

BY FAX

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Hon. George B. Daniels
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

**Re: United States v. A 10th Century Cambodian Sandstone Sculpture
12 Civ. 2600 (GBD)**

Dear Judge Daniels:

I write on behalf of Sotheby's with regard to the above-captioned forfeiture action filed today against a 10th century Cambodian sculpture (the "Statue") consigned to Sotheby's. For the reasons set forth below, we respectfully ask the Court not to permit the Government to take possession of the Statue at this time.

The consignor inherited the Statue from her husband, who purchased it in good faith in an arms-length transaction from a dealer in London in 1976 and owned it openly thereafter in Belgium for more than thirty years. The Government's complaint takes the position that the Statue is nonetheless the property of Cambodia. That position is based on a novel reading of ancient Cambodian law, and the tenuous "belief" of an expert who theorizes (from exceedingly modest evidence) that the Statue was looted at some time after Cambodia declared national ownership of its antiquities, which the complaint alleges occurred in 1900.

The Statue is a unique and valuable piece of art, requiring great care in movement and storage. It is monumental and weighs more than 500 pounds. There is no valid reason to remove it from Sotheby's, where it is properly stored in a temperature controlled environment. In addition, as the Government well knows, Sotheby's voluntarily agreed to hold onto the sculpture in its possession and not move it pending an opportunity to have further discussions with the Government.

We ask that the Court *not* issue a seizure warrant authorizing removal of the piece at this time by the Department of Homeland Security, an agency with little expertise in handling priceless art. Instead, the Court should permit constructive seizure – under which Sotheby's will undertake to hold the piece on site, and not to allow its removal absent an appropriate order by the Court.

Such an approach is routine in cases involving important art in the hands of a reputable holder like Sotheby's. The Government has offered no reason for departing from such ordinary practice, other than citing Homeland Security's desire to complete the seizure.

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The Government's rush to take possession of the piece is particularly difficult to understand because both Sotheby's and the consignor have known about and cooperated with the investigation for more than a year. Indeed, it was Sotheby's that voluntarily brought the piece to the attention of the Cambodian government. Sotheby's has for months – with the full support of the Cambodian government – been attempting to arrange a sale to a buyer who would donate the statue to the nation of Cambodia. Sotheby's has also been working cooperatively with the United States Attorney's Office to assess the validity of any possible legal claims Cambodia might have to the statue. In light of this cooperation, the United States Attorney's Office agreed – repeatedly – to provide Sotheby's an opportunity to be heard before bringing a forfeiture action. We understand that a miscommunication between a line assistant (now on maternity leave) and a supervisor led the Office not to do so.

But given this history, there plainly is no need to rush to remove an irreplaceable work of art from its safe resting spot.

Such haste is particularly unwarranted because, as we lay out briefly below, there are major legal and factual holes in the Government's forfeiture complaint.

Sotheby's will not accept any antiquities for consignment and sale absent evidence sufficient to establish the consignor's good title to the antiquity. In assessing title, Sotheby's recognizes that most antiquities-holding nations have in the last several decades enacted patrimony laws nationalizing their existing antiquities. With regard to Cambodia, Sotheby's understanding has long been that this did not occur until at least 1992, seventeen years after the evidence presented to Sotheby's by the consignor showed the Statue was purchased from a dealer in London.

In the Complaint, the Government takes the position that the statue was likely looted sometime after 1960 and that Cambodia nationalized ownership of its antiquities no later than 1900.

The Government's evidence that the Statue was in Cambodia after 1900 is exceedingly thin. Looting of Khmer sites in Cambodia has been a fact for a thousand years. Against this history, the Government offers only a single "expert's" belief that the Statue was taken "sometime after 1960." Complaint Par. 15. But the evidence this "expert" relies on is much more naturally viewed as leading to the opposite conclusion. The expert principally cites documents written in the 1930s which describe in "detail" the temple site from which the Statue comes but do not reference looting, and photos from the 1950s and 1960s which the expert says show large statues still present at the site. *Id.* at 15(a, b). What is apparent from the need to rely on this very limited evidence is that these pictures *do not show* this particular Statue still at the site, and that the "detail[ed]" description *does not* refer to the Statue. In other words, the Government appears to be asking the Court to infer the Statue was in Cambodia in the 1960s from documents that do not refer to it and pictures that do not display it. The far more logical inference, plainly, is that

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the Statue was *not* still in Cambodia when the detailed survey that does not mention it was made or when the pictures that do not show it were taken.

On top of the serious factual issues here, the Government's reading of Cambodian law is – to say the least – novel. UNESCO, the U.N. organization that addresses cultural property issues, maintains an extensive online database of National Cultural Heritage Law. That database does not include any of the Cambodian laws on which the Government relies. *See* Exhibit A attached. According to press accounts, these laws were “rediscovered” and announced to the world only very recently. *See* Mythic Warrior is Captive in Global Art Conflict, NY Times (February 28, 2012). While we have not yet been able to obtain all of the laws on which the Government relies (much less translate or analyze them), we trust that the due process issues raised by reliance on such a “rediscovered” foreign law to undermine the settled expectations of the consignor are patent. *See, e.g., United States v. McClain*, 593 F.2d 658, 670-71 (5th Cir. 1979) (due process requires that foreign ownership law be drafted “with sufficient clarity to survive translation into terms understandable by and binding upon American citizens” and National Stolen Property Act “cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature”).

Finally, the timing of the Government's action is particularly curious, as it comes less than a week after another Court dismissed as facially insufficient what was plainly a far stronger forfeiture complaint. *See United States v. Mask of Ka-Nefer-Nefer*, 11 Civ. 504 (E.D. Mo. March 31, 2012). There, the Government's evidence showed that an Egyptian mask had been in storage at an Egyptian government storage facility in the 1960s and had disappeared by the early 1970s, before turning up in the global market in 1998, and there was no record that the mask had been sold or given to a private party in the intervening years. Nonetheless, the Court dismissed the Government's forfeiture complaint for failing to allege sufficient facts to establish that the mask was stolen, holding that “[t]he Government cannot simply rest on its laurels and believe that it can initiate a civil forfeiture proceeding on the basis of one bold assertion that because something went missing from one party in 1973 and turned up with another party in 1998, it was therefore stolen and/or imported or exported illegally.”

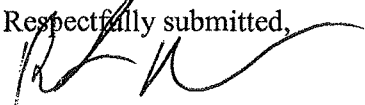
In *Ka-Nefer-Nefer*, the Government at least had evidence that the statue was once in the foreign state's actual possession; here the complaint suggests that the statue was not mentioned in the survey and not shown in the photographs on which the Government relies. If the inference of theft was unavailable to the Government with regard to a mask that disappeared from the Egyptian government's storeroom at some unknown point within a single decade, it surely is unavailable as to a Statue that disappeared from a jungle site in Cambodia at some unknown point in the last thousand years.

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Before the Government deprives anyone of property bought in good faith, at arms-length, for fair value, and held openly for decades, the Government must have more than a "rediscovered" law and inferences from facts not stated in documents and images not appearing in photographs. We hope after the Government reviews these and other arguments, it will elect not to proceed with this action. In the meantime, to protect and preserve the Statue, we ask that the Court not authorize Homeland Security to seize the Statue at this time, but instead order a constructive seizure and permit the object to remain at Sotheby's pending further order of the Court.

Respectfully submitted,



Peter G. Neiman

cc: Sharon Cohen Levin, Esq. (by email)