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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK  
 -----X

Case No.: 11 CIV 1679 (DLC)

SAFFLANE HOLDINGS LTD., and  
 ROBERT WYLDE,  
  
 Plaintiffs,

**ANSWER TO PLAINTIFFS’  
 CORRECTED SECOND AMENDED  
 COMPLAINT**

-against-

GAGOSIAN GALLERY, INC.,  
  
 Defendant.  
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Defendant Gagosian Gallery, Inc. (“Gagosian Gallery”), by and through its attorneys Withers Bergman LLP, as and for its Answer to the Corrected Second Amended Complaint (the “Second Amended Complaint”), states as follows:

**THE PARTIES**

1. Gagosian Gallery denies knowledge or information sufficient to admit or deny the allegations in paragraph 1.
2. Gagosian Gallery denies knowledge or information sufficient to admit or deny the allegations in paragraph 2.
3. Gagosian Gallery admits the allegations in paragraph 3.

4. Gagosian Gallery denies knowledge or information sufficient to admit or deny the allegations in paragraph 4.

#### **JURISDICTION AND VENUE**

5. Gagosian Gallery states that paragraph 5 pleads a legal conclusion to which no answer is required, but to the extent that an answer is required, Gagosian Gallery denies knowledge or information sufficient to admit or deny the allegations in paragraph 5.

6. Gagosian Gallery states that paragraph 6 pleads a legal conclusion to which no answer is required, but to the extent that an answer is required, Gagosian Gallery denies knowledge or information sufficient to admit or deny the allegations in paragraph 6, but admits that a substantial portion of the events and omissions giving rise to Plaintiffs' claims occurred in this District.

#### **FACTUAL BACKGROUND**

7. Gagosian Gallery states that paragraph 7 does not require a response, but to the extent that a response is required, Gagosian Gallery denies knowledge or information sufficient to admit or deny the statements made in paragraph 7, and states that Plaintiffs are judicially estopped from pleading inconsistent facts, as between this action and the *Met v. Safflane* action.

8. Gagosian Gallery denies the allegations in paragraph 8, but admits that Gagosian Gallery is one of the most important contemporary art galleries in the world, and affirmatively avers that Gagosian Gallery maintains a total of 11 galleries throughout the world, is principally owned by Larry Gagosian, and is managed by a management team of which Larry Gagosian is a member.

9. Gagosian Gallery denies the allegations in the first two sentences of paragraph 9, but admits that Tansey, an American postmodern painter known for monochromatic works and elaborate paintings incorporating hidden text and symbols, was born in 1949 in San Jose,

California. Gagosian Gallery denies the third and fourth sentence of paragraph 9, but admits that it has represented Tansey for several years and is familiar with his works.

10. Gagosian Gallery denies the allegations in paragraph 10, but admits that Prince is an American appropriation artist who was born in 1949 in the Republic of Panama and whom Gagosian Gallery represents, and that the work of art made the subject of this action sold for \$2.5 million.

### TANSEY FACTS

11. Gagosian Gallery denies the allegations in paragraph 11, but admits that in or about late July, 31, 2009, John Good (“Good”), an experienced salesperson, issued an invoice to memorialize the sale Gagosian Gallery effected on behalf of its principal, Charles Cowles (“Cowles”), to Plaintiff Safflane, through its authorized representative, Robert Wylde (“Wylde”, of the painting by Mark Tansey, entitled “The Innocent Eye Test.”

12. Gagosian Gallery denies the allegations in paragraph 12.

13. Gagosian Gallery states that paragraph 13 pleads a legal conclusion to which no response is required, but to the extent a response is required, Gagosian denies the allegations in paragraph 13, but admits that since 2004 Wylde, as Safflane’s authorized representative, has engaged in approximately nine art transactions with Gagosian Gallery, and that Plaintiffs are active collectors of the works of Tansey, and that they are experienced art collectors who are known for wanting to improve and complement their art collection, and that Wylde is known for doing extensive research before deciding to purchase works of art for himself or Safflane.

14. Gagosian denies the allegations in paragraph 14, but admits that between on or about July 20, 2009 to and including the date Plaintiff Safflane was invoiced on July 31, 2009, Good relayed to Wylde exactly what Cowles had told Good – namely, that the Tansey Painting was no longer being exhibited at the Metropolitan Museum of Art (the “Met”), the Tansey Painting had

been properly returned to Cowles by the Met, Cowles owned the Tansey Painting, it was hanging in Cowles' gallery, and the Tansey Painting could be sold to Safflane. Gagosian further admits that Good and Wylde exchanged a series of emails on July 28, 2009 with the subject line written by Wylde that said: "promised gift of charles cowls in honour of William s. Lieberman."

15. Gagosian Gallery denies the allegations in paragraph 15, but admits that as a collector of Tansey works, Plaintiff was aware that the Tansey Painting had been displayed at the Met, that the Tansey Painting is an iconic piece, and that secondary sales of works by Tansey are relatively scarce in the secondary market.

16. Gagosian Gallery states that the allegations in paragraph 16 plead a legal conclusion to which no answer is required, but to the extent that an answer is required, Gagosian Gallery denies the allegations in paragraph 16.

17. Gagosian Gallery denies the allegations in paragraph 17, but admits that, at the request of Wylde, Good arranged for Wylde to view the Tansey Painting at the gallery space in Cowles's home, located at 84 Mercer Street in New York City, and that on or about July 27, 2009, Wylde and Good viewed the Tansey Painting at Cowles' gallery.

18. Gagosian Gallery states that the allegations in paragraph 18 plead a legal conclusion to which no answer is required, but to the extent that an answer is required, Gagosian Gallery denies knowledge or information sufficient to admit or deny the allegations in paragraph 18.

19. Gagosian Gallery denies knowledge or information sufficient to admit or deny the allegations in paragraph 19, but admits that in or about March 2010, Gagosian Gallery learned for the first time that the Met, through gifts made by Cowles and his mother, held a 31% undivided interest in the Tansey Painting.

20. Gagosian Gallery denies the allegations in paragraph 20, and affirmatively avers that Gagosian Gallery was not acting on behalf of Plaintiffs and Wylde, a seasoned collector of Tansey, conducted his own research and due diligence, which confirms that, he was aware of the Met's interest in the Tansey Painting before he decided to purchase it from Cowles.

21. Gagosian Gallery states that paragraph 21 states a legal conclusion to which no answer is required, but to the extent that an answer is required, Gagosian denies the allegations in paragraph 21.

22. Gagosian Gallery denies the allegations in paragraph 22, but admits that it issued an invoice to Plaintiff Safflane dated July 31, 2009 reflecting Cowles's sale of the Tansey Painting to Safflane.

23. Gagosian Gallery denies the allegations in paragraph 23, but admits that payment in full was made on or about August 5, 2009, and thereafter Gagosian Gallery arranged to have the Tansey Painting delivered from the gallery space of Cowles's residence to Plaintiffs as per Wylde's instructions.

24. Gagosian Gallery denies the allegations in paragraph 24, and respectfully refers the Court to the invoice reflecting Cowles's sale of the Tansey Painting to Safflane, but affirmatively avers that Gagosian Gallery acted as Cowles's agent to facilitate the sale of the Tansey Painting on behalf of Cowles, a disclosed principal, to Plaintiffs.

25. Gagosian Gallery denies the allegations in paragraph 25 and respectfully refers the Court to the April 2, 2010 memorandum.

26. Defendant states that paragraph 26 pleads expressions of plaintiff Wylde's mental state to which no response is required. To the extent a response is required, Defendant denies the

allegations in paragraph 26, and affirmatively avers that Gagosian Gallery acted as Cowles's agent to facilitate the sale of the Tansey Painting on behalf of Cowles, a disclosed principal, to Plaintiffs.

27. Defendant states that paragraph 27 pleads expressions of plaintiff Wylde's beliefs and mental state to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 27, and affirmatively avers that Cowles consigned the Tansey Painting to Gagosian Gallery and that Gagosian Gallery acted as Cowles's agent to facilitate the sale of the Tansey Painting on behalf of Cowles, a disclosed principal, to Plaintiffs.

### PRINCE FACTS

28. Gagosian Gallery admits the allegations in paragraph 28.

29. Gagosian Gallery admits the allegations in paragraph 29.

30. Gagosian Gallery denies the allegations in paragraph 30, but admits that it offered the Prince Painting to Wylde for the sum of \$2.2 million subject to the condition that Wylde would transfer the funds by no later than Monday.

31. Gagosian Gallery denies the allegations in paragraph 31, but admits that Gagosian Gallery issued an invoice dated October 23, 2009 for the Prince Painting for the sum of \$2,200,000.00, and denies knowledge or information sufficient to admit or deny whether Plaintiff Wylde was unable to initiate a wire transfer or his intentions for initiating the wire transfer on the following Monday.

32. Gagosian Gallery admits the allegations in paragraph 32.

33. Gagosian Gallery states that paragraph 33 pleads a legal conclusion to which no answer is required, but to the extent that an answer is required, Gagosian denies the allegations in paragraph 34, but admits that Good later advised Plaintiff Wylde that Gagosian Gallery had received a higher offer.

34. Gagosian Gallery denies the allegations in paragraph 34.

**TANSEY CLAIMS**

**AS AND FOR A FIRST CAUSE OF ACTION – AGAINST GAGOSIAN**  
(Breach of Express Warranty of Title)

35. Gagosian Gallery's responses to paragraphs 1-27 inclusive, are incorporated herein by reference.

36. Gagosian Gallery denies the allegations in paragraph 36, but admits that it merely repeated to Wylde what its principal, Cowles, the seller, had said about the Tansey Painting.

37. Gagosian denies the allegations in paragraph 37, but admits that John Good conveyed to Robert Wylde exactly what Charles Cowles had told Good, namely, that the Tansey Painting was no longer being exhibited at the Met, had been returned to Cowles, could be sold to Safflane and good, clear and unencumbered title to the Tansey Painting could be conveyed to Plaintiff Safflane.

38. Gagosian Gallery denies the allegations in paragraph 38.

39. Gagosian Gallery denies the allegations in paragraph 39.

40. Gagosian Gallery denies the allegations in paragraph 40.

**AS AND FOR A SECOND CAUSE OF ACTION – AGAINST COWLES**  
(Breach of Express Warranty of Title)

41. Gagosian Gallery's responses to paragraphs 35 -40 inclusive, are incorporated herein by reference.

42. Gagosian Gallery states that paragraph 42 is not addressed to Gagosian Gallery, and therefore it does not require a response from them. To the extent that a response is required, Gagosian Gallery denies the allegations in paragraph 42, and admits that it was acting as Cowles's agent but denies any liability to pay any portion of any damages awarded to Plaintiffs for the misrepresentations made by Cowles, and therefore Cowles is vicariously liable for the First Cause

of Action and any judgment entered by the Court for Safflane in connection with the First Cause of Action should be entered exclusively against Cowles.

**AS AND FOR A THIRD CAUSE OF ACTION – AGAINST GAGOSIAN**  
(Breach of Implied Warranty of Title)

43. Gagosian Gallery's responses to paragraphs 1-27 inclusive, are incorporated herein by reference.

44. Gagosian Gallery denies the allegations in paragraph 44.

45. Gagosian Gallery denies the allegations in paragraph 45.

46. Gagosian Gallery denies the allegations in paragraph 46.

47. Gagosian Gallery denies the allegations in paragraph 47.

**AS AND FOR A FOURTH CAUSE OF ACTION – AGAINST COWLES**  
(Breach of Implied Warranty of Title)

48. Gagosian Gallery's responses to paragraphs 43-47 inclusive, are incorporated herein by reference.

49. Gagosian Gallery states that paragraph 49 is not addressed to Gagosian Gallery, and therefore it does not require a response from them. To the extent that a response is required, Gagosian Gallery denies the allegations in paragraph 49, and admits that it was acting as Cowles's agent but denies any liability to pay any portion of any damages awarded to Plaintiffs for the misrepresentations made by Cowles, and therefore Cowles is vicariously liable for the Third Cause of Action and any judgment entered by the Court for Safflane in connection with the Third Cause of Action should be entered exclusively against Cowles.

**AS AND FOR A FIFTH CAUSE OF ACTION – AGAINST GAGOSIAN**  
(Breach of Implied Warranty of Merchantability)

50. Gagosian Gallery's responses to paragraphs 1-27 inclusive, are incorporated herein by reference.



51. Gagosian Gallery denies the allegations in paragraph 51.
52. Gagosian Gallery denies the allegations in paragraph 52.
53. Gagosian Gallery denies the allegations in paragraph 53.

**AS AND FOR A SIXTH CAUSE OF ACTION – AGAINST COWLES**  
(Breach of Implied Warranty of Merchantability)

54. Gagosian Gallery's responses to paragraphs 50-53 inclusive, are incorporated herein by reference.

55. Gagosian Gallery states that paragraph 55 is not addressed to Gagosian Gallery, and therefore it does not require a response from them. To the extent that a response is required, Gagosian Gallery denies the allegations in paragraph 55, and admits that it was acting as Cowles's agent but denies liability to pay any portion of any damages awarded to Plaintiffs for the misrepresentations made by Cowles, and therefore Cowles is vicariously liable for the Fifth Cause of Action and any judgment entered by the Court for Safflane in connection with the Fifth Cause of Action should be entered exclusively against Cowles.

**AS AND FOR A SEVENTH CAUSE OF ACTION – AGAINST GAGOSIAN**  
(Breach of Contract)

56. Gagosian Gallery's responses to paragraphs 1-27 inclusive, are incorporated herein by reference.

57. Gagosian Gallery denies the allegations in paragraph 57 and respectfully refers the Court to the invoice.

58. Gagosian Gallery admits the allegations in paragraph 58.
59. Gagosian Gallery denies the allegations in paragraph 59.
60. Gagosian Gallery denies the allegations in paragraph 60.

**AS AND FOR A EIGHTH CAUSE OF ACTION – AGAINST COWLES**  
(Breach of Contract)

61. Gagosian Gallery’s responses to paragraphs 56-60 inclusive, are incorporated herein by reference.

62. Gagosian Gallery states that paragraph 62 is not addressed to Gagosian Gallery, and therefore it does not require a response from them. To the extent that a response is required, Gagosian Gallery denies the allegations in paragraph 62, and admits that it was acting as Cowles’s agent but denies any liability to pay any portion of any damages awarded to Plaintiffs for the misrepresentations made by Cowles, and therefore Cowles is vicariously liable for the Seventh Cause of Action and any judgment entered by the Court for Safflane in connection with the Seventh Cause of Action should be entered exclusively against Cowles.

**AS AND FOR AN NINTH CAUSE OF ACTION – AGAINST GAGOSIAN**  
(Fraud)

63. Gagosian Gallery’s responses to paragraphs 1-27 inclusive, are incorporated herein by reference.

64. Gagosian Gallery denies the allegations in paragraph 64.

65. Gagosian Gallery denies the allegations in paragraph 65.

66. Gagosian Gallery denies the allegations in paragraph 66.

67. Gagosian Gallery denies the allegations in paragraph 67, and affirmatively avers there was no “combined transaction” and that Plaintiffs have no standing to assert any claims relating to the Roy Lichenstein which Gagosian Gallery, acting on behalf of Cowles, sold to a third party.

68. Gagosian Gallery denies the allegations in paragraph 68, and affirmatively avers there was no “combined transaction” and that Plaintiffs have no standing to assert any claims

relating to the Roy Lichenstein which Gagosian Gallery, acting on behalf of Cowles, sold to a third party.

69. Gagosian Gallery denies the allegations in paragraph 69, and affirmatively avers there was no “combined transaction” and that Plaintiffs have no standing to assert any claims relating to the Roy Lichenstein which Gagosian Gallery, acting on behalf of Cowles, sold to a third party.

70. Gagosian Gallery denies the allegations in paragraph 70.

**AS AND FOR THE TENTH CAUSE OF ACTION – AGAINST COWLES**  
(Fraud)

71. Gagosian Gallery’s responses to paragraphs 63-70 inclusive, are incorporated herein by reference.

72. Gagosian Gallery states that paragraph 72 is not addressed to Gagosian Gallery, and therefore it does not require a response from them. To the extent that a response is required, Gagosian Gallery denies the allegations in paragraph 72, and admits that it was acting as Cowles’s agent but denies any liability to pay any portion of any damages awarded to Plaintiffs for the misrepresentations made by Cowles, and therefore Cowles is vicariously liable for the Ninth Cause of Action and any judgment entered by the Court for Safflane in connection with the Ninth Cause of Action should be entered exclusively against Cowles.

**AS AND FOR A ELEVENTH CAUSE OF ACTION – AGAINST GAGOSIAN**  
(Negligent Misrepresentation)

73. Gagosian Gallery’s responses to paragraphs 1-27 inclusive, are incorporated herein by reference.

74. Gagosian Gallery denies the allegations in paragraph 74.

75. Gagosian Gallery denies the allegations in paragraph 75, but admits that Cowles, as principal and seller, had a duty to impart accurate and correct information to the Plaintiffs.

76. Gagosian Gallery denies the allegations in paragraph 76, and affirmatively avers that Plaintiffs had the means to, and did, discover all of the information they now claim Gagosian Gallery should have discovered.

77. Gagosian Gallery denies the allegations in paragraph 77.

78. Gagosian Gallery denies knowledge or information sufficient to admit or deny the allegations in paragraph 78.

79. Gagosian Gallery denies the allegations in paragraph 79, and affirmatively avers that the actions and/or omissions of Cowles and Plaintiffs were the sole and proximate cause of any injuries Plaintiffs claim to have suffered.

80. Gagosian Gallery denies the allegations in paragraph 80.

**AS AND FOR A TWELFTH CAUSE OF ACTION – AGAINST COWLES**  
(Negligent Misrepresentation)

81. Gagosian Gallery's responses to paragraphs 73-80 inclusive, are incorporated herein by reference.

82. Gagosian Gallery states that paragraph 82 is not addressed to Gagosian Gallery, and therefore it does not require a response from them. To the extent that a response is required, Gagosian Gallery denies the allegations in paragraph 82, and admits that it was acting as Cowles's agent but denies any liability to pay any portion of any damages awarded to Plaintiffs for the misrepresentations made by Cowles, and therefore Cowles is vicariously liable for the Eleventh Cause of Action and any judgment entered by the Court for Safflane in connection with the Eleventh Cause of Action should be entered exclusively against Cowles.

**AS AND FOR A THIRTEENTH CAUSE OF ACTION – AGAINST GAGOSIAN**  
(Violation of New York Arts and Cultural Affairs Law § 13.03)

83. Gagosian Gallery's responses to paragraphs 1-27 inclusive, are incorporated herein by reference.

84. Gagosian Gallery denies the allegations in paragraph 84.

85. Gagosian Gallery admits the allegations in paragraph 85.

86. Gagosian Gallery denies the allegations in paragraph 86.

**AS AND FOR A FOURTEENTH CAUSE OF ACTION – AGAINST COWLES**  
(Violation of New York Arts and Cultural Affairs Law § 13.03)

87. Gagosian Gallery's responses to paragraphs 83-86 inclusive, are incorporated herein by reference.

88. Gagosian Gallery states that paragraph 88 is not addressed to Gagosian Gallery, and therefore it does not require a response from them. To the extent that a response is required, Gagosian Gallery denies the allegations in paragraph 88, and admits that it was acting as Cowles's agent but denies any liability to pay any portion of any damages awarded to Plaintiffs for the misrepresentations made by Cowles, and therefore Cowles is vicariously liable for the Thirteenth Cause of Action and any judgment entered by the Court for Safflane in connection with the Thirteenth Cause of Action should be entered exclusively against Cowles.

**AS AND FOR A FIFTEENTH CAUSE OF ACTION – AGAINST GAGOSIAN**  
(Unjust Enrichment)

89. Gagosian Gallery's responses to paragraphs 1-27 inclusive, are incorporated herein by reference.

90. Gagosian Gallery denies the allegations in paragraph 90.

91. Gagosian Gallery denies the allegations in paragraph 91.

92. Gagosian Gallery denies the allegations in paragraph 92.

93. Gagosian Gallery denies the allegations in paragraph 93.

**AS AND FOR A SIXTEENTH CAUSE OF ACTION – AGAINST COWLES**  
(Unjust Enrichment)

94. Gagosian Gallery's responses to paragraphs 89-93 inclusive, are incorporated herein by reference.

95. Gagosian Gallery states that paragraph 95 is not addressed to Gagosian Gallery, and therefore it does not require a response from them. To the extent that a response is required, Gagosian Gallery denies the allegations in paragraph 95, and admits that it was acting as Cowles's agent but denies any liability to pay any portion of any damages awarded to Plaintiffs for the misrepresentations made by Cowles, and therefore Cowles is vicariously liable for the Fifteenth Cause of Action and any judgment entered by the Court for Safflane in connection with the Fifteenth Cause of Action should be entered exclusively against Cowles.

**PRINCE CLAIMS -**  
**BY WYLDE ONLY AGAINST GAGOSIAN ONLY**  
**AS AND FOR A SEVENTEENTH CAUSE OF ACTION**  
(Repudiation and/or Breach of Contract)

96. Gagosian Gallery's responses to paragraphs 1-10 and 28-34 inclusive, are incorporated herein by reference.

97. Gagosian Gallery denies the allegations in paragraph 97.

98. Gagosian Gallery denies knowledge or information sufficient to admit or deny the allegations in paragraph 98.

99. Gagosian Gallery denies the allegations in paragraph 99, but admits that Gagosian Gallery subsequently sold the Prince Painting to another buyer for a higher price.

100. Gagosian Gallery denies the allegations in paragraph 100.

**AS AND FOR AN EIGHTEENTH CAUSE OF ACTION**  
(Deceptive and Misleading Business Practices -GBL §§ 349 et. seq.)

101. Gagosian Gallery's responses to paragraphs 1-10 and 28-34 inclusive, are incorporated herein by reference.

102. Gagosian Gallery denies the allegations in paragraph 102.

103. Gagosian Gallery denies the allegations in paragraph 103, but admits that Gagosian Gallery is an art gallery that sells works of art in private transactions.

104. Gagosian Gallery denies the allegations in paragraph 104.

105. Gagosian Gallery denies the allegations in paragraph 105.

**AS AND FOR A NINETEENTH CAUSE OF ACTION**  
(Unjust Enrichment)

106. Gagosian Gallery's responses to paragraphs 1-10 and 28-34 inclusive, are incorporated herein by reference.

107. Gagosian Gallery denies the allegations in paragraph 107.

108. Gagosian Gallery denies the allegations in paragraph 108.

109. Gagosian Gallery denies the allegations in paragraph 109.

110. Gagosian Gallery denies the allegations in paragraph 110.

**AS AND FOR A TWENTIETH CAUSE OF ACTION**  
(Breach of the Implied Covenant Of Good Faith and Fair Dealing)

111. Gagosian Gallery's responses to paragraphs 1-10 and 28-34 inclusive, are incorporated herein by reference.

112. Gagosian Gallery denies the allegations in paragraph 112.

113. Gagosian Gallery denies the allegations in paragraph 113.

**AS AND FOR A TWENTY-FIRST CAUSE OF ACTION**  
(Specific Performance)

114. Gagosian Gallery's responses to paragraphs 1-10 and 28-34 inclusive, are incorporated herein by reference.

115. Gagosian Gallery denies the allegations in paragraph 115.

116. Gagosian Gallery denies the allegations in paragraph 116.

117. Gagosian Gallery denies the allegations in paragraph 117.

#### **FIRST AFFIRMATIVE DEFENSE**

118. Gagosian Gallery alleges that the Second Amended Complaint, and each purported cause of action alleged therein, fails to state facts sufficient to constitute a cause of action against Gagosian upon which relief may be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

119. Gagosian Gallery alleges that Plaintiffs' contract claims on the Tansey Painting cannot be maintained against Gagosian Gallery because Gagosian Gallery, as Cowles's agent, acted on behalf of its fully disclosed principal, Cowles, to facilitate the sale of the Tansey Painting by Cowles to Plaintiffs.

#### **THIRD AFFIRMATIVE DEFENSE**

120. Gagosian Gallery alleges that Plaintiffs' claims cannot be maintained because Cowles enlisted Gagosian Gallery's help in finding a Buyer for the Tansey Painting and then consigned the Tansey Painting to Gagosian Gallery on an exclusive basis, and therefore, Gagosian Gallery was at all times acting as Cowles agent during the sale of the Tansey Painting to Safflane.

121. Cowles offered Gagosian Gallery an exclusive to sell the Tansey Painting on his behalf, but the title, possession and control of the Tansey Painting remained at all times with Cowles until it was purchased by Wylde.

122. Gagosian Gallery consulted Cowles throughout the sale of the Tansey Painting.



123. At all times during the relevant period, Cowles held himself out to be the true owner of the Tansey Painting.

124. Gagosian Gallery did not make any payments to Cowles for the Tansey Painting until it received the money from the sale of the Tansey Painting from Robert Wylde.

125. Gagosian Gallery only received a commission for helping Cowles find a buyer for the Tansey Painting.

#### **FOURTH AFFIRMATIVE DEFENSE**

126. Gagosian Gallery alleges that Plaintiffs' fraud claim is foreclosed because Plaintiffs acted for the themselves in conducting such due diligence as they deemed necessary and appropriate in making the decision to purchase the Tansey Painting, including communicating directly with Cowles concerning their purchase of the Tansey Painting from Cowles. Plaintiffs' fraud claim is foreclosed for the further reason that Plaintiffs have not alleged justifiable reliance, and Plaintiffs' fraud claim is duplicative of their breach of contract claim.

#### **FIFTH AFFIRMATIVE DEFENSE**

127. Gagosian Gallery alleges that Plaintiffs' negligent misrepresentation claim concerning the Tansey Painting cannot be maintained because (1) Plaintiffs did not reasonably rely on any representation made by Gagosian Gallery because Gagosian Gallery merely repeated what its principal, Cowles, the seller told it; (2) Plaintiffs did not have a special relationship with Gagosian Gallery; and (3) Plaintiffs' negligent misrepresentation claim is duplicative of Plaintiffs' breach of contract claim.

#### **SIXTH AFFIRMATIVE DEFENSE**

128. Gagosian Gallery alleges that Plaintiffs' claims are foreclosed because Plaintiffs were on actual notice of Cowles gift of the Tansey Painting to the Met as of July 28, 2009.

**SEVENTH AFFIRMATIVE DEFENSE**

129. Gagosian Gallery alleges that Plaintiffs' claims are foreclosed because Plaintiffs had the means to, and did, discover all material facts relating to ownership of the Tansey Painting.

**EIGHTH AFFIRMATIVE DEFENSE**

130. Gagosian Gallery alleges that Plaintiffs' claims cannot be maintained because Wylde, a seasoned collector, does his own research and due diligence before purchasing works of art, and in the case of the Tansey Painting, decided to purchase it after having seen it in Cowles' apartment and confirming with Cowles that it was Cowles's to sell.

**NINTH AFFIRMATIVE DEFENSE**

131. To the extent that Defendants made misrepresentations to Plaintiffs with regard to the title of the Tansey Painting, such statements were made by Cowles to Gagosian Gallery for the express purpose of inducing Plaintiffs to purchase the Tansey Painting.

**TENTH AFFIRMATIVE DEFENSE**

132. Gagosian Gallery alleges that Plaintiffs' New York Arts and Cultural Affairs Law § 13.03 claim cannot be maintained because that statute does not provide for civil liability.

**ELEVENTH AFFIRMATIVE DEFENSE**

133. Gagosian Gallery alleges that all of Plaintiffs' causes of action for repudiation and/or breach of contract and unjust enrichment cannot be maintained because there was no binding contract between the Plaintiffs and Gagosian Gallery with respect to the Prince Painting.

**TWELTH AFFIRMATIVE DEFENSE**

134. Gagosian Gallery alleges that Plaintiffs has not stated a claim for deceptive and misleading business practices under New York General Business Law § 349 because a private transaction does not give rise to a violation of New York General Business Law § 349.

**THIRTEENTH AFFIRMATIVE DEFENSE**

133. Plaintiffs are judicially estopped from recovering from Gagosian Gallery by reason of the inconsistent facts the have alleged in the *Met v. Safflane* action.

Dated: New York, New York  
August 8, 2011

Respectfully submitted,

WITHERS BERGMAN LLP

By: Hollis Gonerka Bart

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**CERTIFICATE OF SERVICE**

The Undersigned hereby certifies that a copy of the foregoing was served upon the following via ECF on this the 8 day of August, 2011:

Aaron Richard Golub, Esq.  
Aaron Richard Golub, Esquire, P.C.  
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Attorneys for plaintiffs, Safflane Holdings Ltd., and Robert Wylde



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