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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

14 DAVID CASSIRER, THE ESTATE OF
15 AVA CASSIRER, and the UNITED
16 JEWISH FEDERATION OF SAN DIEGO
17 COUNTY, a California nonprofit
18 corporation,

17 Plaintiffs,

18 v.

19 THYSSEN-BORNEMISZA
20 COLLECTION FOUNDATION, and
21 Agency of instrumentality of the Kingdom
22 of Spain,

22 Defendant.

CASE NO: CV 05-3459-JWF (Ex)

**BRIEF OF AMICI CURIAE COMUNIDAD
JUDÍA DE MADRID AND FEDERACIÓN
DE COMUNIDADES JUDÍAS DE ESPAÑA**

Assigned to:
Hon. John F. Walter

Trial: December 4, 2018
Time: 08:30am
Courtroom: 7A

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I

INTRODUCTION

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3 This case relates to the recovery by David Cassirer, the Estate of Ava Cassirer and the
4 United Jewish Federation of San Diego County (collectively the “**Plaintiffs**”) of the painting
5 “*Rue St. Honoré, après midi, effet de pluie*” by Camille Pissarro (1897) (the “**Painting**”). The
6 District Court and the parties agree that the Painting was looted from Lilly Cassirer Neubauer
7 (“**Lilly**”) in 1939. Order of the Hon. John F. Walter dated June 4, 2015 (the “**Order**”) at 2, 15.

8 The Thyssen-Bornemisza Collection Foundation (the “**Foundation**,” the “**Defendant**,” or
9 the “**TBC**”) purchased the Painting pursuant to the Spanish Royal Decree-Law 11/1993, of June
10 18 (“**Royal Decree-Law 11/1993**”). Order at 3. Appendix 000548 (Tab V). In particular, on June
11 21, 1993, the Foundation acquired the Painting along with the rest of the art collection by virtue
12 of the “Acquisition Agreement in Respect of the [TBC] Permanent Collection.” Order at 3.

13 The Order granted TBC’s motion for summary judgment on the grounds that the latter had
14 acquired the Painting in accordance with Spanish law on adverse possession, which, the District
15 Court concluded, applied a period of 6 years even if such possession occurred in bad faith. Order
16 at 13-15. The Ninth Circuit Court of Appeals later reversed the Order, deciding that the District
17 Court had erred in deciding that, as a matter of law, TBC had acquired title to the Painting
18 through Article 1955 of the Spanish Civil Code (the “**Civil Code**”) because there is a triable issue
19 of fact whether the Foundation is an *encubridor* (an “accessory”) within the meaning of Article
20 1956 of the Spanish Civil Code. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862
21 F.3d 951 (9th Cir. 2017) at 964-973.

22 Following an unsuccessful petition for a panel rehearing or a rehearing *en banc* (Order of
23 the Ninth Circuit Court of Appeals dated December 5, 2017), and an unsuccessful petition for
24 *certiorari* to the United States Supreme Court (Order List of the United States Supreme Court
25 dated May 14, 2018 at 14), the case was formally remanded to the District Court for trial.
26 Mandate of the Ninth Circuit Court of Appeals dated May 16, 2018.

II

INTEREST OF AMICI CURIAE

1 Comunidad Judía de Madrid (“**CJM**”) is the main Jewish institution of the Province of
2 Madrid, Spain. CJM’s main purposes are to facilitate and promote the development of Judaism in
3 Madrid in order to guarantee its continuation, to maintain the traditional Jewish values and to
4 strengthen the Jewish community in a plural, open and democratic context. Among its activities
5 are to maintain and promote the memory of the Holocaust (Shoah), contribute to the reparation of
6 the wrongs made to the victims of the Holocaust, and in general resist anti-Semitism. CJM
7 certifies that it is a non-profit religious community in the Kingdom of Spain; it does not offer
8 stock; and it has no parent corporation.

9 Federación de Comunidades Judías de España (“**FCJE**”) is the organization that
10 comprises most of the Jewish communities and other local Jewish organizations in Spain. The
11 main mission of the FCJE is to officially represent the Spanish Jews and their local communities
12 before national and international authorities. Among its activities are to maintain and promote the
13 memory of the Holocaust (Shoah), contribute to the reparation of the wrongs made to the victims
14 of the Holocaust, and in general resist anti-Semitism. The Preamble of Spanish Law 25/1992
15 refers to FCJE as the “representative entity” of all Jewish communities in Spain vis-à-vis the
16 Spanish State, and Article 13 of such Law provides that “[t]he State and [FCJE] shall cooperate in
17 the maintenance and promotion of the Jewish historic, artistic and cultural heritage. . . .”
18 Appendix 000543 (Tab U). FCJE certifies that it is a non-profit federation of religious
19 communities in Spain; it does not offer stock; and it has no parent corporation.

20 As explained in the attached Motion for Leave to File Brief as Amici Curiae in Support of
21 the Plaintiffs, *Amici* have an important interest in the outcome of this case and can offer valuable
22 perspectives on the proper interpretation of Spanish law at issue.¹

23 III

24 ARGUMENT

25 The Ninth Circuit Court of Appeals has decided that there exists a triable issue of fact as
26 to whether the Foundation had “actual knowledge” of the looting of the Painting from Lilly when
27

28 ¹ Neither party nor their counsel played any part in the drafting of this Amici Curiae brief or contributed in any other way.

1 the Foundation acquired the same in 1993. *Cassirer* at 972-973. The District Court must now
2 determine the meaning of “actual knowledge” under Spanish law in these circumstances. Amici
3 shall argue that: (A) the Foundation must adhere to high standards of diligence with respect to the
4 purchasing of artwork; (B) the standard of knowledge relating to the crime of receiving stolen
5 property under Spanish law includes willful blindness [*dolo eventual*]; (C) a criminal conviction
6 is not required in order to apply the *encubridor* rule under Article 1956 of the Spanish Civil Code;
7 (D) Article 1956 of the Spanish Civil Code applies to both individuals and legal entities; and (E)
8 TBC Miscalculates the Time Required to Obtain the Painting Through Adverse Possession.

9 **A. The Foundation Must Adhere to High Standards of Diligence with Respect to the**
10 **Purchasing of Artwork**

11 The Foundation, as an expert in the field of art, must comply with a high standard of
12 diligence when it comes to the buying, selling and borrowing of works of art. The high standard
13 of diligence is enshrined both in Spanish law and international legal norms.

14 Article 1104 of the Spanish Civil Code establishes that a higher level or standard of
15 diligence is expected by experts or professionals acting in their respective fields: “The debtor’s
16 fault or negligence consists of the omission of the diligence required by the nature of the
17 obligation that corresponds to the circumstances of the persons, the time and the place. Where the
18 obligation should not express the diligence to be used in its performance, the diligence of an
19 orderly *paterfamilias* shall be required.” Spanish Civil Code, Article 1104. Appendix 000388
20 (Tab K). The Spanish term “*paterfamilias*” is equivalent to the “reasonable person” standard in
21 common law. Thus, the Spanish Civil Code makes it clear that the circumstances of the relevant
22 person, and the time and place in which he or she is acting, should be factors considered in
23 determining whether he or she has met the applicable standard of diligence. The Spanish Supreme
24 Court explained that the standard for professional negligence “should not be confused with the
25 simple negligence of a careful man, but rather it is that diligence required by the specialty of his
26 knowledge and his technical and professional guarantee.” Spanish Supreme Court Judgment,
27 November 22, 1971, STS 1253/1971. FJ 3. Appendix 000368 (Tab N).

28 Examining this further in another decision, which related to the standard of care expected

1 from a medical professional, the Spanish Supreme Court held that “his acts shall be guided
2 exclusively by the diligence derived from his special training, and therefore the diligence required
3 . . . shall not be that one of the common lay man on the matter, but instead the diligence is one of
4 a professional under the existing circumstances” Spanish Supreme Court Judgment, February 7,
5 1990, RJ 1990/668, FJ 3, 5. Appendix 000284 (Tab G).

6 It is therefore clear that TBC should be expected to behave in the same manner that other
7 museums (and especially national museums established by the State) would behave when
8 investigating the purchase of artwork.

9 In order to better understand the standard of diligence expected from a museum in the
10 acquiring of art, it is useful to consider the Professional Code of Ethics for the International
11 Council of Museums (the “**Code**”) Appendix 000575 (Tab Y). The Code was adopted in 1986,
12 before the Foundation came into possession and eventual ownership of the Painting. Concerning
13 the acquisition of illicit material, the Code highlights that “[a] museum should not acquire,
14 whether by purchase, gift, bequest or exchange, any object unless the governing body and
15 responsible officer are satisfied that the museum can acquire a valid title to the specimen or object
16 in question and that in particular it has not been acquired in, or exported from, its country of
17 origin and/or any intermediate country in which it may have been legally owned (including the
18 museum’s own country), in violation of that country’s laws.” The Code, Article 3.2. The Code
19 also refers more specifically to artwork deriving from countries during times of conflict, and
20 states that museums “should in particular abstain from purchasing or otherwise appropriating or
21 acquiring cultural objects from any occupied country, as these will in most cases have been
22 illegally exported or illicitly removed.” The Code, Article 4.4. In addition, Article 6.4 of the Code
23 requires that any acquisition be registered and documented appropriately, recording all the details
24 regarding the origin of the artwork. Lastly in this regard, the Code provides that it is highly
25 unethical for museums “to support either directly or indirectly the illicit trade in cultural or
26 natural objects . . . [and] [w]here there is reason to believe or suspect illicit or illegal transfer,
27 import or export, the competent authorities should be notified.” The Code, Article 8.5. Hence, the
28 Code provides the best example of how a reasonable acting and prudent museum would have

1 acted in those same circumstances.

2 In sum, the above standards represent the level of diligence that should be expected from a
3 national museum. TBC's conduct in acquiring the Painting should be measured against how other
4 national museums or peers would have acted in like circumstances, taking into account "the
5 circumstances of [TBC], and the time and place in which they are acting." Spanish Civil Code,
6 Article 1104. Appendix 000388 (Tab P).

7 **B. Level of Knowledge for the Receipt of Stolen Property under Spanish Law**

8 The standard of awareness or knowledge for receipt of stolen property has received much
9 consideration in Spanish courts, and it is clear that said knowledge can include willful blindness
10 [*dolo eventual*] on the part of the receiver. The Spanish Supreme Court has declared the inclusion
11 of willful blindness in determining knowledge: "[the] jurisprudence has undoubtedly accepted
12 willful misconduct (at least in the form of willful blindness [*dolo eventual*]) when the perpetrator
13 has acted knowing the concrete risk deriving from his action and said risk clearly overcomes the
14 risk permitted. . . . In these circumstances, there shall be no doubt that if, the author knew the
15 concrete illicit risk, and in spite thereof acted in the manner in which he acted, his decision is the
16 same as accepting the result . . . that the jurisprudence has considered as willful blindness [*dolo*
17 *eventual*]." Spanish Supreme Court Judgment, April 23, 1992, RJ 1992/6783, FJ 3. Appendix
18 000028 (Tab E). This decision sets the standard for the inclusion of willful blindness as part of
19 the required knowledge, and this standard continues to be referred to and relied upon by lower
20 Spanish courts.

21 The above cited definition of willful blindness [*dolo eventual*] under Spanish law has been
22 used and applied in the adjudgment of cases concerning the crime of receiving stolen property.
23 Indeed, under Spanish law, the crime of receiving stolen property can be committed when there
24 has been willful blindness [*dolo eventual*] as to those underlying facts on the part of the receiver.
25 The Spanish Supreme Court has stated that "[w]illful blindness [*dolo eventual*] is perfectly
26 acceptable in the crime of receipt of stolen property, in accordance both with legal doctrine and
27 jurisprudence." Spanish Supreme Court Judgment, June 28, 2000, RJ 2000/6080, FJ 2. Appendix
28 000331 (Tab J). The crime of receiving stolen property "can be committed both by willful

1 misconduct and by willful blindness [*dolo eventual*].” Spanish Supreme Court Judgment, May 19,
2 2016, RJ 2016/2042, FJ 3. Appendix 000347 (Tab L). “The crime of receiving stolen property . . .
3 can be committed by direct intent (knowing with certainty the illicit origin of the chattel), or by
4 willful blindness [*dolo eventual*].” Spanish Supreme Court Judgment, June 12, 2012, RJ
5 476/2012, FJ 3. Appendix 000320 (Tab I). It is therefore clear, as the Spanish Supreme Court has
6 reiterated many times, that the crime of receiving stolen property includes circumstances where
7 there has been willful blindness [*dolo eventual*] regarding the origin of said property.

8 Where the receiver has put himself in the position of ignorance whereby he would or
9 should have been able to be aware of the underlying facts otherwise, this is capable of
10 constituting willful blindness [*dolo eventual*], and the receiver therefore cannot escape criminal
11 liability. In this regard, it has been held by the Spanish Supreme Court that, “whoever puts
12 themselves in a situation of deliberate ignorance, without wanting to know that which they could
13 or should know, is assuming and accepting all of consequences of the wrongful act in which he
14 voluntarily participates. Or . . . whoever is in a situation known as deliberate blindness, cannot be
15 excluded from criminal responsibility for the action executed.” Spanish Supreme Court Judgment,
16 January 19, 2016, RJ 2017/275, FJ 3. Appendix 000294 (Tab H).

17 In measuring the level of deliberate ignorance or willful blindness [*dolo eventual*] with
18 respect to the crime of receiving stolen property, it has been held that it is not necessary that the
19 receiver has knowledge of the underlying crime. In one case, the Spanish Supreme Court held
20 that, “[f]rom a thorough examination of the evidence . . . it can be inferred that the defendant did
21 not have direct knowledge of the illicit origin [of the chattel], but he could have perfectly well
22 imagined the possibility of such [illicit origin] . . . so we find ourselves here, not in a situation of
23 direct intent, but instead in a situation of willful blindness [*dolo eventual*], which is perfectly
24 capable of constituting the crime of receiving stolen property.” Spanish Supreme Court Judgment,
25 June 28, 2000, RJ 2000/6080, FJ 2. Appendix 000331 (Tab J). In another decision, the Spanish
26 Supreme Court ruled that willful blindness [*dolo eventual*] is established when the perpetrator
27 “[1] acts despite it being probable that the goods have their origin in a crime against personal
28 property or the socio-economic order or when the perpetrator could have perfectly imagined the

1 possibility thereof . . . or [2] when the illicit origin of the chattel is highly probable in light of the
2 existing circumstances.” Spanish Supreme Court Judgment, February 24, 2009, RJ 2009\449, FJ
3 4. Appendix 000256 (Tab F). Proviso 1 requires mere probability when the state of mind of the
4 perpetrator would have considered the illicit origin of the goods a probability. This requires an
5 analysis of the personal circumstances of the perpetrator, which in our case would involve
6 recognizing the TBC as an expert in the matter and therefore holding the TBC to a higher
7 standard of diligence. *Supra.*, Part III.A. Proviso 2 disregards the personal circumstances of the
8 perpetrator and instead focuses on whether a bystander would consider that it is highly probable
9 that the goods had an illicit origin in light of the concurring circumstances taken on their face.

10 Circumstantial evidence or indicia satisfy the standard of willful blindness [*dolo*
11 *eventual*]. In this regard, the Spanish Supreme Court expressed that “[t]he Constitutional Court
12 has maintained in various decisions that, where there is a lack of direct evidence, circumstantial
13 evidence is capable of justifying a guilty finding”, and concluded that a cumulus of indicia, or one
14 that is particularly strong, are sufficient to prove knowledge for the purposes of receiving stolen
15 property. Spanish Supreme Court Judgment, May 19, 2016, RJ 2016/2042, FJ 6. Appendix
16 000347 (Tab L). According to the Spanish Supreme Court, examples of indicia that can make it
17 unnecessary to have direct proof of knowledge are “the irregularity of the circumstances of the
18 purchase or method of acquisition, the concealment of the latter, the lack of credibility of the
19 explanations regarding possession of the stolen chattel, the personality of the defendant purchaser
20 or the sellers or conveyors of the chattel or the existence of a negligible or vile price . . . amongst
21 others.” Spanish Supreme Court Judgment, February 24, 2009, RJ 2009\449, FJ 4. Appendix
22 000256 (Tab F).

23 In sum, it is not necessary that TBC knew all of the details of the true origin of the
24 Painting at the time that it was acquired. Rather, as the Spanish Supreme Court precedent
25 establishes, the surrounding facts and circumstantial evidence could have put TBC on notice that
26 it should carry out further enquiries. A failure to conduct such enquiries (i.e. its willful blindness
27 or *dolo eventual*) is sufficient proof of actual knowledge under Spanish law.
28

1
2 **C. A Criminal Conviction is Not Required in Order to Apply the *Encubridor* Rule Under**
3 **Article 1956 of the Spanish Civil Code**

4 TBC states that “[n]either the Foundation nor any of its representatives has ever been
5 charged, or found liable, as a ‘principal, accomplice, or accessory,’ as defined by the 1870, 1873
6 or 1995 Spanish Penal Codes or any other codes or laws in connection with the acquisition of the
7 Painting or any other artworks.” TBC Memorandum of Contentions of Fact and Law, Dkt. Ent.
8 No. 372 at 11, 25, 27. However, under Spanish law it is not necessary that someone be declared
9 as such in order to be deemed to be an *encubridor* under Article 1956 of the Spanish Civil Code.

10 Article 1956 of the Spanish Civil Code provides: “Movable property purloined or stolen
11 may not prescribe in the possession of those who purloined or stole it, or their accomplices or
12 accessories, until the crime or misdemeanor, or its sentence, and the action to claim civil liability
13 arising therefrom, should have become barred by the statute of limitations.” Spanish Civil Code,
14 Article 1956. Emphasis added. Appendix 000389 (Tab P). Article 3.1 of the Spanish Civil Code
15 provides the rules for interpreting any statute in Spain. Said article states in its relevant part that,
16 when interpreting a statute, due regard must be paid to “the proper meaning of their wording and
17 in connection . . . with their historical and legislative background.” Spanish Civil Code, Article
18 3.1. Appendix 000387 (Tab P). Here, the interpretation of the “proper meaning of [the] wording”
19 of Article 1956 reveals three relevant periods of time for calculation of the acquisitive
20 prescription in the case of an *encubridor*:

- 21 i. if there is no criminal conviction yet, the statute of limitation to *prosecute* the crime or
22 misdemeanor must have elapsed; or
23 ii. if there is a criminal conviction, the statute of limitation to *enforce* the sentence of guilt
24 for a crime or misdemeanor must have elapsed; and
25 iii. in both cases, the statute of limitations to claim civil liability arising from the crime or
26 misdemeanor must also have elapsed, which begins to run once either of the periods in (i)
27 and (ii) has elapsed, whichever is earlier.

28 Article 1956 makes a clear difference between the statute of limitation to *prosecute* the

1 crime of misdemeanor and the statute of limitation to *enforce* a sentence finding someone guilty
2 of a crime or misdemeanor. Both cases are separated by the coordinating conjunction “or”
3 (marked in bold in the quote above). The periods of time mentioned in (i) and (ii) above are
4 cumulative with the period mentioned in (iii). The 6-year period of acquisitive prescription of
5 Article 1955 does not commence until the expiration of the periods set forth in Article 1956.

6 By definition, the statute of limitations to *prosecute* a claim implies that the prosecution of
7 the crime is yet to begin (and obviously there is no conviction at that time either). If anyone were
8 to interpret Article 1956 as requiring a conviction, it would void the underlined portion of the
9 following proviso of Article 1956: “until the crime or misdemeanor **or** its sentence.” Indeed, the
10 legislator could have omitted such grammatical construction of Article 1956 in order to require a
11 criminal conviction only.

12 This is not the case and Article 1956 applies to both the statute of limitations to *prosecute*
13 the crime or misdemeanor and to the statute of limitations to *enforce* the sentence finding
14 someone guilty of a crime or misdemeanor, whichever is earlier. Professor Manuel Albaladejo,
15 one of the most prominent commentators of the Spanish Civil Code, shares this interpretation of
16 Article 1956. He states that the reference to prescription of “the crime or misdemeanor **or** its
17 sentence” “provides for termination of criminal liability in the two cases of: 1. termination of
18 liability through expiration of the statute of limitations on the crime . . . 2. Termination of liability
19 through expiration of the statute of limitations on the sentence.” M. Albadalejo García, XXV
20 Comentarios al Código Civil, Article 1956. Appendix 000555 (Tab W). Professor Albaladejo
21 explains these two distinct applications as follows:

22 “The first refers to the case where, after the crime has been committed, a
23 certain uninterrupted period of time elapses without criminal prosecution
24 being initiated against the offender; the second refers to the case where
25 the statute of limitations on criminal liability did not expire and the
26 offender was convicted in a final and enforceable judgment. . . . Article
27 1956 provides: 1) in the case of the perpetrator, accomplice or accessory
28 after the fact of a crime that has as its object the personal property being

1 acquired by adverse possession, that these individuals are prevented from
2 consummating such acquisition until the statute of limitations on the
3 crime has expired; if there was no prosecution for the crime, then the
4 time-barring of the sentence, which was not imposed, does not come into
5 play; 2) and if the crime was prosecuted before the expiration of the
6 statute of limitations and a conviction was handed down, then there is no
7 expiration of statute of limitations on the crime, but Article 1956
8 provides that, in any case, the person who committed the crime is
9 prevented from acquiring by adverse possession until his liability is
10 terminated through expiration of the statute of limitations on the
11 sentence.”

12 *Id.*

13 This is not a coincidence, because the Criminal Code also identifies as two
14 different causes to extinguish the criminal liability (i) the elapse of the statute of
15 limitations to prosecute the crime of misdemeanor and (ii) the statute of limitations to
16 enforce the sentence finding someone guilty for a crime or misdemeanor. Indeed, the
17 Criminal Code of 1870, in force at the time of the enactment of the Civil Code,
18 identifies both the elapse of the statute of limitations to prosecute a claim and the
19 elapse of the statute of limitations to enforce a judgement as independent causes of
20 extinguishment of criminal liability. This is provided for in Article 132 of the
21 Criminal Code of 1870:

22 “Criminal liability is extinguished by: . . .

23 6.- The prescription of the Crime.

24 7.- The prescription of the Sentence.”

25 Spanish Criminal Code of 1870, Article 132. Appendix 000393 (Tab Q). The statute of
26 limitations to *prosecute* a crime operates as cause for the extinction of criminal liability when a
27 crime has been committed but is yet to be prosecuted (i.e., there is no sentence), whereas the
28 statute of limitations to *enforce* a sentence operates as a cause for the extinction of criminal

1 liability when the sentence has not been served for any reason. This difference between the statute
2 of limitations to *prosecute* the crime or misdemeanor and to the statute of limitations to *enforce*
3 the sentence, with virtually the same wording, continued to exist in Article 112 of the Criminal
4 Code of 1973 (Appendix 000410 (Tab R)) (in force when TBC acquired the Painting) and in
5 Article 130 of the Criminal Code of 1995 (in force today). Appendix 000466 (Tab S).

6 Furthermore, Article 133 of the Criminal Code of 1870 lists the statute of limitations to
7 prosecute crimes and Article 134 of the same Code lists the statute of limitations to enforce
8 sentences. The same distinction is contained in (i) Articles 113 and 115 of the Criminal Code of
9 1973 (in force when TBC acquired the Painting); and (ii) Articles 131 and 133 of the Criminal
10 Code of 1995 (in force today). Therefore, there is a strong distinction in the Spanish Criminal
11 Codes throughout time between the statute of limitations to prosecute crimes and the statute of
12 limitations to enforce sentences.

13 According to Article 114 of the Criminal Code of 1973 (Appendix 000410 (Tab R)) (in
14 force when TBC acquired the Painting) and Article 132 of the Criminal Code of 1995 (Appendix
15 000466 (Tab S)) (in force today), the statute of limitation for the prosecution of a crime begins
16 from the day on which the crime was committed. Instead, the statute of limitation for the
17 enforcement of a sentence is calculated from the date on which such sentence becomes final and
18 binding, or from the interruption of the service of the sentence, whichever is later. This rule was
19 of application in Article 134 of the Criminal Code of 1870 (Appendix 000393 (Tab Q)), was
20 included in Article 116 of the Criminal Code of 1973 (Appendix 000410 (Tab R)) and remains in
21 force in Article 134 of the Criminal Code of 1995 (Appendix 000466 (Tab S)). Needless to say,
22 the statute of limitation for the enforcement of a sentence is longer than the statute of limitation
23 for the prosecution of a crime, which is logical because in the former case criminal liability has
24 been declared judicially.

25 The Spanish Constitutional Court, the highest tribunal in Spain, has also recognized the
26 clear distinction between statutes of limitation to prosecute a crime or misdemeanor and statutes
27 of limitation to enforce a sentence. Spanish Constitutional Court Judgment No. 12/2016, February
28 1, 2016 (RTC/2016/12), FJ 3. Appendix 000005 (Tab C). In the statute of limitations of a crime

1 (or to prosecute a crime), a crime has been committed but the legislator has decided to prevent
2 late investigations. On the contrary, in the statute of limitations to enforce a sentence, there is a
3 final and binding judgment and a sentence imposed, but if not enforced on time, the perpetrator is
4 relieved from serving such sentence.

5 In light of the foregoing, Spanish law does not require that someone in receipt of stolen
6 property be declared criminally liable in order to be considered an *encubridor* under Article 1956
7 of the Spanish Civil Code.

8 **D. Article 1956 Applies to Both Individuals and Legal Entities**

9 TBC contends that Article 1956 of the Spanish Civil Code would only apply to
10 individuals, but not to legal entities. This is plainly wrong. Articles 35 to 39 of the Spanish Civil
11 Code regulate legal entities. Appendix 000387 (Tab P). Nowhere is it stated in the Spanish Civil
12 Code that legal entities are excluded from its application.

13 Royal Decree Legislative 1/2010, of July 2, on the Corporations Act, regulates in detail
14 Spanish corporations and Law 50/2002, of December 26, on Foundations, regulates in detail
15 Spanish foundations. They do not exclude the application of the Spanish Civil Code to
16 corporations or foundations. Quite to the contrary, Article 4(3) of the Spanish Civil Code
17 provides that “[t]he provisions of this Code shall be of subsidiary application in matters governed
18 by other statutes.” Appendix 000387 (Tab P). As the above-mentioned special laws on
19 corporations and foundations do not regulate acquisitive prescription, corporations and
20 foundations are subject to Articles 1955 and 1956 of the Spanish Civil Code.

21 Furthermore, the interpretation that TBC intends to give to Articles 1955 and 1956 of the
22 Spanish Civil Code (that they do not apply to legal entities) would lead to an absurd result –
23 something that is plainly prohibited under Spanish law. Indeed, this would mean that persons
24 could entirely escape the limitations of Article 1956 if they use their legal entities to commit the
25 wrongs at issue. The Spanish Supreme Court has held that “the juridical norms should not be
26 interpreted in a manner that leads to solutions that do not adapt to the content and philosophy that
27 inspires the legal text in which they are inserted. . . .” Spanish Supreme Court Judgment,
28 November 21, 1994 (RJ 1994/8542) FJ 2. Appendix 000362 (Tab M).

1 TBC is also prevented from arguing that criminal liability of legal entities was not in
2 effect in 1993. Here the Plaintiffs are not seeking liability *ex delicto*, but instead are exercising a
3 pure civil claim of restitution. Indeed, if the Plaintiffs were to litigate their claims in Spanish
4 courts, which they are not, their legal actions would be of a civil nature, not based on any
5 provisions of the Criminal Code. For example, Articles 348.2 and 464 Spanish Civil Code
6 provide civil actions to claim chattel. Articles 1955 and 1956 of the Spanish Civil Code provide
7 the applicable statute of limitations that would prevent any action for the restitution of movable
8 property. For the sake of clarity, Plaintiffs would not be invoking (i) Article 1902 of the Spanish
9 Civil Code (general liability provision) (Appendix 000388) (Tab P); (ii) Article 1092 of the
10 Spanish Civil Code (criminal liability carve out provision) (Appendix 000388) (Tab P); or (iii)
11 any criminal statute. Therefore, no prior conviction would be necessary, as no criminal statute
12 would be applied.

13 **E. TBC Miscalculates the Time Required to Obtain the Painting through Adverse**
14 **Possession**

15 *Amici* understand that TBC contends that the previous periods of public, peaceful and
16 uninterrupted possession as owner of the Painting would account to the benefit of TBC by virtue
17 of the application of Article 1960 of the Spanish Civil Code. However, Article 1960 of the
18 Spanish Civil Code is of no application in this case because it is trumped by Article 1956 of the
19 Spanish Civil Code, which constitutes *lex specialis*. The principle of *lex specialis* is engrained in
20 the Spanish legal system and means that a more specific law prevails over a general law. This
21 comes from the Latin phrase *lex specialis derogat lex generalis*. The Spanish Supreme Court
22 applies this principle not only in cases concerning different legislative acts, but also for conflicts
23 that exist within the same legal text. In one case, the Spanish Supreme Court determined that
24 there was a conflict between Articles 1073 and 1074 of the Spanish Civil Code, on the one hand,
25 and Article 1075 of the Spanish Civil Code, on the other hand. The Court determined that Article
26 1075 was *lex specialis*, and therefore prevented the application of Articles 1073 and 1074.
27 Spanish Supreme Court Judgment, March 6, 1945 (RJ 1945/272). Appendix 000338 (Tab P). In
28 the present case, Article 1956 of the Spanish Civil Code is *lex specialis* because it relates to the

1 specific circumstance of a “principle, accessory or accomplice”, including an *encubridor*, in
2 receipt of stolen goods, and lengthens the period of time necessary in order to complete
3 prescription.

4 Article 1956 of the Spanish Civil Code requires that, prior to initiating the calculation of
5 the adverse possession periods provided in Article 1955, “the crime or misdemeanor or its
6 sentence, and the action to claim civil liability arising therefrom, should have become barred by
7 statute of limitations.” *Amici* understand that TBC has appointed Professor Yzquierdo Tolsada as
8 Spanish law expert. He has previously recognized that the statute of limitations for the criminal
9 and civil actions must have elapsed before the period for adverse possession can begin to run:
10 “[w]hen it comes to interpreting the precept [Article 1956], it could be understood that, if the time
11 periods of prescription of the criminal violation and the civil responsibility are longer than that of
12 ordinary acquisitive prescription, they shall prevail [over the latter]. In fact, the literal content of
13 the article [1956] suggests that chattel that have been stolen or robbed cannot be adversely
14 possessed ‘without the expiration of the responsibilities,’ that is, that, if the extinction of the
15 criminal and civil responsibility has not yet occurred, the adverse possession that, in accordance
16 with the general rules, would have been produced, is inoperative.” MARIANO YZQUIERDO
17 TOLSADA, *LECCIONES SOBRE POSESIÓN Y USUCAPIÓN* (2002), pp. 107-108. Appendix 000566
18 (Tab X).

19 The Spanish Supreme Court has consistently held that the statute of limitations for civil
20 liability arising from a criminal wrong is 15 years pursuant to Article 1964 of the Spanish Civil
21 Code. *See e.g.*, Spanish Supreme Court Judgment of January 7, 1982, RJ 1982/184, FJ 4
22 (referring to Article 1964 of the Spanish Civil Code as the applicable statute of limitations for
23 civil liability arising from a criminal offense). Appendix 000023 (Tab D).

24 The Spanish Supreme Court has interpreted Article 1956 as requiring the statute of
25 limitations for prosecuting the crime and the statute of limitations for claiming civil liability to be
26 cumulative, which means that both periods must be added together. Only once both the criminal
27 and civil liability are barred by the statute of limitations, may the period of 6 years of adverse
28 possession begin under Article 1955. Indeed, the Spanish Supreme Court has held that the statute

1 of limitations of the criminal offence should be understood “in addition” to the statute of
2 limitations of the civil liability. Spanish Supreme Court Judgment, of July 15, 2004 (RJ
3 2004/4209). Thereafter, the Supreme Court made the following calculation evidencing that both
4 periods are cumulative:

5 [T]he term of extraordinary acquisitive prescription period for movable
6 property, fixed at six years by Art. 1955.2º, can only commence to run
7 when the other two periods have cumulatively elapsed: the one set forth
8 in Art. 131 [of the Spanish Criminal Code] . . . corresponding to the
9 statute of limitations for the crime (five years provided for the
10 “remaining serious crimes”) and the aforementioned fifteen years under
11 Art. 1964 [of the Spanish Civil Code]. In total 26 years. . .

12 Spanish Supreme Court Judgment, of July 15, 2004 (RJ 2004/4209), FJ 4.B. Appendix
13 000377 (Tab O). In short, in the previous example, 20 years must elapse before the 6-year term of
14 extraordinary acquisitive prescription period for movable property of Article 1955 may
15 commence.

16 Under the 1973 Spanish Criminal Code, the statute of limitations for the crime of
17 receiving stolen property was 5 years. *See* 1973 Spanish Criminal Code Articles 30; 546(bis)(a);
18 113. The same statute of limitations is applicable under the 1995 Spanish Criminal Code. *See*
19 1995 Spanish Criminal Code, Articles 298; 131. Therefore, the Foundation needed 26 years to
20 acquire the Painting by adverse possession (5 + 15 + 6) if it is found to have committed the crime
21 of receiving stolen property.

22 IV

23 CONCLUSION

24 As an expert in the field of art, TBC must be held to a higher level of diligence in
25 conducting its inquiries into the provenance of artwork that it wishes to borrow and/or purchase.
26 Spanish law establishes that deliberate ignorance or willful blindness is sufficient to be held
27 criminally liable for receiving stolen property. Therefore, if this Court determines that TBC had
28 knowledge that the painting was stolen, or at least was willfully blind to the true provenance of

1 the Painting, TBC could not have acquired title to the Painting through acquisitive prescription
2 until 2019 given that it would be an *encubridor* for the purposes of Article 1956 of the Spanish
3 Civil Code. It is not necessary that TBC have been found guilty of a crime in order for Article
4 1956 to be applicable, and it is also not possible to rely on prior possessors periods of ownership
5 in the calculation of the periods of adverse possession.

6
7 * * *

8
9 DATED: November 20, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certified that this document has been filed electronically on this 20th day of November 2018 and is available for viewing and downloading to the ECF registered counsel of record:

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DATED: November 20, 2018

Respectfully submitted,

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