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The Art of War: How Japanese Internment Art Was Saved from Auction and Conserved for Posterity

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The Art of War: How Japanese Internment Art Was Saved from Auction and Conserved for Posterity

Debra Ann Ichimura Gass[†]

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INTRODUCTION

On April 15, 2015, Rago Arts and Auction Center (Rago Arts) of New Jersey announced the cancelation of its planned public auction of approximately 450 artifacts created by Japanese Americans during their unconstitutional imprisonment in World War II (WWII) internment camps.¹

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[†] The author received her L.L.M. from the University of California at Berkeley, Boalt Hall, her J.D. from Santa Clara University School of Law, M.S. from Chaminade University, and B.A. from Mills College. Thank you to all the heroes in the Japanese American community including internment camp survivors and their families and supporters, the Heart Mountain Wyoming Foundation Board and its Chair, Shirley Ann Higuchi, Esq., Helen Yoshida, Bruce D. Greenberg, Esq., and Lite, DePalma, Greenberg, LLC, the Japanese American Citizens League, Delphine Hirasuna, Dr. Greg Kimura, and JANM. To Berkeley School of Law Professor Carla Shapreau of Art and Cultural Property Law and Professor Jasper Kim of Negotiations from whom I’ve learned so much from and have been inspired by, and Lori, Kathy, Chris, and my husband, Richard. Special thank you to Wesley Chao, Sarah Kwon, and the *Asian American Law Journal*.

1. NJTV News, *Rago Auctions Under Fire for Sale of Japanese-American Internment Camp Art*, YOUTUBE (Apr. 15, 2015), https://www.youtube.com/watch?v=lyR5dP08_2s [<https://perma.cc/ET9H->

The artifacts were mostly amateur works of art made between 1942 and 1945, ranging from carved wooden door name plates and water color paintings to simple jewelry made from repurposed and recycled items foraged from the various internment camps. Some of the artifacts even included pictures of the private lives of internees in daily internment camp activities.² For the most part, internees made these artifacts by necessity to bypass the time in the camps—a creative distraction from the ugly reality of their involuntary incarceration and sparse environment. These simple artifacts were not the types of high-end lucrative commodities usually bought and sold in the art auction world. Rather, they were the personal expression and property of the approximately 120,000 wrongly imprisoned Japanese Americans and nationals who endured humiliation, shame, and indignation in the camps. To divide and publicly auction these highly personal artifacts—without notice—would add an insensitive insult to the injured internees and their families. This Article catalogs both the successes and challenges in the Japanese American community’s extraordinary efforts to rescue these works, culminating in the preservation of all works for the enrichment and education of future generations.

Part I of this Article describes the WWII Japanese American evacuation from the West Coast of the United States, depicts the harsh living conditions of the internment camps, and explains the context in which the artifacts were created. It also introduces the controversial attempt to sell these artifacts. Part II discusses the Heart Mountain Wyoming Foundation Board’s (Heart Mountain) advocacy efforts and introduces an alleged constructive trust created by the transfer of these artifacts from their creators to the folk arts author, Allen Eaton, upon the condition that they never be sold. Perspectives of the Rago Arts Auction house, the Consignor seller, and Japanese American advocacy groups are explored. Part II also discusses the controversial litigation initiated by Heart Mountain to prevent the sale of the artifacts, as well as online social media wars launched by advocacy groups against Rago Arts and the Consignor, which further fanned the flames of controversy. The critical legal question and theories of who owned the artwork are further discussed under New Jersey state common and constitutional law. Part III explores the ethical and legal implications of keeping and selling prisoner-made artwork. The question of whether such work is really cultural property or personal artistic property is illustrated by an analogy to a former Auschwitz-imprisoned artist’s ongoing legal battle. Finally, Part IV delineates and evaluates the subsequent negotiations between the Japanese American National Museum (JANM), Rago Arts, and the Consignor that ultimately saved the artifacts from being sold to separate parties. While JANM is the permanent home of the artifacts to date, there may be a future forum for these artifacts and other Asian artworks: a

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2. *Id.* (discussing the various artifacts depicted in the Rago Arts catalogue raisonné).

currently pending House Bill proposes to provide the first permanent national platform for Asian American art at the Smithsonian Museum.

I. THE ANNOUNCEMENT OF THE PUBLIC ONLINE AUCTION OF THE ARTIFACTS

Old wounds were reopened for many Japanese Americans when Rago Arts announced that a total of 450 artifacts made by former WWII prison camp internees would be publicly auctioned on April 17, 2015.³ Although the glorified portrayal of WWII in mass media may engender feelings of nostalgia in most Americans, surviving internees and their families have not forgotten a much uglier reality. For the Japanese Americans who actually experienced the trauma of internment camps, these works of art symbolized the individual and collective distress and indignity experienced while imprisoned in the camps. The public sale of these deeply personal items without regard to the historical value or the provenance of the artifacts themselves was a painful reminder of the unjust treatment they suffered during the internment.

After Japan's attack on Pearl Harbor on December 7, 1941, the U.S. government forcibly relocated approximately 120,000 Japanese Americans of at least 1/16 percent ancestry, as well as Japanese nationals, living on the West Coast because of "exigencies of war and the threat to national security."⁴ On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, authorizing the Secretary of War and military commanders to designate military areas "from which any or all persons may be excluded."⁵ By March 1942, the forced removal of over 110,000 persons

3. Hansi Lo Wang, *Art from Japanese-American Internment Camps Saved from Auction Block*, NPR CODE SWITCH (Apr. 16, 2015), <http://www.npr.org/sections/codeswitch/2015/04/18/400052232/auction-of-art-by-japanese-americans-in-internment-camps-cancelled> [https://perma.cc/3F68-CS8A]; Stephen Magagnini, *Auction House Decides Not to Sell Japanese Internment Artifacts*, SACRAMENTO BEE (Apr. 15, 2015, 6:24 PM), <http://www.sacbee.com/news/local/history/article18640974.html> [https://perma.cc/G26E-UQEB].

4. ERICA HARTH, *LAST WITNESSES: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE AMERICANS* 283–86 (2001); *see also* MAISIE CONRAT & RICHARD CONRAT, *EXECUTIVE ORDER 9066: THE INTERNMENT OF 110,000 JAPANESE AMERICANS* 15 (1972).

No charges were ever filed against these persons, and no guilt was ever attributed to them. . . . Evacuation swept into guarded camps orphans, foster-children in white homes, Japanese married to Caucasians, the offspring of such marriages, persons who were unaware of their Japanese ancestry, and American citizens "with as little as one-sixteenth Japanese blood."

MORTON GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION* 2 (1949).

5. *Id.* Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command who was responsible for West Coast Security, recommended to the Secretary of War, Henry L. Stimson:

[T]he Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized," the racial strains are undiluted. . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extradition, are at large today. There are indications that these were organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

of Japanese descent from the West Coast began.⁶ They were allowed to take with them literally only what they could carry by hand.⁷

Their first stops were assembly centers, a euphemism for what were really holding pens improvised from fairgrounds and horse racetracks.⁸ After several months living in the assembly centers, the incarcerated Japanese Americans were transferred to ten concentration camps scattered throughout the western and southern states.⁹ From 1942 to 1945, Japanese Americans were imprisoned in camps located in Utah (Topaz), Wyoming (Heart Mountain), Colorado (Granada), Arkansas (Rohwer and Jerome), Arizona (Gila River and Poston), Idaho (Minidoka), and California (Tule Lake and Manzanar).¹⁰ Upon arrival, they were assigned to rooms that were often nothing more than hastily repurposed horse stalls, fairgrounds, and barracks.¹¹ This usually meant one family to a twenty-by-twenty-five-foot room, simple beds as the only furnishing, no private plumbing facilities, and little protection against the extreme rigors of the climate. The internees were forced to live amidst barbed wire, armed military guards in watchtowers, and searchlights.¹²

The internees were prohibited from bringing tools into the camps or buying them from within.¹³ Consequently, the internees created their artworks inside the camps from repurposed and recycled materials using makeshift tools.¹⁴ The created artifacts included everything from chairs and housewares to paintings and jewelry.¹⁵ These internees foraged, recycled, and reclaimed what they could find to make beautiful works of art out of nothing wherever they were incarcerated, all while enduring indignity and

COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED, PART I 6 (1983) [hereinafter PERSONAL JUSTICE DENIED].

6. *Id.* A 1942 War Department report described the role of the Census Bureau in the roundup of Japanese Americans: after denying its role for decades, the United States Census Bureau admitted that it assisted the internment efforts by providing confidential neighborhood information on Japanese Americans. Thomas Clark, who later became U.S. Attorney General, was assigned to the Western War Relocation (WRL) command and later recalled that a Census Bureau member had shown him files detailing exactly where Japanese Americans lived. See Raymond Y. Okamura, *The Myth of Census Confidentiality*, 8 AMERASIA J. 111, 112–13 (1981). The most important single source of information prior to the evacuation was the 1940 Census of Population. These special tabulations, when analyzed, became the basis for the general evacuation and relocation plan (USDOW 1943). *Id.* at 113.

7. ONLY WHAT WE COULD CARRY: THE JAPANESE INTERNMENT EXPERIENCE 8–9 (Lawson Fusao Inada ed., 2000). Specific instructions were provided to the internees regarding what they could or could not bring with them. See e.g., DELPHINE HIRASUNA, THE ART OF GAMAN: ARTS AND CRAFTS FROM THE JAPANESE AMERICAN INTERNMENT CAMPS 1942–1946 15 (2005); Interview with Delphine Hirasuna, Author and Curator of THE ART OF GAMAN: ARTS AND CRAFTS FROM THE JAPANESE AMERICAN INTERNMENT CAMPS 1942–1946, in San Francisco, Cal. (Feb. 17, 2016).

8. *Id.*; see also HARTH, *supra* note 4, at 283.

9. *Id.*

10. *Id.*; see also PERSONAL JUSTICE DENIED, *supra* note 5.

11. HARTH, *supra* note 4, at 283; see also HIRASUNA, *supra* note 7, at 15.

12. HARTH, *supra* note 4, at 283.

13. *Id.*

14. *Id.*

15. *Id.*

hostility from their own country.¹⁶ At first they were confined to the camps, but as the internees gained the trust of their prison guards, they were eventually able to leave camp and search for natural materials like driftwood, rocks, shells, and other available resources.¹⁷ Whatever they found, they developed into functional, practical, and creative works of art.

When WWII ended and Japanese Americans were finally released from the internment camps in 1945, they were once again allowed only what they could carry.¹⁸ Thus, many of the artifacts made over the years were given away or simply left behind at the camps.¹⁹ The caliber of artwork varied from amateur to professional quality pieces; notable internees included renowned New York sculptor Isamu Noguchi,²⁰ UC Berkeley art professor Chiura Obata, and UC Berkeley alumnus and professor Mine Okubo.²¹ Also among these artists was Estelle Peck Ishigo, the Caucasian wife of a Japanese American internee, who followed her husband into the Heart Mountain camp.²² As a professionally trained artist, her artworks included prized watercolor paintings and pencil sketch drawings. Some of these works are now featured as part of a permanent collection at the University of California, Los Angeles (UCLA) art museum and JANM.²³

Many of the items were essentially busywork for the internees, a way to pass the time and engage their creativity to endure the distressing situation. So when the internees left the camps and either gave away or sold their artwork, no one anticipated their personal works made under those oppressive conditions would ever be sold.²⁴

Many internees believed that their works would remain at the camps and were still the property of the artists who made them or to those whom they were entrusted for historical preservation.²⁵ One such trustee was former Oregon state legislator, anti-war activist, art curator, and folk and

16. *Id.*; see also HIRASUNA, *supra* note 7, at 32; Interview with Delphine Hirasuna, *supra* note 7.

17. HARTH, *supra* note 4, at 283.

18. *Id.*

19. *Id.*

20. As an east coast resident, Isamu Noguchi was not subject to the west coast evacuation of Japanese Americans but reportedly voluntarily entered internment and produced works of art during his seven months of imprisonment. *Gaman and the Story of Isamu Noguchi*, SMITHSONIAN AM. ART MUSEUM: EYE LEVEL (June 22, 2010), <http://eyelevel.si.edu/2010/06/gaman-and-the-story-of-isamu-noguchi.html>; see also HARTH, *supra* note 4, at 153–69.

21. *Mine Okubo Collection*, JAPANESE AM. NAT'L MUSEUM, <http://www.janm.org/collections/mine-okubo-collection/> [<https://perma.cc/3FXA-CQQR>]. Okubo's drawings also served as the basis for her renowned book, "Citizen 13660," which was printed in 1946 and was the first personal account published on the camp experience.

22. *Biography*, THE ESTELLE ISHIGO PAPERS, 1941–1957, <http://hamachi.library.ucla.edu/ishigo/4.html> (last visited Feb. 5, 2017); see also *Ishigo, Estelle*, JAPANESE AM. NAT'L MUSEUM, <http://www.janm.org/collections/people/ishigo-estelle/> [<https://perma.cc/3Y5Q-DNRD>].

23. See *Estelle Ichigo Collection*, JAPANESE AM. NAT'L MUSEUM, <http://www.janm.org/collections/estelle-ishigo-collection/> [<https://perma.cc/Z83H-B5UF>].

24. Interview with Delphine Hirasuna, *supra* note 7.

25. *Id.*

immigration art author Allen Eaton.²⁶ Eaton had received internment artifacts before, during, and after the 1952 publication of his book on Japanese internment artwork, *Beauty Behind Barbed Wire: The Arts of the Japanese in Our War Relocation Camps*.²⁷ His book aimed to humanize incarcerated Japanese Americans, celebrate their artistic skills, and protest the incarceration as an unjust act. Eaton's trusteeship of the artifacts was based on the implied condition that he never sell the works, as evidenced in his book:

It was my intention at the time of going into the field, to purchase a number of objects for an exhibition which I hoped could be circulated throughout the country; but I found that few of the craftsmen had any thought of selling the things they made; they were saving these as "going away gifts," or to send to friends outside of camp, or just to keep in the family. They offered to give me things to the point of embarrassment, but not to sell them. . . .²⁸

Eaton had hoped to curate an exhibition of the artifacts for circulation throughout the country to educate the public about the plight of Japanese Americans during the war.²⁹ Unfortunately, the exhibition was never completed. Eaton died in 1962 and his daughter Martha Eaton inherited the artifacts.³⁰ Upon Martha's death in 1990, the artifacts were controversially transferred to her contractor and the Executor of her estate, Thomas Ryan, in spite of claims of undue influence by Martha's distant relatives.³¹ Upon the Executor's death in 2008, the estate passed once again to the Executor's son John Ryan (the Consignor), who lived in Connecticut.³² The Consignor reportedly kept the collection "safely tucked away" without plans to sell it.³³ In 2015, however, he decided to sell the collection at an auction due to "financial difficulties."³⁴

II. THE ADVOCACY OF HEART MOUNTAIN INTERPRETIVE CENTER

Immediately after the pending auction was announced, certain Japanese American community leaders quickly galvanized supporters with a vested

26. See Complaint at ¶ 9, *The Heart Mountain Wy. Found. v. David Rago Auction, Inc.* (2015), http://www.heartmountain.org/pressreleases_17_4287335041.pdf [https://perma.cc/87JT-EAKS] [hereinafter Heart Mountain Complaint].

27. ALLEN EATON, *BEAUTY BEHIND BARBED WIRE: THE ARTS OF THE JAPANESE IN OUR WAR RELOCATION CAMPS* (1952).

28. *Id.* at 6. This quote from Mr. Eaton's book was a premise in the Heart Mountain Wyoming injunctive claim against the Consignor, which alleged that a constructive trust was implicated and evidenced through this language. See Heart Mountain Complaint, *supra* note 26, at ¶ 14.

29. EATON, *supra* note 26, at 6.

30. Randy Kennedy et al., *Seller in Canceled Internment-Camp Auction Comes Forward*, N.Y. TIMES (Apr. 17, 2015), <http://www.nytimes.com/2015/04/18/arts/design/seller-in-canceled-internment-camp-auction-comes-forward.html> [https://perma.cc/ZU9G-FNV9].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

interest in acquiring the artifacts.³⁵ The Heart Mountain Interpretive Center, a former internment campsite and now historical center, led by Chair of the Board of Directors Shirley Higuchi, vice-chair Doug Nelson, and Executive Director Brian Liesinger, was first to take action.³⁶

A. An Offer That Was Refused, the Rise of Social Media Warfare, and the Devoluton of Negotiations

Heart Mountain's Board Members and individual donors, many of whom were incarcerated at the Heart Mountain site, immediately raised \$50,000.³⁷ Rather than offer the reported \$27,900 valuated price, they decided to offer the full \$50,000 with the intent of making Rago Arts and the Consignor an offer that they could not refuse.³⁸ None of the artifacts were reputed art collector commodities or high-end masterpiece caliber artwork.³⁹ With the exception of a few works by notable artists like Estelle Peck Ishigo, graphic illustrator Mine Okubo,⁴⁰ or in-situ and sumit-style painter UC Berkeley Professor Chiura Obata,⁴¹ all of the 450 artifacts were created by amateurs who wanted the distraction and inspiration to endure the oppressive existence. The types of artifacts for sale included humble carved wooden door plaques depicting family names, oil and water color paintings, and hand-carved painted bird pins.⁴²

Therefore, when Rago Arts and the Consignor rejected the \$50,000 offer, it appeared that, contrary to their stated goals of being "good stewards" of the artifacts, they were instead singularly motivated by the prospect of making the most lucrative sale by conducting an opportunistic bidding contest.⁴³ Some speculated that Rago Arts and the Consignor were aware of other established museums interested in buying the artifacts.⁴⁴ The UCLA museum, for one, already had a permanent collection of certain internment artifacts featuring the notable oil paintings of Estelle Ishigo.⁴⁵ Moreover, the Smithsonian in Washington, D.C., had previously hosted a curated Japanese American WWII art exhibit at its Renwick Gallery.⁴⁶ Ideally, these

35. Telephone interview with Shirley Ann Higuchi, Chair, Heart Mountain Wyoming (June 28, 2016).

36. *Id.*

37. *Id.*

38. *Id.*

39. Interview with Delphine Hirasuna, *supra* note 7; Telephone Interview with Greg Kimura, Executive Director of JANM (Mar. 10, 2016) (regarding personal knowledge of the collection).

40. *Mine Okubo Collection*, JAPANESE AM. NAT'L MUSEUM, <http://www.janm.org/collections/mine-okubo-collection/> [<https://perma.cc/MVZ4-JYET>].

41. KIMI KODANI HILL, TOPAZ MOON: CHIURA OBATA'S ART OF THE INTERNMENT (2000).

42. Kennedy et al., *supra* note 30.

43. Telephone Interview with Shirley Ann Higuchi, *supra* note 35.

44. Kennedy et al., *supra* note 30.

45. *Biography*, THE ESTELLE ISHIGO PAPERS, 1941–1957, <http://hamachi.library.ucla.edu/ishigo/4.html> [<https://perma.cc/2KUW-D9VL>].

46. See C-Span, *Preview: Art in Japanese American Internment Camps*, YOUTUBE (Oct. 25, 2010), <https://www.youtube.com/watch?v=y5JUdRDiuQ8> [<https://perma.cc/947U-33J3>] (discussing a

prospective buyers could be leveraged against each other to raise the price.⁴⁷ The Consignor said:

We have tried to be good stewards of this material and protect it over the years. . . . We weren't trying to extort money from anyone. . . . We really believed it would be the museums who would step up and pick up these items. . . . We've always loved the collection. I did realize that it appeared cold because no one knew who we were.⁴⁸

With the auction happening in a few days, time was of the essence.⁴⁹ Heart Mountain did not have time to discern each item's provenance and determine whether each item had legal title or not.⁵⁰ Instead, Heart Mountain's initial focus was to act immediately and offer to buy and secure the lot of artifacts before it was sold or disseminated.⁵¹ As part of the negotiations, Heart Mountain requested that the auction date be delayed, but Rago Arts rejected the request.⁵² According to founder David Rago, he and the Consignor tried to pull the artifacts from auction and make a private sale, but after public outcry and negative reactions online, the Consignor reportedly became angry because he thought he was not being treated fairly.⁵³ In turn, he directed the auction to go public.⁵⁴

During the negotiations between Heart Mountain and Rago Arts and the Consignor, enraged descendants of internees launched an online social media war via twitter campaigns such as the *#StopRago* hashtag,⁵⁵ as well as a "Japanese American History: Not for Sale" protest on Facebook.⁵⁶ The protest helped gather approximately 8,000 online signatures in support of a petition to stop the auction at change.org.⁵⁷ The petition urged Rago Arts and the Consignor to negotiate in good faith.⁵⁸

prior visiting exhibit at the Smithsonian Renwick Gallery and some of the Japanese American internment WRL pictures as photographed by Ansel Adams).

47. Telephone Interview with Greg Kimura, *supra* note 39.

48. Kennedy et al., *supra* note 30.

49. Telephone Interview with Shirley Ann Higuchi, *supra* note 35.

50. *Id.*

51. NJTV News, *supra* note 1.

52. *Id.*

53. *Id.*

54. *Id.*

55. See TWITTER, <https://twitter.com/search?q=%23StopRago&src=tyah> [<https://perma.cc/TQ5S-N6BE>]; see also Eve M. Kahn, *Auction of Art Made by Japanese-Americans in Internment Camps Sparks Protest*, N.Y. TIMES: ARTSBEAT (Apr. 13, 2015, 3:20 PM), http://artsbeat.blogs.nytimes.com/2015/04/13/auction-of-art-made-by-japanese-americans-in-internment-camps-sparks-protest/?_r=0 [<https://perma.cc/TEP7-STD8>].

56. See Magagnini, *supra* note 3 (crediting activist Yoshinori Toso Himel and his wife, Barbara Takei, with launching the Facebook campaign); see also Yoshinori Himel & Barbara Takei, *Japanese American History: NOT for Sale*, FACEBOOK, <https://www.facebook.com/japaneseamericanhistorynotforsale?fref=ts> [<https://perma.cc/4CQL-P839>].

57. See Lorna Fong, *Negotiate with Japanese American Families to Preserve Concentration Camp Artifacts*, CHANGE.ORG, <https://www.change.org/p/rago-negotiate-with-japanese-american-families-to-preserve-american-concentration-camp-artifacts> [<https://perma.cc/J995-DZQX>] (last updated May 1, 2015).

58. *Id.* (follow "Read the letter" link) ("I agree 'there could be no better resolution than for a

The online cyberwar catalyzed the community and put pressure on Rago Arts and the Consignor to stop the sale, but it also may have undermined the negotiations.⁵⁹ The Consignor allegedly received death threats, which may have further distanced any negotiation.⁶⁰ The Consignor did not have any emotional commitment to the artifacts and took a step back to take the items off the public auction during this time.⁶¹ Some Japanese American advocates were afraid that the cyberwar and death threats might further provoke the Consignor to break up the lot of artifacts and sell them in a private sale, which would then fracture the collective story.⁶²

B. Threatened Litigation: The Draft Complaint

Two days after Rago Arts and the Consignor rejected the offer of \$50,000 for the artifacts, and two days before the auction date, Heart Mountain published a draft complaint against Rago Arts, together with a press release, on its website. Heart Mountain retained New Jersey appellate attorney Bruce D. Greenberg to draft a complaint demanding injunctive relief with venue in New Jersey, where Rago Arts was located. Within hours after counsel for Heart Mountain Board of Directors communicated the intent to file the lawsuit, Rago Arts announced the withdrawal of the auction items.⁶³ Collectively, the threat of a looming lawsuit, along with the ongoing social media wars, appeared to force Rago Arts and the Consignor to retreat and withdraw from the auction, at least temporarily.⁶⁴ According to Rago Arts, the Consignor was upset about the social media war and e-mail threats against him.⁶⁵ The Consignor felt he was being treated unfairly and withdrew the artifacts from public auction.⁶⁶

1. The Claims: First Count of Replevin and Second Count of Unjust Enrichment

Heart Mountain's Complaint alleged one count of replevin and one count of unjust enrichment in the Superior Court of New Jersey, in the Hunterdon County Chancery Division.⁶⁷

suitable museum, foundation or member/members of the Japanese American community with the means to preserve this collection to come forward and secure it for education, display and research.' I ask that you negotiate in good faith so representatives of the Japanese American community can acquire these artifacts with the goals you have expressed.'").

59. See Telephone Interview with Greg Kimura, *supra* note 39.

60. *Id.*; see also NJTV News, *supra* note 1.

61. See NJTV News, *supra* note 1.

62. See, e.g., Telephone Interview with Shirley Ann Higuchi, *supra* note 35; Telephone Interview with Greg Kimura, *supra* note 39.

63. *Id.* (reporting the withdrawal of Japanese American incarceration items from the Allen Eaton collection, which were slated for public auction Friday, April 17, 2015, in Lambertville, New Jersey).

64. See NJTV News, *supra* note 1.

65. *Id.*

66. See *id.*

67. See Heart Mountain Complaint, *supra* note 26.

The first count was based upon replevin, which is a procedure whereby seized goods may be provisionally restored to their owner pending the outcome of an action to determine the rights of the concerned parties.⁶⁸ New Jersey Code 2B:50-1 provides that “a person seeking recovery of goods wrongly held by another may bring an action for replevin If the person establishes the cause of action, the court shall enter an order granting possession.”⁶⁹ Plausibly, the Consignor wrongly held the collection since “the Internees donated their artifacts to Eaton in exchange for his promise to use the artifacts in his planned exhibition for the purposes of educating the public about the Japanese American experience during World War II.”⁷⁰ “This consideration was destroyed when Eaton transferred the artifacts to the Consignor.”⁷¹ Heart Mountain argued it had superior title to the collection because most of the artwork was from the Heart Mountain internment site. The complaint asserted that “the wrongful transfer of the artifacts . . . frustrated the purpose of the incarcerated⁷² exchange with Eaton.”⁷³

The second count of the complaint alleged unjust enrichment, under the theory that the defendants would improperly benefit from the sale of artifacts that the original creators expected to be “used solely for posterity and educational purposes.”⁷⁴ If the collection was sold at auction, the incarcerated would not have obtained the agreed upon benefit, while the Consignor and Rago Arts would receive an undue benefit without giving proper consideration for this benefit.⁷⁵ Selling the collection, which Heart Mountain argued belonged rightfully to the incarcerated, would unjustly enrich the Consignor and Rago Arts.⁷⁶

The Complaint demanding an injunction for the auction scheduled to take place on April 17, 2015 was never filed.⁷⁷ Rago Arts and the Consignor withdrew the items from the public auction.⁷⁸ Consequently, the questions regarding legal title to the artifacts and standing have yet to be explored. Even if Heart Mountain prevailed on the merits of the replevin arguments, the legal title to the artifacts had yet to be litigated. Even if the artifacts were traceable to the internee artists, it is not certain that the artists would have

68. *Id.* Replevin is an action seeking return of personal property wrongfully taken or held by the defendant. Rules on replevin actions vary by jurisdiction. *See Replevin*, CORNELL U. L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/replevin> [<https://perma.cc/8MMV-2Y5U>].

69. N.J. STAT. ANN. § 2B:50-1 (West 1995).

70. Heart Mountain Complaint, *supra* note 26, at ¶ 39.

71. *Id.* ¶ 40.

72. *Id.* ¶ 10 (referencing the term “incarcerated” in the Complaint to refer to Japanese American internees).

73. *Id.* ¶ 41.

74. *Id.* ¶ 43. If the collection was sold at auction, the incarcerated would not have obtained the agreed upon benefit, while the Consignor and Rago Arts will receive an undue benefit without giving proper consideration for this benefit.

75. *Id.* ¶ 44.

76. *Id.* ¶ 45.

77. *See* Telephone Interview with Shirley Ann Higuchi, *supra* note 35.

78. *See* Kennedy et al., *supra* note 30.

standing to sue Rago Arts and the Consignor.

2. *The Legal Viability of Heart Mountain's Claims*

a) *A Constructive Trust and Fiduciary Duties*

Ostensibly, the artifacts were placed in a constructive trust with Eaton as the Trustee, and any subsequent use of the properties would be bound to the same conditions that were placed upon Eaton.⁷⁹ These conditions would thus apply to the Consignor, if he indeed legally owned the artifacts. The elements of a valid constructive trust were plausibly met.⁸⁰ Moreover, the legal remedy for a constructive trust is generally that the person who would otherwise be unjustly enriched transfers the property to the intended party.⁸¹

Purportedly, as trustee and beneficiary, Eaton possessed legal trustee interest in the property defined by the condition of his possession, but could never sell the works.⁸² Moreover, as the trustee, Eaton and his legal predecessors would be bound by certain fiduciary duties, including the duty to keep control of the trust property.⁸³ Additionally, there is the duty to protect and preserve the property and to use it for educational or public purposes.⁸⁴ While these arguments are not legally binding doctrine, they are nevertheless persuasive. Fiduciary duties would apply to anyone to whom Eaton's estate passed, including and up to the Consignor, who would be unjustly enriched by the sale of the artifacts.⁸⁵

b) *Real Standing or a Preemptive Legal Fiction?*

To prevail on the injunction, Heart Mountain knew that it must have a theory of legal standing that was not premised on a preemptive legal fiction.⁸⁶ The general legal doctrine of standing requires that a plaintiff can only bring

79. See Heart Mountain Complaint, *supra* note 26, at 13 (requesting a constructive trust be placed over the artifacts).

80. The basis for creating a constructive trust is to prevent unjust enrichment. See RESTATEMENT (FIRST) OF RESTITUTION § 160 cmt c (AM. LAW. INST. 1937) (“Where a person wrongfully disposes of property of another knowing that the disposition is wrongful and acquires in exchange other property, the other is entitled to enforce a constructive trust of the property so acquired.”). If the property so acquired is or becomes more valuable than the property used in acquiring it, the profit thus made by the wrongdoer cannot be retained by him; the person whose property was used in making the profit is entitled to it.” See RESTATEMENT (FIRST) OF RESTITUTION § 202 (AM. LAW. INST. 1937).

81. *Id.*; see also *Constructive Trust*, CORNELL U. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/constructive_trust [<https://perma.cc/8YZG-UYGE>].

82. See EATON, *supra* note 27, at 6.

83. RESTATEMENT (THIRD) OF TRUSTS, §§ 76–84 (AM. LAW INST. 2008) (“Property must not be left in the possession, or under the control, of anyone other than the trustee or its agent unless authority for outside possession or control is contained in the terms of the trust.”).

84. *Id.* (“The trustee must take whatever steps a prudent person would take to protect and preserve trust property.”).

85. See Heart Mountain Complaint, *supra* note 26, at ¶¶ 42–46; see also *Crescent Park Tenant Ass’n v. Realty Equities Corp.*, 58 N.J. 98, 101 (1971).

86. Telephone Interview with Bruce D. Greenberg, Member, Lite, DePalma, Greenberg, LLC (June 30, 2016).

a lawsuit if imminent harm by the law would occur.⁸⁷ With so many artifacts pending imminent sale, the provenance, origin, and authorship of each artifact from different artists and camp locations could not be easily and quickly proven. How would the New Jersey court adjudicate whether there was legal standing to bring the injunction claim in the first place? Plausibly, Rago Arts and the Consignor could have raised a fatal legal defense regarding the lack of legal standing. How, then, would Heart Mountain have standing to sue? This was a potential novel legal argument in the WWII internment art context that never came to fruition because the matter was settled before the merits were litigated.⁸⁸ Without proper standing, the court may dismiss the case without considering the merits of the claim.⁸⁹

New Jersey courts have historically taken a much more liberal approach than federal courts on the issue of standing.⁹⁰ The seminal case *Crescent Park Tenant Association v. Realty Equities Corp.* is a key illustration.⁹¹ There, the Chancery Division of the Superior Court of New Jersey dismissed the plaintiff Crescent Park Tenant Association's complaint for lack of standing. Crescent Park Tenant Association was a nonprofit association created for the protection and mutual benefit of the tenants residing in the Crescent Apartment House, whose membership consisted of a substantial majority of the tenants.⁹² Although the lower court case involved a number of mismanagement claims, the sole issue on appeal was whether the lower court erred in holding that the Association had no legal or equitable standing to maintain an action based on the alleged wrongful conduct set forth in the complaint.⁹³

The plaintiff in *Crescent Park* alleged various mismanagement charges that impacted the tenant body as a whole.⁹⁴ It specifically alleged that the air conditioning system was in a constant state of disrepair and dangerous to the elderly tenants, that the elevators were in poor working condition and constituted a safety hazard, and that the security and protection were wholly inadequate amongst many other areas of neglect.⁹⁵ The appellate court, finding sufficient standing, reversed the lower court and held that the Chancery Division "erred in dismissing [the case] without determining the

87. See *Standing*, CORNELL U. L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/standing> [<https://perma.cc/WWG3-ASD2>].

88. *Jen Elec., Inc. v. County of Essex*, 197 N.J. 627 (2009) (recapitulating the New Jersey Supreme Court's standing jurisprudence from other cases in this case, which also involved collective individuals and standing).

89. *Id.*

90. Telephone Interview with Bruce D. Greenberg, *supra* note 86; see Bruce D. Greenberg, *Even Under New Jersey State Law, Standing Has Limits*, N.J. APPELLATE L. (Sep. 7, 2012), <http://appellatelaw-nj.com/even-under-new-jersey-state-law-standing-has-limits> [<https://perma.cc/E289-AULX>]; *Crescent Park Tenant Ass'n v. Realty Equities Corp.*, 58 N.J. 98 (1971).

91. *Crescent Park Tenant Ass'n*, 58 N.J. at 98.

92. *Id.* at 99.

93. *Id.* at 101.

94. *Id.* at 100.

95. *Id.*

merits.”⁹⁶

In arriving at its decision, the *Crescent Park* court articulated New Jersey’s liberal application of the standing doctrine:

Unlike the Federal Constitution, there is no express language in New Jersey’s Constitution which confines the exercise of our judicial power to actual cases and controversies. Nevertheless we will not render advisory opinions or function in the abstract nor will we entertain proceedings by plaintiffs who are “mere intermeddlers”, or are merely interlopers or strangers to the dispute. Without ever becoming enmeshed in the federal complexities and technicalities, we have appropriately confined litigation to those situations where the litigant’s concern with the subject matter evidenced a sufficient stake and real adverseness. In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of “just and expeditious determinations on the ultimate merits.”⁹⁷

In sum, the *Crescent Park* court stated that “unlike the Federal Constitution, there is no express language in the New Jersey Constitution⁹⁸ that provides a constitutional limitation on standing.”⁹⁹ Had the standing doctrine been examined under a federal court standard under the U.S. Constitution, Article III, § 2, a different result would have occurred.¹⁰⁰ At the federal level, legal actions cannot be brought simply on the ground that an individual or group is displeased with a government action or law.¹⁰¹ Federal courts only have constitutional authority to resolve actual disputes that are an actual case or controversy.¹⁰² Only those with enough direct stake in an action or law have “standing” to challenge.¹⁰³

Heart Mountain made a brilliant move in tactically selecting New

96. *Id.*

97. *Id.* at 101 (internal citations omitted); *see also* *Jen Elec., Inc. v. Cty. of Essex*, 197 N.J. 627 (2009).

98. N.J. CONST. art. VI, § 1 (“The judicial power shall be vested in a Supreme Court, a Superior Court, and other courts of limited jurisdiction. The other courts and their jurisdiction may from time to time be established, altered or abolished by law.”).

99. *Crescent Park Tenant Ass’n*, 58 N.J. at 107 (“Unlike the Federal Constitution, there is no express language in New Jersey’s Constitution which confines the exercise of our judicial power to actual cases and controversies.”).

100. The U.S. Constitution article III, § 2 states in pertinent part:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

101. *See Standing*, *supra* note 87.

102. *Id.*

103. *Id.*; *see* *Cty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *see also* *Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Jersey as the jurisdiction in which to litigate the claim, as the legal jurisprudence on standing there would likely have allowed it to prevail against a motion to dismiss.

In the leading New Jersey case *Salorio v. Glaser*, the court further extended its standing jurisprudence in *Crescent Park* with respect to taxpayers.¹⁰⁴ In *Salorio*, the court concluded that the collective plaintiffs had standing to challenge the constitutionality of the New Jersey Emergency Transportation Tax Act, despite the fact that the Plaintiffs' total tax obligation may remain unchanged by the outcome.¹⁰⁵ Consistent with *Crescent Park*, the court again reiterated that New Jersey state courts are not bound by the "case or controversy" standing requirement governing federal courts.¹⁰⁶ Further, the court opined that the New Jersey State Constitution contained no analogous provision limiting the subject matter jurisdiction of the Superior Court.¹⁰⁷ Moreover, the court found that it remained free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration.¹⁰⁸ It therefore found it unnecessary to consider whether federal standing requirements had been met and reiterated its consistent standard that "in cases of great public interest, any 'slight additional private interest' will be sufficient to afford standing."¹⁰⁹ Thus Heart Mountain claim for injunctive relief very likely would have endured a legal standing challenge under New Jersey's very broad standing jurisprudence.

While Heart Mountain's injunction claim focused on the legal consequences of selling WWII internee artwork, it did not, however, delve into the major ethical implications involved in the sale of the artifacts.

III. ETHICAL IMPLICATIONS OF KEEPING AND SELLING ARTWORK MADE BY IMPRISONED ARTISTS: HISTORIC OR PERSONAL ARTISTIC PROPERTY?

When asked about the provenance for the artifacts, Rago Arts stated that they had bills of sale, but neither these nor other proof of ownership was ever presented.¹¹⁰ Yet the lack of proof did not hinder Rago Arts from putting these highly personal items made under duress up for auction. Rather, Rago

104. *Salorio v. Glaser*, 82 N.J. 482, 493 (1980).

105. *Id.*; see also N. J. Stat. Ann. § 54:8A-1 (West 2016).

106. See *Crescent Park Tenants Ass'n v. Realty Eq. Corp. of N.Y.*, 58 N.J. 98, 107-08 (1971).

107. *Salorio*, 82 N.J. at 491; see N.J. CONST. art. VI, § 3, ¶ 2 (1947).

108. *Salorio*, 82 N.J. at 491.

109. *Id.* (internal citation omitted); see also Bill Ong Hing, *Rebellious Lawyering, Settlement, and Negotiation: Soko Bukai v. Y.W.C.A.*, 5 NEV. L.J. 172, 172-76, 180-81 (2004) (presenting a potentially controversial standing issue in which the Japanese American community sued the San Francisco (SF) YWCA, which held their property in a charitable trust to circumvent discriminatory land ownership laws during the WWII internment). The defendant argued the defense of standing. According to the SF YWCA, not only was there no legal standing to bring suit because the beneficiary was not around anymore, the equitable doctrine of laches applied, and that the Japanese alien land law was barred as unconstitutional in 1952. This case eventually settled, after intensive advocacy and litigation by the community. *Id.* at 173.

110. NJTV News, *supra* note 1.

Arts provided their perspective on selling internment art:

Property produced under duress is a subset of historic property that is associated with heinous acts or beliefs. Auction houses sell history. So we are faced with choices such as the one we made with the Eaton collection regularly. We take it case-by-case. Rago does not accept Nazi material that has no importance to history because many (certainly not all) of the people interested in it hold white supremacist views. On the other hand, Rago chose to sell a fine sterling silver statuette of a Ku Klux Klansman, despite the detestable subject matter, because it was a gift to D.W. Griffith, the director of *The Birth of a Nation*. It took some thought, but we concluded that it was film history. It also shed light and air on the attitudes of the early 20th c. where such an object would be wanted and could be commissioned from a major silver manufacturer. If a historically significant letter written by a John Wilkes Booth co-conspirator were offered to us, I feel sure we would sell it. We have certainly sold 19th century prints with hook-nosed bankers who are obvious caricatures of Jews (my own heritage). We have struggled with the term “Mammy’s bench” which commonly describes a form of American Windsor settee where children were nursed: if people seeking such a bench use this term to search, is it fair to our consignor to forsake it because it offends us? A painting by mass murderer John Wayne Gacy? We’ve seen two. Not a chance. And so it goes. You do your best to be ethical and equitable as a business and as a person.¹¹¹

Was the internment art that was made under duress by incarcerated internees really a subset of historical property and sellable history as Rago Arts opined? Or, was it unconscionable to sell such personal items made by incarcerated internees under the duress of war?¹¹² The Rago Arts statement above about whether artwork made under duress was historic property or not echoes the belief held by Poland’s Auschwitz National Museum regarding the artwork of artist Dina Gottliebová, referenced as Ms. Babbitt, an Auschwitz Nazi camp survivor.¹¹³

Ms. Babbitt was incarcerated at Auschwitz, where she was forced by the infamous Dr. Mengele to create watercolor portraits of camp prisoners perceived as gypsies.¹¹⁴ She did this to keep her mother and herself alive.¹¹⁵ These portraits are on permanent exhibit at the Auschwitz National Museum, which considers such works as national property.¹¹⁶ The Museum argues that “[the portraits] are rare artifacts and important evidence of the Nazi

111. Email from Miriam Tucker, Rago Arts’ Managing Partner (Feb. 12, 2015) (on file with author).

112. Telephone Interview with Shirley Ann Higuchi, *supra* note 35.

113. See generally Steve Friess, *History Claims Her Artwork, but She Wants It Back*, N.Y. TIMES (Aug. 30, 2006), http://www.nytimes.com/2006/08/30/arts/design/30surv.html?_r=0 [<https://perma.cc/L7YK-8JN9>]; see also Celestine Bohlen, *Artwork by Holocaust Victim Is Focus of Dispute*, N.Y. TIMES (June 20, 2001), <http://www.nytimes.com/2001/06/20/arts/20MURA.html?pagewanted=all> [<https://perma.cc/8A7Z-UUMV>].

114. Friess, *supra* note 116.

115. *Id.*

116. *Id.*

genocide, part of the cultural heritage of the world.”¹¹⁷ They serve an important documentary and educational function about the murder of thousands of Gypsy, or Roma, victims.¹¹⁸ The Museum does not regard these portraits as personal artistic creations, but as documentary work done under direct orders from Dr. Mengele and carried out by the artist to ensure her survival.¹¹⁹

The novelty of Ms. Babbitt’s claim is that it involves artwork created under the duress of Nazis, not property confiscated by the Nazis.¹²⁰ This dilemma is between something that is clearly a significant historical documentation of events and an artist’s claim over her personal creative work.¹²¹ As an imprisoned artist who was forced to create the portraits under extreme duress, Ms. Babbitt states:

Every single thing . . . was taken away from us [E]verything we owned, ever. My dog, our furniture, our clothes. And now, finally, something is found that I created, that belongs to me. And they refuse to give it to me. This is why I feel the same helplessness as I did then.¹²²

Ms. Babbitt’s sentiment about her personal artwork made under duress is analogous to the Japanese American internees’ claims to the artifacts they created while imprisoned: While internees were not directly forced to create their works as she was, these too were artifacts created under oppressive conditions and often out of necessity.¹²³ By comparison, Ms. Babbitt’s claim to her artwork was litigated on an international forum, and the Auschwitz National Museum had already attained the artwork years prior in which it had a vested interest. Her claim that the art she created was personal property mirrors the claims of the WWII internees cited in Heart Mountain’s lawsuit. The critical difference, however, is that Ms. Babbitt’s artwork paintings were directly ordered during the Nazi occupation, allowing the Auschwitz National Museum to define them as its national cultural property, and not personal property. Just as there is no question about the provenance of Ms. Babbitt’s claim to her paintings, there is little question as to Heart Mountain’s claim to the WWII internment art in its unfiled complaint.

IV. AN IMPASSE, THE PIVOT, AND REVIVED NEGOTIATIONS

Even with the threat of a lawsuit and an offer to purchase the artifacts for almost double the valuation, an impasse occurred between Heart Mountain and Rago Arts on behalf of the Consignor. The Consignor refused to sell to Heart Mountain, or to anyone at that point, given the social media

117. *Id.*

118. *Id.* (citing a reference to an e-mail statement by Teresa Swiebocka, Deputy Director, Auschwitz National Museum).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. See Interview with Delphine Hirasuna, *supra* note 7.

war propaganda, potential lawsuit, and other threats launched against him.¹²⁴ Because the artifacts were such an integral part of history, the Japanese American National Museum (JANM), led by Executive Director Greg Kimura, believed that something needed to be done to salvage the negotiations.¹²⁵ JANM was a new face in the negotiations and would eventually pivot the volatile situation toward a more amenable angle.¹²⁶ If it acted effectively and swiftly, JANM believed it could save Rago Arts, the Consignor, and Heart Mountain from further tension and harm to their reputations.¹²⁷ More importantly, JANM believed it could save this family of artifacts.¹²⁸ Something had to be done quickly; otherwise Rago Arts and the Consignor could sell the collection piecemeal to different people and entities, thereby destroying the collective story of the artifacts.¹²⁹

JANM knew it had to try a different approach to get Rago Arts and the Consignor to respond.¹³⁰ Two JANM trustee celebrity spokespersons who were directly impacted by the internment offered credible authority: former United States Secretary of Transportation Norm Mineta¹³¹ and iconic Star Trek actor George Takei.¹³² Former Secretary Mineta opened up the communication by first contacting the Consignor and Rago Arts.¹³³ Following this, Takei, who was formerly imprisoned at the Rohwer and Tule Lake camps, provided a different approach. His was a softer and more emotional appeal to the Consignor and Rago Arts, which, according to negotiation scholars, is an effective strategy in pivoting a negotiation in one's favor.¹³⁴ After speaking with Mr. Takei and then to Dr. Kimura, the Consignor became open to negotiating the sale of the artifacts with JANM.¹³⁵

After a series of telephone calls and e-mails, the Consignor and JANM agreed that any final negotiations would be confidential, with the terms subject to a nondisclosure agreement (NDA).¹³⁶ An NDA would protect the confidentiality of the agreement between the parties from further non-authorized disclosure to anyone not privy to their internal negotiations.¹³⁷

124. See Telephone Interview with Greg Kimura, *supra* note 39.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Telephone Interview with Greg Kimura, *supra* note 39; see Norman Mineta, *An Update on the Eaton Collection from JANM Board Chair Norman Y. Mineta*, FIRST & CENTRAL: THE JANM BLOG (June 23, 2015), <http://blog.janm.org/index.php/2015/06/23/an-update-on-the-eaton-collection-from-janm-board-chair-norman-y-mineta> [<https://perma.cc/H8YE-K9GE>].

132. Telephone Interview with Greg Kimura, *supra* note 39.

133. *Id.*

134. See ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON 5–6 (2006); RICHARD G. SHELL, BARGAINING FOR ADVANTAGE, NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 188–90 (2006).

135. See Telephone Interview with Greg Kimura, *supra* note 39.

136. *Id.*

137. JAMES POOLEY, TRADE SECRETS (ALM) § 8.02[1] (2017).

Generally, NDAs are a "legal contract between at least two parties that defines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to or by third parties."¹³⁸ The parties agreed not to disclose information covered by the agreement.¹³⁹ In this context, the NDA was a perfect negotiation vehicle: the Consignor and Rago Arts could retain secrecy in their financial dealings without fear of further public reprisal, and JANM would be shielded from public scrutiny and inquiry about the process. JANM has honored the NDA and has not disclosed any terms, only commenting that the agreement was amicable and that JANM acquired the artifacts.¹⁴⁰ When asked, JANM would not disclose how much, if anything, was paid for the artifacts. Rather, JANM suggested that it is an assumption that the artifacts were paid for when they were acquired.¹⁴¹

Now that JANM has successfully negotiated for and attained the artifacts, much work remains in the subsequent cataloguing, stabilizing, and restoring of the many items that have been neglected and improperly stored over the past several decades, especially the paper artifacts that are in fragile condition.¹⁴² Expert care and resources are needed to curate the artifacts and the original provenance of each item has yet to be discerned, which will present more challenges for JANM and for Japanese American stakeholders moving forward.¹⁴³

Nonetheless, the biggest battle has been won. The WWII internment artifacts are permanently secured altogether and held in JANM in Los Angeles, California, for all the world to witness.

WWII internment artifacts and other significant Asian cultural heritage artwork may soon have another home in Washington, D.C.'s Smithsonian Museum.¹⁴⁴ Currently pending through Congress is House of Representatives Bill 4307, also known as the "National Museum of Asian Pacific American History and Culture Act."¹⁴⁵ Introduced on December 18, 2015 by New York Democratic Representative Grace Meng, the Act is intended to provide the first permanent national platform for Asian American art to create a forum in the Smithsonian Museum for the public to learn from and enjoy.¹⁴⁶ On January 4, 2016, the House Natural Resources Committee

138. *Id.*

139. *Id.*

140. *See* Telephone Interview with Greg Kimura, *supra* note 39.

141. *Id.*

142. *Id.*

143. *Id.*

144. For a prior Renwick Gallery showing of artifacts, see C-SPAN, *Preview: Art in Japanese-American Internment Camps*, YOUTUBE (Oct. 25, 2010), <https://www.youtube.com/watch?v=y5JUdRDtUQ8> [<https://perma.cc/5XWZ-296J>].

145. National Museum of Asian Pacific American History and Culture Act, H.R. 4307, 114th Congress (2015), <https://www.congress.gov/bill/114th-congress/house-bill/4307/all-actions?overview=closed#tabs> [<https://perma.cc/D7FB-UWP6>].

146. *Id.*

referred this Act to the Subcommittee on Federal Lands for consideration.¹⁴⁷ The implication of this Act is that Asian American cultural property and heritage would finally be recognized in a national light by the U.S. government and greater art community.

CONCLUSION

Most artwork can be valued and quantified at a set price. Once appraised, it can be traded and sold in the lucrative art world as a commodity. The art of the WWII Japanese American internees, however, was never meant to be sold as a commodity or classified as a subset of historical property. Given the original intent of the artifacts' donors and the Eaton estate as trustee, these artifacts should never have been put up for auction. Through the tireless and collective efforts of many, these artifacts will be conserved at the JANM in Los Angeles to educate the public and serve as a reminder of the enduring sentiment symbolized in these works of art. With continuing community momentum, perhaps there will be an enactment of the National Museum of Asian Pacific American History and Culture Act. The passage of this Act will provide a permanent forum not just for Japanese American internment artwork but also for all Asian art as cultural heritage in the national Smithsonian Museum.

In closing, words from former internee, iconic American actor, and JANM trustee, George Takei, poignantly remind us of the lessons learned from that time in American history up until the present:

It was an egregious violation of the American Constitution. We were innocent American citizens and we were imprisoned simply because we happened to look like the people who bombed Pearl Harbor. It shows us just how fragile our Constitution is. Now these items can be shared with a large audience.¹⁴⁸

147. *Id.*

148. See Deborah Vankin, *George Takei Helps L.A. Museum Acquire Internment Camp Artifacts*, L.A. TIMES (May 2, 2015, 7:30 PM), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-japanese-american-national-museum-george-takei-internment-camp-artifacts-20150501-story.html> [<https://perma.cc/8YXZ-CKUB>].