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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAFFLANE HOLDINGS LTD., and
ROBERT WYLDE,

Plaintiffs,

Case No.: 11 CIV 1679 (DLC)(MHD)

-against-

GAGOSIAN GALLERY, INC.,

Defendant.

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GAGOSIAN GALLERY, INC.,

Third-Party Plaintiffs,

-against-

CHARLES COWLES,

Third-Party Defendant.

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DEFENDANT/THIRD-PARTY PLAINTIFF'S REPLY MEMORANDUM OF LAW IN RESPONSE TO CHARLES COWLES' OPPOSITION TO MOTION FOR DEFAULT JUDGMENT AND TO THE DAMAGES DEMONSTRATED BY GAGOSIAN GALLERY, INC. IN THE SAFFLANE INQUEST PROCEEDING

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PRELIMINARY STATEMENT

After Charles Cowles ("Cowles") was sued by both Robert Wylde and Safflane Holdings Ltd. (the "Safflane Plaintiffs") and Third-Party Plaintiff, Gagosian Gallery, Inc. ("Gagosian") for his admittedly unauthorized sale of his mother's painting by Mark Tansey, entitled "The Innocent Eye Test" (the "Tansey Painting"), he deliberately chose not to answer or otherwise respond to any of the claims or motions filed against him despite having notice of them. Now, months later and for the first time, Cowles has decided to appear and claims that Gagosian is not entitled to a default judgment against him, and that its damages in the Safflane inquest proceeding (the "Safflane Inquest Proceeding") should be zero. As discussed below, Cowles' arguments are baseless and should be rejected.

As an initial matter, the Court should summarily reject that portion of Cowles' submission that seeks to oppose Gagosian's Motion for Default Judgment (which is the large majority of his submission) as untimely and unauthorized by the Court. While the Court's recent Order of February 1, 2012 extended Cowles' deadline to respond to Gagosian's papers demonstrating its damages in the Safflane Inquest Proceeding, the Court *did not* extend Cowles' deadline to respond to Gagosian's Motion for Default Judgment against him – which Cowles concedes he had notice of for many months.

Even if the Court were to consider Cowles' unauthorized submission, it would be of no avail, because the arguments he makes in an effort to avoid the consequences of his willful default are meritless. Recognizing that courts will not overturn defaults where they are "willful," Cowles claims that he did not willfully default, making various specious claims to excuse his failure to respond, such as his supposed inability to understand the repercussions of not responding to the complaint and his alleged preoccupation with his mother's ailing health. None of his assertions, however, are plausible, and Cowles is clearly employing the kitchen-sink

approach, coming up with a plethora of improbable excuses hoping one sticks. However, even if the Court were to accept these unsupported claims – and it should not – they are not recognized bases as a matter of law for finding a default not to be "willful." Given this, and the fact that Cowles does not – and cannot – deny that he received notice of Gagosian's claims against him and made the decision to ignore them, he simply cannot credibly contest that his default was "willful."

Cowles' assertion that he has meritorious defenses fares no better. At the outset of this litigation, Cowles admitted that "the whole dispute" relating to the Tansey Painting was "his mistake." Now, in an attempt to manufacture a meritorious defense, he claims that Gagosian was at fault as well, and thus not entitled to indemnification from him. That assertion is absolutely meritless. Indeed, Cowles' entire argument is that Gagosian is to blame for believing the lies he told Gagosian. It is respectfully submitted that such a defense cannot stand.

Cowles also claims that there is a question as to whether Gagosian was in fact his agent and thus entitled to indemnification, but that argument too is baseless given the clear evidence that he consigned the Tansey Painting to Gagosian for sale to the Safflane Plaintiffs, thereby creating a principal-agent relationship. Moreover, his claim that Gagosian set forth an "arbitrary and self-serving" split between its alleged losses relating to the Tansey Painting and another painting at issue in the Safflane proceedings is simply wrong since the apportionment set forth by Gagosian in its memorandum in support for its Motion for Default Judgment provides an appropriate and logical basis from which to determine its damages.

As for his response to Gagosian's demonstration of damages in the Safflane Inquest Proceeding, Cowles has not disputed the $6.5 million valuation for the Tansey Painting proffered by Gagosian's expert. As such, that valuation must be deemed admitted.

Instead, Cowles improperly attempts to argue that he is not liable at all. However, given his unqualified admission that this was entirely his fault, that assertion must be rejected because liability has already been deemed established, and the matter was referred to this Court solely for an Inquest to determine Gagosian's damages. Moreover, Cowles' assertion that he is not liable is based on the truly remarkable argument that the release given by the Safflane Plaintiffs to Gagosian in their settlement agreement (the "Settlement Agreement") also released Cowles, and therefore he owes Gagosian nothing. That assertion is simply ludicrous, as Cowles was not a party to the Settlement Agreement, and even a cursory review of its terms demonstrates that the parties clearly did not intend – and in fact did not – release Cowles from the claims that the Safflane Plaintiffs had brought against him.

For these reasons and those discussed below, Gagosian respectfully requests that the Court (i) reject Cowles' opposition papers, dated February 8, 2012 (the "Opposition Papers" or "Opp. Papers"), to the extent they address Gagosian's Motion for Default Judgment, (ii) grant Gagosian's Motion for Default Judgment, and (iii) award damages to Gagosian in the Safflane Inquest Proceeding, as set forth in Gagosian's Inquest Declaration.

FACTS AND PROCEDURAL HISTORY

The relevant facts and procedural history are set forth in detail in Gagosian's Memorandum of Law in Support of the Motion for Default Judgment, dated December 5, 2011 (the "Opening Memorandum"), and in the declaration Gagosian submitted in the Safflane Inquest Proceeding.[1] Since the filing of these documents, however, several pertinent procedural matters have occurred and are briefly detailed below.

[1] Gagosian also submitted the Affidavit of Dara G. Hammerman, attaching various exhibits, in support of its Motion for Default Judgment against Cowles, on December 5, 2011 (herein referred to as "Judgment Aff.") (Docket Entry 83). On January 19, 2012, Gagosian submitted the Declaration of Dara G. Hammerman and supporting exhibits in the Safflane Inquest Proceeding (herein referred to as the

First, Cowles' deadline to respond to Gagosian's Motion for Default Judgment against him was initially December 19, 2011, and was later extended by the Court to January 26, 2012. *See* Magistrate Dolinger's Orders, dated December 7, 2011 and January 9, 2012 (docket entries 86 and 88). Cowles, however, ignored both of these deadlines.

Second, on January 9, 2012, during the Court's pre-inquest conference in the Safflane Inquest Proceeding – which Cowles attended – the Court set January 26, 2011 as Cowles' deadline to respond to Gagosian's papers in the Safflane Inquest Proceeding. *See* Magistrate Dolinger's Order, dated January 9, 2012 (Docket Entry 88); Court Transcript, dated January 9, 2012 at pp. 6, 11-12. Despite being present when the Court issued this deadline and on full notice, Cowles again failed to file a response. Gagosian, however, timely met its deadline, diligently serving its papers demonstrating its damages in the Safflane Inquest Proceeding on Cowles by Federal Express overnight mail.

On January 30, 2012, after three separate unsuccessful attempts, Federal Express returned the papers Gagosian had served on Cowles in the Safflane Inquest Proceeding. The next day, Gagosian wrote to the Court explaining the difficulties it had serving its papers on Cowles in the Safflane Inquest Proceeding, and noting that it had mailed Cowles another set of those papers via First Class U.S. Mail. In response, the Court issued an Endorsed Order, dated February 1, 2012, holding that "[s]ince Gagosian has served the Safflane papers on Cowles by regular mail, we will allow Mr. Cowles until February 8, 2012 to serve and file responding papers." *See* Docket Entry 99.

"Inquest Declaration") (Docket Entry 95). Today, Gagosian submitted the Declaration of Dara G. Hammerman in Support of Defendant/Third-Party Plaintiff's Reply Memorandum of Law in Response to Charles Cowles' Opposition to Motion for Default Judgment and to Damages Demonstrated by Gagosian Gallery, Inc. in the Safflane Inquest Proceeding, and supporting exhibits (herein referred to as the "Reply Dec.").

On February 8, 2012, Cowles submitted Opposition Papers in the Safflane Inquest Proceeding. Those papers, however, also included an opposition to Gagosian's Motion for Default Judgment, even though the Court's February 1, 2012 Order did *not* permit him to do so and he did not seek leave of the Court to file such papers – papers that were due over two months ago. Thus, for the Court's convenience, Gagosian has combined both of its replies in the two proceedings into this reply memorandum.

ARGUMENT

I. Cowles' Response To Gagosian's Motion For Default Judgment Should Be Rejected Since His Time To Respond Has Passed And He Was Not Authorized By the Court to Submit A Response

Federal Rule of Civil Procedure 55(b)(2) provides that where a party fails to plead or otherwise defend against a complaint, and a default is entered, a default judgment should be entered against such a party. Cowles not only failed to plead or otherwise defend the claims filed against him by Gagosian on July 15, 2011, but he also ignored his original deadline to respond to Gagosian's Motion for Default Judgment of December 19, 2011, as well as the extended deadline granted to him by the Court of January 26, 2012.[2] Therefore, by law, a default judgment should be entered against Cowles.

Despite his deadline having passed, Cowles – without permission of the Court – included an opposition to Gagosian's Motion for Default Judgment in the papers he was allowed, pursuant to the Court's February 1, 2012 Endorsed Order, to submit in the Safflane Inquest Proceeding. Since the Court extended Cowles' deadline to respond to Gagosian's papers it filed in the Safflane Inquest Proceeding, but did *not* extend Cowles' deadline to respond to Gagosian's

[2] It is worth noting that the Court extended Cowles' time to respond to Gagosian's Motion for Default Judgment without any written request from Cowles. His final deadline to submit an opposition – which he clearly was aware of given that he was present in Court when the extension was granted – was January 26, 2012.

motion for entry of a default judgment against him,[3] by unilaterally providing a response in his papers opposing Gagosian's damages in the Safflane Inquest Proceeding, Cowles has improperly sought to exploit the opportunity given to him by the Court in that proceeding. Cowles should not be permitted to do so, and thus, his opposition to Gagosian's Motion for Default Judgment should be rejected.

II. Even if the Court Considers Cowles' Response to the Motion for Default Judgment, A Default Judgment Should be Granted Because Cowles' Default Was Willful, Cowles Lacks A Meritorious Defense And Gagosian Will Be Prejudiced

As demonstrated in Gagosian's Opening Memorandum, in deciding whether to grant a default judgment or set aside an entry of a default, a court must consider the following factors: (1) whether the default was willful, (2) whether a meritorious defense is presented, and (3) whether setting aside the default would prejudice the adversary. *Saleh v. Francesco*, 2011 U.S. Dist. Lexis 130362, at *7 (S.D.N.Y. Nov. 10, 2011).

In his Opposition Papers, Cowles argues that Gagosian's Motion for Default Judgment against him should be denied because he purportedly did not "willfully" default, he has meritorious defenses and Gagosian will not be prejudiced if the default against him is set aside. As discussed below, even if the Court chooses to consider Cowles' unauthorized response – which it should not – the Court nevertheless must still grant Gagosian's Motion for Default, because Cowles' own papers demonstrate that he in fact willfully defaulted, lacks any meritorious defense, and Gagosian will be prejudiced if the default is set aside.

[3] The Court extended Cowles' deadline to respond in the Safflane Inquest Proceeding because it presumably wanted to afford Cowles with one last opportunity to submit papers once he received the mailed copy of Gagosian's papers supporting its damages, which had been returned by Federal Express. That was not the case with Gagosian's Motion for Default Judgment, which Cowles admittedly had received months earlier.

A. Cowles Willfully Defaulted

The Second Circuit Court of Appeals has clearly held that "[a] default should not be set aside when it is found to be willful." *Action S.A. v. Marc Rich & Co.*, 951 F.2d 504, 507 (2d Cir. 1991). "[W]illfulness is preeminent, and a willful default will not normally be set aside." *SEC v. Breed*, 2004 U.S. Dist. LEXIS 16106, at *37 (S.D.N.Y. Aug. 13, 2004).

Here, by Cowles' own admission, his default clearly was willful. Indeed, in his Opposition Papers, Cowles does not deny that (i) he had notice of Gagosian's claims against him, (ii) received all of the papers filed by Gagosian in support of its claims (including the complaint and Motion for Default Judgment filed months ago), and (iii) consciously chose to ignore this proceeding, by failing to timely file a notice of appearance, answer or otherwise respond to the complaint or the Motion for Default Judgment. *See generally* Affidavit of Charles Cowles, dated February 6, 2012 ("Cowles Affidavit"). By failing to do so, Cowles is deemed to have admitted these facts. *Rahiym-Amir v. Bellamy of Corinth, Inc.*, 2007 U.S. Dist. LEXIS 94081, at *5 (N.D.N.Y. Dec. 26, 2007) (holding that defendant conceded liability by failing to respond to the complaint against it). It is, thus, difficult to contemplate a clearer case of a willful default. *See Estate of Lorette Jolles Shefner v. Tuchman*, 2009 U.S. Dist. LEXIS 117273, * 3 (S.D.N.Y. Dec. 10, 2009) ("The Default Defendants' non-appearance in the action and failure to respond to the Complaint indicate willful conduct"); *HICA Educ. Loan Corp. v. Bolte*, 2012 U.S. Dist. LEXIS 17288, at *4 (S.D.N.Y. Feb. 10, 2012) ("Defendant's non-appearance in the action and failure to respond to the Complaint and the instant motion practice indicates willful conduct").

Cowles nevertheless argues – in a single unsupported paragraph of the Opposition Papers – that his default was not willful, because of his purported (1) lack of legal sophistication, (2) serious financial problems that rendered him unable to retain an attorney, (3) lack of

understanding of the serious repercussions of a monetary judgment, (4) preoccupation with the failing health of his mother, and (5) health issues including memory problems for which he is allegedly receiving treatment. Opp. Papers at p. 4; Cowles Affidavit at p. 2. Even if any of these assertions were true – and notably Cowles submits no evidence to support any of them other than his own self-serving affidavit – none of them would support a finding, as a matter of law, that his default was anything other than willful.

First, irrespective of a party's *pro se* status, a lack of legal sophistication is simply not a defense where a party knew of a summons and complaint filed against it and chose to ignore them. *See Saleh*, 2011 U.S. Dist. Lexis 130362, at **8-9 ("A businessman's failure to respond to a properly served summons and complaint is not satisfactorily explained by his status as a layman.") (*internal citations and quotations omitted*); *see also SEC v. U.N. Dollars Corp.*, 2003 U.S. Dist. Lexis 1099, at **4-5 (S.D.N.Y. Jan. 28, 2003) (*pro se* defendants who claimed lack of legal knowledge were, nevertheless, found to have willfully defaulted because they failed to make good faith efforts to comply with the Federal Rules). Thus, Cowles' supposed lack of legal sophistication is not a legitimate defense.

Second, while Cowles alleges that "serious financial problems" rendered him unable to retain an attorney, he cannot and does not dispute that it would have been a simple and cost-free endeavor for him to file a notice of appearance or respond to the claims asserted against him as a *pro se* defendant. His failure to do so only confirms that he willfully chose not to participate in this proceeding. *See RCP's Lear LLC v. Taughannock Aviation Corp.*, 2009 U.S. Dist. Lexis 57768, at *5 (N.D.N.Y. July 8, 2009) (finding willful and deliberate default where "the parties could have filed a *pro se* appearance in th[e] action, and in doing so, the parties could have subsequently moved to set aside the entry of a default for good cause"). Moreover, Cowles'

supposed "serious financial problems" did not preclude him from selectively participating in this litigation, where he attended his deposition, and appeared before this Court during the pre-inquest conference in the Safflane Inquest Proceeding.[4]

Third, Cowles' argument that he lacked an understanding of the serious repercussions of a monetary judgment against him is simply disingenuous. Indeed, he provides no support whatsoever for this argument. Further, the notion that Cowles does not understand the repercussions of a judgment is directly contradicted by the fact that he consensually granted his mother a multi-million dollar judgment against him resulting from his alleged misconduct in connection with his sale of his mother's artwork. *See* Reply Dec., Ex. A.

Fourth, Cowles' claim that he was preoccupied with his mother's ailing health also is specious. In fact, it is nothing short of ironic that Cowles is using his supposed concern for his mother's health to try to avoid responsibility in this action when it was his mother's incapacity, since at least as early as 2004, that apparently enabled him to sell her Tansey Painting and keep the proceeds of the sale for himself. Cowles should not be allowed to use his mother's poor health to evade liability for a problem he alone admittedly created in the first place.

Finally, Cowles claims that unspecified health issues and treatment for "memory problems" make his default not willful. However, he provides absolutely no evidence to support his assertion of medical problems, and such conclusory excuses are insufficient to avoid an entry of a default judgment. Further, as noted above, Cowles' "memory problems" did not preclude him from selectively participating in this litigation, where he attended his deposition, and appeared before this Court during the pre-inquest conference in the Safflane Inquest Proceeding.

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[4] Cowles' claim of "serious financial problems" is also contradicted by the fact that he has now hired an attorney to defend him in this action, and he offers no explanation as to how he can afford to do so now but could not when the action was brought against him long ago.

Cowles cannot now hide behind his alleged "memory problems" in a last ditch attempt to evade liability.

In sum, because Cowles' default clearly was deliberate and willful, the default against him should not now be set aside, and the court should grant Gagosian's Motion for Default Judgment. *See Action S.A.*, 951 F.2d at 507 ("A default should not be set aside when it is found to be willful."); *SEC*, 2004 U.S. Dist. LEXIS 16106, at *37 (same).

B. Cowles Has No Meritorious Defense

In asserting that he has a "meritorious defense," Cowles makes a mockery out of the judicial process. Cowles' primary claim of a meritorious defense is that under the theory of implied indemnification, a party cannot recover if the party seeking recovery can be held responsible "in any degree." Opp. Papers at p. 5. Accordingly, Cowles now seeks to lay blame on Gagosian (*id.* at 5-10), even though Cowles has testified, under oath, that he was entirely to blame for this litigation.

Specifically, in a *New York Times* article, Cowles took full responsibility for his unauthorized sale of the Tansey Painting:

> "Mr. Cowles, reached at his apartment Friday, said that he considered the whole dispute his mistake. He said that after the museum returned the painting to him 'I didn't even think about whether the Met owned part of it or not.'"

See New York Times article, dated March 11, 2011 (emphasis added), attached as Ex. Q to the Judgment Aff. Cowles also admitted the same during his deposition. Reply Dec., Ex. B. at pp. 195-96 (admitting that the "whole dispute was his mistake").

Thus, the crux of Cowles' supposed "meritorious defense" is that although he lied to Gagosian, Gagosian should not have believed him. Cowles' argument is absurd. Having admitted at the onset that he is 100% responsible for the wrongdoing in this action, he simply

should not be heard to say at this late date that others are to blame or be deprived of the right to indemnification for believing his lies.

Cowles also tries to manufacture a meritorious defense by asserting that there is a question of fact as to whether an agency relationship existed between him and Gagosian, giving rise to an implied right of indemnification. Opp. Papers at p. 11. It is simply beyond dispute, however, based on Cowles' own statement and testimony, that he consigned the Tansey Painting to Gagosian so Gagosian could act as his agent in finding a buyer for it – which is exactly what Gagosian did in finding the Safflane Plaintiffs who ultimately purchased the Painting. *See* Reply Dec., Ex. C ("When I first contacted you about selling the Tansey you suggested you had some clients who you thought would be seriously interested and we agreed to work together on the sale of the Innocent Eye Test. I am glad you were able to quickly find a buyer.").

Accordingly, there simply is no denying that, through the consignment of the Tansey Painting, Cowles and Gagosian had a principal-agent relationship and therefore Gagosian is entitled to indemnification from Cowles. *See Rahanian v. Ahdout*, 258 A.D.2d 156, 159 (1st Dep't 1999) ("consignment sale is merely an agency with a bailment and basically governed by the law of agency and service contracts") (*internal quotations and citations omitted*).[5]

Finally, Cowles baselessly argues that Gagosian set forth an "arbitrary and self-serving" split between its alleged losses relating to the Tansey Painting and another painting at issue in the

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[5] Cowles further attempts to cast doubt on what was a clear consignment by noting that there was no written consignment agreement between Cowles and Gagosian. *See* Opp. Papers at p. 11. However, there is no requirement that there be a written consignment agreement in order to create a principal-agent relationship. Moreover, John Good, a Gagosian employee, gave uncontradicted testimony that the reason that there was no written consignment agreement between Cowles and Gagosian was "because the transaction occurred fairly quickly." *See* Reply Dec., Ex. D at p. 48. He also testified that when Cowles reached out to him for the sale of the Tansey Painting, Cowles told him that, he would "like [Gagosian] to offer [the Tansey Painting] for [him]." *Id.* at 48-49. Thus, there is no evidence on the record that Cowles did anything other than consign the Tansey Painting to Gagosian, and he should not now be allowed to assert otherwise.

claims brought by the Safflane Plaintiffs against Gagosian, and that the legal bills Gagosian submitted are "extremely vague" and "lacking in detail." Those assertions are simply meritless.

In its Opening Memorandum, Gagosian provided a detailed explanation of how it calculated Cowles' exact liability. *See id.* at 8-10. Specifically, Gagosian explained that Cowles is liable for 82% of the full amount of damages paid by Gagosian to the Safflane Plaintiffs as well as 82% of the fees, costs and expenses Gagosian incurred in defending the claims against it, as that percentage represented the amount demanded by the Safflane Plaintiffs in connection with the Tansey Painting compared to the total amount of damages demanded by them. That is an appropriate and logical basis on which to apportion the damages here and there is nothing vague, arbitrary or self-serving about Gagosian's analysis. Thus, the Court should reward Gagosian the amount set forth in Exhibit J of the Judgment Aff., along with the fees, expenses and costs set forth in the Opening Memorandum.[6]

As for Cowles' assertion that the legal bills submitted by Gagosian are extremely vague and lacking in detail, this accusation is entirely incorrect. In Gagosian's Motion for Default Judgment, Gagosian's counsel submitted 91 pages of detailed billing reports (redacted solely to exclude privileged material). Moreover, as clearly set forth in Gagosian's Motion for Default Judgment, Gagosian's counsel accounted for the work done with respect to the Tansey Painting versus the Prince Painting by applying the same percentage (82%) to the legal fees as it applied to the full amount of damages paid by Gagosian to the Safflane Plaintiffs. As such, Gagosian's

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[6] Cowles suggests that the "relative strength" of the Safflane Plaintiffs' Tansey Painting versus Prince Painting claims should be considered and that the Prince Painting claim against Gagosian was stronger, requiring a greater portion of the settlement payment to be apportioned to that claim. *See* Opp. Papers at p. 10. That simply is false and unsupported. However, while Gagosian believes that its apportionment for the part of the settlement attributed to the Prince Painting is fair and correct, in the event the Court disagrees, it should clearly not apportion more than $1.1 million of the settlement payment to the Prince Painting, since that was the amount demanded by the Safflane Plaintiffs in their complaint. In that case, such an apportionment would serve to reduce the amount of the judgment that should be granted to Gagosian against Cowles by $308,000.

billing reports are clearly sufficient to demonstrate the fees incurred in connection with Tansey Painting.

C. Gagosian Will Be Prejudiced If Cowles' Default Is Set Aside

In a single sentence, Cowles conclusorily asserts that Gagosian would not be prejudiced if the motion for a default judgment were to be denied. That is false. Denying the entry of a default judgment against Cowles would clearly be prejudicial to Gagosian given that Gagosian changed its position by settling with the Safflane Plaintiffs based on Cowles' unequivocal admission of fault, and his deliberate and willful failure to respond to the claims against him. Thus, Gagosian settled the claims against it with the Safflane Plaintiffs with the expectation that it would recover from Cowles. Had Gagosian known that Cowles intended to defend the claims against him, Gagosian undoubtedly would have adjusted its position in how it chose to defend and/or settle this case.

Moreover, any further delay in the entry of a default judgment against Cowles will only serve to thwart Gagosian's recovery given that Cowles claims to have little money (*see* Reply Dec., Ex. B at p. 104; Cowles Affidavit at p. 2), and already has an outstanding judgment against him, pursuant to the judgment he confessed to in favor of his mother. *See* Reply Dec. at Exhibit B. *See also Saleh*, 2011 U.S. Dist. Lexis 130362, at **12-13 ("a showing that delay which may thwart plaintiff's recovery or remedy is sufficient" to establish prejudice) (*internal quotations and citations omitted*); *New York v. Green*, 420 F.3d 99, 110 (2d Cir. 2005) (same).

Accordingly, because Cowles defaulted willfully, failed to present a meritorious defense, and Gagosian will suffer from prejudice if its motion for a default judgment is denied, the Court should grant Gagosian's Motion for Default Judgment against Cowles.

III. Gagosian Gallery Is Entitled To Recover Damages In The Safflane Inquest Proceeding As A Matter Of Law

In its Inquest Declaration, Gagosian demonstrated, through the submission of the expert affidavit of Elin Lake-Ewald, and its accompanying exhibits, that the Tansey Painting is currently valued at $6.5 million, and therefore, Gagosian is entitled to the difference between that amount and what the Safflane Plaintiffs – who assigned their claims to Gagosian – received in settlement from Gagosian. In response, Cowles has not disputed that valuation. Thus, it must be deemed admitted for purposes of this Inquest.

Instead, Cowles claims that he is not liable at all to Gagosian. That assertion, however, must be rejected because liability has already been deemed established, and the sole purpose for this Inquest is to set Gagosian's damages. *See* Order of Reference to Magistrate Judge, issued by Judge Cote, dated October 14, 2011 (Docket Entry 60). Nevertheless, Cowles makes the ridiculous argument that when the Safflane Plaintiffs settled their claims with Gagosian and gave Gagosian a release, they also released Cowles from the claims they had against him, even though Cowles undeniably was not a party to the Settlement Agreement between the Safflane Plaintiffs and Gagosian, and there is no defined term in that agreement that included Cowles. Opp. Papers at 14-16. Even a cursory review of the Settlement Agreement, however, reflects that the Safflane Plaintiffs did not release Cowles from liability to them when they released Gagosian in exchange for a monetary payment.

First, the Settlement Agreement clearly states that the agreement is only being entered between the Safflane Plaintiffs and Gagosian, and defines the Safflane Plaintiffs and Gagosian as the only parties to the agreement. *See* Preliminary Paragraph of the Settlement Agreement. ("This Settlement Agreement is made and entered into . . . by and between Safflane Holdings Ltd. . . ., Robert Wylde . . . and Gagosian Gallery, Inc."). Thus, Cowles was not a party to it, and

it is nonsensical for him to argue that he somehow was released by the Safflane Plaintiffs in that agreement.

Second, the release provision of the Settlement Agreement expressly states that the Safflane Plaintiffs were executing the release "in favor of [Gagosian]," not Cowles. *See id.* at ¶ 7. Accordingly, the release, by its own terms, does not apply to any claims that the Safflane Plaintiffs had against Cowles.[7]

Third, the Settlement Agreement reflects that the parties expressly contemplated that the Safflane Plaintiffs' claims against Cowles were not being released because they *assigned those very claims to Gagosian* in the Settlement Agreement. *See* Settlement Agreement at ¶ 12 (After "Safflane's full and irrevocable receipt of Settlement Payment No. 2 from [Gagosian], [the Safflane Plaintiffs] shall assign [Gagosian] any and all of such rights as either or both of them may have against Charles Cowles, including without limitation any judgment entered by the Court against Charles Cowles (the 'Safflane Assignment')").

Cowles nevertheless contends that the assignment was not effective based on the unremarkable proposition that "a party may not convey or assign any greater rights to another than what the rights the assigning party actually possesses," and that since the release in the Settlement Agreement took effect before the assignment, Gagosian purportedly received nothing. Opp. Papers at pp. 15-16. This argument, however, is baseless and misses the point. Indeed, for it to succeed, one would have to conclude that the assignment provision in the Settlement Agreement is meaningless, and that the parties included it for no reason, since, if interpreted as Cowles would have the Court do, it could never serve to assign anything from the Safflane

[7] Moreover, the Stipulation of Dismissal (Reply Dec., Ex. E), also makes it perfectly clear that the settlement was only between the Safflane Plaintiffs and Gagosian, and Cowles was not released from the actions filed against him. Specifically, the Stipulation of Dismissal expressly states that, "the above-captioned action be dismissed with prejudice ONLY as between SAFFLANE HOLDINGS LTD., ROBERT WYLDE, and GAGOSIAN GALLERY, INC.," and not Cowles.

Plaintiffs to Gagosian. That would violate the well-established rule that "[t]he rules of contract construction require [courts] to adopt an interpretation which gives meaning to every provision of the contract." *See Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 111 (2d Cir. 2008) (holding that a contract must be read as a whole, and all its terms must be given effect and meaning). Reading the Settlement Agreement as a whole, including the assignment provision, it is clear that neither the Safflane Plaintiffs nor Gagosian intended to release Cowles from any claims or liability.

In sum, Cowles is arguing that Gagosian, in making a payment to the Safflane Plaintiffs to settle the matter, made that payment to also release Cowles from any liability, despite the fact that they had negotiated an assignment of the Safflane Plaintiffs' claims against him to them. This argument is simply nonsensical and should be summarily rejected. Accordingly, Gagosian is entitled to entry of a default judgment against Cowles for the current fair market value of the Tansey Painting of $6.5 million less that portion of the Settlement amount attributable to the Tansey Painting that was paid to the Safflane Plaintiffs. *See* Inquest Declaration at ¶¶ 14-18.

CONCLUSION

For the foregoing reasons, Gagosian respectfully requests that the Court (i) reject Cowles' Opposition Papers to the extent they address Gagosian's Motion for Default Judgment, (ii) grant Gagosian's Motion for Default Judgment against Cowles, and (iii) award damages to Gagosian in the Safflane Inquest Proceedings, as set forth in the Inquest Declaration.

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Respectfully submitted,

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