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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

**ONE OIL PAINTING
ENTITLED "FEMME EN
BLANC" BY PABLO PICASSO,**

Defendant.

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**THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).**

CV 04-8333 FMC (AJWx)

**ORDER DENYING CLAIMANT'S
MOTION TO DISMISS
COMPLAINT FOR FORFEITURE
AND ORDER DENYING
CLAIMANT'S MOTION TO
TRANSFER**

**ORDER DENYING MOTION TO
DISMISS CROSS-COMPLAINT
OF THOMAS BENNIGSON**

FOR PUBLICATION

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This matter is before the Court on Claimant Marilyn Alsdorf's ("Alsdorf") Motion to Dismiss Complaint for Forfeiture or Alternatively to Transfer Case (docket no. 24), filed December 13, 2004, and Alsdorf's Motion to Dismiss Cross-Complaint (docket no. 31), filed January 20, 2005. The Court has read and considered the moving, opposition, reply, and sur-reply documents submitted in connection with this motion. Following oral argument on March 28, 2005, the Court took this matter under submission. For the reasons and in the manner set forth below, the Court hereby **DENIES** the motion to dismiss and to transfer. The Court **DENIES** the motion to dismiss the cross-complaint.

I. Background

This civil forfeiture action concerns an oil painting entitled “Femme en Blanc,” which was allegedly stolen from its owner by the Nazis during World War II. The following summary is based on the Government’s allegations.

The painting was created by Pablo Picasso in 1922. Complaint for Forfeiture (“Compl.”), at ¶ 4. In 1926 or 1927, Carlotta Landsberg or her husband bought the painting. *Id.* at ¶ 9. In 1938 or 1939, Mrs. Landsberg sent the painting to Paris art dealer Justin K. Thannhauser for safekeeping. *Id.* at ¶ 10. In August 1939, Thannhauser fled Paris to escape Nazi persecution. *Id.* at ¶ 11. In 1940, the contents of Thannhauser’s home, including the painting, were looted by the Nazis. *Id.*

On June 12, 1958, Thannhauser wrote to Mrs. Landsberg that, “[u]pon the occupation of Paris in 1940, when we were no longer in Paris and the house was closed, the entire contents of the four-story building—and with it your painting—were stolen.” *Id.* at ¶ 12. Thannhauser wrote that, “during the four day long violent German national socialist plundering everything was taken out of the four-story house during the night and in trucks” by the Nazis. *Id.* After the war, Mrs. Landsberg searched for the painting, but was unable to locate it.

In 1947, the painting was included, with a small photo, in an inventory of looted paintings compiled by the Allied Command. *Id.* at ¶ 15. In 1975, a French art dealer named Maurice Covo asked New York art dealer Stephen Hahn whether Hahn would be interested in buying the painting, which Covo stated he might be able to acquire. *Id.* at ¶ 16. After Covo acquired the painting on consignment, in June 1975, Hahn traveled to Paris, where he

1 purchased it. *Id.* at ¶ 17. In September 1975, Hahn sold the painting to
2 claimant Alsdorf. *Id.* at ¶¶ 18-19. Hahn later stated that Covo had not told
3 him that the painting was a product of Nazi looting. *Id.* at ¶ 18.

4 In 2001, Alsdorf sent the painting to David Tunkl of David Tunkl
5 Fine Art in Los Angeles, California, for an exhibition that took place
6 between September 20, 2001 and October 28, 2001. *Id.* at ¶ 20. After the
7 exhibition ended, Tunkl returned the painting to Alsdorf, who was and is
8 living in Chicago. *Id.*

9 In January 2002, Tunkl suggested to Alsdorf that he could sell the
10 painting for her. *Id.* at ¶ 21. The painting was shipped from Chicago to
11 Geneva Switzerland, at Tunkl's request. *Id.* In Geneva, the painting was
12 viewed by Paris art dealer Didier Imbert, who was acting as an advisor to an
13 unidentified European collector. As part of his due diligence, Imbert
14 contacted the Art Loss Register ("ALR") in London, England. *Id.* at 22.

15 Sarah Jackson, the Historic Claims Director of the ALR, investigated
16 the provenance of the painting in Swiss, German, and French archives and
17 advised Imbert that the painting had been looted by the Nazis during the
18 war. *Id.* at ¶¶ 25-25.

19 On April 17, 2002, Imbert wrote to Adam Cirker of Cirker's Fine Art
20 in New York, advising him of the ALR's finding and asking Cirker to notify
21 the owner of the finding. *Id.* at ¶ 27. On April 25, 2002, the ARL advised
22 Imbert and Tunkl that the painting had been confiscated by the Nazis from
23 its Jewish owner during World War II. *Id.* at ¶ 28.

24 On May 2, 2002, Imbert told Alsdorf that the ALR had advised him
25 that the painting had been confiscated by the Nazis from its Jewish owner
26 during World War II. *Id.* at ¶ 30.

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1 In June 2002, Jackson located Mrs. Landsberg's sole heir in Berkeley,
2 California, claimant Thomas C. Bennigson. *Id.* at ¶ 33.

3 On June 7, 2002, Jackson advised Alsdorf's attorney, Stephen Bernard,
4 that the painting had been confiscated by the Nazis during World War II
5 and that the ALR had "extensive documentation" from three countries
6 showing the confiscation of the painting by the Nazis. *Id.* at 34.

7 In July 2002, Jackson flew to Los Angeles and told Bernard and Tunkl
8 at a lunch meeting that the painting had been looted by the Nazis from
9 Thannhauser's home, that Thannhauser had been holding it for its true
10 owner, and that the owner's grandson was her sole heir. *Id.* at ¶ 35. Jackson
11 also presented Bernard and Tunkl with many documents uncovered from
12 archives showing that the painting had been "looted" by the Nazis. *Id.*
13 These documents were later sent to Alsdorf in Chicago. *Id.* at ¶ 36.

14 On December 13, 2002, Alsdorf instructed Bernard and Tunkl to
15 transport the painting from Los Angeles back to Chicago. *Id.* That same
16 day, Alsdorf also telephoned Tunkl's assistant, Michele Burt, and instructed
17 her to send the painting to her in Chicago. *Id.* at ¶ 44.

18 On December 19, 2002, Bennigson filed suit against Alsdorf in
19 California Superior Court, Los Angeles County, and notified counsel for
20 Alsdorf. *Id.* at ¶ 48. On December 20, 2002, the painting was transported to
21 Chicago. *Id.* at ¶ 49. On June 16, 2003, the Superior Court found that it
22 lacked personal jurisdiction over Alsdorf and granted her Motion to Quash
23 the Summons. The California Court of Appeal affirmed the Superior Court's
24 Order on April 15, 2004. The California Supreme Court accepted review of
25 this decision on July 28, 2004, and the parties are currently awaiting a
26 decision.

1 On September 10, 2004, Alsdorf filed a federal quiet title action
2 pursuant to 28 U.S.C. § 1655 against Bennigson in Chicago (“Illinois
3 action”). *Id.* at ¶ 50. No process has been served on the painting in that
4 action. The docket sheet for that action reveals that the complaint was filed,
5 and a stay was entered pending the decision of the California Supreme Court.
6 No other action has been taken.

7 On October 6, 2004, the government filed this action for civil forfeiture
8 pursuant to 18 U.S.C. §§ 981(a)(1)(C), 2314, and 2315, alleging that Alsdorf
9 transported property she knew was stolen in interstate commerce. On
10 October 21, 2004, the government served process on the painting. On
11 November 8, 15, and 22, 2004, notice of the action was published. On
12 January 3, 2005, the government and Alsdorf entered into a stipulated order,
13 allowing her to retain physical possession of the painting.

14 On December 13, 2004, Alsdorf brought the instant motion to dismiss
15 for lack of subject matter jurisdiction, or in the alternative, to transfer to the
16 Northern District of Illinois. Alsdorf argues that this court lacks jurisdiction
17 and that the Northern District of Illinois is a preferable venue. Also on
18 December 13, 2004, Bennigson brought a cross-claim against Alsdorf for (1)
19 replevin; (2) relief under Cal. Penal Code § 496; and (3) declaratory relief and
20 constructive trust. On January 20, 2005, Alsdorf moved to dismiss the cross-
21 claim for lack of personal jurisdiction.

22 II. Motion to Dismiss Complaint for Forfeiture

23 Federal civil forfeiture actions are actions in rem. *United States v. One*
24 *1985 Cadillac Seville*, 866 F.2d 1142 (9th Cir. 1989). Federal quiet title
25 actions, which do not “determine interests in specific property as against the
26 whole world,” but are brought against a defendant personally, are quasi in
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1 rem actions; “the [parties’] interest[s] in the property . . . serve[] as the basis
2 of the jurisdiction.” See *State Engineer v. South Fork Bank of the Te-Moak Tribe*
3 *of Western Shoshone Indians*, 339 F.3d 804, 811 (9th Cir. 2003). The doctrine
4 of prior exclusive jurisdiction applies to both in rem and quasi in rem
5 actions. *Id.* The traditional distinction between in rem and quasi in rem
6 jurisdiction has largely disappeared. See Restatement (Second) of
7 Judgments, § 6, comment a. (1982).

8 The doctrine of prior exclusive jurisdiction prohibits a court from
9 “assuming in rem jurisdiction over a res that is already under the in rem
10 jurisdiction of another court.” *Cadillac Seville*, 866 F.2d at 1145 (citing *Penn*
11 *Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195 (1935)). The purpose of
12 the doctrine is to promote comity between courts, *Penn General*, 294 U.S. at
13 195, and to avoid the “logical and practical difficulty of two courts
14 simultaneously vying for possession or control of the same property.” *United*
15 *States v. \$79,123.49*, 830 F.2d 94, 97 (7th Cir. 1987).

16 “Where the assertion of jurisdiction by the two courts is nearly
17 simultaneous, it becomes important, as in the present case, to determine the
18 precise time when the jurisdiction attaches.” *Penn General*, 294 U.S. at 196.
19 The *sine qua non* of in rem jurisdiction is seizure, control, or custody of the
20 res. See, e.g., *Penn General*, 294 U.S. at 196 (holding that jurisdiction attaches
21 when a complaint is filed and “process subsequently issues in due course”);
22 *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964) (stating that court with
23 custody is the court with in rem jurisdiction); *Alyeska Pipeline Service Co. v.*
24 *Vessel Bay Ridge*, 703 F.2d 381, 384 (9th Cir. 1983) (“Jurisdiction over the *res*
25 is obtained by arrest under process of the court. In absence of an arrest, no
26 decree in rem can be rendered against the *res.*”); *Scarabin v. DEA*, 966 F.2d
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1 989, 993 (5th Cir. 1992) (stating that jurisdiction attached at moment of
2 seizure and that a court must have physical control over property);
3 \$79,123.49, 830 F.2d at 96-97 (stating that an “injurious conflict of
4 jurisdiction” could occur if “final process of the one could be levied on
5 property which has been taken by the process of the other”) (quoting *Hagan*
6 *v. Lucas*, 35 U.S. (10 Pet.) 400, 403 (1836)); *United States v. Four Parcels of*
7 *Real Property*, 941 F.2d 1428, 1435 (11th Cir. 1991) (“In rem jurisdiction
8 derives entirely from the court’s control over the defendant res.”); *United*
9 *States v. \$2,542*, 754 F. Supp. 378, 380 (D. Ver. 1990) (stating that in in rem
10 actions “the court or its officer must have possession or control of the subject
11 property in order to grant the relief sought”). The doctrine of prior exclusive
12 jurisdiction applies when a state and federal court are both attempting to
13 assert jurisdiction, or when two federal courts are attempting to assert
14 jurisdiction. See *United States v. Howell*, 354 F.3d 693, 695 (7th Cir. 2004).

15 Invoking the doctrine of prior exclusive jurisdiction, Alsdorf argues
16 that because she filed the Illinois action one month before the Government
17 brought its forfeiture action, the Illinois court obtained jurisdiction first, to
18 the exclusion of this Court’s exercise of jurisdiction. The difficulty with
19 Alsdorf’s argument is that the Illinois court has yet to assert jurisdiction over
20 the res. No process has been served on the painting in the Illinois action;
21 the painting is not in the custody, control, or possession of the Illinois court.
22 Nearly a month lapsed between the filing of the Illinois action and the
23 current action, and another three weeks lapsed between the filing of the
24 current action and the seizure of the painting. No stay was in place in the
25 Illinois action during that time, and yet no efforts were made to seize the
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1 painting or deposit the painting with the court.¹ On the other hand, this
2 Court has asserted such jurisdiction. The painting was seized by U.S.
3 Marshalls pursuant to a court order on October 21, 2004. Therefore, this
4 Court was the first to obtain in rem jurisdiction over the painting.

5 Alsdorf's argument that the mere filing of a complaint establishes in
6 rem jurisdiction is unavailing. In *Penn General*, the Court did state that
7 jurisdiction attaches "upon the filing of the bill of complaint," but Alsdorf
8 takes this statement out of context. In *Penn General*, the Court held that
9 jurisdiction attaches upon the filing of the complaint "at least where process
10 subsequently issues in due course." *Penn General*, 294 F.2d at 196. The
11 Court reasoned that the court "whose jurisdiction and process are first
12 invoked by the filing of the bill is treated as in constructive possession." *Id.*
13 This way, confusion and uncertainty could be avoided as to what constitutes
14 actual possession and priority of service of process in the two suits. *Id.* If
15 process had been served on the painting in the Illinois action, the Illinois
16 court would clearly have jurisdiction.² However, *Penn General* did not imply
17 that service of process was unnecessary after a court obtained constructive
18 possession or that filing a complaint alone was sufficient.

19 Similarly, in *Blackhawk Heating & Plumbing Co. Inc.*, 530 F.2d 154 (7th
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22 ¹Nor has the Illinois court found it has such jurisdiction. In its opinion staying the
23 Illinois action (issued after process was served on the painting in this case), the court
24 assumed, without deciding, that it had in rem jurisdiction. *See* Claimant's Motion to
Dismiss, Ex. 5 at 13.

25 ²Alsdorf argues that process did issue in the Illinois action because she served
26 Bennigson with process. While this may or may not be sufficient to establish personal
27 jurisdiction over Bennigson, it does not establish jurisdiction over the painting. *Penn*
Central clearly requires process to be served on the res, not on an individual. *Penn Central*,
28 294 U.S. at 196.

1 Cir. 1976), although the court stated that “[i]n rem jurisdiction attached
2 when the . . . proceedings were commenced,” the court also concluded that
3 the state court had possession of the res. *Blackhawk* does not imply that
4 merely instituting a legal proceeding confers in rem jurisdiction. Alsdorf has
5 not cited any authority, and the Court is aware of none, in which in rem
6 jurisdiction attached to the exclusion of other courts upon the filing of a
7 complaint alone. In fact, if filing a complaint alone were sufficient to grant a
8 court control over the res, the procedures for seizing a res and the courts’
9 consistent insistence that custody and control are necessary would be
10 entirely superfluous. *See, e.g.*, Rule C(3) of the Supplemental Rules of
11 Certain Admiralty and Maritime Claims; cases *supra* (discussing need for
12 control and custody).

13 Alsdorf argues that the general rules relating to in rem jurisdiction do
14 not apply in the 28 U.S.C. § 1655 context. Because Alsdorf brought a quiet
15 title action pursuant to this particular statute, she argues that the
16 requirements of that statute and that statute alone apply. Alsdorf argues that
17 § 1655 requires only that a “warning order” be served on the defendant and
18 upon the person in possession or charge of the property.³

19 At the outset, the text of § 1655 is not helpful in determining whether
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21 ³Alsdorf did not follow this procedure because she did not serve an order on herself
22 as the custodian of the property. She argues that it would be nonsensical to require her to
23 serve an order on herself. Granted, the statute assumes that the person in possession of the
24 property will be different from the plaintiff. Moreover, the requirement that an order be
25 served on the custodian of the property exists not to establish jurisdiction, but to give that
26 person notice of the action. *See* Wright and Miller, 14 *Federal Practice and Procedure*, § 3632
27 (3d ed. 1998)(“Compliance with the statutory obligation to *give notice* to the caretaker seems
extremely desirable . . .”)(emphasis added). Therefore, whether or not Alsdorf was required
to serve herself with an order, simply because the statute says “shall,” has no bearing on
whether this Court has jurisdiction. Even if Alsdorf had served herself, this would serve a
notice-giving function, not a jurisdictional function.

1 process must be served on the painting. The statute does not address how
2 jurisdiction is obtained over the property in question. Rather, it focuses on
3 how personal jurisdiction is obtained over an out-of-state defendant.
4 Therefore, contrary to Alsdorf's assertion, § 1655 does not set forth
5 "different, yet quite specific, procedures" for obtaining in rem jurisdiction.
6 It sets forth "different, yet quite specific procedures" for obtaining in
7 personam jurisdiction. *See Graff v. Nieberg*, 233 F.2d 860 (7th Cir. 1956)
8 (stating that "jurisdiction of the courts depends not at all on the citizenship
9 of the parties but solely upon the location of the property within the district"
10 and explaining that § 1655 pertains to personal jurisdiction); *see also* 14
11 Wright & Miller, *Federal Practice and Procedure*, § 3632 (3d ed. 1998) (stating
12 that § 1655 "establishes venue and provides an alternative to personal
13 service").

14 "Whether brought *in rem* or quasi-*in rem*, § 1655 actions bear the
15 hallmarks of a typical *in rem* action. For example, for an action under § 1655
16 to go forward, the *res* must be in the constructive possession of the court
17 (although actual possession is not necessary)." *Dluhos v. The Floating and*
18 *Abandoned Vessel, Known as "New York"*, 162 F.3d 63 (2d Cir. 1998) (citing
19 *First Charter Land Corp. v. Fitzgerald*, 643 F.2d 1011, 1014 (4th Cir. 1981)). In
20 order for the court to exercise jurisdiction over property under § 1655, the
21 property must be in dominion and control of the court. *See First Nat. Bank*
22 *of Rome v. First Nat. Bank of Jasper*, 264 F. 83, 84 (5th Cir. 1920) ("It is settled
23 that constructive service can only bring nonresidents within the jurisdiction
24 of a court where there is a *res* in the control of the court . . ."); *Watts v.*
25 *Alexander, Morrison & Co.*, 34 F.2d 66, 68 (E.D. N.Y. 1929) (same); Wright &
26 Miller, *supra*, at § 3633 ("It is essential that the property involved in the
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1 litigation be ‘in fact and substance’ within the district *and* under the
2 dominion and control of the district court asserting jurisdiction over it”) (emphasis added). Property is brought under the dominion and control of
3 the court through arrest of the property. *See Dluhos*, 162 F.3d at 69 (stating
4 that a warrant of arrest brings the res into the constructive possession of the
5 court).
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7 The authority Alsdorf cites to the contrary does not seriously
8 undermine the need for an arrest in this context. In *First Charter Land Corp.*,
9 the court held that “actual physical possession” was unnecessary for a court
10 to hear a § 1655 action. *First Charter*, 643 F.2d at 1014. The court held that
11 not all § 1655 actions were actions in rem and declined to hold whether the
12 action before it was an action in rem. *Id.* at 1016. The court reasoned that
13 even though the property in question was in the custody of another court, it
14 could still exercise jurisdiction pursuant to § 1655. Considering the prior
15 exclusive jurisdiction rule, the court held that its exercise of jurisdiction
16 would not be inconsistent with that of the court in custody of the res. *Id.* at
17 1015. It did not address whether, when proceeding on an in rem theory
18 under § 1655, the property must otherwise be in the custody of the court,
19 even if only constructively. The court did not consider whether, had its
20 jurisdiction been in conflict with the court holding custody, arrest of the res
21 would be necessary to adjudicate the rights in the property. Nor did it
22 address whether arrest of the res is necessary to render the court’s
23 jurisdiction over the res exclusive.

24 Neither does *Huntress v. Estate of Huntress*, 235 F.2d 205, 208 (7th Cir.
25 1956) except § 1655 actions from the general rules of in rem jurisdiction.
26 *Huntress* simply addressed whether it was necessary to obtain personal
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1 jurisdiction over a defendant to proceed under § 1655; it held that because
2 actions brought under § 1655 were actions in rem, jurisdiction depended on
3 the location of the property, not on the ability to secure personal jurisdiction.
4 *Id.* It did not address whether attachment of the res was necessary.

5 Finally, *Overby v. Gordon*, 177 U.S. 214, 221 (1900) and *Roller v. Holly*,
6 176 U.S. 398 (1900) demonstrate only that preliminary seizure is not
7 necessary when a lien is in place on real property. In other words, a lien is
8 an alternative manner by which a court may exercise dominion or control
9 over property. *See Roller*, 176 U.S. at 406 (stating that if a lien exists on real
10 property, the court may proceed as though the property had been seized by
11 attachment or execution); *Overby*, 177 U.S. at 221 (citing the *Roller* exception
12 as an alternative to “seizure or its equivalent”). *Overby* and *Roller* do not
13 hold that custody or control over property is ever dispensable in an in rem
14 action. *Overby* specifically noted that when an action is purely in rem, “a
15 preliminary seizure of property is necessary to the power of the court to
16 adjudicate at all.” When an action is “in form in personam,” jurisdiction
17 may proceed “as one in rem against the property of which preliminary
18 seizure or its equivalent has been made” or a preliminary seizure is
19 unnecessary if the suit involves a lien affecting real property. *Overby*, 177
20 U.S. at 221. *Overby* and *Roller* firmly reinforce the need for the court to
21 obtain custody and control of a res in order to exercise in rem jurisdiction.

22 Contrary to Alsdorf’s assertion, the requirement of an arrest does not
23 render Fed. R. Civ. P. 4(n)(1) superfluous. Rule 4(n)(1) states: “If a statute of
24 the United States so provides, the court may assert jurisdiction over
25 property. Notice to claimants of the property shall then be sent in the
26 manner provided by the statute or by service of a summons under this rule.”
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1 The comment to Rule 4(n) states that “[t]his subdivision provides for in rem
2 and quasi in rem jurisdiction. Paragraph (1) incorporated any requirements
3 of 28 U.S.C. § 1655 or similar provisions bearing on seizures or liens.” Rule
4 4(n)(1) assumes that jurisdiction over property and jurisdiction over, or
5 notice to, a person are different concepts. Rule 4(n)(1) states that
6 jurisdiction may be exercised over property and *then* notice should be sent in
7 accordance with the procedures set forth in, for example, § 1655. As § 1655
8 pertains to procedures for personal service, it is not helpful in determining
9 the appropriate procedures for acquiring in rem jurisdiction. Rule 4(n)(1)
10 likewise does not address the procedures for obtaining in rem jurisdiction.

11 In order for the Illinois court to have obtained prior exclusive
12 jurisdiction, the painting must have been in the custody or control of that
13 court. Such a conclusion is consistent with the general and long-standing
14 rules regarding in rem jurisdiction. Actions under § 1655 are no different
15 from any other in rem proceedings. Therefore, Alsdorf has failed to establish
16 that the Illinois court obtained jurisdiction to the exclusion of this Court.

17 Alsdorf argues that the Court’s seizure of the painting does not vest it
18 with jurisdiction because “[p]ossession obtained through an invalid seizure
19 neither strips the first court of jurisdiction nor vests it in the second.”
20 *\$79,123.49*, 830 F.2d at 98. Evidently, the only basis for Alsdorf’s claim that
21 the seizure was invalid is the contention that the Illinois court already had
22 jurisdiction. Because the Illinois court never obtained jurisdiction over the
23 painting, the seizure was not invalid. The seizure, therefore, did vest
24 jurisdiction in this Court.

25 Because this Court obtained jurisdiction upon seizure of the painting,
26 a process which was not and has not been attempted in the Illinois action,
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1 Alsdorf's motion is denied.

2 III. Motion to Transfer

3 Alsdorf argues in the alternative that this action should be transferred
4 to the Northern District of Illinois. In support of this argument, she relies
5 on the first-to-file rule and on 28 U.S.C. § 1404(a), which allows for venue
6 transfer for the convenience of the parties and witnesses and in the interests
7 of justice.

8 A. First-to-file Rule

9 The first-to-file rule allows a "district court to transfer, stay, or dismiss
10 an action when a similar complaint has already been filed in another federal
11 court." *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 623 (9th Cir.
12 1991). It may be invoked when the similar complaint involves the same
13 parties and issues. *Id.* at 625. The purpose of the rule is to "avoid placing an
14 unnecessary burden on the federal judiciary, and to avoid the embarrassment
15 of conflicting judgments." *Church of Scientology v. United States Dep't of the*
16 *Army*, 611 F.2d 738, 750 (9th Cir. 1980). Therefore, a court should consider
17 whether efficiency is served by a decision to invoke the first-to-file rule. *Id.*;
18 *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982). On
19 the other hand, when there is evidence of bad faith, or anticipatory suit and
20 forum shopping, a court may refuse to invoke the first-to-file rule. *Alltrade*,
21 946 F.2d at 628.

22 There is little to support the use of the first-to-file rule here. Although
23 the Illinois action was filed first, any reason to transfer or stay ends there.
24 The issues are not precisely the same. Although both actions are meant to
25 determine the rightful owner of the painting, the instant action also requires
26 a determination as to whether the painting is subject to civil forfeiture. The
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1 parties are not the same. The Illinois action involves only Alsdorf and
2 Bennigson. The Government is an additional party to this action.
3 Moreover, efficiency is not served through transfer or a stay. Because the
4 Illinois court does not have jurisdiction over the painting (this court's
5 jurisdiction is exclusive until it relinquishes it),⁴ there is no risk of
6 conflicting judgments or duplicative efforts. The Court finds no basis for the
7 application of the first-to-file rule.

8 **B. Section 1404(a)**

9 Section 1404(a) of Title 28 of the United States Code provides that
10 “[f]or the convenience of parties and witnesses, in the interest of justice, a
11 district court may transfer any civil action to any other district or division
12 where it might have been brought.” In deciding whether to transfer venue, a
13 court balances the deference given to the plaintiff’s choice of forum with the
14 burden of litigating in that forum. *Gherebi v. Bush*, 352 F.3d 1278, 1302 (9th
15 Cir. 2003), *vacated on other grounds*, 124 S. Ct. 2932 (2004). The defendant
16 must make a strong showing of inconvenience before the plaintiff’s choice is
17 upset. *Id.* Accordingly, “transfer should not be granted if the effect is simply
18 to shift the inconvenience to the party resisting the transfer.” *Id.* at 1303
19 (quoting *Van Dusen v. Barrack*, 376 U.S. 612 (1964)).

20 Alsdorf argues that this action should be transferred to the Northern
21 District of Illinois, where she resides. The Northern District of Illinois is a
22 district where this suit might have been brought. *See* 28 U.S.C. §
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25 ⁴The Government argues that the Illinois court can continue to exercise jurisdiction
26 “to the extent no actual conflict arises between the two actions.” However, it is not clear
27 how a conflict could be avoided. Both courts are to determine the rights to the painting
28 and as Alsdorf argues, “[t]he risk of contradictory rulings is real and certainly of great
concern.” Alsdorf’s Reply to Opposition to Motion to Dismiss, at 11.

1 1355(b)(1)(A), (B) (allowing in rem civil forfeiture actions to be brought in any
2 venue where acts or omissions giving rise to the forfeiture occurred or in any
3 venue allowed for by 28 U.S.C. § 1395).

4 The present forum serves the interests of two of the parties—the
5 Government and Bennigson. Although Bennigson does not reside in this
6 district, he does reside in the state of California. His counsel is located in
7 this district, and counsel for the Government is located in this district. *See*
8 *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 89 F.R.D. 497,
9 501 (C.D. Cal. 1981) (considering whether the parties must bear the expense
10 of counsel traveling to a distant forum). Transfer to Illinois serves only the
11 interests of Alsdorf. Alsdorf has not made a showing that this forum is
12 particularly inconvenient for her. Although she may or may not have to
13 travel to this forum, she has counsel here. Bennigson does not have counsel
14 in Illinois. Therefore, transfer to Illinois would be more costly for
15 Bennigson than maintaining the action here would be for Alsdorf.

16 The convenience of witnesses is the most important factor, however.
17 *See id.* at 501. “In assessing the effect of a transfer on the convenience of
18 witnesses, courts consider the effect of a transfer on the availability of certain
19 witnesses, and their live testimony, at trial.” *Id.* Alsdorf is the only witness
20 located in Illinois. She has not made a showing that she is unable to
21 travel. Other witnesses may include Jackson, Bernard, Imbert, Didier,
22 Tunkl, and Bennigson. Not all of these witnesses are in this district; neither
23 do they reside in the Northern District of Illinois. Several witnesses,
24 including Hahn, Bernard, Tunkl, and Burt do reside in this district. If the
25 case were transferred, they could not be compelled to testify. *See id.* at 501
26 (“Thus, transfer may be denied when witnesses either live in the forum
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1 district or are within the 100-mile reach of the subpoena power”). Alsdorf
2 has not made a strong showing that transfer is more convenient for the
3 witnesses.

4 To establish that transfer is in the interest of justice, Alsdorf argues
5 that the action in Illinois, as the first filed, will address the issues of this
6 action, and that the Court should act so as to avoid multiple actions. *See Lee*
7 *v. Lockheed Martin Corp.*, No. C 03-1533 SI, 2003 U.S. Dist. LEXIS 16301
8 (N.D. Cal. Sept. 15, 2003) (citing *A.J. Industries, Inc. v. United States Dist. Ct.*,
9 503 F.2d 384 (9th Cir. 1974)). The Court has already determined that it has
10 exclusive jurisdiction over the painting that is the subject of this action and
11 the action in Illinois. Therefore, the court in Illinois lacks jurisdiction to
12 proceed. There will not be duplicative litigation if the Court declines to
13 transfer venue.

14 Alsdorf argues that venue is not proper in this district. Section
15 1355(b)(1)(A) of Title 28 of the United States Code provides that “[a]
16 forfeiture action or proceeding may be brought in the district court for the
17 district in which any of the acts or omissions giving rise to the forfeiture
18 occurred.” Section 1355(d) states that “[a]ny court with jurisdiction over a
19 forfeiture action pursuant to subsection (b) may issue and cause to be served
20 in another district such process as may be required to bring before the court
21 the property that is the subject of the forfeiture action.” Because the
22 painting was transported from this district to Illinois, and this transportation
23 in interstate commerce is the basis for the forfeiture action, at least one of the
24 acts or omissions giving rise to the action occurred in this district.
25 Furthermore, the fact that the painting is currently in Illinois is irrelevant.
26 It is within the Court’s power to bring the painting before the Court. The
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1 painting remains in Illinois because the parties so stipulated, with the
2 understanding that Alsdorf's possession of the painting would not serve as
3 the basis for a challenge of jurisdiction. *See* Gov't Opposition to Claimaint's
4 Motion to Dismiss, Ex. E at ¶ 2.

5 Venue is proper in this district. The Court declines to transfer this
6 action to the Northern District of Illinois.

7 **IV. Motion to Dismiss Cross-Complaint**

8 Alsdorf argues that the Court should dismiss Bennigson's cross-claim
9 against her (1) for lack of personal jurisdiction; (2) because it is a compulsory
10 counterclaim in the Illinois action; and (3) because Bennigson is engaging in
11 claim splitting.

12 **A. Personal Jurisdiction**

13 The plaintiff bears the burden of establishing that personal
14 jurisdiction exists. *See Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d
15 1182, 1187 (9th Cir. 2001).

16 A federal court may exercise personal jurisdiction that "comport[s]
17 with the state long-arm statute, and with the constitutional requirement of
18 due process." *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th
19 Cir. 1995). California's long-arm statute extends to the limits of due process.
20 *See* Cal. Code Civ. Pro. § 410.10.

21 Due process considerations require that non-resident defendants have
22 certain minimum contacts with the forum state, so that the exercise of
23 jurisdiction does not offend traditional notions of fair play and substantial
24 justice. *See International Shoe, Co. v. State of Washington Office of*
25 *Unemployment*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

26 The Court may exercise specific jurisdiction over a defendant if the
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1 controversy is related to or “arises out of” a defendant’s contacts with the
2 forum state. *See Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed.
3 2d 683 (1977). The Ninth Circuit has established a three-part test to
4 determine whether courts may exercise specific personal jurisdiction:
5 purposeful availment, relatedness of claims, and reasonableness. *See Roth v.*
6 *Marquez*, 942 F.2d 617 (9th Cir. 1991). The requirement of purposeful
7 availment “ensures that a defendant will not be haled into a jurisdiction
8 solely as a result of random, fortuitous, or attenuated contacts or of the
9 unilateral activity of another party or third person.” *McGlinchy v. Shell*
10 *Chemical Co.*, 845 F.2d 802, 816 n.9 (9th Cir. 1988). Once the first two parts
11 are met, the court’s exercise of jurisdiction is presumptively reasonable, and
12 defendants bear the burden of establishing a compelling case that the
13 exercise of jurisdiction would be unreasonable. *Id.* The reasonableness part
14 is resolved employing a seven-part balancing test: 1) extent of purposeful
15 interjection; 2) burden on the defendant; 3) extent of conflict with the
16 sovereignty of the foreign state; 4) forum state’s interest in adjudication; 5)
17 most efficient judicial resolution; 6) convenience and effectiveness of relief
18 for plaintiff; and 7) availability of an alternative forum. *Id.*

19 **1. Purposeful Availment**

20 Bennigson makes the following allegations with regard to Alsdorf’s
21 forum-related activities: (1) Alsdorf sent the painting to Los Angeles for the
22 purposes of exhibition and sale for a period of eight months; (2) she withheld
23 the painting from Bennigson in this district after learning of his claim and
24 receiving documents confirming that the painting had been stolen; (3) she
25 conspired to remove the painting from the forum with knowledge that it was
26 stolen; (4) she did in fact remove the painting from the forum, even after
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1 receiving notice of Bennigson's state court complaint and application for a
2 temporary restraining order.

3 These contacts are not "random, fortuitous, or attenuated." Alsdorf
4 ostensibly could have chosen any art dealer in any part of the country to help
5 sell her painting. However, she chose an art dealer in California. She made
6 an agreement with the dealer, a California resident, that he would negotiate
7 on her behalf in selling the painting. She authorized her painting to be
8 shipped to, displayed in, and sold in California. She held herself out as the
9 owner of the painting in California. The painting arrived in California and
10 stayed in California for eight months solely as a result of decisions made by
11 Alsdorf. None of these actions happened "fortuitously." Additionally, the
12 connection with California was not "random;" the painting remained in the
13 state for a period of eight months. The connection to California is not
14 "attenuated"—the painting was actually located in this state for the period of
15 time for which it was for sale. It was certainly foreseeable that offering to sell
16 the painting in California could give rise to a dispute over the ownership of
17 the painting in California.

18 **2. Relatedness**

19 Alsdorf's forum-related activities are related to, and gave rise to,
20 Bennigson's cross-claim. Specifically, Bennigson bases his replevin and Cal.
21 Penal Code § 496 claims on Alsdorf's retention and removal of the painting
22 from California after it came to her attention that her ownership was in
23 dispute. It does not matter whether at the time Alsdorf arranged for the
24 painting to be transported from California to Illinois, she knew that
25 Bennigson, the alleged owner of the painting, was a California resident. The
26 action of removing the painting took place in California, with directions to a
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1 California art gallery and California shippers; this action gives rise to
2 Bennigson's claim for replevin.

3 Additionally, Bennigson's claim arises directly from Alsdorf's
4 allegedly wrongful possession and claim of ownership of the painting.
5 During the eight months she held the painting out for sale in California, she
6 held herself out as the rightful owner of the painting. This claim to
7 ownership gives rise to and is related to Bennigson's replevin and Cal. Penal
8 Code § 496 claims.

9 **3. Reasonableness**

10 Alsdorf has not made a compelling case that the exercise of jurisdiction
11 is unreasonable. While her "purposeful interjection" was relatively limited,
12 the Court has concluded that it has satisfied the "minimum contacts" test.
13 The burden on Alsdorf of litigating in this forum is no greater than what any
14 litigant faces in a foreign forum. Plaintiff has identified no conflict between
15 this Court's exercise of jurisdiction and the sovereignty of the state of
16 Illinois. Illinois' interest in protecting its citizens is too broad an interest to
17 affect the outcome here: such an interest would arise in every case where
18 another court asserted jurisdiction over an Illinois resident. California,
19 however, has an expressed interest in Nazi-looted artworks. *See* Cal. Code
20 Civ. P. § 354.3 (extending the statute of limitations for filing suit against
21 galleries and museums).⁵

22 California is the best forum for efficient judicial resolution. A civil
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24 ⁵The Court recognizes that this provision may not apply to Alsdorf, who is neither a
25 museum nor a gallery. The Court relies on this provision only to illustrate California's
26 interest in adjudicating the dispute. If, as Alsdorf contends, California's policy in favor of
27 recovery of Nazi-looted artwork does not extend to Alsdorf, but actually favors her
28 retention of the painting, that does not lessen California's interest in the subject matter of
the suit.

1 forfeiture proceeding, to which Alsdorf and Bennigson are claimants, is
2 already proceeding in this Court. This Court has exclusive jurisdiction over
3 the painting, and accordingly, jurisdiction to determine the rightful owner of
4 the painting. Therefore, in terms of convenient and effective relief for the
5 plaintiff, this forum is superior. In fact, because this Court has exclusive
6 jurisdiction over the painting, no other forum is available to determine its
7 ownership. Far from the exercise of jurisdiction being unreasonable, this
8 Court's exercise of jurisdiction is the most reasonable and efficient for
9 resolution of this case.

10 Alsdorf has already appeared as a claimant in this action and submitted
11 to this Court's in rem jurisdiction. It is not unreasonable to subject her to
12 this Court's in personam jurisdiction to resolve the same issues. In *United*
13 *States v. All Right, Title and Interest in the Contents of the Following Accounts at*
14 *Morgan Guaranty Trust Co. of New York*, No. 95 CIV. 10929 HB THK, 1996
15 WL 695671 (S.D.N.Y. Dec. 5, 1996), the court considered the reasonableness
16 of allowing cross-claims, based on *in personam* jurisdiction, to be asserted
17 along with civil forfeiture claims. The court concluded that it would be
18 "unfair to subject a claimant in an in rem proceeding to in personam liability
19 without satisfying [the] fundamental prerequisites" of personal jurisdiction.
20 *Id.* at *6. However, the main source of the court's concern was that an
21 "unsuspecting claimant," appearing in court solely to adjudicate his or her
22 rights to property, would be subjected to personal jurisdiction and
23 accordingly a personal judgment. *Id.* at *7.

24 Alsdorf was clearly on notice of the claims against her when she
25 appeared in the *in rem* action. The court is not concluding that merely
26 appearing in the *in rem* action is sufficient to establish personal jurisdiction.

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1 Purposeful availment and relatedness are still necessary. *See All Right, title*
2 *and Interest*, 1996 WL 695671, at *16 (“[C]ross-claimants must properly
3 obtain personal jurisdiction in order to lodge their cross-claims”); *see also*
4 *United States v. 51 Pieces of Real Property, Roswell, New Mexico*, 17 F.3d 1306
5 (10th Cir. 1994) (holding the claimant does not consent to personal
6 jurisdiction by appearing in *in rem* action). *But see United States v. Contents of*
7 *Accounts No. 3034504504 & 14407143*, 971 F.2d 974, 980 (3d Cir. 1992)
8 (holding that a claimant submits to personal jurisdiction by appearing in an
9 *in rem* civil forfeiture action). The court does conclude, however, that the
10 exercise of personal jurisdiction is *reasonable* on this basis. The Court is
11 already adjudicating Alsdorf’s claim to the painting because she filed a claim.
12 It is not unreasonable for the Court to adjudicate all claims against her
13 arising from her possession of the painting. *Cf. Mosher v. Tate*, 182 F.2d 475
14 (9th Cir. 1950) (in admiralty law, allowing *in personam* jurisdiction in
15 addition to *in rem*, without any additional service of process, and concluding
16 that defendants had “ample notice of the proceeding and appeared and filed
17 their claim”).

18 4. California Case

19 Alsdorf urges this Court to follow the holdings of the California
20 Superior Court and Court of Appeal, which found that California lacked
21 personal jurisdiction over Alsdorf. The Court elects not to do so (nor to
22 defer ruling until the California Supreme Court issues a decision) for several
23 reasons.

24 First, Bennigson’s claim in this action is based on slightly different
25 facts than in the California state action. In this action, he bases his replevin
26 claim explicitly on Alsdorf’s removal of the painting from California, and
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1 therefore, there is a stronger relationship between Alsdorf's forum-related
2 activities and Bennigson's suit than was considered by either California
3 court.

4 Second, and most importantly, at the time the California courts
5 considered this issue, no civil forfeiture case was pending. The civil
6 forfeiture case presents a strong argument in favor of the reasonableness of
7 this Court's jurisdiction. It was not a factor in the analysis of the other two
8 courts that considered this issue. Because the argument in favor of personal
9 jurisdiction presented before this Court is different from the argument
10 presented to the California courts, the Court declines to rely on those
11 holdings.⁶

12 **B. Compulsory Counter-Claim**

13 Alsdorf argues that Bennigson's cross-claim is a compulsory
14 counterclaim in the Illinois action. Rule 13(a) of the Federal Rules of Civil
15 Procedure requires a defendant to file a counterclaim for any claim he may
16 have against the plaintiff that "arises out of the same transaction or
17 occurrence that is the subject matter" of the plaintiff's claim. A court may
18 dismiss an action that should have been brought as a compulsory
19 counterclaim in a previously-filed action. *See Graumman Sys. Support Corp.*
20 *v. Data Gen. Corp.*, 125 F.R.D 160 (N.D. Cal. 1988).

21 The Court declines to dismiss Bennigson's action because it has
22 concluded that the Northern District of Illinois lacks jurisdiction.
23 Additionally, there is no indication that the Northern District of Illinois has
24 personal jurisdiction over Bennigson such that he would be required to plead
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26 ⁶ Nor do these holdings have collateral estoppel effect. An appeal is currently
27 pending. *See Watson v. Roberts, Scott & Co., Inc.*, 466 F.2d 1348, 1349 (9th Cir. 1972).

1 a claim there, and Bennigson has moved to dismiss Alsdorf's claim on that
2 basis. It is not reasonable for the Court to conclude that Bennigson is
3 required to plead a claim in a court that has no subject matter or personal
4 jurisdiction.

5 **C. Claim Splitting**

6 Alsdorf argues that because the California case is still pending,
7 Bennigson has engaged in claim splitting by filing a nearly identical cross-
8 claim in this Court. The Court recognizes that it might appear unseemly for
9 Bennigson to obtain a stay in the Illinois action on the basis that the
10 California case is pending, and then to file a second claim here in apparent
11 violation of the stay. However, the Court also recognizes that the civil
12 forfeiture action filed by the government has been a "wild card" in the
13 dispute between Alsdorf and Bennigson that has substantially affected their
14 legal maneuvering. This Court has now concluded that because it is the only
15 Court to have custody or control over the painting, it is the only Court with
16 jurisdiction. This result was not within the control of either Alsdorf or
17 Bennigson. Accordingly, the Court accepts Bennigson's argument that by
18 filing the cross-claim, he is not attempting to split claims. Rather, he is
19 seeking to preserve his claims in the event this action goes forward.

20 Bennigson has represented to the Court that he does not intend to prosecute
21 the California action simultaneously with his cross-complaint. The Court
22 accepts his word.

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1 **V. Conclusion**

2 Alsdorf's motion to dismiss the forfeiture claim is DENIED. Her
3 motion to transfer to the Northern District of Illinois is DENIED. Her
4 motion to dismiss Bennigson's cross-claim is DENIED.

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8 March 31, 2005



9 FLORENCE-MARIE COOPER, JUDGE
10 UNITED STATES DISTRICT COURT
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