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 9

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12

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

16 Plaintiffs,

17 vs.

18 THYSSEN-BORNEMISZA
 COLLECTION FOUNDATION, an
 19 agency or instrumentality of the
 Kingdom of Spain,
 20

21 Defendant.

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

**DEFENDANT THYSSEN-
 BORNEMISZA COLLECTION
 FOUNDATION'S [PROPOSED]
 FINDINGS OF FACT AND
 CONCLUSIONS OF LAW**

Judge: Hon. John F. Walter
 Crtrm: 16
 Pre-Trial: November 16, 2018
 Trial: December 4, 2018

1 Pursuant to Local Rule 52-1 and this Court’s Second Amended Scheduling
 2 and Case Management Order, Defendant Thyssen-Bornemisza Collection
 3 Foundation (“Foundation” or “Defendant”) submits this Proposed Findings of Fact
 4 and Conclusions of Law, regarding the trial scheduled to commence December 4,
 5 2018.

6 **I. PROPOSED FINDINGS OF FACT¹**

7 1. French Impressionist painter Camille Pissarro completed the painting,
 8 *Rue St. Honoré, après midi, effet de pluie* (the “Painting”) in 1897. (2015-01-14
 9 Amended Answer ¶14, Dkt. No. 222; *Cassirer v. Thyssen-Bornemisza Collection*
 10 *Found.*, 737 F.3d 613, 615 (9th Cir. 2013); Dkt. No. 377, Exh. A, Joint Proposed
 11 Stipulation of Facts (“Stipulated Facts”) ¶1.)

12 2. Pissarro sold the Painting in 1898 to Durand-Ruel of Galerie Durand-
 13 Ruel, Paris. (Dkt. No. 222.; Stipulated Facts ¶3.)

14 3. The gallery, Bruno und Paul Cassirer, Kunst und Verlagsanstalt in
 15 Berlin at Viktoriastrasse 35 was founded in September 1898. (Stein Decl., ¶ 86;
 16 Stipulated Fact ¶ 4.)

17
 18
 19 ¹ This document references evidence from the filed direct trial testimony of: (1)
 20 former Spanish State Prosecutor Adriana de Buerba, Spanish criminal law expert,
 21 Dkt. No. 402 (“de Buerba Decl.”); (2) Professor Mariano Yzquierdo Tolsada,
 22 Spanish civil law expert, Dkt. No. 409 (“Yzquierdo Decl.”); (3) Professor
 23 Wolfgang Ernst, Swiss law expert, Dkt. No. 396 (“Ernst Decl.”); (4) Ms. Laurie L.
 24 Stein, art provenance researcher, Dkt. No. 412 (“Stein Decl.”); (5) Ms. Lynn
 25 Nicholas, historical researcher and author of *The Rape of Europa*, Dkt. No. 399
 26 (“Nichols Decl.”); and (6) Mr. Guy Jennings, art appraisal expert, Dkt. No. 394
 27 (“Jennings Decl.”). This brief also references evidence found in the witness filed
 28 testimony of: (1) Mr. Evelio Acevedo Carrero, General Director of the Thyssen-
 Bornemisza Foundation Museum, Dkt. No. 411 (“Acevedo Decl.”); and (2)
 Fernando Pérez de la Sota, attorney and lead legal advisor to the Kingdom of Spain
 (the “Kingdom”) and Foundation in connection with the loan of the Collection to
 the Foundation in 1988 and the subsequent well-documented acquisition by the
 Foundation in 1993 (the “1993 Acquisition Agreement”), Dkt. No. 405 (“Pérez de
 la Sota Decl.”).

1 4. Durand-Ruel sold the Painting to Paul Cassirer on April 11, 1900;
2 Julius Cassirer, Bruno's father, acquired the Painting sometime thereafter. (Stein
3 Decl., ¶ 93; Stipulated Facts ¶5)

4 5. When Julius Cassirer died, his son Fritz Cassirer and Fritz's wife, Lilly
5 Cassirer, inherited the Painting. (Stipulated Facts ¶7.)

6 6. Following Fritz's passing in about 1926, Lilly Cassirer became the
7 sole owner of the Painting. (Stipulated Facts ¶8.)

8 7. In August 1901, the cousins Bruno and Paul Cassirer separated their
9 businesses, with Bruno overtaking the publishing arm of the firm and Paul retaining
10 the art gallery business. Paul Cassirer passed away in 1926. The Paul Cassirer
11 gallery was thereafter continued under Walter Feilchenfeldt and Grete Ring in
12 Berlin. Walter and Marianne Feilchenfeldt left for Holland in 1933, where they ran
13 a branch of the firm. The Paul Cassirer gallery in Berlin officially closed in 1935,
14 and Grete Ring continued the business as an individual dealer until 1937, when she
15 emigrated to England and continued in business from there. (Stein Decl., ¶¶ 87, 89-
16 90.)

17 8. The gallery, Bruno und Paul Cassirer, Kunst und Verlagsanstalt in
18 Berlin at Viktoriastrasse 35 closed in 1901. (Stein Decl., ¶¶ 87, 98.)

19 9. In January 1939, Lilly Cassirer married Professor Otto Neubauer and
20 changed her name to Lilly Cassirer Neubauer. (Cassirer Depo. at 155:21-156:7.)

21 10. As a Jew, Ms. Cassirer Neubauer was subjected to increasing
22 persecution in Germany after the Nazis seized power in 1939. (Dkt. 245, 2015-03-
23 13 Order at 2.)

24 11. In 1939, in order for Ms. Cassirer Neubauer and her husband Otto
25 Neubauer to obtain exit visas to flee Germany, Ms. Cassirer Neubauer was forced
26 to transfer the Painting to Jakob Scheidwimmer, a Nazi art appraiser. (Dkt. 245,
27 2015-03-13 Order at 2; Stipulated Facts ¶10.)
28

1 12. In “exchange” for the Painting, Scheidwimmer transferred 900
2 Reichsmarks (around \$360 at 1939 exchange rates), well below the actual value of
3 the Painting, into a blocked account that Ms. Cassirer Neubauer could never access.
4 (Dkt. 245, 2015-03-13 Order at 2; Stipulated Facts ¶11.)

5 13. Venturi’s Catalogue Raisonné from 1939, noted early exhibitions of
6 the Painting, #1018, but did not provide any reference to Ms. Cassirer Neubauer’s
7 connection to the object. (Stein Decl., ¶ 69, Exs. 32.)

8 14. In 1939, Scheidwimmer participated in a second forced sale involving
9 the Painting, trading it for three German paintings owned by another German Jew,
10 Julius Sulzbacher, who was also attempting to flee Germany. (Dkt. 245, 2015-03-
11 13 Order at 2; Stipulated Facts ¶14.)

12 15. Although Sulzbacher obtained possession of the Painting, it was
13 ultimately confiscated by the Gestapo. (Dkt. 245, 2015-03-13 Order at 2.)

14 16. After the war, the Allies established processes for restoring property to
15 the victims of the Nazis’ looting. (Dkt. 245, 2015-03-13 Order at 2; Stipulated
16 Facts ¶15.)

17 17. The law in the American Zone of Germany, Military Zone Law No. 59
18 (“MGL No. 59”), provided for restitution of property, or, if the property could not
19 be found, compensation. (Dkt. 245, 2015-03-13 Order at 2; Stipulated Facts ¶ 16.)

20 18. In 1943, the Painting was sold by an unknown consignor at the Lange
21 Auction in Berlin to an unknown purchaser for 95,000 Reichsmarks. (*Cassirer v.*
22 *Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 956 (9th Cir. 2017), *cert.*
23 *denied*, 138 S. Ct. 1992, 201 L. Ed. 2d 270 (2018).)

24 19. In 1948, Ms. Cassirer Neubauer filed a timely claim against
25 Scheidwimmer under MGL No. 59, seeking restitution of, or compensation for, the
26 Painting. (Dkt. 245, 2015-03-13 Order at 2.)

27 20. Ms. Cassirer Neubauer was represented by Siegfried Fritz Neuland, an
28 attorney that she chose. (Exh. 509 (Dkt. 223-8) at p. 6, 7.)

1 21. Sulzbacher also filed a claim under MGL No. 59, seeking restitution
2 of, or compensation for, the Painting. (Dkt. 245, 2015-03-13 Order at 2.)

3 22. On September 28, 1951, Ms. Cassirer Neubauer’s claim and
4 Sulzbacher’s claims were “combined” into a single proceeding. (Dkt. 245, 2015-
5 03-13 Order at 2.)

6 23. In 1954 Court of High Restitution Appeals (“CORA”) of the Allied
7 High Commission determined that Lilly Neubauer owned the Painting (“1954
8 CORA decision”). (*Cassirer*, 862 F.3d at 956; Stipulated Facts ¶ 17.)

9 24. The 1954 CORA decision refers to Ms. Cassirer Neubauer as Lilly
10 Neubauer or Neubauer; it makes no reference to the name Cassirer. (Nicholas
11 Decl., ¶¶ 69, 74, Exh. 23.)

12 25. After a change in law, Ms. Cassirer Neubauer dropped her restitution
13 claim against Scheidwimmer and initiated a claim against Germany. (Dkt. 245,
14 2015-03-13 Order at 2.)

15 26. Ms. Cassirer Neubauer, Sulzbacher, and Scheidwimmer believed the
16 Painting was lost or destroyed during the war. (*Cassirer*, 862 F.3d at 956.)

17 27. After 10 years of litigation, the parties reached a settlement of their
18 claims on February 28, 1958, under which the German Reich would pay Ms.
19 Cassirer Neubauer DM 120,000, which was the full fair market value as of April 1,
20 1956, the date appointed for all such valuations. (Dkt. 245, 2015-03-13 Order at 3.)

21 28. As part of the settlement, Ms. Cassirer Neubauer agreed to pay Grete
22 Kahn, Sulzbacher’s heir, DM 14,000 from the payment made by the German
23 Government. (Dkt. 245, 2015-03-13 Order at 3.)

24 29. As further part of the settlement, Ms. Cassirer Neubauer agreed that
25 Scheidwimmer would receive the two German Painting. (Dkt. 245, 2015-03-13
26 Order at 3.)

27 30. Claude Cassirer stated that his grandparents “were satisfied with [Mr.
28 Neuland’s] work,” that he was “a very good attorney and [Claude Cassirer] relied

1 on him,” that “[h]e was very responsible,” and that “we had full confidence in Mr.
2 Neuland.” (Dkt. No. 239-6, UMF 7; Cassirer Depo. at 203:13-204:4; 245:16-19;
3 245:16-19; 248:4-21.)

4 31. Ms. Cassirer Neubauer, or her heirs, received all proceeds from the
5 1958 settlement. (Cassirer Depo. at 198:2-25)

6 32. On July 18, 1951, in a documented transaction, the Frank Perls Gallery
7 of Beverly Hills arranged to sell the Painting to Sidney Brody for \$14,850. (Exh.
8 36; Stipulated Facts ¶ 18.)

9 33. Prior to arranging the sale of the Painting to Brody, Perls and E. Coe
10 Kerr of Knoedler & Co. (an art dealer in New York City) undertook steps to
11 determine if the Painting could have been a looted or displaced work. (Nicholas
12 Decl., ¶¶ 79, 103-106; Stein ¶ 125; Exs. 38-42, 66, 161.)

13 34. In letters dated February 24, 1951 and May 11, 1951, Kerr wrote to
14 Perls concerning the Painting under consideration for acquisition, with a
15 handwritten note stating, “#1018 in Venturi & are you sure there is no wartime
16 juggle?-it is not listed among the stolen pictures,” and “I find it in all the books.”
17 (Nicholas Decl., ¶ 103; Stein ¶ 125; Exs. 38-39.)

18 35. The Painting was not on the French lists published during 1947-49,
19 known as the *Le Répertoire des biens spoliés en France Durant la guerre 1939-*
20 *1945*. (Stein Decl., ¶ 130.)

21 36. The Painting was not included in lists created by the Munich and
22 Wiesbaden and associated Collecting Points of dislocated and spoliated artworks
23 that had been assembled in Germany and Austria at war’s end. (Stein Decl., ¶ 130,
24 Exh. 60.)

25 37. There was no record of the Painting on any of the lists or databases of
26 lost or looted art, such as the Art Loss Register. (Nicholas Decl., ¶¶ 64, 85.)
27
28

1 38. The Painting was illustrated in two 1950 publications on Pissarro, by
2 Gotthard Jedlicka and Thadée Natanson, without including any provenance
3 information or ownership reference. (Stein Decl., ¶ 70; Exs. 159-160.)

4 39. Frank Perls was Jewish. (Nicholas Decl., ¶ 98, Exh. 199 at TBF
5 004599, 004562.)

6 40. Frank Perls opened the Frank Perls Gallery in Hollywood in 1939 and
7 closed in 1942 when Perls enlisted in the United States Army. (Nicholas Decl., ¶
8 93, Exh 119 at TBF004561-4562.)

9 41. Perls served as a U.S. military translator in Germany where he and
10 Martin Dannenberg, a WWII Army Sargent, discovered a copy of the 1935
11 Nuremberg Laws signed by Hitler. (Nicholas Decl., ¶ 94, Exh. 119 at TBF004599-
12 4601.)

13 42. After the war, Perls returned to Los Angeles to manage the Associated
14 American Artists Gallery in Beverly Hills, California and re-open the Frank Perls
15 Gallery in Beverly Hills, California. (Nicholas Decl., ¶ 95, Exh. 165.)

16 43. Perls organized major exhibitions of Henri Matisse and Picasso, was a
17 life fellow of the Los Angeles County Museum, and was a member of the Art
18 Dealers of America, serving on its Board of Directors and as a Director. (Nicholas
19 Decl., ¶ 96, Exh. 119 at TBF004563, 004570.)

20 44. Perls was known for exposing art fakes and forgeries, earning him a
21 reputation for discovering and pursuing disreputable art appraisers and dealers.
22 (Nicholas Decl., ¶ 97; Exh. 165.)

23 45. The Frank Perls gallery earned a commission of \$3,105 for arranging
24 the sale of the Painting to Sidney Brody. (Dkt. 315, 2015-06-04 Order at 2;
25 Nicholas Decl., ¶ 90; Exh. 36.)

26 46. Brody was an Army flier during WWII and was awarded the Bronze
27 Star by the United States and the Croix de Guerre by France. (Nicholas Decl., ¶
28 115, Exh. 173.)

1 47. Brody and his wife, Frances Lasker Brody, were avid art collectors.
2 (Nicholas Decl., ¶¶ 90, 112-114; Exh. 173.)

3 48. Brody was a trustee of the Art Council of the University of California
4 at Los Angeles and was appointed by President Reagan to the President’s
5 Committee on the Arts and Humanities. (Nicholas Decl., ¶ 113; Exh. 173.)

6 49. Brody was also a former trustee, past president, and board chairman of
7 the Los Angeles County Museum of Art. (Nicholas Decl., ¶ 114; Exh. 173.)

8 50. Around February 1952, Perls placed the Painting on the art market for
9 Brody. (Stipulated Facts ¶ 19.)

10 51. Perls placed the Painting on consignment with Knoedler, in New York
11 City. (Stipulated Facts ¶20.)

12 52. On May 7, 1952, W. F. Davidson of Knoedler wrote to Frank Perls,
13 referencing Venturi’s Catalogue Raisonné from 1939, #1018, and asking for
14 additional exhibition and publication information on the Painting. Davidson asks
15 Perls, “Any information you have may on collections to complete our pedigree
16 would be very useful,” and a handwritten note indicates, “info given by telephone.”
17 (Stein Decl., ¶ 36; Exh. 42.)

18 53. In May 1952, Sydney Shoenberg, an art collector in St. Louis,
19 Missouri, in a documented transaction, purchased the Painting from Knoedler for
20 \$16,500. (Stipulated Facts ¶ 21; Nicholas Decl., ¶ 99; Exh. 66 at TBF004494.)

21 54. Both Shoenberg and his son, Sydney Shoenberg, Jr., bought several
22 artworks from Knoedler on the same day, including works by Henri Rousseau,
23 Pierre August Renoir, Georges Rouault and Georges Braque. (Stein Decl., ¶ 137,
24 Exh. 62, p. 2; Nicholas Decl., ¶ 100; Exh. 161 at TBF004510, 4514, 4517, 4520,
25 4522, 4538, 4542.)

26 55. Lilly died in America in 1962. (Stipulated Facts ¶24.)

27 56. Shoenberg held the Painting in his collection, in his hometown of St.
28 Louis. (Nicholas Decl., ¶ 102; Stein Decl., ¶¶ 137-138, Exh. 26.)

1 57. The Painting was published and reproduced as part of an article about
2 the Shoenberg Collection in St. Louis, written by Perry T. Rathbone, the director of
3 the St. Louis Museum. The article appeared in the international periodical, *The*
4 *Connoisseur* magazine in May 1954. (Stein Decl., ¶ 138; Nicholas Decl., ¶ 102;
5 Exh. 26.)

6 58. A photograph of the Painting, with a detailed description, was included
7 in the article. (Stein Decl., ¶ 138; Nicholas Decl., ¶ 102; Exh. 26.)

8 59. The article appeared in both the London and the New York editions of
9 *The Connoisseur*. (Stein Decl., ¶ 138.)

10 60. *The Connoisseur* May 1954 article did not provide any reference to
11 Ms. Cassirer Neubauer's connection to the Painting. (Nicholas Decl., ¶ 46; Exh.
12 26.)

13 61. A photo card among the Frick Art Library Photo Archive resources in
14 New York City, references the ownership of the Painting by Shoenberg and refers
15 to the *Connoisseur* article. (CASS000008-0009.)

16 62. The photo card makes no reference to Ms. Cassirer Neubauer's
17 ownership of the Painting. (CASS000008-0009.)

18 63. The Frick Art Library Photo Archive is one of the principle sources for
19 provenance research. (Nicholas Decl., ¶ 127)

20 64. In 1974, John Rewald of the Museum of Modern Art in New York, a
21 noted Pissarro expert, published a study called *Camille Pissarro*. (John Rewald's
22 study from 1974, *Camille Pissarro* (Paris: Nouvelles Editions francaises, 1974)
23 (figure 41). (Stein Decl., ¶ 155; Exh. 303.)

24 65. In this book, the Painting was reproduced as Figure 41. There is no
25 reference to Lilly Cassirer Neubauer's or her family's prior ownership of the
26 Painting. (John Rewald's study from 1974, *Camille Pissarro* (Paris: Nouvelles
27 Editions francaises, 1974) (figure 41). (Stein Decl., ¶ 155; Exh. 303.)
28

1 66. Rewald was responsible for updating the 1939 Pissarro/Venturi
2 *Catalogue Raisonné*, which he took over from Ludovico-Rodolphe Pissarro, who
3 had passed away in 1952. (Stein Decl., ¶ 155.)

4 67. The project was not completed until the 2005 publication of the
5 updated *Catalogue Raisonné* by Claire Durand-Ruel Snollaerts and Joachim
6 Pissarro, under the auspices of the Wildenstein Institute in Paris. (Stein Decl., ¶¶
7 157-159; Exh. 107.)

8 68. The updated *Catalogue* included the first published reference to the
9 previous ownership of the Painting by Ms. Cassirer Neubauer or her family. (Stein
10 Decl., ¶ 159; Exh. 107.)

11 69. The Painting remained in the United States for about 25 years from
12 1951 to 1976. (Stipulated Facts ¶ 23.)

13 70. Frank Perls died on February 8, 1975. (Nicholas Decl., ¶ 98; Exh. 119
14 at TBF 004599, 004562.)

15 71. On July 1, 1975, Sotheby's London sold Camille Pissarro's *Soleil,*
16 *après-midi, la rue de l'Epicerie, Rouen*, 1898, 81.9 x 65.4cm. (cat. raisonne
17 no.1223) for £120,000 (\$262,800). This was the highest price paid for a work by
18 Pissarro in that year. (Jennings Decl., ¶ 25, Exh. 166.)

19 72. Sidney Shoenberg died on November 25, 1975. (Nicholas Decl., ¶
20 101; Exh. 167.)

21 73. In 1976 the highest price paid for a work by Pissarro was \$230,000, at
22 Sotheby Parke Bernet for *La Mere Jolly raccommodant*, 1874, 103 x 80.7cm. (cat.
23 raisonné no. 368). This is an earlier but larger work than "*Rue St Honore, après-*
24 *midi, effet de pluie*". (Jennings Decl., ¶ 26; Exh. 168.)

25 74. In or around October 1976, Stephen Hahn exhibited the Painting for
26 sale at his gallery in New York City. Hahn had the Painting on consignment.
27 (Nicholas Decl., ¶¶ 151-152; Exs. 318, 320.)
28

1 75. In October 1976, Baron Hans Heinrich Thyssen-Bornemisza saw the
2 Painting at Hahn’s galley in New York City. Shortly thereafter, in a documented
3 transaction, the Baron purchased the Painting from Hahn for \$275,000. (Stipulated
4 Facts ¶26.)

5 76. Stephen Hahn made a commission of \$25,000 for the sale of the
6 Painting. (Stipulated Facts ¶ 27.)

7 77. The Baron purchased three other paintings from Stephen Hahn at the
8 time that he purchased the Painting. (Stipulated Facts ¶28.)

9 78. Hahn corresponded with the Baron about his acquisition of these four
10 paintings, including confirmation of the sales prices. (Stipulated Facts ¶ 29; Exs.
11 318-321.)

12 79. The Foundation’s provenance report for each of these four paintings
13 erroneously states that they were purchased by the Baron from “Galerie Hahn,
14 Paris” or “Galerie Joseph Hahn, Paris” and not from the Stephen Hahn Gallery in
15 New York. (Stipulated Facts ¶ 30.)

16 80. Works of art are all unique and therefore have to be priced individually
17 by comparison with similar works, similar in date, size, subject matter, medium,
18 condition. There is no off the peg reference point at any date or time for a work of
19 art. (Unlike crude oil where the price of a barrel can be pin-pointed to any date with
20 precision). (Jennings Decl., ¶ 16.)

21 81. Valuations of works of art are carried out for a wide variety of
22 purposes. Probate, Estate Tax, Auction Sale, Insurance et cetera. For example,
23 Insurance values tend to be on the high side because the insured is looking at
24 replacement cost in the short term. (Jennings Decl., ¶ 17.)

25 82. For the purposes of estimating Fair Market Value the underlying
26 assumption is that the putative transaction is between a willing buyer and a willing
27 seller. Value is established by market data comparison using similar and like works
28 wherever possible which have been sold within a similar time frame. Attention is

1 paid to medium, size, subject matter, date of the work, importance in the artist's
2 oeuvre and condition where this is known. (Jennings Decl., ¶ 18.)

3 83. This is chiefly through publicly available data from auction sale
4 records although knowledge of private transactions and general market intelligence
5 can also be helpful. Public auction records are published on various media
6 platforms on the internet and I have been using one called Artnet which has
7 illustrated records going back to 1985. (Jennings Decl., ¶ 19.)

8 84. The Art Sales Index which was a two volume annual publication
9 listing all public auction prices with sale date, lot number and auction house; it is
10 not illustrated. (Jennings Decl., ¶ 20.)

11 85. The Baron opened Villa Favorita's galleries to the public and,
12 beginning in the 1970's, staged dozens of exhibits from his collection in museums
13 around the world. (Exh. 219 at TBF019352.)

14 86. Hahn was Jewish and was a refugee during WWII. (Nicholas Decl., ¶
15 144; Exs. 295, 302.)

16 87. Hahn was a founding member and an early President of the Art
17 Dealers Association. (Nicholas Decl., ¶ 144; Exs. 295, 302.)

18 88. Hahn was a dealer of longstanding who specialized in Impressionist
19 and Modern Art. He was a member of the Art Dealers Association of America (a
20 highly respected body that jealously guards its reputation for probity). In the 1970's
21 he was at the height of his career. (Jennings Decl., ¶ 45.)

22 89. Baron Thyssen-Bornemisza was a collector of considerable wealth and
23 standing who had a deep knowledge of the art market gained after many years of
24 involvement. (Jennings Decl., ¶ 45.)

25 90. The publicly available information about sales of other paintings by
26 Pissarro, around the time that the Baron Thyssen-Bornemisza purchased the
27 Painting, is useful in determining the reasonable market value for such paintings at
28 that time. (Jennings Decl., ¶ 46.)

1 91. For the time frame in question, 1976, there are three sales of
2 comparable Pissarro paintings that we can refer to in determining the market for
3 such works and, thus, the fair market value of the Painting. (Jennings Decl., ¶ 24.)

4 92. On July 1, 1975, Sotheby's London sold Camille Pissarro's *Soleil,*
5 *après-midi, la rue de l'Épicerie, Rouen* (1898), 81.9 x 65.4 cm. (cat. raisonne
6 no.1223) for \$262,800 (£120,000; £1=\$2.19). This was the highest price paid for a
7 work by Pissarro in that year. (Jennings Decl., ¶ 25; Exh. 166.)

8 93. In 1976 the highest price paid for a work by Pissarro was \$230,000 at
9 Sotheby Parke Bernet for *La Mere Jolly raccommodant* (1874), 103 x 80.7 cm. (cat.
10 raisonné no. 368). This work was earlier but somewhat larger than the Painting.
11 (Jennings Decl., ¶ 26; Exh. 168.)

12 94. In May 1977, Christie's New York sold a work very comparable to the
13 Painting for \$275,000. This was the highest price paid for Pissarro in 1977. This
14 work was *Boulevard de Montmartre, matin, temps de pluie* (1897) (cat. raisonné no.
15 1161). It measured only 52.5 x 66 cm. so was somewhat smaller than the museum's
16 picture (compare 81 x 65 cm). It is exactly the same date and depicts the same
17 meteorological conditions, namely the wet, glistening streets after the rain; it is,
18 however, of the more iconic *Boulevard de Montmartre*. (Jennings Decl., ¶ 27; Exh.
19 171.)

20 95. The price paid by the Baron in 1976 of \$275,000 was a 'fair to strong
21 price' and entirely consistent with the highest prices being paid for the work of
22 Pissarro at the time. (Jennings Decl., ¶ 28; Exh. 72.)

23 96. Although, all dealers try to sell for more than they buy in order to
24 make a profit and remain in business. In this particular case, Hahn had not bought
25 the Pissarro, he did not own it but was selling it on consignment from, presumably,
26 the Estate of Sydney M. Shoenberg. There is no question in this instance of a profit
27 margin. Hahn was paid a commission of \$25,000 for handling the sale (a
28 commission of a little under 10%). (Jennings Decl., ¶ 31.)

1 97. When a painting is sold on consignment, a net minimum price is
2 agreed between the consignor and the dealer. This net minimum can sometimes be
3 the subject of negotiation in the event of a counter offer by the buyer and would
4 only be accepted after referring back to the consignor. Here, the consignor was the
5 Shoenberg Estate, presumably, the dealer was Stephen Hahn and the buyer was
6 Baron Thyssen. When the consigned artwork is sold, the agreed “net minimum” is
7 then returned to the consignor – which is confirmed here by Hahn’s letter to
8 Thyssen, dated October 27, 1976, in which Hahn stated that “as this painting does
9 not belong to me, I have to pay the purchase price directly to the owner.”
10 (Translation mine; French: “*ce tableau ne me’appartenant pas je dois verser le prix*
11 *d’achat directement au proprietaire.*”). (Jennings Decl., ¶ 32; Exh. 318.)

12 98. The Thyssen Pissarro had a market value in November 1976 of
13 approximately \$300,000. The price of \$275,000 plus \$25,000 commission is
14 entirely in line with the prevailing prices at the upper end of the Pissarro market in
15 the mid 1970's. (Jennings Decl., ¶ 37.)

16 99. My experience as a dealer on my own account from 2004-12 and my
17 experience serving as Vice President of The Society of London Art Dealers lead me
18 to confirm that a commission of just under 10% for acting as an agent is entirely
19 consistent with market norms. (Jennings Decl., ¶ 38.)

20 100. Except when on public display on exhibitions outside Switzerland, the
21 Painting was maintained as part of the Thyssen-Bornemisza Collection at the Villa
22 Favorita, in Lugano, Switzerland until 1992. (Dkt. 315, 2015-06-04 Order at 2;
23 Dkt. No. 289-11, UMF 4; Acevedo Decl. ¶ 17.)

24 101. The Painting was maintained as part of the Thyssen-Bornemisza
25 Collection. (Stipulated Facts ¶ 31.)

26 102. The Baron exhibited the Painting during a tour in Australia and New
27 Zealand in 1979 and 1981. (*Cassirer*, 862 F.3d at 975; Acevedo Decl., ¶ 31, Exh.
28 172) This exhibition was published in 1979-1981, *America & Europe, A Century*

1 of *Modern Masters from the Thyssen-Bornemisza Collection*, Perth, Art Gallery of
2 Western Australia; Adelaide, Art Gallery of South Australia; Brisbane, Queensland
3 Art Galley; Melbourne, National Gallery of Victoria; Sidney, Art Gallery of New
4 South Wales; Wellington, New Zealand, National Art Gallery; Auckland, Auckland
5 City Art Gallery; Christchurch, Robert McDougall Art Gallery, n. 37, il. 137. The
6 Painting was pictured in this publication. (*Cassirer*, 862 F.3d at 975; Acevedo
7 Decl., ¶ 31(a), Exh. 172.)

8 103. Sidney F. Brody died in January 1983. (Nicholas Dec., ¶ 116, Exh.
9 173.)

10 104. The Baron exhibited the Painting during a tour in Tokyo, Japan, from
11 May to July 1984. This exhibition was published in 1984, *Modern Masters from*
12 *the Thyssen-Bornemisza Collection*, Tokyo, the National Art Museum of Modern
13 Art; Kumamoto, Kumamoto Prefectural Museum, n. 12, il. The Painting was
14 illustrated in this publication and has about two pages dedicated to it. (Acevedo
15 Decl., ¶ 31(b), Exh. 174.)

16 105. The Baron exhibited the Painting in London, at the Royal Academy of
17 Arts in 1984. This exhibition was published in 1984, *Modern Masters from the*
18 *Thyssen-Bornemisza Collection*, London, Royal Academy of Arts, n. 12, p. 192, il.
19 p 34. The Painting is shown pictured in this publication. (Acevedo Decl., ¶ 31(c),
20 Exh. 303.)

21 106. Between 1985 and 1986, the Baron exhibited the Painting in Florence,
22 Dusseldorf, and Paris. (*Maestri dell'Arte Moderna Nella Collezione Thyssen-*
23 *Bornemisza*, Firenze, Palazzo Pitti, n. 14, p. 178, il.; *Maitres Modernes de la*
24 *Collection Thyssen-Bornemisza*, Paris, Musee d'Art Moderne de la Ville de Paris,
25 il.; *Moderne Malerei aus der Sammlung Thyssen-Bornemisza*, Nurenberg,
26 Germanisches Nationalmuseum; Dusseldorf, Stadtische Kunsthalle, n. 12, p. 180,
27 il.) The Painting is shown pictured in these publication. (Acevedo Decl., ¶ 31(d)-
28 (f); Exh. 109.)

1 107. The Baron further exhibited the Painting during a tour in Madrid and
2 Barcelona, Spain, from February 10 to April 6, 1986. These exhibitions were
3 published as follows: 1985-1986: *Maitres Modernes de la Collection Thyssen-*
4 *Bornemisza*, Paris, Musee d'Art Moderne de la Ville de Paris, il.; and 1986:
5 *Maestros modernos de la coleccion Thyssen-Bornmisza*, Madrid, Biblioteca
6 Nacional, Salas Pablo Ruiz Picasso; Barcelona, Palau de la Virreina, n. 14, p. 190.
7 The Painting is shown pictured in these publications. (Acevedo Decl., ¶ 31(g), Exh.
8 176.)

9 108. In the July 1988 edition of Architectural Digest, The International
10 Magazine of Fine Interior Design, a 9-page article titled "The Collectors: Baron
11 Hans Heinrich Thyssen-Bornemisza, The Villa Favorita in Lugano," features the
12 Painting pictured hanging over the Baron's dressing room and specifically
13 identifies it as "Pissarro's *Rue Saint-Honoré, Effet de Pluie: Après Midi, 1897.*"
14 (Stipulated Facts ¶ 32; Exh. 327.)

15 109. According to the article, approximately 250,000 visitors toured the
16 Villa in 1987. (Nicholas Decl., ¶ 160, Exh. 327.)

17 110. The Baron possessed the Painting for the five years necessary for
18 acquisitive prescription under Swiss Law, completing the five-year period of
19 possession between 1976 and 1981. (*Cassirer*, 862 F.3d at 975; Stipulated Facts ¶
20 35.)

21 111. The Baron transferred the Painting to the Stichting Collectie Thyssen-
22 Bornemisza, a Dutch foundation established in 1971 by the Baron. (Stipulated
23 Facts ¶ 36.)

24 112. The Baron's main objective was to keep the Collection together, to be
25 housed in a museum for public display permanently, and supplied with the funds
26 necessary to do so in perpetuity. (Pérez de la Sota ¶ 26, Exh. 179 at KOS000056-
27 67.)

28

1 113. In 1988, the Baron and Spain agreed that the Baron (through Favorita
2 Trustees Limited (“Favorita”)) would loan a large portion of his art collection (the
3 “Collection”), including the Painting, to the Kingdom of Spain. (Dkt., 315, 2015-
4 06-04 Order at 3; Stipulated Facts ¶ 37; Exh. 83.)

5 114. The transaction was negotiated with Favorita for almost a year. One of
6 the first things we learned was that, although the offer ultimately came from the
7 Baron, he did not have full authority to make any important decisions by himself. In
8 fact, our interlocutor was the trustee and it soon became evident that Favorita had to
9 continuously consult the Baron and also, and more importantly, some of the
10 beneficiaries of the Trust (mainly the Baron’s son Georg Heinrich and daughter
11 Francesca). (Pérez de la Sota Decl., ¶ 36.)

12 115. The Loan Agreement for the Collection between Spain and Favorita
13 was executed on December 20, 1988. (Stipulated Facts ¶ 38; Exh. 83.)

14 116. The Loan Agreement provided for the loan of 787 artworks.
15 (Stipulated Facts ¶ 39.)

16 117. The Loan Agreement provided that Spain would borrow and undertake
17 obligations regarding the curatorship, management, and administration of a portion
18 of the Collection for a period of up to nine years and six months. (TBF009818;
19 Stipulated Facts ¶ 40.)

20 118. In consideration of the loan, Spain would pay to Favorita \$5 million
21 U.S. dollars per year (that amount to be annually indexed to the US Consumer Price
22 Index). (Stipulated Facts ¶42; Pérez de la Sota Decl., ¶ 47; TBF 83 at TBF009824,
23 Clause 4; TBF010017, Article 5(a); TBF010055-10059.)

24 119. Over the course of the loan, Spain paid to Favorita a total of about \$12
25 million in loan payments (\$5,798,004.50 in 1992 and \$5,985,037.41 in 1993).
26 (Stipulated Facts ¶ 42.)

27 120. In further consideration of the loan, the Spanish government agreed to
28 display the Collection at the Villahermosa Palace in Madrid, Spain, which would be

1 restored and redesigned for its new purpose as the Thyssen-Bornemisza Museum.
2 (Dkt. 315, 2015-06-04 Order at 3; Stipulated Facts ¶ 43.)

3 121. The Villahermosa Palace was to be completely refurbished. Only the
4 façades remained the same and the rest of the building was entirely demolished as a
5 museum tailor-made for the Collection was built. For instance, special elevators
6 were manufactured and installed so paintings could be moved around in a safer way
7 and stairways would not have to be used). (Pérez de la Sota Decl., ¶ 65; Stipulated
8 Facts ¶ 44.)

9 122. The Loan Agreement further provided the Kingdom of Spain with the
10 obligation of promoting and publicizing the Collection within Spain, including,
11 *inter alia*, encouraging the public to visit the exhibition of the Loan Collection at
12 the Museum, encouraging scholarly interest in and study of the Loan Collection,
13 and considering temporary exhibitions and loans of artworks within and outside of
14 Spain. (Stipulated Facts ¶ 45.)

15 123. The Loan Agreement provided that the Kingdom of Spain was to
16 procure a staff sufficient in numbers, qualifications, and experience to maintain the
17 Museum, including, a Managing Director, a Chief Curator, and a
18 Conservator/Restorer, all at the expense of the Kingdom of Spain. (Stipulated Facts
19 ¶ 46.)

20 124. The Loan Agreement set stringent requirements for the Museum
21 exhibit rooms: controlled temperature, humidity, air ventilation with filtration, light
22 levels, and appropriate measuring devices for these conditions, among other things.
23 (Stipulated Facts ¶ 47.)

24 125. Architect Rafael Moneo, at that time Dean of the Department of
25 Architecture of Harvard University, and the author of emblematic buildings around
26 the world such as the National Museum of Roman Art, Mérida, Spain, the Davis
27 Museum and Cultural Center at Wellesley College, Wellesley, Massachusetts or the
28

1 Cathedral of Our Lady of the Angels, Los Angeles, California, was hired to
2 refurbish and design the Palace. (Stipulated Facts ¶ 48.)

3 126. The refurbishing of the Palace cost approximately \$27 million
4 (\$27,141,920) and approximately \$16 million (\$16,107,799) for costs associated
5 with acquiring and furnishing it with the necessary equipment, hardware,
6 installations, IT, etc. (Stipulated Facts ¶ 49.)

7 127. The Loan Agreement established a delayed completion as certain
8 conditions had to be fulfilled prior to the issue of the Final Certificate Date.
9 (Stipulated Facts ¶ 50.)

10 128. If those conditions were not met, the Loan Agreement would be
11 suspended and not binding. (Stipulated Facts ¶ 51.)

12 129. The Loan would commence 60 days after the Final Certificate Date or
13 such other day after the Final Certificate Date as may be agreed in writing by the
14 parties (“Loan Commencement Date”). (Stipulated Facts ¶ 52.)

15 130. Delivery of the artworks subject to the Loan would not begin until the
16 Loan Commencement Date. (Stipulated Facts ¶ 53.)

17 131. Pursuant to the 1988 Loan Agreement, the Foundation was established
18 by the Spanish government as a non-profit, private cultural foundation to promote
19 and provide services for art on December 20, 1988. Its role is to: (1) maintain,
20 conserve, exhibit to the public, and promote the works of art that form part of the
21 Thyssen-Bornemisza Collection in the Foundation’s possession; (2) to preserve the
22 museum that houses the art; and (3) to finance this endeavor as necessary.
23 (Stipulated Facts ¶ 54.)

24 132. A February 6, 1989, faxed letter from Anthony Markham, of Maitland
25 & Co., legal advisors to Favorita, reflects that the Painting was located at the Villa
26 Favorita in Lugano and was in the bedroom. (Stipulated Facts ¶ 55.)

27 133. On February 15, 1989, the Painting was transferred from Stichting to
28 Favorita, a Bermudian company created to act as a trustee of one or more

1 settlements created for the benefit of the Baron’s descendants or relatives or for any
2 charitable trust, foundation, or public charity, among other things. (Stipulated Facts
3 ¶ 56.)

4 134. The loan mandated the issuance of legal opinions by the Bermuda, UK
5 and Swiss, among many other, advisors of the Kingdom confirming, *inter alia*, that
6 Favorita had the authority to enter into and perform the Loan Agreement (i.e.
7 deliver the paintings to the borrower) (Stipulated Facts ¶ 57.)

8 135. In 1989, and in connection with the loan of the Collection, an
9 investigation was undertaken regarding title to works in the Collection (“1989
10 investigation”). (Pérez de la Sota Decl., ¶¶ 46-63; Exs. 51-52, 85, 89, 95, 183, 184,
11 186, 188-192, 194, 201-202, 204, 108, 212, 327.)

12 136. The 1989 investigation was undertaken to verify the title of Favorita to
13 the Collection. (Pérez de la Sota Decl., ¶¶ 46-63; Exh. 212.)

14 137. Uría Menéndez was Spanish counsel to the Kingdom of Spain, and
15 along with Allen and Overy (“UK counsel”), and Lenz, Schleup, Briner & de
16 Coulon (later Lenz & Staehelin), Swiss counsel (“Swiss counsel”), were the
17 primary legal advisors to the Kingdom of Spain. (Stipulated Facts ¶ 58.)

18 a. Uría Menéndez, with over 700 lawyers and a presence in 12
19 countries is listed by prestigious international legal directories
20 such as Chambers & Partners, The Legal 500 and IFLR 1000,
21 among others. Harvard Business School has identified UM as an
22 example of professional success and uses it as a case study in its
23 management courses. (Pérez de la Sota Decl., ¶ 3.)

24 b. Allen & Overy is ranked in Band 1 and 2 in 201 categories
25 across all Legal 500 Directories, the highest of the global elite
26 group of international law firms. (Pérez de la Sota Decl., ¶ 17.)

27 c. Lenz & Staehelin, with over 200 lawyers, is the largest law firm
28 in Switzerland. (Pérez de la Sota Decl., ¶ 17.)

1 138. Swiss counsel was primarily responsible for the 1989 investigation of
2 title since most of the paintings had been situated in Switzerland at all relevant
3 times. (*See* Pérez de la Sota Decl., ¶ 61(a).)

4 139. Richard Turnor, UK counsel, posited that the firms engaging in the
5 investigation of title need to consider how to conduct the investigation. (Exh. 183.)

6 140. Turnor recommended that the investigation team make the assumption
7 “as to ownership of the works of art prior to 1980 while conducting a thorough and
8 detailed examination of events in relation to each painting since then. I should have
9 thought that checking the position back to 1980 was reasonable protection against
10 risk of fraud in all the circumstances. It is almost inconceivable that the family
11 would made fraudulent arrangements in regard to ownership of paintings as far
12 back as 1980 with the intention of frustrating a deal with the Kingdom of Spain
13 eight years later.” (Pérez de la Sota Decl., ¶ 54, Exh. 183; *see also* 51, 186, 212.)

14 141. On January 4, 1989, Swiss counsel responded via a faxed letter
15 advising that for paintings acquired before 1980, the Baron (through any one of his
16 entities) could be presumed to have title to such paintings provided that he had held
17 the paintings in good faith for a period of 5-years post-acquisition. (Pérez de la
18 Sota Decl., ¶ 54, Exh. 85.)

19 142. Swiss counsel further advised that “for paintings acquired after 1983, it
20 seems advisable to examine more closely whether the acquisitions are properly
21 documented.” (Pérez de la Sota Decl., ¶ 54, Exh. 85.)

22 143. Documentation regarding acquisitions made after 1983 was closely
23 scrutinized (because the five-year limitation period had not yet expired) but none of
24 the investigations revealed any evidence of the Baron acting in bad faith when
25 acquiring any of those paintings, so the decision of establishing 1980 as a root of
26 title and the elements which were taken into account to make it (specifically that the
27 Baron was a good faith acquiror), proved to be perfectly reasonable. (Perez de la
28 Sota Decl., ¶ 62)

1 144. Given the circumstances and the Swiss legal advice received, it was
2 decided that the root of title would be January 1, 1980. (Perez de la Sota Decl.,
3 ¶53; Exh. 212.)

4 145. Establishing 1980 as a root of title was based on two principles:

5 a) we considered that it was almost inconceivable that any member
6 of the family would have made fraudulent arrangements in regard to
7 ownership of the paintings as far back as 1980 (eight years earlier) aimed at
8 frustrating a deal with the Kingdom that at that time no one could foresee,
9 and

10 b) Swiss counsel confirmed that the paintings which belonged to
11 the TB Collection in 1980 (and which acquisition was regulated by Swiss
12 law) could be assumed to have been properly acquired if, despite any earlier
13 irregularity, the Baron had acquired them in good faith either directly or from
14 a merchant. The five-year limitation on any potential claims under Swiss law
15 had already expired in 1988 and ownership over those paintings had been
16 definitely acquired. (Perez de la Sota Decl., ¶ 54; Exs. 51, 183, 186, 212.)

17 146. The investigation counsel (UK counsel, Swiss counsel, and Uría
18 Menéndez) were permitted to inspect and did inspect a catalogue of all paintings
19 which were within the Thyssen-Bornemisza family structure by January 1, 1980.
20 (Perez de la Sota Decl., ¶ 51-53; Exh. 212.)

21 147. Per the advice of Swiss counsel, paintings held bona fide within the
22 family structure and in Switzerland prior to January 1, 1980, would have been
23 acquired by prescriptive rights (if not otherwise) by the time of the Loan
24 Agreement. (Perez de la Sota Decl., ¶ 54; *see* Exs. 51, 183, 186, 212.)

25 148. Anthony Markham of Maitland & Co., legal advisors to Favorita,
26 supplied a list of paintings which had been purchased since January 1, 1980. (Exh.
27 212; Perez de la Sota Decl., ¶46-63.)
28

1 149. Swiss counsel traveled to Villa Favorita in Lugano and reviewed the
2 inventory lists of paintings acquired before January 1, 1980 to confirm this fact.
3 (Exh. 51 at TBF006088; Perez de la Sota Decl., ¶¶46-63.)

4 150. Copies of documentation relating to transfers within the family
5 structure since 1980 were supplied, and Swiss counsel inspected further records in
6 Lugano for paintings acquired after January 1, 1980. (Exh. 212; Perez de la Sota
7 Decl., ¶¶ 46-63.)

8 151. No further investigation was done with the pre-January 1, 1980,
9 paintings aside from verifying that the paintings were on the inventory lists, as
10 acquisitive prescription under Swiss law was presumed for these paintings. (Exh.
11 51; Perez de la Sota Decl., ¶¶ 46-63.).

12 152. The Foundation was not aware of any adverse title claims having been
13 made on any of the painting that were part of the Loan. (Perez de la Sota Decl., ¶
14 56)

15 153. The Baron was a second generation collector, that is, members of his
16 family (his father and himself) had been spending hundreds of millions in collecting
17 art professionally for some 60 years using their wealth not only to buy pieces of art,
18 but to create a professional infrastructure (curators, restorers, couriers, etc.) to
19 preserve, maintain, exhibit and promote the study of the works that they were, year
20 by year, adding to the TB Collection. A museum had been created in Villa Favorita
21 (the Lugano Museum) to house and exhibit the TB Collection. (Perez de la Sota
22 Decl., ¶ 57)

23 154. One of the main goals of both the Baron and his father was to raise
24 public awareness about the TB Collection. They were collecting works of art not
25 for their personal enjoyment and contemplation in the rooms of their private
26 residences but to exhibit them to the public. And to make this happen, the study of
27 the TB Collection by scholars was promoted, catalogues were prepared and, above
28 all, a large part of the TB Collection was usually in temporary exhibitions all

1 around the world (especially the modern masters, because when the Baron started to
2 collect them in 1961 the walls of Villa Favorita were full of old masters and there
3 was little space for any new arrivals). (Perez de la Sota Decl., ¶ 58)

4 155. From 1975 to 1990, 17 temporary exhibitions of modern masters of the
5 TB Collection (16, if the 1978 exhibition in Lugano is not considered for this sum)
6 were organized in 13 countries of 4 continents (America, Asia, Europe and
7 Australia); the Painting, in fact, was included in two of those exhibitions which
8 toured, in total, 7 countries of 3 continents (Australia (1979-80) and Japan, the UK,
9 Germany, Italy, France and Spain (1984-86)) (Modern Masters: Thyssen-
10 Bornemisza Museum. 1992. by J. Alvarez Lopera (Exs. 209, 172, 174, 176, 213). If
11 we refer just to Spain and to 1986 and 1987 (when the first contact was made and
12 the first formal offer was communicated, respectively), two exhibitions with
13 important pieces of the TB Collection (more than 100 paintings each) were held at
14 the National Library (modern masters) and the San Fernando Royal Academy of
15 Fine Arts (old masters) in Madrid. (Perez de la Sota Decl., ¶ 59)

16 156. That approach to collecting was, in the opinion of the advisors of the
17 Kingdom who had to make a recommendation on the structure of the investigation
18 of title to the Minister of Culture, clearly incompatible with the acquisition of
19 looted art. (Perez de la Sota Decl., ¶ 60)

20 157. Appleby, Spurling & Kempe, Bermudian counsel, were asked to
21 prepare a Bermudian law opinion with regard to Favorita taking good title to these
22 paintings. (Exh. 212; Exh. 208.)

23 158. Further opinions on corporate powers and validity under the applicable
24 transfer laws were sought on transfers previously made within the Thyssen-
25 Bornemisza family structure from: (1) Dutch counsel; (2) British Virgin Island
26 counsel; and (3) Liechtenstein counsel. (Exh. 212 at TBF006076.)

27 159. Anthony Markham further supplied a list of paintings to be subject to
28 the Loan with their present location. Information was also compiled relating to

1 where the paintings had been situated on occasions of past transactions. (Exh. 212
2 at TBF006077; Perez de la Sota Decl., ¶¶ 46-63.)

3 160. Some paintings at the time of the Loan Agreement were situated in
4 Holland, Germany, UK, France, Australia, Japan and Spain. (Exh. 212 at
5 TBF006077; Exh. 212.)

6 161. Locations of paintings since January 1, 1980 also previously included
7 West Germany, Australia, the United States, Netherlands, and Monaco. (Exh. 212
8 at TBF006077-78; Exh. 212.)

9 162. Further opinions were thus sought from U.S. counsel (Sullivan &
10 Cromwell), Dutch counsel, West German counsel (Mueller Weitzel Weisner),
11 counsel from the Netherlands (Nauta Dutilh), Japan, and France. Allen & Overy
12 provided an opinion as to U.K. law, and Uría Menéndez covered Spanish law.
13 (Exh. 212 at TBF006078-6079; *see also* Exs. 52, 89.)

14 163. Once satisfied with the 1989 investigation, the legal opinions referred
15 to in clause 5(c) of the Loan Agreement were issued and once the other suspensive
16 conditions had been fulfilled, the parties executed the First Certificate on February
17 28, 1989 (several days were added by mutual consent to the 60-day period
18 established in the Loan Agreement because the process of obtaining a part of the
19 required documentation was somewhat delayed during the Christmas period).
20 (Perez de la Sota Decl., ¶ 63; Exh. 83)

21 164. For the next three years and a half, the process continued: the sets of
22 tasks included in the Loan Agreement were successively completed and the
23 different milestones (in the form of certificates evidencing the fulfillment of the
24 corresponding set of tasks) were reached. The Second Certificate was executed on
25 January 16, 1991 and the Final Certificate on April 14, 1992. (Perez de la Sota
26 Decl., ¶ 64)

27 165. The investigation of title and artistic authorship required very careful
28 consideration because the Kingdom had undertaken in the Loan Agreement to

1 spend substantial amounts of public money to fulfil its obligations: the payment of
2 a compensation of \$5 million per year indexed to the US Consumer Price Index
3 (which in the most favorable scenario –with an inflation factor equal to 0– would
4 amount to some \$50 million) and the refurbishment of the Palacio de Villahermosa
5 which, at that time, experts calculated could cost some 2 billion Spanish pesetas
6 (the final cost was twice that amount). Thus, the Kingdom wanted to be sure that
7 the project would never turn into a fiasco if after spending dozens of millions of
8 dollars only a part of the Spanish Collection would come to Spain because of title
9 or authorship issues. (Perez de la Sota Decl., ¶ 47)

10 166. In addition, as Spain had been the “winner of a competitive process” in
11 which other important countries had participated (France, Switzerland, Germany,
12 the UK), it could not run the risk of international embarrassment if something
13 scandalous happened during the loan period. (Perez de la Sota Decl., ¶ 48)

14 167. And last but not least, those making the decisions at the Ministry of
15 Culture, the Ministry of the Treasury or even the Cabinet, could not risk putting
16 their political careers on the line. (Perez de la Sota Decl., ¶ 49)

17 168. On March 21, 1989, Irene Martin, the Administrative Director and
18 Curator of the Baron’s collection, contacted John Rewald to inquire if he would be
19 interested in writing a catalogue on Impressionist, Post-Impressionist, and Fauve
20 paintings in the collection, which included the Painting. Martin also asked Rewald
21 if he could curate an exhibition of works scheduled for April-July 1990 at the
22 Lugano Villa. Rewald responded on April 13, 1989, that he could not commit to
23 this task because of his existing commitments. (Stein Decl., ¶¶ 165-167, Exh. 210)

24 169. The Painting was included in the 1990 exhibition at the Lugano Villa.
25 A publication that included the Painting was prepared to accompany the exhibition:
26 *Impressionismo e Postimpressionismo. Collezione Thyssen-Bornemisza /*
27 *Impressionismus und Postimpressionismus. Sammlung Thyssen-Bornemisza.*
28 Lugano, Villa Favorita, n. 19, il. p. 53; which shows that the Painting was displayed

1 to the public from April 1 to July 8, 1990. The Painting is shown pictured in this
2 publication. (Acevedo Decl., ¶ 31(h), Exh. 213.)

3 170. In 1990, the Painting was published in *A Feast of Colour*,
4 Hertogenbosch, Noordbrabants Museum, n. 61, il, p. 167. (Acevedo Decl., ¶ 32(b),
5 Exh. 109.)

6 171. On June 19, 1992, the Final Completion Certificate for Delivery
7 Purposes was executed and the transportation of the Collection to Madrid began.
8 (Stipulated Facts ¶ 59.)

9 172. In accordance with clause 7.2 of the Loan Agreement (Ex. 83 at
10 TBF009837) two condition reports were prepared by artistic experts of both parties
11 (the Art Experts of the Kingdom and members of the staff of the Lugano Museum),
12 one before packing and the other after unpacking each painting, to verify if it had
13 suffered any damage during its journey from Lugano to Madrid. (Pérez de la Sota
14 Decl., ¶ 67)

15 173. The Kingdom of Spain bore all costs incurred associated with the
16 delivery of the paintings subject to the Loan, including the packaging material,
17 transportation, escorting, and security protection. (Stipulated Facts ¶ 60.)

18 174. The Kingdom assumed, in accordance with clause 7.6 of the Loan
19 Agreement, all the costs associated with the delivery of the Spanish Collection,
20 including the building of crates (which had to be built for almost half of the
21 paintings), packaging material, transportation, escorting, protection and even the
22 travel and subsistence costs of the Lender's agent and her assistants. (Pérez de la
23 Sota Decl., ¶ 68; Exh. 83 at TBF009838.)

24 175. Upon delivery of paintings subject to the Loan, agents of Favorita and
25 the Kingdom of Spain would produce and sign a joint report on the condition of the
26 paintings at delivery to the Kingdom of Spain and a similar report on the condition
27 of the paintings at the time of unpacking. (Stipulated Facts ¶ 61.)
28

1 176. On June 22, 1992, the Museum received the Painting. The Museum
2 received a number of other paintings at or around this time. (Stipulated Facts ¶ 62.)

3 177. The Condition and Conservation Report of the Painting was completed
4 on June 26, 1992, and a representative of each party analyzed the condition of the
5 Painting. (Stipulated Facts ¶ 63; Exh. 56.)

6 178. On October 10, 1992, the Museum opened to the public with the
7 Painting on display. (Dkt. 351, 2015-06-04 Order at 3; Stipulated Facts ¶ 64;
8 Acevedo Decl. ¶ 18.)

9 179. During the period of the negotiations of the loan, England,
10 Switzerland, France, Germany, and the Getty Museum all sought to purchase the
11 Baron's Collection. (Pérez de la Sota Decl., ¶ 37; Exh. 179 at KOS000047;
12 KOS000071-73; *see also* Exs. 53, 95, 211, 215, 242, 304.)

13 180. Spain sought the purchase of the Collection during the loan period.
14 (Dkt. 315, 2015-06-04 Order at 3; Pérez de la Sota Decl., ¶ 35.)

15 181. On June 18, 1993, the Spanish cabinet passed Real Decreto-Ley
16 11/1993, authorizing the government to sign a contract allowing the Foundation to
17 purchase the 775 artworks that comprised the Collection. (Dkt. 315, 2015-06-04
18 Order at 3; Stipulated Facts ¶ 65.)

19 182. In accordance with Real Decreto-Ley 11/1993, on June 21, 1993, the
20 Kingdom of Spain, the Foundation, and Favorita entered into an 1993 Acquisition
21 Agreement, by which Favorita sold the Collection to the Foundation. (Dkt. 315,
22 2015-06-04 Order at 3; Stipulated Facts ¶ 66.)

23 183. Favorita was the seller of the Collection (including the Painting), not
24 the Baron. *Cassirer*, 62 F.3d at 957; Dkt. 315, 2015-06-04 Order; Pérez de la Sota
25 Decl., ¶. 12(a), Exh. 96.)

26 184. The Foundation did not acquire the Painting from the Baron. The seller
27 was Favorita and the Baron had no legal right to cause Favorita, of his own free
28 will, to sell the Painting (as part of the Spanish Collection) to the Foundation. The

1 sale required the consent of a number of different people whose interests, in some
2 cases, were in conflict with those of the Baron. (Pérez de la Sota, Decl., ¶ 12(a),
3 Exh. 96.)

4 185. The Painting was one of 775 artworks in the Collection. (Stipulated
5 Facts ¶ 67.)

6 186. As part of the 1993 Acquisition Agreement, Favorita represented and
7 warranted to the Foundation that it was “the legal owner” of the 775 artworks and
8 that the Foundation would become “the absolute beneficial owner” of the 775
9 artworks, including the Painting. (Exh 96, Clause 11.1.1; Stipulated Facts ¶ 68.)

10 187. The 1993 Acquisition Agreement included, as security to Spain and
11 the Foundation, a pledge by Favorita to pay \$10 million in the event that there was
12 a claim to an artwork purchased in the 1993 acquisition. (Pérez de la Sota, Decl.,
13 ¶¶ 101, 102(c), Exh. 96, Clause 2.1, 3.7, 11.8.)

14 188. The term of the pledge – three years – corresponds intentionally to
15 Article 1955’s three-year good-faith acquisitive prescription period. (Pérez de la
16 Sota Decl., ¶ 101; Exh. 96 at TBF010181, Clause 11.8.)

17 189. The purchase price for the Collection, pursuant to the Acquisition
18 Agreement, was \$338,216,958.09. (Stipulated Facts ¶ 69.)

19 190. The full purchase price was \$350,000,000, but the amount paid in
20 consideration for the loan (approximately \$12,000,000) was discounted from this.
21 (Stipulated Facts ¶ 70.)

22 191. The Foundation paid this amount with funds provided entirely by the
23 Kingdom of Spain. (Stipulated Facts ¶ 71.)

24 192. The Kingdom of Spain used public money to fund the purchase of the
25 Collection. (Stipulated Facts ¶ 72.)

26 193. In addition to the purchase price, the Foundation provided additional
27 consideration for the sale including: (1) use of the Palace Villahermosa in
28 perpetuity as a museum called Thyssen-Bornemisza Museum to exhibit the

1 Collection in accordance with deed attached to the Acquisition Agreement
2 (converted into a five story - three floors and two basements - museum with 51
3 exhibition rooms and stringent technical standards, and which cannot be modified
4 without the consent of the Thyssen family); (2) acceptance of further obligations set
5 forth in deed attached to the Acquisition Agreement; and (3) adoption of by-laws
6 and regulations as set forth in attachments to the Acquisition Agreement. (Pérez de
7 la Sota Decl., ¶¶ 13(b), 79; Exh. 96, Clause 2.4-2.5).

8 194. The Kingdom of Spain agreed, in the Acquisition Agreement, that it
9 would make a gratuitous assignment of the Palace Villahermosa to the Foundation
10 to be used as the Thyssen-Bornemisza Museum in perpetuity. (Pérez de la Sota
11 Decl., ¶ 79; Exh. 96, Clause 2.4-2.5).

12 195. The Kingdom of Spain agreed, in the Acquisition Agreement, that it
13 would ensure the Foundation was able to meet its financial obligations. (Pérez de la
14 Sota Decl., ¶ 79; Exh. 96, Clause 2.4-2.5).

15 196. The Kingdom further agreed, in the Acquisition Agreement, that it
16 would perpetually ensure the Foundation will be in a position to pay punctually all
17 its obligations derived from its operations. (Pérez de la Sota Decl., ¶ 73, 79(5) Exh.
18 96, Schedule 4.)

19 197. The Foundation agreed, as part of the Acquisition Agreement, that it
20 would not sell, exchange, charge, pledge or otherwise alienate, encumber or dispose
21 of any artwork in any manner whatsoever. (Pérez de la Sota Decl., ¶ 79; Exh. 96.)

22 198. The Foundation agreed, as part of the Acquisition Agreement, that
23 with limited exceptions it would exhibit the whole of the Collection to the public at
24 the Museum. (Pérez de la Sota Decl., ¶ 79; Exh. 96, Schedule 5.)

25 199. The Foundation agreed, as part of the Acquisition Agreement, that
26 with limited exceptions it would not exhibit any work of art which does not form
27 part of the Collection with the Collection at the Museum. (Pérez de la Sota Decl., ¶
28 79; Exh. 96, Schedule 5.)

1 200. The Foundation agreed, as part of the Acquisition Agreement, that it
2 would keep the Museum up to standards consistent with the best practices of
3 European museums of international standing, and would ensure that the promotion
4 and publicity of the Collection always be in keeping with the highest standards of
5 artistic merit. (Pérez de la Sota Decl., ¶¶ 13(b), 65, 79; Exh. 96, TBF010280;
6 TBF010283-84; TBF010343-45; Schedules 5 & 8.)

7 201. The Foundation agreed, as part of the Acquisition Agreement, that it
8 would arrange for up to ten exhibitions of paintings from the Collection at the Villa
9 Favorita, in Lugano, Switzerland, and that such exhibitions shall include up to 60
10 artworks which would be provided “rent-free.” (Pérez de la Sota Decl., ¶ 79, Exh.
11 96 at TBF010282-84.)

12 202. The Foundation agreed, as part of the Acquisition Agreement, that it
13 would maintain specific and exacting standards for the environmental conditions of
14 the Museum, including restrictions on light, humidity, temperature, air ventilation
15 and filtration, vibration levels, and security. (Pérez de la Sota Decl., ¶¶ 13(b), 65,
16 79; Exh. 96, TBF010280; TBF010283-84; TBF010343-45; Schedules 5 & 8.)

17 203. The Foundation agreed, as part of the Acquisition Agreement, that it
18 would reserve 1/3 of the positions in the board of trustees of the Foundation for the
19 Thyssen family in perpetuity and gave them veto powers to keep their rights intact.
20 (1993 Acquisition Agreement.) (Pérez de la Sota Decl., ¶¶ 13, 79; Exh. 96 at
21 TBF010313-10326.)

22 204. At the time of the 1993 sale the Baron and the Baroness were not vice-
23 chairpersons of the Foundation’s board. The Baron was never the vice-chairman.
24 He was the chairman during the loan phase (from the incorporation of the
25 Foundation until the purchase), Exh. 83 at TBF010014, TBF010020-21,
26 TBF010029, and after the purchase he became honorary (nonmember) chairman,
27 Exh. 96 at TBF0010314-10315. The Baroness was a trustee during the loan phase
28 and became vice-chairperson only after the purchase. Exh. 83 at TBF10014, Exh.

1 96 at TBF010314-10315; Exh. 157 at TBF003249-50. Their positions in the board
2 pre- or post- purchase did not give any of them any executive power as I will
3 explain below. (Pérez de la Sota Decl., ¶ 12(c).)

4 205. The Foundation did not participate in the negotiation of the Purchase
5 Agreement at all. The Kingdom always intended to be the acquiror of the Spanish
6 Collection because all expenses related to the project (the refurbishment of the
7 Museum, the endowment of the Foundation, the consideration to be paid, etc.) had
8 been (or would be) paid with public funds. However, a legal requirement of
9 Bermudian law obliged the Kingdom to accept a few weeks before the execution of
10 the Purchase Agreement that the acquiror had to be the Foundation (with the
11 funding of the Kingdom). The Foundation only provided technical assistance when
12 specifically requested by the negotiators of the Kingdom. The board of trustees of
13 the Foundation never met to discuss any aspect of the negotiation and its only
14 resolution in connection with the purchase was the one dealing with the
15 appointment of the two (governmental) trustees who executed the Purchase
16 Agreement and related documents on behalf of the Foundation once the text had
17 been closed by the negotiating teams of the Kingdom and Favorita. The Foundation
18 did not have any say in the purchase: all decisions were made by the negotiators of
19 the Kingdom without informing (or consulting with) the Foundation. (Pérez de la
20 Sota Decl., ¶12(d).)

21 206. The Kingdom created a foundation to own and exhibit the Spanish
22 Collection (the Baron was also a co-founder but his role as such was purely
23 symbolic as the Kingdom contributed one million (1,000,000) Spanish pesetas to
24 the foundational capital (another 9 billion Pesetas would be subsequently
25 contributed by the Kingdom to put the Foundation in funds to pay for the
26 refurbishment of the Palacio de Villahermosa and the loan compensation) and the
27 Baron contributed one (1) Peseta). (Exhibit 228.)

28

1 207. The Kingdom allocated, free of charge, a XVIII century palace of
2 incalculable monetary value built on an 18,000 m² plot in the Madrid's Museums
3 Golden Mile (previously converted into a five story - three floors and two
4 basements - museum with 51 exhibition rooms and technical standards that 25 years
5 on many international museums that I have visited have yet to meet, and which
6 cannot be modified without the consent of the Thyssen family. (Exh. 83 at
7 TBF009865-66, TBF010056-59; Exh. 280; Exh. 96 at TBF010344-45, TBF010281-
8 82.)

9 208. The Kingdom reserved 1/3 of the positions in the board of trustees of
10 the Foundation (4 out of 12) for the Thyssen family in perpetuity and gave them
11 veto powers to keep their rights intact. (Exh. 96 at TBF010314-16.)

12 209. The Kingdom and the Foundation undertook not to alter the Spanish
13 Collection (no painting would leave the walls of the Museum and no additional
14 painting would be exhibited at the Museum jointly with the Spanish Collection
15 except under a few narrowly defined circumstances. (Exh. 96 at TBF010280-81.)

16 210. The Kingdom undertook to perpetually pay to the Foundation any
17 deficit that it may have as a result of its activities. (Exh. 96 at TBF0010264-74.)

18 211. The Foundation (previously put in funds again by the Kingdom)
19 delivered \$350 million to the seller of the Spanish Collection. (Exh. 83 at
20 TBF009824-25; Exh. 96 at TBF010159; Pérez de la Sota Decl., ¶13.)

21 212. Sotheby's prepared a mid-estimate auction value of the Collection, as
22 of January 1, 1993, taking into account the Foundation's obligations to purchase,
23 maintain, and house the Collection as a whole unit. The appraised value was
24 \$495M - \$693M. (*See* Exs. 229, 241; Pérez de la Sota Decl., ¶¶ 82-83.)

25 213. To arrive at the appraised value, Sotheby's began by considering the
26 total "insurance value" for each painting in the Collection as of 1990. (Pérez de la
27 Sota Decl., ¶ 83, Exs. A; Exh. 214.)

28

1 214. The 1990 insurance value of the Collection was \$1,692,659,500.
2 (Pérez de la Sota Decl., ¶ 83, Exh. A; Exh. 214.)

3 215. The 1990 insurance value of the Painting was \$6,000,000. (Exh. 214.)

4 216. The “insurance value” was then adjusted to reflect fair market value
5 for each of the paintings in 1990 as follows: Old Masters and British Pictures pre-
6 1980, Continental paintings, Prints, and Modern British paintings were discounted
7 by 40% of the insurance value; Impressionist and Contemporary paintings were
8 given a 30% discount on the insurance value; and Early American and
9 Contemporary-American paintings were given a 25% discount on the insurance
10 value. (Pérez de la Sota Decl., ¶ 83; Exh. 214.)

11 217. The 1990 fair market value was then adjusted to reflect the general
12 downturn in the art market between 1990 and 1993 (the date of the new appraisal)
13 as follows: Contemporary paintings were given a 35% discount; Prints and
14 Contemporary-American paintings were given a 30% discount; and Impressionist
15 and Continental paintings were given a 25% discount, including the Painting.
16 (Pérez de la Sota Decl., ¶ 83; Exh. 214.)

17 218. The 1993 fair market value was then adjusted to reflect the restrictions
18 placed on the purchase of the Collection, including that the Collection had to be
19 purchased, maintained, and housed as a whole unit. Sotheby’s determined that
20 these restrictive conditions would reduce the total value by some 30 to 50 percent.
21 (Pérez de la Sota Decl., ¶¶ 83-85; Exh. 214; Exh. 230 at TBF000029.)

22 219. The Sotheby’s valuation and underlying methodology was
23 independently verified, in whole and part, by three separate experts. (Pérez de la
24 Sota Decl., ¶¶ 83-86; Exs. 230- 235.)

25 220. One expert, William B. Jordan, valued the Old Masters. (Pérez de la
26 Sota Decl., ¶ 84, Exs. 230-231.)

27 221. William B. Jordan opined: “The question of the collection's value
28 becomes something else when taking into account the conditions of this particular

1 sale -- that it must be executed *en bloc* and that no paintings may ever be sold by
2 the buyer. There would, surely, be a number of potential buyers for the best 200
3 paintings in the collection. There would even be a number of suitors for the entire
4 collection, if they knew they could sell the several hundred poorer pictures, which
5 diminish the overall level of quality, and thereby reduce, on the bottom line, the
6 price they might have been willing to pay for the whole. There must be a heavy
7 price to pay for the two conditions placed on this sale, and Sotheby's estimate of a
8 30% to 50% discount in the value of the collection to account for the purchase *en*
9 *bloc* and the conveyance of restricted title seems to me entirely justified.” (Pérez de
10 la Sota Decl., ¶ 85, Exh. 230 at TBF000029.)

11 222. William B. Jordan was a member of the Art Advisory Panel of the
12 U.S. Internal Revenue Service; former director of the Meadows Museum, Southern
13 Methodist University, Dallas, and former deputy director of the Kimbell Art
14 Museum; was a professor of art at the Southern Methodist University from 1967 to
15 1981; and published numerous art publications and participated in many lectures
16 and exhibitions. (Pérez de la Sota Decl., ¶ 84; Exh. 231.)

17 223. Theodore E. Stebbins provided an opinion on the American paintings
18 in the Collection, both Early and Contemporary. His opinion was that the 30%
19 reduction for Contemporary American paintings was reasonable and further
20 provided that the Sotheby's reduction for Early American paintings should be
21 reduced further. (Pérez de la Sota Decl., ¶¶ 82, 84; Exs. 234-235.)

22 224. Stebbins opined that “[t]he[] very onerous conditions [in the
23 Acquisition Agreement] would significantly reduce the monetary value of the
24 Collection. In my opinion, a further deduction for the condition of fifty per cent
25 (50%) would be entirely reasonable.” (Exh. 234 at KOS000025.)

26 225. Theodore E. Stebbins was a professor of art history at Boston
27 University; the Curator of American Paintings at the Museum of Fine Arts in
28 Boston; the Curator of American Paintings and Sculpture and Professor of Art

1 History and American Studies at Yale University; Acting Director of the Yale
2 University Art Gallery; Curator of American Painting and Sculpture at Yale
3 University; Curator of American Paintings at the Museum of Fine Arts in Boston,
4 and on the Board of the International Foundation for Art Research in New York.
5 (Pérez de la Sota Decl., ¶ 84, Exh. 235 at KOS000006-11; Exh. 234 at
6 KOS000025-26.)

7 226. Another expert, Francois Daulte, stated in a letter to the Spanish
8 Minister of Culture that the proposed sale price of \$350,000,000 was “realistic and
9 justified[.]” He made this conclusion based on the same factors considered by
10 Sotheby’s and also the Foundation’s obligation to refurbish and provide the Palace
11 Villahermosa as a museum for the Collection, and the fact that the Baron and his
12 family would be members on the Foundation’s Board with significant rights.
13 (Pérez de la Sota Decl., ¶¶ 82, 84; Exh. 232 at KOS000018-19.)

14 227. François Daulte was the founder and director of the publishing house
15 *Bibliothèque des arts - Lausanne et Paris*, author of several art books and
16 catalogues and coordinator of art exhibitions in museums in France (Museum of
17 Vevey in Vevey and the Petit-Palais and L’Orangerie Museums in Paris),
18 Switzerland (Kunstmuseum of Berne), the U.S. (The Art Institute of Chicago) and
19 Japan (Museums of Tokyo) and member of the French Academy of Fine Arts, was
20 asked to value the modern masters except the American painters. Daulte was
21 awarded the Commander of the Order of the Rising Sun, by the Emperor of Japan;
22 the Officer of the Order of the Crown by the King of Belgium; and the Officer of
23 the Order of Merit by the French Ministry of Foreign Affairs. (Pérez de la Sota
24 Decl., ¶ 84; Exh. 233.)

25 228. The Kingdom of Spain also asked Juan G. Dominguez Macias, a
26 prominent Spanish registered auditor, to calculate the value of the main additional
27 loan obligations which the Kingdom and the Foundation would have to undertake
28 (the economic elements of the consideration other than the purchase price). Macias

1 established the value of those economic additional obligations at roughly 27 billion
2 Spanish pesetas (over \$200 million). (Pérez de la Sota Decl., ¶ 87; Exh. 238)

3 229. Therefore, the Kingdom and the Foundation were of the view that the
4 consideration agreed was fair and had been agreed at arm's length as it was within
5 the range of values for the Spanish Collection confirmed by the Kingdom's
6 international experts. (Pérez de la Sota Decl., ¶ 88)

7 230. A suspensive condition of the Acquisition Agreement was that the
8 Kingdom of Spain and the Foundation received, and were reasonably satisfied with,
9 legal opinions from the following advisors: (1) Servicio Juridico del Estado; (2)
10 Messrs Allen & Overy; (3) Messrs Lenz & Staehelin; (4) Messrs Appleby, Spurling
11 & Kempe; and (5) Messrs Carey Langlois. (Pérez de la Sota Decl., ¶¶ 96-106; Exh.
12 96.)

13 231. In 1993, and in connection with the purchase of the Collection, another
14 investigation of title was undertaken. (Pérez de la Sota Decl., ¶¶ 96-106; Exh. 98.)

15 232. In connection with the 1993 investigation, the investigation counsel
16 again relied on the Swiss laws of acquisitive prescription for paintings acquired
17 before 1980, including the Painting. (Pérez de la Sota Decl., ¶¶ 96-106; Exs. 54,
18 98.)

19 233. With regard to certain paintings that had been outside of Switzerland
20 since 1980, further opinions were sought from counsel from multiple jurisdictions
21 relating to the transfer of legal title of movable property in each respective
22 jurisdiction. (Pérez de la Sota Decl., ¶¶ 96-106.)

23 234. There were no adverse ownership claims made against the Baron (or
24 his entities) in connection with any paintings purchased by the Foundation. (Pérez
25 de la Sota Decl., ¶¶ 96-106.)

26 235. Swiss counsel again provided an opinion in connection with the 1993
27 investigation. This time they also undertook a detailed inspection in Lugano of all
28 documents relating to the paintings listed in Schedule 1 of the Acquisition

1 Agreement. (Pérez de la Sota Decl., ¶ 96, Exh. 54.) Schedule 1 constituted the
2 most valuable artworks in the Collection. The Painting was on Schedule 2. No
3 opinion was expressed as to paintings acquired after 1988 because the Baron (or his
4 entities) had title by acquisitive prescription to any such paintings since 1993.
5 (Exh. 54.)

6 236. There were no adverse ownership claims made against any painting in
7 the Collection between 1988 and 1993. (Acevedo Decl., ¶¶ 37-39.)

8 237. Opinions were also obtained from counsel from Australia, Belgium,
9 Germany, and Monaco regarding the transfer of title for paintings that had been
10 located in those jurisdictions. (Exh. 98 at TBF004178-TBF004236.)

11 238. Because prescriptive rights could not be presumed with paintings
12 acquired after 1988, the investigation counsel contacted the Art Loss Register to see
13 whether any of the relevant paintings had been registered as stolen. One of the
14 paintings that counsel contacted the Art Loss Register to investigate was by
15 Pissarro, *Clearing at Eragny*, 1872. (Pérez de la Sota Decl., ¶ 103; *see* Exs. 246,
16 269, 271, 273-276.)

17 239. All searches with the Art Loss Register were clear and none of the
18 paintings searched were registered as stolen. (Pérez de la Sota Decl., ¶ 103; *see*
19 Exs. 246, 269, 271, 273-276.)

20 240. Two paintings, the *Mata Mua*, by French post-impressionist Paul
21 Gauguin, and *The Lock*, one of the most famous paintings by the XIX century
22 English painter John Constable, were excluded from the list of the Loan Agreement
23 and/or the purchase list because Favorita did not have at the relevant time free,
24 marketable and unencumbered title over them (in one case, the painting was co-
25 owned with a third party and in both cases, the paintings were used as collateral to
26 guarantee the facility obtained for their acquisition). (Pérez de la Sota Decl., ¶ 109;
27 Exh. 236 at TBF004786-4841.)
28

1 241. The sale of the Collection to the Foundation was publicized in the Los
2 Angeles Times, the New York Times, the Guardian, and the Independent, among
3 other publications. (Pérez de la Sota Decl., ¶ 106; Exs. 53, 211, 215, 220-222, 242.)

4 242. The Painting has been on public display at the Foundation’s Museum
5 in Madrid, Spain since the Museum’s opening on October 10, 1992, except when
6 on public display in a 1996 exhibition outside of Spain and while on loan at the
7 Caixa Forum in Barcelona, Spain from October 2013 to January 2014; and once
8 against at the Caixa Forum in Barcelona from October 2016 to February 2017.
9 (Dkt. 315, 2015-06-04 Order at 3; Acevedo Decl., ¶ 20.)

10 243. Since the Foundation purchased the Painting in 1993, the Painting’s
11 location and the Foundation’s “ownership” have been identified in several
12 publications including, but not limited to: (1) Wivel, Mikael: Ordrupgaard. Selected
13 Works. Copenhagen, Ordrupgaard, 1993, p. 44; (2) Rosenblum, Robert:
14 “Impressionism. The City and Modern Life”. En Impressionists in Town. [Cat.
15 Exp.]. Copenhagen, Ordrupgaard, 1996, n. 17, pp. 16-17, il. 61.; (3) Llorens,
16 Tomas; Borobia, Mar y Alarco, Paloma: Obras Maestras. Museo Thyssen-
17 Bornemisza. Madrid, Fundacion CollectiOn Thyssen-Bornemisza, 2000, p. 156, il.
18 p. 157; and (4) Perez-Jofre, T.: Grandes obras de arte. Museo Thyssen-Bornemisza.
19 Colonia, Tascnen, 2001, p. 540, il. p. 541. (Dkt. 315, 2015-06-04 Order at 3;
20 Acevedo Decl., ¶¶ 31-32.)

21 244. The Foundation has established the public element of acquisitive
22 prescription under Spanish law because the Foundation publicly displayed the
23 Painting in the Museum as part of the Collection it owned. (*Cassirer*, 862 F.3d at
24 965.)

25 245. The Foundation’s possession of the Painting was peaceful from 1993
26 until 1999. (*Cassirer*, 862 F.3d at 965.)

27 246. The Foundation’s possession of the Painting was uninterrupted from
28 1993 until 1999. (*Cassirer*, 862 F.3d at 965.)

1 247. The Ministers of Culture for the Kingdom of Spain involved with the
2 Loan and/or Acquisition of the Collection were:

- 3 a. Minister of Culture Javier Solana, a chaired professor of Physics and
4 politician who served as Minister of Foreign Affairs, Minister of
5 Education and Science, Minister of Culture and Spokesman of the
6 Cabinet of the Kingdom, General Secretary of NATO and General
7 Secretary of the EU Council and High Representative for the Common
8 Foreign and Security Policy. He was the Minister of Culture during the
9 relevant time period until about July 1988. (Pérez de la Sota Decl., ¶¶
10 7(b), 20, 70)
- 11 b. Minister of Culture Jorge Semprún, a writer and intellectual who joined
12 the French *Résistance* during WWII and was arrested by the Gestapo
13 and imprisoned in Buchenwald, one of the Nazi concentration camps
14 where he spent two years until the camp was freed by troops of the Third
15 United States Army. Semprún became the Minister of Culture around
16 July 1988 and, thereafter, negotiations related to the Loan Agreement
17 were closely monitored by Minister Semprún and the Loan Agreement
18 was finally executed in December 1988. (Pérez de la Sota Decl., ¶¶ 40,
19 41, 70.)
- 20 c. Minister of Culture Mr. Jordi Solé i Tura, a chaired professor of
21 Constitutional Law who had been one of the *Seven Fathers of the*
22 *Constitution* (the commission formed by constitutional experts of the
23 seven main political parties appointed by the constituent parliament
24 which was elected after dictator Franco passed to draft the first Spanish
25 democratic constitution). He became the Minister of Culture in or
26 around early to mid-1992 and was involved with the execution of the
27 Acquisition Agreement. (Pérez de la Sota Decl., ¶¶ 8, 70.)
28

1 248. Neither Ms. Cassirer Neubauer nor any of her heirs attempted to locate
2 the Painting between 1958 and late 1999. (Dkt. 315, 2015-06-04 Order at 3.)

3 249. The successors to the Cassirer family art gallery, Walter and Marianne
4 Feilchenfeldt, had no record of the Painting being associated to the Cassirer gallery
5 or family prior to 1999. (Stein Decl., ¶¶ 100, 105, 187.)

6 250. In late 1999, Claude Cassirer learned from a client that the Painting
7 had been included in a recent book about Pissarro – *The Impressionist and the City*,
8 which identified the Painting as being owned by the Baron. (Cassirer Depo. at
9 168:14-171:10; 181:11-182:14, Exh. 16.)

10 251. *The Impressionist and the City* was published on November 22, 1992.
11 ([https://yalebooks.yale.edu/book/9780300053500/impressionist-and-city.](https://yalebooks.yale.edu/book/9780300053500/impressionist-and-city))

12 252. Claude Cassirer purchased *The Impressionist and the City* from Barnes
13 and Noble on or about December 17, 1999. (Stipulated Facts ¶ 73.)

14 253. Four or five months after Claude Cassirer’s client told him about *The*
15 *Impressionist and the City*, Claude Cassirer learned that the Painting was in the
16 Foundation’s possession. (Cassirer Depo. at 168:14-171:10.)

17 254. On May 3, 2001, Claude Cassirer filed a petition with the Kingdom of
18 Spain and the Foundation, seeking return of the Painting. (Stipulated Facts ¶ 74.)

19 255. The Petition made no reference to the CORA decision. (Exh. 29.)

20 256. The petition was rejected. (Stipulated Facts ¶ 75.)

21 257. The Baron died on April 27, 2002. (Stipulated Facts ¶ 76.)

22 258. On July 19, 2004, Claude Cassirer filed suit against Stephen Hahn (dba
23 Stephen Hahn Gallery) in Santa Barbara County Superior Court for his role in
24 purchasing and selling the Painting (“State Court Action”). (Nicholas Decl., ¶ 157;
25 Exh. 337.)

26 259. On May 10, 2005, after his petition to return the Painting was rejected,
27 Claude Cassirer filed this action against the Kingdom of Spain and the Foundation
28 (“Federal Court Action”). (Stipulated Facts ¶ 77.)

1 260. On June 24, 2005, Claude Cassirer and Hahn entered into a settlement
2 agreement to “definitively resolve[] all claims that Cassirer may have against Hahn
3 in connection with, or arising from, the Pissarro” and the [State Court Action.”
4 [missing a pair of quotation marks] (“Settlement Agreement”). (Exh. 337.)

5 261. The Settlement Agreement makes express reference to this action and
6 states that if Claude Cassirer obtains the Painting and/or \$1M (or more) from the
7 Foundation by way of settlement or judgment, then Hahn will pay \$100,000 to the
8 Foundation upon other certain conditions. (*See* Exh. 337.)

9 262. In the Settlement Agreement, and in connection with the Federal Court
10 Action, Hahn expressly agreed that he would not resist (1) “producing documents
11 within his possession, custody or control relating to the Pissarro” or (2) “attending
12 and testifying at a deposition[.]” Hahn further expressly appointed and authorized
13 his attorneys to accept service of any subpoenas propounded upon him in the
14 Federal Court Action. (*See* Exh. 337.)

15 263. At no time in the Federal Court Action did Claude Cassirer or other
16 plaintiffs serve upon Mr. Hahn any subpoenas for document production or
17 deposition. (Cassirer Depo. at 58:9-14.)

18 264. Claude Cassirer signed an authorization for the Foundation to access
19 his private family archives for war and post-war claims related to the Painting.
20 (Cassirer Depo. at 90:17-91:5; Exh. 341.)

21 265. Claude Cassirer himself did not pursue the German court proceeding
22 files belonging to his family. (Cassirer Depo. at 104:14-21)

23 266. Nor did Claude Cassirer or his family pursue any documents in
24 Germany or elsewhere relating to the Painting until after 2000. (Cassirer Depo. at
25 167:5-7; 168:3-6.)

26 267. Plaintiff Claude Cassirer died on September 25, 2010. (Stipulated
27 Facts ¶ 78.)

28 268. Stephen Hahn died on April 2, 2011. (Nicholas ¶ 158, Exh. 121.)

1 269. On October 12, 2011, David Cassirer, Ava Cassirer, and the United
2 Jewish Federation of San Diego County were substituted as plaintiffs in this action.
3 (Stipulated Facts ¶ 82.)

4 270. The Kingdom of Spain was dismissed from this action in August 2011
5 pursuant to the stipulation of the parties. (Stipulated Facts ¶ 83.)

6 271. The Getty Research Institute acquired the M. Knoedler & Co. records
7 in 2012, and processed and digitized the records, making them publicly available.
8 (Stipulated Facts ¶ 84.)

9 272. The Kingdom of Spain is a party to the Washington Principles of
10 December 3, 1998, and the Terezin Declaration of 2009. (Stipulated Facts ¶ 85.)

11 273. Professor Petropolous performed a physical inspection of the Painting
12 on September 22, 2014. (Stipulated Facts ¶ 86.)

13 274. Partial labels are found at the back of the Painting. (Dkt. No. 239-6,
14 UMF 121.)

15 275. There are no labels or markings on verso of the Painting from
16 Einsatzstab Reichsleiter Rosenberg (ERR) or any other Nazi regime. (Stein Decl.,
17 ¶ 191, Exs. 52, 348.)

18 276. During the Foundation's possession and ownership of the Painting, the
19 Foundation has not modified the Painting's stretcher, frame or verso nor did it
20 remove any labels or markings from the Painting's stretcher, frame or verso.
21 (Acevedo Decl., ¶ 19).

22 277. During the 2014 inspection by Plaintiffs' expert, the Foundation
23 removed a cardboard backing (which had been placed over the Painting's verso) to
24 allow Plaintiffs' expert to view the verso. The cardboard backing contained post-
25 1976 labels. Plaintiffs' expert was also permitted to remove the Painting from its
26 frame, for inspection. (Acevedo Decl., ¶ 19).

27 278. To date, there have been no claims made against any other paintings in
28 the Collection owned by the Foundation. (Acevedo Decl., ¶ 39.)

1 279. Neither the Foundation nor any of its representatives has ever been
2 charged, or found criminally liable, as a “principal, accomplice, or accessory,” as
3 defined by the 1870, 1973, or 1995 Spanish Penal Codes or any other codes or laws
4 in connection with the acquisition of the Painting or any other artworks. (Acevedo
5 Decl., ¶ 40.)

6 280. All prior owners of the Painting have passed away; no one can provide
7 first-hand information regarding the 1958 Settlement Agreement or any of the
8 transactions that predate the Foundation’s possession and ownership. (Nicholas
9 Decl., ¶¶ 98, 101, 116, 158; Stipulated Facts ¶¶ 24, 76.)

10 **II. CONCLUSIONS OF LAW**

11 281. The “question of where the burden of proof lies is one of substantive
12 law[.]” *New York Life Ins. Co. v. Rogers*, 126 F.2d 784, 788 (9th Cir. 1942) (citing
13 *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Cities Serv. Oil Co. v. Dunlap*,
14 308 U.S. 208 (1939)); *see also Robinson v. Reed-Prentice Corp.*, 286 F.2d 478, 479
15 (9th Cir. 1961) (“Substantive state law governs in all nonfederal causes of action.”).

16 282. Under Swiss law, ownership of moveable property prescribes by five
17 years of uninterrupted possession in good faith. Swiss Civil Code (ZGB) Art. 728;
18 Cassirer, 862 F.3d at 975 (“Under Swiss law, to acquire title to movable property
19 through acquisitive prescription, a person must possess the chattel in good faith for
20 a five-year period.”).

21 283. Under Swiss law, “a good faith purchaser is one who is honestly and
22 reasonably convinced that the seller is entitled to transfer ownership.” 862 F.3d at
23 975.

24 284. Under Swiss law, “good faith” is presumed and must be affirmatively
25 rebutted by the plaintiffs. Swiss Civil Code (ZGB), Art. 3(1).

26 285. Because Plaintiffs cannot rebut the presumption of good faith and the
27 Baron satisfied the other requirements for acquisitive prescription, as recognized
28

1 the by the Ninth Circuit, the Baron was the lawful owner of the Painting under
2 Swiss law.

3 286. Under Spanish law, the process of transfer of ownership requires two
4 elements: the “title,” usually a contract relating to the sale or exchange, and the
5 “mode,” which is the transfer of possession by the owner. 862 F.3d at 974.

6 287. The Ninth Circuit recognized that both elements were satisfied,
7 concluding that “*if the Baron had good title to the Painting* when he sold it to [the
8 Foundation], the [Foundation] became the lawful owner of the Painting through the
9 acquisition agreement.” 862 F.3d at 974 (emphasis in original).

10 288. Because, the Baron possessed the Painting peacefully, publically – as
11 owner – for more than five years, and because the Plaintiffs cannot rebut the
12 Baron’s presumed good faith possession, such that the Baron had good title to the
13 Painting when his art trust, Favorita, sold the Collection to the Foundation, the
14 Foundation “became the lawful owner of the Painting through the acquisition
15 agreement” 862 F.3d at 974, under Spanish law.

16 289. Spain’s acquisitive prescription laws require that the possessor: (1)
17 possess the property for a statutory period, (2) possess the property as owner, and
18 (3) possesses the property publicly, peacefully, and without interruption. Spanish
19 Civil Code Art. 1955.

20 290. Within Article 1955, there are two categories of acquisitive
21 prescription, each with different prescriptive periods. Spanish Civil Code Art. 1955.

22 291. If the Baron was not able to convey good title to the Foundation in the
23 1993 Acquisition, it could become the lawful owner of the Painting under Spanish
24 acquisitive prescription.

25 292. Both this Court and the Ninth Circuit recognized that the Foundation
26 satisfied all three requirements for Article 1955’s six-year acquisitive prescription,
27 where good faith possession is not required. 862 F.3d at __; *Cassirer v. Thyssen-*
28 *Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, __ (C.D. Cal. 2015).

1 293. Spanish Civil Code Article 1955 affords that, where the above
2 elements are satisfied, “[o]wnership of movable property prescribes by three years
3 of uninterrupted possession in good faith.” Spanish Civil Code Art. 1955.

4 294. Spanish Civil Code Article 1955 recognizes that, where the above
5 elements are satisfied, ownership prescribes by six years of uninterrupted
6 possession, in the absence of good faith. Spanish Civil Code Art. 1955.

7 295. Article 434 explains “[g]ood faith is always presumed, and the person
8 asserting a possessor’s bad faith shall have the burden of proving it.” Spanish Civil
9 Code Art. 434.

10 296. Article 1950 notes that a “possessor’s good faith consists of the belief
11 that the person from whom he received the thing was its owner, and could transfer
12 ownership thereof.” Spanish Civil Code Art. 1950.

13 297. While the Ninth Circuit – and this Court – reviewed Plaintiffs’
14 purported evidence “with all inferences in their favor as required by our summary
15 judgment rules,” 862 F.3d at 972, *see also* 153 F. Supp. 3d at 1153, Plaintiffs can
16 no longer rely on those inferences.

17 298. The Foundation’s evidence demonstrates that the Foundation *did*
18 possess the Painting in good faith.

19 299. Plaintiffs cannot rebut the Foundation’s presumption of good faith
20 possession.

21 300. Because the Foundation’s public, peaceful possession as owner of the
22 Painting was not disturbed until May 3, 2001, almost eight years after it first
23 possessed the Painting as owner, and Plaintiffs cannot meet their burden of
24 demonstrating bad faith by the Foundation, under Spanish law, title vested in the
25 Foundation through good faith acquisitive prescription no later than June 21, 1996,
26 three years after it acquired the Painting.

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1 301. Spanish Civil Code Article 1930 recognizes that “[o]wnership and
2 other rights in rem are acquired pursuant to prescription, in the manner and subject
3 to the conditions provided in the law.” Spanish Civil Code Art. 1930.

4 302. Rights and actions of any kind are also extinguished by the running of
5 their statute of limitations. Spanish Civil Code Art. 1930.

6 303. Article 1932 provides that rights and actions are extinguished by the
7 running of the statute of limitations to the detriment of all kinds of persons, even
8 legal entities, in the terms provided in the law. Spanish Civil Code Art. 1932.

9 304. Spain’s statutes of limitation are substantive; they not only extinguish
10 a party’s ability to make a claim, they extinguish a non-possessor’s rights in the
11 property.

12 305. Spanish Civil Code Article 1962, states:

13 Actions in rem relating to movable property shall become barred by the
14 statute of limitations six years after possession is lost, unless the
15 possessor has acquired absolute title thereon, pursuant to Article 1,955,
16 and excluding cases of loss and public sale and of purloin or theft, in
17 which cases the provisions of Paragraph 3 of said Article [464] shall be
18 observed.

19 Spanish Civil Code Art. 1962.

20 306. As required by Articles 1930 and 1932, Article 1962’s six-year statute
21 of limitations extinguishes the Plaintiffs’ right of action and right of ownership
22 through extinctive prescription.

23 307. If the Foundation acquired ownership of the Painting through good-
24 faith acquisitive prescription, then the Foundation “acquired absolute title . . .
25 pursuant to Article 1955,” after three years, and before Article 1962’s six-year
26 period had run.

27 308. Article 1962 contains a clause that limits application of the statute of
28 limitations in “cases of loss and public sale and of purloin or theft,” but it does not

1 displace or supersede the prior clause recognizing acquisition of “absolute title”
2 through acquisitive prescription under Article 1955.

3 309. That clause limits acquisition of title resulting from the running of the
4 statute of limitations to permit an action by a deprived owner against a possessor
5 that has not yet attained “absolute title” through acquisitive prescription.

6 310. In the absence of good faith, the Foundation acquired “absolute title”
7 through acquisitive prescription under Article 1955 – at the same time that its
8 ownership is conferred by Article 1962 – on June 21, 1999, six years after the
9 Foundation took public, undisturbed ownership of the Painting on June 21, 1993.

10 311. Because the Foundation obtained “absolute title” to the Painting
11 through Article 1955’s acquisitive prescription – either with three-year good-faith
12 acquisitive prescription (in 1996) or with six-year acquisitive prescription in an
13 absence of good faith (in 1999) – as specifically recognized by this Court (and by
14 the Ninth Circuit) – and because Article 1962’s statute of limitations extinguished
15 the Plaintiffs’ “rights and actions of any kind,” in the Painting, the Foundation is
16 the lawful owner of the Painting under substantive Spanish law.

17 312. The Foundation met the requirements of six-year acquisitive
18 prescription. 862 F.3d at 965.

19 313. Spanish Civil Code Article 1956 provides:

20 Movable property purloined or stolen may not prescribe in the
21 possession of those who purloined or stole it, or their accomplices or
22 accessories [encubridores], unless the crime or misdemeanor or its
23 sentence, and the action to claim civil liability arising therefore, should
24 have become barred by the statute of limitations.

25 862 F.3d at 966.

26 314. Restated by the Ninth Circuit, Article 1956 “extends the time of
27 possession required for acquisitive prescription only as to those chattels (1) robbed
28 or stolen from the rightful owner (2) as to the principals, accomplices or

1 *accessories* after the fact (‘encubridores’) with *actual knowledge* of the robbery or
2 theft.” 862 F.3d at 966 (footnote omitted and emphasis added).

3 315. Under Spanish law, the burden of proof lies with the party seeking to
4 prove the necessary elements of the criminal offense; the defendant retains the
5 presumption of innocence and may demonstrate elements which mitigate or exclude
6 the purported criminal liability.

7 316. The Foundation cannot meet the 1973 criminal code’s definition of
8 “encubridor,” – the criminal code in effect when the Foundation acquired the
9 Painting – because “there is absolutely no evidence that the Foundation purchased
10 the Painting (or performed any subsequent acts) with the intent of preventing
11 Scheidwimmer’s or the Nazis’ criminal offenses from being discovered.” 153 F.
12 Supp. 1148, 1165 (C.D. Cal. 2015).

13 317. The Ninth Circuit held that the 1870 Spanish criminal code provided
14 the operative definition of “encubridor,” and that, therefore, one who satisfies that
15 definition may implicate Article 1956, thereby delaying application of Article 1955.
16 862 F.3d at 968 (“We thus conclude that a person can be *encubridor* within the
17 meaning of Article 1956 if he knowingly receives and benefits from stolen
18 property.”).

19 318. The Ninth Circuit found that “there is a triable issue of fact whether
20 [the Foundation] is an encubridor (an “accessory”) with the meaning of Civil Code
21 Article 1956.” 862 F.3d at 964 (emphasis added).

22 319. “Assuming Article 1956 applies to someone who knowingly benefits
23 from stolen property,” the Ninth Circuit found that it is a triable issue of fact
24 whether the evidence demonstrates the “required actual knowledge element of
25 Article 1956.” 862 F.3d at 972 (emphasis added).

26 320. Article 1956 may delay application of Article 1955’s acquisitive
27 prescription where the property is held by an “accessory,” until the “crime or
28 misdemeanor or its sentence,” and the derivative civil liability arising from the

1 “crime or misdemeanor or its sentence,” is barred by the statute of limitations. 862
2 F.3d at 966.

3 321. In Spain, criminal charges may be brought by public or private parties.

4 322. It is not disputed that the Foundation has never been criminally
5 charged, much less convicted, as an accessory.

6 323. The relevant five-year criminal statute of limitations, 862 F.3d at 966,
7 ran on June 21, 1998, so the Foundation cannot now be charged as an accessory.

8 324. Because the Foundation is not an accessory, there can be no derivative
9 civil liability – no “action to claim civil liability arising therefrom” – to toll
10 application of Article 1955 an additional fifteen years.

11 325. There are no cases in which a Spanish court applied Article 1956 in the
12 absence of a criminal conviction.

13 326. As a matter of Spanish law, the Foundation cannot be deemed a
14 criminal accessory.

15 327. Under Spanish law, only individuals – not legal persons – are subject
16 to liability under criminal law, except in very limited situations.

17 328. Prior to December 24, 2010, only individuals could be held liable
18 under Spanish criminal law.

19 329. On December 24, 2010, Spanish law was amended to allow legal
20 persons to be held criminally liable for certain offences enumerated in Spanish
21 Criminal Code 1995.

22 330. The crime of receiving stolen assets – the crime equivalent to an
23 encubridor under the 1870 criminal code – is not included in the list of criminal
24 offenses which may give rise to a legal person’s criminal liability.

25 331. Under Spanish law, the theory of respondeat superior can subject a
26 legal person to civil, not criminal, liability.

27 332. The Baron’s purported knowledge (that the Painting was stolen during
28 World War II) cannot be imputed to the Foundation.

1 333. Under Spanish law, the Foundation cannot be found vicarious liability
2 for the criminal acts of individuals, as the knowing receipt of stolen assets is not
3 one of the limited number of criminal offenses for which a legal person can be
4 found criminally liable.

5 334. Article 1956 applies to delay application of Article 1955 only where
6 the possessor is a principal, accomplice, or accessory to a crime.

7 335. Because the Foundation was not found to be criminally liable as an
8 accessory – and cannot now be found criminally liable as an accessory – Article
9 1956 cannot, as a matter of Spanish law, apply to displace Article 1955.

10 336. As the Ninth Circuit recognized that Article 1955 vests title in the
11 Foundation if Article 1956 does not apply, 862 F.3d at 965, the Foundation is the
12 owner of the Painting under Spanish law.

13 337. To prove that the Foundation is an accessory, Plaintiffs must
14 demonstrate “actual knowledge” that the Painting was stolen from Lilly Cassirer
15 Neubauer. 862 F.3d at 966.

16 338. “Actual knowledge,” under Spanish law, is a high bar.

17 339. “Actual knowledge” requires evidence of willful intent, not merely
18 reckless behavior.

19 340. Spanish law recognizes a presumption of innocence; absent a
20 confession of actual knowledge, there must be circumstantial evidence
21 demonstrating that the “receiver harbors the conviction and certainty that the assets
22 proceed from a felony against patrimony.”

23 341. The offence of receiving stolen assets must be committed willfully; the
24 reckless receipt of stolen assets is not categorized as criminal offence.

25 342. Plaintiffs’ red flags and revisionist speculation may have defeat
26 summary judgment, but they fall far short of demonstrating “actual knowledge.”
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1 343. The Foundation’s evidence demonstrates affirmatively that the
2 Foundation purchased (and has since, maintained, exhibited, and published), the
3 Collection, including the Painting, in good faith.

4 344. Because Plaintiffs cannot identify *any* evidence to suggest, much less
5 prove, that the Foundation had actual knowledge of the Painting’s wartime looting
6 until Mr. Cassirer’s 2001 petition, the Foundation cannot, under any legal theory,
7 be deemed an encubridor.

8 345. Laches is an equitable time limitation on a party’s right to bring suit,”
9 *Boone v. Mech. Specialties Co.*, 609 F.2d 956, 958 (9th Cir. 1979), resting on the
10 well-established premise that “one who seeks the help of a court of equity must not
11 sleep on his rights,” *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 939 (7th
12 Cir. 1984) (Posner, J., concurring).

13 346. “A party asserting laches must show that it suffered prejudice as a
14 result of the plaintiff’s unreasonable delay in filing suit.” *Jarrow Formulas, Inc. v.*
15 *Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002). Courts examine at what
16 point the plaintiff “knew or should have known” of the claim – a standard that
17 allows a laches defense to be based on either actual or constructive knowledge.
18 *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 980 (9th Cir. 2006).

19 347. During the pendency of the last appeal, Congress enacted the
20 Holocaust Expropriated Art Recovery Act of 2016 (“HEAR Act”), H.R. 6130,
21 which created a uniform, federal six-year statute of limitations. While recognizing
22 that the HEAR Act may preclude application of “any defense at law relating to the
23 passage of time,” Section 5(a), the Ninth Circuit rejected Plaintiffs assertion that the
24 HEAR Act barred the Foundation’s acquisitive prescription defense. 862 F.3d at
25 965.

26 348. After the HEAR Act was introduced, it was amended to make clear
27 that “Congress favor[s] the resolution of disputed art claims without litigation and
28 [by] using alternative dispute resolution mechanisms involving experts in art

1 research.” Senate Report 114-394, December 6, 2016 at 6; *see also* HEAR Act
2 Section 2(8). The amendment affirmatively removed prior references to laches,
3 thus ensuring the continued “availability of equitable defenses and the doctrine of
4 laches.” Senate Report at 7.

5 349. The amendment created an exception which bars certain claims where,
6 as here, the claimant had the requisite knowledge to bring a timely claim, but failed
7 to do so. Senate Report at 7, 10; *see also* HEAR Act Section 5(e). Thus, to the
8 extent that Plaintiffs’ claims are facially timely under the HEAR Act, they are
9 vulnerable to (and barred by) laches.

10 350. Here, Plaintiffs’ predecessors “knew or should have known” of the
11 existence of their claim long before 2000.

12 351. The Baron and the Foundation relied on the absence of any
13 interruption to their public ownership and on Swiss and Spanish law to obtain and
14 formalize their vested property interests.

15 352. Spanish law also recognizes the doctrine of laches, known in Spain as
16 *Verwirkung*. A party in Spain can raise the affirmative defense that an action is
17 barred as the result of the plaintiff’s unreasonable delay. It is premised on the
18 understanding that good faith (Spanish Civil Code Art. 7), requires a party to
19 exercise their rights.

20 353. *Verwirkung* is a secondary defense, raised when the plaintiff has
21 delayed bringing a claim, but the statute of limitations has not yet run.

22 354. When Article 1962’s six-year statute of limitations ran on June 21,
23 1999, Plaintiffs’ claim became time-barred and “absolute title” vested in the
24 Foundation.

25 355. Plaintiffs’ delay in bringing their claim prejudiced the Foundation by
26 depriving it of the opportunity to act on the pledge contained in the 1993
27 Acquisition Agreement.
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Dated: _____, 2018

HON. JOHN F. WALTER
UNITED STATES DISTRICT JUDGE