UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	
	:	
	:	99 Civ. 9940 (LAP)
Plaintiff,	:	
	:	
v.	:	
	:	
PORTRAIT OF WALLY,	:	
A PAINTING BY EGON SCHIELE,	:	
	:	
Defendant *in Rem.*	:	

REPLY MEMORANDUM IN SUPPORT OF MOTION BY THE LEOPOLD MUSEUM FOUNDATION FOR RECONSIDERATION OR RE-ARGUMENT

November 13, 2009

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The Leopold Museum Foundation respectfully submits this Reply Memorandum in Support of its Motion for Reconsideration or Re-Argument of the 2009 Opinion.

I. THE GOVERNMENT DOES NOT DISPUTE THAT CONTROLLING LAW AND FACTS WERE OVERLOOKED IN THE 2009 OPINION

A. The Law-of-the-Case Doctrine and Imputation of Dr. Leopold's Alleged Knowledge to the Foundation

The Foundation has cited controlling authority for the proposition that denial of a motion to dismiss does not establish the law of the case for purposes of a later summary judgment motion when the complaint has been supplemented by discovery. The Government does not contest this well-settled principle of law. The Government, in fact, offers no substantive response at all to the Foundation's argument. The Foundation contends that while Judge Mukasey *assumed* certain allegations to be true for the purpose of ruling on a motion to dismiss, he did not *hold* them to be true. Ignoring this distinction and controlling legal authority, the Government says little more than "Yes he did."[1]

Nor does the Government dispute the facts noted in the Foundation's initial brief: (1) that neither the Foundation nor its counsel ever conceded the imputation of Dr. Leopold's alleged knowledge to the Foundation; (2) that neither the Government nor the 2009 Opinion identifies any such concession; and (3) that the Foundation has denied the alleged imputation of Dr. Leopold's knowledge to the Foundation throughout this litigation.

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[1] The Government simply states, without citation to any supporting authority: "Judge Mukasey *held* that based upon the fact that Dr. Leopold was at all relevant times the Museological Director of the Museum, his knowledge can be imputed to the Museum as a matter of law." (emphasis added.) (Government Reconsideration Opp. Mem. at 3.) [References to the "Government Reconsideration Opp. Mem." are to the Memorandum of Law of Plaintiff United States of America and Claimant Estate of Lea Bondi Jaray in Opposition to Claimant Leopold Museum's Motion for Reconsideration or Re-Argument, dated November 6, 2009.]

There was in fact no such holding in *Wally III*, but only an observation that "All parties concede that Dr. Leopold's knowledge can be imputed to the Leopold Foundation by reason of his having been the Museological Director at all relevant times." (2002 WL 553532 at *24.) This was not a holding, but simply a statement that the *scienter* allegation of the Complaint[2] was conceded to be true for purposes of the then-pending motion to dismiss under Rule 12(b)(6). The Government's attempt to bootstrap this into a *holding* should be rejected. [3]

B. The Recovery Doctrine

The Government argues that the U.S. Forces in Austria cannot be deemed to have acted on behalf of the owner of recovered property because they were not "charged by law with doing so." (*Id.* at 6.) The Government thus asks the Court to disregard the Government's own official publication confirming that its U.S. Forces in Austria "were charged with the tremendous task of restoring to its rightful owners" property that had been taken under duress during the Nazi era. The Government, without more, dismisses this evidence as merely "a single sentence" in its publication. (*Id.* at 4.)

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[2] *E.g.*, Complaint ¶ 10 ("the Defendant *in Rem* . . . was introduced into the United States . . . by the Leopold Museum, through Dr. Leopold, . . . knowing it to have been stolen . . . .").

[3] The Government argues that even if reconsideration is granted, the Court should adhere to its original decision, citing portions of two of its briefs on the summary judgment motions (Government Reconsideration Opp. Mem. at 4.) But the only factual dispute asserted by the Government regarding imputation is found in paragraph 89 of its Rule 56.1 Counter-Statement, in which it asserted that Dr. Leopold had "unfettered authority" and "controlling influence over the Museum Board." The Government filings presented no relevant or competent evidence to support that assertion, whereas the Foundation showed that it was and is impossible for Dr. Leopold to control or dominate the Foundation's Board, and that he has never made any attempt to do so. (Foundation Reconsideration Mem. at 7-8.)

The Government, arguing as proof that the U.S. Forces had no duty to see that property taken from Jews in Austria was returned to them, boldly asserts without record citation that the U.S. Forces "did not investigate" the Reiger claim (*Id.* at 5), despite the undisputed evidence to the contrary, namely (1) Lt. Col. Raymond F. Gunn's letter to Welz of September 4, 1947, stating that the Painting would not be released until the U.S. Military Government completed its "investigation of restitution claims against this collection"; (2) Evelyn Tucker's special trip to Salzburg in November 1947, to inspect the Defendant *in Rem* and other paintings claimed by the Rieger heirs, wherein she personally met with Welz and then reported on her investigation and as to how the restitution of those artworks to the Rieger heirs would be done; and (3) the Government's December 4, 1947 formal "Receipt and Agreement" with the Republic of Austria, wherein it turned over artworks stated to be part of the Rieger collection, including the Defendant *in Rem*, to the Republic of Austria and expressly required Austria to return the paintings to their owner and to report back to the U.S. Forces.

The Government makes much of the unsurprising observation that the U.S. Forces did not return artworks directly to those who were victimized during the Nazi era, but instead delivered such property to the Republic of Austria for restitution, a procedure the Foundation does not – and need not – dispute. That this was the usual practice in post-war Austria has never been at issue, and was made clear in all of the earlier complaints – including the Second Amended Verified Complaint that was dismissed by this Court in *Wally I*.[4]

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[4] Until the current Third Amended Verified Complaint, each complaint filed by the Government stated (in para. 5 (g)) that the task of the U.S. Forces in Austria regarding such artworks was to return them to the country where they had been seized, so that that nation could return them to the owner.

The critical point which the Government and the 2009 Opinion overlooked is the fact that, under *Muzii,* the recovery doctrine applies as soon as lost or stolen property comes into the possession and control of someone entitled to possess it. This Court ruled in *Wally I* that "stolen" must be defined by reference to U.S. law (*Wally I*, 105 F. Supp. at 291), as must the recovery doctrine. Under our common law, a finder who asserts control over lost property has an obligation to seek the owner and to arrange for its return. (Foundation Reconsideration Mem. at 10.) The Government does not dispute this. The actual restitution of that property to its true owner has never been a requirement for application of the recovery doctrine, under *Muzii* or in any other Circuit. The U.S. Forces exercised possession and control over property they knew was to be returned to its owner, thereby acting on the owner's behalf. Under *Muzii*, any taint of "stolenness" was therefore removed. The U.S. Forces then fulfilled that obligation by completing their investigation of the Rieger restitution claim and turning the property over to the Republic of Austria with instructions to implement the restitution.

As this Court in *Wally I* noted, *Muzii* is the only Second Circuit decision substantially addressing the recovery doctrine. *Muzii* dealt with the distinction between "surveillance" and "recovery" and held that the difference between "actual or constructive possession" of goods versus mere "surveillance or observation" was critical. Here, there is no doubt that the U.S. Forces in Austria insisted on and exercised *actual possession and control* of the Painting in 1947. For this reason, *Muzii* compels application of the recovery doctrine.

II. IF RECONSIDERATION IS NOT GRANTED AND SUMMARY JUDGMENT IS NOT ENTERED IN FAVOR OF THE FOUNDATION, CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 USC § 1292(b) IS WARRANTED.

The Leopold Foundation has clearly identified controlling issues of law for which there is a "substantial ground for difference of opinion" and whose resolution would materially advance the ultimate termination of this litigation. Resolution of either issue in favor of the Foundation will not only materially advance the litigation, but will end it.

The Foundation has cited controlling principles demonstrating that the denial of a motion to dismiss under Rule 12(b)(6) cannot be law of the case on a subsequent motion for summary judgment where facts developed in discovery are presented. If this Court finds to the contrary, there can be no doubt of substantial grounds for difference of opinion on what is a fundamental and controlling question of law.

Similarly, with respect to the recovery doctrine, the Foundation has shown that the 2009 Opinion misapplied the doctrine by overlooking relevant evidence in the record clearly showing that the U.S. Forces exercised "actual or constructive possession" over the Defendant *in rem*, knowing it was to be returned to its owner. Should this Court chose to impose additional requirements for application of the recovery doctrine, then there will again be substantial grounds for difference of opinion on a controlling question of law.

CONCLUSION

The Leopold Foundation respectfully requests that this Court reconsider its September 30, 2009 Opinion and grant summary judgment in favor of the Leopold Foundation; or if such relief is denied, that this Court certify the questions of law raised in Point I and Point II of its Memorandum of Law in Support of Motion for Reconsideration or Re-Argument for appellate review pursuant to 28 USC § 1292(b), and grant the Leopold Foundation such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 13, 2009

Respectfully submitted,

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