. 701, 707, suggested that the doctrine of adverse possession would not apply to personal property, and no California case has been cited in support of such an application.").

the provenance of the fine art that they purchase." *von Saher* 2015 Order at 11. In enacting AB 2765, the California Assembly Bill that amended section 338(c)(3), the California Legislature gave detailed consideration to the question whether retroactive application of the statute of limitations would violate the due process clause, and determined that it would not. *See* Cal. S. Judiciary Comm., Bill Analysis (AB 2765), 2009-10 Reg. Sess., at 5 (2010) (finding that AB 2765 does not violate due process).

Applying these principles, TBC did not obtain good title under California law. TBC's acquisition of the Painting from the Baron was an independent act of conversion. TBC is a museum. GIMF ¶151. Claude indisputably sued within six years of obtaining actual knowledge of TBC's possession of the Painting. SUF ¶ 28, 30. TBC did not obtain title to the Painting three years after Claude's knowledge because the expiration of the prior statute of limitations does not convey title. The Legislature was free to lengthen the statute of limitations, balance the competing interests at stake, and determine that the unfairness to rightful owners deserved greater protection than wrongful possessors. TBC does not contend that it can succeed on the merits of its ownership claim under California law. Under California law, TBC's motion must be denied.

C. TBC Is Not Entitled To Summary Judgment Concerning Ownership Under Swiss Law

TBC's motion also fails under Swiss law. TBC summarily states its first argument concerning Swiss law as follows: "The Baron obtained good title to the Painting when he purchased it from art dealer Stephen Hahn in 1976." TBC Br. at 14:6-7. The only evidentiary

material TBC cites in support of this proposition is an invoice from SHG to the Baron, memorializing the sale, "[w]ith compliments." *Id.* (citing SHG invoice). TBC offers no legal authority, whether under the law of Switzerland, Spain, or California that an invoice for the subsequent sale of stolen property conveys valid title. *Id.* Professor Ernst, TBC's Swiss law expert, offers no opinion supporting this point. Dkt. 249-23. Instead, Professor Ernst focuses on acquisitive prescription as discussed below.[6]

TBC's second argument is that "even if the 1976 conveyance was somehow tainted or flawed, the Baron acquired vested titled to the Painting in 1981, under Swiss acquisitive prescription laws." TBC Br. at 14:8-9. Genuine issues of material fact preclude summary judgment on this basis for two independent reasons.

First, TBC concedes that under Swiss law, acquisitive prescription requires a finding of good faith. Plaintiffs have submitted substantial evidence of the Baron's bad faith. GIMF ¶¶62-71. Plaintiffs' expert on Swiss law, Professor Marc André Renold, has provided

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[6] TBC's expert also states that Swiss courts would follow the law of the place where the Painting was located in resolving ownership disputes concerning moveable property. *Id.* at Page 13 of 51, ¶ 3. TBC, however, submits neither evidence nor argument that the Painting was transported to Switzerland before the sale. Under New York law the transfer of possession to the Baron did not transfer title. *Green v. Arcadia Fin. Ltd.*, 663 N.Y.S.2d 944, *aff'd*, 689 N.Y.S.2d 596 (1999) ("A purchaser who purchases … from a thief, or from a dealer who has purchased from a thief does not acquire title under [U.C.C.] § 2–403."); *see also Wilson v. Crocket*, 43 Mo. 216, 216 (1869) ("No one can transfer to another a greater interest" than he possesses) (Missouri); *supra* at 11 (California).

a detailed opinion explaining why the Baron's conduct shows bad faith. Renold Decl., ¶¶14-64. The facts showing bad faith include:

- The Baron paid far below market value for the Painting. GIMF ¶62.

- The back of the Painting has a Berlin label, and the Baron obtained no provenance material substantiating a voluntary transfer out of Berlin. *Id.* ¶64, 68.

- It was well known in the art world that Berlin had a large Jewish population, and that this population was a target of Nazi genocide and looting. *Id.* ¶67.

- In addition to the Berlin/Cassirer Gallery label, the back of the Painting also shows evidence of other labels being removed in whole or in part. *Id.* ¶69.

- The documentation of the transaction was incredibly thin. *Id.* ¶64.

- SHG had a history of trafficking in looted art. *Id.* ¶65.

- The fact that the Painting is a Pissarro should have caused the Baron to act with extra diligence because a large number of Pissarros were looted. *Id.* ¶66.

- The Baron and his consultants were highly sophisticated. *Id.* ¶70.

- The Baron and his consultants failed to diligently investigate the provenance of the Painting. *Id.* ¶71.

Second, TBC's Swiss law expert opines that Swiss law of acquisitive prescription requires that the property in question remain in Switzerland for five continuous years, but that transitory periods in which the property is outside of Switzerland would not defeat a claim of acquisitive prescription if the property was "bound to" return to Switzerland. TBC Ex. 46, ¶¶ 44-48; *see also* TBC Br. at 15 n.6 (periods of interruption do not disqualify claim of acquisitive prescription if "***the owner intends*** that the property will return to Switzerland.") (emphasis added).

Here, TBC cannot make such a showing. First, TBC admits that the Painting was never in Switzerland for an uninterrupted period of five years in the period from 1976-1993. GIMF 91. Second, TBC has no evidence of who the putative owners were after the Baron's acquisition from SHG on November 18, 1976 and before the Stichting purported to transfer the Painting to Favorita Trustees on February 15, 1989. *Id.* ¶75. TBC's expert admits he has not seen documentation of the transfer to the Stichting. Ex. 46 at ¶ 60; GIMF ¶78. As representatives of the Thyssen-Bornemisza family still control four seats on TBC's board, TBC had access to and would have produced evidence on this point if it existed. *Id.* ¶103-104. As TBC has not done so, TBC cannot show that the entity or entities intended to return the Painting to Switzerland at all relevant times. Evidence that TBC omitted from this motion indicates that the transferee was likely an entity known as Alpha Collections Limited ("Alpha"). *Id.* ¶79. TBC has submitted no evidence regarding the ownership and control of Alpha or its intent during the relevant period. *Id.* ¶80. TBC therefore cannot show an absence of genuine issues of material fact regarding the

intent of unknown possessors of the Painting from 1976 to 1993.

D. TBC Is Not Entitled To Summary Judgment Concerning Ownership Under Spanish Law

TBC's motion fails under Spanish law as well. First, TBC's own experts acknowledge that if the Baron lacked good title, he could not have conveyed valid title to TBC in 1993. TBC Ex. 50 at 18-19, ¶¶ 24-25.

As to acquisitive prescription, TBC's experts fail to address the interaction between the Spanish Civil Code and Criminal Code that is relevant to this case and bars TBC's claim of acquisitive prescription. TBC's Spanish law opinion also ignores the European Convention on Human Rights, which would render Spanish law of acquisitive prescription unenforceable as applied to the facts of this case.

As Plaintiffs' expert on Spanish law, Alfredo Guerrero Righetto, makes clear, beginning in 1995, Spain eliminated the statute of limitations for crimes against humanity and genocide. Guerrero Decl., Ex. 55 ¶ 4.1-4.2. This change in law had the effect of eliminating the availability of acquisitive prescription as to moveable property obtained through these crimes by the perpetrators of crimes, ***or*** accomplices or accessories, including those who engage in acts of concealment. *Id.* The change in law also disposes of TBC's argument (TBC Br. at 18:17-20:8) that TBC became vested with ownership by virtue of Spanish statute of limitations as well as acquisitive prescription. *Id.* ¶¶ 4.1-4.2; 5.1-5.3. Because TBC does not claim to have obtained title before 1995, the

application of this change in law applies to TBC and does not affect any vested right of TBC. *Id.* ¶ 4.1-5.3.

Substantial evidence exists concerning the Baron's and TBC's concealment. *See id* ¶¶ 4.2, 5.2, 5.3, 6.1; *supra* at 8.

In addition, if the Spanish law had not been amended to eliminate the availability of acquisitive prescription for the Painting, and if Spanish law were as described by TBC's experts, it would be so extreme as to violate the European Convention of Human Rights. According to TBC, Spanish law allows a ***bad-faith governmental purchaser of stolen property*** to void the title of a ***victim of a crime against humanity and genocide*** where the victim is a ***non-citizen and non-resident*** of Spain (or even the EU) and has ***no ties whatsoever to Spain*** and receives ***neither notice nor an opportunity to be heard***, all after a ***mere six years*** during which time the bad-faith governmental purchaser ***falsifies and conceals information*** to make discovery less likely. This is not a rule of law that harmonizes with any decent sense of justice as understood in democratic societies that respect basic rights.

The European Convention on Human Rights protects against such overstepping. *See* Declaration of Prof. Carlos M. Vázquez filed 3/23/15 (Ex. 104). The most relevant case on point upheld, by a very thin margin, the U.K. law of adverse possession. *Id.* at ¶¶ 15-34. The reasoning applied in that case would invalidate Spanish law as that law is described by TBC's experts. *Id.* at ¶ 35.

E. Choice-of-law Analysis Leads To Application Of California Law

Plaintiffs' Memorandum of Points and Authorities Re: Choice of California Law (Dkt. 251) discusses in detail the choice-of-law principles that govern this action. For the reasons there stated and incorporated herein by reference, were this Court required to resolve choice-of-law issues at this stage, the substantive law of California would govern this case. This section briefly responds to arguments advanced by TBC concerning choice-of-law principles.

First, because TBC's motion for summary judgment must be denied regardless of whether California, Swiss, or Spanish law applies, this Court need not resolve the thorny choice-of-law issues raised by TBC in the context of this motion.

Second, in the wake of the Ninth Circuit's en banc opinion in *Sachs v. Republic of Austria*, 737 F.3d 584, 600 (9th Cir. 2013) (en banc), cert. *granted sub nom. OBB Personenverkehr AG v. Sachs*, 135 S. Ct. 1172 (2015), it is not possible to predict with any degree of certainty whether the next Ninth Circuit panel to address choice-of-law in the context of state-law claims at issue in an FSIA case will conclude that federal or state choice-of-law principles apply, or whether the law of the forum applies automatically with no choice-of-law analysis. *Id.* at n. 14. TBC asserts that "courts in this circuit continue to look to federal common law's conflict of law analysis, as defined in the Restatement." TBC Br. at 6 n.2. TBC, however, refers only to pre-*Sachs* cases. Plaintiffs know of no post-*Sachs* case on point.

Third, for the reasons stated in *Bakalar v. Vavra*, 619 F.3d 136, 143-45 (2d Cir. 2010) (applying state choice-of-law rules and rejecting law of the situs), Plaintiffs believe it would be legal error to apply federal choice-of-law rules to this case to the extent such rules would lead to an application of substantive law of a jurisdiction different from that which would be selected applying California choice-of-law principles. *See also* 28 U.S.C. § 1606 (where foreign state is not entitled to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances.").

Fourth, TBC acknowledges that it has the burden to demonstrate that foreign law controls. TBC Br. at 5:11-13. Yet, TBC simply fails to weigh, or even to acknowledge, the compelling interests of the State of California in ensuring the integrity of the art market, discouraging theft of moveable objects and trafficking in looted art, determining the rightful ownership of fine art, eliminating inequitable procedural obstacles to recovery, and ensuring that a thief cannot convey good title. *See* TBC Br. at 12:12-14:2. Nor does TBC make any serious effort to apply the factors listed in Restatement Section 6. *Id.* 10:18-12:22. As just one example, TBC pays lip service to "justified expectations," *id.* at 12:4-11, but wholly fails to account for the facts (1) that TBC's "expectations" were not "justified" since TBC acquired the Painting in bad faith; and (2) the Cassirer family's expectations that they would be recognized as the owners of the Painting if it were ever found were justified by 10 years of litigation in German after the war and an important published decision by the U.S. CORA.

Fifth, TBC suggests that even under California choice-of-law principles, the "situs rule" regarding the "where the property was situated at the time of the conveyance" would determine valid title. TBC Br. at 11:10-18 (citing *Auto Auction Inc. v. Riding Motors,* 187 Cal. App. 2d 693, 696 (1960) and two secondary sources that cite *Auto Auction* without analysis). TBC's reliance on these authorities is misplaced. As of 1967, California has adopted the governmental interest test and rejected rules that base the choice-of-law selection on a single factor. *See*, *e.g.*, *Reich v. Purcell*, 67 Cal. 2d 551 (1967); *see also* 12 Cal. Jur. 3d Conflict of Laws § 27 (describing governmental interest approach under "fundamental principle") (citing *Hurtado v. Superior Court*, 11 Cal. 3d 574 (1974), and numerous other authorities); *id.*, at § 93 (describing governmental interest approach as the "modern" rule for torts) (citing *Reich*). In addition, *Auto Auction* did not address, much less decide, that the situs rule applies to a defense of adverse possession raised by a bad faith acquirer of stolen property. The claim at issue was breach of warranty, not conversion, and the issue was whether a transaction concerning transfer of a car in Louisiana qualified as a "sale" between people who were also in Louisiana at the time of the transaction. *Auto Auction*, 187 Cal. App. 2d at 694-698. The location of property and application of Louisiana law were "conceded." *Id.* at 696. Nothing in *Auto Auction* remotely stands for the proposition that California courts today would apply the situs rule in this case, which raises entirely different policy issues.[7]

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[7] TBC also asks the Court to consider choice-of-law rules of Spain and Switzerland. TBC Br. at 11:19-12:3. It is undisputed however,

Sixth, TBC ignores the evidence that is relevant to choice-of-law analysis here, including evidence that (1) the Baron obtained the Painting in bad faith; (2) The Painting was not in Switzerland at the time the Baron purported to acquire it; (3) TBC obtained the Painting in bad faith; (4) The Painting was not located in Switzerland during significant stretches of time from 1976-1993, and TBC has not substantiated putative ownership during that time or intent to return the Painting to Switzerland throughout that period; (5) Spain is a signatory of the Washington Principles and the Terezin Declaration which promote the voluntary return of looted art; (6) TBC is a member of the International Council of Museums, and has thereby accepting its Code of Ethics, which dictates against the acquisition and ongoing exploitation of looted art; (7) Claude and his family had no ties to Spain or Switzerland; (8) Lilly was declared to be the owner of the Painting in a published CORA opinion that TBC should respect; (9) TBC and the Baron together decided not to select either Spanish nor Swiss law to govern the acquisition agreement; (10) California has an especially strong interest in this case because a Beverly Hills gallery participated in having the Painting transported out of Germany after the war and participated in two separate sales that undermined the integrity of the art market, prevented Lilly from obtaining the return of the Painting in the German litigation and ultimately prevented Claude Cassirer, who lived in California for the last 30 years of his life from ever recovering the Painting; (11) TBC's and the Baron's falsification of the

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that the choice-of-law rules of foreign countries do not apply to this case.

provenance of the Painting (feigning as if the Painting had been in France at all times prior to the Baron's acquisition and concealment of the Painting's ties to Germany and the U.S.) substantiate the damage to the integrity of the art market. GIMFs ¶¶48-49, 62-71, 82, 87, 88-90, 106, 125-129, 134-143, 152.

F. TBC's Due Process and Statute of Limitations Arguments Fails

Because TBC is not entitled to summary judgment that it has a vested property right under Spanish or Swiss law, it also is not entitled to summary judgment that application of California's statute of limitations would violate its due process rights. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-316 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885); Cal. S. Judiciary Comm., Bill Analysis (AB 2765), 2009-10 Reg. Sess., at 5 (2010).

In addition, even if TBC had a vested property right according to Swiss or Spanish law, TBC has not shown that an amendment to California's statute of limitations would violate principles of due process on the facts of this case. Property rights, for purposes of the due process clause, are not defined by reference to foreign law but "by reference to state law." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972) (dimensions of property interests "are defined by existing rules or understandings that stem from an independent source such as state law"). "[F]ederal constitutional law …determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Samson v. City*

of Bainbridge Island, 683 F.3d 1051, 1057 (9th Cir. 2012).

TBC has not cited any case suggesting, much less establishing, that where foreign law treats as "vested" the interests of a bad faith acquirer of stolen property who claims to have dispossessed the rightful owner of title without notice or an opportunity to be heard, and in disregard of a prior published U.S. opinion adjudicating the issue of lawful ownership in favor of the plaintiff, that such interest would be recognized as "property" under state law or that such an interest has a "legitimate claim of entitlement" to protection under the Due Process Clause. The implications of any such rule would be far-reaching and troubling.

Finally, even if TBC's interests did qualify as a vested property interest in California, application of CCP section 338(c)(3)(A) still would not violate due process because extending the statute of limitations where a sophisticated museum acquires stolen property in bad faith, ignores a published U.S. opinion declaring another person to be the owner, and does not give the rightful owner notice or an opportunity to be heard regarding its plan to misappropriate the property for itself, is narrowly tailored to meet compelling state interests in protecting the integrity of the art market and protecting the valid interests of rightful owners over the illegitimate interests of sophisticated bad faith actors who know better.

G. <u>TBC's Laches Arguments Fail</u>

"[L]aches requires unreasonable delay in bringing suit plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant

resulting from the delay." *Miller v. Eisenhower Med. Ctr.*, 27 Cal. 3d 614, 624, 614 P.2d 258, 264 (1980) (citation and internal quotation marks omitted). "[L]aches is not technical and arbitrary and is not designed to punish a plaintiff." *Bono v. Clark*, 103 Cal. App. 4th 1409, 1418, 128 Cal. Rptr. 2d 31, 36-37 (2002). Prejudice is never presumed[.]" *Id.*; *see also Bono v. Clark*, 103 Cal. App. 4th 1409, 1420, 128 Cal. Rptr. 2d 31, 38 (2002). The defendant has the burden of proof and the burden of production of evidence on the issue of prejudice. *Miller*, 27 Cal. 3d at 624.

The issue of laches is highly fact-intensive. *Id.* (consideration of "all of the applicable circumstances."). Courts routinely deny summary judgment concerning laches due to the existence of disputed issues of fact.[8] Laches does not apply where a defendant's prejudice is caused by factors other than the plaintiff's delay.[9] The death of a witness is not enough to demonstrate

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[8] *See, e.g.*, *Alphaville Design, Inc. v. Knoll, Inc.*, 627 F.Supp.2d 1121, 1133 (N.D. Cal. 2009); *Brighton Collectibles, Inc. v. RK Texas Leather Mfg.*, No. 10-CV-419-GPC (WVG), 2012 WL 6553403 at *11 (S.D. Cal. Dec. 13, 2012); *In re Katz Interactive Call Processing Patent Litig.*, 882 F. Supp. 2d 1123, 1146, 1152 (C.D. Cal. 2010); *ViaSat, Inc. v. Space Sys. / Loral, Inc.*, No. 3:12-CV-00260-H WVG, 2014 WL 868594, at *3 (S.D. Cal. Jan. 31, 2014); *Directors of Motion Picture Indus. Pension Plan v. Nu Image Inc.*, No. 2:13-CV-03224-CAS, 2014 WL 6066105, at *8 (C.D. Cal. Nov. 10, 2014); *Danjaq LLC v. Sony Corp.*, No. CV 97-8414-ER (MCX), 1999 WL 317629, at *2 (C.D. Cal. Mar. 11, 1999).

[9] *Farahani v. San Diego Cmty. Coll. Dist.*, 175 Cal. App. 4th 1486, 1495 (2009) (no laches where prejudice claimed by defendant was caused by its own conduct); *Pac. Hills Homeowners Ass'n v. Prun*, 160 Cal. App. 4th 1557, 1565 (2008) (same; defendant failed to show it would have acted differently).

prejudice. The defendant must "demonstrate whether and how [it] was prejudiced by decedent's unavailability." *Bono v. Clark*, 103 Cal. App. 4th 1409, 1420, 128 Cal. Rptr. 2d 31, 38 (2002).

The issue of unreasonable delay is also highly fact-intensive and turns on the equities and reasons for delay. Even lengthy delays do not lead to an automatic finding of laches.[10] A plaintiff's reasonable but mistaken belief concerning the facts at issue can avoid a finding of laches.[11] The focus is on the equities of the complainant and on whether any delay "is satisfactorily explained." *Cahill v. Superior Court*, 145 Cal. 42, 47 (1904) (citation and internal quotation marks omitted). Courts appropriately reject the defense of laches where a plaintiff acts diligently after discovering the identity of one who is in wrongful possession of the plaintiff's property. *Strasberg v. Odyssey Group, Inc.,* 51 Cal. App. 4th 906, 922 n.11 (1996). The date a cause of action accrues as to a defendant is also relevant.[12]

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[10] *Miller v. Ash*, 156 Cal. 544, 549, 563-64 (1909) (45 yrs); *Golden Gate Wtr. Ski Club v. Contra Costa Cnty.*, 165 Cal. App. 4th 249, 254, 263-64 (2008) (35 yrs); *Huddleson v. Huddleson,* 178 Cal. App. 3d 1564, 1568, 1573-74 (1986) (12 yrs).

[11] *Barndt v. Cnty. of LA*, 211 Cal. App. 3d 397, 402-03 (1989); *Kelly v. San Francisco*, No. C 05-1287 SI, 2005 WL 3113065, at *3 (N.D. Cal. Nov. 21, 2005) (analyzing "reasons" for delay).

[12] *Zakaessian v. Zakaessian*, 70 Cal. App. 2d 721, 726 (1945) ("cause of action had not yet accrued."); *Maguire v. Hibernia Sav. & Loan Soc.*, 23 Cal. 2d 719, 736 (1944) (no laches in case of "rights originating many years past"). TBC's laches cases are distinguishable. In *Jarrow*, the plaintiff waited four years after expiration of statute of limitations to have lab tests done, 304 F.3d at 835. In *Miller v. Glenn Miller Prods.*, years of financial

As an equitable defense, laches does not apply to actions at law or where the defendant has unclean hands. *Quick v. Pearson*, 186 Cal. App. 4th 371, 380 (2010).

H. TBC Cannot Meet Its Burden As To Laches

Genuine issues of material fact preclude summary judgment with respect to the fact-intensive issues of prejudice and reasonableness of delay.

As to prejudice, TBC utterly fails to substantiate any evidentiary prejudice, TBC Br. at 25:21-23, and while TBC's Statement of Uncontroverted Facts asserts that Spain provided funds to purchase the Baron's *entire Collection*, and provided a building to house the *entire Collection*, and agreed to provide operational funding for the *museum as a whole*, SUF ¶¶ 14, 17, 19, 20, 22, TBC points to no evidence of prejudice that is tied to the Painting itself.

TBC admits that the acquisition of the Baron's Collection was a deal of grand scale, including ***775 works and dedication of a palace***. SUF ¶¶ 17, 19. The Painting is just one of the works (a tiny fraction of a percent of the Collection). TBC offers no evidence

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statements put plaintiff on notice, 454 F.3d at 980. In *Boone*, a Title VII case, EEOC officials repeatedly informed the plaintiff of his right to sue, 609 F.2d at 958. In *Piper*, the Seventh Circuit rejected the laches defense, 741 F.2d at 933-934. In addition, as Plaintiffs' causes of action do not arise under substantive federal law, the defense of laches is governed by California law. 28 U.S.C. § 1606. TBC does not argue that either Swiss or Spanish law recognizes the doctrine of laches. Dkt. 249-1 (TBC MSJ); Dkt. 249-27 (Rule 44.1 Notice re foreign law). Disputed issues of fact exist even if federal law were applied.

whatsoever that the Painting takes up more than a minuscule amount of space in Villahermosa Palace, that the palace, or any part of it, would have been excluded from the deal but for the Painting, that the financial terms (or any other terms) of the acquisition agreement would have been different but for the Painting, or that inclusion of the Painting had any other material impact on the museum or the deal that is now causing prejudice. SUF ¶¶ 1-34.

In any event, TBC itself (and the Baron who controlled half of its board) are responsible for any prejudice and knowingly took a risk. GIMF ¶ 113. Both TBC and the Baron had reason to know that the provenance of the Painting was questionable. *Id.* ¶¶62-71. The Painting had been in Berlin. *Id.* ¶64. Their documentation provided no explanation for how the Painting got to the United States. *Id*. Pissarros were known to be frequent subjects of Nazi looting. *Id.* ¶66. The Baron had paid a below-market price. *Id.* ¶¶62-63. They withheld information from the lawyers conducting the title investigation, *id.* ¶¶95-97, and the lawyers notified them of the risks, *id.* ¶¶100-102. The cause of any prejudice is their own.

Because TBC cannot show undisputed facts as to prejudice, it is not entitled to summary judgment regardless of the issue of delay. In any event, the record also precludes a finding that it is undisputed that any delay here was unreasonable.

TBC does not contend that Plaintiffs unreasonably delayed prior to 1958 or after Claude learned that the Painting might actually still exist. TBC Br. at 25:12. Any such argument would have no merit. *See supra* section IV.G.

Nor is there merit in the contention that Lillie or Claude unreasonably delayed in the intervening years. Lilly died in 1962, and by the time she moved to the United States in 1958, she was in poor health. GIMF 143. At the time of her death, her earlier efforts (maintaining a Berlin Cassirer Gallery label on the back of the Painting and obtaining an influential, published CORA opinion identifying her as the owner and identifying the Painting by name), were more than adequate to put any subsequent acquirer on notice of her claim. *Id.* ¶¶48-49, 62-71.

Claude, for his part, reasonably believed the Painting had been lost or destroyed during the war. *Id.* ¶145. Neither Shoenberg nor SHG exhibited the work publicly at any time. *Id.* ¶55. After its transfer to the Baron, neither he nor TBC ever publicly exhibited it in the United States. *Id.* ¶81, 122. In Switzerland, the Baron kept the Painting in a bedroom, not on public display. *Id.* ¶107. Claude had no connection to Spain or Switzerland. *Id.* ¶136-141, . He was not a sophisticated art collector. *Id.* ¶146. He did not speak Spanish, and English was not his first language. *Id.* ¶148. He was not a college graduate. *Id.* ¶147. Claude had no connection to Cassirer family members who had given the Painting to Lilly; indeed, they had passed away decades earlier. *Id.* ¶149.[13]

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[13] TBC contends that the Frick library in New York contained a typed catalogue card identifying Shoenberg's possession of the Painting. SUF ¶ 2 & TBC Ex. 17. TBC, however, has provided no evidence that this card existed or was publicly available at the Frick at any time relevant to establishing laches. GIMF 56.

In addition, TBC has provided no evidence that a reasonable search would have uncovered either the Frick card or a 1954

TBC and the Baron, for their part, disseminated false provenance information about the Painting, making it less likely that anyone would link the Painting to Nazi looting and the Cassirer family. They concealed that the Painting had passed though Germany and the United States and instead created the false impression that it had remained in France at all times prior to the Baron's acquisition. *Id.* ¶¶125-129. These statements were knowingly false given that they had within their possession the Berlin label on the back of the Painting and the paltry provenance information from SHG, directly contradicting the information they disseminated. *Id.* ¶¶64-73. Had the Baron and TBC not been dishonest, Claude may well have learned of his claim earlier. Their dishonesty prevents a finding of unreasonable delay and shows sufficient unclean hands to preclude summary judgment on laches.

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article from the London-based *The Connoisseur* periodical that TBC also has cited. SUF ¶ 2 & TBC Ex. 17 & 18; GIMF ¶56. The Frick is not a leader in provenance research for Pissarros and to this day the Frick maintains incorrect provenance information concerning the Painting. *Id.* ¶59. Neither SHG (located less than a 10-minute walk from the Frick), nor the Baron, nor TBC obtained these materials in connection with their acquisitions. *Id.* ¶60. The parties involved in the Germany proceedings – including the German government – did not find it, despite their extensive efforts in litigating the issue of ownership. *Id*. Even as of 2005, TBC did not identify Shoenberg as part of the Painting's provenance or identify either the Frick photo card or 1954 article from *The Connoisseur* in its official list of the Painting's provenance and publications. *Id.* ¶106.

Newspaper articles that refer to TBC's acquisition of the Baron's collection did not identify the Painting. *Id.* ¶86.

V. CONCLUSION

For the foregoing reasons, TBC's Motion should be denied.

DATED: April 20, 2015

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APPENDIX I

Federal Rule of Civil Procedure 44.1 – Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.