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Don't Get SLAMmed into Nefer Nefer Land: Complaints in the Civil Forfeiture of Cultural Property

Victoria A. Russell

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This Article will explain how this case was properly decided, albeit on a legal technicality. It will also discuss the law surrounding different kinds of repatriation claims, and how foreign patrimony laws apply within the United States legal system. Finally, it will discuss the ramifications of the Ka-Nefer-Nefer decision. Given that the black market for art is estimated to be the third largest in the world, behind drug trafficking and arms dealing, proper understanding of the United States laws in the field of art law is important.

Keywords

St. Louis Art Museum, ka-nefer-nefer, repatriation, cultural property, Egypt, mask

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**Don't Get SLAMmed into Nefer
Nefer Land: Complaints in the Civil
Forfeiture of Cultural Property**

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Abstract

The Saint Louis Art Museum, known as SLAM, acquired the mask of Ka-Nefer-Nefer in 1998. Eight years later, the Egyptian Supreme Council of Antiquities called for its return on the grounds that it had been stolen from the Egyptian Museum in Cairo. SLAM refused. In 2011, the case went before the United States District Court for the Eastern District of Missouri to determine the ownership of the mask. Perhaps to the surprise of many, the court decided that the mask belongs in Saint Louis.

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INTRODUCTION

Collectors and museums have favored Egyptian antiquities since the time of the ancient Greeks.¹ In the fifth century BC, the Greek historian Herodotus visited Egypt and sang its praises in his work, *The Histories*.² The Roman Army took so many Egyptian obelisks during the Classical period that today more obelisks stand in Rome than in Egypt.³ In the eighteenth century, Napoleon's Army collected many objects from Egypt, including the famous Rosetta Stone.⁴ Europeans were so enthralled by Egyptian motifs that they decorated entire rooms in an

¹ See William Kelly Simpson, *Preface* to W. STEVENSON SMITH, *THE ART AND ARCHITECTURE OF ANCIENT EGYPT*, at vii-viii (1998) (discussing the scholars, museums, and excavations devoted to ancient Egypt in the last decades of the twentieth century); John Marincola, *Introduction* to HERODOTUS, *THE HISTORIES*, at xiv (Aubrey de Sélincourt, trans., Penguin Books 1996) (450-420 BC) (discussing Greek culture's fascination with Egypt).

² Marincola, *supra* note 1, at xiv.

³ *Stolen Treasures*, SUPREME COUNCIL OF ANTIQUITIES, http://www.sca-egypt.org/eng/RST_MISS_MP.htm (last visited Jan. 20, 2014).

⁴ MARJORIE CAYGILL, *THE BRITISH MUSEUM: A-Z COMPANION* 272 (1999). When the British defeated the Napoleonic armies, the French ceded the stone to King George III in the Treaty of Alexandria (1801). King George placed it in the British Museum, where it has remained ever since. *Id.*

Egyptian style and collectors sought Egyptian artifacts.⁵

Smuggling artifacts out of Egypt occurs even today, and looting has increased since the Egyptian Revolution in February 2011.⁶ Because of this history of looting, the Supreme Council of Antiquities in Egypt has called for European and American museums to return many objects to Egypt.⁷ Recognizing the importance of protecting cultural heritage, the United Nations General Assembly passed a resolution in 1993 calling for the restitution of cultural treasures to their countries of origin.⁸

Archaeological looting, a form of art theft and a major cause of unprovenanced⁹ antiquities, is a se-

⁵ See T.G.H. James, *Formation and Growth of the Egyptian Collections of the British Museum*, in EDNA R. RUSSMAN, ETERNAL EGYPT: MASTERWORKS OF ANCIENT ART FROM THE BRITISH MUSEUM 49 (2001) (discussing the interest in Egyptian artifacts and Egypt); KRISTINA HERRMANN FIORE, GUIDE TO THE GALLERIA BORGHESE 52 (2008) (discussing the Egyptian Room at the Galleria Borghese and other Egyptian-themed rooms in Rome).

⁶ See Carol Redmount, *El-Hibeh: Archaeological Site Looted*, AMERICAN RESEARCH CENTER IN EGYPT (Mar. 2012), <http://www.arce.org/news/2012/03/u76/El-Hibeh-Archaeological-Site-Looted>.

⁷ The Supreme Council of Antiquities issued a general statement asking people to report any information about possibly looted artifacts. They have also approached various museums and collectors about specific artifacts in those collections. See *Stolen Treasures*, *supra* note 3.

⁸ 1 LEONARD D. DUBOFF, CHRISTIE O. KING, MICHAEL D. MURRAY, *THE DESKBOOK OF ART LAW* B-6 (2d ed. Supp. 2005).

⁹ Provenance is an art historical term defined as “[t]he record of all known previous ownerships and locations of a work of art (as given in a *catalogue raisonné*).” EDWARD KUCIE-SMITH, *THE THAMES AND HUDSON DICTIONARY OF ART TERMS* 154 (1984). Thus, an “unprovenanced” work is one in which the information about previous ownerships and locations is unknown.

rious problem.¹⁰ The black market for art has been ranked the third highest in volume, just under drug trafficking and the arms trade.¹¹ More recently, the International Foundation for Art Research (IFAR) and the United Nations Educational, Social and Cultural Organization (UNESCO) estimated that it is the second most valuable illicit business.¹² While in many cases, art theft has ties to organized crime,¹³ in some cases thieves take advantage of the relatively unregulated art market to sell to collectors and auction houses.¹⁴ The result is that many unprovenanced artifacts end up in museums.¹⁵ Some studies of auction house catalogues indicate that 85 to 90% of antiquities on the market have no associated provenance.¹⁶ Other studies of private collections on loan to prominent museums indicate that only 10% of the antiquities had provenance.¹⁷ Thus, the repatriation of antiquities has significant ramifications for museums, as many of their objects may be affected.

With these facts in mind, any collector who is

¹⁰ Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 446 (2003).

¹¹ Onimi Erekosima & Brian Koosed, *Intellectual Property Crimes*, 41 AM. CRIM. L. REV. 809, 849 (2004).

¹² 1 LEONARD D. DUBOFF, CHRISTY O. KING & MICHAEL D. MURRAY, *THE DESKBOOK OF ART LAW C-3* (2d ed. Supp. 2005). IFAR reports that narcotics trafficking is the first. Marion P. Forsyth, *International Cultural Property Trusts: One Response to the Burden of Proof Challenges in Stolen Antiquities Litigation*, 8 CHI. J. INT'L L. 197, 197 (2007).

¹³ 1 DUBOFF, KING & MURRAY, *supra* note 12, at C-4.

¹⁴ Gerstenblith, *supra* note 10, at 446.

¹⁵ *Id.*

¹⁶ *Id.* at 447.

¹⁷ Derek Fincham, *Towards A Rigorous Standard for the Good Faith Acquisition of Antiquities*, 37 SYRACUSE J. INT'L L. & COM. 145, 154 (2010).

presented with an Egyptian artifact for sale should be diligent in determining its provenance before acquiring it. It may not only be stolen from a collection, the artifact might also have been taken illegally from its country of origin.¹⁸

In one such ongoing case, the Saint Louis Art Museum (SLAM) acquired the Ka-Nefer-Nefer¹⁹ mummy mask in 1998.²⁰ Eight years later, around 2006, the Egyptian government requested the mask's return and SLAM refused.²¹

SLAM then took the preemptive step of filing for declaratory judgment on February 15, 2011.²²

¹⁸ See 2 LEONARD D. DUBOFF, CHRISTIE O. KING & MICHAEL D. MURRAY, *THE DESKBOOK OF ART LAW U-10* (2d ed. Supp. 2006).

¹⁹ The transliteration of the Egyptian hieroglyphs for this name reads, "*k3 nfr nfr*." In English, the syllables would be ka, nefer, and nefer. "Ka" means "spirit" or "soul," and "nefer" means "beautiful" or "good." The name thus means, "doubly beautiful soul" (translation by the author). The name can be written in English in numerous ways, with different capitalization and hyphenation. The following are some examples: Ka-nefer-nefer (as on both museums' websites), Ka Nefer Nefer (as in various pleadings in the case), and Ka-Nefer-Nefer (as in the case name and opinion). To avoid confusion, the name has been standardized throughout this article to Ka-Nefer-Nefer.

²⁰ Complaint for Declaratory Judgment at 5, Art Museum Subdist. of the Metro. Zoological Park & Museum Dist. of the City of St. Louis & the Cnty. of St. Louis v. United States, No. 4:11CV0091, 2011 WL 903377, at *3 (E.D. Mo. Mar. 31, 2012), ECF No. 1 (stating that the museum bought the artifact from Phoenix Ancient Art, S.A. of Geneva, Switzerland).

²¹ Verified Complaint for Forfeiture at 3, United States v. Ka-Nefer-Nefer, No. 4:11CV00504, 2011 WL 10714760, *2 (E.D. Mo. Mar. 16, 2012), ECF No. 1.

²² Art Museum Subdist. of the Metro. Zoological Park & Museum Dist. of the City of St. Louis & the Cnty. of St. Louis v. United States, No. 4:11CV291 HEA, 2012 WL 1107736, at *1.

The District Court for the Eastern District of Missouri stayed the declaratory judgment action, “pending the outcome of the civil forfeiture action in *United States v. Mask of Ka-Nefer-Nefer*.”²³

In response, the United States government filed for civil forfeiture on March 16, 2011.²⁴ However, the District Court granted SLAM’s 12(b)(6) motion to dismiss for failure to state a claim.²⁵ Consequently, the U.S. government filed a notice of appeal on June 29, 2012 and the Eighth Circuit heard oral arguments on January 13, 2014.²⁶

This Article will address the legal issues involved in deciding this case. Part I will address the law pertinent to civil forfeiture, and it will explain how the courts have used this remedy with respect to stolen art. It will also explore the National Stolen Property Act (NSPA), codified at 18 U.S.C. §§ 2314-2315, and the Egyptian patrimony laws, No. 215 and No. 117. Part II will give a detailed analysis of the record of the case and the procedural history as it stands. Part III will analyze whether the court properly dismissed the case and whether the proposed amended complaint would have survived a motion to dismiss. The final Part will conclude the Article with the recommendation that SLAM is legally entitled to the mask, and makes a recommendation

(E.D. Mo. Mar. 31, 2012) [hereinafter *SLAM Declaratory Judgment case*].

²³ *Id.* at *3.

²⁴ Verified Complaint for Forfeiture, *supra* note 21, at 1.

²⁵ *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA, 2012 WL 1094652, at *1 (E.D. Mo. Mar. 31, 2012) *recons. denied*, No. 4:11CV504 HEA, 2012 WL 1977242 (E.D. Mo. June 1, 2012).

²⁶ Notice of Appeal at 1, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 (E.D. Mo. June 29, 2012), ECF No. 55; <http://media.ca8.uscourts.gov/webcal/jan14stl.pdf>, 6

for better ways to write a complaint of this nature.

I. APPLICABLE LAW

This Article will primarily address the U.S. government's civil forfeiture action. The action is brought under the Customs Duties statute, 19 U.S.C. § 1595a.²⁷

Generally, cases citing this law as grounds for forfeiture allege another violation of law concomitant with it.²⁸ Some examples have included the NSPA, 18 U.S.C. § 545, and the patrimony laws of various foreign nations.²⁹ This section will examine these statutes, and the Egyptian patrimony laws that are applicable to the Ka-Nefer-Nefer case.

A. *Civil Forfeiture: 19 U.S.C. § 1595a*

Forfeiture is a procedure that allows the United States government to seize items that exist in violation of the law.³⁰ Forfeiture can be punitive or remedial.³¹ When the government proceeds against an

²⁷ See 77 AM. JUR. PROOF OF FACTS 3D, *Proof of a Claim Involving Stolen Art Antiquities* § 19 (2004) (noting, for example, that the Cultural Property Implementation Act is a customs law because it is in Title 19 "Customs Duties," not in Title 18, "Crimes and Criminal Procedure.").

²⁸ See *United States v. An Antique Platter of Gold*, 184 F.3d 131, 134 (2d Cir. 1999) (alleging violation of 18 U.S.C. § 545); *United States v. An Original Manuscript Dated November 19, 1778*, No. 96 CIV. 6221 (LAP), 1999 WL 97894, at *1 (S.D.N.Y. Feb. 22, 1999) (alleging a violation of the CPIA); *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 250 (S.D.N.Y. 2009) (alleging a violation of the NSPA).

²⁹ National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (2012); 18 U.S.C. § 545 (2012) (titled "Smuggling goods into the United States"); *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1377 (S.D. Fla. 2003).

³⁰ *United States v. Daccarett*, 6 F.3d 37, 46 (2d Cir. 1993).

³¹ *United States v. Bajakajian*, 524 U.S. 321, 332 (1998).

individual in a criminal proceeding, the forfeiture is punitive.³² However, if the government sues the actual property, as in a civil case, the forfeiture is not intended as punishment of an individual for an actual offense.³³ Rather, when the government seizes an artifact in violation of a customs statute and launches a proceeding against the object itself, the court considers the action remedial.³⁴

In a civil forfeiture case, the government files a verified complaint against the property (*in rem*) under the notion that the property itself is the “wrongdoer”.³⁵ The owner then files an official claim to the property with the court.³⁶ Thus, a typical civil forfeiture suit will involve three parties: the government, the *in rem* property, and the claimant.

A statute allowing for this procedure is 19 U.S.C. § 1595a.³⁷ This customs statute states in part, “[m]erchandise which is introduced or attempted to be introduced into the United States contrary to law shall be seized and forfeited if it is stolen, smuggled, or clandestinely imported or introduced.”³⁸ While examining this law, the Second Circuit stated that the statute only requires, “that the property in question be introduced into the United States illegally, unlawfully, or in a manner conflicting with estab-

³² *Id.* The *Bajakajian* case is an example of a punitive forfeiture; there the government proceeded against the individual criminally and then obtained forfeiture of the object (in this case, currency) to punish the convicted.

³³ *Id.* at 331.

³⁴ *United States v. Davis*, 648 F.3d 84, 96 (2d Cir. 2011); *United States v. An Antique Platter of Gold*, 184 F.3d 131, 140 (2d Cir. 1999).

³⁵ *Daccarett*, 6 F.3d at 46.

³⁶ FED. R. CIV. P. G(5)(a)(i).

³⁷ 19 U.S.C. § 1595a (2012).

³⁸ *Id.*

lished law.”³⁹ Thus, the government can seize cultural property in a civil forfeiture action if someone imports that cultural property contrary to a law.⁴⁰

One question of significant importance is what burden of proof is necessary for the government to seize the object.⁴¹ Traditionally, the government only needed to show probable cause to seize property in a forfeiture.⁴² The burden of proof is established by 19 U.S.C. § 1615, which states, “the burden of proof shall lie upon such claimant.”⁴³ However, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) heightened the burden on the government to a preponderance of the evidence.⁴⁴ Nevertheless, as late as 2003, courts have stated that the lesser standard of probable cause was sufficient in civil forfeiture proceedings under a customs statute, and the burden remained upon the claimant.⁴⁵ Furthermore, circumstantial evidence is sufficient to determine probable cause.⁴⁶

The Supplemental Rules for Admiralty and Maritime or Asset Forfeiture Actions determine the

³⁹ *Davis*, 648 F.3d at 89.

⁴⁰ 19 U.S.C. § 1595a.

⁴¹ *United States v. Daccarett*, 6 F.3d 37, 46 (2d Cir. 1993) (noting the concern with the constitutional safeguards for innocent purchasers, given the ease with which the government can seize property).

⁴² Jennifer A. Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L., 1199, 1232 (2005).

⁴³ 19 U.S.C. § 1615 (2012).

⁴⁴ Civil Asset Forfeiture Reform Act, 18 U.S.C. § 983(c)(1) (2012); Kreder, *supra* note 42, at 1231.

⁴⁵ *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1377 n.4 (S.D. Fla. 2003) (noting 18 U.S.C. § 983(i) specifically excludes actions under Title 19).

⁴⁶ *Id.* at 1378.

particularity with which the complaint must plead probable cause.⁴⁷ For an *in rem* action, the government must state “circumstances . . . with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.”⁴⁸ For an asset forfeiture, the government must “state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.”⁴⁹

There are two possible defenses to this statute.⁵⁰ The statute of limitations for civil forfeiture actions under 19 U.S.C. § 1595a is provided by 19 U.S.C. § 1621.⁵¹ This section states that barring any concealment, no one can bring an action five years after the offense was committed, or more than two years after the property was discovered.⁵² Another defense that claimants often use in cultural heritage cases is the doctrine of laches.⁵³ This doctrine bars a claim if the plaintiff

⁴⁷ United States v. Mask of Ka-Nefer-Nefer, No. 4:11CV504 HEA, 2012 WL 1094658, at *1 (E.D. Mo. Mar. 31, 2012) *recons. denied*, No. 4:11CV504 HEA, 2012 WL 1977242 (E.D. Mo. June 1, 2012).

⁴⁸ FED. R. CIV. P. E(2)(a).

⁴⁹ FED. R. CIV. P. G(2)(f).

⁵⁰ 19 U.S.C. § 1621 (2012); Gerstenblith, *supra* note 10, at 442-3.

⁵¹ 19 U.S.C. § 1621. “No suit or action to recover any duty under section 1592(d), 1593a(d) of this title, or any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered, or in the case of forfeiture, within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later”

⁵² *Id.*

⁵³ Gerstenblith, *supra* note 10, at 442-3.

unreasonably delayed in bringing the claim and the defendant suffers prejudice as a result of this delay.⁵⁴

The government has successfully seized objects of cultural property under § 1595a in two prominent cases.⁵⁵ In the first case, the Southern District of Florida held that the forfeiture of a moon rock was valid because it was stolen from Honduras and imported into the United States.⁵⁶ Honduran law required an act of Congress to authorize the alienation of the moon rock, and because they found no legislation to this effect, the court held that the rock was subject to forfeiture.⁵⁷

In the second case, the government successfully seized a manuscript that had been stolen from the National Archives in Mexico and imported into the

⁵⁴ *Id.*

⁵⁵ *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1369 (S.D. Fla. 2003); *United States v. An Original Manuscript Dated November 19, 1778*, No. 96 CIV. 6221 (LAP), 1999 WL 97894, at *1 (S.D.N.Y. Feb. 22, 1999).

⁵⁶ *Lucite Ball*, 252 F. Supp. 2d at 1369. The complaint stated that the Consul General of Honduras had “identified the defendant property as patrimony of the Republic of Honduras and has stated that pursuant to Honduran law the defendant property could not be legally sold, or conveyed nor removed from Honduras unless expressly authorized by action of the National Congress.” Verified Complaint for Forfeiture *in rem* at 9, *Lucite Ball*, 252 F. Supp. 2d 1367 (No. 01-0116 CIV JORDAN), 2001 WL 34841870, at *4, ECF No. 1. A court appointed expert on Honduran law determined that the Honduran government owned the moon rock when President Nixon donated it in 1973. *Lucite Ball*, 252 F. Supp. 2d at 1372. Honduras has had several regime changes since 1973, but the court deemed this immaterial under Honduran law; the moon rock was the patrimony of the state. *Id.* at 1373.

⁵⁷ *Lucite Ball*, 252 F. Supp. 2d at 1375-76 (S.D. Fla. 2003).

United States.⁵⁸ In that case, the Southern District of New York determined that the government made its showing of probable cause because Archives documented the manuscript as part of its collection and 19 U.S.C. § 2607 makes it a crime to import an item belonging to the inventory of a foreign museum after the effective date of that chapter.⁵⁹

⁵⁸ *Original Manuscript*, No. 96 CIV. 6221 (LAP), 1999 WL 97894, at *1 (S.D.N.Y. Feb. 22, 1999). The National Archives in Mexico City documented the manuscript as belonging to its collection in 1993. *Id.* The manuscript was purchased at a flea market for approximately \$300. *Id.* It was imported into the United States, where it was sold in a hotel room for \$16,000. *Id.* at *2. Later, a dealer in rare manuscripts saw the manuscript when Sotheby's had it for auction and notified the Mexican National Archives that the manuscript might belong to them. *Id.* at *2. The National Archives confirmed it was missing from its collection and requested its return from the United States. *Id.* at *2. The court also found that the claimant was not an innocent owner given the suspicious nature of the transaction. *Id.* at *7. Therefore, the manuscript was subject to forfeiture. *Id.* at *1.

⁵⁹ *Id.* at *6. In 1970, United Nations Educational, Scientific and Cultural Organization (UNESCO) held the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. 1 DUBOFF, KING & MURRAY, *supra* note 8, at B-82. The convention called for the signatory nations to prohibit the importation an object of cultural heritage that was stolen from another signatory country. *Id.* at B-82. The United States adopted the Convention in 1983. *Id.* at B-83. The resulting statute became known as the Cultural Property Implementation Act, or the CPIA, codified at 19 U.S.C. §§ 2601 et seq. *Id.*. A relevant part of the Act reads:

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force

B. 18 U.S.C. §§ 2314-2315: National Stolen Property Act

Congress signed the National Stolen Property Act (NSPA) into legislation in 1934 in order to expand the National Motor Vehicle Theft Act to include stolen property other than automobiles.⁶⁰ The Act prevents the transportation of property valued over \$5,000 across state lines.⁶¹ The NSPA was amended in 1986 to include transportation over the United States border and added the word “possession” to eliminate the defense that the property was no longer in interstate commerce and that the federal government could not prosecute it under the Commerce Clause.⁶² The passage of the NSPA pertinent to the recovery of stolen art reads:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . . shall be fined under this title or imprisoned

of the Convention for the State Party, whichever date is later, may be imported into the United States.

Cultural Property Implementation Act, 19 U.S.C. § 2607 (2012).

⁶⁰ Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123, 133 (2010).

⁶¹ 18 U.S.C. § 2314.

⁶² Urice, *supra* note 60, at 134.

not more than ten years, or both.⁶³

In the text itself, the NSPA does not actually define what the term “stolen” means for purposes of the Act. The Ninth Circuit held in *Hollinshead* that the violation of a country’s patrimony law can mean stolen.⁶⁴ The Fifth Circuit held in *McClain* that works of art imported in violation of a country’s patrimony law constitutes “stolen” property under the NSPA.⁶⁵ In *McClain*, the court convicted five individuals of stealing Pre-Columbian artifacts from Mexico and trying to sell them in the United States to an undercover FBI agent.⁶⁶ After tracing the history of laws in Mexico concerning cultural property, the court noted that Mexico did not enact legislation claiming ownership of cultural property until 1972.⁶⁷ The court held “a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered ‘stolen,’ within the meaning of the National Stolen Property Act.”⁶⁸ This holding became known as the McClain Doctrine.⁶⁹

However, the Second Circuit has held that in addition to enacting a patrimony law, the country of origin must enforce that law within its borders before an object can be considered stolen if it is brought into

⁶³ 18 U.S.C. § 2315.

⁶⁴ *United States v. Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974).

⁶⁵ *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977).

⁶⁶ *Id.* at 991-92

⁶⁷ *Id.* at 1000.

⁶⁸ *Id.* at 1000-01 (citing *Hollinshead*, 495 F.2d 1154).

⁶⁹ Adam Goldberg, Comment, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1042 (2006).

the United States.⁷⁰ The court concluded, “the NSPA applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law.”⁷¹ The court further noted that there were “no exceptions” for private ownership for antiquities discovered in Egypt after the effective date of the relevant patrimony law, Egyptian Law No. 117 of 1983.⁷²

In an earlier opinion, the Second Circuit established that the law allegedly violating NSPA must claim ownership, not merely regulate the items.⁷³ In *Long Cove Seafood*, the court found that individuals who took clams in violation of an environmental law across state borders were not guilty under the NSPA because the environmental law only intended to regulate the clams.⁷⁴ New York did not assert a possessory interest in the clams, as evidenced by the fact the government did not assert a violation of the state larceny statute.⁷⁵ Equally important, New York did not assume liability for any attacks by the wild animals regulated under the relevant environmental laws, whereas possessors of animals in New York were liable for attacks.⁷⁶ Thus, the environmental law did not sufficiently describe state ownership of the clams for the court to consider them “stolen” under the NSPA.⁷⁷

⁷⁰ United States v. Schultz, 333 F.3d 393, 416 (2d Cir. 2003).

⁷¹ *Id.*

⁷² *Id.* at 406. In *Schultz*, two individuals looted Egyptian antiquities from archaeological sites and sold them as part of the fictitious “Thomas Alcock Collection.” *Id.* at 396.

⁷³ United States v. Long Cove Seafood, Inc., 582 F.2d 159, 165 (2d Cir. 1978).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

The government has used the NSPA in connection with the civil forfeiture statute in several situations. The government first asserted a claim of civil forfeiture against a work of art under the NSPA in 1999, but the court ultimately decided the case on other grounds.⁷⁸ In cases where the NSPA has been the reason for forfeiture, the record clearly identified a particular thief. In *Portrait of Wally*, the Second Circuit determined that the government met its burden of showing probable cause for forfeiture because it had several letters indicating that a Nazi official had taken a painting without providing compensation to the owner.⁷⁹ In another decision by the Sec-

⁷⁸ Ian M. Goldrich, Comments, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 *FORDHAM INT'L L.J.* 118, 121 (1999). In *Antique Platter*, the claimant purchased an Italian artifact from Sicily in 1991 for \$1.2 million. *United States v. An Antique Platter of Gold*, 184 F.3d 131, 133 (2d Cir. 1999). On the customs form, the claimant listed the Phiale's country of origin as Switzerland and the purchase price as \$250,000. *Id.* The Italian patrimony law stated that all archaeological items belonged to Italy unless the owner could prove private ownership before 1902. *Id.* at 134. The Italian government contacted the United States and requested the Phiale's repatriation. *Id.* The government filed an *in rem* civil forfeiture action, asserting both a customs violation under 18 U.S.C. § 545 and the NPSA. *Id.* False statements are forbidden on customs forms. 18 U.S.C. § 545. The court determined that claimant's importation of the Phiale violated 18 U.S.C. § 545 because of the claimant misrepresented both the price and the country of origin on the customs form. *Antique Platter*, 184 F.3d at 134. The court chose not to address the NSPA allegation. *Id.*

⁷⁹ *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 256 (S.D.N.Y. 2009). The court also stated that the purchaser did not do a good faith provenance search when he relied solely on the seller's word even though he knew a Jewish woman claimed

ond Circuit, a witness testified to seeing the thief carry the painting out of the museum.⁸⁰

C. Egyptian Patrimony Laws No. 215 and No. 117

The Republic of Egypt enacted Law No. 215 in 1951.⁸¹ Article 4 provided that all immovable or movable antiquities or ancient land belonged to the Republic of Egypt, unless it belonged to a wakf (religious entity) or was private property under the law.⁸² Article 22 outlined the exceptions under which a person may privately own an antiquity.⁸³ These exceptions included (1) antiquities found prior to the institution of Law No. 215, in antiquities markets or private collections; (2) antiquities given to the finder by the Egyptian government; (3) antiquities the Egyptian government sold; (4) antiquities imported by a stranger; (5) immovable antiquities; and (6) antiquities sold by museums.⁸⁴

Egyptian Patrimony Law No. 117 replaced

the portrait belonged to her family. *Id.* at 267. The court also insisted that it was not enough that the painting was stolen when it entered the country, but that the government must show that the museum in question knew it was stolen when it was imported. *Id.* at 269. The court also rejected the notion that laches could apply to a civil forfeiture action. *Id.* at 275.

⁸⁰ *United States v. Davis*, 648 F.3d 84, 88 (2d Cir. 2011). In *Davis*, the government brought a civil forfeiture action under 19 U.S.C. § 1595a and the NSPA when Sotheby's attempted to auction the Pissarro painting, *Le Marche*, after it had been stolen from a French museum in 1981. *Id.* at 87. This case determined that "stolen" meant the object was stolen at the time of importation to the US. *Id.* at 91. The court also established that there is no innocent owner defense. *Id.* at 95.

⁸¹ Law No. 215 of 1951 (Law on the Protection of Antiquities), 31 October 1951, p. 1 (Egypt).

⁸² *Id.*

⁸³ *Id.* at 5.

⁸⁴ *Id.* at 5.

Law No. 215 in 1983.⁸⁵ Law No. 3 amended Law No. 117 in 2010.⁸⁶ Article 24 of Law No. 117 expressly provides that anyone who finds an antiquity in Egypt must turn it over to authorities within 48 hours as it belongs to the Egyptian government, and Law No. 3 did not amend this provision.⁸⁷ The sale of antiquities is forbidden by Article 8; as amended by Law No. 3, it also allows the board of directors the ability to retribute artifacts for compensation.⁸⁸ Article 35 claims ownership of any find made during an archaeological expedition made by foreigners, and removes the 1983 provision that the Egyptian government may give excavators some of their finds.⁸⁹ Egyptian authorities will fine anyone who smuggles an artifact out of Egypt between 100,000 and 1,000,000 Egyptian Pounds, and that the object will be forfeited to the Egyptian authorities, pursuant to Article 41.⁹⁰

⁸⁵ Law No. 117 of 1983 (Law on the Protection of Antiquities), *Al-Jarida Al-Rasmiyya*, 11 August 1983, p. 4, (Egypt).

⁸⁶ Law No. 117 of 1983 as Amended by Law No. 3 of 2010 (Promulgating the Antiquities Protection Law), 14 February 2010, p. 8 (Egypt).

⁸⁷ Law No. 117 of 1983 (Promulgating the Antiquities Protection Law), 11 August 1983, p. 17, (Egypt); Law No. 117 of 1983 as Amended by Law No. 3 of 2010 (Promulgating the Antiquities Protection Law), 14 February 2010, p. 22 (Egypt).

⁸⁸ Law No. 117 of 1983 as Amended by Law No. 3 of 2010 (Promulgating the Antiquities Protection Law), 14 February 2010, p. 15 (Egypt).

⁸⁹ *Id.* at p. 28; Law No. 117 of 1983 (Promulgating the Antiquities Protection Law), 11 August 1983, p. 24-25, (Egypt).

⁹⁰ Law No. 117 of 1983 as Amended by Law No. 3 of 2010 (Promulgating the Antiquities Protection Law), 14 February 2010, p. 32 (Egypt). This is a substantial increase from the 1983 amounts, which set the fine between 5,000 and 50,000 Egyptian pounds. Law No. 117 of 1983 (Promulgating the Antiquities Protection Law), 11 August 1983, p. 29 (Egypt).

II. UNITED STATES V. KA-NEFER-NEFER

In 1952, an expedition of the Egyptian Antiquities Service working inside the funerary enclosure of Third Dynasty Pharaoh Sekhemket excavated the Nineteenth Dynasty mat burial of the noblewoman Ka-Nefer-Nefer.⁹¹



Fig 1. Mask of Ka-Nefer-Nefer⁹² and Profile⁹³

Her mummy mask is made of linen, wood, plaster, resin, and it is painted, gilded, and inlaid with glass.⁹⁴ It depicts the face and upper torso of a woman, and it measures approximately 21 and 1/16 inch-

⁹¹ Verified Complaint for Forfeiture, *supra* note 21, at 2.

⁹² *The Mask of Kanefernefer*, SUPREME COUNCIL OF ANTIQUITIES, http://www.sca-egypt.org/eng/RST_005Kanefernefer.htm (last visited Mar. 1, 2014).

⁹³ Photograph of the profile of the Mummy Mask of the Lady Ka-nefer-nefer, SAINT LOUIS ART MUSEUM, http://www.slam.org/eMuseum/media/full/191998_2.jpg (last visited Mar. 1, 2014).

⁹⁴ *Id.*

es by 14 and 9/16 inches by 9 and 3/4 inches.⁹⁵

The provenance of the mask after its excavation is in dispute.⁹⁶ The Government alleged in its verified complaint that Egyptian Antiquities Service stored the mask at Saqqara until 1959, when it shipped the mask to the Egyptian Museum in Cairo for an exhibition in Tokyo that never reached fruition.⁹⁷ In 1962, the Egyptian Museum shipped the mask back to Saqqara in box number fifty-four.⁹⁸ The Egyptian Museum performed an inventory in 1973, at which time museum authorities discovered that the mask was no longer in box fifty-four.⁹⁹ The Egyptian Museum has no record of a sale or transfer for the mask during the period from 1966 to 1973.¹⁰⁰

On the other hand, the Saint Louis Art Museum alleged that the mask was part of the Kaloterna private collection in the 1960s, when a Croatian collector in Switzerland acquired it.¹⁰¹ The complaint stated that in 1995 this collector sold the mask to Phoenix Ancient Art,¹⁰² and stated that SLAM purchased the mask from Phoenix in 1998 for approximately \$499,000.¹⁰³

⁹⁵ *Id.* at 1-2.

⁹⁶ Compare Verified Complaint for Forfeiture, *supra* note 21, at 2-3; with Complaint for Declaratory Judgment, *supra* note 20, at 5.

⁹⁷ Verified Complaint for Forfeiture, *supra* note 21, at 2.

⁹⁸ *Id.* at 3.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Complaint for Declaratory Judgment, *supra* note 20, at 5.

¹⁰² *Id.*

¹⁰³ Notice of Verified Claim of Interest, Exhibit A at 1; Art Museum Subdist. of the Metro. Zoological Park & Museum Dist. of the City of St. Louis & the Cnty. of St. Louis v. United States, No. 4:11CV0091, 2011 WL 903377, at *3 (E.D. Mo. Mar. 31, 2012), ECF No. 8-1

Around 2006, the Egyptian Supreme Council of Antiquities discovered the location of the mask and called for its return.¹⁰⁴ The museum denied these requests.¹⁰⁵ In December 2010, the United States Attorney's Office for the Eastern District of Missouri requested a meeting regarding the mask.¹⁰⁶ The parties met in January 2011, and the United States stated its intention to seize the mask.¹⁰⁷

As a result of this meeting, each party instituted a suit against the other. Part A will examine the declaratory judgment action by SLAM. Part B will explore the civil forfeiture action by the United States government. Part C will review the aftermath of the cases, specifically, the government's motion to reconsider or amend.

A. Declaratory Judgment

SLAM filed for declaratory judgment against the government for the mask on February 15, 2011.¹⁰⁸ SLAM stated that it conducted a "months-long" provenance search, in which it contacted Mohammed Saleh of the Egyptian Museum, the Art Loss Register, INTERPOL, the International Federation of Art Research, the Missouri Highway Patrol, and the Federal Bureau of Investigation.¹⁰⁹ SLAM acknowledged receipt of several emails from Ton Cremers, of the Museum Security Network, beginning in December 2005, alleging the mask was sto-

¹⁰⁴ United States v. Mask of Ka-Nefer-Nefer, No. 4:11CV504 HEA 2012 WL 1094658, at *3 (E.D. Mo. Mar. 31, 2012), ECF No. 11.

¹⁰⁵ Verified Complaint for Forfeiture, *supra* note 21, at 3.

¹⁰⁶ Complaint for Declaratory Judgment, *supra* note 20, at 9.

¹⁰⁷ *Id.* at 9-10.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.* at 5-6.

len.¹¹⁰ Cremers had sent these emails to United States government officials, including the Department of Homeland Security and the FBI.¹¹¹

Dr. Zahi Hawass, at that time the Director of the Supreme Council of Antiquities, contacted SLAM via email several times and provided inconsistent and inaccurate information asking for the return of the mask.¹¹² SLAM stated it was willing to return the mask if it was provided verifiable proof that the mask was stolen.¹¹³ SLAM concluded that the United States had actual or constructive knowledge of the location of the mask and its questionable provenance for more than five years.¹¹⁴ Consequently, the statute of limitations for forfeiture had passed.¹¹⁵

In addition, because Egyptian Law No. 215 allowed private ownership of antiquities, SLAM did not import the mask into the United States in violation of this law and the mask should belong to it.¹¹⁶ Therefore, the museum requested declaratory judgment in its favor.¹¹⁷ SLAM argued that the declaratory judgment would settle the dispute between the relevant parties, because the only other valid potential claimant was the Republic of Egypt.¹¹⁸

The government responded by filing a motion to dismiss the complaint or stay the action for de-

¹¹⁰ *Id.* at 7.

¹¹¹ *Id.* at 7-8.

¹¹² *Id.* at 9.

¹¹³ *Id.*

¹¹⁴ *Id.* at 10.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 11.

¹¹⁷ *Id.*

¹¹⁸ Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 2, *SLAM Declaratory Judgment case*, No. 4:11CV00291, 2011 WL 1258264, at *3 (E.D. Mo. Mar. 31, 2012), ECF No. 14.

claratory judgment on March 16, 2011.¹¹⁹ The government stated that Title 19 and the Supplemental Rules established a procedure in civil forfeiture that would be superior to a declaratory judgment because it would be a final judgment for all possible parties.¹²⁰ Further, the government argued that the civil forfeiture proceeding was more effective for this dispute, because the parties were the same in both the declaratory judgment action and the civil forfeiture.¹²¹ Should the government succeed in showing probable cause and win the forfeiture action, the mask would become the property of the United States, and the government would have the ability to decide whether to return the mask to Egypt, regardless of whether Egypt participated as a claimant in the civil forfeiture action.¹²² Thus, the court should stay the declaratory judgment action because it was unnecessarily duplicitous and hindered judicial economy.¹²³

¹¹⁹ Defendant's Motion to Dismiss or Stay Proceedings at 1, *SLAM Declaratory Judgment case*, No. 4:11CV00291, 2011 WL 999458, at *1 (E.D. Mo. Mar. 31, 2012), ECF No. 8.

¹²⁰ *Id.* at 3. The Museum's primary basis for opposing the motion to stay was that it would open the mask up to frivolous claims from other parties and potentially expose the Museum to large litigation costs. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 7, *supra* note 118.

¹²¹ Defendants' Reply to Plaintiff's Memorandum in Opposition to Their Motion to Dismiss or Stay Proceedings at 2, *SLAM Declaratory Judgment case*, No. 4:11CV00291 (E.D. Mo. Mar. 31, 2012), ECF No. 16.

¹²² *Id.*

¹²³ Defendant's Memorandum in Support of Its Motion to Dismiss or Stay Proceedings at 6, *SLAM Declaratory Judgment case*, No. 4:11CV00291 (E.D. Mo. Mar. 31, 2012), ECF No. 9.

B. Civil Forfeiture

On the same day the government filed its response to the declaratory judgment complaint, it initiated an action for the civil forfeiture of the mask.¹²⁴ The complaint alleged that because the mask was missing from its box and there was no bill of sale or transfer in the records of the Egyptian Museum, the mask had been stolen and was subject to forfeiture under 19 U.S.C. § 1595a(c).¹²⁵ In addition, the government sought an *ex parte* order restraining SLAM from moving the property.¹²⁶ The court granted the restraining order.¹²⁷

A claimant in a civil forfeiture action must file a claim within 60 days of publication and then the claimant must file an answer or motion under Rule 12 within 21 days.¹²⁸ Pursuant to this requirement, SLAM filed a claim of interest in the mask on April 20, 2011, in which it asserted that it had purchased the mask in good faith for \$499,000 from Phoenix Ancient Art in Geneva, Switzerland after months of provenance research.¹²⁹

Shortly thereafter, on May 5, 2011, SLAM

¹²⁴ Verified Complaint for Forfeiture, *supra* note 21, at 1.

¹²⁵ *Id.* at 4.

¹²⁶ *Ex Parte* Application of the United States to Restrain Defendant Prop. at 2, United States v. Mask of Ka-Nefer-Nefer, No. 4:11CV00504 (E.D. Mo. Mar. 31, 2012), ECF No. 3.

¹²⁷ Order Restraining Defendant Prop. at 2, United States v. Mask of Ka-Nefer-Nefer, No. 4:11CV00504 (E.D. Mo. Mar. 31, 2012), ECF No. 5.

¹²⁸ FED. R. CIV. P. 12; Declaration of Publication at 2; United States v. Mask of Ka-Nefer-Nefer, No. 4:11CV 504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 9.

¹²⁹ St. Louis Art Museum's Verified Claim of Interest in the Defendant Mask of Ka-Nefer-Nefer at 3, United States v. Mask of Ka-Nefer-Nefer, No. 4:11CV504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 8.

filed a motion to dismiss for failure to state a claim upon which relief could be granted.¹³⁰ SLAM argued that the term “missing” does not mean “stolen,” and that the complaint therefore could not withstand the motion to dismiss.¹³¹ The museum further argued that the government did not allege when, where, how, or by whom the mask was stolen.¹³² Consequently, the court should grant the motion to dismiss because the complaint did not provide details with sufficient particularity to satisfy Supplemental Rule G(2) of the Federal Rules of Civil Procedure.¹³³ Furthermore, SLAM argued that the only Egyptian patrimony law the United States recognizes is Law No. 117, and because this law was enacted in 1983, it would not have been in effect at the time the mask left Egypt.¹³⁴

Moreover, SLAM argued that the statute of limitations had passed.¹³⁵ The Egyptian authorities knew the mask was missing as of 1973 and did nothing to recover it.¹³⁶ At the very latest, Egyptian authorities should have known the mask was in Saint Louis in 1998, when SLAM sent letters to the Director of the Egyptian Museum.¹³⁷ However, it was not until February 14, 2006 that Zahi Hawass contacted SLAM to ask for the return of the mask.¹³⁸ The gov-

¹³⁰ St. Louis Art Museum’s Motion to Dismiss the Government’s Civil Forfeiture Complaint at 1, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 11.

¹³¹ *Id.*

¹³² *Id.* at 3.

¹³³ *Id.* at 4

¹³⁴ *Id.* at 6-7.

¹³⁵ *Id.* at 8.

¹³⁶ *Id.* at 10.

¹³⁷ *Id.*

¹³⁸ *Id.* at 13.

ernment could have been aware of the mask's importation in 1998.¹³⁹ At the latest, the government would have had reason to discover the location of the mask and file forfeiture proceedings in February 2006 when it received emails from Ton Cremers, but the government did not file until March 2011.¹⁴⁰ Therefore, the five-year statute of limitations had passed.¹⁴¹ For the same reasons just listed, the museum argued that the doctrine of laches should bar the claim.¹⁴²

The government argued in response to SLAM's motion that it was required only to show probable cause in its pleading.¹⁴³ Further, 19 U.S.C. § 1615 shifted the burden to SLAM to show by a preponderance of the evidence that the mask was not stolen property.¹⁴⁴ Because the mask was documented in Cairo in 1966, was missing in 1973, and no record indicates that it was sold, the government argued there is probable cause to believe that it was stolen and therefore imported in violation of 18 U.S.C. § 1595a.¹⁴⁵ The government argued that matters of foreign law should be proven at trial and so the court should not consider SLAM's allegations regarding Egyptian Law No. 117 until that time.¹⁴⁶ Moreover, the government urged the court to reject the motion because the statute of limitations and the defense of

¹³⁹ *Id.* at 14.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 15.

¹⁴³ United States' Memorandum in Opposition to Claimant St. Louis Art Museum's Motion to Dismiss at 3, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 18.

¹⁴⁴ *Id.* at 1.

¹⁴⁵ *Id.* at 4.

¹⁴⁶ *Id.* at 5.

laches were outside of the scope of a motion to dismiss.¹⁴⁷

The government also moved to strike SLAM's claim for lack of standing.¹⁴⁸ It argued that SLAM did not establish a colorable claim under Egyptian law, because that law "provides that antiquities like the Mask are property of the Republic of Egypt[.]"¹⁴⁹ Therefore, SLAM did not have colorable claim of ownership to the mask.¹⁵⁰ The Government asserted that because none of the exceptions for private ownership under Egyptian Law No. 215 were possible, the mask would be contraband like a narcotic, and the museum should not be able to claim the mask.¹⁵¹

SLAM countered by claiming that because the mask was in its exclusive possession and control for thirteen years, it had standing to claim the mask.¹⁵² SLAM argued that its standing was based not just on possession, but also upon the fact that it paid value for the mask and would suffer injury if the mask

¹⁴⁷ *Id.* at 6.

¹⁴⁸ United States' Motion to Strike Claim by St. Louis Art Museum for Lack of Standing at 1, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 20.

¹⁴⁹ United States' Memorandum in Opposition to Claimant St. Louis Art Museum's Motion to Dismiss, *supra* note 143, at 1.

¹⁵⁰ United States' Motion to Strike Claim by St. Louis Art Museum for Lack of Standing, *supra* note 148, at 2.

¹⁵¹ United States' Memorandum in Support of its Motion to Strike Claim by St. Louis Art Museum for Lack of Standing at 4, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 21.

¹⁵² Claimant St. Louis Art Museum's Memorandum in Opposition to the United States' Motion to Strike the St. Louis Art Museum's Verified Claim to the Mask at 4, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 24.

were forfeited.¹⁵³

The court issued its opinion on the declaratory judgment action, the motion to strike and the civil forfeiture action on the same day.¹⁵⁴ The court decided to stay the declaratory judgment because no parties would suffer prejudice.¹⁵⁵ In addition, the court agreed with the government that civil forfeiture was procedurally superior because there was a specific statutory scheme for dealing with the matter.¹⁵⁶ The court also denied the government's motion to strike.¹⁵⁷ Because the mask had been in continuous and open possession of the museum for thirteen years, the court determined that SLAM had standing.¹⁵⁸

However, the court granted the motion to dismiss the civil forfeiture action.¹⁵⁹ Supplemental Rule

¹⁵³ Claimant St. Louis Art Museum's Sur-Reply to the United States' Reply to the Museum's Memorandum in Opposition to the Motion to Strike the Museum's Claim for Lack of Standing at 4, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 30.

¹⁵⁴ *SLAM Declaratory Judgment case*, No. 4:11CV291 HEA, 2012 WL 1107736, at *3 (E.D. Mo. Mar. 31, 2012); *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA, 2012 WL 1094658, at *1 (E.D. Mo. Mar. 31, 2012) *recons. denied*, No. 4:11CV504 HEA, 2012 WL 1977242 (E.D. Mo. June 1, 2012) (granting SLAM's motion to dismiss the verified complaint); *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA, 2012 WL 1094652, at *2 (E.D. Mo. Mar. 31, 2012) (denying the government's motion to strike the claim by SLAM for lack of standing).

¹⁵⁵ *SLAM Declaratory Judgment case*, No. 4:11CV291 HEA, 2012 WL 1107736, at *1 (E.D. Mo. Mar. 31, 2012).

¹⁵⁶ *Id.* at *2.

¹⁵⁷ *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504-HEA, 2012 WL 1094652, at *1 (E.D. Mo. Mar. 31, 2012).

¹⁵⁸ *Id.*

¹⁵⁹ *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA, 2012 WL 1094658, at *4 (E.D. Mo. Mar. 31, 2012) *recons.*

G(2) governs civil forfeiture actions,¹⁶⁰ and it requires that the complaint must plead the facts with particularity.¹⁶¹ The court was not persuaded that the government would be able to meet its burden of proof at trial because the pleading only stated that the mask was “missing” and did not allege any facts indicating the time, place, or manner in which the mask was stolen.¹⁶² Further, the court noted that 19 U.S.C. § 1595a specified that the merchandise be introduced into the country “contrary to law,” and the government failed to note which law was violated.¹⁶³

C. Motion to Reconsider or Amend the Complaint

On April 6, 2012, the government filed a motion to seek leave to file a motion to reconsider and to amend the complaint.¹⁶⁴ The government stated that the order dismissed the complaint, but did not appear to dismiss the underlying action and was therefore not a final judgment.¹⁶⁵ On April 9, 2012, the court granted the motion to file a motion to reconsider by May 7, 2012 but was silent as to when or if the government could file an amended complaint.¹⁶⁶

denied, No. 4:11CV504 HEA, 2012 WL 1977242 (E.D. Mo. June 1, 2012).

¹⁶⁰ *Id.* at *2.

¹⁶¹ *Id.* at *1.

¹⁶² *Id.* at *3.

¹⁶³ *Id.* at *3.

¹⁶⁴ Motion for Enlargement of Time to File Motion for Reconsideration and/or to Seek Leave to File Amended Complaint Prior to Entry of Judgment at 1, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV00504 (E.D. Mo. Mar. 31, 2012), ECF No. 35.

¹⁶⁵ *Id.*

¹⁶⁶ Docket Text Order at 1, *United States v. Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 36.

As a result, the government filed a motion to reconsider or file an amended complaint,¹⁶⁷ arguing that it need only demonstrate probable cause and that claimant had the burden of proof beyond a preponderance of the evidence to show lawful importation.¹⁶⁸ It stated that probable cause should be more than mere suspicion, but it did not need to be a *prima facie* case.¹⁶⁹ The motion noted that courts have construed “stolen” within the context of 19 U.S.C. § 1595a liberally in other cases, such that the government only needed show that the mask belonged at one time to someone other than the current owner; it did not need to show the time and manner of the theft or the identity of the thief.¹⁷⁰ In addition, the plain language of the statute simply states, “stolen” and does not require a predicate law.¹⁷¹ Therefore, the Opinion is incorrect by asserting that “introduced contrary to law” and “stolen” are separate elements to be satisfied.¹⁷²

The court entered the following information into the docket: “ORDERED: PLAINTIFF GRANTED UNTIL 5-7-12 TO FILE WHAT IT SUGGESTS IS A MOTION TO RECONSIDER HEA. (Response to Court due by 5/7/2012.). Signed by Honorable Henry E. Autrey on 04/09/12.”

¹⁶⁷ Motion of the United States to Reconsider Order and Op. Dismissing its Verified Complaint at 2, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 37.

¹⁶⁸ Memorandum of the United States in Support of its Motion to Reconsider Order and Op. Dismissing Verified Complaint at 2, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 38.

¹⁶⁹ *Id.* at 3.

¹⁷⁰ *Id.* at 5.

¹⁷¹ *Id.* at 7.

¹⁷² *Id.* at 7. The museum countered that the government should have alleged that a law was broken in addition to the forfeiture statute and the government did not allege the

The court denied the motion to reconsider because there was not so severe a mistake as to establish manifest error.¹⁷³ Further, the court granted the government's motion to extend time to file an appeal, but it was silent on whether the order was final.¹⁷⁴

On June 8, 2012, the government filed a motion for leave to amend its complaint.¹⁷⁵ It argued that when a court grants a motion to dismiss, the dismissal is generally without prejudice and the plaintiff usually has an opportunity to amend the complaint.¹⁷⁶ The government attached a proposed amended complaint that added information about how provenance can be laundered.¹⁷⁷ It also added that because the Republic of Egypt did not authorize "any person to remove the Mask from box number

Egyptian patrimony law that would be in effect. Claimant St. Louis Art Museum's Memorandum in Opposition to the Government's Motion to Reconsider Order and Opinion Dismissing Verified Complaint at 15, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 40.

¹⁷³ Op., Memorandum, and Order at 3, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 48.

¹⁷⁴ *Id.*

¹⁷⁵ Motion of the United States for Leave to File First Amended Verified Complaint for Forfeiture at 1, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 49.

¹⁷⁶ *Id.* at 2

¹⁷⁷ First Amended Verified Complaint at 3, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. June 8, 2012), ECF No. 49-1 ("Laundering the provenance of an artifact involves creating a fictitious history of the artifact's ownership through the fabrication of documents or other accounts that misstate of the place or time of origin or discovery or falsely describe the transactions leading to its present ownership.") (on file with the author and the Pace Intellectual Property, Sports & Entertainment Law Forum).

fifty-four at Saqqara” there was probable cause to believe the mask was “stolen by an unidentified individual . . . between 1966 and 1973.”¹⁷⁸

The government also added information to the complaint about the necessary Egyptian law.¹⁷⁹ The government stated that Egyptian Law No. 215 defines the mask as an antiquity, and the mask does not fall into any of the exceptions for private ownership carved out by that law.¹⁸⁰ The amended complaint also discussed the individuals who sold the mask to SLAM, pointing out that Egyptian authorities convicted the sellers in 2004 for smuggling artifacts out of Egypt.¹⁸¹

Finally, the complaint alleged that SLAM made inquiries in form only and did not provide any real information about how or when the mask was excavated to those it asked.¹⁸² The complaint pointed out that SLAM did not investigate the “unknown dealer” who held the mask in Brussels only one year after its excavation.¹⁸³ While SLAM heard from the Art Loss Register that the mask was not reported stolen, it was also informed that the Art Loss Register was not a complete list of stolen artifacts.¹⁸⁴ SLAM did not receive answers to its inquiries from the Missouri Highway Patrol, the International Federation of Art Research (IFAR), or INTERPOL.¹⁸⁵ SLAM did not provide important provenance or ask for verification of provenance from the Director of the

¹⁷⁸ *Id.* at 4.

¹⁷⁹ *Id.* at 5.

¹⁸⁰ *Id.* at 5-6.

¹⁸¹ *Id.* at 7.

¹⁸² *Id.* at 9.

¹⁸³ *Id.* at 8.

¹⁸⁴ *Id.* at 9.

¹⁸⁵ *Id.* at 10.

Egyptian Museum.¹⁸⁶ Because SLAM was aware of the Egyptian law controlling exports and did not perform their due diligence, clearly evidenced by the above, it was “willfully blind” to the true owner of the mask: Egypt.¹⁸⁷ In 2006, when the Supreme Council of Antiquities sent letters to the museum asking for the return of the mask, SLAM should have known that the provenance provided by Phoenix Ancient Art was incorrect.¹⁸⁸

The government also alleged that SLAM violated several laws, including 19 U.S.C. § 1595a; 18 U.S.C. §§ 545, 2314 and 2315; Egyptian Law No. 215; Mo. Rev. Stat. § 570.080; and N.Y. Penal Law §§ 165.52 and 165.55.¹⁸⁹ The government included an affidavit signed by a customs official that everything contained within the complaint was true.¹⁹⁰

The government also argued that the court decided the case following the burden of proof presented in an intervening case.¹⁹¹ Therefore, the court should permit the government to amend its complaint because it drafted the complaint before the publication of the case.¹⁹²

SLAM countered that the Order issued April 9, 2012 effectively made the Opinion final and urged

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 11.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 13.

¹⁹⁰ Verification at 1, United States v. Mask of Ka-Nefer-Nefer, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 49-5.

¹⁹¹ United States v. Davis, 648 F.3d 84 (2d Cir. 2011).

¹⁹² Memorandum in Support of the United States Motion for Leave to File First Amended Verified Complaint for Forfeiture at 1, United States v. Mask of Ka-Nefer-Nefer, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 50.

the court to strike the government's motion.¹⁹³ Because the court denied the motion to reconsider on April 9, 2012, SLAM argued that the government did not have recourse under Rules 59(e), 60(b)(1), 60(b)(6) and 15(a)(2) of the Federal Rules of Civil Procedure.¹⁹⁴ Rule 59(e) only extends the deadline for filing notice of appeal, not for filing an amendment to a complaint.¹⁹⁵

For those reasons, the court denied the motion to amend the complaint and denied SLAM's motion to strike as moot.¹⁹⁶ The court merely stated, "[f]or the reasons outlined in the Court's March 31, 2012 Order of Dismissal, and for the reasons offered in its Order denying reconsideration, the Court denies the Government's requested leave raised in its motion submitted on June 8, 2012."¹⁹⁷ Undeterred by the result, the government boldly filed a Notice of Appeal on June 29, 2012 with the Eighth Circuit.¹⁹⁸ The government's brief was filed on June 24, 2013.¹⁹⁹

¹⁹³ Claimant Saint Louis Art Museum's Motion to Strike the Motion of the United States for Leave to File First Amended Verified Complaint for Forfeiture at 2, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 51.

¹⁹⁴ *Id.* at 4.

¹⁹⁵ Claimant St. Louis Art Museum's Memorandum in Support of its Motion to Strike the United States' Motion for Leave to File First Amended Verified Complaint for Forfeiture at 6, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 52.

¹⁹⁶ *Op.*, Memorandum and Order at 2, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 54.

¹⁹⁷ *Id.*

¹⁹⁸ Notice of Appeal, *supra* note 26.

¹⁹⁹ Brief for Plaintiff-Appellant, *United States v. Mask of Ka-Nefer-Nefer*, No. 12-2578, 2013 WL 343390 (8th Cir. June 24, 2013).

III. ANALYSIS

This section will analyze the *Mask of Ka-Nefer-Nefer* case in light of the law provided in Part II. Part A will first examine whether the district court correctly decided that the original complaint failed to show probable cause. Part B will examine whether the proposed amended complaint would survive to trial. At trial, there is a possibility that the action could fail due to the statute of limitations.

A. *The Original Complaint*

The court properly dismissed the civil forfeiture on the pleadings. In its complaint, the government failed to show probable cause that the mask was stolen. Further, the government also did not allege that SLAM or any other party violated a law, either a larceny statute or a patrimony law, to satisfy the “stolen” requirement of 19 U.S.C. § 1595a.²⁰⁰

The government must plead facts with enough particularity that the claimant may commence an investigation without asking for a more definite statement.²⁰¹ SLAM might be able to ascertain from the complaint that it should investigate the provenance of the mask between 1966 and 1973.²⁰² That is not “particular”; it would require researching the entire provenance of the mask. For example, in *Portrait of Wally*, the government was able to allege a time, place, and manner of the theft.²⁰³

²⁰⁰ See Verified Complaint for Forfeiture, *supra* note 21.

²⁰¹ FED. R. CIV. P. SUPP. E(2)(a).

²⁰² Verified Complaint for Forfeiture, *supra* note 21, at 3.

²⁰³ *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 256 (S.D.N.Y. 2009). While the *Davis* case postdates the government’s pleading, it also alleged a specific thief and the time, place, and manner of the theft. *United States v. Davis*, 648 F.3d 84, 87 (2d Cir. 2011).

The pleading must also support a reasonable belief that the government can support its claim at trial.²⁰⁴ The government merely alleged that by 1973, the mask was missing from its box and there was no bill of sale.²⁰⁵ There is no allegation that the Egyptian Museum considered the mask stolen, or that it filed a report to that effect.²⁰⁶ It simply states that officials noticed it was missing.²⁰⁷ Perhaps the Egyptian authorities thought another curator had misplaced it or relocated it. Perhaps what is missing is the bill of sale. In a 2006 interview, Zahi Hawass, then Director of the Supreme Council of Antiquities, stated that the Egyptian Museum did not have much documentation for the mask of Ka-Nefer-Nefer because it kept poor records in that era.²⁰⁸ Without any other facts, it is just as probable that someone misplaced the bill of sale as it is that someone stole the mask. While the government may use circumstantial evidence to support probable cause,²⁰⁹ probable cause needs to be more than a mere suspicion.²¹⁰ The original complaint demonstrates only a suspicion that the mask was stolen.

Certainly, the court found probable cause in an *Original Manuscript* when an object was missing

²⁰⁴ FED. R. CIV. P. SUPP. G(2)(f).

²⁰⁵ Verified Complaint for Forfeiture, *supra* note 21, at 4.

²⁰⁶ *Id.* at 3.

²⁰⁷ *Id.*

²⁰⁸ *Egypt Demands Return of Mummy Mask*, NBC NEWS (May 2, 2006),

http://www.nbcnews.com/id/12598537/ns/technology_and_scienc e-science/t/egypt-demands-return-mummy-mask/.

²⁰⁹ *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1378 (S.D. Fla. 2003).

²¹⁰ Memorandum of the United States in Support of its Motion to Reconsider Order and Op. Dismissing Verified Complaint, *supra* note 167, at 3.

from a museum.²¹¹ However, the court decided that probable cause existed because the circumstances surrounding the purchase were extremely suspicious.²¹² The government does not allege in the original complaint anything other than that SLAM acquired and currently possesses the mask; there is no allegation that it acted in bad faith during the purchase.²¹³

In addition, the pleading did not assert a law predicate to 19 U.S.C. § 1595a.²¹⁴ The Government claims that the *Davis* case changed this pleading requirement from the model used in *Lucite Ball*.²¹⁵ However, this is not entirely true. It is true that the government's complaint did not allege a violation of a *United States* law.²¹⁶ However, the complaint in *Lucite Ball* did clearly indicate that the moon rock was taken in violation of the *Honduran* patrimony law, and this violation was why the importation was illegal under 19 U.S.C. § 1595a.²¹⁷ Thus, even using the standard that the government says was in existence at the time of the pleading, the government's pleading fails.

Therefore, the court properly decided that the pleading was not sufficient. It does not show probable cause, either that the mask was actually stolen or

²¹¹ *United States v. An Original Manuscript Dated November 19, 1778*, 96 CIV. 6221 (LAP), 1999 WL 97894, at *6 (S.D.N.Y. Feb. 22, 1999).

²¹² *Id.* at *7.

²¹³ Verified Complaint for Forfeiture, *supra* note 21, at 3-4.

²¹⁴ *Id.* at 3.

²¹⁵ Memorandum in Support of the United States' Motion for Leave to File First Amended Verified Complaint for Forfeiture, *supra* note 192, at 1.

²¹⁶ See Verified Complaint for Forfeiture, *supra* note 21.

²¹⁷ Verified Complaint for Forfeiture *in rem*, *supra* note 56, at 9.

that SLAM acquired it in bad faith. It does not plead the circumstances with sufficient “particularity” to support the notion it could succeed at trial. Finally, the complaint does not assert a law under which the mask could be considered “stolen.”²¹⁸

B. The Proposed Amended Complaint

The proposed amended complaint does cure these defects. First, it lists a number of laws predicate to § 1595a, such as §§ 545, 2314, and 2315 of Title 18; Egyptian Law No. 215; Mo. Rev. Stat. § 570.080; and N.Y. Penal Law §§ 165.52 and 165.55.²¹⁹ In addition, it alleges an actual theft,²²⁰ and it alleges a matter of foreign law.²²¹ Finally, it casts doubt on the good faith purchase of the museum.²²² The following subsections will analyze whether these allegations support a finding of probable cause.

1. Common Law Theft

Common law doctrine insists that a thief can-

²¹⁸ The term “stolen” is also ambiguous under the NSPA. The court noted in *Long Cove*, “It would be anomalous that while a violator of the Environmental Conservation Law would not be subject to prosecution in New York for larceny, he should be held to have stolen property within the meaning of the NSPA.” *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159, 165 (2d Cir. 1978). One could draw a similar analogy here; in order for something to be considered stolen, a law of some sort must have been broken.

²¹⁹ First Amended Verified Complaint, *supra* note 177, at 13.

²²⁰ *Id.* at 4.

²²¹ *Id.* at 5.

²²² *Id.* at 10 (stating “[a]s such, the Museum either knew or was willfully blind to the fact that Phoenix’s purported provenance was fictional at the time the Mask was imported”).

not pass good title.²²³ Under common law, “stolen” has been defined as

acquired or possessed as a result of a wrongful or dishonest act or taking whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership, whether temporarily or permanently.²²⁴

If the government could show probable cause that the mask was stolen according to common law, the forfeiture would be warranted. The amended complaint still does not provide a manner of theft or a timeframe shorter than 1966 to 1973.²²⁵ It does suggest that an unidentified thief stole the mask.²²⁶ However, a time, place, or manner, or any facts about how the theft could have occurred are still lacking from the complaint.²²⁷ Simply alleging an “unidentified individual” does not strengthen the original complaint’s assertion that because the mask was missing and no bill of sale exists, the mask must be stolen. On the other hand, if the government could demonstrate a time that an unidentified individual broke into the Egyptian Museum, this would strengthen the argument.²²⁸ This statement alone

²²³ Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 21 (1993).

²²⁴ 77 AM. JUR. PROOF OF FACTS 3D *Proof of a Claim Involving Stolen Art or Antiquities* § 2 (2004).

²²⁵ First Amended Verified Complaint, *supra* note 177, at 4.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Zahi Hawass stated that he believed the mask was stolen from a storage facility in the 1980s; however, the government

does not provide probable cause that the mask was stolen according to common law.

However, the amended complaint reveals that Egypt convicted the sellers of the mask, the Aboutaam brothers, in 2004 for smuggling artifacts out of Egypt.²²⁹ A confession from the sellers that they stole the mask, while improbable, would go a long way to establishing probable cause to seize the mask. If the Aboutaam brothers confessed to stealing the mask, then the museum would not have title per the common law doctrine or under the NSPA, and the mask should be forfeited. The amended complaint does not allege a confession.²³⁰ Thus, the complaint does not show probable cause on the allegation of a common law theft.²³¹

never made this allegation in the complaint. Jeff Douglas, *St. Louis Museum Won't Return Egyptian Mask*, WASHINGTON POST (May 12, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/12/AR2006051201046.html>.

Hawass also stated that the last known provenance in Egypt was documented in 1959, which is contrary to the government's complaint that it was documented in 1966. Note that a 1980s theft would allow a proceeding under the CPIA.

²²⁹ First Amended Verified Complaint, *supra* note 177, at 7.

²³⁰ *Id.* at 4.

²³¹ In addition, there is one way that the museum could receive good title even if the mask was stolen – the mask must be stolen when it enters the country. *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 252 (S.D.N.Y. 2009). The museum purchased the mask in Switzerland. Bill of Sale at 1, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV0504 HEA (E.D. Mo. Mar. 31, 2012), ECF No. 8-2. “Under Swiss law, a purchaser of stolen property acquires title superior to that of the original owner only if he purchases the property in good faith.” *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989) *aff'd sub nom.* *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990). Swiss law presumes that a purchaser

2. Egyptian Law No. 215 – Violation of National Patrimony Law

However, it is not necessary to prove a common law theft if the Egyptian patrimony law sufficiently criminalized the alienation of antiquities such that all sales were illegal.²³² Unfortunately, the law does not do this.

SLAM points out that Law No. 117 of 1983 is the only patrimony law the United States recognizes out of Egypt.²³³ It is true that it is the first patrimony law the United States recognized out of Egypt and that it replaced Law No. 215. That does not indicate that the United States would not recognize Law No. 215. The court in *McClain* reviewed all laws since the 1890s relating to Mexican patrimony to find the one that claimed ownership.²³⁴ The court in *Lucite Ball* upheld Honduran law in spite of several regime

acts in good faith. *Id.* Therefore, the burden to show that the buyer did not act in good faith is on the claimant. *Id.* Thus, it is possible that the sellers transferred good title to the museum even if the mask had been stolen from Egypt, if the museum acted in good faith.

²³² See *United States v. Schultz*, 333 F.3d 393, 406 (2d Cir. 2003). In *Schultz*, the defendant was convicted for selling antiquities in violation of the Egyptian patrimony law in spite of the fact that he had not “stolen” the antiquities from a person or entity in Egypt. The court determined that the patrimony law clearly indicated all objects that were found in Egypt after the law was enacted belonged to the government, and could not be sold to another party. Thus, if the government could prove that the mask belonged to Egypt in an unqualified manner, proof of a break in would not be necessary.

²³³ St. Louis Art Museum’s Motion to Dismiss the Government’s Civil Forfeiture Complaint, *supra* note 130, at 6.

²³⁴ *United States v. McClain*, 545 F.2d 988, 997 (5th Cir. 1977).

changes.²³⁵ The mere fact that the United States has not officially recognized Law No. 215 as a patrimony law does not mean it would not do so if it were presented with a case dating from the time Law No. 215 was in effect.

The difference between the application of Law No. 117 in *Schultz* and Law No. 215 in the *Ka-Nefer-Nefer* case is not the text of the law. Law No. 215 does claim ownership of antiquities found in Egypt.²³⁶ Like Law No. 117, it also allows privately owned objects in certain circumstances.²³⁷ The problem is that Schultz and his associates dug antiquities out of the ground and sold them.²³⁸ The Egyptian government under Law No. 117 owns all artifacts found in the ground in Egypt, without exception.²³⁹ Thus, there is no way Schultz could have taken the objects out of Egypt without violating the law.

On the other hand, in the *Ka-Nefer-Nefer* case, the artifact was already out of the ground and the Egyptian Museum owned it. Under Law No. 215, the

²³⁵ *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1373 (S.D. Fla. 2003).

²³⁶ Law No. 215 of 1951 (Sur la Protection de Antiquités), *Al Waqa'i' al-Misriyah or Journal officiel du gouvernement égyptien*, 31 October 1951, p. 1 (Egypt). Please note that this law is only available in French. It was translated by the author and summarized by both parties in the following court documents. See Saint Louis Art Museum's Motion to Dismiss the Government's Civil Forfeiture Complaint at 7, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11-CV-00504 (HEA) (E.D. Mo. May 4, 2011), ECF No. 11 (on file with the author and the Pace Intellectual Property, Sports & Entertainment Law Forum); First Amended Verified Complaint for Forfeiture, *supra* note 177, at 5.

²³⁷ *Id.* at 5.

²³⁸ *United States v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003).

²³⁹ Law No. 117 of 1983 (Law on the Protection of Antiques), *Al-Jarida Al-Rasmiya*, 11 August 1983, p. 17 (Egypt).

Egyptian government, the operator of the Egyptian Museum, is at liberty to sell antiquities.²⁴⁰ Thus, there are ways to take the mask out of Egypt without *automatically* violating the patrimony law, unlike the situation in *Schultz*.

Regardless of this distinction, the government was correct in asserting that the trial court should properly decide matters of foreign law.²⁴¹ Other courts have determined that merely alleging a matter of foreign law was sufficient to survive a motion to dismiss.²⁴²

3. Lack of Good Faith

If the government cannot show probable cause that a common law theft occurred, then it must show that SLAM did not act in good faith. *Scienter* is a necessary component of §§ 545, 2314, and 2315 of Title 18; Mo. Rev. Stat. § 570.080; and N.Y. Penal Law §§ 165.52 and 165.55.²⁴³ Therefore, the government would need to show that SLAM either knew or was willfully blind to the fact that the mask was stolen from Egypt at the time of sale in order to forfeit the

²⁴⁰ Law No. 215 of 1951 (Sur la Protection de Antiquités), *Al Waqa'i' al-Misriyah or Journal officiel du gouvernement égyptien*, 31 October 1951, p. 5 (Egypt).

²⁴¹ United States' Memorandum in Opposition to Claimant St. Louis Art Museum's Motion to Dismiss, *supra* note 143, at 5.

²⁴² *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 546 (N.D. Ill. 1993) ("Therefore, alleging in a pleading that property is stolen under a foreign law is a sufficient pleading without providing the specifics of the foreign law.").

²⁴³ National Stolen Property Act, 18 U.S.C. §§ 2314-2315; 18 U.S.C. § 545; MO. REV. STAT. § 570.080; N.Y. PENAL LAW §§ 165.52, .55. All of these statutes require that the possessor *knowingly* possess, receive, or transport the stolen object.

mask under any of these statutes.²⁴⁴

The government has been able to show probable cause in other cases because the circumstances surrounding the purchases were questionable.²⁴⁵ There are a number of actions the court has considered evidence of bad faith. These include a failure to research the item,²⁴⁶ failure to research the sellers or the original owner,²⁴⁷ paying an extremely low price,²⁴⁸ paying in cash,²⁴⁹ concluding the transaction very hastily,²⁵⁰ or conducting the transaction in an unusual place or at an unusual time.²⁵¹

First, the nature of the item for sale – an antiquity from a country known for being looted – suggests that a potential purchaser should proceed with caution.²⁵² By providing ten paragraphs on illicit trading of antiquities, the amended complaint indi-

²⁴⁴ United States v. Portrait of Wally, 663 F. Supp. 2d 232, 269 (S.D.N.Y. 2009).

²⁴⁵ United States v. An Original Manuscript Dated November 19, 1778, 96 CIV. 6221 (LAP), 1999 WL 97894, at *7 (S.D.N.Y. Feb. 22, 1999); Leonardo Da Vinci's Horse, Inc. v. O'Brien, 761 F. Supp. 1222, 1228 (E.D. Pa. 1991); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc., 717 F. Supp. 1374, 1402 (S.D. Ind. 1989) *aff'd sub nom.* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990).

²⁴⁶ *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1401.

²⁴⁷ *Id.*; *Leonardo Da Vinci's Horse*, 761 F. Supp. at 1224; *Original Manuscript*, 1999 WL 97894, at *7.

²⁴⁸ *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1401; *Leonardo Da Vinci's Horse*, 761 F. Supp. at 1224.

²⁴⁹ *Original Manuscript*, 1999 WL 97894 at *7.

²⁵⁰ *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1402.

²⁵¹ *Original Manuscript*, 1999 WL 97894, at *7.

²⁵² *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1401.

cates the need for due diligence in researching provenance.²⁵³ The complaint demonstrates all the ways in which SLAM could have conducted a more thorough provenance search.²⁵⁴ It is clear that it did a provenance search, as it sent requests to the Art Loss Register, INTERPOL, the International Federation of Art Research, the Missouri Highway Patrol, and the Federal Bureau of Investigation.²⁵⁵ However, the amended complaint notes that SLAM did not hear back from most of these sources, which does not indicate a thorough search.²⁵⁶

Nevertheless, SLAM did contact the Director of the Egyptian Museum in Cairo and provide a description and photos of the mask.²⁵⁷ To the untrained eye, many Egyptian artifacts look the same. However, to someone schooled in Egyptian art, the differences between objects are clear. The director of the Egyptian Museum in Cairo should be versed well enough in Egyptian artifacts to distinguish one artifact from another. One would think that when presented with a description and pictures of an object, the director of such a museum would be able to determine if the object was one that was missing from its collection. Certainly, the Egyptian Museum's collection is vast,²⁵⁸ but if the mask was stolen and the Egyptian government truly wanted it back, the direc-

²⁵³ First Amended Verified Complaint, *supra* note 177, at 8-9.

²⁵⁴ *Id.* at 9-10.

²⁵⁵ Complaint for Declaratory Judgment, *supra* note 20, at 5-6.

²⁵⁶ First Amended Verified Complaint, *supra* note 177, at 10.

²⁵⁷ Complaint for Declaratory Judgment, *supra* note 20, at 5-6.

²⁵⁸ *The Egyptian Museum*, SUPREME COUNCIL OF ANTIQUITIES, http://www.sca-egypt.org/eng/MUS_Egyptian_Museum.htm (last visited Jan. 26, 2014)).

tor would conceivably have a list of some sort to compare objects against when presented with the type of documentation the Saint Louis Art Museum provided.²⁵⁹ Thus, one can hardly fault the museum for continuing with the sale after the Director of the Egyptian Museum did not object, and after the Art Loss Register reported the mask was not on its list.

However, the courts have noted that it is important to take into consideration the sophistication of the buyer.²⁶⁰ In *Schultz*, the court observed that Schultz was an expert in the field of Egyptian Antiquities and should know of Egyptian Law No. 117.²⁶¹ SLAM is also a sophisticated buyer and should know the difficulties of the art market, including the looting that occurs in Egypt. It should have researched the matter very thoroughly.

Second, the courts have noted that when buying art it is necessary to check the authority of the seller to sell the object or to research the original owner.²⁶² The amended complaint notes that Egyptian authorities convicted both sellers in 2004 for smuggling artifacts out of Egypt.²⁶³ It also notes that SLAM failed to contact the previous owners of the mask to determine whether it could be sold.²⁶⁴

The former director of the Metropolitan Museum of Art in New York has expressed disbelief that

²⁵⁹ The Supreme Council of Antiquities currently provides such a list, in some cases with photographs, of antiquities whose return it is seeking. See SUPREME COUNCIL OF ANTIQUITIES, *supra* note 7.

²⁶⁰ United States v. Schultz, 333 F.3d 393, 416 (2d Cir. 2003).

²⁶¹ *Id.*

²⁶² *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1401; *Leonardo Da Vinci's Horse*, 761 F. Supp. at 1224; *Original Manuscript*, 1999 WL 97894, at *7.

²⁶³ First Amended Complaint, *supra* note 177, at 7-8.

²⁶⁴ *Id.* at 9.

anyone would purchase an artifact from the Aboutaam brothers because they were notoriously untrustworthy characters.²⁶⁵ Art historians in the United States have questioned the Aboutaam brothers' story of provenance, stating that it is extremely unlikely the Egyptian government would have given an object to one of its own excavators.²⁶⁶ The conviction of the sellers and their notoriously circumspect reputation casts doubt on the legitimacy of the provenance for the mask, and consequently lends itself to establishing probable cause to investigate the purchase further.

Third, courts have noted that if the price of the object is too low, it should alert the buyers as to the possible illegality of the sale.²⁶⁷ The complaint does not allege that the price paid by the museum was unreasonably low.²⁶⁸ SLAM paid nearly a half million dollars for the mask;²⁶⁹ this seems entirely rea-

²⁶⁵ See Tristan McKinnon, *Antiquities Wishlist Part One: The Mask of Ka-Nefer-Nefer*, LOOTING HISTORY (June 1, 2010, 1:27 PM), <http://looting-history.blogspot.com/2010/06/antiquities-wish-list-part-one-mask-of.html>.

²⁶⁶ *Id.* However, Egyptian Law No. 215 is somewhat ambiguous on this possibility. Note that Art. 22 of No. 215 allows the government to give an artifact to its finder; but Law No. 117 specifies foreign expeditions as the ones who can receive a gift from the Egyptian government, and no provision is made for Egyptian finders. See Law No. 215 of 1951 (Sur la Protection de Antiquités), *Al Waqa'i' al-Misriyah or Journal official du gouvernement égyptien*, 31 October 1951, art. 22 (Egypt); Law No. 117 of 1983 (Law on the Protection of Antiques), *Al-Jarida Al-Rasmiya*, 11 August 1983 (Egypt).

²⁶⁷ *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1401; *Leonardo Da Vinci's Horse*, 761 F. Supp. at 1224.

²⁶⁸ First Amended Complaint, *supra* note 177, at 6-7.

²⁶⁹ St. Louis Art Museum's Verified Claim of Interest in the Defendant Mask of Ka-Nefer-Nefer, *supra* note 129, at 2.

sonable.²⁷⁰ Therefore, this price alone does not lend itself to finding probable cause.

Fourth, the haste with which the parties complete a transaction can raise suspicions.²⁷¹ For example, in *Autocephalous*, the transaction took place over three days.²⁷² The amended complaint does not allege that the transaction was hasty.²⁷³ In fact, SLAM conducted a months-long provenance search before it decided to purchase the object.²⁷⁴ The transaction was in no way hasty or surreptitious. The transaction time does not weigh in favor of finding probable cause.

Finally, the time or place of the transaction can raise suspicions.²⁷⁵ In *Original Manuscript*, the transaction took place in a hotel room at night for cash.²⁷⁶ In contrast, SLAM prepared a contract and conducted itself in a businesslike manner.²⁷⁷ Thus, it paid a reasonable price, took a reasonable time to conduct the transaction, and conducted the transaction in a reasonable manner. SLAM's conduct does not rise to the level of bad faith exhibited in other cases.

On the other hand, the amended complaint does suggest that SLAM's research was substantially lacking. It failed to investigate the previous owners,

²⁷⁰ See generally, LEONARD DUBOFF & CHRISTY KING, ART LAW 38 (2006) (discussing the rise of prices for art).

²⁷¹ *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1402.

²⁷² *Id.*

²⁷³ First Amended Complaint, *supra* note 177, at 10.

²⁷⁴ Complaint for Declaratory Judgment, *supra* note 20, at 5.

²⁷⁵ *United States v. An Original Manuscript Dated November 19, 1778*, 96 CIV. 6221 (LAP), 1999 WL 97894, at *7 (S.D.N.Y. Feb. 22, 1999).

²⁷⁶ *Id.*

²⁷⁷ Complaint for Declaratory Judgment, *supra* note 20, at 7.

and it also failed to follow up with any of its inquiries.²⁷⁸ These failures do suggest probable cause to investigate the purchase further, and to further determine the industry practice at the time of the purchase.

However, unless the government is able to argue that the statute of limitations should be tolled from the beginning of the declaratory judgment action, the civil forfeiture could fail due to an affirmative defense. The statute of limitations established for civil forfeiture by 19 U.S.C. § 1621 is five years, or two years from the point of discovery.²⁷⁹ SLAM properly noted that its importation of the mask in 1998 should have alerted United States authorities to its presence.²⁸⁰ At the latest, the February 14, 2006 letter of Zahi Hawass should have alerted the government to the possibility that the mask was stolen.²⁸¹ In spite of that, the government waited until March 16, 2011 to file a complaint for civil forfeiture.²⁸² This is five years and one month beyond the point discovery, and too late to file a claim. Because SLAM had the mask on display for thirteen years, the government cannot argue that the museum concealed the mask and that the statute of limitations should be tolled.²⁸³

²⁷⁸ First Amended Complaint, *supra* note 177, at 9-10.

²⁷⁹ 19 U.S.C. § 1621.

²⁸⁰ Complaint for Declaratory Judgment, *supra* note 20, at 10.

²⁸¹ St. Louis Art Museum's Motion to Dismiss the Government's Civil Forfeiture Complaint, *supra* note 130, at 13.

²⁸² Verified Complaint for Forfeiture, *supra* note 21, at 1.

²⁸³ 19 U.S.C. § 1621. The statute of limitations states that it will run "except that . . . any concealment or absence of the property, shall not be reckoned within the 5-year period of limitation." *Id.*

SLAM also asserted a defense of laches.²⁸⁴ However, the Southern District of New York has determined that the doctrine of laches does not apply to a civil forfeiture case.²⁸⁵ The same court determined that the doctrine of laches was outside the scope of a motion to dismiss.²⁸⁶ Because laches is so fact-based, the court typically decides whether it is applicable, and it is therefore not appropriate for a pre-trial motion.²⁸⁷

CONCLUSION

The court properly dismissed the original complaint. It failed to show any probable cause that the mask was stolen from Egypt and it did not cite a predicate law to 19 U.S.C. § 1595a. The proposed amended complaint added a number of predicate laws. It also shows probable cause by noting that the antiquities trade is questionable, the sellers of the mask were notoriously circumspect, and under Egyptian patrimony law, Egypt may have been the owner of the mask.

Therefore, if the government wants to survive a motion to dismiss in a case like this one, it must show probable cause. It can do this in a number of ways. It can identify a thief or a break in. It can allege that the patrimony laws of a foreign country prohibit the ownership of the kind of object in question. Failing these, the government must be able to show that the circumstances surrounding the trans-

²⁸⁴ St. Louis Art Museum's Motion to Dismiss the Government's Civil Forfeiture Complaint, *supra* note 130, at 14.

²⁸⁵ United States v. Portrait of Wally, 663 F. Supp. 2d 232, 275 (S.D.N.Y. 2009).

²⁸⁶ *Id.*

²⁸⁷ 77 AM. JUR. PROOF OF FACTS 3D *Proof of a Claim Involving Stolen Art and Antiquities* § 32 (2004).

action clearly indicate bad faith on the buyer's part.