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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

SAFFLANE HOLDINGS LTD., and
ROBERT WYLDE,

Plaintiffs,

-against-

GAGOSIAN GALLERY, INC., and
CHARLES COWLES

Defendants.

**DECLARATION OF
DARA G. HAMMERMAN**

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Dara G. Hammerman hereby declares under the penalties of perjury that the following is true and correct:

1. I am an associate of the law firm of Withers Bergman LLP (“Withers”), attorneys for defendant Gagosian Gallery, Inc. (“Gagosian Gallery”) in this action, and I am admitted to practice before this Court. Plaintiffs Safflane Holdings, Ltd. and Robert Wylde (the “Safflane Plaintiffs”) obtained a default against Charles Cowles (“Cowles”) on October 14, 2011. In accordance with the terms of the Settlement Agreement, on January 13, 2012, the Safflane Plaintiffs assigned their rights and claims against Cowles, including their interest in any

judgment entered by the Court against Cowles, to Gagosian Gallery. This affidavit is submitted in support of Gagosian Gallery's application for entry of a default judgment against defendant Cowles in this action.

2. The Complaint in this action was originally brought on March 10, 2011 by the Safflane Plaintiffs against Gagosian Gallery to recover, *inter alia*, at least \$6 million on claims relating to a painting by Mark Tansey entitled, *The Innocent Eye Test* (the "Tansey Painting") (the "Complaint") that Cowles sold to the Safflane Plaintiffs through Gagosian Gallery. A copy of the Safflane Complaint is annexed hereto as Exhibit A.

3. On July 15, 2011, the Safflane Plaintiffs amended their Complaint to assert claims against Cowles for his alleged fraudulent and negligent misrepresentations as to the title and ownership of the Tansey Painting (the "Second Amended Complaint"). A copy of the Second Amended Complaint is annexed hereto as Exhibit B. On the same date, Gagosian Gallery filed a third-party complaint against Cowles seeking indemnification and contribution in connection with his sale of the Tansey Painting (the "Third-Party Complaint"). A copy of the Third-Party Complaint is annexed hereto as Exhibit C.

4. On July 20, 2011, the Safflane Plaintiffs filed a Corrected Second Amended Complaint (the "Safflane Corrected Second Amended Complaint"). A copy of the Safflane Corrected Second Amended Complaint is annexed hereto as Exhibit D.

5. On July 27, 2011, Cowles was personally served with a Summons and a copy of the Safflane Amended Complaint at 84 Mecer Street, New York, New York 10012. At his deposition on July 13, 2011, Cowles admitted that this was his current address. A copy of the Affidavit of Service is annexed hereto as Exhibit E.

6. On August 10, 2011, the Affidavit of Service was filed with the Court. A copy of the Affidavit of Service filed with the Court is annexed hereto as Exhibit F.

7. Cowles's deadline to answer the Safflane Corrected Second Amended Complaint was August 17, 2011. However, he failed to answer, appear or otherwise respond to the Safflane Corrected Second Amended Complaint, and the time to do so has long since expired.

8. On September 9, 2011, the Safflane Plaintiffs filed an Order to Show Cause seeking a default judgment against Cowles. That same day, the Court issued an Order directing Cowles to appear before the Court on October 14, 2011 to show cause as to why an Order should not be issued against him. A copy of the September 9th Court Order is annexed hereto as Exhibit G.

9. On October 14, 2011, Cowles failed to appear before the Court, and the Court entered a default against him and ordered an inquest to determine damages (the "Default Order"). A copy of the Default Order is annexed hereto as Exhibit H.

10. On October 12, 2011, Gagosian Gallery entered into a confidential settlement agreement with the Safflane Plaintiffs, in which Gagosian Gallery agreed to pay the Safflane Plaintiffs the amount set forth in the settlement agreement (the "Settlement Amount"). A copy of the Settlement Agreement, Exhibit I, has been sealed pursuant to the Court's Order, dated November 8, 2011, and a hard copy of the Settlement Agreement along with the Court's November 8, 2011 Order will be submitted to the Court by hand in accordance with the Court's instruction for submitting documents under seal.

11. In accordance with the terms of the Settlement Agreement, on January 13, 2012, the Safflane Plaintiffs assigned their rights and claims against Cowles, including their interest in any judgment entered by the Court against Cowles, to Gagosian Gallery.

12. By defaulting, Cowles has admitted that he is liable to the Safflane Plaintiffs for the claims brought against him in the Safflane Corrected Second Amended Complaint. *See Estate of Shefner v. Tuchman*, 2009 U.S. Dist. LEXIS 117273, *3 (S.D.N.Y. 2009) (plaintiffs' allegations deemed admitted where defaulting defendants presented no defense to the Court, and therefore Court was unable to determine whether defaulting 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 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's failure to proffer any defense constitutes his admission to the allegations of the Safflane Corrected Second Amended Complaint and warrants entry of a default judgment against him.

13. The measure of damages for the type of claims brought against Cowles is the fair market value of the Tansey Painting at the time of trial. *See Menzel v. List*, 24 N.Y.2d 91, 97 (1969) (holding that a buyer's damages should be measured by the present value of the painting). However, because the Safflane Plaintiffs, through their settlement with Gagosian Gallery, have already recovered a portion of their damages, Cowles should only be liable for the fair market value of the Tansey Painting less that portion of the Settlement Amount attributable to the Tansey Painting.

14. As such, Gagosian Gallery, as assignee of the Safflane Plaintiffs' rights, now seeks entry of a default judgment against Cowles for the current fair market value of the Tansey Painting less that portion of the Settlement Amount attributable to the Tansey Painting.

15. As set forth in the Expert Affidavit of Elin Lake-Ewald and its accompanying exhibits, the fair market value of the Tansey Painting is \$6,500,000. *See* Elin Lake-Ewald Affidavit at ¶ 2-3.

16. Gagosian Gallery submits that 82% of the Settlement Amount is attributable to the Tansey Painting. Gagosian Gallery derived this percentage by taking into account the amounts demanded by the Safflane Plaintiffs in the Safflane Corrected Second Amended Complaint. Specifically, the Safflane Plaintiffs demanded a total of at least \$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, the 82% represents the ratio between the amount demanded by the Safflane Plaintiffs in connection with the Tansey Painting and the total amount of damages demanded by the Safflane Plaintiffs in the Safflane Action. The precise amount attributable to the Tansey Painting (and the amount that should be subtracted from the current fair market value of the Tansey Painting to determine the amount of the default judgment) is set forth in a “Summary of Damages Paid by Gagosian Gallery to Plaintiffs in Safflane Action for Tansey Painting” (the “Summary”), prepared by Withers Bergman. The Summary, Exhibit J, has been sealed pursuant to the Court’s Order dated November 21, 2011, and a hard copy of the Summary along with the Court’s November 21, 2011 Order will be submitted to the Court by hand in accordance with the Court’s instructions for submitting documents under seal.

17. As evidenced by the facts set forth in this affidavit and its accompanying exhibits, and the Expert Affidavit of Elin Lake-Ewald and its accompanying exhibits, Gagosian Gallery respectfully submits that this Court has ample basis for granting a default judgment in the amount of the fair market value of the Tansey Painting less the amount set forth in the Summary.

18. It is respectfully submitted that for the reasons set forth herein, as well as in the Safflane Corrected Second Amended Complaint, and the Affidavit of Elin Lake-Ewald, Gagosian Gallery is entitled to entry of a default judgment against Cowles as follows:

- a. Awarding Gagosian Gallery judgment against Cowles for \$6,500,000 less the amount set forth in the Summary;
- b. Granting such additional relief as this Court deems proper.

DATED: New York, New York
January 19, 2012



Dara G. Hammerman