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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

-----X Docket No. 11-1197-cv

PATRICK CARIOU,

SDNY: 08-cv-11237 (DAB)

Plaintiff-Appellee,

-against-

**DECLARATION OF
HOLLIS GONERKA BART
IN OPPOSITION TO
PLAINTIFF-APPELEE'S
MOTION TO DISMISS
THE APPEAL**

RICHARD PRINCE, GAGOSIAN GALLERY,
INC., and LAWRENCE GAGOSIAN,

Defendants-Appellants.

-----X

HOLLIS GONERKA BART, under the penalty of perjury, states as follows:

1. I am a member of the Bar of this Court and of the law firm of Withers Bergman LLP, counsel for defendants-appellants Gagosian Gallery, Inc. and Lawrence Gagosian ("Gagosian"). I submit this declaration based upon my personal knowledge of the procedural history in this case, in opposition to the motion of Plaintiff-Appellee Patrick Cariou ("Cariou") to dismiss the appeal without prejudice.

2. The action arises under the United States Copyright laws.

3. In his Amended Complaint (“Complaint”), Cariou alleged that Defendants-Appellants Gagosian and Prince (collectively, “Appellants”) infringed his copyright by, among other things, creating, marketing, and selling a series of paintings and catalogs (the “Paintings” and the “Catalogs,” and collectively the “Items”). A copy of Cariou’s Complaint is attached hereto as Exhibit A.

4. In their answers, Appellants each asserted, among other things, the defense of fair use under 17 U.S.C. § 107.

5. On May 14, 2010, the parties cross-moved for summary judgment on liability, including the claim of infringement and the defense of fair use. Neither party moved for summary judgment on damages or remedies.

6. On March 18, 2011, in a Memorandum and Order (the “Order”), the Honorable Deborah A. Batts, of the United States District Court for the Southern District of New York, granted Cariou’s motion for summary judgment on the issues of copyright infringement and rejected Appellants’ defense of fair use.¹

7. The Order also granted injunctive relief against Appellants, although the issue of remedies and damages was not *sub judice*.

8. Specifically, the district court: (i) permanently enjoined Appellants from infringing Cariou’s copyright in the Photographs, thus prohibiting them from selling, displaying, marketing, promoting, or distributing the existing Paintings and

¹ A copy of the Order is found at Exhibit A to the May 19, 2011 Declaration of Daniel J. Brooks (“Brooks Dec.”).

Catalogs, which the district court found to be infringing; (ii) ordered Appellants to deliver to Cariou, within ten days, all unsold Items in their possession, custody, or control, for “impounding, destruction, or other disposition, as Plaintiff determines;” and (iii) ordered Appellants to notify an known owners of the Paintings that the Paintings infringe Cariou’s copyright, and – in the district court’s view – cannot be publicly displayed. *See* Order at pp. 37-38.

9. Each of these three injunctive orders (the “Injunctions”) mirrors a request for injunctive relief that Cariou sought in his Complaint. *Compare* Complaint, at Exhibit A hereto, pp.13-14, ¶¶ A, C, and D *with* Order at pp.37-38

10. On March 25, 2011, Appellants filed a joint notice of appeal, a copy of which is annexed hereto as Exhibit B. *See* 28 U.S.C. § 1292(a)(1).

11. On March 24, 2011, Appellants entered into a stipulation with Cariou (the “Stipulation”) to comply with the district court’s order for impounding, destruction, or other disposition. *See* Brooks Dec. Ex. B, at Whereas Clause, and at ¶ 1. In the Stipulation, the parties agreed that Appellants would turn over the Items to Cariou for an “other disposition,” which Cariou had the right to select, namely the Items would be stored and preserved in a neutral, third-party location. *Id.* ¶ 1. The Stipulation, by its express terms, expires on determination of this appeal. *Id.*

12. By entering into the Stipulation, Appellants were assured that the Items would be preserved intact without the need for motion practice, until this appeal could be heard, rather than irreversibly destroyed before Appellants could be heard on the issue.

13. In accordance with the Injunctions, on or about March 28, 2011 (*i.e.*, within ten days of the district court's Order), Appellants wrote letters to the known owners of the Paintings, informing them of the Order, and of the district court's view that the Paintings infringe Cariou's copyright and cannot be publically displayed. The letters further told the owners that Appellants had filed this appeal. *See Brooks Dec. Ex. C.*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 1, 2011.


HOLLIS GONERKA BART