

11-1197-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

PATRICK CARIOU,

Plaintiff-Appellee,

- against -

RICHARD PRINCE,

Defendant-Appellant,

GAGOSIAN GALLERY, INC., LAWRENCE GAGOSIAN,

Defendants-Cross-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**DECLARATION OF DANIEL J. BROOKS IN OPPOSITION TO
MOTION FOR LEAVE TO FILE REPLY AMICUS CURIAE BRIEF**

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**DECLARATION OF DANIEL J. BROOKS IN OPPOSITION
TO MOTION OF THE ANDY WARHOL FOUNDATION FOR THE
VISUAL ARTS, INC. FOR LEAVE TO FILE A REPLY
AMICUS CURIAE BRIEF**

DANIEL J. BROOKS, under the penalty of perjury, states as follows:

1. I am a member of the Bar of this Court and of Schnader Harrison Segal & Lewis LLP, counsel of record for plaintiff-appellee Patrick Cariou. I submit this declaration, upon personal knowledge, in opposition to the motion of *amicus curiae* The Andy Warhol Foundation for the Visual Arts, Inc. (“Warhol Foundation”) for leave to file a reply *amicus* brief in further support of the defendants-appellants, Richard Prince, Gagosian Gallery, Inc. and Lawrence Gagosian.

2. The Warhol Foundation admits that its request is “unusual.” Warhol Foundation Motion, at 1.

3. The request is not only unusual, but also unnecessary because appellants are more than adequately represented by competent counsel, two law firms and seven attorneys whose names appear on appellants’ opening and reply briefs. Those firms have filed two lengthy briefs, totaling 14,000 words and 6,852 words, respectively.

4. Any public interests potentially favoring appellants are already more than adequately presented in three *amicus* briefs taking the side of appellants, two of which urge reversal of the district court's decision. Those briefs were filed, with my consent, by: the Warhol Foundation (6,986 words, urging reversal); The Association of Art Museum Directors, the Art Institute of Chicago, The Indianapolis Museum of Art, The Metropolitan Museum of Art, The Museum of Modern Art, Museum Associates, d/b/a Los Angeles County Museum of Art, The New Museum, the Solomon R. Guggenheim Foundation, The Walker Art Center, and the Whitney Museum of American Art (6,137 words, urging reversal); and Google Inc. (3,995 words, questioning the district court's approach to the fair use analysis).

5. Conversely, appellee has filed one brief (totaling 13,979 words) and has been supported by one *amici* brief, filed by the American Society of Media Photographers, Inc. and the Picture Archive Council of America, Inc. (totaling 4,637 words).

6. While the lengths of these respective submissions (whether measured in pages or word count) obviously is not dispositive of the merits of this motion, it is clear that appellants' side of this case has been thoroughly presented, at greater length and in more detail than appellee's side of the case. And, while

appellee would certainly like to have the opportunity to file a surreply brief in response to appellants' recently-filed reply brief, there must, at some point, be an end to the briefing of these issues.

7. With regard to the Warhol Foundation's motion and proposed reply brief, it is not at all clear what the brief is "replying" to. Certainly not appellee's brief, which contains no discussion of the Warhol Foundation's initial *amicus* brief. Accordingly, there is no need for the filing of this redundant brief, which reiterates the points already made in the Warhol Foundation's initial brief, including its attempt unnecessarily to import First Amendment considerations into the doctrine of fair use, which itself contains "built-in First Amendment accommodations." *Golan v. Holder*, 132 S. Ct. 873, 181 L. Ed. 2d 835, 856 (2012), quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

8. Finally, the firm which represents appellant Richard Prince on this appeal has represented the Warhol Foundation in significant litigation. *See Simon-Whelan v. The Andy Warhol Found. for the Visual Arts, Inc.*, 07 Civ. 06423 (LTS) (S.D.N.Y. filed July 13, 2007); Leigh Kamping-Carter, *Warhol Group Ends 3-Year Battle With Collectors*, Law360, Nov. 15, 2010, <http://www.law360.com/competition/articles/209186> (available by subscription only, copy attached hereto as Exhibit A); *see also Thompson v. The Andy Warhol*

Found. for the Visual Arts, Inc., 33 Misc. 3d 1221[A], 2011 NY Slip Op 52046[U] (Sup. Ct. N.Y. County 2011).

9. In that regard, Judge Posner’s observations in *Ryan v. CFTC*, 125 F.3d 1062, 1064 (7th Cir. 1997), merit consideration:

The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such amicus briefs should not be allowed. They are an abuse. The term ‘amicus curiae’ means friend of the court, not friend of a party.

* * *

In an era of heavy judicial caseloads . . . we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties’ briefs do not give us all the help we need for deciding the appeal.

10. This admonition is apt inasmuch as the proposed reply *amicus* brief merely reiterates arguments already amply set forth in appellants’ briefs and the Warhol Foundation’s prior brief.

11. For these reasons, it is respectfully requested that the motion by the Warhol Foundation for leave to file a reply *amicus* brief be denied.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 23, 2012, at New York, New York.

/s/ Daniel J. Brooks

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EXHIBIT A



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Warhol Group Ends 3-Year Battle With Collectors

By Leigh Kamping-Carder

Law360, New York (November 15, 2010, 5:22 PM ET) -- Two art collectors have admitted they have no evidence to back up allegations that the Andy Warhol Foundation for the Visual Arts conspired to drive up the price of the artist's work by denying the authenticity of purported Warhols.

Magistrate Judge Andrew J. Peck of the U.S. District Court for the Southern District of New York signed off on an agreement Monday that called for plaintiffs Joe Simon-Whelan and Susan Shaer to drop their suits against the foundation and agree their claims never had merit, following months of discovery.

Under the settlement, the plaintiffs also agreed that if they profit from the litigation — through a book deal, movie rights or even a malpractice claim against their attorney — they will leave themselves open to a breach of contract claim from the foundation, according to court documents.

"It was very important to make sure that not only was this case won, but it was won with a knockout punch, because we don't want people to pursue copycat cases," said Nicholas Gravante Jr. of Boies Schiller & Flexner LLP, lead counsel for the foundation.

In exchange, the foundation agreed to drop its counterclaims against the plaintiffs, as well as a motion for sanctions against their attorney, Seth Redniss of Redniss LLC, for filing the Shaer suit allegedly after the statute of limitations had expired.

Simon-Whelan and Shaer each owned silk-screened Warhol images they believed to be self-portraits, which the foundation's art authentication board denied were authentic in 2002.

Simon-Whelan first sued the foundation in 2007, alleging it violated the Sherman Act through a "deeply corrupt enterprise" to drive up the value of the works the foundation owns by denying the authenticity of as many other purported Warhol works as possible to induce artificial scarcity.

Shaer brought similar claims against the organization in January of this year.

The litigation became more complicated in April, when the foundation's insurer, Philadelphia Indemnity Insurance Co., filed a suit in the Supreme Court for the State of New York seeking a declaration that neither a directors and officers policy nor an errors and omissions policy would cover all the litigation costs.

Among the insurer's gripes was a complaint that both the law firm the foundation initially retained, Carter Ledyard & Milburn LLP, and Boies Schiller charged fees "well in excess" of "normal insurance defense fee rates," the suit said.

At a contentious hearing Wednesday, Judge Peck first attempted to bring about a settlement of Shaer's claims, but that was stalled because Richard L. Reiter of Wilson Elser Moskowitz Edelman & Dicker LLP, an attorney for Philadelphia Indemnity, didn't bring a decision maker from the insurer to the hearing.

"You know what?" the judge told the attorneys. "I'm frankly fed up with all of you."

Frustration prompted Judge Peck to take the unusual step of reading out Shaer's proposed settlement to Simon-Whelan, who was participating in the hearing by phone, so that he could sign on to a similar agreement that very day.

"I want this case to be dismissed," Simon-Whelan, a filmmaker, told the judge. "I can't afford to go up against them. And I don't want to speak about it again or even hear about it. But I have no choice but to do this. I can't fight this organization, it's too big. So I'm signing it and moving on."

Foundation President Joel Wachs said Monday the group had spent \$7 million defending the litigation, which he called "nothing more than a blatant attempt to shake down the foundation."

The insurance policies will cover at least some of the legal costs, although that dispute has yet to be fully resolved.

At the hearing, Judge Peck threatened the insurance company with sanctions, and warned that at the next conference the insurance carrier's "highest decision maker ... will appear, or I'll send a marshal out to get them. And then they can bring their toothbrush and spend some nights in jail awaiting the conference."

Redniss did not immediately respond to a call seeking comment on Monday.

Simon-Whelan and Shaer are represented by Redniss LLC.

The Andy Warhol Foundation is represented by Boies Schiller & Flexner LLP. Philadelphia Indemnity is represented by Wilson Elser Moskowitz Edelman & Dicker LLP.

The cases are Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts Inc. et al., case number 1:07-cv-06423, and Shaer v. The Andy Warhol Foundation for the Visual Arts Inc. et al., case number 1:10-cv-00373, in the U.S. District Court for the Southern District of New York.