

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 61

IN THE MATTER OF AN  
APPLICATION FOR A WARRANT TO  
SEARCH THE PREMISES LOCATED AT  
THE ART INSTITUTE OF CHICAGO  
111 SOUTH MICHIGAN AVENUE  
CHICAGO, IL 60603

Case No.: SMZ-77042-24/001

**ORAL ARGUMENT REQUESTED**

**RESPONDENT ART INSTITUTE OF CHICAGO'S MEMORANDUM OF LAW IN  
OPPOSITION TO THE PEOPLE'S APPLICATION FOR A TURNOVER ORDER**

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Respondent the Art Institute of Chicago (“AIC”) respectfully submits this memorandum of law in opposition to the February 22, 2024 application of the District Attorney of New York (“DANY” or “the People”), which seeks to “turn over” Egon Schiele’s *Russian War Prisoner* (the “Work”) ostensibly pursuant to Penal Law § 450.10 (the “Application”) (App.).<sup>1</sup> Because AIC is the lawful owner of the Work – and because DANY’s Application is both legally and factually baseless – the Application should be denied.

As detailed herein, *Russian War Prisoner* has been a lawful part of AIC’s permanent collection located in Chicago, Illinois for nearly 60 years. Moreover, the core allegations raised by the People – namely that the Grünbaum Schiele collection, including *Russian War Prisoner*, was “looted” by the Nazis during World War II – have been the subject of decades of extensive civil litigation and government investigation, in this country and abroad, which has generally reached the opposite conclusion: that *Russian War Prisoner* was *not* looted during World War II but was, instead, lawfully sold by surviving family members after World War II. *See, e.g., Bakalar v. Vavra*, 819 F. Supp. 2d at 288-89 (concluding the Grünbaum art collection “remained in the Grünbaum family’s possession” and “*was not looted by the Nazis*”) (emphasis added). Those findings have been rooted in the testimony, supported by an extensive collection of documents and records of Eberhard Kornfeld – the man the People baselessly accuse of crimes only after his death (and ability to defend himself) – of having obtained the Work and other works from the Grünbaum collection years after the War in entirely lawful transactions with a surviving family member, Fritz Grünbaum’s sister-in-law Mathilde Lukacs. Notably, while devoting pages to attacking Kornfeld’s credibility regarding his testimony in one of the prior litigations over the Grünbaum art

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<sup>1</sup> As detailed below, in addition to this memorandum of law, AIC submits the expert report of Laurie Stein and dozens of accompanying exhibits, all of which are expressly cited as referenced herein. Because AIC cites directly to that evidence throughout, this memorandum is not styled as an “affidavit” but can be converted to that format if useful to the Court’s adjudication of the issues in dispute.

collection, the People fail to mention that the court presiding over that trial – the late U.S. District Judge William H. Pauley, III – found Kornfeld to be *credible*, rejecting the very arguments the People advance here. *See generally Bakalar v. Vavra*, 2008 WL 4067335 (S.D.N.Y. Sept. 2, 2008) (“*Bakalar I*”), *vacated in part*, 619 F.3d 136 (2d Cir. 2010), *re-decided on remand*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011) (“*Bakalar II*”), *aff’d*, 500 F. App’x 6 (2d Cir. 2012) (“*Bakalar III*”).

Moreover, in November 2023 and February 2024, a federal court in New York rejected the very relief the People seek here in a civil lawsuit brought by the family members whose asserted ownership interests the People seek to invoke (collectively, the “Grünbaum Family Members”), finding AIC to be an “innocent purchaser[]” and “good-faith owner” of the Work and declining to transfer it to the very same parties to whom the People now seek to turn over the Work. *See Reif v. Art Institute of Chicago*, 2023 WL 8167182, at \*4 (S.D.N.Y. Nov. 24, 2023), *aff’d on reconsideration*, 2024 WL 838431, at \*3 (S.D.N.Y. Feb. 28, 2024) (“*Reif*”). The People make no mention of that litigation nor that court’s finding.

Indeed, despite spanning nearly 160 pages, the People’s Application is most notable for the core facts and legal authorities it omits. *First*, DANY elides the fact that there is no authority for the core legal position it advances, namely, that Penal Law § 450.10 could be used, in the absence of any pending criminal case, to adjudicate a dispute over ownership. On the contrary, the New York Court of Appeals has expressly ruled that Section 450.10 *cannot* be used to resolve ownership in the absence of a pending criminal case. *See generally People ex rel. Simpson Co. v. Kempner*, 208 N.Y. 16 (1913). The New York Attorney General has reached the same conclusion. *See* 1973 N.Y. Op. Atty. Gen. No. 160. And while DANY’s Antiquities Trafficking Unit (“ATU”) may have seized and successfully turned over thousands of works of art *on consent* – that is, obtained Turnover Applications where ownership was *not* in dispute – when the ATU’s efforts



have been challenged by the owner of the work, as here, New York courts have rejected the People’s efforts to use Section 450.10 – or more generally to involve the criminal courts – in what amounts to a civil dispute over property ownership, finding, instead, that the appropriate forum is civil litigation between the parties. *In the Matter of the Safani Gallery Inc. Search Warrant* SCID #2017/11212F (Transcript of Nov. 13, 2019 Oral Argument) (Ex. 2); *People v. In the Matter of Persian Guard Relief*, SCID #30219/17 (Dec. 18, 2017 Decision and Order) (Ex. 3).<sup>2</sup>

*Second*, and related, the Application makes no mention of the fact that here, the parties have already engaged in civil litigation over *Russian War Prisoner* and that AIC *has prevailed*, as previewed above. Indeed, in a remarkable omission, the People fail to inform the Court that the very family members to whom the People seek to turn over the Work have already commenced a civil replevin action against AIC in December 2022, and, in November 2023, the Hon. John G. Koeltl of the U.S. District Court for the Southern District of New York granted AIC’s motion to dismiss, affirming AIC’s ownership of the Work, *see generally Reif*, 2023 WL 8167182, and denied reconsideration of the same, *Reif*, 2024 WL 838431. Not only, as noted, does the Application make no mention of that litigation or its conclusion in favor of AIC and its ownership of the Work, but it offers no reason as to why those findings are not binding on the Grünbaum Family Members or why this Court should be burdened with relitigating matters that have already been resolved.

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<sup>2</sup> Recently, in *The Cleveland Museum of Art 11150 East Boulevard Cleveland, Ohio 44106 v. Alvin Bragg*, the Cleveland Museum of Art filed an affirmative action against DANY challenging its effort to seize a work at that Museum under a similar theory. No. 1:23-cv-02048-CEF (Dkt. 1) (Oct. 19, 2023). As the Cleveland Museum of Art noted in its challenge, in the only cases in which the possessor of the work has chosen to contest DANY’s claim that a work was “stolen,” New York courts have “deferred to courts with civil jurisdiction to determine questions of title,” and in the vast majority of other cases, DANY merely “persuades the possessor of the antiquity in question to stipulate that the possessor has no claim to the antiquity and will not object to the disposition of the antiquity by the District Attorney or the New York State Supreme Court.” *Id.*

*Third*, the People’s Application makes no mention of the fact that the men it labels as criminals – Eberhard Kornfeld and Otto Kallir – are well-respected gallerists and collectors whose accounts of the lawful provenance of this Work, and other works by Schiele, have been consistently credited. As noted above, Kornfeld’s testimony and documents establishing that he lawfully acquired works from the Grünbaum Schiele collection from Mathilde Lukacs (the great aunt of Timothy Reif, one of the family members seeking to claim the Work here) has been credited first by the court presiding over the preceding in which Kornfeld testified and subsequently by multiple government investigations. *See generally Bakalar I; Bakalar II.* Notably, the Grünbaum Family Members were parties to the proceeding in which Kornfeld gave testimony, and Kornfeld was cross-examined by their own lawyers. And while this Court can and should assess the credibility of Kornfeld’s evidence itself, credibility findings of judges overseeing the proceeding in which testimony was given are typically given great weight and for good reason: here, Judge Pauley was uniquely positioned to evaluate Kornfeld’s credibility and the arguments and issues raised about the same in the context of presiding over the trial as a whole.

This brief thus proceeds in three parts:

**Part I** addresses the facts, as known and developed through decades of litigation and government investigation, regarding the provenance of the Grünbaum Schiele collection, including *Russian War Prisoner*. That account is driven by those facts and supported by the extensive research and report of Laurie Stein (the “Stein Report”) (Stein Rep.), a foremost expert in 19<sup>th</sup> and 20<sup>th</sup> century German and Austrian fine arts, design and architecture, as well as in issues of collection history and provenance during the Nazi era, who has spent decades specifically researching artwork impacted by World War II. As recounted below, and consistent with the findings of not only Judge Pauley but of the Austrian Government, the far greater weight of the

record supports a finding that while both Fritz and Elisabeth (Lilly) Grünbaum were tragically murdered by the Nazis during the Holocaust, they were among those Jewish families able to secrete a portion of their possessions – including at least part of their art collection – to relatives who had escaped the Nazis’ reach, namely Lilly’s sister, Mathilde Lukacs (“Mathilde”), who, in turn, later sold parts of that collection in the 1950s. Notably, as the Stein Report notes – and the People concede – there is *no evidence* *Russian War Prisoner* was ever physically seized or “looted” by the Nazis. Conversely, there is abundant direct evidence that the Work was sold by Mathilde to Kornfeld.

As part of that history, this brief lays out how AIC came to acquire the Work nearly one decade after Otto Kallir imported and then sold the Work in New York in 1957. Indeed, as detailed herein, while the People baselessly assert that AIC was somehow part of a “conspiracy” with Kornfeld and Kallir (which evidence will show did not exist), AIC did not acquire *Russian War Prisoner* from Kallir. In fact, the Work was sold at least three separate times between Kallir’s 1957 sale and AIC’s 1966 acquisition, which occurred more than 20 years after the end of World War II in a transaction that had nothing to do with the state of New York. Finally, Part I recounts AIC’s efforts over time to further research the provenance of *Russian War Prisoner*, including research conducted more than 20 years ago.

**Part II** addresses the grounds on which this Court can and should dismiss the instant Application as a matter of law. Foremost among them, as noted above, is that there is no jurisdiction for this Court to decide this issue, as Penal Law § 450.10 is not designed to require criminal courts to devote time and resources to resolving civil disputes over ownership, particularly in the absence of any criminal case. Indeed, there is no authority for a court doing so, and, as noted, every New York court faced with this very issue in recent memory has *declined* to

do what the People propose here – that is, in the absence of a pending criminal case, to create a procedure, burden of proof and format for the “quasi-civil proceeding” the People have purported would apply – and has instead deferred to civil courts and civil litigation to resolve what is, at core, a property dispute between two private parties. Here, of course, a civil court has already resolved that civil dispute in favor of AIC, and this Court can and should defer to that resolution.

Part II also addresses two additional legal defects in the People’s theory, namely the jurisdiction of a New York court to revisit the lawfulness of AIC’s possession of the Work *in Illinois* for more than 60 years, or its acquisition of the Work – also in Illinois – in 1966. As the People would have it, Penal Law § 450.10 is not only a tool for resolving competing claims of ownership, but a roving and timeless tool the People can use without regard to where the property is located or how long ago the acquisition in question occurred. The People cite no authority for either proposition – and that is because both are wrong. As detailed herein, the People fail to establish either that AIC’s ongoing possession of *Russian War Prisoner* is within the geographical jurisdiction of New York courts or that the People’s efforts to revisit the events of the 1930s through the 1960s are timely under any applicable statute of limitations.

Finally, in **Part III** – and assuming the Court declines to dismiss the Application for one or more of the reasons above – this brief directly addresses the People’s theory that the Work is “stolen” and the numerous legal and factual deficiencies in the same. As detailed herein, it is impossible to conclusively determine precisely how the Work moved from Fritz and Lilly Grünbaum’s home in Austria in 1928 to Kornfeld’s Swiss gallery in 1956 because of the passage of time, the lack of perfect recordkeeping during the War and the death of all known participants in the same. And in a proceeding where the People carry the burden, that impossibility – which the People concede – weighs heavily against granting the Application. However, as also discussed

herein, the theory supported by direct evidence and conclusions of multiple investigations is that the Grünbaums' Schiele collection was never "looted" by Nazis but instead remained within the Grünbaum family and sold by Fritz's sister-in-law Mathilde to Kornfeld, in 1956, who in turn sold it to Kallir.

It is also the conclusion that makes the most sense. As set forth herein, there is no evidence at all – none – that the Work was ever physically seized by the Nazis. The Nazis were meticulous recordkeepers, resulting in the trove of paperwork that exists today (which the People make use of), and yet, in decades of investigation and litigation, never *once* has a single document reflecting the Nazi seizure of the Grünbaums' Schiele collection ever been recovered. Moreover, the People's theory requires engaging in insurmountable factual and logical leaps, among them that Kornfeld chose to voluntarily submit to a deposition on the topic of his asserted "crimes" and to voluntarily turn over records the People claim are forgeries or fakes, without any obligation; or that Mathilde – who indisputably had a long-term business relationship with Kornfeld – befriended and did business with the man who was selling her late sister's looted art collection. None of that makes any sense.

If the Court does not dismiss the People's Application and is inclined to delve into the factual record through a quasi-civil proceeding, then Respondent respectfully submits it should do so through a hearing – or at least some formal procedure – through which the rules of evidence apply and the Court is able to make factual findings not based on the People's speculation but instead grounded in admissible evidence. Not only is such a procedure consistent with principles of due process and the manner in which courts typically resolve competing claims of ownership, but the People have themselves acknowledged as much when challenged in prior Section 450.10 proceedings. (*See* Ex. 2 at 11) ("Col. Bogdanos: Yes. I fully recognize that we would have to

prove these facts in this courtroom, in that chair, by witnesses under oath, subject to all the rules of evidence and subject to all the rules of discovery. So [Respondent] would get their due process in this courtroom . . . .”).

## **Part I**

### **Factual Overview**

The facts central to the People’s Application principally turn on the provenance of the artwork *Russian War Prisoner*, drawn in pencil and gouache by Egon Schiele in 1917. That provenance, and that of other works by Schiele collected by Fritz Grünbaum, have been the subject of several proceedings in the United States and abroad, all of which sought to explore the collection’s history. To put it mildly, those facts have been the subject of extended dispute. The People’s criminal investigation, however, has added very little new information to the mix of evidence that has been thoroughly investigated and litigated many times before. But that comes as no surprise given the events in question happened as much as 90 years ago and involved persons all of whom, at this point, are deceased.

To frame the discussion that follows, it may be helpful to highlight those facts that are not seriously in dispute. *First*, as of the late 1920s, Franz Friedrich (Fritz) Grünbaum (“Fritz”) (1880-1941) and his third wife Elisabeth (Herzl) Grünbaum (“Lilly”) (1898-1942) (collectively, the “Grünbaums”) owned *Russian War Prisoner* and a collection of other works by Schiele, an artist who – like many artists – found fame and notoriety only after his death. *Second*, both Fritz and Lilly were tragically murdered by the Nazis during World War II. Thankfully, some of Lilly’s relatives managed to survive, including her brother Max Herzl, her sisters Mathilde Lukacs and Anna Reis, and their husbands, Sigmund Lukacs and Berthold Reis, respectively, all of whom fled Vienna and the Nazis in 1938 and 1939. *Third*, in 1956, a gallerist named Eberhard Kornfeld

offered a collection of works by Schiele, including *Russian War Prisoner*, for sale in his Swiss gallery. A number of those works, also including *Russian War Prisoner*, were sold to another gallerist, Otto Kallir, a Jewish emigree from Vienna who fled from the Nazis to the United States, who later exhibited and sold the Work in his New York gallery in 1957. Both Kornfeld and Kallir were (and, notwithstanding the People's allegations, to most remain) respected gallerists who worked in the art world for decades. *Fourth*, AIC acquired *Russian War Prisoner* from the B.C. Holland Gallery in Illinois through a donation made nearly a decade later in 1966.

What is principally in dispute are the sequence of events between approximately 1928 – the last point at which the Grünbaums' possession of *Russian War Prisoner* can be conclusively established – and 1956, when the Work was sold by Kornfeld in Switzerland. The only participant in those events to ever provide a sworn account is Kornfeld himself, who, through voluntary testimony provided in 2007, under oath and in connection with prior civil litigation over these very issues, explained that he acquired the collection from Mathilde who he testified told him that the Work and the collection of Schieles was that of her family's and had survived the War. The account was based not only on Kornfeld's memory of these then 50-year-old events, but also a trove of documentation, including dozens of handwritten letters between him and Mathilde that spanned their five-year professional relationship as well as ledgers and receipts pertaining to their various art sales.

Indeed, while the People very selectively quote from Kornfeld's testimony in *Bakalar* in an effort to discredit it, the testimony as a whole led the presiding judge to reach the opposite conclusion, finding it to be eminently credible and abundantly corroborated by documents and records. Indeed, Kornfeld's full testimony includes his recounting of receiving outreach from Mathilde in 1952, in which she expressed interest in selling works that she, a collector herself, had

amassed, and of how that professional relationship developed and ultimately entailed Mathilde selling to his gallery over 100 works, including *Russian War Prisoner*.

The People contend that Kornfeld is a liar and a criminal. But aside from attacking Kornfeld's credibility through a series of arguments (virtually all of which were raised *and rejected* in the proceeding in which the testimony was given) the People have no evidence to support their theory. In fact, aside from rank speculation that Cornelius Gurlitt – the son of a former Nazi with no known connection to the Grünbaums or *Russian War Prisoner* – might be a “likely source” of the Work, which, as will be addressed herein, can swiftly be disproved, the People do not put forth much of a theory at all. To be clear, not a single witness has testified or will ever testify that Kornfeld obtained the Work from anyone other than Mathilde and not a single document will show a different source of ownership. And, ironically, as noted above, the most reliable evidence of the core fact the People seek to prove – i.e., that *Russian War Prisoner* belonged to the Grünbaums prior to and during World War II – remains the very account the People seek to discredit: the sworn testimony of Kornfeld himself.

### **The Parties**

#### ***Art Institute of Chicago***

Respondent the Art Institute of Chicago (“AIC”) is a museum and school of fine arts located in Chicago, Illinois, which has maintained *Russian War Prisoner* in its collection since 1966. AIC has no offices in New York, nor does it house or permanently display any part of its collection in New York. AIC was founded in 1879 and has since grown its permanent collection to nearly 300,000 works of art, including a vast collection of Expressionist art. Today, that collection includes four different works by Schiele, including *Russian War Prisoner*.



While, as discussed herein, standards for provenance have evolved over the decades relevant to this dispute, provenance research is central to AIC's mission to collect, care for and interpret works of art across time, cultures, geographies and identities. In that respect, AIC employs a team of provenance researchers, scholars and field experts, and maintains its own in-house Ryerson and Burnham Libraries in addition to access to external databases and resources, to uncover crucial information about works in AIC's collection. Consistent with its commitment to provenance research, AIC has, for nearly two decades, endeavored to provide full provenance information for works in its collection on its website so that any member of the public can instantly learn the known provenance of any particular work.

AIC has also been a long-time collaborator with law enforcement, including DANY and its ATU, in addressing issues of provenance where they have arisen. AIC routinely provides information on a voluntary basis where questions are asked about works in its collection, and, in fact, did so on multiple occasions as part of this investigation.

### ***The Grünbaum Family Members***

DANY's Application is brought on behalf of three descendants of the Grünbaums who are the asserted heirs of the Grünbaum art collection: Timothy Reif, David Fraenkel and Milos Vavra (collectively, the "Grünbaum Family Members"). Notably, while the Application, at various points, refers to the Work as having belonged to *Fritz* Grünbaum – or tries to somehow draw a distinction between the ownership interests of Fritz as opposed to his wife, Lilly, in the Work – those distinctions are inappropriate. Both Fritz and Lilly, as a married couple, had an ownership interest in their property, including the Work, and consistent with that view, the Grünbaum Family Members represented here include descendants on both sides of the Grünbaum family. Timothy Reif and David Fraenkel are co-heirs, co-executors and co-trustees of the estate of Leon Fischer, the grandson of Lilly's brother, Max Herzl. Their claim to an interest in *Russian War Prisoner*,

therefore, depends entirely on Lilly's ownership of the Work. Milos Vavra is the descendant of Fritz Grünbaum's sister, Elise Zozuli. None of the Grünbaum Family Members purport to have any firsthand knowledge of the events in Europe in the 1930s through 1950s.

As discussed herein, the Grünbaum Family Members have been engaged in extended civil litigation with various collectors, institutions and museums, including AIC, for decades over the issues raised in the People's Application. And as to those civil litigations, those efforts have been largely unsuccessful.

### **The Provenance of *Russian War Prisoner***

#### ***Egon Schiele and Russian War Prisoner***

Egon Schiele was an Austrian Expressionist artist of the 20<sup>th</sup> century who primarily created works in pencil, watercolor, gouache and oil. In his artistic career, Schiele was prolific, generating more than 2,700 works, often utilizing scraps of paper (sometimes both sides) or pieces of cardboard as canvases to create, in greater part, sexually explicit figure sketches referencing those he knew or had come across in his personal life, and, in lesser part, portraits, cityscapes and still-lives. (Stein Rep. at 11; Ex. 4 ("American Artist")). Schiele was a protégé to Gustav Klimt, whose style heavily influenced Schiele's early works and especially his portraiture, which often evoked tongue-in-cheek homage to iconic Klimt works.

*Russian War Prisoner*, 1916, gouache and pencil, 48.3 x 30.8 cm (19 x 12 1/8 in.) is one among an extensive oeuvre of Schiele's portraiture works on paper created by the artist just two years before he passed away from the Spanish Flu at the early age of 28. The Work, which is two-sided, containing both a *recto* and *verso*, exhibits the hallmarks of Schiele's evocative linework style, mixing pencil and gouache to create a striking and candid portrait of a Russian prisoner of war with whom Schiele became acquainted during his short time conscripted in the Austrian army

in which he briefly served as a guard at a camp for Russian prisoners of war. (See Ex. 4). The Work is pictured below:



*Russian War Prisoner, 1916, gouache and pencil, 48.3 x 30.8 cm (19 x 12 1/8 in.); recto (left) and verso (right)*

### ***Fritz and Elisabeth Grünbaum***

*Russian War Prisoner* is believed to have been first acquired after Schiele's death by Fritz around 1925, though the exact date and method of acquisition is not known. (Stein Rep. at 9).

Fritz was a prominent Jewish cabaret artist, actor, director and entertainer who lived in Austria. Though Fritz was perhaps most recognizable for his entertainment career, he was also an avid art collector and one-time art dealer who primarily collected works from 19<sup>th</sup> and 20<sup>th</sup> century artists, especially those by Schiele. While Fritz is, today, recognized as one of the most significant collectors of Schiele works before World War II, much less information existed as to the extent of his collection prior to the 20th century. In contrast with what might be expected under today's norms, Fritz's collection of Schiele works is not referenced in any published correspondence between Schiele and his patrons nor in literature citing other similar collectors. (*Id.* at 8-9).

At the time of Fritz's acquisition of *Russian War Prisoner*, he was married to his third wife, Lilly, and living in Vienna, Austria. Less is known about Lilly's early life and career. Historical records place *Russian War Prisoner* in the Grünbaums' ownership for the first time in 1925, when the Work was loaned from the Grünbaums to Galerie Würthle in Vienna, Austria for use in its "Egon Schiele" exhibition that featured 150 of Schiele's works. (*Id.* at 9; Kallir Research Institute, Egon Schiele, Complete Works Online (1919-1945) (available at <https://egonschieleonline.org/exhibitions/1919-1945>)). The Work was subsequently loaned to the Neue Galerie in Vienna in 1928 for a brief exhibition, "*Gedächtnisausstellung Egon Schiele*," as noted in contemporaneous documentation from Otto Nirenstein (later Otto Kallir), the gallery's founder. (Stein Rep. at 4, 10-11; see Kallir Research Institute, Egon Schiele, Complete Works Online (1919-1945) (available at <https://egonschieleonline.org/exhibitions/1919-1945>)).

A return receipt bearing Fritz's signature indicated the return of the Work to Fritz's possession at the end of that exhibition in 1928. (Stein Rep. at 11; Exs. 5 (1928 Return Receipt); 5A (English Version)). That return receipt is the last documented movement of *Russian War Prisoner* until 1956, when as discussed herein, it was listed as part of an exhibition at Kornfeld's Swiss gallery, Gutekunst & Klipstein.<sup>3</sup> Whether Fritz loaned the Work to other galleries after 1928, or whether he sold it after those exhibitions cannot be conclusively determined. (Stein Rep. at 11, 40). AIC does not disagree with the People's position, albeit for different reasons, that the more likely scenario is that the Grünbaums continued to possess the Work after the 1928 exhibition and through the early years of the War. As discussed further herein, the primary evidence that

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<sup>3</sup> The Gallery's name changed many times, including during the period in which Mathilde was making sales to Kornfeld. For example, it changed from "Gutekunst & Klipstein" to "August Klipsteins Erben" in spring 1951, and then shortly thereafter to "Klipstein & Kornfeld," then to "Kornfeld & Klipstein," and then, after the departure of the last person who carried the name Klipstein, to "Galerie Kornfeld & Co." (Kornfeld, *History of the House from 1864 Until Today*, available at <https://www.kornfeld.ch/g325.html>). This brief will refer to the Gallery as it is most commonly referenced: "Gutekunst & Klipstein" or G&K.

*Russian War Prisoner* remained with the Grünbaum family after 1928 comes from the account of Kornfeld – and more specifically his account of acquiring the Work from Mathilde as part of a family collection that had survived the War.

### ***The Grünbaums' Imprisonment***

Many of the facts surrounding the Grünbaums' tragic deaths are not in dispute. At the time of the Annexation (*Anschluss*) of Austria by Nazi Germany in March 1938, Fritz and Lilly were still residing in Vienna. Upon news of the Annexation and Nazi occupation of Austria, the Grünbaums made plans to flee to Belgium, where Lilly's brother, Max, already resided. Indeed, much of Lilly's family was planning to travel together to Austria, including her sister and brother-in-law Mathilde and Sigmund and her sister and brother-in-law Anna and Berthold. Lilly and Fritz did not make it, however. They were stopped at the Czech border, after which they returned to Vienna. Soon thereafter, Fritz was arrested by Nazi authorities and placed into detention in Vienna (what the Nazis referred to as "*Schutzhaft*" or "protective custody"). (*Id.* at 12).

After Fritz's initial arrest, Lilly actively sought to secure his release. Placement in "*Schutzhaft*" was not atypical after the annexation – many prominent Jewish cultural, political and business leaders were subject to this type of imprisonment by the Nazis soon after the annexation. In some cases, release of the prisoners from those initial arrests could eventually be secured. However, Fritz was not released, and, around May 24, 1938, was deported to the Dachau Concentration Camp in Bavaria, Germany. (*Id.* at 12-13).

Four months later, on September 23, 1938, Fritz was transferred to the Buchenwald Concentration Camp, where he was imprisoned until he was deported back to Dachau on October 4, 1940. (*Id.* at 26). After nearly three years of imprisonment in Nazi concentration camps, Fritz tragically perished in Dachau on January 14, 1941. (*Id.* at 26).

Lilly refused to flee with her family members following Fritz's imprisonment in Dachau and Buchenwald. Lilly eventually was forced to move from her and Fritz's home at Rechte Wienzeile 29 on October 31, 1938, while Fritz was imprisoned in Buchenwald, and thereafter lived in a succession of apartments with a friend, Elsa Klauber, until the women finally were forced to move to Jewish collective housing at Marc-Aurel Strasse 5. (*Id.* at 26).

From that address, less than one year after Fritz's death, Lilly was deported to the Maly Trostinec concentration camp on October 5, 1942, where she was murdered shortly after, though the precise date is not known. (*Id.* at 26).

### ***The Fate of Russian War Prisoner During World War II***

The travels of *Russian War Prisoner* between the end of the Neue Galerie exhibition in 1928 and the G&K exhibition in 1956 are the case of the present dispute. The Nazis were, as noted above, meticulous recordkeepers and, thus, a paper trail does survive from that period, stretching back nearly 100 years. But those records are not – as the People would have it – conclusive.

In the late 1930s and 40s, the Nazis enacted various discriminatory laws and regulations aimed at Jewish citizens in Austria. One such regulation, which was passed in April 1938 not long after the Annexation, was known as the “Regulation Concerning Registration of Jewish Assets” (*Verordnung über die Anmeldung des Vermögens von Juden*). (Exs. 6 (Regulation); 6A (English Version)). Under this regulation, Jewish residents of Germany and Austria were obligated to submit an asset registration statement (*Vermögensverzeichnis*) to the Nazi government detailing the totality of their personal effects by the end of July 1938. (Stein Rep. at 12; Exs. 5; 5A).

The registration lists were used as a tool by Nazi authorities to assess the range of Jewish-owned property that might be subject to discriminatory regulation. (Stein Rep. at 12). But, critically, the asset registration procedure was neither an act of physical seizure and confiscation

nor its technical equivalent. (*Id.* at 12-13). While the requirement for Jewish citizens to register their assets did, in some cases, lead to a subsequent seizure and confiscation, there are no records to support the conclusion that such a seizure or confiscation happened here.<sup>4</sup> (*Id.* at 12-13, 60).

The facts do not support the People's theory that, by virtue of registering the family's assets and "depositing" the same with the storage company Schenker & Co. ("Schenker") in September 1938, the Grünbaums surrendered their assets to the Nazis. (App. at ¶ 45). While Schenker was affiliated with the Nazi regime, and its reprehensible work in support of the Nazis is well-documented, Schenker also provided lawful storage and moving services to Jewish families throughout the same time period across Europe, including the Grünbaum family members. Indeed, Schenker was the moving company used by Lilly's sisters, Mathilde and Anna (and their husbands), to successfully flee Vienna during the very same time period in 1938, in August and October, respectively, and, as will be discussed herein, the moving company Lilly had planned to use to move the Grünbaums' possessions as well. As such, it does not follow, and there is no evidence to support the conclusion, that Lilly's decision to put the family possessions into storage in September 1938 amounted to a Nazi seizure of the same.

### ***The Power of Attorney***

When the asset registration regulation was enacted in April 1938, Fritz was in "*Schutzhaft*" in Vienna and, shortly thereafter, was taken to Dachau, where he remained imprisoned as of the submission deadline of July 1938. (Stein Rep. at 12). With the submission deadline looming, Lilly contacted Austrian authorities on July 15, 1938 to request an extension for the registration deadline, writing that her husband was interned in Dachau, noting his precise cell block, and

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<sup>4</sup> "Notably, there was a distinction between the *Vermögensverzeichnis* (asset registration), which Lilly completed, under which moveable objects were registered, but not seized, and the subsequent *Vermögenserklärung* (asset declaration), which Lilly did not complete and which could constitute a seizure." (Stein Rep. at 15-16).

requesting that she be able to submit the official asset registration form upon “his return,” obviously hoping that Fritz would be released. (*Id.* at 13).

The Asset Transaction Office (*Vermögensverkehrsstelle*), which handled these inquiries, largely denied the request and directed Lilly to “prompt the inmate to appoint an authorized representative” to allow Lilly to complete the registration on behalf of Fritz, offering a slight deadline extension to August 20, 1938. (*Id.* at 13). Lilly followed this directive and obtained a Power of Attorney (*Vollmacht*), denoted as “Dachau, July 16, 1938,” which would enable Lilly to submit “the statutorily required registration of assets” on her husband’s behalf. (Stein Rep. at 13; Exs. 7 (Power of Attorney); 7A (English Version)). The Power of Attorney was subsequently affirmed and executed by a Viennese Notary Public, Dr. Hans Wallner, on July 26, 1938. (*Id.* at 13; Exs. 7; 7A).

This Power of Attorney would give Lilly the means by which to fulfill the asset registration requirements for her husband before the deadline. It provided Lilly with authorization to represent her husband in matters requiring his signature and statements, and to be allowed to “represent [him] in all [his] matters with legal effect.” (Stein Rep. at 13; Exs. 7; 7A). It also allowed Lilly to appoint a third party, i.e., a legal representative, to act on her husband’s behalf. (Stein Rep. at 13).

The People contend that the Power of Attorney may be forged and that, in any event, a “Power of Attorney executed in 1938 by a Jewish individual imprisoned in Dachau Concentration Camp . . . is involuntary as a matter of law.” (App. at ¶ 40). As to the latter point, AIC would not disagree. But it does not follow that the “Power of Attorney” is “crucial” to the case. (*Id.*). In fact, as detailed below, it is largely irrelevant: the Power of Attorney was created for a limited purpose – to allow Lilly to complete the required asset registration for her and Fritz in July 1938



– which she did. There is no evidence the Power of Attorney was used for any other purpose. More generally, if, as the People would have it, Fritz’s possessions were seized by force by the Nazi regime, the niceties of a Power of Attorney would be of little relevance in any event. By contrast, if Lilly were able to get the Work to her family, as AIC believes the evidence establishes, the Power of Attorney would have no role or bearing in that process. As such, AIC respectfully submits the Court need spend little time wading into the history of the Power of Attorney.

But it bears mention that, as with many components of the People’s investigation, its research is selective, and thus the Application’s use of documents – ostensibly to draw unquestionable conclusions – is misguided. In particular, the People contend that the Power of Attorney must be a forgery because it appears to be dated on July 16, 1938, or before Lilly was notified of the need for one, and that Lilly could not have traveled to and from Dachau in time to secure Fritz’s signature. While not especially relevant to this dispute for the reasons above, neither argument draws support from the evidence.

*First*, a thorough review of documentary records that remain from Dachau illuminate the fact that prisoners were aware of this issue without their families raising it and were communicating directly – and amongst themselves – about the need for a Power of Attorney to complete asset registrations. For example, research concerning another Dachau prisoner who was at Dachau and Buchenwald during the same period (and in a neighboring cell block) as Fritz, shows that on July 17, 1938 – the day after Fritz appears to have signed the Power of Attorney – wrote to his wife, stating:

*We were informed here*, that we must definitely arrange for our asset registration by July 31<sup>st</sup> – as required by law – and I have in this matter written yesterday to Dr. Manchik. Please get in contact with him in agreement and also mother should speak with him, he should submit the registration in any case on the last day or day before the last day. Perhaps I will be back in Vienna by that time . . . . Give Dr. Manchik my business books.

(Stein Rep. at 14-15) (emphasis added). Thus, it is conceivable that Fritz, having been “informed” with the other prisoners at Dachau of the need for this document, began the work of having one prepared even before Lilly was aware he was doing it. Moreover, the designation “*m.p.*” after Fritz’s name on the Power of Attorney represents “*manu propria*,” a commonly-used method in Austrian legal documents in absentia of a handwritten signature. If Fritz never himself signed the document, that would obviate the need for Lilly to have herself traveled to and from Dachau – another point the People seize on – to obtain Fritz’s signature for the Power of Attorney. (*Id.*).

None of this is to dispute the core point on which there is no disagreement – i.e., that a Power of Attorney signed by a prisoner at a Nazi concentration camp is not valid. But it *is* to flag the extent to which the Power of Attorney is a red herring, and more generally, the perils of the People’s frequent overreach in pushing nefarious inferences and useful conclusions from selective portions of the record that exists today.

### ***The Asset Registration and Schenker & Co.***

As noted above, the primary purpose of the Power of Attorney was to permit Lilly to complete an asset registration for both herself and Fritz, which she did. Lilly’s own registration statement, dated July 15, 1938, detailed her inheritance of family property in Slovakia, personal bank accounts, insurance policies and luxury goods such as rugs, furs, precious metals, jewelry and art assets (valued at RM 4,367). (*Id.* at 14; Exs. 8 (Lilly Grünbaum Statement of Assets); 8A (English Version)). The sums are detailed on an appendix to the statement. (Stein Rep. at 14; Exs. 8; 8A).

The statement Lilly completed for Fritz, dated July 29, 1938, details personal bank accounts, cash, stocks, books, jewelry and paintings and graphics, as well as the existence of copyright royalties for his work as librettist (his profession was described as “actor and writer”).

(Stein Rep. at 14; Exs. 9 (Fritz Grünbaum Statement of Assets); 9A (English Version)). The signature on his asset statement states “*Elisabeth Grünbaum for Franz Friedr. Grünbaum as per Power of Attorney of July 16, 1938.*” (Exs. 9; 9A).

As was required by the asset registration process, an appraisal of the Grünbaums’ art collection was appended to the submission dated July 20, 1938. (Stein Rep. at 17; Exs. 10 (Kieslinger Appraisal); 10A (English Version)). That appraisal was prepared by Dr. Franz Kieslinger, an official Viennese evaluator and an expert in medieval art for the Dorotheum auction house. (Stein Rep. at 17).

The document, generally referred to as the “Kieslinger Appraisal” or “Kieslinger Inventory,” (hereinafter, “Kieslinger Appraisal” or the “Appraisal”) detailed the Grünbaums’ art assets and valued them at RM 5,791. (Exs. 10; 10A at 3). As discussed below, while the People ascribe enormous significance to the description of property included in the Kieslinger Appraisal, that description is both ambiguous and subject to interpretation. The People contend the Appraisal listed a total of 452 artworks, including “81 Schiele Works.” (App. at ¶ 43). Other historians have put the total number at 444, given the numerous ways to interpret the number of items on the Appraisal, and while the final number is less relevant, it is important that numerous works on the Appraisal have only general descriptions, lacking artist names, titles, defining dimensions or subject identifications. (See Stein Rep. at 17; Exs. 10; 10A at 2).

The Schiele works were largely not identified by any title or specific description. However, entries 37 and 37a on the Kieslinger Appraisal reference “[l]arge hand drawings by Schiele 55 sheets with colours,” valued at RM 1,200 (roughly \$500) and “20 pencil drawing[s] and 1 etching by Schiele,” valued at RM 300 (roughly \$125).<sup>5</sup> (Exs. 10; 10A at 2). As was the case with other

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<sup>5</sup> Five additional oil paintings by Schiele were listed separately from entries 37 and 37(a) and were listed by title or were otherwise identifiable by information included in those separate entries. (Exs. 10; 10A).

entries, entries 37 and 37a did not include titles, sizes or descriptions of the individual works. Although the overall value of these Schiele works on paper is not insignificant, the individual value of each of the 55 large color drawings was quite modest, just RM 21 per piece, or approximately eight dollars at the time. (Stein Rep. at 21; *see* UC Santa Barbara Historical Dollar-to-Marks Conversion).

As alluded to above, neither the act of filing the asset registration nor obtaining the appraisal constituted seizure, although it certainly could be a precursor to seizure. (*See* Stein Rep. at 12-16). Historical records indicate that many Jewish individuals who were initially forced to register their assets were ultimately able to retain some or most of their assets after that initial filing in the summer of 1938. (*Id.*). Others, of course, were not, and were ultimately forced to physically relinquish their assets to the Nazis. (*Id.*).

In the case of Fritz, the asset registration prompted Nazi authorities to pursue a partial seizure that did *not* include his artwork. In particular, on August 3, 1938, Nazi authorities imposed a so-called “Security Order” (*Sicherungsanordnung der Devisenstelle Wien 858/38-90*) on Fritz’s *cash, bank accounts and stocks*, which – while not entailing a physical seizure – did require permission of the Asset Transaction Office for use or transfer of any of the impacted assets. (*Id.* at 16-17). Importantly, this security order did not apply to Fritz’s *tangible* asset categories, including his jewelry, books and, notably, his artwork. (*Id.*).

Meanwhile, Lilly began preparing with her extended family to remove the Grünbaum family’s assets from Vienna. Indeed, as will be discussed in greater detail, as early as June 1938, Lilly had already begun preparing her property for export and coordinating with her sisters and their husbands to leave Austria and emigrate to Belgium.

Enter Schenker, the transport firm to which Lilly delivered her and Fritz's belongings on September 8, 1938. As noted, the history of Schenker as a transport firm during the Nazi era is a complicated one, and within Schenker, there was unquestionably an extensive network of involvement with the Nazi authorities, highlighted by archival documentation. (*Id.* at 30-34). However, that same extensive trove of documentation, along with other evidence, makes clear that Schenker also engaged in lawful moving and transport work during the same time. Of particular note, and as noted above, Schenker served as the moving company for Mathilde, Anna, and their husbands, who successfully fled Vienna with their belongings beginning in the autumn of 1938.

The Herzl sisters' use of Schenker to move their possessions was no coincidence: historical documentation indicates that as early as June 1938, the sisters, including Lilly, were coordinating with legal counsel to arrange to move their possessions, and presumably out of those discussions came a collective decision to use Schenker to facilitate the transport. (*Id.* at 32; Exs. 11; 11A). For example, in early June, Lilly, the Lukacses and the Reises met collectively with an attorney, Dr. A. Kondor, to discuss moving the three families' assets to Belgium. (Exs. 11; 11A). On June 24, 1938, Kondor wrote to Max Herzl in Belgium that: "Yesterday I was in Vienna and in Mrs. Grünbaum's residence I spoke with Mr. Lukacs and Mr. and Mrs. Reis *and Mrs. Grünbaum*. Fritz Grünbaum himself is in Dachau [*words cut off from the page*]." (*Id.*) (emphasis added). From those planning sessions came two next steps of consequence: first, Max did in fact obtain visas for all three families to leave for Belgium, which were ultimately used by the Lukacs and Reis families later that year. Second, all three families decided to use Schenker – the storage and moving company discussed extensively above – to facilitate those moves. (*Id.* at 33).

With that context in mind, Lilly's decision to put her possessions into storage at Schenker in September 1938 is not the act of Nazi confiscation the People make it out to be. It was instead

the logical next step for Lilly to take toward the goal of ultimately moving her and Fritz to Belgium with her sisters upon his release, which she still very much hoped for as of September 1938.

Notably, in that regard, upon receiving the Grünbaum's possessions on September 8, 1938, Schenker submitted an official application to the Central Agency for Monuments Protection (*Zentralstelle für Denkmalschutz*) to obtain an export license for "emigration goods" on behalf of Lilly. (*Id.* at 27). Indeed, there can be no doubt that Schenker applied for an export permit to move the Grünbaums' goods to Belgium, which contradicts the People's suggestion that Lilly's decision to put the family's belongings into storage at Schenker amounted to a seizure by the Nazis. (*Id.* at 27-28; Exs. 12; 12A).

Lilly's registration with Schenker noted that the property to be moved included "paintings and carpets, as per the attached list," and that "ordinary household items" were to be transported by train or ship. (Exs. 12; 12A). The permit, which confirmed release of the property for export, free from duties, was validated until December 8, 1938.

Attached to the Grünbaums' export application was another handwritten inventory (the "Demus Inventory"), which was created by Central Agency for Monuments Protection staff member Otto Demus, a well-known figure who dealt often with art export matters and reviewed collections to determine any required imposition of art export restrictions.<sup>6</sup> (Stein Rep. at 27-28; Exs. 13 (Demus Inventory); 13A (English Version)). The Demus Inventory described the moving goods, as relevant to any possible reference to *Russian War Prisoner* as 21 oil paintings, 15 watercolors, two pastel paintings, ten drawings, 278 drawings: some in color, seven graphics, three

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<sup>6</sup> Typically, export restrictions were applied to works by historically significant artists whose death had occurred at least 20 years prior. In 1938, Egon Schiele had been deceased for exactly 20 years, and his works were not generally subject to export restriction by the Central Agency for Monuments Protection. Schiele was still considered a modern Austrian artist, and review of a range of export applications and licenses that can be found in the Federal Office of Monuments Protection Archive (*Bundesdenkmalamt*) demonstrates that the authorities rarely embargoed Schiele artworks from export in the late 1930s. (Stein Rep. at 27).

envelopes with misc. graphics, and 66 prints. No artist names or details of individual artworks were included. (Stein Rep. at 27-28; Exs. 13 (Demus Inventory); 13A (English Version)).

The People devote considerable energy to arguing that the Demus Inventory describes the “*exact same collection*” of materials covered by Kieslinger Appraisal conducted two months prior. Indeed, the People contend that is that “the *only* . . . conclusion [that] is reasonable.” (App. at ¶ 47) (emphasis added). The argument – and the certainty the People ascribe to it – is deeply flawed. The Demus Inventory differs from the Kieslinger Appraisal in ways large and small. The total number of objects does not match; the descriptions do not match; the valuations do not match. For example, while the Kieslinger Appraisal lists somewhere around 444 total artworks, (Stein Rep. at 17), the Demus Inventory lists around 420. (See Exs. 9 (Kieslinger Appraisal); 9A (English Version); 13; 13A). The Kieslinger Appraisal identifies 81 works by Schiele, the Demus Inventory does not identify any works by any particular artist. And while the Kieslinger Appraisal includes a value for the collection, the Demus Inventory does not appear to do so.

	<b>Kieslinger Appraisal</b>	<b>Demus Inventory</b>
<b>Valuation</b>	RM 5,791	None <sup>7</sup>
<b>Total Assets</b>	Approximately 444 artworks	Approximately 420 artworks
<b>Descriptions as Relevant to the Work</b>	“Large hand drawings by Schiele 55 sheets with colours; 20 pencil drawing and 1 etching by Schiele; E. Schiele: the Self-seer, oil, canvas; Woman’s portrait, oil, canvas; City by a river; Small landscape with trees; Ships in the port”	“21 oil paintings, 15 watercolors, 2 pastel paintings, 10 drawings, 278 drawings, some in color, 7 graphics, 3 envelopes with misc. graphics, 66 graphic prints”

(See Exs. 10; 10A; 13; 13A).

The People speculate that the two inventories may have had different criteria for categorizing material and further contend that it is “impossible – and inappropriate – to draw any

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<sup>7</sup> The number “5501” is provided on the Demus Inventory, but it cannot be determined whether this number is representative of a valuation amount or is an administrative number assigned to the inventory.

conclusions” based on these discrepancies. (App. at ¶ 46). But that is *just the point*, and one the People cannot have both ways: it *is* impossible and inappropriate to draw any conclusions from the two documents, because they are completely different, were prepared for different purposes and were generated some 80 years ago by people who are no longer alive to testify as to their contents.

Indeed, there is no way of knowing whether the collection of property that Lilly put into storage on September 8, 1938 is the “exact same collection,” (*id.* at ¶ 47), as what she listed on her asset registration two months prior. But it is relatively easy to imagine good reasons why it was not. In anticipation of putting her property into storage, Lilly may have given possessions of particular value or sentiment to others for safekeeping, particularly to her sisters, at least two of whom were, at that very time, making plans to flee Vienna to Belgium. The far more important point is the one the People effectively concede: these inventories are not so reliable nor so consistent and it is, thus, “impossible – and inappropriate – to draw any conclusions” based on them.

Thereafter, until at least June 1939, Lilly paid storage and moving fees to Schenker, although it is unclear what she was paying to store. (Stein Rep. at 28). After the Demus Inventory, no third-party inventory or appraisal of the Grünbaums’ property is known to have ever been conducted.

As of January 31, 1939, the Office of Foreign Currency appointed an administrator for Lilly and Fritz’s assets, Dr. Ludwig Rochlitzer (1890-1945), a well-known attorney and composer in Vienna who represented a considerable number of Jewish families of music figures in this period. It is noteworthy that Rochlitzer was known – and was subject to Gestapo interrogation for



– helping Jewish refugees move their assets abroad or otherwise keep their assets out of Nazi government hands by taking the assets in lieu of charging for his services. (*Id.* at 19-20).

Lilly was in frequent contact with Rochlitzer regarding her and Fritz’s assets. Rochlitzer provided an estimated cost for his services, as well as for those of a German attorney, Dr. Alexander Bayer, which totaled RM 6,500. (*Id.* at 19; Exs. 14 (Rochlitzer Letter); 14A (English Version)). While, to be clear, no component of Rochlitzer’s appointment or oversight of the Grünbaums’ possessions was “voluntary,” the People’s description of Lilly and Rochlitzer’s interactions is unsupported by evidence. To the contrary, the evidence points to a relationship with Lilly that is far more consistent with Rochlitzer’s known role, as discussed above, in working with Jewish families whose assets he oversaw and assisting them with relocating these assets out of Nazi-occupied territories. For example, a review of the correspondence between Lilly and Rochlitzer evidences a respectful relationship: Rochlitzer addressed Lilly as “*Dear Madam*” and signed off with “*Respectfully*,” which starkly contrasted Nazi-era norms – by 1939 (and particularly after *Kristallnacht* in November 1938), Nazi correspondence was often signed with “*Heil Hitler*,” and Lilly would have been addressed with the Jewish designation of “*Sara*” added to her name. (*Id.* at 20; Exs. 14; 14A).

Similarly, while the People highlight a July 1939 asset statement completed by Lilly and signed by Rochlitzer that reflects the same value of artwork as that in earlier statements as concrete evidence that the Work must have remained in her collection (and physically at Schenker), this is, at best, speculative. (*See* Exs. 15 (Rochlitzer Declaration); 15A (English Version)). Unlike the prior inventories and appraisals, which showed evidence of a third party analyzing the family’s assets, there is no evidence that Rochlitzer was himself conducting any sort of inventory – that is, actually comparing the 1939 registration statement as completed against what did (or did not)

remain in storage at Schenker – nor conducting any re-appraisal of the Grünbaums’ assets, which would not have been his particular specialty nor his role. Notably, while Lilly appears to have simply provided the identical number as that used in the earlier Kieslinger Inventory (which Rochlitzer accepted at face value), if, as explained below, Lilly *had* managed to get some or all of her property to her family in late 1938, she would have had no incentive to disclose as much nor to prompt Rochlitzer to amend the registration statement. Likewise, Rochlitzer, whose fees derived, at least, in part, from the value of the Grünbaums’ assets – and therefore who would stand to be paid more by virtue of Lilly’s higher asset inventory – would have had no incentive to push back nor to have the slightest concern that Lilly were *overstating* her assets.

After 1939, the paper trail surrounding *Russian War Prisoner* goes cold until 1956. But there is one final point worth emphasizing: if physical seizure or confiscation of the Grünbaums’ property had taken place, as the People would have it, this would have been an official act of dispossession for which there would exist documentation. The Nazis were notoriously meticulous recordkeepers. Researchers have spent decades since the end of World War II poring over the documents, inventories, ledgers and related records from the Nazis and their collaborators, but no such records for these works have been located, even through the People’s instant extensive criminal investigation. (Stein Rep. at 28-29).

That is quite telling. Indeed, the People rely extensively, at various points in their Application, on the asserted lack of evidence as itself evidence of particular points or arguments the People seek to advance. And while reasonable minds could disagree about the evidentiary value of the *lack* of documents from war-torn countries 80 years ago, once again, the People cannot have these arguments both ways, because on this point in particular, the lack of evidence is devastating to the People’s theory: never once, in decades of litigation and investigation squarely

focused on the Grünbaums' art collection, has a single shred of documentary evidence emerged to support the theory that the Nazi regime physically seized and then sold or otherwise disposed of the Grünbaums' art collection, including *Russian War Prisoner*.

### ***The 1956 Acquisition of Russian War Prisoner by Gutekunst & Klipstein***

The next documented appearance of *Russian War Prisoner* was as part of a catalogue advertising an auction at Gutekunst & Klipstein in Bern, Switzerland, which ran from September 8 through October 6, 1956. (*Id.* at 38). The exhibition and sale catalogue, *Egon Schiele, Pictures-Watercolors-Drawings-Graphics, Stock and Exhibition Catalogue Nr. 57*, was comprised of 65 works by Egon Schiele, including *Russian War Prisoner*.<sup>8</sup> (*Id.*; Exs. 16 (1956 G&K Catalogue); 16A (English Version)).

The People characterize the 1956 catalogue and the exhibition at G&K as Kornfeld's "unexplained, unprecedented and sudden possession" of these works. (App. at ¶ 22). None of that is true. As discussed herein, there is both explanation – and, more important, *evidence* – for how Kornfeld came to acquire the collection, not "sudden[ly]," but rather as part of an extended business relationship Kornfeld developed after the War with Lilly's sister, Mathilde.

The history and supporting evidence of the relationship between Kornfeld and Mathilde is central to understanding the travels of *Russian War Prisoner* today, and it was best developed in civil litigation 20 years ago between the Grünbaum Family Members and another collector David Bakalar over a different Schiele work, in which the collector prevailed. *See generally Bakalar I; Bakalar II; Bakalar III*. As part of that litigation, Kornfeld, at the age of 84, voluntarily agreed to provide documents and sit for a full deposition taken by counsel for the Grünbaum Family Members. Kornfeld was deposed for an entire day regarding topics from his gallery, his

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<sup>8</sup> Listed as Nr. 39, *Portrait of a Russian Prisoner; black chalk and tempura, 47.7 x 26.3 cm*, with illustration. (See Ex. 16).

recordkeeping practices, his extensive dealings with the Lukacs family and, notably, about the collection of Schieles he acquired from Mathilde in the 1950s, including *Russian War Prisoner*.

Not surprisingly, many of the same questions about his records and memory that the People raise now were raised there as well. And because the Grünbaum Family Members were parties to *Bakalar*, they had every opportunity and incentive to probe and explore infirmities in Kornfeld's testimony themselves, which they did, extensively. (*See generally* Ex. 17) (May 25, 2007 Deposition Transcript of Dr. Eberhard Kornfeld)).

The presiding judge in that case – who had access to the full range of evidence before him, including the *full* transcript of Kornfeld's testimony and the *full* universe of exhibits thereto – rejected concerns about his memory and documentation, instead crediting Kornfeld's testimony, concluding that the Grünbaums' collection “remained in the family” and “was not looted by the Nazis.” *Bakalar II*, 819 F. Supp. 2d at 288-89, 295 (“based on the deposition testimony of Eberhard Kornfeld, . . . this Court concluded that the Drawing was sold [to] that gallery in 1956 by Mathilde Lukacs . . . Grünbaum's sister-in-law. . . . This Court reaffirms these factual findings.”). Below, AIC explores that testimony in some detail, including some of the questions raised about Kornfeld's records and the answers he provided to the same.

To start, Kornfeld testified to developing a business relationship with Mathilde that began on May 3, 1952, at which time, Kornfeld recalled, Mathilde had reached out to G&K after seeing an advertisement for the gallery in the German-language magazine, *Weltwoche*. (Ex. 18 (May 3, 1952 Letter)). As with much about that relationship, the initial outreach was in writing, and significant components of that correspondence were retained by Kornfeld and thus exist today. As he testified:

**Q.** You met with Mathilde Lukacs, correct?

**A.** Yes.

**Q.** You personally met her?

**A.** Our business relationship lasted for over five years, from 1952 to 1957. Yes, I met her on several occasions in Brussels and in Bern.

...

**Q.** I would like the record to reflect that the original of the document Dr. Kornfeld has just handed me was previously produced to us by Dr. Kornfeld and it bears the Bates number P2. In his numbering system it was number one of the correspondence that he sent us. There is a stamp on it. Can you tell me what that means and when it was put on it?

**A.** Yes. It is a catalogue. 'Kat' is an abbreviation for 'Katalog' and 'versandt,' 'mail order,' means that this catalogue was sent to her.

(Ex. 17 at 76:4-77:5; 77:6-17; *see also id.* at 141:22-24 (noting *Weltwoche* magazine)).

Mathilde was herself an art collector – she had been prior to the War and continued to collect after the War ended – but as she and her husband rebuilt their lives in Belgium after World War II, they sought to downsize their considerable collection. (Stein Rep. at 32). In Mathilde's initial communication to G&K, she requested a catalogue for an upcoming print auction and relayed that she lived in Belgium and was interested in selling some of her Dutch, German and French prints, i.e., works by Paul Cezanne and Käthe Kollwitz, in an upcoming auction that G&K was set to have. (*See* Ex. 17 at 78:22-79:22; 18 (May 3, 1952 Letter)).

Kornfeld and Mathilde corresponded regularly throughout their business relationship. (*See generally* Ex. 54 (Kornfeld-Lukacs Correspondence 1952-1957)). For example, in their earliest interactions, the correspondence that was preserved shows that the two exchanged letters nearly weekly:

- On May 7, 1952, Mathilde wrote to Kornfeld seeking information on the sizes of two Cezanne works that were presumably in the catalogue Kornfeld sent to her. (Ex. 19) (May 7, 1952 Letter);
- On May 12, Kornfeld responded, sending the sizes of the Cezanne works. (Ex. 20) (May 12, 1952 Letter);

- On May 29, around two weeks later, Mathilde responded to Kornfeld asking, for the first time, whether she should send various works in her collection to be auctioned at G&K. (Ex. 21) (May 29, 1952 Letter);
- On June 12, after apologizing for a delay given Kornfeld's travel, Kornfeld's gallery responded on his behalf, noting they would be having an auction in mid-October and invited Mathilde to send works which were "nice" and "well preserved." (Ex. 22) (June 12, 1952 Letter);
- By July 23, Mathilde had made plans to visit Kornfeld at G&K while her and Sigmund were traveling through Switzerland. (Ex. 23) (July 23, 1952 Letter);
- On July 27, four days later, Kornfeld noted he would not be able to receive Mathilde in person due to being out of the country but noted that "Miss Schuh" would be at the gallery to welcome the Lukases if they did come. (Ex. 24) (July 27, 1952 Letter).

### **The First Sale: August 1952**

The letters soon turned to matters of business. Mathilde negotiated with Kornfeld over the percentage of commission the gallery would take on the works she consigned, (Exs. 25 (Sept. 16, 1952 Letter); 26 (Sept. 24, 1952 Letter)), and ultimately, after visiting G&K in person in August 1952, Mathilde offered the gallery an initial set of works to consign for an upcoming November auction. (Ex. 26). This initial sale by Mathilde, which involved no works by Schiele, included works by 16 different artists, including, most recognizably, Cezanne, Degas, Gericault and Munch. (Exs. 21 (May 29, 1952 Letter); 27 (1998 Letter to Bratschi); 27A (English Version)).<sup>9</sup>

As discussed at some length below, Kornfeld kept records or ledgers of his acquisitions. These were the records of a small business owner in 1956, decades before personal computers would be introduced, and they reflect the nuances and imperfections of handwritten records that

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<sup>9</sup> The most comprehensive compilation of these ledgers was created by Christine Stauffer, Kornfeld's assistant at G&K, who, on March 30, 1998, prepared a letter on behalf of Kornfeld to Kornfeld's lawyer, Dr. Peter Bratschi, which included a chart that summarized various documentation, including receipts and ledgers, regarding G&K's acquisitions of the works from Mathilde between 1952 and 1956 (hereinafter the "1998 Letter") (Exs. 27; 27A).

were never generated for any purpose other than to allow the business at the time to keep track of artwork as it came in and went out of the gallery. Nevertheless, the relevant pages from those ledgers remained preserved as of the time of the *Bakalar* litigation, and, thus, Kornfeld was able to supply copies of the same to the parties, even allowing counsel for the parties to inspect the original versions during his deposition.<sup>10</sup>

The ledgers that Kornfeld produced, both in original and recreated, typed forms, together detailed six tranches of purchases from Mathilde, including the first sale in 1952. Through his testimony, Kornfeld described how the ledgers were created and maintained:

**Q.** And how long before 1956 was it the custom of your business to record your purchases in such books?

**A.** Since 1919, and even my predecessors adhered to the same custom.

**Q.** Do you have those inventory books going back to 1919?

**A.** Yes.

**Q.** And from 1956 until today, do you continue to maintain these books of inventory in the ordinary course of your business?

**A.** Yes, in the very same manner.

(Ex. 17 at 43:24-44:11).

For at least some of these ledgers, Mathilde's name was added to denote the work's seller or to whom money was owed at the time and appeared to be written in a different manner than other details – i.e., in pencil rather than pen. When asked about that inconsistency, Kornfeld testified that he could not recall with certainty whether, for at least some of his documentation, he added her name contemporaneous with the document's creation, and noted that he likely would

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<sup>10</sup> The People suggest there was something improper about the fact that Kornfeld provided his documents to counsel in the *Bakalar* litigation on the day of his testimony, claiming “N[n]either Kornfeld nor his lawyers offered any explanation (or apology) for producing records for the first time at the deposition itself.” (App. at ¶ 71). The People cite absolutely nothing to suggest production of such documents was “due” – or had even been requested – at an earlier time. As noted above and throughout, Kornfeld, based in Switzerland, was beyond the reach of a subpoena and was appearing and producing materials on an entirely voluntary basis.

have added her name to some ledgers at later dates, consistent with his practice of updating his records or clarifying purchases in anticipation of auctions. (*See id.* at 45:11-23 (A. . . . The whole entry that you see on page 108 was established at the very same time except maybe the name Lukacs. I cannot recall if I put that down at the same time or not . . . ”)). While the People present this as evidence of forgery, Kornfeld’s testimony about one of these ledgers makes clear that the “later date” at which he added Mathilde’s name was not recent and certainly not in anticipation of his testimony, as the People effectively allege:

**Q.** And the name Lukacs in between the word “Bar” and the number 5,050, you are not sure when that was put on?

**A.** (Through Interpreter) No.

**Q.** Do you have a specific recollection of writing Lukacs on this at a later date?

**A.** (Through Interpreter) Maybe it was in the course of research or precision that we added to the document because at the time a lot of things were added after the purchase to the document.

**Q.** If it was added later, is *it something that was added in the last five years?*

**A.** (Through Interpreter) *I don’t think so.*

**Q.** Is it something that could have been added at the time that you sold the other, the later Lukacs works?

**A.** (Through Interpreter) Maybe with regard to this entry of 7 February 1956 it has to be seen in the context of the exhibition which was held in fall, in September 1956, and it’s possible that the annotation was added to the document between September and fall, to make a more precise annotation.

**MR JANOWITZ:** I think he actually said between the time that he purchased it and September, between February and September and the fall.

**THE INTERPRETER:** I understood between September and fall.

**MS STAUFFER:** No, between February and fall.

**THE INTERPRETER:** OK.

**DR BRATSCHI:** Purchase in February and exhibition in fall.

(*Id.* at 46:5-47:13) (emphasis added). More important, the fact that Mathilde was the source of the various acquisitions reflected in his ledgers is abundantly corroborated by Kornfeld and Mathilde’s correspondence, which documents dates and times of meetings and sales – all of which align with



the acquisitions reflected in the ledger. For example, as described above, contemporaneous letters and other records document the first sale. So too, as set forth below, with the subsequent sales.

### **The Second Sale: July 1953**

The first sale was successful, and thereafter Kornfeld and Mathilde continued to correspond with frequency. The next summer, in July 1953, Kornfeld visited Mathilde and Sigmund in Brussels to retrieve additional works for an autumn sale, including works by European artists such as Jongkind, Lehmbruck, Corot, Pechstein, Kollwitz, Chagall, Corinth, Pascin, Klimt and Dürer. (See Exs. 17 at 104:13-23; 28 (1953 List of Lukacs Works for Auction); 29 (July 2, 1953 Receipt) (describing payment to Mathilde for 1000 francs “as advancement for Auction // Autumn 1953); 30 (May 11, 1953 Letter) (listing works for auction); 31 (May 31, 1953 Letter); 32 (June 25, 1953 Letter) (noting Kornfeld upcoming visit between June 30 and July 4)). That exhibition and sale appears to have gone successfully as well.

In addition to producing the correspondence itself, as referenced above, Kornfeld testified to these early discussions and meetings, recounting specific and personal details of their conversations had when they were together, including Mathilde’s address, the languages they spoke together, details of the interior of her home, and her accent. Whatever else may be in dispute, Kornfeld left little question that he and Mathilde had known each other well and developed a meaningful professional relationship:

**Q.** Dr. Kornfeld, is that Mathilde Lukacs’ address on the documents?

**A.** Yes.

**Q.** Did you ever visit her at that address?

**A.** Yes. This is her address. At the time she lived in an apartment in rue des Paquerettes 32.

...

**Q.** When you visited her, do you recall whether she had art on the walls?

**A.** She had art in folders.

**Q.** Was her husband with her when you visited her?

**A.** Yes.

**Q.** Did she have children?

**A.** As far as I know, she didn't.

...

**Q.** Did you discuss with Mathilde Lukacs her background and the war?

**A.** No. She merely said that she was an emigrant from Vienna.

**Q.** Did you speak to her in German?

**A.** Yes.

**Q.** Did you ever speak to her in any other language?

**A.** I don't think I did. She spoke with a very pronounced Viennese accent.

**Q.** And you can recognize a Viennese accent?

**A.** Yes.

(Ex. 17 at 79:20-80:1; 80:24-81:8; 82:13-25). Moreover, Kornfeld produced exhibits that could not have been recreated in anticipation of that deposition. For example, he produced a change of address form a postcard sent by Mathilde (which no longer existed as of 2007) stamped with postage dated September 27, 1955 and noting her new address:

**MR. JANOWITZ:** ... So what is this document, Dr Kornfeld?

**A.** (Through Interpreter) This is the report of a change of address. She gave up her old address and then she moved to avenue Paul Deschanel 195.

**Q.** So this is a change of address notification?

**A.** (Through Interpreter) Yes.

**Q.** You found this in your files?

**A.** Yes.

**Q.** There is a space for a signature and then there is writing in pencil. Can you tell me what that says? Can you make that out?

**A.** (Through Interpreter) There is a remark made by our office. It says "Erledigt" which means "done."

**Q.** What is your understanding of that? What does "done" mean?

**A.** (Through Interpreter) The office changed the address.

...

**MR. JANOWITZ:** It appears to me -- Mr Dowd, I would like you to confirm whether you agree with me on this -- that the numbers on the postage stamp, are the numbers “27 9 55 19”?

**MR. DOWD:** That’s correct.

**MR. JANOWITZ:** Do you have an understanding, Dr Kornfeld, of what those numbers mean on the ink stamp over the postage stamps?

**A.** (Through Interpreter) It is the official post stamp of Brussels, first in French, second in Flemish, and the time.

**Q.** The “19,” is that the time?

**A.** (Through Interpreter) Yes. The postcard was stamped on September 27, 1955 at 7 pm.

(Exs. 17 at 84:21-85:13; 93:13-94:1; 79 (Kornfeld Deposition Exhibits) at 75).

### **The Third Sale (First Schiele Sale): August 1955**

On August 3, 1955, nearly three years into their business relationship, Mathilde offered Kornfeld additional works for a forthcoming auction, including “several watercolors, female nudes” by Egon Schiele, and asked that Kornfeld come to see the collection in person “while traveling through” Brussels. This appears to have been the first time works by Schiele were discussed between them. (Exs. 33 (Aug. 3, 1955 Letter); 17 at 133:17-20 (Q. Buomberger wrote: The first Schiele pictures were not delivered by Lukacs until 1955. That is true, correct? A. (Through Interpreter) Yes.”))

Kornfeld subsequently responded noting that he would be in Brussels in October or November but asked that, in the meanwhile, Mathilde send to Kornfeld a series of works that she was considering via mail. (Ex. 34 (Aug. 17, 1955 Letter)). Ultimately, Mathilde made these shipments on August 20, (Ex. 35 (Sept. 9, 1955 Letter)), and included eight Schieles, (Ex. 36 (Sept. 21, 1955 Letter)).

After receiving the works, Kornfeld responded with an appraisal for the collection, totaling 3,770 francs for the collection, 2,550 francs of which were for the Schieles:



(Ex. 36).

#### **The Fourth Sale (Second Schiele Sale): November 1955**

Presumably receiving this as positive news, Mathilde wrote to Kornfeld again on September 24, just three days later, noting that she could show him additional Schieles for the November auction. (Ex. 37 (Sept. 24, 1955 Letter)).

That the works by Schiele were not included in Mathilde's initial offering is not surprising. As set forth in the Stein Report, as of 1955, Schiele was not a prominent artist. Indeed, the correspondence indicates that Mathilde was uncertain about what price the works by Schiele would garner before seeing the appraisal above. (Ex. 38 (Dec. 28, 1955 Letter)).

In furtherance of pursuing the additional works, on October 31, 1955, Kornfeld informed Mathilde that he would be in Brussels during the "second half of next week," "not before Tuesday November 8," and asked that she "have everything of interest ready for [him] in [her] apartment," referring to additional pieces that she sought to auction. (Ex. 39 (Oct. 31, 1955 Letter)). Kornfeld's subsequent travel to Brussels was later confirmed by Kornfeld's assistant in the 1998

Letter as taking place on November 11—i.e., in the “second half of” the week after October 31. (See Exs. 27 and 27A) (“Second visit of EWK in Brussels on November 11, 1955”).

Notably, there exists a ledger of Mathilde’s collection which was prepared by Kornfeld on the same date of that visit, November 11, 1955 (hereinafter the “November 11 Ledger”) (Ex. 40 (Nov. 11, 1955 Ledger)), and in a subsequent letter dated November 21, 1955, Kornfeld thanks Mathilde for the “warm reception,” and notes that he would like to return to Brussels to meet with her again. (Ex. 41 (Nov. 21, 1955 Letter)). The November 11 Ledger indicates that Kornfeld acquired 16 Schieles at or around this time, as well as four additional works by Klimt, Kokoschka, Menzel and Pechstein. (Ex. 40).

Following this November 11 delivery of the collection of works, including the 16 Schieles, Kornfeld informed Mathilde he desired to meet with her in person again, asking her to mark December 7 for his arrival “with near complete certainty.” (Ex. 41). On November 25, 1955, Mathilde responded, agreeing with the “December 7 suggestion” and inquiring as to the results of the November 24 auction, (Ex. 42 (Nov. 25, 1955 Letter)). That auction, according to Kornfeld’s records, was successful – G&K sold seven of Mathilde’s original eight Schieles for a total of 2,360 francs.<sup>11</sup> (Exs. 27; 27A at 3).

The December 7th meeting appears to have occurred, as evidenced by a receipt, dated the same day, showing that Mathilde received a total of 9,300 francs, which reflected a settlement of her entire account up to that time, i.e., anything that she had sold up until December 7, 1955, (Ex. 42 (Dec. 7, 1955 Receipt)), as well as a ledger prepared on December 8 that bears the name “Lukacs,” (Ex. 43 (Dec. 8, 1955 Ledger)).

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<sup>11</sup> The eighth Schiele from this collection was sold later, outside of the November auction, for an unknown amount. (See Ex. 27A at 3).

### **The Fifth Sale (Third Schiele Sale): January 1956**

On January 26, 1956, Mathilde informed Kornfeld of her intent to send 20 additional Schiele works for auction, including “two packages” each containing “6 tempera sheets ... and 1 roll with 7 drawings and 1 tempera.” (Exs. 44 (Jan. 26, 1956 Letter); 45 (Jan. 30, 1956 Letter) (listing works that were sent to Kornfeld)). As the People recount, that shipment arrived on January 30, as reflected by Mathilde’s correspondence with Kornfeld. The value ascribed to these by Mathilde was somewhere between 5,500 and 5,800 francs.<sup>12</sup> Kornfeld appears to have paid 5,050 francs in total for this collection, as reflected in a contemporaneous ledger (the original of which he produced at his deposition). (Ex. 46 (Feb. 7, 1956 Ledger)). Kornfeld testified as to the ledgers he created that reflected this particular acquisition:

**Q.** Dr. Kornfeld, can you tell us what this document is. So that the record is clear, it begins with the number 108 at the top of the column of figures on the left.

**A.** This is a photocopy of our inventory, it is page 108, and it testifies to a purchase of 7 February 1956. It was paid in cash to the tune of 5,050 Swiss francs, and the seller was Lukacs. Above that, there are some annotations that were put to the document later on.

**Q.** Which are those?

**A.** There are three instances, two towards the left and one to the right. There are three annotations.

**Q.** Just so we are clear on the record as to the annotations you are referring to, I believe there is a word and then there is the number 36762, et cetera, then 36228, et cetera, and to the right there is again the word and it is 36762, et cetera. Is that what you are referring to?

**A.** Yes. It is my handwriting and it says “see as well” or “refer to.”

**Q.** What is the significance of that?

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<sup>12</sup> Mathilde’s January 26 letter notes an insurance policy requested from Kornfeld for 5,500 francs. Previous correspondence by Mathilde, on January 17, reflects that Kornfeld had offered Mathilde 5,650 francs for 21 Schieles, to which Mathilde asked to negotiate higher by 300 francs to 5,950 francs. The subsequent January 26 correspondence, which reflects a different offer for 20 Schieles, shows that Mathilde requested Kornfeld to insure the Schieles for 5,500 francs. (See Ex. 44).

A. That you can find the purchases of Lukacs under the three references.

(Ex. 17 at 41:7-42:7).

On this particular ledger, the name “Lukacs” was added in pencil, while the balance of the ledger appeared in pen. Kornfeld explained that, too:

Q. When, to the best of your knowledge, was the name Lukacs added in pencil?

A. That I can no longer remember.

Q. Was it done within a year or two of the date of the receipt?

A. No. It must have been shortly afterwards because the documents are filed continuously.

Q. How were the documents filed? In other words, you have a file which contained the document that is reflected on page 17, is that right?

A. Yes.

Q. Can you describe to me what that file looks like? Is it a file folder?

A. (Through Interpreter) No. No, they are regular binders like the one over there on the table, and these binders are emptied after five years and the contents are filed into a package.

Q. Was this document that is on page 17 of the exhibit put into a package?

A. Yes. Yes, it was part of the respective package for 1956.

(*Id.* at 33:3-25).

As detailed above, the ledger – and Mathilde’s identity as the source of these works – is abundantly set forth by her own letters to him, rendering the date on which her name was added to the ledger somewhat immaterial.

#### **The Sixth Sale (Fourth Schiele Sale): April 1956**

Finally, that spring, on April 24, 1956, Mathilde sent Kornfeld a set of 24 additional works by Schiele, bringing the total to 70 Schiele works. This sale came after a series of correspondence between Mathilde and Kornfeld from April 11 to April 17, 1956, in which Kornfeld and Mathilde planned to meet in Bern at G&K. (Exs. 17 at 35:3-6; 47 (Apr. 11, 1956 Letter); 48 (Apr. 14, 1956 Letter); 49 (Apr. 16, 1956 Letter); 50 (Apr. 17, 1956 Letter)). Mathilde noted in her

correspondence that she was free to meet with Kornfeld on either April 22, 24, 25 or 26,<sup>13</sup> (Ex. 49), and to that, Kornfeld confirmed the following day that April 24 or 25 would be best, (Ex. 50).

On April 24, there are two notable happenings. First, according to Kornfeld's ledger and other documents, the shipment of 24 Schiele works, which was delivered that day to G&K in Bern by Mathilde, included, among other works, *Russian War Prisoner*. (Ex. 51 (May 22, 1956 Ledger)). Kornfeld ascribes the works in this shipment as totaling 10,050 francs. (*See id.*). Second, it is on April 24th that a receipt for payment to Mathilde for 15,100 francs is notarized in Bern following that day's "business meeting." Kornfeld testified that this payment reflected "two sales" by Mathilde to G&K, which appears to have included the Fifth and Sixth Sales – the earlier sales having been settled as of December 1955, as noted above – with respective values of 5,050 and 10,050 francs for a total of 15,100 francs. (Ex. 52 (Apr. 24, 1956 Receipt)).

Kornfeld provided a specific memory observing Mathilde sign this very receipt, recalling the approximate sale amounts and the location of the transaction:

Q. Page 16 is a notary stamp. Page 17, can you describe to me what that is?

A. Two purchases from Mathilde Lukacs were summarized, the first one, about 5,000 Swiss francs, the second one 10,000 Swiss francs.

...

Q. The document which is on page 17, the last two lines are in pencil?

A. Yes.

Q. Can you tell me what those last two lines say?

A. It is the signature of Mathilde Lukacs.

Q. Whose handwriting is in ink?

A. The receipt is made out with my handwriting and it carries the signature of Mathilde Lukacs in pencil.

Q. Where was Mathilde Lukacs when she signed this document if you know?

A. In Bern, at the gallery.

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<sup>13</sup> The translated and transcribed versions of the letter mistakenly substitute September for April. The original handwritten version of the letter lists the dates as 22/IV, 24/IV, 25 IV or 26/IV, with IV corresponding to April. (*See* Ex. 49).



Q. In your presence?

A. Yes.

Q. How many works were included as part of this payment that is reflected in the document?

A. This is reflected in the books. Two sales were taken together. The first sale was in the order of magnitude of about 5,000 Swiss francs, the second one of about 10,000 Swiss francs and 15,100 Swiss francs on the receipt is the combined value of the two.

(Ex. 17 at 31:16-21; 34:17-35:24).

And when questioned as to why Kornfeld would have paid Mathilde for both sales in one transaction in April, he too had a response:

Q. Dr. Kornfeld, did Mathilde Lukacs give you the two lots at the same time?

A. No. Three different purchases.

Q. This receipt, which is on page 17, covers the second and the third or the first and second?

A. It was the second and the third purchase.

Q. So, then, are you telling me that, when she gave you the second lot, you did not pay her for that at the time?

A. No. It was a short interval.

(*Id.* at 37:24-38:11).

### ***The Source of the Collection from Mathilde***

Kornfeld's testimony also directly addressed his understanding of the source of most of the works he obtained from Mathilde. His testimony was Mathilde told him, truthfully, that they were an "old Viennese family possession":

Q. Did you ever ask her where she got the works of art from?

A. I asked her about the origin and she told me that it was an old Viennese family possession.

...

Q. When Mathilde Lukacs came to you, did you ask her for any documentation that she actually owned these works?

A. She showed me her passport and she told me that the works belonged to a Viennese family, were in a Viennese family's possession, and I had no reason to doubt her statement.

(*Id.* at 112:2-112:6; 127:2-9). Kornfeld also testified that he did not know, at the time, that Mathilde's family included Fritz Grünbaum:

Q. To be clear, in that period of time, between 1952 and 1956, did you know that Mrs. Lukacs was related to Fritz Gruenbaum.

A. No.

(*Id.* at 111:9-12).

However, one of the Schiele's sold by Mathilde to Kornfeld – a work known as *Dead City III* – was identified in G&K's 1956 exhibition as being sourced to Fritz Grünbaum, or more specifically, to the 1928 exhibition at Neue Galerie. Kornfeld explained that this work, unlike the others, had been included in the catalogue for the 1928 exhibition with specific provenance – that is, sourced to Fritz. As such, Kornfeld testified that when he prepared his own catalogue, he merely reproduced that information:

Q. That is a picture called *Dead City*, is that correct?

A. Yes.

Q. It says that it is from the collection of Fritz Gruenbaum, is that correct?

A. Yes.

Q. So, in 1956, when you wrote this catalogue, you knew that this painting came from Fritz Gruenbaum, didn't you?

A. Based on the information in the catalogue resume<sup>14</sup> of Otto Nirenstein.

Q. It's a yes or no question, sir?

A. (Through Interpreter) Based on the information of Otto Nirenstein, I printed what you see here.

Q. Did Otto Nirenstein tell you that items 1 through 53 all came from Fritz Gruenbaum?

...

A. (Through Interpreter) As far as the purchases of 1956 by Otto Kallir are concerned, he did not say where they were from. But Otto Kallir produced a catalogue in 1930 and what you see in this catalogue here is based upon the catalogue from 1930.

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<sup>14</sup> Likely a misspelling and should read "catalogue raisonné."

(*Id.* at 121:24-122:22). The People conclude from that same testimony that Kornfeld “admitted under oath that he knew that all 53 – including *Russian War Prisoner* – had come from Fritz Grünbaum.” (App. at ¶ 63). That is an inaccurate read of the testimony, and, indeed, something Kornfeld himself squarely addressed:

**Q.** Christine Stauffer says to Ms Gorayeb “All the Schieles from the stock catalogue no. 57, Egon Schiele, Bilder - Aquarelle - Zeichnungen - Graphik, from September 8 to October 6, 1956, had the same provenance: collection Fritz Gruenbaum, Elisabeth Gruenbaum-Herzl (widow), Mathilde Lukacs-Herzl (sister of Elisabeth).”

**A.** (Through Interpreter) Yes.

**Q.** First of all, do you agree that that is the provenance? Do you know that that is the provenance?

**A.** (Through Interpreter) As far as I know today, yes.

**Q.** *Did you understand this to be the provenance at the time that you sold the Schieles in 1956?*

**A.** (Through Interpreter) *No*. This is the correspondence from the year 2004.

(Ex. 17 at 113:6-113:23) (emphasis added).

But it is also an unhelpful fact to the People’s theory: if, as the People posit, Kornfeld knew the works were “stolen” and knew the works could “only come” from “the six million murdered Jewish souls,” (App. at ¶ 115), then why did he identify Fritz *at all*? Would it not have made far more sense for Kornfeld to have left Fritz – and his historical ownership of *Dead City III* – out of the exhibition materials *entirely*? More broadly, what if Kornfeld did know, as the People would have it, that the entire collection Mathilde sold him had come from the Grünbaums? It would change exactly nothing. Mathilde was Lilly’s sister, and so that fact would be entirely consistent with Mathilde having represented that the works were old family possessions, which of course, they were.

### ***The People's Attack on Kornfeld's Credibility Does Not Withstand Scrutiny***

The People devote over 50 pages of their Application to dissecting Kornfeld's testimony and documentation, pointing to purported inconsistencies in support of their position that "it is difficult to accept any single document provided by Kornfeld as accurately supporting Kornfeld's story of how and when he received these Schieles." (App. at ¶ 80(f)). That is hardly surprising: Kornfeld's testimony and records are devastating to the People's purported theory, which can only make sense if Kornfeld were, as the People make him to be, an expert liar and forger. The People's attacks on Kornfeld do not withstand scrutiny and are based on selective and misleading excerpts from his testimony.

To be very clear, the sort of detailed assessment of Kornfeld's credibility would require a full hearing with the witness present; no court should have to rely on either party's use of snippets of testimony or exhibits from a proceeding over which it did not preside. For just that reason, courts frequently defer to the credibility determinations made by the presiding judicial officer at the proceeding in which the testimony was given, here Judge Pauley. *See Moore v. Beautiful Spaces, LLC*, 192 A.D.3d 591, 591 (1st Dept 2021) ("the court's findings of fact turned primarily upon credibility determinations, which are entitled to deference, and represent a fair interpretation of the evidence") (citing *Wong v. Hsia Chao Yu*, 160 A.D.3d 549 (1st Dept 2018)).

And so, beginning there, Judge Pauley, as noted, found Kornfeld to be credible. But more to the point, he found Kornfeld to be credible notwithstanding the asserted discrepancies identified by the People, all of which were raised in that proceeding, because in the context of Kornfeld's broader testimony, those discrepancies were either explained or immaterial.

For example, questions surrounding why Mathilde's name appears in pencil even though other aspects of the same document appear in pen and the timing of when Mathilde's name was

added to documents were questions that were before Judge Pauley, who considered them and found they were sufficiently addressed by Kornfeld. *Bakalar I*, 2008 WL 4067335, at \*2-3. Judge Pauley rejected arguments questioning Kornfeld’s veracity, making the determination based on the record before him that Kornfeld’s documents were genuine and that his testimony was credible, rejecting the Grünbaum Family Members’ contrary arguments as without merit. *Id.* at \*2, 7-8.

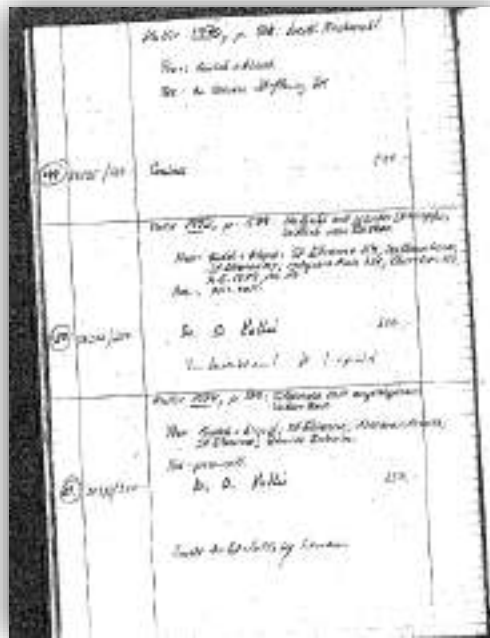
How could Judge Pauley have been so blindsided by such an obvious liar? Closer inspection of the asserted discrepancies identified by the People in Kornfeld’s testimony and documents makes clear those “discrepancies” are either illusory or immaterial. We address several of what the People posit as key examples below:

*First*, the People attack Kornfeld’s testimony as to the number of deliveries of artworks he received from Mathilde, contrasting the six Kornfeld listed in the 1998 Letter he provided to his attorney Dr. Peter Bratschi with what they represent to be his testimony that he only received “three” shipments from Mathilde.<sup>15</sup> (App. at ¶ 70). The People contend this issue to be “the most obvious sign[] of fraud,” claiming Kornfeld “continuously contradicted himself.” (*Id.*).

But the People entirely mischaracterize Kornfeld’s testimony in this respect. The 1998 Letter lists *all* deliveries he received from Mathilde – of those there are six total – and Kornfeld’s testimony is consistent on that point. By contrast, the testimony in question the People cite to pertains to three specific works sold to him by Mathilde. In particular, when Kornfeld noted that the “watercolour paintings from Mathilde Lukacs were purchased at three different points in time. These are three groups that are all recorded in the stock catalog,” (*see* Ex. 17 at 26:2-27:7; App. at ¶ 70), he was referring to, and explaining to counsel upon their question regarding the same, a *specific page* of an exhibit that portrayed Kornfeld’s catalogue, excerpted below:

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<sup>15</sup> The People also seek to ascribe a statement to Kornfeld that there were seven deliveries. (App. at ¶ 70). The statement comes from a book Kornfeld did not write, and whose contents he did not adopt.



(Ex. 53 (Excerpt from Kornfeld Catalogue)). Kornfeld provided specific detail regarding this page through the deposition testimony the People now cite:

**Q.** Page 12 is the notary again. Then we get to page 13. Dr. Kornfeld, can you tell me what page 13 is?

...

**A.** (Through Interpreter) It contains the precise specifications for items 49, 50 and 51. On the left, the figure starting with 36 is the stock number which is sequential in our warehouse. Our list of stock items starts in 1919 and there is a sequential number for each and every item we purchased as of 1919.

...

**A.** (Through Interpreter) Allow me to explain the different numbers as follows: The watercolour paintings from Mathilde Lukacs were purchased at three different points in time. These are three groups that are all recorded in the stock catalogue.

(see Ex. 17 at 25:21-27:7).

This testimony did not pertain to all of works he acquired from Mathilde, as the People would posit, but to three specific watercolors he had purchased from Mathilde. For example, line 50, item no. 36232 in the excerpt above relates to a specific work titled “*Weiblicher Halbakt mit grünen Strümpfen*,” or “Female Semi-Nude with Green Stockings,” and contains updated

provenance information until 1997, comporting with Kornfeld’s practice to “annotate [] handwritten drafts of catalogues with additional information that [he] receive[d] about further sales or exhibitions of works that [he sold].” (Ex. 17 at 29:16-22); *see* Ex. 27A at 3, entry no. 36232) (denoting “50” next to title of work); *see also* Rehs Galleries, Inc. Provenance for *Semi-nude with Green Stockings from the Back*, available at [https://rehs.com/Egon\\_Schiele\\_Semi-nude\\_with\\_Green\\_Sockings\\_from\\_the\\_Back.html](https://rehs.com/Egon_Schiele_Semi-nude_with_Green_Sockings_from_the_Back.html)) (listing provenance information)). There is thus no inconsistency between that testimony regarding those three Schieles and the account of six total sales over time, and it is disingenuous of the People to suggest otherwise.

The People then attempt to discredit Kornfeld on this point once again, arguing that his answer changes to “two,” when Kornfeld indicated “he only had one receipt that covered two purchases ... two purchases on one receipt.”<sup>16</sup> The People reference the April 24, 1956 receipt bearing the total of 15,100 francs reflecting what Kornfeld testified to being a summary of two purchases from Mathilde. (Exs. 17 at 31:16-21; 52). The People contend this cannot be true because Kornfeld “already testified to three purchases.” (App at ¶ 71(a)).

But, again, the details matter. Kornfeld was testifying about a particular *document* – a receipt that *does*, in fact, reflect two purchases of Schieles. His full testimony on this point makes very clear there was no inconsistency at all:

**Q.** Dr Kornfeld, did Mathilde Lukacs give you the two lots at the same time?

**A.** No. Three different purchases.

**Q.** This receipt, which is on page 17, covers the second and the third or the first and second?

**A.** It was the second and the third purchase.

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<sup>16</sup> Of note is the People’s patently incorrect representation that, with respect to the April 24, 1956 receipt, it was a payment by *Mathilde*. The inverse is true. (*See* Ex. 17 at 41:13-15 (“It was paid in cash to the tune of 5,050 Swiss francs, and the *seller* was Lukacs.”) (emphasis added), *contra* (App. at ¶ 81 (“Kornfeld had just testified, *id.* at pp. 34-35, that Lukacs *did not pay* until April 24, 1956”) (emphasis added)).

**Q.** So, then, are you telling me that, when she gave you the second lot, you did not pay her for that at the time?

**A.** No. It was a short interval.

(Ex. 17 at 37:24-38:11)

*Second*, the People contend that the November 11 Ledger, discussed above, “displays . . . signs of fraud,” because there is “no indication what this document is, why there are two different handwritings on it, when it was prepared, why it was prepared, who prepared it, or where it came from. Nowhere does the name Lukacs appear anywhere on the page. Thus, there is no link to Mathilde Lukacs.” (App. at ¶ 76(d)(1)). This ledger is pictured below:



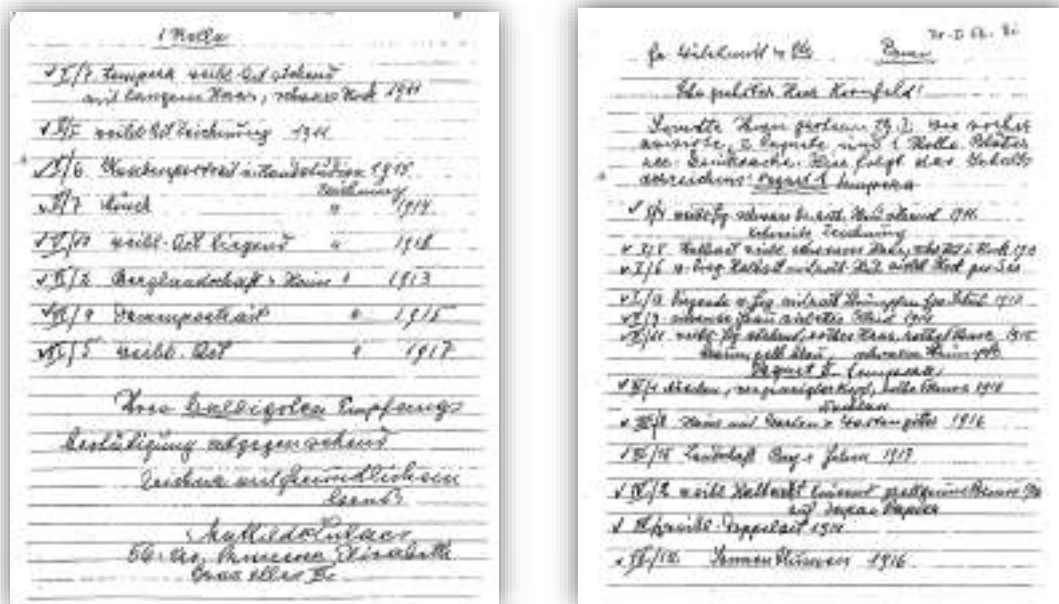
(Ex. 40).

As context surrounding this ledger, including additional documents produced by Kornfeld, makes clear, the link between this ledger and Mathilde’s second Schiele sale of 16 Schieles in November 1955 is quite strong. First, as noted above, the “11-11-55” inscription on the ledger corresponds to the November 11, 1955 date in which Kornfeld informed Mathilde he would be



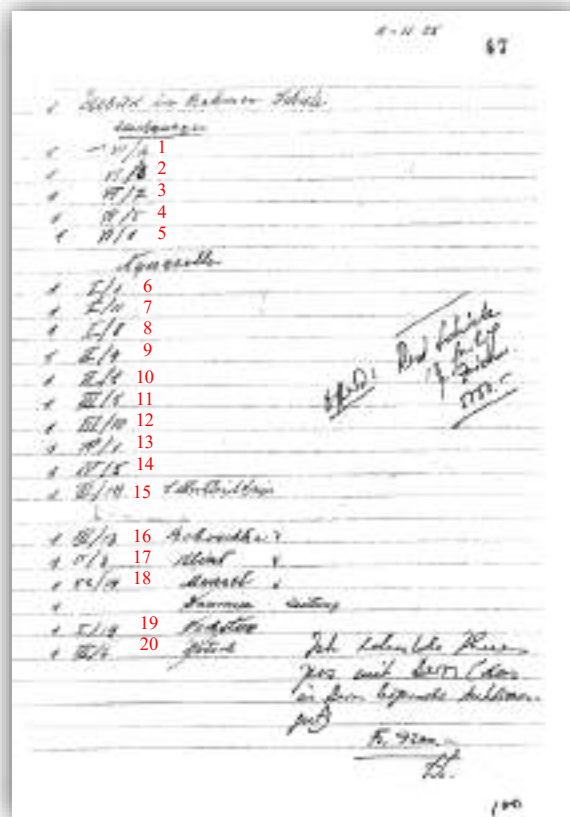
coming to view her collection (including Schieles). Subsequent correspondence was also produced confirming that visit occurred on or around November 11. (Exs. 39; 27; 27A).

Next, the notations, i.e., “VI/6” and “II/9” on the left side of the ledger mimic the way Mathilde herself labeled her shipments. For example, with respect to a subsequent sale, a January 30, 1956 letter authored by Mathilde reflects the exact same numbering system on two pages of information *she* drafted regarding the contents of the package she sent to Kornfeld, likely related to how the art was stored in her own collection, which Kornfeld noted was stored in “folders”:



(Ex. 45; *see also* Ex. 17 at 80:24-81:2) (Q. When you visited her, do you recall whether she had art on the walls? A. (Through Interpreter) She had art in folders.”). Indeed, Kornfeld testified that he believed the handwriting, save the names of the artists, on these January 1956 lists were Mathilde’s. (Ex. 17 at 94:11-15) (“Q. Do you recognise the handwriting on this, Dr. Kornfeld? A. (Through Interpreter) I think it is [Mathilde’s] handwriting but I think the handwriting with the names of the artists is not hers.”).

Finally, as to the November 11 Ledger, the People attack its authenticity by stating that it cannot have reflected the sale of 20 works, as described in Kornfeld’s subsequently produced 1998 Letter, because there are “22 numbers of things” on the list itself. (App. at ¶ 76(d)(1)). A closer inspection of the November 11 Ledger begs a different result. (See Ex. 40). As to the line items that contain Mathilde’s distinctive Roman numeral and number identification, there are exactly 20 items (the red numbering has been inserted to demonstrate the point):



(Ex. 40).

The evidence thus points to just the opposite conclusion that the People advance: the list does track the list provided in the 1998 Letter as to the 16 Schieles and four non-Schieles that were sold by Mathilde in November 1955 to G&K. (Contra App. at ¶ 76(d)(1)) (“Thus, the 20 Schieles listed on this page dated November 11, 1955, do not match the number of Schieles on the typed

November 11, 1955, delivery.”)). And the annotation on the document for “5,050 [francs],” which the People purport is evidence of payment for the third Schiele sale in January 1956 and thus cannot be accurate given the remainder of the document was prepared some two months prior, is an annotation which Kornfeld himself testified corresponded to a different page – the back page which was not photocopied:

A. Two notes are from me. First the note reads as follows. It’s the author saying: Remaining Schiele, 13 in colour, 7 drawings, for an amount of 5,050 francs. (Not Through Interpreter) And that corresponds to the second part of the pages.

Q. The second page.

...

Q. We did not make copies of it: Do you happen to know what that is, on the back? The back contains some things that are not copied.

A. (Through Interpreter) I cannot explain that.

(Ex. 17 at 94:16-95:9). And, of note, the remainder of that annotation: “13 Watercolors, 7 Drawings,” tracks exactly the 20 Schiele works that made up the third Schiele sale as well, which contained precisely 13 watercolors (*aquarelle*) and seven drawings (*zeichnung*). (See Ex. 27A, at 4).

*Third*, the People then take issue with the fact that Kornfeld’s 1956 ledgers, at least in some places, do not include the *years* in which the transactions occurred, just the dates. (See, e.g., App. at ¶ 78-80). But to what end? During the deposition itself, the original ledger book was pulled and displayed to counsel, including counsel for the Grünbaum Family Members, which made clear these particular pages (i) were contained within the original ledger, and (ii) fell in a section of the ledger that pertained to the time period from 1955 through 1957, which is not surprising because those are the dates on the letters from Mathilde to Kornfeld regarding the sale of Schieles. (See, e.g., Ex. 17 at 9:22-25, 10:2-11 (“DR VEIT: . . . Dr. Kornfeld would like to introduce or to offer a set of original documents and copies here for the examination by the Commissioners. . . . DR

BRATSCHI: Yes, Dr. Veit. . . . In preparing for today's meeting Dr. Kornfeld and Ms. Stauffer have found additional documents. There are two sets, one for each, here, starting with the original catalogue, which Dr. Kornfeld found yesterday.”)). These dates also align with the date of the exhibition, which is a well-known public fact.

*Fourth*, and perhaps most glaring of all, the People challenge the page from Kornfeld's ledger reflecting the February 1956 deliveries which included *Russian War Prisoner* as a “fraud.” They claim, in particular, that the “summary Kornfeld provided for this alleged delivery,” which stated “[d]elivery by Mail (1 roll, 2 packages) from Brussels to Berne on January 30, 1956, for acquisition for stock (7. Feb. 1956)” cannot be validated because “[n]o document supporting January 30 has *ever been produced*.” (App. at ¶ 80 (e)) (emphasis added). Not so: as described above, there is a letter, dated January 26, 1956, in which Mathilde writes to Kornfeld noting that due to a ““end of January”” deadline mentioned by Kornfeld, she would send him “2 packages, each containing 6 tempera sheets by E. Schiele, and 1 roll with 7 drawings and 1 tempera ... to [Kornfeld's] address on Saturday, January 28,” (Ex. 44), and, on January 30, the very day cited by Kornfeld in the 1998 Letter, Mathilde writes again confirming that she has sent the works as of January 29, (Ex. 45).

The People's selective use of the *Bakalar* record should make clear that the premise from which the People ask this Court to wholly discredit Kornfeld and his testimony as inconsistent, conflicting and unreliable is simply false and does not withstand scrutiny. Indeed, the People's attacks on Kornfeld are, at best, standard fare for hostile cross examination. Try to create doubt or ambiguity about minute details (most being irrelevant to the issues in dispute) in the hopes the factfinder will be distracted from the bigger picture. We trust that this Court will not be so easily misled. Indeed, even assuming an ambiguity or inconsistency exists in Kornfeld's testimony (and,

as with any human memory of events from 50 years prior, there were no doubt some), none of them – the specific number of sales, the dates on which they occurred nor the manner in which payment was made – undercut the core point of the record developed in *Bakalar*: Kornfeld had a business relationship with Mathilde, which entailed her sale of dozens of works of art, and included in those sales were dozens of works by Schiele, including *Russian War Prisoner*.

***Kornfeld's Testimony is Credible as to The Provenance of Russian War Prisoner***

By contrast, taking a step back from the minutiae the People seek to dwell on, there are myriad reasons to find Kornfeld and his testimony eminently credible. *First*, Kornfeld testified on a voluntary basis. He had no obligation to sit for a deposition, nor any obligation to produce documents.<sup>17</sup> And, as the People note, Kornfeld was being accused “of being a war profiteer by selling Nazi-looted art.” (App. at ¶ 81). If Kornfeld was the war criminal the People suggest him to be, he would have had every incentive to stay silent rather than submit to testimony under oath. It is also important to recall that Kornfeld was 84 years old at the time of his deposition. Kornfeld sat for nearly *eight hours* of questioning by lawyers in the case, including lawyers for the Grünbaum Family Members, during which he was asked to recall events that had happened as much as 55 years prior, to explain ledgers that had been created decades earlier and to answer questions in granular detail about the who, what and where of transactions from a half a century ago. It is not surprising that small errors and inconsistencies might exist under these

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<sup>17</sup> In fact, Kornfeld was protected from having to testify at all under Swiss law. As was noted in his deposition: “Your deposition in Switzerland shall take place on a voluntary basis. Although you have consented through your counsel to being deposed here, you can withdraw your consent at any time. No coercive measures shall be applied against you in connection with the deposition here in Bern and you have the right to be accompanied and assisted by counsel, which I see you have done with Dr. Bratschi,” and further that he had “certain privileges or rights to refuse to give testimony under both U.S. law and the local Bern Civil Code of Procedure. According to Article 11 of the Hague Convention on the Taking of Evidence, you can rely on both the privileges from the applicable US law and from the Bern Civil Code of Procedure.” (Ex. 17 at 7:5-13, 8:12-18).