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January 4, 2013

VIA FEDEX

Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Estate of Riven Flamenbaum, Docket No. 2010-04400*

To Whom It May Concern:

Enclosed please find the following:

1. Original and nineteen copies of Amici Curiae's Brief;
2. Certificate of Service;
3. CD containing searchable pdf of Brief; and
4. Statement stating that CD and printed brief are identical.

Respectfully submitted,

Joseph A. Patella

JAP:lsl

Enclosures

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NYC:245314.1

Appellate Division, Second Department, Docket No. 2010-04400

State Of New York
Court of Appeals

In the Matter of the Account of Proceedings of Hannah K. Flamenbaum, as Executor of the Estate of

RIVEN FLAMENBAUM,

Deceased

And the Application of Vorderasiatisches Museum for a Determination of the Validity and Enforceability of a Verified Claim.

VORDERASIATISCHES MUSEUM,

Claimant-Respondent,

against

HANNAH K. FLAMENBAUM,

Executor-Appellant,

and

ISRAEL FLAMENBAUM

Objectant-Respondent.

STATEMENT OF PDF AND PRINT AUTHENTICITY AS TO THE AMICI CURIAE BRIEF

This is to certify that the original filed printed and pdf versions of the Amici Curiae Brief are identical in every way.

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BRIEF OF AMICI CURIAE

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PRELIMINARY STATEMENT

Amici, a group of organizations concerned with restitution of stolen and looted art and cultural property, particularly cultural objects taken during times of armed conflict, and nations and other foreign entities that have suffered cultural losses as a result of wartime thefts and have engaged in the restitution process,[1] submit this brief in support of affirmance of the Decision and Order of the Appellate Division, Second Department, dated and entered on May 30, 2012 ("Appellate Order") which ordered that the property at issue in these proceedings, an ancient tablet ("Tablet"),[2] be returned to its rightful owner, the

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[1] Amici are: the Archaeological Institute of America, the American Schools of Oriental Research, the Holocaust Art Restitution Project, the Israelitische Kultusgemeinde Wien (Jewish Community Vienna), the Lawyers' Committee for Cultural Heritage Preservation, the Monuments Men Foundation for the Preservation of Art, the Penn Cultural Heritage Center at the University of Pennsylvania, the United States Committee of the Blue Shield, the State of Baden-Württemberg of the German Federal Republic, the Republic of Cyprus and the Republic of Poland. By Order dated October 18, 2012, this Court granted Amici motion for leave to participate in these proceedings.

[2] Amici note that this gold disc was one of three that were excavated in foundation deposits at the corners of the great ziggurat at the site of Assur, located in northern Iraq. The two examples that went to the Berlin Museum were apparently both stolen during World War II, while the third example was sent to Istanbul (and is still there). The discs measure 5cm in diameter and so look more like large gold coins than foundation deposits to an untrained eye. Walter Andrae, *Die Grosse Zikurrat von Assur*, in *Die Heiligtümer Des Gottes Assur Und Der Sin-Šamaš-Tempel In Assur 2, 3 and Plate 3*; A. Kirk Grayson, *Assyrian Rulers of the Third and Second Millennia BC* (to 115 BC) 211-12 (1987). The inscribed discs are of immense historical and archaeological value, as they were the sole in situ documentation for the builder of this structure, identified by the inscription as one of the rulers of Assyria named Shalmaneser (probably Shalmaneser I). We believe that these discs belong in the Museum and their story exemplifies the reason that the law of the United States throughout the twentieth and into the twenty-first centuries has forbidden the plunder of cultural heritage collections during wartime. These objects are perfect examples of the value of documented context and of keeping such finds, together with their documentation,

Vorderasiatisches Museum Berlin ("Museum"). Specifically, Amici ask that this Court reject the entreaties of Executor-Appellant Hannah K. Flamenbaum ("Appellant") that the courts of New York State, long a bastion against entry of looted art into this country, be the first to recognize a "spoils of war" doctrine under which art and cultural objects taken in the course or immediate aftermath of warfare become the property of the taker. This doctrine, more in tune with the mentality and mores of the 1700s than the current era, is at odds with American legal principles dating back at least to the Lieber Code which was written at the request of President Lincoln and placed into effect by the War Department in 1863 to prevent looting of cultural objects by Union soldiers during the Civil War.

INTRODUCTION

Appellant's core defense in this case, laches, requires her to make a showing of unreasonable delay on the part of the original owner of the property which caused prejudice to her, such as by interfering with her ability to present her case. *Vineberg v. Bissonnette*, 548 F.3d 50, 56 (1st Cir. 2008); *Sotheby's, Inc. v. Shene*, No. 04 Civ. 10067 (TPG), 2009 U.S. Dist. LEXIS 23596, at *13 (S.D.N.Y. Mar. 23, 2009). Appellant bases her laches defense on the bold and unsupported assertion that if the Museum's claim had been brought while Riven Flamenbaum

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in the museum that made the discovery, for the benefit of scholarship and to allow museum visitors to experience related objects together.

("Flamenbaum") was still alive, he would have had the opportunity to prove he had acquired good title to the Tablet under a "spoils of war" theory, either by stealing the Tablet himself from the Museum or by acquiring it from Soviet troops, who had previously stolen the Tablet from the Museum. However, neither U.S. nor international law recognizes any such "spoils of war" doctrine which would have conferred title to the Tablet on Flamenbaum under either factual scenario. Under U.S. common law, stolen property remains stolen property and a theft never transfers title either to the thief or to a subsequent good faith purchaser. *See Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982); *Sotheby's, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 23596, at *7-*8; *Menzel v. List*, 267 N.Y.S.2d 804, 819 (Sup. Ct. 1966), *modified on other grounds*, 279 N.Y.S.2d 608 (1967), *modification rev'd*, 298 N.Y.S.2d 979 (1969). Neither international nor U.S. law allows theft of cultural objects during wartime to result in title.

INTEREST OF AMICI

Amici include organizations dedicated to the preservation of cultural heritage and, in particular, include several that were and are still involved in efforts to protect cultural heritage during times of armed conflict. Amici also include foreign entities that have themselves been victims of wartime cultural losses and have engaged in the restitution process to recover cultural objects. Amici are sympathetic to victims of violence, such as Flamenbaum and members of his

family, abhor the persecution and murders carried out by the Nazi regime during the Second World War and condemn the destruction of cultural heritage perpetrated by the Nazis against individuals of Jewish descent and many others. Nonetheless, no such principle of U.S. or international law as a supposed doctrine of "spoils of war" has been recognized in this country for well over a century, at the very least; as detailed below, U.S. courts, when called upon to consider the status of cultural objects taken during wartime, have consistently rejected any such doctrine. In alleging the existence of such a doctrine, Appellant fails to cite any source of international or U.S. law in support of this theory (Appellant's Letter Brief at 16). Nor can any be found. Amici urge this Court not to be the first to depart from these universal and well-settled principles and not to open the door to approving the types of looting and pillage of cultural artifacts that all too often accompany armed conflict, conquest and military occupation.

ARGUMENT

Appellant's suggestion that looting and illegal removal of cultural objects during wartime by a conquering or occupying military force or by individuals is anything other than outright theft is contrary to United States' domestic law and to international law – international principles which the United States has played a leading role in developing. In the nineteenth century, the United States was the first nation to codify what had been an evolving principle – that cultural objects

were not to be treated as lawful war booty, that is, spoils that could be freely taken during wartime. The Lieber Code, drafted for the Union Army by Francis Lieber at the request of Abraham Lincoln in 1863, stated:

> If [classical] works of art, libraries, [or] collections ... can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.
>
> *In no case shall they be sold or given away, if captured by the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.*[3]

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[3] *The Lieber Code: Instructions for the Government of Armies of the United States in the Field Art 36* (emphasis added) (1863) *available at* www.civilwarhome.com/liebercode.htm. Lieber was likely influenced by the actions of the Duke of Wellington and Viscount Castlereagh after their victory in 1815 at the Battle of Waterloo (at which Lieber was present) when they refused to accept as "spoils of war" the works of art and other cultural objects that Napoleon had earlier stolen from several European nations. *See* Margaret M. Miles, *Art As Plunder: The Ancient Origins of Debate About Cultural Property* 349-51 (2008). A few years earlier, a British judge refused to allow the British to keep a cargo of paintings that they had seized from a ship, the Marquis de Somerueles, that was carrying paintings from Italy to Philadelphia during the War of 1812. *The Marquis de Somerueles*, Nova Scotia Stewart's Vice-Admiralty Reports 482 (Vice-Admiralty Court of Halifax 1813).

The recognition that art works and cultural objects deserved a special status and should not be subject to the same rules that applied to other types of property can be traced to Greek and Roman times. The Greek historian Polybius condemned the wanton destruction of cultural works without military justification as the product of a "frenzied mind at the height of its fury." The Roman orator Cicero condemned the actions of Gaius Verres, the Roman governor of Sicily, whom Cicero prosecuted for corruption, including the looting of cultural objects. *See* Sen. Exec. Rep. No. 110-26, *The Hague Cultural Property Convention*, at 1-4 (Sept. 16, 2008), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-110erpt26/html/CRPT-110erpt26.htm; Miles, *supra*, at 82-86, 96-99; Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 Cardozo Public Law, Policy & Ethics J. 677, 680 (2009).

The Lieber Code, written for a military advisory committee led by General Henry Halleck, greatly influenced the development of two international legal instruments that codified principles for the conduct of warfare during the two World Wars of the past century: the Hague Conventions of 1899 and 1907. Articles 23, 28 and 47 of the Annex to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land outlawed pillage and seizure by invading forces. Likewise, Article 56 of the 1907 Hague Convention respecting the Laws and Customs of War on Land (of which the United States is a State Party) forbids "seizure of, destruction or willful [sic] damage done to institutions . . ., historic monuments, works of art and science . . . ". The 1954 Hague Convention on the Protection of Cultural Property During Armed Conflict, 249 U.N.T.S. 215 (May 14, 1954), which was based on orders issued by General Eisenhower for the Allies' conduct of war in Europe, continued these prohibitions. In particular, Article 4(3) of the 1954 Convention states:

> The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property.

The United States signed this Convention in 1954, indicating its general acceptance of these principles (although only ratifying it in 2009). The United States had, however, adopted and followed the core provisions of the 1954 Hague Convention as a matter of practice, regarding it as customary international law.

For example, during the wars in Iraq and Afghanistan, the United States military has been subject to General Order No. 1A, which prohibits the looting of cultural sites or removal of cultural objects from either country. *Prohibited Activities for U.S. Department of Defense Personnel Present Within the United States Central Command (USCENTCOM) AOR* (Dec. 19, 2000) Para. g (prohibiting "[r]emoving, possessing, selling, defacing or destroying archeological artifacts or national treasures"), *available at* http://www.cemml.colostate.edu/cultural/09476/pdf/GeneralOrderGO-1A.pdf. *See also* Dick Jackson, *Cultural Property Protection in Stability Operations*, 2008 The Army Law 47, 48 (2008).

During the Allied invasion of Europe and post-War occupation of Germany, the United States expended considerable effort in protecting cultural objects from theft and ensuring that they were returned to their rightful pre-War owners or to the nations from which the objects originated. *See* Lynn Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (1994). Through the efforts of the Monuments, Fine Arts and Archives Officers, United States military forces sought to protect these artworks and cultural objects from local citizens and survivors of Nazi persecution, as well as from members of the armed forces themselves. It was the official policy of the United

States and the other western Allied nations to protect – not to take – cultural objects and to prohibit their troops from taking such objects.[4]

Military law put in place by the United States for its occupation zone of Germany at the end of the Second World War explicitly forbade "the sale, transfer and export of works of art and other cultural material. Its purpose is to make possible the restoration to their rightful owners of loot taken from other countries. In furtherance of this purpose, personnel of the Allied Expeditionary Forces in occupied German territory will not purchase or otherwise traffic in such objects." Military Government of Germany, *Proclamations, Laws and Ordinances*, Law 52, Article II, para. 3(d). The United States itself refused to accept any objects from the German collections and returned to Germany art works taken to the United States for temporary display. Nicholas, *supra*, at 369-405. This policy that stolen

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[4] The Rules of Land Warfare of the United States War Department applicable during World War II stated:

> 321. Two classes of movable property. – All movable property belonging to the State directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader's government. Other movable property, not directly susceptible of military use, must be respected and cannot be appropriated.

Quoted in *Menzel*, 267 N.Y.S.2d at 810 n.10. An order issued by General Eisenhower stated that "souvenir hunting, writing on walls or damage in any form will be dealt with as military offences". Quoted in Robert M. Edsel, *Rescuing Da Vinci: Hitler and the Nazis Stole Europe's Great Art – America and Her Allies Recovered It* 130 (2006). An order issued by Lt. General Omar N. Bradley stated: "We are a conquering army, but we are not a pillaging army." *Id.* at 136. There are examples in which it seems that U.S. servicemen may have improperly appropriated cultural objects from Germany. However, these takings were never sanctioned by the United States or the U.S. military and should be viewed as rogue, illegal actions – nor have they been validated by any court in this country. *See, e.g., Kunstsammlungen zu Weimar*, 678 F.2d 1150; *Shene*, 2009 U.S. Dist. LEXIS 23596, at *9.

cultural objects should be returned to their rightful owners has been consistently recognized in court decisions since the War. *See Kunstsammlungen Zu Weimar*, 678 F.2d 1150; *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278 (1990 7th Cir.); *Shene*, 2009 U.S. Dist. LEXIS 23596, at *13.

In the post-War Nuremberg trials, the United States joined in the prosecution of members of the Nazi leadership for crimes against humanity and for violating customary international law that, among other things, prohibited the theft and pillage of cultural objects. Alfred Rosenberg, as director of the Nazi Einsatzstab Reichsleiter Rosenberg ("ERR"), organized the theft and confiscation of art works throughout occupied Europe. After the War, he was convicted of war crimes and crimes against humanity, including his involvement with the ERR's plunder of both public and private property, and was subsequently executed. Nicholas, *supra*, at 132-42. This history demonstrates that both international law and U.S. law, policy and practice strenuously condemn the theft and looting of cultural artifacts during war and armed conflict, with World War II as no exception.

U.S. courts have also consistently held that the theft of cultural objects taken during wartime does not transfer title either to the thief or to a subsequent good faith purchaser. This principle was first addressed in the context of Nazi art looting in *Menzel*, in which the court allowed a victim of Nazi persecution to

recover a Chagall painting stolen by the Nazis; the Chagall had been found in the collection of a New York collector who had purchased it in good faith. The court held that the collector had not acquired title. The court there stated, "*Pillage, or plunder*, . . . is the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful. Where pillage has taken place, the title of the original owner is not extinguished." *Menzel* 267 N.Y.S. 2d at 811.

In *Kunstsammlungen Zu Weimar*, the U.S. Court of Appeals for the Second Circuit allowed a German museum to recover two portraits by Albrecht Dürer that were stolen from a German museum, probably by a U.S. serviceman. In *Shene*, a volume of sixteenth century drawings and etchings was stolen from the Staatsgalerie Stuttgart apparently by a U.S. serviceman in 1945. The court recognized the continuing validity of Baden-Württemberg's title (the Staatsgalerie's successor-in-interest), stating that the thief could not pass valid title of the book to a subsequent purchaser.[5]

More recent is the decision, *United States v. Aleskerova*, 300 F.3d 286 (2d Cir. 2002), in which the U.S. Court of Appeals for the Second Circuit affirmed a criminal conviction for possession of and conspiracy to possess stolen property; the

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[5] In both *Kunstsammlungen Zu Weimar* and *Shene*, the court refused to bar the claim of the German institutions under the statute of limitations and in Shene also refused to bar the claim under the doctrine of laches. *Kunstsammlungen*, 678 F.2d at 1160-65; *Shene*, 2009 U.S. Dist. LEXIS 23596, at *10-*13.

defendant, an Azerbaijani, had transported a group of drawings to the United States from Baku, including drawings that had been stolen by Soviet troops from the Bremen Kunstverein during World War II.[6] *See* Thomas R. Kline, *Vorderasiatisches Museum Berlin Loses World War II Trophy Art Case in New York*, 2 Kunst Und Recht 61, 62 (2010). The U.S. Customs Service returned these works to the Bremen Museum. *See U.S. Customs Service Press Release, U.S. Customs Service Returns Renaissance Drawings Valued at $15 Million to Germany* (Jul. 19, 2001), *available at* www.cbp.gov/hot-new/pressrel/2001/0719-01.htm. The United States thus recognized the validity of the Bremen Museum's

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[6] Appellant never states what law she is relying on to assert that the Soviet Union (or Flamenbaum) might have acquired title to the Tablet through theft. Appellant describes the looting of German institutions carried out by the Soviet forces, pursuant to a decree signed by Josef Stalin (Appellant's Letter Brief at 13-15). Although Appellant fails to cite any law or legal doctrine that would support the idea that the Soviets might have obtained title to the Tablet pursuant to this decree, to the extent that she may be implying that the Soviet Union could have acquired title to the Tablet under the act of state doctrine, that doctrine cannot apply to these facts. According to the act of state doctrine, the courts of the United States will not question the legality of an official act taken by another nation *within its own territory*. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The doctrine, which can be applied in the context of appropriations of property, requires that: (1) the taking must be carried out by a sovereign foreign government; (2) the property must be located within the territory of the appropriating nation at the time of the appropriation; (3) the government must be extant and recognized by the United States, and (4) the appropriation must not be in violation of a treaty obligation owed to the United States. *See, e.g., Menzel* at 812-13 (rejecting application of the act of state doctrine to the expropriation of a Chagall painting carried out by the Nazis in Belgium); *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) (rejecting application of act of state doctrine when, during World War II, the Soviet Union expropriated an Archive belonging to the Agudas Chasidei Chabad and located in Poland at the time of the expropriation). If the armed forces of the Soviet Union, acting on behalf of a foreign sovereign and not merely as individuals engaged in opportunistic looting, carried out the expropriation of the Tablet, that fact would have no bearing on the Museum's retention of title to the Tablet.

title to the works, despite a theft carried out by Soviet troops at the end of World War II.

Amici submit that rejection of a "spoils of war" doctrine is fundamental to the law, policies and practices of the United States, as applied to its military and to its citizens, and to principles of international law, as ratified by the United States and the international community. Appellant has failed to cite to any legal sources to support the idea that such a spoils of war doctrine exists or existed any time during the twentieth century as applied to actions taken by the United States or actions considered in U.S. courts. Nor does Appellant explain why, with American forces engaged in armed conflict in the Middle East, adoption of a spoils of war policy would be beneficial at this time. As General Eisenhower recognized shortly before the Allied invasion of Europe,

> Shortly we will be fighting our way across the continent of Europe . . . . Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve. It is the responsibility of every commander to protect and respect these symbols whenever possible.

Quoted in Edsel, *supra* note 4, at 127. The belief that preservation of and respect for cultural heritage of all people is fundamental to fulfillment of U.S. goals and responsibilities, even during wartime, is as valid today as it was when General Eisenhower made this statement. In urging the full Senate to ratify the 1954 Hague Convention in September 2008, the Senate Foreign Relations Committee wrote

that it "believes that cultural property can enhance the growth of civilization, enrich the lives of all peoples, and inspire a mutual respect and appreciation among nations." Sen. Exec. Rep. No. 110-26, *The Hague Cultural Property Convention*, *supra* note 3, at 8.

If this Court were to accept the idea that a "spoils of war" doctrine exists, it could open the door to approval of plunder of cultural objects and destruction of cultural sites and institutions throughout the world – with the products of such plunder finding safe haven on the art market and in collections located in New York. Amici therefore strongly urge this Court to reject not only the applicability of such a doctrine to this appeal, but also the very existence of such a doctrine. If, as Amici demonstrate above, no spoils of war doctrine exists in U.S. law, Appellant cannot be prejudiced by her inability to adduce evidence on that subject. *Vineberg* 548 F.3d at 58 ("Where courts have allowed a laches defense to be premised on an evidence-based predicate, they have done so because that evidence would have been relevant to one or more essential issues in dispute between the parties." (citations omitted)). With no spoils of war doctrine on which to rely, Appellant cannot make such a showing and the Appellate Order, Amici submit, should be affirmed.

CONCLUSION

For all of the foregoing reasons, Amici ask that the Court affirm the Appellate Order to the extent it provided that Appellant was not prejudiced by any delay on the part of the Museum because no set of facts could have established title to the Tablet based on a spoils of war doctrine.

Respectfully submitted,

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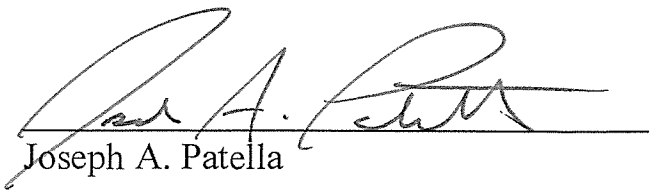

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