

INTRODUCTORY STATEMENT

1. This is an action to recover eight paintings that were owned by Flechtheim, the preeminent dealer in Expressionist and Modernist Art of the Weimar Republic era in Germany (the “Paintings”). Flechtheim fled Nazi Germany in 1933 in mortal fear and to save his life. These Paintings were part of his privately owned large art collection and were lost to Flechtheim due to the policy of racial persecution and genocide.

2. The Nazis enforced these policies against him as part of the “Aryanization” of his gallery and personal property. Aryanization was the humiliating state-approved process in which Jews’ homes and businesses were taken over by approved “Germans,” a process that was part of the explicit persecution of Jews and Flechtheim in Nazi Germany.

3. Flechtheim was a double victim of the Nazi state, not only as a Jew, but also as a promoter of modern art. For all this he was publicly defamed and ridiculed as being “un-German,” “unnatural,” and “degenerate.” The Nazis immediately destroyed his business, his character and personal life as soon as they took totalitarian control of Germany on January 30, 1933. He would never recover.

4. Because of this persecution, Flechtheim was given no choice. He lost control of his life, of his business, and of his valuable property that was left behind when the Nazis forced him to flee. Nazi opportunists swooped in thereafter and converted Flechtheim’s property for their own use.

5. Bavaria and the BSGS claim to have valid title to a number of the Paintings via a donor, Günther Franke (“Franke”), who Defendants say bought the Paintings in 1932, but for which there is no proof. On the contrary, Flechtheim was still the owner of the Paintings when

Adolf Hitler and the Nazi party seized power on January 30, 1933 and it was only the Nazi-induced destruction of his livelihood and subsequent escape from Germany that allowed Franke to possess these Paintings much later before conveying them to the Defendants.

6. Among the evidence that proves this theft is the recent scandal in which Bavaria is directly implicated, namely, the seizure of 1,280 works of art from the Munich apartment of Cornelius Gurlitt (“Gurlitt”) in 2012 that were amassed by Gurlitt’s father, the Nazi art dealer and Adolf Hitler’s art agent Dr. Hildebrand Gurlitt, during the Nazi era. As that story revealed, Hildebrand Gurlitt was appointed as a dealer for the *Führermuseum* in Linz and he traded in modern art, under orders from the Ministry of Public Enlightenment and Propaganda led by Joseph Goebbels. He was one of the four dealers appointed by the *Commission for the Exploitation of Degenerate Art* (together with Karl Buchholz, Ferdinand Möller and Bernhard Böhmer) to market confiscated works of art abroad. Some 16,000 so-called “degenerate” artworks had been removed from museums and confiscated all over Germany. Many such works that were deemed unlikely to yield foreign currency were simply destroyed. Some of these works were exhibited in the Degenerate Art Exhibition in 1937, where Flechtheim was defamed with racist caricatures as a stereotypical Jew in the arts.

7. It was Hildebrand Gurlitt who, by admission of his son Cornelius, acquired *from Flechtheim in 1934* one of the paintings (*The Lion Tamer* by Max Beckmann) that Defendants claim was out of Flechtheim’s hands by 1932—*i.e.*, two years after the supposed transaction on which Defendants rest their claim of title (a transaction that never occurred).

8. On information and belief, Bavaria is still in possession of, or has access to the records of Hildebrand and Cornelius Gurlitt pursuant to that seizure that provide further evidence

of the fate of the Paintings. Bavaria refuses to share those documents with the Plaintiffs as well as to make them publicly available, placing greater priority on the “privacy” of a family that hoarded looted art for decades over the victims of that looting.

9. In short, the BSGS’s chain of title to the Paintings is defective because it was rooted in the seizure of Flechtheim’s property in violation of international law.

10. Given the Defendants’ public pronouncements about commitments to fair and just solutions to the fate of Nazi-looted art, Plaintiffs have attempted to engage in a negotiated resolution to the stolen Paintings. Defendants have rebuffed those efforts, as well as the Plaintiffs’ final demand for the return of the Paintings earlier this year. Germany and Bavaria provide no meaningful forum or remedy to address these claims.

11. These failures leave the Plaintiffs no choice but to seek the present relief.

PARTIES

12. Dr. Hulton is an individual, citizen of the United States, and a resident of San Francisco, CA. He is the great nephew of Flechtheim. His father, Flechtheim’s nephew Heinz Alfred Hulisch, was named as Flechtheim’s sole heir. Heinz Alfred Hulisch later changed his name to Henry Alfred Hulton.

13. Mrs. Hulton is an individual and a citizen of the United Kingdom, who resides in Hertfordshire, England. Mrs. Hulton is the widow of Henry Alfred Hulton.

14. The BSGS, a Munich-based instrumentality of Bavaria, oversees Bavaria’s public collections of artworks on display in various BSGS-administered museums both in and outside

of Munich, including the Pinakothek der Moderne (the “Pinakothek”) in Munich where some or all of the Paintings are on display.

15. Bavaria is a political subdivision of the Federal Republic of Germany (“Germany”), a sovereign nation. Bavaria is one of the 16 federal states (“*Länder*”) of Germany. Germany is the political—and under international law, the legal—successor to the German *Reich* a/k/a the *Third Reich* a/k/a Nazi Germany. Germany was established as West Germany in 1949 from the 11 *Länder*, in the Western-occupied areas of the Third Reich (including West Berlin), and absorbed the remaining 5 *Länder* that comprised East Germany upon reunification in 1990.

16. Bavaria was the birthplace of National Socialism, the locus of the movement in the 1920s under Adolf Hitler that first attempted unsuccessfully to overthrow the local government in 1923 in the infamous “Beer Hall Putsch.”

17. The Paintings are:

Duchess of Malvedi (1926), by Max Beckmann;

Still Life with Cigar Box (1926), by Max Beckmann;

Still Life with Studio Window (1931), by Max Beckmann;

Dream—Chinese Fireworks (1927), by Max Beckmann;

Champagne Still Life (1929), by Max Beckmann;

Quappi in Blue (1926), by Max Beckmann;

Cruche et verre sur un table (1916), by Juan Gris; and

Grenzen des Verstandes (1927), by Paul Klee.

The Paintings are currently in the unlawful possession of the BSGS, an instrumentality of Bavaria.

JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction over all Defendants pursuant to 28 U.S.C. § 1330 and 28 U.S.C. §§ 1605-07 (the Foreign Sovereign Immunities Act). Process will be served on all Defendants pursuant to 28 U.S.C. § 1608.

19. The Defendants are not immune from suit under the so-called “expropriation exception” of 28 U.S.C. § 1605(a)(3) because this action concerns rights in property taken in violation of international law within the meaning of 28 U.S.C. § 1605(a)(3). That taking included, *inter alia* and without limitation the examples that follow.

20. The Paintings were still in Flechtheim’s collection when his company *Galerie Alfred Flechtheim GmbH* and his galleries were Aryanized, and also his privately owned property placed under control of the Nazi tax advisor Alfred E. Schulte (“Schulte”). This is proved by, *inter alia*, the Gurlitt transactions (see below), which are fundamentally at odds with Defendants’ theory that Flechtheim’s Beckmann paintings were sold in 1932 (they were not).

21. The Nazi Party identified and chose Flechtheim as a prime target of their policy of mockery and destruction of the German Jewry early in the 1930s. Flechtheim represented an affront to the Nazi worldview—a cosmopolitan, successful German Jew. Nazi propaganda targeted Flechtheim specifically before and after the national seizure of power in January 1933. That propaganda was intended to create the conditions necessary for genocide of Germany’s (and Europe’s) Jews generally, and Flechtheim specifically.

22. Bavaria, hosting the headquarters of the Nazi party, of the Nazi organizations and of the party leader and *Führer* Adolf Hitler, and Nazi Germany had the specific intent to deprive Flechtheim of the economic means to survive as a prelude to genocide. They succeeded.

Flechtheim had to abandon his life's work and property in Germany and flee for his life early in the Nazis' reign in 1933. The opportunists who preyed on Flechtheim's vulnerable position (as a result of Germany's and Bavaria's genocidal intent) did so knowingly, and furthered the genocidal scheme of Germany and Bavaria.

23. Bavaria's refusal to confront its responsibility has persisted since the war. On information and belief, the BSGS and Bavaria eagerly returned works of art—many of which had been looted from Jews—to Nazis and their families in the 1950s and 1960s, while refusing to make restitution to deserving Jewish victims, their families, and heirs.

24. Bavaria has made a mockery of its (and Germany's) international commitments since 1998 to address the problem of looted art. It provides no recourse for victims and heirs, and refuses even to participate in the national level, highly controversial Advisory Commission (the "Beratende Kommission" or "Limbach Commission"), which is itself inadequate and, by announcement of the German Federal government, faces a possible (though inadequate) reform, because of an evident lack of proper handling of restitution disputes.

25. Bavaria, in its capacity as one of the 16 federal states, or *Länder*, that together form the Federal Republic of Germany, under international law, is the same sovereignty as the Nazi Third Reich. Bavaria is also, the sole beneficiary of the Nazi dictator Adolf Hitler and of his deputy Hermann Goering. As such, Bavaria is not immune from suit for its complicity in and perpetuation of the discriminatory appropriation of the Flechtheim Paintings.

26. The policy of the United States of America since at least 1945 has been to undo the forced transfers and retribute identifiable property to the victims of Nazi persecution wrongfully deprived of such property and, with respect to claims asserted in the United States for

restitution of such property, to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of the Nazi officials. *See* Press Release No. 296, “Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers,” reprinted in *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 375-76 (2d Cir. 1954).

27. Bavaria and the BSGS are engaged in commercial activity within the United States, within the meaning of 28 U.S.C. § 1605(a)(3), including but not limited to the examples that follow.

28. The Pinakothek in Munich, administered by the BSGS and the current location of some or all of the Paintings, publishes and sells a book of the highlights of its collection entitled *Modern Art at the Pinakothek der Moderne* within the United States, including but not limited to within this District.

29. The Pinakothek also publishes and sells a book entitled *Pinakothek Der Moderne, Munich* featuring highlights of the collection within the United States, including but not limited to within this District.

30. The BSGS engages in regular exhibitions within the United States by loaning objects to museums in the United States from the collections of the museums administered by the BSGS. On information and belief, the BSGS also licensed photographs of its collection for inclusion in the catalogues of those exhibitions, which are sold and marketed throughout the United States (including in this District by retail and Internet sales).

31. By way of example but without limitation, the BSGS loaned objects to an exhibition entitled “The Munich Secession and America” in 2009 at the Frye Art Museum; to an exhibition entitled “Three Decades of Contemporary Art: The Dr. John & Rose M. Shuey Collection” at the Cranbrook Art Museum, Bloomfield Hills, Michigan; and to an exhibition entitled “Law and Grace: Martin Luther, Lucas Cranach, and the Promise of Salvation” at the Pitts Theology Library at Emory University this year.

32. The BSGS licenses images of its collection to the general public throughout the United States (including this District) on an ongoing basis, including but not limited to licensing relationships with Art Resource in New York, Bridgeman Images, and Scala Archives.

33. The BSGS solicits subscriptions to its newsletters, solicitations that reach this District, among other parts of the United States. BSGS-administered museums, including the Pinakothek, seek to and sell entrance tickets to patrons in the United States, including but not limited to patrons in this District.

34. On information and belief, Bavaria is selling images of works of art at their state-owned art collections, including images of the claimed Flechtheim Paintings by the German expressionist artist Max Beckmann, in the United States through the German Rights Management company VG Bild-Kunst and, for the U.S., through their American partner and substitute Artists Rights Society in New York. Therefore, Bavaria directly benefits, and for decades has continuously generated profits, from the contested Paintings, unlawfully taken from Flechtheim.

35. On information and belief, with the American Patrons of the Pinakothek Trust in Washington D.C., a charitable organization which receives a substantial part of its support from

a governmental unit or the general public, Bavaria maintains and materially supports a charity in the United States, that was created in 2006 as a channel for donations, for the sole benefit of the BSGS-run Pinakothek. The “Patrons” offer individuals and businesses in the United States the opportunity to support the Pinakothek in Munich via tax deductible donations in the form of artworks or financial gifts.

36. In addition, Bavaria is the most commercially active of the *Länder* in the United States. It sponsors and oversees a wide variety of purely commercial interests within the United States. By way of example but without limitation, Bavaria is a shareholder and franchisor of Hofbräuhaus America, which oversees brew pub franchises in Newport, Kentucky, Pittsburgh, Pennsylvania, and Chicago (Rosemont), Illinois, as well as other restaurants/beer gardens in Nevada, Pennsylvania, Ohio, and Florida. On information and belief, Bavaria is the controlling interest (directly or indirectly), in Hofbräuhaus of America LLC.

37. According to their own website, those brew house franchises “brew their beers under the supervision of the Hofbräu Brewery in Munich” and otherwise operate under the operational direction of the Hofbräuhaus in Munich, which is owned by Bavaria.

38. The American *Hofbräuhäuser* adhere precisely to the instruction of the state-owned enterprise in Munich, which ensures commercial and brand consistency. The franchise buildings are designed architecturally to mimic the original Hofbräuhaus in Munich, using logos and trademarks controlled commercially by Bavaria. All beer sold at the smaller “Beer Garden” establishments is imported directly by Bavaria from Munich.

39. Bavaria and the Hofbräuhaus promote “Oktoberfest” events throughout the United States, including in New York City.

40. Bavaria is, through its state-owned bank (Bayerische Landesbank), the sole shareholder of BayernLB Capital LLC I and BayernLB Capital Trust I in Wilmington, Delaware, two offshore subsidiaries of the Bavarian State bank doing business in the United States.

41. Bavaria also promotes broadly the commercial activities of Bavarian companies. Bavarian culture is portrayed more extensively through these efforts than any other region in Germany. Thanks largely to these commercial efforts by Bavaria, most Americans associate “German” culture with aspects that are in fact specifically attributable to Bavaria. This commercial branding has been widespread and extremely successful.

42. On information and belief, Bavaria, through its Bavarian U.S. Offices for Economic Development LLC in New York City and in San Francisco, engages in a broad range of commercial activity in the United States, including but not limited to the commercial promotion of Bavarian companies and industries and the solicitation of American visitors to Bavarian museums, including but not limited to those administered by the BSGS. In their own words, the Bavarian U.S. Offices for Economic Development LLC actively

promotes and markets the German State of Bavaria, the high-tech business location in Europe. In cooperation with the Bavarian State Department of Economic Affairs and Invest in Bavaria, our team offers confidential assistance to enterprises in the Western United States with locating, expanding and growing their business in Bavaria. Due to our strategic marketing campaigns and tailor-made services for companies of all sizes and industry sectors, we have been highly successful in building strong ties between the business communities in Bavaria and the United States and in supporting enterprises with partnering, branching out and all aspects of global expansion. World famous U.S. companies such as Google, Microsoft, Sun Microsystems, Oracle, Intel, Hewlett Packard, Amazon or Ingram Micro are longtime and successful members of Bavaria's business community. Through its close relationship to state governments and local economic development offices in the U.S., our office is also an effective partner for Bavarian companies planning to expand their business in the USA. We are the local contact for Bavarian companies interested in developing new markets, seeking comprehensive assistance and customized support.

43. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(f)(3) because the BSGS is an agency or instrumentality of Bavaria (a political subdivision of foreign state) and Bavaria and the BSGS are both doing business within the Southern District of New York, *inter alia*, as alleged above. In addition, the BSGS has put in issue certain alleged transactions in New York involving Flechtheim and the man (Franke) from whom the BSGS acquired the Paintings—transactions that never in fact took place—that Bavaria says justify retention of the Paintings.

FACTUAL ALLEGATIONS

Flechtheim and Modern Art

44. Flechtheim was born in 1878 in Münster, capital of the then-Prussian province of Westphalia. The Flechtheims were successful grain merchants, and Flechtheim initially entered the family business as a young man. His eye for art took on increasing prominence in his life, and he began to enter into the art market around the time he married Bertha (Betti) Goldschmidt in 1910. He expanded into works by the Cubists in France, as well as the Expressionist collectives *Der Blaue Reiter* and *Die Brücke* (the Blue Rider and the Bridge, respectively) in the years leading up to 1914, when he soon became a central figure in the art market in the Weimar Republic. Today, he is considered the most important and influential patron of avant-garde art in the interwar era in Germany.

45. Flechtheim served as a cavalry officer in the German army during World War I. After the war, Flechtheim re-established himself in Düsseldorf, later on in Berlin, and by the mid-1920s had left Alex Vömel (“Vömel”) principally in charge of his gallery in Düsseldorf. At various points Flechtheim also had galleries, or joint ventures, in Vienna, Frankfurt and Cologne.

46. Flechtheim was a pioneer of modern art in the turbulent decade that followed World War I. He was responsible for fostering the career and rise to prominence of many renowned artists, like George Grosz (“Grosz”). Grosz had his first major exhibition at Flechtheim’s gallery in 1923.

47. Flechtheim was also the dealer for Max Beckmann (“Beckmann”) in 1927-31, and represented famous avant-garde artists like Paul Klee (“Klee”), Ernst Ludwig Kirchner (“Kirchner”), and Juan Gris (“Gris”), among many others.

48. Flechtheim’s galleries in Düsseldorf and Berlin were synonymous with cutting edge art in the Weimar era, which featured complex themes about modernity, war, and the economic chaos that had enveloped Germany.

49. In 1921 Flechtheim also founded *Der Querschnitt—The Cross Section*—the leading European cultural magazine at the time.

50. Two of Flechtheim’s most senior—and most trusted—employees were Vömel and Curt Valentin (“Valentin”). Vömel was a member of the S.A. (a/k/a “Brownshirts”), the Nazi party’s paramilitary subdivision and of the “Stahlhelm” (a right-wing, paramilitary association of ex-soldiers from World War I). Vömel later became an enthusiastic Nazi, while Valentin moved to New York where he made his name as a conduit for art disfavored by the Nazis in the commercial art market, accompanied by an official license and permit by the Nazi authorities, to sell stolen or otherwise seized art. As detailed below, this misplaced trust would play a tragic role in the downfall of Flechtheim’s life and the eventual plunder of his collection.

The Nazi Rise to Power

51. Founded in 1923, the National Socialist German Workers Party (*National Sozialistische Deutsche Arbeiterpartei*, or “NSDAP”), grew out of various nationalist movements in the wake of World War I. Originally called the DAP, (*Deutsche Arbeiterpartei*), Hitler was member No. 55. He soon took control of the movement, and his message from the start was the unmistakable intent to marginalize and eliminate European Jews. The center of the movement was in Munich, where the Nazis enjoyed their highest support until the very end of World War II.

52. Throughout the 1920s, the NSDAP struggled for relevance in the economic chaos of the fledgling Weimar Republic. A failed coup d’état in 1923 that came to be known as the “Beer Hall Putsch” was derided as amateurish, and Hitler and other Nazi leaders were imprisoned. While incarcerated at Landsberg Prison, Hitler penned the foundational document of what would become the Nazi movement: *Mein Kampf*. The book left no doubt as to Hitler’s worldview, and his views on where Jews fit into it, *i.e.*, they did not. For anyone seeking to rise within the NSDAP, or later the government that it took over, it left no secret about how to please Hitler.

53. With the onset of the Great Depression, the electoral fortunes of the NSDAP improved. Still unable to break through into a position of parliamentary control, they nonetheless achieved substantial enough minorities to be reckoned with, and made a name for themselves with threatening behavior in the legislatures they joined.

54. That threatening behavior took its worst form outside the halls of town halls, “Landtage,” the German states’ parliaments, and the Reichstag, however. The Nazis and their

“Brownshirts” (the S.A.) became known for politically-motivated violence and attacks on political opponents, communists, socialists, and Jews.

55. The Nazis also now found resonance in the electorate with their scapegoating of Jews. Jews had long been stereotyped in association with commerce, as part of the alleged “Global Jewish Conspiracy.” The NSDAP played off this, and blamed Jews for any and all economic setbacks: the hyperinflation of the Weimar Republic, the collapse of the stock market, bank closings, and the Great Depression.

56. Flechtheim was personally at the center of this propaganda. He was bombarded with hate articles by Nazi authors who despised Flechtheim’s role regarding art that the Nazis labeled “degenerate” even long before 1933, but led to a nationwide smear and terror campaign against him at the turn of the year 1932/33. Flechtheim appeared twice in barely four weeks in the leading Nazi magazine *Illustrierter Beobachter—Illustrated Observer*: On the cover of the magazine’s edition of December 10, 1932, in a photo montage entitled “Die Rassenfrage ist der Schlüssel zur Weltgeschichte” (“The racial issue is the key for world history”), he was presented as a key villain of what the Nazis called the alleged “Jewish World-Conspiracy.”



57. The very same issue contained a photo montage entitled “*Im Schatten Ahasver*” (the Wandering Jew), in which prominent German Jews were pictured along with a racist poem. The montage was reprinted shortly thereafter in a local paper, now entitled “*Im Schatten Jehovahs*” (In the Shadow of Jehovah) with figures bearing labels. Flechthorn is shown, as are members of the prominent Cassirer family who were also persecuted by the Nazi government:



58. Only a few weeks later and on the cusp of Hitler's ascension to power, the magazine published another poster of Flechthelm on January 7, 1933. In the infamous "So? oder so?" poster ("This? Or this?"), Flechthelm's face is juxtaposed over a hammer and sickle, contrasted with the swastika and a supposedly classically "Aryan" character held up as an exemplar:



59. In short, Flechthorn personified for the Nazis what they called “Jewish cultural Bolshevism.” His literary and business activities were gravely defamed as “rudely Jewish, negro-like taint of the German national soul,” and he was mocked as, among other things, “the grain-Jew from Odessa.”

60. In the parliamentary elections of 1932, the NSDAP won a plurality of the popular vote for the first time. This gave the NSDAP the largest faction within the Reichstag, though not yet a majority. It was to be the last even arguably democratic election in Germany until after 1945.

61. On January 30, 1933, Adolf Hitler was appointed Chancellor by aging Reich President Paul von Hindenburg. What was initially perceived as a stabilizing nod to conservatism, quickly descended into an onslaught of repression. All the designs of the Nazi

Party program of 1920, the failed “putsch” of 1923, and *Mein Kampf* had now assumed the authority of the state.

62. On February 27, 1933, a fire broke out in the Reichstag, the imperial parliament building that housed the legislature of the Weimar Republic.

63. This provided the Nazis with the entire pretext they needed. Cited as proof that German communists were plotting against the government, despite flimsy evidence and the likelihood that it was orchestrated by the Nazis themselves as an excuse to act, it was to become the precipitating event for Nazi Germany.

64. With the “Decree of the Reich President for the Protection of People and State” of 28 February 1933, better known as the Reichstag Decree, Hitler was given far-reaching, violent means of power. Articles 114, 115, 117, 118, 123, 124, and 153 of the German Constitution, which affected the fundamental rights of citizens, were overridden. Henceforth, the restriction of personal freedom, freedom of expression and of personal property were expressly sanctioned by the state. Infringements of the Decree were punished with confiscation, prison, penitentiary, and death.

65. With free exercise curtailed and violent enforcers unleashed on the streets, victory in the election of March 5, 1933 was ensured. The Nazis emerged with a majority of the seats in the Reichstag, and *carte blanche* was delivered to Hitler and his anti-Semitic program.

66. Hitler and his regime wasted no time whatsoever. The Enabling Act of 1933 (*Gesetz zur Behebung der Not von Volk und Reich*, or Law for the Remedy of the Emergency of

the People and the Reich) amended the Weimar Constitution further, giving the Chancellor—*i.e.*, Hitler—the power to enact laws without the legislature.

67. Other laws followed in this vein: the Restoration of the Civil Service Law of July 4, 1933, the destruction of public unions and democratic trade associations in April and May, 1933, the institutionalization of the one-party state and expulsion of non-National Socialists (July 14, 1933), and the repeal of the fundamental constitutional rights of the Weimar Republic all followed.

68. These laws and regulations, while draconian, barely approach the repression that was unleashed on Germany's Jews. Through the collective humiliation, deprivation of rights, robbery, and murder of the Jews as a population, they were officially no longer considered German.

69. Boycotts of Jewish businesses spread in March and April 1933, just weeks after Hitler's ascension, with the encouragement of the state itself.

70. By the spring of 1933, the first concentration camp had opened— at Dachau, in Bavaria—and the murder of Jews detained there went unprosecuted. This may seem unsurprising with the benefit of hindsight, but Germany had descended in a matter of weeks to a place where Jews could be plucked off the streets, imprisoned, and murdered just yards away from their neighbors, all without consequence.

71. It was not merely that such violence could happen with impunity, but also that it was now official policy.

72. This boycott of Jewish-owned businesses is hard to imagine now. Judges, lawyers, doctors, retailers, art dealers—the bedrock of the German middle class—were targeted and driven out of their ability to make a living.

73. “Aryanization” was the term for the state-sponsored takeover of Jewish business. With the official support and encouragement of sovereign authorities, individual Jews like Flechtheim were stripped of their property for the benefit of approved ethnic Germans.

74. Aryanization was an integral part of genocide, not merely a prelude or incident to it. As one court has stated:

[T]he Nazis’ aryanization of art collections was part of a larger scheme of the genocide of Europe's Jewish population.

Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1194, 1203 (C.D. Cal. 2000).

75. Every Aryanization involved ostensibly “private” actors (opportunists and thieves like Vömel), but that misses the larger point: it was a state policy specifically designed to punish a minority for who they were. Takings pursuant to such an abhorrent policy violate international law, whether or not an actual civil servant took the property itself.

76. Propaganda was soon in full swing. The *Völkischer Beobachter* was the notorious official Nazi Party newspaper. In an edition dated March 31, 1933, Julius Streicher (who published his own militant and racist newspaper *Der Stürmer*) called on the populace to boycott Jews as “profiteers,” “convicts, deserters and Marxist traitors.” He concluded:

All Jews will have to fight so long, until victory is ours! Nazis! Defeat the enemy of the world! And if the world would be full of the devil, we must succeed yet!

77. S.A. men, the by-now-ubiquitous Brownshirt thugs, fanned out to express “public opinion,” as the police and ordinary citizens looked on. Jewish shops were smashed, stores and apartments were looted, and Jewish lawyers were beaten on their way to court.

78. The latent danger for Jews to lose their lives and their property was not dependent on the new laws noted above, though they hastened the threat. More laws restricted the ability of Jews to transfer assets—punishable by death—as Jews were tortured in Gestapo, S.A. and S.S. cellars or simply beaten to death in broad daylight.

The Nazis’ Genocidal Campaign Against Flechtheim Drives Him from His Home

79. In March 1933, after the Nazis ascended to power, the S.A., Hitler's paramilitary hooligans, stormed an auction that had been organized by Flechtheim. Nazi press called him the “art Jew” and accused him of defiling the “German people's soul.”

80. On April 1, 1933, the Nazi newspaper *Volksparole* published an article entitled “Abgetakeltes Mäzenatentum” (“Rotten Patronage”), which hurled the “Judeo-Bolshevist” epithet at Flechtheim and gloated over his financial ruin. The word “extermination” was even used. In other words, in no uncertain terms, the Nazis called for his assassination.

81. As a Jew, and as a successful merchant in art that the Nazis deemed “degenerate,” his situation was hopeless, as a specific and direct result of the Nazi state’s desire and effort to deprive him of the means to survive economically—all as a prelude to his physical destruction and that of Germany’s Jews as a whole. Flechtheim understandably fled Germany shortly thereafter, alone, leaving his wife, Betti Flechtheim, behind in Berlin, in May 1933 and went to Paris.

82. Dr. Uwe Hartmann is a senior German public official, an internationally acknowledged specialist on matters of Nazi plunder, Head of the Department for Provenance at the state-run and established Deutsches Zentrum für Kulturgutverluste (German Center for Cultural Property Losses), a foundation created in part by Bavaria. He made comments in a recent book that are well worth noting in this context. He said: “After the takeover by the National Socialists, the anti-Semitic attacks were intensified and the art-hating defamatory statements were increasingly aimed at destroying [Flechtheim’s] professional existence.”

83. Vömel, who, after the Nazi takeover immediately applied for the NSDAP party membership, sent out announcements on March 30, 1933 that his gallery would be opening “in the previous premises of the Flechtheim Gallery.” Valentin, of course, went on to a profitable career in America laundering art seized by the Nazis as “degenerate.”

84. By the end of 1933, the liquidation of the corporate entity that comprised the Flechtheim Gallery—Galerie Alfred Flechtheim GmbH—had begun. This was governed and handled by Schulte and completed with finality on February 24, 1937.

85. Next to Vömel, the “Aryan” Nazi tax advisor Schulte from Berlin, who had been well connected to Jewish business people as well as to the Nazi state and its authorities, had a major role in Flechtheim’s demise. Because of the enforced shutdown of his galleries in early 1933, Flechtheim found himself on the brink of bankruptcy. In order to avoid insolvency as a direct result of this racial persecution, Flechtheim was forced to place his property at the disposal of Schulte who took over the company and the Berlin headquarter of the Flechtheim Gallery at some point in summer of 1933 (officially in November 1933), by which time Flechtheim was already on the run. It was Schulte, who officially took possession of all of Flechtheim’s

belongings and subsequently sold a good deal of it to the benefit of Flechtheim's German creditors and the Nazi state's authorities. At this point, Flechtheim had totally lost control of his affairs and did not benefit from any of these forced sales.

86. Flechtheim managed to send some of his collection to Paris and London as he fled, but the contested Paintings were not among them. Instead, they changed hands in Germany under the aforementioned dire circumstances.

87. After 1933, Flechtheim's niece Rosa (Rosi) Hulisch (daughter of Betti Flechtheim's sister Clara), crippled with polio, was forced to watch the Aryanization of her uncle's business by Vömel.

88. By that time Vömel had already begun selling Flechtheim's collection, at least in part, through Christoph Bernoulli—a Swiss art dealer, now notorious as a profiteer from art and property left behind in desperation by Jews in Germany and eventually other occupied countries—converting for his own profit what clearly belonged to the owner of the gallery, not his traitorous assistant.

89. Flechtheim died in London on March 9, 1937—lonely, brokenhearted, impoverished and in despair at the early age of 59 in exile after ineffective treatment for an injury from falling on some ice and after the amputation of his legs.

90. In 1937 Rosi was forced to serve as the formal liquidator of the Galerie Alfred Flechtheim GmbH. She, her mother Clara and aunt Betti apparently managed to retain a small fraction of what had belonged to Flechtheim. In April 1942, Rosi and Clara were forcibly removed from their apartment at Eisenbahnstraße 66 in Berlin to a one-room apartment, confined

in a so-called “*Judenwohnung*,” or “Jew apartment.” They lived there, at Güntzelstraße 17/18 until they received an order to report for deportation. Rosi and Clara took their own lives on November 4, 1942 rather than face starvation, disease and certain death in the gas chambers. All that remained of the Flechtheim property was seized by the Gestapo upon their deaths.

91. Betti Flechtheim, Alfred’s widow, also took her own life rather than report for deportation in November 1941. When the Gestapo broke into her apartment to take her away, she was still alive, but died shortly thereafter.

92. Rosi’s brother Heinz Alfred Hulisch—Dr. Hulton’s father, born in 1910—was the lone survivor of the family. He changed his name to Henry Alfred Hulton. Flechtheim’s will named Heinz/Henry as his sole heir.

93. The Beckmann Paintings in the BSGS at issue here later resurfaced in the gallery of Franke in Munich. Franke donated them to the BSGS in 1974, claiming to have acquired them “in 1932 or 1933.”

94. This assertion by Franke was flatly untrue.

95. Franke was a soldier in the Wehrmacht and an eager follower of the Nazis when they were in power. He personally gained from the anti-Modern art measures taken by the Nazis. He amassed a fortune in those years from looted art and he was demonstrably involved in dealings with stolen art in the postwar era.

96. Defendants trace their chain of title to Franke, but only speculatively. They have offered a variety of alternative scenarios instead, each of which is unfounded and uncertain. One other scenario, asserted by the Defendants in recent years, is that Flechtheim allegedly sold all of

his Beckmann paintings (including the Paintings in question and *The Lion Tamer*, as discussed above and below) in early 1932, to the art dealer J.B. (Israel Ber) Neumann (“Neumann”) in New York.

97. That theory is also unfounded and contradicted by clear evidence.

98. Flechtheim represented the interests of Max Beckmann from the second half of the year 1927 until the end of 1930 together with Neumann, owner of the gallery “Graphisches Kabinett” in Munich. Franke was Neumann’s employee and later partner. Franke and Flechtheim had a longstanding animosity, making any suggestion of a deal between them extraordinarily unlikely absent compelling evidence to the contrary—evidence that Defendants cannot produce. These few years of mutually beneficial cooperation of the three art dealers and the artist ended in early 1931. Soon after, Beckmann terminated his business relationship with Neumann and Franke, too.

99. Associated with the termination of their business relationship, Flechtheim received several paintings in lieu of payment from the artist, who had been indebted to his art dealers at the time: In February 1931, Beckmann, among others, transferred ownership of *Duchess of Malvedi*, of *Still Life with Cigar Box* and of *Champagne Still life* to Flechtheim, followed by *Dream—Chinese Fireworks* in March 1931.

100. In May and in June 1931—this time as a replacement for painting *Woodcutter* which had been sold without Flechtheim’s consent by Franke in Paris—Flechtheim received the gouache *Lion Tamer* (which, in 1934, ended up in the Hildebrand Gurlitt collection, as explained further below) and the painting *Still Life with Studio Window*, plus an additional financial compensation payment in the form of a transfer of the sales proceeds of the *Woodcutter*, too.

Three years before, in 1928, Flechtheim had already bought the famous *Quappi in Blue* from Beckmann's first wife Minna Beckmann-Tube. By a letter dated June 6, 1928 to the director of the National Gallery in Berlin (Ludwig Justi), Flechtheim declared this painting and others as “unsellable” works from his “private collection.”

101. At the beginning of 1932, the paintings *Still Life with Studio Window*, *Duchess of Malvedi*, *Still Life with Cigar Box*, and two more (*New Building* and *Spotorno*) were given by Flechtheim on loan to the exhibition “Nyere tysk art”—“Modern German Art” in Oslo, Norway, as part of the private Flechtheim collection.

102. In early 1932, Flechtheim seems to have been prepared to dispose of his entire Beckmann paintings collection, not least motivated by a deep-seated disappointment regarding the break with the artist. Neumann stepped in as a potential buyer.

103. By letter of March 14, 1932 and against the background of a previous bid by Neumann to acquire Flechtheim’s Beckmann paintings for a total of \$2,000, Flechtheim responded positively to this offer, although he expressed certain reservations (“*I must keep the ownership rights subject to the payment thereof, /.../ I would suggest to promise to pay the \$2,000 by the end of 1932.*”).

104. The deal never took place, however, because Neumann ran out of money himself and revised his offer downward dramatically to 2,300 Marks—some \$540 barely a quarter of the offer that Flechtheim had already rejected. In light of this, Flechtheim firmly rejected the proposed deal. By letter of May 12, 1932, Flechtheim made this blunt point explicitly: “*Beckmann: Forget about it! If you had thought that I wanted to get rid of Beckmann paintings for only 2.300,- Marks, you erred.*”

105. Despite all evidence to the contrary, Defendants continue to rely on the initial letter of March 1932 in support of their assertion that Flechtheim sold his entire Beckmann paintings to Neumann before 1933.

106. Moreover, as alleged above, Defendants have also suggested that Flechtheim must have entered into a sale of his Beckmann paintings to Franke. Again, there is no evidence whatsoever for this fictional theory. In recent discussions and in contradiction with what they said before and since, the BSGS came up with a third alternative idea of how Franke may have come into the possession of the Flechtheim Paintings. This time, they suggested that Flechtheim would have sold his *entire* Beckmann collection to Neumann first, who later gave or sold it to Franke. Defendants have no evidence for that assertion, either.

107. Franke certainly came into the possession of the Paintings at some point, though whether this took place by theft or fraud is irrelevant. Flechtheim did not sell the Paintings to Franke, who usurped the collection for himself as a direct, proximate and foreseeable consequence of Flechtheim's racial persecution by the Nazi state. Nor did Flechtheim sell the paintings to Neumann.

108. In short, the Franke provenance is a complete fiction and fabricated for self-serving reasons. Yet in a self-serving "report" published in September, 2016 (after receipt of the Hultons' demand in 2016, and which refers to correspondence with the Hultons in 2015), Bavaria repeated the fiction that the Paintings had been sold by Flechtheim between 1928 and 1932. Defendants know this cannot be true, yet they continue to propagate this misdirection to excuse their wrongful retention of the Paintings.

109. On information and belief, in the postwar era Franke admitted that the provenance he later on supplied to the BSGS was untrue. Specifically, in correspondence that only recently came to light, it was revealed that Franke had told Jan Ahlers (a successful German businessman and renowned art collector) in the mid-1950s that he was not the real owner of *Quappi in Blue*, but that he would inquire of the owner in response to Ahlers's question about purchasing it. That is fundamentally incompatible with the contention that Franke had the legal authority to convey that work (or the others) to the BSGS, without which Flechtheim and his heirs (the Plaintiffs) retain title.

110. On information and belief, the paintings by Juan Gris, *Cruche et verre sur un table* and by Paul Klee, *Grenzen des Verstandes* had been part of the private art collection of Flechtheim and changed hands because of Nazi persecution of their owner only after 1933. The BSGS bears the burden of proof in its assertion of title to prove that the Paintings were lawfully acquired, but has never provided *any* evidence for lawful transfer of ownership.

The Confiscation of the Flechtheim Collection was a Taking of Property in Violation of International Law

111. Since World War II, a presumption of international law has been that any sale of property by a Jew in Nazi Germany after January 30, 1933, or in any country occupied by Nazi Germany carries a presumption of duress and thus is null and void, and the victim or his or her heirs are entitled to restitution.

112. This is for the basic reason, as demonstrated by the foregoing, that no Jewish citizen or resident of Germany could possibly have entered into an arms'-length transaction with the Nazi state itself, or its henchmen, representatives, agents or beneficiaries of that regime of criminals.

113. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 defines genocide as follows:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group; [or]
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . .

114. As noted above, Flechtheim was the target of specific threats and propaganda because he was a Jew and because the then-German government set out to destroy him and all Jews—the very definition of genocide.

115. Any title to the Paintings in this case could only be established if the current possessor (the BSGS) could prove that Flechtheim conveyed them at arms' length, free of duress, in exchange for fair compensation.

116. According to international principles of law, German law—German Civil Code (“BGB”) included—the tainted and voidable acquisition of the works in the BSGS did not convey good title to Bavaria or the BSGS.

117. A bona fide acquisition of unlawfully expropriated or otherwise lost cultural goods is prohibited within the Common law legal system—according to the *nemo dat quod non habet* principle, as well as the codified German Civil Law, pursuant to § 935 BGB.

118. If the *res* in question has been stolen or lost, then bona fide acquisition according to § 932 BGB *et seq.* is not available (§ 935 BGB). The idea behind this limitation is that the

owner has not parted with his direct possession deliberately, so that a third person shall not have the benefit of the appearance of entitlement through possession under such circumstances.

119. Any sale by the victims of the Nazi regime after January 30, 1933 that were under duress are void, with effect *ex tunc* within the meaning of § 138 BGB. This is because, *inter alia*, the transaction would not have been conducted absent the coercive rule of National Socialism. Any acquisition of such cultural objects cannot be considered a bona fide purchase in accordance with § 935 BGB.

120. Such objects whose sale is to be regarded as void under § 138 BGB, fall under the category of § 935 para. 1 BGB and apply as “lost” under German law.

121. As a result, any claimant, whose claim meets the aforementioned requirements, generally speaking, has a claim for restitution, according to § 985 BGB.

122. However, repeatedly affirmed legal precedence has been established since the 1950s that assumes a clear position regarding the enforceability of restitution claims of property seized under Nazi persecution in Germany. Under present law, the restitution claim regulations under public law for asserting restitution claims and related claims in regards to the special laws governing Nazi infractions have been affirmed pursuant to the landmark decision by the German Supreme Court from the 1950s, and have been consistently re-affirmed in the following decades; said regulations excluding regulations under civil law (German Supreme Court, ruling dated October 8, 1953, BGH NJW 1953, 1909f.). The German Supreme Court at that time ruled – without this legal precedence having been reversed to the present day – that the former German restitution laws conclusively settle the seizure cases based on persecution actions by the Nazi

regime, and that therefore restitution claims based on general civil law – that is to say the German Civil Code (BGB) – are therefore categorically excluded.

123. The theft of the Paintings was the direct result desired and planned by Nazi state actors. There is no question that, with their ascension to power and their taunting of Flechtheim after he was ruined, the Nazi state set about to and did deprive Flechtheim of his property as a prelude to his physical destruction. The bit parts played by individuals are incidental, their roles were in a larger scheme devised and executed by the German Reich.

124. Even representatives and senior officials for the Defendants have acknowledged this genocidal intent. For example but without limitation, Dr. Andrea Bambi, Head of the Department of Provenance Research at BSGS, and Dr. Axel Drecol, Head of the *Dokumentation Obersalzberg* of the Institute for Contemporary History at Munich, a state-run entity, established, governed and financed by Bavaria, several Länder and the German Federal Government, edited *Alfred Flechtheim: Raubkunst und Restitution (Alfred Flechtheim: Looted Art and Restitution)*, In that book, Drs. Bambi and Drecol concede that Flechtheim was made a “public enemy” by the Nazis, that he became a symbol for the suffering of Jews and that he was stripped of his rights and assets by the Nazi-regime and its representatives:

A life cut short, defamation, physical attacks, emigration, loss of property in Germany and the difficulties involved in gaining a foothold in a foreign country not only characterize Alfred Flechtheim’s history of persecution. These he shared with many other Jews from Germany, who had their rights and their property taken from them.

In other words, Defendants have admitted that Flechtheim’s property was unlawfully taken from him because of racial persecution by the Nazis. Among this property were the Paintings, about which Defendants have no evidence to the contrary.

Bavaria's International Commitments and Obligations Concerning Nazi Art Looting

125. In 1998, the United States Department of State organized and hosted the Washington Conference on Holocaust Era-Assets (the "Washington Conference").

126. The Washington Conference resulted in what have become known as the Washington Conference Principles on Nazi-Confiscated Art. Germany was a key participant, along with Austria, France, the United States, and dozens of other nations. The Washington Principles state:

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

- 1) Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
- 2) Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
- 3) Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
- 4) In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
- 5) Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
- 6) Efforts should be made to establish a central registry of such information.
- 7) Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
- 8) If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps

should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

9) If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

10) Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

11) Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

127. The restitution encouraged by the Washington Principles confirms what has been the foreign policy of the United States for nearly 75 years. The United States Supreme Court, as well as the Courts of Appeal of the United States, have recognized that proceedings in furtherance of that goal such as this one are entirely consistent with that policy.

128. In addition, Germany is a signatory to the Washington Principles. On December 9, 1999, the Federal Republic itself, the 16 federal states, or *Länder* (including Bavaria), and the association of local authorities issued a declaration of adherence to the Washington Principles, entitled the “*Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz*” vom 9. Dezember 1999 (the “Collective Declaration”).

129. The Collective Declaration commits to the restitution of Nazi-looted artworks, notwithstanding any other wartime claims compensation or restitution by Germany or the Allies and, consistent with postwar Allied Military Government law, without distinguishing according to whether or not Nazi-looted assets had been robbed, stolen, confiscated, or had been sold under duress or by pseudo-legal transaction.

130. In 2009, the Czech Republic hosted a follow-up to the Washington Conference (the “Prague Conference”). Representatives of some 49 countries, most of which were affected by Nazi crimes during World War II, and nearly two dozen NGOs were invited to attend. The Conference focused on immovable (real) property, Nazi-looted art, Holocaust education and remembrance, archival access, and the recovery of Judaica. In addition, there was a session on the social welfare needs of survivors of Nazi persecution, an issue of great importance to the United States.

131. The Prague Conference resulted in the Terezin Declaration, which states, with respect to Nazi-stolen art:

Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence, and

Recalling the Washington Conference Principles on Nazi-Confiscated Art as endorsed at the Washington Conference of 1998, which enumerated a set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions,

- 1) We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,
- 2) In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts,

3) Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their 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, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

132. Pursuant to the Washington Principles, the Terezin Declaration, United States law, German law, and international law, the confiscation and resale of the Flechtheim collection now at the BSGS was not an arms'-length transaction and must be considered a transfer of property under duress, a transfer that could not have passed, and that did not pass legitimate title to the BSGS.

133. Pursuant to the Washington Principles, the Terezin Declaration, United States law, German law, and international law, Germany has committed to address victims of art looting in a fair and equitable manner.

134. Germany itself has acknowledged these principles—but only when it suits. In 2003, Germany created the “German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property,” (*Die Beratende Kommission für die Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz*) better known as the “Limbach Commission” for its presiding member, the late former German Supreme Constitutional Court judge Jutta Limbach (“Limbach” or the “Advisory Commission”). The Advisory Commission is a non-binding mediation that issues recommendations to German state museums, but its decisions have no preclusive effect.

135. Despite Germany's sole responsibility for Nazi-looted art and the presence of thousands of looted works in German public collections, the Advisory Commission has only made thirteen (13) recommendations in as many years. Despite early optimism, it has proven to be outdated and insular at best, and revisionist and even denialist at worst.

136. Despite the creation of the Advisory Commission, despite the Collective Declaration and other measures ostensibly pursuant to the Washington Principles, Germany today still has no coherent policy towards victims of Nazi-looted art.

137. Yet Germany portrays the Advisory Commission as a *solution* to this inadequacy, to give cover to the idea that Germany is in compliance with the Washington Principles.

Bavaria Covers Up the Gurlitt Case and its Connection to Flechtheim

138. The international scandal of the Gurlitt affair beginning in 2013, among other recent developments, has a direct connection to the Flechtheim collection.

139. As noted above, Gurlitt's father Hildebrand was an art dealer authorized in the Nazi state to buy and sell so called "degenerate art" which was considered contraband in the hands of anyone else.

140. In 2013 it was revealed that Germany had seized approximately 1,280 works of art from Cornelius Gurlitt in 2012 as part of a tax investigation on suspicion that the art was Nazi-looted.

141. Since that time (the revelation itself by a newspaper was nearly two years after the artwork was found and held in secret), Germany has failed to adopt any new policies or laws. In April 2014, shortly before he died, Bavaria and the German Federal Government reached a

private agreement with Cornelius Gurlitt, apparently regarding provenance research and the return of works of art that had been unlawfully acquired by Gurlitt's father Hildebrand. The terms of that agreement have never been revealed to the public.

142. There is an even more concrete connection to this case, however. Before the Gurlitt story became public, the Flechtheim heirs became aware that the painting *The Lion Tamer (Löwenbändiger)* by Max Beckmann was for sale at the Lempertz auction house in Cologne, Germany.

143. The Flechtheim heirs, Lempertz and Gurlitt came to an agreement, in which Gurlitt specifically acknowledges that his father Hildebrand obtained *The Lion Tamer* from Flechtheim—in 1934. This conclusively disproves the BSGS's excuse—that Flechtheim had sold all his Beckmann paintings in 1932—for refusing to return the Paintings.

144. Moreover, on information and belief, the Bavarian government's seizure of Hildebrand Gurlitt's records from Cornelius Gurlitt—including private documents Bavaria refuses to make publicly available—contain additional information concerning Gurlitt's acquisition in or around 1934 of some of the Paintings. Bavaria refuses categorically to make those documents available to the Flechtheim heirs or to the public, despite the Defendants' claims of "transparency." The most obvious conclusion to be drawn from the Defendants' refusal to be open about their collections is that they have something to hide in those documents.

145. In November 2013, the German Federal state and Bavaria appointed a "Task Force Schwabinger Kunstfund" (named after the Schwabing neighborhood in which Gurlitt lived) to examine the Gurlitt collection. Neither Bavaria nor Germany (which later entered into another agreement with the Kunstmuseum Bern, to which Gurlitt left his property) has even

followed the public recommendations of that Task Force. Instead, it has continued to resist restitution even of artworks that the Task Force recommended be restituted. On information and belief, the Task Force has made only five recommendations public, and Germany has restituted only two of those five works to their rightful owners. On information and belief, the Task Force ceased to exist on December 31, 2015.

146. The November 2014 agreement between Germany, Bavaria, and the Kunstmuseum Bern in Switzerland, has provided the public with some information on the Gurlitt art trove and records, but most of the documents continue to be kept confidential and the whole process remains opaque.

147. Instead, the government promoted the opening of a “German Center for Cultural Property Losses” (which engages in commercial activity in the United States) that will subsidize limited research at select German museums, but will not provide claimants any platform or forum to raise their claims—and leaves the burden of investigation and inquiry on those claimants rather than where it belongs: on Germany. Since that proposal, the German Federal Government’s Ministry of Culture’s primary restitution activity has been to congratulate itself on this illusory accomplishment.

148. Worse, the late chairwoman of the Advisory Commission herself took the occasion to argue that *German museums* are the victims in the whole affair. This episode is telling on the perspective of German authorities to looted art: Jewish victims can wait, but German museums should be made whole.

No Avenue for Recourse Exists in Bavaria or Germany

149. Bavaria, the federal state with the closest relationship to Nazism and that with the most to hide, has largely refused even to engage with the Advisory Commission, such as it is, except for one case not involving the Flechtheim collection. Absent the agreement of both parties, the Advisory Commission cannot issue a recommendation, even for what that is worth. But even if it would, the Hultons have learned through painful experience that the Advisory Commission has become useless.

150. In their initial foray before the Advisory Commission, the panel acknowledged the obvious: that Flechtheim was the victim of persecution and his collection worthy of restitution. The Hultons and the City of Cologne agreed to seek a recommendation from the Advisory Commission concerning a painting by Oskar Kokoschka (*Portrait of Tilla Durieux*) that Vömel had sold in 1934 to a collector whose foundation was later absorbed by the Wallraf-Richartz-Museum, which later conveyed it to the Museum Ludwig in Cologne. Initially, the City of Cologne refused to return the painting, arguing that the 1934 price was consistent with a fair market value.

151. The Advisory Commission acknowledged the seemingly obvious, finding (emphasis added):

In the absence of evidence to the contrary, it is to be assumed that Alfred Flechtheim abandoned the disputed painting because of his situation of persecution. The Nazi-persecuted loss of the painting is therefore affirmed.

152. Quite unlike the regrettable direction the Advisory Commission has taken of late, this put the burden on the German possessor to prove the legitimacy of its possession, not on the heirs of the persecuted.

153. On the basis of this experience, the Hultons did invite the Defendants to submit the matter to the Advisory Commission. After various indications that they might be willing to do so, Defendants never even gave a final answer to the Hultons' question.

154. More recently, however, the Hultons were subjected to notably poor treatment in the process concerning *Violon et encrier* (1913) by Juan Gris in the Stiftung Kunstsammlung Nordrhein-Westfalen (Art Collections Foundation of Northern Rheinland/Westphalia) in Düsseldorf.

155. The museum bought the Gris work on the international market in 1964.

156. Dr. Hulton and the Düsseldorf museum agreed in 2014 to submit the matter to the Advisory Commission. A hearing of sorts was conducted, but things soon went awry. After flying from California to make his case, he was shocked to find that members of the Advisory Commission were not even present, among others, the chairperson Prof. Jutta Limbach. As if that were not enough, one of the members who was there simply left during the hearing, citing a prior engagement.

157. Dr. Hulton's attorneys advised the Advisory Commission that they would follow up by letter on some of the matters discussed at the hearing, and did so three days later. Yet when they sought confirmation, they were told that the February 15, 2016 follow-up had not been received, and the Advisory Commission was already deliberating its recommendation.

158. Stunned, Dr. Hulton suspended his participation in the proceedings. Two days later, the Hultons formally withdrew from the proceedings entirely. The Advisory Commission actually tried in a press release to defensively excuse this proceeding. It argued that presiding

member Jutta Limbach's absence was meaningless because she was represented by another member.

159. As if in spite, the Advisory Commission, without having a mandate any longer, proceeded nonetheless to issue a recommendation against restitution, more than three weeks later.

160. No one except Germany's Minister of Culture—who rejected calls for inclusion of a Jewish member because such a person would be “prejudiced”—defends this panel any longer.

161. Notably, according to a report by the Commission for Looted Art in Europe, Dr. Hermann Parzinger, president of the Berlin *Stiftung Preussischer Kulturbesitz*, the successor-in-interest to the Free State of Prussia (“Prussia”) with respect to all of Prussia's interests in cultural property and fine art—which itself has been embroiled in scandal for refusing to reconstitute the Guelph Treasure that was sold under duress to agents of Hermann Goering—himself proposed the following changes on November 28, 2015 at the first conference of the new Deutsches Zentrum Kulturgutverluste (DZK, or German Center of Cultural Property Losses):

1. That the Commission should also act if it is called upon by only one of the two parties to a dispute. Currently it only acts if both sides agree.
2. That the administration of the Commission should be carried out by an independent secretariat and not the DZK.
3. That there should be more transparency in the research of museums, as many currently do not publish their findings if they come to the conclusion that a work was not lost due to Nazi persecution.
4. That the Commission should have procedural rules like any arbitration body.
5. That a representative of a Jewish organization be on the Commission.

In recent years, other and further noteworthy changes to improve the Advisory Commission's setup have been proposed by the international community, by the World Jewish Congress and by representatives for Nazi victims families, all of which have remained unconsidered.

162. Only token "reforms" were in fact instituted, adding three new members and making generalized promises of more "transparency." With that nominal reform, Germany cements its ongoing failure to deal in a proper way with the internationally agreed upon requirements for the provision of a functional system and instruments for the restitution of Nazi looted art, in order to meet with the call for "fair and just solutions" for Nazi victims.

163. In sum, the Advisory Commission is broken, it holds no realistic possibility for improvement, and Bavaria refuses to appear before it in any event to address this particular dispute.

The Hultons' Demands and Claims Are Timely

164. The Hultons have tried to resolve this dispute through negotiations, only to be put off by the BSGS and Bavaria. Through correspondence and the making of disingenuous promises, Bavaria's overt inducements to the Hultons to engage in discussions rather than file suit (discussions which were, and are, the Hultons' preference) specifically constitute "lulling" that would compel tolling the statute of limitations through and until Plaintiffs made unequivocal demand for the return of the Paintings.

165. At the Washington Conference itself, the then-Deputy General Director of the BSGS, Prof. Dr. Carla Schulz-Hoffmann, said the following (emphasis added):

Everything helpful and useful to trace and return art property confiscated by the Nazis should be done **keeping in mind that here a "statute of limitations" never can be a justified question.**

166. On December 9, 1999 Germany implemented the Washington Principles of 1998 with the *Gemeinsame Erklärung*—the Collective Declaration. Germany, Bavaria, and the other federal states claim to have and to take a leading role in researching and resolving Nazi looted art matters “on the merits of claims” since. The waiver of the plea of statute of limitations and of the laches defense hereby is only consistent with the principles of the Washington Declaration and its German equivalent, the Collective Declaration of 1999, as specified in the “*Handreichung*”, a handout by the subscribers to the Joint Declaration. Bavaria’s international and domestic commitments therefore estop and forbid it from asserting any statute of limitations in this action.

167. At last unwilling to accept the Defendants’ hollow commitment to restitution, the Hultons demanded unconditionally the return of the Paintings on June 15, 2016.

168. On June 30, 2016, through counsel, the BSGS and Bavaria unequivocally refused to return the Paintings.

169. There is no other forum available in Germany. While the Washington Principles and the Collective Declaration are a commitment not to assert defenses like statutes of limitations, Germany has broken that pledge in the Guelph Treasure litigation.

Bavaria’s Repudiation of Any Commitment to Restitution is Unmasked

170. In addition to the sound legal footing for jurisdiction and forum in this case, the support of United States government officials deprives Bavaria and the BSGS of any prudential argument to decline jurisdiction in this case. Mindful of the treatment that the Hultons have received, twenty-nine (29) members of the United States House of Representatives sent a letter

to Bavarian Minister President Horst Seehofer. As the letter (attached hereto as Exhibit 1) expressed concern (emphasis added):

[T]he Free State of Bavaria has yet to fully honor its pledge regarding restitution or compensation for Holocaust-related confiscations of property, including sales of artwork made under duress.

171. Bavaria made a tepid and meaningless response that promised no concrete action.

172. Finally, an investigation by the Commission for Looted Art in Europe (the “CLAE”) and publicized in 2016 by the *Sueddeutsche Zeitung* (Bavaria’s newspaper of record and one of the largest-circulation and best-respected newspapers in Germany) revealed a scandal of shocking dimensions: Bavaria had for years stymied restitution to victims and heirs while rewarding high-ranking Nazis and their families.

173. Specifically, the government of Bavaria sold artworks returned to it after World War II by the famed Monuments Men to be restituted to the victims of Nazi looting. After the war, the Allies returned some 10,600 objects to Bavaria with explicit instructions “that the investigation into the ownership of the pictures be continued.” Instead, in some cases, it was returned to the families of Nazi officials like Emmy Goering and Henriette von Schirach.

174. As the Washington Conference and subsequent studies have shown, this massive and laudable work by the Allies often allowed the government in question simply to ignore the problem thereafter. Worse, in the modern era of restitution, recalcitrant European sovereign defendants have argued to U.S. courts that individual heirs have no standing to file claims because lawsuits conflict with the policy that the U.S. adopted after the war. Germany itself took this position in a brief filed earlier this year.

175. The CLAE study focused on one deplorable example, of a painting hanging in the Xanten cathedral, *Dutch Plaza*, by an unknown Dutch painter after a painting by Jan Van der Heyden. It was stolen from a Jewish family in Vienna in 1938, the Krauses. After fleeing to Prague, the Krauses possessions and house in the 19th District of Vienna were auctioned off, with the proceeds going to the Nazi government.

176. By contrast, Henriette von Schirach, quietly retired to Munich notwithstanding her husband (one time minister of education and later Gauleiter of Vienna) Baldur's punishment as a war criminal because of his role in the deportation of 185,000 Austrian Jews.

177. Yet while the Krauses obtained no relief from the Bavarian government, she did. The Dutch painting and others were returned not to the surviving family, but to actual Nazis like von Schirach or Heinrich Hoffmann, who then resold them for profit. Hermann Goering's widow also made a successful personal appeal to the general director of the State Paintings Collections.

178. The German church where the painting ended up has tentatively agreed to do the right thing, but Bavaria's response to this shameful episode has been one of defiance and an utter lack of contrition.

179. Called to account for these sales to Nazi officials, Bavarian officials have tried to downplay the severity of the issue and otherwise failed to explain how anyone can trust their assurances about looted art. As noted recently in the *Sueddeutsche Zeitung*, only twelve of more than 1,000 questionable works in Bavaria's possession have been restituted. This failure disqualifies Bavaria from any argument that it has even tried, let alone succeeded, in adhering to the Washington Principles or the Collective Declaration.

180. Put simply, Bavaria has treated its collections of looted art as a profit center, not a historical obligation. It cannot argue for the benefit of any doubt any longer.

* * *

CAUSES OF ACTION

Count I—Declaratory Relief

181. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-180 as though fully set forth herein.

182. An actual case or controversy has arisen between and among the Plaintiffs, the BSGS, and Bavaria, as to the ownership of the Paintings.

183. The Defendants have wrongfully detained the Paintings and have refused to provide restitution to the Plaintiffs.

184. Plaintiffs are entitled to a declaratory judgment decreeing that they are the owners of the Paintings because Nazi Germany's genocidal state persecution of Flechtheim constitutes a taking of property in violation of international law, and directing the Defendants to return the Paintings to the Plaintiffs.

185. Plaintiffs are further entitled to a declaratory judgment decreeing that their right, title, and ownership in the Paintings is superior to any held by either the Bavaria, or both.

Count II—Replevin

186. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-185 as though fully set forth herein.

187. The Paintings are the rightful property of the Plaintiffs' as heirs and/or successor in interest of Flechtheim.

188. Despite lawful demand for the return of the Paintings, Defendants BSGS and Bavaria have refused to return the Paintings to the Plaintiffs.

189. The Defendants have deprived the Plaintiffs of their rightful property, the Paintings.

190. The Plaintiffs are entitled to the replevin of the Paintings in the possession of the BSGS.

Count III—Conversion

191. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-190 as though fully set forth herein.

192. The Paintings are the rightful property of the Plaintiffs, as heirs and/or successors in interest of Flechtheim.

193. The BSGS and Bavaria exercise unlawful control and dominion over the Plaintiffs' property: the Paintings.

194. Despite lawful demand for the return of the Paintings, Defendants BSGS and Bavaria have refused to return the Plaintiffs' property.

195. Plaintiffs have been damaged by the Defendants' conversion in an amount to be determined at trial, but in any event not less than the value of the Paintings.

Count IV—Unjust Enrichment

196. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-195 as though fully set forth herein.

197. The BSGS has wrongfully possessed the Paintings for decades.

198. The BSGS has used the Paintings in commerce in the United States and/or outside the United States having an effect within the United States as a significant attraction and source of revenue.

199. The BSGS's use of the Paintings in this manner has unjustly enriched the BSGS and Bavaria.

200. The BSGS and/or Bavaria should disgorge to the Plaintiffs the amounts by which they have been unjustly enriched, in an amount to be determined at trial.

Count V—Breach of Fiduciary Duty

201. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-200 as though fully set forth herein.

202. As a result of the inequitable and genocidal conduct of the Defendants' predecessors-in-interest, Flechtheim was deprived of his property.

203. By virtue of the political reorganization of Germany, Germany's international commitments, the Washington Principles, the Terezin Declaration, and/or the Collective Declaration, a trust—express, implied, or constructive—arose for the benefit of Flechtheim and his heirs and/or successors in interest: the Plaintiffs.

204. As trustees of that trust, the Defendants owe the Plaintiffs a duty of absolute good faith and against self-dealing.

205. The Defendants have breached that fiduciary duty by refusing to restitute the Paintings to the Plaintiffs and by otherwise enriching themselves at the Plaintiffs' expense through the use of trust property.

206. The Plaintiffs have been damaged by the Defendants' breach of fiduciary duty in an amount to be determined at trial, but in any event not less than the value of the Paintings.

Count VI—Bailment

207. The Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-206 as though fully set forth herein.

208. The Washington Principles, the Terezin Declaration, the Collective Declaration, and other commitments by Bavaria constitute a promise to hold disputed property for the benefit of victims like Flechtheim and their heirs.

209. After negotiations failed, the Plaintiffs demanded the return of the Paintings but the BSGS refused.

210. As a result of the Defendants' breach of this implied bailment, the Plaintiffs have been damaged in an amount to be determined at trial, but in any event not less than the value of the Paintings.

PRAYERS FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request that the Court:

- A) Enter judgment on all counts in favor of the Plaintiffs; and
- B) Order the Defendants to return the Paintings to the Plaintiffs forthwith; and/or
- C) Order the Defendants to pay the Plaintiffs a sum equal to the value of the Paintings or such higher amount as the Court deems just; and
- D) Order the Defendants to pay the Plaintiffs their reasonable attorneys' fees; and
- E) Enter such other and further relief as is just and proper under the circumstances.

December 5, 2016

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