

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PATRICK CARIOU,	:	Docket No. 11-1197
Plaintiff-Appellee,	:	S.D.N.Y. 1:08-cv-11327-DAB
-against-	:	
RICHARD PRINCE, GAGOSIAN	:	REPLY DECLARATION OF
GALLERY, INC. and LAWRENCE	:	DANIEL J. BROOKS IN SUPPORT OF
GAGOSIAN,	:	MOTION TO DISMISS APPEAL
Defendants-Appellants.	:	

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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 the plaintiff-appellee, Patrick Cariou. I submit this declaration, based upon personal knowledge, in order to reply to the opposition of defendants-appellants to Cariou's motion, pursuant to Federal Rule of Appellate Procedure 27(a)(1) and Local Rule of the United States Court of Appeals for the Second Circuit 27.1, for the dismissal, without prejudice, of this appeal on the grounds that the issues sought to be raised on this interlocutory appeal are moot and in further support of that motion.

2. Attached hereto as Exhibit A is a copy of the memorandum of law filed by defendants-appellants in the district court in support of their joint motion for summary judgment.

3. Attached hereto as Exhibit B is a copy of the affidavit of defendant-appellant Richard Prince filed in the district court in support of the joint motion for summary judgment of the defendants-appellants.

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 June 10, 2011, at New York, New York.



DANIEL J. BROOKS

EXHIBIT A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PATRICK CARIOU,

08 CIV 11327 (DAB)

Plaintiff,

-against-

RICHARD PRINCE, GAGOSIAN GALLERY, INC.,
LAWRENCE GAGOSIAN, and RIZZOLI
INTERNATIONAL PUBLICATIONS, INC.,

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT**

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Preliminary Statement

In creating the *Canal Zone* paintings, Richard Prince drew inspiration from the world around him to develop his artistic vision for a fantastical, post-apocalyptic world where all that remained was music and the bands to play it. In expressing that vision, Prince, in the tradition of other acclaimed appropriation artists, used raw materials appropriated from many sources, including pages torn from *Yes Rasta*, a book of photographs taken by Patrick Cariou of Rastafarians in their native Jamaican landscape, to convey new insights with a wholly new expressive meaning and message, the redemptive value of music and equality between the sexes. Through the use of established appropriative techniques, Prince expressed this genuine creative rationale, by collaging and scanning rescaled, altered, cropped images to which he added images of guitars, painterly elements, and historical art references as an homage to master painters he admires. In doing so, Prince achieved his goal of using only what was needed to transform the raw elements into a beautiful, completely new and contemporary take on the music scene having nothing to do with Rastafarians in their Jamaican landscape. As such, the exhibition and sale of the *Canal Zone* paintings by Prince, through the efforts of Gagosian Gallery and its owner, Lawrence Gagosian, does not compete with, and therefore could not usurp the market for, Cariou's *Yes Rasta* images. Indeed, as of November 2008, when the *Canal Zone* exhibition opened, the market for Cariou's images was virtually non-existent due solely to choices Cariou made, and not any bad faith or unlawful conduct by defendants. When viewed in light of defendants' contribution to the broader public benefit of art, then, Prince's use of the *Yes Rasta* images was fair. The goal of copyright law to promote the progress of the arts would be better served by allowing Prince's use of the Images because to hold otherwise would effectively stifle, if not foreclose, an established art form that has been firmly entrenched in society and art history.

FACTUAL BACKGROUND

A. Appropriation Art, an Established Art Form

Appropriation art can be traced back to the late 19th century when authors, composers and artists began borrowing from existing artworks, using fragments of them to create their own. Kenly Ames, *Beyond Rogers v. Koons: A Fair Use Standard For Appropriation*, 93 Colum. L. Rev. 1473, 1478 (Oct. 1993) (“Ames”). By the 20th century, incorporation of elements of popular culture and of existing works had become routine. *See* Ex A (Tate Collection Glossary definition of Appropriation Art).¹ In appropriating artwork, artists “encompass a wide variety of methods, ranging from the incorporation of a single element into a much larger work through collage techniques to the reproduction of an image without physical alteration, but reattributed to the appropriating artist.” Ames at 1479. The collage technique takes pieces of photographs, fabric and other raw materials that are organized together and affixed to a surface, often a canvas, creating a layered effect, to produce a completely new work. *See* Ex B (Tate Collection Glossary definition of collage). By reusing a work and removing it from its usual context, appropriation artists aim to give new meaning to the work, questioning “the most fundamental perceptions, both literal and symbolic, on which society is based.” *Id.* at 1482.

Some examples of the most celebrated appropriation art include Dadaist Marcel Duchamp’s *Fountain* (1917), in which he used a readymade urinal, rotated it ninety degrees and signed it with a pseudonym “R. Mutt,” to reference a popular cartoon character. *See* Ex C (Tate

¹ “Ex __” refers to the exhibits attached to the accompanying Affidavit of Hollis Gonerka Bart (“Bart Aff.”). “RP Aff.” or “Prince Affidavit” refers to the accompanying Affidavit of Richard Prince in Support of Defendants’ Joint Motion for Summary Judgment. “RP Tr.” refers to the transcript of the Prince deposition taken on October 6, 2009, “LG Tr.” refers to the transcript of the deposition of Lawrence Gagosian taken on October 8, 2009, “AP Tr.” refers to the transcript of the deposition of Anthony Petrillose, taken on October 23, 2009, “PC Tr.” refers to the transcript of the deposition of Patrick Cariou taken on January 12, 2010, “CC Tr.” refers to the transcript of the deposition of Christiane Celle taken on January 26, 2010, excerpts of which are attached to Bart Aff. as Exhibits G, L, R, U, Y, respectively.

Collection description of Marcel Duchamp). Another is pop-artist Andy Warhol, who created iconic paintings using popular, commercial images and portrait paintings and recreated them using bright colors, repetition, and his signature grid. *See id.* at Ex D (MOMA description of Warhol's Gold Marilyn Monroe 1962). Other well-known appropriation artists include Pablo Picasso, Georges Braque, Jasper Johns, Robert Rauschenberg, Sherrie Levine, Salvador Dali, Jeff Koons and Prince. *See* Ex A; *see also* Ex E, ¶ 18; Ex F (Guggenheim Release on Prince).

B. Richard Prince, a World-Renowned Appropriation Artist

Prince's career as an appropriation artist began in 1977, when he re-photographed discarded advertising images he salvaged while working in the tear-sheet department of Time Life. RP Aff. ¶ 5; RP Tr. 12-13, 48-49; *see also* RP Tr. 46. Initially, Prince made collages with the clippings, combining the images as if they were freeze frames from the same movie. RP Aff. ¶ 5. Over time, he began working with other artists' photographic images and re-photographing them to place them in a wholly different context. *Id.* at ¶ 6; *see also* RP Tr. 13-16. In 1984, Prince began a new body of works consisting of exact re-drawings of cartoons that evoke a mix of cultural preferences, human desires and prejudices. *Id.* at ¶ 7. These works eventually led to his pursuit of painting and the addition of painterly elements to his work. *Id.* at ¶ 7. In the ensuing years, his techniques expanded with his scribbled "Hippy Drawings" consisting of stick figures with abstract, mask-like faces onto which he would paint circles over the eyes, nose and mouth, known as his "lozenge" faces. RP Aff. ¶ 8. This body of work was followed by sequential series such as the *Nurses* (2002-04), the *Check Paintings* (2004-05), the *De Kooning Paintings* (2007-07), and the *Canal Zone* (2008). RP Aff. ¶ 10. With each successive series, Prince broadened his gestural style with bright colors, dripping paint, bold brush strokes and other painterly elements to create a layered effect. *Id.* at ¶ 9. Historically, Prince has gravitated

toward repetition, groupings and categories as he expresses himself taxonomically, based on the belief that objects are best understood in relation to other objects. *Id.* at ¶ 11.

Prince's appropriative style also is informed by trends in popular culture. *Id.* at ¶ 12. Prince's works feature guitars as a repetitive element, representing his love for music. *Id.* at ¶ 12. Prince is "always trying to hook [his] art up with musical terms." RP Tr. 43; *see also id.* at 125-26. Prince frequently pays homage in his works to master painters whose work he respects. RP Aff. ¶¶ 21, 27; RP Tr. 165-67; Ex F (Guggenheim Release on Prince). Prince aspires to create beautiful pieces of art, and believes that "artists ... should be as free as possible... in their studios." Price Aff. ¶ 3; RP Tr. 123. "Art is about freedom. It's not about being restricted. If I was restricted, then I couldn't transform these images ... I believe artists ... should be as free as possible, yes, in their studios." *Id.* at 120-21.

Prince's works are considered among the most innovative art produced in the past 30 years. Ex F; *see also* Ex E at ¶ 28 (Prince is "an accomplished, educated and informed artist"). The work of Prince has been widely exhibited and is found in the permanent collections of major museums around the world. RP Aff. ¶ 3. In late 2007, the Solomon R. Guggenheim Museum in New York presented a major retrospective of his work, which filled the entire rotunda and two tower galleries. *Id.* at ¶ 3. *See also* Ex F. Prince's works also are sought by significant collectors. RP Aff. ¶ 4. He has an active and strong primary gallery market, with a strong secondary market at auctions and in private sales. *See* Ex H, Ex I. In 2008, *Overseas Nurse* sold at auction in London for approximately \$8.4 million, the highest price for a work by Prince to date. *See* Ex J, Ex K.

C. Prince's Creation of the Canal Zone Series

As detailed further in his affidavit, Prince's creation of the *Canal Zone* series evolved from the storyline of a cinematic "pitch" he began writing in 2007 entitled, *Eden Rock*. *See* RP

Aff. Ex A; *see also* RP Tr. 218, 232. The screenplay is his fantastical account of survivors of a worldwide nuclear attack whose cruise ships end up in St. Barts. *Id.*; *see also* RP Tr. 30, 192, 207-208. Forming separate “tribes” or “gangs,” these survivors take over the resort hotels on the island and create their own post-apocalyptic society. *Id.* at ¶ 16; *see also* RP Tr. 207-08, 214-18.

For Prince, the creation of the *Canal Zone* series was the culmination of a confluence of events that came together when he heard his stepson playing the alternative music of the Easy Star All-Stars band in the album *Radiodread*. RP Aff. ¶ 17; RP Tr. 263-64, 266. The next day, Prince found a copy of *Yes Rasta* in a bookstore on St. Barts (Ex EE), and was drawn to the images in the book, given his inclusion of a reggae band as the Rastafarian “tribe” in his screenplay. RP Aff. ¶ 17; RP Tr. 150-51, 153-58, 158, 266. Drawing inspiration from his birthplace, the Panama Canal Zone, where he had recently visited, and the storyline of his *Eden Rock* screenplay, Prince imagined a make-believe, post-apocalyptic enclave, the Canal Zone, in which bands and music are the only things to survive. RP Aff. ¶ 16; RP Tr. 7, 30, 207-08, 218, 232, 251-52. As Prince explains it, “the redemptive value of music is one of the important concepts of this series.” *Id.* at ¶ 22; *see also* RP Tr. 251-52 (Prince’s *Canal Zone* Paintings represent a musical band).

To convey his message, Prince, in the tradition of Duchamp, used appropriated imagery, which included 41 images torn from the pages of *Yes Rasta* (collectively, the “Images”), and images of naked women, rock guitars and musicians’ hands taken from several other sources. RP Aff. ¶ 24; PR Tr. 30 (Images were but one of the “recipe ingredients” that became the *Canal Zone* series); *see also* RP Tr. 170-71, 277-80 (guitars, naked women and Rastas were all ingredients in the Paintings, with the guitar being the primary one). In all but one of the works, *Canal Zone*, 2007, Prince digitally scanned and enlarged the images, applying some directly to the canvas as a backdrop for collaging, and others as cut-out collage elements. RP Aff. ¶ 26; RP

Tr. 40; 168-69. In some of the works, Prince affixed the collage elements to other images with scotch tape for further scanning, and in others he would apply the collage elements directly to the canvas using his squeegee technique in which elements are affixed to the canvas with paint.² RP Aff. ¶ 26; *see also* RP Tr. 168-69; 331-37. *Canal Zone*, 2007 consists of portions of 35 Rastafarian faces torn from pages in *Yes Rasta* and onto which Prince drew and painted facemasks. RP Aff. ¶ 48. These were reordered and tacked to a board as means for Prince to introduce the likely characters of his next series, the *Canal Zone*. *Id.*

Stylistic references to the history of art are a hallmark of Prince's *Canal Zone* Paintings in which he pays homage to artists such as de Kooning, Cezanne, Warhol and Picasso. RP Aff. ¶ 21; RP Tr. at 165-66; 300-01. For example, the enlarged hands in several Paintings represent a transition from the *De Kooning* series, which emulated the compositional style of De Kooning's hybrid creatures, and also is a reference to Cezanne's *Bathers*. RP Aff. ¶ 21; *see also* RP Tr. 156, 166-67, 251-52; 264-65. In the style of de Kooning's contorted facial features and Picasso's primitive masks, Prince abstracted the faces found in many of the *Canal Zone* Paintings with painterly elements, oil stick crayon, and the application of his signature "lozenge-face" circles. RP Aff. ¶ 21; *see also* RP Tr. 172-73. As Prince explained in his deposition, he was attempting to create an "unbelievably looking great painting that had to do with a kind of rock-and-roll painting on the radical side, and on a conservative side, something to do with Cezanne's *Bathers*." *Id.* at 361. "As I said, I'm trying to make a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene. And it's my way of dealing with this idea that I've always had, which are the three relationships that exist in the world, which are men and

² For a more detailed description of the transformative nature of the various elements and techniques Prince used in the Paintings in the *Canal Zone* series, the Court is respectfully referred to the Prince Affidavit at paragraphs 32 through 61 and Exhibit A thereto, which is a Composite Exhibit describing the transformative elements of each of the Paintings, and contrasting Cariou's stated purpose for each of the Images Prince lawfully appropriated from *Yes Rasta*.

women, men and men, and women and women.” *Id.* at 338-39. In the *Canal Zone series*, Prince emphasized equality between the sexes. RP Aff. ¶ 61.

D. Gagosian Gallery’s Canal Zone Exhibition

Lawrence Gagosian is the founder and owner of the Gagosian Gallery, a leading contemporary art gallery with eight locations worldwide. Ex L at LG Tr. 16, 18-19. Throughout its history, Gagosian Gallery has dedicated itself to organizing important exhibitions of contemporary art. *See*, www.gagosian.com. Since approximately 2005, Gagosian Gallery has represented Prince in the marketing and exhibition of his artwork. LG Tr. 24.

From about November 8, 2008 through December 20, 2008, Gagosian Gallery held the *Canal Zone* Exhibition (the “Exhibition”) at its gallery in Chelsea, featuring 22 of the 29 Paintings in the *Canal Zone* series. Ex M; LG Tr. 25. Gagosian Gallery sold 14 of the Paintings through its promotion of the exhibition. Ex N at Ex A. Gagosian Gallery purchased four of the Paintings, and some were traded in non-cash transactions for other works. *Id.*

Gagosian Gallery spent approximately \$434,730.47 organizing and marketing the Exhibition. Ex O at GGP0043144. Advertisements for the Exhibition were featured in various publications. Ex P at GG0071-79. Marketing efforts primarily targeted prominent collectors, gallerists and museums, as they are the predominant market for Prince’s artwork. *See* Ex H. Invitations to the Exhibition were sent to target consumers. *See* LG Tr. 59-60; Ex Q. Gagosian Gallery also created a catalogue entitled *Canal Zone*, featuring Paintings in the Exhibition. Bart Aff. Ex M. Rizzoli International planned to publish *Canal Zone* for distribution that was scheduled to begin in September 2009, but Rizzoli backed out because of plaintiff’s lawsuit.³ *See* AP Tr. 24. Though not legally obligated to do so, Defendants withdrew the unsold Paintings, pending this case. RP Aff. ¶ 28.

³ Plaintiff has since dismissed all claims against Rizzoli with prejudice. *See* Ex S.

E. Cariou's Career as a Photographer

Cariou is a Paris-based photographer who has published a number of photography books, including *Yes Rasta*, published in 2000 by powerHouse Books, Inc. ("powerHouse"). PC Tr. 45-46, 280, 285; Ex T ¶ 3; Ex E ¶ 3. For the past 20 years, Cariou has focused on portraiture photography and landscapes. PC Tr. 45-6, 280, 285. Sometime before 2004, Cariou stopped accepting commercial free-lance photography assignments to focus solely on his photography projects. PC Tr. 282. Two other books, entitled *Surfers* and *Trench Town Love*, containing Cariou's portraiture-style photographic images have been published. According to Cariou, his fourth book, featuring his Gypsy project, was finished in the fall of 2008, however, as of January 2010, he had no plans to publish this book. PC Tr. 286-7; *but see* CC Tr. 43-44. A few images from Cariou's *Yes Rasta* book and *Surfers* book were exhibited at a gallery in Paris in 2000. PC Tr. 234-235, 288-89. Images from his *Trench Town Love* series were exhibited in a small museum in Paris named La Villette for two months in 2009 as part of a group show. Ex V at 3(f); PC Tr. 288-90.

F. Cariou's Creation of the Images in *Yes Rasta*

According to Cariou, the approximately 100 images that appear in *Yes Rasta* were taken over a six-year period, during which time he continued his career as a professional photographer. AC at ¶ 16; PC Tr. 39-40. Cariou testified that he wanted to photograph Rastafarians in Jamaica because of his love for Reggae music, Jamaica, its culture, the "look" of the Rastafarians and because "no book ha[d] ever been done about Rastafarians." PC Tr. 35-6; Ex E ¶ 16; Ex Z. His intent was to document the Rastafarian culture and the surrounding landscapes, and to capture as closely as possible the subject being photographed. PC Tr. 36, 40-43, 45, 110, 166, 171; 172-73; 176-78; 265-66; *see also id.* at 120; 185-86 ("What I'm into is to make beautiful books.");⁴

⁴ None of the images in *Yes Rasta* have titles. PC Tr. 77; *but see* RP Tr. 248-49 (for Prince, titles to the Paintings are an important component to the works and to "recontextualizing the image" and "create[] another type of subtext that you can read into the painting.").

GGP0043115-6; *but see* RP Tr. 357-58 (in contrast to Cariou's images which capture what is actually there, Prince has "never been interested in what's actually there."). Cariou described the *Yes Rasta* project to powerHouse Books, in this way: "I told them that I wanted to have a book of photographs,...of portraiture, and I didn't want that book to look pop culture at all" *Id.* at 187. Cariou testified that powerHouse marketed *Yes Rasta* to consumers of artist books. *See id.* at 188; *but see* Ex W.

Cariou describes his portraiture style as "a static way of taking a picture of when someone is looking at you;" that is, it is staged and the subject knows he/she is being photographed. *Id.* at 45-46. To Cariou, it is the combination of the way the subject looks at the viewer, the way his body looks, the lighting and the quality of the black and white that make his images strikingly original. *See, e.g.,* PC Tr. 80-81; *but see* Ex CC (similar images from Internet).

Cariou explained that sometimes he would just snap a landscape shot while on his way to another destination, and sometimes he would choose background settings because he thought they would make a beautiful portrait, they suited the subject, were visually compelling, or created a tropical feel, or because they just "felt good" or it "felt right" and not because of any specific attribute about the particular setting. *Id.* at 51, 74, 84, 109-10, 112, 115; 151. Cariou also included photographs of marijuana plantations to depict a prominent feature of the Rastafarian and Jamaican cultures. *Id.* at 114-15; 118. Many of the Images were taken in the towns of Negril and Lucille and in other public places. *Compare* PC Tr. 6, 36-37, 73-74, 83-84, 128 *with* Ex E at ¶ 16. In many instances, Cariou blurred the landscape background to make the subject stand out. *See, e.g.,* PC Tr. 53-55, 123-24; 140-41. Cariou believes his landscape images in *Yes Rasta* are distinctive because they are his and because of the way the tropical landscape is organized in the book, adjacent to the portraiture shots. *Id.* at 67-68, 109; *see also id.* at 171. As

Cariou explained it, the reader must view the whole book to get the feel of the subject matter of each of the individual images in *Yes Rasta*.⁵ *Id.* at 81.

G. By Cariou's Own Design, the Market for his Images is Virtually Non-Existent

Cariou has utilized an unconventional business model to manage and advance his career as a photographer, such that as of November 2008, the market for his photographic images was virtually nonexistent. Information about Cariou's career as well as images from his books can be found at the website he set up years ago, www.patrickcariou.com. Cariou says he does not maintain or monitor this website or check the email address listed on the webpage to see if he has had any inquiries concerning his work. PC Tr. 239. Visitors to Cariou's website can only purchase photographs if they contact him directly via the website. *Id.* at 238-39. Cariou testified that since its creation, no one has contacted him through the website to purchase any of his photographs. *Id.* at 239-40, 254, 260.

Cariou has only sold a few photographs, and by choice, all of these sales were to his friends or to people he liked depending on his mood. Ex V at 1(c); *see also* PC Tr. 89, 92, 126, 157-58, 161, 237, 283-84. In each instance, Cariou arbitrarily decided the price. *See* PC Tr. 92. *Id.* at 221. Moreover, in selecting artist editions for the works he sold, Cariou said he did not really give much thought to which photographs to select. *Id.* at PC Tr. 93-94. Likewise, Cariou has made little attempt to market the *Yes Rasta* images, and he has not given any of the 70 copies of *Yes Rasta* that he received free from the publisher to people who could help market the book. *Id.* at 103, 109, 116, 118, 121, 128, 129, 134, 139, 140, 142, 144, 153, 159, 221.

Cariou is not listed in the 2009 Art in America guide to galleries, museums and artists. *See generally* www.artinamerica.com. Cariou also is not included in either of the Artnet

⁵ For a detailed recitation of Cariou's stated reasons for photographing the Images, the Court is respectfully referred to the Composite Exhibit attached to the Prince Affidavit as Exhibit A.

databases, which is a valuable resource utilized by art appraisers, art dealers, museum curators, auction experts, and collectors to find artists. *See* www.artnet.com. Cariou's website does not list museum exhibitions featuring his work. Ex X at GG004340 – 43143. Other than the exhibition at Galerie 213, Paris, Cariou has not exhibited or actively sought to exhibit the *Yes Rasta* Images in an effort to promote their sale. PC Tr. 232, 234-235, 288-89.

According to Cariou, exhibiting his works at the Clik Gallery was the first opportunity he considered to exhibit and sell the *Yes Rasta* Images. *Id.* at PC Tr. 95. Cariou testified that Christiane Celle ("Celle") planned to represent him on an exclusive basis for the exhibition. *Id.* Cariou claims that Celle backed away from doing the *Yes Rasta* show because she did not want to look opportunistic and ride on Prince's fame while his work was being exhibited at Gagosian. *Id.* at 100. Celle, however, has not foreclosed working with Cariou on future projects, and has even requested proofs from Cariou for other shows, but Cariou has not followed through with finalizing her representation of him. Bart Aff. Ex Y, CC Tr. 106, 133, 149; *see also* PC Tr. 103. After deciding not to move forward with the *Yes Rasta* exhibition, Celle also reached out to Cariou to inform him of her decision. CC Tr. 63. However, Cariou never responded. CC Tr. 63-65, 71. It was not until they spoke months later, when he called to ask her for help with this lawsuit, that Celle first informed Cariou that she had, for her own professional reasons, decided not to proceed with a show featuring the Images in *Yes Rasta*. *Id.* 71-73. Cariou has not approached anyone else about the possibility of helping him implement his plan to sell prints from his various bodies of work, including invoking his right under his agreement with powerHouse Cultural Entertainment, Inc. ("powerHouse") to permit others to publish his Images. *Id.* at 103, 230-231.

Cariou was not involved in the marketing, advertising, or publicity of *Yes Rasta*. *See id.* at 185, 212, 224. Cariou did not know how many *Yes Rasta* books were sold, whether it was out

of print, how many copies powerHouse still has available for sale, or whether powerHouse has received inquiries about the possible sale of *Yes Rasta*. *Id.* at 211, 218, 230, 268; *see also* RP Tr. 236 (*Yes Rasta* was out of print when Prince started to create the *Canal Zone* series). Discovery obtained from powerHouse shows that the market for *Yes Rasta* is very small. *See* Ex T at ¶ 4. powerHouse published one edition of *Yes Rasta*, and has only sold 5,791 copies. *Id.* at ¶ 2, 3. Cariou has earned \$8,087.75 in royalties from the sale of *Yes Rasta*. *Id.* at 214-215; Ex T at ¶¶ 2, 3, and 6. Although powerHouse has not foreclosed working with Cariou on future projects, a hard cover edition of *Yes Rasta* is out of stock and a limited number of copies are available for sale through the powerHouse website. *Id.* at Ex T, ¶¶ 8-9, 11. Cariou claims his ability to sell copies of *Yes Rasta* or to earn revenues from derivative works based on the Images has been damaged due to defendants' alleged conduct. Ex E at ¶ 14. Cariou, however, never intended to continue with portrait photography, and it was not until recently that he allegedly "decided" he was finally ready to market and sell his images. PC Tr. 94-95, 235, 284-85, 286.

ARGUMENT

PRINCE'S APPROPRIATIVE USE OF THE *YES RASTA* IMAGES WAS FAIR

Section 107 of the Copyright Act is a codification of the common law tradition of fair use adjudication, and requires courts to avoid a rigid application of the copyright statute that "would stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). *See also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990) ("Leval") ("Fair use should be perceived . . . as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law."). "The ultimate test of fair use . . . is whether the copyright law's goal of 'promoting the Progress of Science and useful Arts,' . . . 'would be better served by allowing the use than by preventing it.'" *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (citations omitted).

In determining fair use, courts rely on four *non-exclusive*, statutory factors: 1) “the purpose and character of the use,” 2) “the nature of the copyrighted work,” 3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and 4) “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107. Since “no generally applicable definition [of the fair use doctrine] is possible . . . each case raising the question must be decided on its own facts.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). *See also Blanch*, 467 F.3d at 251 (citing *Campbell*, 510 U.S. at 577-78) (“determination of fair use defense is an open-ended and context-sensitive inquiry.”). “Although ‘[f]air use is a mixed question of law and fact,’ this court has on a number of occasions resolved fair use determinations at the summary judgment stage where . . . there are no genuine issues of material fact.” *Blanch*, 467 F.3d at 250. When viewed in light of the pivotal role of the fair use defense in promoting the progress of arts and the public exhibition of art, Prince’s appropriation of plaintiff’s *Images* should be considered fair use as a matter of law.⁶

A. Because the Paintings in Prince’s Canal Zone Series Were Created With New Insights, a Different Purpose, Message and New Meaning, the Character and Purpose Prong of the Fair Use Defense Weighs Decidedly in Defendants’ Favor

The first factor, the purpose and character of the use, lies at the heart of the fair use inquiry, and is often considered the key factor in determining fair use. *See Campbell*, 510 U.S. at 579. In evaluating the purpose and character prong, courts in this Circuit consider whether the use was transformative, for a commercial purpose, and in bad faith, as well as the rationale for the use. *See, e.g., Blanch*, at 476 F.3d at 251-56.

⁶ Plaintiff’s Fifth Claim for Relief, “Conspiracy by [Defendants] to Violate Plaintiff’s Rights Under the Copyright Act” must be dismissed because there is no cause of action under New York for conspiracy to violate the Copyright Act, and such claims are preempted by the Copyright Act. *Calloway v. Marvel Entm’t. Group*, 1983 U.S. Dist. Lexis 10506, at **14-15 (S.D.N.Y. 1983); *Irwin v. ZDF Enters. GMBH*, 2006 U.S. Dist. Lexis 6156, at *9 n.1, 11-14 (S.D.N.Y. 2006).

1. Prince's Use of the Images was Transformative

In determining whether the secondary work is transformative, the central inquiry is whether it “merely ‘supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message...in other words, whether and to what extent the new work is ‘transformative.’ Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and arts, is generally furthered by the creation of transformative works. Such transformative works thus lie at the heart of the fair use doctrine’s guarantee of breathing space.” *Id.* at 251 quoting *Campbell*, 510 U.S. at 579 (citations omitted). The secondary use adds value where the copyrighted expression in the original work “is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” *Id.* (citations omitted).

Here, Cariou’s stated goal was to create a beautiful portraiture book, which accurately depicts members of the Rastafarian culture in their native Jamaican landscapes. PC Tr. 35-36, 51, 132, 134, 141, 186, 265-66; *see also* Ex 2. In other words, Cariou’s objective in taking the Images was to document the Rastafarian culture as reality. *See, e.g.*, Ex AA. Prince, in contrast, is “not interested in what is actually there,” and is instead “really interested in making art that...transforms something that’s already existed without getting involved in the original intent of the image.” RP Tr. 167, 358.

In furtherance of that artistic purpose, Prince appropriated the Images, along with other raw materials, and used them for an entirely different artistic and expressive purpose, which was to create his vision of a fantastical post-apocalyptic world set in a place which no longer exists, while paying homage to master painters. RP Aff. ¶ 21; *see, e.g.* RP Tr. 30, 165-67; 341, 365. One of his creative message for the *Canal Zone* series was to have “music groups and music

itself be the surviving, if not redeeming, fact of life in the post-apocalyptic world I imagined in my screenplay. The redemptive value of music is one of the important concepts and messages of this series.” RP Aff. ¶ 22; *see also* RP Tr.338-40. Prince added guitars to the Paintings to establish groupings of men and men, men and women, and women and women as musical bands, to connote equality between the sexes (RP Aff. ¶ 22) and to further the band and music theme that was one of the centerpieces of his *Canal Zone* series (RP Tr. 279; 338-39. RP Aff. ¶¶ 22 , 32, 44, 45, 46, 53, 55, 65 and Ex A to RP Aff.).

As detailed further in the Prince Affidavit, Prince’s juxtaposition of collaged and other elements in each of the Paintings combined to create a fictionalized world that transforms the individual raw elements used in the Painting into a completely new expression and a different message that had nothing to do with capturing as accurately as possible the Rastafarian culture in native landscapes in Jamaica.⁷ On this record, the first, and arguably most compelling, fair use factor, weighs decisively in favor of a finding that Prince’s appropriative use of rescaled, altered, cropped reproductions of the Images as raw materials in the Paintings, is transformative and should therefore be considered fair use. *See, e.g., Blanch*, 467 F.3d at 252-53 (use of copyrighted work as “raw material” to further creative objectives “sharply different” from those of copyright owner “confirms the transformative nature of the use.”); *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F.Supp. 2d 499, 509-10 (S.D.N.Y. 2009) (Batts, J.) (“The Second Circuit found it ‘plain’ that superimposing the face of Leslie Nielsen on a photographed body intended to look like Demi Moore’s was ‘transformative’ of Leibovitz’s original photograph.”) citing *Leibowitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998).

⁷ As the layering of the raw materials and other elements used in the Painting is difficult to appreciate from a view of the *Canal Zone* book or the photographs attached to the Prince Affidavit, the defendants invite the Court to inspect the Paintings in person at either Prince’s studio in Rensselaerville, New York or in a gallery space in Manhattan should the Court wish to confirm Prince’s sworn statements concerning the manner in which he used the Images.

2. The Broader Public Benefit of the Public Exhibition, and Progress, of Art Outweighs the Commercial Exploitation of the Paintings

While courts will consider the commercial nature of the secondary use when it is an untransformed duplication of the original, any significance attributable to the commercialism factor should be discounted where, as here, the second use is demonstrably transformative. *See Blanch v. Koons*, 467 F.3d 244, 254 (citing *Campbell*, 510 U.S. at 579) (“The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”); *see also* Point A(1). In any event, given the importance placed on encouraging the creative expression of art, the net economic gains derived from the Paintings to which defendants stipulated (*see* Ex N), should give way to the broader public benefits to be derived from the public exhibition of works of art by Prince. *See id.* at 253-54 (“courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest . . . Notwithstanding the fact that artists are sometimes paid and museums sometimes earn money, the public exhibition of art is widely and we think properly considered to ‘have value that benefits the broader public interest.’”). As such, little weight, if any, should be afforded to the commercialism factor.

3. Although Not Dispositive, Prince Acted Properly and in Good Faith

Although consideration of the propriety of an alleged infringer’s conduct is an integral part of the analysis, it is not, even when undertaken in bad faith, dispositive of either the first factor or the fair use defense. *NXIVM Corp. v. Ross Inst.* 364 F.3d 471, 479 (2d. Cir. 2004) citing *Campbell*, 510 U.S. at 585 n.18. In any event, as Prince did not act in bad faith when he used the Images to create the Paintings, the good faith factor weighs in Prince’s favor.

Cariou readily admits that Prince is a well-known appropriation artist. (Ex E ¶ 18). “Appropriation art” is defined as taking “possession of another’s imagery (or sounds), often without permission, reusing it in a context which differs from its original context, most often in

order to examine issues concerning originality or to reveal meaning not previously seen in the original.” Ex BB. Thus, appropriation art necessarily entails a taking and repurposing of another image and turning it into something else – a construct that is the very essence of the fair use doctrine. As such, Prince’s use of the Images was consonant with an established art form for which he is well-known; that is, taking raw elements and turning them into something new. *See, e.g.*, RP Tr. 120-21, 123. Indeed, that Prince would not object to his own images being copied and sold for a profit, illustrates his belief in appropriation art as an art form, his commitment to the promotion of the arts, and in turn, his lack of bad faith. RP Tr. 88 (“I’m all for it.”), 123 (artistic freedom is for all artists: “It could be an art student. I would encourage it.”).

In any event, Cariou’s claim that Prince appropriated the Images without Cariou’s permission (Ex E ¶ 19; RP Tr. 28), in itself, does not constitute bad faith. *Blanch*, 467 F.3d at 256 (“We are aware of no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith and the cases addressing bad faith tend to arise in circumstances strikingly different from the situation here.”). Even plaintiff’s allegation of “continued distribution” of Prince’s work after plaintiff notified him of his copyright infringement claim (Ex E ¶ 27), “is of no relevance to the fair use equation . . . because [i]f the use is otherwise fair, then no permission need be sought or granted” *Id.* Besides, upon learning of this lawsuit, defendants pulled the remaining Paintings pending resolution of this lawsuit out of respect for the judicial process. RP Aff. ¶ 28.

4. Prince Had a Genuine Creative Rationale for Appropriating the Images

For Prince, his decision to appropriate the Images was part of a fluid creative process that was inspired by a series of chance events, which happened while he was working on his *Eden Rock* screenplay. *See* RP Tr. 266; RP Aff. ¶ 16. Specifically, when Prince first saw a copy of *Yes Rasta*, he immediately made a connection between the images in the book and the jungles he

had seen on a recent visit to Panama. RP Tr. 158, 161; RP Aff. ¶ 17. The day before, he had seen “monumental cruise ships” in the harbor in St. Barts and he thought they should be in the screenplay. RP Tr. 266; RP Aff. ¶ 17. In thinking about who should be on the ship, the idea of a reggae band popped into his head. *Id.* At the time, he had been listening to Radiodread, an album that sampled and replicated Radiohead, in a reggae manner. RP Tr. 263-64; RP Aff. ¶ 17. As Prince explained, “I was very much into that album, I played it over and over. And then the next day I walk into a bookstore and what do I pick up, a book that had pictures of Rastas in them and I said to myself, hmm, something is in the air. It was pure chance.” *Id.* “It’s that notion of when worlds collide.” RP Tr. 263; RP Aff. ¶ 17. Prince had been looking for black and white images of figures so that he could put them next to his *de Kooning* women, as a transition from that series. RP Tr. 264, 251; RP Aff. ¶ 17.

At the time he was painting his *de Kooning* series, Prince was already thinking about the *Canal Zone* series, and his desire to pay homage to de Kooning through that series. RP Tr. 156-57, 165-66; RP Aff. ¶¶ 21, 38, 39, 40, 41, 42, 43, 46, 47, 51, 53, 62, 63. Working in the style of de Kooning, Picasso, and Warhol, and using the composition of Cezanne’s *Bathers* along with other raw elements (*i.e.*, “ingredients”), Prince transformed the images he had torn from the pages in *Yes Rasta*. RP Tr. 167, 264, 277-79; RP Aff. ¶¶ 27, 42, 53, 63; *see also* Point A(1). The sincerity of Prince’s artistic vision is further confirmed by the fact that he also used an image of a Rastafarian he came across in a book on Bob Marley. *Id.* at 162, 263; *see also* RP Aff. ¶ 24 and Ex M at p. 13-14. Prince, who two years earlier, had “started drawing directly in the book like [he] had done before in a book of De Kooning’s work” (RP Tr. 151), was inspired by the Images because the Rastafarian culture was a subject he knew nothing about, and Prince often puts himself in a position to discover new things. *Id.* at 156. Thus, Prince’s explanation for using the Images, particularly when viewed in light of the entirely different expressive

purpose of the *Canal Zone* series (see A(1)), reveals a genuine creative rationale for his appropriative use of the Images that supports a fair use defense.⁸ See *Blanch*, 467 F.3d at 255 (Koon’s sworn explanation for use of original work sufficient to carry justification prong of first fair use factor) cited in *Bourne*, 602 F.Supp.2d 499, 507-08 (“Second Circuit has given weight to an artist’s own explanation of their creative rationale when conducting fair use analysis”).

B. The Nature of Cariou’s Work – Depicting, as Accurately as Possible, Real-Life Images – Weighs in Favor of Fair Use

Because Prince’s use of the Images was transformative, the second fair use factor, the nature of the work, arguably is of limited usefulness since the use was intended to further a wholly different artistic purpose, and not to exploit the “creative virtues” of the Images. See *Blanch v. Koons*, 467 F.3d 244, 257 citing *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d at 612-13. In any event, because the images in Cariou’s *Yes Rasta* book were published with the stated goal of depicting real-life images of Rastafarians in their native Jamaican landscape (see Ex Z), which, according to Cariou, are destined to have historical significance (PC Tr. 284-86), the second prong should weigh in favor of fair use. See *Blanch*, 467 F.3d 256 (“greater leeway being allowed to a claim of fair use where the work is factual or information, and [] the work is published”); see also *Blanch v. Koons*, 396 F. Supp. 2d 476, 481-82 (S.D.N.Y. 2005)(fair use factor favored defendant where image “not sufficiently original to deserve much copyright protection.”); CC Tr. 160.

C. The Amount and Substantiality of the Images Prince Used was Reasonable

The third fair use factor considers whether “the quantity and value of the materials used,’ are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586. See

⁸ Cariou has suggested in his February 8, 2010 letter to the Court (Ex Z) that a work must comment on the original work to be transformative. This is not the law. While a transformative work may comment on the original work, it is not a prerequisite to finding that the secondary work is transformative. See *Blanch*, 467 F.3d at 255.

also *Blanch v.* 467 F.3d 244, 257 (whether copying was “excessive, beyond his ‘justified’ purpose for doing so.”). This analysis focuses not only on the quantity of the materials used, but also their quality and importance. *Campbell*, 510 U.S. at 587; *Graham*, 448 F.3d 608, 613. The analysis “must take into account that ‘the extent of permissible copying varies with the purpose and character of the use’” and the review is undertaken in reference to the original work.⁹ *Graham*, 448 F.3d 608, 613 (citing *Campbell*, 510 U.S. at 586-87).

In this case, then, analysis of the amount and substantiality prong must begin with Cariou’s testimony that the images in his *Yes Rasta* book need to be viewed as a whole in order to appreciate the distinctiveness of the individual images. PC Tr. 61-62, 81, 117. By his own admission, then, the individual Images are not particularly distinctive. Indeed, images strikingly similar to Cariou’s images of Rastafarians, tropical landscapes and marijuana plantations can be readily found on the Internet (Ex CC), thereby demonstrating that the importance of the individual Images is marginal. *See Blanch*, 396 F. Supp. 2d at 467 at 482. Cariou’s testimony also shows that the importance of the Images is as part of a collection of approximately 105 images in the *Yes Rasta* book, for which the copyright was registered as a compilation (Ex DD). Prince’s use is thus diminutive and becomes inconsequential when viewed in light of Prince’s overall creative and artistic purpose for the *Canal Zone* series. *See, e.g., NXIVM Corp.*, 364 F.3d at 481 (rejected “heart of the work” theory where plaintiff conceded book was an assemblage, and it reflected “no objective core”).

Even when viewed individually, however, the quantity and value of the Images Prince used in his Paintings are reasonable to carry out that artistic purpose, particularly given the importance placed on the furtherance of the arts. Though Cariou has represented to this Court that Prince engaged in wholesale copying of entire original works, it is important to note that

⁹ As such, Prince’s enthusiastic appreciation for the images in *Yes Rasta* is not determinative, as plaintiff urges in his February 8, 2010 letter to the Court. *See NXIVM Corp.*, 364 F.3d at 480-81.

none of the Paintings incorporate the actual original works, the photographs themselves. Rather, the appropriative use was made of Images which plaintiff had already reproduced, altered and published in book format in *Yes Rasta*. See PC Tr. 204-205. Moreover, as can be readily seen from a comparison of the Images in *Yes Rasta* and those use in the *Canal Zone* series (see PR Aff. Ex A), in all but three of the Paintings, *Djuna Barnes*, *Natalie Barney*, *Renee Vivien and Romaine Brooks*, 2008, *On the Beach*, *On the Beach*, 2008, and *Graduation*, 2008, Prince appropriated only portions of the Images, and in all instances, did so solely to the extent necessary to further his unique artistic purpose and message. See *id.* at ¶¶ 55, 51, 32 and Ex A to Prince's Aff.

In the three instances where Prince used an entire Image, the amount and substantiality of the Images used is not fatal to defendants' fair use defense because Prince's artistic expression in those three Paintings, a fantastical post-apocalyptic survivor society on St. Barts, is entirely different from Cariou's artistic purpose of creating a beautiful book containing images that depict as realistically as possible Rastafarians in their native Jamaican landscapes. See *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1121 (D. Nev. 2006); see also *Leibovitz* (fair use found even where entire photograph replicated to look precisely like original). Moreover, these three Images were altered, cropped and used solely as a backdrop for other raw elements painterly techniques. *Campbell*, 510 U.S. at 586-87 ("[T]he extent of permissible copying varies with the purpose and character of the use"; therefore, this inquiry requires the court to return to the first factor).

Given the purpose of the copyright law to progress the arts and encourage artistic freedom, the amount and substantiality factor should weigh in favor of fair use, particularly since, as demonstrated below, there has been no usurpation of the market for Cariou's *Yes Rasta* book or the photographs contained therein. See *Leval* at 1123-24 (amount and substantiality factor must be evaluated "in relation to the copyright objectives; they must consider the

justification for the secondary use and the *realistic risk* of injury to the entitlements of authorship.”) (emphasis added).

D. Prince’s Use of the Images Did Not Usurp the Potential Market For, or Value of, the *Yes Rasta* Images

In his February 8 letter to the Court, Cariou points to Celle’s decision not to go forward with a six-week show featuring Cariou’s *Yes Rasta* images to support his view that the exhibition of the Paintings has resulted in “Potential Harm to the Market for Plaintiff’s Photographs and Prints.” Ex 2; PC Tr. 98-100. However, even if Celle’s testimony about her reputational concerns of not wanting to be seen as riding on Prince’s coattails (CC Tr. 88-90) can be reconciled with her testimony that she went with another artist due to timing constraints because Cariou did not respond for months to her attempts to reach him (*id.* at 64-65), Celle’s decision is not the sort of harm the Copyright Act protects. *See NXIVM Corp.*, 364 F.3d at 482 (affirming holding that Goldie Hawn’s cancellation of visit with plaintiff after defendants disseminated allegedly infringing materials is not a cognizable harm under Copyright Act). “In considering the fourth factor, our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivative, but whether the secondary use usurps the market of the original work.” *Id.* at 481-82 (citing *Campbell*, 510 U.S. at 593). “The focus here is whether defendants are offering a market substitute for the original.” *Id.* at 481. Here, there is no evidence that Prince’s creation or defendants’ exhibition and sale of the Paintings usurped, or was offered as a substitute for, Cariou’s *Yes Rasta* images.

At the time the *Canal Zone* series was exhibited at Gagosian Gallery, the market for Cariou’s *Yes Rasta* images was virtually non-existent. Other than the creation and publication of the image in the *Yes Rasta* book in 2000 and his non-committal communications with Celle about a possible show in the spring of 2009 (CC Tr. 66), Cariou has not actively tried to license, market, promote, exhibit or actively sell any of the *Yes Rasta* images. *See supra* Factual

Background G. Instead, Cariou intentionally limited the sale of his works to his friends or people he likes. Ex V at 1(c); PC Tr. 89, 92, 126, 157, 158, 161. To date, Cariou has only sold six *Yes Rasta* images for €1,500 to €2,000. Cariou purportedly had no intention of making any of his portraiture work available to the public until his fourth and final book of *Gypsies* portraits was completed, which (purportedly) happened in the fall of 2008. PC Tr. 286; *but see* CC Tr. 43-44 (Cariou told her it was not done as of the fall 2008). Cariou, having completed the last book, intends to move on from portraiture photography altogether. PC Tr. 286. Thus, it was factually impossible to usurp a market that, by Cariou's own design did not exist.

Second, even if Celle's speculation that she would have done well with Cariou's *Yes Rasta* images (CC Tr. 82) could be spun as a forecast of the potential market for those images, Cariou cannot show that the *Canal Zone* Paintings compete in the same market. *See Consumers Union of the United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983) ("[w]here the copy does not compete in any way with the original, this concern [regarding usurping the market] is absent."); *accord Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 2001 U.S. Dist. LEXIS 25687 *29 (S.D.N.Y. 2001) ("If the allegedly infringing use is not in competition with the copyrighted use, the fair use defense is ordinarily sustained.") (citations and internal quotations omitted). Prince is a well-known appropriation artist whose wholly fictionalized works containing pop cultural messages are displayed in major museums around the world. AC ¶ 18; RP Aff. ¶¶ 3, 12. Consumers of his works are museums, galleries and private collectors of contemporary art, and his works are regularly offered at auction. RP Aff. ¶ 3. Four of the Paintings were sold for prices ranging between \$400,000 and \$2,430,000. Ex N. Cariou, in contrast, is an established portraiture photographer, who has had a couple of shows in the last ten years, and who is known for creating beautiful photography books that capture with great accuracy the essence of his subjects. PC Tr. 45-46, 288-90; *Yes Rasta* (inside jacket cover); CC

Tr. 42-46. As there is no similarity between the styles, concepts, mediums, price ranges or the markets of Cariou and Prince, the *Canal Zone* Paintings in no way compete with the *Yes Rasta*, and certainly are not a substitute for them.¹⁰

Moreover, as Prince intended to, and did, create Paintings that were transformative (RP Aff. ¶¶ 21, 64), there is no derivative market for Cariou to tap into that is in any way related to Prince's use of portions of the Images. *Blanch*, 467 F.3d at 258 (existence of derivative market for original work must be related to use by defendant); *see also Campbell*, 510 U.S. at 59 (where second use is "transformative," "market substitution is at least less certain, and market harm may not be so readily inferred.").

Finally, the record reveals that notwithstanding Celle's stated reluctance to proceed with a *Yes Rasta* show due to professional considerations, she was quite adamant when she finally spoke to Cariou on or about February 2009, that he do his own *Yes Rasta* show; she urged him to do a reprint of *Yes Rasta* (it was out of print) "because it is a very important book;" she was insistent on purchasing additional *Yes Rasta* books; she felt she could sell prints of images from *Yes Rasta* for between \$3,000 and \$20,000, depending on the size; and she remained willing to represent him, even though it took him several months to return her call. *See* CC Tr. 52-53, 82, 102, 104-05, 107-08, 155. As Celle put it, "I was very committed, I wanted to represent him. We agree on it but we never really pursue it." *Id.* at 133. PC Tr. 286-7 (powerHouse also is still interested in working with Cariou). On this record, then, the fourth factor weighs in favor of

¹⁰ While Celle (also represented by plaintiff's counsel) testified that her recently-opened (June 2009) gallery, which sells prints of photographic works ranging from \$3,000 to \$20,000, also markets to entertainers, people in the fashion industry, decorators and others (CC Tr. at 67-68, 128, 137, 154-155; *see also Ex Z*), any evidence of an actual overlap between the consumers of the Paintings and consumers of prints of the images in the *Yes Rasta* book (and none was adduced) does not show that in marketing and exhibiting the Paintings, defendants were offering a market substitute for Cariou's *Yes Rasta* prints.

Prince, as his use of the Images did not usurp the potential market for or value of the *Yes Rasta* images. See *Blanch*, 467 F.3d at 258; *NXIVM Corp.*, 364 F.3d at 481-82.

CONCLUSION

When weighed in light of the purposes of copyright to progress the arts, Prince's use of portions of Cariou's Images should be considered fair because, as demonstrated herein and in the accompanying exhibits, Prince's Paintings, having been created in good faith and with genuine creative rationale to convey new insights, a different purpose and new meaning, are transformative and contribute to the broader public benefit of art; and the quantity and value of the Images Prince used in his Paintings was reasonable to carry out his genuine artistic purpose, which was to transform Cariou's fact-based Images into a completely different expressive purpose that does not compete with and therefore does not usurp Cariou's market for the Images. Accordingly, for all of the reasons set forth herein and in the accompanying exhibits, defendants Prince, Gagosian Gallery and Lawrence Gagosian respectfully request that the Court enter an order granting them summary judgment on their fair use defense and dismissing plaintiff's conspiracy claim as it is frivolous and preempted by federal copyright law, and for such other and further relief to which the defendants are entitled.

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EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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08 CIV 11327 (DAB)

PATRICK CARIOU,

Plaintiff,

-against-

RICHARD PRINCE, GAGOSIAN GALLERY, INC.,
LAWRENCE GAGOSIAN, and RIZZOLI
INTERNATIONAL PUBLICATIONS, INC,

Defendants.

**AFFIDAVIT OF DEFENDANT
RICHARD PRINCE
IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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RICHARD PRINCE, being duly sworn, deposes and says:

1. I am an artist living in New York City and Rensselaerville, New York, but maintain my principal studio in Rensselaerville.
2. I submit this affidavit in support of Defendants' Motion for Summary Judgment.
3. I have been an artist for nearly 40 years, and have consistently aspired to create beautiful pieces of art to convey a distinct message or creative concept. My work has been displayed in, and is part of the permanent collection of major museums around the world, including the Solomon R. Guggenheim Museum in New York; Whitney Museum of Art; the San Francisco Museum of Modern Art; Museum Boijmans van Beuningen, Rotterdam; Museum fur Gegenwartskunst, Basel; and Kunstmuseum Wolfsburg. As an example, in late 2007, the Solomon R. Guggenheim Museum in New York presented a major retrospective of my work, which filled the entire rotunda and two tower galleries.

4. My works are sought after by significant collectors and galleries of contemporary art worldwide, and are regularly offered at auction.
5. My career as an appropriation artist dates back to 1977, when I was working in the tear-sheet department of Time-Life magazine, clipping and filing articles for its editors. While working at Time-Life, I would re-photograph discarded advertising images that I salvaged. I also made collages using clippings from various advertising images, and combined them as if they were freeze frames from the same movie.
6. Ultimately, I began using photographic images of artists, and re-photographing them by changing the context in which they appear.
7. In 1984, I began creating exact re-drawings of cartoons that elicited a mix of cultural preferences, human desires and biases. This process inspired me to paint and so I began to add painterly elements to my works to evoke the styles of Robert Rauschenberg and other well-known appropriation artists.
8. My style of appropriation evolved further with my "Hippy Drawings" consisting of stick figures with abstract, mask-like faces onto which I painted circles over the eyes, nose, and mouth, which are known as my signature "lozenge" faces.
9. After this body of work, I increasingly began using bright colors, drip painting, bold brush strokes, and other painterly elements to create layered effects, which spoke to my expressive and gestural styles.
10. My next body of work was my sequential series, which included *Nurses* (2002-04), the *Check Paintings* (2004-05), the *de Kooning Paintings* (2007-07), and the *Canal Zone* (2008) series.

11. I tend to create artwork in series and/or groups, as I believe things are best understood in relation to other things. My work that falls under the grouping and repetition categories include *Untitled* (four women with hats) (1979-80); *Untitled* (three hands with watches) (1980); *Cowboys* (1980-2003); *Gangs* (1984-86); *the Monochrome Jokes* (1985-89); and the *White Painting* (1990-95). Similarly, the *Canal Zone Paintings* were done as a group.

12. My style is highly inspired by popular culture. Guitars frequently appear as a subject in my work, and they represent my love for rock music, which began in 1973 when I moved to New York City and immersed myself in its downtown music and arts scenes. At the time, I was enamored with Andy Warhol, and especially interested in the punk rock movement.

13. In the work I have done as an appropriation artist, including the *Canal Zone* series, I look at pre-existing images of all types and see what I can contribute to make something new, distinctive and hopefully visually beautiful with one or more messages to be found in the work by the viewer. It is all about what contribution I can bring as an artist in all of my work. Often I adopt a unique persona to go along with my works of art often portraying myself as a rebel, an outsider, or an outlaw. Adopting this unique persona allows me to discover and create new things.

14. I like to use other people's work to incorporate facts into my work to reduce speculation and make them more genuine, but I am not interested in what is actually there. Instead, I am interested in making art that transforms something that already existed without involving myself in the original intent of the image. I ultimately believe

that artists should be as free as possible in their studio because art is about freedom of expression and not being restricted.

15. Although my primary artistic practice has been as a painter, sculpture and re-photographer, I have long had an interest in writing. I have collected first editions and other literary works for many years and have also authored a number of works both real and fictitious.

16. My development of the *Canal Zone* series began in part with a literary creation rather than the paintings themselves. The *Canal Zone* developed from the storyline of a cinematic pitch I wrote from 2007 through 2008 called *Eden Rock*. *Eden Rock* describes a fantasy account of survivors of a nuclear attack whose cruise ship ends up in St. Barts. The survivors in the story form gangs and tribes, taking over the resort hotels on the island, and create their own post-apocalyptic society. The tribes and gangs include "Charlie Company," the family unit; the "Backpackers," who are college students on spring break; the "Rastas or Reggae," who play in cruise ship band; lesbian "Amazons" who escaped from the cruise ship; and a group of affluent individuals dubbed, the "Ultimate Ones." I was also affected by a trip I made to Panama (where I was born) in about 2005 and wanted to do a painting series set in a tropical location, as in the pitch described above.

17. Around the same time, I was visiting St. Bart, where I rent a home for two weeks each year, and found a copy of *Yes Rasta* in a bookstore on the Island. I had never seen the book in any other bookstore and assumed it was an out of print book. I saw the documentary images in the book and made a connection to the tropical settings I had seen on my visit to Panama. The day before I had also seen cruise ships in the harbor of St.

Barts and thought they should be in my screenplay. I also had envisioned that one of the tribes in my screenplay would be a reggae band that was on the cruise ship and certain of the Rastafarians looked like males that would fit into my screenplay. At the time, I had also been listening to Radiodread, an album that sampled and replicated Radiohead in a reggae manner, and was very much into that album. When I walked into the bookstore the next day and saw the book with Rastas, I thought something was in the air. At the time that I painted my de Kooning series, I was already thinking about the *Canal Zone* Series, and therefore, I had also been looking for black and images of figures of men that I could put next to my de Kooning women.

18. I began drawing in *Yes Rasta* itself like I had done before in a book of de Kooning's works, and making notations and sketches, which I eventually incorporated into portions of into my *Canal Zone* paintings. When I began to do this, I was simply making random drawings as I tend to do wherever I am, at home or on vacation, as part of the creative process. I continued to draw on the faces for two or three years. I was inspired by the images because it was a subject matter that I knew nothing about, a position that I often put myself in to discover new things.

19. In creating the *Canal Zone* paintings, I was influenced by a combination of events. The paintings are in part inspired by my trip to the former *Canal Zone* in Panama, and depict portions of my storyline from the Eden Rock screenplay. The screenplay was the starting point for the *Canal Zone* series. Therefore, while the plot and characters in the screenplay were in my head when I created the paintings, my paintings do not depict every aspect of the storyline. In creating a painting series there are many

ingredients and influences that go into the germination and creation of works of art in the studio, and portions of the screenplay story line are among those ingredients.

20. I named the series the *Canal Zone* because I was very intrigued by the fact that the name of the place I was born in, *Canal Zone*, had disappeared, and was renamed Panama.

21. In addition, I sought to pay homage and refer back to Willem de Kooning, Cezanne, Warhol and Picasso through my paintings in the *Canal Zone* series (collectively, the "Paintings"). For example, I sketched out enlarged hands and feet on some of the images in the *Yes Rasta* book in de Kooning-esque fashion, as a transition from my previous *de Kooning* series (which I had been working on when I began drawing in the *Yes Rasta* book), and to emulate the style of de Kooning hybrid creatures. This is also a reference to Cezanne's abstracted bathers paintings from the 1930's and his exaggerated drawings of hands and feet. I also abstracted the faces found in many of the *Canal Zone* Paintings with painterly elements, such as dripping paint, use of oil stick crayon and other media, and lozenge-face circles to emulate the style of de Kooning's contorted facial features and Picasso's primitive masks and unique ways of drawing parts of figures. I further transformed the images found in *Yes Rasta* by painting images onto the canvas and then painting over them again to create a ghost-like effect. I organized images of nude figures next to one another and drew Picasso-like primitive masks on some of the images that appear in the Paintings. Finally, the repetition that appears throughout the *Canal Zone* series refers to the iconic style of Andy Warhol. Such references to the history of art are a significant part of my work. Other artists such as Picasso have been noted for the art historical references in their work.

22. I added images of guitars to my paintings to establish groupings of men and women as contemporary musical bands in order to create a rock and roll theme throughout the paintings in the *Canal Zone* series. Each Painting represents different musical bands or aspects of my ideas conveyed in my screenplay pitch as one of the ingredients in the Painting. My creative message for the *Canal Zone* series was to have music groups and music itself be the surviving, if not redeeming, fact of life in the post-apocalyptic world I imagined in my screenplay. The redemptive value of music is one of the important concepts and messages of this series.

23. I used images of Rastas from *Yes Rasta* because they looked primitive, and like the type of man that might appear in my post-apocalyptic screenplay. The landscapes in *Canal Zone* merely served as background for my creative expression. The images served as one ingredient in my entire recipe.

24. To create the *Canal Zone* series, which I created alone, I appropriated, in the tradition of Duchamp, 41 images from *Yes Rasta*, two adult books from an art publishing company called Taschen, images of rock guitars and musician hands from contemporary music magazines, images from anatomy books that I bought at the art supply store, and an image from a book or magazine on Bob Marley.

25. When creating the paintings, I had at least 25 or more books and magazines in front of me and would randomly take images that fit into my artistic vision and message for each work.

26. With the exception of *Canal Zone*, 2007, which I created using portions of pages torn from *Yes Rasta* onto which I drew masks in the style of Picasso (*see* ¶ 21 above), I digitally scanned and resized the *Yes Rasta* images, some of which I scanned directly

onto the canvas while others I fixed onto a canvas with glue, scotch tape or paint, and then used them either as background for collaging or as collage elements, creating a layering effect. In some of the Paintings, I affixed the collaged elements to other images with scotch tape for further scanning, and in others I applied the collage elements directly to the canvas using a squeegee technique in which elements are affixed to the canvas with paint to create a layered effect. Thus, in making the *Canal Zone* Paintings, I sought to make a totally new artistic contribution using what I call ingredients.

27. I also created the works to convey specific messages, such as historical art references as an homage to master painters whose works I admire, such as Cezanne, Picasso, Warhol and de Kooning, and the fictional world on a tropical island where bands of individuals form musical groups that live and interact (as reflected in part of my screenplay pitch.) These ideas are combined with art techniques of collage, layering use of different media (acrylic paint, oil stick, graphite, inkjet printing and images from numerous photographic books) to create entirely new and different works of art that I hope are interesting and contribute to the dialogue of art.

28. Larry Gagosian and I withdrew the balance of the *Canal Zone* paintings that remained for sale from the market pending the resolution of this lawsuit.

29. Although the *Canal Zone* Paintings were done as part of one artistic conception, I have set forth in detail below, what I did – and why – in creating each of the Paintings in the *Canal Zone* series.

30. To appreciate the various elements, or ingredients, that appear in each of the Paintings, and in turn, their transformative nature, the defendants have compiled, as an aid to the Court, the Composite Exhibit attached hereto as Exhibit A, which contains the

images taken from the *Yes Rasta* book, and corresponding Painting(s) in which the image appears, a summary of the various elements (or ingredients) and the techniques I used to create each Paintings and a summary of Mr. Cariou's testimony explaining why he took the particular *Yes Rasta* images.

31. As the various layering effects and elements are not readily ascertainable from the images reproduced in the Composite Exhibit, Mr. Gagosian and I respectfully invite the Court for a private viewing of the Paintings to be held at the Court's convenience either at a gallery space in New York City or in my studio in Rensselaerville, New York, where most of the remaining Paintings are located.

Individual Paintings in the Canal Zone Series

32. **Graduation, 2008.** To create *Graduation*, I tore pages from the *Yes Rasta* book and had it scanned, enlarged in a bluish tint. I also had the background landscape dimmed and deemphasized. I painted a Picasso-inspired, blue lozenge facemask directly onto the canvas on the Rastafarian's face, not only to pay homage to Picasso, but also because musicians often wear face masks while performing, and thus, the mask was another way of illustrating his identity and carrying out my theme for the series. I collaged a picture of a blue electric guitar, which I cut out of a guitar aficionado magazine, onto the Rastafarian's body, and also replaced his hands with enlarged ones. I painted a small dot of blue pigment on the Rasta's forehead. These elements were then rescanned and printed directly onto the canvas. In furtherance of my music-inspired message, I added the guitar to this image to transform the identity of the Rastafarian to a contemporary musician who represented the lead guitarist of one of the bands.

33. *Meditation, 2008*. In creating *Meditation*, I used the same image of the guitar-playing Rastafarian found in *Graduation*. I rotated, and altered the size of, the image, and taped it onto a plain white canvas. I painted a white lozenge facemask on the Rastafarian's face, collaged proportional size hands and a different guitar onto the image, and added hints of blue on the four edges of the painting. The male who appears in *Meditation* represents the same musician that appears in *Graduation*. However, I switched the direction he was facing, and the guitar, as musicians often switch instruments as part of a performance, to further my reference to an ongoing musical performance in this series of Paintings.

34. *Canal Zone, 2008*. In creating *Canal Zone, 2008* I used the same image that appears in *Graduation* and *Meditation*, but once again, I replaced the guitar with a different one and affixed different hands instead. In this painting, the Rastafarian is cut out and placed among a grid-like landscape, which is created from torn, scanned, altered, and reassembled images of foliage I took from various pages in *Yes Rasta* and, if I recall correctly, may include portions from a book on Tahiti I had come across. I used the photographs of different landscapes because I wanted the painting to appear like a camouflage backdrop, with the guitarist in the midst of lush foliage that has taken control of my fictional island. I also was inspired by Andy Warhol's camouflage paintings, and his use of grids, so in this respect, I paid homage to him. The Rastafarian in the painting, symbolizes a musician who is a solo artist, and is actually a reference to musician Neil Young (deliberately using a black man as a stand in for Young). He is holding an appropriated image of Neil Young's guitar with proportional hands, and I added a white lozenge facemask as a reference to Picasso. Absent from this painting is any architecture

or buildings to create a sense that nothing has survived after the apocalypse, except this man and his guitar and music.

35. *The Ocean Club, 2008.* I named this painting after a club on Chambers Street in Manhattan, New York. To create *The Ocean Club*, I cut up different images of green landscapes from *Yes Rasta* and possibly a book on Tahiti, and recombined them on a canvas with tape and paint. I then cut out an image of a Rastafarian from *Yes Rasta* and added white lozenge faces. I also cut out an image of a nude female figure on the beach from another book, and added pink lozenge faces. I duplicated and enlarged the images of the Rastas and the nude women and then pasted them, using white paint, in alternating order onto the canvas over the background images of the landscape. The repetition in this painting is similar to the repetition that I utilize in many of my works of art, and is an homage to Warhol's style of repetition. I also chose *Ocean Club* as the title for this painting because Warhol used to go to the Ocean Club, a club I would also go to when I was a young artist, and I envisioned that the females in the painting were on the beach.

36. *Charlie Company, 2008.* In *Charlie Company*, I tore pages bearing an image from *Yes Rasta* and cut out the image of a Rastafarian riding a donkey, had it scanned and enlarged, and then reassembled it side by side with tape, and glued it twice on top of the image that was scanned on to the canvas as background. During the scanning process, I had the image cropped on the left side and tinted in sepia tones. I then pasted an image of a nude female figure next to the image of the Rastafarian riding a donkey. I attached the images to the canvas with white paint, which I applied with the use of a squeegee. I also painted lozenge facemasks on the Rastafarian and the nude female figure. The repetition and juxtaposition of images in this painting is a reference to Warhol, while the fracturing

of the image is a reference to Picasso's cubism. The woman in this painting represents a tourist and the black man represents a native, and they are juxtaposed because they are helping each other to survive. Again, absent from this painting is anything mechanical or man-made to illustrate the post-apocalyptic world in which they now exist.

37. *Back to the Garden, 2008*. In creating *Back to the Garden*, I first scanned and enlarged the image of the Rastafarian on a donkey along with the background landscape onto a canvas. To this altered image, I added a collaged guitar and a white lozenge mask to make it seem as though the Rastafarian is playing the guitar. Next I cut out the same image of the Rastafarian on a donkey, and cropped, scanned, and tinted it to sepia, and then superimposed it over the image on the canvas. Before applying it, I tore it into three pieces and then reassembled and affixed it using white paint onto the canvas. I also affixed the images of two nude women, which were also scanned in a sepia tone, on each end of the two Rastafarian images, and added lozenges facemasks to the women's faces. I was thinking about Adam and Eve when I painted *Back to the Garden* since they were in the Garden of Eden and my post-apocalyptic screenplay takes place in a tropical jungle garden. This painting also is a take on the music scene, by combining the guitar and hands with the collaged man on the donkey, while highlighting three different human relationships in the universe: women with women, women with men, and men with men. The landscape represents the idyllic setting at Woodstock, and again, included nothing man-made. The man in the painting is playing "Back to the Garden" at Woodstock on George Harrison's guitar and has become a "Beatle" in furtherance of my message that music is the only redeeming thing to have survived.

38. *Cheese and Crackers, 2008.* In creating *Cheese and Crackers*, I first scanned images of three nude women onto the canvas. Next I painted, drew, and collaged onto their bodies enlarged hands and feet, and also obscured their faces. I cut out a portion of a scanned and enlarged image of the Rastafarian found in *Graduation*, and applied it to the canvas using white paint. I obscured his face as well with paint. For one of the Rastafarian's hands, I applied a scanned, enlarged image of a hand onto the figure, and for the other hand, I drew on it with an oil stick crayon. I also altered the Rastafarian's feet by painting enlarged feet over them. I painted the background with bright, heavy colors. This painting, especially the wine colored background, is heavily influenced by de Kooning's techniques, and is stylistically very similar to my de Kooning series. I consider *Cheese and Crackers* a bridge between my de Kooning paintings and the *Canal Zone Paintings*. This painting is also influenced by Picasso's well-known 347 series of etchings and Cezanne's bathers. I essentially took different elements from art history and attempted to update them, and make them a part of this painting in order to pay homage to these particular artists. In particular, the feet and primitive facemasks are a historical reference to Picasso while the cartoon, lozenge faces reference de Kooning. I titled this painting *Cheese and Crackers* because I envisioned that that this was the name of the band.

39. *Mr. Jones, 2008.* Mr. Jones was influenced by Picasso's famous painting *Demoiselles d'Avignon* now in the Museum of Modern Art in New York, and is very similar to *Cheese and Crackers*. The images of the nude female figures were scanned onto the original canvas. The male figure that appears in the painting was a cut out of a scanned and enlarged image of the Rastafarian in *Graduation* that I affixed to the canvas

using paint. I painted a de Kooning-esque mask over the face of the male figure, and added images of oversized hands, feet, and an arm on the image of the Rastafarian. I added similar oversized hands and feet to the nude females that appear on each side of the male figure. I also added pigment to the lower portion of the male figure that continues downward to the bottom of the canvas. This painting is stylistically similar to *Cheese and Crackers* in that it is heavily influenced by de Kooning's techniques, Picasso's 347 series and Cezanne's bathers. I used these elements from art history, again, to pay homage to these particular artists.

40. *The Other Side of the Island, 2008.* In creating this painting, I scanned images of different female figures onto the canvas and painted yellow lozenge facemasks over their faces. Then I cut out, scanned, and enlarged two images of Rastafarians from *Yes Rasta*, the one from *Graduation* and a different one. In obscuring the images of the Rastafarians in this painting, I painted de Kooning-esque style masks on their faces, covered half their bodies with paint, and painted and drew enlarged hands on them. I made the background of this painting dark with a hint of orange and purple swirls. This painting is stylistically similar to *Cheese and Crackers* in that it is heavily influenced by de Kooning's techniques, Picasso's 347 series and Cezanne's bathers. I used these elements from art history, again, to pay homage to these particular artists.

41. *Naked Confessions, 2008.* In creating this painting, I used images of three female figures, and a male Rastafarian figure from a page torn from *Yes Rasta*. I painted the background with darker shades of black and dark red swirls. I collaged an electric guitar onto the Rastafarian figure and then scanned and enlarged the combined image, and affixed it to the canvas. I then obscured the face of the male figure by painting a mask-

like eyes and lips. I also collaged a guitar on the Rastafarian's hands. I replaced the landscape that appeared in the background of the photograph of the male Rastafarian with a background of white and pink paint. I altered the images of the nude females by adding either lozenge masks or for the figure on the right, a fully drawn de Kooning-like face and enlarged hands and feet. This painting is stylistically similar to *Cheese and Crackers* in that it is heavily influenced by de Kooning's techniques, Picasso's 347 series and Cezanne's bathers. I used these elements from art history, again, to pay homage to these particular artists. I also juxtaposed these historical references with the guitar, which is a contemporary reference.

42. *Specially Round Midnight, 2008.* In creating *Specially Around Midnight*, I painted the background with dark colors before affixing scanned and enlarged cutouts of the images of three nude female figures and the two images of Rastafarians, which also appear in *The Other Side of the Island*. Around the two male figures, I painted haloes of white paint. I collaged an image of a guitar over the hands of one of the male figures. To this same male figure I also added exaggerated painted boots to his feet and painted a white mask on his face. On the other male figure, I drew distorted eyes and a mouth over his face and added black stripes to his sleeve. I also obscured the bottom half of his figure by darkening it. On the female figures, I drew and collaged enlarged feet and drew over their faces to obscure them. I also painted haloes of white paint around two of the female figures. This painting is stylistically similar to *Cheese and Crackers* in that it is heavily influenced by de Kooning's techniques, Picasso's 347 series and Cezanne's bathers. I used these elements from art history, again, to pay homage to these particular artists. The title for this painting refers to Miles Davis who had a song and album entitled

“Round About Midnight.” The man in the painting represents the lead guitarist who is playing that song, and the four others that appear symbolize the other members of the band.

43. *Zippping the System, 2008.* In creating *Zippping the System*, I first primed the canvas and then collaged onto the canvas enlarged and cutout scans of three nude females and the same two male Rastafarian figures that appear in *The Other Side of the Island*. I outlined the collaged images with white, pink and grey paint. I altered each Rasta figure by drawing and painting enlarged hands, facial features, and for one of the figures, a sketch of enlarged feet over the existing image. I obscured the bottom half of one of the male figures by cutting off the image at the bottom and painting over it with black paint. I also drew enlarged feet and hands on the female figures and altered their faces by drawing and collaging different eyes and mouths. The up and down style in this painting is a reference to Barnett Newman’s famous zip paintings (areas of vertical color separated by thin lines).

44. *Color Me Mine, 2008.* In creating *Color Me Mine*, I used four scanned and enlarged cutouts of nude female figures, and a scanned and enlarged partial image of a male Rastafarian figure taken from a page torn from *Yes Rasta*, and collaged them onto a primed canvas. Before affixing the image of the Rastafarian, I collaged together four separate bodies before scanning it into a single image. I added a guitar on the image with the Rastafarian head in furtherance of my music-inspired theme and obscured the face by painting it with white paint and an oil stick. To the female images, I added pink lozenge facemasks and sketched enlarged hands for one of them. I also collaged a pair of feet that appears below one of the female figures. I painted the background of the painting with

purple and white brushstrokes. This painting is heavily influenced by de Kooning's style. The melding of the white and black person together is also a reference to Basquiat.

45. *James Brown Disco Ball, 2008.* To create this painting, I scanned and enlarged cut outs of images of five nude figures and headshots of two male Rastafarian images, taken from pages torn from *Yes Rasta*. I affixed portions of these images to the canvas, and layered the background with strokes of purple, pink and white paint. Almost all the images in this painting have been cut and reassembled onto the canvas. On top of one of the nude figures, I pasted an altered and bleached image of a Rastafarian head and added white lozenge eyes, a cut out of an enlarged foot, and white paint around the top of the head. I placed the other image of the Rastafarian's head on top of another nude figure and added a primitive-looking facemask to his face. I also painted black lozenge facemasks on the faces of the female figures, and collaged onto them different scanned and altered images of hands and feet. The bodies in this picture represent disco balls, while the painting itself is a poetic reference to James Brown whose disco ball I had recently purchased at auction. I used the headshots of the Rastafarian men because they typified another black man, but in this painting, he is in a funk band, as evidenced by the title, which again references my musical theme. However, the only visible trait of the Rastafarian images are their dreadlocks, which I used because they give the illusion of dripping paint, a technique that refers to the Japanese photographer Araki who would put black paint on black and white photographic images.

46. *Inquisition, 2008.* To create this painting, I scanned and enlarged an image of a nude female figure onto which I had drawn a lozenge facemask and then collaged an image of a blue electric guitar and an image of a dog on to this image. I scanned,

enlarged, and cut out portions of images of Rastafarian figures taken from pages torn from *Yes Rasta* and onto which I had drawn primitive and de Kooning style masks and pasted them around her. I affixed these images with white paint, which I applied with a squeegee. Each element in this painting has been collaged, scanned, and then collaged and reworked. I also included an upside-down image as a reference to Georg Baselitz, although it is completely obscured by other images layered on top of it. Again I entitled this painting, *Inquisition*, to draw upon its theme of world domination which related to the post-apocalyptic, island/jungle theme and the message of my pitch.

47. *Uncle Tom, Dick, and Harry, 2008*. In creating this painting, I constructed layers with some of the images being scanned directly onto the canvas and others cutout and affixed directly on top. The four images of Rastafarians taken from pages torn from *Yes Rasta* were scanned with a blue tint, and then I cut out portions and altered the images by adding lozenge facemasks and de Kooning style masks over their faces. I affixed one of the images of male figures upside down. I also added black lozenge faces to the nude female figure. I painted the background white, with strokes of blue, and added an enlarged image of a marijuana cigarette. The upside-down image is a reference to the contemporary artist, Georg Baselitz. The title was influenced by the spies that are in my screenplay.

48. *Canal Zone, 2007*: To create this collage, I created a grid of collaged and obscured portions of images of landscapes and Rastafarians taken from pages torn from *Yes Rasta*. I altered each of the images that appear in this collage by drawing lozenge and primitive facemasks on some of the Rastafarian's faces, and other features with magic marker, crayons, pencil, and white acrylic paint. For others, I obscured their facial

image entirely with paint or other techniques. The images were rearranged in a big grid and thumb tacked to a piece of plywood. *Canal Zone* was exhibited during the first unveiling of the pitch at the Eden Rock Hotel in St. Bart, and was a way of introducing some of the characters, components, and players in the screenplay that I envisioned would be a part of the *Canal Zone* series.

49. *Tales of Brave Ulysses, 2008.* In creating this painting, I layered cutout portions of images of nude female figures and a male Rastafarian onto a canvas. I scanned, enlarged, and applied as collage three of the four Rastafarian figures (the same image as is found in *Graduation*), and varied each of the sizes of the images. I scanned and enlarged the fourth one directly onto the canvas, and also altered its size to be smaller than the other three. To affix the collage elements, I used white paint, which I applied with a squeegee. In fact, on the largest male image, the squeegee marks still appear. On the smallest Rastafarian image, I drew enlarged hands. I also varied the size of the female images. I painted the bodies of the female figures, and added white, lozenge eyes to three of the six female images. I painted the background with a combination of light yellow, orange and red. I named the painting after a song by one of my favorite groups, Cream. The repetitive images seek to capture the rhythm of Cream's song, *Tales of Brave Ulysses*, and are also homage to Warhol and a reference Cezanne's *Bathers*. The figures, which are a band, are jamming, but the male figure does not yet have a guitar because he has not been the lead yet.

50. *Escape Goat, 2008.* I painted the background of this painting a whitish-blue color. I then scanned, enlarged, and collaged onto the canvas five images of a portion of the same Rastafarian figure that appears in the *Graduation* in varying sizes and forms.

On the smallest figure to the far left, I collaged an image of enormous hands on the body and a blue lozenge facemask. To the next figure to the right, I added blue lozenge facemasks and an enlarged painted hands. I sketched over his feet with an abstract drawing. I collaged blue lozenge facemasks and a blue, electric guitar to the central male figure. I created this central figure by first collaging the mask and guitar and then scanning it. I also blackened out and enlarged his feet with paint and oil stick crayon. I created the fourth male figure by affixing collaged sections with white paint and then adding white lozenge eyes and sketching over his hands and feet. The last image is identical to the one with the collaged blue guitar and blue lozenge facemask, but I drew different feet on him. I also affixed cutouts of four nude female figures, and painted different colored lozenge facemasks on them as well. I outlined some of figures using a hint of green and gray paint. This painting references Cezanne's bathers.

51. *On the Beach, 2008*. In creating this painting, I cut out, scanned, and enlarged fragments of images of seven nude female figures and a fragment of an image of the same Rastafarian male that appears in *The Other Side of the Island, Specially Round Midnight, Canal Zone, 2007* and *Zippping the System*. For the background, I scanned and enlarged a landscape image taken from pages in *Yes Rasta*, and affixed the other scanned images on top of it using white paint that I applied with a squeegee, which created a layered effect. On the images, I also drew white and mustard yellow lozenge facemasks. The lozenge faces are a reference to de Kooning, and the title reference Nevel Shutes's novel *On The Beach*. The composition of images comes from multiple sources, such as Richard Kern, German nudist books, and a book called "Paradise." These elements added to my vision of a post-apocalyptic world in my screenplay.

52. *Cookie Crumbles, 2008.* In creating *Cookie Crumbles*, I cut out canvases of scanned and enlarged images of four nude female figures, and one image of a male Rastafarian taken from a page torn from *Yes Rasta*, and then collaged them directly onto another canvas. I affixed the images by first applying black paint with a squeegee and then sticking the images to the black paint. I replicated the image of the male Rastafarian three times in the painting, and juxtaposed these images with images of the nude women. I painted a mask over the male Rastafarian and added enlarged hands and other drawings in oil stick crayon. I also scribbled on the stomach of each of these images and altered the man's seashell pendant into a peace sign. I also added white and black lozenge facemasks to the faces of the female figures, and painted parts of their bodies. I painted the background pastel yellow, with a splash of pink and grey. The images in this painting refer to dance and evoke a kind of musical rhythm. The images of women come from four different books, but I repeated the image of the male Rasta in different scales and tones and with different masks to suggest that they are twin brothers who would also be members of the same group on the Island. The repetition also is a reference to Warhol.

53. *It's All Over, 2008.* To create this painting, I first cut out, scanned, and enlarged portions of images of three nude female figures, and a portion of the male Rastafarian figure that appears in *On the Beach, On the Beach, The Other Side of the Island, Specially Round Midnight, Canal Zone, 2007* and *Zipping the System*. For the background, I used an enlarged image of a landscape from *Yes Rasta*, but then painted over it with white and pink paint obscuring the landscape. I drew black, pink, and white lozenge facemasks on all the images. I affixed the images with black, white, pink, and orange paint. I collaged guitars on two of the four Rastafarian images, which represented

George Harrison's guitars, which refers to the musical theme in my screenplay, and drew enlarged feet on them as well, as a historical art reference to deKooning and Picasso. I drew on the images of the female bodies using drip paint. I also included three of my *Hippie Drawings* in this painting. The repetition of different sized images that appears in this painting is a reference to Warhol. I highlighted the dreadlocks as a painterly form of drips, which also references the Japanese photographer, Araki who would put black paint on black and white photographic images.

54. *Ile de France, 2008.* To create this painting, I affixed directly to an unprimed canvas scanned, enlarged, and cutout portions of images of three nude female figures and a Rastafarian that appears in *Canal Zone, 2007*. To affix the images, I applied paint with a squeegee and then stuck the images on top of the paint. On the female figures I painted black and white lozenge faces, and added strokes of white, black, and grey paint over their bodies. I had portions of the image of the Rastafarian scanned in a bluish tint, and I cropped the lower portion of his body. I attached the cropped Rastafarian figure to the canvas with white, black, and grey paint, which is evident from the layers of paint that appear on the figure. This painting represents another aspect of the screenplay in which the hotel on St. Bart (named Ile de France) has been occupied by a band of people.

55. *Djuana Barnes, Natalie Barney, Renee Vivian and Roman Brooks Take Over the Guanahani, 2008.* For the background of this painting, I used a photograph of a tropical landscape taken from pages torn from *Yes Rasta*, had it scanned, cropped, and enlarged in a pinkish tone. I collaged images of cutouts of portions of four nude female figures onto the canvas using pink and white paint to affix them. I also added pink and white lozenge faces to the female figures. I named this painting after four famous literary

lesbians. This painting portrays the women taking over the Guanahani. This painting represents another element of my screenplay in which early 20th century novelists, poets, and expatriates, who had a lesbian salon in Paris, take over the Guanahani on St. Bart. I also wanted to portray a rock and roll theme on the one hand and also make reference to Cezanne's bathers. The background is a stereotypical, generic tropical jungle, which is the setting for my screenplay.

56. *Mina Loy, Janet Flanner, Radclyffe Hall, Una Towbridge and Oscar Wilde's niece Dolly Wilder, 2008.* In creating this painting, which I named after lesbian writers in reference to the lesbian characters in my screenplay, I had scanned and enlarged cutouts of the images of six nude female figures, the male Rastafarian figure that appears in *Graduation*, and portions of images of landscapes, dreadlock hair and necklaces, which were torn from the pages of *Yes Rasta*. Before affixing the collage of images to the canvas, I cut up and reassembled all of the images such that they differed from their original composition and added white lozenge faces to many of the figures. Once assembled, I had them scanned. I then affixed and layered these scanned images onto the canvas using white paint. I painted the background of the painting with pastel blue paint. I used different scales, masks, and tattoos in this painting to create an all over abstract painting. The women in this painting represent lesbian writers from the 20th century.

57. *Quarry, 2008.* In creating this painting, I had scanned and enlarged images of four nude female figures, and an image of the male Rastafarian figures, necklace and landscape that appear in *Mina Loy, Janet Flanner, Radclyffe Hall, Una Towbridge and Oscar Wilde's niece Dolly Wilder*, and the marijuana cigarette that appears in *Uncle Tom, Dick and Harry*. I cut up the scanned images of the male Rastafarian and landscape and

affixed portions of the, along with cut out images of a marijuana cigarette, hemp leaves and a necklace, on top of the images of the female figures. I added white lozenge facemasks to the images. The tattoo in this painting is a reference to the idea of Polynesia and idea that they are shipwrecked. In creating this painting, I was thinking about Marlan Brando and Clarke Gabel sailing. I was also thinking about Tahiti and the oceanic art. The collage of the male and female figures was a way for me to fuse the two together in a new inventive way. The repetition is a reference to Warhol.

58. Untitled, 2008. In creating this painting, I had scanned and enlarged an image of a nude female, and a landscape and the necklace found on the male Rastafarian in *Quarry*. I had the enlarged image of the landscape scanned onto the canvas, and then I affixed with paint the enlarged chest of the female figure on top of the landscape. I then affixed the cropped image of a Rastafarian's chest wearing a medallion necklace on top of the female figure. This painting depicts a contemporary band. All the *Untitled, 2008* paintings (including those described in paragraphs 57 and 58 below) relate to comparisons between and relationships among the males and females occupying my fictional tropical island.

59. Untitled (Rasta), 2008. To create this painting, I cut out, enlarged and scanned onto a canvas images of two nude female figures, to which I added pink and black lozenge faces, and a collaged the image of the Rastafarian male found in *Graduation* to which I had added a white lozenge mask, guitar and a cut out of hands. I then affixed with paint these sheets of canvas to another unprimed canvas. This painting is a sister painting to my other untitled works, and also depicts a contemporary band.

60. Untitled (Rasta), 2008. I used similar techniques to create this painting as I used to create the other *Untitled (Rasta)*. To create this painting, I cut out, enlarged and scanned onto a canvas images of three nude female figures, to which I added white lozenge face. I also collaged a cut out the image of the Rastafarian found in *Graduation* to which I had added a white lozenge mask, guitar and a cut out of hands. I then affixed with paint these sheets of canvas to another unprimed canvas. This painting also depicts a contemporary band, with the Rastafarian representing the lead male in the band.

61. Ding Dong the Witch is Dead, 2008. In this painting I have used a number of raw materials and other elements using many of the same techniques as those found in the rest of the *Canal Zone* series. None of the images found in *Yes Rasta* appear in this work. There is, however, an image I took from a book about Bob Marley to further my artistic concept of post-apocalyptic bands, and my message of equality between the sexes.

Other Matters Related to the Canal Zone Series

62. I did the paintings in the *Canal Zone* relatively quickly both because I often do paintings in a day or less (something which many other artists such as Picasso are also known for) and because I had been working for quite some time on the de Kooning series and felt that I need a break and so I began to prepare these paintings in the summer of 2008 with the idea of using them for a show in the fall of 2008 in lieu of another show that had been planned.

63. The images in the *Yes Rasta* book, in which I had been drawing figures and ideas for some time, fit into my ongoing vision composed of an homage to Cezanne, de Kooning, Warhol, Picasso and others, as well as the screenplay pitch I prepared and my

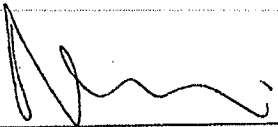
desire to combine these elements with strong references to music and the people who play music in a tropical setting similar to Panama where I was born. As I said before, in my use of any images whether photographic or otherwise, I do this to use an ingredient in a work and to transform the work into something to which I have made a contribution and which I believe contributes to the dialogue among artists through their work while providing an interesting new experience for people to see the work and may be interested in purchasing it.

64. It is true that I have made several million dollars from the sale of the *Canal Zone* paintings. However, the sales of the *Canal Zone* paintings are not at any higher level for similar-sized paintings that I have done in other series and indeed, have sold for less based on such comparisons. I believe that the value contained in the paintings is that which I brought to it by my contribution as an artist as well as the obvious benefit to my name and place in contemporary art as an enticement to collectors to purchase my paintings. In creating these paintings, I changed the use of the images in Mr. Cariou's book of documentary photographs into part of a fictional environment which related to my screenplay pitch, and my desire to do a series of paintings in a tropical setting with an emphasis on musical groups, while still making strong art historical references. Whether a particular viewer likes my work or not, I believe that, when compared to Mr. Cariou's

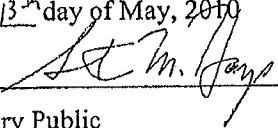
photographs, it is evident that what I have done is a highly individualistic, proprietary and, I believe, transformative use of images, techniques and a variety of other sources to create works which are unique, creative and utilize a visual vocabulary that is uniquely mine.

65. The catalog for the show contained an essay by James Frey, an American author. It is common to have essays contained in art show catalogs, sometimes by the scholars but often by the writers or others whose essays are included in order to add an extra element to the catalog. I asked Mr. Frey initially to do this for me and he did it as a favor. When I received the actual essay, I was not pleased by it, because although some elements of my pitch were referred to in the essay, I felt that he had done an entirely different work and that ultimately the themes contained in his essay had nothing to do with my paintings. However, since he had done the essay for me as a favor, and since I felt that the paintings stood on their own in any event, I agreed to the essay being included.

66. I do see my work as continuing within prior artistic traditions of offering homages to prior artists, utilizing a variety of images and media in new and different ways and bringing my own artistic concepts, message and fantasies to visual expression as part of an ongoing dialogue of art.


RICHARD PRINCE

Subscribed and sworn to before me
this 13th day of May, 2010


Notary Public

STEVEN M. HAYES
Notary Public, State of New York
No. 4888660
Qualified in Nassau County 2013
Commission Expires Oct. 31, 19__