

11-1197-CV

United States Court of Appeals *for the* Second Circuit

PATRICK CARIOU,

Plaintiff-Appellee,

– v. –

RICHARD PRINCE,

Defendant-Appellant,

GAGOSIAN GALLERY, INC., LAWRENCE GAGOSIAN,

Defendants-Appellants.

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

JOINT APPENDIX Volume 4 of 9 (Pages A-842 to A-1130)

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TABLE OF CONTENTS

	Page
Docket Entries.....	A-1
Amended Complaint, dated January 14, 2009	A-16
Answer to Amended Complaint of Defendant Richard Prince, dated March 3, 2009	A-32
Answer to Amended Complaint of Defendants Gagosian Gallery, Inc. and Lawrence Gagosian, dated March 3, 2009	A-41
Plaintiff’s Initial Disclosure, dated April 30, 2009	A-53
Scheduling Order, dated June 19, 2009	A-58
Memo Endorsed Letter, dated January 27, 2010	A-60
Order of the Honorable Deborah A. Batts, dated March 19, 2010.....	A-61
Memo Endorsed Letter, dated April 21, 2010.....	A-62
Memo Endorsed Letter, dated May 3, 2010	A-63
Notice of Motion by Plaintiff for Summary Judgment, dated May 14, 2010.....	A-64
Plaintiff’s Statement Pursuant to Local Rule 56.1, dated May 14, 2010	A-66
Declaration of Daniel J. Brooks, for Plaintiff, in Support of Motion for Summary Judgment, dated May 7, 2010	A-75
Exhibit A to Brooks Declaration - Amended Complaint, dated January 14, 2009 (Reproduced herein at pp. A-16-A-31)	

	Page
Exhibit B to Brooks Declaration - Answer to Amended Complaint of Defendant Richard Prince, dated March 3, 2009 (Reproduced herein at pp. A-32-A-40)	
Exhibit C to Brooks Declaration - Answer to Amended Complaint of Defendants Gagosian Gallery, Inc. and Lawrence Gagosian, dated March 3, 2009 (Reproduced herein at pp. A-41-A-52)	
Exhibit D to Brooks Declaration - Excerpts from Deposition Transcript of Patrick Cariou, dated January 12, 2010	A-84
Exhibit E to Brooks Declaration - Excerpts from Videotaped Deposition Transcript of Richard Prince, dated October 6, 2009.....	A-117
Exhibit F to Brooks Declaration - Excerpts from Videotaped Deposition Transcript of Lawrence Gagosian, dated October 8, 2009.....	A-167
Exhibit G to Brooks Declaration - Excerpts from Deposition Transcript of Gagosian Gallery, Inc. by Louise Neri, dated December 17, 2009	A-185
Exhibit H to Brooks Declaration - Excerpts from Deposition Transcript of Gagosian Gallery, Inc. by Alison McDonald, dated December 17, 2009	A-189
Exhibit I to Brooks Declaration - Excerpts from Deposition Transcript of John Olson, dated November 16, 2009	A-198

	Page
Exhibit J to Brooks Declaration - Excerpts from Deposition Transcript of Christiane Celle, dated January 26, 2009	A-203
Exhibit K to Brooks Declaration - Certificate of Copyright Registration for Book entitled <i>Yes Rasta</i>	A-227
Exhibit L to Brooks Declaration - Cover of <i>Yes Rasta</i>	A-229
Exhibit L-1 to Brooks Declaration - Cover of <i>Yes Rasta</i>	A-230
Exhibit L-2 to Brooks Declaration - Colophon Page of <i>Yes Rasta</i>	A-231
Exhibit M to Brooks Declaration - Cover of the Catalogue published by Gagosian Gallery	A-232
Exhibit M-1 to Brooks Declaration - Front, Back and Spine of the <i>Canal Zone</i> Catalogue	A-233
Exhibit M-2 to Brooks Declaration - Title Page of the <i>Canal Zone</i> Catalogue	A-236
Exhibit M-3 to Brooks Declaration - List of Works depicted in the <i>Canal Zone</i> Catalogue	A-237
Exhibit M-4 to Brooks Declaration - Colophon Page of <i>Canal Zone</i> Catalogue	A-240
Exhibit N to Brooks Declaration - 22 Paintings depicted in the <i>Canal Zone</i> Catalogue	A-241

	Page
Exhibit O to Brooks Declaration - Seven additional Prince Paintings depicted in <i>Canal Zone</i> Catalogue	A-263
Exhibit P to Brooks Declaration - Stipulation between Plaintiff and Gagosian Defendants, dated January 26, 2010	A-270
Exhibit Q to Brooks Declaration - Pages from Prince’s Website, including Comments entitled “Practicing Without A License”	A-279
Exhibit R to Brooks Declaration - Interview of Prince in <i>Artforum</i> , March 2003	A-281
Exhibit S to Brooks Declaration - June 3, 2008 E-mail	A-284
Exhibit T to Brooks Declaration - Interview of Prince in <i>Interview Magazine</i>	A-285
Exhibit U to Brooks Declaration - Comparison Document	A-298
Exhibit V to Brooks Declaration - Prince Painting entitled “ <i>Canal Zone 2007</i> ”	A-325
Exhibit V-1 to Brooks Declaration - <i>Canal Zone 2007</i>	A-326
Exhibit W to Brooks Declaration - <i>The Art Newspaper</i>	A-327
Exhibit X to Brooks Declaration - Exhibit 32 to Prince Deposition.....	A-329
Exhibit Y to Brooks Declaration - Printout from Gagosian Gallery Website.....	A-331

	Page
Exhibit Z to Brooks Declaration - Inserts to <i>Canal Zone</i> Catalogue.....	A-349
Exhibit AA to Brooks Declaration - Blown-up Details from Prince Paintings	A-352
Exhibit BB to Brooks Declaration - Landscape	A-354
Exhibit CC to Brooks Declaration - Photographs	A-355
Exhibit DD to Brooks Declaration - “Pitch” from Movie written by Prince.....	A-357
Exhibit EE to Brooks Declaration - E-mail from Louise Neri to Betsy Biscone, dated October 7, 2008	A-359
Exhibit FF to Brooks Declaration - Printout from Gagosian Gallery Website.....	A-361
Exhibit GG to Brooks Declaration - Newspaper Advertisements	A-364
Exhibit HH to Brooks Declaration - E-mails from Alison McDonald to Darlina Goldak, dated October 2, 2008	A-369
Exhibit II to Brooks Declaration - E-mail from Darlina Goldak to Nicole Heck, dated September 25, 2008.....	A-370
Exhibit JJ to Brooks Declaration - Announcement Card	A-371
Exhibit KK to Brooks Declaration - E-mails from Andie Trainer to Jessica Arisohn, dated December 5, 2008	A-373

	Page
Exhibit LL to Brooks Declaration - Invitation to opening Dinner for the <i>Canal Zone</i> Exhibition	A-377
Exhibit MM to Brooks Declaration - E-mails from Tom Duncan to Anita Foden, dated September 6, 2008	A-378
Exhibit NN to Brooks Declaration - E-mails from Karen Ho to Vanessa Riding and Rysia Murphy, dated October 28, 2008	A-380
Exhibit OO to Brooks Declaration - E-mail from Meredith Dunn to Sam Orlofsky and Others at the Gagosian Gallery, dated October 23, 2008	A-386
Exhibit PP to Brooks Declaration - E-mail from Vanessa Riding to Barbara Wilhelm Dwek, dated October 23, 2008	A-387
Exhibit QQ to Brooks Declaration - Invitation List	A-388
Exhibit RR to Brooks Declaration - Cariou's Cease and Desist Letter, dated December 11, 2008	A-395
Exhibit SS to Brooks Declaration - E-mails from Patrick Cariou to Christiane Celle, dated August 28, 2008, with Certified Translation	A-397
Declaration of Eric Doeringer, for Plaintiff, in Support of Motion for Summary Judgment, dated May 6, 2010	A-400
Exhibit A to Doeringer Declaration - Letter from Peter J. Toren to Eric Doeringer, dated November 10, 2005	A-403

	Page
Exhibit B to Doeringer Declaration - Letter from Eric Doeringer to Peter J. Toren, undated.....	A-405
Exhibit C to Doeringer Declaration - Letter from Peter J. Toren to Eric Doeringer, dated November 28, 2005	A-406
Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment, dated May 14, 2010	A-408
Notice of Motion by Defendants for Summary Judgment, dated May 14, 2010.....	A-438
Affidavit of Hollis Gonerka Bart, for Defendants Gagosian Gallery, Inc. and Lawrence Gagosian, in Support of Motion for Summary Judgment, sworn to May 14, 2010	A-440
Exhibit A to Bart Affidavit - The Tate Collection’s Glossary defining the Term Appropriation Art.....	A-446
Exhibit B to Bart Affidavit - The Tate Collection’s Glossary defining the Term Collage	A-447
Exhibit C to Bart Affidavit - The Tate Collection’s Glossary Information on Marcel Duchamp’s <i>Fountain</i>	A-448
Exhibit D to Bart Affidavit - MOMA, Collection’s Information on Andy Warhol’s <i>Gold Marilyn Monroe</i>	A-449
Exhibit E to Bart Affidavit - Amended Complaint, dated January 14, 2009 (Reproduced herein at pp. A-16-A31)	

	Page
Exhibit F to Bart Affidavit - Guggenheim Press Release entitled “Richard Prince: Spiritual America Opens at the Guggenheim Museum September 28”	A-453
Exhibit G to Bart Affidavit - Excerpts from Deposition Transcript of Richard Prince, dated October 6, 2009.....	A-460
Exhibit H to Bart Affidavit - Artnet’s listing for Richard Prince Work available for sale	A-502
Exhibit I to Bart Affidavit - Article from artcritical.com entitled “Eighteen Experts Talk with Brian Appel on the \$1,248,000 Richard Prince Photograph that Has Set a New World Auction Record for Photography”	A-507
Exhibit J to Bart Affidavit - Article from ArtDaily entitled “Sotheby’s July 2008 Contemporary Art Evening Sale Triumphs”.	A-514
Exhibit K to Bart Affidavit - Excerpt from Trust & Estates, August 2008 Table of Contents.....	A-519
Exhibit L to Bart Affidavit - Excerpts from Deposition Transcript of Lawrence Gagosian, dated October 8, 2009.....	A-520
Exhibit M to Bart Affidavit - Richard Prince Book <i>Canal Zone</i> also referred to as “The Catalogue” [See Exhibit 1 to the Joint Appendix – Hard Copy of <i>Canal Zone</i> Book].....	A-528

	Page
Exhibit N to Bart Affidavit - Stipulation between Plaintiff and Gagosian Defendants, dated January 26, 2010 (Reproduced herein at pp. A-270-A-278)	
Exhibit O to Bart Affidavit - The Gagosian Gallery General Ledger for the Period from October 1, 2008 to June 30, 2009	A-529
Exhibit P to Bart Affidavit - Advertisements for the <i>Canal Zone</i> Exhibition	A-530
Exhibit Q to Bart Affidavit - Guest List for the November 8, 2008 Dinner held at the Gramercy Park Hotel for Richard Prince	A-539
Exhibit R to Bart Affidavit - Excerpts from Deposition Transcript of Anthony Petrillose, dated October 23, 2009	A-547
Exhibit S to Bart Affidavit - Stipulation and Order of Dismissal between Plaintiff and Rizzoli International Publications, Inc., entered February 5, 2010	A-549
Exhibit T to Bart Affidavit - Stipulation between Gagosian and powerHouse Cultural Entertainment, Inc., dated February 1, 2010	A-551
Exhibit U to Bart Affidavit - Excerpts from Deposition Transcript of Patrick Cariou, dated January 12, 2010	A-555
Exhibit V to Bart Affidavit - Plaintiff's Answers and Objections to Defendants Gagosian Gallery, Inc. and Lawrence Gagosian's Interrogatories, dated October 5, 2009	A-606

	Page
Exhibit W to Bart Affidavit - powerHouse’s Press Release announcing the publication <i>Yes Rasta</i> , and categorizing the Book as “ <i>Photography/Reggae Culture</i> ”	A-621
Exhibit X to Bart Affidavit - Printout of Plaintiff’s Website	A-622
Exhibit Y to Bart Affidavit - Excerpts from Deposition Transcript of Christiane Celle, dated January 26, 2010	A-715
Exhibit Z to Bart Affidavit - Letter from Daniel Brooks to the Honorable Deborah A. Batts, dated February 8, 2010.....	A-735
Exhibit AA to Bart Affidavit - Inside Jacket Cover of <i>Yes Rasta</i>	A-738
Exhibit BB to Bart Affidavit - Definition of Appropriation Art from ArtLex	A-740
Exhibit CC to Bart Affidavit - Composite Exhibit containing Copies of Images of Rastafarians	A-742
Exhibit DD to Bart Affidavit - Certificate of Copyright Registration for Book entitled <i>Yes Rasta</i> (Reproduced herein at pp. A-227-A-228)	
Exhibit EE to Bart Affidavit - Photocopy of Patrick Carious’ Book entitled <i>Yes Rasta</i> [See Exhibit 2 to the Joint Appendix – Hard Copy of <i>Yes Rasta</i> Book]	A-743
Affidavit of Richard Prince, Defendant, in Support of Motion for Summary Judgment, sworn to May 13, 2010	A-744

	Page
Exhibit A to Prince Affidavit - Composite Exhibit	A-772
Memorandum of Law in Support of Defendants’ Joint Motion for Summary Judgment, dated May 14, 2010	A-812
Rule 56.1 Statement of Uncontested Material Facts in Support of Defendants’ Joint Motion for Summary Judgment, dated May 14, 2010	A-842
Declaration of Daniel J. Brooks, for Plaintiff, in Opposition to Defendants’ Motion for Summary Judgment, dated June 11, 2010	A-886
Exhibit A to Brooks Declaration - Excerpts from Deposition Transcript of Richard Prince, dated October 6, 2009.....	A-888
Exhibit B to Brooks Declaration - Excerpts from Deposition Transcript of Lawrence Gagosian, dated October 8, 2009.....	A-893
Exhibit C to Brooks Declaration - Excerpts from Deposition Transcript of Christiane Celle, dated January 26, 2010	A-896
Exhibit D to Brooks Declaration - Photograph entitled <i>V-J Day in Time Square</i>	A-901
Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment, dated June 14, 2010	A-902
Supplemental Affidavit of Richard Prince, Defendant, in Further Support of Defendants’ Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment, sworn to June 11, 2010.....	A-933

	Page
Exhibit A to Prince Supplemental Affidavit - Composite Exhibit	A-936
Counter-Statement Pursuant to Local Civil Rule 56.1 of Undisputed Material Facts in Opposition to Defendants’ Motion for Summary Judgment, dated June 14, 2010	A-937
Defendants Rule 56.1 State of Uncontested Material Fact in Response to Plaintiff’s Statement Pursuant to Local Rule 56.1, filed June 14, 2010..	A-970
Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment, dated June 14, 2010	A-984
Affidavit of Hollis Gonerka Bart, for Defendants Gagosian Gallery, Inc. and Lawrence Gagosian, in Opposition to Plaintiff’s Motion for Summary Judgment, sworn to June 14, 2010.....	A-1014
Exhibit A to Bart Affidavit - Pages from Website of “Ganja Fields and Marijuana Tours” and “Negril Ganja Tour”	A-1017
Exhibit B to Bart Affidavit - Web Pages detailing the Amount of Time Cy Twombly and Pablo Picasso dedicated to various Works of Art.....	A-1030
Exhibit C to Bart Affidavit - Complaint, dated December 30, 2008	A-1034
Exhibit D to Bart Affidavit - Excerpts from Deposition Transcript of Richard Prince, dated October 6, 2010.....	A-1049

	Page
Exhibit E to Bart Affidavit - Excerpts from Deposition Transcript of Lawrence Gagosian	A-1059
Exhibit F to Bart Affidavit - Excerpts from Deposition Transcript of Christiane Celle, dated January 26, 2010	A-1075
Exhibit G to Bart Affidavit - Excerpts from Deposition Transcript of Patrick Cariou, dated January 12, 2010	A-1082
Exhibit H to Bart Affidavit - Excerpts from Deposition Transcript of Louise Neri, dated December 17, 2009	A-1085
Exhibit I to Bart Affidavit - Excerpts from Deposition Transcript of Allison McDonald, dated December 17, 2009	A-1091
Response to Defendants' Counter-Statement of Uncontested Material Facts Pursuant to Local Rule 56.1, dated June 24, 2010.....	A-1102
Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, dated June 24, 2010	A-1107
Reply Declaration of Daniel J. Brooks, for Plaintiff, in Further Support of Motion for Summary Judgment, dated June 24, 2010.....	A-1121
Exhibit A to Brooks Reply Declaration - Excerpts from Deposition Transcript of Richard Prince, dated October 6, 2009.....	A-1123
Exhibit B to Brooks Reply Declaration - Excerpts from Deposition Transcript of Lawrence Gagosian, dated October 8, 2009.....	A-1129

	Page
Exhibit C to Brooks Reply Declaration - <i>New York Times</i> Article entitled “If the Copy Is an ArtWork, Then What’s the Original?”	A-1131
Exhibit D to Brooks Reply Declaration - Interview of Richard Prince by Brian Appel	A-1133
Defendants’ Joint Memorandum of Law in Reply to Plaintiff’s Opposition to Defendants’ Joint Motion for Summary Judgment, dated June 24, 2010	A-1139
Reply Affidavit of Hollis Gonerka Bart, for Defendants Gagosian Gallery, Inc. and Lawrence Gagosian, in Further Support of Defendants’ Motion for Summary Judgment, sworn to June 24, 2010	A-1154
Exhibit A to Bart Reply Affidavit - Excerpts from Deposition Transcript of John Olson, dated November 16, 2009	A-1156
Exhibit B to Bart Reply Affidavit - Chart	A-1171
Exhibit C to Bart Reply Affidavit - Deposition Transcript of Richard Prince, dated October 6, 2009	A-1173
Letter from Steven M. Hayes to the Honorable Deborah A. Batts, dated June 24, 2010 with Amendment to Defendants’ Rule 56.1 Statement of Uncontested Material Facts in Response to Plaintiff’s Statement Pursuant to Local Rule 56.1.	A-1271
Memo Endorsed Letter, dated July 1, 2010	A-1273
Deposition Transcript of Lawrence Gagosian, dated October 8, 2009	A-1274

	Page
Deposition Transcript of Anthony Petrillose, dated October 23, 2009	A-1319
Deposition Transcript of Nancyscans Corp. by John Olson, dated November 16, 2009	A-1350
Deposition Transcript of Alison McDonald, dated December 17, 2009	A-1461
Deposition Transcript of Louise Neri, dated December 17, 2009	A-1486
Deposition Transcript of Patrick Cariou, dated January 12, 2010	A-1503
Deposition Transcript of Christiane Celle, dated January 26, 2010	A-1578
Prince Deposition Exhibits 1-43	A-1620
Cariou Deposition Exhibits 1-18	A-1842
Neri Deposition Exhibits 106-109	A-1988
Gagosian Deposition Exhibits 44-62	A-1995
Olson Deposition Exhibits 92-102	A-2067
Celle Deposition Exhibits 1-3	A-2136
Petrillose Deposition Exhibits 63-91	A-2145
McDonald Deposition Exhibits 103-105	A-2235
Notice of Joint Appeal, dated March 25, 2011	A-2260
Stipulation of Counsel, dated April 11, 2011	A-2262

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PATRICK CARJOU,

Plaintiff,

-against-

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

Defendants.

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08 CIV 11327 (DAB)

**RULE 56.1 STATEMENT OF
UNCONTESTED MATERIAL
FACTS IN SUPPORT OF
DEFENDANTS' JOINT
MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1, defendants Richard Prince, Gagolian Gallery, Inc., and Lawrence Gagolian submit the following Statement of Material Facts as to which defendants contend there are no issues to be tried.

1. Defendant Richard Prince ("Prince") is a renowned appropriation artist, whose works are considered highly innovative and have been exhibited in major museums around the world, including at 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 für Gegenwartskunst, Basel; Kunstmuseum Wolfsburg and Sepertine Gallery. Ex E ¶ 18; Ex ¶ F; RP Aff. ¶ 3.¹

2. Defendant Gagosian Gallery, Inc. is a corporation organized and existing under the laws of the State of New York, with a principal place of business in the City and County of New York, that owns and operates a number of art galleries in New York City. Ex E ¶ 5.

3. Defendant Gagosian Gallery is Richard Prince's primary representative and agent. RP Tr. 90; *see also* Ex E ¶ 5. Gagosian Gallery, Inc. has represented Prince in the selling and exhibition of his artwork since approximately 2005. LG Tr. 16, 18-19.

4. Defendant Lawrence Gagosian is the President of Gagosian Gallery, Inc. LG Tr. ¶ 16. He is the founder and owner of the Gagosian Gallery, Inc., a leading contemporary art gallery with eight locations worldwide. LG Tr. 16, 18-19.

5. Plaintiff Patrick Cariou ("Cariou") is a Paris-based portrait photographer who has published a number of photography books, including a book of photographs entitled *Yes Rasta*, published in 2000 by powerHouse Books, Inc. ("powerHouse"). Ex E ¶ 3.

6. 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").

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.

7. By the 20th century, incorporation of elements of popular culture and of existing works had become commonplace. *See Ex A* (Tate Collection Glossary definition of Appropriation Art).

8. 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.

9. 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).

10. 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.

11. 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 Collection description of Marcel Duchamp).

12. 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.*; *Ex D* (MOMA description of Warhol’s *Marilyn Monroe* 1962).

13. Other well-known appropriation artists include Pablo Picasso, Georges Braque, Jasper Johns, Robert Rauschenberg, Sherrie Levine, Salvador Dali, Jeff Koons and Richard Prince. *See Ex A* (Tate Collection Glossary definition of Appropriation Art); *see also*, *Ex F* (Guggenheim Release on Prince).

14. Prince lives in New York City and Rensselaerville, New York, while maintaining his principal studio in Rensselaerville. RP Aff. ¶ 1.

15. Prince has been an appropriation artist for nearly 40 years, and aspires to create beautiful pieces of art to convey a distinct message or creative concept. RP Aff. ¶ 3.

16. Prince's works are considered among the most innovative art produced in the past 30 years. Ex F (Guggenheim Release on Prince); *see also* Ex E ¶ 28.

17. Prince often adopts a unique persona to go along with his works of art often portraying himself as a rebel, an outsider, or an outlaw, which allows him to discover and create new things. RP Aff. ¶ 13; RP 50-52; 71.

18. Prince's career as an appropriation artist began in 1977, while he was employed in the tear-sheet department of Time Life, where he re-photographed discarded advertising images he salvaged. RP Aff. ¶ 5; RP Tr. 12-13, 48-49; *see also* PR Tr. 46.

19. Initially, Prince made collages with the clippings of the discarded advertising images, combining them as if they were freeze frames from the same movie. RP Aff. ¶ 5.

20. Over time, Prince began working with other artists' photographic images by re-photographing them in a wholly different context. RP Aff. ¶ 6; *see also* RP Tr. 13-16.

21. In 1984, Prince began a new body of works, creating exact re-drawings of cartoons with the goal to elicit a mix of cultural preferences, human desires and biases. RP Aff. ¶ 7.

22. The cartoon re-drawings inspired Prince to paint, so he began to add painterly elements to his works and to evoke the styles of Robert Rauschenberg and other well-known appropriation artists. RP Aff. ¶ 7.

23. Prince's appropriative style expanded overtime 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, which are known as "lozenge" faces. RP Aff. ¶ 8.

24. Prince's "Hippy Drawings" were followed by a sequential series of paintings 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.

25. With each successive series, Prince broadened his style using bright colors, dripping paint, bold brush strokes and other painterly elements to create a layered effect in his paintings. RP Aff. ¶ 9.

26. Prince tends to create artwork by employing groupings, repetition, and categories because he believes things are best understood in relation to other objects. Examples of such sequential series by Prince 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). RP Aff. ¶ 11.

27. Prince's *Canal Zone* paintings ("Paintings") were done as a group or series. RP Aff. ¶ 11.

28. Prince's appropriative style is informed by popular culture. RP Aff. ¶ 12.

29. In the work he has done as an appropriation artist, including the *Canal Zone* series, Prince looks at pre-existing image of all types to see what he can contribute to make something new, distinctive, and beautiful with one or more messages to be found in the work by the viewer. RP Aff. ¶ 13.

30. Prince's works often feature guitars as a repetitive element, representing his love for music, which began in 1973 when he moved to New York and immersed himself in the downtown music and art scenes. RP Aff. ¶ 12.

31. Prince tries to connect his art with music. Ex G at PP Tr. 125-26.

32. In the 1970s, Prince was enamored with Andy Warhol, and especially interested in the punk rock movement and hip-hop music. RP Aff. ¶ 12; RP Tr. 43, 125-26.

33. Prince believes in “playing the camera,” and compares his constant desire to “discover something new” to a novice guitarist who is only learning to play days before his performance. RP Tr. 51-52.

34. According to Prince, “[i]t’s [the guitarist’s] inability [that] shines through, which is really exciting. And the fact that he’s not a virtuoso-- it’s the very limitations I think that make – can actually make art great.” *Id.*

35. Prince 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 Aff. ¶ 14; RP Tr. 167.

36. Through his work, Prince frequently pays homage to master painters, whose work he respects. RP Aff. ¶ 25; RP Tr. 165-67; Ex F (Guggenheim Release on Prince).

37. Prince believes that “artists . . . should be as free as possible . . . in their studios.” RP Aff. ¶ 14; RP Tr. 123.

38. To Prince, “art is about freedom. It’s not about being restricted. If I was restricted, then I couldn’t transform these images.” RP Aff. ¶ 14; RP Tr. 120-21.

39. Prince believes in artistic freedom, and would not object to his own images being copied and sold for a profit, so long as the user copying the images makes “a contribution” to them. RP Tr. 88; 123.

40. Prince’s works are sought after by significant collectors and galleries of contemporary art worldwide, and are regularly offered at auction. RP Aff. ¶ 4.

41. Prince has an active and strong primary gallery market, with a strong secondary market at auctions and in private sales. Ex ¶ H.

42. In late 2007, the Solomon R. Guggenheim Museum in New York presented a major retrospective of Prince's work that filled the entire rotunda and two tower galleries. RP Aff. ¶ 3; *see also* Ex F.

43. In 2008, *Overseas Nurse*, a work from the *Nurses* series sold at auction in London for approximately \$8.4 million, the highest price for a work by Prince to date. Ex ¶ J; Ex K.

44. Although Prince's primary artistic practice has been as a painter, sculpture and re-photographer, he has long had an interest in writing, and has collected first editions and other literary works for many years, and has also authored a number of works both real and fictitious. RP Aff. ¶ 15.

45. Prince's creation of the *Canal Zone* series evolved from the storyline of a cinematic "pitch" he was writing in 2007 entitled, *Eden Rock*. RP Aff. ¶ 16; *see also* RP Tr. 218, 232.

46. *Eden Rock* is Prince's fantastical account of survivors of a worldwide nuclear attack whose cruise ships end up in St. Bart's. *Id.*; PR Tr. 30, 192, 207-208. Prince's creative concept was that these survivors would form separate "tribes" or "gangs" and take over the resort hotels on the island to create their own post-apocalyptic society. RP Aff. ¶ 15; *see also* RP Tr. 207-08; 214-18.

47. Prince's concept for the tribes and gangs in *Eden Rock* consists of the Charlie Company, the family unit; the "Backpackers," portrayed as college students on spring break; the "Rastas" who played in the cruise ship band; lesbian "Amazons" who escaped from a cruise ship; and a group of affluent individuals dubbed, the "Ultimate Ones." *Id.*; *see also* RP Tr. 207-08, 214-18.

48. Prince's creation of the *Canal Zone* series was a combination of events that came together when Prince heard the music of the Easy Star All-Stars band in the album *Radiodread*, an album that sampled and replicated Radiohead in a reggae manner, which Prince played in his studio while working on the *Canal Zone* series. RP Aff. ¶ 17; RP Tr. 263-64, 266.

49. Prince was also affected by a trip he had made to Panama and wanted to do a painting series set in a tropical location, as in the pitch described above. RP Aff. ¶ 16.

50. Around the time Prince wrote *Eden Rock*, and while on vacation in St. Barts, Prince found a copy of *Yes Rasta* in a bookstore on the island, and immediately made a connection between the images in the book and the jungles he had seen on a recent visit to Panama. RP Aff. ¶ 16; RP Tr. 158, 161; 266.

51. Prince had never seen the book in any other bookstore and assumed it was an out of print book. RP Aff. ¶ 17.

52. The day before, Prince had seen cruise ships in the harbor of St. Barts and thought that they should be in his screenplay. RP Aff. ¶ 17; RP Tr. 266.

53. Upon finding *Yes Rasta*, Prince was intrigued by the images in the book, given his inclusion of a reggae band that was on the cruise ship as the Rastafarian "tribe" in his screenplay. *Id.*; RP Tr. 150-51, 153-58, 158, 266.

54. At the time, Prince had also been listening to *Radiodread*, and was very much into that album. RP Aff. ¶ 17.

55. When Prince walked into the bookstore and saw the book with Rastas, he thought something was in the air. RP Aff. ¶ 17; RP Tr. 264.

56. Prince had also been looking for black and white images of figures so that he could put them next to his de Kooning women. RP Aff. ¶ 17; *id.* at 246.

57. Over the next couple of years, while on vacation on St. Barts, Prince made notations and sketches *Yes Rasta*, like he had done in a book of de Kooning's works, which he incorporated in his Paintings in the *Canal Zone* series. RP Aff. ¶ 16; RP Tr. 150-51, 154-56, 180.

58. When Prince began to do this, he was simply making random drawings, as he tended to do wherever he was, at home or on vacation, as part of the creative process. RP Aff. ¶ 18.

59. Prince continued to draw on the faces in *Yes Rasta* for two or three years. RP Aff. ¶ 18.

60. Prince was inspired by the images in *Yes Rasta* because it was a subject matter that he knew nothing about, and Prince likes to put himself in a position to discover new things. *Id.*

61. Drawing inspiration from his birthplace, the Panama Canal Zone, where he had visited in 2005 and the storyline of his *Eden Rock* screenplay, Prince imagined a make-believe, post-apocalyptic enclave set in a tropical location, 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.

62. The Paintings are in part inspired by Prince's trip to the former Canal Zone, and depict portions of his storyline from the *Eden Rock* screenplay. RP Aff. ¶¶ 16, 19.

63. The screenplay was the starting point for the *Canal Zone* series, and therefore, while the plot and characters in the screenplay were in Prince's head when he created the Paintings, the Paintings do not depict every aspect of the storyline. RP Aff. ¶ 19.

64. Portions of the screenplay are, however, one of the ingredients that go into the creation of the Paintings. RP Aff. ¶ 19.

65. Prince named the series the *Canal Zone* because he was very intrigued by the fact that the name of the place he was born in, Canal Zone, had disappeared, and was renamed Panama. RP Aff. ¶ 20.

66. Prince used images of Rastafarians from *Yes Rasta* because they looked primitive, and like the type of man that appeared in his post-apocalyptic screenplay. RP Aff. ¶ 23.

67. The landscapes in the *Canal Zone* series served as a background for his creative expression. RP Aff. ¶ 23.

68. All of Prince's *Canal Zone* Paintings represent musical bands, and one of the creative messages 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 he imagined in his screenplay. RP Aff. ¶ 22; PR Tr. 7, 195, 251-52.

69. According to Prince, "the redemptive value of music is one of the important concepts of this series. RP Aff. ¶ 23; *see also* PR Tr. 251-52.

70. To convey his message, Prince, in the tradition of Duchamp, used appropriated imagery, which included 41 images torn from the pages of *Yes Rasta*, images from two adult books from an art publishing company called Taschen, images of rock guitars and musicians' hands from contemporary music magazines, images from anatomy books, and an image from a book or magazine on Bob Marley, which were all "ingredients" in his series. RP Aff. ¶¶ 23-24; PR Tr. 30; *see also* RP Tr. 170-71, 277-80. RP Tr. 162, 263; Ex M at p. 13-14.

71. When creating the Paintings, Prince had at least 25 or more books and magazines in front of him and randomly took images that fit into his artistic vision and message for each work. RP Aff. ¶ 25.

72. *Yes Rasta* images were only one aspect of Prince's *Canal Zone* series. RP Aff. ¶ 21; Prince Tr. 30.

73. Guitars, naked women and Rastas were all ingredients in the *Canal Zone* Paintings, but the guitar is the primary subject. Prince Tr. 170-71; 277-80.

74. Prince added images of guitars to his 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. RP Aff. ¶ 24; Prince Tr. 166-68; 279.

75. In some of the Paintings, Prince digitally scanned and enlarged the images, and either scanned them directly onto the canvas or fixed them directly onto the canvas with glue, scotch tape or paint, and used them as background for collaging, and others as cut-out collage elements. RP Aff. ¶ 24 and RP Aff. at Ex. A; RP Tr. 40; 168-69.

76. In some of the Paintings, Prince affixed the collage elements to other images from *Yes Rasta* with scotch tape for further scanning, and in others he applied the collage elements directly to the canvas using his squeegee technique in which elements are affixed to the canvas with paint to create a layered effect. RP Aff. 24 and RP Aff. at Ex A; *see also* RP Tr. 168-69; 331-37.

77. Prince added elements, including paint, sketches and cutouts of portions of the images and other raw elements to all of the *Canal Zone* paintings, which were all ingredients that served as his artistic contribution. RP Aff. ¶ 26; RP Aff. at Ex A.

78. *Canal Zone, 2007* consists of portions of 35 Rastafarian faces torn from pages in *Yes Rasta* and onto which Prince drew and painted facemasks. These were then re-ordered and tacked to a board as a means for Prince to introduce the likely characters of his next series, *Canal Zone*. RP Aff. 48.

79. Stylistic references to the history of art are a hallmark of Prince's *Canal Zone* paintings. RP Aff. ¶ 21.

80. Other artists such as Picasso have been noted for the art historical references in their work. RP Aff. ¶ 21.

81. At the time he was painting his *de Kooning* series, Prince was already thinking about the *Canal Zone* series. RP Aff. ¶ 17; RP Tr. 156.

82. Through his *Canal Zone* paintings, Prince sought to pay homage to artists such as Willem de Kooning, Cezanne, Warhol and Picasso. RP Aff. ¶ 25; RP Tr. at 165-66; 300-01.

83. The enlarged hands found in many of the *Canal Zone* Paintings represent a transition from Prince's previous *de Kooning* series, which emulated the compositional style of the de Kooning hybrid creatures, and is also a reference to Cezanne's *Bathers*. RP Aff. ¶ 19 and RP Aff. at Ex. A.; see also RP Tr. 156, 166-67, 251-52; 264-65.

84. 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. ¶ 19; see also RP Tr. 172-73 and RP Aff. At Ex. A.

85. The repetition that appears throughout the *Canal Zone* series refers to the iconic style of Andy Warhol. RP Aff. ¶ 21.

86. Prince also painted images onto the canvas that would later be painted over to create a ghost-like effect. RP Aff. ¶ 19; RP Tr. 172-73.

87. Prince organized the images of nude figures next to one another and drew Picasso-like primitive masks on some of the images that appear in the Paintings. RP Aff. ¶ 21;

88. Prince described his Paintings in the *Canal Zone* series as "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*." RP Tr. 361.

89. Titles to the Paintings are an important component to Prince's works and help "recontextualiz[e] the image" and "create[] another type of subtext that [allows one to] read into the painting. RP Tr. 248-49.

90. In the *Canal Zone* series, Prince wanted to emphasize equality between the sexes, highlight the three relationships in the world, which are men and women, men and men and women and women, and portray a contemporary take on the music scene. RP Tr. 338-39.

91. Prince 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. RP Aff. ¶ 62.

92. In creating the Paintings, Prince worked alone. RP Aff. ¶ 24.

93. Around November 8, 2008 through December 20, 2008, Gagosian Gallery held the *Canal Zone* Exhibition (the "Exhibition") at its gallery located in Chelsea, featuring works from Prince's *Canal Zone* series. LG Tr. 25.

94. The *Canal Zone* series consisted of 29 paintings, approximately 22 of which were exhibited at the Exhibition. *Id.*; see also RP Aff. at Ex. A.

95. The Gallery sold 14 of the Paintings through its promotion of the exhibition. Ex N.

96. The Gallery purchased four of the Paintings, while some were traded in non-cash transactions for other works. Ex. N ¶ 3.

97. Gagosian Gallery spent approximately \$434,730.47 organizing and marketing the Exhibition. Ex O.

98. Advertisements for the Exhibition were featured in various publications, including the *Financial Times*, the *New York Times*, *The Art Newspaper*, *Art Auction*, *Art in America*, *Artforum*, and *W Magazine*. Ex P.

99. Marketing efforts primarily targeted prominent collectors, gallerists and museums, as they are the predominant market for Prince's artwork. Ex H.
100. Invitations to the Exhibition were distributed to these types of individuals as well. See Ex. Q.
101. As part of its efforts to promote the Exhibition and the *Canal Zone* series, Gagosian Gallery also worked with Rizzoli International to create a catalogue entitled *Canal Zone*, featuring paintings from the Exhibition. Ex M.
102. Rizzoli International planned to publish *Canal Zone* for distribution that was scheduled to begin in September 2009, but Rizzoli backed out as a result of plaintiff's lawsuit. AP Tr. 24.
103. Lawrence Gagosian and Prince withdrew the unsold *Canal Zone* Paintings, pending this lawsuit. RP Aff. ¶ 26.
104. Cariou, a Paris-based portrait photographer who published the book *Yes Rasta*, has focused on portraiture photography and landscapes. PC Tr. 45-46, 280, 285; Ex. ¶ 3.
105. The copyright of *Yes Rasta* was registered as a compilation. *Id.* at 12; Ex. DD.
106. At some point before 2004, Cariou stopped accepting commercial free-lance photography assignments to focus solely on his photography projects. PC Tr. 282.
107. In addition to *Yes Rasta*, two other books, entitled *Surfers* and *Trench Town Love*, containing Cariou's portraiture-style photographic images have been published. PC Tr. 286-7.
108. Cariou has been working on a fourth book, featuring his Gypsy project, but it is unclear whether this projected was completed as of November 2008. *Id.*
109. As of January 2010, Cariou had no plans to publish his fourth book. PC Tr. 286; CC Tr. 43-44.

110. 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.

111. Images from Cariou's *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. PC Tr. 288-90.

112. There have been no other exhibitions of any of Cariou's photographic works. *Id.*

113. Approximately 100 images that appear in *Yes Rasta* were taken over a six-year period, during which time Cariou continued his career as a professional photographer. Ex E ¶ 16; PC Tr. 39-40.

114. Cariou 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. 35-36; *see also* Ex E ¶ 16; Ex Z.

115. Through *Yes Rasta*, Cariou wanted to document the reality of the Rastafarian culture, which according to him, was destined to have historical significance. *Id.* at 35-36; 284-86; Ex. AA.

116. In creating *Yes Rasta*, Cariou's intent was to create a beautiful portraiture book, to document the Rastafarian culture and the surrounding landscapes, and to capture as closely as possible the subject being photographed. *Id.* at 35-36; 40-43; 45; 51; 110; 120; 132; 134; 141; 165-66; 171; 172-73; 176-78; 186; 265-66; *see also* Ex E ¶ 16; Ex Z; Ex. AA.

117. None of the images in *Yes Rasta* have titles. *Id.* at 77.

118. Prince described the *Yes Rasta* project to his publisher, 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.

119. powerHouse marketed *Yes Rasta* as a book on "Photography/Reggae Culture". . . Ex W.

120. Cariou described his style of portraiture photography as “a static way of taking a picture of when someone is looking at you.” *Id.* at 45-46.

121. Sometimes Cariou would snap a landscape shot while on his way to another destination. *See, e.g.*, PC Tr. 114-15.

122. Cariou chose background settings because he thought they would make a beautiful portrait, they suited the subject, were visually compelling, created a tropical feel, or they just “felt good” or “felt right.” *Id.* at 51, 74, 84, 109-10, 112, 115; 151.

123. Cariou included RP Tr. photographs of marijuana plantations to depict a prominent feature of the Rastafarian and Jamaican cultures as a whole. *Id.* at 114-15; 118.

124. Many of the Images were taken in the towns of Negril and Lucille and in other public places. *Id.* at 6, 36-37, 73-74, 83-84, 128; Ex E ¶ 16.

125. Cariou often blurred the landscape in the background of the *Yes Rasta* images in order to make the subject stand out. *See, e.g.*, PC Tr. 53-55, 123-24; 140-41.

126. Cariou believes the landscape images in *Yes Rasta* distinctive because the images were his, were generally beautiful, and because of the way the tropical landscape is organized in the book, adjacent to the portraiture shots. *Id.* at 67-68, 109; 171.

127. Cariou explained that the reader must view *Yes Rasta* as a whole book in order to get the feel of the subject matter of each of the individual images. *Id.* at 81.

128. Cariou reproduced and altered the original prints and published them in book format in *Yes Rasta*. *See* PC Tr. 204-05.

129. Images similar to Cariou’s images of Rastafarians, tropical landscapes and marijuana plantations can be readily found on the Internet. Ex CC.

130. In keeping with his general policy of not paying his models, Cariou did not pay any of the Rastafarians whose images appear in *Yes Rasta*. PC Tr. 75-77.

131. Cariou did not obtain written permission from any of the Rastafarians, whose images appear in *Yes Rasta*, to photograph them. *Id.* at 45.

132. Cariou does not maintain or monitor his website, www.partickcariou.com, or check the email address listed on the webpage to see if he has had any inquiries concerning the purchase of his work. PC Tr. 239.

133. Visitors to Cariou's website can only purchase individual photographs if they personally contact Cariou directly through the website. *Id.* 238-39.

134. No one has contacted Cariou through his website to purchase any of his photographs. *Id.* at 239-40, 254, 260.

135. During his career as a photographer, Cariou has sold only six prints of photographs in *Yes Rasta* 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); PC Tr. 89, 92, 126, 157-58, 161, 237, 283-84.

136. The highest price paid for one of Cariou's *Yes Rasta* prints was €2,000, the rest were sold for €1,500. PC Tr. 154-58.; Ex V at 1(c).

137. In each instance, Cariou arbitrarily decided the price of his photographs. PC Tr. 92.

138. In selecting the artist editions for the works he did sell, Cariou did not give much thought as to which photographs to select. *Id.* at 93-94.

139. Cariou has made little attempt to market the images in *Yes Rasta*, nor has he distributed any of the 70 copies of *Yes Rasta* that he received from the publisher to anyone who would help market the book. *Id.* at 103, 109, 116, 118, 121, 128, 129, 134, 139, 140, 142, 144, 153, 159, 221.

140. Cariou was not involved in the marketing, advertising, publicity, or financial planning associated with the production of *Yes Rasta*. *Id.* at 185, 212, 224.

141. 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.

142. *Yes Rasta* was out of print when Prince started to create the *Canal Zone* series. RP Tr. 236.

143. The market for *Yes Rasta* is very small. *See* Ex T at ¶ 4.

144. powerHouse published one edition of *Yes Rasta*, and as of February 1, 2010, has sold 5,791 copies. *Id.* at ¶ 2, 3.

145. As of February 1, 2010, Cariou has earned \$8087.75 in royalties from the sale of *Yes Rasta*. PC Tr. 214-215; Ex T.

146. powerHouse remains interested in working with Cariou on future projects. Ex T ¶ 11.

147. A hard cover edition of *Yes Rasta* is currently out of stock and a limited number of copies are for sale through the powerHouse website. *Id.* at Ex T, ¶¶ 8-9, 11.

148. Cariou is not listed in the 2009 Art in America, a guide to galleries, museums and artists, which cross-references artists and the galleries that represent their work. *See generally*, www.artinamerica.com.

149. Cariou is not included in either of the Artnet.com databases. *See* www.artnet.com.

150. Cariou's website does not indicate that he is represented by a gallery nor does it list museum exhibitions featuring his work. Ex X at GG004340 – 43143; *See also*, www.patrickcariou.com.

151. Cariou claims to have decided he was finally ready in or about the fall of 2008 to market and sell his images. PC Tr. 94-95, 235, 284-85, 286.

152. Cariou claims he did not market the *Yes Rasta* images sooner because he was waiting to make his work available to the public when his fourth and final book of portraits about Gypsies was completed, when his work matured, and when the right opportunity to sell his *Yes Rasta* images presented itself. *Id.* at 94-95; 284-85.

153. Upon the completion of the Gypsy project, Cariou intends to move on from portraiture photography to work in other types of photography. *Id.* at 285.

154. Other than the exhibition at Galerie 213, Paris, in the fall of 2000, Cariou has not exhibited or actively sought to exhibit the *Yes Rasta* images in an effort to promote their sale. *Id.* at 232, 234-235, 288-89.

155. In or about August 2008, Christiane Celle, the owner of Clik Gallery, expressed an interest in representing Cariou on an exclusive basis for an exhibition of his *Yes Rasta* series. CC Tr. 39; *see also* PC Tr. 95.

156. Cariou, however, was non-committal and non-responsive to her attempts to follow-up with him. CC Tr. 63-65.

157. Celle never finalized an agreement with Cariou to represent him. As Celle stated, "I was very committed, I wanted to represent him. We agree on it but we never really pursue it." CC Tr. 133.

158. Celle has not foreclosed working with Cariou on future projects. *Id.* at 133.

159. Cariou has not followed through with Celle's requests, including finalizing her representation of him. CC Tr. 106, 133, 149.

160. Cariou is aware that Celle is interested in taking him on as an artist on other projects. PC Tr. 103.

161. In or about November 2008 Celle reached out to Cariou to inform him of her decision not to do a show on the *Yes Rasta* series. CC Tr. 63-64, 71.

162. At the time Cariou commenced this action, he had not responded to Celle's attempts to reach him, and was thus unaware that she had decided not to proceed with a show featuring *Yes Rasta*. CC Tr. 63-65, 71.

163. Cariou did not speak with Celle until sometime in January or February 2008, when he called her to tell her about this lawsuit. *Id.* at 71-73.

164. During that telephone conversation, Cariou asked Celle if she knew of anyone who might have photographs of the *Canal Zone, 2007* Painting that was on display in the Eden Rock Hotel in St. Barts. *Id.* at 96.

165. During their conversation, Celle informed Cariou for the first time, that she had decided not to produce the show featuring the images in *Yes Rasta* for her own professional reasons. *Id.*

166. In or about February 2009, Cell spoke to Cariou and urged him to do his own Yes Rasta show and a reprint of *Yes Rasta* because she considered *Yes Rasta* to be a very important book. CC Tr. 82, 104, 108.

167. Celle insisted on purchasing additional *Yes Rasta* books. CC Tr. 102, 107-108.

168. Celle thought she could sell prints of images from *Yes Rasta* for between \$3000 and \$20,000, depending on the size. CC Tr. 155.

169. Celle remained willing to represent Cariou. CC Tr. 133.

170. Cariou has not spoken to 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 to permit others to publish his images in *Yes Rasta*. RP. Tr. 03, 230-31.

171. Celle is the former girlfriend, and is still a friend, of Thierry Des Fontaine, a photography assistant who worked closely with Cariou on his *Surfer* photographs. CC Tr. 32, 59.

172. The sales of the *Canal Zone* Paintings were not as high as similar-sized paintings that Prince has done in other series. RP Aff. ¶ 64.

173. Prince brought value to the *Canal Zone* paintings by his contribution as an artist, as well as the obvious benefit of his name and place in contemporary art as an enticement to collectors to purchase his paintings. RP Aff. ¶ 64.

174. Prince used the *Yes Rasta* Images and changed them from documentary photographs into elements of a fictionalized, post-apocalyptic world, which related to his screenplay pitch, and his desire to do a series of paintings in a tropical setting with an emphasis on musical groups and the importance of music, while still making strong art historical references. *Id.*

175. When compared to Cariou's photographs, what Prince has done in the *Canal Zone* series is highly individualistic, proprietary. *Id.*

176. Prince emphasized uniqueness, creativity, and utilized visual vocabulary that is uniquely his in the *Canal Zone* paintings. . *Id.*

177. The catalog for the show, *Eden Rock*, contained an essay by James Frey, an American author. RP Aff. ¶ 65.

178. 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. *Id.*

179. Prince asked Mr. Frey to write the essay as a favor. *Id.*

180. When Prince received the actual essay from Mr. Frey, he was not pleased by it, because although some elements of his pitch were referred to in the essay, he felt that he had done an entirely different work and that ultimately the themes contained in his essay had nothing to do with his *Canal Zone* paintings. RP Aff. ¶ 65.

181. Since Mr. Frey had done the essay for Prince as a favor, and since Prince felt that the paintings stood on their own in any event, Prince agreed to the essay being included in the *Canal Zone* Catalogue. RP Aff. ¶ 65.

182. Prince sees his work as continuing within prior artistic traditions of offering homage to prior artists, utilizing a variety of images and media in new and different ways and bringing his own artistic concepts, message and fantasies to visual expression as part of an ongoing dialogue of art. RP Aff. ¶ 66.

Graduation, 2008 (See Composite Exhibit A, p. 2)²

183. To create *Graduation*, Prince tore pages from the *Yes Rasta* book and had it scanned, enlarged in a bluish tint. RP Aff. ¶ 32.

184. He also had the background landscape dimmed and deemphasized. *Id.*

185. Prince collaged a picture of a blue electric guitar, which he cut out of a guitar aficionado magazine, onto the Rastafarian's body, and also replaced the Rastafarian's hands with enlarged ones. *Id.*; RP Tr. 362-63.

186. To Prince, the Rastafarian in this Painting represented the lead guitarist. RP Aff. ¶ 32.

187. He painted a small dot of blue pigment on the Rastafarian's forehead. *Id.*

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 as Exhibit A to the Prince Affidavit, 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*.

188. The elements in 184 to 188 were then rescanned and printed directly onto the canvas. *Id.*

189. In furtherance of Prince's music-inspired message, he 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. *Id.*

190. Prince 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 facemasks while performing, and thus, the mask was another way of illustrating the subject's identity and Prince to carry out his music theme for the series. *Id.*

Meditation, 2008 (See Composite Exhibit A, p. 3).

191. In creating *Meditation*, Prince used the same image of the Rastafarian found in *Graduation*. RP Aff. ¶ 33.

192. He rotated, and altered the size of, the image, and taped it onto a plain white canvas. *Id.*

193. He 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. *Id.*

194. Prince switched the direction the Rastafarian was facing, and changed the guitar, as musicians often switch instruments as part of a performance, to further his reference to an ongoing musical performance in this series of Paintings. *Id.*

Canal Zone, 2008 (See Composite Exhibit A, p. 4).

195. In creating *Canal Zone, 2008*, Prince used the same image that appears in *Graduation* and *Meditation*, but once again, he replaced the guitar with a different one and affixed different hands. RP Aff. ¶ 34.

196. In this painting, Prince cut out the image of the Rastafarian and placed it among a grid-like landscape, which is created from torn, scanned, altered, and reassembled images of foliage he took from various pages in *Yes Rasta* and, as recalls, a book on Tahiti he came across. *Id.*; RP Tr. 352.

197. Prince used the photographs of different landscapes because he wanted the painting to appear like a camouflage backdrop, with the guitarist in the midst of lush foliage that has taken control of his fictional island. RP Aff. ¶ 34.

198. Prince was also inspired by Andy Warhol's camouflage paintings, and his use of grids paid homage to Warhol. *Id.*; RP Tr. 353.

199. 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). RP Aff. ¶ 34; RP Tr. 354.

200. Prince added an image of Neil Young's guitar with proportional hands, and a white lozenge facemask as a reference to Picasso. *Id.*

201. 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. *Id.*
The Ocean Club, 2008 (See Composite Exhibit A, p. 6).

202. Prince named this painting after a club on Chambers Street in Manhattan, New York. RP Aff. ¶ 35; RP Tr. 246.

203. To create *The Ocean Club*, Prince 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. RP Aff. ¶35.

204. He then cut out an image of a Rastafarian from *Yes Rasta* and added white lozenge faces. *Id.*; RP Tr. 252.

205. He also cut out an image of a nude female figure on the beach from another book, and added pink lozenge faces. RP Aff. ¶35.

206. He 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. *Id.*

207. The repetition in this painting is similar to the repetition that he utilizes in many of his works of art, and is homage to Warhol's style of repetition. *Id.*

208. Prince also chose *Ocean Club* as the title for this painting because Warhol used to go to the Ocean Club, as a young artist, and because Prince envisioned that the females in the painting were on the beach. *Id.*; RP Tr. 252.

Charlie Company, 2008 (See Composite Exhibit A, p. 8).

209. In *Charlie Company*, Prince 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. RP Aff. ¶ 36.

210. During the scanning process, Prince had the image cropped on the left side and tinted in sepia tones. RP Aff. ¶ 36.

211. He then pasted an image of a nude female figure next to the image of the Rastafarian riding a donkey. *Id.*

212. Prince attached the images to the canvas with white paint, which he applied with the use of a squeegee. *Id.*

213. He also painted lozenge facemasks on the Rastafarian and the nude female figure. *Id.*

214. 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. *Id.*

215. 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. *Id.*

216. Absent from this painting is anything mechanical or man-made to illustrate the post-apocalyptic world in which these two subjects now exist. *Id.*

Back to the Garden, 2008 (See Composite Exhibit A, p. 9).

217. In creating *Back to the Garden*, Prince first scanned and enlarged the image of the Rastafarian on a donkey along with the background landscape onto a canvas. RP Aff. ¶ 37.

218. To this altered image, he added a collaged guitar and a white lozenge mask to make it seem as though the Rastafarian is playing the guitar. *Id.*

219. Next, he 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. *Id.*

220. Before applying it, Prince tore it into three pieces and then reassembled and affixed it using white paint onto the canvas. *Id.*

221. Prince 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 lozenge facemasks to the women's faces. *Id.*

222. Prince was thinking about Adam and Eve when he painted *Back to the Garden* since they were in the Garden of Eden and his 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. *Id.*; RP Tr. 337-39.

223. The landscape represents the idyllic setting at Woodstock, and again, included nothing man-made. RP Aff. ¶ 37.

224. Prince's artistic concept is that 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 Prince's message that music is the only redeeming thing to have survived the nuclear attack. *Id.* *Cheese and Crackers, 2008* (See Composite Exhibit A, p. 10).

225. In creating *Cheese and Crackers*, Prince first scanned images of three nude women onto the canvas. RP Aff. ¶ 38.

226. He then painted, drew, and collaged onto their bodies enlarged hands and feet, and also obscured their faces. *Id.*

227. He 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. *Id.*; RP Tr. 251.

228. Prince obscured his face as well with paint. RP Aff. ¶ 38.

229. For one of the Rastafarian's hands, Prince applied a scanned, enlarged image of a hand onto the figure, and for the other hand, he drew on it with an oil stick crayon. *Id.*

230. Prince also altered the Rastafarian's feet by painting enlarged feet over them. *Id.*

231. Prince painted the background with bright, heavy colors. *Id.*

232. *Cheese and Crackers*, especially the wine-colored background, is heavily influenced by de Kooning's techniques, and is stylistically very similar to my de Kooning series. *Id.*; RP Tr. 251.

233. Prince considers *Cheese and Crackers* to be a bridge between his de Kooning paintings and the *Canal Zone* Paintings. RP Aff. ¶ 38.

234. *Cheese and Crackers* also is influenced by Picasso's well-known 347 series of etchings and Cezanne's *Bathers*. *Id.*

235. Prince 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. *Id.*

236. In particular, the feet and primitive facemasks are a historical reference to Picasso, while the cartoon and lozenge faces reference de Kooning. *Id.*

237. Prince titled this painting *Cheese and Crackers* because he envisioned that this was the name of the band. *Id.*; RP Tr. 252.

Mr. Jones, 2008 (See Composite Exhibit A, p. 11).

238. 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*. RP Aff. ¶ 39.

239. The images of the nude female figures were scanned onto the original canvas. *Id.*

240. The male figure that appears in the painting was a cut out of a scanned and enlarged image of the Rastafarian in *Graduation* that Prince affixed to the canvas using paint. *Id.*

241. Prince 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. *Id.*

242. He added similar oversized hands and feet to the nude females that appear on each side of the male figure. *Id.*

243. He also added pigment to the lower portion of the male figure that continues downward to the bottom of the canvas. *Id.*

244. 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*. *Id.*

245. Prince used these elements from art history, again, to pay homage to these particular artists. *Id.*

The Other Side of the Island, 2008 (See Composite Exhibit A, p. 12).

246. In creating *The Other Side of the Island*, Prince scanned images of different female figures onto the canvas and painted yellow lozenge facemasks over their faces. RP Aff. ¶ 40.

247. Then he cut out, scanned, and enlarged two images of Rastafarians from *Yes Rasta*. *Id.*

248. In obscuring the images of the Rastafarians in this painting, Prince painted de Kooning-esque style masks on their faces, covered half their bodies with paint, and painted and drew enlarged hands on them. *Id.*

249. He made the background of this painting dark with a hint of orange and purple swirls. *Id.*

250. 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*. *Id.*

251. Prince used these elements from art history, again, to pay homage to these particular artists. *Id.*

Naked Confessions, 2008 (See Composite Exhibit A, p. 13).

252. In creating this painting, Prince used images of three female figures, and a male Rastafarian figure from a page torn from *Yes Rasta*. RP Aff. ¶ 41.

253. He painted the background with darker shades of black and dark red swirls. *Id.*

254. Prince collaged an electric guitar onto the Rastafarian figure and then scanned and enlarged the combined image, and affixed it to the canvas. *Id.* ¶

255. He then obscured the face of the male figure by painting a mask-like eyes and lips. *Id.*

256. Prince also collaged a guitar on the Rastafarian's hands. *Id.*

257. He replaced the landscape that appeared in the background of the photograph of the male Rastafarian with a background of white and pink paint. *Id.*

258. Prince 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. *Id.*

259. 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*. *Id.*

260. Prince used these elements from art history to pay homage to these particular artists.

261. Prince also juxtaposed these historical references with the guitar, which is a contemporary reference. *Id.*

Specially Round Midnight, 2008 (See Composite Exhibit A, p. 14).

262. In creating *Specially Around Midnight*, Prince 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*. RP Aff. ¶ 42.

263. Around the two male figures, Prince painted haloes of white paint. *Id.*

264. Prince collaged an image of a guitar over the hands of one of the male figures. *Id.*

265. To this same male figure, Prince also added exaggerated painted boots to his feet and painted a white mask on his face. *Id.*

266. On the other male figure, Prince drew distorted eyes and a mouth over his face and added black stripes to his sleeve. *Id.*

267. Prince also obscured the bottom half of his figure by darkening it. *Id.*

268. On the female figures, Prince drew and collaged enlarged feet and drew over their faces to obscure them. *Id.*

269. He also painted haloes of white paint around two of the female figures. *Id.*

270. *Specially Round Midnight* 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*. *Id.*

271. Prince used these elements from art history to pay homage to these particular artists. *Id.*

272. 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. *Id.*

Zippping the System, 2008 (See Composite Exhibit A, p. 15).

273. In creating *Zippping the System*, Prince 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*. RP Aff. ¶ 43.

274. He outlined the collaged images with white, pink and grey paint. *Id.*

275. He then 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. *Id.*

276. He 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. *Id.*

277. Prince also drew enlarged feet and hands on the female figures and altered their faces by drawing and collaging different eyes and mouths. *Id.*

278. The up and down style in, and the title of, this painting is a reference to Barnett Newman's famous zip paintings (areas of vertical color separated by thin lines). *Id.*

Color Me Mine, 2008 (See Composite Exhibit A, p. 16).

279. In creating *Color Me Mine*, Prince 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. RP Aff. ¶ 44.

280. Before affixing the image of the Rastafarian, he collaged together four separate bodies before scanning it into a single image. *Id.*

281. He 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. *Id.*

282. To the female images, Prince added pink lozenge facemasks and sketched enlarged hands for one of them. *Id.*

283. He also collaged a pair of feet that appears below one of the female figures. *Id.*

284. He painted the background of the painting with purple and white brushstrokes. *Id.*

285. *Color Me Mine* is heavily influenced by de Kooning's style. The melding of the white and black person together is also a reference to Basquiat. *Id.*

James Brown Disco Ball, 2008 (See Composite Exhibit A, p. 17).

286. To create this painting, Prince 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*. RP Aff. ¶ 45.

287. Prince affixed portions of these images to the canvas, and layered the background with strokes of purple, pink and white paint. *Id.*

288. Almost all the images in this painting have been cut and reassembled onto the canvas. *Id.*

289. On top of one of the nude figures, Prince 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. *Id.*

290. Prince placed the other image of the Rastafarian's head on top of another nude figure and added a primitive-looking facemask to his face. *Id.*

291. He 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. *Id.*

292. The bodies in this picture represent disco balls, while the painting itself is a poetic reference to James Brown whose disco ball Prince had recently purchased at auction. *Id.*; RP Tr. 249-51.

293. Prince 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 is another reference to Prince's musical theme. RP Aff. ¶ 45.

294. However, the only visible trait of the Rastafarian images are their dreadlocks, which he 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. *Id.*

Inquisition, 2008 (See Composite Exhibit A, p. 18).

295. To create *Inquisition*, Prince scanned and enlarged an image of a nude female figure onto which he 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. RP Aff. ¶ 46.

296. Prince scanned, enlarged, and cut out portions of images of Rastafarian figures taken from pages torn from *Yes Rasta* and onto which he had drawn primitive and de Kooning style masks and pasted them around her. *Id.*

297. Prince affixed these images with white paint, which he applied with a squeegee.

Id.

298. Each element in this painting has been collaged, scanned, and then collaged and reworked. *Id.*

299. Prince 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. *Id.*; RP Tr. 348-49.

300. Prince 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 the *Canal Zone* series. RP Aff. ¶ 46.

Uncle Tom, Dick, and Harry, 2008 (See Composite Exhibit A, p. 19).

301. In creating *Uncle Tom, Dick, and Harry*, Prince constructed layers with some of the images being scanned directly onto the canvas and others cutout and affixed directly on top. RP Aff. ¶ 47.

302. The four images of Rastafarians taken from pages torn from *Yes Rasta* were scanned with a blue tint, and then he cut out portions and altered the images by adding lozenge facemasks and de Kooningsque style masks over their faces. *Id.*

303. He affixed one of the images of male figures upside down. *Id.*

304. He also added black lozenge faces to the nude female figure. *Id.*

305. He painted the background white, with strokes of blue, and added an enlarged image of a marijuana cigarette. *Id.*

306. The upside-down image is a reference to the contemporary artist, Georg Baselitz. *Id.*

307. The title was influenced by the spies that are in Prince's screenplay. *Id.*

Canal Zone, 2007 (See Composite Exhibit A, p. 20).

308. *Canal Zone, 2007* is a collage, in which Prince created a grid of collaged and obscured portions of images of landscapes and Rastafarians taken from pages torn from *Yes Rasta*. RP Aff. ¶ 48.

309. Prince 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. *Id.*

310. For others, Prince obscured their facial image entirely with paint or other techniques. *Id.*

311. The images were rearranged in a big grid and thumb tacked to a piece of plywood. *Id.*

312. *Canal Zone, 2007* was exhibited during the first unveiling of the pitch at the Eden Rock Hotel in St. Barts, and was a way of introducing some of the characters, components, and players in the screenplay that Prince envisioned would be a part of the *Canal Zone* series. *Id.*; RP Tr. 180-84.

Tales of Brave Ulysses, 2008 (See Composite Exhibit A, p. 25).

313. In creating *Tales of Brave Ulysses*, Prince layered cutout portions of images of nude female figures and a male Rastafarian onto a canvas. RP Aff. ¶ 49.

314. He 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. *Id.*

315. He scanned and enlarged the fourth one directly onto the canvas, and also altered its size to be smaller than the other three. *Id.*

316. To affix the collage elements, Prince used white paint, which he applied with a squeegee. *Id.*

317. In fact, on the largest male image, the squeegee marks still appear. *Id.*
318. On the smallest Rastafarian image, he drew enlarged hands. *Id.*
319. Prince also varied the size of the female images. *Id.*
320. He painted the bodies of the female figures, and added white, lozenge eyes to three of the six female images. *Id.*
321. He painted the background with a combination of light yellow, orange and red. *Id.*
322. Prince named the painting after a song by one of his favorite groups, Cream. *Id.*; RP Tr. 364.
323. 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*. *Id.*; see RP Tr. 364.
324. The figures, which are a band, are jamming, but the male figure does not yet have a guitar because he has not yet become the lead. *Id.*; RP Tr. 364.
- Escape Goat, 2008** (See Composite Exhibit A, p. 26).
325. Prince painted the background of this painting a whitish-blue color. RP Aff. ¶ 50.
326. He 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. *Id.*
327. On the smallest figure to the far left, Princ collaged an image of enormous hands on the body and a blue lozenge facemask. *Id.*
328. To the next figure to the right, he added blue lozenge facemasks and an enlarged painted hands. *Id.*
329. Prince sketched over his feet with an abstract drawing. *Id.*
330. He collaged blue lozenge facemasks and a blue, electric guitar to the central male figure. *Id.*

5. He created this central figure by first collaging the mask and guitar and then scanning it. *Id.*

331. Prince also blackened out and enlarged his feet with paint and oil stick crayon. *Id.*

332. Prince 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. *Id.*

333. The last image is identical to the one with the collaged blue guitar and blue lozenge facemask, but he drew different feet on him. *Id.*

334. Prince also affixed cutouts of four nude female figures, and painted different colored lozenge facemasks on them as well. He outlined some of figures using a hint of green and gray paint. *Id.*

335. This painting references Cezanne's *Bathers*. *Id.*

On the Beach, 2008 (See Composite Exhibit A, p. 27).

336. In creating this painting, Prince 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*. RP Aff. ¶ 51.

337. For the background, Prince 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 he applied with a squeegee, which created a layered effect. *Id.*

338. On the images, he also drew white and mustard yellow lozenge facemasks. *Id.*

339. The lozenge faces are a reference to de Kooning, and the title references Nevel Shutes's novel *On The Beach*. *Id.*

340. The composition of images comes from multiple sources, such as Richard Kern, German nudist books, and a book called "Paradise." These elements added to Prince's vision of a post-apocalyptic world. *Id.*

Cookie Crumbles, 2008 (See Composite Exhibit A, p. 28).

341. In creating *Cookie Crumbles*, Prince 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. RP Aff. ¶ 52.

342. He affixed the images by first applying black paint with a squeegee and then sticking the images to the black paint. *Id.*

343. Prince replicated the image of the male Rastafarian three times in the painting, and juxtaposed these images with images of the nude women. *Id.*

344. He also painted a mask over the male Rastafarian and added enlarged hands and other drawings in oil stick crayon. *Id.*

345. Prince scribbled on the stomach of each of these images and altered the man's seashell pendant into a peace sign. *Id.*

346. He also added white and black lozenge facemasks to the faces of the female figures, and painted parts of their bodies. *Id.*

347. He painted the background pastel yellow, with a splash of pink and grey. *Id.*

348. The images in *The Cookie Crumbles* refer to dance and evoke a kind of musical rhythm. *Id.*

349. The images of women come from four different books, but Prince repeated the image of the male Rastafarian 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. *Id.*

350. The repetition also is a reference to Warhol. *Id.*

It's All Over, 2008 (See Composite Exhibit A, p. 29).

351. To create *It's All Over*, Prince 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 *Zippping the System*. RP Aff. ¶ 53.

352. For the background, Prince used an enlarged image of a landscape from *Yes Rasta*, but then painted over it with white and pink paint obscuring the landscape. *Id.*

353. Prince drew black, pink, and white lozenge facemasks on all the images. *Id.*

354. He affixed the images with black, white, pink, and orange paint. *Id.*

355. Prince collaged guitars on two of the four Rastafarian images, which represented George Harrison's guitars, as a reference to the musical theme in the *Canal Zone* series, and drew enlarged feet on them as well, as a historical art reference to de Kooning and Picasso. *Id.*

356. Prince drew on the images of the female bodies using drip paint. *Id.*

357. He also included three of his *Hippie Drawings* in this painting. *Id.*

358. The repetition of different sized images that appears in *It's All Over* is a reference to Warhol. *Id.*

359. Prince 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. *Id.*

Ile de France, 2008 (See Composite Exhibit A, p. 30).

360. To create *Ile de France*, Prince 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. RP Aff. ¶ 54.

361. To affix the images, Prince applied paint with a squeegee and then stuck the images on top of the paint. *Id.*

362. On the female figures Prince painted black and white lozenge faces, and added strokes of white, black, and grey paint over their bodies. *Id.*

363. He had portions of the image of the Rastafarian scanned in a bluish tint, and he cropped the lower portion of his body. *Id.*

364. He 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. *Id.*

365. This painting represents another aspect of Prince's creative expression for the *Canal Zone* series in which a hotel on St. Bart (named Ile de France) has been occupied by a band of people. *Id.*

Djuana Barnes, Natalie Barney, Renee Vivian and Roman Brooks Take Over the Guanahani, 2008 (See Composite Exhibit A, p. 31).

366. For the background of this painting, Prince used a photograph of a tropical landscape taken from pages torn from *Yes Rasta*, had it scanned, cropped, and enlarged in a pinkish tone. RP Aff. ¶ 55.

367. Prince collaged images of cutouts of portions of four nude female figures onto the canvas using pink and white paint to affix them. *Id.*

368. Prince also added pink and white lozenge faces to the female figures. *Id.*

369. He named this painting after four famous literary lesbians. *Id.*; RP Tr. 360.

370. This painting portrays the women taking over the Guanahani. RP Aff. ¶ 55.

371. This painting represents another element of his screenplay in which early 20th century novelists, poets, and expatriates, who had a lesbian salon in Paris, take over the Guanahani on St. Barts. *Id.*

372. Prince also wanted to portray a rock and roll theme on the one hand and also make reference to Cezanne's *Bathers*. *Id.*

373. The background is a stereotypical, generic tropical jungle, which is the setting for Prince's *Eden Rock* screenplay. *Id.*

Mina Loy, Janet Flanner, Radclyffe Hall, Una Towbridge and Oscar Wilde's niece Dolly Wilder, 2008 (See Composite Exhibit A, p. 33).

374. In creating this painting, which Prince named after lesbian writers in reference to the lesbian characters in his screenplay, Prince 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*. RP Aff. ¶ 56.

375. Before affixing the collage of images to the canvas, Prince 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. *Id.*

376. Once assembled, Prince had them scanned. *Id.*

377. He then affixed and layered these scanned images onto the canvas using white paint. *Id.*

378. He painted the background of the painting with pastel blue paint. *Id.*

379. Prince used different scales, masks, and tattoos in this painting to create an abstract painting. *Id.*

380. The women in this painting represent lesbian writers from the 20th century. *Id.*
Quarry, 2008 (See Composite Exhibit A, p. 34).

381. In creating *Quarry*, Prince 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. RP Aff. ¶ 57.

382. Prince cut up the scanned images of the male Rastafarian and landscape and affixed portions of the images, along with cut out images of a marijuana cigarette, hemp leaves and a necklace, on top of the images of the female figures. *Id.*

383. Prince added white lozenge facemasks to the images. *Id.*

384. The tattoo in this painting is a reference to the idea of Polynesia and idea that they are shipwrecked. *Id.*

385. In creating *Quarry*, Prince was thinking about Marlon Brando and Clarke Gabel sailing. *Id.*

386. He was also thinking about Tahiti and the oceanic art. *Id.*

387. The collage of the male and female figures was a way for Prince to fuse the two together in a new inventive way. *Id.*

388. The repetition is a reference to Warhol. *Id.*

Untitled, 2008 (See Composite Exhibit A, p. 35).

389. In creating *Untitled, 2008*, Prince had scanned and enlarged an image of a nude female, and a landscape and the necklace found on the male Rastafarian in *Quarry*. RP Aff. ¶ 58.

390. Prince 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. *Id.*

391. He then affixed the cropped image of a Rastafarian's chest wearing a medallion necklace on top of the female figure. *Id.*

392. This painting depicts a contemporary band. *Id.*

393. All the *Untitled*, 2008 paintings (including those described in paragraphs 394 and 401 below) relate to comparisons between and relationships among the males and females occupying Prince's fictional tropical island. *Id.*

Untitled (Rasta), 2008. (See Composite Exhibit A, p. 36).

394. To create this version of *Untitled (Rasta)*, 2008 painting, Prince cut out, enlarged and scanned onto a canvas images of two nude female figures, to which he added pink and black lozenge faces, and collaged the image of the Rastafarian male found in *Graduation* to which he had added a white lozenge mask, guitar and a cut out of hands. RP Aff. ¶ 59.

395. He then affixed with paint these sheets of canvas to another unprimed canvas. *Id.*

396. This painting is a sister painting to Prince's other untitled works, and also depicts a contemporary band. *Id.*

Untitled (Rasta), 2008 (See Composite Exhibit A, p. 37).

397. Prince used similar techniques to create as he used to create the other versions of *Untitled (Rasta)*. RP Aff. ¶ 60.

398. Prince cut out, enlarged and scanned onto a canvas images of three nude female figures, to which he added a white lozenge face. *Id.*

399. He also collaged a cut-out the image of the Rastafarian found in *Graduation* to which he had added a white lozenge mask, guitar and a cut out of hands. *Id.*

400. He then affixed with paint these sheets of canvas to another unprimed canvas. *Id.*

401. This painting also depicts a contemporary band, with the Rastafarian representing the lead male in the band. RP Aff. ¶ 60. *Id.*

Ding Dong the Witch is Dead, 2008.

402. In *Ding Dong the Witch is Dead*, Prince 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.

RP Aff. ¶ 61.

403. None of the images found in *Yes Rasta* appear in this work. There is, however, an image he took from a book about Bob Marley to further his artistic concept of post-apocalyptic bands, and his message of equality between the sexes. *Id.*


4. Attached hereto as Exhibit C are excerpts from the transcript of the deposition of Christiane Celle, taken on January 26, 2010.

5. Attached hereto as Exhibit D is a copy of a photograph entitled *V-J Day in Times Square*, by Alfred Eisenstaedt, referred to in *Monster Communications, Inc. v. Turner Broadcasting System, Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996).

6. Based on the evidence and the applicable law, it is respectfully submitted that defendants' motion for summary judgment should be denied in its entirety.

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 11, 2010, at New York, New York.


DANIEL J. BROOKS

Prince

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

PATRICK CARIOU,

Plaintiff,

Index No.:

vs.

08 CIV 11327 (DAB)

RICHARD PRINCE, GAGOSIAN

GALLERY, INC., LAWRENCE

GAGOSIAN, and RIZZOLI

INTERNATIONAL PUBLICATIONS,

INC.,

Defendants.

-----x

VIDEOTAPED DEPOSITION OF RICHARD PRINCE

New York, New York

Tuesday, October 6, 2009

Reported by:
Bryan Nilsen, RPR
JOB NO. 304040

<p style="text-align: right;">Page 150</p> <p>1 Prince 2 was for the occasion of a show. 3 Q. A show of yours? 4 A. Of mine at the Patrick Seguin 5 Gallery. 6 Q. A show that has nothing to do with 7 the Canal Zone? 8 A. It had nothing to do with the Canal 9 Zone. 10 Q. All right. Well, for whatever 11 reason, they asked you some questions about the 12 Canal Zone -- 13 A. Yes. 14 Q. -- probably because of the temporal 15 proximity. So I would like to have you look at 16 the second question. 17 Your series will be up at a time 18 when perhaps Barack Obama will be president. 19 It could become iconic if it coincides with a 20 pivotal moment in American history. And -- 21 (Interruption.) 22 (Record read.) 23 Q. So then the answer apparently was, 24 That's possible. It is strange for a white man 25 like myself to start painting black people. I</p>	<p style="text-align: right;">Page 152</p> <p>1 Prince 2 Q. Which you had done with some 3 De Kooning works before? 4 MS. BART: Objection, form. 5 Q. Go ahead. 6 A. I had done the same thing to a 7 De Kooning book. 8 Q. Right. Now, you said -- I'm reading 9 what you said -- for two or three years I 10 continued to be inspired by these Rastafarians. 11 So, given -- 12 A. That's the translation. This -- 13 Q. Okay. 14 A. Can I just say that this is -- 15 Q. Yes. 16 A. I've read this interview. 17 Q. Yes. In French? 18 A. Because it just came out in a book. 19 Q. Yes. 20 A. It's one of the worst translations 21 I've ever read. Anyway, I'm just -- I just 22 would like to get that on the record. 23 Q. Okay. But this translation was done 24 for my law firm, so you certainly haven't read 25 this translation. You may have read another bad</p>
<p style="text-align: right;">Page 151</p> <p>1 Prince 2 found a black-and-white book on Rastafarians 3 when I was on vacation in St. Barth's. I 4 started drawing directly in the book like I had 5 done before in a book of De Kooning's work. For 6 two or three years I continued to be inspired by 7 three Rastafarians -- I'm sorry, I continued to 8 be inspired by these Rastafarians. I drew faces 9 on their faces using the shades of the book, the 10 different skin colors, the wild hair styles, all 11 dreadlocked, their poses and their looks. I was 12 listening to Rasta music at the time, one of my 13 son's tapes. 14 Was that a Bob Marley tape? 15 A. No, it wasn't. It was a group 16 called Radiodread. One word. 17 Q. Now, the black-and-white book on 18 Rastafarians that you found, was that this 19 Yes Rasta book by Patrick Cariou? 20 A. Yes. 21 Q. And you said you started drawing in 22 the book. You actually -- actually in the book, 23 you didn't copy, you just write in the book, you 24 were drawing things? 25 A. Yes.</p>	<p style="text-align: right;">Page 153</p> <p>1 Prince 2 translation, but you haven't read this one. 3 A. Oh. Well -- 4 Q. This was done for us recently. 5 A. Okay. All right. 6 Q. But -- fine. If it's incorrect, I 7 would like to know. 8 So is it correct that you were 9 drawing in the Yes Rasta book? 10 A. Yes. 11 Q. And is it correct that given that 12 this is 2008, this interview, that this drawing 13 in the book went on for two or three years? 14 A. The drawing in the book -- no, I 15 believe it started when I bought the book. 16 Q. In 2008? 17 A. When I was on vacation. So 2005. 18 I bought the book and I started -- I was on 19 vacation, and I started to make drawings in the 20 book. 21 Q. Okay. 22 A. And -- 23 Q. You were on vacation? 24 MR. HAYES: Hold on. He hasn't 25 finished his answer.</p>

Page 154

1 Prince
 2 A. Because you had asked me if I had
 3 been doing it for two or three years. I did it
 4 for two weeks out of every year for two years.
 5 So I was drawing in the book for maybe
 6 approximately three to four weeks.
 7 Q. Total?
 8 A. I'm just trying to answer the
 9 question.
 10 Q. Just so I'll understand.
 11 A. Okay.
 12 Q. You found this book in St. Barth's?
 13 A. I bought it at a bookstore.
 14 Q. In St. Barth's?
 15 A. Yes.
 16 Q. Where? In a hotel gift shop or --
 17 A. It was a regular bookstore.
 18 Q. A bookstore?
 19 A. Yes.
 20 Q. On St. Barth's?
 21 A. In St. Barth's, yes.
 22 Q. And you think around 2005?
 23 A. Yes. To the best of my
 24 recollection, yes, 2005.
 25 Q. And then did you -- I understand it

Page 155

1 Prince
 2 wasn't continuous, but did you start writing in
 3 the book right then or did you --
 4 A. I believe I did probably the next
 5 day.
 6 Q. And then at some point you put it
 7 aside?
 8 A. I started writing first. I used it
 9 as a notebook. I started making notes because
 10 of my Canal Zone idea.
 11 Q. For the pitch?
 12 A. Because I was -- yeah, I was writing
 13 about the pitch because of -- yeah, there was
 14 some blank pages.
 15 Q. In the book?
 16 A. In the book.
 17 Q. You wrote things like CIA, Jack
 18 Ruby?
 19 A. Yes.
 20 Q. Lee Harvey Oswald, CIA?
 21 A. Yes.
 22 Q. Kennedy?
 23 A. Right.
 24 Q. Something about the Kennedy
 25 assassination apparently?

Page 156

1 Prince
 2 A. I was thinking out loud, yes.
 3 Q. Okay, good.
 4 Then what was it -- and I realize
 5 the translation may not be --
 6 A. That's okay.
 7 Q. And feel free to tell us it's wrong.
 8 But it says for two or three years I continued
 9 to be inspired by these Rastafarians. What, if
 10 anything, inspired you about them?
 11 MR. HAYES: Objection to the form.
 12 You can answer.
 13 A. I believed at the time that I had
 14 maybe made a connection to the De Kooning
 15 paintings that I was painting. And I believe
 16 I had found subject matter that I knew nothing
 17 about, which is a position I like to put myself
 18 in, in order to discover new things and be able
 19 transform something that once existed over here
 20 to over here.
 21 Q. Okay.
 22 A. So therefore, when I say perhaps I
 23 was inspired, I decided with the De Kooning
 24 women paintings my contribution would be a man.
 25 And I felt -- I mean and this is, again, it's a

Page 157

1 Prince
 2 long time ago, but I believe I was thinking that
 3 the man in the De Kooning paintings should be a
 4 Rastafarian.
 5 Q. Let me just back up.
 6 You said something about this
 7 brought back to you growing up in the Canal Zone
 8 for six years?
 9 MR. HAYES: In his prior answer?
 10 Q. No, earlier today.
 11 Do you remember saying something
 12 like that?
 13 MS. BART: Can I hear the question
 14 back, please?
 15 A. Yes, I remember you, yeah, you
 16 asking me a question about the Canal Zone.
 17 Q. Right.
 18 A. Yeah. I mean I remember the
 19 question.
 20 MR. HAYES: Could I have this
 21 question read back, the last question?
 22 (Record read.)
 23 MR. HAYES: In this book?
 24 MR. BROOKS: Yes.
 25 THE WITNESS: I'm sorry, so can I

Page 190

1 Prince
 2 A. Yeah, you know --
 3 MR. HAYES: Investment bank?
 4 THE WITNESS: What?
 5 MR. HAYES: An investment bank?
 6 THE WITNESS: Yeah, an investment
 7 bank.
 8 Q. In fact, he later bought one of your
 9 paintings at the Canal Zone show, didn't he?
 10 A. Yes.
 11 Q. Which one?
 12 A. I believe it was -- I would have to
 13 look. I mean I know the painting, I just don't
 14 recall the title.
 15 Q. Okay. You can visualize it?
 16 A. I can visualize it, yes.
 17 Q. Can you visualize how much he paid
 18 for it?
 19 MR. HAYES: Objection to form.
 20 MS. BART: Objection to form.
 21 Q. You can answer.
 22 A. I believe he paid around two-million
 23 dollars, but I don't know that for sure because
 24 of -- I'm not --
 25 Q. -- sure which painting it was?

Page 191

1 Prince
 2 A. I know which painting it was, I just
 3 don't know --
 4 Q. The title?
 5 A. -- the exact amount.
 6 Q. All right.
 7 MR. BROOKS: Let's mark as
 8 Plaintiff's Exhibit 18 an e-mail from
 9 Mr. Prince dated July 26, 2007, Bates
 10 stamped GGP004307.
 11 (Plaintiff's Exhibit 18, e-mail
 12 dated July 26, 2007, was marked for
 13 identification, as of this date.)
 14 Q. Is this an e-mail that you sent to
 15 Larry Gagosian?
 16 A. It looks -- yes, I believe it is.
 17 Q. And you said you had a couple of
 18 thoughts about guns and ammo, what did you mean
 19 about that? What did you mean by using that
 20 phrase guns and ammo?
 21 A. I believe it was a way of trying to
 22 describe the paintings that were going to be
 23 shown at Eden Rock at that show.
 24 Q. So it says this is a storyboard for
 25 a screenplay about some guy named Charles

Page 192

1 Prince
 2 Company?
 3 A. Mm-hmm.
 4 Q. For the record, you have to say yes
 5 or no.
 6 A. Oh, I'm sorry. Yes.
 7 Q. All right. He arrives in
 8 St. Barth's with his wife and children and finds
 9 out when he gets to St. Barth's that something
 10 horrible has happened?
 11 A. Yes.
 12 Q. A nuclear war consuming most of
 13 civilization, is that right?
 14 A. Yes.
 15 Q. And then he becomes Charlie Company
 16 instead of Charles Company by which you meant
 17 what?
 18 A. I just thought it was an interesting
 19 way to change his name. He becomes an action
 20 hero.
 21 Q. Becomes weaponized?
 22 A. Yes.
 23 Q. So that --
 24 A. He can fight --
 25 Q. In the aftermath of nuclear war he

Page 193

1 Prince
 2 has to fend for himself, is that the idea?
 3 A. Yes.
 4 Q. You compared him to Steven Segal?
 5 A. Yes.
 6 Q. And Under Siege?
 7 A. Yes.
 8 Q. Which is a movie where a submarine
 9 is taken over?
 10 A. Yes.
 11 Q. And he kills everyone, right?
 12 I think I saw that movie.
 13 I agree with you, it was a good
 14 movie.
 15 MR. HAYES: A couple of Steven Segal
 16 fans here.
 17 MR. BROOKS: What?
 18 MR. HAYES: We got a couple of
 19 Steven Segal fans here.
 20 MR. BROOKS: Yeah, I liked that
 21 movie.
 22 MS. BART: The only two.
 23 BY MR. BROOKS:
 24 Q. And then Jimi Hendrix is going to be
 25 on the soundtrack, right? Is that right?

Page 342

1 Prince
2 Q. Right.
3 A. Maybe that has something to do with
4 it. I mean I don't think the original intent of
5 that image on a donkey ever thought about
6 filling up the donkey with a gas tank at the gas
7 station. I don't even know if there's gas
8 stations in Jamaica. You know, that's not my --
9 Q. There are.
10 A. That's not what I think about.
11 Q. Okay.
12 A. What I think about is how can this
13 collage form a new kind of band, and the band is
14 called Back to the Garden. I mean I think
15 there's even a song by Joni Mitchell called Back
16 to the Garden.
17 Q. Right.
18 A. It was at Woodstock. I see this as
19 a kind of a Woodstock picture. I went to
20 Woodstock --
21 Q. And you took acid, so did Glenn
22 O'Brien, I read that.
23 A. -- and I took one photograph.
24 Q. With your last remaining --
25 A. With my -- which is an important

Page 343

1 Prince
2 point.
3 Q. It is. No, never mind.
4 Does it relate to this painting?
5 A. Again, it's a reading. This could
6 be about --
7 Q. Taking acid at Woodstock?
8 A. No, I didn't take acid at Woodstock.
9 I do think it could be a reading because of the
10 title and because Joni Mitchell wrote it.
11 I just -- actually, it didn't occur
12 to me until this moment that she wrote that.
13 Q. Right. Okay. So this is supposed
14 to be a rock-and-roll band, these four people?
15 A. Yes. Actually --
16 Q. And the donkey, what instrument does
17 he play?
18 MR. HAYES: Objection.
19 A. He's the roadie.
20 Q. He's the roadie? Okay.
21 Now, take a look at this comparison
22 that we marked as Exhibit 40 before.
23 Now, these pages are Bates stamped
24 at the bottom. So could you turn to 39, C00039?
25 A. Yes.

Page 344

1 Prince
2 Q. And this is taken from the insert in
3 your book?
4 A. Yes. No, I had it right here.
5 There's another insert also.
6 Q. There are three inserts?
7 A. Yes.
8 Q. But let's stick with this picture
9 here.
10 A. Okay.
11 Q. So the one on the bottom is a photo
12 in the Yes Rasta book?
13 A. Yes, it is. It's a reproduction in
14 the book, yes.
15 Q. Right. Of a photo.
16 And above looks like you've taken
17 that entire photo and put it in your studio?
18 A. I've taken the entire photo and had
19 it, the inkjet process, blown up to a very large
20 scale on canvas and stretched it on stretcher
21 bars. That's what we're looking at on the top
22 of that photo.
23 Q. Let me just find -- okay. Here is
24 the photo in the book. Here it is, okay?
25 A. Yes.

Page 345

1 Prince
2 Q. Do you agree that's the photo?
3 A. That's the photograph. That's the
4 reproduction.
5 Q. Are you saying that the thing in
6 your -- is this in your studio?
7 A. Not any longer.
8 Q. Well, where was this?
9 A. Where was it?
10 Q. Yes.
11 A. I'll show you.
12 This is --
13 Q. No, no, no, no, no.
14 You misunderstand --
15 A. You asked me where the photograph
16 is.
17 Q. No.
18 A. And I'm answering you.
19 Q. No, no, no, no.
20 MR. HAYES: He's asking you whether
21 or not --
22 Q. When this was taken -- I'm just
23 trying to explain what this is showing. That's
24 all.
25 A. Okay.

Gagosian

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PATRICK CARIOU,

Plaintiff, Index No.:

vs.

08 CIV 11327 (DAB)

RICHARD PRINCE, GAGOSIAN

GALLERY, INC., LAWRENCE

GAGOSIAN, and RIZZOLI

INTERNATIONAL PUBLICATIONS,

INC.,

Defendants.

-----x

VIDEOTAPED DEPOSITION OF LAWRENCE GAGOSIAN

New York, New York

Thursday, October 8, 2009

Reported by:
Bryan Nilsen, RPR
JOB NO. 304041

Page 138

1 Gagosian
 2 Q. And the first painting -- well,
 3 there are four Prince paintings that you traded
 4 this one for. Did you select these four or was
 5 it just random or what?
 6 A. I selected them.
 7 Q. And did you select them because you
 8 liked them?
 9 A. That's right.
 10 Q. And in the first one do you know who
 11 Djuna Barnes, Natalie Barney, Renée Vivien, and
 12 Romaine Brooks are?
 13 A. They're writers. I know they're
 14 female -- I think they're women writers. I
 15 don't know who Yvonne Barnes is. I don't know
 16 all of them, but I think they're novelists or
 17 writers. I'm not sure.
 18 Q. Is the Guanahani -- though that
 19 might not be the right spelling -- Hotel in
 20 St. Barth's?
 21 A. Yes, it is.
 22 Q. The next one is James Brown Disco
 23 Ball. Do you know if Mr. Prince purchased a
 24 James Brown disco ball?
 25 A. What are you asking me?

Page 139

1 Gagosian
 2 Q. Do you know if Mr. Prince purchased
 3 a James Brown disco ball?
 4 A. I think so, yes.
 5 Q. What is a disco ball, one of those
 6 balls that's up in the ceiling and lights
 7 reflect off it?
 8 A. I think that's what it is, yeah.
 9 Q. So he selected that painting as
 10 well.
 11 And now, the third one, Graduation,
 12 is that the invitation painting?
 13 MS. BART: Objection, form.
 14 Q. If you know.
 15 A. If I saw the invitation I could tell
 16 you.
 17 Q. I guess 53A?
 18 MS. BART: 52.
 19 A. It looks like it was, yeah.
 20 MS. BART: Don't guess. He doesn't
 21 want you to guess.
 22 Q. Because I'm actually confused --
 23 A. No, it's a different painting.
 24 Q. Okay. So let me just ask you to
 25 look in the book. There's one called Meditation

Page 140

1 Gagosian
 2 and one called Graduation. They're similar and
 3 that's why I'm --
 4 A. Yeah.
 5 Q. If you look at -- they're both in
 6 the front of the book. Graduation is the very
 7 first painting. I'd give you a page number but
 8 there isn't one.
 9 A. Yeah, I got it.
 10 Q. So that's the one you traded for,
 11 correct?
 12 A. Correct.
 13 MS. BART: Objection, form.
 14 A. I'm sorry.
 15 Q. And then if you go to the sixth
 16 painting I think it's Meditation.
 17 A. Right.
 18 Q. Did you find Meditation?
 19 A. I found it.
 20 Q. Now, is that, to the best of your
 21 knowledge, is that the invitation?
 22 A. I think so, yes, looks like it.
 23 Q. I mean they're similar obviously?
 24 MS. BART: Objection, form.
 25 A. The only problem is I'm not looking

Page 141

1 Gagosian
 2 at the actual invitation, so I mean --
 3 Q. I know. Do you have any left?
 4 A. I'm sure we do.
 5 RQ MR. BROOKS: I'd like to request an
 6 actual invitation, just one.
 7 MS. BART: We'll get you one if we
 8 have it.
 9 BY MR. BROOKS:
 10 Q. And the last painting is another one
 11 by Richard Prince, right?
 12 It's All Over -- I'm back to
 13 exhibit --
 14 A. Yeah --
 15 MS. BART: Which one are you up to?
 16 Q. I'm back to Exhibit 60.
 17 MS. BART: This one.
 18 Q. The second page. It's All Over is
 19 another one of these Richard Prince paintings
 20 from the Canal Zone show, right?
 21 A. Correct.
 22 Q. Have you sold any of those four
 23 paintings that you obtained in exchange for
 24 Dying and Dead Veteran?
 25 A. Yes, I have.

Page 142

1 Gagosian
 2 Q. Which one or ones?
 3 A. I think the only one that I've sold
 4 is It's All Over.
 5 Q. And to whom did you sell it?
 6 MS. BART: I'm going to instruct the
 7 witness not to answer the name.
 8 A. I'm not going to give you the name
 9 of the customer.
 10 Q. How much did you sell it for?
 11 A. I sold it I believe for 1.1-million
 12 dollars.
 13 Q. And did you sell it personally or
 14 was it the gallery that sold it?
 15 I asked you a bad question. I said
 16 did you sell it, and I don't know if you in
 17 answering that you were referring to I sold it
 18 personally or Gagosian sold it?
 19 A. The gallery sold it.
 20 Q. The gallery sold it. So the trade
 21 was not between you and Mr. Prince, it was
 22 between -- maybe there's some confusion?
 23 A. That's my accountant kind of
 24 question.
 25 Q. Okay. To the best of your

Page 143

1 Gagosian
 2 understanding when you traded the Larry Rivers
 3 painting for the four Prince paintings did you
 4 become, you personally become the owner of the
 5 four Prince paintings?
 6 A. I don't know the answer to that.
 7 It could be that the gallery became the owner.
 8 I mean that's my accountant's kind of question.
 9 I really don't know the answer to that.
 10 Q. In any event, you sold it for
 11 1.1-million dollars?
 12 A. That's correct.
 13 Q. And your lawyer has instructed
 14 you --
 15 MS. BART: And the you could be
 16 Gagosian or him, right, that's what you
 17 mean?
 18 MR. BROOKS: I guess. I don't think
 19 it matters.
 20 MS. BART: Then I'm going to object
 21 to the form of the question. Because the
 22 witness --
 23 Q. Who got the 1.1-million dollars?
 24 A. Gagosian Gallery.
 25 Q. Not you?

Page 144

1 Gagosian
 2 A. Not me.
 3 Q. Did you pay a commission on that
 4 particular sale to anyone?
 5 A. I don't recall.
 6 Q. When did you sell It's All Over?
 7 A. I think it was August I believe.
 8 Q. Of what year?
 9 A. This year.
 10 Q. 2009?
 11 A. Yeah.
 12 Q. The other three, you think you
 13 didn't sell them yet, right?
 14 A. I believe I still have them.
 15 Q. Are you trying to sell them?
 16 A. Not really.
 17 Q. If a buyer came along would you sell
 18 them or do you want to keep them?
 19 MS. BART: Objection, form, calls
 20 for speculation. Not answering.
 21 MR. BROOKS: It's not speculation.
 22 MS. BART: Yeah, you did. If a
 23 buyer came along would you sell them?
 24 BY MR. BROOKS:
 25 Q. Do you have a present intention of

Page 145

1 Gagosian
 2 selling those paintings?
 3 A. Not actively.
 4 MS. BART: Objection, form.
 5 A. Not actively.
 6 Q. Passively?
 7 MS. BART: Objection, form.
 8 A. That's kind of a difficult question.
 9 They're not on the market.
 10 Q. Okay. And how do you put a painting
 11 on the market?
 12 A. Well, I indicate either I contact a
 13 potential customer or I have somebody in my
 14 organization contact a potential customer and,
 15 you know, make them aware of the availability.
 16 Q. And that's not been done?
 17 MS. BART: Objection, form.
 18 A. No. To the best of my knowledge,
 19 these paintings are not actively on the market.
 20 Q. Was It's All Over on the market
 21 before you sold it?
 22 MS. BART: Objection, form.
 23 A. No, it wasn't.
 24 Q. Somebody approached you to buy it?
 25 A. That's right.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK CARIOU,

Plaintiff,

vs.

Index No.: 08 CIV 11327

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

Defendants.

DEPOSITION OF

CHRISTIANE CELLE

Tuesday, January 26, 2010
10:00 a.m.

Schnader Harrison Segal & Lewis LLP
140 Broadway, Suite 3100
New York, New York 10005-1101

Reported by:
Bryan Nilsen, RPR



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<p style="text-align: center;">73</p> <p>1 Celle</p> <p>2 here?</p> <p>3 MR. BROOKS: These are the e-mails</p> <p>4 that I have.</p> <p>5 MR. HAYES: Off the record.</p> <p>6 (Discussion off the record.)</p> <p>7 MR. HAYES: Let me have marked as</p> <p>8 Defendant Celle Exhibit 2 a four-page</p> <p>9 document which contains what I believe to</p> <p>10 be a series of e-mails.</p> <p>11 The top one says from Patrick Cariou</p> <p>12 and it bears a date January 29, 2009.</p> <p>13 (Defendant's Exhibit 2, series of</p> <p>14 e-mails, was marked for identification, as</p> <p>15 of this date.)</p> <p>16 MR. HAYES: While he's doing that</p> <p>17 let's take a break for a minute.</p> <p>18 (Recess taken: 11:15 a.m.)</p> <p>19 (Proceedings resumed: 11:20 a.m.)</p> <p>20 BY MR. HAYES:</p> <p>21 Q. Ms. Celle, I would like to refer you</p> <p>22 to what's marked as Defendant Celle Exhibit 2</p> <p>23 for identification and ask you, this is an</p> <p>24 exchange of e-mails between Patrick Cariou and</p> <p>25 yourself?</p>	<p style="text-align: center;">75</p> <p>1 Celle</p> <p>2 Q. Okay. So as we go through it we'll</p> <p>3 just identify which are duplicates.</p> <p>4 A. Great. Okay.</p> <p>5 Q. So the first thing is if you could</p> <p>6 translate for us, please, this e-mail on the</p> <p>7 bottom page 4 with "Chere Christiane"?</p> <p>8 A. Page 4, right. Very good.</p> <p>9 From Patrick.</p> <p>10 Dear Christiane, I'm happy to know</p> <p>11 that all your projects are moving on. I will be</p> <p>12 in New York in the two next month. Something</p> <p>13 incredible is happening to me with Richard</p> <p>14 Prince. Richard Prince – that's slang – "c,es</p> <p>15 vautrer dans Yes Rasta" – it's hard to</p> <p>16 translate, that means picked something in</p> <p>17 Yes Rasta – Richard Prince picked something in</p> <p>18 Yes Rasta.</p> <p>19 Q. That would be the line – could you</p> <p>20 read the line in French just so I understand?</p> <p>21 A. Yes.</p> <p>22 "En effet prince c,es vautrer dans</p> <p>23 yes rasta."</p> <p>24 Q. And just so I'm accurate, could you</p> <p>25 please give me the best translation from French</p>
<p style="text-align: center;">74</p> <p>1 Celle</p> <p>2 A. Correct, yes.</p> <p>3 Q. And is it correct – the document</p> <p>4 physically is four pages, and would it be</p> <p>5 correct to say that the exchange begins on the</p> <p>6 last page on January 29, 2009, at 6:04 a.m.,</p> <p>7 with Mr. Cariou writing to you?</p> <p>8 A. Yes.</p> <p>9 Q. And then continues in point of time</p> <p>10 getting later as we go up this page and through</p> <p>11 the other pages, correct?</p> <p>12 A. Correct.</p> <p>13 Q. So just to be clear, and because I</p> <p>14 unfortunately do not speak French, could you</p> <p>15 start with the first of the e-mails, the one on</p> <p>16 January 29, on the bottom portion of the last</p> <p>17 page of this document and translate it for us</p> <p>18 beginning with "Chere Christiane"?</p> <p>19 A. I'm just confused because I have</p> <p>20 doubles here. So I don't know –</p> <p>21 Q. We have more than one copy of a</p> <p>22 particular e-mail?</p> <p>23 A. Yeah. I think it's the same thing.</p> <p>24 Q. Perhaps we do. Okay.</p> <p>25 A. So it's okay.</p>	<p style="text-align: center;">76</p> <p>1 Celle</p> <p>2 again?</p> <p>3 A. Yeah, in French "c,es vautrer" it's</p> <p>4 slang, so it's hard to translate.</p> <p>5 It's, you know, like kids – "c,es</p> <p>6 vautre" is like kids lying on the sofa would</p> <p>7 be – so it's an expression that's very hard to</p> <p>8 translate. But what he meant by that is Richard</p> <p>9 Prince went to look into the Yes Rasta.</p> <p>10 Q. That's the meaning you took from it?</p> <p>11 A. Yes, that's what – you know.</p> <p>12 Q. Give me, if you would, your best</p> <p>13 translation of the actual words?</p> <p>14 A. "C,es vautrer," I mean –</p> <p>15 Q. Just start with the whole line.</p> <p>16 A. It's like Richard Prince is laying</p> <p>17 on the Rasta, you know.</p> <p>18 Q. Okay.</p> <p>19 A. It's hard to translate.</p> <p>20 Q. And the next line?</p> <p>21 A. He just had a show at Gagosian where</p> <p>22 he's using 30 of my photographs as a central</p> <p>23 theme. Please see attachment. I am doing a</p> <p>24 lawsuit. Please see the links. New York Times</p> <p>25 blog – there is a New York Times link.</p>

77	79
<p>1 Celle</p> <p>2 Q. And was there an attachment to this</p> <p>3 e-mail?</p> <p>4 A. Honestly, I'm sure there was one.</p> <p>5 Q. Do you recall seeing one, opening</p> <p>6 one, what it was?</p> <p>7 A. I opening one -- I opened one,</p> <p>8 but --</p> <p>9 Q. Do you remember what it was?</p> <p>10 A. Yeah, there was a whole article</p> <p>11 about the lawsuit, but the detail I don't really</p> <p>12 remember.</p> <p>13 Q. And did you then also go to this</p> <p>14 site that's referred to in the e-mail?</p> <p>15 A. I think I opened the blog, New York</p> <p>16 Times, yes.</p> <p>17 Q. So there was an attachment which was</p> <p>18 an article about the lawsuit, and then you also</p> <p>19 went to the blog, is that correct?</p> <p>20 A. I remember going somewhere where</p> <p>21 there was New York Times and, you know, the</p> <p>22 article, yes, I do remember that.</p> <p>23 Q. Just to be clear, were there two</p> <p>24 articles you read or one, or you don't remember?</p> <p>25 A. I remember one. I remember the</p>	<p>1 Celle</p> <p>2 A. "Qu'ad meme pas genial" means not</p> <p>3 great to do that. And "vendre si cher" means</p> <p>4 sell so expensive.</p> <p>5 Q. Okay, go ahead.</p> <p>6 A. It is called "plagiat" but that's a</p> <p>7 French name. The French name "plagiat" is like</p> <p>8 copying. It's called "plagiat." I don't know</p> <p>9 if you use that name here.</p> <p>10 I hope you get something out of it.</p> <p>11 "Dedommage" means like I hope you will get some</p> <p>12 money compensation.</p> <p>13 Q. I'll just ask you a question. The</p> <p>14 phrase, "non le mot francais," what does that</p> <p>15 mean?</p> <p>16 A. "Cela se nomme plagiat" -- "plagiat"</p> <p>17 is the French name. I don't know American name,</p> <p>18 but "plagiat" is copying somebody.</p> <p>19 Q. And I was actually asking about the</p> <p>20 four words after that, "non le mot francais"?</p> <p>21 A. I don't know why there is "non,"</p> <p>22 there should not be that.</p> <p>23 (Clarification by reporter.)</p> <p>24 A. "Cela se nomme," means this means</p> <p>25 "plagiat," the French word. I don't know why</p>
78	80
<p>1 Celle</p> <p>2 New York Times.</p> <p>3 Q. Then the next e-mail up above, is</p> <p>4 that a response by you to Mr. Cariou?</p> <p>5 A. Patrick, right.</p> <p>6 The "Antoine me dit"? Yeah.</p> <p>7 Q. Yes. And that one, just so we're</p> <p>8 clear, I think is dated January 29, '09, and</p> <p>9 it's from you to Mr. Cariou, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And then, by the way, above that</p> <p>12 ending with the word Patrick is a response from</p> <p>13 him back to you to your e-mail. There are three</p> <p>14 e-mails on this page?</p> <p>15 A. Correct.</p> <p>16 Q. So focusing on just the second</p> <p>17 e-mail, which is your e-mail to Mr. Cariou,</p> <p>18 could you please translate that for us?</p> <p>19 A. Antoine, who is my husband, is</p> <p>20 telling me that he is used to do this kind of</p> <p>21 thing and then, you know, he has lawyer to deal</p> <p>22 with it. This is not great to do this kind of</p> <p>23 thing and selling the work so expensive.</p> <p>24 Q. Selling the work so expensive, what</p> <p>25 line does that appear?</p>	<p>1 Celle</p> <p>2 there is a "non," I'm sorry, but the French</p> <p>3 word.</p> <p>4 Q. But do the four words "non le mot</p> <p>5 francais" have any meaning to you at all?</p> <p>6 A. No, I think "non" it's a typo</p> <p>7 because that doesn't mean anything in -- you</p> <p>8 know.</p> <p>9 Q. In French?</p> <p>10 A. Yeah.</p> <p>11 Q. How about "le mot francais"?</p> <p>12 A. "Le mot" is the word, French name.</p> <p>13 "Le mot" is French name.</p> <p>14 "Plagiat" will be the French name</p> <p>15 for that kind of action.</p> <p>16 Q. But what is "le mot"?</p> <p>17 A. "Le mot"?</p> <p>18 Q. Yes.</p> <p>19 A. The word.</p> <p>20 Q. The word France?</p> <p>21 A. Yeah.</p> <p>22 Q. So those last three words say the</p> <p>23 word French?</p> <p>24 A. Yeah.</p> <p>25 Q. Go ahead. Keep going, please.</p>



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101

1 Celle
 2 Q. "Bonne chance en tout cas" means
 3 good luck in your case?
 4 A. Yes.
 5 MR. BROOKS: Does it mean in your
 6 case or in any case?
 7 A. "Bonne chance" in any case, whatever
 8 happens, "bonne chance" to you.
 9 Q. And then there is a response by
 10 Patrick Cariou, what appears to be a one-line
 11 response at 16:03 on the 29th?
 12 A. Yeah.
 13 Q. And that's one line with two
 14 question marks.
 15 A. Yeah. He's saying thank you on my
 16 book, interesting, new, because he wants to sell
 17 that collection of book, so he's asking if I'm
 18 interested in those books, his big book
 19 collection.
 20 Q. And then you respond to him by
 21 e-mail, which I don't see has time on it, but
 22 it's also on the 29th and it says "oui bien
 23 sur"?
 24 A. Yeah.
 25 Q. And that consists of --

102

1 Celle
 2 A. Yes, of course. I mean that means
 3 I will be interested to see your collection.
 4 I buy some online. I already bought 40 Rasta
 5 and we sold them.
 6 "En revanche" means on the other
 7 side I've not been very lucky with Surfer
 8 because they are very hard to find, very
 9 difficult to find. But every week I am looking
 10 for -- "un par si par la" means everywhere I
 11 can. Rasta people adore the book, really love
 12 it. Can you do a reprint of the book.
 13 Q. And then we have at the very top his
 14 response to you, which I think we established
 15 before was at 10:31 on January 29.
 16 And now with that leading into this
 17 can you then translate those four lines for us,
 18 please?
 19 A. Yeah.
 20 For Rasta you can call my publisher
 21 Powerhouse Book. In reality I was mentioning my
 22 private collection, the big collection, with
 23 beautiful, rare, vintage pieces and some not as
 24 beautiful.
 25 Q. And that's it?

103

1 Celle
 2 A. Yeah.
 3 Q. Okay. And so between January 29th
 4 and the time --
 5 MR. BROOKS: I'm sorry, that last
 6 line, does it say they're less rare but
 7 very beautiful?
 8 A. Yeah, very beautiful.
 9 MR. BROOKS: And less rare?
 10 A. Yes.
 11 Q. Between that e-mail on January 29th
 12 and the time that he came to your gallery to see
 13 the show did you have any e-mail contact with
 14 him?
 15 A. No, but this refreshed my memory.
 16 When this happened, as you could
 17 see, we are not corresponding. He's talking
 18 about his whole collection and I'm talking about
 19 the Rasta.
 20 So I called him. I remember I call
 21 him. And we talk about the whole thing, you
 22 know, and -- well, he was going on and on with
 23 his lawsuit. And, you know, we talk about a
 24 book and everything.
 25 And I say to him, you know, I saw a

104

1 Celle
 2 few months ago I try to call you, you know, I
 3 heard about what was happening in the gallery,
 4 I tried to call you, you never call me back.
 5 Q. Did he say why he didn't call you
 6 back?
 7 A. You know, he said, you know, my
 8 cellular phone sometimes, you know --
 9 Q. Your what?
 10 A. He told me that sometimes he doesn't
 11 get all messages, you know.
 12 Q. Okay.
 13 A. I mean, you know, and because of the
 14 holiday I guess. Also in St. Barths I don't
 15 have -- my 917 phone in New York doesn't work
 16 there. So I don't know -- we didn't communicate
 17 really.
 18 But what I told him at that moment
 19 is of course I want to carry the book, I think
 20 you should try to do a reprint because it's a
 21 very important book.
 22 And I say to him, anyway, now I
 23 understand more what happened because I didn't
 24 know when this happened, I didn't know if you
 25 worked with him.



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109

1 Celle
 2 through the books and give them to me and –
 3 which he did last week actually.
 4 Q. So the contacts in '09 were the
 5 e-mail exchange, the phone conversation, the
 6 visit to the studio?
 7 A. Yeah.
 8 Q. And his bringing the books to you
 9 last week?
 10 A. Yes.
 11 Q. Anything else?
 12 A. No, I don't recall anything else.
 13 Q. And after the telephone conversation
 14 in early February has there been any further
 15 discussion in any fashion of a show or not
 16 having a show?
 17 A. No.
 18 Q. Just so I'm clear, no other e-mails
 19 after this exchange of e-mails?
 20 A. I don't remember, no, I don't think
 21 so.
 22 MR. BROOKS: By the way, I should
 23 just say something for the record.
 24 We don't have the August e-mail
 25 that you marked as 1 because I told the

110

1 Celle
 2 witness – that came from our production,
 3 and I told the witness they already have
 4 this one, so look for others.
 5 MR. HAYES: Right.
 6 MR. BROOKS: But she does have that
 7 one also.
 8 MR. HAYES: Okay, great.
 9 BY MR. HAYES:
 10 Q. Just for the record, you have, of
 11 course, what we have marked as Exhibit 1, you
 12 have that in your own records?
 13 A. I mean I've seen that e-mail.
 14 Can I retrieve from my computer from
 15 2008? I don't know.
 16 Q. Okay. But you had it or have it?
 17 A. Yeah.
 18 Q. And you have the e-mails which we've
 19 marked as Exhibit 2?
 20 A. Yes.
 21 Q. And for e-mails that's it between
 22 you and Mr. Cariou?
 23 A. Yes.
 24 Q. No problem.
 25 In addition to the conversation you

111

1 Celle
 2 had with Mr. Cariou about not going forward with
 3 the show at that time, did you discuss that with
 4 anyone else?
 5 A. Probably Polly Campbell who worked
 6 with me, P-O-L-L-Y, C-A-M-B-E-L-L, because she's
 7 my closest person, you know, she's my assistant.
 8 Because she can follow up what I do every day.
 9 Q. Do you remember having that
 10 conversation or are you just assuming you had
 11 one?
 12 A. I remember informing her, you know,
 13 about what was going on.
 14 But, you know, it's a small office
 15 so I work with her every day. So she knew since
 16 November what was going on, you know, about, you
 17 know, Gagosian and Richard Prince.
 18 So, you know, I have about 20 other
 19 photographer, you know, that I – in five
 20 galleries. So it is true that Patrick was not
 21 always, you know, the conversation.
 22 Q. Plenty of other things to do?
 23 A. Yeah, especially at the end of the
 24 year because I had St. Barths and, you know.
 25 Q. Other than any conversation you

112

1 Celle
 2 may have had with Ms. Campbell do you recall
 3 discussing it with anyone else?
 4 A. My husband probably because, you
 5 know, he doesn't take care of the operation of
 6 the gallery. But, you know, we discuss artists
 7 and I tell him what I find, you know, the new
 8 artist or the exciting one.
 9 And, yeah, we talk about business
 10 because he put some money into the business.
 11 Q. And do you recall a specific
 12 conversation with your husband about this?
 13 A. No. The only thing I recall is the
 14 first time I heard about, you know, the
 15 Gagosian, Richard Prince, was from my husband.
 16 Q. Other than any conversations with
 17 your husband did you discuss it with anyone else
 18 besides Ms. Campbell and your husband?
 19 A. No.
 20 Q. And Mr. Cariou?
 21 A. No.
 22 Q. I'd like to go back to your finding
 23 out about the show, the Richard Prince show.
 24 A. Yes.
 25 Q. Which is entitled Canal Zone?



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- Alfred Eisenstaedt

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Contents	Editorial	The Platypus	Links	Copyright
Past Features	Camera Corner	War Stories	Dirck's Gallery	Comments
Issue Archives	Columns	Forums	Mailing List	E-Mail

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
PATRICK CARIOU,	:	
	:	
Plaintiff,	:	
	:	08 Civ. 11327 (DAB)
-against-	:	
	:	
RICHARD PRINCE, GAGOSIAN GALLERY,	:	
INC., LAWRENCE GAGOSIAN and RIZZOLI	:	
INTERNATIONAL PUBLICATIONS, INC.,	:	
	:	
Defendants.	:	
-----X		

**MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 2

POINT I

ALL FOUR STATUTORY FACTORS WEIGH HEAVILY AGAINST
DEFENDANTS’ FAIR USE DEFENSE 2

A. First Fair Use Factor: Prince’s Status as an Appropriation Artist
Does not Render “Transformative” Defendants’ Commercial
Exploitation of Cariou’s Work 2

1. As a Matter of Law, Prince’s Appropriation Was Not Transformative 2

2. Prince’s Improper Attempts to Change His Deposition Testimony 10

3. Commerciality and Bad Faith on the Part of the Defendants 15

B. Second Fair Use Factor: The Nature of Cariou’s Work is
Expressive and Creative, Fitting Squarely Within the Core of
Copyright Protection 15

C. Third Fair Use Factor: Prince’s Appropriation Was Excessive and
Unreasonable, Even if He Did not Take the Entire *Yes Rasta* Book 18

D. Fourth Fair Use Factor: The Harm to the Potential Market for
Cariou’s Work Was Caused by the Defendants’ Copyright
Infringement, not by any Delay by Cariou in Responding to
Christiane Celle, and Is Cognizable under the Copyright Act 21

POINT II

CARIOU’S FIFTH CLAIM FOR RELIEF SHOULD
NOT BE DISMISSED 24

CONCLUSION 25

TABLE OF AUTHORITIES**CASES**

<i>Andy Warhol Foundation for the Visual Arts, Inc. v. Federal Insurance Co.</i> , 189 F.3d 208 (2d Cir. 1999)	4
<i>Astor-Honor, Inc. v. Grosset & Dunlap, Inc.</i> , 441 F.2d 627 (2d Cir. 1971)	25
<i>Baraban v. Time Warner, Inc.</i> , No. 99 Civ. 1569 (JSM), 2000 WL 358375 (S.D.N.Y. Apr. 6, 2000).....	16
<i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> , 448 F.3d 605 (2d Cir. 2006)	9
<i>Blanch v. Koons</i> , 396 F. Supp. 2d 476 (S.D.N.Y. 2005)	16, 17
<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2006)	<i>passim</i>
<i>Bourne Co. v. Twentieth Century Fox Film Corp.</i> , 602 F. Supp. 2d 499 (S.D.N.Y. 2009)	6, 7, 21
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	23, 24
<i>Campbell v. Koons</i> , No. 91 Civ. 6055 (RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993).....	5
<i>Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.</i> , 150 F.3d 132 (2d Cir. 1998)	7, 15
<i>Consumers Union of the United States, Inc. v. General Signal Corp.</i> , 724 F.2d 1044 (2d Cir. 1983)	24
<i>Dauman v. Andy Warhol Foundation for the Visual Arts, Inc.</i> , No. 96 Civ. 9219 (TPG), 1997 U.S. Dist. LEXIS 8606 (S.D.N.Y. June 18, 1997).....	4
<i>Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp.</i> , 97 F. Supp. 2d 395 (S.D.N.Y. 2000)	20

Elvis Presley Enters. v. Passport Video,
349 F.3d 622 (9th Cir. 2003), *as amended*, 357 F.3d 896 (9th Cir.),
cert. denied, 542 U.S. 921 (2004)..... 16

Federal Deposit Insurance Corp. v. Wrapwell Corp.,
Nos. 93 Civ. 859 (CSH), 94 Civ. 5574 (CSH), 2002 U.S. Dist. LEXIS 76
(S.D.N.Y. Jan. 3, 2002)..... 13

Gaylord v. United States,
85 Fed. Cl. 59 (2008)..... 8

Gaylord v. United States,
595 F.3d 1364 (Fed. Cir. 2010) 8, 9

Harper & Row, Publishers, Inc. v. Nation Enters.,
471 U.S. 539 (1985)..... 20

Heyman v. Salle,
743 F. Supp. 190 (S.D.N.Y. 1989) 20

Leibovitz v. Paramount Pictures Corp.,
137 F.3d 109 (2d Cir. 1998) 6, 7

Lennon v. Premise Media Corp.,
556 F. Supp. 2d 310 (S.D.N.Y. 2008) 9

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,
545 U.S. 913 (2005)..... 25

Monster Communications, Inc. v. Turner Broad. System, Inc.,
935 F. Supp. 490 (S.D.N.Y. 1996) 17

NXIVM Corp. v. Ross Institute,
364 F.3d 471 (2d Cir.), *cert. denied*,
543 U.S. 1000 (2004)..... 20, 23

Raskin v. The Wyatt Co.,
125 F.3d 55 (2d Cir. 1997) 13

Ringgold v. Black Entm't Television, Inc.,
126 F.3d 70 (2d Cir. 1997) 9

Rogers v. Koons,
960 F.2d 301 (2d Cir.), *cert. denied*,
506 U.S. 934 (1992)..... 5, 16

Sarl Louis Feraud International v. Viewfinder Inc.,
627 F. Supp. 2d 123 (S.D.N.Y. 2008) 16

Sauerhaft v. Bd. of Educ. of the Hastings-On-Hudson Union Free Sch. Dist.,
 No. 05 Civ. 09087 (PGG), 2009 U.S. Dist. LEXIS 46196
 (S.D.N.Y. June 2, 2009)..... 11

Twin Peaks Productions, Inc. v. Publications Int’l, Ltd.,
 996 F.2d 1366 (2d Cir. 1993) 24

United Feature Syndicate, Inc. v. Koons,
 817 F. Supp. 370 (S.D.N.Y. 1993) 5

Universal City Studios, Inc. v. Am. Invsco Mgmt, Inc.,
 No. 80 C 1241, 1981 U.S. Dist. LEXIS 14225
 (N.D. Ill. May 26, 1981) 25

Video-Cinema Films, Inc. v. Cable News Network, Inc.,
 No. 98 Civ. 7128 (BSJ), 2001 U.S. Dist. LEXIS 25687
 (S.D.N.Y. Nov. 28, 2001) 24

Woods v. Universal City Studios, Inc.,
 920 F. Supp. 62 (S.D.N.Y. 1996) 20

STATUTES

17 U.S.C. § 101..... 8

17 U.S.C. § 106(1)..... 8

17 U.S.C. § 106(2)..... 7, 8

17 U.S.C. § 106(3)..... 8

17 U.S.C. § 106(5)..... 8

17 U.S.C. § 107..... 23

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PRELIMINARY STATEMENT

The memorandum of law of defendants Richard Prince, Gagosian Gallery, Inc. and Lawrence Gagosian in support of their motion for summary judgment (“Def. Mem.”), claims that Prince’s extensive copying of plaintiff Patrick Cariou’s photographs (the “Photographs”) is protected by the fair use doctrine, even though Prince’s paintings (the “Paintings”) do not in any way comment on or relate to the Photographs. Defendants’ arguments, which distort the law and the factual record, are: (1) as an “appropriation artist,” Prince was entitled to take whatever images he wanted, without limit and for any or no reason, and to remain willfully ignorant of the identities and rights of the victims of his piracy, failing which his creativity and ability to “convey new insights” would be “stifled”; (2) Cariou’s “factual” photographs of real people can be stolen with impunity; (3) as long as Prince did not appropriate the entire *Yes Rasta* book, he was entitled to take as many Photographs as he needed to produce his “fantastical post-apocalyptic” vision; and (4) Christiane Celle’s irrevocable decision to cancel Cariou’s show the instant she learned of Prince’s plagiarism (and the resulting cognizable harm to the market for Cariou’s Photographs) can be disregarded because Cariou did not promptly return the phone call Celle made to announce that irrevocable decision. *See* Def. Mem. at 1, 19, 20-21, 22.

In opposition to defendants’ motion, Cariou respectfully submits this memorandum of law, counter-statement of undisputed facts pursuant to Local Rule 56.1 and declaration of Daniel J. Brooks, dated June 11, 2010 (“Brooks Opp. Dec.”) and exhibits thereto, in order to address the misleading legal and factual contentions – including assertions in Richard Prince’s moving affidavit contradicting his own sworn deposition testimony – which permeate defendants’ motion. As demonstrated below, defendants’ motion should be denied because it is both unfounded in law and unsupported by the factual record.

ARGUMENTPOINT I**ALL FOUR STATUTORY FACTORS WEIGH HEAVILY
AGAINST DEFENDANTS' FAIR USE DEFENSE****A. First Fair Use Factor: Prince's Status as an Appropriation Artist Does not Render
"Transformative" Defendants' Commercial Exploitation of Cariou's Work****1. As a Matter of Law, Prince's Appropriation Was Not Transformative**

Defendants rely on a student note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1478, 1479, 1482 (1993) (the "Note"), to trace the tradition of "appropriation art," through which, "[b]y 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.'" Def. Mem. at 2 (quoting the Note). Defendants neglect to advise the Court that, according to the author of the Note, the fair use doctrine affords no protection to this "post-modernist" artistic tradition.

As the Note acknowledges: "[C]urrent fair use doctrine does not adequately protect the work of artists who use this creative method [of appropriation]. Instead, artists who appropriate are quite vulnerable to legal sanctions based on their choice of copyrighted subject matter." Note, at 1484. Indeed, the purpose of the Note was to propose a new fair use standard to protect visual artists engaged in the practice of appropriation (*id.* at 1515-16) – a standard which has been adopted neither by Congress nor by the Courts – because "[t]he current copyright law, and especially the fair use doctrine, are ill-equipped to handle the challenge posed by appropriation in the visual arts. In its current form, the fair use doctrine, copyright's accommodation of certain unauthorized secondary uses that accord with the aims of copyright, does not afford much protection to artists who appropriate." *Id.* at 1498.

The lack of protection provided by fair use has been recognized by appropriation

artists themselves, who, with the exception of Jeff Koons, have an “artistic tradition” of not only appropriating other artists’ work, but also, when threatened with a lawsuit or sued by those artists, of paying for or ceasing the appropriation, rather than defending it as a matter of principle. When they were caught taking other artists’ works and were threatened with lawsuits or sued for copyright infringement, Robert Rauschenberg, Sherrie Levine and David Salle, all well-known appropriation artists, settled without attempting to litigate any fair use defense. *Id.* at 1480, 1484-85.

Even Andy Warhol and/or his assigns have capitulated to lawsuits or threats of lawsuits for copyright infringement rather than zealously pressing a fair use defense. Warhol settled a threatened lawsuit by Patricia Caulfield, the copyright holder of the photograph Warhol appropriated in making his well-known *Flowers* paintings, making a payment and giving Caulfield royalties on the print edition of *Flowers*. *See Note*, at 1484. Another instance is described in an article by William M. Landes, the Clifton R. Musser Professor of Law & Economics at the University of Chicago Law School and a co-author with Seventh Circuit Judge Richard A. Posner of numerous books and articles on intellectual property.¹ As explained by Professor Landes in the article (William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1 (2000) (“Landes”)), after Warhol’s death, Henri Dauman, a French photographer, came to realize that Warhol’s famous *Jackie* series of silkscreen prints appropriated Dauman’s copyrighted photograph of Jackie Kennedy, taken at President Kennedy’s funeral, that had appeared in *Life Magazine* in 1963. Landes at 18. Dauman sued the Estate of Andy Warhol, the Andy Warhol Foundation for the

¹ *See, e.g.*, William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Harvard Univ. Press 2003); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. LEGAL STUD. 325 (1989).

Visual Arts and the Andy Warhol Museum (collectively, “Warhol”). Landes at 19.

Notably, rather than vigorously mounting a fair use defense, Warhol entered into protracted settlement discussions and a tolling agreement with Dauman. *Andy Warhol Foundation for the Visual Arts, Inc. v. Federal Insurance Co.*, 189 F.3d 208, 213 (2d Cir. 1999). When Dauman ultimately sued (*id.*), Warhol first moved unsuccessfully to dismiss the complaint (*Dauman v. Andy Warhol Foundation for the Visual Arts, Inc.*, No. 96 Civ. 9219 (TPG), 1997 U.S. Dist. LEXIS 8606, at *6 (S.D.N.Y. June 18, 1997)) and then, in order to obtain coverage, brought a declaratory judgment action against his liability insurance carrier, which was dismissed, but reinstated on appeal. *Andy Warhol Foundation*, 189 F.3d at 214, 218. Having obtained insurance coverage, Warhol then settled with Dauman. Landes at 19.

As Professor Landes explains: “Some appropriation art does not implicate copyright law at all. For example, Marcel Duchamp exhibited ready-made objects such as a urinal, bicycle wheel, and snow shovel as works of art. But when the borrowed image is copyrighted, appropriation art risks infringing the rights of the copyright owner.” Landes at 1. It is at the intersection of appropriation and copyright that “[a]rtists and judges have very different views regarding how the law should treat appropriation art.” *Id.* In outlining how the “artist perceives legal restraints on borrowing as a threat to artistic freedom[,]” Professor Landes provides a “typical” quote from an artist (Richmond Burton), which could have come from Prince himself: “I feel very free to take and change whatever I want, and that includes borrowing from my contemporaries. If some people are upset because my work has similarities to what they’re doing, that’s their problem. And if they take from me, that’s great! I don’t respect these artificial boundaries . . . erect[ed] to keep you in a certain category.” *Id.*; compare Prince’s virtually identical deposition testimony (declaration of Daniel J. Brooks, dated May 7, 2010, in

support of plaintiff's motion for summary judgment ("Brooks Dec."), Ex. E at 118-21). But, according to Professor Landes: "The law takes a more traditional view of appropriation art. Artists receive no special privileges to borrow copyrighted material." Landes at 1-2.

As mentioned above, one appropriation artist who has litigated fair use issues is Jeff Koons. In three cases, where it was found that his secondary works did not comment on the images he appropriated, his fair use defense was rejected because, if artistic expression alone justified the random taking of unrelated copyrighted work, there would be no limit to what could be appropriated and the fair use doctrine would "eviscerate the protection afforded by the Copyright Act." *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 379 (S.D.N.Y. 1993) (also stating: "The fact that the infringing copy can be classified as 'art' or as being part of an 'artistic tradition' cannot be used as a shield to salvage an otherwise defective fair use defense."); *see also Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.) ("If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use – without insuring public awareness of the original work – there would be no practicable boundary to the fair use defense."), *cert. denied*, 506 U.S. 934 (1992); *Campbell v. Koons*, No. 91 Civ. 6055 (RO), 1993 WL 97381, at *1 (S.D.N.Y. Apr. 1, 1993) (Koons' role in "conceiv[ing]" and "oversee[ing]" production of sculpture which appropriated photograph of a pig and boy, added an angel and transformed the boy into an angel was not fair use).

Only in *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) – where Koons explained, without contradiction, that he appropriated an advertisement for Gucci sandals from a glossy fashion magazine in order to use the "typicality [of the ad] to further his purpose of commenting on the 'commercial images . . . in our consumer culture'"; "to 'comment on the ways in which

some of our most basic appetites . . . are mediated by popular images””; “to satirize life as it appears when seen through the prism of slick fashion photography”; and to “comment upon the culture and attitudes promoted and embodied in [the magazine containing the ad]” (*id.* at 247, 248, 255) – was Koons’ fair use defense upheld. Remarkably, given that the Court emphasized Koons’ comment on the appropriated image as having “established a ‘justif[ication for] the very act of [his] borrowing[,]’” (*id.* at 255) (citation omitted), defendants, citing *Blanch*, 467 F.3d at 255, claim the case holds that “[w]hile a transformative work may comment on the original work, it [a comment] is not a prerequisite to finding that the secondary work is transformative.” Def. Mem. at 19, n.8. *Blanch* says nothing of the sort. Instead, after noting the clear and articulate way in which Koons explained his reasons for appropriating the Gucci ad, the Court stated in a footnote (to which defendants are presumably referring): “Koons’s clear conception of his reasons for using ‘Silk Sandals,’ and his ability to articulate those reasons, ease our analysis in this case. We do not mean to suggest, however, that either is a *sine qua non* for a finding of fair use - - as to satire or more generally.” *Blanch*, 467 F.3d at 255, n.5.

Thus, while *Blanch* stands for the proposition that a clear, articulate explanation of the appropriator’s reasons for commenting on the appropriated image is not a prerequisite to a finding of a transformative purpose, *Blanch* does not dispense with the requirement that there be a comment, or some other recognized justification for the appropriation of the specific image that was taken. Simply stealing for the sake of stealing – as Prince admitted he prefers doing (Brooks Dec. Ex. Q; Ex. R, at 2; Ex. E, at 34-35, 44, 48-49) – clearly does not suffice.

In addition to *Blanch*, defendants cite *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009) and *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) in support of their contention that “Prince’s appropriative use of

rescaled, altered, cropped reproductions of the [Photographs] as raw materials in the Paintings, is transformative and should therefore be considered fair use.” Def. Mem. at 15. Neither *Bourne* nor *Leibovitz*, however, holds that the random taking of copyrighted materials in order to alter them, without in any way commenting on them, is transformative. To the contrary, in *Bourne*, 602 F. Supp. 2d at 507, the Court found that the secondary use was a parody in which the defendants “were clearly attempting to comment” on the “hopeful” scene associated with the song *When You Wish Upon a Star* in the plaintiff’s film *Pinnocchio*. Similarly, in *Leibovitz*, the superimposition of Leslie Nielsen’s smirking face on a movie poster depicting a photographed body intended to look like the nude, pregnant Demi Moore in the plaintiff’s well-known photograph was held to be transformative, but not merely because the original image was altered. *Leibovitz*, 137 F.3d at 111-12, 114. As the Second Circuit explained, the secondary use was transformative because it was a parody of the “seriousness, even the pretentiousness, of the original[,]” commenting on it by holding it up to “ridicule.” *Id.* at 114. As the Court stated: “Being different from an original does not inevitably ‘comment’ on the original. Nevertheless, the ad is not merely different; it differs in a way that may reasonably be perceived as commenting, through ridicule, on what a viewer might reasonably think is the undue self-importance conveyed by the subject of the Leibovitz photograph. A photographer posing a well known actress in a manner that calls to mind a well known painting must expect, or at least tolerate, a parodist’s deflating ridicule.” *Id.* at 114-15.

As explained in *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 143 (2d Cir. 1998), because one of the “exclusive rights” of a copyright owner is the right “to prepare derivative works based upon the copyrighted work” (17 U.S.C. § 106(2)) and a “derivative work,” in turn, includes any “form in which a work may be recast, transformed,

or adapted” (*id.* § 101), merely transforming a copyrighted work without commenting on it may be derivative, but it is not transformative. Prince, by doodling on Cariou’s Photographs, and all the defendants, by exhibiting, offering for sale and selling the Paintings, infringed Cariou’s exclusive rights to reproduce, prepare derivative works based upon, distribute and display his copyrighted work (17 U.S.C. §§ 106(1), (2), (3), (5)), even if Prince’s artistic techniques altered Cariou’s images in order to create a “fantastical, post-apocalyptic world.” *See* Def. Mem. at 1, 15. An analogous situation was presented in *Gaylord v. United States*, 85 Fed. Cl. 59 (2008), where a postage stamp depicting the Korean War Veterans Memorial which allegedly infringed the copyright of the Memorial’s sculptor was described by the Court of Federal Claims as having drastically altered the appearance of the Memorial by “providing a different expressive character,” “transform[ing] [the Memorial’s] expression and message, creating a surrealistic environment with snow and subdued lighting where the viewer is left unsure whether he is viewing a photograph of statues or actual human beings[,]” giving the viewer “a feeling of stepping into the photograph, being in Korea with the soldiers, under the freezing conditions that many veterans experienced[,]” and “creating a nearly monochromatic image” that was “grayer” and “colder” than the Memorial. *Id.* at 68-69. Although the Court of Federal Claims found the stamp to be transformative (*id.*), on appeal, the Federal Circuit reversed, holding that the stamp’s appropriation of the Memorial was not transformative or fair use because it lacked any commentary or criticism relating to the original work. *Gaylord v. United States*, 595 F.3d 1364, 1372-73, 1376 (Fed. Cir. 2010).

In reaching this conclusion, the Federal Circuit distinguished several cases, including: *Blanch*, 467 F.3d at 248 (where Koons’ incorporation of “a woman’s feet adorned with glittery Gucci sandals” into a collage “commenting on the ‘commercial images . . . in our

consumer culture[]” was transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (where Grateful Dead concert posters were incorporated into a biographical work, a form “of historical scholarship, criticism, and comment that require[s] incorporation of original source material for optimum treatment of [its] subjects.”); and *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 323 (S.D.N.Y. 2008) (where a movie espousing religion used a clip from John Lennon’s song *Imagine*, which “envisioned a world without religion,” in order to “criticize what the filmmakers see as the naiveté of John Lennon’s views.”). *Gaylord*, 595 F.3d at 1373 & n.3. As the Court noted: “By contrast, here the stamp did not use the [Memorial] as part of a commentary or criticism.” *Id.* at 1373.

Defendants warn that protection of Cariou’s copyright in this case “would effectively stifle, if not foreclose,” Prince’s creative activities. Def. Mem. at 1. That is not true, although Prince will have to modify his business model. The next time Prince, by “pure chance” (Brooks Dec. Ex. E at 264), finds a book containing images whose “look” he “loves” (Brooks Dec. Ex. T at C000675; Ex. E at 261-62), he simply will have to look at the colophon page (there is one not only in *Yes Rasta*, Brooks Dec. Ex. L-2, but also in the Canal Zone Catalogue, Brooks Dec. Ex. M-4) in order to determine whether the images are copyrighted. If they are copyrighted, and if Prince does not intend to criticize, comment upon, report upon, teach about, engage in scholarship about, or research those images, or undertake a “remotely similar” use (*see Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 78-79 (2d Cir. 1997)) he will simply have to contact the copyright owner and attempt to obtain a license to use the images. If he cannot obtain a license, he will have to either take his own photograph or avail himself of the vast quantities of public domain stock photos which are available on the Internet; *see* <http://www.istockphoto.com> (a website with thousands of royalty-free photos of Rastas, one of

which Prince admitted he possibly could have used in the Paintings (Brooks Dec. Ex. E at 286, 290-92)); *see also* Ex. CC to the affidavit of Hollis Gonerka Bart, sworn to May 14, 2010 (“Bart Aff.”), depicting images of Rastas “culled from the internet from a myriad of websites.”

While this new business model will entail some additional steps, that burden will be far from insuperable for Prince, who employs four full-time assistants. Brooks Dec. Ex. E at 173-74. By following these simple steps, Prince will be able to appropriate images, combine those images with other “raw materials appropriated from many sources,” with a “new expressive meaning and message” and “genuine creative rationale, by collaging and scanning rescaled, altered, cropped images,” with “painterly elements,” and “historical art references as an homage to master painters he admires” (Def. Mem. at 1), to his heart’s content, all without running afoul of the Copyright Law. Showing this modicum of respect for fellow artists will not, therefore, stifle Prince’s creativity. What it will do is prevent him from stealing for the sake of stealing, a practice he has admitted he prefers (Brooks Dec. Ex. E at 44), and which he flaunts in the Canal Zone Catalogue (*see* Brooks Dec. Ex. Z, showing the process of stealing in three photographs of canvases in Prince’s studio containing unaltered images of Cariou’s Rastas). The right to steal, however, is not one of the interests safeguarded by the fair use doctrine.

2. Prince’s Improper Attempts to Change His Deposition Testimony

As a matter of law, the first fair use factor weighs heavily against the defendants, even if the assertions contained in the moving affidavit of Richard Prince, sworn to May 13, 2010 (“Prince Aff.”), could be reconciled with his deposition testimony. That, however, is not the case.

In his affidavit, Prince claims that his *Canal Zone* Paintings “developed from the storyline of a cinematic pitch [he] wrote from 2007 through 2008” involving “a fantasy account of survivors of a nuclear attack” who end up in St. Barth’s, where they “form gangs and tribes,”

take over resort hotels, and create a “post-apocalyptic society.” Prince Aff. ¶ 16; *see* Brooks Dec. Exs. DD, EE, FF (the pitch; additions to the pitch written in March 2008; description of the pitch on Gagosian Gallery website). Prince claims that he found a copy of *Yes Rasta* in a bookstore in St. Barth’s “[a]round the same time.” Prince Aff. ¶ 17. Prince contends that he had already “envisioned that one of the tribes in [his] screenplay would be a reggae band,” had recently been listening to reggae music, and that when he “walked into the bookstore the next day and saw the book with Rastas, [he] thought something was in the air.” *Id.* Based on this account in Prince’s affidavit, defendants assert that the *Canal Zone* Paintings “evolved from the storyline of [Prince’s] ‘pitch,’” and downplay the importance of Cariou’s Photographs by repeating Prince’s claim that he only found the copy of *Yes Rasta* after he had already written his screenplay in 2007. Def. Mem. at 4-5.

This narrative flatly contradicts Prince’s deposition testimony. First, he testified that his “pitch” was merely a “subtext.” Brooks Dec. Ex. E at 30. Second, Prince testified unequivocally that he actually found and purchased the copy of *Yes Rasta* in 2005, two years before he wrote the pitch, when he was on vacation in St. Bart’s, and made drawings in the book “for two weeks out of every year for two years.” Brooks Opp. Dec. Ex. A at 153-54. Therefore, the claim in Prince’s affidavit that he found the copy of *Yes Rasta* in 2007, after he had already completed his screenplay, is at odds with his deposition testimony and must be disregarded. *See Sauerhaft v. Bd. of Educ. of the Hastings-On-Hudson Union Free Sch. Dist.*, No. 05 Civ. 09087 (PGG), 2009 U.S. Dist. LEXIS 46196, at *30 (S.D.N.Y. June 2, 2009) (disregarding portions of affidavits filed in support of motion for summary judgment that were inconsistent with witnesses’ deposition testimony).

In his affidavit, Prince provides elaborate explanations of how he chose some of

the titles for his *Canal Zone* Paintings. Prince Aff. ¶¶ 35, 37, 38, 42, 45, 46, 47, 49, 51, 54, 55, 56. Defendants claim that titles are an important component of Prince's work and differentiate Prince's Paintings from Cariou's Photographs, which have no titles. Def. Mem. at 8, n.4. While Prince did testify that the titles were an important subtext that helped in the transformation and recontextualization of Cariou's images (Brooks Dec. Ex. E at 248-49), that testimony was belied by his inability, during the deposition, to remember titles of the Paintings, including some of the titles he explains in his affidavit.

For example, before the opening of the *Canal Zone* show, Prince was interviewed in *Interview Magazine*, which published details from five of the Paintings on the first page of the interview. Brooks Dec. Ex. T, C00065. Prince correctly identified the Painting at the left of the top row, but could not recall the title of the Painting at the right of the top row, which was *Tales of Brave Ulysses* (Brooks Dec. Ex. E at 244-45; Ex. T, C00065), a Painting whose title Prince carefully explains in his affidavit (Prince Aff. ¶ 49). Nor could Prince correctly name the Painting at the right of the bottom row, calling it *On the Beach*, when in fact the correct title was *The Ocean Club*, as Prince admitted, explaining his mistake by saying: "I think I just named them pretty close. The Ocean Club I was off a little bit. It did have something to do with a beach." Brooks Dec. Ex. E at 245-48. Significantly, *On the Beach* and *The Ocean Club* are two of the titles that Prince explains in his affidavit. Prince Aff. ¶¶ 35, 51.

Similarly, when asked whether a particular collector had bought one of his *Canal Zone* Paintings, Prince recalled that the collector had "paid around two million dollars," testified that he could "visualize" the Painting, and stated: "I mean I know the painting, I just don't recall the title." Brooks Opp. Dec. Ex. A at 190. Nor, according to one of his assistants, could Prince, in response to a request from Gagosian Gallery, remember the titles of at least two other

Paintings (Brooks Dec. Ex. MM at GGP004072); as the assistant stated: “[P]lease check the title on back of painting – Richard couldn’t remember which was which.” *Id.* Finally, with respect to his Painting *Back to the Garden*, Prince claims, in his affidavit, that he intended the title to refer to a song by that name that was performed at Woodstock (Prince Aff. ¶ 37), yet, during his deposition, Prince testified: “I mean I think there’s even a song by Joni Mitchell called Back to the Garden” (Brooks Opp. Dec. Ex. A at 342), which “didn’t occur to me until this moment.” *Id.* at 343. In sum, Prince’s facile recollection and explanation of the titles of his Paintings in his affidavit is inconsistent with his deposition testimony, is an improper attempt to rehabilitate his memory lapses and should be disregarded. *See Raskin v. The Wyatt Co.*, 125 F.3d 55, 63 (2d Cir. 1997) (disregarding declaration recounting what was discussed at a meeting when the witness, in his deposition, had been unable to remember the points that were covered during that meeting); *Federal Deposit Insurance Corp. v. Wrapwell Corp.*, Nos. 93 Civ. 859 (CSH), 94 Civ. 5574 (CSH), 2002 U.S. Dist. LEXIS 76, at *47-49 (S.D.N.Y. Jan. 3, 2002) (same).

A recurrent theme in defendants’ motion is the assertion that Prince’s message in the *Canal Zone* Paintings was “the redemptive value of music and equality between the sexes.” Def. Mem. at 1, 7, 15; *see* Prince Aff. ¶¶ 22, 61. In his deposition, however, when asked what his message was in producing the Paintings, Prince testified: “I don’t really have a message” (Brooks Dec. Ex. E at 45-46), later adding that “[t]he message is to make great art that makes people feel good” (*id.* at 267), and to do so with “a completely different look, and . . . a completely different application, and . . . a new way of collaging” (*id.* at 331). He also said that his message in the Painting *Back to the Garden*, in addition to making a “fantastic, absolutely hip, up to date, contemporary take on the music scene” (*id.* at 338-39) was, with respect to the Rastafarian on the donkey with a guitar: “hey, this guy is playing the guitar” (*id.* at 340). Not

once in his deposition did Prince testify that his message was either “the redemptive value of music” or “equality between the sexes.” The only deposition testimony cited by defendants regarding either of these “messages” (Def. Mem. at 15, citing pp. 338-40 of Prince’s deposition transcript) contains no such statement.

Nor can either of these messages be found in Prince’s “pitch” (Brooks Dec. Exs. DD, EE), the supposed source of Prince’s inspiration for the Paintings, or in James Frey’s adaptation of the pitch. Prince acknowledged that Frey’s essay, *Ding Dong the Witch Is Dead*, which is included as an insert in the Canal Zone Catalogue (Brooks Dec. Exs. M, M-4), was “essentially based on [Prince’s] pitch[,]” was written after Frey saw the pitch and some of the Paintings in Prince’s Long Island studio in the summer of 2008, and that “parts of [Frey’s] essay . . . are fairly close to [Prince’s] original pitch.” Brooks Dec. Ex. E at 201-02, 231. Frey’s essay (the first insert in the Canal Zone Catalogue) makes no mention of the “redemptive value of music” (or music) and, far from envisioning “equality between the sexes,” describes the post-apocalyptic environment this way: “Women become slaves. Some cook, some clean, some carry children, some take care of children, some care for the sick and the wounded, some care for prisoners. Some of the women become objects of pleasure and they are defiled, defiled every day, defiled in every way you can image.” See Brooks Dec. Ex. M. Not surprisingly, given its repellent nature, Prince distances himself and his Paintings from Frey’s oeuvre (Brooks Dec. Ex. E at 235; Prince Aff. ¶ 65), but the fact remains that the defendants chose to include the essay in the Canal Zone Catalogue, making sure that Frey’s name appeared on the title page (Brooks Dec. Ex. M-2), so it would “come up if you Google James Frey.” Brooks Dec. Ex. II. In any event, whether or not Frey’s essay mirrors Prince’s “message,” the salient point is that neither the essay, nor Prince’s pitch, nor Prince’s deposition testimony makes any mention of the contrived

messages – the redemptive value of music and equality between the sexes – first enunciated in Prince’s affidavit. Because these messages are merely “*post hoc* rationalizations,” *Castle Rock*, 150 F.3d at 142, they should be disregarded.

3. Commerciality and Bad Faith on the Part of the Defendants

Seeking to minimize commerciality and negate bad faith on their part, defendants claim that, “upon learning of this lawsuit, [they] pulled the remaining Paintings pending resolution of this lawsuit out of respect for the judicial process.” Def. Mem. at 16-17; *see also* Prince Aff. ¶ 28. This self-serving assertion is false and misleading. The lawsuit was commenced on December 30, 2008, but Canal Zone Catalogues were sold through February 2009. Brooks Dec. Ex. P, ¶ 4. Four Paintings were traded for a Larry Rivers painting valued at \$3 or \$4 million on March 13, 2009. Brooks Dec. Ex. P, ¶ 3(a) & Ex. A, at 2; Ex. F at 136-37. The Painting *Inquisition* was sold on June 8, 2009 for \$800,000. Brooks Dec. Ex. P, Ex. A, at 4. Another Painting, *It’s All Over*, was sold in August 2009 for \$1.1 million. Brooks Opp. Dec. Ex. B at 141-44.

B. Second Fair Use Factor: The Nature of Cariou’s Work is Expressive and Creative, Fitting Squarely Within the Core of Copyright Protection

While claiming that Prince’s practice of ripping pages out of *Yes Rasta* and sending them to a commercial laboratory to be scanned and printed with an ink jet printer is highly creative, defendants contend that Cariou’s Photographs, because they depict “real-life images of Rastafarians in their native Jamaican landscape,” are “factual or informational,” rather than creative. Def. Mem. at 19. Defendants also insist (incorrectly) that “[m]any of the [Photographs] were taken in the towns of Negril and Lucille and in other public places[,]” Def. Mem. at 9, presumably making those Photographs less worthy of copyright protection. And, defendants contend that Cariou’s Photographs “are not particularly distinctive” and that “images

strikingly similar to Cariou's images of Rastafarians, tropical landscapes and marijuana plantations can be readily found on the Internet[,]” Def. Mem. at 20; Bart Aff. Ex. CC, purportedly making them “not sufficiently original to deserve much copyright protection” (quoting *Blanch v. Koons*, 396 F. Supp. 2d 476, 481-82 (S.D.N.Y. 2005)). Def. Mem. at 19.

“[P]hotographs taken for aesthetic purposes [] are creative in nature and thus fit squarely within the core of copyright protection.” *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003), *as amended*, 357 F.3d 896 (9th Cir.), *cert. denied*, 542 U.S. 921 (2004); *see also Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.) (“As an original expression [plaintiff’s photograph] has more in common with fiction than with works based on facts . . . [and it] was creative and imaginative . . .”), *cert. denied*, 506 U.S. 934 (1992); *Baraban v. Time Warner, Inc.*, No. 99 Civ. 1569 (JSM), 2000 WL 358375, at *4 (S.D.N.Y. Apr. 6, 2000) (“Although photographs are often ‘factual or informational in nature,’ the art of photography has generally been deemed sufficiently creative to make the second fair use factor weigh in favor of photographer-plaintiffs.”) As Judge Lynch recently stated in *Sarl Louis Feraud International v. Viewfinder Inc.*, 627 F. Supp. 2d 123, 128 (S.D.N.Y. 2008) (quoting a prior decision in the same case): “[T]he notion that photographs merely reproduce reality, and do not apply a creative, or even distorting, eye to the events is long discredited. The photographer selects the image to be reproduced, capturing a particular angle of view, and that image conveys . . . at best a partial, two-dimensional impression of the [original] . . .”

As support for their claim that “many” of the Photographs were taken in Negril, Lucille and “other public places,” defendants cite pages 6, 36-37, 73-74, 83-84, and 128 of Cariou’s deposition transcript. Page 6 consists of defense counsel introducing herself to Cariou and eliciting the fact that he is a French citizen; pages 36-37 establish that Cariou spent “most of

the time . . . in the mountains,” but “[s]ometimes we had to go back to town to get some, you know, food or whatever we needed. Sometimes I needed batteries or whatever”; pages 73-74 do indeed discuss a photograph taken in Negril; pages 83-84 discuss a photograph of a man “in the middle of his plantation”; and page 128 describes someone who purchased two prints of Cariou’s Photographs. Needless to say, the cited pages of the deposition transcript do not support defendants’ claim that the Photographs were taken in populated areas. Nor would it matter. “[P]hotographic images of actual people,” even taken in public places, such as Alfred Eisenstaedt’s *V-J Day in Times Square*, “the classic image of a thrilled sailor exuberantly kissing a woman in Times Square on V-J Day,” see Brooks Opp. Dec. Ex. D, “may be as creative and deserving of protection as purely fanciful creations.” *Monster Communications, Inc. v. Turner Broad. System, Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996).

Photographs that are “creative” or “expressive” lie within the core of copyright protection. *Blanch*, 467 F.3d at 256. Although the amended complaint alleges that Cariou’s Photographs are “strikingly original” and “distinctive” (Brooks Dec. Ex. A, ¶ 16) – allegations that Cariou stands by and that are evident to anyone who peruses *Yes Rasta* – there is no requirement that photographs be unique or distinctive in order to be sufficiently creative to make the second fair use factor weigh in favor of the copyright owner. Therefore, the fact that other photos of Rastas and their environment may be available on the Internet is irrelevant to this analysis. Moreover, defendants’ reliance on the statement by the District Court in *Blanch* that the plaintiff’s photo was “not sufficiently original to deserve much copyright protection” is badly misplaced, to put it mildly; as the Second Circuit said on appeal of that decision, “[W]e disagree with the district court’s characterization of Blanch’s photograph as ‘banal rather than creative.’” *Blanch*, 467 F.3d at 257. The Court then went on to explain, however, that, even though

Blanch's Gucci ad was a "creative work," this was of "limited usefulness where the creative work of art is being used for a transformative purpose." *Id.* (citation omitted). Since Prince's Paintings are not transformative, the creative nature of Cariou's Photographs weighs heavily against the fair use defense in this case.

C. Third Fair Use Factor: Prince's Appropriation Was Excessive and Unreasonable, Even if He Did not Take the Entire *Yes Rasta* Book

Defendants argue that, because the copyright for Cariou's work was registered as a compilation and Cariou supposedly testified that the images needed to be viewed as a whole in order to be appreciated, "the importance of the individual [Photographs] is marginal," and Prince acted reasonably in taking entire Photographs "to the extent necessary to further his unique artistic purpose and message." Def. Mem. at 20, 21.

Defendants' contention that Cariou testified that the Photographs in *Yes Rasta* needed to be viewed as a whole in order to be appreciated (citing pp. 61-62, 81 and 117 of Cariou's deposition transcript) is disingenuous at best. Significantly, none of the testimony cited by defendants pertains in any way to Cariou's photographic portraits of Rastafarians.

At pp. 61-62, Cariou was asked what instructions he gave to his laboratory for processing a specific Photograph and Cariou explained that he had given the same overall instructions for "the book as a whole." Cariou then responded affirmatively when asked: "[I]s it fair to say then once you developed the technique that you wanted to create the certain dark look with accents, that is how all of the images that appear in the *Yes Rasta* book were developed?" The fact that Cariou wanted a uniform look throughout his book is a far cry from saying that each Photograph was of marginal importance and could only be appreciated if one viewed the book as a whole.

At p. 81, Cariou was asked, with respect to a landscape background that had been

“blurred out”: “[I]s this just another example of you have to look at the whole book to get what’s distinctive about the landscape?” and he responded, “Yeah, you have to look at the whole book in order to get a better feel of the place than looking at one picture, definitely.” Similarly, at p. 117, Cariou responded affirmatively when asked: “And this is just another photograph of a landscape that you shot, again, to create this whole feeling of the whole book?” Cariou also explained that it took him time to frame this particular shot properly and find the proper light and that, by showing banana trees in proximity to “ganja [marijuana],” it showed “how intertwined ganja is with Jamaica. It’s everywhere.” Brooks Dec. Ex. D at 117-18.

Thus, while some of the landscapes, which are often in the background and out of focus, are better appreciated when viewed as a whole, that does not mean that Cariou agreed that each landscape was of marginal importance and could only be appreciated by viewing the entire book.² Nor, of course, does the cited testimony have any bearing at all upon the Photographs of Rastas which Prince appropriated in their entirety, often cropping out the background landscapes. Cariou never testified that his photographic portraits of individual Rastafarians could only be appreciated by viewing the entire *Yes Rasta* book.

The fact that *Yes Rasta* was registered as a compilation is also irrelevant. Where, as here, the registrant of the compilation is also the sole author and owner of its constituent parts, as evidenced by Cariou’s certificate of copyright registration (Brooks Dec. Ex. K), he can bring an action for infringement of each copyrightable component of the compilation and is not limited

² Cariou described some other landscapes that he shot: “[T]he countryside was beautiful and the light was amazing. I waited until the light was perfect . . . You can see there is a tropical storm coming in, and I was waiting for that storm to get at the right place[]”; “I think the sky is quite amazing and, you know, the light. Once again, the tropical storm makes extremely specific light. And the sugar cane, the sun on the sugar cane, and the really dark sky picture Jamaica very well I think[]”; “I took a lot of time to find the perfect lighting, the perfect depth of field in order to have the leaves that I really like in the background to be the way they are.” Brooks Dec. Ex. D at 133-34, 143-44, 155.

to suing only for infringement of the entire compilation. *See Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62, 64 (S.D.N.Y. 1996) (rejecting claim that copyright registration for a collective work only covers the selection and arrangement of its constituent illustrations and holding that the owner of a copyright for a collective work also owns copyrights for its constituent parts); *Heyman v. Salle*, 743 F. Supp. 190, 193 (S.D.N.Y. 1989) (copyright protection in a compilation of photographs extends to each copyrightable photograph contributed by the author of the compilation); *see also Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395, 416-17 (S.D.N.Y. 2000) (same). This being so, defendants' fair use defense must be evaluated with respect to each copyrightable Photograph which Prince appropriated. To hold otherwise would mean that it would be permissible for someone to pirate one song from an album as long as the entire album was not copied or to reproduce one copyrightable passage from a book as long as the entire book was not taken. *Cf. Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985) (taking 300 or 400 words from President Ford's memoirs relating to his pardon of former President Nixon was not fair use).

Nor does *NXIVM Corp. v. Ross Institute*, 364 F.3d 471 (2d Cir.), *cert. denied*, 543 U.S. 1000 (2004), which defendants cite (Def. Mem. at 20), support their argument. In that case, the defendants, "cult de-programmers," quoted sections of plaintiffs' course manual in order to expose the manual as a form of "mind control." *Id.* 364 F.3d at 475. The Court found that the third fair use factor did not favor the plaintiffs because the portions of the course manual that were taken were not "separately copyrightable" and the manual itself had no "objective core of expression." *Id.* at 481. Here, by contrast, each of Cariou's Photographs is creative and, therefore, copyrightable and Prince took the heart of each of those copyrightable images.

Defendants argue, finally, that Prince's appropriation was quantitatively

reasonable given his “unique artistic purpose and message.” Def. Mem. at 21. The implication – that the extent of Prince’s appropriation was carefully calibrated to accomplish his artistic purpose – is specious. As Prince admits: “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.” Prince Aff. ¶ 25 (emphasis supplied). Prince’s own description of his creative process distinguishes his random taking from the measured appropriation in *Bourne Co. v. Twentieth Century Fox Film*, 602 F. Supp. 2d at 509, where the facts made “it clear that the Defendants thought about how much of the original song was necessary to make the object of their parody recognizable.” As the Court stressed, “The internal, creative dispute over how much of the original to use demonstrates that Defendants were concerned about taking just enough of the original to make their point clear.” *Id.* at 510. Whatever Prince’s point may have been – and, unlike the defendants in *Bourne*, it certainly was not to comment on Cariou’s work – it is clear that Prince gave no thought to “taking just enough of the original” to make that point. Instead, Prince admits that he randomly took as much as he felt like taking in the moment, as was his right as a renowned “appropriation artist.”

D. Fourth Fair Use Factor: The Harm to the Potential Market for Cariou’s Work Was Caused by the Defendants’ Copyright Infringement, not by any Delay by Cariou in Responding to Christiane Celle, and Is Cognizable under the Copyright Act

Seeking to evade responsibility for the potential, but very concrete, harm they caused to the market for Cariou’s work – lost sales of prints at prices ranging from \$3,000 to \$20,000 per print; lost introductions to clients of Christiane Celle who are drawn to images of Rastas; and a foregone book signing of Cariou’s reprinted book in conjunction with an exhibition opening a new gallery (Brooks Dec. Ex. J at 40-42, 45-46, 66-69, 87-88, 127-28, 130-31, 153-56, 158-59) – defendants attempt to blame the victim. As defendants would have it, Celle’s decision to cancel Cariou’s show and open her new gallery with another artist was “due to timing

constraints” because Cariou did not respond promptly to her attempt to reach him when she learned that the Gagosian Gallery was exhibiting Paintings by Prince which plagiarized Cariou’s Photographs. Def. Mem. at 22. Defendants also claim that this harm is not “cognizable” under the Copyright Act and that Prince did not usurp the market for Cariou’s work because the Paintings do not compete in the same market as the Photographs. Def. Mem. at 22, 23.

Celle testified that when she found out about the *Canal Zone* show, in November or December 2008, she called Cariou and left a message for him to call her back. Brooks Dec. Ex. J at 63-64, 71. She did not speak to Cariou until late January 2009, perhaps because she went to St. Barth’s on December 17, 2008, where she had an art gallery (but where her cell phone did not work), remaining there for the holidays. *Id.* at 36-37; Brooks Opp. Dec. Ex. C at 103, 104, 111. Celle called Cariou right after receiving an e-mail from him on January 29, 2009, advising that he had filed a lawsuit against Prince. Brooks Opp. Dec. Ex. C at 74-77; Brooks Dec. Ex. J at 107-08. Contrary to defendants’ assertion (Def. Mem. at 11), Cariou’s e-mail did not ask Celle for “help with this lawsuit.” Brooks Opp. Dec. Ex. C at 75-77.

Celle never testified that she cancelled Cariou’s show because of “timing constraints” or because he did not reply to her promptly. *Cf.* Def. Mem. at 22. In fact, due to construction delays, her new gallery did not actually open until June 2009. Brooks Dec. Ex. J at 65-66. Celle testified that, as soon as she learned of the *Canal Zone* show, she thought: “[I]f it’s done already I’m not going to do now a Rasta show . . . It looks like I’m trying to take advantage of the success of Richard Prince . . . So at the time I knew that if I will do something with Patrick it will be probably the Surfer. But I could not do anymore the Rasta because it was already in Chelsea, a beautiful gallery in Chelsea.” *Id.* at 89. When asked whether, by the end of January 2009, she had made any arrangements for advertising Cariou’s show, Celle responded: “No,

because the minute I figure out that there was a Chelsea show of his work, you know, I knew that it was over.” *Id.* at 91. Again, when asked whether it was in January 2009 that she decided not to proceed with the Cariou exhibit, Celle unequivocally replied: “No, actually I decided the end of November, December, and I met - - at the time when I saw the Richard Prince situation, I committed with another photographer called Lyle Owerko . . . [and] I just opened my gallery with [Owerko’s] show.” *Id.* at 123-24. Any delay by Cariou in responding to Celle’s phone call was, thus, unrelated to the cancellation of his show.

Defendants contend that this harm is “not cognizable” under the Copyright Act, Def. Mem. at 22, citing *NXIVM*, 364 F.3d at 482. In that case, however, the defendants took portions of plaintiffs’ course manual in order to criticize it as a cult, causing some individuals, including the actress Goldie Hawn, not to attend plaintiffs’ seminars, a “sort of harm . . . not cognizable under the Copyright Act. If criticisms on defendants’ websites kill the demand for plaintiffs’ service, that is the price that, under the First Amendment, must be paid in the open marketplace for ideas.” *Id.* Like parody, criticism, a form of expression specified in the preamble to the fair use statute, 17 U.S.C. § 107, is not likely to “affect the market for the original in a way cognizable under [the fourth fair use factor], that is, by acting as a substitute for it (‘supersed[ing] [its] objects’).” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (citation omitted). “[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because ‘parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,’ . . . the role of the courts is to distinguish between ‘[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.’” *Id.* at 591-92 (citations omitted). Criticism and parody are considered fair use because few creators will develop or license others

to produce “critical reviews or lampoons of their own productions.” *Id.* at 592.

Here, conversely, the harm was caused not by any criticism of Cariou’s work, but by the very act of appropriating it, as Celle testified. Nor is the harm mitigated, as defendants argue, because the Paintings and Photographs do not compete in the same market. Def. Mem. at 23. The cases cited by defendants for this argument are distinguishable. In *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983), not only was there no competition between the copyright owner and the copier, “but the owner does not even allege injury to any work currently copyrighted.” In *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, No. 98 Civ. 7128 (BSJ), 2001 U.S. Dist. LEXIS 25687, at *29-30 (S.D.N.Y. Nov. 28, 2001), not only was there no competition between the defendants’ obituaries and the plaintiff’s film, but the plaintiff “acknowledged that the obituaries did not have an impact on the market for the entire original film.” Even without competing in the same market, a secondary use can potentially harm an original work, tipping the fourth factor against fair use. *See, e.g., Twin Peaks Productions, Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993) (book containing detailed plot summaries of television episodes could lead someone who had missed an episode to refer to the book instead of renting the videotape of that episode).³

POINT II

CARIOU’S FIFTH CLAIM FOR RELIEF SHOULD NOT BE DISMISSED

In a footnote, defendants contend that Cariou’s fifth claim for relief must be dismissed “because there is no cause of action under New York [law] for conspiracy to violate

³ In arguing that they did not harm the market for Cariou’s work, defendants improperly refer to a “stipulation” the Gagosian defendants entered into with Cariou’s publisher, powerHouse Cultural Entertainment, Inc. *See* Def. Mem. at 12, citing Bart Aff. Ex. T. This “stipulation,” to which Cariou was not a party, is rank hearsay, containing unsworn statements by a non-party whose deposition defendants did not bother to take, and references to it should be disregarded.

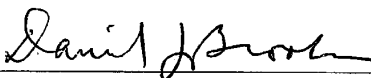
the Copyright Act, and such claims are preempted by the Copyright Act.” Def. Mem. at 13, n.6. The claim, however, is brought under the Copyright Act, not New York law. *See* Brooks Dec. Ex. A at 13. Although the Copyright Act does not explicitly proscribe conspiracy to infringe, it also does not explicitly proscribe contributory or vicarious infringement, yet both of those “doctrines of secondary liability emerged from common law principles” and are well recognized in copyright. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). *See* 3 Melville B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT § 12.04 (Matthew Bender, Rev. Ed.) (“conspiracy to infringe may indeed be a cognizable claim”); *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627, 629 (2d Cir. 1971) (Friendly, J.) (same) (*dictum*); *Universal City Studios, Inc. v. Am. Invsco Mgmt, Inc.*, No. 80 C 1241, 1981 U.S. Dist. LEXIS 14225, at *15 (N.D. Ill. May 26, 1981) (denying motion for summary judgment dismissing copyright conspiracy claim due to a disputed issue of material fact).

CONCLUSION

For the foregoing reasons, defendants’ motion should be denied in all respects.

Dated: New York, New York
June 14, 2010

SCHNADER HARRISON SEGAL & LEWIS LLP

By: 
Daniel J. Brooks
Eric A. Boden
140 Broadway, Suite 3100
New York, New York 10005
(212) 973-8000
Attorneys for Plaintiff Patrick Cariou

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PATRICK CARIOU,

Plaintiff,

-against-

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

Defendants.

08 CIV 11327 (DAB)

**SUPPLEMENTAL AFFIDAVIT
OF DEFENDANT
RICHARD PRINCE IN
OPPOSITION TO
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
AND IN FURTHER SUPPORT
OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

-----X

RICHARD PRINCE, being duly sworn, deposes and says:

1. I submit this Supplemental Affidavit in Further Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Supplemental Affidavit").

Supplementing Affidavit to Include the Painting Entitled, *Pumpsie Green*

2. On May 14, 2010, I submitted an affidavit sworn to on May 13, 2010 in support of Defendants' Motion for Summary Judgment ("Affidavit"). In the Affidavit, I set forth in detail what I did to create each of the Paintings in the Canal Zone series and the creative expression, meaning and/or message I was trying to achieve in creating them.

3. To appreciate the various elements, or ingredients, that appear in each of the Paintings, and in turn, their transformative nature, the defendants also compiled and

submitted, as an aid to the Court, the Composite Exhibit, which was attached as Exhibit A to the Affidavit, and which contained 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.

4. Subsequent to the filing of the Affidavit, I discovered that I inadvertently omitted from my Affidavit a description of the painting entitled, *Pumpsie Green*, which was part of the Canal Zone Series, and which was exhibited at the Canal Zone Exhibition. Defendants also inadvertently failed to include *Pumpsie Green* in the Composite Exhibit. As such, I am submitting this Supplemental Affidavit to correct that oversight.

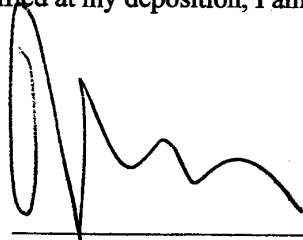
5. *Pumpsie Green* (2008): To create *Pumpsie Green*, I tore an image from the *Yes Rasta* book and had it scanned and enlarged in a sepia tint. I cut out a portion of this image and collaged it with other images of nude women, a man and a guitar. I collaged all of these images directly to the canvas with white paint using the squeegee technique. On the man, I painted black lozenge eyes. On two of the women I painted pinkish colored lozenge eyes and over one of the women I painted black lozenge eyes. I named this painting *Pumpsie Green* because Pumpsie Green, who was the first African-American player on the Red Sox, was my childhood hero, and I wanted to honor him through the title.

6. In addition, to appreciate the various elements, or ingredients, that appear in *Pumpsie Green*, and in turn, its transformative nature, the defendants have submitted a supplement to the Composite Exhibit attached hereto as Exhibit A, containing the images

taken from the *Yes Rasta* book that appear in *Pumpsie Green*, an image of *Pumpsie Green*, a summary of the various elements (or ingredients) and the techniques I used to create *Pumpsie Green*.

Testimony on Commenting

7. At my deposition, which took place on October 8, 2009, I was asked whether I make comments with my Canal Zone paintings. Although my responses suggested that I do not make comments with my work, I understood the use of the word "comment" to mean a political comment. As I testified at my deposition, I am not a political artist.



RICHARD PRINCE

Subscribed and sworn to before me
this VIth day of June, 2010

Jacqueline Bogardus
Notary Public

Jacqueline Bogardus
Notary Public State of New York
No. 01B06068391
Qualified in Greene County
Commission Expires 12/31/13



Pumpsie Green,* 2008 Ink jet, acrylic and collage on canvas, 77 x 100 1/2 inches (195.6 x 255.3 cm)

To create *Pumpsie Green*, Prince tore an image from the *Yes Rasta* book and had it scanned and enlarged in a sepia tint. He cut out a portion of this image and collaged it with other images of nude women, a man and a guitar. All of these images were then collaged directly onto the canvas with white paint, using the squeegee technique. On the man, Prince painted black lozenge eyes. He painted pinkish colored lozenge eyes on two of the women and black lozenge eyes on one of the women. Prince named this painting *Pumpsie Green* because Pumpsie Green, who was the first African-American player on the Red Sox, was his childhood hero, and he wanted to honor him through the title. Prince said that "it was just a way of giving a nod to my boyhood hero." RP Supp. Aff. ¶ 5. See also Bart Aff. Ex. G at 253-4.

Not sold. Bart SJM Aff. Ex. N at Ex. A.

*This Painting was not included in the *Canal Zone* catalog.



Yes Rasta, p 13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK CARIOU,	X	
	:	
Plaintiff,	:	
	:	08 CIV 11327 (DAB)
-against-	:	
	:	COUNTER-STATEMENT,
	:	PURSUANT TO LOCAL CIVIL
	:	RULE 56.1, OF UNDISPUTED
RICHARD PRINCE, GAGOSIAN GALLERY,	:	MATERIAL FACTS, IN
INC., LAWRENCE GAGOSIAN and	:	OPPOSITION TO DEFENDANTS'
RIZZOLI INTERNATIONAL	:	MOTION FOR
PUBLICATIONS, INC.,	:	<u>SUMMARY JUDGMENT</u>
	:	
Defendants.	:	
	X	

Plaintiff Patrick Cariou (“Cariou”), by and through his attorneys Schnader Harrison Segal & Lewis LLP, for his response to each numbered paragraph of the Rule 56.1 Statement of Uncontested Material Facts (the “Rule 56.1 Statement”) in Support of the Joint Motion for Summary Judgment of Defendants Richard Prince, Gagosian Gallery Inc. and Lawrence Gagosian (“Defendants”), states the following:

General Objections

Plaintiff objects to the Rule 56.1 Statement on the grounds that Defendants’ submission of 403 individually-numbered paragraphs of purported undisputed material fact flouts both the spirit and letter of Southern District Local Rule 56.1, which states, in pertinent part, “[t]here shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.” By no measure could 403 paragraphs be deemed short and concise. Moreover, as the ensuing individual responses of Plaintiff will demonstrate, many of these 403 paragraphs are

immaterial to the instant lawsuit, and many either cite to documents which fail to support defendants' allegations or cite to non-existent sources.

Individual Responses

Without waiving the General Objections, Plaintiff responds to Defendants' Rule 56.1

Statement as follows:

1. This paragraph is not in dispute.
2. This paragraph is not in dispute.
3. This paragraph is not in dispute.
4. This paragraph is not in dispute.
5. This paragraph is not in dispute.
6. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
7. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
8. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
9. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
10. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
11. This paragraph is not in dispute.
12. This paragraph is not in dispute.
13. This paragraph is not in dispute.

14. This paragraph is not in dispute.
15. This paragraph is not in dispute.
16. This paragraph contains inadmissible hearsay and is disputed.
17. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
18. This paragraph is not in dispute.
19. This paragraph is not in dispute.
20. This paragraph is not in dispute.
21. This paragraph is not in dispute.
22. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
23. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
24. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
25. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
26. This paragraph is not in dispute.
27. This paragraph is not in dispute.
28. This paragraph is not in dispute.
29. This paragraph is not in dispute.
30. This paragraph is not in dispute.

31. Plaintiff controverts the statement in Paragraph Number 31 because the authority cited by Defendants in support of the allegation, "Ex G at PP Tr. 125-26", does not exist.
32. This paragraph is not in dispute.
33. This paragraph is not in dispute.
34. This paragraph is not in dispute.
35. This paragraph is not in dispute.
36. This paragraph is not in dispute.
37. This paragraph is not in dispute.
38. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
39. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
40. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
41. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
42. This paragraph is not in dispute; the retrospective was called "American Spiritual," after a photograph of Brooke Shields, emerging nude from a bathtub at a prepubescent age, taken by Garry Gross, and "re-photographed" by Prince. Bart Dec. Ex. G at 18-19, 68-69 and 92-93.
43. This paragraph contains inadmissible hearsay and is controverted. Plaintiff does not recognize "Ex ¶ J" as an exhibit annexed to the Declaration of either Hollis Bart or Daniel Brooks.

44. This paragraph is not in dispute.

45. Plaintiff controverts Defendants' statement that "Prince's creation of the Canal Zone series evolved from the storyline of a cinematic 'pitch' he was writing in 2007 entitled, *Eden Rock*" and asserts that, to the contrary, Prince testified at deposition that the "pitch" was merely a "subtext." Brooks Dec. Ex. E at 30.

46. This paragraph is not in dispute.

47. This paragraph is not in dispute.

48. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

49. This paragraph is not in dispute.

50. Plaintiff controverts Defendants' statement that "Around the time Prince wrote *Eden Rock*, and while on vacation in St. Barts, Prince found a copy of *Yes Rasta* in a bookstore on the island, and immediately made a connection between the images in the book and the jungles he had seen on a recent visit to Panama," and asserts that Prince's testimony establishes that he actually found and purchased the copy of *Yes Rasta* in 2005, two years before he wrote *Eden Rock*, when he was on vacation in St. Bart's, and made drawings in the book "for two weeks out of every year for two years." Brooks Opp. Dec. Ex. A at 153-54.

51. This paragraph is not in dispute.

52. This paragraph is controverted. Prince testified that he actually found and purchased the copy of *Yes Rasta* in 2005, two years before he wrote *Eden Rock*, when he was on vacation in St. Bart's, and made drawings in the book "for two weeks out of every year for two years." Brooks Opp. Dec. Ex. A at 153-54.

53. Plaintiff controverts Defendants' statement that "Upon finding *Yes Rasta*, Prince was intrigued by the images in the book, given his inclusion of a reggae band that was on the cruise ship as the Rastafarian 'tribe' in his screenplay" and asserts that Prince's testimony establishes that he actually found and purchased the copy of *Yes Rasta* in 2005, two years before he wrote *Eden Rock*, when he was on vacation in St. Bart's, and made drawings in the book "for two weeks out of every year for two years." Brooks Opp. Dec. Ex. A at 153-54.

54. Plaintiff controverts Defendants' statement in Paragraph Number 54 and incorporates Plaintiff's response to Statement of Uncontested Material Fact Number 53.

55. Plaintiff controverts Defendants' statement in Paragraph Number 55 and incorporates Plaintiff's response to Statement of Uncontested Material Fact Number 53.

56. This paragraph is not in dispute.

57. Plaintiff controverts Defendants' statement in Paragraph Number 57 and incorporates Plaintiff's response to Statement of Uncontested Material Fact Number 53.

58. This paragraph is not in dispute.

59. This paragraph is not in dispute.

60. This paragraph is not in dispute.

61. This paragraph is not in dispute.

62. This paragraph is not in dispute.

63. Plaintiff controverts Defendants' statement in Paragraph Number 63 and incorporates Plaintiff's response to Statement of Uncontested Material Fact Number 53.

64. This paragraph is not in dispute.

65. This paragraph is not in dispute.

66. Plaintiff controverts Defendants' statement that "Prince used images of Rastafarians from *Yes Rasta* because they looked primitive and like the type of man that appeared in his post-apocalyptic screenplay" and asserts that Prince used the images because he liked them and "loved" the "look." Brooks Dec. Ex. E at 161, 261-62.

67. This paragraph is not in dispute.

68. Plaintiff controverts Defendants' statement that "All of Prince's *Canal Zone* Paintings represent musical bands, and one of the creative messages 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 he imagined in his screenplay" and asserts that in his deposition, when asked what his message was in producing the Paintings, Prince testified: "I don't really have a message" (Brooks Dec. Ex. E at 45-46), later adding that "[t]he message is to make great art that makes people feel good" (*id.* at 267), and to do so with "a completely different look, and . . . a completely different application, and . . . a new way of collaging" (*id.* at 331).

69. Plaintiff controverts Defendants' statement that "According to Prince, the redemptive value of music is one of the important concepts of this series" and asserts that in his deposition, when asked what his message was in producing the Paintings, Prince testified: "I don't really have a message" (Brooks Dec. Ex. E at 45-46), later adding that "[t]he message is to make great art that makes people feel good" (*id.* at 267), and to do so with "a completely different look, and . . . a completely different application, and . . . a new way of collaging" (*id.* at 331).

70. This paragraph is not in dispute.

71. This paragraph is not in dispute.

72. This paragraph is not in dispute.

73. This paragraph is not in dispute.
74. This paragraph is not in dispute.
75. Plaintiff controverts Defendants' statement that "In some of the Paintings, Prince digitally scanned and enlarged the images, and either scanned them directly onto the canvas or fixed them directly onto the canvas with glue, scotch tape or paint, and used them as background for collaging, and others as cut-out collage elements" and asserts that Prince hired a vendor, NancyScans Corp., to scan, enlarge and print his images. Brooks Dec. Ex. I at 22.
76. This paragraph is not in dispute.
77. This paragraph is not in dispute.
78. Plaintiff controverts Defendants' statement that "*Canal Zone, 2007* consists of portions of 35 Rastafarian faces" and asserts that *Canal Zone 2007* consists of entire pages from *Yes Rasta*. Brooks Dec. Ex. V, Ex. V-1.
79. This paragraph is not in dispute.
80. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
81. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
82. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
83. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
84. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

85. This paragraph is not in dispute.

86. This paragraph is not in dispute.

87. This paragraph is not in dispute.

88. Plaintiff controverts Defendants' statement that "Prince described his Paintings in the Canal Zone series as '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*'" and asserts that Prince provided this testimony to describe only the painting *Djuna Barnes, Natalie Barney, Renee Vivien, and Romaine Brooks Take Over the Guanahani*, and not to describe any other painting in the *Canal Zone* series. Bart Dec. Ex. G at 355-61.

89. Plaintiff controverts Defendants' statement that "Titles to the Paintings are an important component to Prince's works and help 'recontextualiz[e] the image' and 'create[] another type of subtext that [allows one to] read into the painting'" and asserts that Prince's inability, during his deposition, to remember titles of the *Canal Zone* Paintings belies this allegation. For example, before the opening of the *Canal Zone* show, Prince was interviewed in Interview Magazine, which published details from five of the Paintings on the first page of the interview. Brooks Dec. Ex. T, C00065. Prince correctly identified the Painting at the left of the top row, but could not recall the title of the Painting at the right of the top row, which was *Tales of Brave Ulysses* (Brooks Dec. Ex. E at 244-45; Ex. T, C00065). Nor could Prince correctly name the Painting at the right of the bottom row, calling it *On the Beach*, when in fact the correct title was *The Ocean Club*, as Prince admitted, explaining his mistake by saying: "I think I just named them pretty close. The Ocean Club I was off a little bit. It did have something to do with a beach." Brooks Dec. Ex. E at 245-48. Similarly, when asked whether a particular collector had bought one of his *Canal Zone* Paintings, Prince recalled that the collector had "paid around

two million dollars,” testified that he could “visualize” the Painting, and stated: “I mean I know the painting, I just don’t recall the title.” Brooks Opp. Dec. Ex. A at 190. Nor, according to one of his assistants, could Prince, in response to a request from Gagosian Gallery, remember the titles of at least two other Paintings (Brooks Dec. Ex. MM at GGP004072); as the assistant stated: “[P]lease check the titles on back of painting – Richard couldn’t remember which was which.” *Id.* Finally, with respect to his Painting *Back to the Garden*, Prince claims, in his affidavit, that he intended the title to refer to a song by that name that was performed at Woodstock (Prince Aff. ¶ 37), yet, during his deposition, Prince testified: “I mean I think there’s even a song by Joni Mitchell called Back to the Garden” (Brooks Opp. Dec. Ex. A at 342), which “didn’t occur to me until this moment.” *Id.* at 343.

90. Plaintiff controverts Defendants’ statement in Paragraph 90 that “In the *Canal Zone* series, Prince wanted to emphasize equality between the sexes” and asserts that not once in his deposition did Prince testify that his message was “equality between the sexes.” Plaintiff does not dispute the remaining allegations in this paragraph.

91. This paragraph is not in dispute.

92. Plaintiff controverts Defendants’ statement in this paragraph and asserts that Prince hired a vendor, NancyScans Corp., to scan, enlarge and print his images. Brooks Dec. Ex. I at 22.

93. This paragraph is not in dispute.

94. Plaintiff controverts Defendants’ statement that “[a]pproximately 22 of which were exhibited at the Exhibition” and asserts that only 15 of the *Canal Zone* Paintings were exhibited at the Exhibition. Brooks Dec. Ex. E at 292, 295, 302-09, Ex. X, Ex. Y, Ex. G at 22-24.

95. This paragraph is not in dispute.
96. This paragraph is not in dispute.
97. Plaintiff controverts this paragraph as the document to which Defendants cite is unauthenticated and, therefore, inadmissible.
98. This paragraph is not in dispute.
99. This paragraph is not in dispute.
100. This paragraph is not in dispute. In addition to the individuals listed on Exhibit Q, invitations to the Exhibition were distributed to celebrities, fashion models, musicians and a quarterback of a professional football team.
101. This paragraph is not in dispute.
102. This paragraph is not in dispute.
103. Plaintiff controverts Defendants' statement that "Lawrence Gagosian and Prince withdrew the unsold *Canal Zone* Paintings, pending this lawsuit" and asserts that four Paintings were traded for a Larry Rivers painting valued at \$3 or \$4 million on March 13, 2009 (Brooks Dec. Ex. P, ¶ 3(a) & Ex. A, at 2; Ex. F at 136-37); the Painting *Inquisition* was sold on June 8, 2009 for \$800,000 (Brooks Dec. Ex. P, Ex. A, at 4); and another Painting, *It's All Over*, was sold in August 2009 for \$1.1 million (Brooks Opp. Dec. Ex. B at 141-44).
104. This paragraph is not in dispute.
105. This paragraph is not in dispute.
106. This paragraph is not in dispute.
107. This paragraph is not in dispute.

108. Plaintiff controverts Defendants' statement in this paragraph. Cariou testified that the mock-up for his fourth book on Gypsies was completed and that he was ready to move on to something else. Bart Dec. Ex. U at 94, 98, 227, 285-86.

109. Plaintiff controverts Defendants' statement in this paragraph. Cariou testified that the mock-up for his fourth book on Gypsies was completed and that he was ready to move on to something else. Cariou further testified that he was talking to publishers about the publication of this book. Bart Dec. Ex. U at 94, 98, 227, 285-86, 286-88.

110. This paragraph is not in dispute.

111. This paragraph is not in dispute.

112. This paragraph is not in dispute.

113. This paragraph is not in dispute.

114. This paragraph is not in dispute.

115. This paragraph is not in dispute.

116. This paragraph is not in dispute.

117. This paragraph is not in dispute.

118. Plaintiff controverts Defendants' statement in this paragraph. Prince said no such thing to powerHouse Books.

119. This paragraph is not in dispute.

120. This paragraph is not in dispute.

121. Plaintiff controverts Defendants' statement in this paragraph. This occurred not "sometimes," but rather, very rarely. Brooks Dec. Ex. D at 46, 56, 109, 113-21, 132, 134, 137, 142, 151-52, 155-56, 165.

122. This paragraph is not in dispute.

123. This paragraph is not in dispute.

124. Plaintiff controverts Defendants' statement that "Many of the Images were taken in the towns of Negril and Lucille and in other public places" and asserts that the portions of Plaintiff's deposition and the paragraph from the Amended Complaint which Defendants cite fail to support this allegation. Paragraph 16 of the Amended Complaint alleges that Cariou spent "parts of six years in the secluded mountains of Jamaica, gaining access to, living and working with, and earning the trust of the Rastafarians who are the subjects of *Yes Rasta*. . . . [I]t was only after living with them for years that Plaintiff was finally permitted to photograph them"; Page 6 of Plaintiff's deposition transcript consists of defense counsel introducing herself to Cariou and eliciting the fact that he is a French citizen; pages 36-37 establish that Cariou spent "most of the time . . . in the mountains," but "[s]ometimes we had to go back to town to get some, you know, food or whatever we needed. Sometimes I needed batteries or whatever"; pages 73-74 do indeed discuss a photograph taken in Negril; pages 83-84 discuss a photograph of a man "in the middle of his plantation"; and page 128 describes someone who purchased two prints of Cariou's Photographs. Brooks Dec. Ex. A ¶ 16, Ex. D at 6, 36-37, 73-74, 83-84, 128.

125. This paragraph is not in dispute.

126. This paragraph is not in dispute.

127. Plaintiff controverts Defendants' statement that "Cariou explained that the reader must view *Yes Rasta* as a whole book in order to get the feel of the subject matter of each of the individual images" and asserts that, in response to the question: "[i]s this just another example of you have to look at the whole book to get what's distinctive about the landscape?", Cariou responded, addressing the question posed as to the landscape in one photograph alone, "Yeah, you have to look at the whole book in order to get a better feel of the place than looking at one

picture, definitely.” Brooks Dec. Ex. D at 81. Describing other landscapes that he shot, Cariou testified: “[T]he countryside was beautiful and the light was amazing. I waited until the light was perfect . . . You can see there is a tropical storm coming in, and I was waiting for that storm to get at the right place[]”; “I think the sky is quite amazing and, you know, the light. Once again, the tropical storm makes extremely specific light. And the sugar cane, the sun on the sugar cane, and the really dark sky picture Jamaica very well I think[]”; “I took a lot of time to find the perfect lighting, the perfect depth of field in order to have the leaves that I really like in the background to be the way they are.” Brooks Dec. Ex. D at 133-34, 143-44, 155. Plaintiff further asserts that Defendants fail to cite to any testimony from Cariou (nor is there any) that his photographic portraits of individual Rastafarians could only be appreciated by viewing the entire *Yes Rasta* book.

128. This paragraph is not in dispute.

129. Plaintiff controverts Defendants’ statement that “Images similar to Cariou’s images of Rastafarians, tropical landscapes and marijuana plantations can be readily found on the Internet” and asserts that, in support of their contention, Defendants fail to cite to any testimony or admissible evidence, but, rather, refer to a rambling sequence of thumbnail photographs “culled from the internet from a myriad of websites” without providing any testimony or other evidentiary support for the proposition that these images were “similar to Cariou’s images of Rastafarians, tropical landscapes and marijuana plantations.”

130. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

131. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

132. This paragraph is not in dispute.

133. This paragraph is not in dispute.

134. This paragraph is not in dispute.

135. Plaintiff controverts Defendants' statement that "During his career as a photographer, Cariou has sold only six prints of photographs in *Yes Rasta* and, by choice, all of these sales were to his friends or to people he liked, depending on his mood" and asserts that Cariou has, in fact, sold ten prints of *Yes Rasta* Photographs. Bart Dec. Ex V at 1(c); Brooks Dec. Ex. D at 284.

136. This paragraph is not in dispute.

137. This paragraph is not in dispute.

138. This paragraph is not in dispute.

139. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

140. This paragraph is not in dispute.

141. This paragraph is not in dispute.

142. The allegations in this paragraph are speculative and inadmissible because Prince would not know this information.

143. Plaintiff controverts Defendants' statement that "The market for *Yes Rasta* is very small" because Defendants' sole support for the claim is an inference derived from a statement made in a document purporting to be a "Stipulation" between the Gagosian Defendants and Cariou's publisher, powerhouse Cultural Entertainment, Inc., to which Cariou was not a party, and is rank hearsay, containing unsworn statements by a non-party whose deposition Defendants did not bother to take.

144. Plaintiff controverts Defendants' statement in this paragraph because it is based upon a document purporting to be a "Stipulation" between the Gagosian Defendants and Cariou's publisher, powerhouse Cultural Entertainment, Inc., to which Cariou was not a party, and is rank hearsay, containing unsworn statements by a non-party whose deposition Defendants did not bother to take.

145. Plaintiff controverts Defendants' statement in this paragraph and incorporates his response to Statement of Uncontested Material Fact Number 144.

146. Plaintiff controverts Defendants' statement in this paragraph and incorporates his response to Statement of Uncontested Material Fact Number 144.

147. Plaintiff controverts Defendants' statement in this paragraph and incorporates his response to Statement of Uncontested Material Fact Number 144.

148. Plaintiff controverts Defendants' statement in this paragraph as it is based upon inadmissible hearsay.

149. Plaintiff controverts Defendants' statement in this paragraph as it is based upon inadmissible hearsay.

150. This paragraph is not in dispute.

151. This paragraph is not in dispute.

152. This paragraph is not in dispute.

153. This paragraph is not in dispute.

154. This paragraph is not in dispute.

155. Plaintiff controverts Defendants' statement in this paragraph because the correct name of Celle's gallery is "Clic."

156. Plaintiff controverts Defendants' statement in this paragraph that he "was non-committal and non-responsive." Cariou responded to Celle's email requesting that he collaborate with her on a show exhibiting his *Yes Rasta* Photographs. Brooks Dec. Ex. J at 39-40. Furthermore, Cariou agreed to work with Celle in selling prints of his *Yes Rasta* Photographs at an exhibition in New York. Bart Dec. Ex. U at 227. Cariou also met with Celle on two occasions, once in New York City in Fall 2008, where he indicated that he was "very interested" in working with Celle, and, shortly thereafter, in Paris, where, again, the two discussed a potential exhibition of Cariou's *Yes Rasta* Photographs. Brooks Dec. Ex. J at 40-43. Cariou discussed with Celle which of the *Yes Rasta* Photographs to include in the exhibition. Brooks Dec. Ex. D at 227; Ex. J at 39-40, 42-44.

157. This paragraph is not in dispute.

158. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

159. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

160. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

161. This paragraph is not in dispute.

162. Plaintiff controverts Defendants' statement in this paragraph because Celle would have no basis for knowing what Cariou was or was not aware of.

163. Plaintiff controverts Defendants' statement that "Cariou did not speak with Celle until sometime in January or February 2008, when he called her to tell her about this lawsuit"

and asserts that on January 29, 2009 Cariou sent Celle an email informing her of this lawsuit, after which Celle called Cariou right away. Brooks Dec. Ex. J at 72-73, 74-77, 107-08.

164. This paragraph is not in dispute.

165. Plaintiff controverts Defendants' statement that "During their conversation, Celle informed Cariou for the first time, that she had decided not to produce the show featuring the images in *Yes Rasta* for her own professional reasons" and asserts that Celle testified that her reasons for not wanting to move forward with Cariou's show were that it was "done already" and that she did not want to seem to be capitalizing on Prince's fame. Brooks Dec. Ex. J at 89, 91, 105-06.

166. This paragraph is not in dispute.

167. This paragraph is not in dispute.

168. This paragraph is not in dispute. Celle believed she could sell prints at these prices before she learned of the *Canal Zone* Paintings.

169. This paragraph is not in dispute.

170. Plaintiff controverts Defendants' statement that "Cariou has not spoken to 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 to permit others to publish his images in *Yes Rasta*" and asserts that Defendants incorrectly cite to Prince's deposition transcript in support of this claim and, moreover, Cariou testified only that he has not approached anyone other than powerHouse Books about the possibility of publishing *Yes Rasta* or the images contained therein, and mentioned nothing of his other bodies of work. Bart Dec. Ex. U at 230-231.

171. This paragraph is not in dispute.

172. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

173. Plaintiff controverts Defendants' statement in this paragraph on the grounds that Prince is not competent to make this claim, the claim is conclusory and, as such, it is not admissible evidence.

174. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

175. Plaintiff controverts Defendants' statement in this paragraph on the grounds that Prince is not competent to make this claim, the claim is conclusory and, as such, it is not admissible evidence.

176. Plaintiff controverts Defendants' statement in this paragraph on the grounds that Prince is not competent to make this claim, the claim is conclusory and, as such, it is not admissible evidence. Furthermore, Defendants dispute the allegations in this paragraph because Prince only copied the work of others.

177. This paragraph is not in dispute.

178. This paragraph is not in dispute.

179. This paragraph is not in dispute.

180. Plaintiff controverts Defendants' statement in this paragraph. Frey's essay was "essentially based on [Prince's] pitch," and "parts of [Frey's] essay are fairly close to [Prince's] original pitch." Bart Dec. Ex. G at 201-02, 231.

181. This paragraph is not in dispute.

182. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

183. This paragraph is not in dispute.

184. This paragraph is not in dispute.

185. This paragraph is not in dispute.

186. This paragraph is not in dispute.

187. This paragraph is not in dispute.

188. This paragraph is not in dispute.

189. Plaintiff controverts Defendants' statement that "In furtherance of Prince's music-inspired message, he 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" and asserts that in his deposition, when asked what his message was in producing the Paintings, Prince testified: "I don't really have a message" (Brooks Dec. Ex. E at 45-46), later adding that "[t]he message is to make great art that makes people feel good" (*id.* at 267), and to do so with "a completely different look, and . . . a completely different application, and . . . a new way of collaging" (*id.* at 331).

190. This paragraph is not in dispute.

191. This paragraph is not in dispute.

192. This paragraph is not in dispute.

193. This paragraph is not in dispute.

194. This paragraph is not in dispute.

195. This paragraph is not in dispute.

196. This paragraph is not in dispute.

197. This paragraph is not in dispute.

198. This paragraph is not in dispute.

199. This paragraph is not in dispute.
200. This paragraph is not in dispute.
201. This paragraph is not in dispute.
202. This paragraph is not in dispute.
203. Plaintiff controverts Defendants' statement in this paragraph because nothing in *The Ocean Club* came from a book on Tahiti. Brooks Dec. Ex. U, C00025.
204. This paragraph is not in dispute.
205. This paragraph is not in dispute.
206. This paragraph is not in dispute.
207. This paragraph is not in dispute.
208. Plaintiff controverts Defendants' statement that "Prince also chose *Ocean Club* as the title for this painting because Warhol used to go to the Ocean Club, as a young artist, and because Prince envisioned that the females in the painting were on the beach" and incorporates Plaintiff's response to Statement of Uncontested Material Fact Number 89.
209. This paragraph is not in dispute.
210. This paragraph is not in dispute.
211. This paragraph is not in dispute.
212. This paragraph is not in dispute.
213. This paragraph is not in dispute.
214. This paragraph is not in dispute.
215. This paragraph is not in dispute.
216. This paragraph is not in dispute.
217. This paragraph is not in dispute.

218. This paragraph is not in dispute.

219. This paragraph is not in dispute.

220. This paragraph is not in dispute.

221. This paragraph is not in dispute.

222. Plaintiff controverts Defendants' statement that "Prince was thinking about Adam and Eve when he painted *Back to the Garden* since they were in the Garden of Eden and his 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" and asserts that Prince, during his deposition, said that his message in the Painting *Back to the Garden*, in addition to making a "fantastic, absolutely hip, up to date, contemporary take on the music scene" (Brooks Dec. Ex. E at 338-39) was, with respect to the Rastafarian on the donkey with a guitar: "hey, this guy is playing the guitar" (*id.* at 340). The portion of Statement of Uncontested Material Fact Number 222 referencing the "three different human relationships in the universe" is not in dispute.

223. This paragraph is not in dispute.

224. Plaintiff controverts Defendants' statement that "Prince's artistic concept is that 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 Prince's message that music is the only redeeming thing to have survived the nuclear attack" and asserts that in his deposition, when asked what his message was in producing the Paintings, Prince testified: "I don't really have a message" (Brooks Dec. Ex. E at 45-46), later adding that "[t]he message is to make great art that makes people feel good" (*id.* at 267), and to do so with "a completely different look, and . . . a

completely different application, and . . . a new way of collaging” (*id.* at 331). When asked about the message of “Back to the Garden,” Prince testified that the message was: “hey, this guy is playing the guitar.” Bart Dec. Ex. G at 340.

225. This paragraph is not in dispute.
226. This paragraph is not in dispute.
227. This paragraph is not in dispute.
228. This paragraph is not in dispute.
229. This paragraph is not in dispute.
230. This paragraph is not in dispute.
231. This paragraph is not in dispute.
232. This paragraph is not in dispute.
233. This paragraph is not in dispute.
234. This paragraph is not in dispute.
235. This paragraph is not in dispute.
236. This paragraph is not in dispute.
237. This paragraph is not in dispute.
238. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
239. This paragraph is not in dispute.
240. This paragraph is not in dispute.
241. This paragraph is not in dispute.
242. This paragraph is not in dispute.
243. This paragraph is not in dispute.

244. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

245. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

246. This paragraph is not in dispute.

247. This paragraph is not in dispute.

248. This paragraph is not in dispute.

249. This paragraph is not in dispute.

250. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

251. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

252. This paragraph is not in dispute.

253. This paragraph is not in dispute.

254. This paragraph is not in dispute.

255. This paragraph is not in dispute.

256. This paragraph is not in dispute.

257. This paragraph is not in dispute.

258. This paragraph is not in dispute.

259. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

260. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

261. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

262. This paragraph is not in dispute.

263. This paragraph is not in dispute.

264. This paragraph is not in dispute.

265. This paragraph is not in dispute.

266. This paragraph is not in dispute.

267. This paragraph is not in dispute.

268. This paragraph is not in dispute.

269. This paragraph is not in dispute.

270. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

271. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

272. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

273. This paragraph is not in dispute.

274. This paragraph is not in dispute.

275. This paragraph is not in dispute.

276. This paragraph is not in dispute.

277. This paragraph is not in dispute.

278. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

- 279. This paragraph is not in dispute.
- 280. This paragraph is not in dispute.
- 281. This paragraph is not in dispute.
- 282. This paragraph is not in dispute.
- 283. This paragraph is not in dispute.
- 284. This paragraph is not in dispute.
- 285. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
- 286. This paragraph is not in dispute.
- 287. This paragraph is not in dispute.
- 288. This paragraph is not in dispute.
- 289. This paragraph is not in dispute.
- 290. This paragraph is not in dispute.
- 291. This paragraph is not in dispute.
- 292. This paragraph is not in dispute.
- 293. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
- 294. This paragraph is not in dispute.
- 295. This paragraph is not in dispute.
- 296. This paragraph is not in dispute.
- 297. This paragraph is not in dispute.
- 298. This paragraph is not in dispute.

299. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

300. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

301. This paragraph is not in dispute.

302. This paragraph is not in dispute.

303. This paragraph is not in dispute.

304. This paragraph is not in dispute.

305. This paragraph is not in dispute.

306. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

307. Plaintiff controverts Defendants' statement that "The title was influenced by the spies in Prince's screenplay" and incorporates Plaintiff's response to Statement of Uncontested Material Fact Number 89. Plaintiff further controverts the reference to "spies" in this paragraph as there has been no evidence elicited that spies were part of the pitch or the revised pitch. Brooks Dec. Ex. DD, Ex. EE.

308. This paragraph is not in dispute.

309. This paragraph is not in dispute.

310. This paragraph is not in dispute.

311. This paragraph is not in dispute.

312. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

313. This paragraph is not in dispute.

314. This paragraph is not in dispute.

315. This paragraph is not in dispute.

316. This paragraph is not in dispute.

317. This paragraph is not in dispute.

318. This paragraph is not in dispute.

319. This paragraph is not in dispute.

320. This paragraph is not in dispute.

321. This paragraph is not in dispute.

322. Plaintiff controverts Defendants' statement that "Prince named the painting after a song by one of his favorite groups, Cream" and incorporates Plaintiff's response to Statement of Uncontested Material Fact Number 89.

323. This paragraph is not in dispute and, furthermore, the portion of the paragraph that refers to "Warhol" and "Cezanne's *Bathers*" contains allegations which are not material to this lawsuit.

324. Plaintiff controverts Defendants' statement that "The figures, which are a band, are jamming, but the male figure does not yet have a guitar because he has not yet become the lead" because the portion of Prince's deposition transcript cited by Defendants does not support the allegations stated.

325. This paragraph is not in dispute.

326. This paragraph is not in dispute.

327. This paragraph is not in dispute.

328. This paragraph is not in dispute.

329. This paragraph is not in dispute.

330. This paragraph is not in dispute.

(Statement of Uncontested Material Fact incorrectly numbered "5") This

paragraph is not in dispute.

331. This paragraph is not in dispute.

332. This paragraph is not in dispute.

333. This paragraph is not in dispute.

334. This paragraph is not in dispute.

335. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

336. This paragraph is not in dispute.

337. This paragraph is not in dispute.

338. This paragraph is not in dispute.

339. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

340. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

341. This paragraph is not in dispute.

342. This paragraph is not in dispute.

343. This paragraph is not in dispute.

344. This paragraph is not in dispute.

345. This paragraph is not in dispute.

346. This paragraph is not in dispute.

347. This paragraph is not in dispute.

348. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

349. This paragraph is not in dispute.

350. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

351. This paragraph is not in dispute.

352. This paragraph is not in dispute.

353. This paragraph is not in dispute.

354. This paragraph is not in dispute.

355. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

356. This paragraph is not in dispute.

357. This paragraph is not in dispute.

358. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

359. This paragraph is not in dispute.

360. This paragraph is not in dispute.

361. This paragraph is not in dispute.

362. This paragraph is not in dispute.

363. This paragraph is not in dispute.

364. This paragraph is not in dispute.

365. This paragraph is not in dispute.

366. This paragraph is not in dispute.

367. This paragraph is not in dispute.

368. This paragraph is not in dispute.

369. This paragraph is not in dispute.

370. This paragraph is not in dispute.

371. Plaintiff controverts Defendants' statement that "This painting represents another element of his screenplay in which early 20th century novelists, poets, and expatriates, who had a lesbian salon in Paris, take over the Guanahani on St. Barts" and assert that, during his deposition, in response to a question regarding whether or not Prince was trying to create something new and unique with the Painting *Djuna Barnes et al. Take Over the Guanahani*, Prince responded: "Yes. . . . A balls-out, great, unbelievably looking great painting that had to do with a kind of a rock-and-roll painting on the radical side, and on a conservative side something to do with Cezanne's *Bathers*." Brooks Dec. Ex. E at 360-61. Prince further testified that in this particular painting, he was not commenting on any aspects of culture (*id.* at 354, 364) or trying to create anything with a new meaning or new message (*id.* at 360).

372. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

373. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

374. This paragraph is not in dispute.

375. This paragraph is not in dispute.

376. This paragraph is not in dispute.

377. This paragraph is not in dispute.

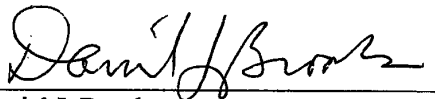
378. This paragraph is not in dispute.

379. This paragraph is not in dispute.
380. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
381. This paragraph is not in dispute.
382. This paragraph is not in dispute.
383. This paragraph is not in dispute.
384. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
385. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
386. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
387. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
388. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
389. This paragraph is not in dispute.
390. This paragraph is not in dispute.
391. This paragraph is not in dispute.
392. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
393. This paragraph is not in dispute.
394. This paragraph is not in dispute.

395. This paragraph is not in dispute.
396. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
397. This paragraph is not in dispute.
398. This paragraph is not in dispute.
399. This paragraph is not in dispute.
400. This paragraph is not in dispute.
401. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.
402. This paragraph is not in dispute.
403. This paragraph is not in dispute.

Dated: New York, New York
June 14, 2010

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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08 CIV 11327 (DAB)

PATRICK CARIOU,

Plaintiff,

-against-

**DEFENDANTS' RULE 56.1
STATEMENT OF UNCONTESTED
MATERIAL FACTS IN RESPONSE
TO PLAINTIFF'S STATEMENT
PURSUANT TO LOCAL RULE 56.1**

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

Defendants.

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Defendants Richard Prince, Gagosian Gallery, Inc., and Lawrence Gagosian, by and through their attorneys, submit the following Rule 56.1 Statement of Uncontested Material Facts in Response to Plaintiff's Statement Pursuant to Local Rule 56.1 ("plaintiff's statement").

I. Defendants' Response to Plaintiff's Statement Pursuant to Local Rule 56.1

1. Defendants admit the allegations of material fact in paragraph 1 of plaintiff's statement.

2. Defendants admit the allegations of material fact in paragraph 2 of plaintiff's

statement.

3. Defendants admit that Prince has admitted in his deposition testimony and Affidavit that he scanned, enlarged and altered certain Images found on pages he tore from the book entitled *Yes Rasta*. RP Tr. 40, 168-69, 331-337; RP Aff. ¶¶ 24, 32-61 and RP Aff. at Ex A; RP Supp. Aff. ¶ 5 and RP Supp. Aff. at Ex A.¹

4. Defendants admit the allegations of material fact in paragraph 4 of plaintiff's statement, but deny that all 15 paintings exhibited at the Canal Zone exhibition contained *Yes Rasta* Images. Of the 15 paintings exhibited, only 14 contained *Yes Rasta* Images. Prince's painting, MC9 (*White Panthers*), did not contain *Yes Rasta* Images. Brooks Dec. Ex. O, PR00019.

5. Defendants admit that a catalogue of the *Canal Zone* exhibition was produced by Gagosian Gallery with the input and assistance of Prince and Rizzoli International, and that Rizzoli International was the publisher of the catalogue. Ex. M; AM Tr. 17-18.

6. Defendants deny the allegations of material fact in paragraph 6 of plaintiff's statement, but admit that the catalogue contains photographic reproductions of some of the Paintings in the *Canal Zone* series, which incorporate as raw elements scanned, enlarged and altered versions of certain Images Prince took from pages he tore from the book entitled *Yes*

¹ "P. Mem." refers to the referenced page of the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment. "D. Mem." refers to the referenced page of the Memorandum of Law in Support of Defendants' Motion for Summary Judgment. "RP Supp. Aff." refers to the accompanying Supplemental Affidavit of Defendant Richard Prince in Opposition to Plaintiff's Motion for Summary Judgment and in Further Support of Defendants' Motion for Summary Judgment. "Opp. Aff. Ex. ___" refers to the exhibits attached to the accompanying Affidavit of Hollis Gonerka Bart in Opposition to Plaintiff's Motion for Summary Judgment. All other references mentioned in this Memorandum remain the same as Footnote 1 of the Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment. "LN Tr." refers to the transcript of the deposition of Louise Neri taken on December 17, 2009 and "AM Tr." refers to the transcript of the deposition of Alison McDonald taken on December 17, 2009, excerpts of which are attached to Opp. Aff. as Exhibits H and I, respectively. All other references mentioned in this Memorandum remain the same as Footnote 1 of the Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment.

Rasta. The Catalogue also contains photographs of Prince's studio in which certain of the Paintings can be seen. *See* Ex. M (inserts to Catalogue).

7. Defendants deny the allegations of material fact in paragraph 7 of plaintiff's statement. The publication of the Catalogue was copyrighted in the name of Gagosian Gallery and the artwork was copyrighted in the name of Richard Prince. Ex. M. Rizzoli International added the copyright notice to the catalogue. LG Tr. 90-91.

8. Defendants admit that in addition to the photographs of the Paintings which appear in the catalogue, there were other Paintings which incorporate as raw elements scanned, enlarged and altered versions of certain Images Prince took from pages he tore from the book entitled *Yes Rasta* that were not featured in the catalogue. Ex. N at Ex. A.

9. Defendants admit the allegations of material fact in paragraph 9 of plaintiff's statement.

10. Defendants admit the allegations of material fact in paragraph 10 of plaintiff's statement. Defendants assert that Prince understood the word comment to mean a political comment. Prince is not a political artist and therefore does not make political comments with his work. RP Supp. Aff. ¶ 7; RP Tr. 79, 338-39. Prince, through his appropriative techniques, effectively comments generally on aspects of society and the music scene through the meaning and messages which inspired the creation, and informed the expression, of his Paintings. RP Aff. ¶ 19, 21-22.

11. Defendants admit that in response to the question posed on page 273 of his deposition, Prince answered that the Canal Zone paintings were "done very quickly – they're not really thought about..." in relation to his execution of the Paintings (some of which were completed in a full day, a half day, and two hours), and not the concept and ideas behind the

paintings. In explaining the manner and speed with which he works, Prince testified, "I like when I do things fast. I think they should be done quickly. I think when they drag on, you know, you can over think it. I don't like a painting that's overcooked." RP Tr. 274. The genesis of the Paintings was the result of a creative process that spanned a two-year period, which was informed by a trip Prince took to Panama, sketches he made in a copy of *Yes Rasta* he purchased while on vacation, and a screenplay he had been in the process of writing long before he began working on the first Painting. RP Aff. ¶¶ 16, 18-19; RP Tr. 150-51, 154-56, 180.

12. Defendants admit the allegations of material fact in paragraph 12 of plaintiff's statement, but clarify that Prince's use of the word "they're" was intended to mean "they were" in that Prince would complete the Paintings quickly. RP Tr. 273-74. Defendants incorporate by reference their response to paragraph 11.

13. Defendants admit the allegations of material fact in paragraph 13 of plaintiff's statement.

14. Defendants admit that in response to the question posed on pages 45-46 and 267 of his deposition, he answered that he did not have a message that he understood to mean a "political" message, which he denied having because he is not a political artist (RP Tr. 339) and Prince's testimony, when read as a whole make clear that the Paintings were created as part of a basic theme or message about music, art history, and his vision of a fantastical, post-apocalyptic world. See RP Tr. 165-68, 195, 207-08, 214-18, 232, 251-52, 279-80, 300-01, 338-39; RP Aff. ¶¶ 16, 22-25; see also P. Mem. 7-8.

15. Defendants admit the allegations of material fact in paragraph 15 of plaintiff's statement.

16. Defendants deny as stated the allegations of material fact in paragraph 16 of

plaintiff's statement. The "primary subject" of certain Paintings, such as *Graduation* and *Mediation*, was the guitar, which Prince appropriated from other sources, including *Guitar* magazine, and Prince testified that "the guitar is a brilliant, brilliant contribution." RP Tr. 164, 168, 279.

17. Defendants deny the allegations of material fact in paragraph 17 of plaintiff's statement. Prince testified that in his painting *Back to the Garden*, the "guitar...turns this – the original intentions of this image into something completely different, obviously, he's playing the guitar now, it looks like he's playing the guitar, it looks as if he's always played the guitar, that's what my message was...[i]s sort of tell people, he, this guy is playing the guitar." Prince's inclusion of the guitar along with the hands was his contemporary take on the music scene and his attempt to highlight three different human relationships in the universe: women with women, women with men, and men with men. The landscape represented the idyllic setting at Woodstock, and 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 his message that music is the only redeeming thing to have survived. Prince was also thinking about Adam and Even when he painted *Back to the Garden* since they were in the Garden of Eden and his post-apocalyptic screenplay takes place in a tropical jungle garden. Thus, as Prince testified, *Back to the Garden* also fits into his post-apocalyptic vision. RP Tr. 337-41; see RP Aff. ¶ 37.

18. Defendants deny the allegations of material fact in paragraph 18 of plaintiff's statement. Prince scanned, cropped, and enlarged in a pinkish tone one of Cariou's landscape Images as a backdrop to the painting *Djuna Barnes, Natalie Barney, Renee Vivien, and Romaine Brooks Take Over the Guanahani*, which is named after four famous lesbians. The Painting

portrays the women taking over the Guanahani, which represents another element of Prince's screenplay in which early 20th century novelists, poets, and expatriates, who had a lesbian salon in Paris, take over the Guanahani on St. Barts. Prince also wanted to portray a rock and roll theme on the one hand and also make reference to Cezanne's *Bathers*. See RP Tr. 357-61; RP Aff. ¶ 55.

19. Defendants deny the allegations of material fact as written in paragraph 19 of plaintiff's statement but admit that the Paintings evolved from, and are therefore informed by, screenplay "pitch" Prince had been working on, which 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." Prince also was affected by a trip he made to Panama (where he was born) in about 2005 and wanted to do a painting series set in a tropical location, as in the pitch described above. RP Aff. ¶ 16; RP Tr. 214-16.

20. Defendants deny the allegations of material fact in paragraph 20 of plaintiff's statement. Cariou testified that he didn't actually live with the Rastafarians, but rather he "hung out with them" and others he photographed on the streets of Negril and other towns he visited while traveling to Jamaica on and off over a six-year period. PC Tr. 35-37, 73-74, 83.

21. Defendants deny the allegations of material fact in paragraph 21 of plaintiff's statement, but admit that Cariou is the author of one photography book entitled *Surfers*, and has yet to publish two other photography books, and that his commercial photography has appeared

in fashion and travel magazines. PC Tr. 182, 280-83, 286.

22. Defendants admit for purposes of this motion only the allegations of material fact in paragraph 22 of plaintiff's statement.

23. Defendants deny the allegations of material fact in paragraph 23 of plaintiff's statement. Defendants admit that Cariou said in his deposition he wanted to take beautiful and visually compelling and appealing photographs, but deny that this was his only purpose in taking the photographs. Cariou's purpose was to create a beautiful portraiture book, to document the Rastafarian culture and the surrounding landscapes, and to capture as closely as possible the subject being photographed. PC Tr. 35-36, 40-43, 45, 51, 110, 120, 132, 134, 141, 165-66, 171, 172-73, 176-78, 186, 265-66; see also Ex. E ¶ 16; Ex. Z; Ex. AA.

24. Defendants deny the allegations of material fact in paragraph 24 of plaintiff's statement. In selecting the artist editions for the works Cariou did sell, Cariou did not give much thought as to which photographs to select. PC Tr. 93-94. Cariou has been working on a fourth book, featuring his Gypsy project, but it is unclear whether this project was completed as of November 2008. PC Tr. 286-87. As of January, 2010, Cariou had no plans to publish his fourth book. PC Tr. 286; CC Tr. 43-44. Cariou claims to have decided that he was finally ready in or about the fall of 2008 to market and sell his images. PC Tr. 94-95, 235, 284-85, 286. Cariou claims he did not market the *Yes Rasta* images sooner because he was waiting to make his work available to the public when his fourth and final book of portraits about gypsies was completed, when his work matured, and when the right opportunity to see his *Yes Rasta* images presented itself. PC Tr. 94-95, 284-85. Upon completion of the Gypsy project, Cariou intends to move on from portraiture photography to work in other types of photography. PC Tr. 285.

25. Defendants deny the allegations of material fact in paragraph 25 of plaintiff's

statement. In or about August 2008, Christiane Celle, the owner of the Clik Gallery, expressed an interest in representing Cariou on an exclusive basis for an exhibition of his *Yes Rasta* series. CC Tr. 39; see also PC Tr. 95. Celle did not intend for the gallery opening to focus on the *Yes Rasta* images exclusively, as she was interested in exhibiting Cariou's *Surfers* images in the same show. CC Tr. 39-40, 42-44. Celle knew Cariou as she is the former girlfriend, and is still a friend, of Thierry Des Fontaine, a photography assistant who worked closely with Cariou on his Surfer photographs. CC Tr. 32-33, 59.

26. Defendants deny the allegations of material fact in paragraph 26 of plaintiff's statement. Cariou discussed his interest in holding an exhibition of his work with Celle and they met in order to discuss which of the *Yes Rasta* and *Surfers* photographs might be included in an exhibition. CC Tr. 39-40, 42-44. Cariou, however, was non-committal and non-responsive to her attempt to follow-up with him. CC Tr. 47, 52, 63-65, 105. Celle never finalized an agreement with Cariou to represent him. As Celle stated, "I was very committed, I wanted to represent him. We agree on it but we never really pursue it." CC Tr. 133. Celle testified that "In general when I do a show with somebody - when I do a show with an artist I do not do a show if I don't represent him, because it's very expensive to put together a show. CC Tr. 133-34. Celle never gave Cariou a contract to review or sign. CC Tr. 160. Therefore, whatever plans Celle may have had for a show featuring Cariou were never finalized prior to her decision to not hold the exhibition because Cariou had not committed to the show, and Cariou and Celle never settled on or chose the photographs that would appear in the show. CC Tr. 42-44; 47, 133.

27. Defendants admit the allegations of material fact in paragraph 27 of plaintiff's statement, but deny that Celle had finalized a pricing structure for the prints. CC Tr. 67. Celle only estimated that she could sell prints of image from *Yes Rasta* for between \$3000 and

\$20,000, depending on the size. CC Tr. 67, 155. Defendants incorporate by reference the facts set forth in paragraph 26.

28. Defendants admit the allegations of material fact in paragraph 28 of plaintiff's statement.

29. Defendants deny the allegations of material fact in paragraph 29 of plaintiff's statement, but admit that Celle's clients included decorators and individuals in the entertainment business, though she proffered no names. CC Tr. 45, 68-69, 130-31, 158-59.

30. Defendants deny the allegations of material fact as written in paragraph 30 of plaintiff's statement. Celle did not "cancel Cariou's show" because, as of that date, she had been unable to get Cariou to even commit to allowing her to represent him much less sign a contract committing to the particulars of a show, leading her to believe he must have found someone else to represent him and that was why he had not returned any of her calls. CC Tr. 63-65, 88-89, 106, 133, 149.

31. Defendants deny the allegations of material fact in paragraph 31 of plaintiff's statement. As noted in paragraph 30, there was no show to "cancel" because Cariou had never committed to allowing Celle to represent him or to do a show. Nonetheless, Celle remained willing to represent Cariou, and has not foreclosed working with Cariou on future projects. CC Tr. 133. Celle stated, "I was very committed, I wanted to represent him. We agree on it but we never really pursue it." CC Tr. 133. Cariou, however, was non-committal and non-responsive to her attempts to follow-up with him. CC Tr. 63-65, 105. Cariou is aware that Celle is interested in taking him on as an artist on other projects. PC Tr. 103.

32. Defendants deny the allegations of material fact in paragraph 32 of plaintiff's statement, but admit that on or about December 11, 2008, plaintiff's counsel sent Prince and

Gagosian Gallery a demand letter (Brooks Dec. Ex. RR) and that Gagosian Gallery received the demand letter. Defendants also admit that the Canal Zone exhibition ran through December 20, 2008, and that Gagosian Gallery sold some of the Paintings featured at the exhibit and the Canal Zone catalogue. LG Tr. 25; Ex. N. Lawrence Gagosian and Prince withdrew the unsold Canal Zone Paintings, pending this lawsuit. RP Aff. ¶ 26.

33. Defendants admit the allegations of material fact in paragraph 33 of plaintiff's statement.

34. Defendants admit the allegations of material fact in paragraph 34 of plaintiff's statement, but deny that Prince was the author of written works describing his practice of appropriation on the website.

35. Defendants deny the allegations of material fact in paragraph 35 of plaintiff's statement as incomplete and taken out of context. Prince testified that he finds it satisfying to appropriate because he can "get as much fact into [his] work and reduce the amount of speculation. [He] believe[s] there's too much –[he] like[s] an artwork where that when you see something, like a cowboy or a girlfriend...these are, in fact, true." PR Tr. 44. He further explains that it is more satisfying to appropriate if you are attempting to produce work with a certain believability, an official fiction. Brooks Dec. Ex. Q.

36. Defendants deny the allegations of material fact in paragraph 36 of plaintiff's statement. Louise Neri and Alison McDonald testified that they did nothing to learn the source of the images in Prince's Paintings and did not know whether anyone at Gagosian had done anything to find out where Prince had obtained the images taken from *Yes Rasta* or whether those images were copyrighted. LN Tr. 17-18; AM Tr. 92-93. It would not have been Allison McDonald's job to check to see where Prince had obtained the images taken from *Yes Rasta* or

whether those images were copyrighted. AM Tr. 9-10.

37. Defendants deny the allegations of material fact as written in paragraph 37 of plaintiff's statement, but admit that Gagosian Gallery approved ads for the *Canal Zone* exhibition in seven newspapers, five of which featured certain Paintings by Richard Prince, which incorporate as raw elements scanned, enlarged and altered versions of certain Images Prince took from pages he tore from the book entitled *Yes Rasta*. Brooks Dec. Ex. H, at 42-46, 47-50; Brooks Dec. Ex. F at 36, Ex. P.

38. Defendants deny the allegations of material fact in paragraph 38 of plaintiff's statement, but admit that Gagosian Gallery publicized the *Canal Zone* exhibition on its website and in a press release that depicted one of Richard Prince's Paintings, which incorporate as raw elements scanned, enlarged and altered versions of a portion of one of the Images Prince took from pages he tore from the book entitled *Yes Rasta*. Brooks Dec. Ex. F at 49; Brooks Dec. Ex. FF, C00008-09; Brooks Dec. Ex. G, at 18-19.

39. Defendants admit the allegations of material fact in paragraph 39 of plaintiff's statement, but deny the accuracy of Prince's responses during the interview as reported.

40. Defendants deny the allegations of material fact as written in paragraph 40 of plaintiff's statement, but admit that an announcement card containing a reproduction of *The Graduation*, a Painting which Prince incorporated as raw elements scanned, enlarged and altered versions of an Image Prince took from a page he tore from the book entitled *Yes Rasta* was mailed by Gagosian Gallery to some of the 7,500 people on Gagosian's mailing list, consisting of clients, collectors and museums, in order to promote the *Canal Zone* show. Brooks Dec. Ex. JJ; Brooks Dec. Ex. F, at 35; Brooks Dec. Ex. H, at 29-33; AM Tr. 30.

41. Defendants admit the allegations of material fact in paragraph 41 of plaintiff's

statement.

42. Defendants admit the allegations of material fact in paragraph 42 of plaintiff's

statement.

43. Defendants admit the allegations of material fact in paragraph 43 of plaintiff's

statement.

44. Defendants admit the allegations of material fact in paragraph 44 of plaintiff's

statement. Prince also played a role in setting the prices for the Paintings. LG Tr. 116-17.

45. Defendants admit the allegations of material fact in paragraph 45 of plaintiff's

statement.

46. Defendants admit the allegations of material fact in paragraph 46 of plaintiff's

statement.

47. Defendants admit the allegations of material fact in paragraph 47 of plaintiff's

statement.

48. Defendants admit the allegations of material fact in paragraph 48 of plaintiff's

statement.

49. Defendants admit that a cease and desist letter was sent to Eric Doeringer in

November 2005, but deny that the letter, its contents or the circumstances giving rise to the letter

has any relevance to any issue before the Court on the pending motions, which seek a

determination as to whether Prince's use of Images as raw elements in certain of his *Canal Zone*

Paintings constitutes fair use.

II. Defendants' Counter-Statement

50. Defendants incorporate by reference those facts asserted in Defendants' Rule 56.1

Statement of Uncontested Material Facts In Support of Defendants' Joint Motion for Summary

Judgment and any additional facts asserted in response to Plaintiff's Statement Pursuant to Local Rule 56.1 in paragraphs 1 through 49.

51. *Pumpsie Green* (2008): To create *Pumpsie Green*, Prince tore an image from the *Yes Rasta* book and had it scanned and enlarged in a sepia tint. He cut out a portion of this image and collaged it with other images of nude women, a man and a guitar. He collaged all of these images directly to the canvas with white paint using the squeegee technique. On the man, Prince painted black lozenge eyes. On two of the women Prince painted pinkish colored lozenge eyes and over one of the women he painted black lozenge eyes. Prince named this painting *Pumpsie Green* because Pumpsie Green, who was the first African-American player on the Red Sox., was his childhood hero, and he wanted to honor him through the title. RP Supp. Aff. ¶ 5, RP Tr. 253-54.

52. Prince understood the use of the word "comment" to mean a political comment. RP Supp. Aff. ¶ 7.

53. Prince is not a political artist. RP Supp. Aff. ¶ 7; RP Tr. 79, 338-39.

54. Prince therefore does not make political comments with his work. RP Supp. Aff. ¶ 7; RP Tr. 79, 338-39.

55. In capturing the Jamaican Rastafarian culture, it is commonplace to incorporate pictures of Rastafarians with dreadlocks. Ex. CC; Opp. Aff. Ex. A (YouTube videos of, and online brochures for, tours of Jamaican ganja plantations).

56. It is common to include shots of tropical vegetation, ganja plantations, ganja vegetation and marijuana cigarettes, and scenes of the mountains, villages and key towns such as Negril and Kingston, in attempting to capture the Jamaican Rastafarian culture. See *id.*

57. Some of the great master painters, such as Picasso and Cy Twombly, created masterpieces in a matter of hours. See Opp. Aff. Ex. B.

58. Cariou considered the *Yes Rasta* images he staged and shot in 15 minutes to have taken him "considerable time." PC Tr. 132.

59. According to Prince, "in any artwork, I don't think there's any one message." RP Tr. 339.

60. Though Lawrence Gagosian did not approve the sale of leftover *Canal Zone* announcement cards to Rare Posters for a dollar a piece, those sales nonetheless fostered the promotion of and public exhibition of the Paintings. LG Tr. 77-78.

61. Prince, who created the Paintings in his studio in the Hamptons with assistance from personnel in his studio in upstate New York, worked alone. RP Tr. 174-75, 182.

62. Lawrence Gagosian works mainly out of the office located on Madison Avenue in New York. LG Tr. 15.

63. Neither Gagosian Gallery or Lawrence Gagosian had any control over or involvement with Prince's creation of the paintings. RP Aff. ¶ 24.

64. Although Prince has been a prolific appropriation artist of international acclaim for more than 30 years, he has never been sued, until this lawsuit. RP Tr. 25.

65. Defendants correct an inadvertent factual mistake made in their opening brief and state the following: In all but four of the Paintings, *Djuana Barnes*, *Natalie Barney*, *Renee Vivien and Romaine Brooks*, 2008, *On the Beach*, 2008, *Canal Zone*, 2008, and *The Ocean Club*, 2008, Prince appropriated only portions of the Images. See Ex. A to RP Aff.

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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 OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
Preliminary Statement.....	1
POINT I	
CARIOU HAS NOT SHOWN THAT THE USE OF THE IMAGES SATISFIES THE IMPROPER APPROPRIATION PRONG OF HIS COPYRIGHT INFRINGEMENT CLAIM.....	2
POINT II	
CARIOU HAS FAILED TO SUSTAIN HIS BURDEN, AS MOVANT, THAT HE IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF FAIR USE	5
A. Cariou Has Not Proffered Any Basis to Defeat Defendants’ Showing that Prince’s Use of the Images was Transformative as a Matter of Law	5
1. Evidence that Prince Worked Quickly in Implementing His Creative Expression is Irrelevant to the Fair Use Analysis	6
2. Prince’s Creation of the Paintings in the Tradition of Appropriation Artists Does Not Foreclose a Fair Use Defense, As Cariou Urges.....	7
3. Neither Section 107 Nor the Cases Construing It Require the Secondary User to Comment on the Original Work in Order to Satisfy the Transformative Prong	8
4. The Public Benefit of Promotion of and Access to Art Outweighs the Profits From Defendants’ Commercial Use of the Substantially Transformed Images	12
5. Prince’s Sharply Different Creative Goals in Using the Images as Raw Materials to Create the Paintings Confirm the Transformative Use of the Images	13
B. Because the Copyright in the Fact-Based Images, if Any, Is Weak, the Second Factor, Nature of Work, Weighs in Favor of Fair Use	15
C. Not Only the Amount, But the Substantiality, of Prince’s Use of the Images was Reasonable to Carry Out His Creative Purpose	16
D. Cariou’s Claim That the <i>Canal Zone</i> Exhibition Led to a Decision to “Cancel” a Show Featuring Yes Rasta Is Neither Evidence of Market Usurpation Nor Credible.....	20
POINT III	
DEFENDANTS GAGOSIAN GALLERY AND LARRY GAGOSIAN ARE NEITHER VICARIOUS NOR CONTRIBUTORY INFRINGERS	22
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>A.V. v. iParadigms, LLC</i> , 562 F.3d 630 (4 th Cir. 2009).....	15
<i>Arden v. Columbia Pictures Indus., Inc.</i> , 908 F. Supp. 1248 (S.D.N.Y. 1995).....	3
<i>Bill Diodato Photography, LLC v. Kate Spade, LLC</i> , 388 F. Supp.2d 382 (S.D.N.Y. 2005).....	2, 3, 4, 5
<i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> , 448 F.3d 605 (2d Cir. 2006).....	13, 16, 17
<i>Blanch v. Koons</i> , 396 F. Supp. 2d 476 (S.D.N.Y. 2005).....	18
<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2006).....	passim
<i>Bourne Co. v. Twentieth Century Fox Film Corp.</i> , 602 F. Supp. 2d 499 (S.D.N.Y. 2009).....	5, 11, 13, 17
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	passim
<i>Campbell v. Koons</i> , 91 Civ. 6055 (RO); 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993).....	19
<i>Castle Rock Entm't v. Carol Publ'g Group</i> , 150 F.3d 132 (2d Cir. 1998).....	13
<i>Davis v. Gap</i> , 246 F.3d 152 (2d Cir. 2001).....	17
<i>Faulkner v. Nat'l Geographic Soc.</i> , 211 F. Supp. 2d 450 (S.D.N.Y. 2002).....	22, 23, 24
<i>Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., Inc.</i> , 499 U.S. 340 (1991).....	2, 3, 16
<i>Harper & Row, Publs. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	19
<i>Inwood Labs., Inc. v. Ives Labs., Inc.</i> , 456 U.S. 844 (1982).....	24
<i>Jeffreys v. City of New York</i> , 426 F.3d 549 (2d Cir. 2005).....	22
<i>Knitwaves, Inc. v. Lollytogs, Ltd.</i> , 71 F.3d 996 (2d Cir. 1995).....	4
<i>Leibowitz v. Paramount Pictures Corp.</i> , 137 F.3d 109 (2d Cir. 1998).....	18, 20
<i>Lennon v. Premise Media Corp.</i> , 556 F. Supp. 2d 310 (S.D.N.Y. 2008).....	14
<i>Mannion v. Coors Brewing Co.</i> , 377 F. Supp. 2d 444 (S.D.N.Y. 2005).....	6
<i>Maxtone-Graham v. Burtchaell</i> , 803 F.2d 1253 (2d Cir. 1986).....	2
<i>NXIVM Corp. v. Ross Inst.</i> , 364 F.3d 471 (2d Cir. 2006).....	18, 20, 21
<i>Reyes v. Wyeth Pharm., Inc.</i> , 603 F. Supp. 2d 289 (D. P.R. 2009).....	9

Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) 7, 8, 11, 19

Salinger v. Fredrik Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) 22

United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993) 8

Walker v. Time Life Films, Inc., 784 F.2d 44 (2d Cir. 1986)..... 3

Warner Bros. Entm't v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) 17

Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991)..... 20

Other Authorities

4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[B][2]..... 5

4 *Nimmer on Copyright* § 13.05[A][2][a]..... 15

H. R. Rep. No. 94-1476 (1976)..... 10

S. Rep. No. 94-473 (1975)..... 10

Preliminary Statement

Relying principally on his status as the compilation copyright holder and a presumption of infringement; snippets of testimony quoted out of context; and language lifted from cases without discussion of its application to the true facts of this case, Cariou's moving papers confirm that he cannot, as a matter of law, sustain his burden, as movant, to show that the Images are sufficiently original to warrant much, if any copyright protection, or that the use of the Images satisfies the "improper appropriation" prong of his copyright infringement claim (which is not even pled in his Amended Complaint), or that the use of the Images was not fair. Moreover, having failed to come forward with any evidence that either of the Gagosian defendants had any control over Prince's creation of the Images, Cariou's vicarious liability claim must be dismissed as frivolous. Nor is it enough to say that because Prince is a well-known appropriation artist, the Gagosian defendants knew or should have known that Prince had (allegedly) infringed Cariou's copyright, such that they should be held contributorily liable. As Cariou's moving papers also confirm that he cannot rebut the showing defendants have made in their opening brief and in this opposition that each of the determinative fair use factors weighs in favor of defendants, their summary judgment motion should be granted, particularly in light of Prince's transformative use of the Images to create a wholly new and different expression, meaning and message.¹

¹ "P. Mem." refers to the referenced page of the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment. "D. Mem." refers to the referenced page of the Memorandum of Law in Support of Defendants' Motion for Summary Judgment. "RP Supp. Aff." refers to the accompanying Supplemental Affidavit of Defendant Richard Prince in Opposition to Plaintiff's Motion for Summary Judgment and in Further Support of Defendants' Motion for Summary Judgment. "Supp. Aff. Ex ___" refers to the exhibits attached to the accompanying Supplemental Affidavit of Defendant Richard Prince. "Opp. Aff. Ex. ___" refers to the exhibits attached to the accompanying Affidavit of Hollis Gonerka Bart in Opposition to Plaintiff's Motion for Summary Judgment. All other references mentioned in this Memorandum remain the same as Footnote 1 of the Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment.

POINT I
CARIOU HAS NOT SHOWN THAT THE USE OF THE IMAGES SATISFIES THE IMPROPER APPROPRIATION PRONG OF HIS COPYRIGHT INFRINGEMENT CLAIM

In his opening brief, Cariou assumes that because he owns the compilation copyright in the images in *Yes Rasta*, he is entitled to the “core protection” of the copyright laws as to the entirety of the Images. P. Mem. 1-2, 20. However, to prevail on an infringement claim, the owner also must show actual copying *and* “improper appropriation” of constituent elements of the work that are original. *See Feist Publ’ns., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) (“*Feist*”) (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.”).

While the techniques Cariou chose to shoot images depicting Rastafarians in their native Jamaican landscape may be enough to satisfy the minimum standard for originality (P. Mem. 2, 20), “[n]o one may claim originality as to facts. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery. . . . The discoverer merely finds and records.” *Feist*, 499 U.S. at 347 (internal citations omitted). As such, the fact-based images of Rastafarians in their Jamaican landscape that Cariou depicted as realistically as possible, are not protectable as a matter of law. *Id*; *see also, Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262-63 (2d Cir. 1986); P. Mem. 1-2.

Though Cariou claims to have “staged” many of the pictures he took (P. Mem. 2), these images along with the tropical and ganja-filled landscapes which surround them are non-protectable *scenes a faire* typical of images of this type and thus, are not original. *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp.2d 382, 392 (S.D.N.Y. 2005) (“*Diodato*”) (“Sequences of events that necessarily result from the choice of a setting or situation do not

enjoy copyright protection.”) (citations omitted). In capturing the Jamaican Rastafarian culture, it is commonplace to incorporate pictures of Rastafarians with dreadlocks. Indeed, plaintiff concedes in his Opening Memorandum that images of Rastafarians such as those found in *Yes Rasta* can be readily found in stock photos. See P. Mem. 8; *Diodato* at 393 (photographs not original where stock photos similar to ones at issue were readily available, and were found in films and other media); see also Ex. CC; Opp. Aff. ¶ 2, Ex. A (a search on YouTube also yields homemade videos by tourists filming ganja plantations in Jamaica, the details of which are accessible via Google search, and footage of Rastas in their natural habitat). These materials also confirm that it is common to include shots of tropical vegetation, ganja plantations, vegetation, and scenes of mountains, villages and towns such as Negril and Kingston, in attempting to capture the Jamaican Rastafarian culture. See *id.*; see also *Diodato* at 392 (“elements of an image that flow naturally and necessarily from the choice of a given concept cannot be claimed as original.”); *Arden v. Columbia Pictures Indus., Inc.*, 908 F. Supp. 1248, 1259 (S.D.N.Y. 1995) (“depictions of drunks, prostitutes, rodents, and abandoned cars were unprotectable scenes a faire”) (citing *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986)).

The manner in which Cariou posed his subjects also is not a protectable element. *Diodato* at 393 (“a plaintiff’s copyrights cannot monopolize the various poses used”) (internal citations omitted). Nor does Cariou have a protectable monopoly on the technique commonly used by photographers to blur the background, so as to bring the subject into sharp focus. *Diodato*, 388 F. Supp. 2d at 392.

Even Cariou’s position that his work must be viewed as a compilation to appreciate the distinctiveness of the *Yes Rasta* images (PC Tr. 61-62, 81) does not warrant copyright protection as to the entirety of each Image. While the arrangement of elements in a compilation may give rise to originality (*Feist*, 499 U.S. at 348), Prince used the Images as raw elements in the

Paintings without regard to how they are organized in *Yes Rasta*. In any event, as the Supreme Court has observed:

No matter how original the format, however, the facts themselves do not become original through association. . . . This inevitably means that the *copyright in a factual compilation is thin*. Notwithstanding a valid copyright, a subsequent compiler *remains free to use the facts contained in another's publication to aid in preparing a competing work*, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "No matter how much original authorship the work displays, the facts and ideas it exposes are *free for the taking*. . . . The very same facts and ideas may be *divorced from the context* imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas."

Id. at 349 (emphasis added) (internal citations omitted).

Where, as here, the works contain both protectable and unprotectable elements, the court's "inspection must be more discerning; [it] must attempt to extract the unprotectable elements from [its] consideration and ask whether the *protectable elements, standing alone*, are substantially similar." *See Diodato* at 390 (citing *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)) (emphasis in original). As most of the elements in the Images are non-protectable, Cariou cannot show an improper appropriation (an element not pled in his Amended Complaint) since the only arguably protectable elements in the Images, *standing alone*, are not substantially similar to the scanned, enlarged, altered and re-contextualized images in the Paintings. *See id.* at 390 (to satisfy improper appropriation requirement, copyright owner must demonstrate that "'substantial similarities' as to the protected elements of the work would cause an average lay observer to 'recognize the alleged copy as having been appropriated from the copyrighted work.'"). Cariou has conceded that the only elements of his photographs that fall "within the core protection of copyright" are his choice of "camera, lenses, film, angle, lighting and exposure" and his oversight of film development to "exacting specifications." P. Mem. 20. Thus, when stripped of the non-protectable elements (fact-based images documenting

Rastafarians in their Jamaican landscape), it is not possible for an average observer to recognize the remaining protectable elements as having been appropriated from *Yes Rasta*. See *Diodato*, 388 F. Supp. 2d at 390 (“When similar works resemble each other only in unprotected aspects – for example, when similarities inhere in . . . expression that is not proprietary to plaintiff – defendant prevails.”) (citing 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[B][2]).

POINT II
CARIOU HAS FAILED TO SUSTAIN HIS BURDEN, AS MOVANT, THAT HE IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF FAIR USE

Even if Cariou could make out a copyright infringement claim, he would not be entitled to summary judgment on his claim that defendants are not entitled to invoke the fair use defense. As is evident from his opening brief, Cariou cannot rebut the showing defendants have made on their motion for summary judgment seeking a determination that the use was fair. See *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 503 (S.D.N.Y. 2009) (Batts, J.) (non-movant may not rely on conclusory allegations, speculation or conjecture. “Instead, when the moving party has documented particular facts in the record, ‘the opposing party must set forth specific facts showing that there is a genuine issue for trial.’”) (citation omitted).

A. Cariou Has Not Proffered Any Basis to Defeat Defendants’ Showing that Prince’s Use of the Images was Transformative as a Matter of Law

Cariou begins his discussion of the transformative prong by reciting the standard in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) for determining whether the “challenged use is transformative”; that is, “whether the new work merely ‘supersede[s] the objects of the original creation . . . or instead *adds something new*, with a *further purpose of different character*, altering the original with *new expression, meaning or message*; it asks, in other words, whether and to what extent it is ‘transformative.’” P. Mem. 14 (emphasis added).

Though this standard clearly requires a comparison of the original and challenged work, Cariou does not explain why he feels Prince's use of the Images as raw elements in each of the Paintings is not transformative. *See id.* Instead, Cariou spends six pages attempting, unsuccessfully, to discredit Prince in the style and manner in which he works as an appropriation artist, attributing arguments to defendants they have never made, applying inapplicable legal theories quoted out of context, and chastising the Gagosian defendants for doing their job to promote a facially transformative body of works by Prince. *Id.* at 14-19. As such, none of Cariou's theories undermine the showing defendants made in their opening brief that Prince's use of the Images as raw elements to create an entirely new expression, meaning and message that was transformative as a matter of law. *See* D. Mem. 14-16; *see also* PR Aff. Ex. A.

1. Evidence that Prince Worked Quickly in Implementing His Creative Expression is Irrelevant to the Fair Use Analysis

Cariou cites no case to support his vague suggestion that the speed with which Prince completed the Paintings somehow casts doubt as to their transformative nature. P. Mem. 17. As Prince explained (in that portion of his deposition which Cariou omits): "I like when I do things fast. I think they should be done quickly. I think when they drag on, you know, you can over think it. I don't like a painting that's overcooked." RP Tr. 274. Indeed, some of the great masters, such as Cy Twombly and Picasso, to which Prince pays homage in the Paintings (RP Tr. 165-67), created many masterpieces in a matter of hours.² *See* Opp. Aff. Ex. B. The issue, however, is not how long it took Prince to complete each Painting, only the transformative nature of result of that process. *See, e.g., Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2005) ("'Sweat of the brow' is not the touchstone of copyright. Protection derives

² Cariou's views about the speed with which Prince works stand in contrast to his statement that the shots he staged in 15 minutes took him a "considerable" period of time. *See* P. Mem. 2.

from the features of the work itself, not the effort that goes into it.”). In any event, the irrefutable record is clear that the genesis of the Paintings was the result of a two-year creative process, which was informed by a trip Prince took to Panama, sketches he made in a copy of *Yes Rasta* he purchased while on vacation, and a screenplay he had been writing long before he began working on the Paintings. RP Tr. 8-9, 152-54, 265-66; *see also* P. Mem. 3, 8.

2. Prince’s Creation of the Paintings in the Tradition of Appropriation Artists Does Not Foreclose a Fair Use Defense, As Cariou Urges

In their opening brief, defendants show that appropriation art, an established and respected art form, by its very nature, involves a taking of an original work for the purpose of transforming into a new expressive meaning and purpose. *See* D. Mem. 14-16); *see also* *Rogers v. Koons*, 960 F.2d 301, 303 (2d Cir. 1992) (“*Rogers*”) (defining appropriation art, as follows: “when the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place.”). This is the very essence of fair use. Defendants then showed, in painstaking detail, precisely why Prince’s use of the Images satisfies each element of their fair use defense. D. Mem. 14-24; *see also* RP Aff. Ex. A. On this record, then, the Court should ignore Cariou’s unsubstantiated, and demonstrably false, accusation that Prince claims he is “excused” from (allegedly) infringing another artist’s copyright simply “by following in that artistic tradition.” P. Mem. 17. In making this argument, Cariou quotes language out of context from the *Rogers* case to urge that *Rogers* applies here. In *Rogers*, the artist, Jeff Koons “argue[d] that his sculpture is a satire or parody of society at large.” *Rogers*, 960 F.2d at 309. Here, there is no claim that the Paintings are a satire or a parody. Thus, the holding in that case (also cited out of context in Cariou’s Memorandum (P. Mem. 17-18)), requiring that the copied work must be the object of the parody to ensure “public awareness of the original,” is limited to works involving parody. *Rogers* at 310 (“By requiring that the copied work be an object of the parody,

we merely insist that the audience be aware that underlying the parody, there is an original and separate expression, attributable to a different artist.”); *see also United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993) (after completing its analysis of the four fair use factors (Point IIIA), court turned to Koons’ claim that works were a parody or satire (Point IIIB), noting: “It is well recognized that there is a branch of the fair use doctrine which deals specifically with the use of a copyrighted work for purpose of parody or satire.”).

In the same way, *United Feature Syndicate, Inc.*, also relied on by Cariou, is inapplicable because it is another parody case that rejects the same art as a defense theory that has not been advanced by the defendants in this case. P. Mem. 15. In any event, as both *Rogers* and *United Feature Syndicate* were decided before the Supreme Court issued its landmark fair use decision in *Campbell*, they are of limited precedential value on this point, since neither of these cases address the transformative nature of the works at issue in those cases, focusing instead on commercialism, a factor which *Campbell* teaches is of lesser significance than the transformative nature of the new work. *Campbell*, 510 U.S. at 579.

3. Neither Section 107 Nor the Cases Construing It Require the Secondary User to Comment on the Original Work in Order to Satisfy the Transformative Prong

In his opening brief, Cariou lifts snippets of Prince’s testimony out of context to argue that Prince’s creation of the Paintings lack a message and do not comment. P. Mem. 6-7, 15, 17. However, as shown in Defendants’ Memorandum, Prince’s creation of the Paintings was informed by certain core meanings or messages he intended to convey through them:

- Prince’s concept of a fantastical post-apocalyptic world, where music was the only redeeming thing to survive, as shown through repetitive use of the guitar, figures as band members, and rhythm as expressed through various painterly and collaging techniques. *See, e.g.*, RP Aff. ¶¶ 22, 27, 32-61; *see also* RP Tr. 338-39 (“I’m trying to make a kind of fantastic, absolutely hip, up to date contemporary take, on the music scene.”), 359-61 (“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.”); P. Mem. 7, 8.

- An ongoing exploration of the relationships that exist in the world, which are men and men, men and women, and women and women. RP Aff. ¶ 37; RP Tr. 338-39.
- Equality between the sexes, as shown through their nudity and roles as band members. RP Aff. ¶ 61.
- To pay homage to master painters whose works Prince admires. *Id.* at ¶¶ 21, 27, 32, 34, 35, 38-42, 63, 66; *see also* RP Tr. 165-67.

See also RP Tr. 339 (“in any artwork I don’t think there’s any one message.”). In using altered, scanned and enlarged copies of the Images as raw materials alone or in combination with other raw materials and painterly elements to communicate these meanings or messages, Prince has created an entirely new and different creative expression, such that his use of the Images in the Paintings is substantially transformative as a matter of law.³ *See* D. Mem. 5-7, 14-24; *see also* *Reyes v. Wyeth Pharm., Inc.*, 603 F. Supp. 2d 289, 296-97 (D. P.R. 2009) (though actual sculpture was pictured without alteration, secondary work found “somewhat transformative” because message of the sculpture had nothing to do with message conveyed in ad).

In his opening brief, Cariou cites to Prince’s deposition testimony that he does not make comments with any of his works (P. Mem. 7),⁴ and then urges this Court to impose a further requirement that in expressing these meaning or messages, Prince must also comment on the Images or on culture generally, or his use must fit within one of the other illustrative purposes listed in Section 107. *See* P. Mem. 15-16. Cariou, however, makes no attempt to harmonize his

³ Prince testified that his message is further expressed in the titles he gave to the Paintings. *See* RP Tr. 249; RP Aff. ¶¶ 35, 38, 42, 45-47, 51. Though Cariou tries to discredit this testimony by pointing out Prince’s inability to recall specific titles for each of the Paintings (P. Mem. n.2), any perceived deficiencies in his ability to remember with precision all 29 titles does not diminish the importance Prince placed on those titles to convey his transformative message at time the works were created.

⁴ It is worth noting that when viewed in the context of the questions and answers which preceded this answer that Prince struggled with the examiner’s use of the word “comment,” but he was steadfast in his responses that his message is about music and its reference to pop culture. *See* RP Tr. 353-55. This sequence also came on the heels of testimony in which Prince stated he is not a “political artist” (*id.* at 338-39), thereby suggesting that he understood the use of the term “comment” to mean political comment, a fact which he confirms in his Supplemental Affidavit. Supp. RP Aff. 7.

insistence on a strict application of Section 107 with the admission in his Memorandum that purposes listed in Section 107 are “illustrative” (P. Mem. 14), or with the cases he cites, each of which expressly adopt the holding in *Campbell* that Section 107 “employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.”⁵ *Campbell*, 510 U.S. at 577-78 (internal citations omitted). Had Congress intended to impose a requirement that all secondary works must comment, it could have done so by adding a comment requirement as a conjunctive element, or by providing that only those activities listed in Section 107 can qualify as fair use, a construction that was soundly rejected in describing the legislative intent:

The statement of the fair use doctrine in Section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can [a]rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H. R. Rep. No. 94-1476 at 66 (1976); S. Rep. No. 94-473, p. 62 (1975). *See also* H.R. Rep. No. 94-1476, at 65; S. Rep. No. 94-473 at 61 (examples in Section 107 “are by no means exhaustive”).

⁵ In keeping with his practice of using appropriated images as raw elements, Prince used the Images to provide unassailable authenticity to the creative expression and message of Rastafarian band members in a post-apocalyptic world set on a tropical island. *See* RP Tr. 43-44 (“I like to get as much fact into my work and reduce the amount of speculation. I believe there’s too much – I like an artwork where that when you see something, like a cowboy or a girlfriend, I mean these are, in fact, true.”); RP Aff. ¶ 14. It was in this sense that Prince finds it more satisfying to appropriate than to create his own work, not because he wanted to “avoid the drudgery in working up something fresh,” as Cariou suggests. P. Mem. 3, 15 (quoting *Campbell*). As such plaintiff’s attempt to cram this case into the facts of *Campbell* is unavailing.

Unlike the parody cases on which Cariou relies, in which the point of the parody can only be appreciated by commenting on the underlying work, there was no need for Prince to comment on the Images since his intent was to re-contextualize them into an entirely new expression, thereby rendering their original meaning irrelevant. RP Aff. ¶¶ 26, 27, 32-61; RP Tr. 361-61. In any event, even in a parody case, the Second Circuit has found the use transformative where the artist was commenting generally, and not on the underlying works. *See Blanch v. Koons*, 467 F.3d 244, 252-53 (2d Cir. 2006) (use transformative where artist used image “as fodder for his commentary on the social and aesthetic consequences of mass media.”).

Even if this Court were to interpret Section 107 to impose a commenting requirement, it could nonetheless find that Prince, through his appropriative techniques, effectively comments generally on aspects of society and the music scene through the meaning and messages which inspired the creation, and informed the expression, of the Paintings. *See, e.g., Rogers*, 960 F.2d at 304 (appropriation art, which dates back to beginning of 20th century, defines its efforts as follows: “when the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place.”); *see also Blanch*, 467 F.3d at 254-55 (in deciding that Koons’s work appeared more properly classified as a satire than a parody, the Second Circuit noted that “[a]lthough it seems clear enough to us that Koons’s use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography, we need not depend on our own poorly honed artistic sensibilities” and Court looked instead to Koons’s own words, which had been offered to substantiate his parody theory); *Bourne*, 602 F. Supp. 2d at 508 (after noting that “Second Circuit has given weight to an artist’s own explanation of their creative rationale when conducting the fair use analysis,” Court properly made its own assessment of the way secondary work “may reasonably be perceived” as commenting).

4. The Public Benefit of Promotion of and Access to Art Outweighs the Profits From Defendants' Commercial Use of the Substantially Transformed Images

Cariou's disdain for Prince, his appropriative art style and the gallery that has thoughtfully and professionally represented him for the past four years is particularly apparent in Cariou's discussion of defendants' efforts to market the *Canal Zone* series and sell the Paintings to an international clientele of established collectors and museums.⁶ Indeed, Cariou starts with a premise (based on snippets from case holdings without making the analysis courts use to assess the transformative nature of the works at issue), that the Paintings are "less transformative." P. Mem. 18. He then lists activities one would expect an international art gallery to undertake in representing a world-renowned artist client, as if to suggest that defendants have done something unseemly by engaging in industry-standard conduct.⁷ *Id.* at 18-19 (falsely accusing defendants of "hawking" works "hastily thrown together by Prince without much thought"). They have not.

During discovery, Gagosian turned over documents detailing the gallery's efforts to market the Paintings, which cost Gagosian Gallery \$434,730.47 in expenses in promoting the *Canal Zone* series. At the request of plaintiff, Gagosian stipulated to the \$10,480,000 in gross sales generated from Paintings that were sold before defendants pulled the series during the pendency of this lawsuit, and the \$6,288,000.00 that was paid to Prince as his share of the profits. Ex. N-O. In doing so, the Gagosian defendants readily acknowledges that the gallery is a commercial enterprise, which they hoped would yield a return on their continued investment and belief in Prince. LG Tr. 41. But analysis of the commercialism factor does not end here. The Supreme Court in *Campbell* warns against the application of a *per se* rule of presumption

⁶ Cariou's reliance on the Doeringer affidavit says more about Cariou and the weakness of his case than he feels the need to proffer the wholly irrelevant statement of a third party concerning an unrelated event in an effort to try to prejudice the defendants in the eyes of this Court.

⁷ Though Lawrence Gagosian did not approve the sale of leftover *Canal Zone* announcement cards to Rare Posters for a dollar a piece, those sales nonetheless fostered the promotion of and public exhibition of the Paintings. LG Tr. 77-78.

against fair use when commercial use is present, as Cariou seems to advocate. *Campbell*, 510 U.S. at 585; *see also* P. Mem. 12-13. Instead, *Campbell* instructs that “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.” *Id.* at 579. Also relevant is the broader public benefit of promoting and affording access to the arts.⁸ *See, e.g., Blanch*, 467 F.3d. at 254; *see also* D. Mem. 12-17. Thus, the commercial gains derived by defendants should be discounted in light of the broader public benefits of promoting and providing access to the art, and the substantially transformative nature of the Paintings.⁹ *See* D. Mem. 16-17.

5. Prince’s Sharply Different Creative Goals in Using the Images as Raw Materials to Create the Paintings Confirm the Transformative Use of the Images

In assessing the purpose and character prong of the first fair use factor, courts in this Circuit consider whether the purpose in using the original work is “plainly different from the original purpose for which it was created.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) cited with approval in *Blanch*, 467 F.3d at 252-53 (“The sharply different objectives that Koons had in using, and *Blanch* had in creating, ‘Silk Sandals,’ confirms the transformative nature of the use.”); *Bourne Co.*, 602 F. Supp. 2d at 509 (work which was different in tone and message “could not have been more different” and thus was transformative); *see also* D. Mem. 15-16. Thus, Cariou’s argument that he and Prince had “the

⁸ Cariou cannot, on the one hand, fault defendants for having exploited the Paintings, while on the other, suggest that defendants are not entitled to the weight given to the promotion and public exhibition of the arts merely because they made the decision, in good faith and in keeping with accepted mitigation practices, to “retir[e] the unsold art to storage, where no one from the public can see it.” P. Mem. 19.

⁹ Because Prince’s use of the Images was transformative, the Paintings are not derivative works as a matter of law. *See Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d 132, 143 (2d Cir. 1998) (“Although derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation, such works—*unlike works of fair use*--take expression for purposes that are not transformative.”). Since the Paintings were not derivative works, the decision of Rizzoli International to include a copyright designation in the *Canal Zone* catalogue (LG Tr. 91) was perfectly appropriate.

same *aesthetic* purpose” to create beautiful art is not determinative of the first prong. P. Mem. 15 (emphasis added). Indeed, if comparable aesthetic purposes were the test, there could never be a finding of fair use since it is hard to imagine that any creator of an original work would purposefully set out to create something aesthetically displeasing. It follows then, that Prince’s use of the Images has not, as Cariou urges, superseded the objects of Cariou’s work just because both artists set out to create something beautiful. *See id.*

In any event, as shown in Defendants’ Memorandum, Prince did not merely repackage the Images (and thereby supersede them); he used them as raw elements “in the creation of new information, new aesthetics, new insights and understandings.” *Blanch* at 253; *see also Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 324 (S.D.N.Y. 2008) (though plaintiffs contended that defendants’ use of song “Imagine” was not transformative because it was unnecessary to use it to further the purposes defendants articulated, court held that such use “posed no obstacle to a finding of fair use” because “[d]etermining whether a use is transformative does not require courts to decide whether it was strictly necessary that it be used.”). As Cariou fails to even address this determinative point in his papers, much less explain how his purpose in depicting as realistically as possible Rastafarians in their native Jamaican environment is the same as Prince’s artistic purpose of creating a hip take on the music scene through his expression of a fantastical post-apocalyptic world where music is the only redeeming thing to survive, the first prong weighs decidedly in defendants’ favor. *See Blanch*, 467 F.3d at 253 (“When, as here, the copyrighted work is used a ‘raw material’ in the furtherance of distinct *creative or communicative* objectives, the use is transformative.”) (internal citations omitted); *see also D. Mem.* 15-16.

B. Because the Copyright in the Fact-Based Images, if Any, Is Weak, the Second Factor, Nature of Work, Weighs in Favor of Fair Use

As shown in Point I *supra*, the copyright protection afforded to the protectable creative elements in the Images is non-existent, or at best, very weak. *See also* Point II(C) *infra*. Even assuming Cariou can show that the Images, individually, or when viewed as part of the fact-based compilation for which they were taken, are enough to meet the minimum creativity required for copyright protection, *and* that Prince's alteration and use of those Images satisfies the "improper appropriation" prong of the copying element of a copyright infringement claim, the existence of some degree of creativity (*i.e.*, choice of lighting, film, camera, time of day, film speed) is not enough, to carry the second fair use prong. As the Second Circuit in *Blanch* instructs:

Two types of distinctions as to the nature of the copyrighted work have emerged that have figured in the decisions evaluating the second factor: (1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.

467 F.3d at 256. *See also* 4 *Nimmer on Copyright* § 13.05[A][2][a] ("the more creative the work, the more protection it should be accorded from copying," whereas, "the more informational or functional the ... work, the broader should be the scope of the fair use defense."). As the Images have been published, and they were, according to Cariou, intended as part of a factual compilation that is likely to be of historical significance (PC Tr. 285-86), the second prong weighs in favor of fair use, notwithstanding the presence of some degree of protectable elements in the Images. *A.V. v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009) ([I]f the disputed use of the copyright work is not related to its mode of expression but rather to its historical facts," then the creative nature of the work is mitigated") (internal citations omitted). But, even if it were determined that the second factor somewhat favors Cariou, it is of

“limited usefulness” where, as here, the work is being used for a transformative purpose. *Blanch*, 467 F.3d at 257; *see also Graham Archives*, 448 F.3d at 612-13 (“even though [original] images are creative works . . . the second factor has limited weight in our analysis because the purpose of [the] use was to emphasize the images’ historical [i.e., factual] rather than creative value.”); RP Aff. ¶¶ 45, 53, 54 (Prince was looking for black and white figures to further his theme). Thus, whatever marginal creativity may be extant in the Images, it is not enough to defeat defendants’ fair use defense, as Cariou urges (P. Mem. 19-20).

C. Not Only the Amount, But the Substantiality, of Prince’s Use of the Images was Reasonable to Carry Out His Creative Purpose

At first blush, it might be tempting to focus solely on the number, amount and large scale of the Images Prince incorporated as raw elements of his Paintings, as Cariou has done. P. Mem. 21-22. However, *Campbell* teaches that in deciding the third prong, courts are to look not only at the amount of the underlying work used, but also its substantiality – i.e., its “value.” According to *Campbell*, this factor “calls for recognition that some works are closer to the core of intended copyright protection than others,” citing *Feist*, 499 U.S. at 348-51 (contrasting creative works with fact-based compilations; *see also supra* at Point II(B); D. Mem. 20-23).

Though Cariou relies on *Campbell* in his analysis of the third prong (P. Mem. 21), he does not mention, much less address, the substantiality prong. Instead he focuses solely on the quantity and enlarged size of the Images taken, and in doing so, grossly overstates his case by accusing Prince (without any record cite), of “taking *entire* Photographs of Rastas and copious portions of landscapes” as if to suggest that Prince did this in each of the Paintings. P. Mem. 21 (emphasis added). As can be readily seen from the comparison of the Images and the Paintings found in the Composite Exhibit, with the exception of four of the Images, Prince used only a portion of the Images he tore from *Yes Rasta* to further his artistic message, and in this regard,

the use was reasonable. *See* RP Aff. Ex. A; RP Aff. ¶¶ 26, 34, 38-39, 45-50, 53-57; *see also* P. Mem. 21 (conceding that “[F]ragmentary copying is more likely to have a transformative purpose than wholesale copying.”) (citing *Davis v. Gap*, 246 F.3d 152, 175 (2d Cir. 2001)); *Campbell*, 510 U.S. at 586-89 (copy was “reasonable in relation to the purpose of copying).

As demonstrated herein and in Defendants’ Memorandum, even in those four instances in which Prince used the entirety of the Image he tore from the pages of *Yes Rasta*, the amount taken was reasonable when viewed in light of the creative purpose for which it was being used. *See Graham Archives*, 448 F.3d at 613 (acknowledging that the Second Circuit and its sister circuits has never ruled that copying an entire work “favors” fair use, held: “At the same time, however, courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image.”) cited in P. Mem. 21-22; *see also* D. Mem. 20-21. Here, three of the Images that were copied in their entirety (Ex EE at pp. 1-2, 95-96, and 133-34), were landscape shots which Prince used as backdrop to carry out his tropical theme and onto which he collaged raw elements and added painterly elements to create an entirely new work. *See Graham Archives* at 613 (third factor does not weigh against fair use where images were copied in their entirety “to provide a visual context” and then combined with other raw elements and original graphics to further transformative purpose);¹⁰ *Bourne*, 602 F. Supp. 2d at 509 (“The Second Circuit found it plain that superimposing face of Leslie Neilson on a photographed body intended to look like Demi Moore was ‘transformative’ of Leibowitz’s original photograph.”) (citations omitted).

In the Painting entitled *Graduation*, Prince scanned, enlarged, and cropped a page taken from *Yes Rasta* (Ex. EE, p. 118) in which a single Rastafarian is shown standing against a

¹⁰ The absence of alterations, reconceptualized messages and transformational purposes renders Cariou’s reliance on *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513, 544-48 (S.D.N.Y. 2008) misplaced.

tropical landscape that Cariou had intentionally blurred out of focus. *See* RP Aff. Ex. A, p.1. Prince then added raw elements, such as appropriated images of a guitar and hands of a rock star, changed the image tint to blue, and then rescanned and printed the new work directly onto canvas. *See* RP Aff. at ¶ 32; P. Mem. 4. In this post-apocalyptic, music-themed series, the Rastafarian in the Image was Prince's lead guitarist, which explains why the man is the focus of *Graduation* and why he has been scanned, enlarged, altered and the outline of his body cut out and applied as a raw element in other Paintings in the series. RP Aff. at ¶ 32; *see also* RP Aff. Ex. A.

In deciding the third factor, however, “‘what is relevant is the amount and substantiality of the copyrighted *expression* that has been used, not the *factual content* of the material in the copyrighted works,’ thus calling for ‘thought not only about the quantity of the materials used, but about their quality and importance, too.’” *Blanch v. Koons*, 396 F. Supp. 2d 476, 482 (S.D.N.Y. 2005) (citations omitted) (emphasis in original) *aff'd*, *Blanch*, 467 F.3d 244 (2d Cir. 2006). Thus, the quality of copyright protection of the Image which appears in *Graduation* is very weak. *Id.*; *see also Leibowitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115-16 (2d Cir. 1998) (even though entire image replicated with exacting precision, photographer “entitled to no protection for the appearance in her photograph of the body of a nude, pregnant female.”); *see also supra* at Points I and II(B); D. Mem. 15-16, 22-23.

The marginal importance of the Images used, coupled with Cariou's admission that the images in *Yes Rasta* must be viewed as a whole to appreciate their distinctiveness, also weighs against a finding that Prince took “the heart of” Cariou's compilation work consisting of fact-based images, the factual content of which was not original to Cariou. *See, e.g., NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481 (2d Cir. 2006) (rejected “heart of the work” theory where plaintiff

conceded book was an assemblage, and it reflected “no objective core.”) cited in P. Mem. 20-21;¹¹ *see also* D. Mem. Point 21.

The balance of Cariou’s discussion of this factor is spent reciting holdings from cases, which he fails to apply the facts of this case except to make the general and conclusory allegation (paraphrased from one of the cases) that Prince’s “unrestrained copying and enlargement” was “excessive.” P. Mem. 21-22. Cariou fails to offer any evidence that Prince’s copying was unrestrained. If it had been, one would expect to see a wholesale reproduction of all of the images in *Yes Rasta*, which Prince did not do. Prince also repeated many of the same Images (P. Mem.4-5; RP Aff. Ex. A) to further his creative expression of a music-based message by repeating band members throughout the series (RP Aff. ¶¶ 32, 38, 42, 45, 49, 58-61).

Cariou’s allegation that Prince’s “enlargement” of the Images was “excessive” not only confirms that the Images were altered, a factor weighing in favor of transformative use, but it stands in stark contrast to the argument Cariou repeatedly made elsewhere in his brief, when it suited his purposes to do so, that the Images were “unaltered.” P. Mem. 4-5, 21-22; *see also* RP Aff. Ex. A. In any event, this Court need only compare the size of the pages in *Yes Rasta* (12.25 x 9.75 inches) with the size of each of the Paintings, which range from 40 x 26 ¼ inches to 100 ½ x 154 ½ inches (Ex. N at A), to confirm that *each* of the Images used as raw elements in the Paintings was enlarged, and then further altered and/or combined with other elements, and/or collaging and painterly techniques to produce an entirely new expressive meaning and message. Prince’s use of the Images thus, was reasonable to carry out his artistic purpose when viewed in light of Prince’s overall creative and artistic purpose for the *Canal Zone* series. *See Campbell*,

¹¹ The three cases Cariou cited for his “heart of the work” argument are inapposite because there was no alteration of the original works in those cases. *Rogers*, 960 F.2d at 311; *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 565 (1985); *Campbell v. Koons*, 91 Civ. 6055 (RO); 1993 WL 97381, at *3 (S.D.N.Y. Apr. 1, 1993).

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.); *see also Leibowitz*, 137 F.3d at 116 (fair use found where elements were copied “to an extreme degree” though use of digital computer enhancement and defendant took more of original than necessary to conjure up original; will not necessarily tip third factor against fair use in light of “overriding purpose and character”).

D. Cariou’s Claim That the Canal Zone Exhibition Led to a Decision to “Cancel” a Show Featuring *Yes Rasta* Is Neither Evidence of Market Usurpation Nor Credible

Plaintiff has offered no evidence (nor can he) that defendants have ever offered the Paintings as a market substitute for the Images, such that the exhibition and sale of the Paintings has completely usurped the market for the Images, as is required to carry the fourth factor. *See Blanch*, 467 F.3d at 258. As the Second Circuit has made clear:

The focus here is on whether the defendants are offering a market substitute for the original. 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 derivatives, but whether the secondary use usurps the market of the original work. As we stated in *Wright*, the relevant market effect with which we are concerned is the market for plaintiffs’ expression, and thus, it is the effect of the defendants’ use of that expression on plaintiffs’ market that matters, not the effect of defendants’ work as a whole.

NXIVM Corp., 364 F.3d at 481-82, citing *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991). As plaintiff has failed to carry his burden on this point (much less address the applicable market usurpation test), the fourth factor weighs decidedly in favor of fair use. *See id.*; *see also* D. Mem. 22; P. Mem. 22 (in arguing harm test that *Campbell* and courts in this Circuit have rejected, Cariou admits he cannot make requisite usurpation showing: “defendants’ actions at least harmed the potential market for *Yes Rasta*”) (emphasis added).

Indeed, the only evidence Cariou proffered is his suggestion that Celle, the owner of a bookstore and gallery featuring photography, “cancelled Cariou’s show.” *See* P. Mem. 12

(emphasis added). Such a “cancellation” – even assuming it occurred (a fact which is not plausible based on the record before the court (*see infra*) – is not evidence of market usurpation. *NXIVM Corp.* at 482 (affirming determination that Goldie Hawn’s cancellation of visit with plaintiff after defendants disseminated allegedly infringing materials is not cognizable market harm under Copyright Act).

In any event, as a careful review of the transcript of the Celle deposition confirms, there was no show to be “cancelled” because Cariou had not, as of the time of the *Canal Zone* exhibition (or to this date), actually committed to engaging Celle as his agent, or do a show of *Yes Rasta*. CC Tr. 47. As Celle explained it, “I was very committed, I wanted to represent him. We agree on it but we never really pursue it, no.” *Id.* at 133; *see also id.* at 133-34 (when asked, “You never got to an agreement?” Celle answered: “No. In general when I do a show with somebody – when I do a show with an artist, I do not do a show if I don’t represent him, because it’s very expensive to put a show together.) (When asked if Celle ever gave Cariou a contract to review or sign, Celle answered: “No, no. It didn’t go so far.”); *id.* at 160 (Cariou’s unresponsiveness led Celle to believe he must have found someone else to represent him and so, out of timing concerns, went with another artist). Moreover, Cariou, who was not responding to her attempts to reach him, did not know until after he commenced this action, when he called Celle to enlist her help with it (CC Tr. 96), that she purportedly told him she had decided not to pursue featuring him as the first artist of her soon-to-be opened bookstore and gallery. *See id.* at 101-105; *see also* Opp. Aff. Ex. C (complaint contains nothing about “cancelled” show). In that call, Cariou also learned that Celle remains willing to represent him. CC Tr. 106.

Cariou’s post-action story should thus be rejected for the further reason that it is wholly lacking in credibility and corroboration, even by the account of a witness who retained Cariou’s counsel the day before her deposition, and who is a former girlfriend of Cariou’s photography

assistant. CC Tr. 58-59. Celle's testimony also renders suspect the prescient timing of Cariou's decision, which he purports to have made because he was "waiting for the proper opportunity" "and proper timing" (after nine years of inertia) to exploit the images in *Yes Rasta* as he has claimed in this case. PC Tr. 221-22; *see also* D. Mem. Fact Sections D and G. Thus, even when viewed in the light most favorable to plaintiff, his story, which is rife with inconsistencies and wholly lacking in credibility, must be rejected. *See Jeffreys v. City of New York*, 426 F.3d 549, 555 n. 2 (2d Cir. 2005) (summary judgment proper where plaintiff failed "to explain away these obvious inconsistencies with any 'plausible explanation'") (internal citations omitted); *Salinger v. Fredrik Colting*, 641 F. Supp. 2d 250, 258-60, n.3 (S.D.N.Y. 2009) (Batts, J.) (finding party's uncorroborated position in lawsuit, which was inconsistent with party's pre-action position and conduct, lacking in credibility).

POINT III
DEFENDANTS GAGOSIAN GALLERY AND LARRY GAGOSIAN ARE
NEITHER VICARIOUS NOR CONTRIBUTORY INFRINGERS

Nowhere in Point II (or elsewhere in his opening brief) does Cariou allege or offer any evidence that either Gagosian Gallery or Larry Gagosian had any involvement in, much less control over, any aspect of Prince's creation of the Paintings, including his decision to use the Images in the manner he did. In doing so, Cariou has conceded that neither of the Gagosian defendants can be liable as a vicarious infringer under the holding of the case he cites for this point. *See Faulkner v. Nat'l Geographic Soc.*, 211 F. Supp. 2d 450, 472-73 (S.D.N.Y. 2002) cited in P. Mem. 25. As *Faulkner* makes clear, to establish vicarious liability, Cariou must adduce "meaningful evidence" that Gagosian Gallery and/or Lawrence Gagosian exercised control of Prince's creative process, or their "paths must cross on a daily basis, and the character of this intersection must be such that the party against whom liability is sought is in a position to

control the personnel and activities responsible for the direct infringement.” *Faulkner* at 473 (citations omitted).

The undisputed evidence shows that Prince, who created the Paintings in his studio in the Hamptons with help from two assistants in his studio in upstate New York, worked alone. RP Tr. 174-75; RP Aff. ¶ 24. It also is undisputed that Lawrence Gagosian works mainly out of the office located on Madison Avenue in New York, and none of Gagosian Gallery’s eight offices worldwide are located in the Hamptons. LG Tr. 15, 19-20. On this record, then, Cariou’s vicarious liability claim should be dismissed as frivolous. *See Faulkner* at 473 (“the notion that the control must be substantial and have practical force – remains sound”).

In the same way, Cariou has not, and cannot, come forward with sufficient evidence to show that Gagosian Gallery and/or Lawrence Gagosian should be contributorily liable because there is no evidence that either of them “with knowledge of the [allegedly] infringing activity, induce[d], cause[d] or materially contribute[d] to the infringing conduct...” *Faulkner* at 473 cited in P. Mem. 25. As there is no evidence that either of the Gagosian defendants controlled or was involved in Prince’s creative process, it thus was not possible for them to even know the source from which Prince obtained the Images he used as raw elements. Moreover, while the Gagosian defendants readily acknowledge their participation in producing the *Canal Zone* catalogue and promoting the exhibition, these facts alone are not enough to sustain a contributory liability claim. Instead, Cariou must show that either of the Gagosian defendants “knew or should have known of the infringing activity at the time of [their] material contribution.” *Id.* at 473-74.

Cariou cites no case to support his novel theory that because the Gagosian defendants knew Prince to be a known appropriation artist, that they should have also known he had appropriated the Images (allegedly) in violation of Cariou’s rights as the compilation copyright

holder. P. Mem. 25. Indeed, to presume such a fact would mean that any time a gallery represents an artist of a well-known genre that the gallery will, by reason of the artist's reputation, always be contributorily liable even where, as here, there is no evidence to substantiate a "knew or should have known" theory. Specifically, the record shows that although Prince has been a prolific appropriation artist of international acclaim for more than 30 years, he has never been sued, until this lawsuit. RP Tr. 25. This fact, coupled with his reputation for being an "accomplished, educated and informed artist," as Cariou readily admits in his Amended Complaint at ¶ 28 (Ex. E), provides further evidence that there was no reason for either of the Gagosian defendants to know, at the time they worked with Rizzoli International to create the *Canal Zone*, or marketed the series, or launched the exhibition that Prince had violated any right of Cariou's (a premise which defendants respectfully deny). See *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854, n. 13 (1982) (service provider not contributorily liable merely for failing to "reasonably anticipate possibility of a third party's infringing conduct").

Plaintiff's assertion that the Gagosian defendants were put on notice of the infringement when they received the cease and desist letter, but continued with the *Canal Zone* is equally unavailing and in any event factually incorrect. Continuing to sell and market the allegedly infringing work after receiving a cease and desist letter is not infringement because the issue of fair use still needs to be determined. See *Faulker* at 474-75. In any event, defendants withdrew the Paintings from the market shortly after they received the notice, upon learning that plaintiff had filed this infringement action, even though they believed then, as they do today, that (even assuming Prince's use constitutes copyright infringement), it is nonetheless fair as a matter of law. RP Aff ¶ 28; LG Tr. 144-46.

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that a copy of the foregoing was served upon the following via ECF on this the 14th day of June, 2010:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PATRICK CARIOU,

Plaintiff,

-against-

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

Defendants.

No. 08-CV-11327 (DAB)

**AFFIDAVIT OF
HOLLIS GONERKA BART
IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

-----X
STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

Hollis Gonerka Bart, being duly sworn, deposes and says:

1. I am a member of the bar of the state of New York and of this Court and a member of the law firm of Withers Bergman LLP, attorney for defendants Gagosian Gallery, Inc. and Lawrence Gagosian (collectively "Gagosian"), and I submit this affidavit on behalf of Gagosian and Richard Prince in opposition to Plaintiff's Motion for

Summary Judgment to place before the Court true and correct copies of documents and testimony adduced in discovery, or publicly available documents.

2. Annexed hereto as Exhibit A are true and correct copies of "Ganja Fields and Marijuana Tours" and "Negril Ganja Tour" which illustrate that ganja plantations in Jamaica are easily and readily accessible to anyone and which depict images of Rastafarians in their native Jamaican landscape. *See:*

- <http://www.jamaicamax.com/tour-packages/ganja-fields-and-marijuana-tours/> and http://www.jamaicamax.com/shop/product_info.php?products_id=55;
- Jamaica Daze
(http://www.youtube.com/watch?v=11qFXhvV_PU&feature=related);
- Jamaican Herbs
(<http://www.youtube.com/watch?v=GHUHAEtKH5c&feature=related>);
- Jamaican Jungle Tour
(<http://www.youtube.com/watch?v=WMSv4dmGN8s&feature=related>);
- Ganja Trip to Jamaica
(<http://www.youtube.com/watch?v=5C-Kny3t2go&feature=related>),

3. Annexed hereto as Exhibit B are true and correct copies web pages detailing the amount of time Cy Twombly and Pablo Picasso dedicated to various works of art. *See* <http://www.artquotes.net/masters/cy-twombly/index.htm> and http://www.artchive.com/artchive/P/picasso_late.html.

4. Annexed hereto as Exhibit C is a true and correct copy of Plaintiff's original complaint, which was filed on December 30, 2008.

5. Annexed hereto as Exhibit D is a true and correct copy of relevant excerpts from the deposition of Richard Prince, taken on January 12, 2010, together with his signed errata sheet.

6. Annexed hereto as Exhibit E is a true and correct copy of relevant excerpts from the deposition of Lawrence Gagosian, taken on October 8, 2009, together with his signed errata sheet.

7. Annexed hereto as Exhibit F is a true and correct copy of relevant excerpts from the deposition of Christiane Celle, taken on January 26, 2010.

8. Annexed hereto as Exhibit G is a true and correct copy of relevant excerpts from the deposition of Patrick Cariou, taken on January 12, 2010, together with his signed errata sheet.

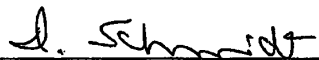
9. Annexed hereto as Exhibit H is a true and correct copy of relevant excerpts from the deposition of Louise Neri, taken on December 17, 2009, together with her signed errata sheet.

10. Annexed hereto as Exhibit I is a true and correct copy of relevant excerpts from the deposition of Allison McDonald, taken on December 17, 2009, together with her signed errata sheet.

Dated: New York, New York
June 14, 2010


HOLLIS GONERKA BART

Subscribed to and sworn to before me this 14th day of June, 2010


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• Ganja Fields and Marijuana Tours

Wanna see some ganja fields in Jamaica? Would you like to take a ganja tour in Negril and a trip over to Orange Hill or Cave Mountain for some sweet Jamaican weed and maybe a cup of ganja tea to wash your ganja cake down with? We might have heard about some ganja tours in Jamaica that would interest a ganja fan or marijuana connoisseur like you. Trick is that we do not offer ganja tours to cops, feds, police or anyone with a badge, a baton or a gun or anyone that will not smoke Jamaican herbs with us before the tour.

32

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So, if you want a ganja tour in Jamaica you will have to come to Jamaica and smoke a big fat bob marley joint with us before we'll take you anywhere. After you smoke a spliff with us and we get to know you then we will take you on the best ganja tours in Jamaica and you'll smoke (and eat if you want) so much ganja you'll be talking to Bob Marley himself.

Marijuana is illegal in Jamaica no matter how hard it is to avoid all over the island. It seems like literally every other person has some "high grade" to offer or a "bob marley spliff" for you to burn. Of course it will cost you but that's between you the hustler and Bob. Nothing is free and even something as simple as a person offering to smoke with you will come at a hefty charge if you don't know what you're doing in Jamaica. It's better to ask first and always settle on a price before you do anything.

Marijuana is still cultivated in Jamaica by small time farmers amongst other crops usually such as pumpkins or Jamaican squash. The pot plants grow in short single stem plants call "one sticks" that are normally between 12 and 24 inches in length when harvested. The days of huge pot plants and large plantations are long gone. Governmental controls and American drug money have broken up the large growers and made it so that an army of small farmers now does what a few used to control.

The idea that one ganja farmer has better marijuana than an other is not new but the real difference here in Jamaica is in the cure. Many ganja farmers in Jamaica are not allowing the plants to fully mature and the seeds to drop. Many are plucking the plants early in attempts to offer sinsemilla or seedless pot. The trouble here of course is that the THC is not quite mature at this stage of development and the plants potency suffers from a premature harvest.

If you're looking for ganja in Jamaica then you can most likely look no further than your hotel lobby or taxi driver for someone with some ganja for sale. A good size spliff is about \$100JA, jamaican dollars, or about \$2 US but that's for those of us that know. Most hustlers will try to hit a tourist hard and ask for \$500JA or more for the same amount. Tell him its all good, tell him you know a grower in Orange Hill with some nice high grade but you are always looking for something new. Tell him "me know wa gwan here mon" and "me jus lookin for a likkle sumting difrent" and you might get a better deal.



On top of Ganja Mountain in Negril Jamaica

Be wary of purported pot tours to ganja farms in Negril Jamaica as you might just find yourself in one surrounded by not only some pretty pot plants but the local police force as well. Jamaican Ganja farmers have been known to turn in competitors after dragging some unsuspecting fool to be held by the cops until they can "work something out between them" and negotiate a cash settlement on the spot. This usually means you have to give up everything you have on you and you may even have to run to the ATM to withdraw as much cash as you can for the day. All of this of course is to make it better for you and to save you from the nasty Jamaican jail system.

So like we said. Be careful who you ask about a ganja tour in Jamaica. You never know who you can trust mon ☹

//UPDATE Spring 2010

McDonalds has "Billions Served" and JamaicaMAX has "Hundreds Stoned" ☹



Marijuana Garden outside the Peter Tosh Museum

Tour of the Marijuana Garden outside the Peter Tosh Mausoleum in Belmont Jamaica where the Tosh family keeps a small patch of marijuana in honor of the reggae legend. It was his stance on marijuana legalization that got Peter Tosh killed and it's kinda cool to see the herb garden nearby his grave.



Jamaican Marijuana Garden by the Caribbean



Seen enough? Ready to book a ganja tour or make a reservation inquiry? Check out the [Jamaica Ganja Tour Reservations](#) page and ask Alfred about the "[Buzz Tour](#)".

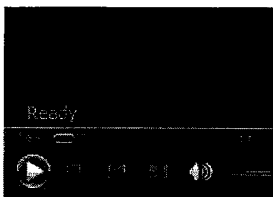
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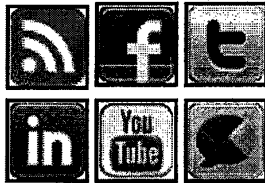
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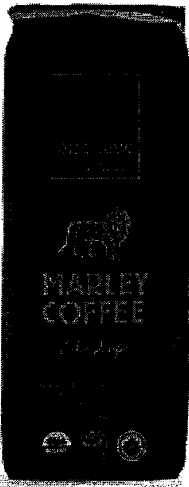


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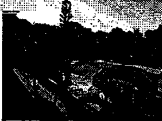
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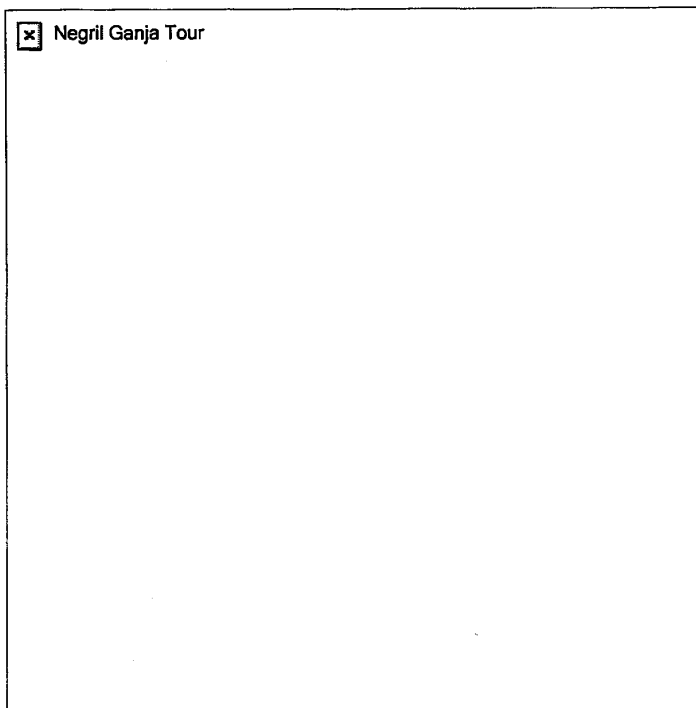
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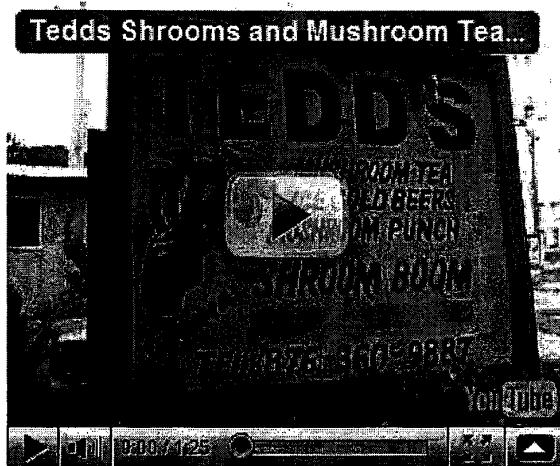
Negril Ganja Tour

\$75.00

[tour-neg-day]

The Buzz Tour as I prefer to call it began as a simple ganja tour but then developed into my favorite way to enjoy an afternoon in Negril and introduce my new friends to some cool spots.

We start our tour at your hotel room around 1PM where we will head out to Tedds Mushroom Palace for the best tasting slice of ganja cake in all of Negril. Tedd runs a legal mushroom shop in the same location for 30 years and his mother Miss Brown left him with a recipe for a ganja cake that is moist and delicious with a variety of local fruits and herbs for an extra iTal kick. Most guests only need a half slice of cake to kick start their buzz tour. Eating ganja cake is a more physical experience and it truly sets the mood for a cool day.



From Tedds we will move on to Orange Hill for the ganja farm tour to our largest and most productive fields. Spend time in the fields with the Jamaican ganja farmer and learn how he tends to his crops and grows some of the best herb you will ever smoke. Hand pick your own buds from his selection of manicured herbs and take back a generous selection which is usually enough to last your entire vacation so plan this trip on your first full day in Jamaica.



After we make the hike back down the hill we will take a ride over to the West End Negril and Ricks Cafe for world famous sunsets and Rum Punch or Red Stripe along with some cliff diving, live reggae music and then dancing under the stars as the sun sets over the Caribbean Sea for a spectacular show. Ricks is the end of our stop and from here we return to the hotel so most of the time we end up hanging out and enjoying a few more drinks unless the ganja has taken over and about 30% of our guests are ready for some sleep as soon as the sun sets :)



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Pablo Picasso

(1881-1973)

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9. Late Works

The Late Work

In the last two decades of his long career, Picasso produced more work than at any other time of his life. During this period, some works are not only dated by month and day, but with a numeral (I, II, III, etc.) indicating multiple works created that single day!

This late period tends to be overlooked, but contains some of the finest of Picasso's paintings. Some critics maintain Picasso was creatively lazy at this point, but a close look at the work is very rewarding. He had achieved a level of effortless artistic expression that, I believe, has still not been fully appreciated after more than 25 years.

Regardless of your position on Picasso's personal and artistic life, each of us can, in view of our own mortality, be awed by his final self-portrait.

Picasso Images on the Web from his late work

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+ I sit for two or three hours and then in 15 minutes I can do a painting, but that's part of it. You have to get ready and decide to jump up and do it; you build yourself up psychologically, and so painting has no time for brush. Brush is boring, you give it and all of a

sudden it's dry, you have to go. Before you cut the thought, you know?

+ My line is childlike but not childish. It is very difficult to fake.. to get that quality you need to project yourself into the child's line. It has to be felt.

+ I work in waves, because I'm impatient. Because of a certain physicality, of lack of breath from standing. It has to be done and I do take liberties I wouldn't have taken before.

+ Graffiti is linear and it's done with a pencil, and it's like writing on walls. But in my paintings it's more lyrical.

+ When I work, I work very fast, but preparing to work can take any length of time.

+ Paint is something that I use with my hands and do all those tactile things. I really don't like oil because you can't get back into it, or you make a mess. It's not my favourite thing.. pencil is more my medium than wet paint.

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Attorneys for Plaintiff Patrick Cariou

UNITED STATES DISTRICT COURT
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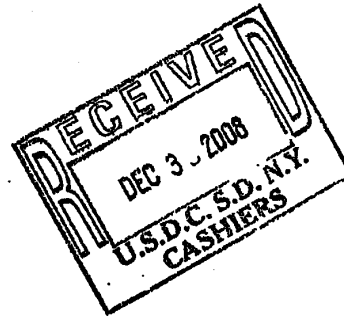
PATRICK CARIOU,

Plaintiff,

- against -

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

Defendants.



JUDGE BATTS

08 CIV 11327

COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiff Patrick Cariou, by his attorneys, Schnader Harrison Segal & Lewis LLP, for his Complaint against defendants Richard Prince, Gagosian Gallery, Inc. ("Gagosian Gallery"), Lawrence Gagosian, and Rizzoli International Publications, Inc. ("Rizzoli") (collectively "Defendants"), alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a), because this action arises under the Copyright Act of 1976, as amended, 17 U.S.C. §§ 101, *et seq.* The copyrighted works at issue are registered with the U.S. Copyright Office under Copyright Registration VA0001301506, issued on November 5, 2001.

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and (c), and 28 U.S.C. § 1400(a) because defendants Gagosian Gallery, Gagosian and Rizzoli either reside or conduct business and may be found in this district and defendant Richard Prince resides in the State in which this district is located, and because a substantial part of the events giving rise to the claim occurred, and a substantial part of the property that is subject of the action is situated, in this district.

PARTIES

3. Plaintiff Patrick Cariou ("Plaintiff"), a French citizen and resident of Paris, France, is a photographer who has published a number of books of photography, including a book of photographs entitled *Yes Rasta*, published in 2000 by Powerhouse Books, Inc. Plaintiff's work has also appeared in numerous international magazines.

4. Defendant Richard Prince, a citizen of the State of New York, is a contemporary artist who resides in Rensselaerville, New York.

5. Defendant Gagosian Gallery is a corporation organized and existing under the laws of the State of New York and having its principal place of business in the County and City of New York. Gagosian Gallery owns and operates a number of art galleries in New York City

and various other cities, including one located at 555 West 24th Street, New York, New York (the "Chelsea Gallery"). Gagosian Gallery is Prince's exclusive representative and agent.

6. Defendant Lawrence Gagosian is the controlling shareholder of the Gagosian Gallery and makes its operating decisions, including those involving the Chelsea Gallery.

7. Defendant Rizzoli is a corporation organized and existing under the laws of the State of New York and having its principal place of business in the County and City of New York. Rizzoli is the exclusive distributor of a book entitled *Canal Zone*, published by Gagosian Gallery in 2008, and containing photographs of various paintings by Prince which were on display at the Chelsea Gallery from November 8, 2008 through December 20, 2008 in an exhibition entitled *Canal Zone* (the "Canal Zone Exhibition").

NATURE OF THE ACTION

8. Defendants have infringed Plaintiff's exclusive rights under Section 106 of the Copyright Act of 1976, as amended, by, without authorization, reproducing, adapting, distributing and displaying copyrighted photographic works (the "Photographs") which Plaintiff owns and published in the book entitled *Yes Rasta*. Plaintiff seeks damages and other remedies under the Copyright Act.

9. Plaintiff is the sole copyright owner and author of the Photographs, which are published as part of the photography book *Yes Rasta* and copyrighted under Copyright Registration No. VA0001301506, issued on November 5, 2001. A copyright notice is displayed on Plaintiff's published book, *Yes Rasta*, in accordance with Section 401 of the Copyright Act.

10. Long following the issuance of the above Copyright Registration, Defendant Prince appropriated the Photographs without authorization from Plaintiff and created a series of paintings (the "Paintings") incorporating copies of the Photographs, thereby infringing Plaintiff's exclusive rights in the Photographs under the Copyright Act.

11. Defendants Gagosian Gallery and Gagosian displayed the Paintings during the Canal Zone Exhibition and sold some or all of the Paintings, thereby infringing and contributing to Prince's infringement of Plaintiff's exclusive rights in the Photographs under the Copyright Act. Gagosian Gallery and Gagosian also infringed Plaintiff's rights under the Copyright Act by displaying certain of the Photographs on Gagosian Gallery's website and by publishing the book entitled *Canal Zone*, which contains photographs of the Paintings and the Photographs included within the Paintings.

12. By distributing the book entitled *Canal Zone*, which contains copies of the Photographs, Rizzoli has infringed and contributed to Prince's infringement of Plaintiff's exclusive rights under the Copyright Act.

13. None of the Defendants was ever authorized by Plaintiff to appropriate the Photographs, or to reproduce, display or distribute the Photographs, or to adapt the Photographs in order to create the Paintings or any other derivative work based on the Photographs. Defendants' conduct was and continues to be in willful disregard of Plaintiff's rights under the Copyright Act.

14. Defendants' conduct has damaged Plaintiff's ability to sell additional copies of *Yes Rasta* or to earn revenues from derivative works based on the Photographs which Plaintiff

could have licensed to others, while at the same time enabling Defendants to profit from their unauthorized reproduction, adaptation, display and distribution of the Photographs.

FACTUAL BACKGROUND

15. Plaintiff is an accomplished photographic artist whose published works include the book entitled *Yes Rasta*.

16. Plaintiff spent parts of ten years in the secluded mountains of Jamaica, gaining access to, living and working with, and earning the trust of the Rastafarians who are the subjects of *Yes Rasta*. The Rastafarians are a spiritual society living simply, independently, and in harmony with nature, apart from the industrialized world of environmental pollution and materialism which they reject and refer to as "Babylon." Naturally, the Rastafarians do not easily trust outsiders, such as Plaintiff, and it was only after living with them for years that Plaintiff was finally permitted to photograph them. The result was the Photographs in *Yes Rasta*, approximately 100 strikingly original black-and-white photographs, mostly close-up portraits of stern, mystical-looking men within a distinctive tropical landscape. *Yes Rasta* also contains an essay by Perry Henzell, who was the producer and director of the noted Jamaican film, *The Harder They Come*.

17. The Photographs, registered with the United States Copyright Office on November 5, 2001 under Registration No. VA0001301506, are highly original, for few, if any, artists have been afforded the unfettered opportunity to photograph the Rastafari people in such breadth and detail. *Yes Rasta* was published in 2000 with a copyright notice as prescribed under Section 401 of the Copyright Act.

18. Prince is well-known as an “appropriation artist,” due to his penchant for appropriating and using as his own images created by others without attribution or permission. As Prince once said of his own work in an interview, he is “practicing without a license.” Prince has publicly admitted appropriating photographs created by others and publishing them as his own work. Although he primarily has been known for copying anonymous commercial imagery, such as advertisements, in the Paintings contained in his Canal Zone Exhibition, Prince has appropriated Plaintiff’s copyrighted art work. As stated in Gagosian Gallery’s website – which, by displaying the Photographs, itself infringes Plaintiff’s exclusive rights under the Copyright Act – Prince copied the Photographs in various ways, including by scanning them and printing them directly onto the base canvas of the Paintings. In a recent interview with *Interview Magazine*, Prince described his work in the Canal Zone Exhibition as having been taken from “a book” that he “picked up” about Rastas, who represented a culture “that I didn’t really know much about. But I loved the book, and I loved the dreads, so I just started fooling around with this book . . .” According to Prince, “[t]he pictures are very quickly done – they’re not really thought about . . .” Prince added: “The Rastas came really fast. And they’re going to be over really fast, too.” In addition to copying Plaintiff’s images of Rastafarians, Prince also copied the landscapes depicted in the Photographs.

19. Not only did Prince appropriate the images in the Photographs and incorporate them into the Paintings without Plaintiff’s permission and despite the prominent copyright notice contained in *Yes Rasta*, but, in the infringing book published by Gagosian Gallery and distributed by Rizzoli entitled *Canal Zone*, Prince actually purports to be the copyright owner of all “artworks” and “insert images,” presumably including the Paintings (which contain

Plaintiff's Photographs). Furthermore, Gagosian Gallery claims to be the copyright owner of the *Canal Zone* "publication."

20. The Canal Zone Exhibition contained twenty-two Paintings, at least twenty of which reproduce and are derived from the Photographs, incorporating unauthorized uses of Plaintiff's registered copyrighted work. Among the infringing Paintings which were displayed in the Chelsea Gallery from November 8, 2008 through December 20, 2008 were two untitled works, as well as works entitled: *Graduation*, *Back to the Garden*, *Charlie Company*, *Meditation*, *Canal Zone*, *The Ocean Club*, *Cookie Crumbles*, *Ile de France*, *Ding Dong the Witch Is Dead*, *Djuna Barnes, etc.*, *Zippering the System*, *Tales of Brave Ulysses*, *It's All Over*, *Specially Round Midnight*, *Naked Confessions*, *The Other Side of the Island*, *Cheese and Crackers*, and *Mr. Jones*. Plaintiff's copyrighted work is contained in each of these Paintings and has been wrongfully copied and appropriated by Prince and displayed and distributed by the other Defendants. All of the Paintings were created by Prince, displayed by Gagosian Gallery and Gagosian, and distributed by Rizzoli years after Plaintiff registered his copyright covering the Photographs.

21. Some, if not all, of the Paintings were sold by Prince or Gagosian Gallery before, during or after the Canal Zone Exhibition, and Gagosian Gallery, Gagosian and Prince all benefitted from the sales.

22. In an effort to promote the Canal Zone Exhibition, Gagosian Gallery caused to be printed in newspaper and magazine advertisements copies of the Paintings, containing infringing reproductions of images from the Photographs, including advertisements in *The Art Newspaper* and *Art Forum Magazine*. Gagosian Gallery's invitation to the opening of the Canal Zone Exhibition depicted an image of *Graduation*, the Prince Painting found on the first page of

the *Canal Zone* exhibition book, which itself contains an infringing reproduction of images from the Photographs. This use of one of Plaintiff's Photographs in the invitation demonstrates the centrality of the Photographs appropriated by Prince to the essence of the Canal Zone Exhibition. Despite the centrality of the Photographs to the Canal Zone Exhibition, at no time in their press releases, interviews or other public statements did Prince, Gagosian Gallery or Gagosian ever mention Plaintiff's name or comment on the fact that the Paintings were taken directly from Plaintiff's copyrighted work.

23. Neither Prince, nor Gagosian Gallery, nor Gagosian, nor Rizzoli ever asked for or received permission to use the Photographs.

24. After the Canal Zone Exhibition opened, Plaintiff discovered that the Defendants had infringed his rights under the Copyright Act. Through his counsel, on December 11, 2008, Plaintiff served Defendants with a cease and desist demand, outlining the relevant facts set forth in this Complaint and requiring Defendants to:

- i. Cease and desist from continuing to exhibit or distribute Prince's artwork containing unauthorized reproductions of Plaintiff's copyrighted work;
- ii. Remove all unauthorized reproductions of Plaintiff's copyrighted work from Prince's artwork;
- iii. Deliver or destroy all remaining copies of the *Canal Zone* exhibition book containing Prince's artwork that is being distributed by Rizzoli; and
- iv. Identify all of Prince's artwork containing unauthorized reproductions of Plaintiff's copyrighted work and the current location of each of such work.

25. Defendants did not comply with Plaintiff's cease and desist demand and the Canal Zone Exhibition ran through its scheduled completion date of December 20, 2008 without any corrective action being taken.

FIRST CLAIM FOR RELIEF**(COPYRIGHT INFRINGEMENT AGAINST RICHARD PRINCE)
(17 U.S.C. §§ 106, 501)**

26. Plaintiff hereby incorporates paragraphs 1 through 25 of this Complaint as if fully set forth herein.

27. Defendant Prince, with full knowledge of the copyright protection of the Photographs, without authorization, and despite receiving a cease and desist demand, infringed Plaintiff's exclusive rights as the copyright owner of the Photographs by reproducing, displaying, and causing the Photographs to be distributed and by adapting the Photographs into unauthorized derivative works. All of the infringing conduct occurred in the State of New York.

28. Defendant Prince's infringement was willful because, as an accomplished, educated and informed artist, Prince had knowledge that his conduct constituted infringement or, at least, recklessly disregarded the possibility. Prince's willful infringement is also manifested by his disregard of the copyright notice on the copy of *Yes Rasta* that he admitted perusing and copying from. Finally, Prince's receipt of and non-compliance with Plaintiff's cease and desist demand also establishes the willful nature of his infringing conduct.

29. Prince's acts have damaged and are continuing to damage Plaintiff in an amount and to an extent as yet unknown.

SECOND CLAIM FOR RELIEF**(COPYRIGHT INFRINGEMENT AGAINST GAGOSIAN GALLERY)
(17 U.S.C. §§ 106, 501)**

30. Plaintiff hereby incorporates paragraphs 1 through 29 of this Complaint as if fully set forth herein.

31. Defendant Gagosian Gallery, without authorization, infringed Plaintiff's exclusive rights as the copyright owner of the Photographs by publicly displaying, offering for sale, and selling the Paintings; by advertising the Canal Zone Exhibition with infringing depictions of the Paintings, containing images of the Photographs, on its website and in newspaper and magazine advertisements as well as in the invitation to the opening of the Canal Zone Exhibition; and by publishing and causing to be distributed the Canal Zone Exhibition book, *Canal Zone*, which contained photographs of the Paintings, and the Photographs included within the Paintings. All of this infringing conduct occurred in the County and State of New York. With those same acts, Gagosian Gallery also contributorily and vicariously infringed Plaintiff's exclusive rights as the copyright owner of the Photographs.

32. Defendant Gagosian Gallery's infringement was willful because, as a prominent and sophisticated art gallery which exclusively represented Prince and knew of his background as an "appropriation artist" who openly boasted about copying works created by others, it knew or should have known that its conduct constituted copyright infringement or, at least, recklessly disregarded the possibility. Defendant Gagosian Gallery's willful infringement is also manifested by its disregard of the copyright notice on the copy of *Yes Rasta* that Defendant Prince admitted perusing and copying from, and by its disregard of Plaintiff's cease and desist demand..

33. Defendant Gagosian Gallery's acts have damaged and are continuing to damage Plaintiff in an amount and to an extent as yet unknown.

THIRD CLAIM FOR RELIEF

**(COPYRIGHT INFRINGEMENT AGAINST GAGOSIAN)
(17 U.S.C. §§ 106, 501)**

34. Plaintiff hereby incorporates paragraphs 1 through 33 of this Complaint as if fully set forth herein.

35. Defendant Gagosian, without authorization, infringed Plaintiff's exclusive rights as the copyright owner of the Photographs by publicly displaying, offering for sale, and selling the Paintings; by advertising the Canal Zone Exhibition with infringing depictions of the Paintings, containing images of the Photographs, on the Gagosian Gallery website and in newspaper and magazine advertisements as well as in the invitation to the opening of the Canal Zone Exhibition; and by publishing and causing to be distributed the Canal Zone Exhibition book, *Canal Zone*, which contained photographs of the Paintings, and the Photographs included within the Paintings. All of this infringing conduct occurred in the County and State of New York. With those same acts, Gagosian also contributorily and vicariously infringed Plaintiff's exclusive rights as the copyright owner of the Photographs.

36. Defendant Gagosian's infringement was willful because, as a prominent and sophisticated proprietor of numerous art galleries, including the Chelsea Gallery, who exclusively represented Prince and knew of his background as an "appropriation artist" who openly boasted about copying works created by others, he knew or should have known that his conduct constituted copyright infringement or, at least, recklessly disregarded the possibility. Defendant Gagosian's

willful infringement is also manifested by his disregard of the copyright notice on the copy of *Yes Rasta* that Defendant Prince admitted perusing and copying from, and by his disregard of Plaintiff's cease and desist demand..

37. Defendant Gagosian's acts have damaged and are continuing to damage Plaintiff in an amount and to an extent as yet unknown.

FOURTH CLAIM FOR RELIEF

**(COPYRIGHT INFRINGEMENT AGAINST RIZZOLI)
(17 U.S.C. §§ 106, 501)**

38. Plaintiff hereby incorporates paragraphs 1 through 37 of this Complaint as if fully set forth herein.

39. Defendant Rizzoli, without authorization, infringed Plaintiff's exclusive rights as the copyright owner of the Photographs by distributing the Canal Zone Exhibition book, *Canal Zone*, which contains photographs of the Paintings, and the Photographs included within the Paintings. All or most of this infringing conduct occurred in the County and State of New York. With those same acts, Rizzoli also contributorily and vicariously infringed Plaintiff's exclusive rights as copyright owner of the Photographs.

40. Defendant Rizzoli's infringement was willful because, as an experienced book publisher and distributor, it knew or should have known that its conduct constituted copyright infringement or, at least, recklessly disregarded the possibility. Defendant Rizzoli's willful infringement is also manifested by its disregard of the copyright notice on the copy of *Yes Rasta* that Defendant Prince admitted perusing and copying from, and by its disregard of Plaintiff's cease and desist demand..

41. Defendant Rizzoli's acts have damaged and are continuing to damage Plaintiff in an amount and to an extent as yet unknown.

FIFTH CLAIM FOR RELIEF

(CONSPIRACY BY PRINCE, GAGOSIAN GALLERY, GAGOSIAN, AND RIZZOLI TO VIOLATE PLAINTIFF'S RIGHTS UNDER THE COPYRIGHT ACT)

42. Plaintiff hereby incorporates paragraphs 1 through 41 of this Complaint as if fully set forth herein.

43. Defendants agreed to reproduce, display, publish, advertise, promote, sell, offer for sale, market, distribute or otherwise dispose of the Photographs and the Paintings derived from the Photographs without Plaintiff's authorization and contrary to his cease and desist demand. Defendants' willful infringement is manifested by their agreement to disregard the copyright notice on the copy of *Yes Rasta* that Defendant Prince admitted perusing and copying from.

44. Defendants' conspiracy was intended to and did deprive Plaintiff of his exclusive rights as the copyright owner of the Photographs.

45. Defendants' acts have damaged and are continuing to damage Plaintiff in an amount and to an extent as yet unknown.

WHEREFORE, Plaintiff Patrick Cariou requests judgment in his favor and against Defendants as follows:

A. That, pursuant to 17 U.S.C. § 502, Defendants, their directors, officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with

them, be enjoined and restrained permanently from infringing the copyright in the Photographs, or any other of Plaintiff's works, in any manner, and from reproducing, displaying, publishing, advertising, promoting, selling, offering for sale, marketing, distributing or otherwise disposing of the Photographs or any copies of the Photographs, or any other of Plaintiff's works, and from participating or assisting in or authorizing such conduct in any way.

B. That Defendants be required to pay Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' infringements of the copyrights in the Photographs and to account for and pay Plaintiff all of the Defendants' profits attributable to such infringements or, alternatively, as Plaintiff may elect, that Plaintiff be awarded such statutory damages as the Court may find just because of Defendants' willful acts of infringement.

C. That Defendants be required to deliver up on oath for impounding, destruction, or other disposition, as Plaintiff determines, all infringing copies of the Photographs, including the Paintings and unsold copies of the *Canal Zone* Exhibition book, in their possession, custody, or control and all transparencies, plates, masters, tapes, film negatives, discs, and other articles for making such infringing copies.

D. That Defendants be required to notify in writing any current or future owners of the Paintings of whom they are or become aware that the Paintings infringe the copyright in the Photographs, that the Paintings were not lawfully made under the Copyright Act of 1976, and that the Paintings cannot lawfully be displayed under 17 U.S.C. § 109(c).

E. That Defendants pay to Plaintiff the full costs of this action, including reasonable attorney's fees under 17 U.S.C. § 505.

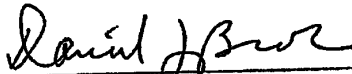
F. That Plaintiff have such other relief as is just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury in this action.

Dated: New York, New York
December 30, 2008

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Condensed Transcript

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PATRICK CARIOU,

Plaintiff,

**Index No.:
08 CIV 11327 (DAB)**

vs.

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

Defendants.

VIDEOTAPED DEPOSITION OF

RICHARD PRINCE

**October 6, 2009
10:00 a.m.**

**140 Broadway
New York, New York**

**Reported By:
Bryan Nilsen, RPR**


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<p style="text-align: center;">77</p> <p>1 Prince</p> <p>2 MR. BROOKS: Right.</p> <p>3 MR. HAYES: And what you're now</p> <p>4 doing is you're taking this entirely out</p> <p>5 of context without consenting, for</p> <p>6 example, to read the paragraph above that</p> <p>7 I asked you to read in to put the entire</p> <p>8 article into context.</p> <p>9 MS. BART: I think you should do</p> <p>10 that now for the record --</p> <p>11 MR. HAYES: That article -- that</p> <p>12 paragraph says Mr. Krantz --</p> <p>13 MR. BROOKS: Now, I -- listen, if</p> <p>14 you're going to enforce the seven-hour</p> <p>15 rule, I object to your saying anything</p> <p>16 other than objection, or direct him not to</p> <p>17 answer.</p> <p>18 MR. HAYES: I object to the witness</p> <p>19 being asked questions without it being put</p> <p>20 in context by reading appropriate parts of</p> <p>21 the rest of the article, which --</p> <p>22 MR. BROOKS: Fine.</p> <p>23 MR. HAYES: -- by the way, is two</p> <p>24 sentences --</p> <p>25 MR. BROOKS: Which you can read when</p>	<p style="text-align: center;">79</p> <p>1 Prince</p> <p>2 incorporated in the question. I think the</p> <p>3 question is improper, and I join with</p> <p>4 Ms. Bart's objection.</p> <p>5 Q. So now you can answer.</p> <p>6 Do you disagree with that statement</p> <p>7 attributed to --</p> <p>8 A. I'm sure he has -- I mean, you know,</p> <p>9 I respect his feelings.</p> <p>10 Q. So you agree with what he's saying?</p> <p>11 MR. HAYES: Well, what he's saying,</p> <p>12 you're agreeing with his statement about</p> <p>13 that Mr. Krantz considers his work</p> <p>14 distinctive or imagery that he feels or</p> <p>15 what Mr. Prince considers it to be.</p> <p>16 You're asking for Mr. Prince's state of</p> <p>17 mind about Mr. Krantz's artwork --</p> <p>18 MR. BROOKS: Mr. Hayes, you're</p> <p>19 starting to obstruct.</p> <p>20 MR. HAYES: I'm not. There are two</p> <p>21 statements in there. Which one are you</p> <p>22 asking about?</p> <p>23 BY MR. BROOKS:</p> <p>24 Q. Do you agree that the Marlboro ads</p> <p>25 that you rephotographed are distinctive?</p>
<p style="text-align: center;">78</p> <p>1 Prince</p> <p>2 you do redirect, if you wish.</p> <p>3 A. No. Listen, I'll -- here's the</p> <p>4 thing. You know, I don't know Mr. Krantz, and I</p> <p>5 have no -- I'm sure he's a great guy and a great</p> <p>6 photographer, you know, and I'm sure he took</p> <p>7 great photographs for the Marlboro. I don't</p> <p>8 know if he did or not.</p> <p>9 But, you know, it had -- what he did</p> <p>10 has nothing to do with what I do.</p> <p>11 Q. I understand.</p> <p>12 There's a statement attributed to</p> <p>13 him. He may or may not have made it. Let me</p> <p>14 just ask you, do you disagree with the statement</p> <p>15 that's attributed to him?</p> <p>16 MS. BART: Objection, form, rule of</p> <p>17 optional completeness.</p> <p>18 Q. The statement is Mr. Krantz said he</p> <p>19 considered his ad work distinctive, not simply</p> <p>20 the kind of anonymous commercial imagery that he</p> <p>21 feels Mr. Prince considers it to be.</p> <p>22 MR. HAYES: Objection, calls for</p> <p>23 speculation, it's improper complete.</p> <p>24 The quote -- the attributed quote,</p> <p>25 it calls for speculation. That's</p>	<p style="text-align: center;">80</p> <p>1 Prince</p> <p>2 A. Well, they're distinctive for me,</p> <p>3 yes.</p> <p>4 Q. What does that mean?</p> <p>5 A. They're distinctive for me in many,</p> <p>6 many ways. I mean I can talk about it for an</p> <p>7 hour. You know, they're cowboys but they're not</p> <p>8 cowboys. They seem to represent something about</p> <p>9 America. They're political I suppose. With me</p> <p>10 not really being a political artist. They're</p> <p>11 great-looking images.</p> <p>12 Again, you know, when I first took</p> <p>13 them -- I mean had a show of cowboys in 1984.</p> <p>14 No one paid any attention. There was nothing</p> <p>15 ever written on them. And no one bought any.</p> <p>16 I like them. I mean that's as</p> <p>17 simple as I can say. I think they're great</p> <p>18 images.</p> <p>19 THE VIDEOGRAPHER: Two minutes.</p> <p>20 A. Sorry --</p> <p>21 Q. No, I appreciate that.</p> <p>22 Now, if you would go back to</p> <p>23 Exhibit 6, remember I said we were going to go</p> <p>24 back --</p> <p>25 MS. BART: I think he wants to --</p>



<p style="text-align: center;">177</p> <p>1 Prince</p> <p>2 A. Yes, I believe that would be about,</p> <p>3 yes.</p> <p>4 Q. And were any of those works -- and</p> <p>5 I'm not talking about the Canal Zone, I'm sorry,</p> <p>6 I don't want to confuse you.</p> <p>7 A. That's okay.</p> <p>8 Q. I'm talking about the one the year</p> <p>9 before in St. Barth's.</p> <p>10 A. Right.</p> <p>11 Q. Were any of those works --</p> <p>12 withdrawn.</p> <p>13 Did any of those works contain</p> <p>14 materials, images appropriated from the</p> <p>15 Yes Rasta book?</p> <p>16 MS. BART: Objection to form.</p> <p>17 MR. HAYES: Objection as to form.</p> <p>18 A. Yes.</p> <p>19 Q. How many of those 14 or 15</p> <p>20 paintings?</p> <p>21 A. There was one collage.</p> <p>22 Q. Right. And that was called Canal</p> <p>23 Zone, right?</p> <p>24 A. I believe it was, yes.</p> <p>25 Q. We're going to look at that in a</p>	<p style="text-align: center;">179</p> <p>1 Prince</p> <p>2 one you did in 2007, was that either in the</p> <p>3 Canal Zone book or exhibited at the Canal Zone</p> <p>4 show at the Gagosian Gallery?</p> <p>5 A. It was never exhibited at -- it</p> <p>6 didn't get in the show at the Canal Zone exhibit</p> <p>7 at Larry Gagosian's.</p> <p>8 Q. Okay. And it's not in the book?</p> <p>9 A. It's not in the book.</p> <p>10 MR. BROOKS: Let's mark as</p> <p>11 Plaintiff's Exhibit 14 a document produced</p> <p>12 by Gagosian defendants Bates stamped</p> <p>13 GGP003781.</p> <p>14 (Plaintiff's Exhibit 14, GGP003781,</p> <p>15 was marked for identification, as of this</p> <p>16 date.)</p> <p>17 Q. Mr. Prince, does this refresh your</p> <p>18 recollection that the title of that work of art</p> <p>19 was The Canal Zone, comma, 2007?</p> <p>20 A. That's what it says here, yes.</p> <p>21 Q. And is this the work of art you've</p> <p>22 been describing that was part of the show at the</p> <p>23 Eden Rock?</p> <p>24 A. Yes.</p> <p>25 Q. And this is the only one on display</p>
<p style="text-align: center;">178</p> <p>1 Prince</p> <p>2 second, but of those paintings that were</p> <p>3 exhibited at the Eden Rock Hotel, are any of</p> <p>4 those in the Canal Zone book?</p> <p>5 A. There wasn't a painting that was</p> <p>6 exhibited in that particular exhibition. It was</p> <p>7 a collage.</p> <p>8 Q. Well, there are 14 or 15 works,</p> <p>9 right?</p> <p>10 A. No, there were -- the 14 -- I</p> <p>11 thought you were referring to -- the other 14 or</p> <p>12 15 paintings in that show were different</p> <p>13 paintings.</p> <p>14 Q. No, I understand that. I</p> <p>15 understand. They don't have material images</p> <p>16 taken from Yes Rasta?</p> <p>17 A. Right. Right.</p> <p>18 Q. I'm just asking you, those</p> <p>19 paintings, were any of those in the Canal Zone</p> <p>20 book or the Canal Zone show at Gagosian</p> <p>21 Gallery --</p> <p>22 A. Oh, no. No.</p> <p>23 Q. -- in 2007?</p> <p>24 Now, how about the one collage which</p> <p>25 does have images from the Yes Rasta book, the</p>	<p style="text-align: center;">180</p> <p>1 Prince</p> <p>2 at that show that had images taken from the</p> <p>3 Yes Rasta book, is that correct?</p> <p>4 A. Yes.</p> <p>5 Q. And all of these images in this --</p> <p>6 what did you call it, a --</p> <p>7 A. Collage.</p> <p>8 Q. Collage. These were all taken from</p> <p>9 the Yes Rasta book, correct?</p> <p>10 A. These images were what I would refer</p> <p>11 to as -- it was sort of like, yes, they were</p> <p>12 torn out, they were pages that were torn out of</p> <p>13 the Yes Rasta book.</p> <p>14 Q. And does this relate back to what</p> <p>15 you were saying before that over the course of a</p> <p>16 couple years you intermittently wrote in the</p> <p>17 book and looked at it?</p> <p>18 A. Yes, I think this probably was done</p> <p>19 over the course of probably three seasons in</p> <p>20 St. Barth.</p> <p>21 Q. Is that because you left the book</p> <p>22 there when you --</p> <p>23 A. I left a number of, you know -- also</p> <p>24 there was -- yes, I left a number of art-related</p> <p>25 materials at the house.</p>



193	195
<p>1 Prince</p> <p>2 has to fend for himself, is that the idea?</p> <p>3 A. Yes.</p> <p>4 Q. You compared him to Steven Segal?</p> <p>5 A. Yes.</p> <p>6 Q. And Under Siege?</p> <p>7 A. Yes.</p> <p>8 Q. Which is a movie where a submarine</p> <p>9 is taken over?</p> <p>10 A. Yes.</p> <p>11 Q. And he kills everyone, right?</p> <p>12 I think I saw that movie.</p> <p>13 I agree with you, it was a good</p> <p>14 movie.</p> <p>15 MR. HAYES: A couple of Steven Segal</p> <p>16 fans here.</p> <p>17 MR. BROOKS: What?</p> <p>18 MR. HAYES: We got a couple of</p> <p>19 Steven Segal fans here.</p> <p>20 MR. BROOKS: Yeah, I liked that</p> <p>21 movie.</p> <p>22 MS. BART: The only two.</p> <p>23 BY MR. BROOKS:</p> <p>24 Q. And then Jimi Hendrix is going to be</p> <p>25 on the soundtrack, right? Is that right?</p>	<p>1 Prince</p> <p>2 to this phrase you wrote.</p> <p>3 Anyway, this is what I'm thinking</p> <p>4 these paintings are about. Do you see that</p> <p>5 language?</p> <p>6 A. Yes.</p> <p>7 Q. So tell me what were they about,</p> <p>8 these paintings?</p> <p>9 A. The guns and ammo paintings?</p> <p>10 Q. The paintings at the Eden Rock show.</p> <p>11 A. Yeah, the ones that we referred to</p> <p>12 as guns and ammo.</p> <p>13 Q. Okay.</p> <p>14 A. You want me to describe them or tell</p> <p>15 you --</p> <p>16 Q. Well, I think we have some images of</p> <p>17 them that have been produced. But just what was</p> <p>18 your thinking in making those paintings?</p> <p>19 A. They reminded me of science fiction</p> <p>20 paintings.</p> <p>21 Q. And did they have anything to do</p> <p>22 with the Canal Zone in your mind?</p> <p>23 A. I believe they were about -- they</p> <p>24 represented a way of how -- or the images in</p> <p>25 these paintings represented survival.</p>
194	196
<p>1 Prince</p> <p>2 A. I believe in this version, yeah.</p> <p>3 Yeah, that's what it says, yes.</p> <p>4 Q. So anyway, at the end you say,</p> <p>5 Anyway, this is what I'm thinking these</p> <p>6 paintings are about. And then you say, In my</p> <p>7 movie is the title of the whole set of paintings</p> <p>8 at least for now, and Eden Rock is the title of</p> <p>9 the screenplay. That was your thinking at the</p> <p>10 time?</p> <p>11 A. I believe I was writing a piece --</p> <p>12 Q. Right.</p> <p>13 A. -- for ArtForum that was called In</p> <p>14 My Movie, or maybe I had already written -- it</p> <p>15 was published. But these were some of the</p> <p>16 things, yes, I was thinking about.</p> <p>17 Q. And when you say you were writing an</p> <p>18 article in Art -- what did you say?</p> <p>19 A. Forum.</p> <p>20 Q. This is separate from what you've</p> <p>21 been calling the pitch, right?</p> <p>22 A. Yes.</p> <p>23 Q. That's a different thing?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. Now, I just want to go back</p>	<p>1 Prince</p> <p>2 Q. Now, how did the -- this Canal Zone</p> <p>3 2007, which was Exhibit 14, how did that fit in</p> <p>4 with these guns and ammo paintings, if it did?</p> <p>5 A. It didn't.</p> <p>6 Q. But it was in the same show?</p> <p>7 A. In the same show.</p> <p>8 Q. Okay.</p> <p>9 MR. BROOKS: Let's mark as</p> <p>10 Plaintiff's Exhibit 19 two pages Bates</p> <p>11 stamped GGP004330 and 4332. Or is there a</p> <p>12 third page? No.</p> <p>13 (Plaintiff's Exhibit 19, GGP004330</p> <p>14 and 4332, was marked for identification,</p> <p>15 as of this date.)</p> <p>16 Q. Exhibit 19 has two pages, the first</p> <p>17 has smaller versions of some of these images,</p> <p>18 and on the second page they're slightly larger.</p> <p>19 Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. Now, one of these paintings is that</p> <p>22 Canal Zone 2007 mixed media on wood, correct?</p> <p>23 A. Yes.</p> <p>24 Q. And the others are what you were</p> <p>25 saying, referring to as guns and ammo?</p>



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<p style="text-align: center;">253</p> <p>1 Prince</p> <p>2 Q. So the only lesbians are in that one</p> <p>3 painting?</p> <p>4 A. No. One shows up in another</p> <p>5 painting. But primarily the -- the four -- the</p> <p>6 lesbian painting -- that was in the show.</p> <p>7 Q. Yes.</p> <p>8 A. But I don't know if it's in the</p> <p>9 catalog. I would have to check. I know that</p> <p>10 another lesbian showed up in another painting.</p> <p>11 I know that's not in the catalog.</p> <p>12 Q. How about -- I notice there's one</p> <p>13 that was part of the show, even though I don't</p> <p>14 think it's in the book, called Pumpsie Green?</p> <p>15 A. Pumpsie Green.</p> <p>16 Q. So he was the first African-American</p> <p>17 player on the Boston Red Sox?</p> <p>18 A. My hero.</p> <p>19 Q. Which was the last team to</p> <p>20 integrate?</p> <p>21 A. My hero.</p> <p>22 Q. Correct?</p> <p>23 A. Yes. Second baseman I believe.</p> <p>24 Q. And what does that have to do with</p> <p>25 this?</p>	<p style="text-align: center;">255</p> <p>1 Prince</p> <p>2 date.)</p> <p>3 Q. This is now 26.</p> <p>4 Do you have an assistant named Eric</p> <p>5 Brown?</p> <p>6 A. Yes, I do.</p> <p>7 Q. Do you see he was asked about two of</p> <p>8 these paintings, numbers 510 and 511, and he's</p> <p>9 asking -- somebody was asking at Gagolian for a</p> <p>10 list so he could match the numbers with the</p> <p>11 titles. And he wrote at the bottom of the first</p> <p>12 page Anita attaches a list of the works she</p> <p>13 received from the Long Island studio, can you</p> <p>14 please double check that RPS510 and 511 match</p> <p>15 what you have received. Please check the title</p> <p>16 on back painting. Richard couldn't remember</p> <p>17 which was which.</p> <p>18 Do you recall that?</p> <p>19 This relates to the painting called</p> <p>20 Île-de-France?</p> <p>21 MR. HAYES: Objection as to form.</p> <p>22 A. No, I don't remember this.</p> <p>23 I don't -- is Île-de-France on here?</p> <p>24 Q. That's 511.</p> <p>25 No, it's not on --</p>
<p style="text-align: center;">254</p> <p>1 Prince</p> <p>2 A. I just love the name.</p> <p>3 Q. So it has nothing to do with it?</p> <p>4 A. I think it was just a way of giving</p> <p>5 a nod to my boyhood hero.</p> <p>6 Q. Not to the fact that the Red Sox</p> <p>7 were the last team to integrate?</p> <p>8 A. I didn't know that.</p> <p>9 Q. Then it wasn't.</p> <p>10 MR. BROOKS: You know what, I'm</p> <p>11 going to go back, and let's as mark as</p> <p>12 Exhibit 27, that was -- there was no</p> <p>13 Exhibit 27 --</p> <p>14 MS. BART: Yeah, we have one.</p> <p>15 (Clarification by reporter.)</p> <p>16 MR. BROOKS: Okay. Let's go back</p> <p>17 and mark as 26 -- it's a two-page document</p> <p>18 Bates stamped GG --</p> <p>19 THE WITNESS: Do we have this</p> <p>20 document?</p> <p>21 MR. HAYES: No, he's got to give it</p> <p>22 to us.</p> <p>23 (Discussion off the record.)</p> <p>24 (Plaintiff's Exhibit 26, e-mail, was</p> <p>25 marked for identification, as of this</p>	<p style="text-align: center;">256</p> <p>1 Prince</p> <p>2 A. I know the painting Île-de-France,</p> <p>3 I think.</p> <p>4 (Discussion off the record.)</p> <p>5 BY MR. BROOKS:</p> <p>6 Q. Getting back to this interview with</p> <p>7 Glenn O'Brien. So I'm showing you part of</p> <p>8 Exhibit 42. And it's page, Bates stamped at the</p> <p>9 bottom, C00140. Is that Île-de-France?</p> <p>10 A. Yes, it is.</p> <p>11 Q. And it was originally untitled?</p> <p>12 A. I don't know what originally it was.</p> <p>13 Q. And they asked you for the name and</p> <p>14 you couldn't remember and told them to look on</p> <p>15 the back of the painting, is that right?</p> <p>16 A. I don't remember that. I do know</p> <p>17 that if there was any -- if there was a question</p> <p>18 about -- if there was a question about it, I</p> <p>19 probably wasn't present and I probably said to</p> <p>20 whoever was doing the shipping, look on the</p> <p>21 back.</p> <p>22 Q. And you didn't say you couldn't</p> <p>23 remember the title?</p> <p>24 A. I don't remember the exchange at</p> <p>25 all.</p>

<p style="text-align: center;">273</p> <p>1 Prince</p> <p>2 A. So anyway -- oh, okay, Fulton Ryder</p> <p>3 is the pseudonym. So anyway? Yes.</p> <p>4 Q. So anyway, the Rastas and the</p> <p>5 lesbians started starring in these pictures and</p> <p>6 were kind of like bands, there were like five</p> <p>7 people to a picture and every picture has a</p> <p>8 title to it. It sort of becomes an allegory.</p> <p>9 It's just something I needed to get out of my</p> <p>10 system. The pictures are very quickly done,</p> <p>11 they're not really thought about, and there's a</p> <p>12 collage element to them that's very primitive.</p> <p>13 Paste up, cutting with scissors, and squeegeed</p> <p>14 on with paint. It's something that I can do by</p> <p>15 myself and I like that aspect of it. I don't</p> <p>16 need assistants. I don't need anybody.</p> <p>17 What did you mean by the pictures</p> <p>18 are not really thought about? Did you mean by</p> <p>19 you?</p> <p>20 A. I like to paint a painting and</p> <p>21 finish it within a day, day and a half tops. I</p> <p>22 like instant paintings.</p> <p>23 Q. In the case of these paintings what</p> <p>24 did you mean that they're not really thought</p> <p>25 about?</p>	<p style="text-align: center;">274</p> <p>1 Prince</p> <p>2 A. That's --</p> <p>3 MS. BART: Objection, form, and</p> <p>4 asked and answered.</p> <p>5 A. I'm trying to answer your question.</p> <p>6 That's what I mean. I like -- I like when I do</p> <p>7 things fast. I think they should be done very</p> <p>8 quickly. I think when they drag on, you know,</p> <p>9 you can overthink it. I don't like a painting</p> <p>10 that's overcooked.</p> <p>11 Q. Okay. I understand your answer, but</p> <p>12 I was asking about these paintings, not what you</p> <p>13 generally like.</p> <p>14 A. No, I'm talking about these specific</p> <p>15 paintings. They were done day, half a day, some</p> <p>16 of them took two hours. That's what was so</p> <p>17 satisfying about the process. You know,</p> <p>18 Especially Around Midnight, a painting that you</p> <p>19 had previously said that I didn't remember the</p> <p>20 title to --</p> <p>21 Q. No, that was Île-de-France.</p> <p>22 A. You didn't say that. You pointed to</p> <p>23 an e-mail from Eric Brown suggesting that Eric</p> <p>24 thought that I didn't remember the title.</p> <p>25 Q. Île-de-France.</p>
<p style="text-align: center;">275</p> <p>1 Prince</p> <p>2 A. Well, it wasn't Île-de-France.</p> <p>3 That's not the way I remember the question. It</p> <p>4 was Round About Midnight.</p> <p>5 Q. When you read the transcript you'll</p> <p>6 see.</p> <p>7 A. Fine. Okay.</p> <p>8 Q. But let's get back to what you were</p> <p>9 saying about doing them quickly. What is it</p> <p>10 that you were saying, that you like to do them</p> <p>11 quickly because?</p> <p>12 MS. BART: Objection --</p> <p>13 A. I don't like to --</p> <p>14 (Multiple speakers talking at once.)</p> <p>15 (Interruption by reporter.)</p> <p>16 MS. BART: Objection to form and</p> <p>17 asked and answered.</p> <p>18 MR. HAYES: And I joined in it.</p> <p>19 MS. BART: He just doesn't like the</p> <p>20 answer.</p> <p>21 A. It has to do with technique. I come</p> <p>22 up with various techniques that are very new, no</p> <p>23 one's ever done them before. Like the squeegee.</p> <p>24 No one had ever painted a painting</p> <p>25 by squeegeeing on a collage onto a piece of</p>	<p style="text-align: center;">276</p> <p>1 Prince</p> <p>2 canvas. No one had ever done that before. That</p> <p>3 was totally new and it was a very quick way to</p> <p>4 add on an ingredient and make it into an entire</p> <p>5 recipe.</p> <p>6 Q. Okay. So let's talk about the</p> <p>7 ingredients. These guitars that you say -- your</p> <p>8 contribution to the Rastas was this introduction</p> <p>9 of the guitar. Do you see where you said that?</p> <p>10 MS. BART: Objection, form. I mean</p> <p>11 there are --</p> <p>12 MR. BROOKS: That's fine.</p> <p>13 MS. BART: No, I just wanted --</p> <p>14 MR. BROOKS: There are no speaking</p> <p>15 objections.</p> <p>16 MS. BART: I'm going to make my</p> <p>17 comment for you --</p> <p>18 MR. BROOKS: Don't make it for him.</p> <p>19 MS. BART: He's not my client.</p> <p>20 MR. BROOKS: I know that.</p> <p>21 MS. BART: I'm making it for you.</p> <p>22 There are a myriad of pictures in</p> <p>23 this book, and to ask a blanket question</p> <p>24 like that --</p> <p>25 MR. BROOKS: No, I'm asking him</p>



<p style="text-align: center;">333</p> <p>1 Prince</p> <p>2 a different tonality --</p> <p>3 Q. Okay --</p> <p>4 MS. BART: Let him finish.</p> <p>5 A. Which I think is really important,</p> <p>6 because this is a bit darker, this is lighter.</p> <p>7 MR. HAYES: Let the record reflect,</p> <p>8 referring to the man on the donkey and the</p> <p>9 woman to the right.</p> <p>10 A. You know, the tonality here is quite</p> <p>11 different. And this was a -- I mean this</p> <p>12 collage was sent out to NancyScans.</p> <p>13 Q. Right.</p> <p>14 A. And then came back, as I believe, on</p> <p>15 a fairly large canvas, which I then cut up the</p> <p>16 canvas. These strips, as you see them here --</p> <p>17 MR. HAYES: Referring to 118.</p> <p>18 A. This image then was transferred to</p> <p>19 canvas and then I cut the canvas again in strips</p> <p>20 and I squeegeed it. That was the new technique.</p> <p>21 That's what made this painting very exciting for</p> <p>22 me to paint because I couldn't control the</p> <p>23 amount of paint that would come out from behind</p> <p>24 the collage.</p> <p>25 Q. Right.</p>	<p style="text-align: center;">335</p> <p>1 Prince</p> <p>2 because I'm very confused now.</p> <p>3 Now, let's talk about C118. Are you</p> <p>4 saying you painted this?</p> <p>5 MS. BART: Objection, form.</p> <p>6 A. No, I just explained what I did.</p> <p>7 MR. HAYES: He just told at some</p> <p>8 length.</p> <p>9 Q. You cut it out of the book and then</p> <p>10 squeegeed it on?</p> <p>11 MR. HAYES: No, you want him to</p> <p>12 explain it all again?</p> <p>13 A. You want me to --</p> <p>14 Q. I don't understand.</p> <p>15 How is this a painting, that's what</p> <p>16 I want to know, C118, in what way is it a</p> <p>17 panting as opposed to a scanned photograph?</p> <p>18 MR. HAYES: This is part of 116, you</p> <p>19 got that, right?</p> <p>20 Q. I want to hear about 118.</p> <p>21 A. Again?</p> <p>22 MS. BART: But it's a detail.</p> <p>23 Q. I'm aware of that, but I'm limiting</p> <p>24 it to this page in your book.</p> <p>25 MS. BART: Then I object to the</p>
<p style="text-align: center;">334</p> <p>1 Prince</p> <p>2 A. This kind of -- no one -- I had</p> <p>3 never seen that in a painting before. It was</p> <p>4 almost a new way of silk screening.</p> <p>5 Q. Okay. Now, can I ask you to go back</p> <p>6 to C118?</p> <p>7 A. Sure.</p> <p>8 Q. Which is what I was asking you</p> <p>9 about. And I want you to look at that and then</p> <p>10 compare it to the image in the Yes Rasta book.</p> <p>11 And I'm just talking about those two.</p> <p>12 A. Yes.</p> <p>13 Q. I'm talking about a page in your</p> <p>14 book.</p> <p>15 A. A page in my book.</p> <p>16 MR. HAYES: Detail of the painting,</p> <p>17 right?</p> <p>18 Q. Which you say you're the copyright</p> <p>19 owner of?</p> <p>20 A. I don't say that I'm the copyright</p> <p>21 owner.</p> <p>22 Q. No? Okay.</p> <p>23 A. In fact --</p> <p>24 Q. Let's just compare this image on</p> <p>25 C118 with the photograph in the Yes Rasta book</p>	<p style="text-align: center;">336</p> <p>1 Prince</p> <p>2 question.</p> <p>3 A. I understand, but I just explained</p> <p>4 it. You want me to explain it again?</p> <p>5 Q. Did you paint the nose and the eyes</p> <p>6 and the ears and the beard?</p> <p>7 MR. HAYES: Explain it again.</p> <p>8 A. I painted on the nose and the eyes</p> <p>9 and the ears.</p> <p>10 Q. Okay. So you took the photograph --</p> <p>11 A. And I also painted on the eyes and</p> <p>12 the ears and the mouth of the image that was</p> <p>13 next to him.</p> <p>14 Q. In 116?</p> <p>15 A. And I also painted the eyes and the</p> <p>16 nose and the mouth on the women.</p> <p>17 But to answer your question, yes,</p> <p>18 it's -- on 118 this is a painting.</p> <p>19 The process, you have to understand,</p> <p>20 inkjet is four colors. Paint is mixed and it's</p> <p>21 blown out on canvas. It's a completely</p> <p>22 different type of texture when I receive it.</p> <p>23 And then what I do is I start to</p> <p>24 paint again. That's why you see all this paint</p> <p>25 underneath the image and on the image. I don't</p>



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<p style="text-align: center;">353</p> <p>1 Prince</p> <p>2 THE VIDEOGRAPHER: 5:51. Off the</p> <p>3 record. End of tape 5.</p> <p>4 (Recess taken: 5:51 p.m.)</p> <p>5 (Proceedings resumed: 5:55 p.m.)</p> <p>6 THE VIDEOGRAPHER: 5:55. On the</p> <p>7 record. Beginning of tape 6.</p> <p>8 BY MR. BROOKS:</p> <p>9 Q. Now, this painting on C24 where you</p> <p>10 took landscapes from Yes Rasta and inserted one</p> <p>11 of the Rastas in the middle, what is the new</p> <p>12 meaning or message or artistic expression in</p> <p>13 that painting?</p> <p>14 A. I was thinking about camouflage,</p> <p>15 hiding in plain sight, thinking about Warhol's</p> <p>16 camouflage paintings.</p> <p>17 Q. Are you -- in this painting on C24</p> <p>18 are you commenting on any aspects of culture?</p> <p>19 MS. BART: Object to form.</p> <p>20 A. I'm sorry, we're on the same</p> <p>21 painting?</p> <p>22 Q. 24, C24.</p> <p>23 MR. HAYES: Object to form.</p> <p>24 A. I would say a musician is a solo</p> <p>25 artist, maybe, if that's -- is that culture?</p>	<p style="text-align: center;">354</p> <p>1 Prince</p> <p>2 Yeah.</p> <p>3 Q. So the musician is this Rasta with a</p> <p>4 guitar?</p> <p>5 A. The musician is actually Neil Young.</p> <p>6 Q. It's supposed to be Neil Young?</p> <p>7 A. Yes.</p> <p>8 Q. Because it's called Canal Zone or</p> <p>9 because of some other reason?</p> <p>10 A. It's Neil Young's guitar.</p> <p>11 Q. So you're not commenting on the</p> <p>12 landscape in this painting, right?</p> <p>13 MR. HAYES: Objection to the form,</p> <p>14 asked and answered.</p> <p>15 Q. You can answer.</p> <p>16 MS. BART: Same.</p> <p>17 A. I don't really make comments with</p> <p>18 any of my work.</p> <p>19 Q. But the landscaping is not the</p> <p>20 subject of this painting Canal Zone's page C24?</p> <p>21 MR. HAYES: Object to form.</p> <p>22 MS. BART: Same.</p> <p>23 Q. You can answer.</p> <p>24 A. Well, it helps to make it appear</p> <p>25 like camouflage, the shapes.</p>
<p style="text-align: center;">355</p> <p>1 Prince</p> <p>2 Q. Right. But any landscaping could do</p> <p>3 that, right?</p> <p>4 MS. BART: Object to form.</p> <p>5 MR. HAYES: Object to form.</p> <p>6 A. Not really. I don't think my front</p> <p>7 lawn in Wainscott would do that trick.</p> <p>8 Q. But any tropical landscape would be</p> <p>9 able to do the same?</p> <p>10 MS. BART: Objection, form,</p> <p>11 speculative.</p> <p>12 Q. You can answer.</p> <p>13 A. I don't know.</p> <p>14 Q. Turn to C30 in the Exhibit 40. This</p> <p>15 is Djuna Barnes, Natalie Barney, et cetera.</p> <p>16 A. I've got the wrong one.</p> <p>17 Which one?</p> <p>18 MR. HAYES: C30.</p> <p>19 Q. C30.</p> <p>20 A. C30, yes.</p> <p>21 Q. You have that?</p> <p>22 A. Yes.</p> <p>23 Q. The top part is your painting Djuna</p> <p>24 Barnes, Natalie Barney, et cetera, Take Over the</p> <p>25 Guanahani, correct?</p>	<p style="text-align: center;">356</p> <p>1 Prince</p> <p>2 A. Yes.</p> <p>3 Q. And now beneath that do you see that</p> <p>4 the entire backdrop to those four women is taken</p> <p>5 from the Yes Rasta book?</p> <p>6 And here I've turned in the</p> <p>7 Yes Rasta book to that photo which takes up two</p> <p>8 pages. Do you see that?</p> <p>9 A. Yes --</p> <p>10 MR. HAYES: Objection, form.</p> <p>11 Q. What's the answer?</p> <p>12 A. Yes, I believe I used that</p> <p>13 reproduction as a background material for this</p> <p>14 new painting.</p> <p>15 Q. For instance -- I'm sorry.</p> <p>16 In the upper right there's a palm</p> <p>17 frond or something. Do you see that?</p> <p>18 A. Yes.</p> <p>19 Q. It's very distinctive, right?</p> <p>20 MR. HAYES: Objection to form.</p> <p>21 MS. BART: Objection, form.</p> <p>22 Q. You can answer.</p> <p>23 A. I don't --</p> <p>24 Q. It's very noticeable, right?</p> <p>25 MS. BART: Objection, form.</p>



Richard Prince

October 6, 2009

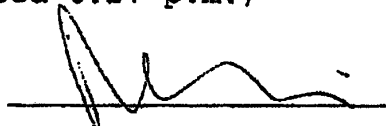
Page 378

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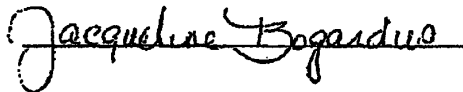
That's it.

(Time noted 6:27 p.m.)



RICHARD PRINCE

Subscribed and sworn to
before me this 24 day
of November, 2009.



Jacqueline Bogardus
Notary Public State of New York
No. 0100698591
Qualified in Greene County
Commission Expires 12/31/09

Richard Prince

October 6, 2009

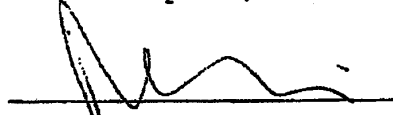
Page 378

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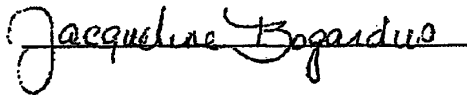
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Jacqueline Bogardus
Notary Public State of New York
No. 01806038391
Qualified in Greene County
Commission Expires 12/31/09

Condensed Transcript

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK CARIOU,

Plaintiff,

vs.

Index No.:
08 CIV 11327 (DAB)

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

Defendants.

VIDEOTAPED DEPOSITION OF

LAWRENCE GAGOSIAN

October 8, 2009
10:00 a.m.

140 Broadway
New York, New York

Bryan Nilsen, RPR
Notary Public of the State of New York



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October 8, 2009

<p style="text-align: center;">29</p> <p>1 Gagosian 2 employees. Sometimes -- 3 Q. About a hundred? 4 A. -- I might have saw a face, but 5 maybe not the name. 6 Q. You have about a hundred you said? 7 A. Yeah. 8 Q. Anyway, apparently James McKee -- 9 and if you look further up, it says -- it 10 indicates that he works at 555 West 24th Street, 11 do you see that under his name? 12 A. Yeah. 13 Q. That's one of your galleries, right? 14 A. That's right. 15 Q. He wrote Louise Neri, Do we know who 16 is in charge of curating the Prince show here? 17 And there's a response above it where Louise 18 Neri said Larry. Do you see that? 19 A. Oh, I see. I see my name, yeah. 20 Q. Now, again, who is Louise Neri? 21 A. She works for the gallery. 22 Q. For the one on 24th Street? 23 A. That's her -- that's her office. 24 Q. So is she incorrect when she appears 25 to be saying --</p>	<p style="text-align: center;">31</p> <p>1 Gagosian 2 were you involved? 3 A. You know, making decisions about 4 what should be exhibited and not exhibited, you 5 know, giving my opinion, which is often 6 overruled. 7 Q. Did you have any involvement in 8 promoting the show through advertisements? 9 A. I'm sorry? 10 MS. BART: Objection, form. 11 A. I can't hear -- 12 MS. BART: Yeah, I'm having a really 13 hard time hearing you. 14 Q. Did you have any involvement in 15 promoting the show through advertisements? 16 A. The gallery advertised the show, 17 yes. 18 Q. Did you personally? 19 MS. BART: He wants to know if you 20 Larry Gagosian -- 21 MR. BROOKS: Correct. 22 MS. BART: -- as opposed to Gagosian 23 Gallery. 24 A. It's also collaborative. So it 25 would be a similar answer to the curating</p>
<p style="text-align: center;">30</p> <p>1 Gagosian 2 A. She is -- she is incorrect. 3 Q. You were not curating the show? 4 A. No. 5 (Interruption by reporter.) 6 BY MR. BROOKS: 7 Q. Was there someone who was curating 8 the show? 9 A. These shows are often a 10 collaborative thing in terms of curating them. 11 That's how we typically curate. 12 Q. Who was collaborating and curating 13 the Canal Zone show? 14 A. I don't remember everybody, but it 15 would have been Richard -- 16 Q. Prince? 17 A. -- it would have been some input 18 from me, it would have been Sam, it would have 19 been maybe even -- it's a trial-and-error thing. 20 And lot of people are involved, including 21 myself. 22 Q. Can you tell us generally what your 23 involvement was in curating that show? 24 And I'm not looking for specifics 25 because we'll get to that, but in what areas</p>	<p style="text-align: center;">32</p> <p>1 Gagosian 2 question. 3 Q. Did you have any involvement in the 4 production of a book, maybe catalog is the right 5 word, in connection with the exhibition? 6 MS. BART: In connection with what? 7 MR. BROOKS: Exhibition. 8 Q. A Canal Zone book? 9 A. We -- I don't know. We did it with 10 Rizzoli. I don't know what -- you know, the 11 gallery was involved. Our name is on the book. 12 Q. Were you personally involved in any 13 way? 14 A. Not that much. 15 Q. With the layout? 16 A. Not that much. 17 Q. A little bit? 18 A. Very little. 19 MS. BART: Objection to form. 20 A. Very little. 21 Q. And I referred to it as a catalog, 22 is that the right term? 23 A. Yes. 24 Q. Do you know in which outlets 25 advertisements were placed for the Canal Zone</p>

<p style="text-align: center;">41</p> <p>1 Gagosian</p> <p>2 Q. What is the purpose of advertising a</p> <p>3 show before it takes place?</p> <p>4 A. To promote business and to make</p> <p>5 people aware of the exhibition.</p> <p>6 Q. In the hopes that they'll come to</p> <p>7 the show?</p> <p>8 A. Come to the show --</p> <p>9 MS. BART: Objection, form.</p> <p>10 A. Just informing -- yeah, informing</p> <p>11 people.</p> <p>12 Q. In the hopes that they'll come to</p> <p>13 the show and buy some of the artwork?</p> <p>14 MS. BART: Objection, form.</p> <p>15 Q. You can answer.</p> <p>16 A. I don't -- I don't think about it</p> <p>17 that way. It's just part of the process.</p> <p>18 Q. When you have a show you hope to</p> <p>19 sell the pieces in the show, don't you?</p> <p>20 MS. BART: Objection, form.</p> <p>21 Q. You can answer.</p> <p>22 A. Yes.</p> <p>23 Q. That's how you make money, right?</p> <p>24 A. That's right.</p> <p>25 Q. That's how you pay your employees?</p>	<p style="text-align: center;">43</p> <p>1 Gagosian</p> <p>2 and I want to find out what he's nodding</p> <p>3 about.</p> <p>4 MS. BART: He nodded after he</p> <p>5 answered it.</p> <p>6 Q. All right. Mr. Gagosian, it's not</p> <p>7 infrequent that pieces are sold before the show</p> <p>8 even opens, right?</p> <p>9 MS. BART: Objection, form.</p> <p>10 Q. In your business?</p> <p>11 A. Sometimes pieces are sold before the</p> <p>12 show opens.</p> <p>13 Q. Now, how about more specifically in</p> <p>14 connection with the Canal Zone show that opened</p> <p>15 in November of 2008 at your gallery, were pieces</p> <p>16 sold before that show opened?</p> <p>17 A. I think so.</p> <p>18 (Plaintiff's Exhibit 46, checklist</p> <p>19 of paintings, was marked for</p> <p>20 identification, as of this date.)</p> <p>21 Q. Mr. Gagosian, can you tell us what</p> <p>22 this document is?</p> <p>23 A. Well, it appears to be a checklist</p> <p>24 of paintings that Richard made for the</p> <p>25 exhibition.</p>
<p style="text-align: center;">42</p> <p>1 Gagosian</p> <p>2 A. Absolutely.</p> <p>3 Q. Is it normal, maybe not in this</p> <p>4 economy, but if you go back at least a year and</p> <p>5 before that, is it normal in a show where the</p> <p>6 artist is of the caliber of Mr. Prince to sell</p> <p>7 out all or most of the pieces before the show</p> <p>8 even opens?</p> <p>9 MS. BART: Objection, form, in</p> <p>10 particular use of the word normal.</p> <p>11 A. Yeah, normal I have a problem with.</p> <p>12 Q. That happens sometimes, right?</p> <p>13 MS. BART: Objection. That what?</p> <p>14 Q. That most of the pieces are sold</p> <p>15 before the show even opens?</p> <p>16 A. That's the exception.</p> <p>17 MS. BART: Objection, form.</p> <p>18 Q. That's the exception?</p> <p>19 (Nonverbal response.)</p> <p>20 Q. You're nodding but you have to say</p> <p>21 yes or no.</p> <p>22 A. I said it's the exception.</p> <p>23 MS. BART: He answered your</p> <p>24 question.</p> <p>25 MR. BROOKS: Excuse me. He nodded</p>	<p style="text-align: center;">44</p> <p>1 Gagosian</p> <p>2 Q. The Canal Zone exhibition?</p> <p>3 A. Exactly, yes.</p> <p>4 Q. Is this a normal type of document</p> <p>5 that your company creates in connection with a</p> <p>6 show?</p> <p>7 A. Yes.</p> <p>8 Q. Does it have a name, this type of</p> <p>9 document?</p> <p>10 A. Checklist -- I don't know what</p> <p>11 the -- I call it checklist.</p> <p>12 Q. Now, there are a number of paintings</p> <p>13 listed, and then to the right there are some</p> <p>14 images. Is it the case that the image</p> <p>15 corresponds with the painting that's listed?</p> <p>16 A. I'm sorry?</p> <p>17 MR. BROOKS: Can you read that back.</p> <p>18 Q. If you don't understand it I'll</p> <p>19 rephrase it.</p> <p>20 A. I just couldn't hear you, I'm sorry.</p> <p>21 Q. Okay. I'm going to try to speak up.</p> <p>22 A. My hearing is not great.</p> <p>23 (Record read.)</p> <p>24 A. Yeah, that would be -- that would be</p> <p>25 the idea.</p>

Lawrence Gagosian

October 8, 2009

49	51
1 Gagosian	1 Gagosian
2 Q. Does the Gagosian Gallery have a	2 Q. Do you recall going to it?
3 website?	3 A. I'm sure I did.
4 A. Yes, we do.	4 Q. Was it -- let me see if I can help
5 Q. Did you -- withdrawn.	5 you. Was it in the Gramercy Park Hotel?
6 Did your website publicize the fact	6 MS. BART: Well, objection. The
7 that the Canal Zone show was about to open?	7 witness has testified that he doesn't
8 A. I would imagine so.	8 recall.
9 Q. Did Gagosian Gallery issue a press	9 MR. BROOKS: Right. And I can --
10 release stating that the show was going to open,	10 I'm entitled to help his recollection.
11 the Prince show was going to open?	11 BY MR. BROOKS:
12 A. We always do.	12 Q. Do you recall a dinner in the
13 Q. Are you aware that Mr. Prince was	13 Gramercy Park Hotel, which is right near
14 interviewed by Interview Magazine shortly before	14 Gramercy Park?
15 the Canal Zone show opened?	15 A. I honestly don't, but --
16 A. I don't recall.	16 Q. Do you recall having any
17 Q. Do you know if Gagosian Gallery	17 involvement, you personally, in preparing the
18 arranged such an interview for Mr. Prince?	18 invitation list for the dinner in connection
19 A. It wouldn't -- that wouldn't be the	19 with the opening of the Canal Zone show?
20 case usually.	20 A. What I almost always do is review a
21 Q. Do you know Glenn O'Brien?	21 list. I'm given a list and I'll sometimes take
22 A. I do.	22 somebody's name off or add somebody's name, but
23 Q. Do you recall, now that I've	23 it's usually pre-prepared.
24 mentioned his name, that he interviewed	24 Q. And did you do that in connection
25 Mr. Prince in Interview Magazine?	25 with the dinner for the opening of this show?
50	52
1 Gagosian	1 Gagosian
2 A. It's possible, I just don't --	2 A. I almost always do.
3 I don't have a specific recollection.	3 Q. But you don't remember?
4 Q. Do you know whether Gagosian Gallery	4 A. I don't have specific recollection.
5 sent JPEGs of images from the Canal Zone show to	5 Q. Okay.
6 Interview Magazine to be used in connection with	6 (Discussion off the record.)
7 the publication of the Prince interview?	7 MR. BROOKS: This is 48.
8 A. I don't have a specific	8 (Plaintiff's Exhibit 48, series of
9 recollection.	9 e-mails, was marked for identification, as
10 Q. Do you know if Interview Magazine	10 of this date.)
11 had a slide show in connection with the Canal	11 MR. BROOKS: Plaintiff's Exhibit 48
12 Zone exhibition on its website?	12 is a series of -- again, a series of
13 A. I didn't know that.	13 e-mails.
14 Q. Was Peter Brant the owner of	14 MS. BART: It's just a compilation,
15 Interview Magazine in 2008, if you know?	15 not that they're one sequence, correct?
16 A. I know he bought it recently. I	16 MR. HAYES: They don't appear to be
17 don't know the date that he bought it, so I	17 a chain.
18 don't know who was the owner at that point.	18 MR. BROOKS: I'm not sure.
19 Q. Was there a -- withdrawn.	19 MS. BART: They're not.
20 The show opened on November 8th,	20 MR. HAYES: No, they're not a chain.
21 2008. Was there a dinner in connection with	21 BY MR. BROOKS:
22 the opening of the show?	22 Q. Again, take your time, look them
23 A. I'm sure there was.	23 over, tell me when you're ready and I'll ask you
24 Q. Do you recall?	24 some questions.
25 A. I don't recall exactly.	25 A. Okay.

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October 8, 2009

77	79
<p>1 Gagosian</p> <p>2 Q. You can answer.</p> <p>3 A. Extremely.</p> <p>4 Q. All right. Could you look at</p> <p>5 the invitation again one more time? It's</p> <p>6 Exhibit 52.</p> <p>7 Do you know if at the end of the</p> <p>8 show excess invitations were left over?</p> <p>9 Do you understand what I'm saying?</p> <p>10 A. Usually that's the case.</p> <p>11 Q. And are they then usually discarded?</p> <p>12 A. No, not as a rule. I think we --</p> <p>13 I think we hold onto them. I don't think we</p> <p>14 throw them away.</p> <p>15 Q. Do you ever sell them?</p> <p>16 A. I think we have from time to time.</p> <p>17 Q. To what types of entities do you</p> <p>18 sell them to?</p> <p>19 MS. BART: Objection, form. Are we</p> <p>20 talking about this invitation or --</p> <p>21 MR. BROOKS: Yes.</p> <p>22 MS. BART: -- are we talking about</p> <p>23 invitations generally?</p> <p>24 MR. BROOKS: First in general and</p> <p>25 then I'll get to this one.</p>	<p>1 Gagosian</p> <p>2 but I'm going to -- and we only have five</p> <p>3 minutes left on this tape, so depending on how</p> <p>4 long you want to review it we may have to take a</p> <p>5 break or I can ask you questions now.</p> <p>6 (Witness looks at exhibit.)</p> <p>7 A. Yeah.</p> <p>8 MS. BART: Are you ready?</p> <p>9 Q. So, to make sense of this, to the</p> <p>10 extent it makes sense, you have to start from</p> <p>11 the back and then go forward because</p> <p>12 chronologically the e-mails start from the back.</p> <p>13 Andy Traynor, that's somebody who</p> <p>14 works -- I'm on the last page, 2766.</p> <p>15 A. Yeah, yeah.</p> <p>16 Q. Or 3063, I'm not sure.</p> <p>17 Andy Traynor works in the gallery on</p> <p>18 24th Street?</p> <p>19 A. I guess so. I don't know -- the</p> <p>20 name doesn't ring a bell.</p> <p>21 Q. And I assume you don't know Ryan</p> <p>22 Dowler from Rare Posters?</p> <p>23 A. Never heard of him.</p> <p>24 Q. You see here he -- there were three</p> <p>25 extra boxes of invitations left and apparently</p>
78	80
<p>1 Gagosian</p> <p>2 MS. BART: Well, then I object to</p> <p>3 the form.</p> <p>4 BY MR. BROOKS:</p> <p>5 Q. Okay. You can answer.</p> <p>6 A. I don't know.</p> <p>7 Q. In this case do you recall that some</p> <p>8 excess invitations were sold?</p> <p>9 A. I didn't recall that.</p> <p>10 Q. Would you have approved if you had</p> <p>11 been asked whether it was okay to sell excess</p> <p>12 invitations to a poster company?</p> <p>13 MS. BART: Objection, form, calls</p> <p>14 for the witness to speculate.</p> <p>15 Q. You can answer.</p> <p>16 A. Probably not.</p> <p>17 Q. Why not?</p> <p>18 A. Because it seems kind of tacky.</p> <p>19 MR. BROOKS: Plaintiff's Exhibit 53</p> <p>20 is a series of e-mails again.</p> <p>21 (Plaintiff's Exhibit 53, series of</p> <p>22 e-mails, was marked for identification, as</p> <p>23 of this date.)</p> <p>24 Q. Mr. Prince -- I'm sorry,</p> <p>25 Mr. Gagosian. Take as much time as you want,</p>	<p>1 Gagosian</p> <p>2 Mr. Dowler wanted them. Do you see that?</p> <p>3 A. Yeah.</p> <p>4 Q. Any idea how many invitations in a</p> <p>5 box?</p> <p>6 A. No.</p> <p>7 Q. And then Nicole Hecht, she works for</p> <p>8 Gagosian Gallery?</p> <p>9 A. Yes, she does.</p> <p>10 Q. And she said, Shouldn't we get a</p> <p>11 percentage of the sale if he is selling</p> <p>12 something we paid to produce, do you see that?</p> <p>13 A. I do.</p> <p>14 Q. Do you agree with that?</p> <p>15 A. Do I agree with what?</p> <p>16 Q. What she said.</p> <p>17 A. I don't agree with this whole thing.</p> <p>18 I think it's stupid.</p> <p>19 Q. And then Allison McDonald who was --</p> <p>20 again, her position?</p> <p>21 A. She's the head of kind of design and</p> <p>22 publications in house.</p> <p>23 Q. And at the top of this last page of</p> <p>24 the exhibit she said we should sell them to him,</p> <p>25 referring to Ryan Dowler presumably. You don't</p>

<p style="text-align: center;">89</p> <p>1 Gagosian</p> <p>2 fall apart.</p> <p>3 BY MR. BROOKS:</p> <p>4 Q. I'm just going to hand you a copy of</p> <p>5 the book called Canal Zone, which is Exhibit 42,</p> <p>6 right, Plaintiff's 42.</p> <p>7 Just do you recognize it?</p> <p>8 A. Yes.</p> <p>9 Q. Did you have a role -- and I may</p> <p>10 have asked you this before -- in the preparation</p> <p>11 of this book?</p> <p>12 A. Minimal, if any.</p> <p>13 Q. Did you have a role -- the book has</p> <p>14 some inserts. There's -- I'm just showing you</p> <p>15 in this copy. By insert I mean it's the pages</p> <p>16 are not the same size, they're smaller.</p> <p>17 A. The text apparently, yeah.</p> <p>18 Q. Yeah. There are three different</p> <p>19 inserts. The first one is an essay entitled</p> <p>20 Ding Dong the Witch is Dead. Do you see that?</p> <p>21 A. Yeah.</p> <p>22 Q. Do you know who wrote that essay?</p> <p>23 A. It says James Frey.</p> <p>24 Q. Well, did you know that though?</p> <p>25 A. Yes.</p>	<p style="text-align: center;">91</p> <p>1 Gagosian</p> <p>2 a name.</p> <p>3 Q. A colophon?</p> <p>4 A. I think that's it. That sounds like</p> <p>5 it, yeah.</p> <p>6 Q. All right. At the top of that page</p> <p>7 it states that this book is published on the</p> <p>8 occasion of the exhibition, and this is the</p> <p>9 Canal Zone exhibition we've been talking about a</p> <p>10 little bit, correct?</p> <p>11 A. Right.</p> <p>12 Q. And then it says publication</p> <p>13 copyright 2008 Gagosian Gallery. Do you have</p> <p>14 any understanding of what that means?</p> <p>15 A. It means that the gallery -- I'm</p> <p>16 just speculating, that the gallery holds the</p> <p>17 copyright to the publication.</p> <p>18 Q. And is the publication the book that</p> <p>19 you're holding in your hand now?</p> <p>20 A. Yes.</p> <p>21 Q. And then it appears that James Frey</p> <p>22 is the copyright holder of that essay Ding Dong</p> <p>23 the Witch is Dead?</p> <p>24 A. Yes.</p> <p>25 Q. And was that your understanding?</p>
<p style="text-align: center;">90</p> <p>1 Gagosian</p> <p>2 Q. You knew that before today?</p> <p>3 A. Yes.</p> <p>4 Q. Did you know that before the show</p> <p>5 started in November 2008?</p> <p>6 A. Most likely.</p> <p>7 Q. Did you have any input into the</p> <p>8 wording of the essay which I'll call Ding Dong</p> <p>9 the Witch is Dead?</p> <p>10 A. No.</p> <p>11 Q. Did you have any input into the</p> <p>12 layout of this Canal Zone book or the other</p> <p>13 two inserts?</p> <p>14 A. I don't think so.</p> <p>15 MS. BART: Objection, form.</p> <p>16 A. I don't think so.</p> <p>17 Q. Could you look at the last page,</p> <p>18 please. There's a page which has a number of</p> <p>19 copyright notices on it. Is that the page</p> <p>20 you're looking at?</p> <p>21 A. I am.</p> <p>22 Q. Does this type of page have a name</p> <p>23 it's known by, if you know?</p> <p>24 A. Yeah, I think it does. I just</p> <p>25 can't -- I can't think of it. I think there is</p>	<p style="text-align: center;">92</p> <p>1 Gagosian</p> <p>2 A. Yes.</p> <p>3 Q. Okay. At the bottom it says all</p> <p>4 rights reserved, no part of this publication may</p> <p>5 be used or reproduced in any manner whatsoever</p> <p>6 without prior written permission from the</p> <p>7 copyright holders.</p> <p>8 Have you seen that type of notice</p> <p>9 before in any book that the Gagosian Gallery was</p> <p>10 associated with?</p> <p>11 A. I don't recall.</p> <p>12 Q. Have you or attorneys working for</p> <p>13 you ever sent a cease and desist letter to</p> <p>14 anyone who copied materials belonging to any</p> <p>15 artist that you represented?</p> <p>16 A. Not that I recall.</p> <p>17 Q. Do you know what a cease and desist</p> <p>18 letter is?</p> <p>19 A. Not really.</p> <p>20 (Discussion off the record.)</p> <p>21 BY MR. BROOKS:</p> <p>22 Q. It was marked as Plaintiff's</p> <p>23 Exhibit 34. I'm just going to hand you a copy</p> <p>24 of that. When I said cease and desist letter</p> <p>25 that's what I was referring to.</p>

Lawrence Gagosian

October 8, 2009

<p style="text-align: center;">113</p> <p>1 Gagosian 2 A. Absolutely not. 3 MR. HAYES: I'm going to step out 4 for just a minute, but keep going. 5 MR. BROOKS: You sure? 6 MR. HAYES: Yeah. Is it okay if I 7 step out for a minute? 8 MR. BROOKS: It's okay with me. 9 I don't mind taking a break. 10 MR. HAYES: Pardon? 11 MR. BROOKS: I don't mind taking a 12 short break. 13 MS. BART: Why don't we just take a 14 short break -- 15 MR. HAYES: I don't want to 16 interrupt -- 17 THE WITNESS: Why are we taking a 18 break? Let's keep going. 19 MS. BART: All right. Well, if 20 you're all right to keep going -- 21 MR. BROOKS: I think I might have to 22 have the same -- 23 MS. BART: You need to take a break? 24 MR. BROOKS: I think I need to also. 25 I didn't take one -- I'm going to do my</p>	<p style="text-align: center;">115</p> <p>1 Gagosian 2 (Interruption.) 3 (Plaintiff's Exhibit 55, e-mail 4 dated September 25, 2008, was marked for 5 identification, as of this date.) 6 (Witness looks at exhibit.) 7 Q. Mr. Gagosian, this I think is a new 8 name I haven't seen before, Darlina Goldak, 9 G-O-L-D-A-K. Does she also work for you, if you 10 know? 11 A. I guess so. 12 Q. It says at the top, M. Laz, that's 13 Melissa Lazarov? 14 A. Mm-hmm, yes. 15 Q. And then it says, LG notes on 16 Prince. First, it says they would like the blue 17 man Rasta -- withdrawn -- they would like the 18 blue Rasta man on the cover. 19 Do you remember I asked you this 20 before if the figure on Exhibit 52 had ever been 21 known as a blue Rasta man? 22 A. I don't know. 23 MS. BART: Hold on. 24 Q. You still don't know? Okay. 25 MS. BART: Let's get Exhibit 52 in</p>
<p style="text-align: center;">114</p> <p>1 Gagosian 2 best to expedite this. You're not going 3 to be here all day. 4 THE VIDEOGRAPHER: 12:13. Off the 5 record. 6 (Recess taken: 12:13 p.m.) 7 (Proceedings resumed: 12:16 p.m.) 8 THE VIDEOGRAPHER: 12:16. On the 9 record. 10 MR. BROOKS: Can you read back the 11 last question and answer, unless it's very 12 long. 13 I remember. I asked you if it was 14 okay -- 15 (Record read.) 16 BY MR. BROOKS: 17 Q. Did you want Mr. Frey's name to be 18 on the title page of the Canal Zone exhibition 19 book? 20 A. I don't think I had any opinion on 21 that. 22 MR. BROOKS: Let's mark as 23 Plaintiff's Exhibit 55 an e-mail dated 24 September 25th, 2008. 25 MS. BART: Someone's at the door.</p>	<p style="text-align: center;">116</p> <p>1 Gagosian 2 front of him. 3 A. I don't remember. 4 Q. Okay. Now, down about eight lines 5 it says, Please include, quote, essay, unquote, 6 or, quote, text by James Frey, unquote, in the 7 title page, they want the book to come up if you 8 Google James Frey. Do you see that? 9 A. I do. 10 Q. And do you have any recollection of 11 making that wish known to anyone? 12 A. No.</p>
<p>13 I remember. I asked you if it was 14 okay -- 15 (Record read.) 16 BY MR. BROOKS: 17 Q. Did you want Mr. Frey's name to be 18 on the title page of the Canal Zone exhibition 19 book? 20 A. I don't think I had any opinion on 21 that. 22 MR. BROOKS: Let's mark as 23 Plaintiff's Exhibit 55 an e-mail dated 24 September 25th, 2008. 25 MS. BART: Someone's at the door.</p>	<p>13 MS. BART: I note that the Re line 14 reads, Subject, Richard Prince printing 15 layout notes from M. Laz. 16 MR. BROOKS: Right. And it says, 17 M. Laz LG notes on Prince right beneath 18 the subject line. 19 BY MR. BROOKS: 20 Q. Were you involved at all in the 21 pricing of the paintings that were part of the 22 Canal Zone show? 23 A. Yes. 24 Q. Can you tell us generally what role 25 you played in the pricing of the paintings?</p>

Lawrence Gagosian

October 8, 2009

117

1 Gagosian
 2 A. It's the same role I play usually
 3 with every artist. We have a conversation and
 4 discuss where we think the appropriate price
 5 level should be. And I sometimes also discuss
 6 it with other people in the gallery just to get
 7 different points of view and try to come up with
 8 what seems like the right number.
 9 MR. BROOKS: I'm going to mark as
 10 Plaintiff's 56 a series of e-mails.
 11 (Plaintiff's Exhibit 56, series of
 12 e-mails, was marked for identification, as
 13 of this date.)
 14 MS. BART: Again, this is a
 15 compilation as opposed to a single
 16 sequence for the record?
 17 MR. BROOKS: I don't know. It
 18 looks that way. Well, I think I have to
 19 withdraw that. I think the first two are
 20 related to each other.
 21 MS. BART: The Re lines are
 22 different.
 23 BY MR. BROOKS:
 24 Q. Do you have 3123 through 31 -- 3123,
 25 3124, and 3150, are those the pages?

119

1 Gagosian
 2 of page 3150 from somebody named John Good,
 3 G-O-O-D. Do you know who he is?
 4 A. He works at the gallery.
 5 Q. Which gallery?
 6 A. Uptown, 980 Madison.
 7 Q. Do you know who Greg is in this
 8 e-mail?
 9 A. Gregg Hymowitz.
 10 Q. Is he a collector, an employee?
 11 A. He's a collector.
 12 Q. He's a collector.
 13 And then you wrote, Okay prices,
 14 question mark, do you see that?
 15 A. I'm looking.
 16 Q. Above, above the e-mail that says
 17 Gregg liked the following paintings.
 18 A. Is that what I asked, the question?
 19 Q. It looks like Larry Gagosian on
 20 Saturday --
 21 A. Right.
 22 Q. -- October 4th at 5:45 p.m. --
 23 A. Okay, right.
 24 Q. You said, Okay prices?
 25 A. That's what it says.

118

1 Gagosian
 2 MR. HAYES: Yes.
 3 A. Yes.
 4 Q. Okay, fine.
 5 So the first one, Candy Coleman,
 6 again, she was in LA, is that right?
 7 A. Yes.
 8 Q. Or am I confusing -- she was in LA.
 9 And she sent you an e-mail asking,
 10 What is the price of the two Prince paintings?
 11 Do you have any idea which two paintings that
 12 was?
 13 A. No, I don't.
 14 Q. And on the next page at the bottom
 15 it looks like you responded from your Blackberry
 16 that one was 3 million and one was 1.5 million,
 17 do you see that?
 18 A. I do.
 19 Q. Does that help you at all to know
 20 which two paintings?
 21 A. Not at all.
 22 Q. Do you recall this exchange of
 23 e-mails?
 24 A. No, I don't.
 25 Q. Now, there's an e-mail at the bottom

120

1 Gagosian
 2 Q. So you wanted to know the prices, is
 3 that right?
 4 A. I'm just reading the same thing you
 5 are, I don't --
 6 Q. You don't remember?
 7 A. No.
 8 Q. Do you know at the top of that page
 9 it says that Sam gave me prices for 1.5 and 1
 10 I suppose million for the other. Sam, again,
 11 who would that be in this sequence?
 12 A. Sam Orloffsky I would suppose.
 13 Q. And where does he work?
 14 A. 24th Street gallery.
 15 MR. BROOKS: Let's mark as
 16 Exhibit 57 another series of e-mails.
 17 (Plaintiff's Exhibit 57, series of
 18 e-mails, was marked for identification, as
 19 of this date.)
 20 MS. BART: Again, this appears to be
 21 a composite of e-mails, for the record?
 22 MR. BROOKS: Well, again, the first
 23 two pages appear to go together.
 24 MS. BART: Only by Bates Number.
 25 MR. BROOKS: Well, let's ask the

<p style="text-align: center;">141</p> <p>1 Gagosian 2 at the actual invitation, so I mean -- 3 Q. I know. Do you have any left? 4 A. I'm sure we do. 5 RQ MR. BROOKS: I'd like to request an 6 actual invitation, just one. 7 MS. BART: We'll get you one if we 8 have it. 9 BY MR. BROOKS: 10 Q. And the last painting is another one 11 by Richard Prince, right? 12 It's All Over -- I'm back to 13 exhibit -- 14 A. Yeah -- 15 MS. BART: Which one are you up to? 16 Q. I'm back to Exhibit 60. 17 MS. BART: This one. 18 Q. The second page. It's All Over is 19 another one of these Richard Prince paintings 20 from the Canal Zone show, right? 21 A. Correct. 22 Q. Have you sold any of those four 23 paintings that you obtained in exchange for 24 Dying and Dead Veteran? 25 A. Yes, I have.</p>	<p style="text-align: center;">143</p> <p>1 Gagosian 2 understanding when you traded the Larry Rivers 3 painting for the four Prince paintings did you 4 become, you personally become the owner of the 5 four Prince paintings? 6 A. I don't know the answer to that. 7 It could be that the gallery became the owner. 8 I mean that's my accountant's kind of question. 9 I really don't know the answer to that. 10 Q. In any event, you sold it for 11 1.1-million dollars? 12 A. That's correct. 13 Q. And your lawyer has instructed 14 you -- 15 MS. BART: And the you could be 16 Gagosian or him, right, that's what you 17 mean? 18 MR. BROOKS: I guess. I don't think 19 it matters. 20 MS. BART: Then I'm going to object 21 to the form of the question. Because the 22 witness -- 23 Q. Who got the 1.1-million dollars? 24 A. Gagosian Gallery. 25 Q. Not you?</p>
<p style="text-align: center;">142</p> <p>1 Gagosian 2 Q. Which one or ones? 3 A. I think the only one that I've sold 4 is It's All Over. 5 Q. And to whom did you sell it? 6 MS. BART: I'm going to instruct the 7 witness not to answer the name. 8 A. I'm not going to give you the name 9 of the customer. 10 Q. How much did you sell it for? 11 A. I sold it I believe for 1.1-million 12 dollars. 13 Q. And did you sell it personally or 14 was it the gallery that sold it? 15 I asked you a bad question. I said 16 did you sell it, and I don't know if you in 17 answering that you were referring to I sold it 18 personally or Gagosian sold it? 19 A. The gallery sold it. 20 Q. The gallery sold it. So the trade 21 was not between you and Mr. Prince, it was 22 between -- maybe there's some confusion? 23 A. That's my accountant kind of 24 question. 25 Q. Okay. To the best of your</p>	<p style="text-align: center;">144</p> <p>1 Gagosian 2 A. Not me. 3 Q. Did you pay a commission on that 4 particular sale to anyone? 5 A. I don't recall. 6 Q. When did you sell It's All Over? 7 A. I think it was August I believe. 8 Q. Of what year? 9 A. This year. 10 Q. 2009? 11 A. Yeah. 12 Q. The other three, you think you 13 didn't sell them yet, right? 14 A. I believe I still have them. 15 Q. Are you trying to sell them? 16 A. Not really. 17 Q. If a buyer came along would you sell 18 them or do you want to keep them? 19 MS. BART: Objection, form, calls 20 for speculation. Not answering. 21 MR. BROOKS: It's not speculation. 22 MS. BART: Yeah, you did. If a 23 buyer came along would you sell them? 24 BY MR. BROOKS: 25 Q. Do you have a present intention of</p>



<p style="text-align: center;">145</p> <p>1 Gagosian 2 selling those paintings? 3 A. Not actively. 4 MS. BART: Objection, form. 5 A. Not actively. 6 Q. Passively? 7 MS. BART: Objection, form. 8 A. That's kind of a difficult question. 9 They're not on the market. 10 Q. Okay. And how do you put a painting 11 on the market? 12 A. Well, I indicate either I contact a 13 potential customer or I have somebody in my 14 organization contact a potential customer and, 15 you know, make them aware of the availability. 16 Q. And that's not been done? 17 MS. BART: Objection, form. 18 A. No. To the best of my knowledge, 19 these paintings are not actively on the market. 20 Q. Was it's All Over on the market 21 before you sold it? 22 MS. BART: Objection, form. 23 A. No, it wasn't. 24 Q. Somebody approached you to buy it? 25 A. That's right.</p>	<p style="text-align: center;">147</p> <p>1 Gagosian 2 MS. BART: Hold on one second. 3 (Discussion off the record.) 4 MS. BART: I think the witness would 5 like to clarify the record. 6 BY MR. BROOKS: 7 Q. Go ahead. 8 A. I don't know if it's relevant, but 9 they were not sold for money, they were sold 10 through exchange. I didn't receive any funds. 11 Q. Now, are you talking about Back to 12 the Garden? 13 A. These three pictures. 14 MS. BART: That you just made 15 reference to. 16 A. That we just referenced. 17 Q. Okay, but just for the record -- 18 A. They were not sold for money. It 19 was an exchange. 20 Q. Okay. You're talking about Back to 21 the Garden -- 22 A. I'm talking about the three 23 paintings on this invoice. 24 Q. Cookie Crumbles and an untitled -- 25 A. Right.</p>
<p style="text-align: center;">146</p> <p>1 Gagosian 2 Q. So therefore the other three don't 3 have an asking price right now? 4 A. They do not. 5 Q. Are they in storage? 6 A. I believe they're all in storage. 7 Q. If you look back at Exhibit 58, we 8 were looking at that before. The last three 9 pages which we looked at before indicate sales 10 of Back to the Garden, Cookie Crumbles, and an 11 untitled Rasta 2008 dot 0044. Do you remember 12 we looked at this? 13 A. Right. 14 Q. And there were two different prices 15 given? 16 A. Right. 17 Q. Do you know if these paintings were 18 actually sold? 19 MS. BART: Objection, form, and 20 asked and answered. 21 Q. You can answer. 22 A. What did I answer? 23 Q. I don't know, because I'm not sure 24 I asked it. 25 A. I believe they were sold.</p>	<p style="text-align: center;">148</p> <p>1 Gagosian 2 Q. Oh, okay. They were exchanged? 3 A. That's right. 4 Q. And with whom were they exchanged? 5 A. A client. 6 Q. And what did you get in exchange? 7 A. I got a sculpture. 8 Q. What did Mr. Prince get? 9 A. Mr. Prince got the money. I paid 10 him money and I got a sculpture. 11 Q. Somebody else, who -- and I take it 12 your counsel is directing you not to identify 13 the other person, is that right? 14 MS. BART: We would prefer not. 15 A. That's been my instruction in 16 general, not to identify people. 17 Q. It's not important for this 18 question, so I'm not -- I don't really care. 19 It doesn't matter. Somebody -- 20 MS. BART: Mr. X. 21 Q. -- we'll call him again Mr. X -- 22 well, let's call him Mr. Y because we already 23 had Mr. X. 24 Mr. Y gave you a sculpture? I mean 25 I'm not sure I'm following you. What did Mr. Y</p>

<p style="text-align: center;">77</p> <p>1 Gagosian 2 Q. You can answer. 3 A. Extremely. 4 Q. All right. Could you look at 5 the invitation again one more time? It's 6 Exhibit 52. 7 Do you know if at the end of the 8 show excess invitations were left over? 9 Do you understand what I'm saying? 10 A. Usually that's the case. 11 Q. And are they then usually discarded? 12 A. No, not as a rule. I think we -- 13 I think we hold onto them. I don't think we 14 throw them away. 15 Q. Do you ever sell them? 16 A. I think we have from time to time. 17 Q. To what types of entities do you 18 sell them to? 19 MS. BART: Objection, form. Are we 20 talking about this invitation or -- 21 MR. BROOKS: Yes. 22 MS. BART: -- are we talking about 23 invitations generally? 24 MR. BROOKS: First in general and 25 then I'll get to this one.</p>	<p style="text-align: center;">79</p> <p>1 Gagosian 2 but I'm going to -- and we only have five 3 minutes left on this tape, so depending on how 4 long you want to review it we may have to take a 5 break or I can ask you questions now. 6 (Witness looks at exhibit.) 7 A. Yeah. 8 MS. BART: Are you ready? 9 Q. So, to make sense of this, to the 10 extent it makes sense, you have to start from 11 the back and then go forward because 12 chronologically the e-mails start from the back. 13 Andy Traynor, that's somebody who 14 works -- I'm on the last page, 2766. 15 A. Yeah, yeah. 16 Q. Or 3063, I'm not sure. 17 Andy Traynor works in the gallery on 18 24th Street? 19 A. I guess so. I don't know -- the 20 name doesn't ring a bell. 21 Q. And I assume you don't know Ryan 22 Dowler from Rare Posters? 23 A. Never heard of him. 24 Q. You see here he -- there were three 25 extra boxes of invitations left and apparently</p>
<p style="text-align: center;">78</p> <p>1 Gagosian 2 MS. BART: Well, then I object to 3 the form. 4 BY MR. BROOKS: 5 Q. Okay. You can answer. 6 A. I don't know. 7 Q. In this case do you recall that some 8 excess invitations were sold? 9 A. I didn't recall that. 10 Q. Would you have approved if you had 11 been asked whether it was okay to sell excess 12 invitations to a poster company? 13 MS. BART: Objection, form, calls 14 for the witness to speculate. 15 Q. You can answer. 16 A. Probably not. 17 Q. Why not? 18 A. Because it seems kind of tacky. 19 MR. BROOKS: Plaintiff's Exhibit 53 20 is a series of e-mails again. 21 (Plaintiff's Exhibit 53, series of 22 e-mails, was marked for identification, as 23 of this date.) 24 Q. Mr. Prince -- I'm sorry, 25 Mr. Gagosian. Take as much time as you want,</p>	<p style="text-align: center;">80</p> <p>1 Gagosian 2 Mr. Dowler wanted them. Do you see that? 3 A. Yeah. 4 Q. Any idea how many invitations in a 5 box? 6 A. No. 7 Q. And then Nicole Hecht, she works for 8 Gagosian Gallery? 9 A. Yes, she does. 10 Q. And she said, Shouldn't we get a 11 percentage of the sale if he is selling 12 something we paid to produce, do you see that? 13 A. I do. 14 Q. Do you agree with that? 15 A. Do I agree with what? 16 Q. What she said. 17 A. I don't agree with this whole thing. 18 I think it's stupid. 19 Q. And then Allison McDonald who was -- 20 again, her position? 21 A. She's the head of kind of design and 22 publications in house. 23 Q. And at the top of this last page of 24 the exhibit she said we should sell them to him, 25 referring to Ryan Dowler presumably. You don't</p>



October 8, 2009

<p style="text-align: center;">89</p> <p>1 Gagosian</p> <p>2 fall apart.</p> <p>3 BY MR. BROOKS:</p> <p>4 Q. I'm just going to hand you a copy of</p> <p>5 the book called Canal Zone, which is Exhibit 42,</p> <p>6 right, Plaintiff's 42.</p> <p>7 Just do you recognize it?</p> <p>8 A. Yes.</p> <p>9 Q. Did you have a role -- and I may</p> <p>10 have asked you this before -- in the preparation</p> <p>11 of this book?</p> <p>12 A. Minimal, if any.</p> <p>13 Q. Did you have a role -- the book has</p> <p>14 some inserts. There's -- I'm just showing you</p> <p>15 in this copy. By insert I mean it's the pages</p> <p>16 are not the same size, they're smaller.</p> <p>17 A. The text apparently, yeah.</p> <p>18 Q. Yeah. There are three different</p> <p>19 inserts. The first one is an essay entitled</p> <p>20 Ding Dong the Witch is Dead. Do you see that?</p> <p>21 A. Yeah.</p> <p>22 Q. Do you know who wrote that essay?</p> <p>23 A. It says James Frey.</p> <p>24 Q. Well, did you know that though?</p> <p>25 A. Yes.</p>	<p style="text-align: center;">91</p> <p>1 Gagosian</p> <p>2 a name.</p> <p>3 Q. A colophon?</p> <p>4 A. I think that's it. That sounds like</p> <p>5 it, yeah.</p> <p>6 Q. All right. At the top of that page</p> <p>7 it states that this book is published on the</p> <p>8 occasion of the exhibition, and this is the</p> <p>9 Canal Zone exhibition we've been talking about a</p> <p>10 little bit, correct?</p> <p>11 A. Right.</p> <p>12 Q. And then it says publication</p> <p>13 copyright 2008 Gagosian Gallery. Do you have</p> <p>14 any understanding of what that means?</p> <p>15 A. It means that the gallery -- I'm</p> <p>16 just speculating, that the gallery holds the</p> <p>17 copyright to the publication.</p> <p>18 Q. And is the publication the book that</p> <p>19 you're holding in your hand now?</p> <p>20 A. Yes.</p> <p>21 Q. And then it appears that James Frey</p> <p>22 is the copyright holder of that essay Ding Dong</p> <p>23 the Witch is Dead?</p> <p>24 A. Yes.</p> <p>25 Q. And was that your understanding?</p>
<p style="text-align: center;">90</p> <p>1 Gagosian</p> <p>2 Q. You knew that before today?</p> <p>3 A. Yes.</p> <p>4 Q. Did you know that before the show</p> <p>5 started in November 2008?</p> <p>6 A. Most likely.</p> <p>7 Q. Did you have any input into the</p> <p>8 wording of the essay which I'll call Ding Dong</p> <p>9 the Witch is Dead?</p> <p>10 A. No.</p> <p>11 Q. Did you have any input into the</p> <p>12 layout of this Canal Zone book or the other</p> <p>13 two inserts?</p> <p>14 A. I don't think so.</p> <p>15 MS. BART: Objection, form.</p> <p>16 A. I don't think so.</p> <p>17 Q. Could you look at the last page,</p> <p>18 please. There's a page which has a number of</p> <p>19 copyright notices on it. Is that the page</p> <p>20 you're looking at?</p> <p>21 A. I am.</p> <p>22 Q. Does this type of page have a name</p> <p>23 it's known by, if you know?</p> <p>24 A. Yeah, I think it does. I just</p> <p>25 can't -- I can't think of it. I think there is</p>	<p style="text-align: center;">92</p> <p>1 Gagosian</p> <p>2 A. Yes.</p> <p>3 Q. Okay. At the bottom it says all</p> <p>4 rights reserved, no part of this publication may</p> <p>5 be used or reproduced in any manner whatsoever</p> <p>6 without prior written permission from the</p> <p>7 copyright holders.</p> <p>8 Have you seen that type of notice</p> <p>9 before in any book that the Gagosian Gallery was</p> <p>10 associated with?</p> <p>11 A. I don't recall.</p> <p>12 Q. Have you or attorneys working for</p> <p>13 you ever sent a cease and desist letter to</p> <p>14 anyone who copied materials belonging to any</p> <p>15 artist that you represented?</p> <p>16 A. Not that I recall.</p> <p>17 Q. Do you know what a cease and desist</p> <p>18 letter is?</p> <p>19 A. Not really.</p> <p>20 (Discussion off the record.)</p> <p>21 BY MR. BROOKS:</p> <p>22 Q. It was marked as Plaintiff's</p> <p>23 Exhibit 34. I'm just going to hand you a copy</p> <p>24 of that. When I said cease and desist letter</p> <p>25 that's what I was referring to.</p>

<p style="text-align: center;">177</p> <p style="text-align: center;">1 CERTIFICATE</p> <p>2</p> <p>3 STATE OF _____</p> <p>4 COUNTY/CITY OF _____</p> <p>5 Before me, this day, personally appeared,</p> <p>6 LAWRENCE GAGOSIAN, who, being duly sworn, states that the</p> <p>7 foregoing transcript of his/her Deposition, taken in the</p> <p>8 matter, on the date, and at the time and place set out</p> <p>9 on the title page hereof, constitutes a true and accurate</p> <p>10 transcript of said deposition.</p> <p>11</p> <p>12</p> <p>13 _____</p> <p>14 LAWRENCE GAGOSIAN</p> <p>15</p> <p>16 SUBSCRIBED and SWORN to before me this</p> <p>17 _____ day of _____, 20____ in the</p> <p>18 jurisdiction aforesaid.</p> <p>19</p> <p>20</p> <p>21 _____</p> <p>22 My Commission Expires _____ Notary Public</p> <p>23</p> <p>24 *If no changes need to be made on the following two pages,</p> <p>25 place a check here <input type="checkbox"/>, and return only this signed page.</p>	<p style="text-align: center;">179</p> <p>1 Deposition of LAWRENCE GAGOSIAN</p> <p>2</p> <p>3 Page No. _____ Line No. _____ Change to: _____</p> <p>4 _____</p> <p>5 Reason for change: _____</p> <p>6 Page No. _____ Line No. _____ Change to: _____</p> <p>7 _____</p> <p>8 Reason for change: _____</p> <p>9 Page No. _____ Line No. _____ Change to: _____</p> <p>10 _____</p> <p>11 Reason for change: _____</p> <p>12 Page No. _____ Line No. _____ Change to: _____</p> <p>13 _____</p> <p>14 Reason for change: _____</p> <p>15 Page No. _____ Line No. _____ Change to: _____</p> <p>16 _____</p> <p>17 Reason for change: _____</p> <p>18 Page No. _____ Line No. _____ Change to: _____</p> <p>19 _____</p> <p>20 Reason for change: _____</p> <p>21 _____</p> <p>22</p> <p>23</p> <p>24 SIGNATURE: _____ DATE: _____</p> <p>25 LAWRENCE GAGOSIAN</p>
<p style="text-align: center;">178</p> <p style="text-align: center;">1 DEPOSITION ERRATA SHEET</p> <p>2</p> <p>3 RE: Esquire Deposition Solutions</p> <p>4 File No. 13829</p> <p>5 Case Caption: PATRICK CARIOU</p> <p>6 vs. RICHARD PRINCE, et al.</p> <p>7 Deponent: LAWRENCE GAGOSIAN</p> <p>8 Deposition Date: October 8, 2009</p> <p>9 To the Reporter:</p> <p>10 I have read the entire transcript of my Deposition taken</p> <p>11 in the captioned matter or the same has been read to me.</p> <p>12 I request that the following changes be entered upon the</p> <p>13 record for the reasons indicated. I have signed my name to</p> <p>14 the Errata Sheet and the appropriate Certificate and</p> <p>15 authorize you to attach both to the original transcript.</p> <p>16</p> <p>17 Page No. _____ Line No. _____ Change to: _____</p> <p>18 _____</p> <p>19 Reason for change: _____</p> <p>20 Page No. _____ Line No. _____ Change to: _____</p> <p>21 _____</p> <p>22 Reason for change: _____</p> <p>23 Page No. _____ Line No. _____ Change to: _____</p> <p>24 _____</p> <p>25 Reason for change: _____</p>	<p> </p>



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* * * ERRATA SHEET * * *

**VIDEOTAPED DEPOSITION OF LAWRENCE GAGOSIAN
TAKEN: OCTOBER 8, 2009**

The following corrections, additions, or deletions are noted for the following reasons:

PAGE	LINE	CHANGE	REASON
64	13	Rasta man to Rastaman	Transcription Error
74	17	Delete "Do you know if he was at the dinner?" [It appears twice. See Page 74 line 16].	Transcription Error
75	18-19	Delete "Did either of them buy a Richard Price Canal Zone painting?" [It appears twice. See Page 75 lines 16-17].	Transcription Error
75	23	Mark to Marc	Transcription Error
80	21	"head of kind of design" to "head of design"	Transcription Error
115	21	Rasta man to Rastaman	Transcription Error
130	3	2008 dot 0044 to 2008.0044	Transcription Error
137	23	veterans to Veterans	Transcription Error
138	24	disco ball to Disco Ball	Transcription Error
139	3	disco ball To Disco Ball	Transcription Error
142	23	accountant To accountant's	Transcription Error
146	11	2008 dot 0044 to 2008.0044	Transcription Error

Sworn before me this 19th
day of November, 2009


LAWRENCE GAGOSIAN


NOTARY PUBLIC

658382.1.

ROBERT B. KURZBERG
Notary Public, State of New York
No. 31-4731915
Qualified in New York County
Commission Expires 2/28/2011

Lawrence Gagosian

October 8, 2009

177

CERTIFICATE

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STATE OF

COUNTY/CITY OF

Before me, this day, personally appeared,
LAWRENCE GAGOSIAN, who, being duly sworn, states that the
foregoing transcript of his/her Deposition, taken in the
matter, on the date, and at the time and place set out
on the title page hereof, constitutes a true and accurate
transcript of said deposition.

[Signature]

LAWRENCE GAGOSIAN

SUBSCRIBED and SWORN to before me this
3rd day of November, 2009 in the
jurisdiction aforesaid.

ROBERT B. KURZBERG
Notary Public, State of New York
No. 31-4731915
Qualified in New York County
Commission Expires 2/17/2011

[Signature]

My Commission Expires Notary Public

*If no changes need to be made on the following two pages,
place a check here , and return only this signed page.

Condensed Transcript

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK CARIOU,

Plaintiff,

vs.

Index No.: 08 CIV 11327

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

Defendants.

DEPOSITION OF

CHRISTIANE CELLE

Tuesday, January 26, 2010
10:00 a.m.

Schnader Harrison Segal & Lewis LLP
140 Broadway, Suite 3100
New York, New York 10005-1101

Reported by:
Bryan Nilsen, RPR



Telephone: 212.687.8010
Toll Free: 800.944.9454
Facsimile: 212.557.5972

One Penn Plaza
Suite 4715
New York, N.Y. 10119

<p style="text-align: center;">29</p> <p style="text-align: center;">Celle</p> <p>1 2 Christoff Hoenberg, H-O-E-N-E-N-B-E-R-G. 3 He had a book signing and a show 4 about when Andy Warhol died, because he made 5 that beautiful book about the funerals of 6 Andy Warhol. So we did a show and book signing. 7 We had Patrick Demarchelier book 8 signing and mini show. When I say mini show 9 it's because we do so many events, you know, 10 that we don't leave that show for four weeks. 11 We had a Vanity Fair party for 12 Risko, illustrator. It's R-I-S-K-O. 13 We had Ron Gallela show and book 14 signing. Ron Gallela, G-A-L-L-E-L-A. 15 My God, I'm forgetting some. 16 We had a Vogue -- Grace Coddington, 17 C-O-D-D-I-N-G-T-O-N, book signing, about her cat 18 book. She did a book about cats. She loves 19 cats. 20 We did also the Christo, 21 C-H-R-I-S-T-O, and Wilkinson book signing called 22 Walking Thunder. 23 Q. Is this the Christo? 24 A. Yes. It's actually, the son, Cyril 25 Christo.</p>	<p style="text-align: center;">31</p> <p style="text-align: center;">Celle</p> <p>1 2 any kind of a specialization or a concentration 3 of the kind of artists it handles or the subject 4 matter, or is it a general gallery? 5 A. No, it's general. But, for example, 6 right now I have a different thing happening, 7 but I have a big show coming for Gian Paolo 8 Barbieri about Madagascar, Tahiti, and the 9 Seychelles. So it's a black and white show. 10 He's a gentleman who is in his late -- closer to 11 70 I will say, and who has been doing traveling 12 photography for years. So that's one of the 13 next shows happening. 14 I have something different called a 15 Asylum, A-S-Y-L-I-U-M. It's a book signing and 16 a show by a gentleman called Chris Payne. 17 Q. And what is that about? 18 A. That's about -- he's a gentleman who 19 works about 6 years doing a repertoire of all 20 the mental institution in America. So it's 21 photography of old buildings that are completely 22 abandoned. So it's very interesting. 23 And MIT publish a book, so we had a 24 book signing I think in October or November and 25 the show is going to happen in April or May.</p>
<p style="text-align: center;">30</p> <p style="text-align: center;">Celle</p> <p>1 2 Q. Okay. 3 A. Same thing, I'm forgetting a few, 4 but -- 5 Q. Okay. So the painter that you first 6 talked about, that was Jeannie Weissglass? 7 A. Yes, correct. 8 Q. And she's a painter? 9 A. She's a painter. 10 Q. What kind of work does she do, oil? 11 A. Yeah, she does oil and she does 12 drawing. And we did a catalog for her that I 13 still have. 14 Q. Does she do collage work? 15 A. No collage. 16 Q. Is it correct that all the others 17 were book signings or shows or mini shows 18 relating to photographers? 19 A. Yes. 20 Q. And have you had shows -- I know the 21 original space you use as a bookstore. Have you 22 had shows at that space? 23 A. At the 189, no, it's too small. 24 Q. Too small, okay. 25 Does the space at 255 Centre have</p>	<p style="text-align: center;">32</p> <p style="text-align: center;">Celle</p> <p>1 2 Q. Do you know Patrick Cariou, who is 3 the plaintiff in this lawsuit? 4 A. Yes, I do. 5 Q. And how did you first come to know 6 Patrick Cariou? 7 A. I heard about Patrick Cariou years 8 ago when the surfer book came out. He had a 9 book called Surfer. And a friend of mine at the 10 time was his assistant on part of the trip in 11 Hawaii. He was a photographer assistant. 12 And I heard about the project, and 13 when the book came out I bought the book. 14 Q. And the name of assistant who's your 15 friend is? 16 A. Yes, Thierry, T-H-I-E-R-R-Y, 17 Des Fontaines, D-E-S, F-O-N-T-A-I-N-E-S. 18 Q. Do you know where Mr. Des Fontaines 19 resides now? 20 A. Yes. Where he is now? 21 Q. Yes. 22 A. Oh, yes, definitely. He's in 23 Brazil. 24 Q. Do you know where in Brazil? 25 A. He's a photographer -- oh, yes.</p>

33	35
<p>1 Celle</p> <p>2 I keep contact.</p> <p>3 Q. Where?</p> <p>4 A. Rio.</p> <p>5 Q. Okay. And so you had heard about</p> <p>6 Mr. Cariou?</p> <p>7 A. Yes.</p> <p>8 Q. And what happened next in terms of</p> <p>9 your having any contact with him?</p> <p>10 A. I mean I heard when the book was –</p> <p>11 I bought the book. When I open the bookstore,</p> <p>12 you know, I had in mind to carry a lot of books,</p> <p>13 new books and out-of-print books. I bought</p> <p>14 right away Surfer actually. I find a copy</p> <p>15 somewhere online that was signed actually.</p> <p>16 And, you know, I find out about all</p> <p>17 the other books that he did. So I find out</p> <p>18 about Yes Rasta.</p> <p>19 I was trying to get a book called</p> <p>20 Trench Town Love, but I don't think I could find</p> <p>21 that one. Or sometime the price was really</p> <p>22 high. That's how I really, you know, get to</p> <p>23 know more his work. But I never met him.</p> <p>24 Q. So you found out about him you said</p> <p>25 about his work, is that by going online?</p>	<p>1 Celle</p> <p>2 Q. Did you sell them?</p> <p>3 A. Yes.</p> <p>4 Q. All of them?</p> <p>5 A. Frequently, yes, I sold them. And</p> <p>6 actually what's interesting is Powerhouse didn't</p> <p>7 have any more, so I went online and I bought a</p> <p>8 few online also.</p> <p>9 Q. Do you know how many copies of</p> <p>10 Yes Rasta you sold out of your store?</p> <p>11 A. Probably in all combined, in all my</p> <p>12 store, I won't tell you exactly, no. But I know</p> <p>13 it's selling, you know, basically in different</p> <p>14 store.</p> <p>15 Q. Is it more than a dozen, less than a</p> <p>16 dozen?</p> <p>17 A. More than a dozen.</p> <p>18 Q. More than a hundred?</p> <p>19 A. Less than a hundred.</p> <p>20 Q. And have you sold copies of the</p> <p>21 Surfer book or any other books by him in the</p> <p>22 bookstore?</p> <p>23 A. Only a few because they are hard to</p> <p>24 find and they are very expensive.</p> <p>25 Q. You had to buy them online?</p>
34	36
<p>1 Celle</p> <p>2 A. When I wanted to open the bookstore</p> <p>3 I started researching a lot of photographer</p> <p>4 books, you know, editor. And I mean I had</p> <p>5 Surfer at home, I didn't have the Yes Rasta.</p> <p>6 But when I start looking at, you</p> <p>7 know, what kind of book he did, I came up upon</p> <p>8 Rasta. And as I see Trench Town on the website,</p> <p>9 he had a black website with there was a lot of</p> <p>10 documentation about all the work he did.</p> <p>11 Q. So you went to Mr. Cariou's website?</p> <p>12 A. Yes.</p> <p>13 Q. And is that where you found out</p> <p>14 about Yes Rasta?</p> <p>15 A. Yes. It's even where I found out</p> <p>16 his address or e-mail address I think, because I</p> <p>17 wanted to contact him.</p> <p>18 Q. And when you first opened the</p> <p>19 bookshop you carried one or more copies of the</p> <p>20 Surfer book?</p> <p>21 A. Yes. I had two copies and then I</p> <p>22 contacted Powerhouse, the company who made the</p> <p>23 book, to get some Yes Rasta, and I got a few.</p> <p>24 Q. And you offered them for sale?</p> <p>25 A. Yes.</p>	<p>1 Celle</p> <p>2 A. Online because they're already from</p> <p>3 170 to 300 dollars, so I can't really mark up on</p> <p>4 those books.</p> <p>5 Q. By the way, do you have any records</p> <p>6 as to how many copies of Yes Rasta you sold?</p> <p>7 A. We have that because we keep</p> <p>8 bookkeeping of all the sales.</p> <p>9 Q. So if I was to leave a space in the</p> <p>10 deposition could you just insert the number for</p> <p>11 me?</p> <p>12 A. Yes, of course.</p> <p>13 Q. Thank you. I appreciate that.</p> <p>14 TO BE FURNISHED: _____</p> <p>15</p> <p>16 Q. By the way, you've been selling</p> <p>17 the books by Mr. Cariou out of the space on</p> <p>18 Lafayette Street, also out of any other space?</p> <p>19 A. Lafayette, St. Barths, because I</p> <p>20 have a space in St. Barths, and also East</p> <p>21 Hampton. That's the three space basically.</p> <p>22 Q. So you actually have three</p> <p>23 galleries – you have the gallery in New York?</p> <p>24 A. Yes.</p> <p>25 Q. You have a gallery in St. Barths?</p>



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<p style="text-align: center;">37</p> <p>1 Celle</p> <p>2 A. Yes.</p> <p>3 Q. And a gallery in East Hampton?</p> <p>4 A. Yeah, the gallery is small in</p> <p>5 East Hampton, very small.</p> <p>6 Q. And the one in East Hampton, what</p> <p>7 kind of work does that show?</p> <p>8 A. It's mainly a bookstore because it's</p> <p>9 very tiny. And work, last year we had mainly</p> <p>10 surfing-oriented work.</p> <p>11 Q. What's the address in East Hampton?</p> <p>12 A. It's 23 Newtown Lane.</p> <p>13 Q. And how long have you had that</p> <p>14 store?</p> <p>15 A. I open it -- I don't know the dates</p> <p>16 exactly. Last year 2009 was my first season, so</p> <p>17 I probably opened April.</p> <p>18 Q. And the store in St. Barths, the</p> <p>19 gallery in St. Barths, what does that show?</p> <p>20 A. That one opened in November 2008.</p> <p>21 And my first show was Andy Warhol, show of Andy</p> <p>22 Warhol Polaroid, and also surfer show, same</p> <p>23 artist Tony Caramanico, the collage.</p> <p>24 Q. And the Andy Warhol you were selling</p> <p>25 the Polaroids?</p>	<p style="text-align: center;">39</p> <p>1 Celle</p> <p>2 work.</p> <p>3 And I was in the Hamptons, I</p> <p>4 remember, you know, I was preparing my gallery.</p> <p>5 And I had in mind to open the gallery. I had</p> <p>6 signed a lease, but I knew I could not open a</p> <p>7 gallery in three months. It was a long project.</p> <p>8 So I was planning for spring 2009.</p> <p>9 And I looked at his e-mail contact</p> <p>10 or his website and I sent him an e-mail, you</p> <p>11 know, asking if he would be interested to do a</p> <p>12 show with me.</p> <p>13 Q. And did he respond to that?</p> <p>14 A. He did respond to that, yeah. Yeah.</p> <p>15 Q. And subsequent to that e-mail, you</p> <p>16 e-mailed him and he e-mailed back, did you have</p> <p>17 further contacts with Mr. Cariou about a show or</p> <p>18 in general?</p> <p>19 A. Later on, yes. Once he answer me</p> <p>20 that, yes, we have to talk, or I can't remember</p> <p>21 what he answer me, but, you know, he wanted to</p> <p>22 engage the conversation.</p> <p>23 Then I remember him coming to</p> <p>24 New York after that. We had drink or lunch at</p> <p>25 Cafe Select. He came -- I can't recall if it's</p>
<p style="text-align: center;">38</p> <p>1 Celle</p> <p>2 A. Yes.</p> <p>3 Q. And did you obtain them from the</p> <p>4 Andy Warhol Foundation or from where?</p> <p>5 A. Yes, it was done with a gentleman</p> <p>6 called Tim Hunt from the foundation, and Fergus</p> <p>7 McCaffrey -- I might have to spell that for you,</p> <p>8 F-E-R-G-U-S, McCaffrey, C-A-F-F-R-E-Y.</p> <p>9 And this was a partnership with</p> <p>10 that person. And we got everything from the</p> <p>11 foundation. And the person in charge was</p> <p>12 Tim Hunt. He's the director.</p> <p>13 Q. Going back to the chronology of your</p> <p>14 contact with Mr. Cariou.</p> <p>15 A. Yeah.</p> <p>16 Q. So what I understand is that first</p> <p>17 you were aware of his Surfer book and you bought</p> <p>18 one copy?</p> <p>19 A. Yes.</p> <p>20 Q. And then you subsequently bought</p> <p>21 perhaps another copy for your bookstore?</p> <p>22 A. I had one copy for years that</p> <p>23 belonged to me personally. And when I was</p> <p>24 looking for photographer books and what to do</p> <p>25 I came upon his work and I discovered the Rasta</p>	<p style="text-align: center;">40</p> <p>1 Celle</p> <p>2 September or October, but he came in New York.</p> <p>3 Q. September or October of 2008?</p> <p>4 A. 2008. He came to see me, and we</p> <p>5 went to Cafe Select. It's a little cafe close</p> <p>6 to Broome Street. We had lunch.</p> <p>7 And, you know, I explained to him</p> <p>8 that I was interested to do a show and I had two</p> <p>9 things in mind. I had the Rasta for New York</p> <p>10 City for probably spring. And I was also</p> <p>11 interested in his Surfer photographs for</p> <p>12 St. Barths or East Hampton. I was not really</p> <p>13 sure.</p> <p>14 Q. And what did Mr. Cariou say to you</p> <p>15 at lunch about that idea or those ideas?</p> <p>16 A. He was very interested. He told me</p> <p>17 that he had a show before at Marion de Beaupre</p> <p>18 in France -- Marion de Beaupre, it's</p> <p>19 B-E-A-U-P-R-E -- and he'd be interested.</p> <p>20 I asked him where the prints are of</p> <p>21 his photographs, because I always ask that first</p> <p>22 question to know if people are organized.</p> <p>23 He told me everything was in</p> <p>24 New York because he had lived in New York for</p> <p>25 the past 12 years and he had his own printer in</p>



<p style="text-align: center;">57</p> <p>1 Celle</p> <p>2 and one in Tokyo in October.</p> <p>3 Q. And that's the end of the second</p> <p>4 paragraph, right?</p> <p>5 A. Yes.</p> <p>6 Q. The show that was planned – I'm</p> <p>7 going to ask you to go through the rest of them,</p> <p>8 but before I do that, the show that you're</p> <p>9 referring to for Mr. Fournier, that was supposed</p> <p>10 to be at which space and when?</p> <p>11 A. Okay, this show was supposed to be</p> <p>12 in 2008. But I signed the lease in June, but</p> <p>13 because of a huge problem in the building, you</p> <p>14 know, that I took at 255 Centre, I could not</p> <p>15 open the gallery until the spring 2009.</p> <p>16 So that Vincent Fournier happened</p> <p>17 but in 2009 October, a year later.</p> <p>18 Q. And that's the show you told us</p> <p>19 about earlier?</p> <p>20 A. Yes, with the moon, the astronaut.</p> <p>21 Q. Thank you.</p> <p>22 Could you, on the third paragraph,</p> <p>23 please translate that?</p> <p>24 A. Yes.</p> <p>25 Will you be interested about talking</p>	<p style="text-align: center;">59</p> <p>1 Celle</p> <p>2 Q. That's the fourth paragraph, right?</p> <p>3 A. That's this one, yes.</p> <p>4 Q. Go ahead.</p> <p>5 A. Thierry was my boyfriend in New York</p> <p>6 during many years. It's actually '84 to '89.</p> <p>7 Voila.</p> <p>8 If you could give me a phone number</p> <p>9 where I would be happy to call you. And my</p> <p>10 name.</p> <p>11 Q. So at that point you were proposing</p> <p>12 the possibilities of a show, which would be a</p> <p>13 surf-photograph-oriented show?</p> <p>14 A. At the time, you know, we are</p> <p>15 talking about that, yeah.</p> <p>16 Q. And the idea is that you would do a</p> <p>17 joint show with Mr. Cariou and Tony – I'll call</p> <p>18 him Tony C. because I mispronounced his last</p> <p>19 name?</p> <p>20 A. At that time, yes, correct.</p> <p>21 Q. And Tony C's work -- what is his</p> <p>22 full name again?</p> <p>23 A. Tony Caramanico.</p> <p>24 Q. And Mr. Caramanico's work is</p> <p>25 photography?</p>
<p style="text-align: center;">58</p> <p>1 Celle</p> <p>2 about a possibility of expo, an exhibition in</p> <p>3 New York. I will also have a gallery that's</p> <p>4 opening in St. Barths, Gustavia is the town.</p> <p>5 And I'm starting with a show of Tony C., it's my</p> <p>6 surfer that you never heard about. And he's</p> <p>7 doing print with his diaries. Diaries is the</p> <p>8 journal. The theme is surf.</p> <p>9 He's almost 60 and was a big</p> <p>10 longboard champion. He did the longboard</p> <p>11 competition. I was thinking also that I could</p> <p>12 show you work and Tony work and some of your</p> <p>13 surf photographs.</p> <p>14 I also wanted to know if you were</p> <p>15 interested or if you had an exclusive with</p> <p>16 somebody.</p> <p>17 Voila.</p> <p>18 Q. That's the one-line paragraph?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. Keep going, please.</p> <p>21 A. I also note Thierry Des Fontaines</p> <p>22 that was your assistant for a small period or</p> <p>23 short moment is living now in Brazil and he has</p> <p>24 a website if you want to look. He's devoted his</p> <p>25 time to sport photography.</p>	<p style="text-align: center;">60</p> <p>1 Celle</p> <p>2 A. Yeah, it's the surf journal and</p> <p>3 transfer into photography.</p> <p>4 Q. So it's collage which has been</p> <p>5 rephotographed?</p> <p>6 A. Yes.</p> <p>7 Q. Okay, great.</p> <p>8 And so that was your idea for the</p> <p>9 show at that point?</p> <p>10 A. At that moment, yes.</p> <p>11 Q. And then going above to the top</p> <p>12 of the document, which would now be what I</p> <p>13 understand to be Mr. Cariou's response to you,</p> <p>14 correct?</p> <p>15 A. Mm-hmm.</p> <p>16 Q. And that appears to be dated</p> <p>17 August 28th, that is the same date as your</p> <p>18 e-mail, correct?</p> <p>19 A. Yes.</p> <p>20 Q. And could you please, starting with</p> <p>21 bonjour Christiane --</p> <p>22 A. Yes.</p> <p>23 Q. -- translate that for us?</p> <p>24 A. Hello, Christiane. Thank you very</p> <p>25 much for the interest that, you know, you are</p>

<p style="text-align: center;">93</p> <p>1 Celle</p> <p>2 Q. Space, and then three lines?</p> <p>3 A. Yes.</p> <p>4 Q. Could you please --</p> <p>5 MR. BROOKS: We've already looked at</p> <p>6 that. That's on the fourth page.</p> <p>7 Just to save a little bit of time,</p> <p>8 those lines are all on the fourth page.</p> <p>9 They're the end of the second e-mail.</p> <p>10 MR. HAYES: Okay. So these are</p> <p>11 actually portions of the e-mail which were</p> <p>12 sent -- off the record.</p> <p>13 Bear with me for a second.</p> <p>14 (Discussion off the record.)</p> <p>15 BY MR. HAYES:</p> <p>16 Q. So what appears at the top of</p> <p>17 page 3, those six lines are actually a portion</p> <p>18 of the e-mail that you sent to him, to Patrick</p> <p>19 Cariou on the 29th, correct?</p> <p>20 A. Correct.</p> <p>21 Q. You've already translated those?</p> <p>22 A. Correct.</p> <p>23 On the artist that's 65 years old.</p> <p>24 Q. Yes. And the balance of this page</p> <p>25 appears to be the e-mail portion that we looked</p>	<p style="text-align: center;">95</p> <p>1 Celle</p> <p>2 at on page 4?</p> <p>3 A. Correct.</p> <p>4 Q. The balance of what appears on</p> <p>5 page 3, was that part of the original e-mail?</p> <p>6 A. Yes, that's all -- yes, correct.</p> <p>7 Q. Okay. So now, by looking at this</p> <p>8 page, do we now have the complete e-mail that</p> <p>9 Mr. Cariou sent you at 6:04 a.m. on the 29th?</p> <p>10 A. Correct.</p> <p>11 Q. Whereas what we looked at before was</p> <p>12 just partial?</p> <p>13 A. Correct.</p> <p>14 Q. Now, the line beginning "d'autre</p> <p>15 pars," and so on -- I apologize for the</p> <p>16 mispronunciation -- could you read me that line?</p> <p>17 A. "D'autre pars"?</p> <p>18 Q. Yes. Translate that, please.</p> <p>19 A. On another subject I'm thinking of</p> <p>20 selling a good part of my collection of photo</p> <p>21 books with some beautiful rare pieces.</p> <p>22 And then he said I'm a little bit</p> <p>23 confused about your program. Are you going to</p> <p>24 have three gallery, New York, St. Barths, and</p> <p>25 East Hampton.</p>
<p style="text-align: center;">94</p> <p>1 Celle</p> <p>2 at previously on page 4 but with additional</p> <p>3 material, is that correct?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. So would it be accurate to</p> <p>6 say that what actually appears on page 3,</p> <p>7 beginning on January 29, 2009, at 6:04 a.m.,</p> <p>8 Patrick Cariou wrote -- is that the complete</p> <p>9 e-mail that he sent you at that time?</p> <p>10 A. Yes.</p> <p>11 Q. Whereas what we looked at on page 4</p> <p>12 was a partial portion of the e-mail?</p> <p>13 A. Yeah. Correct. It was missing the</p> <p>14 two last lines.</p> <p>15 Q. Actually, unless I misread it, it</p> <p>16 misses a number of lines. The prior one, which</p> <p>17 ended up with the line HTTP artsbeat blogs?</p> <p>18 A. Correct.</p> <p>19 Q. And you see that appears here?</p> <p>20 A. Yes.</p> <p>21 Q. Then below that there's another line</p> <p>22 which begins HTTP www.theartnewspaper?</p> <p>23 A. Correct.</p> <p>24 Q. And now everything on the balance of</p> <p>25 the page appears to be something we did not look</p>	<p style="text-align: center;">96</p> <p>1 Celle</p> <p>2 Q. Yes.</p> <p>3 A. He's questioning.</p> <p>4 Q. Yes.</p> <p>5 A. And then he asked me, do you know</p> <p>6 somebody at Eden Rock Gallery. This is in</p> <p>7 St. Barths. Prince, which is Richard Prince,</p> <p>8 had a show there with my photograph but I cannot</p> <p>9 find them -- but I cannot find them or, you</p> <p>10 know, anything about that show.</p> <p>11 I will need some photograph of that</p> <p>12 show or reproduction of painting. Thank you.</p> <p>13 Q. And A-plus?</p> <p>14 A. A-plus means "a bientot" or see you</p> <p>15 soon.</p> <p>16 Q. Did you understand this latter</p> <p>17 portion of the e-mail to be asking you to obtain</p> <p>18 the photos for him?</p> <p>19 A. He ask me if I -- yeah, but --</p> <p>20 Q. Did you do that?</p> <p>21 A. No.</p> <p>22 Q. Now, let's turn to -- we've now</p> <p>23 translated the entire e-mail, right?</p> <p>24 A. Yes.</p> <p>25 Q. Now, let's go back to page 2, the</p>



<p style="text-align: center;">129</p> <p style="text-align: center;">Celle</p> <p>1 A. No.</p> <p>2 Q. Have you ever asked him whether you</p> <p>3 could carry inventory of Patrick Cariou?</p> <p>4 A. I've been trying. But, you know, he</p> <p>5 wanted to do a show and then take it from there.</p> <p>6 Q. I see. But did you ask him at any</p> <p>7 time after the -- withdrawn.</p> <p>8 At any time since beginning of '09</p> <p>9 have you asked him to give you inventory to</p> <p>10 sell?</p> <p>11 A. No.</p> <p>12 Q. At any time in '08 did you ask him</p> <p>13 to give you inventory to sell?</p> <p>14 A. No.</p> <p>15 Q. Did he ever offer to give you</p> <p>16 inventory to sell other than discussions about</p> <p>17 the show?</p> <p>18 A. No.</p> <p>19 Q. I think you referred to an artist by</p> <p>20 the name of Morlock who uses photography in art?</p> <p>21 A. Yes.</p> <p>22 Q. And in some fashion she puts some</p> <p>23 kind of images over the photographs, at least in</p> <p>24 part, is that fair to say?</p> <p>25</p>	<p style="text-align: center;">131</p> <p style="text-align: center;">Celle</p> <p>1 A. Yes.</p> <p>2 Q. And so you have conversations with</p> <p>3 them about photographs that might be appropriate</p> <p>4 for their decorating jobs?</p> <p>5 A. Correct.</p> <p>6 Q. Have you ever discussed with a</p> <p>7 decorator the possibility of them buying Patrick</p> <p>8 Cariou photographs from you?</p> <p>9 A. Never, except Robert Novogratz.</p> <p>10 Q. And did you personally speak to</p> <p>11 Robert Novogratz about it?</p> <p>12 A. Robert came to buy books from me and</p> <p>13 was interested in Patrick, and I ask him at the</p> <p>14 time to contact him and he contact him directly.</p> <p>15 Q. Patrick contacted Mr. Novogratz?</p> <p>16 A. Mr. Novogratz went on Patrick's</p> <p>17 website, contacted him and bought some</p> <p>18 photograph for a hotel in New Jersey.</p> <p>19 Q. You personally have not spoken to</p> <p>20 Mr. Novogratz about selling Patrick Cariou</p> <p>21 prints?</p> <p>22 A. No, I was not involved in the</p> <p>23 transaction at all.</p> <p>24 Q. And so has there ever been a time</p> <p>25</p>
<p style="text-align: center;">130</p> <p style="text-align: center;">Celle</p> <p>1 A. I mean in the whole show 80 percent</p> <p>2 is painting and drawings, but she has two</p> <p>3 photographs that are vintage photographs she</p> <p>4 bought, probably online, she blew up really big</p> <p>5 and then she painted -- I guess it's black ink,</p> <p>6 she painted tattoo on the woman.</p> <p>7 Q. Have you ever had any other artists</p> <p>8 who used photos together with other media in any</p> <p>9 show?</p> <p>10 A. Just Tony C., the surfer.</p> <p>11 Q. And that consisted of photographs of</p> <p>12 his collage works?</p> <p>13 A. Yeah, photograph, collage, any kind</p> <p>14 of paper clip or advertising or publicity that</p> <p>15 he put in his journal and then it's translated</p> <p>16 into a photograph, yeah.</p> <p>17 Q. Forgive me if I asked this, did you</p> <p>18 ever have a situation where you were thinking</p> <p>19 about having an exhibit, other than Mr. Cariou,</p> <p>20 that you did not go forward with, that you</p> <p>21 canceled?</p> <p>22 A. Not so far.</p> <p>23 Q. You deal, I think you said, with</p> <p>24 decorators about photography?</p> <p>25</p>	<p style="text-align: center;">132</p> <p style="text-align: center;">Celle</p> <p>1 when you personally went to anyone and offered</p> <p>2 to sell or try to get them to buy Patrick Cariou</p> <p>3 photographs?</p> <p>4 A. Never.</p> <p>5 Q. Robert Novogratz came to your</p> <p>6 gallery?</p> <p>7 A. Yes, correct.</p> <p>8 Q. And he was interested in Patrick</p> <p>9 Cariou?</p> <p>10 A. Yes.</p> <p>11 Q. And what did he say to you about</p> <p>12 being interested in Mr. Cariou?</p> <p>13 A. He bought two books, loved his work</p> <p>14 and asked me if I knew him. And I say I would</p> <p>15 love to do a show with him, I'm in conversation,</p> <p>16 but I'm not representing him yet.</p> <p>17 And because Robert Novogratz is a</p> <p>18 friend and client, I said best thing is to go</p> <p>19 directly and contact him, which he did.</p> <p>20 And when Patrick was in New York</p> <p>21 he say to me, thank you, you know, I'm doing</p> <p>22 something with Robert, that's very nice of you.</p> <p>23 Q. And did he say what it was he was</p> <p>24 doing with Robert?</p> <p>25</p>



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK CARIOU,

Plaintiff,

vs.

Index No.: 08 CIV 11327 (DAB)

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

Defendants.

DEPOSITION OF

PATRICK CARIOU

Tuesday, January 12, 2010

New York, New York

Reported by:
Bryan Nilsen, RPR



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Patrick Cariou

January 12, 2010

181	183
<p>1 Cariou</p> <p>2 pages of my outline, Mr. Brooks, as an</p> <p>3 accommodation to your client.</p> <p>4 I'd like to mark Defendant's</p> <p>5 Exhibit 7, please.</p> <p>6 (Defendant's Exhibit 7, Powerhouse</p> <p>7 agreement, was marked for identification,</p> <p>8 as of this date.)</p> <p>9 Q. Mr. Cariou, I'm handing you what's</p> <p>10 been marked as Defendant's Exhibit 7, which is a</p> <p>11 copy of the agreement between you and Powerhouse</p> <p>12 to which we've been referring throughout the day</p> <p>13 today, and it's dated June 9, 2000.</p> <p>14 And you see it's between Powerhouse</p> <p>15 Cultural Entertainment, Inc., and yourself.</p> <p>16 Is this the Powerhouse agreement?</p> <p>17 A. Yes, it is.</p> <p>18 Q. And if you go to the last page which</p> <p>19 bears Bates stamp number C7, that's your</p> <p>20 signature on the last page?</p> <p>21 A. Yes.</p> <p>22 Q. Is there a reason why Yes Rasta was</p> <p>23 published by Powerhouse Cultural Entertainment</p> <p>24 as opposed to Powerhouse Books, do you know?</p> <p>25 A. It's the same entity.</p>	<p>1 Cariou</p> <p>2 MS. BART: Right. Let me just</p> <p>3 finish, Mr. Brooks.</p> <p>4 BY MS. BART:</p> <p>5 Q. That the proprietor grants the</p> <p>6 publisher Powerhouse the first option for the</p> <p>7 initial term of this agreement on all future</p> <p>8 licenses the right to distribute the book, and</p> <p>9 then it also gives him a right to include</p> <p>10 additional books. And that appears in I think</p> <p>11 section 35.</p> <p>12 Does this help you refresh your mind</p> <p>13 as to whether or not you're familiar with what</p> <p>14 an option is?</p> <p>15 A. No, I'm not familiar with what an</p> <p>16 option is.</p> <p>17 Q. Okay. When you first published the</p> <p>18 Surfer book did you give Powerhouse just the</p> <p>19 right to publish the first book?</p> <p>20 MR. BROOKS: Objection, calls for a</p> <p>21 legal conclusion.</p> <p>22 You can answer.</p> <p>23 A. I don't know.</p> <p>24 Q. Did you have an agreement in the</p> <p>25 first book?</p>
182	184
<p>1 Cariou</p> <p>2 Q. It's the same entity?</p> <p>3 A. Yeah.</p> <p>4 Q. When you approached or when you had</p> <p>5 discussions with Powerhouse did you approach</p> <p>6 them or did they approach you about publishing</p> <p>7 this book?</p> <p>8 A. Well, they already had published my</p> <p>9 first book called Surfers.</p> <p>10 Q. The Surfers?</p> <p>11 A. Yeah.</p> <p>12 Q. Did they have an option on your next</p> <p>13 book after Surfers?</p> <p>14 MR. BROOKS: I just want to make</p> <p>15 sure he knows what that means. If he does</p> <p>16 he can answer.</p> <p>17 Q. If you turn to page 24 of the</p> <p>18 Powerhouse agreement --</p> <p>19 MR. HAYES: You mean paragraph 24?</p> <p>20 Q. Paragraph 24. It says in that</p> <p>21 paragraph, the proprietor -- which is in this</p> <p>22 case Powerhouse -- hereby grants the</p> <p>23 publisher --</p> <p>24 MR. BROOKS: No, he's the</p> <p>25 proprietor.</p>	<p>1 Cariou</p> <p>2 A. Did I have a contract for the first</p> <p>3 book?</p> <p>4 Q. Yes.</p> <p>5 A. Yeah.</p> <p>6 Q. And in that contract did it talk</p> <p>7 about what would happen if you came up with</p> <p>8 another idea of the book?</p> <p>9 In other words, if you came up with</p> <p>10 book number 2 did Powerhouse have any right to</p> <p>11 publish that before anybody else or make a</p> <p>12 decision to publish that?</p> <p>13 A. I don't know.</p> <p>14 Q. You don't know?</p> <p>15 A. I don't know. I really don't know.</p> <p>16 Q. So the publication of the Yes Rasta</p> <p>17 book wasn't just an option to purchase your</p> <p>18 second book?</p> <p>19 A. No, it was just we were really</p> <p>20 friendly, the first book went really well and</p> <p>21 they were really supportive from the beginning</p> <p>22 on this project.</p> <p>23 Q. This meaning Yes Rasta?</p> <p>24 A. Yeah. And that's it.</p> <p>25 Q. Did Powerhouse Books or Powerhouse</p>



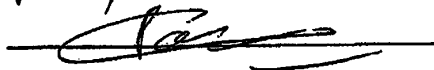
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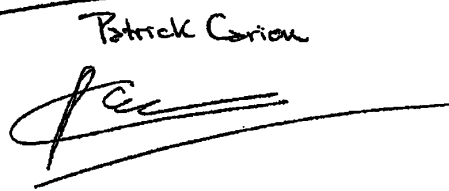
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One Penn Plaza
New York, NY 10119
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ACKNOWLEDGEMENT OF DEPONENT

I declare that I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof.

Signed on the 20 day of
February, 2010

Patrick Cariou

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February
20/02/, 2010.

Patrick Cariou

Subscribed and sworn to on the _____ day of _____, 20____ before me,

Notary Public,
In and for the State of _____

Condensed Transcript

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PATRICK CARIOU,

Plaintiff,

vs.

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

Defendants.

~~~~~

Index No.:  
08 CIV 11327 (DAB)

**DEPOSITION OF**

**LOUISE NERI**

December 17, 2009  
3:57 p.m.

430 Park Avenue  
New York, New York

Reported By:  
Bryan Nilsen, RPR



**ESQUIRE**  
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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: center;">17</p> <p>1 Neri<br/>                 2 many you saw?<br/>                 3 A. I can't recall. A few. Probably<br/>                 4 five.<br/>                 5 Q. Some of those images had pictures of<br/>                 6 Rastafarians, correct?<br/>                 7 MS. BART: Objection, form.<br/>                 8 MR. HAYES: Objection, form.<br/>                 9 Q. You can answer.<br/>                 10 You can answer.<br/>                 11 A. Yes, they did. Or I would say men<br/>                 12 with dreadlocks. I don't know if they were<br/>                 13 strictly Rastafarians.<br/>                 14 Q. Okay, so let's call them men with<br/>                 15 dreadlocks.<br/>                 16 Did you ever attempt to ascertain<br/>                 17 where those images came from, the ones with the<br/>                 18 men with dreadlocks?<br/>                 19 A. No.<br/>                 20 Q. Did you ever ask him?<br/>                 21 A. No.<br/>                 22 Q. Having worked with Mr. Prince before<br/>                 23 and knowing him, you knew he was known as an<br/>                 24 appropriation artist, correct?<br/>                 25 MS. BART: Objection, form.</p>                                                               | <p style="text-align: center;">19</p> <p>1 Neri<br/>                 2 like a website copy.<br/>                 3 Q. Whose website?<br/>                 4 A. Our website, Gagosian Gallery<br/>                 5 website.<br/>                 6 Q. Do the first two pages of Exhibit 31<br/>                 7 appear to be your press release as taken off the<br/>                 8 website?<br/>                 9 A. Yes.<br/>                 10 Q. Now, let me ask you this. On the<br/>                 11 first page do you see where it says artist info<br/>                 12 and it says view on the right?<br/>                 13 A. Yes.<br/>                 14 Q. Are you familiar with the Gagosian<br/>                 15 Gallery website?<br/>                 16 A. Yes.<br/>                 17 Q. If you were to click on that where<br/>                 18 it says view artist info, view, what would you<br/>                 19 get?<br/>                 20 A. It depends. You would either get a<br/>                 21 view of available works, or in the case of an<br/>                 22 exhibition you would have a view of the<br/>                 23 exhibition. In certain cases we shoot videos<br/>                 24 of the show.<br/>                 25 Q. In this case please look at the</p> |
| <p style="text-align: center;">18</p> <p>1 Neri<br/>                 2 MR. HAYES: Objection, form.<br/>                 3 Q. You can answer.<br/>                 4 A. Yes.<br/>                 5 Q. You knew he had a practice of<br/>                 6 appropriating images created by others and<br/>                 7 including them in his work, right?<br/>                 8 MR. HAYES: Objection, form.<br/>                 9 MS. BART: Objection, form.<br/>                 10 Q. You can answer.<br/>                 11 A. Yes.<br/>                 12 Q. Do you know if anyone at Gagosian<br/>                 13 Gallery attempted in this case to make sure that<br/>                 14 the images appropriated in the Canal Zone<br/>                 15 paintings were not copyright protected?<br/>                 16 MS. BART: Objection, form.<br/>                 17 MR. HAYES: Form.<br/>                 18 Q. You can answer.<br/>                 19 A. I don't know.<br/>                 20 Q. Let's talk about the press release<br/>                 21 then. I'm going to hand you what's been marked<br/>                 22 as Exhibit 31.<br/>                 23 Here's Exhibit 31. Do you know what<br/>                 24 Exhibit 31 is or what it is a copy of?<br/>                 25 A. It looks like a copy -- it looks</p> | <p style="text-align: center;">20</p> <p>1 Neri<br/>                 2 third page of Exhibit 31. There appears to be<br/>                 3 some biographical information about Mr. Prince,<br/>                 4 correct?<br/>                 5 A. Yes.<br/>                 6 Q. Do you know if that's the artist<br/>                 7 info that's being referred to on the first page<br/>                 8 of Exhibit 31?<br/>                 9 A. I don't understand your question,<br/>                 10 I'm sorry.<br/>                 11 Q. You don't understand my question?<br/>                 12 A. No.<br/>                 13 Q. Do you know if you clicked on --<br/>                 14 A. Oh, sorry, I see it.<br/>                 15 Could you repeat the question?<br/>                 16 Q. Does the third page of Exhibit 31<br/>                 17 appear to be the artist info referred to on the<br/>                 18 first page?<br/>                 19 MS. BART: Objection, form.<br/>                 20 A. It appears to be. I can't tell you<br/>                 21 for sure.<br/>                 22 Q. Did you write the third page of<br/>                 23 Exhibit 31?<br/>                 24 A. Yes.<br/>                 25 Q. You personally?</p>                                          |



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
PATRICK CARIOU,

Plaintiff,

-against-

Case No.: 08 CIV 11327 (DAB)

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

Defendants.  
-----X

\* \* \* ERRATA SHEET \* \* \*

**DEPOSITION OF LOUISE NERI**  
**TAKEN: DECEMBER 17, 2009**

To the Reporter:

I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me. I request that the following changes be entered upon the record for the reasons indicated. I have signed my name to the Errata Sheet and the appropriate Certificate and authorize you to attach both to the original transcript.

| PAGE | LINE  | CHANGE                                                                                                                       | REASON         |
|------|-------|------------------------------------------------------------------------------------------------------------------------------|----------------|
| 13   | 14    | It's an independent Swiss-based publishing company.<br><br>to<br><br>It's a Swiss-based publishing company.                  | Clarification. |
| 15   | 16-17 | We have a process in the gallery whereby we have a review process.<br><br>to<br><br>We have a review process in the gallery. | Clarification. |

|    |       |                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                      |
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| 16 | 16-18 | A: As reproductions, as JPEGs?<br>Q: As JPEGs?<br>A: Mh-hmm.<br><br>to<br><br>A: As printed reproductions of works in the show.                                                                                                                                                                                                                                                                                                                    | Clarification.       |
| 17 | 3-4   | I can't recall. A few. Probably five.<br><br>to<br><br>A few. Probably five.                                                                                                                                                                                                                                                                                                                                                                       | Clarification.       |
| 31 | 23    | As collages, paint collages.<br><br>to<br><br>As collages, painted collages.                                                                                                                                                                                                                                                                                                                                                                       | Transcription error. |
| 32 | 4-9   | They were collages, works on paper, so there was no canvas involved. And then there is a series of large canvases where the images that are inspired by the original images, they're not the book covers, they're not the book covers per se.<br><br>to<br><br>They were collages, works on paper. And then there is a series of large canvases where the images are inspired by the original book covers, but they're not the book covers per se. | Clarification.       |
| 39 | 15-17 | Based on looking at the images that I had been given in JPEG form and speaking, discussing it a bit with Richard.<br><br>to<br><br>Based on looking at the reproductions that I had been given and speaking, discussing it a bit with Richard.                                                                                                                                                                                                     | Clarification.       |
| 40 | 9     | It's very brief.<br><br>to<br><br>It was brief.                                                                                                                                                                                                                                                                                                                                                                                                    | Clarification.       |

|    |       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                |
|----|-------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| 48 | 11-14 | <p>The squeegee is simply the instrument that's used. It's not a technique in itself. So it's simply what is used to stick one surface to another.</p> <p>to</p> <p>The squeegee is simply the tool that's used. It's not a technique in itself. So it's simply what is used to deliver the paint to the surface of the canvas.</p>                                                                                                                                                                                                                                                                                                                         | Clarification. |
| 48 | 21    | <p>It means to stick literally.</p> <p>to</p> <p>Coller in French means to stick.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Clarification. |
| 51 | 14-20 | <p>No, I'm using it with a degree of license here because I'm trying to write these press releases for a public, and had the idea -- everyone knows in this day and age how to drag images across the screen, so I'm making an analogy between dragging on a screen and then -- you know, you can't take them out of context.</p> <p>to</p> <p>No, I'm using it with a degree of license here because I'm trying to write these press releases for a public. Everyone knows in this day and age how to drag images across the screen, so I'm making an analogy between dragging on a screen and dragging on a canvas. You can't take it out of context.</p> | Clarification. |
| 59 | 9     | <p>He challenged and expanded them.</p> <p>to</p> <p>He challenged and expanded it.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Clarification. |

Sworn before me this 1  
day of February, 2010

  
NOTARY PUBLIC

  
LOUISE NERI

827903.3.

Charles Fernandez  
Notary Public - State of New York  
No. 01FE6202724  
Qualified in New York County  
My Commission Expires March 23, 2013

Louise Neri

December 17, 2009

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64

Neri

MR. HAYES: Thank you.

(Time noted: 5:17 p.m.)

*Louise Neri*

LOUISE NERI

Subscribed and sworn to  
before me this 1 day  
of February, ~~2009~~ <sup>CF</sup>  
2010

*Charles Fernandez*

Charles Fernandez  
Notary Public - State of New York  
No. 01FES202724  
Qualified in New York County  
My Commission Expires March 23, 2013

Toll Free: 800.944.9454  
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New York, NY 10119  
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**Condensed Transcript**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

PATRICK CARIOU,

Plaintiff,

vs.

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

Defendants.

Index No.:  
08 CIV 11327 (DAB)

DEPOSITION OF  
ALISON MCDONALD

December 17, 2009  
1:00 p.m.

430 Park Avenue  
New York, New York

Reported By:  
Bryan Nilsen, RPR



**ESQUIRE**  
an Alexander Gallo Company

Toll Free: 800.944.9454  
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| <p style="text-align: center;">9</p> <p>1 McDonald</p> <p>2 boss?</p> <p>3 A. Yes.</p> <p>4 Q. And who was that?</p> <p>5 A. Melissa Lazarov and Larry Gagosian.</p> <p>6 Q. Do you know if Melissa Lazarov had a</p> <p>7 title last year at Gagosian Gallery?</p> <p>8 A. No, I don't think there are formal</p> <p>9 titles.</p> <p>10 Q. Was she also at 980 Madison?</p> <p>11 A. Yes.</p> <p>12 Q. Did you work on the Canal Zone</p> <p>13 exhibition in 2008?</p> <p>14 A. I worked on the publication.</p> <p>15 Q. Of the catalog?</p> <p>16 A. Yes.</p> <p>17 Q. I just want to make sure I'm using</p> <p>18 the right terminology. I'm going to show you a</p> <p>19 book, which I think has been marked previously</p> <p>20 as Exhibit 42, Plaintiff's 42.</p> <p>21 Is that the publication you're</p> <p>22 referring to?</p> <p>23 A. Yes.</p> <p>24 Q. So you worked on that book?</p> <p>25 A. Yes.</p>                                                                                                                                                      | <p style="text-align: center;">11</p> <p>1 McDonald</p> <p>2 A. Yes.</p> <p>3 Q. Were those taken by somebody named</p> <p>4 Rob McKeever, if you know?</p> <p>5 MS. BART: Objection to form.</p> <p>6 Q. You can answer.</p> <p>7 A. Yes.</p> <p>8 Q. Do you know Rob McKeever?</p> <p>9 A. Yes.</p> <p>10 Q. And he's a photographer employed by</p> <p>11 Gagosian Gallery?</p> <p>12 A. Yes.</p> <p>13 Q. Freelance or he's an employee, if</p> <p>14 you know?</p> <p>15 A. He's an employee.</p> <p>16 Q. If you look towards the back of that</p> <p>17 book you'll find a page which has your name on</p> <p>18 it and gives you credit as the managing editor.</p> <p>19 Have you found that?</p> <p>20 A. Yes.</p> <p>21 Q. And for the record, we had Bates</p> <p>22 stamped a copy of this book, so just for the</p> <p>23 record that would be Bates stamp C00213. And I</p> <p>24 think the book has some Bates stamps but not all</p> <p>25 of them.</p> |
| <p style="text-align: center;">10</p> <p>1 McDonald</p> <p>2 Q. In what capacity?</p> <p>3 MS. BART: Objection, form.</p> <p>4 Q. Okay, what were you doing with</p> <p>5 respect to the book?</p> <p>6 A. I'm just not sure -- could you be</p> <p>7 more specific?</p> <p>8 Q. Well, were you the managing editor</p> <p>9 of the publication of the book?</p> <p>10 A. Yes.</p> <p>11 Q. What did that entail doing?</p> <p>12 A. I managed the production with the</p> <p>13 printer, paper selection, binding, delivery.</p> <p>14 I work to make sure there are no</p> <p>15 copy editing mistakes with regards to the text</p> <p>16 and captioning and -- of that material.</p> <p>17 I work to make sure the paintings</p> <p>18 reproduce as beautifully as possible.</p> <p>19 Q. I'm sorry, I didn't hear the end of</p> <p>20 that?</p> <p>21 A. As beautifully as possible, as</p> <p>22 accurately as possible.</p> <p>23 Q. Okay. Does the book contain</p> <p>24 photographs of some of the paintings that were</p> <p>25 exhibited at the Canal Zone show?</p> | <p style="text-align: center;">12</p> <p>1 McDonald</p> <p>2 So this indicates that Melissa</p> <p>3 Lazarov was the editor of this book?</p> <p>4 A. Yes.</p> <p>5 Q. And did she supervise you in any way</p> <p>6 in connection with the publication of this book?</p> <p>7 A. Yes.</p> <p>8 Q. Did you ever go to the Canal Zone</p> <p>9 exhibition, I think it was between November 8th</p> <p>10 and December 20th, 2008?</p> <p>11 A. Yes.</p> <p>12 Q. And can you tell us how frequently</p> <p>13 you went? Approximately. No one's going to</p> <p>14 hold you to it.</p> <p>15 A. Twice.</p> <p>16 Q. Did you go there before the</p> <p>17 exhibition opened?</p> <p>18 A. I don't remember.</p> <p>19 Q. Did you discuss the exhibition with</p> <p>20 Melissa Lazarov?</p> <p>21 MS. BART: Objection, form.</p> <p>22 Q. You can answer.</p> <p>23 A. Yes.</p> <p>24 Q. Did you discuss the exhibition with</p> <p>25 Richard Prince?</p>                |



|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: center;">29</p> <p>1 McDonald</p> <p>2 announcement of the exhibition with a photograph</p> <p>3 on it, do you know?</p> <p>4 A. Yes.</p> <p>5 MR. BROOKS: Let's mark as</p> <p>6 Plaintiff's Exhibit 104 a document that's</p> <p>7 been produced and Bates stamped GGP00139A</p> <p>8 and 140A front and back.</p> <p>9 (Plaintiff's Exhibit 104, GGP00139A</p> <p>10 and 140A, was marked for identification,</p> <p>11 as of this date.)</p> <p>12 Q. You've been handed Plaintiff's</p> <p>13 Exhibit 104. Do you know what it is?</p> <p>14 A. Yes.</p> <p>15 Q. Can you tell us?</p> <p>16 A. An announcement card for the</p> <p>17 exhibition.</p> <p>18 Q. Do you know if these announcement</p> <p>19 cards were mailed out?</p> <p>20 A. Yes.</p> <p>21 Q. Do you know to whom they were mailed</p> <p>22 out, I don't mean the names of all the people,</p> <p>23 but what types of people, if you know?</p> <p>24 MS. BART: Objection, form.</p> <p>25 MR. HAYES: Objection, form.</p> | <p style="text-align: center;">31</p> <p>1 McDonald</p> <p>2 give us maybe the page number of the</p> <p>3 actual catalog.</p> <p>4 MR. BROOKS: It's in the second</p> <p>5 insert I think. It's C00148. I think</p> <p>6 there's a Post-it there with that number.</p> <p>7 MS. BART: We're there.</p> <p>8 MR. BROOKS: That is the number,</p> <p>9 okay.</p> <p>10 BY MR. BROOKS:</p> <p>11 Q. So you said something about a</p> <p>12 picture in a studio, is this what you're</p> <p>13 referring to, the C148?</p> <p>14 MS. BART: Objection, form.</p> <p>15 A. This is a different picture.</p> <p>16 Q. This is a different picture than the</p> <p>17 announcement card?</p> <p>18 A. Yes.</p> <p>19 Q. How do you know that?</p> <p>20 A. It's a different angle.</p> <p>21 Q. Okay. But if you look at the</p> <p>22 announcement card there's a painting that</p> <p>23 appears to be propped up on two cans of paint,</p> <p>24 right?</p> <p>25 A. Yes.</p>                                                                                                                                       |
| <p style="text-align: center;">30</p> <p>1 McDonald</p> <p>2 MR. SHERMAN: Objection, form.</p> <p>3 Q. You can answer.</p> <p>4 A. Yes.</p> <p>5 Q. Can you tell me?</p> <p>6 A. We have a mailing list of about</p> <p>7 7,500 people.</p> <p>8 Q. So these announcement cards were</p> <p>9 mailed to people on that list?</p> <p>10 MS. BART: Objection, form.</p> <p>11 Q. You can answer.</p> <p>12 A. Yes.</p> <p>13 Q. Do you notice on the front of the</p> <p>14 announcement card an image of a man, do you see</p> <p>15 him?</p> <p>16 A. I see a painting in a studio, yeah.</p> <p>17 The painting has a man in it, yes.</p> <p>18 Q. I couldn't hear what you said.</p> <p>19 MR. BROOKS: Read it back.</p> <p>20 (Record read.)</p> <p>21 BY MR. BROOKS:</p> <p>22 Q. Why don't you look in that book, the</p> <p>23 Canal Zone book, and I think if you look at</p> <p>24 page C00148 perhaps you will find something.</p> <p>25 MS. BART: You're going to have to</p>                                    | <p style="text-align: center;">32</p> <p>1 McDonald</p> <p>2 Q. And if you look at C148 the same</p> <p>3 seems to be true, there's a picture propped up</p> <p>4 on two cans of paint, right?</p> <p>5 MS. BART: Objection, form.</p> <p>6 MR. HAYES: Objection, form.</p> <p>7 Q. You can answer.</p> <p>8 A. There is a painting on two cans of</p> <p>9 paint.</p> <p>10 Q. So you're saying that the photo is</p> <p>11 from a different angle, but is it correct that</p> <p>12 the image in Exhibit 104 in the announcement is</p> <p>13 maybe a different photo of the same painting</p> <p>14 that's propped on the two cans in C148?</p> <p>15 A. Yes.</p> <p>16 Q. But it's from a different angle?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. And do you know if the</p> <p>19 painting that's shown on C148 in the insert in</p> <p>20 the book, do you know if that painting was</p> <p>21 actually exhibited at the Canal Zone exhibition?</p> <p>22 A. I don't know.</p> <p>23 Q. Could you look at the very first</p> <p>24 painting in the book, you have to go back to the</p> <p>25 beginning.</p> |





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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: center;">41</p> <p>1 McDonald</p> <p>2 Q. Foliage, okay, fine.</p> <p>3 If you look at that canvas on C184</p> <p>4 with the Rastafarian and the foliage -- and</p> <p>5 maybe keep your hand there in case you want to</p> <p>6 go back to it -- and now look at C124.</p> <p>7 MS. BART: I'm sorry, C124?</p> <p>8 MR. BROOKS: Right.</p> <p>9 BY MR. BROOKS:</p> <p>10 Q. Do you know if the painting in C124</p> <p>11 is based on the canvas we looked at in C184?</p> <p>12 MR. HAYES: Objection to form.</p> <p>13 MS. BART: Join.</p> <p>14 Q. You can answer.</p> <p>15 A. I don't know.</p> <p>16 Q. Do you know where the -- you call</p> <p>17 this foliage, if you look at 124?</p> <p>18 A. Mm-hmm.</p> <p>19 Q. The plants that are around the image</p> <p>20 of the man, do you know where those images of</p> <p>21 foliage came from?</p> <p>22 A. No.</p> <p>23 Q. Can I have the announcement back?</p> <p>24 Thanks.</p> <p>25 MS. BART: Are you done with this</p> | <p style="text-align: center;">43</p> <p>1 McDonald</p> <p>2 advertisements were placed?</p> <p>3 A. The Art Newspaper, Financial Times,</p> <p>4 and New York Times.</p> <p>5 Q. How about W?</p> <p>6 A. The magazine? Yes, W.</p> <p>7 Q. How about Art Forum, Art in America,</p> <p>8 and Art and Auction?</p> <p>9 MS. BART: Objection.</p> <p>10 A. Yes.</p> <p>11 Q. All three?</p> <p>12 A. There were more than -- did you</p> <p>13 say W?</p> <p>14 Q. I just said -- no, after W I said</p> <p>15 Art Forum?</p> <p>16 A. Yes.</p> <p>17 Q. Were there ads there?</p> <p>18 A. One ad, yes.</p> <p>19 Q. And Art in America, was there an ad</p> <p>20 for the Canal Zone exhibition there?</p> <p>21 A. Yes.</p> <p>22 Q. And how about Art and Auction?</p> <p>23 A. Yes.</p> <p>24 Q. One ad in each of them?</p> <p>25 A. Yes.</p>                                                                                                                                                                  |
| <p style="text-align: center;">42</p> <p>1 McDonald</p> <p>2 one?</p> <p>3 MR. BROOKS: I'm done with that</p> <p>4 page, yes, but she should keep the book.</p> <p>5 BY MR. BROOKS:</p> <p>6 Q. Did you ever ask anyone where the</p> <p>7 images of the Rastafarians that are in many of</p> <p>8 these Canal Zone paintings came from?</p> <p>9 MS. BART: Objection, form.</p> <p>10 MR. HAYES: Objection, form.</p> <p>11 Q. You can answer.</p> <p>12 A. No.</p> <p>13 Q. Did you ever hear anyone explaining</p> <p>14 where they came from?</p> <p>15 MS. BART: Objection, form.</p> <p>16 A. No.</p> <p>17 Q. Have you ever seen this book, it's</p> <p>18 called Yes Rasta?</p> <p>19 A. No.</p> <p>20 Q. Okay, you can give it back to me.</p> <p>21 Thank you.</p> <p>22 Were there newspaper advertisements</p> <p>23 for the Canal Zone exhibition?</p> <p>24 A. Yes.</p> <p>25 Q. Do you remember where the</p>                                                                                    | <p style="text-align: center;">44</p> <p>1 McDonald</p> <p>2 Q. In the New York Times were there two</p> <p>3 ads?</p> <p>4 A. I don't remember.</p> <p>5 Q. Was there an ad just for the Canal</p> <p>6 Zone exhibition in the New York Times?</p> <p>7 A. I remember it was on a list of other</p> <p>8 exhibitions the gallery was having in the</p> <p>9 New York Times ad.</p> <p>10 Q. Right. One other, right, a painter</p> <p>11 with a Japanese name?</p> <p>12 A. I think it was Hiroshi Sugimoto.</p> <p>13 Q. To your knowledge did Mr. Gagosian</p> <p>14 review the ads before they were placed in the</p> <p>15 newspapers?</p> <p>16 A. Yes.</p> <p>17 Q. That's a yes?</p> <p>18 A. Yes.</p> <p>19 Q. Do you know if Mr. Prince reviewed</p> <p>20 the ads?</p> <p>21 A. I don't know for sure, no.</p> <p>22 Q. I'm going to hand you a series of</p> <p>23 e-mails that have been collectively marked as</p> <p>24 Plaintiff's Exhibit 45 previously.</p> <p>25 The first page of Exhibit 45</p> |



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| <p style="text-align: center;">41</p> <p>1 McDonald</p> <p>2 Q. Foliage, okay, fine.</p> <p>3 If you look at that canvas on C184</p> <p>4 with the Rastafarian and the foliage -- and</p> <p>5 maybe keep your hand there in case you want to</p> <p>6 go back to it -- and now look at C124.</p> <p>7 MS. BART: I'm sorry, C124?</p> <p>8 MR. BROOKS: Right.</p> <p>9 BY MR. BROOKS:</p> <p>10 Q. Do you know if the painting in C124</p> <p>11 is based on the canvas we looked at in C184?</p> <p>12 MR. HAYES: Objection to form.</p> <p>13 MS. BART: Join.</p> <p>14 Q. You can answer.</p> <p>15 A. I don't know.</p> <p>16 Q. Do you know where the -- you call</p> <p>17 this foliage, if you look at 124?</p> <p>18 A. Mm-hmm.</p> <p>19 Q. The plants that are around the image</p> <p>20 of the man, do you know where those images of</p> <p>21 foliage came from?</p> <p>22 A. No.</p> <p>23 Q. Can I have the announcement back?</p> <p>24 Thanks.</p> <p>25 MS. BART: Are you done with this</p> | <p style="text-align: center;">43</p> <p>1 McDonald</p> <p>2 advertisements were placed?</p> <p>3 A. The Art Newspaper, Financial Times,</p> <p>4 and New York Times.</p> <p>5 Q. How about W?</p> <p>6 A. The magazine? Yes, W.</p> <p>7 Q. How about Art Forum, Art in America,</p> <p>8 and Art and Auction?</p> <p>9 MS. BART: Objection.</p> <p>10 A. Yes.</p> <p>11 Q. All three?</p> <p>12 A. There were more than -- did you</p> <p>13 say W?</p> <p>14 Q. I just said -- no, after W I said</p> <p>15 Art Forum?</p> <p>16 A. Yes.</p> <p>17 Q. Were there ads there?</p> <p>18 A. One ad, yes.</p> <p>19 Q. And Art in America, was there an ad</p> <p>20 for the Canal Zone exhibition there?</p> <p>21 A. Yes.</p> <p>22 Q. And how about Art and Auction?</p> <p>23 A. Yes.</p> <p>24 Q. One ad in each of them?</p> <p>25 A. Yes.</p>                                                                                                                                                                  |
| <p style="text-align: center;">42</p> <p>1 McDonald</p> <p>2 one?</p> <p>3 MR. BROOKS: I'm done with that</p> <p>4 page, yes, but she should keep the book.</p> <p>5 BY MR. BROOKS:</p> <p>6 Q. Did you ever ask anyone where the</p> <p>7 images of the Rastafarians that are in many of</p> <p>8 these Canal Zone paintings came from?</p> <p>9 MS. BART: Objection, form.</p> <p>10 MR. HAYES: Objection, form.</p> <p>11 Q. You can answer.</p> <p>12 A. No.</p> <p>13 Q. Did you ever hear anyone explaining</p> <p>14 where they came from?</p> <p>15 MS. BART: Objection, form.</p> <p>16 A. No.</p> <p>17 Q. Have you ever seen this book, it's</p> <p>18 called Yes Rasta?</p> <p>19 A. No.</p> <p>20 Q. Okay, you can give it back to me.</p> <p>21 Thank you.</p> <p>22 Were there newspaper advertisements</p> <p>23 for the Canal Zone exhibition?</p> <p>24 A. Yes.</p> <p>25 Q. Do you remember where the</p>                                                                                    | <p style="text-align: center;">44</p> <p>1 McDonald</p> <p>2 Q. In the New York Times were there two</p> <p>3 ads?</p> <p>4 A. I don't remember.</p> <p>5 Q. Was there an ad just for the Canal</p> <p>6 Zone exhibition in the New York Times?</p> <p>7 A. I remember it was on a list of other</p> <p>8 exhibitions the gallery was having in the</p> <p>9 New York Times ad.</p> <p>10 Q. Right. One other, right, a painter</p> <p>11 with a Japanese name?</p> <p>12 A. I think it was Hiroshi Sugimoto.</p> <p>13 Q. To your knowledge did Mr. Gagosian</p> <p>14 review the ads before they were placed in the</p> <p>15 newspapers?</p> <p>16 A. Yes.</p> <p>17 Q. That's a yes?</p> <p>18 A. Yes.</p> <p>19 Q. Do you know if Mr. Prince reviewed</p> <p>20 the ads?</p> <p>21 A. I don't know for sure, no.</p> <p>22 Q. I'm going to hand you a series of</p> <p>23 e-mails that have been collectively marked as</p> <p>24 Plaintiff's Exhibit 45 previously.</p> <p>25 The first page of Exhibit 45</p> |



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| <p style="text-align: center;">49</p> <p>1 McDonald</p> <p>2 GGP002418, it says I told Nicole Larry likes the</p> <p>3 Prince ad with just, all capital letters, the</p> <p>4 Rasta man, not the one in the studio. For the</p> <p>5 announcements he likes the Rasta man poster on</p> <p>6 two paint cans with no books in the picture.</p> <p>7 Do you remember seeing a copy of</p> <p>8 this e-mail?</p> <p>9 A. No.</p> <p>10 Q. Is it correct though that the</p> <p>11 announcement had the picture in the studio on</p> <p>12 the paint can without books?</p> <p>13 MS. BART: Objection, form.</p> <p>14 Q. And I'm showing you Exhibit 104?</p> <p>15 A. Yes.</p> <p>16 Q. And the advertisement just had a</p> <p>17 Rastafarian, not the one in the studio, is that</p> <p>18 right?</p> <p>19 MS. BART: Objection, form.</p> <p>20 MR. HAYES: Objection, form.</p> <p>21 A. It had that same painting in the ad,</p> <p>22 yes.</p> <p>23 Q. Which ad?</p> <p>24 A. Which ad?</p> <p>25 Q. Yes.</p> | <p style="text-align: center;">50</p> <p>1 McDonald</p> <p>2 A. The Art Forum, Art in America, Art</p> <p>3 and Auction.</p> <p>4 Q. They had a painting, a picture of</p> <p>5 the same painting?</p> <p>6 A. Yes.</p> <p>7 Q. But the New York Times didn't?</p> <p>8 MS. BART: Objection, form, and</p> <p>9 asked and answered.</p> <p>10 Q. Is that what you're saying?</p> <p>11 MS. BART: Third time.</p> <p>12 A. No image was in the New York Times.</p> <p>13 Q. What about the Financial Times?</p> <p>14 A. No.</p> <p>15 Q. I'm going to show you a document</p> <p>16 which has previously been marked as Exhibit 52.</p> <p>17 Is that the image that was used in</p> <p>18 some of the ads anyway?</p> <p>19 MS. BART: Can we just have one of</p> <p>20 the extras that you have there, please?</p> <p>21 I think John needs one, right?</p> <p>22 MR. BROOKS: You do?</p> <p>23 MR. SHERMAN: Yes.</p> <p>24 A. I don't --</p> <p>25 MS. BART: Just one minute. I want</p>                                                                                                                                                                 |
| <p style="text-align: center;">51</p> <p>1 McDonald</p> <p>2 to hear the question back. I'm not sure</p> <p>3 there was one.</p> <p>4 MR. BROOKS: There was.</p> <p>5 Can you read the question back,</p> <p>6 please.</p> <p>7 (Record read.)</p> <p>8 MS. BART: Object to form.</p> <p>9 Q. You can answer.</p> <p>10 A. I don't remember. I don't remember.</p> <p>11 Q. Does it look like what was used in</p> <p>12 the ads --</p> <p>13 MS. BART: Objection.</p> <p>14 Q. -- as you've been describing it?</p> <p>15 MS. BART: Objection, form.</p> <p>16 MR. HAYES: Objection, form.</p> <p>17 MS. BART: The witness isn't here to</p> <p>18 speculate.</p> <p>19 Q. You can answer.</p> <p>20 A. It's the same type. I don't know --</p> <p>21 I don't remember this.</p> <p>22 RQ MR. BROOKS: Okay. If the witness</p> <p>23 doesn't know I'm going to request that</p> <p>24 Gagosian tell us whether Exhibit 52 is the</p> <p>25 image that was used in newspaper and</p>                              | <p style="text-align: center;">52</p> <p>1 McDonald</p> <p>2 magazine ads.</p> <p>3 She's testified to a number of ads,</p> <p>4 some of which had images she said from</p> <p>5 the same painting, and I want to know if</p> <p>6 Exhibit 52 is the image that was used</p> <p>7 in the ads in Art Forum, Art in America,</p> <p>8 Art and Auction, the Art Newspaper, and W.</p> <p>9 MS. BART: We'll take it under</p> <p>10 advisement.</p> <p>11 But just so that I understand I know</p> <p>12 what you're asking me, are you talking</p> <p>13 about the entirety that includes the title</p> <p>14 that says Richard Prince at the top, or</p> <p>15 are you talking about the cutout in the</p> <p>16 middle, in other words, are you talking</p> <p>17 about the entirety?</p> <p>18 I don't know what you're asking.</p> <p>19 MR. BROOKS: Well, this is how it</p> <p>20 was produced to me by you.</p> <p>21 MS. BART: That's irrelevant.</p> <p>22 You're asking us for a stipulation,</p> <p>23 Mr. Brooks, and I'm asking you, are you</p> <p>24 saying just the thing in the middle or are</p> <p>25 you talking about the entirety --</p> |



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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: center;">89</p> <p>1 McDonald</p> <p>2 where it says artist info, can you make it out?</p> <p>3 A. No.</p> <p>4 Q. All right. Having looked at the</p> <p>5 last page of Exhibit 31, do you know if that</p> <p>6 material about Richard Prince is the artist info</p> <p>7 that's referred to on the first page of</p> <p>8 Exhibit 31?</p> <p>9 A. I don't know.</p> <p>10 Q. Okay. Were you familiar with</p> <p>11 Mr. Prince's cowboy paintings or cowboy photos</p> <p>12 or whatever they are?</p> <p>13 A. A bit.</p> <p>14 Q. Do you know where he got them from?</p> <p>15 MS. BART: Objection, form.</p> <p>16 MR. HAYES: Objection, form.</p> <p>17 A. No.</p> <p>18 Q. How about his nurse paintings, were</p> <p>19 you familiar with those?</p> <p>20 A. The paintings?</p> <p>21 Q. Yes.</p> <p>22 A. Yes.</p> <p>23 Q. And do you know where those images</p> <p>24 came from?</p> <p>25 MS. BART: Objection, form.</p>                                     | <p style="text-align: center;">91</p> <p>1 McDonald</p> <p>2 Q. Were you aware that Mr. Prince had a</p> <p>3 retrospective at the Guggenheim Museum in late</p> <p>4 2007?</p> <p>5 A. Yes.</p> <p>6 Q. Did you go to it?</p> <p>7 A. No.</p> <p>8 Q. Did Gagosian represent Mr. Prince at</p> <p>9 that time?</p> <p>10 A. I don't know.</p> <p>11 Q. Did you know in 2008 that Mr. Prince</p> <p>12 had a practice of appropriating images created</p> <p>13 by others and including those images in his</p> <p>14 work?</p> <p>15 MS. BART: Objection, form.</p> <p>16 MR. HAYES: Form.</p> <p>17 Q. You can answer.</p> <p>18 A. Can you say it again?</p> <p>19 Q. He'll read it again.</p> <p>20 (Record read.)</p> <p>21 A. I knew he was an appropriation</p> <p>22 artist, yes.</p> <p>23 Q. Well, how do you define an</p> <p>24 appropriation artist?</p> <p>25 MR. HAYES: Objection, form.</p>                                                                                              |
| <p style="text-align: center;">90</p> <p>1 McDonald</p> <p>2 MR. HAYES: Objection, form.</p> <p>3 A. No.</p> <p>4 Q. The cover of pulp fiction novels?</p> <p>5 MR. HAYES: Objection, form.</p> <p>6 MS. BART: Join.</p> <p>7 A. Sometimes, I think, yes.</p> <p>8 Q. Were you familiar with his painting</p> <p>9 Spiritual America?</p> <p>10 MR. HAYES: Objection, form.</p> <p>11 A. Is that a painting?</p> <p>12 Q. It's a rephotograph of a picture of</p> <p>13 Brooke Shields when she was ten years old?</p> <p>14 A. I think it's a photograph, yes.</p> <p>15 Q. And were you aware that Mr. Prince</p> <p>16 rephotographed that photograph that some other</p> <p>17 photographer had taken?</p> <p>18 MS. BART: Objection, form.</p> <p>19 MR. HAYES: Form.</p> <p>20 Q. You can answer.</p> <p>21 A. That photograph I'm familiar with</p> <p>22 recently.</p> <p>23 Q. Do you know how long Gagosian</p> <p>24 Gallery has represented Mr. Prince?</p> <p>25 A. I don't know.</p> | <p style="text-align: center;">92</p> <p>1 McDonald</p> <p>2 A. An artist who uses materials that</p> <p>3 influence him and reinvents them to make</p> <p>4 something new.</p> <p>5 Q. He uses materials that influence</p> <p>6 him, materials created by others, right?</p> <p>7 MS. BART: Objection, form.</p> <p>8 MR. HAYES: Objection, form.</p> <p>9 A. Other painters, other magazines.</p> <p>10 Q. Other photographers?</p> <p>11 MS. BART: Objection, form.</p> <p>12 MR. HAYES: Objection, form.</p> <p>13 Q. You can answer.</p> <p>14 A. Could be, yeah.</p> <p>15 Q. Did you personally do anything to</p> <p>16 find out whether any of the images in these</p> <p>17 Canal Zone paintings were taken from copyrighted</p> <p>18 material?</p> <p>19 MS. BART: Objection, form.</p> <p>20 MR. HAYES: Objection, form.</p> <p>21 Q. You can answer.</p> <p>22 A. No.</p> <p>23 Q. Do you know if anyone at Gagosian</p> <p>24 Gallery did that?</p> <p>25 MS. BART: Objection, form.</p> |



93

1 McDonald  
 2 Q. You can answer.  
 3 A. I don't know.  
 4 Q. Did you ever try to find out -- I  
 5 know you didn't ask him you said already, but  
 6 did you ever try to find out where the images in  
 7 these Canal Zone paintings, specifically the  
 8 Rastafarian images, came from?  
 9 MS. BART: Objection, form.  
 10 MR. HAYES: Objection, form.  
 11 Q. You can answer.  
 12 A. No.  
 13 Q. To your knowledge did anyone at  
 14 Gagosian Gallery make an attempt to find out  
 15 where the Rastafarian images came from?  
 16 MS. BART: Objection, form.  
 17 MR. HAYES: Objection, form.  
 18 Q. You can answer.  
 19 A. I don't know.  
 20 MR. BROOKS: Let's take five minutes  
 21 and I might be finished. I want to look  
 22 at my notes.  
 23 MS. BART: Okay.  
 24 (Recess taken: 3:40 p.m.)  
 25 (Proceedings resumed: 3:48 p.m.)

94

1 McDonald  
 2 MR. BROOKS: I have no further  
 3 questions. And happy birthday.  
 4 MS. BART: Thank you for  
 5 acknowledging that.  
 6 MR. HAYES: I have no questions.  
 7 MR. SHERMAN: I don't either.  
 8 (Time noted: 3:48 p.m.)

\_\_\_\_\_  
 ALISON MCDONALD

Subscribed and sworn to  
 before me this \_\_\_\_ day  
 of \_\_\_\_\_, 2009.

\_\_\_\_\_  
 \_\_\_\_\_

95

1 McDonald  
 2 CERTIFICATE  
 3  
 4 STATE OF NEW YORK )  
 5 )ss:  
 6 COUNTY OF NEW YORK)

I, BRYAN NILSEN, a Notary Public  
 within and for the State of New York, do  
 hereby certify:  
 That ALISON MCDONALD, the witness  
 whose deposition is hereinbefore set  
 forth, was duly sworn by me and that such  
 deposition is a true record of the  
 testimony given by such witness.  
 I further certify that I am not  
 related to any of the parties to this  
 action by blood or marriage and that I am  
 in no way interested in the outcome of  
 this matter.  
 IN WITNESS WHEREOF, I have hereunto  
 set my hand this \_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
 BRYAN NILSEN, RPR

96

1 McDonald  
 2 ----- I N D E X -----  
 3 WITNESS EXAMINATION BY PAGE  
 4 ALISON MCDONALD MR. BROOKS.....6  
 5  
 6  
 7 ----- INFORMATION REQUESTS -----  
 8 RULINGS: page 70, line 21  
 9  
 10 REQUESTS: PAGE  
 11 Whether Exhibit 52 is image used in  
 12 newspaper and magazine ads.....51  
 13  
 14 MOTIONS: PAGE  
 15 Motion to strike.....35  
 16 Motion to strike.....35  
 17  
 18  
 19 ----- EXHIBITS -----  
 20 PLAINTIFF'S FOR ID.  
 21 103 Invitation GGP001696A.....28  
 22 104 GGP00139A and 140A.....29  
 23 105 Documents C00541 through 558.....86  
 24  
 25 \*\* EXHIBITS RETAINED BY COUNSEL \*\*



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
PATRICK CARIOU,

Plaintiff,

-against-

Case No.: 08 CIV 11327 (DAB)

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

Defendants.  
-----X

\* \* \* ERRATA SHEET \* \* \*

**DEPOSITION OF ALISON MCDONALD**  
**TAKEN: DECEMBER 17, 2009**

To the Reporter:

I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me. I request that the following changes be entered upon the record for the reasons indicated. I have signed my name to the Errata Sheet and the appropriate Certificate and authorize you to attach both to the original transcript.

| PAGE | LINE | CHANGE                                                                    | REASON             |
|------|------|---------------------------------------------------------------------------|--------------------|
| 23   | 20   | Yes.<br><br>to<br><br>No.                                                 | Deponent misspoke. |
| 33   | 25   | Yes.<br><br>to<br><br>Yes, the same painting that is on the announcement. | Clarification.     |

|    |    |                                             |                |
|----|----|---------------------------------------------|----------------|
| 54 | 24 | Yes.<br><br>to<br><br>It has no paint cans. | Clarification. |
|----|----|---------------------------------------------|----------------|

Sworn before me this 1  
day of February, 2010

Charles Fernandez  
NOTARY PUBLIC

Alison McDonald  
ALISON MCDONALD

Charles Fernandez  
Notary Public - State of New York  
No. 01FE6202724  
Qualified in New York County  
My Commission Expires March 23, 2013

Alison McDonald

December 17, 2009

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McDonald

MR. BROOKS: I have no further questions. And happy birthday.

MS. BART: Thank you for acknowledging that.

MR. HAYES: I have no questions.

MR. SHERMAN: I don't either.

(Time noted: 3:48 p.m.)

*Alison McDonald*

ALISON MCDONALD

Subscribed and sworn to before me this 1 day of February, 2009.  
2010

*Charles Fernandez*

Charles Fernandez  
Notary Public - State of New York  
No. 01FE8202724  
Qualified in New York County  
My Commission Expires March 23, 2013

Toll Free: 800.944.9454  
Facsimile: 212.557.5972

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

|                                                                                                                  |   |                                |
|------------------------------------------------------------------------------------------------------------------|---|--------------------------------|
| PATRICK CARIOU,                                                                                                  | : |                                |
|                                                                                                                  | : |                                |
| Plaintiff,                                                                                                       | : | <b>08 CIV 11327 (DAB)</b>      |
|                                                                                                                  | : |                                |
| -against-                                                                                                        | : | <b>RESPONSE TO DEFENDANTS'</b> |
|                                                                                                                  | : | <b>COUNTER-STATEMENT OF</b>    |
|                                                                                                                  | : | <b>UNCONTESTED MATERIAL</b>    |
|                                                                                                                  | : | <b>FACTS PURSUANT TO LOCAL</b> |
|                                                                                                                  | : | <b>RULE 56.1</b>               |
| RICHARD PRINCE, GAGOSIAN GALLERY,<br>INC., LAWRENCE GAGOSIAN and<br>RIZZOLI INTERNATIONAL<br>PUBLICATIONS, INC., | : |                                |
|                                                                                                                  | : |                                |
| Defendants.                                                                                                      | : |                                |
|                                                                                                                  | : |                                |

Plaintiff Patrick Cariou, by and through his attorneys, Schnader Harrison Segal & Lewis LLP, for his response to the counter-statement by Defendants Richard Prince, Gagosian Gallery Inc. and Lawrence Gagosian (“Defendants”) of additional uncontested material facts, pursuant to Local Rule 56.1, states the following:

50. Plaintiff incorporates by reference the General Objections and Individual Responses set forth in Plaintiff’s Counter–Statement, Pursuant to Local Civil Rule 56.1, Of Undisputed Material Facts, In Opposition To Defendants’ Motion For Summary Judgment.

51. This paragraph is not in dispute.

52. Plaintiff controverts Defendants’ statement that “Prince understood the use of the word ‘comment’ to mean a political comment” and asserts that in his deposition, Prince answered “no” in response to the questions: “[w]ere you commenting on the Rasta photos in the *Yes Rasta* book?” (Brooks Dec. Ex. E at 281) and “Were you commenting on Mr. Cariou’s technique or methodology in taking those photos?” (*id.* at 281); in response to the question: “Are you – in this painting on C24 are you commenting on any aspects of culture?” (*id.* at 353), Prince

replied: “I would say a musician is a solo artist, maybe, if that’s -- is that culture?” (*id.* at 353); in response to the question: “So is that what you were talking about, commenting on the music scene?” (*id.* at 340), Prince stated: “[t]he guitar, again, is what I think my contribution is to the image, one of the contributions to this particular image, just like the mask was my contribution to the nurse paintings. Once I make some sort of connection. Now, if that hadn’t been made, this guitar, this collage, which turns this – the original intentions of this image into something completely different, obviously, he’s playing the guitar now, it looks like he’s playing the guitar, it looks as if he’s always played the guitar, that’s what my message was.” (*id.* at 340); in response to the question: “So you’re not commenting on the landscape in this painting, right?” (*id.* at 354), Prince stated: “I don’t really make comments with any of my work.” (*id.* at 354); in response to the question: “[I]n superimposing these four images over the landscape from *Yes Rasta*, right, were you commenting on any aspects of culture?” (*id.* at 360), Prince answered: “No.” (*id.* at 360); in response to the question: “So how have you added a new meaning or message or commented on aspects of culture in your painting as compared to the photo from *Yes Rasta*?” (*id.* at 363-64), Prince replied, “I’m not sure if I have to comment on culture with every single painting.” (*id.* at 364). In all of the foregoing questions, not once was the word “political” used to modify “comment”, nor did Prince state or even imply that the question as asked confused him. Moreover, Prince’s responses to the questions demonstrate his understanding of the word “comment” as it was used in the question (*e.g.*, “I’m not sure if I have to comment on culture with every single painting” (*id.* at 364)).

53. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

54. Plaintiff controverts Defendants’ statement that “Prince therefore does not make

political comments with his work” and asserts that the portions of Prince’s deposition transcript and supplemental affidavit to which Defendants cite do not support the stated proposition, rendering the allegations in this Paragraph inadmissible.

55. Plaintiff controverts Defendants’ statement that “In capturing the Jamaican Rastafarian culture, it is commonplace to incorporate pictures of Rastafarians with dreadlocks” and asserts that the documents cited to in support of this statement constitute inadmissible hearsay. These documents, and the foregoing statement purportedly supported by these documents, are irrelevant to any issue on either Plaintiff or Defendants’ motion for summary judgment. Moreover, in his deposition (Brooks Opp. Dec. Ex. A at 156), Prince admitted he “knew nothing” about this subject.

56. Plaintiff controverts Defendants’ statement that “It is common to include shots of tropical vegetation, ganja plantations, ganja vegetation and marijuana cigarettes, and scenes of the mountains, villages and key towns such as Negril and Kingston, in attempting to capture the Jamaican Rastafarian culture” and asserts that the documents cited to in support of this statement constitute inadmissible hearsay. These documents, and the foregoing statement purportedly supported by these documents, are irrelevant to any issue on either Plaintiff or Defendants’ motion for summary judgment. Moreover, in his deposition, Prince admitted that he “knew nothing” about this subject matter.

57. Plaintiff controverts Defendants’ statement that “Some of the great master painters, such as Picasso and Cy Twombly, created masterpieces in a matter of hours” and asserts that the documents cited in support of this statement constitute inadmissible hearsay. Furthermore, these documents, and the foregoing statement purportedly supported by these documents, are irrelevant to any issue on either Plaintiff’s or Defendants’ motion for summary

judgment.

58. Plaintiff controverts Defendants' statement in this paragraph. Page 132 of Plaintiff's deposition transcript, which is cited to by Defendants in support of the allegations in Paragraph No. 58, does not contain the words "considerable time."

59. This paragraph is not in dispute and contains allegations which are not material to this lawsuit. In his deposition, when asked what his message was in producing the Paintings, Prince testified: "I don't really have a message" (Brooks Dec. Ex. E at 45-46), later adding that "[t]he message is to make great art that makes people feel good" (*id.* at 267), and to do so with "a completely different look, and . . . a completely different application, and . . . a new way of collaging" (*id.* at 331).

60. Plaintiff controverts Defendants' statement that "[t]hose sales nonetheless fostered the promotion of and public exhibition of the Paintings" and asserts that the portion of Lawrence Gagosian's deposition transcript cited in support of the proposition does not discuss, in any respect, the sale of the announcement cards as encouraging "promotion of and public exhibition of the Paintings." Furthermore, the *Canal Zone* Exhibition's announcement cards were sold to Rare Posters at the conclusion of the *Canal Zone* Exhibition (Brooks Dec. Ex. F at 77), thus rendering the sale of the announcement cards purely commercial.

61. Plaintiff controverts Defendants' statement that "Prince, who created the Paintings in his studio in the Hamptons with assistance from personnel in his studio in upstate New York, worked alone" and asserts that this statement is contradictory, as one cannot work both "with assistance," while at the same time, "alone." Furthermore, Plaintiff controverts this statement as Prince hired a vendor, NancyScans Corp., to scan, enlarge and print his images. Brooks Dec. Ex. I at 22.

62. This paragraph is not in dispute.

63. This paragraph is not in dispute. However, Gagosian Gallery and Lawrence Gagosian knew that Prince had a practice of appropriating images belonging to others and did not ascertain where Prince had obtained the images he took from *Yes Rasta* and whether those images were copyrighted. Brooks Dec. Ex. C ¶18; Ex. G at 17-18; Ex. H at 91-92. They also received Cariou's cease and desist letter on December 11, 2008, yet continued on with the Canal Zone show. Brooks Dec. Ex. C ¶¶ 24-25. Additionally, Gagosian Gallery was responsible for promoting the Canal Zone show through advertisements (Brooks Dec. Ex. F at 36), publishing the Canal Zone catalogue (Brooks Dec. Ex. M-4), deciding what Paintings should be exhibited at the Canal Zone show and selling the Paintings. Brooks Dec. Ex. F at 47-48, 116-17.

64. This paragraph is not in dispute and contains allegations which are not material to this lawsuit.

65. Plaintiff controverts Defendants' statement that "In all but four of the Paintings, . . . Prince appropriated only portions of the Images" and asserts that Prince appropriated entire images from *Yes Rasta*, including entire images of individuals and entire images of landscapes, in nearly every Canal Zone Painting. Brooks Dec. Ex. U.

Dated: New York, New York  
June 24, 2010

SCHNADER HARRISON SEGAL & LEWIS LLP

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT .....1

ARGUMENT.....1

POINT I

PRINCE’S APPROPRIATION OF CREATIVE AND PROTECTABLE  
ELEMENTS OF CARIOU’S VALIDLY COPYRIGHTED WORK  
RENDERS ALL OF THE DEFENDANTS LIABLE FOR COPYRIGHT  
INFRINGEMENT.....1

POINT II

DEFENDANTS’ USE OF CARIOU’S PHOTOGRAPHS WAS NOT FAIR.....6

A. First Fair Use Factor .....6

B. Second Fair Use Factor.....8

C. Third Fair Use Factor.....8

D. Fourth Fair Use Factor.....9

CONCLUSION.....10

**TABLE OF AUTHORITIES****CASES**

|                                                                                                               |          |
|---------------------------------------------------------------------------------------------------------------|----------|
| <i>Bill Diodato Photography, LLC v. Kate Spade, LLC</i> ,<br>388 F. Supp. 2d 382 (S.D.N.Y. 2005) .....        | 4, 5     |
| <i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> ,<br>448 F.3d 605 (2d Cir. 2006) .....                 | 7, 9     |
| <i>Blanch v. Koons</i> ,<br>467 F.3d 244 (2d Cir. 2006) .....                                                 | 6, 9, 10 |
| <i>Bourne Co. v. Twentieth Century Fox Film Corp.</i> ,<br>602 F. Supp. 2d 499 (S.D.N.Y. 2009) .....          | 6, 7     |
| <i>Burrow-Giles Lithographic Co. v. Sarony</i> ,<br>111 U.S. 53 (1884).....                                   | 3, 5     |
| <i>Campbell v. Acuff-Rose Music, Inc.</i> ,<br>510 U.S. 569 (1994).....                                       | 6, 10    |
| <i>Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp.</i> ,<br>97 F. Supp. 2d 395 (S.D.N.Y. 2000) .....        | 3        |
| <i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> ,<br>499 U.S. 340 (1991).....                              | 1, 2, 5  |
| <i>Harper &amp; Row, Publishers, Inc. v. Nation Enters.</i> ,<br>471 U.S. 539 (1985).....                     | 1, 3, 4  |
| <i>Lennon v. Premise Media Corp.</i> ,<br>556 F. Supp. 2d 310 (S.D.N.Y. 2008) .....                           | 6        |
| <i>Mannion v. Coors Brewing Co.</i> ,<br>377 F. Supp. 2d 444 (S.D.N.Y. 2005) .....                            | 3        |
| <i>Maxtone-Graham v. Burtchaell</i> ,<br>803 F.2d 1253 (2d Cir. 1986) .....                                   | 2        |
| <i>MCA, Inc. v. Wilson</i> ,<br>425 F. Supp. 443 (S.D.N.Y. 1976) .....                                        | 8        |
| <i>Monster Communications, Inc. v. Turner Broad. System, Inc.</i> ,<br>935 F. Supp. 490 (S.D.N.Y. 1996) ..... | 3        |
| <i>Perma Research &amp; Development Co. v. Singer Co.</i> ,<br>410 F.2d 572 (2d Cir. 1969) .....              | 7        |



*Reyes v. Wyeth Pharm., Inc.*,  
603 F. Supp. 2d 289 (D. P.R. 2009)..... 8

*Rogers v. Koons*,  
960 F.2d 301 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992)..... 3, 5, 9

*Sarl Louis Feraud Int'l v. Viewfinder Inc.*,  
627 F. Supp. 2d 123 (S.D.N.Y. 2008) ..... 4

*Shapiro, Bernstein & Co., Inc. v. H.L. Green Co., Inc.*,  
316 F.2d 304 (2d Cir. 1963) ..... 5

*Strauss v. Hearst Corp.*,  
No. 85 Civ. 10017 (CSH), 1988 WL 18932  
(S.D.N.Y. Feb. 19, 1988)..... 3

*United Feature Syndicate, Inc. v. Koons*,  
817 F. Supp. 370 (S.D.N.Y. 1993) ..... 7

**STATUTES**

17 U.S.C. § 107..... 8

**OTHER AUTHORITIES**

Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*,  
93 COLUM. L. REV. 1473 (1993)..... 6

**PRELIMINARY STATEMENT**

This memorandum of law is respectfully submitted on behalf of plaintiff, Patrick Cariou, in reply to the memorandum of law of defendants Richard Prince, Gagosian Gallery, Inc. and Lawrence Gagosian, filed on June 14, 2010 in opposition to Cariou's motion for summary judgment ("Def. Opp. Mem."), and in further support of Cariou's motion. Accompanying this reply memorandum are the declaration of Daniel J. Brooks, dated June 24, 2010 ("Brooks Rep. Dec.") and exhibits thereto, and a response to defendants' Local Rule 56.1 counter-statement.

**ARGUMENT****POINT I****PRINCE'S APPROPRIATION OF CREATIVE AND PROTECTABLE ELEMENTS OF  
CARIOU'S VALIDLY COPYRIGHTED WORK RENDERS ALL OF THE  
DEFENDANTS LIABLE FOR COPYRIGHT INFRINGEMENT**

Copyright infringement has two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). To be "original," a copyrighted work must have been independently created by the author and must possess "at least some minimal degree of creativity," although "the requisite level of creativity is extremely low; even a slight amount will suffice." *Id.* at 345. "The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Id.* (citation omitted). "Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." *Id.* "No author may copyright his ideas or the facts he narrates." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985). Copyright only protects the form in which facts or ideas are expressed, and not the facts or ideas themselves. *Id.*; *see also Feist*, 499 U.S. at 350 (noting "idea/expression" and "fact/expression" dichotomies).

Despite the extremely low bar on the level of creativity needed to make a copyrighted work “original,” defendants claim, implausibly, that Cariou’s Photographs are so lacking in creativity and, therefore, originality, that Prince’s taking of the Photographs was not the type of “improper appropriation” required in order to sustain a copyright infringement claim. A review of the cases cited by defendants exposes the frivolity of this argument.

Citing *Feist* and *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), defendants claim that because “facts” are not original or copyrightable, the “fact-based images of Rastafarians in their Jamaican landscape that Cariou depicted as realistically as possible, are not protectable as a matter of law.” Def. Opp. Mem. at 2. From defendants’ discussion and lengthy quotation from *Feist* (*id.* at 3, 4), one would never know that the case involved the white pages of a telephone directory from which listings were extracted by the defendant when it compiled its own directory; that the issue before the Supreme Court was “whether the copyright in [plaintiff’s] directory protects the names, towns, and telephone numbers copied by [defendant]”; and that plaintiff’s only claim to creativity was that it had arranged the names alphabetically. *Feist*, 499 U.S. at 343-44, 363. Reiterating that “originality is not a stringent standard [and] does not require that facts be presented in an innovative or surprising way[,]” but that “some minimal degree of creativity” is required, the Court concluded that “[T]here is nothing remotely creative about arranging names alphabetically in a white pages directory. \* \* \* It is not only unoriginal, it is practically inevitable.” *Id.* at 363. *Maxtone-Graham* is equally inapposite, addressing only the fair use defense of an author who prepared an essay on abortion in which he quoted from verbatim factual interviews conducted by the plaintiff with women who discussed their experiences with abortion. *Id.* 803 F.2d at 1255-56. Notably, while the case did not even address “improper appropriation,” in analyzing the second fair use factor the Court did state that the “verbatim interviews,” while “essentially reportorial in nature[,]” nevertheless “contain[]

elements of creative journalistic effort. ‘Creation of a nonfiction work, even a compilation of pure fact, entails originality.’” *Id.* at 1262-63 (quoting *Harper & Row*, 471 U.S. at 547). By no stretch of the imagination does either of these cases hold, or even suggest, that Cariou’s “fact-based” Photographs are “not protectable as a matter of law.” Def. Opp. Mem. at 2.

To the contrary, it has been widely recognized, for well over a century, that photographs of real people, places and events can be creative and protectable. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (originality of photographic portrait of Oscar Wilde arose from the posing of the subject, selection of his clothing, background, light and shade, and by “suggesting and evoking the desired expression”); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir.) (“Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.”), *cert. denied*, 506 U.S. 934 (1992); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) (“Almost any photograph ‘may claim the necessary originality to support a copyright.’”) (citation omitted); *Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395, 417 (S.D.N.Y. 2000) (photographs of “common industrial items” possessed sufficient originality and creativity to be protectable; originality may be based upon factors such as the “choice of subject matter, angle of photograph, lighting, determination of the precise time when the photograph is to be taken, the kind of camera, the kind of film, the kind of lens, and the area in which the pictures are taken.”); *Monster Communications, Inc. v. Turner Broad. System, Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996) (“photographic images of actual people, places and events may be as creative and deserving of protection as purely fanciful creations.”); *Strauss v. Hearst Corp.*, No. 85 Civ. 10017 (CSH), 1988 WL 18932, at \*5 (S.D.N.Y. Feb. 19, 1988) (a photographer’s “efforts to create an aesthetically attractive, technically competent photograph” of fishing gear involved “plainly creative expressions.”).

Cariou testified that he made all of these creative decisions in taking and developing the Photographs. *See* declaration of Daniel J. Brooks, dated May 7, 2010 (“Brooks Dec.”), Ex. D at 51-64, 133-34, 137-38, 143-44, 152, 169. Cariou’s Photographs, far from being mere facts (like names in a phone book), or mere “reproduc[tions of] reality” (like xerox copies), are “partial, two-dimensional impression[s]” of three-dimensional reality, seen through a professional photographer’s “creative, or even distorting, eye.” *Sarl Louis Feraud Int’l v. Viewfinder Inc.*, 627 F. Supp. 2d 123, 128 (S.D.N.Y. 2008). As such, they are creative, “original,” and protected by the Copyright Act.

In addition to arguing the irrelevant proposition that facts are not copyrightable, defendants also rely on the truism that ideas are not protectable. Defendants rely principally on *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382 (S.D.N.Y. 2005), where the defendant allegedly copied the idea depicted in plaintiff’s prior photograph by commissioning an ad showing the bottom of a bathroom stall through which one could see a woman’s feet, astride a toilet, in stylish, colorful shoes, with a handbag on the floor. *Id.* at 384. Had Prince borrowed Cariou’s idea by going to Jamaica and, for example, photographing a Rasfarian on a donkey, rather than simply stealing that Photograph (among many others), defendants might have some basis for arguing – based upon *Diodato*, 388 F. Supp. 2d at 390, 392 – that the idea of a man on a donkey is not protectable and that “similarities inher[ing]” in or “deriv[ing]” or “naturally flow[ing] from [that] idea” (*e.g.*, the angle of the donkey’s ears, the way in which a man would sit astride a donkey) are similarly not protectable. *See* Def. Opp. Mem. at 2-4. But, unlike the defendant in *Diodato*, Prince did not appropriate Cariou’s ideas; he appropriated the creative expressions of those ideas, which are protectable and copyrightable. *Harper & Row*, 471 U.S. at 556. The cases relied upon by defendants involving the *scenes a faire* doctrine (Def. Opp. Mem. at 3), under which elements of an image that flow naturally and

necessarily from an appropriated idea are no more protectable than the idea itself, are distinguishable inasmuch as Prince appropriated Cariou's Photographs, not the underlying idea. Similarly misguided is defendants' reliance on *Diodato* for the proposition that Cariou "cannot monopolize the various poses [he] used" or the "technique" he used "to blur the background, so as to bring the subject into sharp focus." Def. Opp. Mem. at 3. While *Diodato* would foreclose Cariou from asserting that other photographers may not, in their own photographs, use poses similar to those he used in *Yes Rasta* (or may not blur the background of their own photographs), the law does preclude the improper appropriation of Cariou's actual Photographs, including their creative, protectable elements, one of which is the subjects' poses. See, e.g., *Burrow-Giles*, 111 U.S. at 60; *Rogers v. Koons*, 960 F.2d at 307.

Defendants also baldly assert – without citing any objective, scientific study – that Cariou's Photographs of Rastafarians are typical. Def. Opp. Mem. at 3. Even if this *ipse dixit* (on a subject Prince admittedly "knew nothing" about (see declaration of Daniel J. Brooks, dated June 11, 2010 ("Brooks Opp. Dec.") Ex. A at 156; affidavit of Richard Prince, sworn to May 13, 2010, ¶ 18)) rested on admissible evidence, it would not matter: "Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." *Feist*, 499 U.S. at 345.

The Gagosian defendants contend that they are not vicariously liable because they had no control over Prince's creation of the Paintings and are not contributorily liable because it cannot be shown that they knew or should have known of Prince's infringing activity. Def. Opp. Mem. at 22, 23. As to the first point, vicarious liability, which requires neither "an intention to infringe or knowledge of infringement" (*Shapiro, Bernstein & Co., Inc. v. H.L. Green Co., Inc.*, 316 F.2d 304, 308 (2d Cir. 1963)), flows from the Gagosian defendants' control over the advertising and exhibition of the *Canal Zone* show and the sale of the Canal Zone Catalogues

and Paintings, not from any control over Prince's creative process. As to the second point, as the defendants knew (*see* Brooks Dec. Ex. C, ¶ 18; Ex. G at 17-18, Ex. H at 91-92), Prince was a "flagrant appropriator" (Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1513 (1993)), whose retrospective at the Guggenheim Museum was named *Spiritual America*, after a photograph by Garry Gross of a prepubescent Brooke Shields emerging nude from a bathtub, which Prince "re-photographed," paying Gross for the rights nine years later. Brooks Rep. Dec. Ex. A at 18-20, 68-74; Exs. C, D. Moreover, after receiving Cariou's cease and desist letter on December 11, 2008, the Gagosian defendants continued selling the catalogue and exhibiting, bartering and selling the Paintings; while they may quibble that the March 2009 exchange was between them and Prince and that *It's All Over*, sold in August 2009 for \$1.1 million, was obtained through that exchange, there is no avoiding their sale, to which they stipulated, of *Inquisition* on June 8, 2009, for \$800,000. *See* Cariou's memorandum of law in opposition to defendants' motion for summary judgment, at 15.

## POINT II

### DEFENDANTS' USE OF CARIOU'S PHOTOGRAPHS WAS NOT FAIR

#### A. First Fair Use Factor

With one exception, all of the cases relied upon by defendants for their contention that Prince's appropriation of Cariou's Photographs was transformative (Def. Opp. Mem. at 5, 9, 13-14) involve instances where the secondary use commented on the original (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994); *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 507 (S.D.N.Y. 2009)); or was a satire "target[ing] the genre of which [the original was] typical" (*Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2006)); or criticized the original (*Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 323 (S.D.N.Y. 2008)); or incorporated the originals into a biography, "a form[] of historical scholarship, criticism, and

comment that require[s] incorporation of original source material for optimum treatment of [its] subjects” (*Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006)). Here, in sharp contrast, Prince admitted that the Photographs were not the subject of his Paintings and that he was not commenting on Cariou’s Photographs or on Cariou’s technique or methodology in taking those Photographs. Brooks Dec. Ex. E at 30, 281-82. Defendants leave unanswered a number of questions: If Prince may nevertheless randomly take the Photographs because he likes them, “loves” the “look” and wants to use them in order to pay homage to artists he admires and to depict a post-apocalyptic fantasy, where would the line be drawn? Is there any copyrighted image, however unrelated, that Prince could not take in order to further these purposes? Is Cariou’s copyrighted work due no more respect and protection than the urinal which Duchamp famously appropriated? May copyright protection be “eviscerate[d],” as Judge Leisure put it in *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 379 (S.D.N.Y. 1993), whenever an appropriation artist comes across copyrighted images he likes?

Prince’s latest improper attempt to change his deposition testimony – by claiming, in ¶ 7 of his supplemental affidavit, sworn to June 11, 2010, that he “understood,” when asked if he made comments with his work, the word “comment” to mean a “political comment” – should be disregarded. *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969) (party opposing summary judgment may not submit affidavit contradicting his own deposition testimony). In any event, defendants’ use of this new assertion to contend that Prince “effectively comments generally on aspects of society and the music scene” (Def. Opp. Mem. at 11) misses the point: to be transformative, the comment must be at least in part about the appropriated material, not society in general. *See Bourne*, 602 F. Supp. 2d at 506, 507 (finding that the defendants “were clearly attempting to comment in some way on the wishful, hopeful scene in Pinocchio with which the song is associated[.]” and distinguishing



*MCA, Inc. v. Wilson*, 425 F. Supp. 443, 453 (S.D.N.Y. 1976), where the defendant’s “song commented on life, and sexual mores, but not the original work.”).

The only case cited by defendants not involving comment or criticism is *Reyes v. Wyeth Pharm., Inc.*, 603 F. Supp. 2d 289 (D. P.R. 2009) (Def. Opp. Mem. at 9), in which the defendants’ “public service educational” ad of a woman holding plaintiff’s sculpture was not commenting on the sculpture, but sought to “raise awareness concerning RA [rheumatoid arthritis] and treatment options available for people suffering from RA[,]” conveying an “implicit message” – that the woman in the ad “suffer[ed] from RA and yet, because of treatments currently available, [could] creat[e]” the sculpture – which differed from the “message involved in the sculpture itself,” rendering the ad “somewhat transformative.” *Id.* at 293, 296-97. The transformative purpose in *Reyes* – teaching – is one enumerated in the preamble to the fair use statute, 17 U.S.C. § 107, distinguishing *Reyes* from this case.

**B. Second Fair Use Factor**

Defendants claim that Cariou’s Photographs are factual, rather than works of fiction, and are, therefore, entitled to less protection. Def. Opp. Mem. at 15. Defendants fail to explain, however, how a photograph can be anything other than “factual,” or why the Court should disregard the substantial authority cited in plaintiff’s memorandum of law in support of his motion for summary judgment (“Pl. Mem.”), at 19-20, establishing that aesthetic photographs, even of actual people, are routinely deemed to be creative and imaginative, fitting within the core of copyright protection and, even though factual or informational in nature, ordinarily making the second fair use factor weigh in favor of photographer-plaintiffs.

**C. Third Fair Use Factor**

Defendants admit that Prince appropriated four of Cariou’s Photographs in their entirety, but deny that Prince also took “entire Photographs of Rastas and copious portions of

landscapes.” Def. Opp. Mem. at 16. In fact, with respect to the 22 Paintings depicted in the Canal Zone Catalogue, Prince did appropriate entire portraits of Cariou’s Rastafarians (usually cropping out the landscape background) in 17 Paintings (Brooks Dec. Ex. N, #s 1-9, 15-22; Ex. U) and appropriated substantial portions of landscapes in five Paintings (Brooks Dec. Ex. N, #s 1, 5, 7, 8, 14; Ex. U); *see also* Ex. O, PR00029, PR00030 (also appropriating entire Rastas). This taking of the essence of these portraits, even without the landscapes, contrasts with what Koons did in *Blanch*, 467 F.3d at 248, taking only a fragment, the legs and feet, from a photo “showing a woman’s legs and feet resting on a man’s lap in a first-class airplane cabin that, in its essence, ‘was supposed to have an erotic sense.’” As explained previously (Pl. Mem. at 20-22), Prince’s alterations of the Photographs (*cf. Rogers v. Koons*, 960 F.2d at 305, 312 (black and white photo altered into polychromatic painted three-dimensional wood sculpture)); enlargements which emphasize rather than minimize Cariou’s work (*cf. Bill Graham Archives*, 448 F.3d at 611); and addition of other images do not change the fact that he appropriated substantial portions of Cariou’s work, making the third fair use factor weigh against fair use.

**D. Fourth Fair Use Factor**

Overlooking documentary proof that, on August 28, 2008, before anyone knew about Prince’s *Canal Zone* Paintings, Christiane Celle sought to represent Cariou and exhibit his work, and that Cariou expressed interest (Brooks Dec. Ex. SS), defendants imply that Cariou and Celle have concocted this narrative. Def. Opp. Mem. at 21-22. Defendants claim (*id.* at 21) that Cariou never “committed” to the project with Celle, overlooking undisputed testimony that Cariou met with Celle twice, once in New York and once in Paris, all well before Prince’s *Canal Zone* show, went through *Yes Rasta* to identify Photographs for the show, and that Cariou, in Celle’s view, “wanted to do a show.” Brooks Dec. Ex. D at 227; Ex. J at 39-44. Defendants point to the absence of a written contract between Cariou and Celle’s gallery (supposedly

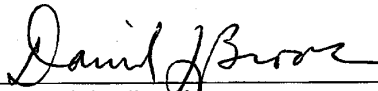
proving that there was no show to cancel) (Def. Opp. Mem. at 21), even though there also was no written contract between Prince and Gagosian Gallery. See Brooks Rep. Dec. Ex. A at 90-91; Ex. B at 23-24. Despite Celle's undisputed testimony that she cancelled Cariou's show because it had been "done already" at the Gagosian Gallery (Brooks Dec. Ex. J at 89), thereby "superseding the objects" of Cariou's work, defendants argue that the market for the Photographs was not "completely usurped" (even though *Blanch*, which defendants quote for this point, never uses the phrase "completely usurp") (see Def. Opp. Mem. at 20). Finally, defendants fault Cariou for asserting harm to the "potential market" for his work (*id.*), even though the fourth fair use factor employs the words "potential market" and despite *Campbell's* explanation that this factor "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original." 510 U.S. at 590 (citation omitted).

#### CONCLUSION

For the foregoing reasons, Cariou's motion for summary judgment should be granted.

Dated: New York, New York  
June 24, 2010

SCHNADER HARRISON SEGAL & LEWIS LLP

By:   
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Eric A. Boden

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*Attorneys for Plaintiff Patrick Cariou*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

|                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| PATRICK CARIOU,                   | : |                                |
|                                   | : |                                |
| Plaintiff,                        | : | <b>08 Civ. 11327 (DAB)</b>     |
|                                   | : |                                |
| -against-                         | : | <b>REPLY DECLARATION OF</b>    |
|                                   | : | <b>DANIEL J. BROOKS IN</b>     |
| RICHARD PRINCE, GAGOSIAN GALLERY, | : | <b>SUPPORT OF PLAINTIFF'S</b>  |
| INC., LAWRENCE GAGOSIAN and       | : | <b>MOTION FOR</b>              |
| RIZZOLI INTERNATIONAL             | : | <b><u>SUMMARY JUDGMENT</u></b> |
| PUBLICATIONS, INC.,               | : |                                |
|                                   | : |                                |
| Defendants.                       | : |                                |
|                                   | : |                                |

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, Patrick Cariou. I submit this reply declaration, based upon personal knowledge, in response to the papers filed by defendants Richard Prince, Gagorian Gallery, Inc. and Lawrence Gagorian in opposition to plaintiff's motion for summary judgment and in further support of that motion.
2. Attached hereto as Exhibit A are excerpts from the transcript of the deposition of defendant Richard Prince, taken in this action on October 6, 2009.
3. Attached hereto as Exhibit B are excerpts from the transcript of the deposition of defendant Lawrence Gagorian, taken in this action on October 8, 2009.

4. Attached hereto as Exhibit C is a copy of an article that appeared in *The New York Times* on December 6, 2007, entitled *If the Copy Is an Artwork, Then What's the Original?* The article, concerning the Richard Prince retrospective at the Solomon R. Guggenheim Museum, was marked as Exhibit 7 to Mr. Prince's deposition.

5. Attached hereto as Exhibit D is a copy of an interview of Mr. Prince by Brian Appel, which was marked as Exhibit 8 to Mr. Prince's deposition.

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 24, 2010, at New York, New York.

  
DANIEL J. BROOKS

Prince

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

PATRICK CARIOU,

Plaintiff,

Index No.:

vs.

08 CIV 11327 (DAB)

RICHARD PRINCE, GAGOSIAN

GALLERY, INC., LAWRENCE

GAGOSIAN, and RIZZOLI

INTERNATIONAL PUBLICATIONS,

INC.,

Defendants.

-----x

VIDEOTAPED DEPOSITION OF RICHARD PRINCE

New York, New York

Tuesday, October 6, 2009

Reported by:  
Bryan Nilsen, RPR  
JOB NO. 304040

Page 18

1 Prince  
2 that in Germany?  
3 A. Yes.  
4 Q. Do you know how to spell that?  
5 MR. HAYES: C-O-L --  
6 A. K-O-L-N.  
7 Q. K-O-L --  
8 A. Or C-O --  
9 MR. HAYES: C-O-L-O-G-N-E.  
10 A. I believe it's the same.  
11 Q. In 1983 did you rephotograph a photo  
12 by a photographer named Garry, G-A-R-R-Y, Gross?  
13 A. I didn't rephotograph a photo by  
14 him. I rephotographed an image that appeared in  
15 a little advertising booklet that he had  
16 self-published.  
17 MR. BROOKS: Can I hear that again?  
18 (Record read.)  
19 BY MR. BROOKS:  
20 Q. What was the nature of the image?  
21 A. He apparently had taken an image of  
22 Brooke Shields that I believe when she was  
23 around 12 or -- years old. I don't exactly know  
24 what the age was, but -- he was I believe  
25 wanting to publish those images.

Page 19

1 Prince  
2 I mean this was ten years later and  
3 she had already grown up. I guess he wanted --  
4 he wanted to publish posters of the original  
5 shoot that he made that day.  
6 Q. But getting back to my question, the  
7 image that you saw in his materials was a  
8 reproduction of that photo?  
9 A. The image that I saw that day, that  
10 evening when I received the little booklet, I  
11 felt that my reaction to it is, oh, that's what  
12 they're talking about. Because these images  
13 were in the press at the time.  
14 Q. But the image, was it a photograph,  
15 that's all I'm asking?  
16 A. In the booklet?  
17 Q. Yes.  
18 A. I didn't know what the image was.  
19 All I saw was the reproduction.  
20 Q. What was Brooke Shields wearing in  
21 the picture?  
22 A. She wasn't wearing anything at all.  
23 Q. Did you make a photograph of that  
24 image?  
25 A. I rephotographed the image, yes.

Page 20

1 Prince  
2 Q. And did you give it a title?  
3 A. Yes, I did.  
4 Q. What was the title?  
5 A. Spiritual America.  
6 Q. And you say you obtained the image  
7 that you rephotographed in the mail in some kind  
8 of advertising publication?  
9 MR. HAYES: Objection. I don't  
10 think he said that.  
11 MR. BROOKS: Okay. I could be  
12 wrong.  
13 BY MR. BROOKS:  
14 Q. Tell us again how you --  
15 A. I received the image because someone  
16 gave me the little pamphlet or --  
17 Q. Okay. You didn't get it in the  
18 mail?  
19 A. I didn't get it in the mail.  
20 Q. So you didn't purchase the pamphlet,  
21 somebody gave it to you?  
22 A. Someone gave it to me, yes.  
23 Q. Did you obtain Mr. Gross's  
24 permission to rephotograph the image?  
25 A. No.

Page 21

1 Prince  
2 Q. Did you obtain his permission to  
3 sell your photograph of the image?  
4 A. It wasn't for sale.  
5 Q. I'm going to hand you what I'd like  
6 marked as Plaintiff's Exhibit 1, which is simply  
7 a copy of the amended complaint in this lawsuit.  
8 (Plaintiff's Exhibit 1, amended  
9 complaint, was marked for identification,  
10 as of this date.)  
11 Q. Mr. Prince, what I've placed in  
12 front of you is a copy of the amended complaint  
13 in this lawsuit. Have you ever seen it before?  
14 A. No.  
15 Q. I'm going to ask you to turn to  
16 page 4, please. And I'm going to read you what  
17 paragraph 13 states.  
18 Quote, None of the defendants was  
19 ever authorized by Plaintiff to appropriate the  
20 photographs, comma, or to reproduce, comma,  
21 distribute or display the photographs, comma, or  
22 to adapt the photographs in order to create the  
23 paintings or any other derivative work based on  
24 the photographs, period. Defendant's conduct  
25 was and continues to be a willful disregard of

Page 66

1 Prince  
2 living in an apartment in East Village -- in the  
3 East Village, where the rent was \$75 a month.  
4 My job earned me \$100. I had enough left to  
5 eat, drink, and buy supplies to paint. But if,  
6 unfortunately, I were to be sued today, I would  
7 call upon a law firm. However, it would not  
8 bother me in the slightest for someone to  
9 appropriate my work. And it's rather funny for  
10 me to work with a company Louis Vuitton whose  
11 sales revenue depends in large part on defending  
12 its copyright.  
13 Do you recall giving an answer along  
14 those lines?  
15 A. That's pretty good. Yeah. That's a  
16 pretty good translation.  
17 Q. And did you work on the 2008 spring  
18 collection for Louis Vuitton together with Mark  
19 Jacobs?  
20 A. Yes.  
21 Q. Who is Mark Jacobs?  
22 A. He's a friend.  
23 Q. No, but what is his -- what is he  
24 known for?  
25 A. He's a fashion designer.

Page 67

1 Prince  
2 Q. And so the two of you put together a  
3 spring collection for Louis Vuitton?  
4 A. No, I -- I didn't put anything  
5 together. I gave him ideas for -- my job, or --  
6 you know, what I was supposed to do was to work  
7 with the font, I guess you call it, the Louis  
8 Vuitton, their logo. I was supposed to come up  
9 with a variation that they then could put on  
10 handbags.  
11 Q. And was that done?  
12 A. Yes, it was.  
13 Q. Were you paid?  
14 A. I was paid.  
15 Q. Let's take a look at -- let me just  
16 say something. I'm going to come back to that  
17 so, just so --  
18 MR. HAYES: We'll leave it right  
19 here.  
20 Q. -- it can be kept on top of the pile  
21 because I am going to come back to it.  
22 MR. HAYES: Sure. This is actually  
23 the copy here, this is my copy.  
24 MR. BROOKS: All right. Fine.  
25 Let's mark as Plaintiff's Exhibit 7

Page 68

1 Prince  
2 a two-page article which was produced with  
3 Bates stamps C83 and 84.  
4 (Plaintiff's Exhibit 7, two-page  
5 article, was marked for identification, as  
6 of this date.)  
7 Q. Mr. Prince, please take a look at  
8 Plaintiff's Exhibit 7. You'll see it was  
9 written -- do you know Randy Kennedy, the  
10 reporter who wrote this?  
11 A. I know of him, yes.  
12 Q. From the New York Times?  
13 A. Yes.  
14 Q. It looks like this article was  
15 written December 6th, 2007, and that was on the  
16 occasion of your mid-career retrospective at the  
17 Guggenheim, is that right?  
18 A. Yes.  
19 Q. What was the name of that show?  
20 A. Spiritual America.  
21 Q. After the Brooke Shields photograph?  
22 A. Yes.  
23 Q. Now, that -- I should say  
24 rephotograph, that Brooke Shields image.  
25 The name, the title Spiritual

Page 69

1 Prince  
2 America, where did you get that from?  
3 A. It was an Alfred Stieglitz image  
4 that I saw at the Metropolitan Museum of Art.  
5 (Discussion off the record.)  
6 Q. You saw it where, at the  
7 Metropolitan Museum of Art? What did you say?  
8 A. Yes. Yes. That's where I saw the  
9 image.  
10 Q. The Stieglitz image?  
11 A. The Stieglitz image was titled.  
12 Q. Right.  
13 A. Spiritual America.  
14 Q. If you go down to the fourth  
15 paragraph do you see it starts with the words  
16 when Mr. Prince started reshooting ads, do you  
17 see that?  
18 A. Yes.  
19 MR. HAYES: I caution the witness,  
20 you can take your time to read the entire  
21 document that's put in front of you.  
22 Any documents put in front of you,  
23 just you take the time to read the entire  
24 document.  
25 Just so he knows.



| Page 70                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Page 72                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1 Prince</p> <p>2 BY MR. BROOKS:</p> <p>3 Q. That goes for any document I show</p> <p>4 you today.</p> <p>5 Now, this paragraph states when</p> <p>6 Mr. Prince started reshooting ads, first prosaic</p> <p>7 ones of fountain pens and furniture sets and</p> <p>8 then more traditionally striking ones like those</p> <p>9 from Marlboro, he said he was trying to get at</p> <p>10 something he could not get at by creating his</p> <p>11 own images. He once compared the effect to the</p> <p>12 funny way that, quote, certain records sound</p> <p>13 better when someone on the radio station plays</p> <p>14 them, than when we're home alone and play the</p> <p>15 same records ourselves, unquote.</p> <p>16 Do you recall making a statement to</p> <p>17 that effect?</p> <p>18 A. Yeah, it's a great statement.</p> <p>19 Q. But it's your statement?</p> <p>20 A. The quote?</p> <p>21 Q. Yes.</p> <p>22 A. Yes, that's a statement. Whether I</p> <p>23 made it to him, I don't recall.</p> <p>24 Q. And is it correct that before you</p> <p>25 started rephotographing the Marlboro commercials</p>                                                        | <p>1 Prince</p> <p>2 Q. The next paragraph states people</p> <p>3 might not have been looking at the time when his</p> <p>4 art was not highly sought, but as his reputation</p> <p>5 and prices for his work rose steeply, dash, one</p> <p>6 of the Marlboro pictures set an auction record</p> <p>7 for a photograph in 2005, comma, selling for</p> <p>8 1.2 million dollars, dash, they began to look,</p> <p>9 and Mr. Prince has spoken of receiving threats,</p> <p>10 comma, some legal and some more physical in</p> <p>11 nature, comma, from his unsuspecting lenders.</p> <p>12 He is said to have made a small payment in an</p> <p>13 out-of-court settlement with one photographer</p> <p>14 Garry Gross who took the original shot for one</p> <p>15 of Mr. Prince's most notorious early borrowings,</p> <p>16 an image of a young unclothed Brooke Shields.</p> <p>17 Mr. Prince declined to comment for this article,</p> <p>18 comma, saying in an e-mail message only, quote,</p> <p>19 I never associated advertisements with having an</p> <p>20 author, unquote.</p> <p>21 Now, is it true that you started</p> <p>22 receiving legal threats at some point?</p> <p>23 A. No, that's probably something that I</p> <p>24 just made up.</p> <p>25 Q. Did Garry Gross ever threaten to sue</p> |
| <p>Page 71</p> <p>1 Prince</p> <p>2 ads you did fountain pens and furniture sets?</p> <p>3 A. Yes.</p> <p>4 Q. The next paragraph it says,</p> <p>5 referring to you, But he was not circumspect</p> <p>6 about what it meant or how it would be viewed.</p> <p>7 In the 1992 discussion at the Whitney Museum of</p> <p>8 American Art he said of rustling the Marlboro</p> <p>9 aesthetic, colon, quote, no one was looking,</p> <p>10 this was a famous campaign, if you are going to</p> <p>11 steal something, you know, you go to the bank.</p> <p>12 Did you make a statement to that</p> <p>13 effect?</p> <p>14 A. I really can't say that, but it</p> <p>15 sounds like something I might have said at the</p> <p>16 time, yes.</p> <p>17 Q. Have you ever compared yourself to</p> <p>18 Willy Sutton?</p> <p>19 A. I believe that I was probably</p> <p>20 riffing on the Willy Sutton comment, and I was</p> <p>21 probably being a bit of a -- again, playing the</p> <p>22 part of kind of a punk rock artist at the time.</p> <p>23 Q. And just for the record, who is</p> <p>24 Willy Sutton, as far as you know?</p> <p>25 A. I believe he was a bank robber.</p> | <p>Page 73</p> <p>1 Prince</p> <p>2 you?</p> <p>3 A. No, he never did.</p> <p>4 Q. Did you ever reach an out-of-court</p> <p>5 settlement with Garry Gross?</p> <p>6 A. No.</p> <p>7 Q. You're positive?</p> <p>8 A. I'm positive.</p> <p>9 As far as I can tell, I'm positive.</p> <p>10 I actually -- in 1992 I guess that's what</p> <p>11 they're talking about, your last quote here,</p> <p>12 you're talking about -- I mean Mr. Kennedy is</p> <p>13 talking about a 1992 discussion at the Whitney,</p> <p>14 and I believe at that time I bought the rights</p> <p>15 to the image for \$2,000.</p> <p>16 Q. From Gary Gross?</p> <p>17 A. Yes.</p> <p>18 Q. Because he threatened to sue you?</p> <p>19 A. No. I was told by the Whitney that</p> <p>20 I -- in order to exhibit that image I made a</p> <p>21 concession, or they advised me that it would</p> <p>22 probably be best that -- and I believe I sort of</p> <p>23 reached out to him at the time.</p> <p>24 Because up until then, that image</p> <p>25 that I rephotographed from that pamphlet that he</p>                                                                                                                                                                                                                                |

| Page 74                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Page 76                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1 Prince<br/>2 had produced in 1983, I made one copy, an 8 by<br/>3 10, and I gave it away. And it wasn't until<br/>4 1992 that it came back into the limelight, and I<br/>5 think my attitude changed a bit and I was sort<br/>6 of willing to become more part of the process I<br/>7 suppose.<br/>8 Q. And at that time you made ten copies<br/>9 plus an artist proof?<br/>10 A. At the time there was ten copies and<br/>11 I believe two artist proofs, none of which I<br/>12 own.<br/>13 MR. HAYES: By the way, do you want<br/>14 to read into the record the following<br/>15 paragraph --<br/>16 (Clarification by reporter.)<br/>17 MR. HAYES: Do you want read into<br/>18 the record the following paragraph --<br/>19 MR. BROOKS: No, no, you can do that<br/>20 when you have redirect. I don't want to<br/>21 spend my time --<br/>22 MR. HAYES: Okay. Just read back --<br/>23 let me restate my statement because the<br/>24 court reporter didn't get it.<br/>25 The question is do you want to read</p>                                     | <p>1 Prince<br/>2 with products. And I believe I started taking<br/>3 them, rephotographing them because of those<br/>4 qualities.<br/>5 Q. Do you see further down on the<br/>6 second page of Exhibit 7 -- withdrawn.<br/>7 Have you ever heard of Jim Krantz,<br/>8 K-R-A-N-T-Z, before?<br/>9 A. No.<br/>10 Q. Well, he apparently was at least one<br/>11 of the people who did the ads for Marlboro.<br/>12 A. He did?<br/>13 Q. According to this article.<br/>14 And I'm just going to call your<br/>15 attention to what he is quoted as saying at the<br/>16 bottom of page 2. Fourth paragraph from the<br/>17 bottom it says, Mr. Krantz said he considered<br/>18 his ad work distinctive, comma, not simply the<br/>19 kind of anonymous commercial imagery that he<br/>20 feels Mr. Prince considers it to be.<br/>21 I take it you disagree with<br/>22 Mr. Krantz's statement?<br/>23 MR. HAYES: Well, objection on<br/>24 several grounds. First of all, we don't<br/>25 know that Mr. Krantz actually said this.</p> |
| <p>Page 75</p> <p>1 Prince<br/>2 in for context the following paragraph and<br/>3 its reference to the fair use exceptions<br/>4 to copyright law?<br/>5 BY MR. BROOKS:<br/>6 Q. Did you send an e-mail to this<br/>7 reporter saying, at the top of page 2 of the<br/>8 exhibit, I never associated advertisements with<br/>9 having an author?<br/>10 A. It sounds like something I would<br/>11 have said. Whether or not I sent an e-mail to<br/>12 him, I don't know. I don't recall.<br/>13 Q. And you -- that actually is<br/>14 something you believe, right?<br/>15 A. Yeah. Advertisements have no<br/>16 authors. They're art directed though, and I<br/>17 believe -- I believe that sincerely. I believe<br/>18 they're psychologically hopped-up images that<br/>19 are too good to be true. They look like they<br/>20 have a life of their own, and they look like a<br/>21 film still.<br/>22 I don't believe I've ever seen<br/>23 an author or an artist's signature on an<br/>24 advertisement.<br/>25 What I believe -- they're associated</p> | <p>Page 77</p> <p>1 Prince<br/>2 MR. BROOKS: Right.<br/>3 MR. HAYES: And what you're now<br/>4 doing is you're taking this entirely out<br/>5 of context without consenting, for<br/>6 example, to read the paragraph above that<br/>7 I asked you to read in to put the entire<br/>8 article into context.<br/>9 MS. BART: I think you should do<br/>10 that now for the record --<br/>11 MR. HAYES: That article -- that<br/>12 paragraph says Mr. Krantz --<br/>13 MR. BROOKS: Now, I -- listen, if<br/>14 you're going to enforce the seven-hour<br/>15 rule, I object to your saying anything<br/>16 other than objection, or direct him not to<br/>17 answer.<br/>18 MR. HAYES: I object to the witness<br/>19 being asked questions without it being put<br/>20 in context by reading appropriate parts of<br/>21 the rest of the article, which --<br/>22 MR. BROOKS: Fine.<br/>23 MR. HAYES: -- by the way, is two<br/>24 sentences --<br/>25 MR. BROOKS: Which you can read when</p>                                          |

Page 90

1 Prince  
2 A. Yes.  
3 Q. Do you remember when you switched,  
4 if you did, from Barbara Gladstone to Gagosian  
5 Gallery as your representative?  
6 A. I've never really switched.  
7 Q. Does Barbara Gladstone Gallery still  
8 represent you as well?  
9 A. She represents some of my work, yes.  
10 Q. Currently?  
11 A. Currently.  
12 Q. And does Gagosian Gallery represent  
13 some of your work?  
14 A. He has some of my work on  
15 consignment, yes.  
16 Q. Okay. But doesn't he do other --  
17 render other services for you, for instance,  
18 help sell your art?  
19 A. That's what they're -- both of them  
20 are supposed to do.  
21 Q. Market it?  
22 A. Yes.  
23 Q. Do you have a written contract with  
24 Gagosian Gallery?  
25 A. I have no contracts.

Page 91

1 Prince  
2 Q. It's just a handshake?  
3 A. There's not even a handshake.  
4 Q. When he sells -- withdrawn.  
5 When Gagosian Gallery sells your art  
6 for you do they keep a percentage and give you a  
7 percentage?  
8 A. Yes.  
9 Q. And is it always 60 percent that you  
10 get?  
11 A. No.  
12 Q. No?  
13 A. It's different. It depends on what  
14 work sells.  
15 Q. Okay. And is it negotiated on a  
16 work-by-work basis rather than in some  
17 underlying agreement?  
18 A. It's very fluid. It depends upon my  
19 mood at the time that it sells. I can fluctuate  
20 this, whatever you call it, a sliding scale. I  
21 don't know.  
22 Q. So whatever arrangement you have  
23 with Gagosian Gallery, it's just a set of oral  
24 understandings --  
25 A. Yes.

Page 92

1 Prince  
2 Q. -- is that right?  
3 No written contract?  
4 A. No written contract.  
5 Q. Now, turning to Plaintiff's  
6 Exhibit 8, the -- I guess the second question  
7 Mr. Appel asked you. I'll read it. One of the  
8 highlights of the summer for me was having the  
9 pleasure of seeing two of your controversial  
10 rephotography pieces from 1983 turning up in two  
11 excellent survey shows, semicolon, the  
12 subversively seductive, quote, Untitled  
13 Girlfriend on Motorbike, unquote, a  
14 44-by-64-inch ectocolor print of a scrawny nude  
15 biker girl awkwardly splayed on top of a Harley  
16 Davidson motorcycle in the Christine Bell  
17 curated, quote, Girls on Film, unquote, exhibit  
18 at Zwimmer, Z-W-I-M --  
19 MR. HAYES: Zwirner I believe it is.  
20 Q. -- Zwirner, Zwirner, Zwirner,  
21 Z-W-I-R-N-E-R, and Wirth, W-I-R-T-H, and the  
22 notorious, quote/unquote, Spiritual America, a  
23 24-by-20-inch ectocolor print after an original  
24 by Garry Gross of a prepubescent Brooke Shields  
25 emerging nude from a steamy bathtub in the

Page 93

1 Prince  
2 Donna-De-Salvo-curated, quote/unquote, landscape  
3 exhibit from the permanent collection at the  
4 Whitney Museum of Art.  
5 That was a mouthful, but --  
6 MR. HAYES: And it goes on more. Do  
7 you want to read it?  
8 MR. BROOKS: It does go on. It goes  
9 on for six pages. I'm not going to read  
10 it all.  
11 MR. HAYES: No, I mean that question  
12 went on or that statement went on more.  
13 MR. BROOKS: Yeah, I know. But this  
14 is the part I'm focusing on.  
15 BY MR. BROOKS:  
16 Q. The scrawny nude biker girl, is that  
17 the photo to the right of the text?  
18 There appears to be a photo called  
19 Untitled Girlfriend 1993?  
20 A. I don't know.  
21 Q. Okay. Fair enough.  
22 You don't remember rephotographing  
23 that image?  
24 Do you see the girl on the  
25 motorcycle?

Gagosian

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

PATRICK CARIOU,

Plaintiff,

Index No.:

vs.

08 CIV 11327 (DAB)

RICHARD PRINCE, GAGOSIAN

GALLERY, INC., LAWRENCE

GAGOSIAN, and RIZZOLI

INTERNATIONAL PUBLICATIONS,

INC.,

Defendants.

-----x

VIDEOTAPED DEPOSITION OF LAWRENCE GAGOSIAN

New York, New York

Thursday, October 8, 2009

Reported by:  
Bryan Nilsen, RPR  
JOB NO. 304041

| Page 22                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Page 24                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1 Gagosian</p> <p>2 A. I don't think so. Not that I can</p> <p>3 think of.</p> <p>4 Q. Does Gagosian Gallery represent some</p> <p>5 artists?</p> <p>6 A. Yes, we do.</p> <p>7 Q. And what services in general do you</p> <p>8 render for the artist that you represent?</p> <p>9 Not you --</p> <p>10 MS. BART: Objection.</p> <p>11 Q. -- but Gagosian Gallery Inc.?</p> <p>12 MS. BART: Objection, form.</p> <p>13 You can answer.</p> <p>14 A. We render the same services most</p> <p>15 galleries do. We sell the work, we display the</p> <p>16 work, we promote the work, we produce catalogs,</p> <p>17 we organize museum shows.</p> <p>18 Pretty much what -- you know, pretty</p> <p>19 typical dealer/artist relationships.</p> <p>20 Q. When you represent an artist is it</p> <p>21 normally an exclusive relationship?</p> <p>22 MS. BART: Objection, form.</p> <p>23 A. It varies.</p> <p>24 Q. Sometimes it is, sometimes it isn't?</p> <p>25 A. That's right.</p> | <p>1 Gagosian</p> <p>2 Mr. Prince, is that correct?</p> <p>3 A. That's correct.</p> <p>4 Q. Do you normally have written</p> <p>5 agreements with the artists you represent?</p> <p>6 A. No.</p> <p>7 Q. Do you ever?</p> <p>8 A. I think so. Like I'd have to, you</p> <p>9 know, scratch my head. But it's less -- it's</p> <p>10 not that frequent.</p> <p>11 Q. When did Gagosian Gallery Inc.</p> <p>12 commence representing Mr. Prince?</p> <p>13 A. We had our first exhibition I</p> <p>14 believe four years ago. You know, I could be</p> <p>15 off by a year. At that time we were not his</p> <p>16 exclusive or primary gallery, but we did an</p> <p>17 exhibition with him.</p> <p>18 Q. Are you his primary gallery now?</p> <p>19 A. Yes.</p> <p>20 Q. Where was the exhibition -- no one's</p> <p>21 going to hold you to this -- four years ago or</p> <p>22 whenever?</p> <p>23 A. It was in Los Angeles.</p> <p>24 Q. In Los Angeles.</p> <p>25 Was the Canal Zone show his first</p> |
| <p>Page 23</p> <p>1 Gagosian</p> <p>2 Q. With respect to Richard Prince is</p> <p>3 your -- do you represent Richard Prince, your</p> <p>4 gallery?</p> <p>5 A. We do.</p> <p>6 Q. Is that an exclusive --</p> <p>7 A. No.</p> <p>8 Q. -- representation?</p> <p>9 A. No.</p> <p>10 Q. Is he also represented by Barbara</p> <p>11 Gladstone Gallery?</p> <p>12 A. No, no.</p> <p>13 Q. Do you know who else he's</p> <p>14 represented by?</p> <p>15 A. He's represented -- I think he's</p> <p>16 still represented by Sadie Coles in London. I'm</p> <p>17 not sure what the status of the relationship is,</p> <p>18 but I believe he's still represented by Sadie</p> <p>19 Coles in London.</p> <p>20 Q. C-O-L-E-S?</p> <p>21 A. Yes.</p> <p>22 Q. Any others, to your knowledge?</p> <p>23 A. Not to my knowledge.</p> <p>24 Q. Now, I understand Gagosian Gallery</p> <p>25 Inc. does not have any written agreement with</p>                                                   | <p>Page 25</p> <p>1 Gagosian</p> <p>2 solo show for Gagosian Gallery Inc.?</p> <p>3 A. No.</p> <p>4 Q. Was it his first solo show in</p> <p>5 New York for the Gagosian Gallery Inc.?</p> <p>6 A. I believe so.</p> <p>7 Q. And when I say the Canal Zone show</p> <p>8 you know what I'm talking about?</p> <p>9 A. Yes, I do.</p> <p>10 Q. The one in November and December of</p> <p>11 last year?</p> <p>12 A. Right.</p> <p>13 Q. Do you have any financial</p> <p>14 arrangement with Mr. Prince?</p> <p>15 A. I sell his paintings.</p> <p>16 Q. At the inception of the relationship</p> <p>17 was any payment made to him by you or your</p> <p>18 gallery?</p> <p>19 MS. BART: Objection, form.</p> <p>20 A. You mean like a bonus or something?</p> <p>21 What do you mean by a payment?</p> <p>22 Q. You know, like a retainer payment --</p> <p>23 A. I don't think so.</p> <p>24 Q. -- payments --</p> <p>25 A. Not that I recall.</p>                                                        |