UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAFFLANE HOLDINGS LTD., and
ROBERT WYLDE,

Plaintiffs, 11 CIV 1679 (DLC)(MHD)

-against-

GAGOSIAN GALLERY, INC., and
CHARLES COWLES,

Defendants.

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GAGOSIAN GALLERY, INC.,

Third-Party Plaintiff,

-against-

CHARLES COWLES,

Third-Party Defendant.

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DEFENDANT/THIRD-PARTY DEFENDANT CHARLES COWLES' MEMORANDUM OF LAW IN OPPOSITION TO THE GAGOSIAN GALLERY, INC.'S MOTION FOR A DEFAULT JUDGMENT AND IN OPPOSITION TO THE PURPORTED DAMAGES BEING CLAIMED BY THE GAGOSIAN GALLERY INC. IN THE SAFFLANE INQUEST PROCEEDING

Defendant/Third-Party Defendant Charles Cowles ("Cowles") respectfully submits this memorandum of law in opposition to the motion of Defendant/Third-Party Plaintiff Gagosian Gallery, Inc. ("GGI") for a default judgment against Mr. Cowles and in opposition to the purported damages being claimed by GGI as the assignee of the claims of Plaintiffs Safflane Holdings Ltd. ("Safflane") and Robert Wylde ("Wylde") (collectively, the "Safflane Plaintiffs") against Mr. Cowles (the "Safflane Inquest Proceeding").

Preliminary Statement

As detailed below, GGI's motion for a default judgment and for damages pursuant to the Safflane Inquest Proceeding are barred by their own sworn factual admissions, Settlement Agreement, and established and controlling caselaw. GGI's motion for a default and motion to set damages pursuant to the Safflane Inquest Proceeding therefore should be denied in their entirety.

Statement of Facts

The relevant facts are set forth in the accompanying affidavit of Charles Cowles, sworn to February 6, 2012 (the "Cowles Aff.") and in the exhibit to the accompanying affirmation of Dean T. Cho, Esq., dated February 8, 2012 (the "Cho Aff") and those facts are set forth below and will not be repeated here.

ARGUMENT

POINT I

GGI's MOTION FOR A DEFAULT JUDGMENT SHOULD BE DENIED

GGI moves for a default judgment on its third-party complaint against Cowles pursuant to Fed. R. Civ. P. 55. (GGI Mem. 1).[1] That motion should be denied for the reasons set forth below.

Strong public policy favors resolving disputes on the merits. *Pecarsky v. Galaxiworld,* 249 F.3d 167, 172 (2d Cir. 2001); *American Alliance Ins. Co. Ltd. v. Eagle Ins. Co.,* 92 F.3d 57, 61 (2d Cir. 1996)(reversing denial of vacatur of default). Defaults

[1] Mr. Cowles' opposition to GGI's motion here should be treated as a motion to set aside the clerk's certificate of default pursuant to Fed. R. Civ. P. 55(c). *Meehan v. Snow,* 652 F.2d 274, 276 (2d Cir. 1981)("Even if a default had been entered, opposition to a motion for a default judgment can be treated as a motion to set aside the entry of a default despite the absence of a formal Rule 55(c) motion."

therefore are disfavored and "are reserved for rare occasions" when it is clear that "a litigant is confronted by an obstructionist adversary." *Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 96 (2d Cir. 1993)(reversing denial of motion to vacate Rule 55 default). A court's understandable desire "to dispose of cases that, in disregard of the rules, are not processed expeditiously" "should not overcome a court's duty to do justice in a particular case" and therefore does not justify denying a party his day in court except upon a serious showing of willful default. *Id.*

Accordingly, "when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party." *Id.*

The generous standard in favor of excusing defaults is particularly strong where a litigant – like Mr. Cowles here – is unrepresented by counsel. Unrepresented parties are to be "afforded extra leeway in meeting the procedural rules governing litigation, and trial judges must make some effort" to protect such parties from waiving their rights to be heard because of their lack of legal knowledge. *Id.*

In considering whether to enter a default judgment, a court should consider: (a) whether the default was willful; (b) whether the defaulting party has a meritorious defense; and (c) whether setting aside the default would unfairly prejudice the adversary. *Meehan,* 652 F.2d at 277 (reversing grant of default judgment). It bears emphasis that the standard for setting aside a Rule 55 default is "less rigorous that the 'excusable neglect' standard for setting aside a default judgment by motion pursuant to Rule 60(b)." *Id.* at 276.

A. Mr. Cowles' Failure To Timely Answer Was Not Willful

Here, as set forth in the accompanying affidavit of Charles Cowles, sworn to February 6, 2012 (the "Cowles Aff."), Mr. Cowles' failure to timely answer GGI's third-party complaint was not willful. To the contrary, Mr. Cowles' failure to timely answer resulted from: (a) his lack of legal sophistication; (b) serious financial problems that rendered him unable to retain a suitable attorney; (c) his lack of understanding of the serious repercussions – including the entry of an enormous monetary judgment against him – that could result from his failure to timely answer; (d) his preoccupation with the failing health of his 93 year old mother, Jan Cowles; and (e) Mr. Cowles' own health issues including, *inter alia*, his being treated for memory problems. (Cowles Aff. ¶¶ 3-4).

Mr. Cowles' failure to timely answer therefore was not prompted by "bad faith," but rather resulted from his lack of understanding, preoccupation and confusion, which – at most – constituted carelessness or negligence by Mr. Cowles. Such conduct lacks the willfulness necessary to warrant the entry of a default judgment. *American Alliance,* 92 F.3d at 61 ("we see no reason to expand this Court's willfulness standard to include careless or negligent errors in the default judgment context").

B. Mr. Cowles Has Meritorious Defenses To GGI's Claim

Under controlling Second Circuit caselaw, a defense will be deemed meritorious if it gives "the factfinder some determination to make." *American Alliance,* 92 F.3d at 61. Here, GGI's motion for a default should be denied as Mr. Cowles has a meritorious and complete defense as a matter of law based on GGI's own admissions. GGI's own moving brief states that GGI "seeks default judgment against Cowles for indemnification" pursuant to an "implied duty to indemnify." (GGI Mem. 1, 4).

1. GGI's Indemnification Claim Is Barred By Its Culpable Conduct

A defendant who has settled – like GGI here – and seeks what it characterizes as indemnification must show that "it may not be held responsible **in any degree**" with respect to the claims settled "in order to demonstrate its entitlement to recovery under a theory of indemnification." *Westport Marina, Inc. v. Boulay,* 2010 U.S. Dist. Lexis 113761 at *18 (E.D.N.Y. 2010)(granting summary judgment dismissing indemnity claim)(citations omitted; emphasis added), *citing Rosado v. Proctor & Schwartz, Inc.,* 66 N.Y.2d, 21, 24-25 (1985)(affirming dismissal of implied indemnification claim). The party seeking indemnification bears the burden of proving that it was not responsible in any way, shape or manner. *Rosado,* 66 N.Y.2d at 24-25.

The reason a party seeking implied indemnification – like GGI – must demonstrate that it may not be held responsible in any degree goes to the basic distinction between indemnification and contribution. Under New York law, the right to contribution may arise between joint tortfeasors,[2] while the right to implied indemnification arises out of vicarious liability. *Westport Marina,* 2010 U.S. Dist. Lexis 113761 at *13. Accordingly, "a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the common law indemnity doctrine." *Id.*

Here, the deposition testimony of GGI's own employee, John Good, confirms that GGI richly shares responsibility with Mr. Cowles for the events resulting in the instant action. That testimony confirms GGI plainly knew and/or should have known of the Metropolitan Museum of Art's ownership interest in The Innocent Eye Test (the "Tansey

[2] GGI does not seek – and cannot obtain – judgment on a contribution theory as contribution is not available under New York law to a settling party under N.Y. General Obligations Law § 15-108. GGI implicitly concedes this by not seeking a default judgment on a contribution claim. *Rosado,* 66 N.Y.2d at 24 (under § 15-108, "a settling tort-feasor can neither obtain, nor be liable for, a contribution claim").

Painting") and that Mr. Cowles therefore did not have the right to sell that work, but turned a willful blind eye those facts and GGI's own admitted doubts about Mr. Cowles' right to sell the Tansey Painting. Excerpts of Mr. Good's deposition testimony (annexed as Ex. A to the accompanying affirmation of Dean T. Cho, Esq., dated February 8, 2012 (the "Cho Aff.")) confirm:

A. GGI represented Mark Tansey, the artist who painted The Innocent Eye Test, beginning around 2003 and Mr. Good was the person at GGI who was responsible for dealing with Mr. Tansey, as GGI's gallery liaison with the artist (Good Dep. 25);

B. GGI kept books on Mr. Tansey's work on file, along with letters and other archival materials relating to Mr. Tansey (Good Dep. 27);

C. Mr. Good would do research on the artists he represented at GGI, such as Mr. Tansey, and Mr. Good would "typically ask" his assistant to provide materials to him that relate to art works that Mr. Good would be selling (Good Dep. 29-31);

D. Mr. Good had seen the Tansey Painting on display at the Metropolitan Museum of Art in 2004 (years before Mr. Cowles sought to sell it) and knew it at the time to be a Mark Tansey painting, but never inquired as to how the Tansey Painting had come to be exhibited at the museum (Good Dep. 31-33);

E. **Mr. Good admitted having serious doubts about Mr. Cowles' ownership and right to sell the Tansey Painting**. Indeed, Mr. Good

described his initial conversation with Mr. Cowles[3] about selling the Tansey Painting as follows:

> "He [Cowles] said, I want to sell this painting, The Innocent Eye Test. **And I [Good] said, Oh, but that painting belongs to The Metropolitan Museum of Art**. And he said, No it doesn't, it belongs to me. **And I said, Well, how can that be? It's in all the books as promised gift to Metropolitan Museum of Art.** And he said, Well, I gave it to them and had a **contract** with them that stipulated that if they didn't hang it, it would be returned to me and I would be the rightful owner. Or words to that effect."

(Good Dep. 49-50)(emphasis added).

F. Mr. Good further admitted to having continuing doubts about Mr. Cowles' right to sell the Tansey Painting, conceding that later in that same conversation with Mr. Cowles, "**I said something to the effect of, Are you sure that you have the right to sell this?** And he said, Yes, you can come down and see it, it's hanging in my loft." (Good Dep. 50)(emphasis added);

G. Despite his admitted doubts about Mr. Cowles' right to sell the painting, Mr. Good admittedly never asked to see the purported contract between Mr. Cowles and the Metropolitan Museum of Art that allegedly was the basis of Mr. Cowles' ownership claim, was not curious about the purported contract, and had no interest in seeing the purported contract, even though the Tansey Painting was worth millions of dollars and thus dwarfed any *purported* prior transactions between GGI and Mr. Cowles which were all under $25,000.[4] (Good Dep. 51-52);

[3] Mr. Good testified that this initial conversation was held in June or July 2009. (Good Dep. 54).
[4] Mr. Cowles did not have any prior business dealings with GGI. This absence of prior dealings is underscored by Mr. Good's subsequent testimony at his deposition which makes plain that he had no

H. Mr. Good promptly told Larry Gagosian (the owner of GGI) about his conversation with Mr. Cowles and that "**the understanding was that we all thought the painting was going to The Met and Charlie [Mr. Cowles] stated that it was his to sell and that The Met no longer owned it because of their contract.**" (Good Dep. 55);

I. Mr. Good further admitted that -- despite his and Mr. Gagosian's concerns and understanding that the Met owned the painting – he is unaware of any attempt whatsoever by Mr. Gagosian, himself or anyone else to contact any third-party to inquire as to whether the Metropolitan Museum of Art had given back the painting to Mr. Cowles or to research same. (Good Dep. 55-56);

J. When Mr. Good did have the opportunity to inspect the painting at Mr. Cowles' gallery, Mr. Good did not look at the back of the painting or otherwise look for any shipping tags or shipping documentation on the back of the painting, even though he often looks at the backs of paintings. (Good Dep. 58-59). Mr. Good claimed he did not notice whether the bottom of the painting had a tag indicating that the painting was a promised gift to the Metropolitan Museum of Art, although he concedes there "could have been" such a tag. (Good Dep. 59).

K. Upon inspecting the painting, Mr. Good again failed to ask Mr. Cowles for documentation to show that Mr. Cowles had the right to sell it. (Good Dep. 59-60);

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personal knowledge of any prior dealings between Mr. Cowles and GGI and could not specify anyone at GGI would allegedly had worked with Mr. Cowles previously. (Good Dep. 84-91).

L. Despite GGI's failure to take any steps to confirm Mr. Cowles' right to sell the Painting, **Mr. Good told Mr. Wylde that Mr. Cowles had regained ownership of the Painting pursuant to an agreement with the Metropolitan Museum of Art and never told Mr. Wylde, in words or substance, to check out the Painting's provenance on his own**. (Good Dep. 70-71).

M. To rationalize GGI's failure to do anything to followup on its own admitted concern about Mr. Cowles' right to sell the Painting, Mr. Good testified that he and Mr. Gagosian trusted Mr. Cowles because "we had known him for thirty years as an honest broker in the business and we had no reason to doubt his word." (Good Dep. 84). However, Mr. Good thereafter admitted that he had no prior business dealings with Mr. Cowles and proved incapable of providing any details whatsoever to confirm any such relationship or the existence of such purported trust between GGI personnel and Mr. Cowles. (Good Dep. 84-91); and

N. Mr. Good testified that in GGI's business, one does not take representations made at face value, stating: "I believe we all operate under the terms of caveat emptor . . . ." (Good Dep. 70).

The foregoing samples of Mr. Good's admissions confirm that GGI affirmatively led the Safflane Plaintiffs to believe that Mr. Cowles had the right to sell the Tansey Painting, in willful disregard of GGI's own admitted concerns about Mr. Cowles' right to do so. GGI's conduct therefore was at best negligent and at worst fraudulent in nature. Mr. Good's sworn admissions preclude any showing by GGI that it lacked any culpability

or responsibility in the transactions giving rise to this lawsuit. Accordingly, GGI's indemnification claim fails as a matter of law and should be dismissed.

2. Questions Of Fact Exist As To The Apportionment Of GGI's Purported Indemnification Damages

"A party which has entered into a settlement and then seeks indemnification bears the burden of showing that it should be indemnified for that payment." *The City of N.Y. v. Veatch,* 1997 WL 624985 at * 10 (S.D.N.Y. 1997).

Here, the settlement agreement between the Safflane Plaintiffs and GGI does not purport to apportion the lump sum settlement payment between the Safflane Plaintiffs' claims based on the Tansey Painting (which implicates Mr. Cowles) and the Prince Painting (which Mr. Cowles had nothing to do with). Moreover, GGI cannot point to anything in the record indicating that any effort was made to account for the disparity in the relative strength of the Safflane Plaintiffs' claims based on the Tansey Painting versus the Prince Painting. For example, while GGI argued that it was an agent for a known principal in opposing the Tansy claim, GGI failed to advance any coherent defense to the Prince claim.

Transparently attempting to gloss over those defects in its purported damages claim, GGI advances an arbitrary and self-serving split between its alleged losses relating to the Tansey Painting and the Prince Painting based on nothing more than a comparison of the relative damages alleged by the Safflane Plaintiffs with respect to the two paintings. (GGI Mem. 8 fn. 1). Moreover, in seeking indemnification for its legal bills to the tune of $703,217.55, it bears emphasis that the legal bills submitted by GGI's counsel are extremely vague and are lacking in detail, manifesting a broad failure to reflect any effort to separate the purported work done by GGI's counsel with respect to the Tansey

Painting (which implicates Mr. Cowles) versus the Prince Painting (which Mr. Cowles admittedly had nothing to do with).

The foregoing makes plain that GGI has failed to meet its burden of showing that it should be indemnified for the payment it seeks.[5] Mr. Cowles therefore has a meritorious defense to GGI's indemnification claim on this ground as well.

3. Issues Of Fact Exist As To GGI's Purported Agency Thus Giving Rise To A Meritorious Defense To GGI's Indemnification Claim

As made plain by GGI's brief in support of its motion for a default judgment, GGI premises its indemnification claim on the purported existence of a principal-agent relationship between Mr. Cowles and GGI. (GGI Mem. 4-5). Mr. Cowles has a meritorious defense to GGI's indemnification claim because, at minimum, issues of fact exist as to whether GGI was acting as Mr. Cowles' agent in selling the Painting to Safflane, as confirmed by Mr. Good's following sworn deposition testimony:

A. When GGI acts as an agent for a seller of artwork, it "usually" has a written agreement with the seller. (Good Dep. 48);

B. GGI did not have a written agency agreement with Mr. Cowles. (Good Dep. 48-49);

C. Mr. Good does not recall ever mentioning the word "commission" or discussing with Mr. Cowles any commission to be made payable to GGI for selling the Painting and does not recall any agreement with Mr. Cowles ever being reached as to any commission to be payable to GGI. (Good Dep. 60-63);

[5] GGI's lack of entitlement to a default judgment and its failure to properly establish its purported damages also plainly obviates its request for pre-judgment and post-judgment interest.

D. Mr. Good does not recall ever telling Mr. Wylde that he was acting as an agent for Mr. Cowles in the sale of the Painting. (Good Dep. 93);

E. Mr. Good does not recall ever discussing with Mr. Cowles, verbally or in writing, that he was selling the Painting as Mr. Cowles' agent. (Good Dep. 104-106);

F. Mr. Good testified that "At some point **we** offered him [Mr. Cowles] three million for both paintings, and it was implicit that he was getting two million for The Innocent Eye Test and a million for the Girl in the Mirror." (Good Dep. 97); and

G. Mr. Good testified that in dealing with Mr. Wylde, "the concept I like to employ in terms of sales is enlightened mutual self-interest. For me, it was good for me to sell him paintings from the Gagosian Gallery whether they were Tanseys or other quality artwork." (Good Dep. 65).

Based on the foregoing admissions by Mr. Good, a trier of fact could easily conclude that Mr. Good and GGI were not acting as agents for Mr. Cowles in selling the Painting, but rather were acting on GGI's own account. The apparent issues of fact concerning whether the essential agency relationship element of GGI's indemnification claim exists constitutes a matter to be decided by the trier of fact. Mr. Cowles therefore has a meritorious defense on this agency issue as to GGI's indemnification claim. *American Alliance,* 92 F.3d at 61 (in the default context, a defense will be deemed meritorious if it gives "the factfinder some determination to make").

In light of Mr. Cowles' foregoing meritorious defenses, GGI's motion for a default judgment should be denied.

C. GGI Would Not Be Prejudiced By The Denial Of Its Motion For A Default

In its motion papers, GGI does not and cannot point to any real prejudice it would suffer if its motion for a default judgment is denied.

Accordingly, given the absence of willfulness underlying Mr. Cowles' failure to timely answer GGI's third-party complaint, the existence of meritorious defenses possessed by Mr. Cowles' to GGI's indemnification claim, and GGI's lack of prejudice if its motion for a default judgment is denied, GGI's motion should be denied and Mr. Cowles should be afforded his day in court.

POINT II

GGI IS NOT ENTITLED TO RECOVER ANY DAMAGES IN THE SAFFLANE INQUEST PROCEEDING AS A MATTER OF LAW

In the Safflane Inquest Proceeding, GGI -- as assignee of the Safflane Plaintiffs' claims against Mr. Cowles -- seeks to recover damages on those claims against Mr. Cowles pursuant to the default judgment entered on or about October 14, 2011 against Mr. Cowles on the Safflane Plaintiffs' claims.

However, the damages being sought by GGI in the Safflane Inquest Proceeding are barred, as a matter of law, pursuant to the doctrine of accord and satisfaction.

> An accord and satisfaction is a method of discharging a contract **or settling a claim arising from a contract or a tort by substituting for such contract or claim an agreement for the satisfaction thereof**. . . ." *City of Amsterdam v. Daniel Goldreyer, Ltd.,* 882 F. Supp. 1273, 1279-80 (E.D.N.Y. 1995). As its name suggests, **an accord and satisfaction has two components: (1) the accord, which is the agreement that a stipulated performance will be accepted in lieu of an existing claim; and (2) the satisfaction, which is the performance of the substituted agreement.** *Denburg v. Parker Chapin Flattau & Klimpl,* 82 N.Y.2d 375,

> 383-84, 624 N.E.2d 995, 604 N.Y.S.2d 900 (1993) [*8] (citations omitted). An accord may be executory in that there is an agreement to perform in the future. *Albee Truck Inc. v. Halpin Fire Equip. Inc.,* 206 A.D.2d 789, 615 N.Y.S.2d 118 (3d Dept. 1994).

Petrello v. White, 2007 U.S. Dist. LEXIS 57489 at *7-8 (E.D.N.Y. 2007).

Here, the Settlement Agreement entered into between the Safflane Plaintiffs and GGI (Cho Aff. Ex. B), plainly constituted an accord and satisfaction of **all** of Safflane's and Wylde's claims in this action, ***including those claims asserted by the Safflane Plaintiffs against Mr. Cowles*****,** as the Safflane Plaintiffs expressly agreed to accept the stipulated payment and other agreed consideration from GGI under the Settlement Agreement in exchange for its agreement to:

> **fully and finally settle all claims, causes of actions, disputes and controversies arising out of or relating to the transactions, occurrences and allegations set forth in *Safflane Holdings Ltd. and Robert Wylde v. Gagosian Gallery, Inc.*, No. 11-CV-1679 (the "Safflane Action")** which asserts claims relating to a painting by Mark Tansey, entitled "The Innocent Eye Test" (the "Tansey Painting") and a painting by Richard Prince, entitled "The Millionaire Nurse" . . . .[6] (Emphasis added).

The foregoing text confirms that it was the intention and agreement of the Settlement Agreement's signatories to globally, fully and finally settle and resolve all claims brought in this action, **including all of the Safflane Plaintiffs' claims against Mr. Cowles**, as the those claims against Mr. Cowles clearly arise out of or relate to the transactions, occurrences and allegations raised in this action and relate to the Tansey Painting. Moreover, Section 8 of the Settlement Agreement expressly provided that all of the Safflane Plaintiffs' claims against Mr. Cowles were to be extinguished pursuant to the settlement agreement, stating:

[6] The foregoing text appears in the second paragraph of the Settlement Agreement.

> Immediately upon payment by the Gallery to Safflane of the full amount of Payment No. 1, counsel for the Wylde Parties shall file with the Court within one (1) business day thereof a Stipulation of Dismissal with prejudice in the form annexed hereto as Exhibit 8 for the Safflane Action, ***and*** **any and all of plaintiffs' claims shall be discontinued with prejudice** . . . . (Emphasis added).

That all of the Safflane Plaintiffs' claims against Mr. Cowles were to be extinguished pursuant to the Safflane Plaintiffs' settlement with GGI is confirmed by GGI's own memorandum of law, which concedes that "The amount paid by Gagosian Gallery under the Settlement Agreement to the Safflane Plaintiffs **serves to compensate the Safflane Plaintiffs for the damages that it suffered due to Cowles's misrepresentations** regarding his supposed title to the Tansey Painting." (GGI Mem. 8)(emphasis added).

The undisputed fact that GGI has paid the Safflane Plaintiffs all of the settlement monies called for under the Settlement Agreement confirms the completion of the accord and satisfaction. This accord and satisfaction means that all of the Safflane Plaintiffs' claims in this action – including their claims against Mr. Cowles – were fully satisfied and therefore dismissed with prejudice and extinguished as a matter of law, so as to be no longer actionable.

The assignment of the Safflane Plaintiffs' fully satisfied claims, against Mr. Cowles, to GGI does not revive those claims or render them actionable by GGI for at least two reasons. First, it is a basic proposition that a party may not convey or assign any greater rights to another than what the rights the assigning party actually possesses at the time of such conveyance or assignment. Here, the Settlement Agreement confirms that the extinguishment of the Safflane Plaintiffs' claims against Mr. Cowles occurred **BEFORE** those claims were assigned to GGI. Under Section 8 of the Settlement

Agreement, it was agreed that "**any and all of plaintiffs' claims shall be discontinued with prejudice**" within one (1) business day following payment of **Settlement Payment No. 1** by GGI to the Safflane Plaintiffs called for under the Settlement Agreement. Under Section 12 of the Settlement Agreement, the Safflane Plaintiffs' assignment of their claims against Mr. Cowles to GGI was only to occur "within seven business days of Safflane's full and irrevocable **Settlement Payment No. 2**" from GGI. **Thus, the Settlement Agreement itself makes plain that the Safflane Plaintiffs' claims against Mr. Cowles were already extinguished by the time those claims were assigned to GGI**. **Accordingly, the Safflane Plaintiffs could not assign any actionable claims or damages against Mr. Cowles to GGI as a matter of law**.

Second, because the Safflane Plaintiffs' claims against Mr. Cowles must be deemed fully satisfied and settled pursuant to the Settlement Agreement's terms, any recovery by GGI on those same claims would essentially amount to an impermissible double recovery on the Safflane Plaintiffs' claims against Mr. Cowles.

GGI's request for damages in the Safflane Inquest Proceeding should also be rejected because the settlement agreement between the Safflane Plaintiffs and GGI completely fails to apportion the lump sum settlement payment between the Safflane Plaintiffs' claims based on the Tansey Painting (which implicates Mr. Cowles) and the Prince Painting (which Mr. Cowles had nothing to do with) and for the other reasons set forth in Point I(B)(2) above.

CONCLUSION

For the reasons set forth above, GGI's motion for a default and motion to set damages pursuant to the Safflane Inquest Proceeding therefore should be denied in their entirety.

Dated: February 8, 2012

Respectfully submitted,

LAW OFFICES OF DEAN T. CHO, LLC

/s/
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