# 18-634-cv

## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

LAUREL ZUCKERMAN, as Ancillary Administratrix
of the estate of Alice Leffmann,
*Plaintiff-Appellant*,

*v.*

THE METROPOLITAN MUSEUM OF ART,
*Defendant-Appellee*.

On Appeal from the United States District Court
for the Southern District of New York, No. 16-cv-7665
Before the Honorable Loretta A. Preska, U.S. District Judge

**BRIEF FOR DEFENDANT-APPELLEE**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The Metropolitan Museum of Art certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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## JURISDICTIONAL STATEMENT

The Museum agrees with Plaintiff-Appellant's Jurisdictional Statement. In addition, the amount in controversy exceeds $75,000, exclusive of interest and costs. *See* A32 (Am. Compl. ("AC") ¶ 6).

## STATEMENT OF THE ISSUES

1. Did the district court properly dismiss the Amended Complaint for failure to allege duress?
2. Should the dismissal be affirmed on the additional grounds of ratification, the good faith purchaser doctrine, statute of limitations, and/or laches?

## INTRODUCTION

The district court dismissed under Fed. R. Civ. P. 12(b)(6) Plaintiff Laurel Zuckerman's claims that the Swiss estate of Alice Leffmann (the "Estate") is the rightful owner of Pablo Picasso's *The Actor* (the "Painting") and for conversion and replevin. That dismissal should be affirmed. The Metropolitan Museum of Art (the "Museum") has owned and publicly displayed the Painting since 1952, when it was donated to the Museum by New York collector Thelma Chrysler Foy. Foy had purchased it in New York in 1941 through a gallery that had it on consignment from dealer Paul Rosenberg. Rosenberg and another dealer, Hugo Perls, purchased the Painting in 1938 (the "1938 Sale") through a third dealer in Paris from collector Paul Leffmann.

Paul Leffmann ("Leffmann") and his wife, Alice (together, the "Leffmanns"), were German Jews from Cologne who—in the aftermath of the Nuremberg Laws—lost a significant amount of their wealth through below-market sales to "Aryan" buyers in 1935 and 1936. In April 1937, they fled Nazi Germany and resettled in Florence, Italy. The following year, in June 1938, the Leffmanns sold the Painting on the open market in Paris after turning down at least two other offers. The Painting itself was in Switzerland at the home of an art historian, Professor Heribert Reiners, who had it for a number of years prior to the 1938 Sale. Several months later, in the face of rising anti-Semitism in Fascist Italy, the Leffmanns moved to Switzerland, where they lived until 1941 and ultimately settled after the War.

It is undisputed that the 1938 Sale occurred on the open market in Paris between private parties. It is also undisputed that there were no Nazis or Fascists involved in the 1938 Sale. Indeed, Plaintiff's claim is *not* that any Nazis or Fascists affirmatively threatened or coerced the Leffmanns to agree to the 1938 Sale. Rather, Plaintiff claims that the 1938 Sale was tainted by duress from the overall "circumstances in Fascist Italy," A33 (AC ¶ 9) in the sense that the situation in Italy had become tense and fearful for Jews and the Leffmanns had responded to these developments by "[t]rying to raise as much cash as possible for the flight and whatever the future would bring." A42 (AC ¶ 36).

The district court properly dismissed Plaintiff's claim, not for any failure to appreciate this historical context or the gravity of these allegations—which the court accepted as true and recounted almost verbatim in its opinion—but rather because Plaintiff's allegations do not satisfy any of the elements of duress in connection with the 1938 Sale. Indeed, Plaintiff's claim fails for five independent legal reasons, any one of which, standing alone, is sufficient to affirm the dismissal of the Amended Complaint for failure to state a claim under Rule 12(b)(6).

First, as the district court correctly held, Plaintiff fails to plead under both New York law and Italian law any of the elements of duress in connection with the 1938 Sale.[1] SPA26-35. She has not alleged any "wrongful threat" directed at Leffmann for the purpose of coercing or extorting his consent. SPA31-32. Nor has she alleged facts to show that Leffmann was precluded from exercising his own "free will" and left with "no other alternative." SPA33-35. To the contrary, Leffmann took months or even years deciding to sell the Painting on the international art market, A40-43 (AC ¶¶ 28, 32, 33, 36), explored the possibility of selling it through multiple dealers in Paris, A40 (AC ¶ 28), negotiated with several potential buyers prior to the 1938 Sale, A41-43 (AC ¶¶ 33, 36-37), sought to

[1] The district court did not need to engage in a choice-of-law analysis to reach that conclusion because it properly held that there is no dispositive conflict between New York law and Italian law. Both are fatal to Plaintiff's theory of duress. In the alternative, and for the avoidance of doubt, the court correctly decided that, in the event of a dispositive conflict between New York and Italian law, New York's choice-of-law rules would require application of New York law.

"improve his leverage to maximize" the sale price, A43 (AC ¶ 36), rejected at least two other offers, A41-43 (AC ¶¶ 33, 36), and "finally accepted" the offer of dealers Rosenberg and Perls, A43 (AC ¶ 37), apparently because it matched or exceeded the highest previous offer Leffmann had received, A42-43 (AC ¶ 36). As these allegations demonstrate, Leffmann faced no wrongful threat specific to the 1938 Sale and was not precluded from exercising his "free will" when he considered his options and agreed to the transaction. SPA34.

Plaintiff cites no precedent for invalidating a sale in similar circumstances and instead effectively asks this Court to create a new law of duress to encompass her theory. This Court should deny that request, not only because it would cast doubt on the well-settled rights and expectations of untold numbers of good-faith owners of property sold under similar circumstances, but also because it would deny the will of the Leffmanns themselves, who chose to sell the Painting on the open market in 1938 and subsequently chose not to make a claim for the Painting when they brought other Nazi-era claims in the post-War years. Moreover, Plaintiff's desire to expand the law of duress has no workable limit if it were to encompass this scenario, in which private parties negotiated at arms' length on the open market and agreed to a sale without any involvement by the Nazis or Fascists. Plaintiff's other theories for invalidating the 1938 Sale—*i.e.*, that it was "unconscionable" under New York law, Br. 50-51, or violated rules of "public

order" or "public morals" under Italian law, Br. 72-79—are also unavailing. Those laws are inapposite here, as they prohibit unlawful agreements and do not apply to an open-market sale of artwork for value following an arms'-length negotiation between private parties.

Second, affirmance here is warranted for the independent reason that, even assuming Plaintiff could plead duress, good title was nonetheless conveyed to Rosenberg and Perls because Leffmann subsequently "ratified" the 1938 Sale. Under both New York and Italian law, a victim of duress must repudiate the transaction within a reasonable period after the duress subsides or he will be deemed to have ratified the sale. Here, Leffmann retained the proceeds of the 1938 Sale, A46 (AC ¶ 47), and failed to repudiate it when the alleged duress had passed. Leffmann lived until 1956—roughly eleven years after the end of the Nazi era—and his wife lived ten more years, until 1966, yet there is no allegation that either of them ever disavowed the 1938 Sale.

Plaintiff has suggested that the Leffmanns had no viable remedy, *see* Br. 43, A261, A286 (Decl. of Prof. Marco Frigessi ("Frigessi") ¶ 72), but this was no longer true after the War. As Plaintiff is aware, the Leffmanns engaged a sophisticated law firm in the post-War years and successfully brought numerous claims for their Nazi-era losses. Tellingly, however, those claims did not include a

claim for the Painting or the 1938 Sale.[2] Under these circumstances, affirmance is warranted on the ground that Leffmann ratified the 1938 Sale.

Third, affirmance is also warranted on the ground that, even assuming duress and a lack of ratification, good title to the Painting nonetheless passed to collector Thelma Chrysler Foy in 1941 when she purchased the Painting for value in good faith through a gallery in New York that had it on consignment from Rosenberg, and she conveyed that good title to the Museum when she donated the Painting to the Museum in 1952. A47 (AC ¶ 53).

Fourth, affirmance is also justified for the additional reason that Plaintiff's claim is barred by the statute of limitations. New York's three-year limitations period for such actions expired decades ago while Alice Leffmann was alive and the Estate's rights in property—if any—are limited to the rights of the deceased at the time of death. Moreover, the claim here was not tolled by New York's demand-and-refusal rule or revived by the Holocaust Expropriated Art Recovery ("HEAR") Act, which does not apply here.

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[2] The Museum obtained the Leffmanns' extensive post-War claims files from the German government and provided complete copies of those files to Plaintiff and her counsel many years ago. Although the Amended Complaint is replete with facts taken selectively from those files, it omits any mention of the post-War claims or the fact that the Leffmanns chose not to include a claim for the Painting. A court is free to consider information beyond the four corners of the complaint for purposes of a Rule 12(b)(6) motion where, as here, "plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991); *see also* A370-371.

Fifth and finally, affirmance is also proper on the independent ground of laches. The Leffmanns and the Estate—which was administered roughly five decades ago in Switzerland—unreasonably delayed bringing any claim based on the 1938 Sale, which occurred approximately 80 years ago. Moreover, that delay caused prejudice to the Museum, as witnesses are no longer living and evidence has been lost. Regardless of the time it took Plaintiff to learn about the 1938 Sale, all the relevant facts were known to the Leffmanns from the moment of the 1938 Sale. The doctrine of laches would have barred this claim within a reasonable period following the end of the War and before either of the Leffmanns passed away in 1956 and 1966, respectively. The claims remain barred by laches today.

Plaintiff suggests that none of these "normal" rules should apply to a Nazi-era case and relies heavily on U.S. policy for that proposition, but the policies she cites instead help demonstrate the correctness of the district court's decision. The Washington Conference Principles on Nazi-Confiscated Art (the "Washington Principles") and The Terezin Declaration on Holocaust Era Assets and Related Issues (the "Terezin Declaration"), by their terms, do not compel the result Plaintiff seeks here. Nor do they suggest that well-settled duress law is inapplicable in a case such as this. Rather, those policies urge stakeholders to facilitate the "just and fair" resolution of claims to "Nazi-confiscated and looted art" and "art confiscated, sequestered and spoliated, by the Nazis, the Fascists and

their collaborators through various means including theft, coercion, … confiscation, … forced sales and sales under duress." Br. 26, 29 (quoting the Washington Principles and the Terezin Declaration). Although this case is not even allegedly such a case—and although those policies are not law and do not bind U.S. courts—the district court decided this case in a manner consistent with those policies, accepting as true all of Plaintiff's allegations and delivering a "just and fair" resolution on the merits of her claim.

Plaintiff describes the HEAR Act as part of her policy argument, Br. 28-30, but that law merely extends the period in which to bring certain claims involving "confiscated," "stolen," or "misappropriated" art or other property "lost" at the hands of the Nazis. Pub. L. No. 114-308 §§ 3-5, 130 Stat. 1524, 1525-1526. The HEAR Act does not create or alter substantive law regarding duress. Nor does it apply here, as the Painting was not stolen or otherwise "lost" at the hands of the Nazis. Even if the HEAR Act applied, it would have had no impact on the district court's decision below. The district court did not address the statute of limitations and resolved the case in a "just and fair" manner. *Id.* § 3.

The Museum shares the view that Nazi-era claims should be handled in such a manner, with appropriate sensitivity to the historical circumstances surrounding the Holocaust. Indeed, that is what happened here. As part of the Museum's commitment to handle Nazi-era claims in accordance with the principles and

guidelines established by the Association of American Museums (the "AAM") and the Association of American Museum Directors (the "AAMD"), the Museum undertook extensive research in response to Plaintiff's pre-litigation demands and inquiries. The Museum voluntarily shared with Plaintiff the full universe of relevant documents and information it collected in the course of an exhaustive, multi-year investigation into the facts and circumstances surrounding the Painting and the 1938 Sale. Based upon that careful work, the Museum ultimately concluded that the 1938 Sale was not an "illegal confiscation" or "unlawful appropriation," the AAMD and AAM standards for restitution. Nor was it an involuntary sale compelled by Nazi coercion or duress.

The Museum reached its conclusions with the benefit of voluminous research—all of which was shared with Plaintiff, and only some of which is reflected in the Amended Complaint[3]—yet, the Museum nonetheless accepted as true for purposes of its motion all the well-pleaded allegations, even those that are inconsistent with the Museum's understanding of the facts. Moreover, in the spirit of the AAM and AAMD guidelines, the Museum expressly requested dismissal on

[3] It is apparent on the face of the Amended Complaint that Plaintiff has relied upon documents from the pre-litigation investigation, while omitting key facts from her pleading. The Court could consider such information when determining the sufficiency of claims for Rule 12(b)(6) purposes, *see Brass v. American Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993), but it need not do so here because neither the Museum nor the district court has relied upon this information as a basis for dismissal.

"any or all of the merits-based grounds," not merely on the basis that the claims are time-barred. A68. Consistent with that request, the district court accepted the well-pleaded allegations as true, heard extensive oral argument from both parties, relied in the opinion only on the facts Plaintiff alleged, analyzed both New York law and Italian law, and dismissed the case for failure to allege duress under the laws of both jurisdictions. In light of the proceedings below, it cannot be said that "the District Court denied Plaintiff her day in court." Br. 7.

On appeal, Plaintiff asks this Court to reimagine the case as a life-and-death scenario in which Leffmann was forced to choose between the 1938 Sale and "an unspeakable fate," such as "imprisonment and/or death," Br. 4, 43, but that ahistorical hypothetical goes further than the allegations in the Amended Complaint and beyond what the factual record can support. It is undisputed that anti-Semitism was on the rise in Fascist Italy at the time of the 1938 Sale and that the Leffmanns (like all Jews in Italy at that moment) had ample reason to fear what the future would bring, but one cannot infer from those facts that the choice to sell the Painting was "forced" by the threat of certain death or imprisonment. Furthermore, that inference contradicts the facts alleged in the Amended Complaint (*e.g.*, that the Leffmanns continued living in Italy for months following the 1938 Sale) and is not supported by the Leffmanns' post-War claims.

Regrettably, several amici curiae have taken Plaintiff's speculation a step further, even going so far as to make false or misleading statements with no basis at all in the Amended Complaint or the factual record. Such submissions, which the Museum addresses at the end of this brief, are improper and should be disregarded. More generally, the amici curiae have advanced legal and policy arguments that closely resemble those made by Plaintiff or otherwise seem as if they were written for a different case involving Nazi-confiscated art. Although apparently not their intent, such arguments serve to highlight the difference between a true "forced sale" at the hands of the Nazis, on the one hand, and an open market sale between private parties during the Nazi era, on the other. This case concerns the latter, as the district court properly recognized when it dismissed Plaintiff's claims. SPA33. The dismissal should be affirmed.

## STATEMENT OF THE CASE[4]

### A. The Leffmanns In Germany And Italy

Leffmann was a "prosperous industrialist and investor" who lived with his wife, Alice, in Cologne, Germany. A31-33 (AC ¶¶ 2, 10). The Leffmanns acquired the Painting in 1912. A33 (AC ¶ 9). In addition, they owned "sizeable assets," including a leading manufacturing company, real estate investments, and a

[4] The Museum accepts as true the well-pleaded factual allegations only for purposes of this Motion. For all other purposes, the Museum reserves the right to contest the allegations.

stately home. A33 (AC ¶ 10). In 1935-1936, after the Nazis enacted the Nuremberg Laws and began to exclude Jews from Germany's economic and social life, the Leffmanns suffered substantial losses when they were forced to sell much of their property to Aryan corporations or individuals. A34 (AC ¶ 13). The Leffmanns fled Germany and resettled in Italy in April 1937. A35, 38 (AC ¶¶ 16, 22). Before leaving Germany, the Leffmanns found "alternative means of moving their funds abroad," including a "major avenue" that allowed them in December 1936 to purchase a house and factory in Florence, Italy, for RM 180,000. A37-38 (AC ¶ 21). After moving to Italy in April 1937, they sold their Italian house and factory—allegedly for 456,500 Lira (or about 61,622 RM) in cash—and rented a home in Florence. A38 (AC ¶ 23). They were unable to work during their time in Italy. A39 (AC ¶ 24).

**B. Leffmann's 1938 Sale Of The Painting To Rosenberg And Perls**

Soon after moving to Florence, Leffmann "began to explore the possibility of selling" the Painting "with dealers in Paris." A40 (AC ¶ 28). Previously, in 1936, he had declined an offer to sell the painting to French art dealer C.M. de Hauke with Jacques Seligmann & Company in Paris. A41 (AC ¶ 33). "In April 1938, in the face of the growing Nazi persecution spreading across Europe and into Italy, [Leffmann] escalated his efforts to liquidate [the Painting]." A41 (AC ¶ 32). On April 12, 1938, he "reached out to de Hauke asking him if he would be

interested in purchasing the Painting." A41 (AC ¶ 33). In May 1938, Leffmann "continued to try to sell the Painting" in an effort to "raise as much cash as possible for the flight and whatever the future would bring." A42-43 (AC ¶ 36). Leffmann wrote to de Hauke that he "had already rejected an offer obtained through another Paris dealer" for "$12,000 (net of commission)"; Leffmann was "trying to improve his leverage to maximize the amount of hard currency he could raise." *Id.* Prior to and at the time of the 1938 Sale, the Painting was with Professor Heribert Reiners in Switzerland where it was "saved from Nazi confiscation." A35 (AC ¶ 14).

In June 1938, Leffmann "finally accepted" an offer of $13,200 for the Painting; the offer came through Käte Perls, a German-Jewish émigré and Paris dealer who allegedly was acting on behalf of her ex-husband Hugo Perls, also a German-Jewish émigré, and Paul Rosenberg, a French-Jewish dealer—who bought the Painting together. A42-43 (AC ¶¶ 36-37). The $13,200 sales price matched or exceeded the highest previous offer Leffmann had received for the Painting. *Id.* The Leffmanns received and retained the proceeds of the 1938 Sale, and continued to live in Italy until after the first anti-Semitic laws were enacted; they moved to Switzerland in October 1938. A45-46 (AC ¶¶ 43, 47).

### C. Rosenberg's Sale Of The Painting To Foy In 1941

In 1939, Rosenberg loaned the Painting to the Museum of Modern Art in New York, and soon thereafter offered it for sale in New York by placing it on consignment with M. Knoedler & Co. Gallery. A47 (AC ¶¶ 52-53). In 1941, three years after Leffmann had sold the Painting, Thelma Chrysler Foy purchased the Painting from Rosenberg, through the Knoedler gallery, for $22,500. A47 (AC ¶ 53).

### D. Foy's Donation Of The Painting To The Museum In 1952

Foy donated the Painting to the Museum in 1952, where it has remained ever since. A47 (AC ¶ 54). The Museum first published the provenance of the Painting in 1967; it listed the owners as "P. Leffmann, Cologne (in 1912); a German private collection (until 1938)." A48 (AC ¶ 57). Before publishing this provenance, the Museum interviewed Hugo Perls, who recalled purchasing the Painting in 1938 from a "German professor" in Switzerland, A49 (AC ¶ 62), apparently referring to Professor Reiners, the German art historian who had custody of the Painting in Switzerland. A35 (AC ¶ 14). This may explain how "German private collection (until 1938)" became part of the provenance. A49 (AC ¶ 62). After the Museum learned that Leffmann had owned the Painting until the 1938 Sale, it revised the provenance. A49 (AC ¶ 63).

### E. The Leffmanns After The 1938 Sale

After selling the Painting, the Leffmanns continued to live in Italy until they relocated to Bern, Switzerland in October 1938. A45-46 (AC ¶¶ 43, 46). The Leffmanns obtained temporary Swiss residence permits and apparently had assets sufficient to satisfy strict "asset requirements" in Switzerland. A44-45 (AC ¶ 42). In addition, Swiss authorities "required emigrants to pay substantial sums through a complex system of taxes and 'deposits.'" A45 (AC ¶ 44).

After living in Switzerland for three years, the Leffmanns moved to Brazil for the duration of the War. A45-46 (AC ¶¶ 46-48). The Leffmanns relocated to Brazil, paid "bribes that were typically required to obtain necessary documentation," deposited at least U.S. $20,000 in the Banco do Brasil, paid a "levy" of $4,641 imposed by the Brazilian government, and lived in Brazil for six years. *Id*. In 1947, the Leffmanns relocated again to Zurich, Switzerland, A46 (AC ¶ 48), where they lived for the rest of their lives: Paul Leffmann died in 1956, A46 (AC ¶ 49), leaving Alice as his sole beneficiary. A31 (AC ¶ 1). Alice died in 1966, A46 (AC ¶ 50), leaving to 12 residuary beneficiaries the bulk of her Estate, which was administered soon after her death by the Zurich bank, Schweizerische Bankgesellschaft, now UBS. A177.

### F. The Plaintiff And The Claim

Plaintiff is the Leffmanns' great-grandniece. Although she is neither the executor nor a beneficiary of the Estate, she was appointed Ancillary Administratrix by the New York Surrogate's Court. A31-32 (AC ¶¶ 1, 4). Her Amended Complaint asserts claims for conversion and replevin, on the theory that the 1938 Sale was made under duress.

### G. The District Court's Dismissal Of The Claim

The district court accepted as true all of Plaintiff's well-pleaded allegations. SPA3. It found no outcome-determinative difference between Italian and New York law. SPA49. It concluded that "under either law, Plaintiff fails to state a claim for relief," and "[a]ccordingly, dismissal is required under Fed. R. Civ. P. 12(b)(6)." *Id.* The district court went on to rule, in the alternative, that "to the extent that a difference is perceived between Italian and New York law, New York's choice-of-law analysis prescribes that New York law is applicable to the 1938 transaction." *Id.* The court reiterated its conclusion that Plaintiff failed to state a claim under New York law. *Id.*

## STANDARD OF REVIEW

This Court reviews de novo the district court's decision to grant the Museum's motion to dismiss for failure to state a claim upon which relief can be granted. *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 124 (2d Cir. 2008).

As the district court correctly stated, "[i]n considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must 'accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor.'" SPA22 (quoting *Phelps v. Kapnolas*, 308 F.3d 180, 184 (2d Cir. 2002)). Although well-pleaded allegations must be accepted as true, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* As the district court correctly explained, "[d]eciding whether a complaint states a claim upon which relief can be granted is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" SPA22 (citing *Rahman v. Schriro*, 22 F. Supp. 3d 305, 310 (S.D.N.Y. 2014) (quoting *Iqbal*, 556 U.S. at 679)).

## ARGUMENT

The district court correctly dismissed Plaintiff's claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The district court began by correctly concluding that it is unnecessary to conduct a choice-of-law analysis because there is "no outcome-determinative difference between Italian and New York law." SPA49. For the avoidance of doubt, however, the district court also reached the

proper conclusion, in the alternative, that to the extent there is any dispositive difference between Italian and New York law, "New York's choice-of-law analysis prescribes that New York law is applicable to the 1938 transaction." *Id.* Next, the district court properly held that dismissal is required for failure to state a claim under Fed. R. Civ. P. 12(b)(6) on the ground that Plaintiff failed to plead the elements of duress under both New York and Italian law. *Id.* As shown below with respect to each of these steps, the district court's analyses and holding are correct. The dismissal may be affirmed on all of the bases set forth by the court—*i.e.*, Plaintiff's failure to plead facts sufficient to satisfy each of the elements of duress—or on the more narrow basis of Plaintiff's failure to plead any particular one of these elements.

In addition, there are four independent grounds on which this Court may affirm the dismissal, including that (1) even assuming Plaintiff had properly pleaded duress, Leffmann ratified the 1938 Sale by retaining the proceeds and choosing not to repudiate it; (2) even assuming Plaintiff had properly pleaded duress and that the 1938 Sale was never ratified, good title nonetheless passed to good-faith purchaser Foy as a result of the open market sale in New York in 1941; (3) Plaintiff's claim is barred by the statute of limitations; and (4) Plaintiff's claim is barred by the doctrine of laches. Following the discussion of Plaintiff's failure to plead duress, we address in turn each of these additional bases for affirmance.

## I. THE DISTRICT COURT PROPERLY DISMISSED THE AMENDED COMPLAINT ON THE GROUND THAT PLAINTIFF FAILED TO PLEAD DURESS

### A. The District Court Properly Concluded That A Choice-of-Law Analysis Is Unnecessary

The district court was correct to apply New York's choice-of-law rules on the ground that jurisdiction here is predicated on diversity. SPA24 (citing *Bakalar v. Vavra*, 619 F.3d 136, 139 (2d Cir. 2010) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941))). The court was also right to decide first—as required by New York choice-of-law rules—whether there is an actual conflict of laws "upon which the outcome of the case is dependent." SPA25 (citing *Bakalar*, 619 F.3d at 139); *see also* SPA24 (citing *Federal Ins. Co. v. American Home Assurance Co.*, 639 F.3d 557, 566 (2d Cir. 2011)). As Plaintiff concedes, absent any dispositive difference between New York and Italian law, there is no genuine conflict to resolve and thus no reason to engage in a choice-of-law analysis. SPA24-25; Br. 63 (admitting that a choice-of-law analysis under New York law is required only if "New York and Italian laws diverge in a determinative manner").

Here, as the district court properly held, there is no dispositive difference between New York and Italian law. SPA26. "Under New York law, 'to void a contract on the ground of economic duress,' Plaintiff must plead and show that the 1938 transaction 'was procured by means of (1) a wrongful threat that (2) precluded the exercise of its free will.'" SPA31 (quoting *Interpharm, Inc. v.*

*Wells Fargo Bank, N.A.*, 655 F.3d 136, 142 (2d Cir. 2011) (citing *Stewart M. Muller Constr. Co. v. New York Tel. Co.*, 359 N.E.2d 328, 390 (N.Y. 1976)). New York law further provides that "[t]o prove economic duress, a party seeking to void a contract must plausibly plead that the [contract] in question was procured by (1) a threat, (2) which was unlawfully made, and (3) caused involuntary acceptance of contract terms, (4) because the circumstances permitted no other alternative." SPA31 (quoting *Kramer v. Vendome Group LLC*, 11 Civ. 5245, 2012 WL 4841310, at *6 (S.D.N.Y. Oct. 4, 2012)); *see also Kamerman v. Steinberg*, 891 F.2d 424, 431 (2d Cir. 1989). Italian law—like New York law—requires the party claiming duress to plead and prove the same type of "*specific and concrete threat of harm, purposefully presented by its author* to extort the victim's consent.'" SPA27 (quoting Decl. of Prof. Pietro Trimarchi ("Trimarchi") ¶ 13 (A382)) (court's emphasis); *see also* A312 (1865 Ital. Civil Code, arts. 1108, 1111-1113) (requiring a specific, concrete threat of considerable and unjust harm). Under Italian law, like New York law, the wrongful threat must "induce[] the victim to enter into a contract that would not otherwise have been concluded." SPA26 (quoting Trimarchi ¶¶ 13, 26 (A382, 387)). Plaintiff does not contest that New York law and Italian law are the same in these respects.

The district court properly noted one difference between New York and Italian law: New York law requires the counterparty to be the source of the

wrongful threat. SPA31 (citing *Mandavia v. Columbia Univ.*, 912 F. Supp. 2d 119, 127-128 (S.D.N.Y. 2012), *aff'd*, 556 F. App'x 56 (2d Cir. 2014); *Kramer*, 2012 WL 4841310, at *6). Here, Plaintiff failed to plead that the counterparties, Rosenberg and Perls, were the cause of the alleged duress. This failure, however, does not affect the choice-of-law analysis. As the district court correctly concluded, Plaintiff fails to plead all the elements of duress under both New York and Italian law. Thus, even assuming Plaintiff had sufficiently pleaded that the buyers of the Painting had wrongfully threatened the Leffmanns (which she has not), her claim still would fail under the other elements of duress, as held by the district court. For this reason, New York's requirement that the counterparty be the source of the wrongful threat did not by itself determine the outcome of dismissal. *See* SPA25 (citing *Bakalar*, 619 F.3d at 139). As the district court concluded, there is no need to engage in a choice-of-law analysis as New York and Italian law do not differ in any dispositive way.

Plaintiff urges this Court to apply the doctrine of "dépeçage" and analyze the choice-of-law issues on a transaction-by-transaction basis, Br. 64 (citing *Bigio v. Coco-Cola Co.*, 675 F.3d 163, 169 (2d Cir. 2012)), but that approach would yield the same result here. Taking the 1938 Sale in isolation, the first step in any choice-of-law analysis—as Plaintiff concedes (at Br. 63)—is to determine whether there is any genuine conflict of laws "upon which the outcome of the case is dependent."

SPA25 (citing *Bakalar*, 619 F.3d at 139). As discussed, there is no genuine conflict between the New York and Italian laws of duress; both require, at a minimum, a wrongful threat directed at the victim for the purpose of obtaining his consent. SPA26-31. As *Bigio* makes clear, the fact that the two laws "may differ in some respects" is irrelevant if, as here, "they each at a minimum require" elements that have not been sufficiently pleaded. 675 F.3d at 173 (comparing causation requirements under New York and Georgia law).

Plaintiff does not clearly contest this conclusion, and instead tries to have it several different ways. First, she urges the Court to be guided by U.S. policy (Br. 25-33), which she claims has been "adopted by New York courts" (Br. 69). Second, she suggests that New York law and Italian law are essentially in accord. Br. 9-10. Third, she contends that, to the extent the laws are inconsistent, Italian law should apply. Br. 9. Fourth, she contends that, to the extent Italian law "does not provide relief to Plaintiff in a manner consistent with U.S. policy, as adopted by New York courts, then the Court should apply New York law." Br. 69. In short, Plaintiff's approach to the choice-of-law question is to apply whichever combination of policy and law might favor her substantive arguments. This is not how applicable law is chosen. In contrast, the district court's approach adheres to New York choice-of-law rules in concluding that there is no outcome-determinative difference between New York law and Italian law on the issue of

duress and thus no choice-of-law analysis is even necessary. SPA26. That conclusion should be affirmed.

### B. The District Court Properly Concluded, In The Alternative, That If A Choice-of-Law Analysis Were Necessary, It Would Require Application Of New York Law

For the avoidance of any doubt, the district court also reached the proper conclusion, in the alternative, that to the extent there is any dispositive difference between Italian and New York law, "New York's choice-of-law analysis prescribes that New York law is applicable to the 1938 transaction." SPA49; *see id.* 35-49. "Plaintiff and Defendant agree that New York applies an 'interest analysis' to choice-of-law questions" in these circumstances. SPA36 (citing A256 (Pl. Opp.); A364 (Def. Rep.)). This test requires the court to apply the laws of the jurisdiction that "has the greatest interest and is most intimately concerned with the *outcome* of [a given] litigation." *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 333 N.E.2d 168, 173 (N.Y. 1975); *see also* SPA36-37 (citing *Bakalar*, 619 F.3d at 144; *Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 337 (2d Cir. 2005); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002); *John v. Sotheby's, Inc.*, 858 F. Supp. 1283, 1289 (S.D.N.Y. 1994), *aff'd*, 52 F.3d 312 (2d Cir. 1995); *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277 (N.Y. 1993)).

"Here, as in *Bakalar*, New York has 'the greatest interest in,' and 'is most intimately concerned with, the *outcome*' of, this litigation." SPA41-42 (first quoting *Bakalar*, 619 F.3d at 144; and then quoting *Sotheby's*, 858 F. Supp. at 1289 (court's emphasis)). The Painting has been in New York for nearly 80 years. SPA42. It was brought to New York no later than 1939, loaned to another New York museum (the Museum of Modern Art) that year, sold to a New York collector through a New York gallery in 1941, and donated to the Museum in 1952. *Id.* (citing AC ¶¶ 5, 52-54 (A32, 47)). It has been publicly displayed by the Museum, "a major New York cultural institution," for the past 66 years. *Id.* (citing AC ¶¶ 5, 54 (A32, 47)). These undisputed and overwhelming connections to New York led the district court to properly conclude—as this Court concluded on analogous facts in *Bakalar*—that New York has the greatest interest in this case. SPA41-43.

Plaintiff urges a different type of analysis focused on where the Leffmanns were *located* at the time of the 1938 Sale, Br. 65 (citing *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009)), but New York has rejected the *situs* approach to choice-of-law questions, *see*, *e.g.*, SPA39-40 (quoting this Court's holding in *Bakalar*, 619 F.3d at 143-144, noting New York's rejection of the "situs" rule); *see also* SPA46-47 (rejecting "hybrid" approach in *Schoeps*, 594 F. Supp. 2d at 465, which improperly conflates the traditional "situs" rule and the

"interest analysis"). Plaintiff further contends that Italy "[h]as a [s]trong [i]nterest in the 1938 [t]ransaction and the [p]recipitating [c]ircumstances," Br. 65, but even if that were so, it would be beside the point. New York's "interest analysis" focuses on the jurisdiction that has the greatest interest in the current litigation. *See Bakalar*, 619 F.3d at 144. Nor does it matter that Italy is where the Leffmanns lived in 1938 and supposedly "would have remained had they not been forced out." Br. 68. The "situs" of the sellers in 1938 is not sufficient to show that Italy has an ongoing interest in the current dispute that exceeds New York's interest, especially given that the Painting was never in Italy and the parties before this Court are not Italian.[5]

Under these circumstances, the district court was correct to conclude that New York has the "greatest interest" in the litigation and, therefore, that—to the extent there is any genuine conflict of laws—New York law should apply.

### C. The District Court Properly Concluded That Plaintiff Fails To Plead Duress Under Both New York And Italian Law

To establish duress under New York law, the burden is on Plaintiff to "plead and show that the 1938 transaction 'was procured by means of (1) a wrongful threat that (2) precluded the exercise of its free will.'" SPA30-31 (quoting *Interpharm*, 655 F.3d at 142; citing *Stewart M. Muller Constr. Co. v. New York*

[5] Notably, Plaintiff concedes "the Court should apply New York law" in the event Italian law "does not provide relief," which it does not. *Supra* p. 22.

*Tel. Co.*, 359 N.E.2d 328 (N.Y. 1976)); *see also Kramer*, 2012 WL 4841310, at *6 ("To prove economic duress, a party seeking to void a contract must plausibly plead that the release in question was procured by (1) a threat, (2) which was unlawfully made, and (3) caused involuntary acceptance of contract terms, (4) because the circumstances permitted no other alternative.")).

Italian law, like New York law, requires Plaintiff "to plead and prove 'a specific and concrete threat of harm' that 'induced the victim to enter into a contract that would not otherwise have been concluded.'" SPA26 (citing Trimarchi ¶¶ 13, 26 (A382, 387)). Under Italian law, the wrongful threat must be "*specific and concrete*" and "*purposefully presented by its author* to extort the victim's consent.'" SPA27 (quoting Trimarchi ¶ 13 (A382)) (court's emphasis); *see also* A312 (1865 Ital. Civil Code, arts. 1108, 1111-1113) (requiring a specific, concrete threat of considerable and unjust harm).

As the district court correctly held, Plaintiff here fails to plead any of the elements of duress under both New York and Italian law.

First, Plaintiff has failed to plead an affirmative, wrongful threat connected to the 1938 Sale. SPA28, 32. Instead, she alleges that the "circumstances in Fascist Italy" caused Leffmann to sell the Painting. A33 (AC ¶ 9); *see also* Br. 48-49. According to Plaintiff, the "circumstances facing the Leffmanns as of June 1938" included, *inter alia*, the prior threats they had faced in the past in Nazi

Germany as well as the anticipated threats they expected to face in the future as Fascist Italy became more dangerous. Br. 48. As the district court correctly held, however, it simply is not enough to plead duress from a broad set of circumstances not specifically directed at the Leffmanns. SPA27, 31-32. Rather, duress requires allegations of a particular "wrongful threat" that is both specific to the victim and sufficiently coercive to induce his consent. *See Interpharm*, 655 F.3d at 142, 147-148 (requiring specific threat that precludes victim's free will); *see also In re Estate of Heric*, 669 N.Y.S.2d 791, 792 (Sur. Ct. 1998) ("[A] state of mind, such as fear … (does not) constitute coercion") (quotation marks omitted); *Manufacturers Hanover Tr. Co. v. Jayhawk Assocs.*, 766 F. Supp. 124, 128 (S.D.N.Y. 1991) (no duress based only on "economic pressure in general," without affirmative coercion specific to the transaction); *Orix Credit All., Inc. v. Bell Realty, Inc.*, No. 93 CIV. 4949, 1995 WL 505891, at *4 (S.D.N.Y. Aug. 23, 1995) (citing authorities stating the same). Even in wartime, general conditions of economic hardship are insufficient to establish duress. *See Hugo V. Lowei, Inc. v. Kips Bay Brewing Co.*, 63 N.Y.S.2d 289, 290 (Sup. Ct. 1946); *see also Bethlehem Steel Corp. v. Solow*, 405 N.Y.S.2d 80, 82 (App. Div. 1978) (citing *Lowei*, 63 N.Y.S.2d at 290).

Plaintiff cites *Reif v. Nagy*, No. 161799/2015, 2018 WL 1638805 (N.Y. Sup. Ct. Apr. 5, 2018), for the proposition that the "ordinary rules" do not apply in Nazi-era cases, Br. 30, but that case further illustrates the insufficiency of

Plaintiff's allegations here. There, the court accepted as true that Nazis had effectively looted artworks belonging to a German Jew who was being held at the time in the Dachau Concentration Camp (where he was eventually murdered) by forcing him to sign a power of attorney to his wife (who was also subsequently murdered at a different concentration camp). *Reif*, 2018 WL 1638805, at *1-4. Here, in contrast, the Nazis were not involved in the 1938 Sale and did not have custody of the Leffmanns, who had already left Germany and ultimately survived the War. Although the situation for Jews in Fascist Italy was tense and dangerous at the time of the 1938 Sale, courts have not inferred duress from general circumstances for purposes of invalidating Nazi-era transfers of art where Nazis never had possession of the artworks. *See*, *e.g.*, *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 300 (S.D.N.Y. 2011) (declining to "infer [Nazi] duress" or appropriation where there was "no … evidence that the Nazis ever possessed the Drawing" and distinguishing cases that presented "indisputable evidence of Nazi seizure"), *aff'd*, 500 F. App'x 6 (2d Cir. 2012); *see also Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 805 (N.D. Ohio 2006) (granting possessor declaratory judgment based on statute of limitations in case involving Nazi-era duress claim, noting that the transaction in question "occurred outside Germany by and between private individuals," "[t]he [p]ainting was not confiscated or looted by the Nazis," and

"the sale was not at the direction of, nor did the proceeds benefit, the Nazi regime").[6]

Italian law is in accord. Under Italian law—as under New York law—it is not enough to allege duress based on general circumstances such as rising anti-Semitism or Fascist persecutions. SPA27 ("A general state of fear arising from political circumstances is not sufficient to allege duress.") (citing Trimarchi Ex. 3 (A419-422)); *see also* A384 (Trimarchi ¶20) ("[I]t is not the mere fear of retaliation, easy to arise in the mind of citizens during the Fascist regime, in case of refusal of the requests from the dominant political party, or from some of its leaders … who requested and solicited that contract, *but a real threat of retaliation must have actually occurred*." (quoting Court of Cassation, 21 Mar. 1963, No. 697 at 858 et seq.) (emphasis added)). Instead, Italian law—like New York law—

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[6] The recent opinion in *Philipp v. Federal Republic of Germany*, No. 17-7064, 2018 WL 3352898 (D.C. Cir. July 10, 2018), is not to the contrary. There, the court's decision to exercise jurisdiction in a case against a German state museum under the Foreign Sovereign Immunities Act was based on allegations of an "unlawful taking" of medieval treasures by Nazis—including the "Führer" Adolf Hitler and Nazi leader Hermann Goering themselves—from German Jews in Nazi Germany in 1935 through the use of a "manipulated sham transaction." These Nazi leaders allegedly "targeted the Welfenschatz" and subjected the Jewish owners—who were living in Germany at the time of the transaction and the years leading up to it—to "direct personal threats of violence for being Jews and for trying to sell the Welfenschatz fairly" on the market. *Philipp v. Federal Republic of Germany*, No. 15-cv-266, 2016 WL 510536 (D.D.C.), First Amended Complaint; *see also Philipp*, 2018 WL 3352898, at *1. Here, in stark contrast, no Nazis were involved in the 1938 Sale, which occurred in Paris on the open market between private parties.

requires a specific and direct link between the persecution or threat and the transaction in question. SPA27 (stating that the threat must be "purposefully presented by its author to extort the victim's consent" (quoting Trimarchi ¶ 13 (A382))). "The generic indiscriminate persecutions of fascism … do not constitute legally significant duress pursuant to Art. 1108 of the 1865 Civil Code … when there is no specific, direct relationship between these persecutions and the legal transaction alleged to have been carried out under this act of duress." SPA27 (quoting Trimarchi Ex. 3, Corte di Appello, 9 aprile–31 agosto 1953, Rassegna Mensile Dell'Avvocatura Dello Stato 1954, IV, sez. I civ., 25 *et seq*. (A419); *see also* A384 (Trimarchi ¶ 20 n.5) ("The generic and wholesale persecutions exerted by the Fascists against their political opponents … where there is no specific and direct relationship between such persecutions and the agreement concluded allegedly as a result of duress … do not amount to duress … under Article 1108 of the Civil Code of 1865.") (quoting Court of Appeal of Rome, 9 Apr.- 31 Aug. 1953 at 25 *et seq*.).

Plaintiff is wrong to suggest (at 83) that a renowned Italian scholar, Professor Jemolo, would criticize this "narrow vision of Italian duress law" and conclude that duress does not require "an individualized threat." Professor Jemolo instead confirms the legal standard of duress under Italian law and agrees that duress requires that the threat, whether made with words or conduct, must be

specifically aimed at extorting the other party's consent. A384-385 (Trimarchi ¶¶ 19-20).[7] No such purposeful threat is alleged here.

Nor can Plaintiff salvage her claim of duress by speculating that the counterparties Rosenberg and Perls "w[ere] aware" and "took advantage" of Leffmann's allegedly desperate circumstances in June 1938. Br. 6, 40. That argument fails because New York law requires the counterparties to be the source of the wrongful threat[8] and, in any case, there are no factual allegations to support

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[7] Professor Jemolo refrs to examples of duress where a party: (a) contracted with a member or an affiliate of the Fascist regime or, at the very least, a person who was notorious for inflicting harm; and (b) had reason to fear retaliation, as other people had already been threatened or had suffered harm by the same person in similar instances. Conversely, in our case, neither a member/affiliate of the Fascist regime nor a person who was notorious for inflicting harm directly or indirectly asked or induced the Leffmanns to enter into the 1938 Sale. Pl. Addendum. ("Pl. Add.") 103-107.

[8] As the district court correctly concluded, New York law requires the counterparty—not a third-party—to be the source of the wrongful threat. SPA31 (citing *Mandavia*, 912 F. Supp. 2d at 127-128; *Kramer*, 2012 WL 4841310, at *6). Plaintiff disagrees, but the authorities she cites do not support her. Br. 38 (citing *Aylaian v. Town of Huntington*, 459 F. App'x 25, 27 (2d Cir. 2012)). In *Aylaian*, this Court rejected a claim of third-party duress on the ground that "[a]lthough third-party duress may render a contract voidable, *it cannot do so where the other contracting party gives value to the contract*." *Id*. (citing *Restatement (Second) of Contracts* § 175(2)) (emphasis added). The order says nothing about the New York law of duress and does not otherwise support Plaintiff's claim. Plaintiff's reliance on *Oquendo v. CCC Terek*, 111 F. Supp. 3d 389, 409 (S.D.N.Y. 2015), is equally misplaced. Br. 38-39. There, the court rejected a claim of third-party duress, noting the general rule in New York that "[d]uress by other than the opposing party to a contract cannot constitute compulsion sufficient to void the contract." *Oquendo*, 111 F. Supp. 3d at 409 (citation omitted). Although the court recognized the possibility of third-party duress where the counterparty has "knowledge of or consent[s] to the third party's actions," it did so only in dicta,

Plaintiff's speculation. The Amended Complaint says nothing about whether Rosenberg or Perls knew, much less took advantage, of the Leffmanns' circumstances in June 1938. Indeed, not even Käte Perls (who allegedly represented buyers Rosenberg and Hugo Perls) is alleged to have known (much less disclosed to Rosenberg and Hugo Perls) the Leffmanns' circumstances at the time of the 1938 Sale. A43 (AC ¶ 37). Dismissal of a speculative theory or claim is appropriate where, as here, the Amended Complaint "does not contain any factual allegation sufficient to plausibly suggest" another's knowledge or state of mind. *Iqbal*, 556 U.S. at 683 (explaining that unfounded claims regarding another's state of mind do not meet the Rule 8 pleading standard); *see also Biro v. Condé Nast*, 807 F.3d 541, 544-545 (2d Cir. 2015) ("Rule 8 requires that [state of mind] be plausibly pleaded and supported by factual allegations.").

Plaintiff's only purported support for her speculative claim that Rosenberg and Hugo Perls knew, and took advantage, of Leffmann's circumstances says nothing at all about either Rosenberg or Hugo Perls. Br. 40 (citing AC ¶ 38 (A43)). Rather, it pertains to another individual, Frank Perls, the son of the then-divorced dealer Käte Perls and buyer Hugo Perls; and even with respect to Frank Perls, there is no allegation that he knew Leffmann's circumstances at the time of the 1938 Sale. A43 (AC ¶ 38). Moreover, the Amended Complaint elsewhere

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without citing any binding precedent. Although it cites *Aylaian*, that case (as discussed above) did not involve the New York law of duress.

suggests that the buyer Hugo Perls did not even know that Leffmann was involved in the 1938 Sale, as Hugo Perls told the Museum nearly thirty years later (in 1967) that he bought the Painting in 1938 from "a 'German professor' in Solothurn, Switzerland," A49 (AC ¶ 62), apparently referring to Professor Reiners, who had been the custodian of the Painting at the time of the 1938 Sale. A35 (AC ¶ 14). Dismissal is appropriate where, as here, Plaintiff's speculative claim is "not even meaningfully alleged" and is otherwise "contradicted by more specific allegations in the Complaint." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995); *cf. Iqbal*, 556 U.S. at 683; *Biro*, 807 F.3d at 544-545.

Second, as the district court properly held, Plaintiff also "fails to plead that the Leffmanns entered into the 1938 [Sale] by force that 'preclud[ed] the exercise of [their] free will.'" SPA33 (quoting *Orix Credit All.*, 1995 WL 505891, at *4 (quoting *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533, 535 (N.Y. 1971))); *see also* A382 (Trimarchi ¶ 13) ("the fear induced by a specific and concrete threat of harm, purposefully presented by its author to extort the victim's consent, must have induced the victim to enter into a contract that would not otherwise have been concluded"). As evidenced by the allegations in the Amended Complaint, Leffmann exercised his free will as he "began to explore the possibility of selling [the Painting] with dealers in Paris," "escalated his efforts" to sell the Painting as circumstances grew worse "across Europe," "reached out" to a dealer

who had made an offer for the Painting two years earlier, and "continued to try to sell" the Painting through that dealer until finally negotiating the 1938 Sale. A40-43 (AC ¶¶ 28, 32-33, 36-37); *see also* SPA34 (citing AC ¶¶ 28, 32-33, 36 (A40-43)). Furthermore, Leffmann "negotiated with several parties prior to the 1938 transaction," "rejected offers from other dealers," and "attempted to 'improve [his] leverage to maximize' the sale price before ultimately accepting an offer from Perls and Rosenberg, the proceeds of which the Leffmanns retained and used in later years." SPA34 (citing AC ¶¶ 28, 32-33, 36-37, 47 (A40-43, 46)). And the 1938 Sale "occurred between private individuals, not at the behest of Nazi or Fascist officials." SPA34 (citing AC ¶¶ 28, 32-33, 36 (A40-43)). The district court rightly concluded that such allegations are fatal to Plaintiff's claim of duress as Plaintiff has not pleaded facts to show that Leffmann was "precluded" from exercising his own "free will" in agreeing to the 1938 Sale. SPA34 (citing *Manufacturers Hanover Tr.*, 766 F. Supp. at 128; *805 Third Ave. Co. v. M.W. Realty Assocs.*, 448 N.E.2d 445, 447 (N.Y. 1983)).

This conclusion was not based on any "erroneous statement" concerning the length of time it took to negotiate the 1938 Sale. Br. 42. As the district court correctly stated, it took Leffmann "nearly two years" from the time he rejected an offer in September 1936 to the time he "negotiated for its sale in June, 1938." SPA34. In any case, the particular length of time it took Leffmann to find a buyer

or negotiate the terms is immaterial. The important points recognized by the district court are that Leffmann considered his options, negotiated with multiple parties, and exercised free will in deciding when and to whom to sell the Painting. SPA34 (citing AC ¶¶ 28, 32-33, 36-37, 47 (A40-43, 46)). Specifically, as alleged in the Amended Complaint, Leffmann considered and rejected an offer from a dealer in September 1936, explored the possibility of selling the Painting with dealers in Paris as the situation grew worse in Italy, rejected another dealer's offer, tried in April 1938 to obtain a higher offer from the dealer who made the offer in 1936, and "finally decided" to accept an offer made on behalf of yet other dealers (Rosenberg and Perls) in June 1938. A40-43 (AC ¶¶ 28, 32-33, 36-37). These allegations provide strong support for the court's conclusion that, notwithstanding the broader circumstances in Italy, Leffmann exercised his free will when he "finally decided" to sell the Painting in June 1938.

Plaintiff argues that it was wrong of the district court to think in terms of "economic duress" because the circumstances in Italy in June 1938 should be thought of more like "[p]hysical compulsion, or something akin to physical compulsion," as when "a party is compelled by force to do an act that he has no intention of doing." Br. 46. But the economic duress argument comes from Plaintiff, who alleges in the Amended Complaint that Leffmann wanted to sell the Painting because he was "trying to raise as much cash as possible for the flight and

whatever the future would bring." A42-43 (AC ¶ 36); *see also id.* (alleging that the negotiations were intended to "maximize the amount of hard currency [Leffmann] could raise"). Regardless, Plaintiff's theory of duress akin to physical compulsion fails for several reasons. First, there is no allegation that a physical threat was ever directed at Leffmann, much less directed at him for the purpose of extorting his consent to the 1938 Sale, as required under both New York and Italian law. *Supra* pp. 26-31. Second, there is no allegation that any threat was made by the counterparties to the 1938 Sale, as required under New York law. *Supra* pp. 31-33. Third, the theory that Leffmann agreed to the 1938 Sale only because he feared "'imminent physical violence'" if he declined, Br. 46, is inconsistent with Plaintiff's allegations that Leffmann had already turned down at least two other offers and that the Leffmanns continued living in Italy for several more months following the 1938 Sale. A41-43. 45 (AC ¶¶ 33, 36-37, 43).

Third, as the district court correctly concluded, Plaintiff's claim of duress also fails because she does not plead "facts demonstrating that the Leffmanns had 'no other alternative' than to engage in the 1938 [Sale]." SPA35 (quoting *Kramer*, 2012 WL 4841310, at *6); *see also* A382 (Trimarchi ¶ 12) (Italian law requires that "the threatened person is faced with the alternative: either enter into a particular contract, or meet the threatened unjust harm"). As the district court explained, Plaintiff's theory fails in part because it "conflates" Leffmann's alleged

"need 'to raise as much cash as possible'" with the legal requirement of "having 'no other alternative.'" SPA35 (quoting AC ¶¶ 9, 36 (A33, 42)). While asserting a need to raise cash may help explain the reason for selling the Painting, pleading a motive is not sufficient to show a lack of alternatives.

Moreover, as the district court recognized, allegations in the Amended Complaint demonstrate the opposite: the Leffmanns had other alternatives, as they considered and rejected at least two other offers, and also had other "resources." SPA35 (citing AC ¶¶ 9, 28, 32-33, 36); *see also* A46 (AC ¶ 47) (asserting that proceeds from the sale of the Painting "constituted the majority of … available resources," but not the only available resources and not the majority of all resources). Indeed, as the Amended Complaint makes clear, the Leffmanns had considerable resources—including the remaining cash proceeds from the sale of a "house and factory" in Italy in 1937, A38 (AC ¶ 23)—that were *at least* enough to cover their expenses for a decade or more, including the rent for their home, *id.*, moving expenses for their move to Switzerland in 1938, A45 (AC ¶ 43), the "substantial sums" they paid for Swiss "taxes and 'deposits,'" A45 (AC ¶ 44), moving expenses for their move to Brazil in 1941, A45-46 (AC ¶ 46), the "bribes" required "to obtain necessary documentation" in Brazil, *id.*, the "levy" of $4,641 imposed by the Brazilian government, $20,000 required for a Brazilian visa, *id.*, and moving expenses for their move back to Switzerland in 1947, A46 (AC ¶ 48),

all of which they were able to afford without working again, A38-39 (AC ¶ 24). As these allegations demonstrate, the Leffmanns had resources far in excess of the $12,000 in proceeds from the 1938 Sale. Plaintiff's "attenuated" claim that the Painting was the Leffmanns' last asset of any value conflicts with these more specific allegations in the Amended Complaint and thus should not be credited. *Hirsch*, 72 F.3d at 1095. And the more specific allegations provide ample support for the district court's conclusion that Plaintiff has not pleaded facts sufficient to show that Leffmann had "no other alternative" to the 1938 Sale. SPA35.

Contrary to Plaintiff's assertion, the court's conclusions were not based upon any "improper findings of fact." Br. 8, 33. Rather, the court expressly "accepted as true for the purposes of [the] motion" all of Plaintiff's well-pleaded allegations, SPA3, and then based its conclusions on an analysis of those allegations, *see*, *e.g.*, SPA32-35. Nor did the court ignore the historical circumstances of the Nazi era. Br. 7. Instead, it dedicated almost half of its 44-page opinion to a near-verbatim summary of the allegations, SPA3-21, including how the Nazis persecuted the Leffmanns in Germany, collaborated with the Italian Fascists, contributed to the rise of anti-Semitism in Italy, and caused the Leffmanns to fear for their safety during this period. SPA4-14. Plaintiff's allegations are also quoted and cited extensively in the court's legal analysis. *See*, *e.g.*, SPA26-35. Those allegations fell short, not because they were ignored or "distort[ed]" by the court, Br. 8, but

rather because they were accepted as true and properly determined not to satisfy any of the elements of duress under either New York law or Italian law.

## II. THE 1938 SALE WAS NOT "UNCONSCIONABLE" AND DID NOT VIOLATE "PUBLIC MORALS," "PUBLIC ORDER," OR OTHER PROVISIONS OF NEW YORK OR ITALIAN LAW

Although the Amended Complaint pleads a theory of duress, A33 (AC ¶ 9), Plaintiff has taken a new tack to try to avoid dismissal, relying heavily on theories of unconscionability, public morals, and public order—none of which are mentioned in the Amended Complaint. These concepts are inapposite, however, as they plainly do not govern the sale of artwork on the open market. Rather, they prohibit unlawful agreements (or clauses) that shock the conscience or seek to accomplish illicit purposes. Moreover, the unconscionability argument cannot even be considered on appeal, as it was not presented in the district court and is therefore waived. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("'[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.").

Had it been raised below, the doctrine of unconscionability would not help Plaintiff because it is reserved for those circumstances in which *the terms* of a contract are "so reprehensible that it shocks the conscience of the court." Br. 50 (citing *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 381 (S.D.N.Y. 2002); N.Y. U.C.C. Law § 2-302(1)). There are no such terms alleged here. Nor could

there be; the terms were the product of arms'-length negotiations in which Leffmann considered his options, rejected at least two offers, and "finally accepted" the highest price he could obtain on the open market at that time. A40-43 (AC ¶¶ 28, 33, 36-37). In any case, Plaintiff has waived any unconscionability argument by not raising it below. *Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 133.

As for Plaintiff's claim that the 1938 Sale violated Italian rules of "public morals" and "public order," the district court properly rejected that claim on the ground that such rules prohibit only those contracts with illicit purposes. SPA28 (citing Trimarchi ¶ 52 (A395)); *see also* Museum Add.1 (translation of paragraph 156 of Trimarchi's handbook) (the "content" of the contract, as distinct from the means used to induce the contract, must be illegal). Examples of such contracts include: (i) spouses agreeing to release themselves from the civil law obligation of fidelity; (ii) parties agreeing to transact in certain goods during a time when the law required all of those goods to be transferred to the State; (iii) licensed business owners agreeing to lease a business to an unlicensed individual; and (iv) parties entering a loan agreement to finance an illegal business. A395 (Trimarchi ¶ 52 n.30).

Here, as the district court properly recognized, there is no allegation that any of the parties to the 1938 Sale sought to accomplish an illegal objective. SPA28.

To the contrary, Plaintiff alleges that the 1938 Sale was an agreement to sell artwork for an agreed cash price on the international art market. A42-43 (AC ¶ 36). Moreover, the 1938 Sale has nothing in common with contracts that have been ruled in violation of Italian public order or morals, and Plaintiff points to no examples where contracts that even remotely resemble the 1938 Sale have been deemed to violate Italian public order or morals.[9]

Instead her public order or morals argument leans heavily on a "set of post-War rules providing for particularly strong protections of Jewish individuals persecuted by the anti-Semitic laws"—especially, an Italian law known as "Article 19," which provided a mechanism for victims to rescind contracts that met certain conditions. Br. 74. Her own expert notes that Article 19 applied only to contracts formed "after October 6, 1938—the date when the directives on racial matters issued by the [Fascist] regime were announced" and only where the claimant could establish a certain level of damages," A276 (Frigessi ¶ 35 n.14); *see also* A393, 400 (Trimarchi ¶¶ 47, 62(b)(2)). Here, Plaintiff concedes—as she must—that the June 1938 Sale "falls outside the purview" of Article 19.[10] Br. 74. Nonetheless,

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[9] A 1988 review of cases regarding contracts Jews entered into during the Fascist era revealed no cases finding that the contracts violated public order or morals. A398 (Trimarchi ¶ 58). Nor has Plaintiff cited any.

[10] Even if the June 1938 sale was covered by the legislation, the result would be to render the transaction *voidable* at the option of the victim (not void *ab initio*) and, even then, only for a period of one year following the War. *See* A276 (Frigessi ¶ 35 n.14); *see also* A393 (Trimarchi ¶ 47) (recognizing that the period

she argues that the legislation is "instrumental to an understanding that the circumstances here give rise to a violation of the public order and morals." Br. 75. In essence, she asks this Court to use principles of Italian public order and morals—which bar contracts for illicit purposes—to reverse a contract made for lawful purposes and thereby extend the "boundaries under Italian law to encompass a transaction that the Italian legal system opted not to include" under Article 19. SPA30.

The district court wisely decided not to do so, SPA30, and this Court should affirm that decision for at least four reasons. First, as threshold matter, principles of Italian public order and morals bar only illegal contracts entered for illicit purposes, and it is undisputed that the 1938 Sale had no such purposes.

Second, as both parties' experts agree, public order and morals are "subsidiary rules aimed at completing the legal system with rules to be applied to situations not expressly regulated by code or statute." A397 (Trimarchi ¶ 57); *see also* A400 (Trimarchi ¶ 62(c)); A273 (Frigessi ¶ 19 (noting public order "performs the role of a subsidiary rule")). Here, the Italian legal system already considered and expressly regulated—through Article 19—the "issue of Jewish individuals as

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was extended by two years to 1948). Here, there is no allegation that the Leffmanns ever sought to void or otherwise repudiate the 1938 Sale. *See infra* III.A.

weak contracting parties during the Holocaust." SPA30. The subsidiary rules of public order and morals therefore do not apply to the 1938 Sale.[11]

Third, as Plaintiff concedes, Article 19 retroactively applied only to contracts formed after October 6, 1938. The Italian legislature determined that Jews were most affected after this date and deserved stronger legal protection to redress the harms they suffered from coercive contracts entered after this date. The Italian legislature did not consider the general political climate before October 6, 1938 to require these same rules or remedies. *See* A398 (Trimarchi ¶ 60). Moreover, the remedy afforded under Article 19 was not to invalidate a contract or render it void *ab initio*, rather it was to give the victim a temporary right after the War (until 1948) to rescind a contract on a showing of sufficient damages. A393-394, 396 (Trimarchi ¶¶ 47, 55, 57). Here, it is undisputed that the 1938 Sale occurred before the relevant time period under Article 19 and that qualifying claims had to be brought within a fixed statutory period that expired roughly 70 years ago.

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[11] Plaintiff's claim (at 78) that "Article 19 has … been applied by Italian courts to contracts executed by Jewish sellers *before the entry into force of the anti-Semitic laws*," is no help to her. Indeed, the relevant date for the purposes of Article 19, *i.e.*, October 6, 1938, is the date when the racial laws were announced, not when they entered into force. A393-394 (Trimarchi ¶ 47). As is demonstrated by a footnote Plaintiff failed to translate, the sole case she relies upon for this proposition involves a transaction that occurred on December 1, 1938, *i.e.*, *after* October 6, 1938—the date when Article 19's coverage began. Museum Add. 6 (translation of Tribunal of Turin, Judgment of July 5, 1947, *in Foro it.*, at 591 n.1).

Fourth, it would be illogical to apply principles of Italian public order to invalidate the 1938 Sale roughly 80 years after the fact, because doing so would effectively extend greater protections to the 1938 Sale—which occurred in June 1938—than to sales that occurred *after* October 6, 1938, when the circumstances became more dire for Jews in Italy and, accordingly, when Italian legal protections were much greater under Article 19. As Professor Trimarchi has stated: "[I]t would be illogical to take the position [which Plaintiffs take] that, although specific legislation designed to address contracts entered into under the most dire circumstances rendered the sale only *voidable* [and required victims to repudiate the contracts by April 5, 1948], the rules of public order and public morals would apply to contracts that fall outside of those most dire circumstances and would render them *void*." A398 (Trimarchi ¶ 60).

Plaintiff makes the additional argument that the Sale is void because it is contrary to principles of Italian public order and morals to enforce any contract where a party allegedly has taken advantage of a counter-party's state of necessity. Br. 73-75. This argument, however, lacks both factual support, *see supra* pp. 31-33, and legal authority, A395 (Trimarchi Op. ¶¶ 44-50). Contracts where a party allegedly has taken advantage of a counter-party's state of necessity are generally enforceable, unless they fit within one of two special circumstances set forth in the Italian Code: one involving real estate and the other involving rescues at sea. *Id.*

Neither of these circumstances is remotely applicable here and, in any case, such contracts are (only temporarily) voidable at the option of the victim, not void *ab initio*. *Id*.

There also is no support for Plaintiff's suggestion that contracts are void as against public order and morals if they are "unfair and unbalanced." Br. 75. The only cases Plaintiff cites for this proposition rely on the "good faith" principle to nullify contractual provisions that established excessive penalties for a default. Those cases have nothing to do with this one. And the "good faith" principle does not help Plaintiff here because it is used only to invalidate specific contractual clauses not whole contracts. Moreover, it is a general principle of law that operates only as a subsidiary rule and, as such, is inoperative here because there was a more specific rule under Article 19 that addressed the same issues. *Supra* pp. 42-43. Finally, contrary to Plaintiff's suggestion (at 75), Professor Trimarchi's handbook does not identify the protection of the "economically weak party" as a free-standing basis for invalidating contracts. Instead, it explains that the protection of "the economically weak party" is the *rationale* underlying certain specific private law rules that render void certain unfair contractual clauses—*e.g.*, the prohibition on usury, or protections for consumers. Pl. Add. 215-216. Those rules are inapplicable here and there is no general rule in Italian law that a contract is void as against public order simply because one of the parties is "economically

weak," especially not where Italian law has already provided more specific rules and remedies to address the issue.

## III. PLAINTIFF'S CLAIMS FAIL ON FOUR ADDITIONAL GROUNDS, EACH OF WHICH INDEPENDENTLY WARRANTS AFFIRMANCE OF THE DISTRICT COURT'S DISMISSAL

Even assuming Plaintiff has adequately pleaded duress (which she has not), this Court may affirm the dismissal of the Amended Complaint on any or all of four additional grounds: First, the allegations demonstrate that Leffmann never repudiated, and instead ratified, the June 1938 Sale. *Infra* III.A. Second, Foy acquired good title when she purchased the Painting in good faith on the open market in New York in 1941, and passed that good title to the Museum when she donated the Painting to the Museum in 1952. *Infra* III.B. Third, Plaintiff's claims are barred by the statute of limitations. *Infra* III.C. Fourth, Plaintiff's claims are barred by the doctrine of laches. *Infra* III.D. The Museum presented these grounds to the district court, *see* A77-84, 369-375, but the court did not reach them because it dismissed the Amended Complaint for failure to allege duress. This Court nonetheless may affirm on any or all of these grounds. *McCall v. Pataki*, 232 F.3d 321, 323 (2d Cir. 2000) ("This Court … is free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied." (quotation marks omitted)).

### A. Even Assuming Duress, The 1938 Sale Was Subsequently Ratified

Even assuming that the 1938 Sale had been tainted by duress, the district court's dismissal should be affirmed because Leffmann subsequently ratified the contract. Under both New York and Italian law, duress renders a contract *voidable* at the option of the victim. *See Landers v. State*, 391 N.Y.S.2d 723, 725 (App. Div.) ("It is fundamental that a contract obtained by duress is merely voidable and may be subsequently ratified and affirmed."), *aff'd*, 43 N.Y.2d 784 (1977); A260 (Pl. Opp.) (stating "a duress sale is voidable under Italian law"); A388, 399 (Trimarchi ¶¶ 30, 62) (same). Under the laws of both jurisdictions, a victim of duress has the option of "ratifying" the contract and retaining its benefits or, alternatively, repudiating it and demanding rescission. A victim who wishes to repudiate a contract must do so promptly after the duress subsides, however, or he will be deemed to have "ratified" the contract. *See VKK Corp. v. National Football League*, 244 F.3d 114, 123 (2d Cir. 2001); *International Halliwell Mines, Ltd. v. Continental Copper & Steel Indus., Inc.*, 544 F.2d 105, 108 (2d Cir. 1976); A388 (Trimarchi ¶ 30) (a contract entered into under duress "can only be voided if an action is brought by the victim within the five-year limitation period"). Under both New York and Italian law, a victim of duress can ratify a contract by, *inter alia*: intentionally accepting benefits under the contract; remaining silent or acquiescing in the contract after having the opportunity to avoid it; or performing

under it. *VKK Corp.*, 244 F.3d at 123; *Sheindlin v. Sheindlin*, 450 N.Y.S.2d 881, 882 (App. Div. 1982) (citing *Bethlehem Steel*, 405 N.Y.S.2d 80; *Fowler v. Fowler*, 188 N.Y.S. 529 (App. Div. 1921)); A388 (Trimarchi ¶ 31) ("the victim can ratify the contract either by a specific covenant or voluntary performance in the awareness of the duress … or by both having performed the contract and not bringing an action for annulment within the five-year limitation period").

Although New York law does not prescribe a specific time period for repudiating a contract on the basis of duress, courts have held "delays as short as six months have constituted forfeiture of a duress claim." *Cavelli v. New York City Dist. Council of Carpenters*, 816 F. Supp. 2d 153, 164 (E.D.N.Y. 2011) (citing *VKK*, 244 F.3d at 123); *see also, e.g.*, *Teachers Ins. & Annuity Ass'n v. Wometco Enters.*, 833 F. Supp. 344, 348-349 (S.D.N.Y. 1993) (eighteen months of performance constituted ratification); *Grubel v. Union Mut. Life Ins. Co.*, 387 N.Y.S.2d 442, 443 (App. Div. 1976) (two years of accepting benefits constituted ratification)). Indeed, the burden on the party claiming duress "increases proportionately with the delay in initiating suit or otherwise repudiating the contract in question." *VKK*, 244 F.3d at 123 (quotation marks omitted). Italian law is in accord. *See* A387-388 (Trimarchi ¶ 29 (citing 1865 Ital. Civil Code, art. 1300) (action for nullity may be brought within five years from when the duress has ceased, or else contract is deemed ratified)).

Here, the Amended Complaint makes clear that Leffmann ratified the 1938 Sale. Plaintiff alleges Leffmann received and retained the proceeds from the 1938 Sale and continued to spend those proceeds as late as 1941, *i.e.*, roughly three years after leaving Italy. A46 (AC ¶ 47). Plaintiff also alleges that the Leffmanns lived until 1956 and 1966, respectively, *id*. (AC ¶¶ 49-50), and yet there is no allegation that the Leffmanns ever repudiated the 1938 Sale or included it in their post-War claims for Nazi-era losses. This is fatal to Plaintiff's claim. *See*, *e.g.*, *Matter of Peters*, 821 N.Y.S.2d 61, 66 (App. Div. 2006) (rejecting Plaintiff's theory that the painting had been converted because the original owner "did not treat it as such"). If the Leffmanns themselves never treated the Painting as sold under duress, a representative of the Estate should not be heard to do so more than 70 years after the Sale. *Id.* at 66-67 (holding that if the original owner "did not treat the painting as stolen in 1936, his wife's estate will not be heard to speculate, some 70 years after the fact, that it might have been misappropriated and that its acquisition at auction by the unidentified prospective defendant was therefore tainted").

Plaintiff has never disputed that the New York law of ratification is fatal to her claim. A260-261. In the district court she contended (incorrectly) only that Italian law requires an "*explicit* declaration" of ratification and would not deem a contract to be ratified by "the lack of repudiation" within the five-year statutory

period. A261 (emphasis in original). There is no Italian authority for that conclusory assertion and Plaintiff's own expert cites none. *Id.* (Pl. Opp. (citing Frigessi ¶¶ 71-72 (citing nothing))). There is, however, ample Italian authority to support the black letter rule that a contract made under duress is merely voidable and can still be enforced unless an individual repudiates within five years after the alleged duress subsides. A388 (Trimarchi ¶¶ 30 n.16 & 31 n.17 (citing authorities)). A failure to repudiate within the allowable period—as happened here—is deemed to be ratification. A387-388 (Trimarchi ¶¶ 28-31). In any case, to the extent there is any dispositive difference between Italian law and New York law, the district court properly concluded that New York law would apply. *See supra* I.B. And New York law provides that a victim of duress shall be deemed to have ratified a contract by "remaining silent of acquiescing in the contract for a period of time after he had the opportunity to avoid it." *VKK Corp.*, 244 F.3d at 123 (quotation marks omitted).

Plaintiff has suggested that the Leffmanns lacked a viable way to repudiate the 1938 Sale or make any claim for the Painting, *see* Br. 43, A261, A286 (Frigessi ¶ 72), but they did in fact make claims after the War for Nazi-era losses and did not include the Painting. As Plaintiff is aware from extensive records of the Leffmanns' post-War claims—the files of which were shared with her and formed the basis for many of her allegations—the Leffmanns engaged sophisticated

counsel who helped them successfully pursue numerous post-War claims for Nazi-era losses.[12] These claims made no mention of the Painting or the 1938 Sale, although they included claims for losses suffered in both Germany and Italy during the Nazi era. Leaving aside whether it was proper to omit such facts from the Amended Complaint, Plaintiff should not be heard to suggest that the Leffmanns had no legal remedies or recourse after the duress had subsided.

### B. Even Assuming Duress And The Absence Of Ratification, Good Title Subsequently Passed To A Good-Faith Purchaser In 1941

New York law applies to the 1941 sale of the Painting from a New York Gallery to Thelma Chrysler Foy, a New York collector, A47; and, as Plaintiff acknowledges, Br. 9-10, 66, 84, New York law also applies to Foy's 1952 donation of the Painting to the Museum. Under New York law, even "'[a] person with *voidable* title has power to transfer a good title to a good faith purchaser for value.'" *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 623 (App. Div. 1990) (quoting N.Y. U.C.C. § 2-403(1) (emphasis added)), *aff'd*, 77 N.Y.2d 311 (1991); *Bakalar*, 819 F. Supp. 2d at 299 (same). "'[I]f defendant is a good-faith purchaser and the [painting] was not stolen, then defendant's title is superior to plaintiff's.'" *Matter of Peters*, 821 N.Y.S.2d at 67 (quoting *Lubell*, 550

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[12] The Court may consider information beyond the four corners of the complaint for purposes of a Rule 12(b)(6) motion where, as here, "plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).

N.Y.S.2d at 618); *see also Kaminsky v. Karmin*, 589 N.Y.S.2d 588, 590 (App. Div. 1992) ("A bona fide purchaser for value may obtain a good title from one who has a voidable title."). As such, "duress cannot be made the basis of attack … against one who has acquired the … property or thing in action as or through a good-faith purchaser for value, because the voidable transaction is made valid by a subsequent bona fide purchase for value." 28 *Williston on Contracts* § 71:17 (4th ed.).[13]

Here, the Museum holds good title because Foy acquired good title to the Painting when she purchased it for value in 1941, and she passed that good title to the Museum when she donated the Painting to the Museum in 1952. Even if Plaintiff could establish that Perls and Rosenberg had acquired and held only voidable title (which she cannot), Foy's good-faith purchase of the Painting would have perfected title in 1941. At that time, Foy purchased the Painting for value; and Plaintiff has not alleged that Foy lacked good faith or was even aware of any alleged defect in the title. Accordingly, Foy obtained good title in 1941, which she subsequently conveyed to the Museum when she donated the Painting in 1952. A47 (AC ¶ 54); *see* 3A Anderson U.C.C. § 2-403:4 (3d ed.) ("A donee acquires

[13] The 1941 sale of the Painting from a New York gallery to a New York collector is governed by New York law. Nonetheless, there is no conflict between Italian law and New York law: under Italian law, receiving possession through a good-faith purchase remedies the possible defect in the seller's title of ownership. *See* A391 (Trimarchi ¶ 39).

whatever title a donor possesses."). The Museum therefore has held good title to the Painting for more than 65 years.

Plaintiff has never disputed that Foy was a good-faith purchaser when she bought the Painting in 1941, or that a "person with voidable title has power to transfer a good title to a good-faith purchaser for value." *Lubell*, 550 N.Y.S.2d at 623 (quotation marks omitted). Instead, she asks this Court to treat the 1938 Sale like a theft that transferred *void* title, such that good title could not pass even to a good-faith purchaser. Br. 54. That position directly contradicts Plaintiff's (correct) concession below that, under Italian law, if Leffmann had sold the Painting under duress in 1938, he would have transferred *voidable* title, A260, and it also contradicts New York law, which says the same. *VKK Corp.*, 244 F.3d at 122 ("'[a] contract … which is induced by duress, is voidable'" (quoting *DiRose v. PK Mgmt. Corp.*, 691 F.2d 628, 633 (2d Cir. 1982)).

Plaintiff's theft argument rests on a misreading of *Schoeps*. Br. 54-55, 84-85. That case involved a transfer allegedly made under "threats and economic pressures by the Nazi government" in Germany in 1935, which post-War German law would have treated as *void*. *Schoeps*, 594 F. Supp. 2d at 465-466. *Schoeps* reasoned that *if* the transfer there was void under German law, the purchaser's title would be no better than a thief's in the sense that each would have only void title, and under New York law a good-faith purchaser cannot subsequently obtain valid

title from a possessor of void title. *Id*. at 466-467. But *Schoeps* decided only that there were triable issues of fact concerning the timing and circumstances of the transfer and whether it had predated the Nazi era or instead occurred under Nazi pressure and made to look as if it had occurred earlier. That case says nothing to support treating the 1938 Sale—an allegedly *voidable* sale on the open market in Paris (by sellers living in Italy)—as a "theft"; nor does it provide authority to avoid the consequence of the subsequent sale in 1941 to good-faith purchaser Foy by treating the 1938 Sale as *void*, contrary to both New York law and Italian law.[14]

Plaintiff cannot avoid the good-faith purchaser defense on procedural grounds either. Contrary to Plaintiff's unsupported assertion that this Court may not reach a good-faith purchaser argument on a motion to dismiss, Br. 52 n.9, dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) where, as here, the well-pleaded allegations demonstrate that plaintiff fails as a matter of law to state a claim on which relief can be granted. *See Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003).

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[14] If the 1938 Sale were treated as a "theft," this action would be untimely because the "statute of limitations for conversion and replevin automatically begins to run against a bad faith possessor on the date of the theft or bad faith acquisition." *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 481-482 (S.D.N.Y. 2010), *aff'd*, 403 F. App'x 575 (2d Cir. 2010).

### C. Plaintiff's Claims Expired Decades Ago And Remain Barred By The Statute Of Limitations[15]

Neither of the Leffmanns had a viable claim for the Painting at the time of his or her death in 1956 and 1966, respectively, because even if they once had a claim, they ratified the 1938 Sale by not promptly bringing the claim after the War, *see supra* III.A, and, in any event, title would have passed in 1941 to Foy as a good-faith purchaser, *see supra* III.B. Even assuming, *arguendo*, a claim survived until the Museum later acquired the Painting in 1952, any claim against the Museum would have expired in 1955, after New York's three-year limitations period. N.Y. C.P.L.R. § 214(3). The Leffmanns were still living at that time. Plaintiff, as a representative of the Estate, cannot assert a claim that was extinguished before either of the Leffmanns died many decades ago. *See In re Estate of Young*, 367 N.Y.S.2d 717, 722 (Sur. Ct. 1975) ("A personal representative acquires only such title as the decedent had." (quotation marks omitted)); *see also Grosz*, 772 F. Supp. 2d at 482 ("plaintiffs have no more right to

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[15] The AAM "acknowledges that in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses." AAM, *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era*, *available at* http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era (visited July 20, 2018). Because the Museum determined that the 1938 sale was not an "unlawful appropriation," it is not waiving defenses. In the spirit of the guidelines, however, the Museum requested that the district court address the merits-based defenses, which the district court did. A68.

*Poet* than Grosz would have had if he were still alive"). This action is therefore barred, not only for failure to state a claim, but also as untimely.

In the district court, Plaintiff argued that the HEAR Act revived her claim when it was enacted in 2016, but as mentioned previously that law applies only to certain claims for artworks "confiscated," "stolen," "misappropriated," or "lost" at the hands of the Nazis. Plaintiff contends that the Act's reference to artworks "lost … because of Nazi persecution" is broad enough to include the Painting, A246, but elsewhere the Act repeatedly refers to the recovery of "Nazi-*Confiscated* Art," and makes clear that its purpose is "[t]o ensure that claims to artwork … *stolen* or *misappropriated by the Nazis* are not unfairly barred by statutes of limitations." HEAR Act §§ 2, 3, 130 Stat. 1524-1526 (emphasis added).

This is not such a case. Here, Plaintiff alleges the Painting was safely in Switzerland and sold on the open market through a dealer to private individuals in Paris, without any involvement by the Nazis or Fascists. A35, 42-43 (AC ¶¶ 14, 36). She never alleges the Painting was "confiscated," "stolen," "misappropriated," or even "lost." Instead, Plaintiff uses words like "disposed of," A32 (AC ¶ 3), "sell … under duress," A33 (AC ¶ 9), "explore the possibility of selling," A40 (AC ¶ 28), "turn … into cash," *id.*, "sold," A44 (AC ¶ 42), and "received from the sale," A46 (AC ¶ 47). The HEAR Act's reference to art "lost … because of Nazi persecution" cannot be stretched to encompass an open market

sale for value, which—according to Plaintiff's own allegations—was a negotiated "sale" on the open market, without any involvement by Nazis or Fascists.

Nor does New York's demand-and-refusal rule toll the limitations period for many decades. A247-250. Contrary to Plaintiff's suggestion, the demand-and-refusal rule would not toll the limitations period here because, *inter alia*, it does not apply when the possessor "openly deals with the property as its own." *See SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 182-183 (2d Cir. 2000).[16] "[T]o establish a conversion it is unnecessary to show a demand when the holder exercises an act of ownership inconsistent with the ownership and dominion of the true owner, as such an act itself constitutes an unlawful misapplication amounting to a conversion." *Del Piccolo v. Newburger*, 9 N.Y.S.2d 512, 513 (Sup. Ct. 1939) (per curiam). Here, it is undisputed that the Museum has treated the Painting as its own, in a way that was clearly inconsistent with Leffmann's (and the Estate's) alleged ownership. A47-51 (AC ¶¶ 52-67). Demand-and-refusal therefore cannot revive a claim that expired many decades ago.

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[16] *See also St. John's Univ. v. Bolton*, 757 F. Supp. 2d 144, 180 (E.D.N.Y. 2010) ("The New York Court of Appeals has consistently held that a cause of action for conversion against a bona fide purchaser accrues *either* after demand and refusal *or* earlier, when a bona fide purchaser openly takes action in respect of the property which is inconsistent with the true owner's rights."), *aff'd*, 450 F. App'x 81 (2d Cir. 2011); *accord Lenard v. Design Studio*, 889 F. Supp. 2d 518, 532 (S.D.N.Y. 2012); *Kapernekas v. Brandhorst*, 638 F. Supp. 2d 426, 428 (S.D.N.Y. 2009).

### D. Plaintiff's Claims Are Barred By The Doctrine Of Laches

Plaintiff's claims are also barred by laches because the claim for the Painting was unreasonably delayed, and that delay has prejudiced the Museum. *See Perez v. Danbury Hosp.*, 347 F.3d 419, 426 (2d Cir. 2003). Paul and Alice Leffmann lived until 1956 and 1966, respectively, A46 (AC ¶¶ 49-50), and they never brought a claim for the Painting or otherwise challenged the 1938 Sale, despite the fact that the Painting has been displayed at the Museum since Foy donated it in 1952. Laches therefore would have operated to bar any claims during their lifetimes, and during the lifetimes of the succeeding generation. Because the laches inquiry "focuses not only on efforts by the party to the action, but also on efforts by the party's family," *Bakalar*, 819 F. Supp. 2d at 303 (quotation marks omitted),[17] the Estate cannot revive a claim that three prior generations opted not to pursue. By the time Plaintiff made her initial demand for the return of the Painting in 2010, more than 70 years had passed since the Leffmanns sold it in 1938, nearly 70 years had passed since Foy purchased it in 1941, and nearly 60 years had passed since Foy donated it to the Museum in 1952. Such delay is unreasonable under the circumstances, especially given that the Leffmanns themselves successfully brought claims more than a half-century ago for their Nazi-era losses.

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[17] *See also Sanchez v. Trustees of Univ. of Pa.*, No. 04 Civ. 1253, 2005 WL 94847, at *2-3 (S.D.N.Y. Jan. 18, 2004) (considering lack of effort by plaintiff's grandfather and father); *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, 752 N.Y.S.2d 295, 297 (App. Div. 2002) (noting lack of family inquiries).

In addition, this delay has prejudiced the Museum due to "deceased witnesses, faded memories, [and] lost documents." *Sanchez v. Trustees of Univ. of Pa.*, No. 04 Civ. 1253, 2005 WL 94847, at *3 (S.D.N.Y. Jan. 18, 2004) (quotation marks omitted); *see also Bakalar*, 819 F. Supp. 2d at 306 ("prejudice … is clear" where delay of approximately 60 years had similar consequences); *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, No. 98 Civ. 7664, 1999 WL 673347, at *10-11 (S.D.N.Y. Aug. 30, 1999). Plaintiff's claim is, therefore, barred by laches.[18]

Contrary to Plaintiff's argument in the district court, a dismissal based on laches prior to discovery would not be premature in this particular case. A250-251. The parties here spent years researching and investigating the facts and, in the years prior to the initiation of this litigation, the Museum shared with Plaintiff and her counsel all relevant documents and information gathered in the course of its research and investigation. *Supra* pp. 9, 50-51. As a result, the facts material to

[18] *See Bakalar*, 819 F. Supp. 2d at 303-307 (laches barred Nazi-era duress claim); *Wertheimer*, 752 N.Y.S.2d at 297 (laches barred claim for painting sold by person to whom owner entrusted it while owner fled Nazis). Plaintiff suggested that the Museum acted in bad faith in failing to accurately represent the Painting's provenance in Museum publications, A47-51 (AC ¶¶ 56-65), but she later abandoned that claim (at A249) in the absence of facts to support it and perhaps also because it would further demonstrate that New York's demand-and-refusal rule is inapplicable here. When the Museum published the provenance of the Painting in 1967, suggesting that it had been in a "German private collection" until 1938, Br. 22, it did so apparently on the basis of what it had been told by buyer Hugo Perls, who said that he had purchased it in 1938 from a "German professor" in Switzerland, apparently referring to Professor Reiners. A37 (AC ¶ 19).

a laches defense are known to both parties: neither the Leffmanns nor the Estate has made a prior claim against the Museum, and the instant claims come many decades after the 1938 Sale, after the end of the War, and after the Museum acquired the Painting. These are unreasonably long delays, and there is no dispute that key witnesses have died and evidence has been lost during that period. "[W]here the original owner's lack of due diligence and prejudice to the party currently in possession are apparent, [laches] may be resolved as a matter of law." *Matter of Peters*, 821 N.Y.S.2d at 69.

## IV. THE MUSEUM'S HANDLING OF THIS CASE AND THE DISTRICT COURT'S DECISION ARE CONSISTENT WITH U.S. POLICY

According to Plaintiff, relevant U.S. policy is set forth in The Washington Principles and The Terezin Declaration. But, contrary to her suggestions, those instruments are not law and do not compel any particular result in this or any other case. Rather, they constitute "non-binding" principles urging signatories to facilitate the "just and fair" resolution of claims to covered artworks, including "Nazi-confiscated and looted art" and "art confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators" through "theft, coercion, … confiscation, … forced sales and sales under duress." Br. 26 & 29 (quoting the Washington Principles and the Terezin Declaration). Although this is not even allegedly a case of Nazi confiscation, looting, theft, coercion, or a forced sale, and

Plaintiff's allegations do not amount to duress, the Museum's handling of this case and the decision by the district court were consistent with these policies.

As mentioned, the Museum shares the view that Nazi-era claims should be handled with appropriate sensitivity to the historical circumstances surrounding the Holocaust. The Museum did so here. Consistent with the Museum's commitment to handle Nazi-era claims in accordance with the principles and guidelines established by the Association of American Museums (the "AAM") and the Association of American Museum Directors (the "AAMD"), the Museum undertook extensive research in response to Plaintiff's pre-litigation demands and inquiries concerning the Painting. The Museum voluntarily shared with Plaintiff all the relevant documents and information it collected in the course of an exhaustive, multi-year investigation and research effort into the facts and circumstances surrounding the Painting and the 1938 Sale. With the benefit of careful research and analysis and an extensive factual record, the Museum ultimately concluded that the 1938 Sale was not an "illegal confiscation" or "unlawful appropriation," the AAMD and AAM standards for restitution. It further concluded that the facts do not support Plaintiff's theory of duress. Although the Museum shared with Plaintiff its voluminous research and factual

materials—which is only selectively reflected in the Amended Complaint[19]—the Museum accepted as true for purposes of its motion all the well-pleaded allegations, even those that are inconsistent with the facts developed in the course of the Museum's investigation and shared with Plaintiff prior to the litigation.

Even in the course of this litigation, the Museum has maintained its commitment to ensure that Nazi-era claims are resolved in a just and fair manner. To that end, it expressly requested that the district court decide the motion on any of the merits-based defenses, even in the event of a dismissal on other grounds, such as the statute of limitations or laches. The district court, for its part, accepted as true all of Plaintiff's allegations and decided the case on the merits of Plaintiff's duress claim, consistent with U.S. policy urging the "just and fair" resolution of Nazi-era claims.

Plaintiff also cites several decisions by European restitution tribunals in support of her policy arguments, Br. 57-60, but none provides a reason to second-guess the district court's ruling here. As a threshold matter, those decisions were made by tribunals applying different national laws and policies, including some that reflect varying degrees of state responsibility for underlying historic wrongs,

---

[19] It is apparent on the face of the Amended Complaint that Plaintiff has relied upon documents from the pre-litigation investigation, while omitting key facts from her pleading. The Court could consider such information when determining the sufficiency of claims for Rule 12(b)(6) purposes, *see Brass*, 987 F.2d at 150, but it need not do so here because neither the district court nor the Museum incorporated or relied upon this information as a basis for dismissal.

as in the case of the German Advisory Commission. In addition, none of the cases is factually analogous to this one, where the sale occurred in Paris in June 1938 when the sellers were living in Italy and the buyers were living in France; the Painting was safely in Switzerland; and the sellers had worked with multiple dealers, declined at least two other offers, finally accepted an offer that met or exceeded the highest previous offer, received and retained the proceeds of the sale, survived the war by a decade or more, and made numerous post-War claims for Nazi-era losses without including a claim for the artwork. Under these circumstances, the district court's dismissal of the case for failure to plead duress was required by both New York and Italian law and consistent with policies urging the "just and fair" resolution of Nazi-era claims.

## V. THE AMICUS BRIEFS ARE UNAVAILING

The amici curiae advance legal and policy arguments that closely resemble those made by Plaintiff, and also seem as if they were written for a case involving Nazi-confiscated art. This is not such a case. The Museum responds briefly here to correct only the most egregious misstatements of fact and to address a legal argument not previously addressed.

The brief of amici curiae The 1939 Society and Bet Tzedek (the "1939 Brief"), Dkt. 63, makes several misstatements of fact that require correction. For example, it asserts that the Leffmanns sent the Painting to Switzerland in response

to Nazi persecution, and as "their world crumble[d] around them" following the adoption of the Nuremberg Laws in 1935. *Id.* at 6. That claim appears nowhere in the Amended Complaint, which alleges only that the Leffmanns sent the Painting to Switzerland "some time prior to their departure from Germany." A35 (AC ¶ 14). The Amended Complaints says nothing to indicate that the Leffmanns sent the Painting to Switzerland in response to, or during, their suffering from Nazi persecution in Germany; because apparently that is not what happened. As the Museum discovered from handwritten correspondence and the recollection of an eyewitness who was a member of the family that had the Painting in Switzerland—information that was shared with Plaintiff, but omitted from the Amended Complaint—the Leffmanns apparently sent the Painting to Switzerland no later than 1932, a year before the Nazis took power, and several years before the Nuremberg Laws were enacted.[20]

In another example, the 1939 Brief (at 20 n.13) states that the "initial buyers"—*i.e.*, Rosenberg and Perls—"knew the purpose of the [1938 Sale] was to fund the Leffmann's survival." That allegation also appears nowhere in the Amended Complaint and has no factual support. As the Museum has explained, the Amended Complaint alleges that Rosenberg and Perls made their offer through

[20] Leaving aside whether it was proper for Plaintiff to omit this information from the Amended Complaint, it is not proper for amicus briefs to make such unsupported and unalleged assertions with no factual basis.

a Paris dealer, Käte Perls. It does not allege that they knew Leffmann was the seller, much less that they knew what his circumstances were or what he intended to do with the proceeds from the sale. Instead, as the Amended Complaint alleges, it seems that one of the buyers, Hugo Perls, believed that the seller was Professor Reiners, the art historian in Switzerland who had custody of the Painting in the years leading up to the 1938 Sale. A49 (AC ¶ 62).

The brief of amici curiae B'nai B'rith International and others (the "B'nai Brief"), Dkt. 69, also requires correction. For example, it contends (at 7) that the Painting here should be labeled "Flight Art," defined as "artworks Nazi persecutees were forced to sell to pay the discriminatory taxes, including the infamous Flight Tax." Here, however, the Painting was not even allegedly sold for that purpose. According to the Amended Complaint, the Leffmanns departed Nazi Germany and paid extortionate Nazi flight taxes more than a year prior to the 1938 Sale. A37 (AC ¶ 19). In another example, the B'nai Brief (at 10) falsely states again that the Leffmanns sold the Painting to "pay discriminatory and extortionate 'taxes' to flee the Nazis." As explained, this is untrue. According to the Amended Complaint, Leffmann sold the Painting to "raise as much cash as possible" for a later move from Italy to Switzerland and "whatever the future would bring." A42 (AC ¶ 36). In other places, the B'nai Brief again appears to be addressing a different case altogether. For example, it asserts (at 9) that this Court is "bound by

the leading decision of the New York judiciary that fleeing Jews *cannot be deemed to have abandoned their property*." (emphasis added) (citation omitted). Here, however, there has never been any allegation that the Leffmanns "abandoned" the Painting. The B'nai Brief (at 9) also cautions this Court to view any documentation of Nazi-era transactions with a "critical, historically informed eye" because "the Nazis and others used many tactics to mask involuntary transactions in a cloak of legality." Here, however, the Nazis were never involved in the 1938 Sale—which occurred between private parties on the open market in Paris—and there is no allegation that the Nazis even knew of the 1938 Sale, much less sought to manipulate it.

Nor is there any basis for the B'nai amicus curiae to accuse the Museum and the district court of adopting a position that "denies historical truth and stains the judicial record." B'nai Br. 7. In reality, the Museum worked for years to research the Painting's provenance, investigate the relevant facts, share its information and findings with Plaintiff, and analyze and apply the relevant policies and laws in a good faith effort to determine the rightful owner of the Painting. The district court also handled the case with appropriate sensitivity and diligence, as it accepted Plaintiffs' allegations as true, carefully considered the parties' arguments and expert opinions, conducted a full and fair hearing, analyzed and applied both New York law and Italian law, and issued a well-reasoned opinion on the merits of

Plaintiff's duress claim, consistent with U.S. policy urging the "just and fair" resolution of Nazi-era claims.

Against this backdrop, the amicus briefs' hyperbolic arguments and misguided statements of fact should not be credited. Nor should their arguments regarding different types of cases such as those involving Nazi-confiscated art or Nazi forced sales to pay Nazi flight taxes. The facts alleged here are of a different type of transaction in which neither Nazis nor Fascists were involved. Determining whether such allegations state a claim of duress requires more careful analysis of the applicable law and well-pleaded facts, as demonstrated by the district court. Nothing in the amicus briefs undermines that analysis.

Finally, to the extent the amicus briefs advance the same legal and policy arguments made by Plaintiff, those arguments are unavailing for all the same reasons already explained in response to Plaintiff's brief. And to the extent the amicus briefs rely on non-binding and inapposite policy considerations to advocate for new "federal common law" and an expanded notion of duress, they help to further demonstrate that Plaintiff's case is not supported by existing law. As the district court correctly concluded, the allegations in the Amended Complaint simply do not meet the required elements under both New York and Italian law.

## CONCLUSION

For all the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted.

/s/ David W. Bowker

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July 20, 2018

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that, notwithstanding the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), this brief complies with the Court's May 10, 2018, order granting an enlargement of up to 18,000 words.

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 17,373 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ David W. Bowker
DAVID W. BOWKER

July 20, 2018

# ADDENDUM

[…]

**156. The unlawful contract: the concept**

A contract is held **unlawful** when it aims to achieve a result forbidden by mandatory provisions or principles. They may be *imperative rules of law*, fundamental and unwaivable principles in the legal system (*public order*) or even commonly accepted moral concepts (*morals*): Art. 1343 of the Italian Civil Code.

In any case, an unlawful contract is neither recognized nor protected by law; its effects that are contrary to law do not come into force; the contract, or the individual clause, are *null and void* (and sometimes the void clause will be automatically replaced by a lawful provision).

It is thus required that the *content* of the contract be illegal. This case must be clearly kept distinct from the case in which only the *means* used to obtain the establishment of the contract are unlawful. Hence, if one uses threats to force others to sell him or her land, the object and cause of the contract (transfer of real property in consideration of a price) are per se lawful and, therefore, the sale contract is not null and void as unlawful (whereas it is voidable on the ground of duress).

[…]

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**Add.2**

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Si discute se questa regola, dettata dalla legge per le promesse, possa applicarsi analogicamente alle dichiarazioni rivolte a trasferire la proprietà o altri diritti, o a costituire diritti reali. La giurisprudenza lo nega [14]. In particolare: se si tratta di un trasferimento per il quale la legge richiede la forma scritta, anche la causa deve risultare dallo scritto [15].

## C - Il negozio illecito

### 156. Il negozio illecito: concetto

Il negozio si dice **illecito** quando tende a realizzare un risultato vietato da norme o principi inderogabili. Si può trattare di *norme imperative di legge*, di princìpi fondamentali e inderogabili dell'ordinamento giuridico (*ordine pubblico*), o anche di concezioni morali comunemente accolte (*buon costume*): art. 1343 cod. civ.

In ogni caso il negozio illecito non è riconosciuto né tutelato dal diritto: gli effetti contrari al diritto non si producono: il negozio, o la singola clausola, sono *nulli* (e talvolta la clausola nulla sarà automaticamente sostituita da una disposizione legale).

Occorre dunque che sia illecito il *contenuto* del negozio. Tale ipotesi va nettamente distinta da quella in cui siano illeciti esclusivamente i *mezzi* usati per ottenere la stipulazione del negozio. Così, se taluno con le minacce costringe altri a vendergli un terreno, oggetto e causa del negozio (trasferimento del terreno verso il corrispettivo del prezzo) sono in sé e per sé leciti e perciò il contratto di vendita non è nullo per illiceità (bensì annullabile per violenza).

### 157. Norme imperative e princìpi di ordine pubblico

Non qualsiasi contrasto con norme di diritto determina l'illiceità del negozio: occorre che si tratti di **norme imperative** (v. *supra*, n. 110 e 111).

Accanto alle norme imperative contenute nel codice civile, hanno particolare importanza quelle del codice penale: è chiara infatti la nullità di qualsiasi negozio che preveda l'impegno a commettere un reato, oppure

[14] Cass. civ. n. 10238/13; 9625/87, in *Corr. giur.* 1988, 253; Cass. civ. n. 412/47.
[15] Cass. civ. n. 8365/00; 301/96.

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**CERTIFICATION**

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Italian into English of the attached paragraph 156 of Pietro Trimarchi, *Istituzioni di diritto privato*, (Giuffrè Editore, Milano 2016).

Lynda Green, Senior Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me

this 19 day of July, 2018.

JEFFREY AARON CURETON
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[…]

(1) The Court holds that, for purposes of ruling on the action for rescission under Art. 19 of Italian Lieutenancy Legislative Decree No. 222 of April 12, 1945 of a contract executed on December 1, 1938 between the plaintiffs, citizens of the Jewish race, and the defendant, the "personal requirement relating to the seller's status", i.e., threatened by the racial campaign, must be deemed to have been met.

In fact, the Court observes that, even though legislative measures had not been taken against citizens defined as of the Jewish race on October 6, 1938 and "a true and proper persecution of their persons and assets" had not begun at that time, the racial campaign, which was announced that day by the Grand Council of Fascism, and in relation to the fact that "what had happened in other countries could not but represent a dangerous warning to the Jews, especially since those examples inspired the racial campaign in Italy," led them to "fear that the racial measures would also be drastically applied in Italy." It was an uncertain time for Jews, namely, an "atmosphere of general danger for those of the Jewish race, especially following the enactment of Italian Royal Decree-Law of November 17, 1938", which, among other provisions, prohibited Jews from "managing firms with more than 100 employees."

A further clarification regarding the nature of the seller's "state of need" at the time of the sale in an action for rescission due to harm, under Art. 19 of Italian Legislative Decree No. 222 of April 12, 1945, is set forth in the order of the Milan Court of December 11, 1947 (Borghese, author) in *Foro*, 1948, I, 138, which *a)* provided for a more general extension of the requirement of the seller's need, beyond the limits of the concept of financial need, to the state of necessity contemplated by criminal law, which consists of fear for one's life and personal health; and *b)* noted the particular fact that the buyer was aware of that state of need, simply by knowing the seller's "Jewish" status.

[…]

**Israeliti — Vendite stipulate per timore di persecuzioni razziali — Lezione enorme — Rescissione — Valutazione delle circostanze ambientali** (D. legisl. luog. 12 aprile 1945 n. 222 contenente norme integrative, complementari e di attuazione del d. legisl. luog. 20 gennaio 1944 n. 26, per la reintegrazione degli ebrei nei diritti patrimoniali).

Lo stato di minaccia pendente sui cittadini italiani di razza ebraica, dopo l'enunciazione delle direttive razziali del Gran Consiglio fascista, deve essere considerato, anche prima che queste si concretassero in disposizioni legislative, effettivo ed influente al fine della decisione del giudizio di rescissione di contratti stipulati, in quell'epoca, per timore, dalle persone minacciate. (1)

**Tribunale di Torino**; sentenza 5 luglio 1947; Pres. Merlo, Est. Ferrati; Tedeschi (Avv. Gastaldi) c. Cerruti (Avv. Badini).

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**Locazione di cose — Fondi rustici — Decisioni delle commissioni speciali agrarie — Impugnazione per revocazione — Ammissibilità** (Cod. proc. civ., art. 395, 396; d. legisl. 1° aprile 1947 n. 273, proroga dei contratti agrari, art. 7).

Contro le decisioni delle commissioni speciali agrarie è ammissibile l'impugnazione per revocazione. (2)

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Anzichè il pagamento in natura si può stipulare invece che il debitore debba una somma pecuniaria pari al prezzo di mercato, corrente al tempo del pagamento, di una data quantità di una certa merce o di un certo gruppo di merci.

Proseguendo su questa via, si giunge a stipulare che la somma di moneta oggetto del contratto debba variare secondo un numero indice dei prezzi. Le variazioni dell'indice misurano le variazioni proporzionali di una media ponderata dei prezzi di determinate merci e servizi. La situazione è esattamente analoga, nella sostanza, a quella sopra considerata per cui il debitore debba pagare il prezzo di determinate quantità di merci e di servizi: ad esempio, di un pasto in trattoria di cui sia determinata in anticipo la lista.

Avv. Giulio Capodaglio
Prof. inc. di economia politica nell'Univ. di Bari.

(1) Il Tribunale afferma che, al fine di decidere dell'azione di rescissione, ai sensi dell'art. 19 decreto legisl. luog. 12 aprile 1945 n. 222, di un contratto stipulato in data 1° dicembre 1938 tra gli attori, cittadini di razza ebraica, ed il convenuto, debba ritenersi sussista il requisito «personale relativo alla condizione del venditore», minacciato dalla campagna razziale.

Il Tribunale osserva infatti che, se anche il 6 ottobre 1938 non furono presi provvedimenti legislativi contro i cittadini definiti di razza ebraica e non si iniziò, per allora, «contro di essi una vera e propria persecuzione nelle persone e negli averi», tuttavia la campagna razziale, in quel giorno annunziata dal Gran Consiglio del fascismo, anche in relazione a «quanto era avvenuto in altri Stati non poteva non costituire per gli ebrei un pericoloso monito, tanto più che a quegli esempi si ispirava la campagna razziale in Italia», induceva costoro nel «timore che le misure razziali venissero anche in Italia applicate drasticamente». Era quello per gli ebrei un *tempus dubium* e cioè una «atmosfera di generico pericolo per gli appartenenti alla razza ebraica, tanto più dopo l'emanazione del r. decreto legge 17 novembre 1938» che, tra le altre sue disposizioni, vietò agli ebrei «la gestione di aziende impieganti più di cento dipendenti».

Ulteriore precisazione per quanto attiene ai caratteri dello «stato di bisogno» del venditore al momento della vendita nella azione di rescissione per lesione, prevista dall'art. 19 decreto legisl. 12 aprile 1945 n. 222, contiene l'ordinanza del Tribunale di Milano 11 dicembre 1947 (est. Borghese) in *Foro*, 1948, I, 138, che rileva *a*) una più generale estensione del requisito del bisogno dell'alienante, oltre i limiti del concetto di bisogno economico, a quello stato di necessità previsto dalla legge penale che si concreta nel pericolo alla vita e alla integrità personale; *b*) il particolare aspetto della conoscenza da parte dell'acquirente di tale stato di bisogno, che si identifica nella semplice conoscenza dello *status* di «ebreo» dell'alienante.

(2) Due sono gli argomenti su cui la Commissione si fonda: poichè l'art. 7 decreto legisl. n. 273 del 1947 limita il ricorso per cassazione alla sola incompetenza, il silenzio sulla revocazione va interpretata nel senso dell'implicita estensione della regola generale adottata in tema di revocazione dall'art. 395 cod. proc. civ.; la mancata ripetizione, nell'art. 395, del richiamo alla «autorità giudiziaria», contenuto nell'art. 494 cod. proc. civ. 1865, vuol significare che il rimedio della revocazione non è limitato alla sola sentenza dell'autorità giudiziaria, ma è «esteso a tutte le sentenze emanate *in grado di appello o in unico grado* senza distinzione dell'autorità da cui esse sono pronunziate».

Sulla revocabilità delle decisioni di queste giurisdizioni speciali, si veda, in senso contrario, Comm. Bari per le controversie sull'assegnazione di alloggi, 8 febbraio 1947, *Foro it.*, 1947, III, 214, con nota di richiami; Comm Firenze per le controversie in materia di requisizione alloggi, 9 maggio 1947, *Temi*, 1948, 159 con nota di A. Bazzera; ed in senso favorevole, Comm. Agrigento per la concessione delle terre incolte, 7 febbraio 1948, in questo volume III, 131; Comm. Torino per le controversie in materia di requisizione alloggi, 1 marzo 1947, *Temi*, loc. cit.

(1) Con innovazione rispetto al precedente decreto in materia di proroga dei contratti agrari, il decreto legisl. 1° aprile 1947 n. 273 introduce nell'art. 1 lett. *c*) per la mezzadria, colonia parziaria e compartecipazione, e nell'art. 3 lett. *c*) per l'affitto, una nuova causa di esclusione della proroga: il proposito del concedente di procedere ad immediate opere di trasformazione fondiaria, incompatibili con la prosecuzione del contratto. Per garantire la serietà del proposito, la legge richiede che il piano delle opere sia stato approvato dall'ufficio competente; la dizione imprecisa dà adito al dubbio se si tratti di causa permanente di esclusione della proroga, o limitata ai progetti già approvati prima della pubblicazione della legge. Sulla questione, che a quanto ci risulta, non ha precedenti giurisprudenziali editi, si pronuncia la Commissione reg. per le controversie agrarie di Torino in favore della tesi più liberale, con la seguente motivazione: «In primo luogo il Montanaro eccepisce la non applicabilità al caso del disposto dell'art. 1 lett. *B* del decreto. legisl. 1° aprile 1947 n. 273 invocato dalla Carenzo, in quanto il suo piano di trasformazione agraria non era già approvato dall'Ispettorato compartimentale di agricoltura alla data di entrata in vigore di quel decreto. L'eccezione non ha alcun fondamento. Con l'avverbio «già» inserito in quell'articolo di legge il legislatore ha manifestamente inteso significare semplicemente la necessità di assicurare preventivamente, almeno in tema di massima, la serietà della trasformazione agraria progettata dal proprietario sul fondo che egli intende per codesta ragione sottrarre al mezzadro, ciò per l'appunto a garanzia del mezzadro, che altrimenti avrebbe diritto alla proroga della sua mezzadria, onde evitare facili frodi da parte del proprietario ai di lui danni e nel tempo stesso pure per dare avviamento solo a quelle trasformazioni agrarie che siano di effettiva utilità, non solo pel proprietario, ma sopratutto per la produzione nazionale. Ma posto questo indiscutibile intento del legislatore, non si comprende, come e perchè il legislatore, con la disposizione di cui sopra, avrebbe dovuto favorire solo i proprietari che all'entrata in vigore di quella disposizione già avevano ottenuto l'approvazione del loro piano di trasformazione, e non anche i proprietari, i quali invece avessero conseguito tale approvazione successivamente a quel decreto, attuando così un'ingiusta disparità di trattamento fra gli uni e gli altri conseguente ad una mera accidentalità di tempo, e non a una qualsiasi ragione di dovuta maggior considerazione per quella prima categoria di proprietari».

**Commissione regionale per le controversie agrarie di Napoli**; decisione 26 febbraio 1948; Pres. ed est. Mattera; Coelli Guarnio (Avv. d'Onofrio) c. De Simone (Avv. Bruno).

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**Colonia, mezzadria e affitto a coltivatore diretto — Proroga legale — Esecuzione di trasformazioni agrarie — Inapplicabilità della proroga** (D. legisl. 1° aprile 1947 n. 273, proroga dei contratti agrari, art. 1.

La proroga non è ammessa per il contratto di mezzadria, qualora il concedente voglia compiere nel fondo radicali ed immediate trasformazioni agrarie, la cui esecuzione sia incompatibile con la continuazione del contratto, anche se il piano delle opere sia stato dichiarato attuabile ed utile ai fini della produzione agraria dall'Ispettorato compartimentale dell'agricoltura, dopo l'entrata in vigore del d. legisl. 1° aprile 1947 n. 273. (1)

**Commissione regionale per le controversie agrarie di Torino**; sentenza 17 gennaio 1948; Pres. ed est. Alessio; Montanaro c. Carenzo.

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**CERTIFICATION**

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Italian into English of the attached footnote 1 to the Tribunal of Turin, Judgment of July 5, 1947, *in Foro it.*, 1948, page 591.

Lynda Green, Senior Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me

this 11 day of July, 2013.

JEFFREY AARON CURETON
NOTARY PUBLIC-STATE OF NEW YORK
No. 01CU6169789
Qualified in New York County
My Commission Expires September 23, 2019



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