No. 18-0634-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,

Plaintiff-Appellant,

v.

THE METROPOLITAN MUSEUM OF ART,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF PLAINTIFF-APPELLANT FOR PANEL REHEARING AND REHEARING *EN BANC*

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INTRODUCTION AND STATEMENT OF BASIS

Pursuant to Federal Rules of Appellate Procedure 35 and 40, and the local rules of this Court, Petitioner Laurel Zuckerman, as Ancillary Administratrix of the estate of Alice Leffmann ("Petitioner"), respectfully submits this Petition for Rehearing and Rehearing *En Banc* of the decision by the Panel in *Zuckerman v. The Metropolitan Museum of Art*, 2019 WL 2607155 (2d Cir. June 26, 2019) (the "Decision")[1]. As shown in Point I below, rehearing is warranted because the Panel misapprehended or overlooked critical facts and law material to an evaluation of a laches defense under New York law. As shown in Point II below, rehearing *en banc* is warranted because the Decision conflicts with the decision of the United States Supreme Court in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) and because this proceeding involves the question of whether the Holocaust Expropriated Art Recovery (HEAR) Act of 2016 preempts the application of a laches defense, which raises issues of exceptional importance under both Federal jurisprudence and United States foreign policy.

STATEMENT OF THE CASE

Petitioner is the great-grandniece of Paul and Alice Leffmann, a Jewish couple residing in Germany until the Nazis rose to power and ravaged all semblance of

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[1] Citations to pages of the Decision herein refer to Dkt. 167-1. Citations to A-___ refer to the Joint Appendix (Dkt. 49).

peace and normalcy. In June 1938, after having fled Germany and after the Nazis forcefully stripped them of almost all their wealth, their livelihood and their property, and in order to raise funds *needed* to finance their flight from genocidal persecution, Paul Leffmann sold an extraordinary artwork by Pablo Picasso, *The Actor* (the "Painting"), under duress for well below its value, to French art-dealers who exploited the mounting life-and-death pressures facing the Leffmanns. (A-31-32, ¶¶1-3)

Through the underlying action, Petitioner seeks to regain rightful possession of the Painting on behalf of the estate of Alice Leffmann. The Painting is currently in the permanent collection of, and on display at, the Metropolitan Museum of Art (the "Museum").

REASONS TO GRANT REHEARING

In its Opinion of February 7, 2018, the District Court dismissed the Complaint for failure to allege duress under New York law. The District Court did not address the Museum's arguments as to the statute of limitations and laches.

Exercising its *de novo* power of review, the Panel did not address the District Court's determination regarding duress, but rather held that Petitioner's claims are barred by the doctrine of laches, an issue not considered by the District Court. This determination, however, rested on demonstrable errors of fact and law. Moreover, the Decision ruled that the HEAR Act does not preempt the application of a laches

defense, which conflicts with the decision of the United States Supreme Court in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) and raises issues of exceptional importance concerning the interpretation of a Federal statute and the application of United States foreign policy.

I. The Determination that Petitioner's Claims Are Barred by the Doctrine of Laches Is Based on the Panel's Misapprehending or Overlooking Critical Facts and Law

A. Critical Alleged Facts Misapprehended or Overlooked by the Panel

As presented below and to this Court on appeal, the Complaint abounds with allegations that demonstrate the Museum acted with unclean hands and that it failed to meet the requisite level of due diligence and care for a public institution. These facts support a finding of unclean hands as a threshold matter, and, moreover, tip the equities in favor of Petitioner and against a finding of laches. At a minimum, these allegations necessitate a trial on the merits, rather than pre-answer dismissal.

In particular, the Complaint sets forth that:

> [t]he Museum, given its resources, relationships, expertise, and status as a museum that holds its collection in the public trust should have discovered through due diligence Leffmann's ownership up until 1938, and the circumstances under which he was compelled to dispose of the Painting because of Nazi and Fascist persecution." (A-47-48, ¶56)

Moreover, the Museum's published provenance for the Painting, delayed until 1967, was manifestly erroneous for 45 years. Instead of stating that Leffmann owned the Painting from 1912 until 1938, it indicated Leffmann no longer owned the

Painting in the years leading up to its sale. This error was perpetuated, time-and-time again, notwithstanding obvious red flags about the history of the Painting and despite post-War governmental directives to museums warning against acquiring art misappropriated during the Nazi era. (A-48-50, ¶¶57-64)

In 1945, the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (also known as the "Roberts Commission") issued a circular that urged museums and others to inform the Commission of objects of "special artistic importance" that had "obscure or suspicious" provenances. (A-49-50, ¶64)

Shortly thereafter, in or about 1947, the Department of State sent museums another bulletin, in which it highlighted the responsibility of museums and other institutions to exercise "continued vigilance" in identifying cultural objects with provenances tainted by World War II. The directive underscored the need for museums to notify the Secretary of State of any objects identified as lacking a clear title. In 1950, the College Art Association of America reprinted the directive in *College Art Journal*, and in 1951, the American Federation of Arts reprinted it in *Magazine of Art*. (*Id.*)

The Museum, a "major public institution" (Dkt. 167-1 at 15), had a responsibility — both in light of the post-War directives and the principles later enunciated in *Solomon R. Guggenheim Found. v. Lubell,* 153 A.D.2d 143, 152 (1st

Dep't 1990), *aff'd*, 77 N.Y.2d 311 (1991) — to exhaust its vigilance in investigating the provenance of the Painting before acquiring it. Had it done so, any possible prejudice to the Museum would have been avoided at the outset.

Nonetheless, it was not until some fifteen years after acquiring the Painting that the Museum's curators finally asked Hugo Perls where he had obtained it. Perls's answer was that he had bought the Painting in 1938 from a "German professor" in Solothurn, Switzerland who had been "thrown out by Nazis." Therefore, at least at the time of the cataloguing, red flags should have been raised for the Museum. It should have tried to correct its error by investigating the acquisition of the Painting, especially because Perls said that the seller had been "thrown out" of Germany by the Nazis. But no investigation was conducted in 1967, and the provenance published in 1967, and for many years thereafter, was erroneous. (A-49, ¶62)

It was not until October 2011, after inquiries from Petitioner, that the Museum revised its provenance to finally acknowledge Leffmann's ownership of the Painting through 1938 and its transfer during the Nazi era.

B. Critical Law Misapprehended or Overlooked by the Panel

Despite the clear allegations set forth above, and as argued in submissions to the District Court and to this Court on appeal, the Panel wholly overlooked the dispositive inquiry of whether unclean hands bars consideration of the laches

defense. *PenneCom B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 493 (2d Cir. 2004) ("New York courts have long applied the maxim that one who comes to equity must come with clean hands.") (internal citations removed); *cf. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (it is a "guiding doctrine" that "he who comes into equity must come with clean hands"); *Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.,* 219 F.3d 104, 107 (2d Cir. 2000) ("fundamental principle" requiring "clean hands" is a "dispositive, threshold inquiry that bars further consideration of the laches defense").

The Panel overlooked the Museum's lack of due diligence in obtaining and displaying the Painting, and the Museum's failure to disclose Leffmann's continuous ownership of the Painting up until 1938 and the circumstances under which he was compelled to dispose of the Painting. The analysis of these facts should have been considered as a threshold determination. For example, in *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009), Judge Rakoff recognized that if shown at trial that the museums there "had reasons to know that the Paintings were misappropriated," the museums would be "barred from invoking laches by the doctrine of 'unclean hands.'" Petitioner has been deprived of the opportunity to make that showing at trial.

Even if the Museum's unclean hands did not bar the analysis of laches, such analysis would still not warrant a finding of laches. The Panel's decision focused

exclusively on the conduct of Petitioner and the Leffmanns, without any examination of the reasonableness of the Museum's conduct, contrary to applicable New York law. The laches inquiry mandates a fact-intensive examination of *each* party: "defendant's vigilance is as much in issue as plaintiff's diligence. . . The reasonableness of *both* parties must be considered and weighed." *Lubell,* 153 A.D.2d at 152, *aff'd*, 77 N.Y.2d 311 (1991) (emphasis added); *accord U.S. v. Portrait of Wally*, 99 Civ. 9940 (MBM), 2002 WL 553532, at *22 (S.D.N.Y. Apr. 12, 2002).

Unlike standard commercial actors in the ordinary course, the Museum — which received the Painting as a donation to be held in the public trust — must act with a higher degree of diligence and responsibility, especially given the U.S. government's post-War directives to museums about acquiring art misappropriated during the Nazi era. Moreover, the Museum's lack of due diligence must be evaluated in the context of the principles of the American Alliance of Museums ("AAM"), by which the Museum is accredited, and the Association of Art Museum Directors ("AAMD"), of which it is a member. (A-50-51, ¶65) Recognizing that a museum's mission is to serve the public, AAM's "Standards Regarding Unlawful Appropriation of Objects During the Nazi Era" dictate that museums identify, research, and make the provenance available for all objects in its possession transferred in Europe during the Nazi era. (*Id.*) *Accord* AAMD's "Art Museums and the Restitution of Works Stolen by the Nazis."

More broadly, the Museum regularly acquires artworks, either through donation or purchase, qualifying it as an institution with "knowledge and experience in the art industry" with a higher duty of inquiry and diligence. *Brown v. Mitchell-Innes & Nash, In*c., No. 06 Civ. 7871(PAC), 2009 WL 1108526 (S.D.N.Y. April 24, 2009); *see also Davis v. Flagstar Cos.*, 124 F.3d 203 (7th Cir. 1997); *R.F. Cunningham & Co. v. Driscoll*, 7 Misc. 3d 234 (City Ct. Auburn 2005); *cf. Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306 (S.D.N.Y. 2011) (laches barred action where defendant, as "*an ordinary non-merchant purchaser of art*," had "no obligation to investigate the provenance" of the artwork) (emphasis added). Faulty and careless scholarship by the institution, if established, would evince a failure to meet the requisite level of due diligence.

Moreover, the fact-intensive laches defense cannot be evaluated at the motion to dismiss stage. *See, e.g., Deere & Co. v. MTD Prods., Inc.*, 00 Civ. 5936 (LMM), 2001 WL 435613, at *2 (S.D.N.Y. Apr. 30, 2001) (laches inquiry "inappropriate on a motion to dismiss"); *Wally*, 2002 WL 553532, at *22 (laches inquiry "often not amenable to resolution on a motion for summary judgment, let alone a motion to dismiss"). In *Schoeps*, MoMA and the Solomon R. Guggenheim Foundation argued, on a motion for summary judgment, that the heirs of a German Jew could not seek the return of Picasso paintings. The court rejected a laches defense, holding that the questions of fact were a matter for trial. 594 F. Supp. 2d at 468. In so doing, the court

recognized that the deprivation of plaintiff's day in court, especially to reclaim what was lost in the Holocaust era, cannot be based on mere supposition. *Id.*

Nonetheless, the Panel here accepted the Museum's laches defense, concluding as a matter of law that Paul and Alice unreasonably delayed in making a claim, in part because they could have located the Painting and contacted "Käte Perls, the MoMA, or the Met." (Dkt. 167-1 at 16) This finding overlooks critical facts alleged in the Complaint that explain and contextualize what is prematurely deemed to be blameworthy inactivity. Such facts include the Museum's lack of diligence in identifying and contacting the Leffmanns, the continuing errors and omissions in the Museum's provenance (A-47-49, ¶¶56-63), and the fact that, in the great period of chaos and unrest after the War, the Leffmanns resided outside the United States until their deaths without knowledge of the Painting's whereabouts (A-46, ¶¶48-50).[2]

In contrast, none of the reasons cited by the Panel, including that no first-hand witnesses "remain who could testify" (Dkt. 167-1, at 17-18), are "probative" (*Reif v. Nagy*, 2019 WL 2931960, at *15 (1st Dep't July 9, 2019)). As in the case of *Reif*,

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[2] The Panel's reliance on *In re Peters,* 34 A.D.3d 29 (1st Dep't 2006) (Dkt. 167-1 at 16) is misplaced. In stark contrast to this case, it had already been factually established in *Peters* that petitioner had actual, continuing knowledge of the identity of the possessor of the artwork (who was an individual, not an institution such as the Museum).

decided yesterday by New York's Appellate Division, First Department, the historical record (as would be presented by expert testimony) is clear. Thus, in a trial on the merits, the Petitioner would have the opportunity to present experts who would testify as to the reasonableness of the Leffmanns' conduct in light of their Holocaust-era flight and the Nazi and Fascist persecution they faced. Any argument by the Museum that "the Sale was voluntary" (Dkt. 167-1, at 17) would be similarly addressed by expert testimony.[3] The Decision, however, denies the Petitioner that chance.

By omitting consideration of the reasonableness of the Museum's conduct and concluding, at the motion to dismiss stage, that the Museum "has been prejudiced" by the "decades that have elapsed" since the end of the War (Dkt. 167-1 at 17), the Panel overlooked important issues of law and fact. For these reasons, Petitioner respectfully requests rehearing.

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[3] Testimony regarding Thelma Chrysler Foy's "good faith" when she purchased the Painting from Rosenberg and Perls is likewise not "probative." Disposition of artwork by Jews under duress during the Nazi era, should be treated as the equivalent of theft, thus barring, under New York law, subsequent good faith purchasers from obtaining good title of this "stolen property." *Schoeps*, 594 F. Supp. 2d at 467.

II. Rehearing *En Banc* Is Warranted Because the Panel's Decision Conflicts with a Decision of the United States Supreme Court and Involves a Question of Exceptional Importance

A. The Panel's Decision Conflicts with the Decision of the United States Supreme Court

This decision conflicts with the Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014). Rehearing and *en banc* review are therefore necessary to secure or maintain uniformity of the courts' decisions.

In *Petrella*, the Court held that, "in [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." *Id.* at 679. In *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 137 S. Ct. 954 (2017), the Supreme Court reiterated its holding, stating that, as "stressed in *Petrella,* 'courts are not at liberty to jettison Congress' judgment on the timeliness of suit.'" *Id.* at 960 (quoting *Petrella,* 572 U.S. at 667). Nonetheless, the Panel concluded that the "general rule" set forth in *Petrella*, and reaffirmed in *SCA Hygiene*, does not apply in the context of the HEAR Act. (Dkt. 167-1 at 21)

The Panel's conclusion simply ignored the rationale of *Petrella*. The Supreme Court cautioned against expansive use of the laches doctrine when Congress has provided a uniform statute of limitations: "we have *never* applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period. Inviting individual judges to set a time limit other than the one Congress prescribed. . . would tug against the uniformity Congress sought to achieve when it

enacted [the statute]." *Id.* at 680-81 (emphasis added). The Court in *SCA Hygiene* explained that the enactment of a "statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted." *Id.* at 960.

The holding set forth in *Petrella* is clear and controlling. By providing a Federal statute of limitations for claims to recover art lost as a result of Nazi-era persecution, the HEAR Act creates uniformity and certainty for such claims. Permitting a laches defense in an otherwise timely claim would undercut this purpose and "tug against" what "Congress sought to achieve." *Id.*

The "separation-of-powers principles" inherent in *Petrella*'s holding further compel the preemption of laches in a claim governed by the HEAR Act. *SCA Hygiene*, 137 S. Ct. at 960. As a Federal law applying broadly to "claims to artwork and other property stolen or misappropriated by the Nazis" in an effort to "ensure that laws governing claims to Nazi-confiscated art and other property further United States policy," (HEAR Act §3), the HEAR Act cannot be interpreted to embrace a state law on laches, as did the Panel in this case (Dkt. 167-1, at 14), to the effect of vitiating Congress' express purpose. "Nothing in this [Supreme] Court's precedent suggests a doctrine of such sweep." *Petrella*, 572 U.S. at 680–81.

B. The Question of Whether the HEAR Act Preempts the Application of a Laches Defense is an Issue of Exceptional Importance Under Federal Jurisprudence and United States Foreign Policy

This Decision implicates the exceptionally important issue of whether the HEAR Act permits the assertion of a laches defense, despite United States foreign policy on Holocaust-era art, which mandates that artworks unlawfully lost because of Nazi persecution be adjudicated on the merits.

The Federal policy on art misappropriated during the Nazi era is reflected in the 1998 Washington Conference Principles on Nazi-Confiscated and the Terezin Declaration on Holocaust Era Assets and Related Issues. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014); *accord, Philipp v. Fed. Rep. of Ger.*, 248 F. Supp. 3d 59, 75-76 (D.D.C. 2017). These principles comprise key tenets of U.S. foreign policy and restitution law. *Von Saher*, 754 F.3d at 721.

With the enactment of the HEAR Act in 2016, Congress expressly adopted the "United States policy" as "expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration." HEAR Act §2(7). In recognizing the "unique and horrific circumstances of World War II and the Holocaust," the HEAR Act embraced the core tenet of the Washington Principles, reaffirmed in the Terezin Declaration, that it is essential to "facilitate just and fair solutions with regard to Nazi-confiscated and

looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims. . ." *Id.* at §2(5)-(6).

Critically, the HEAR Act defines, in a broad and all-encompassing manner, the category of artworks for which Congress intends to facilitate restitution: "any artwork or other property that was lost during the covered period because of Nazi persecution" (with "Nazi" defined to include Nazi allies). HEAR Act, §§5, 4(5). The transactions protected by the HEAR Act include those made under duress, as set forth in the Terezin Declaration and as recently affirmed by New York's Appellate Division in *Reif*, 2019 WL 2931960 at n.34 (in noting that "Courts have generally interpreted the HEAR Act liberally," the court points to a case "covered" by the Act that involved a "sale of art during the Holocaust by a Jewish owner [who] was coerced and under duress") (citing *Philipp*, 248 F. Supp. 3d at 70, *aff'd* 894 F.3d 406 (D.C. Cir. 2018)). The HEAR Act likewise applies to Petitioner's claims.

In furtherance of U.S. policy, the HEAR Act provides for a preemptive six-year statute of limitations that is triggered by actual knowledge of the identity and location of the artwork by the claimant. This blanket adoption of the statute of limitations leaves no room for a laches defense. Only a claim "barred on the day before the date of enactment" of the Act is excepted from the statutory period, and only if "(1) the claimant or a predecessor-in-interest of the claimant" had the requisite knowledge as of January 1, 1999; and "(2) not less than 6 years have passed

from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations." HEAR Act §5(e). By specifically accounting for the case where a "claimant or predecessor-in-interest" may have earlier acquired actual knowledge, Congress eliminates the possibility of a laches defense.

Where "statutory language is unambiguous," as it is here, the Court's "inquiry ceases." *Sebelius v. Cloer*, 569 U.S. 369, 380 (2013); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (when "words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete") (internal citations removed). In light of the plain statutory language of the HEAR Act, there was no cause for the Panel to analyze its legislative history (Dkt. 167-1 at 23-25). *See Germain*, 503 U.S. at 254 (Court rejected analysis of legislative history where statutory text was clear).

But, even if the statutory language of the Act were uncertain, so that there would be a reason to look beyond the plain meaning of the text, the Panel's interpretation of the legislative history frustrates the clear purpose of the Act and the United States policy that it embodies. The omission of the words "laches" or "equity" from the legislation cannot be understood as permitting a laches defense

under the HEAR Act.[4] The Act is intended to ensure that claims "are resolved in a just and fair manner" as set forth in the "Washington Principles, the Holocaust Victims Redress Act, and the Terezin Declaration." HEAR Act §3. In these cited declarations and law, U.S. policy expressly instructs the return of misappropriated artworks to their rightful owners, irrespective of technical defenses such as the statute of limitations and laches. It would severely undercut the import of the HEAR Act if its framework for assessing the timeliness of Holocaust-era claims can be circumvented with a laches defense — especially on a pre-answer motion to dismiss.

Finally, it is important to consider the New York Appellate Division decision in *Reif*, which was handed down yesterday. *Reif* underscores the significance of the HEAR Act as a statement of U.S. restitution policy that will permeate every Holocaust-era case. As the court made clear, the "tragic consequences of the Nazi occupation of Europe on the lives, liberty and property of the Jews [that] continue to confront us today" cannot be separated from the "intent and provisions of the HEAR Act." 2019 WL 2931960, at *15.

For the foregoing reasons, the Decision is exceptionally important to the adjudication of claims for the recovery of art lost during the Holocaust era as a result

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[4] Indeed, it must be presumed that Congress was aware of *Petrella* and therefore saw no need to specifically include mention of laches in the statute.

of persecution by the Nazis and their allies. The Decision merits additional scrutiny and should be vacated by an *en banc* Court.

Dated: July 10, 2019

Respectfully submitted,

HERRICK, FEINSTEIN LLP

By: /s/ Lawrence M. Kaye
Lawrence M. Kaye

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 32(g), 35(b) & 40(b)

Case No. 18-0634-cv

I hereby certify that, pursuant to Rule 32(g), 35 (b)and 40 (b), the text of this Petition uses proportionately spaced 14-point Times New Roman font type. The brief contains 3,894 words or less (including footnotes) as calculated by Microsoft Word, the word processor used to create the document.

Dated: July 10, 2019

Respectfully submitted,

HERRICK, FEINSTEIN LLP

By: /s/ Lawrence M. Kaye
Lawrence M. Kaye

CERTIFICATE OF SERVICE

Case No. 18-0634-cv

I hereby certify that, on July 10, 2019, I electronically filed the foregoing PETITION OF PLAINTIFF-APPELLANT FOR PANEL REHEARING AND REHEARING *EN BANC* with the Clerk of the United States Court of Appeals for the Second Circuit using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: July 10, 2019

Respectfully submitted,

HERRICK, FEINSTEIN LLP

By: /s/ Lawrence M. Kaye
Lawrence M. Kaye

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18-634-cv
Zuckerman v. The Metropolitan Museum of Art

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: February 27, 2019 Decided: June 26, 2019)

Docket No. 18-634

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,

Plaintiff-Appellant,

—v.—

THE METROPOLITAN MUSEUM OF ART,

Defendant-Appellee.

Before:

KATZMANN, *Chief Judge*, LIVINGSTON and DRONEY, *Circuit Judges*.

Plaintiff-Appellant Laurel Zuckerman appeals from the judgment of the United States District Court for the Southern District of New York (Preska, *J.*) dismissing her complaint for failure to state a claim. Zuckerman seeks recovery of a painting by Pablo Picasso that has been in the Metropolitan Museum of Art's

possession since 1952. The painting once belonged to Zuckerman's ancestors, Paul and Alice Leffmann, who sold it in 1938 to a private dealer to obtain funds to flee fascist Italy after having already fled the Nazi regime in their native Germany. The district court concluded that Zuckerman failed to allege duress under New York law. We do not reach the issue of whether Zuckerman properly alleged duress because we find that her claims are barred by the doctrine of laches. Accordingly, we **AFFIRM**.

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KATZMANN, *Chief Judge*:

In the 1930s, the German government, under the control of Adolf Hitler's National Socialist German Workers' Party (the "Nazis"), launched a campaign of oppression against German Jews and other minorities. As part of its reign of terror, the Nazis and their affiliates forced Jews out of their homes, seized their businesses, and stripped them of their property. By the late 1930s, life in Germany for Jewish people became so dangerous that many were forced to flee the country. Of those who were unable to escape, most were removed from their homes, shipped to concentration camps, and murdered.

In recent decades, with the passage of time and as the number of survivors of Nazi brutality diminishes, there has been a sense of urgency that some measure of justice, albeit incomplete, be given to those victims and their heirs. International conferences and subsequent declarations have outlined principles designed to ensure, for example, that "legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art." Prague Holocaust Era Assets Conference: Terezin Declaration, Bureau of European and Eurasian Affairs, U.S. Department of State (June 30, 2009), https://2009-

2017.state.gov/p/eur/rls/or/126162.htm. What was a moral imperative has appropriately been converted into statute, with such landmark legislation as the Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act"). Pub L. No. 114–308, 130 Stat. 1524. These efforts are grounded in the recognition that the claims of survivors and their heirs must be given serious and sympathetic consideration. To facilitate the processing of such claims, the HEAR Act creates a nationwide statute of limitations for bringing claims to recover artwork and other property lost during the Holocaust era. The HEAR Act directs that every case be given individual attention, with special care afforded to the particular facts. In that effort to render justice, the law does not eliminate equitable defenses that innocent defendants may assert, where to do otherwise would be neither just nor fair.

Paul and Alice Leffmann (the "Leffmanns") were German Jews who, prior to Hitler's rise to power, enjoyed a flourishing and prosperous life in Germany. They had "sizeable assets," including a manufacturing business and multiple properties. J. App'x 33. Among the items they owned, purchased in 1912, was The Actor, a "masterwork" painting by the famed artist Pablo Picasso. *Id.* When the Leffmanns were forced to sell their business and flee Germany in 1937, they

lost much of their property. Once in Italy, they sold their Picasso painting to raise money to escape Hitler's growing influence in Italy and relocate to Brazil.

Plaintiff-Appellant Laurel Zuckerman is the Leffmanns' great-grandniece. Zuckerman seeks replevin of the painting from Defendant-Appellee the Metropolitan Museum of Art (the "Met"). Zuckerman argues the Leffmanns sold the Painting under duress and that the sale is therefore void. The district court (Preska, *J.*), concluding that Zuckerman had failed to adequately allege duress under New York law, dismissed her complaint.

On appeal, the Met argues, *inter alia*, that Zuckerman's claims are barred by the doctrine of laches and that such a determination can be made on the pleadings. In this Court's narrow ruling, we agree. Laches is an equitable defense available to a defendant who can show "that the plaintiff has inexcusably slept on [its] rights so as to make a decree against the defendant unfair," and that the defendant "has been prejudiced by the plaintiff's unreasonable delay in bringing the action." *Merrill Lynch Inv. Managers v. Optibase Ltd.*, 337 F.3d 125, 132 (2d Cir. 2003).[1] Here, despite the facts that the painting was a significant work by a celebrated artist, that it was sold for a substantial sum to a well-known French

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[1] Unless otherwise indicated, case quotations omit all citations, internal quotation marks, footnotes, and alterations.

art dealer, and that it has been in the Met's collection since 1952, neither the Leffmanns nor their heirs made any demand for the painting until 2010. Such a delay is unreasonable, and the prejudice to the Met is evident on the face of Zuckerman's complaint. We further conclude that the HEAR Act does not preempt the Met's laches defense. Accordingly, we **AFFIRM** the judgment of the district court.

BACKGROUND

The following facts are drawn from the allegations in Plaintiff-Appellant's Amended Complaint or are "matters of which judicial notice may be taken." *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 123 (2d Cir. 2011).

I. The Leffmanns

Paul Friedrich Leffmann, a German Jew from Cologne, purchased The Actor, a painting by Pablo Picasso, in 1912 (the "Painting"). Mr. Leffmann and his wife, Alice, lent the Painting for various exhibitions throughout Germany in the early 20th Century. The Painting was also featured in articles, magazines, and monographs.

After the adoption of the Nuremberg Laws in September 1935, the Leffmanns' lives in Germany became untenable. Stripped of the rights and privileges of German citizenship, they were forced to sell their property and businesses to "Aryan" corporations, receiving "nominal compensation." J. App'x 34.

By 1937, it became clear that life in Germany for Jews like the Leffmanns was no longer simply difficult, but genuinely perilous. The Leffmanns decided to flee Germany for Italy. After paying exorbitant "flight taxes," the Leffmanns arrived in Italy in April 1937. They engaged in financial transactions at a loss in order to settle in Italy. For example, the Leffmanns arranged to purchase a home for 180,000 Reichsmark ("RM") but pre-agreed to later sell it back to the original owners at a substantial loss. These "triangular agreements" were common at the time, as they allowed individuals outside of Germany to acquire RM while simultaneously permitting German emigrants to circumvent "the ever-tightening regulations governing the transfer of assets" outside of the country. *Id.* at 37. Prior to fleeing Germany, the Leffmanns "arranged" for the Painting, one of their few remaining assets, "to be held in Switzerland by a non-Jewish German acquaintance." *Id.* at 35.

But by early 1938, Italy was no longer a safe place for Jews. The growing influence of Nazi Germany resulted in anti-Semitic policies—for example, in 1937, Italy's Ministry of the Interior produced a list of all German refugees (most of whom were Jewish) living in Italy—and a warm welcoming of Adolf Hitler in May 1938. The Leffmanns began to make plans to flee to Switzerland, which required money. On April 12, 1938, Paul Leffmann wrote to C.M. de Hauke, an art dealer whom the U.S. State Department later identified as dealing in Nazi-looted art, from whom Leffmann had previously rejected an offer to sell the Painting. Leffmann now sought to revive discussions about the possibility of a sale. As matters became more perilous for Jews in Italy, Leffmann "continued to try to sell the Painting through de Hauke." *Id.* at 42. "Trying to raise as much cash as possible," and in attempt to "improve his leverage to maximize the amount of hard currency he could raise," in 1938, Leffmann told de Hauke that he had rejected a $12,000 offer from another dealer. *Id.* at 42-43.

Shortly after writing to de Hauke stating he had rejected an offer for $12,000 from another dealer, Leffmann sold the Painting in June 1938 for that

very price to the Paris art dealer Käte Perls, who was acting on behalf of her former husband, Hugo Perls, and another art dealer, Paul Rosenberg.[2]

Funded partially by their June 1938 sale of the Painting (the "Sale"), the Leffmanns fled to Switzerland in October 1938. The record on appeal is unclear as to how much the Leffmanns had to pay in order to leave Italy and arrive in Switzerland, but Plaintiff-Appellant alleges that Swiss authorities required immigrants to pay substantial fees and taxes in order to enter the country. According to Plaintiff-Appellant, "[g]iven the various payments required by Switzerland . . . the Leffmanns depended on the $12,000 . . . they received from the [S]ale" in order to survive. *Id.* at 46.

Their stay in Switzerland was short. Having only been able to procure a temporary Swiss residence visa, the Leffmanns fled to Brazil. Relocating to Brazil was similarly expensive. The Leffmanns had to pay unspecified bribes to acquire the necessary documentation from the Brazilian government and deposited at least $20,000 in the Banco do Brasil. They arrived in Rio de Janeiro on May 7, 1941. Once in Brazil, they had to pay a "levy" of $4,641 imposed by the Brazilian government on all Germans living in the country. *Id.* at 46. Plaintiff-Appellant

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[2] The selling price was $13,200, but after a 10% selling commission, the Leffmanns came away with $12,000.

avers that the Leffmanns "depended on the $12,000" from the Sale for these payments. *Id.*

The Leffmanns lived in Rio de Janeiro for six years. In 1947, after the war had ended, the Leffmanns returned to Europe and settled in Zurich, Switzerland, where they lived for the rest of their lives. Paul Leffmann died in 1956; Alice Leffmann died in 1966. While they were still alive, the Leffmanns brought a number of successful claims with the assistance of counsel for Nazi-era losses, but those claims were limited to property that was "taken in Germany" before the Leffmanns fled Germany. Oral Argument at 25:34-58, *Zuckerman v. The Metropolitan Museum Art*, No. 18-634, http://www.ca2.uscourts.gov/oral_arguments.html. The Leffmanns made no demand to reclaim the Painting.

II. The Painting after the Leffmanns' Sale

In 1939, Paul Rosenberg loaned the Painting to the Museum of Modern Art ("MoMA") in New York. Rosenberg asked MoMA to insure the Painting for $18,000. Sometime before October 28, 1940, Rosenberg consigned the Painting to the M. Knoedler & Co. Gallery in New York. In November 1941, that gallery sold

the painting to Thelma Chrysler Foy for $22,500. Thereafter, Foy, an arts patron noted for her gifts of prized pieces to public institutions, donated the Painting to the Met in 1952.

Since at least 1967, when the Painting appeared in the Met's published catalogue of French paintings, the Met's published provenance of the Painting listed Leffmann as a previous owner. Until recently, however, the provenance incorrectly suggested that Leffmann sold the Painting after 1912; it listed the provenance as "P. Leffmann, Cologne (in 1912); a German private collection (until 1938)." J. App'x 48.

III. Procedural History

On September 8, 2010, Plaintiff-Appellant, the Leffmanns' great-grandniece, demanded that the Met return the Painting. The museum refused. On October 18, 2010, Zuckerman was appointed Ancillary Administratix of the estate of Alice Leffmann by the New York Surrogate's Court.[3] On September 30, 2016, Zuckerman filed suit in the Southern District of New York, asserting claims for conversion and replevin on the theory that the 1938 Sale was

[3] On February 7, 2011, Zuckerman and the Met entered into a standstill agreement tolling any statute of limitations as of that date.

made under duress. On February 7, 2018, the district court dismissed Zuckerman's claims "[f]or failure to allege duress under New York law." Special App'x 3. The district court did not address the Met's contention that Zuckerman's claims are time-barred in New York by the statute of limitations and laches. This appeal followed.

DISCUSSION

On appeal, the Met argues, among other things, that Zuckerman's claims are barred by the doctrine of laches. We agree.[4] Neither the Leffmanns nor their heirs made a demand for the Painting until 2010. This delay was unreasonable, and it prejudiced the Met. We further conclude that the HEAR Act, which creates a uniform, nationwide six-year statute of limitations for claims to recover art lost during the Holocaust era, does not preempt the Met's defense.

[4] Below, the Met asserted its affirmative defenses—statute of limitations and laches—but "requested that the district court address the merits-based defenses," which the district court did. Appellee's Br. 55 n.15.

I. Standard of Review

We review *de novo* a district court's decision to grant a motion to dismiss. *See Arar v. Ashcroft*, 585 F.3d 559, 567 (2d Cir. 2009). "In so doing, we accept as true the factual allegations of the complaint, and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff." *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

II. The Doctrine of Laches

It is well established that "[w]e may . . . affirm on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 584 (2d Cir. 2000). The doctrine of laches "protect[s] defendants against unreasonable, prejudicial delay in commencing suit." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). "A party asserting a laches defense must show that the plaintiff has inexcusably slept on

its rights so as to make a decree against the defendant unfair. Laches . . . requires a showing by the defendant that it has been prejudiced by the plaintiff's unreasonable delay in bringing the action." *Merrill Lynch Inv. Managers*, 337 F.3d at 132 ; *see also Matter of Stockdale v. Hughes*, 189 A.D.2d 1065, 1067 (N.Y. App. Div. 1993) ("It is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches . . . .").

"[M]ere lapse of time, without a showing of prejudice, will not sustain a defense of laches." *Saratoga Cty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003).[5] "A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim." *Conopco Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996). Finally, laches may be decided "as a matter of law" when "the original owner's lack of due diligence and prejudice to the party currently in possession are apparent." *Matter of Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 38 (N.Y. App. Div. 2006).

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[5] Both parties rely solely on New York law in making arguments concerning laches. Therefore, we do the same.

a. Unreasonable Delay

First, we conclude that the delay in this case was unreasonable. The Painting is an important and well-known work by an influential and celebrated artist. The Leffmanns sold it for a substantial sum to a French dealer. The Painting was then moved to the United States, where it was acquired by a major public institution. Meanwhile, the Leffmanns were in Brazil beginning in October 1938, and Switzerland from 1947 until Alice Leffmann died in 1966.

It is evident on the face of the complaint that the Leffmanns knew to whom they sold the Painting in 1938, and Zuckerman nowhere contends that the Leffmanns, despite making some post-war restitution claims, made any effort to recover the Painting. Indeed, over seventy years passed between the sale of the painting in 1938 and Zuckerman's demand that the Met return the Painting in 2010. *See, e.g.*, *Krieger v. Krieger*, 25 N.Y.2d 364, 370 (1969) (delay of twelve years in commencing an action for declaratory judgment that a Florida divorce decree was void was an "inordinate length of time").

It is eminently understandable that the Leffmanns did not bring any claim for the Painting during the course of World War II and even, perhaps, for a few years thereafter, given their specific circumstances. However, it is simply not

plausible that the Leffmanns and their heirs would not have been able to seek replevin of the Painting prior to 2010. As noted above, the Leffmanns, being a financially sophisticated couple, actively and successfully pursued other claims for Nazi-era losses. This is not a case where the identity of the buyer was unknown to the seller or the lost property was difficult to locate. Indeed, the Painting was a "masterwork" of Picasso, not an obscure piece of art. J. App'x 33. Nor is this a case where the plaintiff alleges that the buyers themselves exerted any undue or improper pressure on the sellers. The Leffmanns could have contacted Käte Perls, the MoMA, or the Met. Since at least 1967, "P. Leffmann" has been listed as a prior owner of the Painting. Although that—concededly incomplete—provenance was included in the Met's published catalogue, none of the Leffmanns' heirs demanded that the Painting be returned. *See Peters*, 821 N.Y.S.2d at 68-69 (concluding that the pre-suit delay was unreasonable given that "neither the estate nor anyone in the [original owner's] family . . . attempted to recover the painting from the [subsequent purchaser], even though both families lived in Manhattan and the painting was exhibited . . . at prominent museums, galleries, and universities").

b. Prejudice

While the determination of prejudice is ordinarily fact-intensive, even at this early stage of the proceedings, based on the unusual circumstances presented by the complaint, we conclude that the Met has been prejudiced by the more than six decades that have elapsed since the end of World War II. This time interval has resulted in "deceased witness[es], faded memories, . . . and hearsay testimony of questionable value," as well as the likely disappearance of documentary evidence. *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 149 (N.Y. App. Div. 1990). Assuming *arguendo* that Plaintiff's central claim that the Sale is void because it was made under third-party duress is cognizable under New York law, resolution of that claim would be factually intensive and dependent on, among other things, the knowledge and intent of the relevant parties. *See* Restatement (Second) of Contracts § 175(2) (1981). No witnesses remain who could testify on behalf of the Met that the Sale was voluntary,[6] or indeed on behalf of the Plaintiff that the Painting was sold "involuntar[ily]," *Kamerman v. Steinberg*, 891 F.2d 424, 431 (2d Cir. 1989), because the Leffmanns "had absolutely no other alternative," *Kenneth D. Laub & Co., Inc. v. Domansky*,

[6] Käte Perls died in 1945. Paul Rosenberg died in 1959. Hugo Perls died in 1977.

172 A.D.2d 289, 289 (N.Y. App. Div. 1991).[7] Nor are there first-hand witnesses who could testify to facts relevant to the Met's possible affirmative defenses, including whether Foy purchased the Painting in good faith. On these facts, "the original owner[s'] lack of due diligence and prejudice to the party currently in possession are apparent," and the issue of laches can be decided as a matter of law. *Peters*, 34 A.D.3d at 38.[8]

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[7] Under New York's "demand and refusal" rule, the statute of limitations is not triggered "until a *bona fide* purchaser refuses an owner's demand for return of a stolen art object." *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272 (2d Cir. 1994). If this rule applies to claims for art objects sold under duress, the failure to pursue legal proceedings related to the Painting—namely, to make a demand—also prejudiced the Met by essentially extending the New York statute of limitations indefinitely. *See Peters*, 34 A.D.3d at 36. In *Peters*, the Appellate Division recognized that a consequence of New York's "demand and refusal" rule is that "there is a potential for a plaintiff to indefinitely extend the statute of limitations by simply deferring the making of the requisite demand" and that such a consideration is relevant to a laches analysis. *Id*. We do not reach the question of whether New York's "demand and refusal" rule, which unquestionably applies to stolen and looted art, applies to claims of an owner demanding the return of an art object sold under duress.

[8] *Peters* also involved a claim to recover a Nazi-era loss. In that case, in the early 1930s, the original owner of the painting at issue, Professor Curt Glaser, entrusted it to his brother, Paul, while fleeing Nazi Germany. *Id.* at 31. Paul, however, "apparently sold the work within the following year without first obtaining [Curt's] consent." *Id.* The painting ended up at a well-known art gallery in Cologne, Germany. *Id.* That gallery sold it to a steel magnate named Otten. *Id.* Otten fled Germany in 1937 but sent the painting out of the country. *Id.* at 32. Soon after learning that the painting had been sold, Curt Glaser attempted

c. The HEAR Act

Zuckerman argues in the alternative that, because her claims are timely pursuant to the applicable statute of limitations as codified by the HEAR Act, a laches defense is unavailable in this case.

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to buy it back but was rebuffed. *Id* at 31. He never "report[ed] a theft and, indeed, did not regard the painting as having been stolen." *Id.* at 35.

The painting eventually ended up in the United States, where it was exhibited in several museums and universities. *Id*. at 32. Decades later, the Otten family consigned the painting to Sotheby's which, in 2002, sold it for $1.5 million. *Id*. It was only in December 2003 that the petitioner (a descendant of Glaser's) sought to recover the painting on the theory that it was converted or otherwise misappropriated. *Id.* at 33.

The Appellate Division rejected the request for pre-action discovery to identify the new owner of the painting. It did not squarely hold whether the sale in that case constituted a conversion, finding instead that even "assum[ing] that the subject [painting] was converted," any claim for recovery was barred by the statute of limitations and the doctrine of laches. *Id.* at 37. With respect to laches, although Glaser attempted to buy back the painting soon after his brother sold it, he never made a legal claim for the painting. *Id.* at 35. Further, "[t]he delay by the Glaser family and the estate in asserting any claim of ownership during the approximately 70-year odyssey of [the painting] prejudiced the good-faith purchaser since none of the parties to the original sale of the painting—Professor Glaser, Albert Otten and Paul Glaser—are alive." *Id.* at 38. The Appellate Division determined that "the original owner's lack of due diligence and prejudice to the party currently in possession are apparent," such that the issue of laches could be decided as a matter of law, even at the pre-action discovery stage. *Id.* The Court of Appeals denied petitioner's motion for leave to file an appeal. *Matter of Peters v. Sotheby's Inc.*, 8 N.Y.3d 809 (2007).

The HEAR Act addresses the "unfair impediment" caused by "[s]tate statutes of limitations" that do not account for "the unique and horrific circumstances of World War II and the Holocaust." S. REP. NO. 114-394, at 5 (2016). The HEAR Act encourages the return of Nazi-stolen and looted artwork to Holocaust victims, heirs, and their survivors by preempting state statutes of limitations and imposes instead a uniform nationwide six-year statute of limitations. Specifically, the statute provides that "a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during [the period between 1933 and 1945] because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant . . . ." HEAR Act § 5(a).[9]

Generally, "in [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014); *see also SCA Hygiene Prods.*, 137 S. Ct. at 960 ("The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally

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[9] *Amicus* Holocaust Art Restitution Project ("HARP") urges us extend the HEAR Act beyond its enumerated scope and to create a federal common law cause of action for replevin for "Nazi-confiscated artwork." HARP Br. 15-30. We decline to do so.

hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted.").

This general rule does not apply to the HEAR Act. While the HEAR Act revives claims that would otherwise be untimely under state-based statutes of limitations, it allows defendants to assert equitable defenses like laches. The statute explicitly sets aside "defense[s] *at law* relating to the passage of time." HEAR Act § 5(a) (emphasis added). It makes no mention of defenses *at equity*. "[A] major departure from the long tradition of equity practice should not be lightly implied." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Moreover, a key Senate committee report accompanying the statute, discussed *infra*, unequivocally indicates that the Act does not preclude equitable defenses.[10] S. REP. NO. 114-394, at 7.

Allowing defendants to assert a laches defense, despite the introduction of a nationwide statute of limitations designed to revive Holocaust-era restitution

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[10] The HEAR Act applies to claims to "recover any artwork . . . that was lost during the [Holocaust era] because of Nazi persecution." HEAR Act § 5(a). A stated purpose of the law is to recover property "stolen or misappropriated by the Nazis." *Id.* § 3(2). We need not and do not decide whether Zuckerman's claims, for recovery of art sold under duress to non-Nazi affiliates, are within the ambit of the statute. Even if we assume *arguendo* they are, her claims are nevertheless barred by the doctrine of laches.

claims, comports with the overall legislative scheme advanced by the HEAR Act. One of the stated purposes of the HEAR Act is to ensure that claims to recover art lost in the Holocaust era are "resolved in a just and fair manner." HEAR Act § 3(2). But the HEAR Act does not allow potential claimants to wait indefinitely to bring a claim.[11] To do so would be neither just nor fair. At the very core of a successful laches defense is prejudice to the defending party: even an unreasonable delay is not fatal to a claim if there has been no harm to the other party. Unlike a mechanical application of a statute of limitations, a laches defense requires a careful analysis of the respective positions of the parties in search of a just and fair solution. [12]

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[11] The HEAR Act's six-year statute of limitations applies after "actual discovery" of the claim. HEAR Act § 5(a). The statute also contains an exception to this generally applicable rule for preexisting claims: those will still be time-barred under the applicable state statute of limitations if "(1) the claimant or a predecessor-in-interest of the claimant had knowledge of [the claim] on or after January 1, 1999; and (2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations." *Id.* § 5(e). The Senate Report explained that Congress "recognizes the importance of quieting title in property generally and the importance that claimants assert their rights in a timely fashion." S. REP. NO. 114-394, at 10.

[12] The general principle that a codified statute of limitations prevents a defendant from asserting a laches defense does not apply to New York's applicable three-year statute of limitations for recovery of a chattel, N.Y. C.P.L.R. § 214. Even when a claim is timely pursuant to the statute of limitations, a

Finally, the legislative history of the HEAR Act makes clear that Congress intended that laches remains a viable defense to otherwise covered claims. An early draft of the bill, introduced in the Senate Committee on the Judiciary on April 7, 2016, would have explicitly swept aside a laches defense. Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. § 5(c)(2)(A) (as introduced in Senate, Apr. 7, 2016) (permitting recovery "[n]otwithstanding . . . any . . . defense at law *or equity* relating to the passage of time (*including the doctrine of laches*)" (emphasis added)). That draft also stated that one of the purposes of the HEAR Act was to ensure that claims for the recovery of art lost during the Holocaust era were "not barred by statutes of limitations *and other similar legal doctrines* but are resolved in a just and fair manner on the merits." *Id.* § 3 (emphasis added).

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defendant may still assert a laches defense. *See, e.g.*, *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991) (holding that "although [defendant-]appellant's Statute of Limitations argument fails, [its] contention that the [plaintiff] did not exercise reasonable diligence in locating the painting" is relevant "in the context of [a] laches defense"). Were this not the case, plaintiffs could, as discussed *supra* n.7, delay bringing their claims indefinitely without consequence. The availability of a laches defense in this context allows courts to examine whether a plaintiff has abused New York's idiosyncratic "demand and refusal" rule in a way that is unfair to defendants, while keeping that rule in place. Thus, even if Zuckerman's claims were properly brought within the New York statute of limitations (a question we do not reach), they can still be barred by laches.

The final version of the bill, however, drops this language. Introduced in the House on September 22, 2016, and the Senate on September 29, 2016, the final version does not include any mention of laches or other equitable defenses. In addressing the amendment, which was in the nature of a substitute, the Senate Report explicitly noted that the new version "remove[d] the reference precluding the availability of equitable defenses and the doctrine of laches." *See* S. REP. NO. 114-394, at 7. Moreover, there is no mention of "other similar legal doctrines" in the purposes section of the final version of the statute. The final version notes that one of the purposes is to "ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner." HEAR Act § 3(2). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *see also* Simon J. Frankel & Sari Sharoni, Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016, 42 Colum. J.L. & Arts 157, 175-76 (2019) ("[B]y *removing* laches from the draft text of the statute, Congress intended laches and other equitable defenses under state law to remain available to good faith

possessors of artworks."). The HEAR act does not prevent defendants from asserting a laches defense. We emphasize that each case must be assessed on its own facts: while the laches defense succeeds here, in other cases it will fail and not impede recovery for claims brought pursuant to the HEAR Act.

CONCLUSION

For the reasons set forth above, we conclude that the HEAR Act does not preempt the Met's laches defense and that Zuckerman's claims are barred by laches. Accordingly, we AFFIRM the judgment of the district court.