

WITHERS BERGMAN LLP

Hollis Gonerka Bart (HB-8955)

Brian Dunefsky (BD-3554)

Dara G. Hammerman (DH-1591)

Azmina Jasani (AJ-4161)

430 Park Avenue, 10th Floor

New York, New York 10022

212.848.9800 (p)

212.848.9888 (f)

Attorneys for Defendant/Third-Party Plaintiff

Gagosian Gallery, Inc.

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.

-----X

GAGOSIAN GALLERY, INC.,

Third-Party Plaintiffs,

-against-

CHARLES COWLES,

Third-Party Defendant.

-----X

DEFENDANT/THIRD-PARTY PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF THE MOTION FOR DEFAULT JUDGMENT

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PRELIMINARY STATEMENT

Defendant/Third-Party Plaintiff Gagosian Gallery (“Third Party Plaintiff” or “Gagosian Gallery”) submits this Memorandum of Law, together with the Affidavit of Dara G. Hammerman (“Hammerman Aff.”) and the exhibits annexed thereto, in support of its motion, pursuant to Fed R. Civ. P. 55, for a default judgment against Charles Cowles (“Cowles” or “Third-Party Defendant”). Gagosian Gallery properly served Cowles, but he did not answer or otherwise respond to the Third-Party Complaint. Gagosian Gallery now seeks default judgment against Cowles for indemnification.

STATEMENT OF FACTS

The third-party action by Gagosian Gallery against Cowles arises out of claims Plaintiffs Safflane Holdings, Ltd. and Robert Wylde (the “Safflane Plaintiffs”) asserted in the underlying action against Gagosian Gallery for allegedly fraudulent and negligent misrepresentations as to the title and ownership of a painting by Mark Tansey entitled, “The Innocent Eye Test” (the “Tansey Painting”) that Cowles sold to the Safflane Plaintiffs through Gagosian Gallery. In its Third-Party Complaint, Gagosian Gallery sets forth causes of action against Cowles for indemnification and contribution. Hammerman Aff. Ex. C.

For approximately 30 years, Gagosian Gallery engaged in art transactions with Cowles, a well-known New York City art dealer and collector of contemporary art, and/or the Charles Cowles Gallery without incident. Hammerman Aff. Ex. M at Good Tr. 51, 84, 88. In or about late July 2009, Cowles contacted John Good (“Good”), a Gagosian Gallery employee, and asked Good if Gagosian Gallery could help him find a buyer for the Tansey Painting. *Id.* at Good Tr. 49-50, 61; Hammerman Aff. Ex. E at Cowles Tr. 193-94. Because the Tansey Painting has attained an “iconic status” in the art world, and had been on display at the Met, Good asked Cowles whether the Met had an interest in it. Hammerman Aff. Ex. M at Good Tr. 49-50.

Cowles replied that he had an agreement with the Met's director that the Tansey Painting would be returned to Cowles as the owner if it were no longer being exhibited at the Met. *Id.* As such, the Tansey Painting had been properly returned to Cowles by the Met, that Cowles was rightfully in possession of the Tansey Painting, and it was now his to sell. *Id.* at Good Tr. 49-50, 247.

On the basis of the representations made by Cowles, Good agreed to assist Cowles in finding a buyer for the Tansey Painting and Cowles consigned the Tansey Painting to Gagosian Gallery for sale. *Id.* at Good Tr. 61, 180, 197.

Good thereafter contacted Robert Wylde to determine whether he might be interested in purchasing the Tansey Painting from Cowles. Hammerman Aff. Ex. N at Wylde Tr. 57. During their discussion of the Tansey Painting, Good conveyed to Wylde exactly what Cowles, the seller, had told him concerning Cowles ownership of the Tansey Painting. Hammerman Aff. Ex. N at Wylde Tr. 60-61 and Ex. M at Good Tr. 238. Good thereafter arranged for Wylde to view the Tansey Painting at Cowles' Gallery, which was located at the same premises as Cowles' residence. *Id.* at Good Tr. 58.

On or about July 27, 2009, Wylde, accompanied by Good, viewed the Tansey Painting in the gallery space of Cowles' residence, and confirmed that the Tansey Painting was in Cowles' possession. *Id.* at Good Tr. 58, 238; Hammerman Aff. Ex. N at Wylde Tr. 64-65. During the viewing at Cowles' Gallery, Cowles reassured and represented directly to Wylde that the Tansey Painting was his (Cowles) to sell. *Id.* at Good Tr. 240; Hammerman Aff. Ex. N at Wylde Tr. 67-68.

Satisfied by the representations made by Cowles during the viewing, Wylde, shortly after the viewing, told Good to let Cowles know that he would purchase the Tansey Painting for \$2.5 million. Hammerman Aff. Ex. N at Wylde Tr. 81. On or about August 5, 2009, Wylde, through

Safflane, paid the \$2.5 million for the Tansey Painting, and Gagosian Gallery thereafter arranged for its delivery from Cowles' home gallery to plaintiffs. Hammerman Aff. Ex. O & P.

In or about March 2010, Gagosian Gallery learned for the first time that Cowles did not have the authority to sell the Tansey Painting, as he had represented he did, and that the Met, through gifts made by Cowles and his mother, held a 31% undivided interest in it. Hammerman Aff. Ex. M at Good Tr. 175.

When confronted with this, Cowles readily acknowledged that this was all "his mistake." Specifically, Cowles admitted in his deposition taken on July 13, 2011 that the following statements attributed to him in an article that was recently published in the *New York Times* discussing this lawsuit, are true and were made by him:

Mr. Cowles . . . [s]aid 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." "[A]nd one day [I] saw it on the wall and thought, 'hey, [I] could use money' and so [I] decided to sell it," he added. "and now it's a big mess."

Hammerman Aff. Ex. Q & E at Cowles Tr. 191-193.

Procedural History

On March 10, 2011, Gagosian Gallery was named as a Defendant in the Safflane Action, which sought to recover, *inter alia*, \$6 million from Gagosian Gallery on claims relating to the Tansey Painting. Hammerman Aff. Ex. A. On May 10, 2011, the Metropolitan Museum of Art (the "Met") and Jan Cowles filed a lawsuit against Plaintiffs in the Safflane Action for a declaratory judgment that the Met is the sole and exclusive owner of the Tansey Painting and for its immediate return. Hammerman Aff. Ex. B.

On July 15, 2011, Gagosian Gallery filed the Third-Party Complaint against Cowles seeking indemnification. Hammerman Aff. Ex. C. On July 15, 2011, the Clerk of the Court issued a Summons in a Civil Action directed to Cowles. Hammerman Aff. Ex. D. On October

6, 2011, Cowles was personally served with the Summons and Third-Party Complaint at 84 Mercer Street, New York, New York 10012, the address to which he testified was his at his deposition on July 13, 2011. Hammerman Aff. Exs. E & F at Cowles Tr. 4. On October 31, 2011, an Affidavit of Service was filed with the Court. Hammerman Aff. Ex. G. Cowles's deadline to answer the Third-Party Complaint was October 27, 2011. However, Cowles failed to answer or appear or move with respect to the Third-Party Complaint and the time to do so has expired. On November 2, 2011, the Clerk of the Court issued a Certificate acknowledging Cowles' Default. Hammerman Aff. Ex. H.

On October 12, 2011, Gagosian Gallery entered into a settlement agreement with the Safflane Plaintiffs in the Safflane Action, in which Gagosian Gallery agreed to pay the Safflane Plaintiffs the amount set forth in the Settlement Agreement, the terms of which are confidential. Hammerman Aff. Ex. I.

Gagosian Gallery now seeks a default judgment against Cowles as to liability on its indemnification claim in favor of Gagosian Gallery pursuant to Fed.R.Civ.P. 55(b) and Rule 55.2(b) of the Local Rules of the Southern District of New York for failing to answer the Third-Party Complaint.

ARGUMENT

I. Gagosian Gallery Has a Viable Cause of Action Against Cowles for Indemnification

"Indemnity is predicated on 'vicarious liability without actual fault on the part of the proposed indemnitee'...[and it] shifts all liability to the negligent party." *Transmodal Corp. v. Pianin*, 2010 U.S. Dist. LEXIS 65412, *2 (S.D.N.Y. 2010). To state a claim for implied indemnification, a party must allege a special relationship with the potential indemnitee that gives rise to an implied duty to indemnify. *Id.* at *3. A principal-agency relationship is a special relationship that can give rise to such an implied duty to indemnify. *Amusement Indus. v. Stern*,

693 F. Supp. 2d 301 (S.D.N.Y. 2010) (holding that an agent-principal relationship is sufficient to support a claim for implied indemnification).

When Cowles first approached Gagosian Gallery, Cowles made clear that he wanted Gagosian Gallery to assist Cowles with finding a buyer for the Tansey Painting on his behalf. *See* Hammerman Aff. Ex. M at Good Tr. 49-50, 61; Hammerman Aff. Ex. E at Cowles Tr. 193-94. As such, Gagosian Gallery was at most acting as an agent for Cowles and cannot be held responsible for Cowles' failure to deliver good and unencumbered title. In acting as Cowles agent, Gagosian Gallery relied on the statements made by Cowles concerning the title of the Tansey Painting, and relayed these statements to the Safflane Plaintiffs. *See* Hammerman Aff. Ex. M at Good Tr. 238. However, Cowles' representations concerning the title of the Tansey Painting were, by his own admission, false, and he has readily admitted that he considered this entire dispute "his mistake." Hammerman Aff. Exs. R & E at Cowles Tr. 191-193.

Cowles owed a duty as the seller of the Tansey Painting to deliver good and unencumbered title to the Safflane Plaintiffs. Thus, Cowles' negligent misrepresentations were the sole proximate cause of the damages suffered by the Safflane Plaintiffs. By virtue of Cowles' misrepresentations, Gagosian Gallery was exposed to liability from the Safflane Plaintiffs, and was compelled to pay damages to the Safflane Plaintiffs that Cowles should have paid based solely on his own wrongful acts. *See Panigeon v. Alliance Navigation Line, Inc.*, 1997 U.S. Dist. LEXIS 12239 (S.D.N.Y. 1997), *quoting City of New York v. Keene Corp.*, 132 Misc. 2d 745, 786 (Sup. Ct. N.Y. Co. 1986) ("The law implies a contract to reimburse in cases of unjust enrichment 'where payment by one person is compelled, which another should have made.'"). As such, Gagosian Gallery is entitled to common law indemnification from Cowles based upon their agent-principal relationship for the percentage of the damages it paid to the

Safflane Plaintiffs relating to the Tansey Painting, including costs and disbursements, together with attorneys' fees and the expenses incurred therein.

II. This Court Should Enter A Default Judgment Against The Defaulting Third-Party Defendant

A court may enter a judgment of default pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure. In deciding whether to enter a default judgment, the Court may consider the following three factors: “1) whether the defendant's default was willful; 2) whether defendant has a meritorious defense to plaintiff's claims; and 3) the level of prejudice the non-defaulting party would suffer as a result of the denial of the motion for default judgment.” *House of Diamonds, Inc. v. Borgioni LLC*, 2009 U.S. Dist. LEXIS 76089, *15 (S.D.N.Y. 2009); *Mason Tenders Dist. Council v. Duce Constr. Corp.*, 2003 U.S. Dist. LEXIS 6881, *2 (S.D.N.Y. 2003). The entry of a default judgment is left to the “sound judicial discretion” of the Court. *Shaw v. N.Y. State Dep't of Civil Service*, 168 F.3d 610, 615 (2d Cir. 1999).

A. Cowles Has Willfully Defaulted

Where, as here, a party has failed to answer a complaint and has been entirely unresponsive, their continued failure is considered willful, and the first ground for a default judgment has been met. *See House of Diamonds, Inc. v. Borgioni LLC*, 2009 U.S. Dist. LEXIS 76089 (S.D.N.Y. 2009). As stated in detail above, Cowles has failed to answer or respond in any way to the Third-Party Complaint, or otherwise make any appearance in this action by the deadline imposed under the Federal Rules of Civil Procedure. Cowles has also failed to provide any explanation for his failure to answer or respond. Such failures render Cowles willfully in default concerning the causes of action against him. As such, the Court may enter a default judgment against him. *See id.*; *Estate of Lorette Jolles Shefner v. Tuchman*, 2009 U.S. Dist.

LEXIS 117273, * 3 (S.D.N.Y. 2009) (“The Default Defendants’ non-appearance in the action and failure to respond to the Complaint indicate willful conduct.”).

B. Cowles Has No Meritorious Defense By Virtue Of His Non-Responsiveness

Since Cowles has not filed an Answer or otherwise responded to the Third-Party Complaint, he can offer no meritorious defense to Gagosian Gallery’s allegations. *See House of Diamonds*, at *15-16 (finding no evidence of a defense where defendants did not file an Answer or otherwise respond to the Complaint). To the contrary, by defaulting, Cowles has admitted that he is liable to Gagosian Gallery for common law indemnification. *See Estate of Shefner*, at *3 (plaintiffs’ allegations deemed admitted where default defendants presented no defense to the Court and therefore Court was unable to determine whether Default Defendants had a meritorious defense to allegations). *See also Au Bon Pain Corp. v. Artect, Inc.* 653 F. 2d61, 65 (2d. Cir. 1981) (Upon a defendant’s default, the Court should accept as true all of the factual allegations of the complaint, except those relating to damages); *Schwarz-Liebman Textiles v. Last Exit Corp.*, 815 F. Supp. 106, 107 (S.D.N.Y. 1992) (“default judgment entered on well-pleaded allegations of a complaint establishes a defendant’s liability”). As such, Cowles’ failure to proffer any defense and his admission of the the well-pleaded allegations of the Third-Party Complaint warrant entry of a default judgment against him.

C. Gagosian Gallery Will Be Prejudiced If A Default Judgment Is Not Entered

The final factor for the Court to consider is whether Gagosian Gallery would be prejudiced if the motion for default were to be denied. Here, denying this motion would be prejudicial to Gagosian Gallery, as Cowles has failed to appear or respond to any of Gagosian Gallery’s allegations, and pursuant to Rule 55(a), the Court may enter default due to this failure. *See Fed. R. Civ. P. 55(a)*. As such, there are no additional steps available to Gagosian Gallery to obtain relief in this Court. *See House of Diamonds*, at *16 (holding that denying motion for

default judgment would be prejudicial as there were no additional steps available to plaintiff to secure relief.); *See also Estate of Shefner*, at *3 (finding that denying the motion for default judgment would be unfairly prejudicial to plaintiffs where defendants failed to appear or respond to allegations and the Court may enter default due to this failure). For the foregoing reasons, default judgment should be entered.

III. Gagosian Gallery Is Entitled To Recover Damages Plus Attorney's Fees and Costs

A. Gagosian Gallery Is Entitled To Recover a Percentage of the Safflane Damages Relating to Tansey Painting From Cowles as Set Forth in Exhibit J

For the reasons set forth above, Cowles is liable to Gagosian Gallery for common law indemnification, and thus, must indemnify Gagosian Gallery for the damages Gagosian Gallery has paid to the Safflane Plaintiffs pursuant to the Settlement Agreement entered into on October 12, 2011 between Gagosian Gallery and the Safflane Plaintiffs (the "Safflane Damages").¹ *See Gomez v. Preferred Rentals*, 1997 U.S. Dist. LEXIS 19222 (S.D.N.Y. 1997) (indemnitee is entitled to recover any damages paid to the injured party). 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. *See Hammerman Aff.* ¶ 16 & Ex I. The amount paid does not exceed the amount prayed for in the Safflane Plaintiffs' Complaint. Cowles is liable to

¹ The Safflane Plaintiffs demanded in their Second Corrected Amended Complaint a total of \$6 million in damages with respect to the Tansey Painting and a total of \$1.1 million in damages with respect to a separate painting by Richard Prince entitled "Millionaire Nurse" (the "Prince Painting"). As such, only 82% of the settlement paid by Gagosian Gallery was attributable to the Tansey Painting (that percentage representing the amount demanded in connection with the Tansey Painting compared to the total amount of damages demanded by the Safflane Plaintiffs in the Safflane Action.). Cowles is thus liable for the amount set forth in Hammerman Aff. Ex. J, which is 82% of the full amount of damages paid by Gagosian Gallery to the Plaintiffs in the Safflane Action relating specifically to the Tansey Painting.

Gagosian Gallery for 82 percent² of the total amount paid by Gagosian Gallery to Plaintiffs in the Safflane Action for the Tansey Painting (the “Safflane Damages”). Thus, this Action seeks judgment for 82% of the Safflane Damages, which have been set forth in an Exhibit prepared by Gagosian Gallery entitled “Summary of Safflane Damages” (the “Summary”). See Hammerman Aff. ¶ 17 & Ex J.

B. Gagosian Gallery Is Entitled To Recover Legal Fees and Costs From Cowles In The Amount Of \$703,217.55

Gagosian Gallery is also entitled to indemnification for the legal fees, costs and expenses it incurred in responding to and defending against the Safflane Plaintiffs’ claims concerning the Tansey Painting. See *Chapel v. Mitchell*, 84 N.Y.2d 345 (1994) (holding that common-law right to indemnification against the party actually at fault encompasses the right to recover attorneys’ fees, costs and disbursements incurred in connection with defending the suit brought by the injured party); *Gomez v. Preferred Rentals*, 1997 U.S. Dist. LEXIS 19222 (S.D.N.Y. 1997) (Under New York law, an indemnitee is entitled to recover the legal expenses incurred in connection with defending the suit brought by the injured party); *Fed Ex Customer Information Services Inc., v. Leslee Sports, Inc.*, 2010 U.S. Dist. LEXIS 34849 (N.D.N.Y. 2010) (holding that attorney’s fees are available under a theory of common-law indemnification in connection with defending the main claim). Withers Bergman’s contemporaneous time entries for this matter reflect that the total amount of fees charged in connection with defending Gagosian Gallery

² The Safflane Plaintiffs demanded in their Second Corrected Amended Complaint a total of \$6 million in damages with respect to the Tansey Painting and a total of \$1,1 million in damages with respect to a separate painting by Richard Prince, entitled, “Millionaire Nurse” (the “Prince Painting”). As such, only 82% of the damages paid by Gagosian Gallery was attributable to the Tansey Painting (that percentage representing the amount demanded in connection with the Tansey Painting compared to the total amount of damages demanded by the Safflane Plaintiffs in the Safflane Action.). Cowles is thus liable for the amount set forth in Exhibit J, the full amount of damages paid by Gagosian Gallery to the Plaintiffs in the Safflane Action for the Tansey Painting.

against the Safflane Action since August 31, 2010 amounted to \$841,420.35.³ Hammerman Aff. Ex. K. However, Cowles is only liable to Gagosian Gallery for 82%⁴ of these fees, which amounts to \$689,964.69.

In addition, Gagosian Gallery also incurred a total of \$16,162.03 in costs and expenses in connection with defending the Safflane Action. Hammerman Aff. Ex. L. However, as discussed above, Cowles is only liable to Gagosian Gallery for 82% of the costs and expenses attributable to Gagosian Gallery's defense in the Safflane Action, which amounts to \$13,252.86.⁵

Hammerman Aff. Ex. L.

C. Gagosian Gallery is Entitled to Pre-Judgment and Post-Judgment Interest

Gagosian Gallery is also entitled to recover pre-judgment and post-judgment interest in accordance with 28 U.S.C. § 1961. Gagosian Gallery is entitled to post-judgment interest on any award of attorney's fees, costs and judgment commencing on the date the Clerk's office enters judgment and ending on the date of payment. *See Estate of Shefner*, at *6. Gagosian Gallery is also entitled to pre-judgment interest from the date of the settlement with the Safflane Plaintiffs, October 12, 2011, until the entry of judgment. *See id.* Pre-judgment interest should be awarded at the rate set forth in 28 U.S.C. § 1961.

³ Withers Bergman's time entries include work performed on behalf of Gagosian Gallery just prior to the commencement of this lawsuit, at which point the parties were working to resolve this matter in the hopes of avoiding litigation.

⁴ Since 82% of the damages paid by Gagosian Gallery was attributable to the Tansey Painting, Gagosian Gallery is only seeking 82% of the fees charged to Gagosian Gallery, which represents the amount of fees charged by Withers Bergman with respect to the Tansey Painting.

⁵ *See supra*, fn. 3. For purposes of this motion, Withers Bergman reduced the total disbursements and costs by \$1200 to account for disbursements and costs charged in connection with the Third-Party Action.

D. An Inquest is Not Required

An inquest is not required in this case as it is “not necessary for the District Court to hold a hearing, as long as it ensure[s] that there [is] a basis for the damages specified in a default judgment.” *Fustok v. Conticommodity Servs., Inc.*, 873 F.2d 38, 40 (2d Cir. 1989). A “court may rely on detailed affidavits or documentary evidence” when evaluating the fairness of the proposed sum. *Id.* As evidenced by the facts set forth in the attached Hammerman Affidavit and its accompanying exhibits, this Court has ample basis for granting a default judgment in the amount set forth herein.

CONCLUSION

For the foregoing reasons, Defendant/Third-Party Plaintiff respectfully requests that the Court enter a default judgment against Cowles for the amount set forth in the Summary submitted to the Court as Exhibit J, together with pre-judgment and post-judgment interest, the legal fees incurred by Gagosian Gallery in defending the Safflane Action and the costs and disbursements of the Safflane Action.

Dated: New York, New York
December 5, 2011

Respectfully submitted,

WITHERS BERGMAN LLP

By: *Dara Hammerman*

Hollis Gonerka Bart (HB-8955)

Brian Dunefsky (BD-3554)

Dara G. Hammerman (DH-1591)

Azmina N. Jasani (AJ-4161)

430 Park Avenue, 10th Floor

New York, NY 10022-3505

Phone: (212) 848-9800

Fax: (212) 848-9888

*Attorneys for Defendant/Third-Party
Plaintiff Gagosian Gallery, Inc.*