circumstances, but those are superfluous and red herrings that do not change the fact that Mathilde sold her collection, including *Russian War Prisoner*, through Kornfeld's gallery.

Second, there can be no legitimate question that Kornfeld developed a professional relationship with Mathilde that included her visiting his gallery in Switzerland and him visiting her home. There are *dozens* of letters that exist between them documenting the relationship over the years, including personal details about their lives as well as their art transactions. The People, in passing, suggest those letters may be forgeries. The People have no evidence of that and do not seriously press the issue because, in the People's view, the letters are "immaterial." (*See, e.g.*, App. at ¶ 91). To be clear, the notion that Kornfeld, at the age of 84, would have created dozens of counterfeit letters back and forth with Mathilde – letters that include details (like addresses and phone numbers) that Kornfeld would have had to do research to uncover – borders on the absurd.

But the fact of the relationship between Mathilde and Kornfeld is far from "immaterial" and has been abundantly documented. Indeed, it renders the People's theory not simply speculative but nonsensical. Under the People's theory, Mathilde developed, and then continued, a relationship with the gallerist who was actively selling (and marketing) her deceased sister's looted art collection. And that is not simply implausible. It is inconceivable. Setting aside the sheer coincidence of Mathilde stumbling into a relationship with the same Swiss gallerist who just so happened to have received her late sister's looted collection from the Nazis, recall that Mathilde was herself an art collector and, thus, there is little chance she would have been unfamiliar with the Grünbaums' art collection. The Grünbaums' collection of Schieles had been subject to exhibition and was not small. Mathilde would almost certainly have recognized Lilly's collection in Kornfeld's catalogues, of which she had received before, and she would have had every

incentive to raise that issue, whether with the authorities or with Kornfeld himself. And yet there is no record of her ever doing so.

Third, if Kornfeld had truly set out to make up a story – to forge documents to support his theory – one might suspect he could have done a better job. Indeed, many of the asserted deficiencies the People point to are of the sort that could have readily been *solved* by someone intentionally lying and forging documents – the consistent use of pen or pencil, for example; ensuring the numbers, names and dates in the ledgers matched the letters; offering testimony about specific details of discussions with Mathilde about the precise provenance of the collection. (*See* App. at 75-77, 90-92, 97-99). There are so many ways in which Kornfeld – had he, in fact, been setting out to concoct a story and fabricate documents – could have done such a *better job*. But Kornfeld was not lying or fabricating, which is why his testimony and his records reflected the sort of imperfections that come with paper recordkeeping and human memory, particularly a memory being tested about events from five decades prior.

Potential Avenues of Export of* Russian War Prisoner*: Mathilde and The Herzl Family

There is a final reason to credit the account provided by Kornfeld: there is compelling evidence that Mathilde and the Herzl family did, in fact, come to acquire components of the Grünbaums' art collection.

In the spring of 1938, shortly after Fritz was initially detained, two of Lilly's sisters, Mathilde and Anna Reis, and their husbands, began making plans to join their brother Max in Belgium. (Stein Rep. at 23). Lilly's brother-in-law, Sigmund had also been detained in March of 1938, around the same time of Fritz's arrest, but was able to secure his release in May of 1938, in

return for turning over a considerable sum of money and property, and for promising to leave the country by August 1938. (*Id*. at 22).[18]

Planning began in earnest shortly after Sigmund's release and was heavily assisted by Max Herzl who, as noted, lived in Belgium. Lilly participated in those plans, which, as noted above, included meetings with an attorney, Dr. A. Kondor, and decisions to use Schenker to transport all three families' possessions to Belgium.

Mathilde and Sigmund left first to meet the August deadline to which Sigmund's release was conditioned. On June 23, 1938, the day of the aforementioned meeting at the Grünbaums' home with Dr. Kondor, Sigmund signed a moving certificate (*Umzugsattest*) on stationary from Schenker, which stated that the family property to be exported from Austria was for personal use as part of the Lukacses' move to Belgium, including furniture, decorative arts, household goods and appliances, circa 200 books and works of art. (*Id.* at 32; Ex. 55 (Lukacs Moving Certificate); 55A (English Version)). Subsequently, on June 27, an application for an export permit was prepared for the Lukacses through the Central Office for Landmark Preservation. (Exs. 56 (Lukacs Export Application); 56A (English Version)). The application noted that Sigmund was able to arrange export for a sizeable group of artworks including "11 oil paintings, 3 watercolour paintings, 8 graphic art pieces, 3 drawings, 5 miniatures." (Exs. 56; 56A). Shipping and export forms indicate that the Lukacses' property departed August 5, 1938 and that Mathilde and Sigmund themselves left one week later, on August 12, 1938. (Ex. 56A at 3).

Anna and Berthold Reis were under less time pressure and left later. The export application forms for Berthold were filed by Schenker on September 16, 1938, and gave them an extendable

[18] These conditions were not atypical. Cultural, political, and financial figures who were arrested soon after the annexation were commonly released later under similar conditions, which also offers some explanation as to why Lilly believed that Fritz could have been released soon after his own imprisonment. (Stein Rep. at 25).

three-month window in which to leave for Belgium. (Stein Rep. at 33-34; Ex. 57 (Reis Export Documentation)). Examination of documents for Anna and Berthold indicate that export of their property successfully took place around January 26, 1939, less than three months after Lilly was forced to move out of the home she shared with Fritz and into an apartment with a friend. (Stein Rep. at 26, 33-34; Ex. 57). This is significant. After Kristallnacht, it was increasingly difficult for Jewish citizens to move their assets, but the export documents for the Reises indicate that the family had more freedom than what could have been expected at the time to move and otherwise export their assets from Austria. (Stein Rep. at 33-34).

Was Lilly able to get some of her possessions out of Austria with her sisters? We will, of course, never know for certain. But the evidence that does exist indicates that it was certainly plausible. Leaving aside anything Lilly may have given her sisters directly, after September 8, 1938, Lilly's property was already at Schenker, and after the September Demus Inventory was conducted – which, as discussed above, lacks sufficient detail to offer proof regarding the contents of the Lilly's possessions at that time – there was never a subsequent accounting of what actually remained in storage. Moreover, while both sisters were also required to complete similar inventories, the Reises' inventory would have been completed in September of 1938 and might not have accurately reflected the items that left the country with them the following January. Indeed, it would have been relatively easy for Lilly to consolidate some of the Grünbaums' most important (and easily transportable) possessions with those of her sister Anna in January 1939 as Lilly learned she would be losing her home and the prospect of Fritz's imminent release must have seemed somewhat more remote than it had the summer prior.

The People contend "it is *inconceivable* that [Lilly] would have removed anything from her husband's collection after it had been inventoried" in the summer of 1938 or "would have

allowed anyone else to do so while her husband was still alive." (App. at ¶ 47(a)) (emphasis added). Yet, the People offer no evidence for such a position. Indeed, even in the world of speculation, it is not speculation that comports with common sense. *Inconceivable* that with her husband in detention – and with Lilly facing the prospect and then reality of being forced from her home – that she decided to start moving some of the Grünbaums' readily-transportable possessions out of the country with her sisters for safekeeping? That is hardly "inconceivable" at all, particularly when the evidence establishes that some of those assets ended up in the possession of one of those sisters.

Russian War Prisoner *Was Never Possessed by The Gurlitt Family*

By contrast, the People put forth no clear theory nor present evidence of how Kornfeld obtained the Work if not from Mathilde. The closest the People come is to point to asserted relationships Kornfeld had with Cornelius and Wolfgang Gurlitt, the son and cousin of Hildenbrand Gurlitt, respectively, who was widely involved in the resale of unlawfully-seized art during World War II. But there is no evidence tying any of those activities to the Grünbaums, *Russian War Prisoner*, or this case at all.

In particular, the People's theory – that Kornfeld obtained the Work from Cornelius Gurlitt ("Gurlitt") (who had, in turn, inherited it from his father Hildebrand Gurlitt) (App. at ¶ 108) – fails for two reasons. *First*, it is entirely speculative. There is not a shred of evidence tying Gurlitt to *Russian War Prisoner* or the Grünbaums, nor any record, document, witness or other evidence suggesting Gurlitt sold the same to Kornfeld. As detailed in her expert report, Stein was one of the primary researchers involved in reviewing the trove of artworks recovered a decade ago in the home of Gurlitt and believed to be linked back to his father. (Stein Rep. at 36). Extraordinary efforts were made by the German government and investigators to understand Hildebrand Gurlitt's

role in the War and collection of artwork. And yet, not only is there "no known connection" between the Gurlitts and the Work, but no such suggestion has ever been made. (*Id.*). Indeed, Stein describes "a complete absence of any trail" that suggests any direct link between the Grünbaums' art collection and the Gurlitts. (*Id*. at 37).

Second, the People's speculative theory does not work by its own terms. The People's theory is that:

> [Following Hildebrand's] death in 1956, he left [allegedly looted art] all to his son, Cornelius Gurlitt. Needing some way to profit from the stolen hoard, Cornelius Gurlitt became a regular client and source of artwork for Swiss dealer Eberhard Kornfeld, making frequent trips to collect the proceeds of sales of his stolen art.

(App. at ¶ 108). Under the People's theory, thus, any sales from Gurlitt to Kornfeld would have occurred *after* Hildebrand's death. There is just one problem: Hildebrand Gurlitt died in *November* 1956. (*See* Kunst Museum Berlin, *Hildebrand Gurlitt & Cornelius Gurlitt*, available at https://www.kunstmuseumbern.ch/en/research/the-gurlitt-estate/hildebrand-gurlitt-cornelius-gurlitt-2487.html). Kornfeld's exhibition of Schieles obtained from Mathilde had already occurred by that point. Indeed, he had acquired the Work in April 1956, and it was publicly exhibited in G&K's exhibition "*Egon Schiele*" from September 8 to October 6, 1956. There is thus no conceivable way that whatever Gurlitt inherited from his father and allegedly sold to Kornfeld included *Russian War Prisoner*.

Finally, it bears mention that the People's source for asserting that Kornfeld purchased a *different* work from Wolfgang Gurlitt (in 1959) is none other than Kornfeld himself, or at least his gallery, which revealed, in response to a provenance question from a different institution, that the source of the work was Wolfgang Gurlitt. (Ex. 58 (Oct. 28, 2005 Email from Kornfeld)). Presumably if that were true for *Russian War Prisoner* as well, Kornfeld would have said as much to AIC in 2002 when – as shall be discussed below – AIC had a similar inquiry at a similar time.

He, of course, did not, and rather noted that Mathilde was the source of the Work, as he would say again some five years later in sworn testimony.

Post-1956:* Russian War Prisoner *is Sold to Kallir

After Kornfeld's 1956 exhibition, Otto Kallir purchased a collection of 20 Schiele works from Kornfeld, including *Russian War Prisoner*. Kallir, in turn, transported that collection to Galerie St. Etienne in New York City where he launched his own exhibition, *Egon Schiele (1890-1918), Watercolors and Drawings*, which ran from January to February 1957. (Stein Rep. at 53; Ex. 59 (1957 St. Etienne Catalog)).[19]

The People portray Kallir as "struggling" in 1956 to develop his gallery, and that may have been true, albeit for different reasons: Kallir was himself Jewish and had lost his gallery in Vienna – the Neue Galerie where the 1928 exhibition described above occurred – during the War. In particular, and after Austria was annexed by the Nazis in 1938, Kallir was forced to turn over his gallery to a non-Jewish person, his secretary Vita Künstler. Kallir took much of his collection, which was deemed degenerate art and thus not subject to Austria's export laws, with him and fled to Switzerland. (*See* Ex. 60 ("Saved from Europe")). Because he was unable to obtain a work permit in Switzerland during the War, he moved to France, where he faced another barrier as they did not permit him to bring his family with him. (*Id.*). As a result, Kallir and his family emigrated to the United States, bringing with them the inventory that he had taken from the Neue Galerie some years prior. (*Id.*). It was there that Kallir established the Galerie St. Etienne in New York City. (*Id.*).

[19] The Work was included as "*Cat. Nr. 25, Russian War Prisoner, Tempera and black crayon. Signed and dated 1916. (Signed by the prisoner in Russian script). Reverse side: Pencil drawing of two nudes. Signed and dated 1913. Illustrated on page 30*."

The People speculate that Kallir secretly pined for Fritz's Schiele collection during the 1928 exhibition but was rebuffed. The People provide no citation for such, and that is because there is no evidence of it. Indeed, there is no evidence Kallir recalled Fritz Grünbaum – let alone his art collection – nearly three decades later when, in 1956, he learned from Kornfeld of a new exhibition. To state the obvious, it completely plausible that a professional gallerist, one whose career entailed briefly displaying collections of works of art primarily for sale, would not remember every work he had ever displayed, let alone the provenance of such work. That is particularly true given the traumatic events of the intervening years, which entailed Kallir's own displacement at the hands of the Nazis.

Nor is there much, if anything, to be discerned from the lack of records – again *decades* after the relevant facts – of conversations that may or may not have occurred between the two men regarding the provenance of the collection. Kornfeld – whose testimony on this point the People *do* credit – recalled that no such conversations occurred. The People contend this lack of inquiry is clear evidence of criminal intent. But the People offer no evidence of what would have been expected of a buyer and seller in Switzerland in 1956, and in *Bakalar*, where the parties *did* present evidence and litigate the issue, Judge Pauley found that under Swiss law at the time:

> [A] purchaser of an object has no general duty to inquire about a seller's authority to sell the object, or to inquire about the object's origins, unless suspicious circumstances exist. Suspicious circumstances may exist if (1) the seller offers to sell the object well below its market value, (2) the seller has a notoriously bad reputation, (3) the seller tries to sell the object unusually quickly, (4) there are marks on the object indicating the likelihood of another owner, or (5) the seller makes an unusual demand for cash.

2008 WL 4067335, at *7.[20]

[20] *Bakalar I* was reversed by the Second Circuit which concluded that Judge Pauley should have applied New York law to the different issue of the lawfulness of Bakalar's acquisition of the work in New York decades later. *See generally* 619 F.3d 136 (2d Cir. 2010). The Circuit did not disturb Judge Pauley's interpretation of what Swiss law required of buyers and sellers doing business in Switzerland in the 1950s. *Id.*

None of those "suspicious circumstances" would have applied to Kornfeld's acquisition of the works from Mathilde. Nor is there any reason to believe that Kallir – himself a victim of Nazi hatred and upheaval – would have knowingly sought to profiteer off the looted works of a fellow Jewish person, and the People's contention to the contrary borders on abhorrent.

But there is a more fundamental flaw with the People's portrayal of Kornfeld and Kallir as co-conspirators knowingly engaging in a massive scheme to loot and launder stolen art: neither Kornfeld nor Kallir *acted* like they believed they were engaging in anything unlawful at all. Kornfeld, as described above, prominently and publicly touted his exhibition of works by Schiele, publishing a catalogue of the same, which affirmatively listed Fritz as having previously owned one of the works, *Dead City III*. And Kallir did the same exact thing in New York. The two conducted business in writing, negotiating the sales through letters and documenting the transactions in ledgers and receipts, which allow us to review their records today. These are not the steps of the sophisticated criminals the People make them out to be.

Indeed, if Kallir thought he was engaging with a *criminal* – if he thought he was "trafficking" in looted artwork – why publicize it? Why not offer the works slowly in private showings, or try to pass them off the back of the proverbial truck? As the People emphasize, "[e]very criminal conspiracy attempts to operate in the shadows." (App. at ¶ 101(a)). Kornfeld and Kallir did not. And that is because there is no evidence that either had any reason to believe they were doing anything wrong – because they were not. Kornfeld had lawfully acquired the works from Mathilde and had lawfully sold them to Kallir.

The Art Institute of Chicago's Acquisition of* Russian War Prisoner *in 1966

In 1957, Kallir returned with the Work to New York for his own exhibition. (Ex. 59). But Kallir did not sell the Work to AIC. Kallir instead sold the Work to a private collector, David

Kimball, who lived in Connecticut at the time. Kimball in turn sold the Work to another private collector, Leo Askew, who is believed to have resided in Louisiana. Askew then sold the Work to a gallery in Chicago, Illinois, the B.C. Holland Gallery, where the Work appears to have drawn the attention of AIC curator Harold Joachim. (Ex. 61 (B.C. Holland Gallery Invoice)).

In 1966, Joachim formally proposed AIC's acquisition of *Russian War* Prisoner, which was funded by a donation from Dr. Eugene A. Solow and Family and was accessioned as 1966.172r. (Stein Rep. at 55, Exs. 55; 62 (July 1966 Intake Report)). The artwork was credited as a gift in the memory of Gloria Brackstone Solow from Dr. Eugene A. Solow and Family and was Solow was a Chicago-based allergist and collector with interests in Expressionism and a major patron of the Prints and Drawings Department of AIC. (Stein Rep. at 55). Joachim and Solow were also both Jewish, Joachim a refugee from Nazi Germany himself, and undoubtedly all too familiar with the tragic events of World War II.

As shall be explored further below, the People assert that AIC failed to conduct "reasonable inquiry" in connection with accepting that donation. *See* N.Y. Penal Law § 165.55(2); (App. at ¶¶ 123-125). Even assuming New York law could apply to an Illinois art museum's acquisition of a work from an Illinois art gallery (a proposition for which there is no authority), not only is there no law, as the People concede, defining what the "reasonable inquiry" standard requires, but the People offer no evidence of what "reasonable inquiry" would have consisted of in 1966. That is a remarkable omission for a filing that nonetheless accuses AIC of having failed to do just that.

As detailed in the Stein Report, written provenance was uncommon at the time; and while it was not unusual for curators to ask questions or inquire further into the history of a work, the results of those questions (and answers) might not necessarily have been documented. (Stein Rep. at 56). That fact – coupled with the passage of nearly 60 years – draws into considerable question

the value, if any, of the People's asserted lack of documentation in a voluntary production made by AIC in 2023. Board meetings from 60 years ago are not transcripts, conversations and research steps may not have been documented, and records (particularly handwritten ones) may have been discarded in the normal course of the many intervening years.

As set forth in the Stein Report, in the 1960s, as the Work was entering AIC's collection, the procedures of acquisition included presentation of possible purchases to the departmental committee (a procedure that continues in the successive decades). (*Id*. at 55-56). That procedure appears to have been followed here: in documentation from the meeting of the Committee on Prints and Drawings on July 21, 1966, the proposed purchase of *Russian War Prisoner* was raised to the Committee members and subsequently approved. (Ex. 63 (AIC 1966 P&D Committee Meeting Minutes) at 4). As reflected in documents that were preserved, the AIC curator overseeing the acquisition – the person who would have been primarily responsible for conducting research into the Work – was Harold Joachim, an internationally-renowned curator of prints and drawings who was *himself a refugee from Nazi Germany*. (*Id.* at 55). Suffice it to say there is no reason to believe Joachim – or anyone at AIC – would have intentionally ignored troubling facts about *Russian War Prisoner* at the time.

The People point to multiple State Department "warnings" about Nazi-era artwork that were ostensibly disseminated in the late 1940s and early 1950s. (App. at ¶ 118-121). As the People know – but relegate to a footnote – AIC has no record of having received them. (App. at ¶ 119 n.85). Moreover, even assuming one or more of those notices were received by AIC in the late 1940s or early 1950s, the People identify no reason that anyone at AIC, including its curator, should have been concerned, nearly two decades later, that a work acquired from Chicago-area gallery had a troubling wartime provenance. As documented in the Stein Report, Schiele was still

not a well-known artist in 1966 – the first comprehensive catalogue of his works on paper was not published in the United States until decades later, in 1990 – and the Work was of relatively modest expense for a museum acquisition (approximately $5,500 at the time, or $50,000 in current value). (Stein Rep. at 5, 55). And as will be discussed, the People provide no basis on which to conclude that AICs had reason to believe it was necessary to undergo further inquiry.

But provenance standards have evolved over time, and, in the early 2000s, after the American Association of Museum Directors and the Washington Conference on Holocaust-Era Assets/Washington Principles encouraged further research on the ownership histories for artworks which were bought or sold in continental Europe between 1933 and 1945, AIC conducted further review of works in its collection, including *Russian War Prisoner*. (*Id.* at 56-57).[21] As the hundreds of pages of material produced by AIC as part of this investigation make clear, AIC's curatorial department conducted a comprehensive review of literature regarding Schiele and of *Russian War Prisoner* in particular. That included direct outreach on September 27, 2002 to Kornfeld – the only known communication between AIC and him regarding this Work – who was by then the only living person with first-hand knowledge of the same. (Ex. 64 (Sept. 27, 2002 AIC Fax)). One day later, Kornfeld responded, in writing, indicating that:

> This watercolor came from the Grünbaum collection. We had bought the Grünbaum collection from Mrs. Lukacs, the sister of the widow Grünbaum. The collection of Grünbaum was never seized by Nazi authorities. The widow could keep it and gave it to her sister. The sister kept the collection until 1955 and sold it thereafter in different parts.

(Ex. 65 (Sept. 28, 2002 Letter)).

[21] The People take issue with the fact that AIC's further research into the provenance of the Work was part of a "project," contending that "despite all the warnings of Nazi-looted artworks, AIC had so many '*works of art with wartime provenance gaps*' that they had to establish a project to fill those gaps." (App. at ¶ 130(b)). The contention is disingenuous at best: as the People should well know, a core result of the Washington Conference described above was to encourage *all museums* to engage in thorough reviews of their collections for works with potential wartime provenance gaps, which AIC did consistent with its general commitment to support the Washington Principles.

Documents produced by AIC to the People show that this letter appears to be the first time AIC understood that the Work had once belonged to the Grünbaums, after which it updated its provenance accordingly. (Ex. 66 (2002 AIC Updated Provenance)). And since at least 2007, AIC has included the full known provenance of the Work on its website, where it remains today. (Ex. 67 (AIC Current Provenance)).

The Grünbaum Family Members' Demand and Refusal

On October 24, 2005, almost 40 years after AIC acquired *Russian War Prisoner*, counsel for the Grünbaum Family Members contacted AIC seeking information about certain "works of Egon Schiele" that they claimed "belong[] to the estate of Franz Friedrich ('Fritz') Grünbaum." (Ex. 68 (Oct. 24, 2005 Letter)). At the time, the *Bakalar* litigation referred to above was pending, and counsel for the Grünbaum Family Members also sent a letter to Judge Pauley attaching a chart, that Vavra and Fischer characterized as identifying "all of the other stolen Grünbaum works" which they believed to be relevant to that litigation. (Ex. 69 (Nov. 29, 2005 Letter) at 5, 7-9). The chart included "*Russian Prisoner of War*," located at "The Art Institute of Chicago." (*Id.* at 9).

On January 24, 2006, counsel for the Grünbaum Family Members wrote to AIC directly "to formally demand the return of art works owned by Grünbaum." (Ex. 70 (Jan. 24, 2006 Letter) at 1). The letter attached a declaration specifically identifying the Work. (Ex. 71 (Gruber Declaration) at 37).

By a letter dated February 3, 2006, AIC refused the demand, stating: "[b]ased on our current understanding of the law and facts, we do not believe your clients' claim has any merit. Accordingly, we decline to turn over to your clients the artwork[] referenced in your letter." (Ex. 72 (Feb. 3, 2006 Letter)). On February 17, 2006, AIC sent another letter to plaintiffs' counsel with detailed provenance for the Work, similar to what appears now on AIC's website (described

above). (Ex. 73 (Feb. 17, 2006 Letter) at 1). The letter explicitly noted that a scholar in 2005 had identified *Russian War Prisoner* as having previously belonged to the Grünbaums and had traced the passage of the Work from Lilly to Mathilde to G&K to Galerie St. Etienne and, ultimately, to AIC. (*Id.*). As discussed below, there was no follow-up to that correspondence for more than fifteen years.

Prior Litigations and Investigations

The Grünbaums' art collection – and more precisely, their collection of Schieles – has been the subject of extensive prior litigation and investigation. We briefly summarize that history, as relevant to the instant case. But there is one notable fact about it: Kornfeld's documents and testimony – and his account of having acquired the works from Mathilde – has been central to substantially all of it.

Dead City III – Museum of Modern Art

First, in 1997, DANY pursued *Dead City III* – the work that, as noted above, was expressly identified as having belonged to Fritz as part of Kornfeld's 1956 exhibition – by issuing a grand jury subpoena to the Museum of Modern Art ("MoMA") where the work was on loan from the Leopold Foundation in Vienna. *In re Grand Jury Subpoena Duces Tecum Served on Museum of Mod. Art*, 93 N.Y.2d 729, 740 (1999) (hereinafter, "*MoMA*"). The People's theory there, as here, is that *Dead City III* constituted "stolen property" having been "looted" during World War II and that it was being displayed at MoMA.

MoMA moved to quash the subpoena as invalid under Section 12.03 of New York's Cultural Affairs Law, which generally protects works that are in the state only by virtue of having been loaned or exhibited to an in-state museum. *Id.* The New York Court of Appeals agreed and quashed the subpoena. For reasons not elucidated by the People's Application, DANY did not

further pursue the investigation in the Grünbaums' alleged "looted" art collection for more than 25 years.

Bakalar v. Vavra

The *Bakalar* case is discussed in some length above, thus summarized only briefly here. In *Bakalar*, an art collector, David Bakalar, brought an action against the Grünbaum Family Members seeking a declaratory judgment that he was the rightful owner of a Schiele drawing known as *Seated Woman with Bent Left Leg (Torso)*, a different work by Schiele believed to be part of the same collection sold by Mathilde to Kornfeld to Kallir in New York. *See generally Bakalar I; Bakalar II; Bakalar III.* The Grünbaum Family Members sought the same and brought counterclaims for conversion and replevin. *Id.*

As noted above, Kornfeld gave testimony and evidence in that case and provided documents and records – including the ledgers and letters above – and the finding of Judge Pauley on the full record before him was that "the Court credit[ed] Kornfeld's testimony that he purchased the Drawing from Lukacs." *Bakalar I*, 2008 WL 4067335, at *2. The court noted that "Kornfeld did not ask Lukacs for any documentation confirming that she owned the Schieles" but "[w]hen he asked Lukacs where she acquired the Schieles, she told him they were 'an old Viennese family possession,' and he did not inquire further." *Id.* at *3. *Bakalar I* was vacated by the Court of Appeals because Judge Pauley had applied Swiss law to the issue of ownership and was remanded for consideration under New York law. *See generally* 619 F.3d 136.

On remand, Judge Pauley reached the same conclusion, albeit on somewhat different legal grounds. Of relevance here, on remand, Judge Pauley affirmed all of his prior factual findings, concluding again that "[t]he most reasonable inference to draw from these facts is that the Drawing remained in the Grünbaum family's possession and was never appropriated by the Nazis" and that

"what little evidence exists—that the Drawing belonged to Grünbaum and was sold by one of his heirs after World War II—suffices to establish by a preponderance of the evidence that the Drawing was not looted by the Nazis." *Bakalar II*, 819 F. Supp. 2d at 298-99.[22]

The Grünbaum Family Members appealed again and the Second Circuit affirmed in favor of Bakalar. *See Bakalar III*, 500 F. App'x at 7-8. Of particular relevance, the Second Circuit affirmed Judge Pauley's factual finding that the work "was not looted by the Nazis." *Id.* at *7.

Austrian Government Investigations

At the same time the *Bakalar* litigation was unfolding in New York, the Austrian Government was conducting two inquiries of its own into the same facts. The Austrian Government inquiries focused on certain of the Schiele works from the Grünbaum collection that currently reside at the Leopold Museum in Vienna, and the Albertina Museum also in Vienna. (Exs. 74 (Nov. 18, 2010 Leopold Museum Decision); 75 (Oct. 15, 2015 Albertina Museum Decision)). The findings of those inquiries substantially mirror the conclusions of Judge Pauley above.[23] In particular, in both cases, the investigations credited the evidence provided by Kornfeld and declined to return the works to the Grünbaum Family Members. (Exs. 74; 75).

In November of 2010, a committee of researchers, Ambassadors and Government officials in Austria (the "Commission") was assembled to investigate the very issues raised by the People

[22] The court further found that the doctrine of laches precluded the Grünbaum Family Members from prevailing, finding – of some relevance here – the enormous prejudice faced by the collector resulting from the Grünbaum Family Members' delay in pursuing their claims:

> [The Grünbaum Family Members'] delay in pursuing their claim makes it difficult for Bakalar to garner evidence to vindicate his . . . rights. It has resulted in deceased witnesses, faded memories, lost documents, and hearsay testimony of questionable value. Of the greatest significance is the death of Mathilde Lukacs in 1979, perhaps the only person who could have elucidated the manner in which she came to possess the Drawing, or indeed, whether she owned it at all.

Id. at 306 (internal quotations marks and citations omitted).

[23] It is also notable that the Commission was created for the express purpose of recovering assets stolen from those persecuted during World War II. (Stein Rep. at 58-59).

here – namely, the provenance of works by Schiele held at the Leopold Museum and believed to have belonged to the Grünbaums prior to World War II. The Commission started by noting that there is no documentation of "a seizure of the [Grünbaum's] art collection or parts of it via [Nazi] government actions between 1938 and 1945." (Ex. 74 at 6). Moreover, "[i]n the absence of verified sources, how and whether it remained in Austria or moved abroad" during that time period "can only be speculated." (*Id*.).

However, the Commission found persuasive the facts and evidence obtained from Kornfeld, which the Commission deemed credible. In particular, the Commission credited Kornfeld's account of obtaining the collection from Mathilde, concluding that Mathilde "sold artwork in Switzerland in the 1950s, including the three works identified in the judgment and demonstrably originating from Fritz Grünbaum's art collection." (*Id.* at 7). This and other factual findings led the Committee to conclude that "there is no indication that the owners were deprived of the art collection or parts of it by government action between March 13, 1938 and May 8, 1945." (*Id.* at 11). "The sales in the 50s by Mathilde Lukacs lead to the opposite conclusion – that the collection at least effectively remained within the disposal of the family or of individual family members." (*Id.*).

Second, five years later, the same Commission reached the same conclusion with respect to certain Schiele works at the Albertina, another Viennese art museum. (*See generally* Ex. 75). As in the *Leopold Museum* matter, the Commission in the *Albertina* matter found that Mathilde established contact with the G&K gallery in Bern in May 1952. (*Id.* at 5). The Commission found that this resulted in years of correspondence and visits between Mathilde and Kornfeld, at which point Mathilde then sold "a variety of prints and hand sketches" to Kornfeld. (*Id.* at 6) ("In 1955 she delivered the first eight Egon Schiele art prints, which had been offered in the auction on

November 24th, 1955" . . . "[o]ther art prints were sold in the fall of 1956 at the Egon Schiele Sales Exhibition."). The decision noted that 113 artworks in total were sold by Mathilde to Kornfeld's gallery, concluding that:

> The 113 works of art sold 1952 through 1956 by Mathilde Lukacs to the Swiss Galerie Kornfeld do indeed agree with the famous contemporary information on the Fritz Grünbaum Collection. It therefore stands to reason that the artworks sold by Mathilde Lukacs were part of the Fritz Grünbaum Collection.

(*Id.* at 7).

Reif v. Nagy

In 2018, the Grünbaum Family Members sued to obtain two other Schiele works: *Woman in a Black Pinafore* and *Woman Hiding Her Face* (the "Artworks"). *Reif v. Nagy*, 61 Misc. 3d 319, 320-21 (Sup. Ct. N.Y. Cty. 2018), *aff'd as modified*, 175 A.D.3d 107 (1st Dept 2019) ("*Nagy*"). There, Vavra and the co-executors of Fischer's estate, Timothy Reif and David Fraenkel, brought an action to compel the return of the works and prevailed. *Id.* at 321.

The court in *Nagy* proceeded under the HEAR Act, which is inapplicable here,[24] and which the court construed as requiring only "reasonable proof" of the rightful owner to return the work. The court found this "reasonable proof" by assuming, without explanation or analysis, that the 1939 Jewish property registrations equated to a total seizure of the Grünbaums' property as of that date. As discussed, the property registrations did not amount to seizure in all cases, nor in this case. Importantly, the *Nagy* court relied exclusively on evidence established in prior litigation and conducted no independent discovery nor held a trial.

Rather, while calling Kornfeld's documents "inconclusive," *Nagy*, 175 A.D.3d at 123, the court generally credited the account of the works as having come from Mathilde to Kornfeld,

[24] Judge Koeltl in *Reif* found the HEAR Act inapplicable to the claims of the Grünbaum Family Members as to *Russian War Prisoner*. 2024 WL 838431, at *1 ("The [HEAR Act] did not revive the plaintiffs' claims because the plaintiffs' claims fall within the exception of the Act").

indeed relying on Kornfeld's testimony and documents as one of several bases for finding the works had ever belonged to Fritz, *Nagy*, 61 Misc. 3d at 325 ("An e-mail sent from Mr. Kornfeld's namesake gallery, Galerie Kornfeld, to Dover Street Gallery in 2004 states that all Schieles from the [S]ale [C]atalogue had the same provenance stemming from Mr. Grünbaum: collection Fritz Grünbaum, Elisabeth Grünbaum-Herzl (widow), Mathilde Lukacs-Herzl (sister of Elisabeth)"; and declining to say for certain that the works did *not* come from Mathilde, even on appeal; *see also Nagy*, 175 A.D.3d 107 at 124 ("Accordingly, it is clear that the Artworks here were obtained by Kornfeld from the same seller—whether or not that seller was Mathilde").[25]

Reif v. Art Institute of Chicago

Finally, and most recently, in December of 2022, the Grünbaum Family Members brought suit against AIC seeking a declaratory judgment and raising claims of conversion and replevin based on AIC's ongoing possession of the same Work at issue here – *Russian War Prisoner.*

On November 24, 2023, Judge John G. Koeltl granted AIC's motion to dismiss, holding that the Grünbaum Family Members claims were time-barred under New York's statute of limitations for conversion and replevin, which began to run after the demand and refusal, and, in any event, were barred by laches. *See Reif*, 2023 WL 8167182, at *5. Notably, in conducting its analysis, the court found – without passing on the accuracy of what did or did not occur in Europe 80 years ago – that AIC was an "innocent purchaser[]." *Id.* at *4.

In finding the claims time-barred, Judge Koeltl found that "[o]n January 24, 2006, as part of the *Bakalar* litigation, Fischer and Vavra made a demand on the Art Institute of Chicago, the defendant in this case, to return *Russian Prisoner of War*, the Artwork at issue in this case." *Id.* at

[25] Finally, it is of note that the decision in *Nagy* turned in significant part on the burden of proof: in *Nagy*, once the court was satisfied that the works had once belonged to Fritz (not in dispute here), the court shifted the burden to defendants to establish a superior claim to the works. That is not the case here where the People have the burden. *See Nagy*, 175 A.D.3d 107 at 127.

*2. This was because the work in *Reif* – which is the Work here – and the work in *Bakalar* were both part of a common collection, the Grünbaum Schiele collection sold by Mathilde to G&K in 1956. *Id.* The *Reif* court also found that "[o]n February 3, 2006, the defendant declined to return the Artwork." *Id.* The court thus found that the statute of limitations, which began to run at the time of demand and refusal in 2006, barred plaintiffs' claims in 2022. *Id.* at *4-5.

The Grünbaum Family Members sought reconsideration of that opinion or, in the alternative, for leave to file an amended complaint and, on February 28, 2024, Judge Koeltl denied both requests. *Reif*, 2024 WL 838431 at *5. And notably, in so doing, found that the facts in *Nagy* were "completely distinguishable from the facts in this case." *Id*.

The Grünbaum Family Members have appealed.

Procedural Overview

On December 28, 2022 – just days after the federal case described above had been filed against AIC by the Grünbaum Family Members – DANY contacted counsel for AIC to discuss a possible investigation into the provenance of *Russian War Prisoner*. At the time, DANY's sole request was that AIC agree, on a voluntary basis, not to sell or otherwise dispose of the Work, to which AIC promptly agreed.

In May 2023, DANY informed AIC that its investigation had led it to conclude that *Russian War Prisoner* was "stolen." AIC indicated its surprise and disagreement with that position and sought several meetings with the ATU to discuss its evidence. In those meetings, DANY set forth the evidence collected in its investigation to date, substantially all of which was known to AIC and its counsel because it was part of the extensive web of litigation described above and germane to the provenance research AIC had already conducted on the Work. AIC also presented its evidence and position, raising for DANY both factual and legal flaws with its theory, among them the court's

findings in *Bakalar* and additional corroborative evidence supporting the account provided by Kornfeld.

On September 12, 2023, DANY obtained a seizure warrant for *Russian War Prisoner*. Notwithstanding the fact that neither AIC nor *Russian War Prisoner* is within the state of New York – and thus within the jurisdiction of the People's seizure warrant – consistent with its generally cooperative approach to the investigation, AIC agreed to nonetheless accept service of and honor that seizure warrant, provided AIC reserved its rights to challenge the jurisdiction of DANY and a New York court to pursue the Work. (Ex. 76 (AIC Warrant)). AIC made clear it would contest the warrant and defend its lawful possession of the Work. Only thereafter, on September 19, 2023, did DANY, for the first time, serve a subpoena for documents on AIC, calling for production of materials relevant to AIC's provenance research. AIC, once again, voluntarily accepted service and agreed to comply, notwithstanding the People's lack of jurisdiction to issue such a subpoena to an out-of-state entity. AIC produced nearly one-thousand pages of non-privileged information regarding its provenance on the Work, both in its acquisition in 1966 and since.

During the discussions with DANY between December 2022 and September 2023, DANY represented on multiple occasions that there were other museums and collectors who had similar works that were under the same investigation. AIC now understands that these individuals and entities were: Ronald Lauder, Museum of Modern Art, Santa Barbara Museum of Art, Morgan Library and Museum, Michael Lesh, Carnegie Museums of Pittsburgh and Allen Memorial Art Museum at Oberlin College.

The People make repeated reference in their Application to the fact that these other individuals, collectors and institutions voluntarily agreed to return their works. As the People present it, these other individuals, collectors and institutions:

> [H]aving reviewed the evidence—similar in sum and substance to the evidence included in this application . . . agreed that the evidence convinced them that their drawing was stolen by the Nazis, [consenting] to its return to Judge Reif and his fellow heirs as its lawful owner.

(App. at ¶ 6).

It is not entirely clear what proper purpose such claims could be put to in this proceeding, *if true*. But the inclusion is all the more confounding because it is, at bare minimum, incomplete. Indeed, a number of the other institutions issued public statements disputing key components of the People's theory advanced here. For example, the Allen Memorial Art Museum at Oberlin College said:

> [w]hen questions relating to the [*Girl with Black Hair*, Egon Schiele (1958)'s] provenance came to light . . . Oberlin invested significant resources researching the history of its sale and purchase and concluded it had been lawfully acquired. The artwork was bought for the Allen by Charles Parkhurst, director of the museum from 1949 to 1962. As one of the 'Monuments Men,' he was celebrated for tracking down and returning art looted by Nazis in WWII. *It is inconceivable that Parkhurst would have knowingly purchased any artwork that he believed might have been stolen*. The Manhattan D.A.'s Office, through its ongoing investigation, nonetheless raised questions about the ownership of *Girl with Black Hair*. As a result, Oberlin College voluntarily returned the drawing.

(Ex. 77 at 2) (emphasis added)). Likewise, the Carnegie Museums of Pittsburgh noted that:

> If at any time we believed that the Egon Schiele drawing *Portrait of a Man* had been stolen by the Nazis, Carnegie Museums would have returned it before now to those we believed to be its rightful owners. *To date, we have relied on a finding confirmed and upheld in federal court that the collection to which this drawing belonged was not, in fact, stolen by the Nazis.* Now that the Manhattan District Attorney's Office has become involved in this matter, we have decided *not to contest* the DA's claims and are therefore giving the drawing to the Manhattan DA.

(Ex. 78) (emphasis added)).

Confident in its lawful ownership, AIC feels it is important to contest the People's baseless theory and claims. Moreover, unlike any of the other individuals, collectors and institutions, AIC has already – and successfully – litigated ownership with the Grünbaum Family Members. And while AIC may be the only institution still willing to oppose DANY's allegations in this case, it is not alone in raising serious concerns about the way DANY and the ATU are pursuing works based on scant evidence and using a legal theory that – as discussed herein – draws no support from New York law. As the Cleveland Museum of Art, which is also presently contesting DANY and ATU's efforts to seize a work in its collection, recently noted in a court filing, it was forced to bring the action to resolve issues of title "in a civil forum with appropriate jurisdiction" because although:

> The Museum has repeatedly told the District Attorney's office that the evidence is insufficient and inconsistent, and suggested additional avenues of investigation that could provide evidence relevant to the District Attorney's claims. Those suggestions have been refused.

The Cleveland Museum of Art 11150 East Boulevard Cleveland, Ohio 44106 v. Alvin Bragg, No. 1:23-cv-02048-CEF (Dkt. 1 at 7-8) (Oct. 19, 2023).

Additionally, as the only institution challenging the DANY and its theory, AIC is also alone in being accused of knowingly possessing stolen property (among other things). The allegations are both legally and factually incorrect and will be swiftly disproven below. By contrast, the People concluded and publicly announced that, with respect to each of the institutions that returned their works, "DANY has not found any evidence that [those institutions] engaged in any criminal activity or wrongdoing in connection" with their possession of the work at issue. (*See, e.g.*, App. at Exs. 2, 4, 6, 8, 10, 12, 14, 16 (Signed Stipulations)). And since the People have chosen to make the decisions by those ten other individuals, institutions and collectors to return their works part of the information before the Court, the Court should ask itself – if the provenance of all of the works is the same, the evidence as to each institution is "similar in sum and substance to the

evidence included in this application," (App. at ¶ 6) and, based on that evidence, DANY concluded that none of those other institutions engaged in "any wrongdoing" – how did DANY reach a different conclusion as to AIC alone?

Part II

Jurisdiction and Timeliness

The crux of the People's Application turns on a legal theory that is unfounded, unprecedented and wrong: namely, that Section 450.10 of the New York Penal Code authorizes the People, in the absence of a pending prosecution, to seize a work under a criminal theory it has no intention of prosecuting, and then ask a criminal court to adjudicate heavily-disputed issues regarding ownership of that work. The People are wrong, and every New York court to consider similar applications from DANY's ATU, certainly that AIC has been able to identify, has declined to do so. Notably, and as detailed herein, those courts have declined for good reason: both the New York Court of Appeals and the New York Attorney General have previously and unequivocally said that Section 450.10 *cannot* be used to adjudicate ownership, and that a civil action is instead required to do so. Here, such a civil action has already occurred, and a civil court has already dismissed the Grünbaum Family members' claims to the Work. Consistent with the overwhelming weight of authority, this Court should defer to the findings of the civil proceeding and return the Work to AIC.

There is a second fundamental legal flaw to the People's Application: even assuming Section 450.10 could be used in the manner the People suggest, *Russian War Prisoner* has been possessed by AIC in Illinois for decades. AIC acquired the Work in 1966 in Illinois, in a transaction that had nothing to do with the State of New York and has lawfully possessed it in Illinois ever since. The People again have scant authority for the proposition that a court in New

York can revisit the lawfulness of an acquisition that occurred entirely outside of the state – and cite no case in which a court has done so – and the People's supposition that Section 450.10 has no statute of limitations, (App. at ¶ 152), which is again supported by citation to no authority at all, is wrong and should be immediately rejected.

Presumably aware of the clear infirmities in that theory, the People alternatively posit a "conspiracy" assertedly involving Kornfeld, Kallir and AIC, arguing that because Kallir briefly possessed the Work in New York in 1957, a New York court retains jurisdiction over the Work in perpetuity. But once again, the People's theory does not withstand scrutiny, because even assuming the People could establish a conspiracy between Kornfeld and Kallir (and as detailed herein, the People cannot), there is not a scintilla of evidence to support a finding that AIC joined in such a conspiracy. As discussed below, AIC did not even acquire the Work until nearly a decade after Kallir last possessed it, nor are there any facts to support an inference that, in 1966, AIC joined in a purported conspiracy that had otherwise ended a decade earlier.

Absent a conspiracy involving Kallir in New York, the People are left with a challenge to AIC's possession of a 1966 purchase of a work of art from a gallery in Illinois. There is no theory under which a New York court in 2024 can revisit that purchase. That, too, warrants dismissal.

Penal Law § 450.10 Cannot Be Used to Resolve Issues of Disputed Ownership, Particularly in the Absence of a Criminal Case

The People contend not only that this Court "*must* determine the owner" of *Russian War Prisoner* under Section 450.10, but further claim that "*only this Court* has authority to determine the 'owner' of *Russian War Prisoner*." (App. at ¶ 141) (emphasis added). Both claims are wrong, and the People cite no authority in support of either. In particular, as discussed herein, a more careful examination of the cases cited by the People makes clear that (i) no court has ever agreed to use Section 450.10 to "determine the owner" of property whose ownership was disputed,

particularly in the absence of a pending criminal case, and that (ii) every court to consider that question has rejected the People's theory, including the New York Court of Appeals, as well as the two most recent courts to consider applications by the ATU. The New York Attorney General, in its only written guidance on the topic, has similarly concluded that a criminal court lacks jurisdiction, in the absence of a criminal case, to adjudicate property ownership under Section 450.10. Indeed, all of those authorities reach the exact opposite conclusion from the one the People advance: that a civil court – and a civil claim of replevin – is the appropriate forum in which to litigate a dispute over ownership. This Court should reach the same conclusion and defer to the findings of the civil court that has already adjudicated the civil claims of replevin in AIC's favor.

Starting with the plain language of the statute itself, Section 450.10(5) provides, in relevant part, that "[i]f stolen property comes into the custody of a court, it must . . . be delivered to the owner, on satisfactory proof of [] title . . . ." N.Y. Penal Law § 450.10(5). The word "must" – and the authority the People seek to invoke – therefore applies only upon the existence of "satisfactory proof of title." *Id.* By contrast, the statute provides neither authority nor mechanism for adjudicating a *dispute* over ownership, particularly one that is untethered to a criminal prosecution the court is overseeing. *See id.* As the People would have it, that silence was a legislative invitation to courts to invent procedures that suit the People's current needs, to create an applicable burden of proof and statute of limitations, and to determine what kind of hearing is required. (*See, e.g.*, App. at ¶¶ 149-152). There is an alternative, and far more logical explanation for the statute's silence on each of those issues: the legislature never intended Section 450.10 to be used to adjudicate property disputes, particularly in the absence of a criminal case.[26]

[26] Notably, in this respect, Section 450.10 *does* include detailed procedures and timelines for applications that were intended by the legislature – i.e., the return of property whose owner is undisputed during a pending criminal case. For example, the statute details the procedure for notifying a defendant of the People's intention to return property,

Indeed, for just that reason, and based upon AIC's exhaustive review of New York case law, every court to be presented with an application by the ATU under Section 450.10 has squarely *rejected* the People's theory that Section 450.10 *requires* a criminal court to resolve disputes issues of property ownership and has instead found that a civil case and civil action for replevin is necessary to determine which party has "satisfactory proof of title." N.Y. Penal Law § 450.10(5).

First, in 2017, the Honorable Melissa C. Jackson rejected the very same arguments the People make here, finding that in the absence of a pending criminal prosecution, a New York criminal court "does not have jurisdiction to determine the issue of ownership." (Ex. 3 at 2). There, as here, the ATU sought to seize and turn over an antiquity, an Achaemenid Limestone Relief of a Persian Guard from Persepolis, that it had recently seized from a New York-based collector. (*See id.* at 1). The People asserted that the antiquity constituted "stolen property" because of events alleged to have occurred nearly a century prior in 1935, and that the rightful owner was the Government of Iran. (*See id.* at 2). Justice Jackson, analyzing the plain language of Section 450.10 and the People's theory that the statute authorized her to resolve a dispute between the New York collector and the Government of Iran, rejected that theory and the same misreading of the statute the People advance here. (*Id.*). In particular, Justice Jackson found that "the People's reliance on the word 'owner' [was] misplaced" given the active and unresolved dispute of ownership, and that it was "clearly in the 'interests of justice,' that the issue of ownership be determined before the Court release[] the property," which should be accomplished by a "court with civil jurisdiction" that could adjudicate "all the relevant issues involving conflict of law and

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the time in which the People must do so, and the procedural safeguards in place to protect the right of the defendant in such a circumstance. Penal Law § 450.10. Those detailed procedures further underscore the fallacy of the People's argument that, as the People would have it, the legislature intended for Section 450.10 to be used to resolve disputes about property ownership absent a criminal case, but intentionally chose to remain silent on the myriad procedural issues attendant to such a use.

title." (*Id.*).

Second, in 2019, the Honorable Thomas A. Farber similarly declined to resolve a contested issue of the ownership regarding an antiquity seized by the ATU, concluding that a civil court was the more appropriate forum for resolving a dispute between a New York gallery, from which it had been seized by DANY, and the Government of Italy on whose behalf the People claimed the work was "stolen." (Ex. 2). There, the People cited the very same authority presented to this Court and made the same arguments, which Justice Farber, in large part, rejected. While Justice Farber found that a criminal court, in certain contexts, might have jurisdiction under Section 450.10 to address the issue of ownership – adding that "in the average case . . . ownership is not in dispute" – he noted that in the case before him, like the case before this Court, "the issues [as to ownership] are complicated" and that he was "really not the best judge to make this kind of determination." (*Id.* at 50). Justice Farber further noted:

> [A]ny proceeding that I would do would be in the nature of a summary type of proceeding, and that would not be appropriate in this case. I think these are issues that should be explored in the manner suggested by the defense, and that the best forum for that is the forum they have now chosen, which is [a civil action pending in] the Southern District of New York, where I believe these issues can be resolved relatively quickly.

(*Id.* at 50-51).

While finding he might have jurisdiction to hear the dispute, Justice Farber made clear that were he to decide the dispute, he would do so "in the context of a civil proceeding" – and not a criminal one – noting:

> [A]lthough I may have jurisdiction, is not my usual jurisdiction. So I'm taking kind of an ancillary proceeding, something that I would – would be a very tiny, tiny, tiny, tiny portion of what I usually do, and reaching out to do a whole plenary hearing where I make a determination as to ownership in a context that's going to have international implications."

(*Id.* at 28). Justice Farber therefore denied the People's turnover application, deferring to the then-

pending civil case brought by the New York gallery to determine ownership. (*Id.* at 52).

The People bury these authorities in a footnote and misrepresent those courts' findings. In particular, the People contend that Justice Jackson ordered *Persian Guard Relief* to be returned to Iran "affirming her authority under § 450.10 to *adjudicate* and order the release of stolen property." (App. at ¶ 143 n.92) (emphasis added). That is false. While Justice Jackson did ultimately sign the turnover order, she did so only after the parties resolved the issue of ownership out of court, and thus, only after there was no remaining ownership dispute for Justice Jackson to "adjudicate." *See In the Matter of an Application for a Warrant to Search the Premises Located at the Park Avenue Armory, 643 Park Ave., New York, NY 10065*, Turnover Order (July 23, 2018). Similarly, the People's characterization of Justice Farber's conclusion – i.e., that he "affirmed he did have jurisdiction to determine the issue of ownership," but "deferred" his ruling pending "the outcome of a federal lawsuit," (App. at ¶ 143 n.92) – is misleading, particularly in the People's representation to Your Honor that "*only this Court* has authority to determine the 'owner' of *Russian War Prisoner*." (*Id.* at 141) (emphasis added).

Indeed, notwithstanding the People's position before this Court, AIC has not identified a *single* case in which a New York court has agreed to use a Section 450.10 proceeding to resolve a *disputed* claim of ownership to property, nor do the People cite one. (*See* Ex. 3 at 2) (noting that none of the authorities relied upon by the People involve resolving an ownership dispute in the absence of a pending criminal case, and thus "[a]ll cases cited them are distinguishable on this basis alone"). And that is for good reason: the conclusions of Justice Jackson and Justice Farber are entirely consistent with the uniform guidance of New York's highest legal authorities, including the New York Court of Appeals and the New York Attorney General.

First, in *People ex rel. Simpson Co. v. Kempner*, the only case in which New York's highest

court has squarely addressed the question of whether a criminal court could use an administrative proceeding – in particular, the predecessor statute to Section 450.10 – to resolve disputed claims of property, the Court of Appeals answered that question in the negative. 208 N.Y. 16 (1913). *Kempner* involved a similar fact pattern: there, as here, the People had obtained a criminal warrant in the absence of a pending criminal case to seize two allegedly stolen rings that were in the possession of a pawnbroker in an effort to return them to their asserted original owner. *Id.* at 16-17. Noting that there existed "controversy between the person from whom it is claimed that the property was stolen and the person from whom the possession of the property was taken by the search warrant as to which is entitled to the possession thereof," *id.* at 16, the Court of Appeals held that such a question:

> *cannot be determined upon a criminal process*. It is a matter wholly between the contending parties and of no direct concern to the state. *It must be determined in a civil action*, in which the parties are by Constitution entitled to notice and a hearing, and, if demanded, to a trial of the issue by jury.

Id. at 25 (emphasis added).[27] The *Kempner* court went further, questioning why a criminal warrant should be obtained at all in furtherance of such a "civil purpose," noting that a search warrant is "in the nature of a criminal process," and its "purpose is to aid in the detection and punishment of crime. It has no relation whatever to civil process or civil trials." *Id.* at 22-23.[28]

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[27] In prior proceedings, the People have tried to contend that *Kempner* is distinguishable because while the dispute there was of "no direct concern to the state," here, the "New York courts have an undeniable interest in denying safe haven to possessors of stolen cultural property." (App. at ¶ 144(b)). But such an argument misreads *Kempner*: the core finding of *Kempner* is that a dispute between two private parties over property – whether jewelry, as was the case in *Kempner*, or art, as here, – "is a matter wholly between the contending parties and of no direct concern to the state." That, as noted, remains good law and has been cited by other courts in declining the People's request to use Section 450.10 to resolve property disputes. Indeed, whatever interest New York has in the worldwide art market does not undo that basic principle that New York criminal courts are not the appropriate forum for adjudicating disputes over the ownership of artwork. That is particularly true here where the Work is not located in New York, was not acquired by its current owner in New York, is not alleged to have been unlawfully "looted" in New York and has limited historical ties to the state.

[28] For just these reasons, the People's argument that a grand jury investigation is a "criminal proceeding" as defined under Criminal Procedure Law § 1.20(18) – and thus sufficient to trigger the provisions of Section 450.10, (*see, e.g.*,

Second, the New York Attorney General has reached the same conclusion – i.e., that Section 450.10 cannot be used to resolve contested claims of ownership in the absence of a criminal case. In 1973, then-acting Attorney General Louis J. Lefkowitz was asked to opine on whether Section 450.10 could be used to dispose of property seized incident to the arrest of someone who was never charged or convicted of a crime in connection with the property at issue. The Attorney General opined that Section 450.10 could *not* be used under such circumstances, stating that "since there has been no criminal action commenced by the filing of an accusatory instrument no court has jurisdiction to order any disposition pursuant to Article 450." 1973 N.Y. Op. Atty. Gen. No. 160 (July 19, 1973). And, like the New York Court of Appeals before him, the Attorney General concluded the appropriate forum for determining ownership, under such circumstances, was a civil claim of replevin. *See id.*

The 1973 Guidance remains the only known written position of the New York Attorney General of the appropriate use of Section 450.10. Similarly, *Kempner* remains good law, notably evident by Justice Jackson's citation to it in *Persian Guard Relief*. Yet, the People make no mention of the 1973 Guidance, and, with respect to *Kempner*, argue otherwise – once again, only in a footnote – claiming that *Kempner* (i) "concerns a statute that no longer exists," or in the alternative, (ii) was "overruled" by *MoMA*. 93 N.Y.2d at 740; (App. at ¶ 141(a) n.91). Neither argument withstands scrutiny.

With respect to the first, while it is true that *Kempner* involved the prior version of the statute, Section 687 of the Code of Criminal Procedure, there are few substantive differences

App ¶ 10(b)), seems dubious. Indeed, as *Kempner* makes clear, absent criminal *charges*, which the People here have no intention of pursuing (the only person they even suggest they might charge, Kornfeld, is deceased) opening a grand jury investigation for purposes of wading into an ownership dispute is precisely what *Kempner* found to be improper. But the Court need not ultimately resolve that issue – and AIC does not address it further – because even assuming this grand jury investigation constitutes a "criminal proceeding," it remains the case that Section 450.10 does not authorize (let alone mandate) that a court resolve a contested issue of ownership, as opposed to ordering the turnover of property whose ownership is not in dispute.

between Section 687 and Section 450.10, and none that impact *Kempner*'s core holding: i.e., that the "*question presented . . . cannot be determined upon a criminal process*," but must instead be "determined in a civil action." *Kempner*, 208 N.Y. at 25 (emphasis added). In particular, the statute at issue in *Kempner* provided, in relevant part that:

> If property stolen or embezzled comes into the custody of a magistrate, it must, unless its temporary retention be deemed necessary in furtherance of justice, be delivered to the owner, on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

People ex rel. Robert Simpson Co. v. Kempner, 154 A.D. 674, 676 (2d Dept 1913), *aff'd*, 208 N.Y. 16 (1913) (quoting § 687). Section 450.10(5), the provision the People seek to rely on, is virtually identical.

The People contend that *Kempner* was motivated by concern about a lack of "notice" to parties asserting ownership, which the People further contend have been "cured" by Section 450.10. (App. at ¶ 141(a) n.91). The argument is doubly wrong. First, the "curative" notice provisions cited by the People in Section 450.10, revised as it stands today, do not apply to a proceeding, such as this one, where the People ask the Court to turn over property already within its possession.[29] *See* McKinney's N.Y. Penal Law § 450.10, Editor's Notes, William C. Donnino, Practice Commentary (2024) ("In the event a court is the custodian of the property . . . the foregoing procedures are inapplicable, and the statute simply provides that the court must return the property to its owner unless 'temporary retention' is necessary.").

Notwithstanding, even assuming *Kempner* can be read as focused on the procedural defects

[29] The full relevant statutory history is as follows: in 1971, § 450.10 was enacted to control disposition of stolen property, which expanded upon § 687. In 1981, § 450.10 was further amended to reflect the addition of a version of what is now subdivision (1) of the statute, and three years later, in 1984, the statute was again amended to replace the newly added subdivision (1) with what are now subdivisions (1) through (4) of the statute. None of these additions had any effect on subdivision (5), which only addresses instances where stolen property "comes into the possession of a magistrate or court" pursuant to a search warrant. *Kempner*, 208 N.Y. at 24.

of using Section 687, the defects identified in *Kempner* go far beyond notice. The *Kempner* court found that the dispute before it required a "civil action in which the parties *are by Constitution* entitled to notice *and a hearing, and, if demanded, to a trial of the issue by jury*." *Kempner*, 208 N.Y. at 25 (emphasis added). Neither the language of Section 450.10 nor the People's current use of it would come anywhere near resolving those *constitutional* defects: as discussed below, the People *oppose* a hearing, let alone a jury trial. (App. at ¶ 154). As such, the People's current use of Section 450.10 raises *exactly the same* procedural concerns present in *Kempner*, all of which further underscore *Kempner*'s core holding – i.e., the impropriety of asking a criminal court in a summary proceeding to resolve a contested matter of ownership.

The People's second argument fares no better, as *MoMA* neither "overruled" *Kempner* – a case the *MoMA* court did not so much as mention – nor did it constitute a "ruling" that Section 450.10 could be used in the manner the People suggest. In fact, *MoMA* did not involve Section 450.10 *at all*. In *MoMA*, the People sought to seize a work of art (of some relevance, as discussed below, also a work by Schiele believed to have been owned by the Grünbaums prior to World War II), via grand jury subpoena. *See MoMA*, 93 N.Y.2d 729. The work in question was on loan to *MoMA* from the Leopold Foundation in Vienna, and the core issue in the case was whether the artwork had protection under Section 12.03 of New York's Arts and Cultural Affairs Law, which affords protection from seizure works of art that are in the state while on loan. The People in *MoMA* did not obtain a seizure warrant pursuant to Section 690.10, nor did they seek to turn the work over pursuant to Section 450.10. And, the People lost. The Court of Appeals rejected DANY's efforts to seize the work, finding it protected under Section 12.03. *See id.* at 742.

Because Section 450.10 was not at issue in that case, no party appears to have briefed it, nor was *Kempner* or its holding part of the parties' briefing or the court's decision. Instead, in

touching on arguments made by the People below (and abandoned on appeal) about how property seized pursuant to a subpoena might be disposed of in other contexts, the *MoMA* court noted that:

> Penal Law § 450.10 . . . provides a mechanism for returning allegedly stolen property to an owner prior to, or during the pendency of, a criminal proceeding, [and] requires proof of title before property in the custody of the People or the court can be returned. *Thus, a civil-like proceeding would have to be commenced in this case to return the paintings to the rightful owners under either CPL 610.25 (2) or Penal Law § 450.10--regardless of the outcome of the People's case*.

Id. at 740 (emphasis added).

The language in question is classic dicta, not a holding of the court. Section 450.10 and the issue of how it might apply was not before the Court of Appeals, nor is there anything about the language of *MoMA* that suggests the Court of Appeals intended to overturn its own precedent. To the contrary, as noted, the *MoMA* decision did not reference *Kempner* at all.

Moreover, the language from *MoMA* is not inconsistent with *Kempner* for at least two reasons: *first*, the language in question makes clear that a "civil-like proceeding" would have to "be commenced" separate and apart from any pending criminal proceeding to resolve the issue of ownership. *See id*. That is consistent with the core holding of *Kempner* that a criminal court lacks jurisdiction, in the absence of a pending criminal case, to adjudicate ownership, and that such a matter should instead be resolved through civil proceedings. *See Kempner*, 208 N.Y. at 24-25.

Second, As discussed below, the *MoMA* court was silent as to what that "civil-like proceeding" should look like, and thus certainly did not overrule *Kempner*'s finding that the parties had a *constitutional right* to a "civil action" that entailed "*notice and a hearing, and, if demanded, to a trial of the issue by jury*." *Id.* at 25 (emphasis added). Relatedly, the language from *MoMA* contemplates such a "civil-like proceeding" as arising in the context of a criminal case – that is, to resolve ownership "regardless of the outcome of the People's case" – not as a standalone proceeding. *See MoMA*, 93 N.Y.2d at 740. For these reasons, as noted above, in every case counsel

has identified in which this issue has been directly addressed has rejected the People's efforts to recast *MoMA* as a decision on the scope of Section 450.10 or as somehow overruling *Kempner*.

Nor does the remaining case law that the People rely on support their position because none involves a court agreeing to resolve a dispute over ownership in the absence of a criminal case. For example, *Stuhler v. State of New York* involved the court's efforts to distribute funds stolen by a criminal defendant after that defendant's conviction. 127 Misc. 2d 390 (Sup Ct. N.Y. Cty. 1985). Notably, there existed no dispute over ownership between the purported thief and the true owners – the funds at issue in *Stuhler* had already been "conclusively [] shown to be the fruits of the crime, that is, the criminal conduct of which [the defendant] was convicted, was the conduct through which the funds were obtained." *Id.* at 392. The court further found it had authority under Section 450.10 to disperse money, as *fruits of the crime* of conviction, to the defendant's various defrauded creditors. *See id.*

Similarly, in *Matter of Okada v. Prop. Clerk of the Police Dep't of N.Y.*, a defendant (Okada) was indicted for attempting to sell two violins stolen from a dealer to undercover officers. 2004 WL 6039559 (Sup. Ct. N.Y. Cty. 2004). The issue before the court in *Okada* was not ownership of the violins, which was not in dispute, but instead whether DANY could continue to hold the property pending resolution of the prosecution. *See id.* The court sided with the owner, noting that ownership was not in dispute and had been "established . . . to the satisfaction of this Court," and thus there was "no further reason why [the violins] should not be returned." *Id.*; (*cf.* Ex. 3 at 2) (noting the same authority was "distinguishable" in context of rejecting the People's application under Section 450.10).

The cases cited by the People, ostensibly for the proposition that New York criminal courts need not initiate separate civil actions to return property seized by warrant, are similarly not

instructive because none involve the facts here – i.e., resolving disputed ownership over said property, and the absence of a criminal case. *See In the Matter of Documents Seized Pursuant to a Search Warrant*, 124 Misc. 2d 897, 898-99 (Sup. Ct. N.Y. Cty. 1984) (returning documents necessary for evidence in prosecuting a criminal case to the court, noting that "the instant petition seeks to restore possession of the documents to the court, *not to the owner*") (emphasis added); *People v. Louis Posner*, 86 A.D.3d 443 (1st Dept 2011) (contemplating proper distribution of funds which were fruits of a crime to pay fees in a criminal case) (emphasis added). Similarly, *People v. Braunhut* is equally unhelpful to the People's position insofar as it makes clear that a criminal court's role in returning property is triggered only where it has already presided over an underlying criminal prosecution and where it is thus "*undisputed* that the defendant [to whom the property is to be returned] is the rightful owner of the property in question." 101 Misc. 2d 975, 979 (N.Y. Crim Ct. Bronx Cty. 1979) (emphasis added).

And while the People contend that "civil-court delays are legendary," (App. at ¶ 147), even assuming such delays are relevant,[30] no such concern exists because the civil case brought by the Grünbaum Family Members has already proceeded to conclusion during the period of time in which DANY was ostensibly conducting its investigation. As noted above, the Grünbaum Family Members commenced a civil action for replevin against AIC in December of 2022, and in November of 2023, the Honorable John G. Koeltl rejected those claims and later, in February of 2024, affirmed AIC's ownership. *See generally Reif*, 2023 WL 8167182; *Reif*, 2024 WL 838431. Consistent with the plain language of Section 450.10, the conclusions of Justice Jackson and Justice Farber, and the conclusions of both *Kempner* and even *MoMA*, that adjudication should be

[30] Indeed, Justice Farber in *Safani Gallery* correctly noted that the delays that would plague civil cases are equally as applicable in criminal matters, finding that "given my extraordinarily busy calendar, and any other numerous issues I have to decide with pending motions and the complexity of some of the underlying issues, it would be some time before you got any decision, and I'm reluctant to do that." (*See* Ex. 2 at 49).

final, and this Court should return the Work to AIC.

This highlights the core problem with the use of Section 450.10 the People advance here: even assuming Section 450.10 authorizes a criminal court to resolve an ownership dispute in the absence of a pending criminal case, the People offer no explanation for why a New York court *should* use Section 450.10 to *overturn* another court's recent adjudication of that very issue. The People do not mention Judge Koeltl's findings *at all*, let alone explain why his resolution of the dispute over title as between the Grünbaum Family Members and AIC should not be considered conclusive. That is presumably because there is no explanation.

In sum, Section 450.10 does not authorize a New York court to resolve a disputed issue of ownership. The statute itself provides no such authority, and every court – including the New York Court of Appeals – to address the issue has concluded that Section 450.10 does *not* permit adjudication of contested issues of ownership, particularly in the absence of a pending criminal case. Instead, all of those courts have reached the same conclusion: disputes between two parties over ownership are quintessentially civil in nature, and thus properly resolved in civil litigation between the parties. Here, such civil litigation has occurred, and AIC has prevailed. And thus, consistent with the finding of all New York courts to address the issue, this Court should conclude that the Application must be denied, and the Work returned to AIC.

The People Have Not Established Jurisdiction in New York County and This Dispute Is Untimely

There is a second fundamental defect in the People's attempts to invoke the jurisdiction of this Court to adjudicate the ownership of *Russian War Prisoner*: the jurisdiction of this Court is appropriately proscribed to address the criminal conduct occurring *within New York County* and within applicable statutes of limitation. And even assuming a crime occurred – which as discussed at length above and in Part III, below, it did not – no aspect of AIC's purchase and possession of

the Work had any connection with New York. Nor is there a viable theory under which this action is timely under the applicable statute of limitations. Both mandate dismissal of the Application and return of the Work to AIC.

This Court Lacks Geographical Jurisdiction over AIC's Purchase and Possession of* Russian War Prisoner *in Illinois

The People concede the undeniable point that this Court must have jurisdiction to hear this matter. (App at ¶¶ 103, 110). It is, of course, the People's burden to establish jurisdiction. To trigger the jurisdiction of New York's criminal courts, the People must generally show that "[c]onduct occurred within this state sufficient to establish . . . [a]n element of such offense." N.Y. Crim. P. L. § 20.20(1)(a). Here, whatever the People may say about AIC's acquisition or possession of the Work, the People cannot dispute that AIC (i) acquired the Work in Illinois from an Illinois gallery, and (ii) currently possesses the Work in Illinois, all well beyond the borders of New York County.

In an effort to overcome that jurisdictional problem, the People rely principally on Section 105.25, which proscribes the scope of the Court's jurisdiction to preside over criminal conspiracy charges. The People's argument is that because Kallir imported and then sold *Russian War Prisoner* in New York in 1957, New York County "has jurisdiction over the Kornfeld-Kallir Conspiracy and its co-conspirators." (App. at ¶ 97(c)).

There are at least two fundamental problems with that theory, at least as to AIC and its ongoing possession of *Russian War Prisoner*. *First*, New York law is clear that conspiracy jurisdiction extends only to members of the conspiracy who takes acts within the state of New York. *See, e.g.*, *People v. Carvajal*, 6 N.Y.3d 305, 313 (2005) (while "jurisdiction over an offense exists based on a conspiracy occurring in New York to commit that offense" that "jurisdiction exists *only for those defendants whose criminal acts in furtherance of the conspiracy occurred in*

New York") (emphasis added); *see also* N.Y. Crim. P. L. § 20.20(1)(c) (conspiracy jurisdiction "extends only to . . . those persons whose conspiratorial or other conduct of complicity occurred within this state"). There is no allegation AIC's acquisition or possession of *Russian War Prisoner* occurred in or has *anything* to do with New York.[31] Notably, as discussed above, AIC did not acquire the Work from Kallir or from a New York seller; it acquired the Work from a gallery in Chicago. As such, even assuming the People could establish jurisdiction over the "Kornfeld-Kallir Conspiracy" it would not extend their reach to AIC or its possession of *Russian War Prisoner*. [32]

But *second*, even assuming a "Kornfeld-Kallir Conspiracy" existed, the People do nothing to establish that conspiracy was "ongoing" after 1957, when Kallir sold the last of the works he had acquired from Kornfeld, or that it extended to AIC's acquisition of the Work nearly a decade later in Illinois. Indeed, while repeatedly referring to "co-conspirators," the People never identify who those co-conspirators are, let alone present evidence to support a claim that those asserted "co-conspirators" knowingly joined the conspiracy with the specific intent to further its unlawful objectives.

Whatever the scope of the conspiracy, the co-conspirators certainly could not include AIC. Leaving aside the lack of any action of AIC in this state, as discussed in Part III below, the core of a conspiracy entails establishing "an *agreement* with another person to engage in or cause that crime to be performed." *People v. Reyes*, 31 N.Y.3d 930, 931 (2018) (quoting William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 38, Penal Law § 105.00)) (emphasis added). Indeed, as the People's own cases make clear, absent evidence of an agreement,

[31] While not mentioned by the People, the Work was briefly loaned to Galerie St. Etienne in New York 1980, more than a decade after AIC acquired it, and years after Kallir's death, for a temporary exhibition. It has not been in the state of New York since.

[32] For substantially the same reasons, the People's attempted reliance on Section 20.30 is unavailing because while the People contend that provision "does not limit New York's ability to assert jurisdiction over actions performed largely outside the state," it does not confer jurisdiction on conduct that occurred *entirely outside the State*. *See* N.Y. Crim. P. L. § 20.30.

two individuals or entities do not become part a "general conspiracy" simply because they are alleged to have engaged in the same unlawful conduct. *People v. Winter*, 288 N.Y. 418, 422 (1940) (vacating conspiracy conviction because while "[e]ither or both [of] these [defendants] may have" committed the substantive crime, "this is not . . . the same thing as proving that they [] were participants in the general conspiracy charged").

And here, the People offer no evidence that AIC ever agreed with Kornfeld or Kallir to do anything. As noted, AIC did not acquire the Work until nearly a decade *after* Kallir sold it. And as discussed further below, the People's theory is that AIC did no diligence on the history of the Work when accepting it, and thus did not even *know* the Work it acquired in 1966 had been sold by Kornfeld and Kallir nearly ten years prior. Needless to say, AIC cannot have joined a conspiracy it did not know existed.

As noted, AIC discusses the factual and legal infirmities in the People's conspiracy theory in far greater detail in Part III. But for present purposes, it suffices to note that absent evidence establishing tying AIC's acquisition or possession of the Work to New York, or to the asserted "Kornfeld-Kallir Conspiracy" (assuming it existed), there is no theory of this Court's jurisdiction over this dispute. Whatever AIC did or did not do within the state of Illinois is not a matter DANY or the ATU have the ability to pursue or ask this Court to resolve.

The People similarly offer no theory of this Court's jurisdiction to issue the warrant to seize a work located in another state (they certainly offered none in their warrant application). And New York law says just the opposite. *See* N.Y. Crim. P. L. § 690.20 ("A search warrant issued by a district court, the New York City criminal court or a superior court judge sitting as a local criminal court may be executed pursuant to its terms *anywhere in the state*.") (emphasis added). That, too, mandates dismissal of the instant Application and return of the Work to AIC.

The People's Claim Is Time-Barred

There is a second, related problem: the statute of limitations for any claim related to AIC's acquisition of the Work has long since passed. Indeed, that was the core finding of Judge Koeltl in rejecting the Grünbaum Family Members' civil claim of replevin. *Reif*, 2023 WL 8167182, at *5. The People do not mention – let alone dispute – that finding. Nor could they: New York law is clear and well-settled on the point. *See, e.g.*, *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 318 (1991) (finding that "owner whose property had been stolen" could pursue a civil claim of replevin provided the owner did so within "a three-year statute of limitations").

Instead, the People contend that "while the prosecution of an individual may be barred by the statute of limitations, that statute of limitations only applies to people, not things." As the People would have it, "'[o]nce stolen, always stolen' is not just a catchy phrase, but a bedrock of our criminal law." (App. at ¶ 100(c)). Curiously, the People not a single case or other authority for this "bedrock" of New York criminal law, and that is because it is unquestionably wrong.[33] Both criminal and civil actions regarding property alleged to be stolen have applicable statute of limitations, and authorities relied upon by the People say precisely the same thing.

Indeed, *Guggenheim*, the New York Court of Appeals decision upon which the People rely extensively – including for the proposition that "New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it's in the possession of a good-faith purchaser for value," (App. at ¶ 100) – actually holds that New York protects the right of an owner to recover such property, *if they bring a claim within the applicable statute of limitations. See, e.g.*, 77 N.Y.2d at 317-18 (an "owner whose property had been stolen" could pursue a civil claim of replevin within "a three-year statute of limitations," one which "accrues

[33] The case the People do cite – *Depetris v. Warnock*, 2000 N.Y. Misc. LEXIS 428 (Jut. Ct. Mar. 21, 2000) – is not helpful to their position here because the "true owner" asserted a claim well within the three-year statute of limitations.

when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it"). Criminal actions for possession of stolen property must similarly be commenced within five years of the offense. *See* N.Y. Crim. P. L. § 30.10(2).

As noted above, the statute of limitations for any civil claim has passed. That issue has been decided, and the People provide no reason to disturb Judge Koeltl's finding in that regard. Indeed, they do not mention it. The People may claim the civil statute of limitations does not apply in this "criminal" proceeding, but that is yet another issue on which there is no authority. There is no question that the criminal statute of limitations would apply to a prosecution, but the People have not commenced a prosecution. They have asked this Court to adjudicate ownership under Section 450.10, to determine title, a quintessentially *civil* matter. And, as noted above, the New York Court of Appeals has made clear a civil proceeding is the appropriate forum for this type of dispute, and the New York Attorney General has previously concluded that the civil three-year statute of limitations *should* apply in these circumstances. 1973 N.Y. Op. Atty. Gen. No. 160 (July 19, 1973).

But the Court need not ultimately resolve that issue because the claim is time-barred under the People's criminal theory as well because, as noted above, the People have no cognizable theory of how the "Kornfeld-Kallir Conspiracy" extended beyond the 1950s. The People contend that a "conspiracy to traffic and distribute art is, by definition, ongoing as long as the art that is being trafficked is still being displayed and sold at prices that are possible if the artwork is legal." (App. at ¶ 106). Once again, the People cite no case or authority for that proposition, and it is wrong. Indeed, as the People themselves acknowledge elsewhere, a conspiracy ends when "the objectives of the conspiracy 'either [fail] or [are] achieved.'" *People v. Canales*, 927 N.Y.S.2d 289, 293 (Sup. Ct. Kings Cty. 2011) (quoting *Krulewitch v. United States*, 336 U.S. 440, 442 (1949)). Here,

even assuming the People could establish a conspiracy between Kornfeld and Kallir to possess and traffic stolen artwork, the objectives of that purported conspiracy were achieved and, thus, the conspiracy completed, when Kallir successfully sold the works obtained from Kornfeld in the late 1950s. At that point, the members of conspiracy no longer possessed and had already "trafficked" the works. Thus, charges based on that alleged conspiracy would have been timely through the early 1960s, at the latest.

Faced with that obvious and insurmountable obstacle, the People try to suggest at various points that ongoing possession by AIC and the ten other institutions, museums and collectors from whom the People seized Schiele works in the last year somehow extended the conspiracy as "overt acts" in furtherance of the conspiracy. As a threshold matter, and as detailed in Part III, below, the People have not established that ongoing possession by AIC or any other institution is criminal. On the contrary, AIC has lawfully possessed the Work for decades, and that lawful ownership was recently affirmed by a federal court. But leaving that issue aside, for present purposes, to extend a conspiracy, "overt acts" must be taken by *members* of the conspiracy. *See People v. Caban*, 5 N.Y3d 143, 149 (2005) ("[C]onspiracy consists of an agreement to commit an underlying substantive crime . . . , coupled with an overt act *committed by one of the conspirators* in furtherance of the conspiracy.") (citing Penal Law §§ 105.15, 105.20)); *People v. Berkowitz*, 50 NY2d 333, 341 (1980) ("'[O]nce an illicit agreement is shown, the overt act *of any conspirator* may be attributed to other conspirators to establish the offense of conspiracy'" (quoting *People v. McGee*, 49 N.Y.2d 48, 57 (2d Dept 1979)). The People do not and cannot establish that AIC, or any one of the other museums, institutions or collectors, was a member of the alleged conspiracy. As such, whatever AIC did or did not do in Illinois since 1966 would not extend the statute of limitations over the acts of the "Kornfeld-Kallir Conspiracy."

And much as with jurisdiction, the People's failure to establish that this action is within the statute of limitations is no small technicality: statutes of limitations serve important purposes, including to promote the timely resolution of disputes and to ensure courts can consider those issues when evidence still exists and when witnesses are still alive. The People have been aware of Fritz Grünbaum and his collection of Schiele works, including *Russian War Prisoner*, since at least 1998 when DANY pursued one of those works, *Dead City III*, in the action that led to *MoMA*. Issues surrounding the Schiele collection have been extensively litigated in state and federal court in the decades since then. And yet, the People waited until December 2022 to commence this investigation. In a footnote, the People note that the ATU did not exist in the late 1990s. (App. at ¶ 131 n.88). But the internal organization of personnel within DANY is immaterial; it is clear that *someone* at DANY was tasked with the responsibility for investigating these very issues at least as early as 1998, and the ATU has itself been in existence since at least 2017.

Moreover, AIC has been extraordinarily prejudiced by that delay. Numerous witnesses whose memories and testimony would be central to the issues in dispute have passed away in the intervening years, none more central than Kornfeld himself who passed just before ATU opened the investigation in 2022. Members of the AIC staff involved in the acquisition of *Russian War Prisoner* have also passed, and documents that might have existed 25 years ago, may no longer. Indeed, in denying the Grünbaum Family Members' claims against AIC, Judge Koeltl observed that the Grünbaum Family Members' delay in pursuing these claims "resulted in deceased witnesses, faded memories, lost documents, and hearsay testimony of questionable value." *Reif*, 2023 WL 8167182, at *8 (quoting *Bakalar II*, 819 F. Supp. 2d at 306).

To the extent the People acknowledge the concern at all, it is to preemptively assert that the doctrine of "laches" – that is, the argument that a prejudicial delay in pursuing a claim warrants

dismissal – "does not apply in a criminal case." (App at ¶ 137). But as noted above and throughout, the People have not brought a criminal case. The People, rather, have asked this Court to hold a "civil-like proceeding" to determine ownership. Moreover, even criminal cases, when brought, are not immune from dismissal on the basis of undue delay in pursuing them. *See, e.g.*, *People v. Regan*, 39 N.Y.3d 459, 466 (2023) ("Prosecutors may not needlessly delay without an 'acceptable excuse or justification,' and a sufficiently lengthy unexplained delay may require us to dismiss the indictment altogether."); *People v. Singer*, 44 N.Y.2d 241, 254 (1978) ("[I]f commencement of the action has been delayed for a lengthy period, without good cause, the defendant may be entitled to a dismissal although there may be no showing of special prejudice"). Indeed, New York courts regularly dismiss criminal cases where there are unexplained delays in pursuing them, delays far shorter than the nearly 25-year lapse since the People first expressed interest in the Grünbaum art collection. *See, e.g.*, *Regan*, 39 N.Y.3d at 473 (dismissing indictment where People did not "offer any explanation for 31 months of delay" in bringing criminal case); *People v. Cousart*, 58 N.Y.2d 62, 68 (1982) ("[A] five-year delay prior to trial raises a presumption of prejudice"); *People v. Staley*, 41 N.Y.2d 789, 790-793 (1977) ("wholly unexplained 31-month delay" was an "extraordinary time-lapse" that "would, without question, be cause for dismissal of the indictment" even without any showing of prejudice). And while no specific showing of prejudice is even required where the People lack good cause for pursuing a criminal action, *Regan*, 39 N.Y.3d at 471 there can be no question AIC has been meaningfully prejudiced by the delay here.

To be clear, the Court need not reach the issue of whether the People's delay in pursuing the case itself warrants dismissal. It can reach the same result through straightforward application of either the civil or criminal statute of limitations. But it is underscore the significant weight New

York courts rightfully attach to the timeliness of the People's action in pursuing a criminal proceeding and the need for rigorous application of the applicable statute of limitations.

Part III

The Work is Not Stolen

Alternatively, should the Court decide in its discretion to proceed with a "quasi-civil" proceeding to adjudicate the ownership dispute between the Grünbaum Family Members and AIC all over again, then the Court should quash the previously-entered seizure warrant and order *Russian War Prisoner* returned to AIC, which has demonstrated "satisfactory proof of [its] title." N.Y. Penal Law § 450.10(5). As detailed above and not seriously disputed by the People, AIC acquired *Russian War Prisoner* for consideration paid pursuant to an arms' length transaction from a gallery in Chicago, Illinois in 1966. (Ex. 62). The People's theory that the Work is "stolen property" is factually unsupported and wrong. Moreover, even if the People could establish the Work was "looted" in Europe 80 years ago, they fail to tie that criminality to AIC's lawful possession today.

AIC Acquired Lawful Title Through Adverse Possession

While AIC strenuously disagrees with the suggestion that the Work was or is "stolen" property – and directly responds to the People's theory below – before delving into the events of the 1930s and 40s, there is a more straightforward path to rejecting the People's theory and affirming AIC's lawful ownership: under the well-established doctrine of adverse possession, AIC has acquired title because AIC has maintained continuous, open, notorious and hostile possession of the Work for years.

Under New York law, title to both real and personal property can be acquired through adverse possession. *See Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 Civ. 1226(DAB), 2005 WL 1153752, at *6 (S.D.N.Y. May 13, 2005) (applying New York law);

O'Neill v. Gen. Film Co., 157 N.Y.S. 1028, 1036-37 (1st Dept 1916); 2 N.Y. Jur. 2d Adverse Possession § 97. "The standards for adverse possession of real and personal property are the same." *Soho Int'l Arts Condo.*, 2005 WL 1153752, at *6; *see also Rabinof v. United States of America*, 329 F. Supp. 830, 841 (S.D.N.Y. 1971). Accordingly, to acquire property through adverse possession, possession must be "actual, open and notorious, exclusive, hostile, under claim of right, and uninterrupted" for at least three years. *Id.*; *see also* N.Y. C.P.L.R. § 214(3) (statutory period in New York for adverse possession of personal property is three years); *Soho Int'l Arts Condo.*, 2005 WL 1153752, at *6 (same).

Here, AIC's possession of *Russian War Prisoner* meets each requirement. *First*, AIC's possession has been "actual, open and notorious" for decades. AIC purchased the Work from B.C. Holland Gallery in 1966, at which point AIC became the exclusive owner of the Work, and, as the People themselves allege, AIC has prominently advertised its possession of *Russian War Prisoner*, which has appeared in catalogues and public exhibitions for decades and on AIC's website since at least 2007. *Cf. Weinstein Enters. v. Pesso*, 231 A.D.2d 516, 517 (1996) (possession that is "sufficiently visible such that a casual inspection by the owner of the property would reveal the adverse possessor's occupation and use thereof" establishes elements of adverse possession). Notably, as detailed above and further below, the Grünbaum Family Members have been aware of AIC's exclusive possession of *Russian War Prisoner* since at least 2005, when, through counsel, they made a demand for its return. (Ex. 68).

Second, and related, AIC's possession has been exclusive and under claim of right as demonstrated by AIC's refusal of the plaintiffs' demand: counsel for the Grünbaum Family Members asserted substantially the same claims raised by the People and demanded, on January 24, 2006, that AIC turn over *Russian War Prisoner*, (Ex. 70), and, by letter dated February 3,

2006, AIC asserted its lawful possession of the Work and informed the Grünbaum Family Members it was "declin[ing] to turn over . . . the artwork[]." (Ex. 72). It is well established that a demand and refusal is sufficient to establish ownership adverse to another claimant of title. *See, e.g.*, *Est. of Becker v. Murtagh*, 19 N.Y.3d 75, 81-82 (2012); *Walling v. Przybylo*, 7 N.Y.3d 228, 232 (2006).

AIC continued its open possession of the Work since the demand and refusal to the present, and the Grünbaum Family Members' failure to act within three years of AIC's February 3, 2006 perfected AIC's title. *See Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 1999 WL 673347, at *4 (S.D.N.Y. Aug. 30, 1999) (applying New York law). Judge Koeltl – in rejecting the Grünbaum Family Members' civil lawsuit – made all of these factual findings. *See Reif*, 2023 WL 8167182, at *2 ("On January 24, 2006, as part of the *Bakalar* litigation, Fischer and Vavra made a demand on the Art Institute of Chicago, the defendant in this case, to return Russian Prisoner of War, the Artwork at issue in this case. On February 3, 2006, the defendant declined to return the Artwork.").

Counsel for AIC informed the People of all of the above prior to the People's decision to obtain a seizure warrant for *Russian War Prisoner*. Yet the People make no mention of this independent legal basis upon which AIC has good title to the Work – either in their *ex parte* seizure warrant application or in the instant Turnover Application – which, under the unambiguous language of Section 450.10, entitles AIC to its prompt return.

Nor does the People's repeated mantra that "a thief can never lawfully acquire good title" alter the result because the New York Court of Appeals has long distinguished adverse possession from possession by a "thief." *See Lightfoot v. Davis*, 198 N.Y. 261, 267 (1910). As the New York Court of Appeals has explained adverse possession, once established, overcomes the proposition

that "a thief can acquire no title to the stolen property" because unlike a thief, who "obtains possession of property *secretly* by a common-law larceny and *conceals that possession*," one who obtains title through adverse possession does so "under claim of right, and open, public and notorious." *Id.* (emphasis added). Here, of course, AIC has done just that. *See also Rabinof*, 329 F. Supp. at 842 ("[W]here where one has had the peaceable, undisturbed, and open possession of it, under an assertion of ownership, for the [statutory] period which bars an action for its recovery by the real owner, he has acquired a good title or at least a superior title to that of the owner.") (applying New York law, citing *Lightfoot*, 198 N.Y. at 267).

Notably, the primary case relied on by the People for the proposition that "'New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it's in the possession of a good-faith purchaser for value,'" (App. at ¶ 100), reaches the same conclusion. As discussed above, the New York Court of Appeals held in *Guggenheim* that an "owner whose property had been stolen" could pursue a civil claim of replevin (which, of course, is the appropriate remedy for this quintessentially civil dispute) provided the owner did so within "a three-year statute of limitations," one which "accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it." *Lubell*, 77 N.Y.2d at 317-18 (1991). After that three-year period runs, the asserted "true owner" can no longer pursue a claim. *See id.*

By contrast, no New York court has ever held, as the People would have it, that "[o]nce an artwork is proven to be stolen, no matter how many times it has changed hands, it can be legally seized and returned to its legal owner." (App. at ¶ 100). Nor have they endorsed "once stolen, always stolen" which the People describe – again with citation to no authority – as "a bedrock of

our criminal law." (*Id.*). To the contrary, such a rule would be completely *inconsistent* with the authority the People do cite and with the well-established law of this State.

In this "civil-like proceeding" to determine which of the competing parties has "satisfactory proof of title," adverse possession provides a straightforward answer rooted in long-standing New York law. Adverse possession causes title to shift, and thus even assuming, contrary to the weight of the evidence, the Work was "looted" in Europe in the 1930s or 40s, decades prior to AIC's acquisition of the same, AIC's current title has been perfected through adverse possession.

Russian War Prisoner **Is Not and Has Never Been "Stolen Property"**

Alternatively, should the Court proceed to determine what happened in Europe in the 1930s and 40s, the conclusion is the same: the People have not come close to meeting their burden of establishing the Work constitutes stolen property. Indeed, the progression of the People's argument – from asserting that *Russian War Prisoner* ever was, at any point, "stolen property," to their claim that AIC's current possession "is the culmination of a multinational conspiracy" to do the same (App. at ¶ 97) – fails at every step along the way.

Starting with that burden, the People contend that because Section 450.10 is silent on the question of burden of proof, the Court should infer that the legislature meant for a relaxed preponderance of the evidence standard to apply. That proposition is, to put it mildly, debatable: this entire proceeding exists solely because the People have invoked *criminal law* and the authority of New York's *criminal courts*. Moreover, the entire premise of the People's theory is that a crime occurred, a context in which, of course, the prevailing burden is proof beyond a reasonable doubt, which requires that the proof "satisfies the judgment and consciences of the jury, as reasonable [individuals], and applying their reason to the evidence before them, that the crime charged has

been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible." *Victor v. Nebraska*, 511 U.S. 1, 12 (1994) (internal quotation marks omitted) (citing *Commonwealth v. Costley*, 118 Mass. 1, 24 (1875)); *see also* N.Y. Criminal Jury Instr. 2d Penal Law ("Proof of guilt beyond a reasonable doubt is proof that leaves you so firmly convinced of the defendant's guilt that you have no reasonable doubt of the existence of any element of the crime or of the defendant's identity as the person who committed the crime."). There is thus good reason to believe the People should be required to prove at least the existence of a crime – that is, the alleged looting in Europe 80 years ago – under the traditional beyond-a-reasonable-doubt standard. Notably, the People at various points in the Application seem to acknowledge as much. (*See, e.g.*, App. at ¶ 113) (noting that to establish criminal possession of stolen property "[t]he People would be required to prove . . . from all of the evidence in the case, *beyond a reasonable doubt*, each of the following three elements . . . .") (emphasis added).

But even assuming the more relaxed preponderance-of-the-evidence standard in this "civil-like proceeding," the People would nonetheless bear the burden of establishing "evidence that is sufficient to 'produce a reasonable belief in the truth of the facts asserted.'" *People v. M.M.*, 63 Misc. 3d 772, 779 (N.Y. Co. Ct. 2019) (internal citation omitted). Where, as here, a factfinder is presented with competing theories and evidence, the preponderance standard looks to where "the greater part of the believable and reliable evidence" lies, *People v. J.W.*, 63 Misc. 3d 1210(A), at *3 (N.Y. Sup. Ct. Kings Cty. 2019), and requires the People to "prove that something is more likely true than not true." *Id*.

The People meet neither standard. Under New York law, "[a] person is guilty of criminal possession of stolen property . . . when he *knowingly* possesses stolen property," N.Y. Penal Law § 165.40 (emphasis added), and for any property to be "stolen," it must have been "wrongfully

take[n], obtain[ed], or with[e]ld from an owner thereof," N.Y. Penal Law § 155.05(1)(5). Even assuming property was "stolen," the offense of criminal possession of stolen property clearly requires establishing that the possession was *knowing* – that is, the People must show the possessor to be "aware that" at the property was. "wrongfully take[n], obtain[ed], or with[e]ld" from its owner at the time of possession. N.Y. Penal Law § 15.05(2). As the people concede, innocent owners in possession of works asserted to be "stolen" are not guilty of criminal possession of stolen property. (App. at ¶ 100). It is the People's burden to prove "beyond a reasonable doubt" that (i) the defendant knowingly possessed stolen property (ii) with intent to benefit himself/herself; and (iii) that the value of such stolen property exceeded one million. N.Y. Penal Law § 165.40.[34]

As to the first element – the *sine qua non* of a "stolen property" claim – the People contend they have "painstakingly laid out the facts from which it is clear the Nazis wrongfully took, obtained and withheld *Russian War Prisoner* from its lawful owner, Fritz Grünbaum, before they murdered him at Dachau." (App. at ¶ 98). Not so. There is no evidence the Work was ever seized by the Nazis. Not one document or witness establishes as much, and in particular, notwithstanding the meticulous records kept by the Nazis over the years, a document reflecting the seizure of the Grünbaum art collection has never surfaced. Given that the burden is on the People, that alone is sufficient to find the People have failed to meet it. The People certainly come nowhere close to establishing beyond a reasonable doubt that "the Nazis wrongfully took" the Work, nor do they even meet the preponderance standard.

[34] The predecessor law to N.Y. Penal Law § 165.40, N.Y. Penal Law § 1308, was applicable until 1986 and would be applicable here to all transfers of the Work. While the law is substantially similar to the current version, case law cited herein at times refers to Section 1308.

By contrast, Kornfeld's testimony and documents provide strong direct and corroborated evidence that the Work was *not* taken by the Nazis but instead remained within the Grünbaums' extended family and sold to Kornfeld lawfully in 1956 by Mathilde. Kornfeld's testimony on that point was clear and was corroborated by extensive, contemporaneous correspondence with Mathilde and ledgers reflecting the sales. And unlike the People's speculative theory of how the Work made into Kornfeld's 1956 exhibition, Kornfeld's testimony and documents constitute *admissible* and *direct* evidence that the Court can – and in this case certainly should – rely upon. As discussed extensively above, the People's attacks on Kornfeld's testimony and documents do not withstand scrutiny, which is why Judge Pauley, presiding over the trial at which that testimony was offered, credited Kornfeld's account and concluded the Grünbaums' art collection "remained in the Grünbaum family's possession" and "was not looted by the Nazis." *Bakalar II*, 819 F. Supp. 2d at 298-99. And, as discussed, the Austrian Government has twice reached the same conclusion following their investigations. (*See* Exs. 74; 75).

The People's alternative theory – that Kornfeld obtained the Work from Cornelius Gurlitt fails, as discussed above at pages 63-64. Under the People's own theory, Gurlitt did not acquire the "vast trove" of allegedly looted artworks until *after* Kornfeld's acquisition and exhibition of the Work. Gurlitt thus could not possibly be the source of Kornfeld's acquisition of it. (*See* App. at ¶ 108).

Presumably recognizing the thinness of their evidence of looting, the People then pivot and claim that "*regardless* of what happened after September 8, 1938," – the date Lilly put the couples' possessions into storage – the Work is "stolen" because "Fritz Grünbaum did not cease to be the lawful owner of *Russian War Prisoner*." (App. at ¶ 100) (emphasis added). It is not clear what the People mean to suggest by saying as much. But, certainly, to the extent the People mean to

challenge Lilly's transfer of their works to Mathilde or Mathilde's possession of the same because Fritz "did not cease to be the lawful owner," the argument can be swiftly rejected. In this *criminal* proceeding, the People would need to demonstrate that Lilly – by trying to move the Grünbaums' possessions out of the country during a time of war – or Mathilde receiving the same from her sister would or should have viewed themselves as having done something *illegal.* The People cannot advance such a position, and they do not seriously try. Notably, the People's theory *requires* finding that both Lilly and Fritz were co-owners of their art collection – descendants from Lilly's side of the family are among the Grünbaum Family Members seeking to recover the Work here, and would have no claim otherwise – and if, as AIC suggests the record supports, Lilly was able to get the Work to her sister for safekeeping, there is no reason to believe either Lilly or Mathilde should have viewed that as "wrongful" act, let alone that Mathilde should have perceived herself as in possession of "stolen property" after the War and her sister's death.

In sum, the People have failed to meet their burden of establishing the Work was ever "stolen" or ever constituted "stolen property." Having determined the People's theory failed at step one, the Court could simply stop there. There can be no "Kornfeld-Kallir Conspiracy" – at least as relevant to this matter – if the Work were never "stolen" and similarly any challenge to AIC's ongoing possession of the Work would fail, too. Nevertheless, we proceed to address the next and equally flawed steps in the People's legal theory.

There Was No "Kornfeld-Kallir Conspiracy"

There is a second problem with the People's theory: the People have no evidence that either Kornfeld or Kallir had knowledge the Work was "wrongfully obtained." And, as argued above, there is enormous evidence to the contrary – that is, evidence that neither believed the Work to be nor was aware of the possibility that the Work was "stolen." For example, as discussed, both

gallerists publicly advertised their exhibitions of works by Schiele and created catalogues to document the same, and both documented their purchases and sales through the maintenance of receipts and ledgers. And when questioned decades later, Kornfeld came forward *voluntarily* to provide testimony regarding his acquisition of the works from Mathilde and his sale of the same to Kallir. There is, in sum, no evidence of the sort of "operat[ion] in the shadows" that the People contend to be the hallmark of "[e]very criminal conspiracy." (App. at ¶ 105(a)).

Absent any direct evidence of criminal knowledge or intent, the People instead create, out of whole cloth a scene in which Kornfeld and Kallir were "[d]oubtless exchanging knowing glances" and "asked no questions about such unpleasantries as ownership history. Rather, they asked the only question that seemed to matter to either of them: the price." (App. at ¶ 64(a)). But the People's writing, however creative, is just that – fiction. Kornfeld *did* ask questions, confirming that Mathilde had come into her collection by way of her family, and checking her passport and documentation to confirm her identity:

> **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.

(Ex. 17 at 110:24-112:6; 127:2-9). And while we know less about Kallir's process because he was deceased at the time litigation over the Schiele collection began, he and Kornfeld were longtime business partners – Kornfeld testified that Kallir "bought art from me on a regular basis." (*Id.* at 103:7-14) ("Q. When did you first meet him? A. It must have been during the years following immediately after World War II. Q. And did he purchase art from you after the war? A. Yes. He has bought art from me on a regular basis."). Kallir was not buying artwork off of the back of the

proverbial truck. He traveled to Switzerland and purchased a collection from a gallery that was having a public exhibition of artwork, documented all of the transactions, and sourced the works in his subsequent sales.

The People devote considerable energy to arguing that Kallir must have known some or all of the works belonged to the Grünbaums prior to the War because a number were included in his 1928 exhibition. That may be true – after all, one of the works in Kornfeld's collection, *Dead City III*, had provenance that noted its inclusion in the Neue Galerie Schiele exhibition. But 30 years and likely dozens, if not hundreds of exhibitions later, did Kallir remember that exhibition? Did he remember *every work in* the exhibition? Kallir, of course, had lived through a lot in the intervening years. He had survived the War himself and lost his gallery (and presumably many of his records). Moreover, even assuming he did recall Fritz and the exhibition, that is not a helpful fact for the People's theory: after all, Kornfeld and Kallir both publicly disclosed Fritz Grünbaum's association with *Dead City III* in catalogues for their respective exhibitions, a decidedly unusual thing for either to do if they truly believed the collection of works they were buying and selling to constitute Fritz's unlawfully obtained property.

In sum, the People have no evidence of knowledge by Kornfeld or Kallir that the works were stolen, nor any evidence of the formation of a criminal agreement between them.

There Is No Evidence of an "Ongoing Conspiracy"

More important, for present purposes, even assuming the People could establish a conspiracy between Kornfeld and Kallir to traffic in stolen art, the People's theory of on "ongoing conspiracy" quickly unravels thereafter. Indeed, while the People contend the conspiracy was in "*continuous operation* since at least the 1950s and involves numerous conspirators and many overt and criminal acts," (App. at ¶ 97(b)) (emphasis added), the People do not identify the purported co-conspirators nor present evidence to support a claim that the conspiracy (assuming one existed)

involved anyone beyond Kornfeld and Kallir. The conspiracy certainly does not appear to extend to the ten other museums, institutions or collectors identified last fall who came to possess Schiele works alleged to have been "trafficked" by Kornfeld and Kallir. The People have already publicly announced that none of those museums, institutions or individuals did anything wrong. (*See, e.g.*, App. at Exs. 2, 4, 6, 8, 10, 12, 14, 16) ("DANY represents that DANY has not found any evidence that [these museums, institutions or individuals] or any [ ] affiliates, officers, directors, employees or agents engaged in any criminal activity or wrongdoing in connection with its possession and/or transfer of the Drawing …"). Nor could it include AIC. Indeed, there is no legal or factual basis for asserting that AIC conspired with Kornfeld or Kallir to do anything at all.

As noted above, a conspiracy requires "an *agreement* with another person to engage in or cause that crime to be performed." *People v. Reyes*, 31 N.Y.3d 930, 931 (2018) (quoting William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 38, Penal Law § 105.00)) (emphasis added). Indeed, "it is *fundamental*" to a theory of conspiracy, *Berkowitz*, 50 NY2d at 343 (emphasis added), to establish that each member of the conspiracy "entered into a criminal agreement with at least one other person," *People v. Treuber*, 64 NY2d 817, 818 (1985). "The 'act' of agreeing is concrete and unambiguous as an expression of each actor's intent to violate the law" and "[t]he fact of agreement serves only to unequivocally establish a particular actor's intent to commit the object crime by acting with others." *Caban*, 5 N.Y.3d at 149.

Here, the People do not allege any facts at all in support of a finding that AIC entered into an unlawful agreement – the "fundamental" cornerstone of a conspiracy – with *anyone*. They certainly do not allege such an agreement with either Kornfeld or Kallir. The timeline here is important: as detailed above, Kornfeld sold the Work to Kallir in Switzerland in 1956, and Kallir imported the Work to New York at that time. Kallir then sold the Work in 1957, not to AIC, but

to David Kimball, the private collector in Connecticut, who in turn sold it to Leo Askew, another private collector believed to have resided in Louisiana. Mr. Askew then sold the Work to the B.C. Holland Gallery in Chicago, whereafter, in 1966, the Work was identified and proposed for acquisition by Harold Joachim and funded by a donation from a Chicago-based patron of the museum, Dr. Eugene A. Solow.

The People do not suggest (nor could they) that *any* of those intervening owners – David Kimball, Leo Askew, or B.C. Holland Gallery – were members of the asserted "conspiracy." In fact, as noted, aside from Kornfeld and Kallir, the People identify no other members of the conspiracy at all.

That nine-year gap and series of subsequent transfers dooms the People's theory of "continuing conspiracy" and theory that whatever Kornfeld and Kallir agreed to do in 1957 extended to an unrelated sale in Illinois a decade later. Conspiracies do not make decade-long lurches in time, and, more to the point, there is no evidence to support the notion that AIC, in selecting the piece and accepting the donated funds in 1966, knew it was entering into a criminal conspiracy with gallerists who had owned it a decade earlier. Not a shred. To the contrary, recall the People's theory is that AIC did not look into the history of the Work *at all* in acquiring it – that "no one ever asked about *Russian War Prisoner's* provenance" – and therefore would not have even *known* at the time AIC acquired the Work that it had come via Kornfeld and Kallir. (App at ¶ 128(a)).

Alternatively, the People devote considerable energy to arguing that AIC failed to conduct "reasonable inquiry" in acquiring the Work in 1966 – and therefore that knowledge should be imputed to AIC that the Work was "stolen." N.Y. Penal Law § 165.55. And to be clear, as discussed above and further below, AIC strongly disputes the People's factually and legally baseless theory under Penal Law § 165.55 that it failed to conduct "reasonable inquiry" with respect to *Russian War Prisoner*. But even assuming that provision applies, it would not create a "conspiracy" with men who had possessed the Work ten years prior. It would establish, at most that when acquiring the Work (in Illinois) in 1966 from a seller (also in Illinois), AIC should have known the Work was "stolen." And nothing about those facts or that transaction would have anything to do with Kornfeld, Kallir or the "Kornfeld-Kallir Conspiracy."

Nor do the People's other arguments in support of the "ongoing conspiracy" fare any better. In particular, to the extent the People contend that "the continued possession of stolen property by all the other museums, universities, institutions, and collectors from whom this Court in 2023 ordered the property seized also constituted overt acts extending the conspiracy" that will certainly come as news to those other museums, universities, institutions and collectors, all of whom, as noted above, DANY has stated did nothing wrong. None are identified as members of the "Kornfeld-Kallir Conspiracy" and as such, their acts cannot be overt acts in furtherance of the conspiracy or that extend the conspiracy's duration.

Finally, while the People use phrases like "community of purpose" or "willful blindness,"[35] neither is a substitute for evidence establishing membership in a conspiracy. While "willful

[35] The People contend "[o]ur law requires only that there be a '*community of purpose*.'" (App at ¶ 109(b) (citing *People v. Viera*, 172 A.D.3d 762, 763 (2d Dept 2019) (quoting *People v. Scott*, 25 N.Y.3d 1107 (2015))). However, *Scott* was describing accomplice liability, not conspiracy, and *Viera* concluded that "the jury could rationally infer from the evidence that defendant *and the principals* shared a 'community of purpose.'" 172 A.D.3d at 763 (emphasis added). Neither case drew into question the longstanding principal that a conspiracy requires evidence of agreement.

blindness" can, *if proven*, establish knowledge for purposes of a substantive crime, one cannot join a conspiracy through "willful blindness." Membership in a conspiracy requires actual acts or communications evidencing an agreement. *Caban*, 5 N.Y.3d at 149 (noting that New York law requires an "'act of agreeing'" that is "concrete and unambiguous as an expression of each actor's intent to violate the law"); *see also United States v. Reyes*, 302 F.3d 48, 55 (2d Cir. 2002) ("When a defendant has been charged with conspiracy . . . the jury may use the conscious avoidance doctrine to establish the defendant's knowledge of the aims of the conspiracy but . . . may *not* use it to establish the defendant's intent to participate in the conspiracy") (emphasis added). And as noted throughout, the People have no such evidence that anyone aside from Kornfeld and Kallir knowingly joined in what the People themselves repeatedly call the "Kornfeld-Kallir Conspiracy." Instead, that conspiracy, to the extent it existed at all, ended when its "objectives . . . had been achieved.'" *Canales*, 927 N.Y.S. 2d at 293 (quoting *Krulewitch*, 336 U.S. at 442). Here, that entailed Kallir's successful sale of the last the works he and Kornfeld (allegedly) conspired to traffic together in the late 1950s, at which point the conspiracy ended.

And as noted in Part II, the lack of evidence – or even a clear theory – of how the "Kornfeld-Kallir Conspiracy" extended beyond Kallir's sale of the Schiele collection in 1957 to encompass a sale nearly decade later in another state cuts to the heart of the People's baseless efforts to extend their reach – and that of the New York criminal law – to what is a civil matter between private parties involving property in the state of Illinois. AIC purchased the Work from a gallery in Chicago under circumstances that had nothing to do with Kallir, Kornfeld or whatever the People allege occurred in Europe decades earlier. As such, even assuming the People can establish a "Kornfeld-Kallir Conspiracy," absent evidence tying that conspiracy to AIC's acquisition of the

Work a decade later, the People have no theory of how this Court can revisit AIC's acquisition of *Russian War Prisoner* in Illinois in 1966 nor its ongoing possession of the same in Illinois.

AIC Has Never Knowingly Possessed Stolen Property

Finally, AIC is compelled to respond forcefully to the People's final, baseless effort to create "ongoing" conduct for purposes of persuading this Court that it can today adjudicate the facts of what did – or did not – occur in Europe 80 years ago: the People's contention that AIC has knowingly possessed "stolen property." In particular, the People contend that possession of stolen property is a "continuing crime" and that "the clock only starts at the sale, transfer, or seizure" of the work. (App. at ¶ 136(b)). As such, the People further assert that "AIC's *illegal possession* of *Russian War Prisoner* began in 1966 and terminated on September 12, 2023" when it was seized by the ATU, meaning, as the People would have it, that the five-year statute of limitations applicable to criminal possession of stolen property only began to run on that date. (*Id.*). There are three core problems with the People's argument:

First – and, of course, assuming the Work was ever "stolen," which, as discussed above, it was not – as the People's own logic makes clear, this "continuing crime" only "starts" with the "sale, transfer or seizure," and here the "sale" from which AIC acquired the Work happened in Chicago, Illinois, which is where AIC's "possession" began and has occurred since. AIC did not buy it from a New York individual or entity, nor did AIC's possession occur in any part of New York. As such, the "continuing crime" the People allege did not occur in New York and therefore does not give this Court jurisdiction to address AIC's acquisition or possession of the Work.

Second, the People's theory of AIC's participation in such an offense is incorrect. To allege "illegal possession," the People must prove, beyond a reasonable doubt, *knowing* possession of stolen property, which requires a showing that the possessor was "aware" the property was

"wrongfully take[n], obtain[ed], or with[e]ld" from its owner at the time of possession. N.Y. Penal Law §§ 15.05(2), 155.05(1). There is no evidence that AIC has, at any point, known or believed the Work to be "wrongfully take[n]." N.Y. Penal Law § 155.05(1). On the contrary, AIC's lawful title is well-documented, having acquired the Work from a gallery in Chicago in 1966, and ever since that acquisition, AIC has acted in a manner consistent with its good-faith view of itself as the lawful owner of *Russian War Prisoner*: AIC has long publicly advertised its possession and ownership of *Russian War Prisoner*, has invited students and scholars to visit the Work at its galleries in Chicago, has, through counsel, defended its ownership in numerous arenas, and, most recently, has *successfully* defended its ownership in civil litigation against the Grünbaum Family Members. These are hardly the acts of an institution "aware that" its possession is wrongful. Notably, while the People themselves describe "ensur[ing] that the stolen artwork's owner remains forever concealed" as a "*necessary concomitant*" of art trafficking, (App. at ¶ 105) (emphasis added), AIC has publicly sourced *Russian War Prisoner* to the Grünbaums – the "stolen artwork's owner," as the People would have it – for more than two decades.

The People dispute none of that, nor could they. Instead, their theory of "knowledge" turns on a baseless, unprecedented, and almost certainly unconstitutional misinterpretation of Section 165.55(2), a provision of New York's penal code that provides, in relevant part, that a "collateral loan broker or a person in the business of buying, selling or otherwise dealing in property," is "presumed to know that such property was stolen if [they] obtained it without having ascertained by reasonable inquiry that the person from whom he obtained it had a legal right to possess it." The People's theory appears to be that in acquiring the Work in 1966, AIC failed to conduct "reasonable diligence" therefore can be "presumed" to know the Work was "stolen." As the People concede, there is no case law or statute defining "reasonable inquiry," and no court has ever applied

it to the context of an acquisition of a work of art. But the case law that does exist makes clear how wrong the People's use of the statute is here.

Starting with first principles, presumptions of knowledge in criminal law are disfavored and read narrowly because state and federal constitutional law places the burden of proof exclusively on the People. *See People v. Nowakowski*, 331 N.Y.S.2d 64, 65 (1972); *see also Mullaney v. Wilber*, 421 U.S. 684 (1975) (finding that shifting burden of persuasion to defendant as to material element of the offense violates due process). Accordingly, New York courts have long held that the presumption set forth in Section 165.55(2) is not only a "*rebuttable* presumption," but one that is easily rebutted: all that is required to rebut the presumption is "*any proof* which negates the inference of knowledge." *People v. Walter*, 371 N.Y.S.2d 101, 105-06 (N.Y. Sup. Ct. Kings Cty. 1975) (emphasis added). The standard is low – "the language of the statute may not be used in any way to circumscribe the value or nature of other proof on that subject" – because "any stricter interpretation would render the section infirm when measured by constitutional standards." *Id.*[36]

And as cases the People themselves highlight make clear, the presumption of knowledge set forth in Section 165.55(2) has generally applied where the "person in the business of buying, selling, or otherwise dealing in property" is alleged to have *no information* about where the allegedly stolen goods came from or where that person has taken steps to affirmatively conceal the same. For example, courts have found the presumption to be met where an auto parts business made *no inquiry* as to the ownership of the parts purchased and prepared "no internal documentation of the purchase," *People v. Agnello*, 178 A.D.2d 414, 416 (1991); where a horse

[36] For just these reasons, the People's attempted reliance on *civil* concepts of "due diligence" – which, to be clear, would not result in a different outcome on these facts – are inapplicable. (*See, e.g.*, App. at ¶ 126). The People here rely on a *criminal* statute and, thus, the obvious corollary is that the People are limited by principles applicable to a *criminal* statute.

dealer did not "ask for registration papers . . . obtain a receipt for the purchase nor . . . record the names of . . . sellers," *People v. Landfair*, 191 A.D.2d 825, 826 (3d Dept 1993); and where the defendant "acquired goods under suspicious circumstances" and failed to "turn over . . . business records" during the criminal investigation," *People v. Grossfeld*, 216 A.D.2d 319, 320 (2d Dept 1995).

None of those facts come anywhere near describing AIC's acquisition and possession of *Russian War Prisoner* in 1966. As detailed above, AIC knew the "identity of the seller," B.C. Holland Gallery in Chicago, as well as the identity of the donor who was making the gift of funds, Dr. Solow. Both were well-respected and neither has ever, to AIC's knowledge, been accused of any misconduct. Moreover, AIC documented the sale not only through receipt, but in Board minutes and other corporate documents. That information is precisely the sort of "evidence" needed to easily establish "reasonable inquiry." *Cf. Walter*, 371 N.Y.S.2d at 106 ("The defendants have explained their possession of the tubing. They purchased it from a known buyer at a fair market price. I find that they lacked knowledge that the property was stolen and that they have overcome the statutory presumption of fact.").

The People's position appears to be that Section 165.55(2) requires a gallery or museum – when questioned 60 years after the fact about an acquisition – to come forward with evidence of having conducted an extensive investigation going back *decades* and combing through multiple rounds of prior ownership in foreign countries. That position draws no support from the plain language of the statute or case law. No court has ever agreed that Section 165.55(2) imposes any such obligation in any context, and for good reason: such an interpretation of Section 165.55 would raise the very constitutional burden shifting problems both New York and federal courts have previously sought to avoid. *Mullaney*, 421 U.S. at 703 (shifting burden of persuasion to defendant

as to material element of the offense violates due process); *Walter*, 371 N.Y.S.2d at 105-06 ("any proof" sufficient to rebut presumption because "any stricter interpretation would render the section infirm when measured by constitutional standards").

But there is a more fundamental problem: the People's position that AIC failed to conduct "reasonable inquiry" draws no support from the record before the Court. As noted throughout, the People offer no evidence at all of what "reasonable inquiry" for an art museum in 1966 would or should have entailed. By contrast, AIC has: the Stein Report makes clear that museums in the 1960s typically did *not* conduct detailed historical provenance research into prior owners of works being donated to its collection. (Stein Rep. at 55-56). Stein's opinion in that regard is consistent with the facts of this investigation. As discussed above, at least ten other collectors, institutions and museums acquired Schiele works from this same collection, but none did whatever diligence the People seem to believe would have been necessary to dissuade them from acquiring those works. Yet, the People have (correctly) concluded that none of them – not one – did *anything wrong*. Given those facts, there is no reason before this Court to conclude that the inquiry conducted by AIC in 1966 was atypical, abnormal or unreasonable.

The People's asserted use of the State Department "warnings" about Nazi-era artwork, discussed in Part I, fares no better. Even assuming AIC was aware of those warnings at the time (of which there is no evidence), the People identify no reason that AIC's curator – himself a Nazi refugee – or anyone else at AIC should have been concerned, nearly two decades after the War was over, that a work acquired from Chicago-area gallery and funded by a Chicago-area donor had a concerning wartime provenance. By that point, the Work had been in the United States for nearly a decade. Each of the Work's four prior owners were based in the United States. And in a

time well before the internet or other contemporary research tools, the People provide no basis on which to conclude that "reasonable inquiry" required AIC to go back further.

But there is a third core flaw with the People's logic: whatever the People could say about the "reasonable inquiry" conducted in 1966, AIC's subsequent diligence work in the early 2000s unquestionably satisfies that standard and rebuts any presumption of "knowledge" under the Penal Code. Recall that in 2002, in light of then-evolving industry standards, AIC conducted additional extensive diligence on the Work that *did* include going back decades and looking into in prior owners in foreign countries. AIC conducted thorough research on published histories of the Work – reflected in its production of the same to DANY as part of this investigation – and made direct contact with Kornfeld, who, at the time, was the only known living person with direct knowledge of the provenance of the Work. Kornfeld provided the same history he provided under oath in *Bakalar* – i.e., that the Work stayed in the family and was sold to him by Mathilde. AIC credited that account and updated its provenance research, which remains consistent with the current conclusions of AIC's provenance expert, who has conducted additional exhaustive research in Europe.

There can be no serious question that AIC's process in 2002 – extensive research and direct contact with the only living person with direct knowledge of the history of the Work – constitutes "reasonable inquiry" under New York law. The People seek to discredit those efforts based on "what we know about Kornfeld's criminal behavior and lack of credibility." (App. at ¶ 131(b)). But exactly what did AIC know "about Kornfeld's criminal behavior and lack of credibility," certainly in 2002? Kornfeld was a very well-respected gallerist and art historian whose publications span a wide range of topics. And while, as noted, there is no case law defining "reasonable inquiry" for purposes of Section 165.55(2), it cannot possibly be that, under New York

criminal law, a museum can be *presumed* to have criminal knowledge when relying on an account that a federal judge also credited and adopted. As such, even assuming the People could meet their burden of proving AIC failed to conduct reasonable inquiry in 1966 (which they cannot), AIC's subsequent diligence would more than suffice to rebut that presumption, terminating, at least as of 2002, any evidence of *knowing* possession of "stolen property" and thus the People's theory of an ongoing offense.

And, of course, in November 2023, AIC successfully litigated its ownership of the Work with the Grünbaum Family Members, which was subsequently reaffirmed this February, in which the Southern District of New York found AIC to be "good-faith possessor," dismissing the Grünbaum Family Members claims. *Reif*, 2024 WL 838431, at *3. Notably, Judge Koeltl addressed the very theory the People espouse here, concluding:

> Had it been so clear that the Artwork was stolen, the plaintiffs would have made a demand sooner than forty years after the defendant acquired the Artwork. Indeed, the [Grünbaum Family Members]' own allegations detail the difficulty of uncovering the provenance of the Artwork and other works that belonged to Grünbaum.

Id.

In sum, there is simply no basis under Section 165.55(2) to find that AIC failed to conduct "reasonable inquiry" in 1966, or, in the alternative, has failed to present "*any proof*" necessary to rebut the presumption and "negate[] the inference of knowledge." *Walter*, 371 N.Y.S.2d at 105-06 (emphasis added). Indeed, if not in 1966, AIC's efforts in the early 2000s unquestionably satisfy the relatively low standard set by this *rebuttable* presumption.

Which leads to the final problem with the People's attempted use of the "reasonable inquiry" provision set forth in Section 165.55(2): the People's issue in this case is not really with the scope of inquiry that AIC conducted, but with the information AIC received in response. Had AIC, in 1966, traced the Work back five prior owners to Kornfeld in Switzerland, Kornfeld

presumably would have told AIC then what he said decades later: he lawfully obtained the Work from Mathilde who inherited it from her family. That the People, through a full grand jury investigation, believe in 2024 that Kornfeld is lying does not mean a "reasonable inquiry" was not conducted; indeed, even assuming the People are *right* about Kornfeld, museums are not prosecutors; they cannot issue subpoenas or send agents around the world to compel witnesses to speak with them. And New York's criminal law does not impose such obligations on them, either. That its earlier findings may have been wrong – even if true – does not render AIC's prior inquiries unreasonable.

None of the above is relevant given the People's failure to establish the Work was ever "stolen," or that, even if it was "stolen," AIC had anything to do with the "Kornfeld-Kallir Conspiracy." But as the People concede, innocent owners in possession of works asserted to be "stolen" are not committing criminal possession of stolen property. (App. at ¶ 100). The People's assertions aside, there should be no question that AIC is and has always been an innocent owner of a Work it lawfully acquired from a Chicago gallery over two decades after the end of World War II. There is no evidence at all – and no basis under New York law – to conclude otherwise. Judge Koeltl has already concluded as much in resolving the Grünbaum Family Members' civil suit. And, as such, AIC's long-time possession of the Work does nothing to further the People's untimely theory of a crime that allegedly occurred 80 years prior to the instant Application.

The Court Should Hold a Hearing

There are multiple grounds on which this Court can and should simply deny the People's Application on the papers and return the Work to AIC as lawful owner. Those include finding: (1) that Section 450.10 does not authorize a criminal court, in the absence of a pending criminal case, to resolve disputed issues of ownership; (2) the People have failed to establish the jurisdiction of

this Court to resolve ownership of a work of art bought in Illinois and possessed in Illinois; (3) the People have failed to establish that the People's request is timely; and (4) AIC has established lawful title under the well-established doctrine of adverse possession and based on facts not meaningfully in dispute. The Court could similarly conclude, on the basis of the parties' written submissions, to (1) defer to the finding of the very recent civil litigation between the Grünbaum Family Members and AIC over the Work, which as discussed extensively above, was resolved in AIC's favor; or (2) the conclusions of the Hon. William Pauley, who presided over the *Bakalar* trial in which Kornfeld gave testimony, who had the benefit of the full factual and evidentiary record, and who concluded based on the same that the Grünbaum family art collection "remained in the Grünbaum family's possession" and "*was not looted by the Nazis*." *Bakalar II*, 819 F. Supp. 2d at 298-99 (emphasis added).

However, if the Court intends to entertain the People's request to re-open those issues that have been previously litigated on multiple occasions and adjudicate the factual allegations that give rise to the People's theory that the Work was "stolen," AIC respectfully submits it should do so through a hearing, or at least a final process that requires the People to comply with the rules of evidence, and to prove their case solely based on the same. Notably, while the People tell the Court that no hearing is needed, when the People have been challenged before, they have acknowledged the obvious – that due process requires more. In particular, in the last known contested Turnover Application brought by the ATU, the People's position was as follows:

> 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 . . . ."

(*See* Ex. 3 at 11).

So too here.

Conclusion

For the reasons set forth above, AIC respectfully requests the Court deny the People's Turnover Application, vacate its previously entered seizure warrant, and order the Work returned to AIC, its lawful owner. In the alternative, AIC respectfully requests the Court schedule a hearing or develop any other procedure as the Court may deem appropriate for the People to attempt to meet their burden under the applicable rules of evidence and subject to all applicable rules of discovery.

Dated: April 23, 2024
New York, New York

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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 **ORDER**

Having considered the Application for Turnover Order of Assistant District Attorney Matthew Bogdanos dated February 22, 2024, and brief in opposition and accompanying exhibits of Respondent Art Institute of Chicago ("AIC") dated April 23, 2024, it is HEREBY ORDERED that:

1. This Court's warrant dated September 12, 2023 authorizing the New York County District Attorney to seize the drawing *Russian War Prisoner* by Egon Schiele, dated 1916, watercolor and pencil on paper, measuring 17 ¼ × 12 ¼ inches, and valued at approximately $1,250,000 (the "Work"), is vacated; and

2. The Work shall be immediately returned to AIC.

Dated: _____

_____
J.S.C.