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California State Assembly Ms. Diane F. Boyer-Vine Office of Legislative Counsel State Capitol, Suite 3021 Sacramento, California 95814

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VIA ELECTRONIC MAIL

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Re: AB-1570 Collectibles: sale of autographed memorabilia (2015-2016)

Dear Ms. Boyer-Vine:

This letter is respectfully submitted by the Art Law Committee of the New York City Bar Association (the "ALC"). The New York City Bar Association is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The members of the Art Law Committee address legal issues relating to works of art, including the transfer and sale of works of art, throughout the United States and abroad. The Committee is comprised of numerous subcommittees, including a Subcommittee on Authenticity, Forgery and Fraud, for which legislation pertaining to authentication is of special interest.

The ALC recently learned of the September 2016 enactment of AB-1570, the California law pertaining to the sale of autographed memorabilia. The membership of the Art Law Committee – and the New York City Bar Association under which it is organized – is primarily comprised of attorneys who are licensed to practice in New York. As you are likely aware, New York, like California, is recognized as a "hub" for art market transactions, and its courts have developed a robust body of jurisprudence on authenticity issues. Members of the Art Law Committee represent clients who transact business in both California and New York, as the U.S. art market is an interstate market.

Accordingly, the ALC wishes to comment on AB-1570, in the hopes of informing the California State Assembly's consideration of other parties' formal requests to amend or repeal this bill.

The Purpose of AB-1570

The ALC appreciates that AB-1570 was enacted as a consumer protection measure, in light of the reportedly increased incidence of forged entertainment memorabilia in the marketplace. All indications are that the legislative intent was to broaden the scope of pre-existing Section 1739.7 of the California Civil Code, which previously applied only to *sports* memorabilia, to also include *entertainment* memorabilia. Presumably the further intent was to create a mechanism by which a consumer can a) obtain assurance that the autographed items of sports *and* entertainment memorabilia they purchase are "authentic" (e.g., signed by the individual the seller claims they are signed by), and b) be compensated for his/her damages in the event that the purchased item is determined to bear a spurious signature. The mechanism contemplated calls for the sale of said memorabilia to be accompanied by a "certificate of authenticity" that would record not only the date of the signing but also the name and address of the source of the item offered for sale. Failure to provide the requisite certificate of authenticity may lead to ten-fold punitive penalties.

Issues with Current Text

Despite its admirable legislative intent, as currently enacted, AB-1570 may be ineffective in achieving its desired goals, and also has the grave potential to harm the California market for fine art and collectibles as a whole.

Scope of Law is Overbroad

a. What is a Collectible?

As currently enacted, the category of collectible property to which AB-1570 applies is unreasonably overbroad. A "collectible" is defined as any "autographed item" being sold for five dollars or more, and "autographed" is defined as "bearing the actual signature of a personality signed by that individual's own hand." These definitions are broad enough to include, for example, a centuries-old manuscript, a limited edition promotional print being offered in a museum gift shop, or – most importantly from the perspective of the ALC – a painting signed by a long-deceased artist. To wit, a work of art executed prior to 1800 by an "Old Masters" painter, or during the "Impressionist" period from the 1870s-1880s, has in most cases been "autographed" by its artist, is sought by dedicated collectors the world over, and without doubt commands a sales price far in excess of five dollars, regardless of sales venue. Such a painting, then, meets all the criteria to be considered an item of autographed memorabilia under the current text of AB-1570, and under the law must be sold with a certificate of authenticity.

As drafted, paragraph (b)(7) is not clear as to the seller's responsibility in such a situation. For instance, *even if* the painting was not signed in the seller's presence – which will inevitably be the case for works of art created in a previous century, such as the examples provided above – the current text of AB-1570 seems to require the seller to identify the date and location of, and a witness to, the work's signature. Identification of the specific circumstances of signature would clearly be impossible for many such works of fine art, even if such information had been requested

from the researchers who compiled the artist's *catalogue raisonné*. Accordingly, the requirements established by AB-1570 for certificates of authenticity are impracticably broad as applied to fine art.

Given that AB-1570's author, former Assemblywoman Chang, has publicly commented that the law was not meant to apply to fine art, the ALC recommends that the California State Assembly carefully review proposals to carve back the scope of AB-1570 to specifically exclude that category of collectible property, by adding a definition of "collectible" that does not include fine art (including, without limitation, paintings, sculptures, photographs and limited edition multiples) to the extent signed by the artist, a representative of the artist's estate or the publisher or printer.

b. Which Sales Are Covered?

Under the statute as drafted, a "collectible" is defined in the current text as an item "sold or offered for sale in or from this state"; similarly, a "dealer" is a person "offering for sale collectibles in or from this state." As such, it is unclear whether AB-1570 applies only to items purchased from sales *physically conducted in California*, or whether it might intend to reach sales conducted in other states (including, without limitation, New York), but advertised in California or consummated with a California purchaser. Because of this lack of clarity, some booksellers have already adopted a policy whereby they will decline to ship collectibles which would fall under the ambit of AB-1570 to California purchasers. ¹ The ALC anticipates that sellers of fine art will react similarly.

In the ongoing *Sam Francis Found. v. Christie's, Inc.* litigation, the Ninth Circuit held that the California Resale Royalty Act was unconstitutional as applied to out-of-state art sales conducted by out-of-state agents.² To the extent that AB-1570 would regulate such out-of-state sales, it would surely run afoul of this precedent, making it vulnerable to a decision which would render it unenforceable in its entirety. However, even in the absence of litigation challenging the constitutionality of AB-1570's application to out-of-state sellers, the new law is already having a commercial impact on business transactions in California, depriving its consumers of the ability to purchase goods in other states due to those sellers' trepidation and uncertainty about their exposure. The ALC therefore recommends that the California State Assembly clarify the text of the law to explicitly exclude out-of-state sales, even where the purchaser is located in California or the sale is advertised therein.

See e.g., Easton Press' website indicating the company will not ship a signed edition of a book to California (available at https://www.eastonpress.com/prod/101/3255/ NEIL-deGRASSE-TYSON--Space-Chronicles--A-Signed-Edition); see also public comments from booksellers in Alabama, Arizona, Connecticut, Florida, Kansas, Maine, Maryland, Massachusetts, Nevada, New Jersey, and other states indicating their reluctance to (or newly-adopted policy of having discontinued) attending trade shows in California and/or selling to California purchasers, on a Change.org petition entitled "Repeal California Assembly Bill 1570" (available at https://www.change.org/p/california-state-house-repeal-california-assembly-bill-1570).

² 784 F.3d 1320, at 1325 (9th Cir. 2015).

Law Appears to Misunderstand the Authentication Process for Fine Art

Although it anticipates that the California State Assembly will receive separate commentary from booksellers associations and other stakeholders in the complex market for art and collectibles, the ALC is well-positioned to speak to the impact of AB-1570 on works of fine art. As was discussed in greater detail in the Art Law Committee's February 2016 report to the New York State Assembly in support of pending New York legislation designed to protect fine art authenticators,³ authentication of fine art is a complex process often relying on a combination of documentation, stylistic inquiry, and scientific verification. In the U.S., artists' foundations and authentication boards are often recognized as the authority on works by particular artists, and U.S. sales of works by European artists rely on authentication by rights-holders under the European *droit moral* system, under which the right to authenticate an artist's work can be inherited or assigned.

The fine art market is already equipped to address questions of authenticity. As an initial matter, section 2-313 of the Uniform Commercial Code applies to fine art transactions (like other sales of goods), and creates an express warranty on the part of the seller that the item being sold conforms to the seller's representation thereof (provided such representation was part of the basis of the bargain between the buyer and the seller). In both the primary and secondary fine art markets, sellers and buyers have well-developed contractual methods of sharing or shifting the risk associated with authenticity, in many cases providing an express limited warranty and establishing a procedure for determining whether that warranty has been breached, as well as the remedies for such a breach.

In order to make an informed decision about whether a work to be sold is authentic - a decision which impacts the ability or willingness to offer the work with a warranty as described above - a fine art seller typically consults with the recognized authority on works by the given artist, in order to confirm the attribution. At the time of sale, the seller may pass along with the work of art any certificate or documentation obtained from that authority. The identity of the seller of the work, however, is not typically disclosed for privacy and business protection purposes.

AB-1570's application to fine art upsets the delicate balance of this pre-existing patchwork of authentication rights and procedures, forcing the *seller* to create, execute, and provide to the buyer a "certificate of authenticity." Such a certificate would not be accepted in the fine art marketplace (either domestic or international) as binding or relevant, as the sellers who will be governed by this statute are not the authorities with the recognized *ability* to provide such a certification.

To the extent that AB-1570 continues to apply to the category of works of fine art, the ALC recommends that the California State Assembly reconsider the law's certificate requirement, and consider adopting a different standard for fine art – specifically, a requirement that secondary

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³ See "Report on Legislation by the Art Law Committee," available at http://www2.nycbar.org/pdf/report/uploads/20072498-SupportedAmendmentstoAuthenticiyOpinions.pdf.

sellers of fine art provide a *warranty* of authenticity, which maintains their role as liaison between the purchaser and the authority for a given artist.

Enforcement Mechanism is Unclear and Unrefined as Applied to Fine Art

Although AB-1570 establishes civil penalties applicable to sellers who fail to provide certificates of authenticity or who provide false certificates, it does not establish any mechanism or process for the evaluation of the falsity of a certificate. Presumably the California State Assembly intended that either the California State Board of Equalization (the body vested with the authority to license dealers' re-sale of collectible property) or the California court system would be called upon to evaluate the alleged falsity of a certificate of authenticity provided for a work of art, pursuant to claims brought under AB-1570.

Yet, as discussed above, the art market already recognizes specific authorities for specific artists, some domestic and some international, and a judicial determination as to the authenticity of a work of fine art may be seen as non-binding (and inefficient) in that marketplace. Moreover, considering the number of collectibles that trade in the marketplace for sales prices in excess of five dollars, it is possible that a large volume of new cases seeking a determination as to the falsity of a certificate of authenticity provided under AB-1570 would be a burden on the California court system, thereby impeding the administration of justice in this area, and likely driving the trade out of state.

As also noted above, fine art transactions are already subject to representations and warranties with respect to authenticity; similarly, there are established mechanisms available for seeking disclosure of the identity of a seller in instances where warranty of merchantability is suspect. AB-1570's civil penalty scheme overlaps with these pre-existing rights and remedies, and unfairly disadvantages California sellers by subjecting them to additional exposure that they do not face in other states. The sheer impossibility of documenting the circumstances of the signing of a work of fine art by a deceased artist should also be taken into consideration when assessing penalties against good faith and diligent dealers; the current text of AB-1570 does not distinguish between the underlying circumstances that might lead to an error in the certificates of authenticity that it mandates.

The ALC recommends that the California State Assembly provide further clarity with respect to the administration of the new class of claims that will arise under AB-1570, and that it reconsider the commercial impact of its penalty scheme, if the law applies to fine art.

Confidentiality Provisions Will Harm Individual Owners and the Market at Large

Paragraph (b)(8) of AB-1570 requires a secondary seller, such as a dealer or auction house, to "[i]ndicate whether the item was obtained or purchased from a third party," and "[i]f so, [to] indicate the name and address of this third party." The fine art market relies on confidentiality. When a private collector consigns a work of fine art to a dealer or auction house as his/her agent, (s)he relies on the assumption that the agent will protect his/her identity, in many

instances for security reasons (a private collector who is in possession of valuable items does not wish to advertise this fact, lest (s)he become the target of solicitation or theft). The duty to disclose the identity of the seller is onerous and would interfere with standard industry practice.

The ALC is of the opinion that requiring agents to disclose the name and address of consignors will dramatically harm the fine art market in California, as private collectors will simply consign their works to secondary sellers outside California, rather than risk compromising their security by releasing their name and address. Moreover, to the extent that AB-1570 creates a direct cause of action on the part of the purchaser ("consumer") as against the seller ("dealer"), requiring such seller to provide the name of the consignor is subverting that cause of action by suggesting to the purchaser that (s)he may have direct recourse against the consignor as well, which such right is not contemplated by the current text.

The ALC requests that the California State Assembly consider proposals to amend AB-1570's disclosure requirements, such as by requiring that dealers retain records of their consignors to be released in the event of court order, but eliminating the requirement that this information must be released to the purchaser with every sale.

Conclusion

Although the proliferation of forged collectibles in the market is certainly a problem worthy of legislative measures, the ALC believes that a more narrowly-tailored and clearly-articulated statute would better accomplish the California State Assembly's assumed goals. As discussed above, if AB-1570 is not amended to explicitly exclude fine art, numerous refinements would be necessary to properly account for the unique procedures already in place for that category of collectible, and the unique aspects of the market within which it trades.

The ALC thanks the Committees on Privacy and Consumer Protection; Business, Professions and Economic Development; and Judiciary, in advance, for the opportunity to weigh in on this important issue, and welcomes further inquiry thereon.

Dated: January 2017

Signed: New York City Bar Art Law Committee

Cc: California State Assembly, Committee on Privacy and Consumer Protection California State Senate, Committee on Business, Professions and Economic Development California State Senate, Committee on Judiciary