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United States District Court, S.D. New York.
UNITED STATES OF AMERICA
v.
PORTRAIT OF WALLY, A PAINTING BY EGON SCHIELE, Defendant in Rem.
No. 99 Civ. 9940(MBM).

April 12, 2002.

OPINION & ORDER

MUKASEY, J.

The United States seeks civil forfeiture of Portrait of Wally, a painting by Egon Schiele ("Wally" or "the painting") under 18 U.S.C. § 545, 19 U.S.C. § 1595(a)(c), and 22 U.S.C. § 401(a), alleging that it was imported into the United States and was about to be exported in violation of the National Stolen Property Act, 18 U.S.C. § 2314 (1994). The painting was brought to the United States for an exhibit at the Museum of Modern Art ("MoMA"), on loan from an Austrian museum, Leopold Museum-Privatstiftung, ("the Leopold"). The Leopold, MoMA, and various purported heirs of the alleged rightful owner of the painting have joined the suit as claimants.
…

The government has filed a Third Amended Verified Complaint ("the Complaint") in this action, and pending now before the court are the Leopold's and MoMA's motions to dismiss pursuant to Rule 12(b)(1) and (6).

I.

For purposes of a motion to dismiss, the factual allegations pleaded in the complaint are taken as true and are construed in the light most favorable to the plaintiff. The following recitation is based entirely on those allegations.

In or about March 1938, Austria was annexed by Germany and became part of the German Reich. In April of that year, Friedrich Welz acquired a Viennese art gallery belonging to Lea Bondi Jaray ("Bondi"), an Austrian Jew, through the process of "Aryanization," whereby Jews were forced to sell their property to "Aryans" at artificially low prices. (*Id.*) Welz later joined the Nazi party. During a subsequent visit to Bondi's apartment, Welz saw Wally hanging on the wall and insisted that his Aryanization of the gallery entitled him to it. Bondi responded that Wally was part of her private collection and had nothing to do with the gallery, but "Welz continued to pressure [her] for the painting until [Bondi's] husband finally told her that, as they wanted to leave Austria, perhaps as soon as the next day, she should not resist Welz, because 'you know what he [Welz] can do." ' Bondi then surrendered the painting to Welz and fled to London.

After World War II, Welz was interned on suspicion of having committed war crimes. All of his possessions, whether they were stolen outright, Aryanized, or legitimately acquired, were seized and put under the authority of the United States armed forces in Austria. Under the military decrees and policies in effect in post-war Austria, property seized by the United States armed forces was sorted and turned over to the country from which each object had been taken. The United States armed forces transferred Wally to the government authority in Austria designated to take custody of such seized artwork, the Bundesdenkmalamt ("BDA").

After the war, Austria was required to enact laws to reverse the results of Nazi persecution. Austria enacted seven codes governing the restitution of property. Under these codes, claims were to be filed with statutory Restitution Commissions and restitution proceedings would then be held to adjudicate claims. Property that could not be restored to the true owner was to be transferred to one of two collecting organizations, to be put up for auction, and the funds were to be used to aid victims of the Holocaust. [FN2]

FN2. The BDA, then, was not charged with the restitution of artwork to the true owners. And indeed, under the Ban on Export of Cultural Assets Code then in effect, the BDA could impede the return of artwork to

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> successful claimants residing abroad when it found that the "public interest" required the preservation of such cultural assets in Austria. In determining whether or not to grant the required export approval, the BDA would consult with Austrian museums, including the Austrian National Gallery, the Österreichicshce Galerie Belvedere ("the Belvedere"). Often the BDA would grant export approval for certain works of art on the condition that the owner would sell at a low price or make a gift of other works of art to Austrian museums.

When the United States armed forces had Wally in their possession, those in authority did not know that it was stolen property or that it had belonged to Bondi. Records indicate that they thought it may have been the property of Dr. Heinrich Rieger, whose art collection Welz had acquired through Aryanization in or about 1938. Wally, which depicted the artist's mistress, was confused with a Schiele drawing in Rieger's collection entitled "Bildnis seiner Frau" (Portrait of His Wife). Based on conversations with Welz and review of his records, the United States military authorities appear to have questioned whether Wally was properly included in the Rieger collection. In their inventory of artwork and in the accompanying cover letter given to the BDA, they called attention to their doubts, noting that Welz's records do not indicate Wally was acquired from Rieger and that Welz stated that the woman depicted in the painting was not the artist's wife.

Rieger and his wife were killed in the Holocaust, survived by their son and granddaughter ("the Rieger heirs"). In 1948, the Rieger heirs sued Welz under the Austrian Third Restitution Code for the return of various artworks. The Restitution Commission returned to the Rieger heirs 12 works of art, including three by Egon Schiele. The Rieger heirs neither demanded nor recovered Wally.

The Rieger heirs then agreed to sell some of the returned artworks to the Belvedere. Wally was erroneously shipped to the Belvedere as part of the sale. Dr. Garzarolli, then director of the Belvedere, inspected the artworks and compiled a list of them dated December 1, 1950. On his copy of this list, next to the entry for "Frauen Bildnis" (Portrait of a Woman) Dr. Garzarolli noted by hand "Vally Neuzil aus Wein [Wally Neuzil from Vienna]."

After the war, Bondi visited Vienna and questioned Welz about the whereabouts of Wally. Welz told her it had been confiscated and was now at the Belvedere, having erroneously been mixed in with the Rieger collection. Bondi had to return to London on urgent business; she was not concerned about Wally, believing it was safe at the Belvedere.

In or about 1949, Bondi recovered her art gallery in a restitution proceeding against Welz. The Restitution Commission noted in its partial judgment that Welz had also "demanded ... a Schiele from [Bondi]," referring to Wally.

In or about 1953, Dr. Rudolph Leopold, a collector of paintings by Schiele, visited Bondi in London to ask for her help in buying such paintings. Dr. Leopold mentioned that Wally was hanging in the Belvedere, "knowing that it had belonged to her." Bondi asked Dr. Leopold to explain to the Belvedere on her behalf that Wally was her property. In return, Bondi was to help Dr. Leopold locate other Schieles. "Despite Dr. Leopold's knowledge of Bondi's ownership of Wally," he acquired Wally from the Belvedere for himself in or about August or September of 1954 in an exchange for one of his own Schiele paintings, "Rainerbub." He did not tell Bondi about his visit to the Belvedere. She discovered that he had obtained Wally in or about 1957, when the painting was featured in a catalogue for an exhibition and Dr. Leopold was listed as the owner.

Bondi then engaged an Austrian lawyer, Dr. Hunna, to help her recover Wally. In a letter to him, she suggested that Dr. Leopold be held up to public ridicule as a common thief. She hoped the matter could be resolved this way, "because she believed it was futile to file a lawsuit in Vienna against a Viennese doctor, since she believed that the Viennese judge always sided with Viennese residents, 'and if the lawsuit is lost, I have lost my painting forever." ' Bondi described an encounter with Dr. Leopold at an exhibit featuring his collection. She wrote that Dr. Leopold did not bring Wally to the exhibit because he knew she would make a claim to it and that when confronted about Wally, Dr. Leopold " 'was self-conscious, said it must be solved in some way" '. Bondi did not speak with him again.

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In late 1957, Dr. Hunna wrote to both Dr. Leopold and the Belvedere, demanding return of Wally. The Belvedere's director, Garzarolli, responded that the lawyers for the Rieger heirs had advised them that all of the items in the collection were the property of the Rieger heirs. In his letter, he acknowledged that Dr. Leopold had informed him in 1954 of “the possible property right of Ms. Lea Jaray regarding the painting ‘Vally,” but claimed that he had never heard that before or since, and that Bondi had visited the Belvedere at least twice without mentioning it. Thus, he claimed, the Belvedere and Dr. Leopold “did not have any doubt about the legality of the exchange” of Wally for “Rainerbub.” Hunna advised Bondi that in his opinion, Dr. Leopold was obligated to return the painting to her, but Bondi told Hunna's law partner that she did not wish to sue.

In or about 1966, Bondi sought the help of her colleague and friend, Otto Kallir. By letter, Bondi recounted how she had engaged Hunna and another lawyer, but feared that they were siding with Dr. Leopold and did not wish to rely on them. In a declaration obtained by Kallir dated January 5, 1967, Rieger's son acknowledged that his father never owned Wally. Bondi died in or about 1969, and Kallir stopped his efforts on her behalf to reacquire Wally.

After Bondi's death, an unsigned, undated statement, written in English, was found in her home which bore the heading, “Concerning my Painting ‘Vally’ by Egon Schiele.” In this letter, Bondi recounted how she acceded, “under duress,” to Welz's demands for Wally and how she went to the Belvedere after the war and claimed Wally as hers, but got no reply. She wrote also that she had asked Dr. Leopold to help recover her painting from the Belvedere. She explained that she prevented a lawsuit against the Belvedere, deeming any quarrel with the Belvedere “not possible” because the Belvedere is the museum of modern art in Vienna and she had just been reinstated as the proprietor of her modern art gallery in Vienna.

In August 1994, Dr. Leopold sold Wally to the Leopold, of which he is a Director and the Museological Director for life. Wally has been valued at over $2 million. In 1995, Dr. Leopold published his current catalogue raisonne on Schiele, in which he changed his 1972 published provenance for Wally to include Rieger ownership. When the Austrian Daily newspaper Der Standard questioned the change, he attempted to justify it in a rebuttal letter to the editor, explaining that although Bondi had told him twice of her ownership of Wally, he was convinced she had sold it to Rieger because she never registered her claims with the Belvedere.

In 1997, pursuant to a contract, the Leopold sent the painting to New York where it was displayed at a MoMA exhibit from October 8, 1997 to January 4, 1998. Three days after the exhibit ended, the New York County District Attorney's Office issued a subpoena for the painting; that subpoena was quashed by the New York Court of Appeals on September 21, 1999. *In the Matter of the Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art,* 93 N.Y.2d 729, 697 N.Y.2d 729, 697 N.Y.S.2d 538, 719 N.E.2d 897 (1999). That day, United States Magistrate Judge James C. Francis IV issued a seizure warrant for the painting and the next day the United States started this forfeiture action. The government claims that under 18 U.S.C. § 545, 19 U.S.C. 1595a(c), and 22 U.S.C. § 401, the painting must be forfeited because the Leopold transported it in foreign commerce knowing it to have been stolen or converted property, in violation of the National Stolen Property Act, 18 U.S.C. § 2314 (1994).

II.

….. I must address first the issue of MoMA's standing.

“Whether a claimant has standing is the threshold question in every federal case, determining the power of the court to entertain the suit.” Before a claimant can contest a forfeiture, it must demonstrate both statutory and Article III standing.

To establish statutory standing in a civil forfeiture proceeding, a claimant must comply with the procedural requirements of Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which include a verified claim stating the claimant's interest in the property. The Rule provides further that “an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another.” MoMA's verified claim states that it has a legal right to possess the painting pursuant to its loan contract with the Leopold. The government argues that the loan con-

tract makes MoMA a bailee, and that MoMA has failed to state that it is authorized to bring a claim on behalf of the Leopold. Moreover, it argues, such a claim would be superfluous because the Leopold has already filed its own claim. MoMA counters that it is not bringing a claim on behalf of the Leopold, but rather is asserting its own right to possess the painting, and therefore need not comply with this provision of Rule C(6).

… I need not decide this question, however, because even if MoMA makes its claim "on behalf of" the Leopold, the requirement that it state it is authorized to make the claim is met where the bailee names the owner in its claim. MoMA has done so here, and therefore has accommodated the Rule's policy of deterring false or naked claims.

The government argues also that MoMA lacks Article III standing. ….

In a civil forfeiture proceeding, a claimant with an ownership or possessory interest generally will have standing because " 'an owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the seized property." Courts have "widely held" that a bailee has a sufficient stake in seized goods to have Article III standing. …

However, although possession is evidence of standing, the ultimate focus of any standing inquiry is injury. MoMA has demonstrated lawful possession pursuant to its contract with the Leopold. The seizure has interfered with MoMA's rights and obligations under the contract, and the Leopold has threatened MoMA with liability for any damage it suffers. [FN4] This lawful possession and financial stake is sufficient to confer standing. ...

FN4. MoMA further argues, dubiously in my view, that it is injured because the forfeiture has diminished the likelihood that other art of questionable ownership will be available for loan to MoMA. This projected hardship in the competition to display stolen art is the sort of speculative injury that would be insufficient to confer standing, and thus saves me the interesting if distasteful task of deciding whether enforcing an interest in displaying stolen art would violate public policy.

III.

… It is necessary to address first the Leopold's Rule 12(b)(1) challenge to this court's subject matter jurisdiction. The Leopold does not dispute that 28 U.S.C. §§ 1345, 1355, and 1395 support jurisdiction and venue in the Southern District in this *in rem* forfeiture proceeding. Rather, it argues that the Austrian State Treaty of 1955, as well as the act of state, international comity, and political question doctrines, oust this court of jurisdiction to hear the government's claim. The Republic of Austria, as amicus curiae, endorses this view. Those doctrines go to justiciability rather than to jurisdiction. However, because they can operate as principles of abstention, they similarly present a threshold issue: whether or not to exercise the court's jurisdiction.

A. The Austrian State Treaty of 1955

Article 26 of the Austrian State Treaty of 1955, 6 U.S.T. 2369, 217 U.N.T.S. 223, to which the United States is a signatory, defines Austria's responsibility to return property improperly seized from its citizens during Nazi rule. Under the first paragraph of Article 26, Austria was obligated to restore the legal rights and interests of the true owners of such property where possible. The second paragraph specifically provides that if property remains unclaimed or heirless six months after the Treaty comes into force, Austria "agrees to take under its control all [such] property" and "transfer such property ... to the appropriate agencies or organizations ... to be used for the relief and rehabilitation of victims of persecution." [FN8]

FN8. Austria fulfilled its duties under the treaty in part through the enactment and implementation of legislation such as the post-war restitution acts, and later the Reception Organizations Act, providing for claims and the ultimate disposition of unclaimed property by auction. Auction proceeds were to be used for the victims of the Holocaust.

The Leopold and the Republic of Austria argue that the Treaty expressly designated the sovereign Republic of Austria as the sole authority responsible for the disposition of property improperly seized during Nazi

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rule. They reason that because neither Bondi nor anyone else claimed Wally within the six months after the Treaty came into force, Article 26(2) vested the Austrian Republic with sole responsibility for disposing of the unclaimed painting. When the Senate ratified the Treaty, the argument goes, the United States recognized that the disposition of property was expressly entrusted to Austria, and neither this nor any other United States court has jurisdiction to consider or decide issues relating to Austria's disposition of property covered by Article 26. That is, this court would have to usurp jurisdiction in order to direct the painting's forfeiture in contravention to the Treaty.

This argument is without merit. First, as Dr. Lambert, the government's Austrian law expert, has stated, Article 26 on its face does not state that the Austrian government has exclusive jurisdiction over such property, and the Leopold provides no case law from any country in support of its novel interpretation. The restitution laws enacted to fulfill Austria's obligations under the Treaty have never been viewed as the exclusive means for restoring property: indeed, other restitution actions have been filed in the United States. *See, e.g., Altmann v. Republic of Austria,* 142 F.Supp.2d 1187, 1208 (C.D.Cal.2001). Nothing in the Treaty suggests that this court is without jurisdiction to hear a forfeiture case which includes issues of ownership of property taken by the Nazis.

Furthermore, under the Treaty, Austria was charged with taking all unclaimed property and transferring it to an agency to be used for the relief of victims of the Holocaust. It is unclear how this provision could be invoked by the Leopold to support its title to the painting. As the government argues, had the Republic of Austria taken control of Wally as unclaimed property within the meaning of the Treaty, it would have breached the Treaty to allow the painting to remain with the state-owned Belvedere or to give it to Dr. Leopold. Under Austrian law pursuant to the Treaty, all such property was to be transferred to Assembly Centers, whose contents have since been liquidated for the benefit of the victims of the Nazis.

Whether or not United States courts would review such a breach need not be decided, however, because it makes no logical sense to apply this provision to Wally, which was not and could not have been taken under Austria's control as "unclaimed" property, but rather was mistakenly transferred to the Belvedere as part of the sale of the Rieger collection before the Treaty was enacted. That Austria, pursuant to Treaty, sought to return all improperly seized property or to otherwise use it for the victims' general benefit does not deprive this court of jurisdiction over property that escaped such disposition. The express purpose of the Treaty, and of related Austrian law, was to restore property to its true owner; an exercise of jurisdiction in this case would seem unobjectionable under the Treaty.

B. The Act of State Doctrine

The Leopold seeks dismissal also based on the act of state doctrine. MoMA too invokes this doctrine in its Rule 12(b)(6) motion to dismiss. The classic statement of this doctrine was articulated over 100 years ago: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez,* The Leopold and MoMA argue that this doctrine bars this court from revisiting and invalidating Austria's disposition of the painting to the Belvedere together with other property given to the Rieger heirs.

As an initial matter, it is far from clear that doctrine applies to the act in question. An "act of state" must be a formal or official act by an actor with sovereign authority. Contrary to the conceptualization by the Leopold and MoMA, Wally was never legally transferred to the Rieger heirs pursuant to an official Austrian government determination of ownership. Rather, the BDA erroneously attributed it to the Rieger collection and mistakenly shipped it to the Belvedere with the Rieger collection. Although the court might be reluctant to second-guess the public acts of a sovereign, this does not seem to have been such an act. The court is notably not being asked to review a decision by a Restitution Commission regarding the restitution of Wally.

Even if the BDA had purposefully placed Wally with the state-owned Belvedere in derogation of Bondi's interest, it had no authority to dispose of artwork other than through the Restitution Commissions; rather, Austrian law provided that the Restitution Commissions would govern the return of property to its rightful owner. ...

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Without deciding whether the "act" or "state" requirements have been met, I conclude that the balance of interests in this case counsels against applying the doctrine. Here, there is no possible interference with the executive branch in its conduct of foreign relations. Notably, it is the executive branch that has brought this forfeiture action, and the restoration of proper ownership of seized property is a pronounced goal of Austrian law. Further, the highly doubtful presence of an "act" of "state" here suggests the inappropriateness of the doctrine's application. An inquiry into the BDA's shipment of a painting under the post-war Austria regime would not impinge upon the executive's preeminence in foreign relations, particularly where the restoration of ownership has always been a professed goal of Austrian law and where it is the executive branch itself that brings this forfeiture action under United States law. Absent sufficient separation of powers concerns, there is no basis in the act of state doctrine for this court to abrogate its obligation to decide cases and controversies properly presented to it.

C. International Comity

The Leopold argues next that international comity requires this court to abstain from deciding the case out of deference to Austria's restitution framework.

International comity requires recognition of foreign actions, decrees, and proceedings that do not conflict with the interests or policies of the United States. … The Leopold argues that the court should defer to the Austrian restitution system, which was enacted with the approval of the allies and is thus consistent with both United States and international policy. It argues also that Austria's interest in the subject matter of this action is paramount.

As the government suggests, the first problem with the Leopold's argument is that there is no pending action, proceeding or decree relating to this case in Austria to which this court could defer. Austria may have a system of laws that are neither contrary nor prejudicial to the laws and interests of the United States and international law, but the principle of comity does not operate as a pre-emption doctrine, barring this court from hearing a valid forfeiture action merely because there are foreign laws that might also apply. The mere existence of the Austrian restitution system does not vest exclusive jurisdiction in Austrian courts to hear all issues touching upon Holocaust-related property.

Nor are Austria's interests affronted by the adjudication of this case. The Leopold argues that Austria has a greater interest in this case because of acts taken by Austria with respect to the painting, the existence of its restitution system, and its responsibility under the Austrian State Treaty. However, as noted, there has been no formal or purposeful act of the Austrian judiciary, executive, or legislature with respect to the painting rising to a level that would implicate international comity. Because Bondi's ownership of Wally was never adjudicated on the merits under Austrian law, neither the restitution system nor the Treaty was ever implicated. Adjudication of this case, then, would not offend Austrian law.

The United States, on the other hand, has a strong interest in enforcing its own laws as applied to conduct on its own soil. The ownership of the painting under Austrian law is merely a predicate to the determination of whether there has been a violation of United States law. The basis for this forfeiture action is the alleged importation of Wally into the United States in violation of the National Stolen Property Act. It is United States law and policy to prohibit knowing transportation of stolen or converted goods into the United States. Even when there is true conflict with the laws of a foreign nation, United States courts will not yield in the name of comity if doing so conflicts with the law or policy of the United States. Dismissal on international comity grounds, then, is not warranted here.

D. The Political Question Doctrine

The Leopold's final threshold argument is that this action relates to foreign policy, and therefore is nonjusticiable by virtue of the political question doctrine. That doctrine bars adjudication of certain issues that are committed to the political branches of the government; it is a function of the separation of powers. *Baker v. Carr,* 369 U.S. 186, 210-11 (1962). Repeating its former arguments, the Leopold contests this court's interference with Austria's "exclusive" restitution system. It argues specifically that adjudication of the present case not only would show disrespect for Austria, but also would interfere with the political decisions of the United States and its allies during the post-war period to approve Austria's restitution laws

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and the Austrian State Treaty. This argument is without merit.

In *Baker v. Carr,* the Supreme Court set forth the following list of relevant factors to be considered by a court when deciding case-by-case whether a political question is presented:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

None of the six factors is present here. It should first be noted that although the doctrine is often applicable in matters of foreign affairs, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. Thus, tort suits against the Palestine Liberation Organization, or by Croat and Muslim victims of wartime atrocities against the leader of Bosnian-Serb forces, have not been barred by the political question doctrine where *Baker* factors were not present. *See* *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria,* 937 F.2d 44, 49 (2d Cir.1991).

The issues to be resolved in the instant case include whether the Leopold owns a painting under Austrian law and whether the Leopold violated United States law in transporting that painting into the United States and thereby subjected the painting to civil forfeiture. As the government suggests, "[t]hese are not issues constitutionally committed to other, non-judicial branches of government. To the contrary, adjudication of these types of claims is squarely within the parameters of what is entrusted to the judiciary." Determining the standards to resolve such a claim, then, is within the court's competence.

Further, there is no impermissible policy determination to be made, nor any intrusion on or lack of respect for a decision already made, or yet to be made, that would engage the remainder of the *Baker* factors. Despite the Leopold's protestations to the contrary, the Austrian restitution systems has never been found to be the exclusive mechanism for the recovery of Holocaust property and the United States has never committed such claims to the Austrian government. That distinguishes this case from *In re Nazi Era Cases Against German Defendants Litigation,* 129 F.Supp.2d 370 (D.N.J.2001), where it was found that the United States had entered an Executive Agreement with Germany agreeing to inform United States courts that it was United States policy to recognize Germany's exclusive jurisdiction over forced labor claims.

… By contrast, as the government points out, the present case does not ask this court to pass on the adequacy and implementation of Austria's restitution scheme, or even to adjudicate a restitution claim. Rather, this is an *in rem* action seeking forfeiture of a painting pursuant to United States law. The court's review of Austrian law is limited to determining the predicate issue of ownership. This question alone is not a political question.

IV.

Because this court has subject matter jurisdiction in this case and is not barred from exercising it, I turn now to the Leopold's and MoMA's arguments addressing the merits of the government's claim. The government predicates this forfeiture action on a violation of 18 U.S.C. § 2314. The elements of such a violation are (1) the transportation in interstate or foreign commerce of property, (2) valued at $5,000 or more, (3) with knowledge that the property was "stolen, converted or taken by fraud." 18 U.S.C. § 2314; The Complaint alleges that the Leopold transported Wally knowing it to have been stolen by Welz and/or converted by Dr. Leopold. The Leopold and MoMA dispute the sufficiency of the Complaint.

…

B. *Wally I:* The Recovery Doctrine

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The Leopold's motion to dismiss begins, logically, with the argument that this court has already decided that Wally is not stolen property, which would preclude a § 2314 violation. (Leopold Mem. 2 at 20) MoMA echoes this argument. (MoMA Mem. 2 at 8) In *Wally I,* I determined that federal law controls the question of whether an item is stolen. *Wally I,* at 292. I then relied on the recovery doctrine, originating in common law and adopted into federal law, which holds that stolen property may no longer be considered stolen when it is recovered by the owner or his agent, including the police. *Wally I,* at 290 (citing *United States v. Muzii,* 676 F.2d 919, 923 (2d Cir.1982). I found that the seizure of Wally from Welz by the United States armed forces after World War II was tantamount to a recovery of the painting by an agent of its true owner, Bondi, and therefore purged the painting of the taint that it had. The government vigorously protested my characterization of the armed forces as an agent of Bondi, and in *Wally II,* I permitted the government to set forth further specifics in its Third Amended Complaint that might refute an agency relationship. Based on the new factual allegations that followed, I now find the recovery doctrine inapplicable because the United States armed forces cannot properly be deemed an agent of Bondi.

As the *Wally I* holding makes clear, the doctrine "is rooted in agency principles" and applies only where an agency relationship can be said to exist. When stolen goods are recovered by law enforcement officers, typically the police, "the law implies a principal-agent relationship between the true owner and the government officials who recover it, ... who are deemed to act on her behalf because they are charged by law with doing so." *Wally I,* at 293. …

[T]he [government] now alleges that, pursuant to a military decree in effect, "Decree No. 3," the allied forces seized all of the property of suspected war criminals, regardless of whether it was stolen, Aryanized, or legitimately acquired. Vast quantities of property were subject to seizure under this decree and millions of items of property were in fact seized. Pursuant to military decrees and policies then in effect, all of this property was then transferred to its country of origin.

Under these circumstances, it can no longer be said that the United States military acted as Bondi's agent when it came into possession of Wally. Rather than "recovering" stolen property, the United States armed forces were simply collecting all property. They did not even know that Wally was stolen. Nor were they "charged by law" with holding Wally on Bondi's behalf or with securing Wally's eventual return. Rather, they were required merely to sort all seized property and transfer it to the BDA. This lack of both knowledge and duty makes this case unlike every other case cited to the court that applied the recovery doctrine to the police or other implied agents. It negates the existence of the requisite agency relationship. *See id.* (explaining an agency relationship is implied when stolen goods are recovered by someone charged by law with acting on the owner's behalf). And although there is language in some cases to suggest that any lawful possession triggers the recovery doctrine, *see Wally I,* at 293-94 and cases cited therein, the doctrine has never been applied, and should not be applied, where property has merely passed through the hands of government officials who were unaware that the property was stolen and who were under no legally enforceable duty to act on the owner's behalf. *See id.* The point of the recovery doctrine rests on the agent's knowledge that stolen property has been recovered. I therefore rescind my prior ruling that Wally could not be considered stolen based on the recovery doctrine.

Nor should the Leopold's and MoMA's invitation to extend the recovery doctrine to the BDA's possession of the painting be accepted. First, the lack of agency relationship between Bondi and the United States armed forces prevents any finding that the BDA was a subagent or joint agent of those armed forces. Second, like the armed forces, the BDA did not know Wally was stolen and was not required, or even authorized, to return Wally to its true owner. Its role thus differed sharply from that of the police or other implied agents. Moreover, the BDA had divided loyalties because it was also responsible for deciding whether owners of cultural assets should be permitted to export them from Austria. The facts alleged in the Complaint indicate that the BDA, along with the Belvedere, often sought to keep certain works in Austria and place them in Austrian museums. Notably, the BDA ignored information that Wally was not properly sorted with the Rieger collection, information that would have prevented the Belvedere from acquiring it. Whether this was deliberate or not, the underlying conflict of loyalties precluded any agency

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relationship between the BDA and the true owners of Holocaust property… Accordingly, the possession of Wally by the BDA was not tantamount to a recovery by Bondi or her agent, and the recovery doctrine does not apply.

C. Welz's Criminal Intent to Steal Wally

The Leopold next argues that, even if the recovery doctrine does not apply, Wally cannot be considered stolen within the meaning of § 2314 because the Complaint fails to allege that Welz had the specific criminal intent to steal Wally. This argument is utterly meritless.

The Leopold argues that the Complaint shows that Welz acquired the painting in connection with his Aryanization of the gallery, which, although repugnant, was legal at the time. Even if Welz's belief that he was entitled to the painting was erroneous, the Leopold argues, "there is no allegation that he knew he was wrong."

In fact, the Complaint does not state that Welz acquired Wally through Aryanization, but rather that Welz demanded the painting from Bondi in the face of a claim that it was part of her private collection and thus unconnected to Welz's Aryanization of her gallery. This taking of Bondi's private property was outside the scope of his authority to Aryanize the gallery. As to whether Welz knew he was wrong, the Complaint specifically alleges that the painting was hanging in Bondi's home, and that he continued to pressure Bondi even after Bondi informed him that the painting was her private property. The Complaint goes on to detail that Bondi surrendered Wally to him without compensation only because she and her husband, Austrian Jews, feared what Welz could do to them. …

D. Title to the Painting Under Austrian Law

To state a violation of § 2314 in this case, the government must allege not only that Welz stole the painting but also that the painting remained stolen at the time it was imported in 1997. *See United States v. An Antique Platter of Gold,* 991 F.Supp. 222, 231 (S.D.N.Y.1997), *aff'd,* 184 F.3d 131 (2d Cir.1999). The Leopold argues that the government cannot make the requisite showing because by 1997, the Leopold had acquired good title to the painting from its predecessors through operation of the Austrian doctrine of prescription. Austrian law does govern here, because although federal law determines whether property has been stolen, local law "controls the analytically prior issues of (a) whether any person or entity has a property interest in the item such that it can be stolen, and (b) whether the receiver of the item has a property interest in it." *Wally I,* at 292. However, an analysis of that law as applied to the facts alleged in the Complaint shows that this argument too fails.

1. Prescriptive Possession by the Belvedere

The Leopold argues first that the Belvedere had obtained ownership of Wally through prescription, and was thus able to transfer good title to the painting's subsequent owners. Under Austrian law, a possessor of property may acquire title to that property if the possession is based on legal title (purchase or exchange) and extends throughout the statutory period accompanied by the possessor's belief that the possession is lawful.

… It is sufficient … for the court to rely here on the allegations in the Complaint that establish that the Belvedere had reason to doubt that it was the legal possessor of Wally…..

Although good faith is presumed under Austrian law a possessor will be found not to have had the requisite confidence for prescription if, at any time during the prescription period, the possessor had any objective reason to doubt his claim, or if he was negligent in maintaining his belief of lawful possession. …

[A]n inference of bad faith … arises … from Bondi's letter, excerpted in the Complaint, which states explicitly that she visited the Belvedere after the war and made a claim to her painting. The Leopold strongly protests this allegation, citing Dr. Garzarolli's letter, also excerpted in the Complaint, which denies that Bondi made any such claim and insists that the Belvedere believed it owned the painting based on assurances by the Rieger heirs. However, construing the facts in the light most favorable to plaintiff, I must at this point infer Bondi's statement to be true and Dr. Garzarolli's to be merely self-serving. If Bondi did present her claim to the Belvedere, that was enough to overcome the presumption of that institution's good faith under Austrian law. The Leopold thus cannot rest any claim to title on the

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Belvedere's prescriptive possession of Wally.

2. Prescriptive Possession by Dr. Leopold

Based on the allegations in the Complaint, neither could the Leopold hold good title to Wally based upon Dr. Leopold's acquisition of ownership by prescription. Again, good-faith possession will not be found where the possessor knew or should have known that he was not the legal possessor.) The Complaint recounts that Bondi informed Dr. Leopold more than once of her claim to Wally. The first time was in 1953, when Bondi asked Dr. Leopold for help in getting her painting back from the Belvedere. He was again reminded of Bondi's claim on at least two occasions after acquiring Wally for himself, once in an encounter with Bondi at an exhibition opening and once by letter from her attorney in 1957. According to the government's Austrian law expert, the Austrian Supreme Court has held that there cannot be good-faith possession where the true owner informs the possessor of his legal opinion that property belongs to him. Bondi's communications with Dr. Leopold, then, were enough to raise an objective doubt in his mind that he was the legal owner.

…

That Dr. Leopold may have been able to whistle past the graveyard with enough confidence to fool even himself is a hypothesis I need not indulge at this stage of the case.

Because neither the Belvedere nor Dr. Leopold obtained legal ownership of Wally through prescription, the Leopold did not acquire good title to Wally through its predecessors, and the painting did not lose its taint on that basis.

E. Expiration of Claims

The Leopold further maintains that, even if Bondi and her heirs did not lose title to the painting through prescription, they lost the right to claim it because applicable statutes of limitation ran before the painting reached the United States in 1997. Therefore, it was not "stolen" when imported because there was then no one with a superior claim.

The Leopold is correct in arguing that in order for property to be considered "stolen," the property must rightfully belong to someone other than the person who has it. *United States v. McClain,* 545 F.2d 988, 995 (5th Cir.1977). Forfeiture under § 2314 is not proper where the alleged illegal taking does not interfere with another party's ownership or possessory interests. The Leopold bases its limitations arguments on Austrian and New York law, and on the equitable doctrine of laches. As set forth below, Austrian law does not bar the Bondis' claim; New York law does not apply, and would not bar the claim even if it did; and the record is insufficient at this point to support a finding of laches.

1. The Third Restitution Act

The Leopold first argues that any claim Bondi may have had to the painting was extinguished by her failure to file a claim in accordance with the restitution laws enacted in Austria immediately following World War II. It cites specifically the Third Restitution Act, enacted in 1947 with the approval of the United States and its allies, which the Leopold argues provided the exclusive framework for resolving post-war restitution claims. The Act itself set a one-year limitations period for the filing of such claims, which was later extended until the Reception Organizations Act provided an absolute deadline of June 30, 1961.

However, the Third Restitution Act was not the exclusive basis on which Bondi could claim her painting. Rather, because Welz's taking of Wally was either theft or extortion under Austrian law, Bondi also had a viable ownership claim to Wally under the Austrian Civil Code, which does not generally subject ownership rights to limitation. As there is no basis in law or logic to believe the Third Restitution Act extinguished claims arising under the Austrian Civil Code, Bondi's failure to file a claim within the limitations period of the Third Restitution Act did not operate as a waiver of her ownership rights.

The Third Restitution Act voided all methods of property seizure practiced by the Nazis, declared that dispossessed property should be returned to rightful owners, and eased the burden of proof for applicants seeking restitution. It thereby provided a streamlined procedure for victims of Nazi persecution to regain ownership rights, and importantly, provided a cause of action for victims whose property was Aryanized, or similarly seized under color of law, and whose

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ownership rights might therefore have been lost under general principles of the Austrian Civil Code. Its purpose, then, was to help restore ownership rights, not to limit rights owners would otherwise have under Austrian law, and thereby reward outright theft by Nazis.

…

The plain meaning of the Third Restitution Act confirms that its limitations period did not apply to claims arising under the General Civil Code. … Thus, there is no basis for finding that the Third Restitution Act extinguished the right to bring a valid claim under the Civil Code when the time for bringing a claim under the Third Restitution Act expired.

… To be sure, Bondi could not now bring her claim to a Restitution Commission and rely on the relaxed burdens of proof permissible in restitution proceedings under the Third Restitution Act. But that does not mean that her claim under the General Civil Code has expired ….

The applicable provision of the General Civil Code is found in Paragraph 1459. It provides that "the rights of a person in regard to his/her property are not subject to limitation unless, according to an express provision of law, the failure to use those rights for a certain period of time causes the loss thereof." Because title to Wally was not legally transferred to Welz under Austrian law, nor acquired by prescription by its subsequent possessors, Bondi had an ownership right to Wally. And because the Third Restitution Act does not explicitly limit claims other than those arising under that Act, Bondi's ownership claim survives.

…

2. New York Law

The Leopold next argues that even if a claim to the painting survives under Austrian law, Bondi's heirs do not have a claim to the painting because all arguable claims are barred by New York's statute of limitations or by the doctrine of laches.

The Leopold opines that the government brought this forfeiture plan with the intent that the heirs would file a claim to the painting. It then reasons that because the heirs have asserted their claim in New York, New York law determines the timeliness of that claim. The Leopold goes on to argue that under the applicable version of New York's Borrowing Statute, the heirs' claim cannot be brought in New York if it is barred either by the laws of New York or the laws of Austria, the situs where Bondi's cause of action arose. Because the New York statutes of limitation have long since run on all conceivable claims of the heirs-conversion, fraud, or breach of contract-the Leopold argues that the heirs' claim is time-barred irrespective of Austrian law.

This argument contains at least three fatal flaws. First, there is no basis for applying New York law to the government's forfeiture action. The government's case does not depend upon the heirs' ability to file a claim in this proceeding. Although Bondi or her heirs must have a viable claim to the painting before it can be considered stolen, *see supra* pp. 47-48, their property interest is to be determined by local law-*i.e.* Austrian law, *see supra* p. 42. The Complaint, then, cannot be dismissed on the basis of New York law.

Second, even if the government had brought the action on the condition that the heirs assert a claim in this action, the heirs' claim is timely. Although this finding is again unnecessary to the government's claim, it bears discussion here because the Leopold revives its arguments regarding New York law in its motion to dismiss the heirs' claim. There is no clear precedent for applying New York law to the heirs' claim in this federal forfeiture action. Arguably, Austrian law applies here as well. However, even if the heirs' claim in this forfeiture action were dependent upon their having a viable underlying state tort claim, all of the limitations periods cited by the Leopold would have been tolled until Wally was imported in 1997, when the Leopold, or any of its purported owners, first became subject to suit in New York through *in rem* jurisdiction over the painting. Thus, the heirs' claim in 1999 in this action was within the three-year limitations period for conversion claims, the shortest limitations period cited by the Leopold. Even if New York law applied, it would not bar the heirs' claim.

Nor can the Leopold find refuge in the equitable doctrine of laches on this motion to dismiss. To show laches here, the Leopold would have to show that Bondi and her heirs unreasonably delayed in starting an action and that the Leopold suffered undue prejudice as a result. *See* Solomon R. Guggenheim Foun-

dation v. Lubell, 153 A.D.2d 143, 149, 550 N.Y.S .2d 618, 621-22 (1st Dep't 1990), *aff'd,* 77 N.Y.2d 311, 567 N.Y.S .2d 623 (1991). This would involve a fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities. Such issues are often not amenable to resolution on a motion for summary judgment, let alone a motion to dismiss. The record here does not provide the factual basis for a finding as to delay and prejudice.

None of the Leopold's arguments overcomes the conclusion, based on the allegations in the Complaint, that the painting was properly considered stolen at the time of its importation in 1997.

F. Elements of Conversion

In its Third Amended Complaint, the government does not rest its § 2314 case solely on the allegation that the painting was stolen by Welz. Rather, as previously noted, it asserts an independent ground for forfeiture based on the allegation that the painting was converted by Dr. Leopold. Specifically, it argues that when Dr. Leopold acquired Wally from the Belvedere, knowing it rightfully belonged to Bondi, he committed an act of criminal conversion under § 2314.

A broad definition of conversion has … been read into § 2314. In *United States v. Evans,* 579 F.2d 360, 361 (5th Cir.1978), the Fifth Circuit approved a jury instruction that conversion means "to appropriate dishonestly or illegally to one's own use anything of value." The Court explained that "the language of § 2314 reflects a congressional purpose to reach all ways by which an owner is wrongfully deprived of the use or benefits of his property." *Id.* Conversion thus includes Dr. Leopold's wrongful acquisition of property belonging to Bondi.

…

G. Section 2314's Scienter Requirement

The Leopold and MoMA's final attack on the sufficiency of the Complaint is that even if Wally was stolen or converted, the allegations cannot satisfy the knowledge element of § 2314 because they do not establish that the Leopold Foundation knew the painting's status when it transported the painting in 1997.

All parties concede that Dr. Leopold's knowledge can be imputed to the Leopold Foundation by reason of his having been the Museological Director at all relevant times. In somewhat of a reprise of its earlier arguments, the Leopold argues that Dr. Leopold did not have the requisite mens rea.

[T]he Complaint details that Bondi told Dr. Leopold in 1953 that she *owned* Wally, not just that she had a *claim* to it. In addition, Dr. Leopold was reminded of Bondi's ownership of the painting on at least two occasions after he acquired Wally, once by Bondi herself and once by her lawyer. Indeed, Dr. Leopold admitted that Bondi twice told him that Wally belonged to her.

It is reasonable to infer from these allegations that Dr. Leopold either knew or could deduce that Wally was stolen, particularly given the historical backdrop of Nazi persecution. Such an inference is further supported by a letter, excerpted in the Complaint, in which Bondi reports that Dr. Leopold acted self-consciously after she confronted him about her painting. Another allegation giving rise to suspicion is that Dr. Leopold amended Wally's published provenance in 1995 to show that Bondi had sold Wally to Heinrich Rieger, although he knew Bondi's claim to the contrary, and notwithstanding that former published statements of provenance, including his own, did not include Rieger ownership.

Given that knowledge can be proved by circumstantial evidence, and that deliberate ignorance is no defense, these allegations suggest that the government at trial will be able to show probable cause that the Leopold, through Dr. Leopold, knew Wally to have been stolen at the time it was transported in foreign commerce.

…

On the strength of these allegations, I cannot say as a matter of law that the government will not be able show the requisite knowledge at trial, and the Complaint will not be dismissed on that basis. Whether or not Dr. Leopold actually had the knowledge is a question of fact for trial.

In summary, then, despite voluminous arguments to the contrary, the Complaint satisfies the Rule E(2)(a) standard of particularity and states a claim on which relief can be granted.

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V.

Beyond the sufficiency of the Complaint, the Leopold and MoMA raise statutory and constitutional arguments in support of their motion to dismiss. All are without merit, as set forth below.

A. Fair Warning

The Leopold and MoMA first assert that because Austrian law is so unclear on the issue of ownership of Wally, the Leopold could not possibly have had "fair warning" that importation of Wally violated § 2314. They argue specifically that the rule of lenity and due process preclude application of § 2314 to property that is subject to a genuine ownership dispute or property that can be deemed stolen only on the basis of unclear foreign law.

…

First, as noted previously, the government is not arguing that § 2314 be applied to property that is the subject of a genuine ownership dispute. Rather, under its theory of forfeiture, the Leopold imported Wally into the United States with knowledge that it was stolen and converted. (Compl.¶¶ 9-12) This conduct "plainly and unmistakably" falls within § 2314, as is clear not only from the statutory language itself but also from *Dowling v. United States,* the very case relied on by the Leopold and MoMA in support of narrow construction. *See* 473 U.S. 207, 213-18, 228 (1985) (analyzing the language of § 2314 and declining to extend that statute to cover goods that infringe copyright). As the government has also shown that title to Wally is not an open question under Austrian law, there is no concern that the statute will, in this way, be construed too broadly.

The Leopold and MoMA analogize this case to *United States v. McClain,* 593 F.2d 658, 671 (5th Cir.1979), in which the Fifth Circuit overturned convictions under § 2314, stating that "it cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature." That Court found a denial of due process and of notice because the Mexican patrimony statutes governing ownership of the goods in question "do not clearly announce any line that appellants' willfulness can have led them to cross," observing that "willful conduct cannot make definite that which is undefined." *Id.* (citations omitted). However, on the basis of the declarations and exhibits before me, construed in the light most favorable to the government, it appears that Bondi retained ownership of Wally since it was taken from Welz, that neither the Belvedere nor the Leopold ever obtained good title to Wally, and that neither had sound reason to believe otherwise.

At this stage, I cannot say that Austrian law is so ambiguous so as to preclude fair notice to the Leopold and its principal, Dr. Leopold, who, notably, are themselves Austrian. Although their subjective knowledge of the law ultimately may not meet § 2314's scienter requirement, the objective standards of due process are not offended by allowing this case to proceed.

B. Statutory Purpose

The Leopold and MoMA also contend that applying § 2314 to the facts of this case is contrary to the stated purpose and spirit of the statute. The Supreme Court has noted that in enacting § 2314, Congress sought to assist the states in detecting and punishing criminals who evade state authorities by utilizing the channels of interstate commerce. In addition to their repeated, yet unavailing insistence that Dr. Leopold is not a criminal, but rather someone with a genuine claim to title, the Leopold and MoMA also argue that § 2314's purpose is not vindicated if it is not applied to supplement Austrian law enforcement efforts. They argue that Austria is not seeking to "detect" or "punish" Dr. Leopold; nor did Dr. Leopold use "the channels of interstate commerce" to make a successful getaway. Rather, the Leopold participated in "an arms-length cultural exchange with a world-renowned museum ... with the express permission of the Patrimony authorities of the Republic of Austria and their explicit requirement that the Painting be returned to Austria directly following the MoMA exhibit." Thus, the Leopold argues, this forfeiture action not only fails to aid, but actually interferes with Austria's interests.

However, as the government argues, "[t]he dominant purpose of the statutes under which this case is brought, 18 U.S.C. § 545, 19 U .S.C. § 1595a, and 22 § U.S.C. § 401, is undeniably to effectuate the forfeiture of property which has been imported into the

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United States or is about to be exported in violation of law." On its face, § 2314 proscribes the transportation in foreign commerce of all property over $5,000 known to be stolen or converted. Although the museum parties and amici would have it otherwise, art on loan to a museum-even a "world-renowned museum"-is not exempt. Moreover, the United States need not speculate upon, consult, nor follow a state's prosecution decisions in a given case regarding property deemed stolen or converted under U.S. law. Rather, if Wally is stolen or converted, application of § 2314 will "discourage both the receiving of stolen goods and the initial taking," which was Congress's apparent purpose. Such discouragement of trafficking in stolen goods was intended to, and ultimately does, serve states' interests by closing an enforcement gap, and thereby enhances government protection of the rights of property owners. *See id.* Thus, a forfeiture based on § 2314 is entirely proper.

…. [T]he gap that would exist absent application of § 2314 is a gap in governmental protection of property rights, because just as a state cannot reach property beyond its borders, a foreign country cannot reach property in the United States. *McClain,* 545 F.2d at 994, 996. A foreign country's civil restitution scheme is irrelevant to Congress's efforts to recover stolen property for its true owner once it is transported into the United States.

…

D. Due Process

The Leopold's final argument is that "the unfairness of the instant forfeiture action denies the Leopold Museum due process." …

The Leopold … contends that its application here violates due process because the theft and conversion occurred more than 40 years ago, the chain of title to the painting is complex and involves the interpretation of Austrian law, many of the witnesses are dead and most of the documents are lost, and whatever few sources of proof still exist are in Austria and not subject to this court's subpoena power. As the government points out, however, these generalized complaints bypass the important point that Dr. Leopold himself was personally involved in almost all the critical events in Wally's history. There is no allegation that the Leopold and Dr. Leopold no longer have documents relevant to this litigation, and as is clear from the Complaint, important documents already have been obtained. Moreover, the Leopold and Dr. Leopold are themselves Austrians residing in Austria and will be able to retrieve relevant Austrian documents and procure the testimony of Austrian witnesses more readily than any other party. At this stage of the proceeding, prior to discovery, I am not willing to dismiss the Complaint on the empty claim that there is nothing discoverable.

I disagree also with the Leopold's further contention that neither the government nor New York has an interest in this case, and that resolution of this dispute should be left to Austria. The government brings this forfeiture action pursuant to federal laws proscribing the transportation of stolen and converted property in foreign commerce, and there is a strong federal interest in enforcing these laws. A civil forfeiture action based on the United States law is properly brought in the United States, in the district in which the property is found and in which the transportation occurred. 28 U.S.C. §§ 1355(b)(1)(A), 1395(b). In this case, the Leopold brought the painting into New York, allegedly with the knowledge that it was stolen and converted, and the painting is now in New York. Thus, there is no injustice in this court's assertion of *in rem* jurisdiction.

…

None of the arguments in opposition to this forfeiture action provides a reason to dismiss the government's Complaint. The government may therefore proceed with its case; the Leopold's and MoMA's motions are denied.

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