Avoiding Controversies Over Commissioned Artwork

Beware of agreements based on informal understandings

By **Amelia K. Brankov & Bianca de Kroon**

Last year, a court in the Netherlands ruled in favor of collector Bert Kreuk on his claim that artist Danh Võ breached a commission agreement. The court ordered Võ to either produce new artwork for the collector within one year, or if the artist doesn't comply with that deadline, to pay a steep daily fine. If your client is an art collector who's looking to commission artwork, here's what you should know.

The Museum Show

Kreuk is a well-known Dutch art collector. In 2013, the Gemeentemuseum in The Hague asked Kreuk to curate a show entitled, "Transforming the Known," which was to feature works from Kreuk's vast contemporary art collection. In preparing for the show, Kreuk contacted Võ through one of his gallerists, Galerie Isabella Bartolozzi in Berlin. In early 2013, Võ met with Kreuk and museum representatives at the museum to inspect the space for the upcoming exhibition.

The parties never entered into a written agreement concerning Võ's intended contribution to the exhibition. Kreuk claims that he commissioned Võ to create large and impressive artwork that Kreuk would purchase for 350,000 euros, which would be installed in a main gallery of the museum. A contemporaneous email from Võ's gallerist to Kreuk states: "I am sure that [Võ] will produce a great work for the show. We are in constant contact as soon as I have any news I will call you."[1]

Võ never created a work of art for the exhibition. Instead, Võ's gallery sent a pre-existing work by Võ entitled "Fiat Veritas," a gilded cardboard Budweiser beer carton, on loan to the museum for display at the exhibition.

Concerns About Kreuk

Võ reportedly became concerned about Kreuk's intentions as a collector after galleries informed Võ that Kreuk was searching for works by Võ that are of interest to investment speculators.[2] Võ, age 40, is an artist whose works are in high demand and whose prices have been rising steeply in the past few years. The artist has referred to Kreuk as an "art flipper," a derogatory term for a person who buys and sells works quickly. Last year, Kreuk sold at auction one of Võ's works for $700,000, about 14 times the value of one of those works in 2013.[3]

The Lawsuit

In 2013, Kreuk filed a lawsuit in the Netherlands against Võ and the gallery for breach of contract. Kreuk sought monetary damages and an order compelling Võ to create the commissioned artwork. In defense, Võ and the gallery argued that they never agreed to create artwork for the show. Võ claimed that

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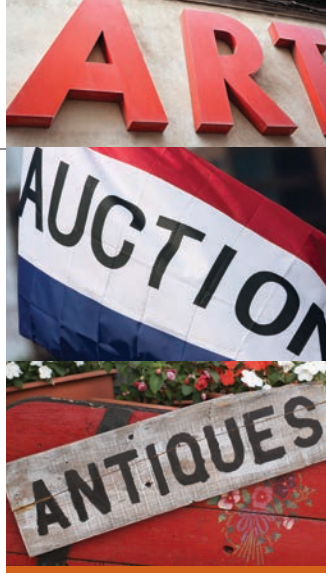


he and Kreuk "flirted" with the idea of a sale, but never discussed any details or entered into an agreement.

On Aug. 15, 2014, the court of first instance issued an interlocutory judgment in the case. The court ruled that there was an issue of fact concerning whether the parties reached an agreement whereby works by Vō were to be made available to the museum for exhibition.[4] The court also ruled that, before it can rule that the parties reached an agreement for the sale of artwork, as opposed to a mere loan agreement for the exhibition, Kreuk would need to present evidence supporting the existence of a purchase agreement. If Kreuk carried his evidentiary burden, then the court would find the defendants liable because there was no question that no new artwork was created. Moreover, the court ruled that, since neither the gallery nor the artist argued that performance of the commission agreement was impossible, an order compelling the artist to create artwork for Kreuk would be an appropriate remedy.

Subsequently, Kreuk offered three witnesses (a family member, an advisor and a museum director) who testified that Vō and the gallery agreed to create artwork for the exhibition and sell it to Kreuk for $350,000. The defendants didn't call any witnesses. Instead they provided their own self-serving written statements, which carried less evidentiary value than the sworn testimony Kreuk provided.

On June 24, 2015, the Rotterdam court issued its final decision in the case. The court ruled that Kreuk had carried his burden to establish the existence of the commission agreement. Although the court noted that Kreuk's witnesses may have been biased, they were credible, and therefore their testimony carried evidentiary weight. Additionally, the court found that the emails exchanged between the gallery and Kreuk referencing Vō's creation of new artwork for the show supported Kreuk's case. The court ruled that the defendants' contention that they were under no obligation to produce anything for the show was inconsistent with these emails, as was the delivery by the gallery of a work for display at the museum.

The court ordered that, within one year, Vō must create a large and impressive artwork for Kreuk, taking into account the collector's preferences. Given the artistic nature of the commission, Vō isn't required to create exact copies of prior works merely because Kreuk indicated a preference for those works; instead, Vō is free to make new works that fit with his continuing development as an artist.[5] The court presumes that the parties will be professional about reaching an agreement about the details of the art commission, the price (not to exceed 350,000 euros) and the logistics.[6] Because the defendants seemed disinclined to voluntarily comply with the order, the court included a provision imposing monetary damages in the event of non-compliance within the time allowed: a daily fine of 10,000 euros, up to a maximum of 350,000 euros. As for the gallery, applying Dutch law, the court held it jointly and severally liable for any damages resulting from the breach of the agreement, because the gallery was found to have been a party to the commission agreement.[7]

Post-Decision Events

After the Rotterdam court's ruling, on July 16, 2015, Vō sent artnet, an online art industry news publication, a letter addressed to Kreuk, which was published on the website. By that letter, Vō informed Kreuk that he intended to appeal the court's decision. But, his letter also included a proposal to Kreuk of how Vō would like to fulfill the terms of the court's judgment. Vō proposed to create a large mural in which Vō's father writes out a sentence. That sentence is rife with expletives directed at Kreuk: "SHOVE "IT UP YOUR

A**, YOU F*****." Kreuk wrote a reply, which was also published on artnet, in which he expressed frustration at Vō's communications with Kreuk through a public website, which he didn't believe complied with the court's directive to be in touch with each other in a professional manner to normalize relations. He also suggested that the artist consider donating 350,000 euros to an art museum and that Kreuk would match the gift.[8]

Subsequently, on Dec. 1, 2015, the parties appeared in court for a conference. At that conference, the court encouraged the parties to negotiate a resolution of the case. Following the conference, Vō agreed to dismiss his appeal in exchange for Kreuk's promise not to execute the Rotterdam court's order.

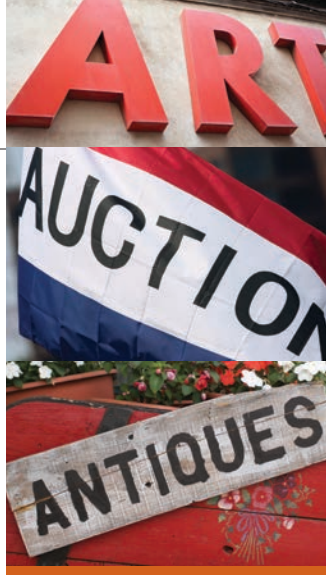
U.S. Legal Perspective

Discussions about the *Kreuk v. Vō* case are rippling through the art industry, and many in the United States are wondering: Could a U.S. court compel an artist to perform a commission agreement? A U.S. court likely would have made a different ruling than the Dutch court in this case. Because New York is at the center of a great deal of art transactions in the United States, we refer to New York law in this article.

While courts in New York have granted specific performance of a contract for the sale of artwork that's already in existence,[9] they generally don't grant specific performance of personal services contracts. Because U.S. society values freedom of association, courts are reluctant to impose a personal relationship on an unwilling party.[10] Additionally, performance of a personal services contract depends on the skill, volition and fidelity of the person engaged to perform the services. Therefore, courts view it as impracticable to supervise the proper and faithful performance of such contracts.[11] Instead, courts generally find that money damages, rather than specific performance, are an adequate remedy for the breach of a personal services agreement.[12] Applying these principles to the Kreuk/Vō dispute, it seems unlikely that, assuming the New York court found that Vō and Kreuk were parties to a valid commission agreement, a New York court would issue an order compelling Vō to create artwork for Kreuk.

Lessons Learned

- **Written commission agreement.** When a collector commissions an artist to create an original work of art, it's recommended that the parties execute a written commission agreement. The agreement should include a provision specifying the nature of the work being commissioned, including the medium, size and a rough sketch of the work or comparable works previously created by the artist as references. It should also include a provision stating the amount of compensation due to the artist and the timing of the payment(s). The agreement should specify a deadline for completion of the work and state when title to the work shall pass from the artist to the collector. The agreement can also specify the consequences of the artist's delay or failure to finish the commissioned work (for example, a reimbursement of funds paid to the artist) and the consequences if the collector decides to cancel the project prior to completion. Although one of the parties could still breach the agreement by failing to perform, a written agreement eliminates the possibility that the non-performing party can plausibly deny the existence of the agreement like Vō and



his gallery did.

- **Resale of artwork.** A major source of contention between the parties in the instant case is the artist's apparent mistrust of Kreuk, who's reportedly[13] seen as an art "flipper." Many artists (and especially younger artists) generally are wary of collectors who quickly buy and sell their works for fear that the rapid trading will negatively affect the artist's long-term career, as the works could be seen as waning in value and importance when sold. Equally important, artists generally don't want collectors to view their works as mere commodities in an investment portfolio. To be clear, there's no allegation in the case that Kreuk resold one of Vō's works before the museum show, nor is there any allegation that there was any contractual provision restricting Kreuk's ability to sell Vō's artwork. However, while Kreuk was insisting that Vō create artwork for him under their alleged agreement, he also put one of Vō's works up for sale at an auction house. Savvy collectors who want to maintain healthy relationships with artists and their galleries would be wise to avoid public sale of their works soon after purchase. If the collector wishes to sell the work, going back to the seller from whom it was bought or otherwise selling it privately may be advisable where possible.

Benefits of Agreements

The teachable moment from the Kreuk/Vō case is that, although transactions based on informal understandings are common in the art world, both parties can benefit from a commission agreement, which can outline the parties' rights and obligations and serve as written evidence of their agreement. Additionally, collectors should be mindful that news of collectors' behavior travels fast in the art community, and if collectors want to continue to have access to the best works, then they would be wise to "play well in the sandbox" and not upset the artists they want in their collection.

Endnotes

1. Rechtbank Rotterdam, June 25 2015, ECLI:NL:RBROT:2015:4417, under 2.6.3.
2. Doreen Carvajal, "Danh Vo and Bert Kreuk's Legal Battle Pits Artist Against Collector," *The New York Times* (July 13, 2015).
3. *Ibid.; www.sothebys.com/content/sothebys/en/auctions/ecatalogue/2015/contemporary-evening-n09345/lot.24.html.*
4. *See* Rechtbank Rotterdam, Aug. 15 2014, ECLI:NL:RBROT:2014:6962, under 4.9.
5. *See* Rechtbank Rotterdam, June 24 2015, ECLI:NL:RBROT:2015:4417, under 2.16—2.18.
6. *Ibid.,* under 2.22.
7. *See* Article 7:407, paragraph 2 Dutch Civil Code.
8. *See* 'Bert Kreuk Replies to Danh Vo, Suggests Charity to Cure Artist's 'Frustration' Over Contentious Court Ruling," ArtNet (July 20, 2015), *https://news.artnet.com/people/bert-kreuk-replies-to-danh-vo-318163.*
9. *See, e.g., Van Damme v. Gelber,* No. 601995/07, 24 Misc.3d 1218(A), 2009 WL 2045568 (Sup. Ct. N.Y. Cty., July 7, 2009) (granting specific performance of sale agreement for artwork despite seller's argument that he didn't authorize agent to sell the work), *aff'd,* 79 A.D.3d 534 (1st Dep't 2010).
10. *See, e.g.* 96 N.Y. Jur.2d Specific Performance Section 48 (2015).
11. *See, e.g., In re Baby Boy C,* 84 N.Y.2d 91, 101 (N.Y. 1994), quoting *American Broadcasting Companies. v. Wolf,* 76 A.D.2d 162, 173-74 (N.Y. 1980); *Arias v. Solis,* 754 F. Supp. 290, 293 (E.D.N.Y. 1991); *Stiefel & Co., Inc. v. Blitz,* No. 93 Civ. 6080 (PNL), 1993 WL 526386, at *3 (S.D.N.Y. Dec. 14, 1993).
12. *See, e.g.,* 71 Am. Jur. 2d Specific Performance Section 179 (2015).
13. *See, e.g.,* Doreen Carvajal, "Danh Vo and Bert Kreuk's Legal Battle Pits Artist Against Collector," *The New York Times* (July 13, 2015).

ARTnews Est. 1902

Investor Wins Claim Against Manhattan Gallery

BY DANIEL GRANT
February 1, 2005 3:50pm

NEW YORK—A decision on damage awards in a lawsuit pitting an investor against a Manhattan gallery is anticipated on Feb. 16. The investor, Jean-Pierre Lehmann, who successfully sued The Project for breach of contract because he hadn't been given access to certain works of art, is expected to receive a substantial court-ordered award from the gallery. The case is indicative of how intense competition can be for the works of up-and-coming young artists.

On Jan. 12 Judge Ira Gammerman rendered a finding in state supreme court that The Project had not lived up to its written agreement with collector and gallery investor Lehmann that "Lehmann would have a right of first refusal on any work by any artist represented by The Project," the lawsuit said.

"This case isn't about money. It's about access," Lehmann's attorney Peter R. Stern told ARTnewsletter. "The lesson of this case is: You make a deal, you live up to it."

Lehmann assumed that he had bought his way to the front of the waiting list for the work of Ethiopian-born artist Julie Mehretu. The investor, who has dual French and Swiss citizenship and maintains homes in both Geneva and New York City, made an interest-free loan (sans due date) of $75,000 in 2001 to the gallery, which needed the money to move from its location at 126th Street to another one at East 57th Street.

There are two parts to the written agreement, dated Feb. 7, 2001, that The Project's principals—Christian Haye and Jenny Liu—presented to Lehmann: In exchange for the $75,000 loan, that agreement states, the collector would have his pick of the gallery's artwork and would "receive a 30 percent discount on any work purchased from The Project, such discount to be applied until an aggregate of $100,000.00 (U.S.) has been discounted off of your purchases."

Richard Solomon, president of New York's Pace Prints gallery and current president of the Art Dealers Association of America, told ARTnewsletter that many galleries, particularly

smaller and start-up operations, have investors and financial backers. The agreements that investors make with dealers range widely—from owning a percentage of the gallery or obtaining a share of the gallery's profits to generous discounts for purchases and insider access to works by artists that are much in demand.

Offering the right of first refusal, however, is "a risky thing to do," Solomon says. Dealers themselves will want "to buy the most desirable piece—it's called cherry-picking—with the idea of making a good profit." Lehmann did make a number of purchases, racking up a discount amount of $82,500. These consisted of six videos by artist Paul Pfeiffer. But the collector was particularly interested in the work of Mehretu, who creates large abstract drawings and paintings, and relatively few of them in the course of a year.

Repeated requests by Lehmann to the gallery for Mehretu's work were turned aside, the suit alleges, even as The Project sought to place the artist's work in a number of private and institutional collections in the U.S. and Europe.

The gallery sold Mehretu's work to several private collectors and dealers—including Jeanne Greenberg Rohatyn of Greenberg Van Doren Gallery, New York; Jay Jopling of White Cube, London; fellow London art dealer Thomas Dane; and the Walker Art Center, Minneapolis.

According to attorney Stern, the plaintiff was told by the gallery in November 2001 that one work by the artist, entitled Retropistics: A Renegade Excavation, had already been sold when, in fact, it wasn't sold until two weeks later.

In 2003, the suit stated, Lehmann was finally given the opportunity to buy one small Mehretu painting for which he paid $17,500, discounted from a list price of $25,000. The work, an ink and acrylic on canvas measuring 32-by-54 inches, is entitled Excerpt (Regiment). In his ruling Judge Gammerman stated that "damages should be computed based on the difference between what the plaintiff would have paid for the paintings that should have been offered to him," and the current value of the works.

BY ANNIE ARMSTRONG

artists

Consumer Reports: Jenny Odell

The writer and artist charts a week that includes discussion of The Office, a trip to a police auction website, and a visit to the rose garden that inspired her most recent book.

BY THE EDITORS OF ARTNEWS

artists

For Whitney Biennial, One Participant Targets Controversial Whitney Patron

The London–based Forensic Architecture has tapped Laura Poitras and Praxis Films to create a new video that homes in on Warren B. Kanders.

BY ALEX GREENBERGER

artists

Facing Possible Jail Time Over Protest, Bangladeshi Photographer Shahidul Alam Is Still Optimistic About the Power of Art

After being arrested and spending time in jail, photographer Shahidul Alam is still optimistic about the power of art.

BY BARBARA POLLACK

artists

Consumer Reports: Torey Thornton

The artist rents a U-Haul, watches the Jennifer Lopez movie The Cell, and researches rare Beanie Babies.

BY THE EDITORS OF ARTNEWS

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Attorney for Defendant IBRAHIM MOHAMMAD MAHAMA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SIMCOR LLC, a California limited liability company; and ELLIS KING LTD., an Ireland limited liability company,

Plaintiffs,

vs.

IBRAHIM MOHAMMED MAHAMA, an individual,

Defendant.

IBRAHIM MOHAMMED MAHAMA, an individual,

Counter-Claimant,

vs.

SIMCOR LLC, a California limited liability company; and ELLIS KING LTD., an Ireland limited liability company, and DOES 1-20, inclusive

Counter-Defendants.

No.: 2:15-CV-004539-RSWL (PJWx)

DEFENDANT IBRAHIM MOHAMMED MAHAMA'S COUNTER CLAIM FOR RELIEF UNDER:

1. **Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A;**
2. **Art Preservation Act, Cal. Civ. Code § 987;**
3. **Breach of Contract;**
4. **Invasion of Privacy (Appropriation of Plaintiff's likeness for Defendants' advantage)**
5. **Civil Code § 3344 (Using another's signature or likeness without permission);**
6. **Unfair Business Practices, Bus. & Prof. Code 17200, *et seq*.**
7. **Intentional Inference with Prospective Economic Advantage**

Counter Claimant Ibrahim Mohammed Mahama hereby alleges upon information and belief:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under 28 U.S.C. § 1331, as this action arises under the laws of the United States of America, specifically, the Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 101 *et seq*.

2. Venue is proper in the Central District of California because Counter Defendant Simcor resides in the Central District and the Counter Defendants collectively (Simcor and Ellis King LTD.) are subject to personal jurisdiction here as provided in 28 U.S.C. § 1391(c). Further, some of the property at issue (original artworks) is, on information and belief, being stored in the Central District.

II. PARTIES

3. Counter Claimant Ibrahim Mohammed Mahama is an artist living in Tamale, Ghana who produces visual works of fine art. In his installations and wall-based works, Ibrahim Mahama considers the ways in which capital and labor are expressed in common materials. Included in the 2015 Venice Biannual Exhibition (56th *Venezia Biennale*), and London's Saatchi Gallery, Mahama is best known for his use of jute sacks — cloth bags once used to carry cocoa and now employed as vessels for coal. Each sack is inscribed with names and embellished with regional patterned fabrics. "The coal sacks began as an extension of how the body could be looked at. It contains all these system and makings of original owners, which have been transferred from the bodies creating a link between the two forms," the artist has said. Mahama's immersive installations, which are installed in both art spaces and public markets, draw attention to the global transportation of goods across borders.

4. Counter Defendant Simcor is a limited liability company organized under the laws of California with its principal place of business in Los Angeles County.

Stefan Simchowitz is the principal of Simcor. Simcor provides independent fine art consultation, and management and curating services to artists, galleries, collectors, foundations and exhibitors.

5. Counter Defendant Ellis King is a limited liability company organized under the laws of Ireland. Jonathan Ellis King is a citizen of Ireland and its principal. Ellis King owns and operates a fine art gallery in Dublin, Ireland, and on information and belief, transacts business here in the Central District.

6. On June 15, 2015, Counter Defendants sued Counter Claimant in the United States District Court in the Central District of California, No. 15-4539 RSLW for breach of contract, fraudulent inducement, commercial disparagement, unfair competition, specific performance, and declaratory relief. Summarizing briefly, Defendants paid Mahama $150,000 for fine art works. Pursuant to their Agreement, Mahama intended that the works be presented whole, and not sold in the open market, but Counter Defendants mutilated them by cutting them up, and stretching and framing them as individual pieces to sell, all *without* any required written authorization from Mahama. Indeed, Mahama's expressed wishes — orally and in writing — were to the contrary. Counter Defendants claim that the artworks they mutilated are worth approximately $4.5 million. When Mahama exercised the "moral rights" to his artwork, as he had every right to do under 17 U.S.C. § 106A, and Cal. Civ. Code 987, by, in part, disclaiming his authorship of the works mutilated by Counter Defendants, Counter Defendants brought suit requesting that the court order, *inter alia*, Mahama to sign and claim the works as his own, and sign certificates of authenticity. Unfortunately, for Counter Defendants, under VARA, these are not remedies to which the Counter Defendants are entitled.

III. GENERAL ALLEGATIONS AS TO ALL CLAIMS.

7. In September 2013, Mahama was contacted via email by Simchowitz and King who had been aggressively pursuing him in the months prior in an effort to be able to someday work with him in some capacity. Mahama was an established artist with a

growing following; had many exhibits and installations that were in the works and soon-to-be exhibited; and was generally well-known in the art world having just sold one of his earlier installations to London's Saatchi Gallery.

8. It was not until September 2013, that Mahama returned King's many prior communications. Mahama spoke to King about Mahama's practice, and informed King that he would be coming to London to participate in a residency at Gasworks.

9. Mahama also informed King that his primary interest was in displaying his works to the public, and ***not*** in selling them as King had been proposing. King, in turn, requested to fund Mahama's work, but Mahama rejected that offer.

10. In a further attempt to foster a hopeful business relationship with Mahama, King asked to buy a piece from him. And on September 29, 2013, King sent Mahama an email offering to buy a 20' x 60' jute-coal-sack piece for £5,000. King wrote: "I am excited to purchase the work and also for the [sic] to be a starting point for future things together. I'm happy to support your work and practice and assist you with further projects and your artistic development."

11. Mahama sold the 20' x 60' piece to King for the agreed price, stating that it was worth more, but they could "start their friendship with this." Mahama reiterated that "it's not about the money, but my practice. I believe the work will be seen and experienced and that's good enough for me."

12. The work was shipped by FedEx and arrived in London a bit *after* the two of them had already personally met.

13. The two actually met for the first time at a Contemporary African Art Fair [1:54] and had drinks after. They met again soon thereafter at the Frieze Art Fair. Like before, the two discussed art, Mahama's practice, and his desire to open an art gallery in Ghana so to have the public experience his artwork and story. In these discussions, King continued his plea to work with Mahama in some capacity. Mahama wasn't interested in being represented by King, but he was open to potentially working with him in some capacity as an option.

14. Mahama began asking his contemporaries about King, but no one knew of him, and therefore offered no advice. Mahama and King met several times during Mahama's residency at Gasworks (October through December 2013) at openings and other events. They had many discussions, but none were based on agreements or contracts.

15. During these meetings, King informed Mahama about his own desire to open a gallery and represent artists, including Mahama if he was interested. King also informed Mahama that he had storage space in Dublin as a possible space for his gallery.

16. This sounded promising to Mahama, but Mahama questioned King's affiliation with Simchowitz. King stated that "Stefan was only advising him and insisted he funded everything himself," Mahama took his word for it.

17. In the final days in London while Mahama was concluding his Gasworks residency, he and King visited a camera store where King offered to pay — and did pay — for a 16-35mm wide-angle lens with rolls of film for a medium format camera for Mahama. Mahama accepted the purchase, and informed King that he would get his money back from deals they would do in the future.

18. Feeling a bit uneasy about the above-mentioned camera-equipment purchase, Mahama asked King if he would be willing to keep Mahama's artwork he produced from Gasworks. King had storage space in London as well, and since Mahama didn't have space for these projects, it worked out well.

19. King brought an art transporter who took the Gasworks projects to his London storage space. This was not a sale, but rather King just storing them for Mahama. These projects/artworks are still in King's possession, believed to now be in King's Dublin storage space.

20. Upon Mahama's return to Ghana after the Gasworks residency, they continued their conversations and King sent Mahama pictures of his space in Dublin. The two of them had agreed that Mahama would show an installation at King's Gallery

entitled "Civic Occupation." King later designed a website and put Mahama's name as one of the artist's King Gallery represented. Mahama ignored this when it came to his attention, for according to him, this was common in the artworld, and more so since Mahama would be showing his 'Civic Occupation," installation in Dublin at King's Gallery.

21. On December 31, 2013, Mahama wrote to King stating that he was designing a studio space with his father, and needed a loan to support his work, and to fund his travel between West African Countries to collect materials for his work. And on January 1, 2014, Mahama wrote King: "I am writing official to ask you for a loan for work . . . *not the studio*. I think we will talk about the studio when I know the cost as the architect is still working around it . . . I need 20000£ if its not too much to ask." (*Emphasis added*.)

22. On January 3, 2014, King emailed Mahama stating: "myself and Stephan [Simchowitz] would be delighted to fund your temporary studio and current projects. We'd like to support you and give you £10,000 each totaling £20,000 in exchange for more jute artwork and material. Considering we did £5,000 for 20' x 60' before, I'd propose we do something similar and receive 20' x 120' each approx."

23. Mahama questioned King about Simchowitz's involvement as Mahama was aware of Simchowitz's reputation within the art community, and more so because Mahama's vision of his work and what he wanted the public to gain from it was important to him. In his eyes, Simchowitz only cared about money, and that was at odds with Mahama's philosophy.

24. King informed Mahama that the £20,000 was too much for him, and he needed to bring in Simchowitz — Mahama reluctantly agreed.

25. The next day, January 4, 2014, Mahama emailed King invoices for the work stating that he needed to raise the price a little because of an increase in the price of materials. Mahama also wrote "more over [sic] you are aware that I am not selling to anyone so this will sustain my working significantly for now till I decide to try

something different which will be more involving . . . also I hope you understand that I sold the first work [20ft x 60ft piece] to use at that price because we needed to start from there. I decided to exchange work for funds wit [sic] you so I wouldn't have to work all over yet." The two invoices to Counter Defendants were for £15,000 each. Later that day King responded: "Cool. I think I'll give your bank a call on Monday morning and see if they can be of assistance also." King and Simchowitz later wired £15,000 each to Mahama.

26. On January 24, 2014, Mahama wrote King an email stating: "As I mentioned earlier, the plan for the studio is out. Am very lucky to have my father take charge of construction so it will be much cheaper. Its [sic] a lifetime studio and space so I don't want to just do anything. Its [sic] still expensive than the figure I mentioned but I will start building and complete it as time goes by. The entire building will cost 150000 pounds to construct. It will not just be a studio where I work but also become a center where artists can meet and exhibitions can take place. As I spoke about many times with Jonathan [King] its [sic] very important that these things come together. It will enhance collaborations and contribute significantly to the art scene in Ghana and the sub region. Currently I need about 60000 pounds to be able to build part of it where I can move in and start working. I don't want to ask so much of you. You can also decide what you want to pledge and terms of payments back. The main working area is huge so it can be modified with time and host artworks of any nature. I intend to pay this money back in the very near future with sale of work. Am working really hard and this means a lot to my career and possible works that be made in the future. Please let me know what your thoughts are and if you are still interested in supporting this idea. I have attached parts of the plan so you can see what it will look like. Many thanks."

27. On February 4, 2014, King wrote Mahama an email stating:

So as we briefly discussed, myself and Stephan are happy to partly fund the studio project for £30k each. As always, we are delighted to support you and your endeavors. We've agreed that it's a lot of money and that we'd like to part pay in

installments in £10k at agreed intervals based on the deliverables/completion of artwork/material in return.

So we'd propose the following:

£10k each up front (£20k) 20' X 140' ft jute coal sacks.

£10k at each deliverable point of first artwork material (£20k) – 20' x 140' jute coal sacks.

£10k each at final specified point (£20k) - colored fabric works – 5 each.

We'd like to ultimately cut up the material as individual artworks and have them stretched with certificates of authenticity also.

Of course, we understand there is a lot of work here and I think this project will take the course of a year in terms of setting up the studio and also stretching the individual artworks, etc.

Considering the investment and amount of funding here, we'd like to propose setting up a website for the studio project/residency programme and we would like our names affiliated as supporters in some way. And we'd like to discuss contributing further towards the running of any residency programme/operations.

Anyway, these are just some key points and there's a lot to discuss so hence why Skype would be ideal! So let's try to Skype at some point this week.

28. On February 10, 2014, Mahama wrote King an email stating:

Thanks for the mail, and I hope all is well. I'm glad you want to support but the conditions you proposed are much and it also involves a lot of work. I have the work ready for you and Stefan. I think it would be better to ship them as soon as I can so we know that part is sorted out. *Personally, I wasn't thinking of selling any more of the material for personal reasons*. Its [sic] also because I don't want too much out there in different hands. I do hope you understand. The recent work I sold to you and Stefan was very important and huge. I think I explained to you from the beginning that for me it was more about getting resources to get work done and showing them. I am developing new work and still collecting materials here and there to try things out. It

will all come together once in [sic] settle down in a space to put the most complex ideas together.

I think supporting the studio should be done on a giant leap of faith and of course I will pay back in work but we have to find other ways to make it happen if we still can. I told you about my father supporting the idea by building for free. Yes I do understand the amount is huge but it's not even the entire amount I quoted for you. The offer will not be there forever and its rear. [sic] Moreover the economy is not good and the prices of things are skyrocketing every other month. Honestly the cost I got originally has gone up because drastic increments were just made last week. I did prefer if we went straight to the project or not do it at all. Doing it in pieces will only make things more complicated. Or I'll wait, practice for some time, and revisit the idea later.

Considering the website and acknowledgments [letters of authenticity] *I think we will talk about it further later, although originally you mentioned keeping your distance from the project.*

We can talk about this further if it makes or doesn't make sense to you. But I do hope you understand my point. We have spoken about some of these things over time and again. Please let me know what your thoughts are. (*Emphasis added.*)

29. On February 24, 2014, Mahama wrote King an email stating:

These are the invoices. It excludes the shipment, packaging and transportation charges. That is 3000 pounds. I thought it would cost more as it weighed a lot. So in all it will be 63000 pounds. I wish payment could be done as soon as you can. My father is ready to start the project. The funds are the only thing holding back. The work can be picked up today or any time after. Its [sic] very stressful trying to ship things out of this country but in the end they always go through.

As I said earlier, its [sic] important to keep the work intact and show it as it is. It *preserves the integrity of the work* and gives it more room to play. I sent great work which has very interesting layers and narratives so its [sic] *important that we do keep it intact. Lets [sic] talk in the day.* (*Emphasis added.*)

30. On March 12, 2014, King sent funds to Mahama in the amount of $52,500 (£31,500). Simchowitz also sent Mahama funds in the amount of £30,000.

31. On March 17, 2015, King wrote a letter to the British High Commission in Ghana stating that payments for approximately £63,000 were sent to Mahama to "assist in the funding of constructing a new artist studio in Ghana where he can further develop his art practice and methods of working and creativity."

32. On May 22, 2014, Mahama sent King an email with pictures of the progress of the construction at the studio. On May 23, 2015 King wrote Mahama back that "the studio looks great – keep the images coming! Always love to see you in action.

33. On May 28, 2014, Mahama sent King an email stating:

I trust all is well. Attached are images of new work in the studio for a project

In Accura. Work is coming up well. Should be 240 feet by 20 feet when completed. So far everything is working quite well and am glad about that. You haven't responded to your trip to Ghana or my trip to Dublin to look at the city space for the site specific piece [Dublin exhibit of "Civic Occupation]. Please let me know what you think? Are things settled with the publishers? Have you spoke to Osei recently about it? I will write again today to discuss some ideas with you. Take care.

34. On May 28, 2014, King sent Mahama an email stating:

Wow the images and work look great! You've been busy! :)

Yes a visit to Dublin would be great and very beneficial now that it's all up and running! Would the first week of July work for you to come out? Let me know what dates and I can book you a flight and accommodation. I'd love to come out to a Ghana also but it may be August as I as I have to go to London/Basel/Berlin in June then I'm going away with Alana to the Maldives at the end of July which will be exciting.

I've been looking into book publishers also. I have some ideas but would be good to speak with Osei too. I tried to call him earlier, but he must be busy. I'll try him again now shortly.

Are you free for a Skype tonight? Maybe 10:00 pm or is that too late? Would be great to catch up properly. Let me know and hope all is well.

35. On May 31, 2014, Mahama sent King an email stating:

I believe you saw the images of new work am making for a project in the next few months with the prints. Its [sic] coming up well I believe and I can't wait to explore it to its limites. [sic] Basically I need some funding to complete the studio once and for all and also work till [sic] middle of next year so I don't stress over having to sell anything to raise funds for work. I believe we can work it out with work in the future. 10 pieces of the new work (each 20 by 21 feet) for which will be ready to be sent to you before the exhibition in December this year. I need 100,000 pounds. Half will go to the studio and half will go into getting materials and building work until I am exhausted. The studio in the north and recently the one I got in Accura are the best decisions I made in a very long while so I am ready to give in a lot to have it realize so I can do other things. There are many interesting ideas to explore now and I think its [sic] time to reinvent my work and look to other possible ideas or forms that my work could take. As I said over the phone I have sent most of what I have on the studio and new work. The current economic state of my country des [sic] help either so I just have to keep pushing till we make some change.

Let me know what you think. As usual you know how important these things are to me so I [sic] glad if you treat it with urgency and care.

36. On July 16, 2014, King wrote Mahama an email stating:

Hey Ibrahim,

Hope you're well.

Everything's going great here. I'm getting some things organised before my holidays on Sunday. Can't wait!

I also got accepted in to two art fairs for the winter which I'm excited about – ABC Berlin (a curator focused fair) and Officielle Paris (Fiac's emerging fair). These will be fantastic for exposure as a young gallery. I didn't expect to be accepted this

early on to be honest so I'm happy.

I just received the first lot of stretched jute sack works from London today which is also exciting. They've been photographed and I will have images by Friday. I'll sent these two [sic] you then and let's discuss how you'd like to title and record them etc. They look incredible!

How was Denmark? Hope you had fun. Do you have wifi where you're staying also? We could Skype on Friday to catch up properly before I leave for vacation. Thanks!

37. On July 28, 2014, Mahama wrote King an email stating:

Thank you for the last two mails. I went straight to an artists residency out of town as soon as I arrived back home last week and haven't had Internet reception till I came home yesterday. Hope the holiday is promising and everything is great. *I saw the images you sent and they look interesting. I however have some concerns. Don't you think its too early to have these works stretched and more over put there? It will come to represent the idea of my practice, which reduce its intensity. It will be great if you maintain the material in its state without stretching any more. I haven't figured out titles and it hasn't been a part of my work since I began exploring this side. As for the certificates we can arrange some for the ones you have stretched so far. It's very important that the context of the practice through these works is not lost at the early stages. As you know I haven't shown my work internationally yet so it's easy to be misunderstood especially when its connected to selling. It's quite a risk playing within that position I must admit Jonathan. It needs a lot of time to mature and keeping everything together will even have far more value in the future than now or stretching them I figured out.*

I hope I am not proofing [sic] difficult as I am only trying to protect the integrity of my practice. The next few years has a lot to promise in the terms of projects and collaborations [sic] so I am careful of how the beginnings might go. *Selling those works in the beginning was to allow me the chance to work on the studio mainly and do other*

projects but that hasn't worked out as planned. Everything in Ghana has gone to ruins within the last few months so its difficult to predict the outcome of things when planning now. It was a difficult decision to have to give that amount of work out. I must admit it was a lot of work but that's not the point for now. What do you plan to do with the Stretched works? Are you still going to hold on to them as we discussed earlier this year? I think you should. It might not be in your favor but it's the best decision to make now I think.

Just to let you know, am collaborating with another artist to make a project in Italy next year or so. We are still discussing the possible outcome of the projects. He is a very interesting artist and I'm glad we can together [sic] at this stage.

I also got in an art festival in Denmark due in 2016, which is really exciting. Discussing possible projects with the curator already. I also got a gallery offer in London but turned it down because I think I'm not ready for representation now. I still need space to develop my practice and understand myself better. Decisions and choices are always difficult to make so I want to take my time with that.

I will apply for the Irish Visa with the week or early next week when I put all the documents required together. For that I will need an invitation letter from you stating the purpose trip on a letterhead. Am sure you know the procedure. Osei and I had the chance to meet with the graphic designer in London and we think he will do a great job. He sent us a quote excluding printing for now so we have to get back to him so we start something. We also got some writers to contribute from Ghana, which will enhance the content and context. We can talk about this in more detail and Osei has a lot more to say than I within this conversation.

Aside that I hope the gallery is doing well and the parents are great. Well I am back now to Accura so let's talk when you have the time. (*Emphasis added.*)

38. On November 23, 2014, Mahama wrote King an email stating:

I hope this email finds you well. I want to clarify a few things before the show opens.

First of all I have sent Cesar an email cancelling the show at the Mistake Room, as I haven't been treated with much respect as an independent artist practicing on his own terms.

Secondly, I have serious concerns regarding stretched work (the pieces you cut from the original work and stretched), as they are not part of my practice. The best decision would have been to maintain them as they were. *Moreover 300 pieces is way too much as I have thought about it carefully time and again. I guess we will talk more about it when I come over for the show. Just to let you know serious concerns I have*. *These pieces are no longer an intervention (with the spirit of process and production at the core), thereby losing that character and sense, and the work's value.* The point is not to objectify the work. When it sometimes adapts to gallery space/white cube space, it does so *criticality still within its form. Its very easy to loose [sic] the sense of all this I have mentioned I must admit.* (*Emphasis added.*)

Also talking about independence, I want to make clear I am breaking all ties with galleries so that I can do the work I need to next year and after. This will mean not having representation for some time so that I can reflect and produce work. I comes [sic] as a response to dealing with the practice and taking much time to work on projects for reflection.

I traveled out of Accura again. I will be back tomorrow so lets please talk tomorrow evening. Thanks you and speak soon.

39. On November 24, 2014, King wrote Mahama an email stating:

Hey Ibrahim,

Hope you had a good weekend.

Ok good to know your thoughts and of course I'm always open to discuss everything. (*Emphasis added.*)

I'm off to Brussels for just one night but I'm around later so just let me know when you're free and we can chat. Cheers Ibrahim!

40. On December 8, 2014, Mahama wrote King and email stating:

Dear Jonathan

I arrived in Italy safely and thank you for the warm stay while I was in Dublin for the exhibition ["Civic Occupation," exhibit]. I must say the talk was the highlight aside the opening. There are many potentials if we do what is right. *I hope you spoke with Stefan and you came to a conclusion that all the stretched works have to be returned to their original state. It is very important that as I made clear before I left and tried on a few occasions also. Please lets do this right.* (*Emphasis added.*)

I am trying to get a sim card to we can talk, but in the mean time you we [sic] can Skype. *I look forward to a good conclusion*. (*Emphasis added.*)

41. On December 12, 2014, Simchowitz wrote Mahama an email stating:

Jonathan will discuss this and 18 other works like this sold to a person who should not have bought them and sold them to Sothebys. Jonathan and I strongly suggest that you get a handle on this on behalf of Ibrahim.

42. On May 15, 2015, King wrote Mahama an email stating:

Hey Ibrahim,

How's everything going? Sorry didn't get to see you in Venice – it was crazy week and I'm sure even crazier for you!

Congrats once again also – your work looked incredible and I'm so happy for you. I've also had fantastic feedback on my side and your work seemed to be a highlight of the Arsanale for many.

43. On May 25, 2015, Mahama wrote King and Simchowitz and email stating:

Dear All

With regards to the situation surrounding the works in your possession, I cannot act like all is well. Please let us settle this right away. (*Emphasis added.*)

Ibrahim

44. Mahama's May 25, 2015 email related to Mahama learning that King and Simchowitz were selling his works of visual art on the open marker without out any authorization (expressed or implied) to do so. Mahama wrote King a letter stating:

Dear Jonathan,

It has been brought to my attention that your gallery, Ellis King Ltd. 61 Grange Wood Rathfarnham Dublin 16 Ireland, has been using the work which I sold to you last year as per invoices attached and per below description:

- Ibrahim Mahama, 2013-2014 installation of coal sacks. Dimensions 2(20 x 150) ft, invoice 21st of February 2014;
- Ibrahim Mahama, 2013-2014 installation of coal sacks, dimensions 20 x 120 ft, invoice 3rd of January 2014.

In association with the marketing or sale of further artworks using parts of the original work:

- Ibrahim Mahama, 2013-2014 installation of coal sacks. Dimensions 2(20 x 150) ft, invoice 21st of February 2014;
- Ibrahim Mahama, 2013-2014 installation of coal sacks, dimensions 20 x 120 ft, invoice 3rd of January 2014.

The work in question is not exhibited in its entirety and parts and/or pieces of the original installation are missing from the original work as it was originally conceptualized.

The installation as per below description are copyrighted works and are owned by me, Ibrahim Mahama:

- Ibrahim Mahama, 2013-2014 installation of coal sacks. Dimensions 2(20 x 150) ft, invoice 21st of February 2014;
- Ibrahim Mahama, 2013-2014 installation of coal sacks, dimensions 20 x 120 ft, invoice 3rd of January 2014.

Therefore the use of parts of the installation under the copyright/artist's terms is illegal and forbidden.

The copyright artist's terms provides the artist with certain proprietary rights. This incudes, but is not limited, to restrict the use of the work or parts of the work, or

confusing it with a similar work, in association with confusingly similar works. Permission was neither asked nor granted to reproduce parts of the works.

- Ibrahim Mahama, 2013-2014 installation of coal sacks. Dimensions 2(20 x 150) ft, invoice 21st of February 2014;
- Ibrahim Mahama, 2013-2014 installation of coal sacks, dimensions 20 x 120 ft, invoice 3rd of January 2014.

And the resulting new works therefore constitute infringement of the artist's rights. In terms of the copyright statutes, the artist are entitled to an injunction against your continued infringement, as well as to recover damages from you for the loss the artist have suffered as a result of your infringing conduct.

It is important that the artist exercises the right to protect the works:

- Ibrahim Mahama, 2013-2014 installation of coal sacks. Dimensions 2(20 x 150) ft, invoice 21st of February 2014;
- Ibrahim Mahama, 2013-2014 installation of coal sacks, dimensions 20 x 120 ft, invoice 3rd of January 2014.

A certificate of authenticity with a corresponding registry certificate will be made out in the owner's name as well as a booklet of installation guides.

Pending the above certificates, the invoices attached are considered as certificate of authenticity.

It serves and important and distinctive representation of the original work of artwork as well as the goodwill of the artist.

This confusion may cause substantial harm to the artist by facilitating the loss of its effectiveness in establishing a distinct association between the original work and the artist.

Due to these concerns, and because unauthorized use of the work amounts to an infringement of the artist's rights, the artist respectfully requests that you cease and desist in any further use of the original work by Ibrahim Mahama in association with the marketing, sale, distribution, or identification of further works.

In the circumstances, I demand that you immediately,

1) Remove all infringing content and notify in writing that you have done so;

2) Restore the "installation" to its original form in the following manner:

a) Each part of the complete original installation must be preserved and protected in its entirety;

b) A list is to be drawn up of each original element that is identifiable by the artist's signature, and is an integral part of the original installation.

c) Communication of the exact location of the installation, complete of all its original elements that have been properly packed for their conservation;

d) Immediately cease the use and distribution of part/parts of the entire work;

e) Undertake in writing to desist from using any part of the original Work in the future without prior written authority from me.

Please respond by letter: indicating your intention to cease & desist the use of the work, or any confusing similar part of the work within ten (10) calendar days.

I do hope this issue may be resolved this way so we can avoid any further legal remedies.

This letter is being sent to you as part of a legal process that must be followed in an effort to maintain the artist' legal rights.

45. Counter Defendants ignored Mahama's demands to stop selling his works of visual art and restore them to their original state. Instead of agreeing to maintain Mahama's legal right he maintains in the artworks, Counter Defendants King and Simchowitz (through their business entities) filed the instant action in this Court on June 15, 2015. In their Complaint, Counter Defendants admit that they cut and stretched Mahama's works that they paid around $150,000 — approximately 300 individual pieces that they claim is now valued at $4.5 million. In cutting and stretching Mahama's artworks into approximately 300 individual pieces, Counter Defendants mutilated Mahama's work despite his repeated statements, orally and in writing, that he did not want the works cut into smaller pieces and sold, and despite Counter Defendants

acknowledging Mahama's concerns.

First Claim for Relief Under Visual Artists Rights Act of 1990 (VARA)

(Against All Counter Defendants, and DOES 1-20, inclusive)

46. The allegations set forth above in Paragraphs 1-45, inclusive, are incorporated into this claim for relief by reference as if set forth in full.

47. Congress passed, and the President signed the Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 101 *et seq*. The Act protects both the reputations of certain visual artists and the works of art they create. The Act provides these artists with the rights of "attribution" and "integrity." These rights are analogous to those protected by Article 6 of the Berne Convention, which are commonly known as "moral rights." The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation. *Carter v. Hemsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995) (citing H.R.Rep. No. 514 at 5 (internal quote omitted).

48. The Act's "principal provisions afford protection only to authors of works of visual art—a narrow class of art defined to include paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes, existing in a single copy or limited edition of 200 copies or fewer. 17 U.S.C. § 101 (Supp. III 1991). With numerous exceptions, VARA grants three rights: the right of attribution, the right of integrity and, in the case of works of visual art of "recognized stature," the right to prevent destruction. 17 U.S.C. § 106A (Supp. III 1991)." "The rights cannot be transferred, but may be waived by a writing signed by the author. Copyright registration is not required to bring an action for infringement of the rights granted under VARA, or to secure statutory damages and attorney's fees. 17 U.S.C. §§ 411, 412 (1988 & Supp. III 1991). All remedies available under copyright law, other than criminal remedies, are available in an action for infringement of moral rights. 17 U.S.C. § 506 (1988 & Supp. III 1991)." *Carter*, 77 F.3d at 83.

49. As an artist whose works have been included in international galleries and

exhibitions, including Ireland, the Saatchi in London, and Venice's Biennial Exhibition, Mahama's works that he sold to Counter Defendants were works of fine art and are entitled to protection under VARA.

50. Under VARA, Mahama has the right to claim authorship of works of art. Mahama claimed authorship of specific works created by him sold to Counter Defendants, specifically:

Ibrahim Mahama, 2013-2014 installation of coal sacks. Dimensions 2(20 x 150) ft, invoice 21st of February 2014;

Ibrahim Mahama, 2013-2014 installation of coal sacks, dimensions 2(20 x 120 ft), invoice 3rd of January 2014.

** The above referenced invoices shall hereafter be referred to as "The Four Invoices."

51. VARA also permits an artist "to prevent the use of his or her name as the author of any visual work of visual art which he or she did not create." 17 U.S.C. § 106A(a)(1)(B).

52. Under VARA, an artist also has the right to "prevent any intentional distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification is a violation of that right." 17 U.S.C. § 106A(a)(3)(A).

53. As set forth in the allegations above, Mahama repeatedly communicated to Counter Defendants, orally and in writing, his desire to keep his works of visual art intact. Counter Defendants, orally and in writing, as above alleged, acknowledged that concern. Notwithstanding Mahama's expressed desires, Counter Defendants distorted, mutilated, and modified his works by cutting them up into approximately 300 lots for sale. Despite Mahama's insistence that the works be restored to their original state, Counter Defendants have failed to do so and have instead sued Mahama for what they claim is the net worth of the pieces sold individually.

54. VARA provides that the rights granted under the statute may not be transferred and may be "waived if the author specifically agrees to such waiver in a

written instrument signed by the author. Such instrument shall specifically identify the work, and uses of the work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified." Mahama has not ever given any written waiver of his rights under VARA to Counter Defendants.

55. As a result of Counter Defendants actions, Mahama has suffered monetary damages to his reputation and honor, and is entitled to an injunction ordering Cross Defendants from continuing to alter his works of visual art and to restore his works of visual art to their original state.

Second Claim for Relief Under Art Preservation Act, Cal. Civ. Code § 987
(Against All Counter Defendants, and DOES 1-20, inclusive)

56. The allegations set forth above in Paragraphs 1-55, inclusive, are incorporated into this claim for relief by reference as if set forth in full.

57. The California Art Preservation Act, Civil Code section 987 (subdivision (a)) states the Legislature's declarations and findings, and includes the statement that "physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction...." The purpose of Section 987, subdivision (e) is to "effectuate the rights created by this section," and permits the artist to sue for injunctive relief as well as actual and punitive damages.

58. Subdivision (c)(1) of section 987 provides that no one but the artist who owns and possesses a work of fine art "shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art." Pursuant to subdivision (c)(2), acts constituting gross negligence causing defacement, mutilation, alteration or destruction of fine art by one who frames, conserves or restores fine art are prohibited.

59. "As commentators have noted, section 987 was the first statute in the United States to recognize that an artist has personal rights in his or her work which are

retained even after the work has been sold. This bundle of rights is known by the French term *droit moral*, translated into English as "moral rights." (Petrovich, Artists' Statutory Droit Moral in California: A Critical Appraisal (1981) 15 Loyola L.Rev. 29.) Among these moral rights, which are also known as the "right of the author's personality," is the right of integrity, which includes the right to object to the destruction of one's work and to prevent its mutilation, distortion, or alteration. (Karlen, Moral Rights in California (1982) 19 San Diego L.Rev. 675, 684–685.) The classic example of a violation of the right of integrity occurs when the owner of a work of art alters it and then continues to display it. (Petrovich, *supra*, at p. 37.) Professor Karlen states, "[T]he artist must be entitled to certain rights in order to survive as a professional. For instance, the artist must be able to require credit for his work in order to establish a reputation. Conversely, he must be able to disassociate himself from work which is not *his* including his work which has been so badly altered that it no longer expresses his creative efforts. Further, to mount exhibitions, especially retrospective ones, he should have access to works he has created earlier in his career. To do so, he must be able to locate the owners of the works and to prevent destruction of the works. To effectuate the right to restrain destruction, the artist should have the right to repair damaged works or to conserve decaying works so that careless abandonment does not put the work of art beyond redemption...." (Karlen, *supra*, at p. 682.)." *Lubner v. City of Los Angeles*, 45 Cal.App.4th 525, 529-30 (1996).

60. As set forth in the allegations above, Mahama repeatedly communicated to Counter Defendants, orally and in writing his desire to keep his works of fine visual art intact. Counter Defendants, orally and in writing, as above alleged, acknowledged that concern. Notwithstanding Mahama's expressed desires, Counter Defendants distorted, mutilated, and modified his works by cutting them up into approximately 300 lots for sale. Despite Mahama's insistence that the works be restored to their original state, Counter Defendants have failed to do so and have instead sued Mahama for what they claim is the net worth of the pieces sold individually.

61. Civil Code § 987(g)(3) controls, wherein the rights under the Art Preservation Act "may not be waived except by an instrument in writing expressly so providing which is signed by the artist." Mahama has not ever given any written or signed waiver of his rights under § 987 to Cross-Defendants.

62. As a result of Counter Defendants actions, Mahama has suffered monetary damages to his reputation and honor, and is entitled to an injunction ordering Counter Defendants from continuing to alter his works of visual art and to restore his works of visual art to their original state.

Third Claim for Relief – Breach of Contract (Oral and Written)
(Against all Counter Defendants, and DOES 1-20, inclusive)

63. The allegations set forth above in Paragraphs 1-62, inclusive, are incorporated into this claim for relief by reference as if set forth in full.

64. Mahama had an oral contract with Counter Defendants that when he sold them his works of fine visual art, they would not be distorted, mutilated, altered, modified and not sold on the open market. The Four Invoices sent by Mahama with the four shipments — to be later pieced together by him — also serve as written contracts.

65. Cross Defendants breached their oral and written contracts with Mahama when they cut his work into smaller pieces, stretched them on frames, and sold them on the open market.

66. The Four Invoices were dated, and were clear on their face: they described the property/artwork to be sold; the price; the date; and to whom it was delivered. There was no authorization to allow for them to be distorted, mutilated, or modified. To the contrary, they were to be kept in tact — to be later pieced together.

67. As a result of Counter Defendants actions, Mahama has suffered monetary damages to his reputation and honor in an amount subject to proof at trial.

Fourth Claim for Relief – Invasion of Privacy (Appropriation of Plaintiff's likeness for Defendants' advantage)

(against all Counter Defendants, and DOES 1-20, inclusive)

68. The allegations set forth above in Paragraphs 1-67, inclusive, are incorporated into this claim for relief by reference as if set forth in full.

69. By doing the thing alleged above, Cross Defendants made unauthorized use of Mahama's identity, signature and likeness to their commercial advantage resulting in injury to Mahama.

Fifth Claim for Relief — Civil Code § 3344 (Using another's signature or likeness without permission),

(against all Counter Defendants, and DOES 1-20, inclusive)

70. The allegations set forth above in Paragraphs 1-69, inclusive, are incorporated into this claim for relief by reference as if set forth in full.

71. Civil Code § 3344(a) provides:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are

required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

72. By virtue of the conduct above alleged, Counter Defendants used the signature and likeness of Mahama without his permission for the purpose of selling his works of visual art. Mahama is entitled to the gross revenue obtained by Cross Defendants' use of his signature and likeness, including statutory and punitive damages.

Sixth Claim for Relief – Unfair Business Practices,
Cal. Bus. & Prof. Code §§ 17200 *et seq*.,
(against all Counter Defendants, and DOES 1-20, inclusive)

73. The allegations set forth above in Paragraphs 1-72, inclusive, are incorporated into this claim for relief by reference as if set forth in full.

74. By virtue of the conduct and statements alleged above, Counter Defendants engaged in and conspired to engage in unlawful, unfair, and fraudulent business acts and practices forbidden by Business & Professions Code §§ 17200 *et seq*.

75. Counter Defendants violated Federal and California law protecting an artist's moral rights to his work, including VARA, 17 U.S.C. § 106A; and the Art Preservation Act, Cal. Civ. Code § 987. These violations are "borrowed" by the *unlawful* prong of § 17200.

76. Mahama was injured in fact by Counter Defendants' business acts and practices in violation of §§ 17200 *et seq*., and he lost money and property as a result of these business acts and practices.

77. Mahama is entitled to the equitable relief available under Business & Professions Code §§ 17200, *et seq*., which is available against any person who engages, has engaged, or proposes to engage in unfair competition. The court may make such

orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Mahama seeks disgorgement, restitution and injunctive relief necessary to restore him to his money, property, fees, interest, and commissions taken by the Counter Defendants.

Seventh Claim for Relief – Intentional Interference with Prospective Economic Advantage,

(against all Counter Defendants, and DOES 1-20, inclusive)

78. The allegations set forth above in Paragraphs 1-77 inclusive, are incorporated into this claim for relief by reference as if set forth in full.

79. By doing the things alleged above, Counter Defendants intentionally interfered with Mahama's prospective economic advantage. As set forth above, there was existing and potentially exiting : (1) an economic relationship between Mahama and third parties, including several galleries, art sales, and other showings with the probability of future economic benefit to Mahama; (2) the Counter Defendants knew of Mahama's relationships with these third parties, especially the outer art galleries and other third parties that could economically benefit Mahama; (3) Counter Defendants intentionally sued Mahama and made complaints to the media that Mahama was a difficult artist to work with, did not honor his contracts, etc. These acts, including the mutilating of his work on the part of Counter Defendants were designed to disrupt these relationships; (4) Mahama's relationship with third parties was actually disrupted by Counter Defendants' conduct; and (5) these actions proximately caused economic harm to Mahama by limiting the places where he would be able to show his art, or limit the eventual sales of the art at action, and his reputation now and forever.

WHEREFORE, Mahama requests the following relief:

1. That the Court enter judgment dismissing the Complaint in this matter;
2. An award of damages for economic losses, prospective economic advantage, damage to reputation and honor, and emotional distress against all Counter Defendants jointly and severally.
3. An award of punitive damages against Counter Defendants;
4. An injunction prohibiting Counter Defendants from continuing to sell Mahama's works of visual art; and an order that Mahama's works sold to Counter Defendants be restored to their original state;
5. Disgorgement of all profits received by Counter Defendants;
6. An award of costs, including attorneys' fees against Counter Defendants; and
7. Such other and further relief as the Court finds just and proper.

Dated: March 17, 2016

RIZWAN R. RAMJI, ESQ.

By: /s/Rizwan R. Ramji
Rizwan R. Ramji
Attorney for Cross-Complainant Ibrahim Mohammed Mahama

JURY DEMAND

Cross-Complainant hereby demands trial by jury.

By: /s/Rizwan R. Ramji
Rizwan R. Ramji
Attorney for Cross-Complainant Ibrahim Mohammed Mahama

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Attorney for Plaintiff SIMCOR LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SIMCOR LLC, a California limited liability company; and ELLIS KING LTD., an Ireland limited liability company,

Plaintiffs,

vs.

IBRAHIM MOHAMMED MAHAMA, an individual,

Defendant.

Case No.: 2:15-cv-4539

COMPLAINT FOR:

(1) BREACH OF CONTRACT;
(2) FRAUDULENT INDUCEMENT;
(3) COMMERCIAL DISPARAGEMENT;
(4) UNFAIR COMPETITION;
(5) SPECIFIC PERFORMANCE; AND
(6) DECLARATORY RELIEF

JURY TRIAL REQUESTED

Plaintiffs SIMCOR LLC ("Simcor") and ELLIS KING LTD. ("Ellis King" and, together with Simcor, "Plaintiffs"), complain as follows against Defendant IBRAHIM MOHAMMED MAHAMA ("Mahama"):

THE PARTIES

1. Plaintiff Simcor is a limited liability company organized under the laws of the State of California with its principal place of business in Los Angeles County, California. Stefan Simchowitz ("Simchowitz") is the principal of Simcor. Simcor provides independent fine art consultation, management and curating services to artists, galleries, collectors, foundations and exhibitors.

2. Plaintiff Ellis King is a limited liability company organized under the laws of the nation of Ireland and is in good standing. Jonathan Ellis King, a citizen of Ireland, is its principal. Ellis King owns and operates a fine art gallery in Dublin, Ireland.

3. Plaintiffs are informed and believe and thereon allege that Defendant Mahama, now a celebrated contemporary artist, is a citizen of the nation of Ghana, residing in Tamale, Ghana.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action under principles of diversity jurisdiction pursuant to 28 U.S.C. §1332. The amount in controversy exceeds the sum or value of $75,000, exclusive of interests or costs. Complete diversity of citizenship between the Parties is also present as Plaintiffs are citizens of California and Ireland while Defendant is a citizen of Ghana. Further, some of the inventory of artworks that are the subject of this action are stored in Los Angeles County. Lastly, this Court has jurisdiction under the Declaratory Judgment Act pursuant to 28 U.S.C. §§2201, 2202.

5. This Court has personal jurisdiction over Mahama because, on information and belief, Mahama has engaged in the sale of artwork to residents of the State of California and/or otherwise entered commercial transactions with

residents of the State of California within this judicial district; has conducted or attempted to conduct business and/or engage in commercial enterprises in the State of California within this judicial district; and has committed tortious acts which Mahama knew or should have known would cause injury to Simcor in the State of California.

6. Venue is proper before this Court pursuant to 28 U.S.C. § 1391.

GENERAL ALLEGATIONS

7. Simchowitz is a renowned cultural entrepreneur. Having produced several acclaimed feature films and founded two major photographic licensing websites, Simchowitz currently specializes as an independent consultant and curator for modern art collectors and institutions. Simchowitz has had significant success in discovering, financially supporting and promoting unknown artists, guiding them from obscurity to international prominence. Mahama is one such artist. Simchowitz does business through Simcor, LLC, of which he is a managing member. Simcor is a California Limited Liability Company in good standing.

8. Prior to meeting Simchowitz, Mahama had little, if any, recognition in the Western art world. Mahama had never displayed his work in any gallery or exhibit outside Ghana, either individually or as part of a group. He had made few sales of his work, if any. His work was not included in the collections of any museums, and exhibitions of his work were limited to Ghana. In short, Mahama was virtually unknown to the art world and had no experience exhibiting his art outside of his home country.

9. In or about 2012, Simchowitz contacted Mahama through Facebook. Simchowitz had seen photographs of some of Mahama's pieces online, principally consisting of draped jute coal sacks, and thought that he showed promise. Simchowitz eventually introduced Mahama to Ellis King, and the parties agreed to work together.

10. In October 2013, the parties corresponded and orally agreed on the terms of a business arrangement (the "Contract"). Specifically, pursuant to the Contract, Simchowitz and Ellis King each paid Mahama £45,000—a total of £90,000—for six different allotments of jute coal sack material from Mahama (the "Lots"). The £90,000 figure was agreed upon because Mahama represented that he needed some of that amount to obtain the jute materials and the majority of the money to build and furnish an artist's studio and living space. The parties further orally agreed that two of the Lots, one measuring approximately 20x120 feet and the other measuring approximately 20x150 feet, would remain intact and would serve as the material for installations to be exhibited by Ellis King, and which would be owned by Plaintiffs (the "Installation Pieces"). The parties further orally agreed to create a series of smaller, unique artworks from the remaining four Lots by reducing them into three separate sizes (108"x54", 96"x48", and 72"x36") and mounting the fabric over stretcher bars, which would then be authenticated by Mahama's signature on the recto of the stretched frame (the "Individual Works"), and which Plaintiffs would have the exclusive right to sell.

11. All of the parties initially performed their respective obligations under the Contract. Plaintiffs paid Mahama in full for the six Lots. Plaintiffs paid an additional € 1,650.00 to import the Lots to the United Kingdom. Plaintiffs hired a skilled artisan, Dylan Atkins ("Atkins"), to undertake the process of creating the Individual Works by cutting four of the Lots into the agreed sizes and mounting the fabric over stretcher bars for Mahama's signature.

12. Mahama visited Atkins at his studio in London to oversee and approve the stretching process. Based on Mahama's input, Atkins completed his work, assembling a total of at least 294 Individual Works, for which Atkins was paid approximately $67,000 by Plaintiffs.

13. On December 3 and 4, 2014, Mahama signed the 294 Individual Works at Ellis King's gallery in Dublin.

14. While Atkins was completing the Individual Works from four of the six Lots, Ellis King was erecting the Installation Pieces in its Dublin gallery. Two additional workers were hired by Ellis King to assemble and erect the Installation Pieces in the exhibition space.

15. From December 5, 2014 through January 10, 2015, Ellis King exhibited the Installation Pieces, titled "Civil Occupation" (the "Exhibition"). The Exhibition was a tremendous success and received extremely favorable reviews. As a result, the formerly unknown Mahama suddenly rose to fame. Of the 294 Individual Works, Plaintiffs sold 27 pieces to galleries and collectors in Los Angeles, New York, London, Paris, Cyprus, Belgium, Monaco, Greece and the United Arab Emirates. The average price in U.S. Dollars for each of the Individual Works sold was approximately $16,700.

16. Some of the remaining unsold inventory of 267 Individual Works is stored in Dublin; the rest in California. The value of the unsold inventory is approximately $4,450,000.

17. In addition to the 294 Individual Works, there are 15 more stretched but unsigned works of varying sizes in Simcor's possession in California (the "California Works"). These pieces were sent to California for display and sale by Simcor, with the understanding between Mahama and Simcor that Mahama would provide certificates of authenticity.

18. During the Exhibition, once Plaintiffs had brought Mahama to the public's attention and begun establishing a market for his work, Mahama began to breach the parties' Contract.

19. On information and belief, without advising either of the Plaintiffs, Mahama secretly made a new series of artworks substantially similar to the Individual Works.

20. On information and belief, during or close to the period the Exhibition was on display in Dublin, Mahama sold approximately 20 of his new pieces to a

collector in Los Angeles, with whom he attempted to arrange an artist studio residency to take place in Los Angeles, without either of Plaintiffs' participation, or knowledge.

21. In January 2015, Mahama wrote an email to Ellis King stating, for the first time, that he was "disappointed" with the Individual Works, although he had written to Ellis King the previous February that "the stretched work looks fine." Mahama went on to admit that he had sold his new works to the collector in California to "help me to raise funds" for his participation in the Venice Biennale, a major international contemporary art exhibition held every other odd year. Mahama concluded his email stating he wanted "to drop the representation" with Ellis King, and that his name should be removed from the gallery's website.

22. On or around May 2015, Mahama sent an undated letter to Ellis King asserting that he was the owner of the copyright in Installation Pieces, as well as the owner of the Installation Pieces themselves. He further stated that Ellis King did not have permission to use the Installation Pieces. He continued: "Permission was neither asked nor granted to reproduce parts of the works…[a]nd the resulting new works therefore constitute infringement of the artist's rights." Mahama went on to state that he intended to provide a "certificate of authenticity" for each of the two Lots comprising the Installation Pieces, and that, pending provision of the certificates, Mahama's invoices for the Lots purchased by the Plaintiffs "are considered as certificate of authenticity."

23. In Mahama's letter May 2015, he took the position that none of the Individual Works were authentic, despite his having signed them, and despite his knowledge that many of the Individual Works had already been sold. Further, Mahama stated that he was the owner of the copyright in and to all of the original six Lots purchased by Plaintiffs. Mahama admonished Plaintiffs not to display, sell or otherwise exploit that material, complaining that he had not agreed to the commercialization of his artworks.

24. On information and belief, Mahama is presently represented by new and different galleries, through which he is selling artworks identical to, or substantially similar to, the Individual Works and the California Works. Further, despite Mahama's statements to Plaintiffs regarding the commercialization of his artwork, Mahama is currently selling through his Italian gallery seven different photographs of his unadorned jute sacks, in series of five, for approximately $5,000 each.

25. On information and belief, Mahama did not use the £90,000 paid to him by Plaintiffs to build a studio. Rather, Plaintiffs are informed and believe Mahama invested that money in ventures with his father.

FIRST CLAIM FOR RELIEF

(Breach of Contract)

26. Plaintiffs incorporate by reference Paragraphs 1 through 25 of this Complaint as though fully set forth herein.

27. Plaintiffs and Mahama entered into the Contract pursuant to which Plaintiffs would finance, install, advertise and host the Exhibit in exchange for ownership of the Installation Pieces, and for the exclusive right to create and market, at Plaintiffs' additional expense, the Individual Works and the California Works.

28. Pursuant to the Contract, Plaintiffs each paid £45,000 to Mahama for the Lots, and an additional £3,000 approximately to import them from Ghana to the United Kingdom.

29. Pursuant to the Contract, Plaintiffs paid €2,000 approximately to hold the Exhibit, which costs included the labor required to assemble and erect the Installation Pieces in the exhibition space. Plaintiffs incurred additional costs of approximately €1,500.00 to advertise and promote the Exhibit.

30. Pursuant to the Contract, Plaintiffs paid Atkins $67,000 to create the Individual Works by reducing them into agreed upon sizes and fastening them over stretcher frames, in order for Mahama to sign them.

31. Mahama was not required to do very much pursuant to the Contract; rather all the work – importing the material, assembling and installing the fabric pieces, and cutting and stretching the fabric lots to create the Individual Works and the California Works– was performed by individuals other than Mahama who were paid by Plaintiffs. Mahama's sole obligations pursuant to the Contract were to oversee the installation process for the Exhibit, approve the process employed by Atkins to size and stretch the Individual Works and the California Works, and to approve and sign the stretched pieces created by Atkins. With his signature, Mahama physically gave his imprimatur as to the provenance and authenticity of the Individual Works and was supposed to bestow the same authenticity on the California Works had he fulfilled his contractual obligations.

32. On information and belief, during or immediately after the Exhibition, without the knowledge of consent of Plaintiffs, Mahama created artworks identical or substantially similar to the Individual Works and sold them to collectors for tens of thousands of dollars.

33. Mahama has taken the position that he owns the copyright in all of the artwork created from the original six Lots, including the Installation Pieces, the Individual Works and the California Works.

34. On information and belief, Mahama has taken the position that none of the stretched pieces are authentic, despite his having personally signed the Individual Works and having agreed to sign the California Works.

35. On information and belief, Mahama took £90,000 (the equivalent of $148,500 U.S. Dollars) from Plaintiffs, most of which was supposed to fund the building of an artist's studio and residence. On information and belief, Mahama did

not spend any of that amount as promised, but instead invested the money in a venture with his father.

36. As a result of Mahama's actions as hereinabove alleged, Mahama has materially breached and repudiated the Contract.

37. Mahama's breach of the Contract has resulted in substantial damages to Plaintiffs in an amount to be established at trial including, but not limited to, the value of unsold inventory of the Individual Works, estimated at approximately $4,450,000, the market for which Mahama has devalued and discredited.

SECOND CLAIM FOR RELIEF

(Fraudulent Inducement)

38. Plaintiffs incorporate by reference Paragraphs 1 through 25 of this Complaint as though fully set forth herein.

39. Mahama represented to Plaintiffs that he intended to build a fully integrated artist studio and living space with money Plaintiffs provided, and that he would fulfill his obligations under the Contract by authenticating the Individual Works and the California Works, thereby enabling Plaintiffs to establish a market for those pieces, which were to be exclusively sold by Plaintiffs.

40. In reasonable reliance on Mahama's representations, Plaintiffs spent hundreds of thousands of dollars to purchase and import the Lots, assemble and erect the Installation Pieces for the Exhibition, promote and host the Exhibition, and to create the Individual Works and the California Works. In the process, Plaintiffs helped to transform a virtually unknown Ghanaian man in his twenties into an internationally successful artist.

41. Mahama's representations were false when made to Plaintiffs. Specifically, on information and belief, Mahama had no intention of allocating any of the money Plaintiffs paid directly to him for the construction of a studio, instead using the money in investments. Mahama further falsely represented that he intended to fulfill his obligations under the Contract by signing the Individual

Works and the California Works, thereby enabling Plaintiffs to create a market for the authentic pieces.

42. Mahama's true intentions regarding his participation in the Exhibit and in authenticating the stretched pieces were also deceptive. On information and belief, Mahama secretly sold numerous artworks, for tens of thousands of dollars, to collectors in California at or around the time the Exhibition was being held. Mahama thus had no intention of honoring his agreement of exclusivity with Plaintiffs. On the contrary, Mahama used Plaintiffs to bring him to prominence and wasted no time going behind their backs to start reaping the benefits of his new-found fame.

43. But for Mahama's deceptive representations as to his intent to fulfill his contractual obligations, Plaintiffs would not have invested the substantial amounts of time, money and effort required to create a name for Mahama and establish a market for his work.

44. As a result of Mahama's actions as hereinabove alleged, Plaintiffs suffered damages, in an amount to be established at trial, in that they were fraudulently induced into investing substantial sums of money to bring him into the Western art world, only to have him disavow his relationship with Plaintiffs in an attempt to discredit and to devalue the artwork they paid for – as well as claim ownership of artwork they paid for – all in order to benefit himself at Plaintiffs' expense and to their considerable financial detriment.

Plaintiffs are entitled to, and hereby seek, in addition to compensatory damages, punitive damages as a result of Mahama's fraudulent conduct herein on grounds that such conduct was knowing, willful, malicious and specifically intended to cause harm to Plaintiffs and did, in fact, cause harm to Plaintiffs.

THIRD CLAIM FOR RELIEF

(Commercial Disparagement)

45. Plaintiffs incorporate by reference Paragraphs 1 through 25 of this Complaint as though fully set forth herein.

46. On information and belief, Mahama has publicly stated that the Individual Works and the California Works are not authentic, and that he is the owner of the Installation Pieces. Further, Mahama has made disparaging statements about Plaintiff Simcor and its member, Stefan Simchowitz, to various artists in Ghana and elsewhere with whom Simcor works that they should not do business with Simcor because of Simcor's improper and dishonest business practices. Upon information and belief, these disparaging statements have been made starting mid-January 2015 to the present.

47. Mahama's statements are knowingly, demonstrably false because he was handsomely paid for the materials for the Installation Pieces and because he personally authenticated the Individual Works by signing them himself.

48. Mahama's false statements were made with the express intention of eliminating the market for the inventory of Individual Works and the California Works in Plaintiffs' possession while increasing the market for his own, competing artworks.

49. As a direct and proximate result of Mahama's actions as hereinabove alleged, Plaintiffs have suffered damages in an amount to be established at trial including, but not limited to, the value of unsold inventory of the Individual Works, estimated at approximately $4,450,000, the market for which Mahama has devalued and discredited by his false and disparaging statements. In addition, Plaintiffs stand to suffer additional losses for which Mahama will be held liable if the Individual Works Plaintiffs already sold are deemed non-authentic, causing Plaintiffs to refund to the buyers the sale prices of those works.

50. Plaintiffs seek punitive damages for Mahama's action as hereinabove alleged because Mahama acted willfully and maliciously towards Plaintiffs in making his statements concerning the authenticity of the Individual Works and the California Works in that he knew such statements were verifiably false, but made them with the express understanding that they would cause financial harm to Plaintiffs.

FOURTH CLAIM FOR RELIEF

(Unfair Competition)

51. Plaintiffs incorporate by reference Paragraphs 1 through 27 of this Complaint as though fully set forth herein.

52. Mahama's actions as hereinabove alleged are unfair, unlawful and fraudulent in that Mahama knowingly, willfully and with intent to damage Plaintiffs challenged the ownership and authenticity of the Installation Pieces, the Individual Works and the California Works in order to eliminate competition for the sale of his own, different artworks.

53. As a result of Mahama's actions as hereinabove alleged, Plaintiffs have suffered damages from the impact on the market for their inventory of unsold Individual Works and the California Works.

54. Based on the foregoing, in addition to other damages and remedies available to them, Plaintiffs are entitled to restitution for amounts they have expended in connection with the Installation Pieces, the Individual Works and the California Works, and are further entitled to injunctive relief precluding Mahama from engaging in unfairly competitive business practices including, without limitation, falsely representing that the Individual Works and the California Works are not authentic.

FIFTH CLAIM FOR RELIEF

(Specific Performance)

55. Plaintiffs incorporate by reference Paragraphs 1 through 25 of this Complaint as though fully set forth herein.

56. Plaintiffs and Mahama entered into a valid and binding Contract as alleged above.

57. Plaintiffs have performed and are continuing to perform all of their obligations under the Contract.

58. In addition to Mahama's contractual breaches as alleged above, Mahama failed and refused to sign the California Works, thereby placing those works' authenticity in question. Each of the unsigned pieces was created at the same time, in the same place, by the same person (Atkins), in the same manner, from the same materials, and for the same cost to Plaintiffs as the works Mahama did sign. On information and belief, Mahama did not provide any reason why he failed to sign the California Works.

59. Bearing Mahama's signature to verify their authenticity and provenance, the California Works may be sold for approximately $16,700 each. Without his signature, the pieces are simply jute coal sacks mounted to wooden frames, which impacts their commercial value.

60. In light of the foregoing, Plaintiffs seek an order for specific performance requiring Mahama to either sign the California Works or otherwise provide sufficient documentation to attest to their authenticity and provenance. Alternatively, in addition to the other contractual damages prayed for herein, Plaintiffs seek from Mahama the equivalent value of 15 signed Individual Works, an amount equal to at least $250,500.

SIXTH CLAIM FOR RELIEF

(Declaratory Relief)

61. Plaintiffs incorporate by reference Paragraphs 1 through 25 of this Complaint as though fully set forth herein.

62. As alleged hereinabove, Plaintiffs paid Mahama $148,500 for the Lots, two of which were assembled and erected at Plaintiffs' expense as the Installation Pieces, which pieces are owned by Plaintiffs.

63. Also alleged hereinabove, the Individual Works and the California Works were created with Mahama's knowledge, consent, oversight and approval. Following their creation Mahama authenticated the Individual Works by personally signing them. Overall, Plaintiffs spent approximately $225,000 in payments to Mahama, in paying for and importing the Lots, creating the Installation Pieces, promoting and hosting the Exhibit, and creating the Individual Works and the California Works.

64. Despite the foregoing, on information and belief, Mahama now asserts ownership of the Installation Pieces and disputes the authenticity of the Individual Works and the California Works.

65. Absent a declaration that the Individual Works and the California Works are authentic, Plaintiffs will suffer millions of dollars in damages because they will not be able to sell their inventory of unsold Individual Works and California Works.

66. In addition, absent a declaration that the Individual Works are authentic, Plaintiffs may be required to refund the payments received from buyers of the 27 Individual Works already sold.

67. An actual and justiciable controversy exists between the parties as to copyright ownership of the Installation Pieces as well as the pieces themselves.

68. An actual and justiciable controversy exists between the parties as to the authenticity of the Individual Works and the California Works. Plaintiffs

therefore seek a declaration that: (1) Plaintiffs own the Installation Pieces, and (2) the Individual Works and the California Works are, in fact, authentic.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

1. On the first claim for breach of contract, for an order for actual damages in the amount Plaintiffs have been damaged as a result of Mahama's breach of the Contract, in an amount to be proved at trial but estimated at approximately $4,450,000;

2. On the second claim for fraudulent inducement, for an order for actual damages as a result of Mahama's fraudulently inducing Plaintiffs to enter and perform under the Contract, in an amount to be proved at trial but estimated at approximately $4,450,000, plus punitive damages.

3. On the third claim for commercial disparagement, for an order for actual damages and punitive damages as a result of Mahama's malicious and knowingly false statements regarding the authenticity of the Individual Works and the California Works;

4. On the fourth claim for unfair competition, for an order requiring Mahama to pay restitution for amounts Plaintiffs expended in connection with the Installation Pieces, the Individual Works and the California Works, and enjoining Mahama from engaging in unfair competitive business practices including, without limitation, falsely representing that the Individual Works and the California Works are not authentic;

5. On the fifth claim for specific performance, for an order requiring Mahama to either sign the California Works or otherwise provide sufficient documentation to attest to their authenticity and provenance or, alternatively, in addition to the other contractual damages prayed for herein, the equivalent value of 15 signed Individual Works, an amount equal to at least $250,500;

6. On the sixth claim for declaratory relief, for an order declaring that: (1) Plaintiffs own the Installation Pieces, and (2) the Individual Works and the California Works are authentic;

7. For costs of suit herein incurred;

8. For attorneys' fees on claims allowing such fees; and

9. For such other and further relief as the Court deems just.

DAVID STEINER & ASSOCIATES

By: /s/ David P. Steiner
DAVID P. STEINER
JONATHAN BALFUS
Attorney for Plaintiffs SIMCOR LLC and ELLIS KING LTD.

THE RUDD LAW FIRM, A P.C

By: /s/ Christopher L. Rudd
CHRISTOPHER L. RUDD
Attorney for Plaintiff SIMCOR LLC

JURY TRIAL DEMAND

Plaintiffs request trial by jury of all issues so triable.

DAVID STEINER & ASSOCIATES, PLC

By: /s/ David P. Steiner
DAVID P. STEINER
JONATHAN BALFUS
Attorney for Plaintiffs SIMCOR LLC and ELLIS KING LTD.

713 F.Supp.2d 367
United States District Court,
S.D. New York.

Craig ROBINS, Plaintiff,
v.
David ZWIRNER, et al., Defendants.

No. 10 Civ. 2787(WHP).
|
May 20, 2010.

Synopsis

Background: Art patron brought action against art dealer, alleging that dealer breached promise to sell certain paintings, and seeking, inter alia, specific performance of oral agreements. Patron moved for preliminary injunction to prevent dealer from selling, pledging, or otherwise disposing of three paintings.

Holdings: The District Court, William H. Pauley III, J., held that:

[1] patron alleged irreparable injury required for preliminary injunction;

[2] enforcement of oral confidentiality agreement was barred by Statute of Frauds;

[3] enforcement of agreement for sale of paintings was barred by Statute of Frauds;

[4] patron failed to demonstrate likelihood of unexpected and serious injury required for preliminary injunction on grounds of promissory estoppel; and

[5] patron failed to state fraud claim.

Motion denied.

West Headnotes (21)

[1] **Injunction**
Grounds in general; multiple factors

A court may grant a preliminary injunction if the moving party establishes (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

[2] **Injunction**
Equitable considerations in general
Injunction
Irreparable injury

A preliminary injunction should be granted only when the intervention of a court of equity is essential to protect a party's property rights against injuries that would otherwise be irremediable. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

[3] **Injunction**
Clear, likely, threatened, anticipated, or intended injury
Injunction
Irreparable injury

The mere possibility of harm is not sufficient to show the irreparable harm required for issuance of a preliminary injunction; rather, the harm must be real and imminent, and the movant must show that it is likely to suffer the harm if equitable relief is denied. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

1 Cases that cite this headnote

[4] **Injunction**
Irreparable injury
Injunction
Adequacy of remedy at law

"Irreparable harm" required for issuance of a preliminary injunction is injury for which a monetary award cannot be adequate compensation, and is often found in the loss of a unique product or service. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

2 Cases that cite this headnote

[5] **Specific Performance**
Specific articles or goods

Original works of art are within the small category of intrinsically unique goods for which a specific performance remedy is appropriate; this is because a painting's value depends, in large part, on the purchaser's aesthetic sensibilities and the eye of the beholder and, accordingly, affixing an appropriate monetary remedy for these goods is difficult.

2 Cases that cite this headnote

[6] **Injunction**
Sale, mortgage, or other disposition

Art patron alleged irreparable injury required for preliminary injunction prohibiting art dealer from selling, pledging, or otherwise disposing of three paintings, in breach of contract action alleging dealer breached oral promise to sell to patron certain paintings by artist whose works patron collected; damages remedy would be inadequate to make patron whole for any breach because artist rarely made her work available for sale and paintings at issue were of scenes that were thematically exceptional for artist and in a subject area artist was unlikely to soon revisit, and if paintings were sold, patron would thus have no recourse to obtain substitute. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

[7] **Frauds, Statute Of**
Nature and Subject-Matter
Frauds, Statute Of
Nature of contract

Under New York law, where a service component of an oral agreement predominates over the incidental sale of personal property, the agreement is barred by the Statute of Frauds only if it is incapable of being performed within one year. N.Y.McKinney's Uniform Commercial Code § 2–201(1); N.Y.McKinney's General Obligations Law § 5–701.

2 Cases that cite this headnote

[8] **Frauds, Statute Of**
Possibility of Performance

Under New York law, where an oral agreement between the parties calls for performance of an indefinite duration and can only be terminated within one year by its breach during that period, it is void under the Statute of Frauds. N.Y.McKinney's Uniform Commercial Code § 2–201(1); N.Y.McKinney's General Obligations Law § 5–701.

[9] **Frauds, Statute Of**
Nature of contract

Under New York law, a court determining whether an oral agreement is subject to the Statute of Frauds looks to the main objective sought to be accomplished by the contracting parties to ascertain whether the agreement is for the sale of goods or rendition of services. N.Y.McKinney's Uniform Commercial Code § 2–201(1); N.Y.McKinney's General Obligations Law § 5–701.

2 Cases that cite this headnote

[10] **Frauds, Statute Of**
Possibility of Performance

Under New York law, enforcement of oral confidentiality agreement between art patron and art dealer which required dealer never to disclose patron's sale of artist's painting was barred by Statute of Frauds; agreement was intended to last for unlimited duration and thus could not be fully performed within one year, and indeed the only way agreement could terminate within one year was if dealer breached agreement. N.Y.McKinney's Uniform Commercial Code § 2–201(1); N.Y.McKinney's General Obligations Law § 5–701.

1 Cases that cite this headnote

[11] **Frauds, Statute Of**
Nature and Subject-Matter
Frauds, Statute Of
Nature of contract

Primary objective of oral agreement between art patron and art dealer was for future sale to patron of at least one of artist's paintings, not for personal services, and agreement was thus subject to Statute of Frauds under New York law in action alleging breach of agreement; alleged requirement of agreement that patron be removed from blacklist of potential buyers of artist's works could only be effected by artist, who was non-party to litigation, and thus only aspect of agreement that dealer could control was sale of artist's paintings. N.Y.McKinney's Uniform Commercial Code §§ 1–206, 2–201.

[12] **Sales**
Rights of first refusal

Under New York law, a "right of first refusal" requires an owner, when and if he decides to sell, to offer the property first to the party holding the preemptive right so that he may meet a third-party offer or buy the property at some other price set by a previously stipulated method.

[13] **Sales**
Agreements to agree
Sales
Rights of first refusal

Under New York law, rights of first refusal and agreements to agree on the sale of a good are both governed by the Uniform Commercial Code.

[14] **Frauds, Statute Of**
Promise to reduce agreement to writing

Under New York law, an oral agreement to execute an agreement that is within the Statute of Frauds is itself within the statute.

2 Cases that cite this headnote

[15] **Frauds, Statute Of**
Nature and amount of price

Under New York law, Statute of Frauds barred enforcement of alleged oral agreement between art dealer and art patron for sale to patron of at least one of artist's paintings, where three paintings at issue were each priced over one million dollars. N.Y.McKinney's Uniform Commercial Code §§ 1–206, 2–201.

1 Cases that cite this headnote

[16] **Estoppel**
Future events; promissory estoppel

Under New York law, to recover under theory of promissory estoppel, a plaintiff must show (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise was made, and (3) an injury to the party to whom the promise was made by reason of the reliance.

6 Cases that cite this headnote

[17] **Injunction**
Sale, mortgage, or other disposition

Art patron failed to demonstrate likelihood of unexpected and serious injury flowing from art dealer's breach of oral agreement to sell to patron three of artist's paintings priced at over one million dollars each, as required for preliminary injunction barring dealer from selling paintings on grounds of promissory estoppel under New York law, in action for breach of agreement; patron asserted promissory estoppel to overcome dealer's valid Statute of Frauds defense to breach claim, but any injuries patron suffered were within the realm one would reasonably expect from the non-performance of a sales contract.

5 Cases that cite this headnote

[18] **Fraud**
Effect of existence of remedy by action on contract

Under New York law, a party cannot maintain overlapping fraud and breach of contract claims.

[19] **Fraud**
Effect of existence of remedy by action on contract

Under New York law, to state a fraud claim co-existent with an alleged breach of contract, a plaintiff must (1) demonstrate a legal duty separate from the duty to perform under the contract; (2) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (3) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.

[20] **Fraud**
Effect of existence of remedy by action on contract

Art patron failed to allege any special duty owed by art dealer apart from duty to perform under agreement to sell to patron three of artist's paintings, as required under New York law to state fraud claim co-existent with alleged

breach of agreement.

[21] **Fraud**
Effect of existence of remedy by action on contract

Art patron suffered no special damages as a result of art dealer's allegedly fraudulent conduct as required under New York law to bring fraud claim co-existent with alleged breach of agreement to sell to patron three of artist's paintings.

Attorneys and Law Firms

***370** Aaron Richard Golub, Esq., New York, NY, for Plaintiff.

Peter C. Harvey, Esq., Patterson Belknap Webb & Tyler LLP, New York, NY, for Defendants.

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiff Craig Robins ("Robins") brings this breach of contract action against Defendants David Zwirner ("Zwirner"), David Zwirner Gallery, and David Zwirner, Inc. (collectively the "Gallery") claiming that Zwirner reneged on a promise to sell certain paintings by the artist Marlene Dumas ("Dumas") to Robins. Robins seeks, *inter alia*, specific performance of the oral agreements. He moves for a preliminary injunction under Fed.R.Civ.P. 65 to prevent the Defendants from selling, pledging, or otherwise disposing of three Dumas paintings while this litigation is pending. For the following reasons, Plaintiffs application for a preliminary injunction is denied.

BACKGROUND

This lawsuit offers an unflattering portrait of the art world—a realm of self-proclaimed royalty full of "blacklists," "greylists," and astonishing chicanery. Robins is an art patron from Miami Beach, Florida who has amassed a substantial collection of Dumas' works. (Affidavit of Craig Robins in Support of Preliminary Injunction dated Mar. 29, 2010 ("Robins Aff.") ¶ 2.) Zwirner is an art dealer and the owner of the Gallery bearing his name in the Chelsea section of Manhattan. (Declaration of David Zwirner ("Zwirner Decl.") ¶ 1.) The Gallery displays and sells works of art and represents contemporary artists. (Zwirner Decl. ¶ 2.) Dumas is a South African artist who Zwirner has represented since April 2008. (Zwirner Decl. ¶¶ 2, 3, 17.) Before that time, another New York gallerist Jack Tilton ("Tilton") represented Dumas for almost two decades and displayed her works at a gallery bearing his name on the Upper East Side of Manhattan. (Transcript of Apr. 21, 2010 Hearing ("Tr.") at 3–4.)

A. *The Confidentiality Agreement*

In late 2004, Robins approached Tilton for assistance in selling a Dumas painting ***371** titled *Reinhardt's Daughter.* (Robins Aff. ¶ 3; Tr. at 6–7.) Robins had purchased Reinhardt's Daughter in the Secondary Market.[1] (Robins Aff. ¶ 3.) Tilton contacted Zwirner, with whom he had done business before, to ascertain whether Zwirner could sell the painting on consignment. (Tr. at 7–8.) Thereafter, Zwirner informed Tilton that he had located a buyer. (Zwirner Decl. ¶ 5; Zwirner Decl. Ex. A: Invoice dated Nov. 15, 2004.) Tilton told Zwirner repeatedly that Robins wanted the transaction to be kept secret. (Tr. at 8.) During a telephone conversation with Tilton, Zwirner agreed to keep the sale confidential (the "Confidentiality Agreement"). (First Amended Complaint dated Apr. 12, 2010 ("Am. Compl.") ¶ 8; Tr. at 7–10.) According to Robins, the Confidentiality

Agreement was intended to prevent Dumas, who opposed Secondary Market sales of her works, from learning of the deal. (Robins Aff. ¶¶ 3–4.) Dumas did not sell to collectors who "churned" her work in the Secondary Market. (Tr. at 9.) Contrary to Robins' and Tilton's statements, Zwirner avers that he "did not enter into any confidentiality agreement, written or oral, with Mr. Robins" and that, although an art sale is usually kept confidential during negotiations, after a piece is sold, "the new ownership of the work is as public or as private as the new owner wishes to make it." (Zwirner Decl. ¶ 8.)

On December 2, 2004, Robins and Zwirner signed a document titled "Robins Exchange No. 1004," which memorialized the sale of *Reinhardt's Daughter* from Robins to Zwirner in a section called "Relinquished Property Contract ('Sales Agreement')." (Zwirner Decl. Ex. B: Robins Exchange No. 1004 dated Dec. 2, 2004 ("Sales Agreement").) No confidentiality provision was included in the Sales Agreement.

B. *The Dumas Blacklist*

In early 2005, while Zwirner was collaborating with Dumas on a catalogue, he informed the artist that Robins had sold *Reinhardt's Daughter.* (Robins Aff. ¶ 6.) On March 5, 2005, Dumas' studio manager in the Netherlands, Jolie van Leeuwen ("van Leeuwen"), emailed Tilton inquiring if Robins had sold Reinhardt's Daughter. (Defendants' Ex. A: Email from Dumas to Tilton dated Mar. 5, 2005.) Tilton confirmed that Robins had sold the painting for personal reasons. (Defendants' Ex. B: Email from Dumas to Tilton dated Mar. 25, 2005.) Tilton testified that when van Leeuwen learned of Robins' sale of *Reinhardt's Daughter,* she was "quite upset" and "hysterical[ ]." (Tr. at 17.) Upon learning Robins had sold *Reinhardt's Daughter,* Dumas also "became so incensed that she literally blacklisted [Robins] from purchasing any other work of hers in the Primary Market." (Robins Aff. ¶ 6.)

Tilton acknowledged that Dumas "blacklisted" persons suspected of selling her work in the Secondary Market. (Tr. at 16–17.) In early 2005, van Leeuwen circulated to gallerists several lists of collectors forbidden from purchasing Dumas' art (collectively the "Dumas Blacklist"). Names were added to the lists by recipients who contacted Dumas to inform her of sales in the Secondary Market. (Tr. at 21–28.) A March 2005 version of the Dumas Blacklist includes Robins' name under the heading "Grey List." According to Tilton, ***372** the Dumas Blacklist was actually two lists—a Blacklist and the Grey List. The two lists were functionally equivalent—persons on either roll were theoretically forbidden by Dumas from purchasing her works. (Tr. at 21.) The March 2005 version of the Dumas Blacklist contains the following passage:

> From all of you [gallerists] I have received names of persons that we consider for a blacklist. Also with the reasons why these people are considered for a black list. We also spoke about the difficulties of making such a list and about personal grieve [sic] about grey lists of names that are not to be called crooks but you will not so quickly sell them another work from Dumas anymore. Most of these grey names are from people that want a new piece or people that sell thru other galleries or sell themselves, but still consider themselves as admirers of DUMAS. But please let [sic] not sell to the grey list persons either, for the time being.

(Defendants' Ex. D: Dumas Blacklist and Grey List dated Mar. 2005 ("Dumas Blacklist") at 1.)

Many of the names on the Dumas Blacklist are accompanied by the informant who disclosed the identity of a seller in the Secondary Market. Robins' name appears on the Grey List, but no informant is listed. (Dumas Blacklist at 1.) Zwirner's name is also on the March 2005 Dumas Blacklist with a notation that Jack Tilton, his competitor, reported him. (Dumas Blacklist at 1.) Tilton admitted he added Zwirner because Zwirner "was actively selling numerous pieces by Marlene,

buying and selling in the secondary market." (Tr. at 55.)

There were only two ways a person could be removed from the Dumas Blacklist. First, Dumas herself could cross someone off the list. (Tr. at 64.) Alternatively, if a gallerist was on the list, his name could be removed if he became Dumas' representative and was given "access to her work." (Tr. at 66.)

C. *The Gallery Agreement*

In early 2005, Zwirner told Robins that his name was on the Dumas Blacklist. (Tr. at 18.) Robins was "livid" when he learned that Zwirner had revealed his sale of *Reinhardt's Daughter* to Dumas. (Tr. at 19.) After telling Tilton that he wished to sue Zwirner, Tilton encouraged Robins to meet with Zwirner to stave off litigation. (Tr. at 19.)

In late March 2005, Robins, Zwirner, and Tilton met at the Gallery. (Robins Aff. ¶ 8.) According to Robins, as consideration for refraining from legal action, Zwirner agreed to give Robins "first choice, after museums, to purchase one or more" of Dumas' works whenever Dumas had an exhibition at the Gallery and to remove Robins name from the Dumas Blacklist (the "Gallery Agreement"). (Robins Aff. ¶ 8.) The Gallery Agreement was oral and concluded with a handshake. (Robins Aff. ¶ 8.) Tilton remembers that Robins was given "first choice on something that [Zwirner] would show in his gallery going forward," which could include one or one or more paintings because "sometimes Marlene works in groups." (Tr. at 20.) Not surprisingly, Zwirner recalls the meeting differently. In his version, Tilton was not present and the meeting occurred in May 2005. At that time, Zwirner agreed "in principle" to sell Robins "other unspecified works from upcoming exhibitions of artists that [Zwirner] represented at the time, whose work was in high demand and for whom there were waiting lists." (Zwirner Decl. ¶ 15.) Robins and Zwirner both agree that there is no writing memorializing the meeting or the Gallery Agreement. (Tr. at 46.)

***373** D. *Dumas' Show at the Zwirner Gallery*

In March 2010, Zwirner opened a Dumas exhibition titled "Against the Wall" (the "Exhibition") at the Gallery. (Robins Aff. ¶ 10.) The Exhibition ran from March 18 to April 24, 2010. (Robins Aff. ¶ 10.) On March 4, 2010, Robins emailed Zwirner regarding his intention to purchase Dumas works from the Exhibition:

> Hi David. As you will recall, we resolved our disagreement a few years ago with your commitment to give me first choice on the Dumas show after museums. I look forward to seeing the images of works in the show as well as the pricing. If you do not mind, I would like to share the images with Jack to get his input. Thank you in advance. I hope you are well. Craig

(Robins Aff. Ex. 1: Email from Robins to Zwirner dated Mar. 4, 2010.) After receiving no response from Zwirner, Robins followed up with another email on March 13:

> Hi David: I am concerned because you did not acknowledge your obligation under our settlement agreement. Hopefully, this is not an issue and we are on the same page. Please do not think that you can absolve yourself of your responsibility by ignoring me. I enjoy our relationship and would not want to be in a conflict with you. Craig

(Robins Aff. Ex. 2: Email from Robins to Zwirner dated Mar. 13, 2010.) That provoked a response. Two days later, Zwirner acknowledged his receipt of both emails and addressed an issue concerning Robins and Zwirner's partnership in another

painting. (Robins Aff. Ex. 3: Email from Zwirner to Robins dated Mar. 4, 2010.)

After another email from Robins to Zwirner on March 16, 2010, Zwirner responded:

> Dear Craig, I do recall our disagreement that we had in 2004 about Marlene Dumas. But I do not remember promising to give you priority in the purchase of a work by Dumas, and cannot find any record of any promise like that. In fact, I could not have made that promise, as Marlene did not join my gallery until three years later.

(Robins Aff. Ex. 5: Email from Zwirner to Robins dated Mar. 17, 2010.) At this point, Robins advised Zwirner that he intended to purchase three Exhibition paintings by Dumas: *Figure in a Landscape*, *Under Construction*, and *Wall Weeping* (the "Three Dumas Paintings"). (Robins Aff. ¶ 11.) Zwirner refused to sell these paintings to Robins. (Robins Aff. ¶ 13.) Instead, he offered Robins a Dumas painting titled *The Grapes of Plenty*, which Robins claims was nothing more than a "glaring sarcastic insult." (Robins Aff. ¶ 13.)

On March 29, 2010, Robins commenced this action and sought a temporary restraining order. (Robins Aff. ¶ 16.) Robins seeks specific performance of the Gallery Agreement because Dumas' works are "nearly impossible to obtain as Dumas creates a limited amount." (Robins Aff. ¶ 17.) Robins also claims the Exhibition is "a unique body of Israeli themed works," and Dumas "may never do similar paintings." (Robins Aff. ¶ 17.) Absent an injunction allowing him to purchase the art, Robins claims he "will not have first provenance in any of the subject paintings" which would "materially" impair his collection. (Robins Aff. ¶ 19.) In his Amended Complaint, Robins alleges that in, reliance on Zwirner fulfilling the Gallery Agreement, he purchased several Dumas works—a set of seven drawings in June 2005 and a $500,000 oil painting in December 2005. (Am. Compl. ¶ 17.) On April 21, 2010, this Court conducted an evidentiary hearing.

***374** *DISCUSSION*

[1] [2] A court may grant a preliminary injunction "if the moving party establishes (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." *Lynch v. City of N.Y.*, 589 F.3d 94, 98 (2d Cir.2009). An injunction should be granted only "when the intervention of a court of equity is essential to protect a party's property rights against injuries that would otherwise be irremediable." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir.1999) (citing *Cavanaugh v. Looney*, 248 U.S. 453, 456, 39 S.Ct. 142, 63 L.Ed. 354 (1919)).

A. *Irreparable Harm*

[3] [4] Irreparable harm is the "single most important prerequisite for the issuance of a preliminary injunction." *Bell & Howell Mamiya Co. v. Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir.1983). The mere possibility of harm is not sufficient; rather, the harm must be real and imminent, and the movant must show that it is likely to suffer the harm if equitable relief is denied. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir.2004). Irreparable harm is "injury for which a monetary award cannot be adequate compensation," *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979), and is often found in the loss of a unique product or service. *See Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37–38 (2d Cir.1995); *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907–08 (2d Cir.1990). In this regard, a showing of irreparable harm is similar to the showing required for specific performance of a contract. *Cf. David Tunick, Inc. v. Kornfeld*, 838 F.Supp. 848, 852 (S.D.N.Y.1993) (finding two photo prints, even where produced by the same artist and same plate, to be unique).

[5] Original works of art are within the small category of intrinsically unique goods for which a specific performance remedy is appropriate. *See* N.Y. U.C.C. § 2–716 & cmt. 2 ("Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases." (emphasis added)); *Kornfeld*, 838 F.Supp. at 852 ("Thus, each print is, by definition, unique. Hence, there can be no exact substitute for a given print purchased by a collector."). This is because a painting's value depends, in large part, on "the purchaser's aesthetic sensibilities" and the "eye of the beholder"—accordingly, affixing an appropriate monetary remedy for these goods is difficult. *See Kornfeld*, 838 F.Supp. at 852. That art sales are not covered by the standards applicable to most sale-of-goods contracts is demonstrated by New York's enactment of special rules governing fine art transactions. *See* N.Y. Arts & Cult. Aff. L. § 1.01 *et seq.*; *see also Levin v. Dalva Bros., Inc.*, 459 F.3d 68, 77 (1st Cir.2006) (considering breach of warranty claims under N.Y. Arts & Cult. Aff. L. § 13.01). Notably, lay purchasers of fine art are afforded stronger warranty protection than that available under Article 2 of the Uniform Commercial Code (the "U.C.C."). *See* N.Y. Cult. Aff. L. § 13.01; *Levin*, 459 F.3d at 75 ("The fine art statute provides that whenever an art merchant sells a work of fine art to someone who is not an art merchant and provides a document certifying the period or author of the piece, the merchant's representation is an express warranty.").

***375** [6] The Three Dumas Paintings are unique works of art. Thus, if a breach of contract has occurred, a damages remedy would be inadequate to make Robins whole. Dumas rarely makes her work available in the Primary Market. Moreover, the Exhibition paintings relate to the Israeli–Palestinian conflict. For Dumas, scenes of the Wailing Wall in Jerusalem are thematically exceptional and in a subject area she is unlikely to soon revisit. If one of these paintings is sold, Robins will have no recourse to obtain a substitute. *See Kornfeld*, 838 F.Supp. at 852 ("In this context it would be fundamentally unfair, and unsound policy, to impose on plaintiff a duty to accept another—inherently different—[work of art] as a substitute for the one plaintiff actually viewed, bid for, and purchased."). Accordingly, Robins has shown irreparable harm.

B. *Likelihood of Success on the Merits*

Robins' application for injunctive relief rests primarily on Zwirner's alleged breach of the Confidentiality and Gallery Agreements. Defendants contend that the Statute of Frauds bars enforcement of these two oral agreements.

1. *Statute of Frauds*

[7] [8] [9] Under New York law, "a contract for the sale of goods for the price of $500 or more is not enforceable" without a contemporaneous writing "sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." N.Y. U.C.C. § 2–201(1); *Hoffmann v. Boone*, 708 F.Supp. 78, 80 (S.D.N.Y.1989) (applying § 2–201 to sale of art). However, where a service component of a contract "predominates" over the incidental sale of personal property, an oral agreement is barred by the Statute of Frauds only if it is incapable of being performed within one year. *See* N.Y. Gen. Oblig. L. § 5–701: *Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co., Inc.*, 804 F.2d 787, 794–95 (2d Cir.1986) (citation omitted); *Computech Int'l, Inc. v. Compaq Computer Corp.*, No. 02 Civ. 2628(RWS), 2002 WL 31398933, at *3 (S.D.N.Y. Oct. 24, 2002) (applying New York law to a service contract). Where an "oral agreement between the parties call[s] for performance of an indefinite duration and [can] only be terminated within one year by its breach during that period," it is void under the Statute of Frauds. *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449, 483 N.Y.S.2d 164, 472 N.E.2d 992, 995 (1984). New York courts look to "the main objective sought to be accomplished by the contracting parties" to determine whether a contract is for the sale of goods or rendition of services. *Consol. Edison Co. of N.Y., Inc. v. Westinghouse Elec. Corp.*, 567 F.Supp. 358, 361 (S.D.N.Y.1983); *see also Harte v. Iberia, Lineas Aereas de Espana, S.A.*, No. 02 Civ. 362(LMM), 2004 WL 1375119, at *1 (S.D.N.Y. June 17,

2004).

a. *The Confidentiality Agreement*

[10] The Confidentiality Agreement between Tilton, as agent for Robins, and Zwirner was a verbal accord for a service to be performed by Zwirner—non-disclosure of Robins' sale—and, according to Tilton, was intended to last for "an unlimited duration." Since the agreement was premised on Dumas *never* learning that Robins had sold *Reinhardt's Daughter,* the Confidentiality Agreement could not be fully performed within one year. *See D & N Boening,* 483 N.Y.S.2d 164, 472 N.E.2d at 993. Indeed, the only way the Confidentiality Agreement could terminate within one year was if Zwirner breached the agreement. Enforcement of this contract is barred by the Statute of Frauds. *See Koret, Inc. v. RJR Nabisco, Inc.,* 702 F.Supp. 412, 414–15 (S.D.N.Y.1988) ("An oral contract that is 'terminable within one ***376** year only upon a breach by one of the parties' is not enforceable under New York law." (citations omitted)).

b. *The Gallery Agreement*

[11] Under the Gallery Agreement, Robins was to (1) receive first choice, after museums, to purchase one or more Dumas works, (2) be removed from the Dumas Blacklist, and (3) receive access to Dumas' works in the Primary Market. Despite Plaintiff's averments, the primary objective of this agreement was the future sale to Robins of at least one Dumas painting. Plaintiff's assertion that this is a service agreement is undercut by the fact that only Dumas, a non-party to this litigation, can remove Robins from the Blacklist. The only aspect of the Gallery Agreement that Zwirner can control is the sale of the Three Dumas Paintings from the Gallery.

[12] [13] [14] The Gallery Agreement granted Robins a right of first refusal—in essence, an agreement to agree on a future painting. A right of first refusal "requires [an] owner, when and if he decides to sell, to offer the property first to the party holding the preemptive right so that he may meet a third-party offer or buy the property at some other price set by a previously stipulated method." *Metro. Transp. Auth. v. Bruken Realty Corp.,* 67 N.Y.2d 156, 501 N.Y.S.2d 306, 492 N.E.2d 379, 382 (1986); *McCormick v. Bechtol,* 68 A.D.3d 1376, 891 N.Y.S.2d 188, 191 (3d Dep't 2009). Rights of first refusal and agreements to agree on the sale of a good are both governed by the U.C.C., and it is "well settled that an oral agreement to execute an agreement that is within the [S]tatute of [F]rauds is itself within the statute." *Backus Plywood Corp. v. Commercial Decal, Inc.,* 317 F.2d 339, 343 (2d Cir.1963) (collecting cases); *see Boone,* 708 F.Supp. at 80–81; *see also Stillman v. Townsend,* No. 05 Civ. 6612(WHP), 2006 WL 2067035, at *2–3 (S.D.N.Y. July 26, 2006) ("[E]ven if the Agreement constitutes an oral 'agreement to agree,' it remains subject to the statute of frauds."). The relevant Statute of Frauds provisions are set forth in U.C.C. sections 2–201, the sale of goods provision, and 1–206, the sale of personal property provision. *See Sel–Leb Mktg., Inc. v. Dial Corp.,* No. 01 Civ. 9250(SHS), 2002 WL 1974056, at *6 (S.D.N.Y. Aug. 27, 2002); 25 Williston on Contracts § 67:85 (4th ed.).

[15] Under either of sections 1–206 or 2–201, enforcement of the Gallery Agreement is barred by the Statute of Frauds. The Three Dumas Paintings are each priced over $1 million, and Plaintiff has not come forward with any writing signed by Zwirner promising to sell paintings to Robins. Absent a writing signed by Zwirner, enforcement of the oral Gallery Agreement is barred.

2. *Promissory Estoppel*

[16] [17] As an alternative ground for recovery, Robins submits that Zwirner should be estopped from reneging on his promise to sell the Three Dumas Paintings. To recover under promissory estoppel, a plaintiff must show (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise was made, and (3) an injury to the party to whom the promise was made by reason of the reliance. *Cyberchron Corp. v. Calldata Sys. Dev., Inc.,* 47 F.3d 39, 44 (2d Cir.1995); *Townsend,* 2006

WL 2067035, at *4. When promissory estoppel is interjected to overcome a valid Statute of Frauds defense, it "has been strictly construed to apply only in those rare cases where 'the circumstances [are] such as to render it *unconscionable* to deny the oral promise upon which the promisee has relied.' " *Townsend,* 2006 WL 2067035, at *4 (emphasis added); *see also* ***377** *Cyberchron,* 47 F.3d at 44; *Philo Smith & Co. v. USLIFE Corp.,* 554 F.2d 34, 36 (2d Cir.1977).

Because Robins alleges no injuries sufficiently severe to be "unconscionable," he is unlikely to succeed on estoppel grounds. The Court of Appeals has defined an "unconscionable injury" as "beyond that which flows naturally (expectation damages) from the non-performance of the unenforceable agreement." *Merex A.G. v. Fairchild Weston Sys., Inc.,* 29 F.3d 821, 827 (2d Cir.1994). Here, any injuries Robins suffers are within the realm one would reasonably expect from the non-performance of a sales contract—Robins does not own the artworks promised to him. Moreover, when Robins sold *Reinhardt's Daughter,* he was aware Dumas might learn of the transaction and ban him from purchasing in the Primary Market. Indeed, it was for that reason that he sought the Confidentiality Agreement. "To invoke the power that equity possesses to trump the Statute of Frauds," *Merex,* 29 F.3d at 826, a plaintiff must suffer a greater injury than one that is both predictable and, to a certain degree, the consequences of the Plaintiff's own choices.

The standard of "unconscionability" cannot be judged solely based on Plaintiff's personal tastes. Because Robins has not shown an unexpected and serious injury flowing from the breach of Zwirner's promises, has been able to purchase Dumas art, and has been offered another painting from the Exhibition by Zwirner, he is unlikely to show an unconscionable injury. Accordingly, a preliminary injunction on estoppel grounds is not warranted.

3. *Fraudulent Inducement Claims*

[18] [19] [20] Plaintiff's remaining claims sound in fraud but merely duplicate his breach of contract and estoppel claims. "It is well settled under New York law that a party cannot maintain overlapping fraud and breach of contract claims." *Townsend,* 2006 WL 2067035, at *6; *accord Bridgestone/Firestone, Inc. v. Recovery Credit Serv., Inc.,* 98 F.3d 13, 19–20 (2d Cir.1996) ("[T]hese facts amount to little more than intentionally-false statements by Beladino indicating his intent to perform under the contract."); *New York Univ. v. Cont'l Ins. Co.,* 87 N.Y.2d 308, 639 N.Y.S.2d 283, 662 N.E.2d 763, 768–70 (1995). To state a fraud claim "co-existent with an alleged breach of contract, [a plaintiff] must '(i) demonstrate a legal duty separate from the duty to perform under the contract; (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.' " *Townsend,* 2006 WL 2067035, at *6 (quoting *Bridgestone,* 98 F.3d at 20).

[21] While Robins alleges "wanton dishonesty" on Zwirner's part, his fraud claims amount to nothing more than a reiteration of his contract claims with words like "purposefully" and "induced" sprinkled in. Robins does not allege any special duty owed by Zwirner, and, for the reasons discussed above, he suffered no special damages from Zwirner's misdeeds. Further, given that Zwirner did not even represent Dumas in 2005, and was himself on the Dumas Blacklist, it is difficult to conceive how Zwirner intended to violate his agreements with Robins. Accordingly, Plaintiff's fraudulent inducement claims are unlikely to succeed on the merits.

CONCLUSION

As the facts of this case make clear, some in the art world desire a market that is neither open nor honest. Thus, collectors in this seemingly refined bazaar should heed the admonition "caveat emptor" and be mindful of the Statute of Frauds.

***378** For the foregoing reasons, Plaintiff Craig Robins' application for a preliminary injunction is denied.

SO ORDERED.

All Citations 713 F.Supp.2d 367

Footnotes

1 The Amended Complaint refers to both the "Primary" and "Secondary" Markets for artwork. The Primary Market includes the sale of artwork by living artists for the first time, often at gallery exhibits. (Tr. at 4.) The Secondary Market includes works being resold at galleries or in private sales and often involves the works of deceased artists. (Robins Aff. ¶¶ 2–4; Tr. at 4.)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Kozak v. Porada, N.Y.A.D. 3 Dept., October 26, 2017

79 N.Y.2d 641, 595 N.E.2d 828, 584 N.Y.S.2d 753, 60 USLW 2805

Wildenstein & Co., Inc., Plaintiff,
v.
Brent Wallis, Individually, as President of the Hal B. Wallis Foundation, as Trustee of the Hal B. Wallis Trust, and as Executor of Hal B. Wallis, Deceased, et al., Defendants.

Court of Appeals of New York
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Argued April 29, 1992;
Decided June 9, 1992

CITE TITLE AS: Wildenstein & Co. v Wallis

SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals § 500.17 (22 NYCRR 500.17), to review four questions certified to the New York State Court of Appeals by order of the United States Court of Appeals for the Second Circuit. The following questions were certified by the United States Court of Appeals and accepted by the New York State Court of Appeals pursuant to section 500.17: "(1) Does the New York Rule Against Perpetuities apply to preemptive rights and future consignment interests in personal property? (2) Does the New York common law rule against unreasonable restraints on alienation invalidate preemptive rights and future consignment interests in personal property? (3) If either the Rule Against Perpetuities or the common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights and interests assert a claim for unjust enrichment stemming from the loss of such rights and interests? (4) If either the Rule Against Perpetuities or the common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights and interests nevertheless state a claim for fraudulent inducement and fraud arising from the transaction that gave it such rights and interests?"

HEADNOTES

Perpetuities
Rule against Perpetuities

Applicability to Preemptive and Exclusive Consignment Rights in Paintings

() The New York statutory Rule against Perpetuities (EPTL 9-1.1) does not apply to invalidate an art dealer's right of first refusal to purchase and an exclusive right of consignment to auction 15 original paintings by renowned artists in a private collection, which rights were granted to the dealer pursuant to an agreement settling a dispute between the parties concerning ownership of two of those paintings. Inasmuch as the dealer's preemptive and exclusive consignment rights serve significant commercial interests by facilitating broader marketing of world-renowned art treasures ***642** while posing, at the most, only a minimal limitation on the alienability of the works, they are not subject to the Rule against Perpetuities.

Perpetuities
Unreasonable Restraints on Power of Alienation

Applicability to Preemptive and Exclusive Consignment Rights in Paintings

() The New York common-law rule against unreasonable restraints on alienation does not apply to invalidate an art dealer's right of first refusal to purchase and an exclusive right of consignment to auction 15 original paintings by renowned artists in a private collection, which rights were granted to the dealer pursuant to an agreement settling a dispute between the parties concerning ownership of two of those paintings. Given the reasonableness of the price, duration and purpose of the dealer's first refusal and exclusive consignment rights, they should not be declared

invalid under the common-law rule prohibiting unreasonable restrictions on the alienation of property.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Perpetuities and Restraints on Alienation, § 6 *et seq.*

Carmody-Wait 2d, Payment of Testamentary Dispositions and Distributive Shares §§ 169:109, 169:126.

EPTL 9-1.1.

NY Jur 2d, Estates, Powers and Restraints on Alienation, §§40, 410, 438, 441, 452, 458, 459, 460.

ANNOTATION REFERENCES

See Index to Annotations under Perpetuities and Restraints on Alienation.

POINTS OF COUNSEL

Jeremy G. Epstein, Joseph T. McLaughlin, Alan S. Goudiss, Karen S. Hart and *Andrew W. Feinberg* for plaintiff.

I. The Rule against Perpetuities does not apply to preemptive rights or future consignment interests in governmental or commercial transactions involving personal property. *(Anderson v 50 E. 72nd St. Condominium*, 119 AD2d 73, 69 NY2d 743; *Becce v Spencer Affiliates*, 137 AD2d 575; *Morrison v Piper*, 77 NY2d 165; *Weber v Texas Co.*, 83 F2d 807, 299 US 561; *Matter of Nathanson*, 27 Misc 2d 340; *Metropolitan Transp. Auth. v Bruken Realty Corp.*, 125 Misc 2d 497, 112 AD2d 809, 67 NY2d 156.) II. The common-law rule prohibiting unreasonable restraints on alienation does not invalidate reasonable preemptive rights to personal property. *(Allen v Biltmore Tissue* ***643** *Corp.*, 2 NY2d 534; *Ryan v Thompson Co.*, 453 F2d 444, 406 US 907; *Continental Cablevision v United Broadcasting Co.*, 873 F2d 717.)

III. Application of the rule or the common-law rule prohibiting unreasonable restraints on alienation does not preclude Wildenstein's claim for unjust enrichment. *(Farash v Sykes Datatronics*, 59 NY2d 500; *Katz v Zuckermann*, 126 Misc 2d 135, 119 AD2d 732; *Matter of Rothko*, 84 Misc 2d 830, 56 AD2d 499, 43 NY2d 305; *Continental Cablevision v United Broadcasting Co.*, 873 F2d 717; *Phillips v Iglehart*, 626 F2d 393; *Charlebois v Weller Assocs.*, 72 NY2d 587.) IV. Application of the rule or the common-law rule prohibiting unreasonable restraints on alienation does not preclude Wildenstein's fraud claims. *(Lehman v Dow Jones & Co.*, 783 F2d 285; *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403; *Solin Lee Chu v Ling Sung Chu*, 9 AD2d 888; *National Bank & Loan Co. v Petrie*, 189 US 423; *Songbird Jet v Amax Inc.*, 581 F Supp 912; *Sabo v Delman*, 3 NY2d 155.)

Martin R. Gold and *Robert P. Mulvey* for defendants.

I. New York's Rule against Perpetuities applies to preemptive rights and future consignment interests in personal property. *(Morrison v Piper*, 77 NY2d 165; *Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156; *Buffalo Seminary v McCarthy*, 86 AD2d 435, 58 NY2d 867; *Sherman v Richmond Hose Co. No. 2*, 230 NY 462; *Matter of Wilcox*, 194 NY 288; *Low v Bankers Trust Co.*, 270 NY 143; *Matter of Kellogg*, 35 AD2d 145; *Glick v Beer*, 263 App Div 599; *Anderson v 50 E. 72nd St. Condominium*, 119 AD2d 73, 69 NY2d 743; *Smith v Smith*, 116 AD2d 810.)

II. New York's common-law rule against unreasonable restraints on alienation invalidates preemptive rights and future consignment rights in personal property. *(Allen v Biltmore Tissue Corp.*, 2 NY2d 534; *Rafe v Hindin*, 29 AD2d 481, 23 NY2d 759; *Wraight v Estate of Neu*, 155 AD2d 904; *Witt v Disque*, 79 AD2d 419; *Kowalsky v Familia*, 71 Misc 2d 287; *Benson v RMJ Sec. Corp.*, 683 F Supp 359; *Continental Cablevision v United Broadcasting Co.*, 873 F2d 717.)

III. Wildenstein cannot maintain a claim for unjust enrichment stemming from the loss of future interests invalid under the Rule against Perpetuities or the common-law rule against unreasonable restraints on alienation. *(Sage v Hampe*, 235 US 99; *Matter of Walker*, 64 NY2d 354; *Walters v Fullwood*, 675 F Supp 155; *Segrete v Zimmerman*, 67 AD2d 999; *Stone v Freeman*, 298 NY 268; *McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465; ***644** *United Calendar Mfg. Corp. v Huang*, 94 AD2d 176; *Woodworth v Bennett*, 43 NY 273; *Dewitt v Brisbane*, 16 NY 508; *Gray v*

Hook, 4 NY 449.)

IV. Wildenstein cannot state a claim for fraudulent inducement or fraud based upon future interests invalid under the Rule against Perpetuities or the common-law rule against unreasonable restraints on alienation. *(Matter of Grace,* 232 App Div 76, 261 NY 502; *Silvera v Safra,* 79 Misc 2d 919; *Mix v Neff,* 99 AD2d 180; *Newborn v Peart,* 121 Misc 221, 219 App Div 249; *Edwil Indus. v Stroba Instruments Corp.,* 131 AD2d 425; *Luxonomy Cars v Citibank,* 65 AD2d 549; *Bouquet Brands Div. of J & D Food Sales v Citibank,* 97 AD2d 936; *Stella Flour & Feed Corp. v National City Bank,* 285 App Div 182, 308 NY 1023; *National Bank & Loan Co. v Petrie,* 189 US 423.)

OPINION OF THE COURT

Bellacosa, J.

Wildenstein & Co., a dealer in fine art, seeks relief under a settlement agreement between itself and Hal Wallis, now deceased, pursuant to which Wildenstein returned to Wallis in 1982 two valuable paintings, Monet's "Houses of Parliament" and Gauguin's "The Siesta--A Brittany Landscape". In exchange, the agreement gave Wildenstein preemptive and exclusive consignment rights with respect to 15 original paintings by renowned artists in Wallis's collection. Wildenstein's lawsuit, begun in the United States District Court for the Southern District of New York, named the Estate of Hal B. Wallis, the Hal B. Wallis Trust, the Hal B. Wallis Foundation and Brent Wallis as defendants. The defendants resisted Wildenstein's claims by invoking the Rule against Perpetuities (EPTL 9-1.1) and the common-law rule against unreasonable restraints on alienation of property.

This lawsuit comes to us from the United States Court of Appeals for the Second Circuit, which certified four questions arising out of an appeal in that court from the District Court's dismissal of the Wildenstein complaint:

"(1) Does the New York Rule Against Perpetuities apply to preemptive rights and future consignment interests in personal property?

"(2) Does the New York common law rule against unreasonable restraints on alienation invalidate preemptive rights and future consignment interests in personal property?

"(3) If either the Rule Against Perpetuities or the ***645** common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights assert a claim for unjust enrichment stemming from the loss of such rights and interests?

"(4) If either the Rule Against Perpetuities or the common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights and interests nevertheless state a claim for fraudulent inducement and fraud arising from the transaction that gave it such rights and interests?" (949 F2d 632, 636.)

On January 16, 1992, we accepted the certified questions *(see,* NY Const, art VI, §3 [b] [9]; 22 NYCRR 500.17).

The first two questions are not academic abstractions and must be construed in the context of the real case in controversy in order to provide meaningful and appropriate answers. We must determine whether the New York statutory Rule against Perpetuities applies to invalidate Wildenstein's preemptive and consignment rights, or whether the common-law rule against unreasonable restraints on alienation is transgressed. We conclude in the negative as to those two questions and, therefore, need not address the third and fourth questions relating to alternative relief.

I.

Hal Wallis, a California-based film producer whose credits included "Casablanca", avidly collected Impressionist and Modern works of art. In late 1980, Wallis's wife, Martha Hyer Wallis, apparently gave, without his knowledge, paintings from the collection, including "Houses of Parliament" and "The Siesta--A Brittany Landscape", to several individuals in exchange for an anticipated loan to her of approximately $1 million. In January 1981, two of these individuals went to Wildenstein's New York City offices

offering to sell the Monet and the Gauguin. They produced a power of attorney and other documents purporting to grant them authority to sell the paintings for Mrs. Wallis. Wildenstein purchased the two paintings for $650,000.

Hal Wallis learned that Wildenstein had his Monet and ***646** Gauguin in August 1981. Through his attorney, he sought to retrieve the paintings, informing Wildenstein that the paintings had been sold without his permission. On April 20, 1982, following lengthy negotiations, Wildenstein and Wallis reached a formal settlement agreement pursuant to which Wildenstein returned the two paintings to Wallis in exchange for $665,000, representing the $650,000 Wildenstein paid for them plus $15,000 for expenses. The settlement agreement provides that Wildenstein would have a right of first refusal to purchase and an exclusive right of consignment to auction 15 named paintings in the Wallis collection. The first refusal right, sometimes also referred to as a preemptive right, requires Hal or Martha Wallis to give Wildenstein at least 30 days prior notice of the terms of any proposed sale of a painting covered by the settlement agreement, and provides that Wildenstein shall have the option to purchase such painting within 20 days on the same terms as the triggering purchase offer. The exclusive right of consignment requires that, in the event the Wallises decide to sell any painting at auction, the painting shall be consigned exclusively to Wildenstein for six months. The agreement recites the parties' intent that "Wildenstein shall have the first opportunity to purchase or sell all paintings listed". The terms of the settlement agreement are applicable to the "executors, successors and assigns" of the Wallises and Wildenstein. However, the agreement specifically excludes any painting given to a charitable organization exempt from tax under Internal Revenue Code § 501 (c) (3) (26 USC § 501 [c] [3]).

Hal Wallis died in October 1986. Pursuant to the terms of the Hal B. Wallis Trust as amended in 1985, most of the paintings in the Wallis collection were distributed to the Hal B. Wallis Foundation, a tax-exempt charitable organization, which was to arrange to have the paintings displayed at the Los Angeles County Museum of Art. Under the terms of the Wallis Trust, Renoir's "Jeune Fille au Chapeau a Coquelicots", one of the paintings covered by the settlement agreement, passed to Hal Wallis's son, defendant Brent Wallis, subject to his guarantee not to sell the painting. In December 1986, Brent Wallis nevertheless sold the Renoir for $750,000.

In early 1989, Wildenstein learned that the Hal B. Wallis Foundation intended to sell other paintings listed in the settlement agreement at an auction to be held on May 10, 1989 at Christie's in New York. On May 9, 1989, Wildenstein sued Brent Wallis, the Wallis Trust, the Wallis Foundation ***647** and the Wallis Estate in the United States District Court. The complaint was dismissed by the District Court, which granted summary judgment to the Wallis defendants (756 F Supp 158).

The District Court declined to decide whether Wildenstein's rights under the settlement agreement are immune from the New York Rule against Perpetuities under *Metropolitan Transp. Auth. v Bruken Realty Corp.* (67 NY2d 156). Instead, that court rested its decision on the common-law rule against unreasonable restraints on the alienation of property. It rejected Wildenstein's claims under the settlement agreement, stating: "these private restrictions on the transferability of the Wallis paintings did not further any countervailing public interest in the purchase and sale of works of fine art or otherwise facilitate such transactions" (756 F Supp 158, 164-165, *supra).*

II.

At the outset of our analysis, it is important to place the Wildenstein/Wallis agreement and the respective benefits and obligations of those contracting parties in perspective. Wildenstein is a commercial art dealer and Wallis was an avid art collector. They settled a dispute over valuable art works of world-wide renown. That settlement boomeranged into this controversy that dissolves under a remarkable old doctrine--the Rule against Perpetuities. That the principles of the 1682 *Duke of Norfolk's Case* (3 Ch Cas 1) should emerge to dominate this modern commercial transaction is a royal irony that does not serve the common-law policy designed to block long-term retention over property by long-gone ancestors.

The Rule against Perpetuities and the common-law rule against unreasonable restraints on alienation both limit the ability of owners to control future

dispositions of their property. The New York Rule against Perpetuities, codified at EPTL 9-1.1, provides that (1) any present or future estate is void if it suspends the absolute power of alienation for a period beyond lives in being at the creation of the estate plus 21 years (EPTL 9-1.1 [a] [2]), and (2) any estate in property is invalid unless it must vest, if at all, within the same period (EPTL 9-1.1 [b]). The statutory rule against remote vesting (EPTL 9-1.1 [b]) is thus a rigid formula that invalidates any interest that may not vest within the prescribed time period *(see,* Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 9-1.1, at 480; Morris and Leach, The ***648** Rule Against Perpetuities, at 12 [2d ed 1962]). Because of its capricious consequences, the modern view of the rule has evoked its characterization as a "Reign of Terror" (Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* 65 Harv L Rev 721, 721-723 [1952]).

Somewhat in tandem, the common-law rule against unreasonable restraints on the alienation of property, which invalidates unduly restrictive controls on future transfers, erects a somewhat more flexible standard, requiring a case- by-case analysis that measures reasonableness of the restraint by its price, duration and purpose *(Metropolitan Transp. Auth. v Bruken Realty Corp.,* 67 NY2d 156, 161-162, *supra; Allen v Biltmore Tissue Corp.,* 2 NY2d 534). Despite their differences, however, both the statutory and common-law rules strive to strike a balance between society's interest in the free alienability of property and the rights of owners to direct future transfers.

A.

We turn to the first question certified: whether the rule against remote vesting applies to Wildenstein's rights under the settlement agreement.

The Rule against Perpetuities, though founded in a real property context, became generally applicable to interests in both real and personal property *(see, Sherman v Richmond Hose Co. No. 2,* 230 NY 462, 471). We have also held the rule applicable to options in real estate transactions *(Buffalo Seminary v McCarthy,* 58 NY2d 867, *affg for reasons stated in parts I and II of opn below* 86 AD2d 435 [Hancock, Jr., J.]). In certain contexts, preemptive rights may also be subject to the Rule against Perpetuities *(see, Morrison v Piper,* 77 NY2d 165, 170; *Metropolitan Transp. Auth. v Bruken Realty Corp.,* 67 NY2d 156, 164-166, *supra).*

The instant settlement agreement grants Wildenstein two types of rights-- preemptive rights, should the Wallises decide to privately sell any of the covered paintings, and exclusive consignment rights, should the Wallises decide to sell by auction. Preemptive rights differ significantly from options in that the holder of an option has the power to induce a transaction, while the holder of a preemptive right may purchase only if an owner decides to sell *(see, Metropolitan Transp. Auth. v Bruken Realty Corp., supra,* at 163; *see also, LIN Broadcasting Corp. v Metromedia, Inc.,* 74 NY2d 54, 60). ***649** While we have not addressed the applicability of the Rule against Perpetuities to future consignment rights, the parties have offered no distinction to justify treating such rights differently from preemptive rights. These two kinds of rights constitute future contingent interests in 15 paintings which can be triggered only by the Wallises' decision to sell, privately or by auction.

To resolve the applicability of the Rule against Perpetuities with respect to Wildenstein's rights, we must examine the history and purposes of the rule in the relevant context of this Court's recent decisions in *Metropolitan Transp. Auth. v Bruken Realty Corp.* (67 NY2d 156, *supra)* and *Morrison v Piper* (77 NY2d 165, *supra).* The rule against remote vesting originated in the late 17th century to address donative transfers of land among family members. By curbing attempts by the landed gentry to control future generations' ownership of their real property, the rule protected the public's interest in the development of land and prevented undue concentrations of wealth and power *(see,* 5A Powell, Real Property ¶ 759 [1], at 71- 2--71-4; Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* 65 Harv L Rev 721, 725-726). Although the limits imposed by the rule upon the power to control future ownership of property stem from a policy against the withdrawal of property from commerce, the rule against remote vesting struck a balance in allowing property owners to provide for family members they personally knew and those within the first generation after that class *(see,* 6 American Law of

Property § 24.16, at 51 [1952]; *see also,* Dukeminier, *A Modern Guide to Perpetuities,* 74 Cal L Rev 1867, 1869-1870).

The Rule against Perpetuities thus began as a flexible balancing principle. Commentators became troubled as the rule acquired rigid encrustations over the centuries because it did not sufficiently lend itself in a modern setting to taking reasonable account of competing interests and evolving policies *(see,* Morris and Leach, The Rule Against Perpetuities, at 12-13 [2d ed 1962]; Dukeminier, *A Modern Guide to Perpetuities, op. cit.,* at 1869-1870). Professor Leach found the extension of the rule to modern commercial transactions, such as option agreements, a "step of doubtful wisdom" which, he suggested, ought to be the outer limits of its application to commercial contractual responsibilities *(see,* Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* 65 Harv L Rev 721, 736-737; *see also,* Leach, ***650** *Perpetuities: New Absurdity, Judicial and Statutory Correctives,* 73 Harv L Rev 1318, 1321-1322; Leach, *Perpetuities in a Nutshell,* 51 Harv L Rev 638, 660). Application of the rule to invalidate rights such as rights of first refusal has been found to defeat the legitimate expectations of the holder of the rights to the advantage of the other party who expressly agreed to the limitations *(see, Weber v Texas Co.,* 83 F2d 807, 808- 809, *cert denied* 299 US 561; Note, *Survey, Developments in Maryland Law, 1987-1988: Property,* 48 Md L Rev 749, 783-784). Thus, courts have recognized that the important commercial interests served by upholding preemptive rights, which only minimally affect alienability, outweigh the purpose underlying the rule against remote vesting *(see, Metropolitan Transp. Auth. v Bruken Realty Corp.,* 67 NY2d 156, *supra; see also, Anderson v 50 E. 72nd St. Condominium,* 119 AD2d 73, 78, *appeal dismissed* 69 NY2d 743; *Weber v Texas Co.,* 83 F2d 807, *supra; Cambridge Co. v East Slope Inv. Corp.,* 700 P2d 537 [Colo]; *Shiver v Benton,* 251 Ga 284, 304 SE2d 903; *Robroy Land Co. v Prather,* 95 Wash 2d 66, 622 P2d 367; *Hartnett v Jones,* 629 P2d 1357 [Wyo]).

In *Metropolitan Transp. Auth. v Bruken Realty Corp.* (67 NY2d 156, *supra),* this Court acknowledged the contradiction of ancient purpose and modern application. We held the Rule against Perpetuities inapplicable to preemptive rights in commercial and governmental transactions, emphasizing that application of the rule "would invalidate an agreement which promoted the use and development of the property" *(Metropolitan Transp. Auth. v Bruken Realty Corp., supra,* at 166, 168). In *Morrison v Piper* (77 NY2d 165, *supra),* we addressed the applicability of the rule to preemptive rights in a noncommercial, family transaction involving residential property. We declined to extend the modern realism of *Bruken* to interests arising out of that family-land transaction, which had all the traditional touchstones envisioned by the original rule and purpose. Even so, we found an interpretative path, as the statute prescribes, to avoid invalidation of the transfer wherever possible *(id.,* at 171-174). Thus, our *Morrison* decision should not be read to limit or otherwise affect the scope of the *Bruken* holding and exception concerning the Rule against Perpetuities in contemporary commercial settings.

In light of the history and purposes underlying the rule and the commercial and precedential context in which the Wildenstein/Wallis agreement arose, we conclude that the rule against remote vesting does not apply to these preemptive and exclusive consignment rights. The parties' agreement, although factually in the borderland between the transactions ***651** considered in *Bruken* and *Morrison,* is plainly closer to that in *Bruken* and qualifies for the commercial escape route from the rule expounded as part of *Bruken's* rationale.

In exchange for helping Wallis regain a valued part of his collection, Wildenstein was assured that in the event of a sale of one or more of the paintings, it might still realize the profit or commission it hoped to earn when it originally acquired the Monet and the Gauguin. That the agreement also covered 13 other paintings does not alter our analysis, particularly because Wildenstein's rights are triggered only by a decision to sell the paintings. Because Wildenstein must meet a third party's offer if it elects to exercise its preemptive right, that right allows the Wallises, and their executors, successors or assigns, to realize the highest possible price should they decide to sell any of the paintings subject to the agreement. The agreement leaves the Wallises, and their executors, successors and assigns, free to maintain the paintings in the private collection or transfer them to a tax-exempt charitable organization--factual and interpretative matters not within the questions certified to us nor upon which we may rule or express any views.

() Inasmuch as Wildenstein's preemptive and exclusive consignment rights serve significant commercial interests by facilitating broader marketing of world-renowned art treasures while posing, at the most, only a minimal limitation on the alienability of the works, we conclude that they are not subject to the Rule against Perpetuities. Accordingly, the first certified question, as thus construed and applied, should be answered in the negative.

B.

Turning next to the second question certified, we address the validity of Wildenstein's rights under the common-law rule against unreasonable restraints on alienation. We conclude that this doctrine does not invalidate Wildenstein's rights under the agreement.

The reasonableness of Wildenstein's preemptive first refusal rights and exclusive consignment rights depends upon their duration, price and purpose *(see, Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 167, *supra; Allen v Biltmore Tissue Corp.*, 2 NY2d 534, 542, *supra).* The rule condemns "not a *restriction* on transfer, a provision merely postponing sale during the option period, but an effective ***652** *prohibition* against transferability itself" *(Allen v Biltmore Tissue Corp., supra,* at 542 [emphasis in original]). Thus, the reasonableness of Wildenstein's rights is determined by considering the 30-day period during which it could exercise its preemptive rights and the six-month period of its exclusive consignment right, not the remotely potential perpetual quality of those rights. We have upheld 90-day periods for exercising preemptive rights to purchase land *(Metropolitan Transp. Auth. v Bruken Realty Corp., supra)* and corporate stock *(Allen v Biltmore Tissue Corp., supra).* We note that the record contains an uncontradicted affidavit of an art gallery expert attesting to the widespread use of preemptive and exclusive consignment rights in the art world, and the unusually short duration of the six-month exclusive consignment rights in the Wildenstein/Wallis agreement.

() The terms of Wildenstein's first refusal right require it to meet the offer of a third party. Preemptive rights conditioned upon payment equal to a third party's offer are generally reasonable; under this method of price determination, the owner suffers no legally cognizable loss *(see, Metropolitan Transp. Auth. v Bruken Realty Corp., supra,* at 167-168; 3 Simes and Smith, Future Interests § 1154, at 62-63 [2d ed]). The settlement agreement provides that should the Wallises wish to sell any of the paintings at auction, they may propose a price for the paintings. If the parties ultimately cannot agree as to a reasonable price, the agreement requires that the price be set by a major international auction house representative. This method of price setting, with input by Wildenstein, the Wallises and an independent third party, seems sensible and balanced. It ill behooves a court to substitute its sense of unreasonableness for the parties' arm's length agreement in the circumstances of a settlement of an essentially commercial dispute like the one in this case. Thus, given the reasonableness of the price, duration and purpose of Wildenstein's first refusal and exclusive consignment rights, they should not be declared invalid under the common-law rule prohibiting unreasonable restrictions on the alienation of property.

Accordingly, the first and second questions certified, as construed and applied, should be answered in the negative and the third and fourth questions certified, concerning the alternative remedies that might be available in the event Wildenstein's rights were deemed invalid under either of the ***653** first two certified questions, should be not answered as unnecessary.

Hancock, Jr., J.

(Concurring). I agree with the Court's two determinations (majority opn, at 645): (1) that the New York Rule against Perpetuities does not apply to invalidate Wildenstein's preemptive and consignment rights; and, (2) that the rule against unreasonable restraints on alienation is not transgressed. I also agree with so much of the opinion as relates to the Court's answer to the second question. In answering the first question, however, it is not necessary to resolve what, I believe, is a problematic issue: i.e., whether the settlement agreement comes within the *Bruken* exception to the general rule that EPTL 9-1.1 (b) applies to preemptive options *(see, Morrison v Piper,* 77 NY2d 165, 170-171; *Metropolitan Transp. Auth. v Bruken Realty Corp.,* 67 NY2d

156, 164-167).

If it were assumed that the rule against remote vesting applied to the instrument before us, the answer to the question submitted would be the same. The problem is resolved by simply applying the special rule of construction which the Legislature has enacted to govern "with respect to any matter affecting the rule against perpetuities" (EPTL 9-1.3 [a]). The statute directs that "[u]nless a contrary intention appears" (EPTL 9-1.3 [a]), "[i]t *shall be presumed* that the creator intended the estate to be valid" (EPTL 9-1.3 [b] [emphasis added]; *see, Morrison v Piper, supra,* at 171-174; Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 9-1.3, at 543-544).

There is nothing in the agreement indicating that the parties had any thought that it would ever be enforced against anyone other than the Wallises or their respective executors, or at any time after the Wallises' deaths except during the administration of their estates. Certainly, nothing suggests that the preemptive option and consignment clauses were intended to bind future generations or to be indefinite in duration. On the contrary, both the option and consignment provisions are, by their terms, to be enforced only against "Mr. Wallis, Mrs. Wallis, or their respective executors." In this respect, it is significant that while the eighth paragraph makes the agreement binding on the Wallises' executors, successors and assigns, the word "heirs" is omitted *(compare, Buffalo Seminary v McCarthy,* 86 AD2d 435, 445, *affd* 58 NY2d 867, *for reasons stated in parts I and II of opn at App* ***654** *Div, Hancock, Jr., J.* [presence of the word "heirs" significant in determining that option was intended to be exercised by prospective owners indefinitely and, hence, was of indefinite duration]).

Finally, the sense and purpose of the settlement agreement, taken as a whole, leave no doubt that it relates not to remote contingencies but to events which were expected to occur, if at all, within the immediate future. Mr. Wallis was very elderly when the settlement was reached. The contingencies giving rise to Wildenstein's option right and its consignment right are respectively: "If Mr. Wallis, Mrs. Wallis, or, upon their decease, the executors of their respective estates, *receives an offer acceptable to him or her* for the purchase of any painting" (agreement, para 3 [emphasis added]) and "If Mr. Wallis, Mrs. Wallis, or, upon their decease, the executors of their respective estates, *determines to sell at auction any painting* listed" (agreement, para 4 [emphasis added]). What the parties had in mind, it seems evident, were decisions or transactions pertaining to the sale of the paintings which would be made while the Wallises were still living or following their deaths during the period of administration of their estates *(see, Morrison v Piper, supra,* at 174 [over-all sense of instrument shows intent to restrict right to exercise option "to immediate family members whom (the parties) would be likely to know and to prohibit exercise by strangers--e.g., purchasers or remote donees or beneficiaries"]; *compare, Buffalo Seminary v McCarthy, supra,* at 445 [option agreement read as a whole indicated purpose of option on 20- foot strip was protection during indefinite future for prospective owners from placement of improvements on optioned parcel]).

In sum, the settlement agreement could not offend the rule against remote vesting, in any event. Assuming the applicability of the rule to a preemptive option clause of the type in question, the provision would be saved from invalidity by the presumption of validity in EPTL 9-1.3 (b). Any contingency involving the Wallises' executors would be presumed to have been intended to occur, if at all, within 21 years from the effective date of the settlement agreement (EPTL 9-1.3 [d]).

Chief Judge Wachtler and Judges Simons, Kaye and Titone concur with Judge Bellacosa; Judge Hancock, Jr., concurs in result in a separate opinion.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the ***655** questions by this Court pursuant to section 500.17 of the Rules of Practice of the New York State Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question number one answered in the negative, certified question number two answered in the negative, and certified questions number three and four not answered as unnecessary. ***656**

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