



U.S. Department of Justice

*United States Attorney
Southern District of New York*

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

April 4, 2012

By Fax

The Honorable George B. Daniels
United States District Judge
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

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

Dear Judge Daniels:

I write in response to the letter submitted today by Peter G. Neiman, counsel for Sotheby's, objecting to the issuance of an arrest warrant in rem in this matter for a sandstone statue, circa 10th Century A.D., which was illicitly removed from the Prasat Chen Temple at the historic and archeological site of Koh Ker, Preah Vihear Province, Cambodia (the "defendant property"). For the reasons set forth below, the Government respectfully requests that the Court reject Sotheby's objection and issue the arrest warrant in rem under Rule G of the Federal Rules of Civil Procedure.

Rule G(3)(b) provides that once a civil forfeiture complaint has been filed against a defendant in rem that is not real property:

- (i) the clerk must issue a warrant to arrest the property if it is in the government's possession, custody, or control;
- (ii) the court—on finding probable cause—must issue a warrant to arrest the property if it is not in the government's possession, custody, or control and is not subject to a judicial restraining order; and
- (iii) a warrant is not necessary if the property is subject to a judicial restraining order.

The property here is not in the Government's possession, and is not subject to a judicial restraining order. Accordingly, under Rule G, the Court, on finding probable cause, must issue a warrant to arrest the property. Indeed, the Government is required to seize the property in order to obtain jurisdiction for this action. "When a forfeiture suit is commenced against personalty,

the government must seize the defendant property. ‘In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object.’” United States v. All Funds Distributed To, or o/b/o Weiss, 345 F.3d 49, 55 (2d Cir. 2003) (internal citations omitted).

Moreover, there is no mechanism, either in Rule G or elsewhere, for the type of objection made by Sotheby’s. Rule G does not provide for notice to potential claimants, let alone an opportunity for hearing, prior to issuance of an arrest warrant *in rem*. Sotheby’s objection is therefore procedurally inappropriate as well as substantively meritless.

Sotheby’s suggestion that the Department of Homeland Security (“DHS”) has little expertise in handling artworks like the defendant property is simply inaccurate. In fact, DHS routinely seizes, preserves, and repatriates artwork and cultural property. Since 2007 alone, DHS has repatriated more than 2400 such items to over 20 countries. Some of these invaluable works of art and cultural property include 525 million year old Chinese paleo-vertebrate fossils, Bactrian bronze age tomb items dated circa 2000 B.C., an ancient Egyptian sarcophagus, a Corinthian column krater dated circa 580-570 B.C., a marble sculpture of Roman Emperor Marcus Aurelius dated circa 2nd century A.D., a limestone Buddha statute dated circa 550-577 A.D., a Pompei wall fresco, two 16th century Hebrew bibles, and paintings by Edgar Degas and Paul Klee.

DHS has contracted with a professional art moving company to move the defendant property, and with an art storage facility which will store the defendant property in a temperature controlled environment, just as it would be at Sotheby’s. Indeed, this storage facility has stored many items ordered seized by the United States District Court for the Southern District of New York that were valued at considerably more than \$2-3 million, the value estimated by Sotheby’s for the defendant property, including paintings by Egon Schiele, valued at \$19 million, Jean-Michel Basquiat, valued at \$8 million, and Roy Lichtenstein, valued at \$3.5 million. DHS is plainly more than competent to handle the seizure and preservation of the defendant property, without risk of damage to that property.

While Sotheby’s is correct that the Government has the discretion to enter into a substitute custodian agreement with an independent third party under which that party would hold the property on behalf of DHS, such a substitute custodian agreement with Sotheby’s would be inappropriate in this matter. As the Government has alleged in its Complaint, Sotheby’s marketed and attempted to sell the defendant property for more than a year after being informed by its own expert that the defendant property had been stolen from the Prasat Chen temple. (See Complaint ¶ 24.) Given Sotheby’s own significant role in the offenses on which this forfeiture action is based, they are not an appropriate independent third party for the Government to entrust with the property during the pendency of the action.

Contrary to Sotheby’s implication that the Kingdom of Cambodia supports their continued possession of and attempts to sell the defendant property, the Government initiated

this forfeiture action at the express request of the Cambodian government. Similarly, it is simply not accurate that the Government ever agreed to condition its ability to file a forfeiture action against the defendant property on providing Sotheby's "an opportunity to be heard." Neither the line Assistant United States Attorney nor any other representative of the Government reached any such agreement with Sotheby's.

Finally, Sotheby's arguments regarding the merits of this action are irrelevant to whether a warrant-in-rem should be issued under Rule G. Should Sotheby's or any other party file a claim to the defendant property, they may raise such arguments on a motion to dismiss or otherwise during their litigation of the action, and the Government will address them at that time. The Government does note, however, that Sotheby's assertion that the defendant property was not stolen property subject to Cambodian cultural patrimony laws is at odds with the conclusions reached by their own expert. As alleged in the Complaint, the scholar of Khmer art retained by Sotheby's to write the catalogue entry for and give a lecture about the defendant property informed Sotheby's that:

"The Cambodians in Phnom Penh now have clear evidence that [the defendant property] was definitely stolen from Prasat Chen at Koh Ker, as the feet are still *in situ*...I think it would be hugely unwise to offer the [defendant property] publicly, and I would not really feel comfortable writing it up under the circumstances. It is also quite possible that the Cambodians might block the sale and ask for the piece back."

Complaint ¶ 24. The expert ultimately advised Sotheby's that they could go ahead with a sale because:

"there are no plans at all for Cambodia or the National Museum of Cambodia in Phnom Penh to attempt to ask for the return of anything at the [] Museum or the [Museum] etc. They would also have to ask for all the Khmer material in the [Museum], and they want to continue to get French support etc. I think that Sotheby can therefore go ahead and plan to sell the Koh Ker Guardian, but perhaps not good to show or mention the feet still *in situ* at Koh Ker in the catalogue."

Complaint ¶ 26.

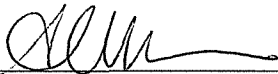
Based upon the facts alleged in the Complaint, the Government has established probable cause to believe that the defendant property is subject to forfeiture pursuant to 19

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U.S.C. § 1595a(c), and 18 U.S.C. §§ 545, 981(a)(1)(C), 2314 and 2315, and accordingly the Court should issue a arrest warrant in rem for the defendant property pursuant to Rule G.

Respectfully submitted,

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