APPENDIX

Tobin v. Rector

United States District Court for the Southern District of New York

November 14, 2017, Decided; November 14, 2017, Filed

17 Civ. 2622 (LGS)

Reporter
2017 U.S. Dist. LEXIS 187792 *; 2017 WL 5466705

STEVEN TOBIN, Plaintiff, -against- THE RECTOR, CHURCH-WARDENS, AND VESTRYMEN OF TRINITY CHURCH, IN THE CITY OF NEW YORK, Defendant.

Subsequent History: Affirmed by *Tobin v. Rector, Church-Wardens, & Vestrymen of Trinity Church, 2018 U.S. App. LEXIS 23761 (2d Cir. N.Y., Aug. 23, 2018)*

Core Terms

sculpture, Root, modification, alleges, destruction, churchyard, promissory estoppel, gross negligence, site-specific, mutilation, promise, distortion, cause of action, presentation, destroyed, relocate, parties, artist, rights, terms, damaged, removal, photographs, motion to dismiss, written agreement, installation, permanently, fails

Counsel: **[*1]** For Steven Tobin, Plaintiff: Gale P. Elston, Gale P. Elston P.C, New York, NY; Steven S. Honigman, Steven Honigman, New York, NY.

For The Rector, Church-Wardens, and Vestrymen of Trinity Church, in the City of New York, Defendant: Peter W. Tomlinson, LEAD ATTORNEY, Elizabeth Clare Quirk, Patterson, Belknap, Webb & Tyler LLP, New York, NY.

Judges: Lorna G. Schofield, United States District Judge.

Opinion by: Lorna G. Schofield

Opinion

OPINION AND ORDER

Plaintiff Steven Tobin brings this action against The Rector, Church-Wardens, and Vestrymen of Trinity Church, in the City of New York ("Defendant" or "Trinity"), alleging breach of contract, promissory estoppel and violations of the *Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. §§ 106A, 113(d)*. Defendant moves to dismiss the Second Amended Complaint (the "Complaint") under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure to state a claim upon which relief can be granted. The motion is granted.

I. BACKGROUND

The following facts are taken from the Complaint and accompanying exhibits. *See Fed. R. Civ. P. 10(c); Tannerite Sports, LLC v. NBCUniversal News Grp., 864 F.3d 236, 247 (2d Cir. 2017)*. The facts are construed, and all reasonable inferences are drawn, in favor of Plaintiff as the non-moving party. *See Trs. Of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt., 843 F.3d 561, 566 (2d Cir. 2016)*.

A. Events Prior to the Written Agreement

Plaintiff is a visual artist based in Coopersburg, Pennsylvania and the creator **[*2]** of *The Trinity Root*, the sculpture at the center of this action. Trinity, appearing in this action through its Rector, Church-Wardens and Vestrymen, is a religious organization based in New York, New York. Trinity owns *The Trinity Root*, which it commissioned in 2004 and received as a charitable donation in

September 2005.

Defendant approved a sketch of the proposed sculpture that Plaintiff had prepared, depicting it in the courtyard of Trinity Church. If the sketch had not been approved, Plaintiff's commission to create the sculpture would have been terminated. The intent, spirit and design of the sculpture were specific to the site.

The Trinity Root is "a cast bronze sculpture fifteen feet wide, twenty feet deep and thirteen feet high that weighs more than three tons." It is a full-size reproduction of the root structure and stump of a 100-year old sycamore tree that stood in the churchyard of St. Paul's Chapel (owned by Defendant) until it was toppled during the September 11, 2001, World Trade Center attack. The sculpture's patina contains "actual DNA from victims of the attack that came to rest in soil within St. Paul's churchyard." The sculpture is "composed of hundreds of fragile **[*3]** individual pieces welded together," and required Plaintiff and an expert team of riggers to supervise its transport from Plaintiff's studio to the churchyard. The cost to Plaintiff of creating and installing *The Trinity Root* was more than a million dollars. Plaintiff took out a home equity loan to cover this expense.

B. The Parties' Written Agreement

The parties memorialized their agreement regarding *The Trinity Root* in a written contract (the "Agreement") dated August 4, 2004. As relevant here, section 6(a) of the Agreement states:

> Tobin hereby transfers and assigns to Trinity by charitable donation all right, title, and interest to the Sculpture and all materials related thereto (including but not limited to all sketches, photographs and audio-visual footage), including but not limited to the copyright therein, and any cause of action that Tobin may have with respect thereto, in perpetuity throughout the universe, *for use in any manner* and in any media now known or hereafter invented. In the event of any termination of this Agreement, Trinity will own the Sculpture, in whatever degree of completion (including but not limited to the sketches), and will have the right to complete, *exhibit and sell* **[*4]** *the Sculpture if it so chooses*. Tobin grants Trinity the right to use his name, approved likeness and approved biographical information in connection with any and all exploitation of the Sculpture. Tobin understands that Trinity *has not promised the public exhibition* of the Sculpture, and that Trinity may *loan* the Sculpture to third parties as Trinity deems appropriate.

(emphasis added). Section 8(d) states that the Agreement "constitutes the entire agreement between the parties with respect to the subject matter hereof and may only be amended or modified by a written instrument executed by the duly authorized representatives of the parties." The Agreement further states that it will be governed and interpreted in accordance with New York law.

C. Events after the Agreement

The Trinity Root was installed in the courtyard at Trinity Church, and on September 11, 2005, was dedicated in a public ceremony. During the year preceding the installation, the parties' plans to create *The Trinity Root* were described in numerous publications attached as exhibits to the Complaint.

On August 9, 2004, Plaintiff's manager and communications consultant, Kathleen Rogers, submitted to CBS Sunday Morning a press release **[*5]** stating that *The Trinity Root* "will be permanently sited at the corner of Wall St. and Broadway." Defendant reviewed and approved the press release. On July 6, 2005, *The New York Times* published a story stating that *The Trinity Root* "will be installed and dedicated near ground zero on Sept. 11, becoming the first substantial permanent memorial in the area."

Between August and September 2005, various other publications, including *The Living Church* (a weekly publication for Episcopalians), *National Geographic Magazine* and *The Episcopal News Service* published articles either stating or implying that *The Trinity Root* would be permanently sited in the churchyard. Defendant did not challenge or

correct any of these statements.

In May 2015, nearly a decade after the sculpture's installation in the courtyard of Trinity Church, Rogers, on behalf of Plaintiff, contacted Nathan Brockman, Defendant's representative, about restoring the sculpture's patina, using dirt from the St. Paul's churchyard that Tobin preserved for that purpose. Brockman informed Rogers that Trinity Church's new Rector wanted the sculpture removed and asked whether Plaintiff would take it to his studio or relocate it at Defendant's **[*6]** expense. During that conversation, and in a subsequent email to Rogers, Brockman stated that Defendant had no present plans to relocate the sculpture.

On December 11, 2015, Brockman called Plaintiff and told him that Defendant wanted to move the sculpture to Tobin's studio or to a seminary in Connecticut. Plaintiff told Brockman that the sculpture was created to be site-specific, and that it could be damaged if it were cut into pieces or lifted incorrectly. Plaintiff said that he needed to think about it and would call Brockman the following week.

On December 14, 2015, Plaintiff called Brockman and told him that he did not agree to relocate the sculpture because it is site-specific. After Plaintiff said that he planned to bring his children to see the sculpture the following Saturday, Brockman said that Defendant had relocated the sculpture to Connecticut on December 11, 2015, during the night and that it had sustained some damage during the move. In January 2016, Brockman told Plaintiff that he (Plaintiff) could repair the sculpture at his own expense. Around this time, Brockman also told Plaintiff that the sculpture was going to be moved a second time, to another Connecticut location. **[*7]** The Complaint attaches two photographs of several roots that allegedly were broken off the sculpture in the move and quotes Defendant's statement that the sculpture suffered "minor, reparable damage." Plaintiff has not inspected the sculpture, but based on photographs Defendant provided, believes the damage is substantial.

II. STANDARD

On a motion to dismiss, a court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the non-moving party, *Trs. Of Upstate N.Y. Eng'rs Pension Fund, 843 F.3d at 566*, but gives "no effect to legal conclusions couched as factual allegations," *Stadnick v. Vivint Solar, Inc., 861 F.3d 31, 35 (2d Cir. 2017)* (internal quotation marks omitted). To withstand a motion to dismiss, a pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted). In assessing the sufficiency of a complaint, a court may consider documents attached to it or incorporated in it by reference. *See Tannerite Sports, LLC, 864 F.3d at 247-48*.

III. DISCUSSION

The Complaint alleges claims under VARA and New York law, all of which stem from Defendant's moving *The Trinity Root* from the churchyard **[*8]** in New York to Defendant's property in Connecticut.

A. Breach of Contract

Defendant moves to dismiss the Complaint's breach of contract claim. Plaintiff did not offer any arguments in opposition. Claims that are not defended may be deemed abandoned, and therefore, this claim is dismissed. *See Estate of M.D. by DeCosmo v. New York, 241 F. Supp. 3d 413, 423 (S.D.N.Y. 2017)* ("Federal courts have the discretion to deem a claim abandoned when a defendant moves to dismiss that claim and the plaintiff fails to address in their opposition papers defendants' arguments for dismissing such a claim.").

B. Promissory Estoppel

The Complaint alleges promissory estoppel based on Defendant's removing *The Trinity Root* from the Trinity churchyard. Specifically, the Complaint alleges that Defendant made a clear and unambiguous promise, by making and failing to correct public statements, that *The Trinity Root* would be located in the churchyard permanently; that Plaintiff reasonably relied on that promise and that Plaintiff suffered unconscionable injury as a result. This claim fails because the parties' valid written agreement "precludes recovery under the cause[] of action sounding in promissory estoppel . . . which arises out of the same subject matter." *Hoeg Corp. v. Peebles Corp., 153 A.D.3d 607, 60 N.Y.S.3d 259, 262 (2d Dep't 2017)*; *accord Sec. Plans, Inc. v. CUNA Mut. Ins. Soc'y, 769 F.3d 807, 816 (2d Cir. 2014)* (stating that, in **[*9]** general, under New York law, "a party may not maintain a promissory estoppel claim where the promises on which the claim is based are expressly contradicted by a later written agreement covering the same subject matter" (internal quotation marks omitted)); *Grossman v. N.Y. Life Ins. Co., 90 A.D.3d 990, 935 N.Y.S.2d 643, 645 (2d Dep't 2011)* (stating that "the existence of valid and enforceable written contracts precludes recovery under the cause[] of action sounding in promissory estoppel . . . .").

The merger clause also bars the promissory estoppel claim. Promissory estoppel requires that the plaintiff reasonably relied on the alleged promise giving rise to the estoppel. *Castellotti v. Free, 138 A.D.3d 198, 27 N.Y.S.3d 507, 513 (1st Dep't 2016)*. Here, the Agreement provides that it "constitutes the entire agreement between the parties with respect to the subject matter hereof and may only be amended or modified by a written instrument executed by the duly authorized representatives of the parties." This provision and the parties' unambiguous intention for the Agreement to govern their relationship regarding *The Trinity Root* preclude Plaintiff from claiming that he reasonably relied on any oral promise to locate *The Trinity Root* permanently in the churchyard. *See Steinbeck v. Steinbeck Heritage Found., 400 F. App'x 572, 577 (2d Cir. 2010)* (summary order) (applying New York law and holding that the plaintiff "could **[*10]** not reasonably have relied on . . . [a] purported oral promise . . . because such a representation modifies the relationship between the parties established by the [written] Agreement, which by its terms can only be done in writing"); *accord Bank of N.Y. v. Spring Glen Assocs., 222 A.D.2d 992, 635 N.Y.S.2d 781, 784 (3d Dep't 1995)* ("[D]efendants' estoppel argument is unavailing as they could not have justifiably relied on such an [oral] assurance, given the express language in the [contracts] declaring that no modification or waiver of their terms . . . can be brought about except by a signed writing."); *see also Fariello v. Checkmate Holdings, LLC, 82 A.D.3d 437, 918 N.Y.S.2d 408, 409 (1st Dep't 2011)* (holding that the promissory estoppel claim was barred by the merger clause in the agreement between the parties).

Plaintiff is incorrect that Defendant's alleged promise is outside of scope of the Agreement and therefore that the promissory estoppel claim is not barred. The Agreement expressly states what Defendant may do with the sculpture, including sell, loan, exhibit or use it "in any manner." Any added restriction on that use would be squarely within the scope of the Agreement and would vary its terms. *See Kleinberg v. Radian Grp., No. 01 Civ. 9295, 2002 U.S. Dist. LEXIS 20595, 2002 WL 31422884, at *5 n.2 (S.D.N.Y. Oct. 29, 2002)* (holding that "to add terms to an agreement would clearly vary that agreement's terms, insofar as the terms of the 'supplemented' agreement would no longer be the **[*11]** same as the terms of the written one" (internal quotation marks omitted)). Even if the alleged promise to keep the *The Trinity Root* in the churchyard indefinitely were outside the scope of the Agreement, the promise would be unenforceable. "New York courts have held that an oral agreement for an indefinite obligation is not enforceable." *Komlossy v. Faruqi & Faruqi, LLP, ___ Fed. Appx. ___, 2017 U.S. App. LEXIS 20330, 2017 WL 4679579, at *1 (2d Cir. Oct. 18, 2017)* (summary opinion).

C. The VARA Claims

The Complaint alleges three causes of action under VARA -- two based on Defendant's removing *The Trinity Root* from the courtyard, which allegedly constitutes "an intentional distortion, mutilation and modification of the work," causing injury to Plaintiff's honor and reputation; and one cause of action based on the alleged destruction of *The Trinity Root* because of damage done to it during the relocation. The Complaint alleges a fourth VARA purported claim, which asserts, and seeks a declaratory judgment that Plaintiff did not waive his rights under VARA, an issue that is not in dispute but does not entitle Plaintiff to any independent relief.

"VARA was enacted in 1990 . . . to provide for the protection of the so-called 'moral rights' of certain artists." *Pollara v. Seymour, 344 F.3d 265, 269 (2d Cir. 2003)*. Unless **[*12]** the artist expressly waives them in writing, these statutory rights transcend third-party ownership and contractual rights. *See 17 U.S.C. § 106A(e)(1); Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 133 (1st Cir. 2006)* ("[T]hese moral rights protect what an artist retains after relinquishing ownership . . . of the tangible object that the artist has created."). "VARA provides that the author of a 'work of visual art,' 'shall have the right,' for life,

> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
>
> (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

Pollara, 344 F.3d at 269 (quoting *17 U.S.C. §§ 106A(a)(3)(A)—(B)*). Under *subsection (A)*, "[t]he right of integrity allows the author to prevent any deforming or mutilating changes to his work, even after title in the work has been transferred." *Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995)* (internal citations omitted). Under *subsection (B)*, in the case of works "of recognized stature," the statute allows the author to prevent destruction of the work. The statute also confers:

> the right to prevent the use of his or her name as the author of the work of **[*13]** visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.

17 U.S.C. § 106A(a)(2). Despite the preventative language of *§ 106A(a)*, "[a]ll remedies available under copyright law, other than criminal remedies, are available in an action for infringement of moral rights." *Carter, 71 F.3d at 83* (citing *17 U.S.C. § 506*).

An artist's rights under VARA are expressly limited by the following:

> (2) The modification of a work of visual art which is the result of . . . the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in *subsection (a)(3)* unless the modification is caused by gross negligence.

17 U.S.C. § 106A(c)(2).[1]

A. Alleged "Distortion, Mutilation or Modification" of the Sculpture

The Complaint alleges that removing *The Trinity Root* from the churchyard constitutes an actionable distortion, mutilation and modification under *§§ 106A(a)(2)—(3)* because *The Trinity Root* is a site-specific work of art. Site-specific art "incorporates the environment as one of the media with which [the artist] works." *Phillips, 459 F.3d at 134*. For example, a "sculpture [that] has a marine theme that integrates the large granite stones of [a] park with [the] sculpture and the granite **[*14]** sea walls of Boston Harbor" is clearly site-specific art. *Id.*

This claim fails because simply relocating *The*

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[1] The statute also excludes from the protections of *17 U.S.C. § 106A(a)(2)—(3)* art incorporated into a building "in such a way that removing [it] will cause the destruction" of the work as described in *§§ 106A(a)(2)—(3)* if the author consented to the installation. *17 U.S.C. § 113(d)*. The statute does not otherwise address site-specific installations.

Trinity Root does not by itself constitute distortion, mutilation or modification under VARA. Even assuming that *The Trinity Root* is site-specific art, and that changing its location results in its "modification," that modification "is the result of . . . the public presentation, including . . . placement, of the work" and therefore is not actionable unless the modification is caused by gross negligence. *See* 17 U.S.C. § 106A(c)(2). The legislative history makes clear that "removal of a work from a specific location comes within [this] exclusion because the location is a matter of presentation." H.R. Rep. No. 101-514, at *6927 (1990). Addressing site-specific art and the public presentation exception, the Seventh Circuit stated, "[T]he artist has no cause of action unless through gross negligence the work is modified, distorted, or destroyed in the process of changing its public presentation." *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 306-07 (7th Cir. 2011) (dictum); *cf. Phillips*, 459 F.3d at 143 (affirming dismissal of a VARA claim challenging removal of a sculptor's site-specific art on the ground that VARA does not apply to site-specific art at all, but rejecting the reasoning that VARA **[*15]** applies to site-specific art and that removal of the sculptor's work was not actionable under VARA's public presentation exception).

The VARA claims based on Defendant's relocating *The Trinity Root* fail because the Complaint does not plead sufficient facts to support an inference of gross negligence, which is required to overcome the public presentation exception. 17 U.S.C. § 106A(c)(2). To satisfy the "gross negligence" standard, a plaintiff must plead facts suggesting "[a] conscious, voluntary act or omission in reckless disregard of a legal duty and the consequences to another party . . . ." *Gross Negligence*, Black's Law Dictionary (10th ed. 2014). The Complaint alleges -- in conclusory fashion -- gross negligence and damage to the "physical and aesthetic integrity" of the artwork. The Complaint fails to plead facts showing reckless disregard for Plaintiff's rights. The Complaint describes Defendant's offer to return the sculpture to Plaintiff, and Plaintiff's warning to Defendant that the sculpture could be destroyed structurally if it were cut into pieces or lifted incorrectly. The Complaint further alleges that Defendant moved the sculpture twice, and two attached photographs show several roots that **[*16]** allegedly were broken off in the moving process. The Complaint also quotes Defendant's statement that the sculpture suffered "some minor, reparable damage" and includes Plaintiff's characterization of the damage as "substantial." These allegations are insufficient to plead gross negligence and overcome the public presentation exclusion to a claim based on the relocation of the sculpture. *See, e.g., English v. BFC & R E. 11th St. LLC*, No. 97 Civ. 7446, 1997 U.S. Dist. LEXIS 19137, 1997 WL 746444, at *5 (S.D.N.Y. Dec. 3, 1997) (holding that the removal of plaintiff's sculptures would not violate VARA because "[r]emoving the individual sculptures does not in and of itself constitute mutilation or destruction"), *aff'd sub nom. English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999). Accordingly, the VARA claims under §§ 106A(a)(2) and (3)(A) are dismissed.

B. Alleged Destruction of the Sculpture

The Complaint also fails to plead sufficient facts to support an inference that Defendant's conduct caused *The Trinity Root*'s physical "destruction." To the contrary, the Complaint alleges that Defendant's conduct merely "damaged" the sculpture (*e.g.*, "Mr. Brockman . . . revealed to Tobin that the sculpture had been damaged; "[T]he Church confirmed that what it termed 'some minor, reparable damage,' 'did occur'"; Defendant would permit Plaintiff to repair the statute at Plaintiff's expense). These allegations **[*17]** of damage are insufficient to support a claim of destruction under § 106A(a)(3)(B) of VARA. *See, e.g., Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 534-35 (S.D.N.Y. 2001) (rejecting the complaint's argument that the head of a sculpture was destroyed within the meaning of VARA because "the complaint and photographs of the head annexed to it unambiguously show that although the face was damaged, the head has not been destroyed and is capable of being repaired"). The Complaint's claim for injunctive relief requiring Defendant to return *The Trinity Root* to the churchyard likewise undermines the Complaint's allegation that Defendant caused *The Trinity Root*'s

destruction because such relief presupposes that *The Trinity Root* has not been destroyed.

Plaintiff's attempt to distinguish *Flack v. Friends of Queen Catherine Inc.* is unpersuasive. 139 F. Supp. 2d at 534. There, plaintiff alleged partial destruction of the head of a 35-foot clay sculpture due to defendant's allegedly placing it in a garbage dump, where it was "[e]xposed to the elements" and ultimately damaged. Although the court noted that "VARA does not provide a means of enjoining or obtaining damages due to modifications resulting from 'the passage of time or the inherent nature of the materials,'" it also expressly rejected plaintiff's argument that **[*18]** the head was "destroyed" through defendant's gross negligence. Id. at 534. The court found that "[t]he complaint and the photographs of the head annexed to it unambiguously show that although the face was damaged, the head has not been destroyed and is capable of being repaired," and accordingly, dismissed the partial destruction claim under VARA. *Id.*

As the Complaint does not allege any facts suggesting that *The Trinity Root* was destroyed within the meaning of the statute, the VARA claim is dismissed. Because the VARA claims are dismissed, the cause of action seeking a declaratory judgment that Plaintiff has not waived his rights under VARA with respect to *The Trinity Root* is dismissed as moot.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss the Second Amended Complaint is GRANTED. The parties' joint applications for oral argument and a stay of fact witness depositions and expert discovery are denied as moot. The Clerk of Court is directed to close the motions at Docket Nos. 23 and 33 and close the case.

SO ORDERED.

Dated: November 14, 2017

New York, New York

/s/ Lorna G. Schofield

LORNA G. SCHOFIELD

UNITED STATES DISTRICT JUDGE

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Bd. of Managers of Soho Int'l Arts Condo. v. City of New York

United States District Court for the Southern District of New York

May 13, 2005, Decided ; May 13, 2005, Filed

01 Civ. 1226 (DAB)

Reporter
2005 U.S. Dist. LEXIS 9139 *

BOARD OF MANAGERS OF SOHO INTERNATIONAL ARTS CONDOMINIUM, on behalf of itself and all unit owners of the Soho International Arts Condominium, Plaintiff, -v- CITY OF NEW YORK, NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, and FORREST MYERS, Defendants.

Subsequent History: Related proceeding at *Altman v. Myers, 2006 N.Y. Misc. LEXIS 9358 (2006)*

Prior History: *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, 2004 U.S. Dist. LEXIS 17807 (S.D.N.Y., Sept. 8, 2004)*

Core Terms

adverse possession, destroyed, ownership, rights, recreated, hostile, removal, notorious, reinstallation, abandoned, disband, repairs, destruction, permanent, changes, clear and convincing evidence, physical occupation, actual possession, Landmarks, installed, claimant, conveyed, exclusive possession, public art, permission, projecting, possessed, purposes, Artists

Case Summary

Procedural Posture

Before the court was the issue of ownership of artwork in the context of a *Fourteenth Amendment* takings analysis, and whether removal of the artwork was a destruction for purposes of the Visual Artists Rights Act, 17 U.S.C.S. § 10 et seq., in an action brought by plaintiff art board against defendant city.

Overview

The city removed artwork located on a wall when it tore down the wall. The art board brought an action for damages against the city. During the course of the litigation, the art board sought two decisions from the court; the issue of ownership of the artwork for purposes of the *Fourteenth Amendment*, and whether removal of the artwork was destruction for purposes of the Visual Artists Rights Act, *17 U.S.C.S. § 101 et seq.* As to the takings analysis, the court concluded that ownership of the artwork was vested in the holder of title to the building to which the removed wall was attached. Accordingly, for a takings analysis, any removal of the artwork would have been compensable to the owner of the building. As to the Visual Artists Rights Act claim, the court concluded that the artwork fell within the ambit of the Act; thus judgment was granted to the art board against the city.

Outcome

The court held that the art board did not own the artwork for takings purposes, and that the work was destroyed for purposes of the Visual Artists Rights Act.

LexisNexis® Headnotes

Copyright Law > ... > Ownership Rights > Reproductions > Limitations

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > Moral Rights

Copyright Law > ... > Protected Subject Matter > Graphic, Pictorial & Sculptural Works > Works of Art

HN1[] Reproductions, Limitations

17 U.S.C.S. § 113(d)(2) applies if the artwork can be removed without destroying it and 17 U.S.C.S. § 113(d)(1) applies if removal of the artwork destroyed it.

Copyright Law > ... > Ownership Rights > Reproductions > Limitations

Copyright Law > ... > Protected Subject Matter > Graphic, Pictorial & Sculptural Works > Works of Art

HN2[] Reproductions, Limitations

See 17 U.S.C.S. § 113(d)(1)-(2).

Copyright Law > Scope of Copyright Protection > Ownership Rights > Moral Rights

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > ... > Protected Subject Matter > Graphic, Pictorial & Sculptural Works > Works of Art

HN3[] Ownership Rights, Moral Rights

17 U.S.C.S. § 106A(c)(2) excepts from the definition of destruction, distortion, mutilation or other modification, any modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement.

Real Property Law > Estates > Present Estates > Fee Simple Estates

Real Property Law > Fixtures & Improvements > General Overview

Real Property Law > Fixtures & Improvements > Fixture Characteristics

HN4[] Present Estates, Fee Simple Estates

The three criteria for fixtures under New York law are: (1) actual annexation to the real property or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold.

Real Property Law > Fixtures & Improvements > General Overview

HN5[] Real Property Law, Fixtures & Improvements

There is no inflexible and universal rule by which to determine under all circumstances whether that which is originally personal property has become part of the realty as a result of being affixed to the property and used in connection with it.

Real Property Law > Fixtures & Improvements > Fixture Characteristics

Real Property Law > Fixtures & Improvements > General Overview

HN6[] Fixtures & Improvements, Fixture Characteristics

The determination of whether a chattel has become a fixture thus is determined on a case-by-case basis. Often, the intention element is considered the chief factor by New York courts, the other two elements' chief value being evidence of such intention, particularly when the other factors

are indeterminate.

Real Property Law > Title Quality > Adverse Claim Actions > General Overview

HN7[] Title Quality, Adverse Claim Actions

Abandonment of property requires a confluence of intention and action by the owner. Accordingly, before possessory rights will be relinquished, the law demands proof both of an owner's intent to abandon the property and of some affirmative act or omission demonstrating that intention.

Real Property Law > Adverse Possession > Governmental Entity Claims

Real Property Law > Adverse Possession > General Overview

HN8[] Adverse Possession, Governmental Entity Claims

Adverse possession is a remedy not favored by the courts but used as a mechanism to quiet title of property that is in dispute.

Real Property Law > Adverse Possession > Elements of Adverse Claims

Real Property Law > Adverse Possession > General Overview

HN9[] Adverse Possession, Elements of Adverse Claims

In order to establish adverse possession in New York, a claimant must show each of the following elements: possession that is (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous. Since the acquisition of title to land by adverse possession is not favored under the law, these elements must be proven by clear and convincing evidence. All five elements are essential to succeed in a claim of adverse possession.

Contracts Law > Personal Property

Real Property Law > Adverse Possession > General Overview

HN10[] Contracts Law, Personal Property

The doctrine of adverse possession also applies to claims of ownership of personal property. The standards for adverse possession of real and personal property are the same; adverse possession of personal property must also be actual, open and notorious, exclusive, hostile, under claim of right, and uninterrupted for the statutory period. The statutory period in New York for adverse possession of personal property is three years. *N.Y. C.P.L.R. § 214(3)*.

Real Property Law > Adverse Possession > Elements of Adverse Claims

Real Property Law > Adverse Possession > General Overview

HN11[] Adverse Possession, Elements of Adverse Claims

As a preliminary matter, the adverse possessor must possess the property.

Real Property Law > Adverse Possession > General Overview

HN12[] Real Property Law, Adverse Possession

Possession must also be open and notorious so that the true owner and others in the community are given notice of the adverse possession.

Real Property Law > Adverse Possession > General Overview

HN13[] Real Property Law, Adverse

Possession

The initial entry on the property must be under a claim of absolute right without recognition or deference to the interest or rights of any other. Adverse use is presumed if the elements of open, notorious and continuous possession are proven. However, where the possession is permissive in its inception, its character will be changed to adverse, so as to permit the running of the statutory period only when the possessor evinces a claim of ownership by some tangible act in hostility to the rights of the real owner.

Business & Corporate Law > ... > Corporate Formation > Place of Incorporation > General Overview

HN14[] **Corporate Formation, Place of Incorporation**

Corporate existence and the capacity of a corporation to sue or to be sued are governed by the laws of the state of incorporation.

Business & Corporate Compliance > ... > Income Taxes > Corporations & Unincorporated Associations > Failure to Pay

Business & Corporate Law > ... > Dissolution & Receivership > Termination & Winding Up > General Overview

HN15[] **State & Local Taxes, Failure to Pay Business & Corporate Taxes**

Under Delaware law, a corporation which has been proclaimed forfeited for non-payment of taxes is not completely dead. It is in a state of coma from which it can be easily resuscitated, but until this is done its powers as a corporation are inoperative and the exercise of these powers is a criminal offense. It still can serve as repository of title and as obligor of debt.

Counsel: **[*1]** For Board of Managers of Soho International Arts Condominium, on behalf of itself and all unit owners of the Soho International Arts Condominium, Plaintiff: Jeffrey Louis Braun, Kramer, Levin, Naftalis & Frankel, LLP, New York, NY.

For City of New York, New York City Landmarks Preservation Commission, Defendants: Virginia Waters, Michael D. Hess, Corporation Counsel of the City of New York, New York, NY; Virginia Waters, Victor A. Kovner, Corp. Counsel, New York, NY.

For Myers, Defendant: Richard A. Altman, New York, NY.

For The Municipal Art Society, Movant: Christopher Rizzo, Carter Ledyard & Milburn LLP, New York, NY.

For Myers, Counter Claimant: Richard A. Altman, New York, NY.

For Board of Managers of Soho International Arts Condominium, Counter Defendant: Jeffrey Louis Braun, Kramer, Levin, Naftalis & Frankel, LLP, New York, NY.

Judges: DEBORAH A. BATTS, United States District Judge.

Opinion by: DEBORAH A. BATTS

Opinion

A bench trial [1] **[*3]** was held in this matter on March 15, 16 and 18, 2005. The factual background of this dispute has been set forth fully in the Court's prior Opinions on summary judgment motions in *Board of Managers v. City of New York, et al., 2003 U.S. Dist. LEXIS 10221, No. 01 Civ. 1226, 2003 WL 21403333 **[*2]** (S.D.N.Y. June 17, 2003)* ("Board I"), and *Bd. of Managers of Soho*

[1] Plaintiff initially requested a jury trial. However, by letter dated October 20, 2004, Plaintiff withdrew that request and consented to a bench trial. Accordingly, the Court scheduled a bench trial on the merits of the remaining claims. The standard of proof in a civil trial is preponderance of the evidence. As in all bench trials, it is the Court that makes findings of fact and conclusions of law.

Int'l Arts Condo. v. City of New York, et al., 2004 U.S. Dist. LEXIS 17807, No. 01 Civ. 1226, 2004 WL 1982520 (S.D.N.Y. Sept. 8, 2004) ("Board III"), [2] and will not be repeated here. The two issues before the Court are the question of ownership as it affects the *Fourteenth Amendment* takings argument of Plaintiff, and whether or not the removal of the work of art (the "Work") from the wall of the building located at 599 Broadway, destroyed it for purposes of the Visual Artists Rights Act ("VARA"), *17 U.S.C. § 101, et seq.* [3] **[*4]** What is not before the Court is whether or not the Landmarks Preservation Commission ("Commission") ruled properly when it directed Plaintiff to reinstall the Work after the approved repairs to the wall had been made. [4]

[*5] By permission of the Court, City Defendants and Plaintiff submitted post-trial memoranda on April 7, 2005. [5]

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[2] The Court issued a decision, *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, 2003 U.S. Dist. LEXIS 13201, No. 01 Civ. 1226, 2003 WL 21767653 (S.D.N.Y. July 31, 2003) ("Board II")*, on motions for reconsideration by Plaintiff and Defendant Myers of the Court's decision in Board I.

[3] Counsel for Defendant Myers made an argument at trial that Defendant Myers has VARA rights under *17 U.S.C. § 106A(d)(2)*. Defendant Myers' argument is essentially that he has VARA rights because the Work was created before the effective date of VARA and title was never transferred from the author of work of art because he, Defendant Myers, never had title. Defendant Myers provides no legal support for this argument.

Defendant Myers' interpretation of the statutory provision stretches the plain meaning of the statute and would seem to broaden significantly the scope of *§ 106A(d)(2)*. The Court interprets the statute as requiring the author to hold title to the work of art in order for *§ 106A(d)(2)* to apply. See also *Martin v. City of Indianapolis, 982 F.Supp. 625, 638 (S.D. Ind. 1997)* ("VARA protection extends to those works of visual art created prior to the effective date in which title was held by the author as of that date.") (citing *§ 106A(d)(2)*). Because Defendant Myers never had title to the Work, *§ 106A(d)(2)* does not apply to him.

Plaintiff also submitted a new VARA argument in its pre-trial submissions and at the bench trial. Plaintiff argues that Defendant Myers has no rights under VARA because the Work does not fall within VARA's definition of a "work of visual art." Plaintiff cites *17 U.S.C. § 101* which excludes from the definition of a "work of visual art" "(C) any work not subject to copyright protection under this title." However, according to *17 U.S.C. § 411*, a registered copyright claim is not required for actions brought for violations of the rights of the author under *17 U.S.C. § 106A*. Congress amended *§ 411* so that registration would not be a prerequisite to file a suit for violations of *§ 106A*. (See H.R. Rep. 101-514, 1990 U.S.C.C.A.N. 6915, 6932) (quoting Prof. Jane Ginsburg of Columbia Law School: "moral rights are particularly inapt subject matter for imposition of formalities. Moral rights claims go to creators' reputations, not to rights of economic exploitation."). Defendant Myers' first counterclaim asserts a violation of *17 U.S.C. § 106A*; therefore copyright registration of the Work is not required.

[4] Counsel for Defendant Myers stated in his opening that "in your Honor's September ruling of last year you have indicated that in fact the city has the right to so order that to be done, that the city has the right to order the owner to put [the Work] back." (Trans. of Mar. 15, 2006, at 28.)

In its Complaint, Plaintiff brought a claim for relief under *New York CPLR Article 78* to annul and set aside the Landmarks Preservation Commission's refusal to permit Plaintiff to remove the Work, and its requirement that Plaintiff restore or replicate the Work after the northern wall of the building is rehabilitated. (Compl. PP71-75.)

The Court did state in Board III that the Commission's denial of a Certificate of Appropriateness to remove the Work permanently and to mandate that it be reinstalled did not violate the *First Amendment*, *2004 U.S. Dist. LEXIS 17807, 2004 WL 1982520, at *16*, and also stated that "it is clear to the Court that by the Commission's determinations, the Board cannot permanently remove the Work and must reinstall it." *2004 U.S. Dist. LEXIS 17807 [WL] at *19*. However, the Court did not rule on the lawfulness of the Commission's determination. The Court declined to exercise supplemental jurisdiction over the Article 78 claim, stating that "the Article 78 proceeding is a unique state procedural law best left to the expertise of the state courts, the very places where the state legislature intended such actions to be tried." *2004 U.S. Dist. LEXIS 17807, [WL] at *28*.

As the Court noted in footnote 19 of Board III, the statute of limitations to file an Article 78 proceeding had not expired when it issued its Opinion in Board III.

[5] Defendant Myers also submitted a post-trial memorandum of law.

The Court was explicit in its instruction that the Court would not entertain post-trial memoranda of law. (Trans. of Mar. 16, 2005, at 302.) However, after both Plaintiff and City Defendants raised new arguments in their closing statements, the Court permitted Plaintiff and City Defendants to respond to those new arguments. (Trans. of Mar. 18, 2005, at 359.)

[*6] I. Applicability of VARA

In Board I, the Court denied both Plaintiff Board's and Defendant Myers' motions for summary judgment on whether Defendant Myers had rights under VARA pursuant to 17 U.S.C. § 106A(a). This was because the evidence before the Court in Board I did not address the impact of the removal of the Work. Specifically, ***HN1***[↑] 17 U.S.C. § 113(d)(2) applies if the Work could be removed without destroying it and 17 U.S.C. § 113(d)(1) applies if removal of the Work destroyed it. [6]

Defendant Myers' post-trial memorandum contains no responses to new arguments raised by Plaintiff at trial. Nevertheless, the Court has reviewed Myers' post-trial submission and finds that he does not raise any new points that were not raised in prior submissions or at the bench trial.

City Defendants submitted two post-trial memoranda -- one on March 18, 2005 and another on April 7, 2005. The first will be referred to as City Defs.' Mem. of Law I, and the second as City Defs.' Mem. of Law II.

[6] 17 U.S.C. § 113(d)(1) - (2) reads as follows:

> ***HN2***[↑] (1) In a case in which -
>
> > (A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3) and
> >
> > (B) the author consented to the installation of the work in the building either before the effective date [6/19/91] set forth in . . . the Visual Rights Act or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.
>
> (2) If the owner of a building wishes to remove a work of visual art which is part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106(a)(3) shall apply unless
>
> > (A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the visual art, or
> >
> > (B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

[*7] In his opening statement at trial, counsel for Defendant Myers said, "The work is down at this point which means on some level, yes it has been destroyed." (Trans. of Mar. 15, 2005, at 12-13.) At the trial, Defendant Forrest Myers himself stated that the Work does not exist at this time:

> Q: And is it therefore your view that once you take these pieces of metal off the building's wall, the artwork is destroyed unless you put them back on that very same wall? Is that your view?
> A: Yes, the artwork does not exist right now.
> [. . . .]
> Q: Is it your view that it does not exist at this time?
> A: It does not.
> Q: Is it your view that it has been destroyed or would you characterize it differently?
> A: You know, it is not permanently destroyed.
> Q: Would you explain what you mean?
> A: Well, I mean that it can be put back up. And the Landmarks expects them to do that.

(Trans. of Mar. 16, 2005, at 208-09, 218.)

Professor Krauss, Defendant Myers' expert witness made similar statements on direct examination:

> Q: You are aware, of course, that the work is temporarily removed, correct?
> A: It's been disbanded, yes.
>
> Q: Would it **[*8]** be correct to say that it's been destroyed? Or would there be another --
> A: I think in most cases --
> Q: -- way to describe that?
> A. -- if you disband a work you do destroy it. I'm thinking, for instance, the kind of work that I would see as an analogy to this would be the kind of works called collage in which Picasso and Braque took bits of printed pieces of paper and glued them together in order to make a meaningful work of art. And if you pulled those things apart, you would destroy that work. So, by disbanding Mr. Myers' work I think it is

certainly on the way to being destroyed. It hasn't been ground up, it hasn't been, you know, thrown in the trash yet but by disbanding it, yes, it's destroyed.

[. . .]

Q: . . . Are you aware of the component parts of Mr. Myers' work?

A: Yes, I am.

Q: What do you understand them to be?

A: Well, the part affixed to the building which has been referred to as a channel iron and the projections which are made of aluminum, the wall itself and the paint which covers the wall.

Q: If the projections having been removed and are not, having not been destroyed, do you think that the work could be recreated? **[*9]**

A: Yes, I do.

Q: And if it were recreated, would it then resume its existence? Would that be a fair way to characterize it?

A: I would say yes.

(Trans. of Mar. 16, 2005, at 256-58.)

On cross-examination, Professor Krauss again testified that the Work was destroyed, and that it would remain so unless it was recreated at 599 Broadway:

Q: Professor Krauss, you testified on direct examination by Mr. Altman that the Myers work at 599 Broadway can be recreated. I want to ask you this: Can it be recreated at another site?

[. . .]

A: I don't believe it could be. And when I said it could be recreated, I'm not an engineer, so that's not expert testimony by any -- by any means. But I don't believe it could be recreated at any site.

Q: So, it is your view that unless it is recreated at this particular site, it is destroyed?

A: Yes.

(Id. at 263-64.)

It would appear that Defendant Myers' theory is that while the Work is "destroyed" for the time being, it is capable of being "recreated," and therefore is not destroyed for purposes of VARA.

Counsel for Defendant Myers concedes that this type of ephemeral destruction is not contemplated **[*10]** by VARA:

I'm not asking your Honor to rule in Mr. Myers' favor out of sentimentality, it is protected by the Visual Artists Rights Act . . . because even though it is a situation which VARA does not specifically contemplate, I believe it, nonetheless, should fall under its protections . . . Now when VARA talks about removability it doesn't really talk -- it really contemplates the notion of let us, say, a painting hanging on a wall or a sculpture which is bolted to the floor of the lobby of an office building, something like that. This is not what we have here.

(Trans. of Mar. 15, 2005, at 27-28.) Yet, even after conceding that VARA does not contemplate this type of artwork, Defendant Myers asks the Court to find that Defendant Myers' rights are nevertheless protected by VARA.

Congress, in enacting VARA, made a distinction between "removal" and "destruction" and how either "removal" or "destruction" affects the rights of an artist under VARA. The statute does not formally define "removal" and "destruction" and instead relies on the common, everyday meaning of these words. The Court defined the meaning of "remove" in Board I as "to move from a position occupied . . **[*11]** . to convey from one place to another." *2003 U.S. Dist. LEXIS 10221, 2003 WL 21403333, at *10*. The word "destroy" is defined as "to tear down or break up." *American Heritage Dictionary of the English Language* (4th ed. 2000). The definition of "remove" implies that the object being removed has retained its physical integrity; a "destroyed" object clearly has not.

Counsel for Defendant Myers provides no support for his attempts to state that artwork that is "destroyed" but capable of being "recreated" is not "destroyed" for the purposes of VARA, *17 U.S.C. § 113(d)(1)*. It would seem that his "clarification" or "definition" of what constitutes "destruction" under the statute would render meaningless the distinction Congress made in enacting *17 U.S.C. § 113(d)(1)-(2)*. And indeed, the words "disband" and "recreate," used by Defendant Myers and Prof. Krauss, support the conclusion that the Work is destroyed. The definition of "disband" is

synonymous with "destroy": "to dissolve the organization of . . . to break up". The word "recreate" is defined as "to create anew," *American Heritage Dictionary of the English Language* (4th ed. 2000).

Indeed, the Work **[*12]** has undergone two substantial changes since it was first erected in 1973. In 1981, Defendant Myers repainted the Work with a new color scheme. (Pl.'s Ex. ("PX") 60.) In 1997, the Commission approved the "interim removal of unstable steel braces, along with the attached projecting sculpture," which resulted in the removal of the easternmost row of braces. (PX 70.) These are two significant changes to the "original" Work as conceived of and created by Defendant Myers. [7] The Work has metamorphosed from its original form as visualized and conceptualized by Defendant Myers, from the time it was first installed, to its incarnation if it were to be reinstalled, so that it would not be the original Work if it were to be put back on the wall of any building, including that of 599 Broadway.

[*13] Based on these previous changes to the Work, and the terminology used by Defendant Myers and Prof. Krauss to describe the current state of the Work ("disband" and the ability to be "recreated"), as a matter of law, the Court finds that the Work falls within the ambit of *17 U.S.C. § 113(d)(1)* and not *§ 113(d)(2)*. If the previous changes to the Work were not sufficient to cause its "destruction, distortion, mutilation, or other modification," the complete removal of the Work from the wall has certainly caused the "destruction, distortion, mutilation, or other modification" of the Work. *17 U.S.C. § 113(d)(1)*. Despite the attempts of Defendant Myers and Prof. Krauss to qualify their answers by saying the Work could be recreated even though now it does not exist, the Court finds that the Work is disbanded, as Defendant Myers and Prof. Krauss stated, and hence, it is destroyed.

Defendant Myers consented to the installation of the Work on the wall of 599 Broadway before the effective date of VARA, as counsel for Defendant Myers conceded at trial. (See Trans. of Mar. 18, 2005, at 325.) Accordingly, the Court declares that Defendant Myers **[*14]** has no rights under the Visual Artists Rights Act to block or otherwise object to the permanent removal of the Work from Plaintiff's building. Judgment is granted to Plaintiff on its VARA claim against Defendant Myers. Defendant Myers' counterclaim based on VARA is dismissed with prejudice.

II. *Fourteenth Amendment* Takings Argument

In Board III, the Court found that it was precluded from granting summary judgment on the takings cause of action to either Party because the Parties had not proffered any evidence on the ownership of the Work, which the Court found to be a genuine issue of material fact. [8] See *2004 U.S. Dist. LEXIS 17807, 2004 WL 19825250, at *19-20*. The determination of ownership has a direct impact on the takings analysis to be applied to the situation at hand, namely whether the Court should analyze the case as a physical occupation, or whether it should apply the test appropriate for economic regulations. The takings analyses are discussed in detail in Board III. See *2004 U.S. Dist. LEXIS 17807, 2004 WL 1982520, at *16-18*.

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[7] The 1981 repainting of the Work with a new color scheme would seem to be the first "destruction" of the Work. There is no question that Thomas Gainsborough's painting *The Blue Boy* would not be the same painting if later the boy's clothes were painted red. The 1997 permanent removal of the easternmost braces would also seem to be a "destruction" of the Work.

HN3[↑] *17 U.S.C. § 106A(c)(2)* excepts from the definition of destruction, distortion, mutilation or other modification, "any modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement." However, the two changes to the Work, repainting, and the removal of the braces, were not the result of conservation, nor did they come about because of any public presentation of the Work. The repainting of the Work had nothing to do with its conservation, or with the lighting or placement of the Work. The second change, the 1997 removal of the braces, involved the functional role of the building wall as support for the building. The braces were removed not to protect the Work or preserve the artistic integrity of the Work, but to preserve the stability of the building wall itself.

[8] Any determinations in prior Opinions based on ownership noted that there was nothing before the Court at that time to establish ownership. Discovery for trial revealed documents and information not previously available to the Court.

[*15] Plaintiff states that it does not own the Work, and that title has always remained with City Walls, Inc. ("City Walls"), the nonprofit organization that played arguably the most significant role in the installation of the Work on 599 Broadway. [9] City Defendants dispute this contention and argue that the owners of 599 Broadway have owned the Work from the time it was installed, and if not since then, then certainly after City Walls ceased to function or exist as a corporation.

A. Plaintiff's Exhibit 53

Plaintiff's Exhibit ("PX") 53 is a signed letter dated October 19, 1973 from Charles J. Tanenbaum, the owner of 599 Broadway at the time the Work was created, to Doris Freedman, President of City Walls. The letter states in pertinent part:

> I understand that by virtue of the terms of the consent granted by the Board of Estimate, as well as the Agreement of Acceptance **[*16]** which you executed, that you cannot, at this time, follow your normal practice of conveying title to the completed work of art and that you may thus continue subject to certain residuary liability.

(PX 53.)

PX 53 speaks for itself. City Walls had title to the Work. That title was never conveyed to Mr. Tanenbaum because of the restriction contained in the Board of Estimate Resolution, which restricted conveyance of the title to the Work without the Board of Estimate's consent. [10]

[*17] There are no other documents before the Court that counter PX 53, and City Defendants, despite their objections to it, offer no evidence to rebut PX 53. They instead argue that the Court should rely on Mr. Tanenbaum's explanation of his intent in writing PX 53 to find that PX 53 does not determine ownership of the Work. [11]

On the witness stand, Mr. Tanenbaum, an attorney, repeatedly stated that he held title to the Work. When the Court stated to Mr. Tanenbaum that it was not clear to the Court how PX 53 demonstrated that Mr. Tanenbaum had title, Mr. Tanenbaum explained:

> If I had **[*18]** realized that was what has happened subsequently, I would have said I want you to confirm that I have title. But at that point it was so clear to me that I have title that I ignored this as basically her explanation of why she wanted an answer to the letter.

(Id. at 121-22.)

City Defendants state, "Mr. Tanenbaum is intelligent and straightforward." (City Defs.' Mem. of Law II at 11.) The Court did find that Mr. Tanenbaum's testimony on other matters was "straightforward;" however, his testimony concerning PX 53 was less so. Mr. Tanenbaum

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[9] City Wall's involvement in the subject of this litigation is discussed in Board I. See *2003 U.S. Dist. LEXIS 10221, 2003 WL 21403333, at *2-4*.

[10] City Defendants state that the Court misconstrued the Board of Estimate Resolution ("BOE Resolution") in Board I when the Court stated that because of the BOE Resolution, "the grantee City Walls could not transfer title to the work." *2003 U.S. Dist. LEXIS 10221, 2003 WL 21403333, at *4*. City Defendants argue that the BOE Resolution merely gave permission to City Walls to allow projections from the building over a city sidewalk and since the BOE and the City did not own or have title to the Work, the BOE could not prohibit transfer of title. (City Defs.' Mem. of Law II at 7-8.)

It is the City Defendants who misconstrue the BOE Resolution. The BOE Resolution gave consent to "City Wall, Inc. to erect an artistic creation involving various projections over the city sidewalk on the north wall of the building known as 599 Broadway, ..." (PX 18 at 2.) The BOE, in giving this consent, stated that "this consent is for the exclusive use of the grantee and solely for the purpose hereinabove mentioned and shall not be assigned either in whole or in part, or leased or sublet in any manner, nor shall title thereto, or right, interest or property therein pass to or vest in any other person, firm or corporation . . . without the consent in writing of The City of New York, acting by the Board of Estimate." The BOE Resolution made clear that the consent granted to City Walls would not necessarily be granted to the next owner of the Work.

[11] Mr. Tanenbaum stated that he understood the sentence in PX 53 about City Walls' inability to convey title as Doris Freedman being "afraid that because of her having put it up, she might have some further liability." (Trans. of Mar. 15, 2005, at 119.) According to Mr. Tanenbaum, PX 53 was his response to Doris Freedman's concerns about liability, by giving her everything she needed other than indemnification. (Id. at 123.)

attended Yale Law School. (Trans. of Mar. 15, 2005, at 31.) He testified that he had practiced real estate law in the past "because the family had been in real estate for several generations and . . . I worked on real estate matters." (Id. at 32.) As a lawyer, not a layman, and particularly one familiar with real estate law, Mr. Tanenbaum understood the legal significance of the term "title". His explanation to the Court why he ignored the reference to "title" in PX 53 when responding to concerns of liability by City Walls is not credible. [12]

[*19] Accordingly, the Court finds that the Board of Estimate conditioned its permission to erect the Work on the "applicant" (City Walls) retaining title and that ownership status exists in City Walls to this day. [13]

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[12] Doris Freedman expressed concerns about liability in another letter dated February 7, 1973 to her attorney at Wilkie, Farr & Gallagher. In that letter, Doris Freedman states that "This brings to mind the very important fact, that if indeed this Wall ever gets up, what kind of protection does City Walls have in case one of the projections falls off the wall. . . . I told [John Latona of Seaboard] that we could not move one more step unless he verified the safety condition of these steel channels . . . ." (PX 37.) Liability is traditionally a concern of an owner.

[13] City Defendants argue that the Work is a fixture, and thus, belongs to Plaintiff as owner of the building. Although it would seem that PX 53, as an agreement concerning ownership of the Work, precludes this argument, see *People ex rel. Interborough Rapid Transit Co. v. O'Donnel, 202 N.Y. 313, 319, 95 N.E. 762 (1911)*, *Tyson v. Post, 108 N.Y. 217, 221, 15 N.E. 316, 13 N.Y. St. 503 (1888)*, *J.K.S.P. Restaurant, Inc. v. County of Nassau, 127 A.D.2d 121, 127-28, 513 N.Y.S.2d 716 (2d Dep't 1987)*, the Court also finds that the Work does not possess the characteristics of a fixture.

In footnote 14 of Board III, the Court stated *HN4*[⬆] the three criteria for fixtures under New York law: "(1) actual annexation to the real property or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold." *2004 U.S. Dist. LEXIS 17807, 2004 WL 1982520, at *19*. The New York Court of Appeals has stated that *HN5*[⬆] "there is no inflexible and universal rule by which to determine under all circumstances whether that which was originally personal property has become part of the realty as a result of being affixed [to the property] and used in connection [with it]." *Interborough Rapid Transit Co., 202 N.Y. at 318 (1911)*. *HN6*[⬆] The determination of whether a chattel has become a fixture thus is determined on a case-by-case basis. Often, the intention element is considered the chief factor by New York courts, the other two elements' chief value being evidence of such intention, particularly when the other factors are indeterminate. See 2 NY Jur Fixtures § 7; *South Seas Yacht Club, 136 A.D.2d 537, 538, 523 N.Y.S.2d 157 (2d Dep't 1998)*; *Snedeker v. Warring, 12 N.Y. 170 (1854)*.

The Court in Board III did not make a determination of whether the Work constituted a fixture but noted that "it is in dispute whether City Walls intended or expected the Work to be a 'permanent accession to the freehold.'" *2004 U.S. Dist. LEXIS 17807, 2004 WL 1982520, at *19*.

An examination of the evidence reveals that the Work meets none of the criteria. The Work was not intended to be a "permanent accession" to the building. The BOE Resolution granted a limited consent to City Walls to maintain the Work: "This consent shall continue only during the pleasure of the Board of Estimate and shall be revocable at any time by Resolution of said, but in no case shall it extend beyond a term of ten (10) years from the date of its approval . . . ." (PX 18 at 2.) Mr. Tanenbaum was also aware of the limitations posed by the BOE Resolution and the impact it had on the permanency of the Work. In PX 53, Mr. Tanenbaum stated:

> The owners wish to confirm:
>
> (a) If the City of New York shall require the removal of this work, we will assume full responsibility for the removal of the portion projecting over the street.
>
> (b) If the City of New York shall direct specific measures for the maintenance of the project, we, at our option, will either comply with its directions or remove the portions projecting over the street.

(Pl.'s Ex. 53.) This echoed a sentiment Mr. Tanenbaum had made in an earlier letter where he stated "Further, I am concerned by the possibility that the permit given to erect these projections may be revoked at some further date." (PX 2.) In that same letter, Mr. Tanenbaum indicated that removal of the projections was a possibility. (Id.)

Rather than the statements made in hindsight by Mr. Tanenbaum and Defendant Myers, or arguments made by counsel which are not substantiated by any documents in the record, the Court finds that the circumstances of the annexation as revealed by the BOE Resolution and Mr. Tanenbaum's understanding of the temporary nature of the consent granted by the BOE at the time the consent was given, demonstrate that the Work was not intended to be a permanent accession to the building.

The Work also has no application to the use or purpose of the building. 599 Broadway is organized as a condominium under the *New York Condominium Act*. There is no evidence before the Court that the Work, as a piece of art placed on the

[*20] B. City Defendants' Arguments that Plaintiff Owns the Work

City Defendants offer three arguments in support of their position that even if City Walls initially had title to the Work, it does not anymore, and the Work is now owned by Plaintiff: (1) abandonment; (2) adverse possession; and (3) that City Walls can not hold title to any property because it is a defunct corporation. Although the Court has found that City Walls owns the Work, it will nevertheless address these arguments.

1. Abandonment

City Defendants argue that even if the Court finds that the title to the Work was never conveyed to Plaintiff, title rests with Plaintiff because previous owners of the building took possession of the Work after City Walls abandoned the Work when City Walls ceased to operate in 1977.

As Plaintiff's counsel stated in his closing argument, the standard for finding abandonment is very high. ***HN7***[↑] "Abandonment of property requires a confluence of intention and action by the owner. Accordingly, before possessory rights will be relinquished, the law demands proof both of an owner's intent to abandon the property and of some affirmative act or omission demonstrating that intention." *Hoelzer v. City of Stamford, 933 F.2d 1131, 1138 (2d Cir. 1991).* **[*21]**

City Defendants argued both during the trial and in their post-trial memoranda that City Walls abandoned the Work. According to City Defendants, "the sculpture was abandoned . . . when City Walls went out of existence, and . . . the title of the abandoned property is then passed to the first person who [sic] possession of it." (Trans. of Mar. 18, 2005, at 320.) The ceasing of operations of City Walls cannot be construed as a deliberate intention by City Walls to abandon its title to the Work. No evidence is before the Court that would demonstrate any deliberate or intentional "throwing away" of the Work by City Walls.

2. Adverse Possession

City Defendants also raise for the first time in their closing statement the argument that Plaintiff owns the Work by the doctrine of adverse possession. This alternative argument made by City Defendants is unusual. In the first instance, the Court was not able to find another case where a party not claiming to be the owner is attempting to foist ownership through the operation of adverse possession on another party who disclaims ownership. ***HN8***[↑] Adverse possession is a remedy not favored by the courts but used as a mechanism to quiet title of property **[*22]** that is in dispute. *See Belotti v. Bickhardt, 228 N.Y. 296, 308, 127 N.E. 239 (1920)* ("Adverse possession, although not a favored method of procuring title, is a recognized one. It is a necessary means of clearing disputed titles . . . ."). In all the cases found by the Court, the person raising the doctrine of adverse possession uses it either offensively to quiet title to him or her or defensively against someone claiming superior title to the property. In either case, the person claiming adverse possession is seeking title or ownership to the object at issue. The Court was unable to find a case in which adverse possession was used as a weapon to impress ownership upon an unwilling owner, as is the case here. Nevertheless, the Court will address City Defendants' adverse possession argument.

HN9[↑] In order to establish adverse possession in New York, a claimant must show each of the

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building's wall, furthers the use or purpose of the building as a commercial condominium. City Defendants attempt to argue that New York courts have found ornamentation or aesthetic improvement to a building to be a proper use or purpose when determining whether something is a fixture by citing cases where ornaments were found to be fixtures. However, the cases cited are more properly read as such ornaments constituting fixtures because of the manner in which they are affixed to the property rather than because they serve any use or purpose of the property. *See Snedeker v. Warring, 12 N.Y. 170 (1854)* (court found that a statue was intended to be permanent accession because it was placed on permanent mount and base); *New York Life Ins. Co. v. Allison, 107 F. 179 (2d Cir. 1901)* (mirrors that were "so attached as to become practically integral with the walls" were fixtures).

Finally, although the Work had been annexed to the building, it no longer is.

following elements: possession that is (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous. See *Gache v. Town/Village of Harrison, 813 F.Supp. 1037, 1052 (S.D.N.Y. 1993)*. "Since the acquisition of title to land by adverse possession **[*23]** is not favored under the law, these elements must be proven by clear and convincing evidence." *Ray v. Beacon Hudson Mt. Corp., 88 N.Y.2d 154, 159, 666 N.E.2d 532, 643 N.Y.S.2d 939 (1996)*. All five elements are essential to succeed in a claim of adverse possession. *Belotti, 228 N.Y. at 302*; see also *State of New York v. Seventh Regiment Fund, Inc., 98 N.Y.2d 249, 255, 774 N.E.2d 702, 746 N.Y.S.2d 637 (2002)* (noting that in the cases cited by a party where adverse possession was not found, "private claimant did not satisfy one or more of the elements of adverse possession").

HN10[↑] The doctrine of adverse possession also applies to claims of ownership of personal property. See *Lightfoot v. Davis, 198 N.Y. 261, 267, 91 N.E. 582 (1910)*; see also 2 N.Y. Jur. Adverse Possession and Prescription § 86. The standards for adverse possession of real and personal property are the same; adverse possession of personal property must also be "actual, open and notorious, exclusive, hostile, under claim of right, and uninterrupted for the statutory period." *Rabinof v. United States, 329 F. Supp. 830, 841 (S.D.N.Y. 1971)*. The statutory period in New York for adverse possession of personal **[*24]** property is three years. See *New York CPLR § 214(3)*.

a. Actual Possession

HN11[↑] As a preliminary matter, the adverse possessor must possess the property. See 2 NY Jur Adverse Possession and Prescription § 10 ("Possession is an indispensable element in the acquisition of title by adverse possession."); see also 2 CJA Adverse Possession § 34 ("Actual possession of some part of the land claimed is an indispensable element of adverse possession.).

It is not clear how any private individual can "possess" a public work of art. "Possession" is defined as "the fact of having or holding property in one's power; the exercise of dominion over property . . . the right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object." *Black's Law Dictionary* (8th ed. 2004). Possession does not presuppose ownership. Ownership is defined as "the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to posses a thing, regardless of any actual or constructive control." Id. For example, **[*25]** a tenant possesses the right to use an apartment to the exclusion of others, except the owner/landlord. It is not clear to the Court how one can possess the Work in the legal sense when the Work was created for and made accessible to everyone.

Without discussing the public nature of the Work, City Defendants argue that Plaintiff possessed the Work because it "has clearly been on the building side for 32 years." (Trans. of Mar. 18, 2005, at 321; City Defs.' Mem. of Law II at 17.) This fact alone does not prove that Plaintiff possessed the Work. Since the Work was first created in 1973, it was installed on Plaintiff's building wall. City Defendants present no other argument or evidence of actions by Plaintiff that would demonstrate actual possession by Plaintiff of the Work, other than the fact that the Work is on Plaintiff's property. Hence, City Defendants have failed to establish actual possession by clear and convincing evidence. [14]

[*26] City Defendants do make the argument that Plaintiff "exclusively exercised all rights of ownership over the sculpture -- insuring, repairing and maintaining it." (City Defs.' Mem. of Law II at 17.)

However, the exercise of these rights by Plaintiff also does not establish actual possession by clear and convincing evidence. The Court first notes that insuring, repairing and maintaining property are not necessarily the hallmarks of ownership. For example, a tenant may covenant with his or her landlord to make certain repairs to the property, or have other conditions imposed on the tenancy

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[14] City Defendants, and not Plaintiff, the purported adverse possessor, bear the burden of proof because they seek to show that Plaintiff own the Work through adverse possession.

while ownership still rests in the landlord. See 74 N.Y. Jur Landlord and Tenant § 210. In this case, Mr. Tanenbaum assumed certain responsibilities for the Work, as stated in PX 53, Mr. Tanenbaum's letter to Doris Freedman. Specifically, in that letter, Mr. Tanenbaum confirmed, as owner of the building:

> (a) If the City of New York shall require the removal of this work, we will assume full responsibility for the removal of the portion projecting over the street.
>
> (b) If the City of New York shall direct specific measures for the maintenance of the project, we, at our option, will either **[*27]** comply with its directions or remove the portions projecting over the street.
>
> (c) We will not look to you for any further expenditures of any kind, although we hope you will cooperate if it becomes necessary to apply for the renewal of this permit.
>
> (d) We maintain liability insurance in limits of $ 1,000,000 as to persons and property, and will be willing to add your name as additional insured at any time if this can be done without additional premium.

(PX 53). Any maintenance or insurance of the Work did not mean that Plaintiff, or any preceding building owners, possessed the Work because such responsibilities were explicitly taken on in PX 53, a document which also confirmed that City Walls had title to the Work, and not the owner of 599 Broadway.

In addition, any maintenance by Plaintiff of the Work as evidenced by applications to the Landmarks Preservation Commission concerning the Work, resulted from the fact that the Work was on Plaintiff's property. Plaintiff was required to apply to the Landmarks Preservation Commission for any changes it wanted to make to its building because 599 Broadway is within the SoHo-Cast Iron Historic District. Any changes or repairs it **[*28]** desired to make to the building wall necessarily included changes to the Work. Under these circumstances, it cannot be said that Plaintiff's maintenance of its wall and the Work constitutes clear and convincing evidence that Plaintiff had actual possession of the Work. [15]

b. Open and Notorious

HN12[↑] Possession must also be open and notorious so that the true owner and others in the community are given notice of the adverse possession. *See Ray v. Beacon Hudston Mt. Corp., 88 N.Y.2d at 160*; 2 CJS Adverse Possession § 54.

City Defendants reiterate their argument that possession of the Work is open and notorious because the Work is on **[*29]** the side of Plaintiff's building and Plaintiff has maintained and insured it. However, for the same reasons stated by the Court above, City Defendants have failed to prove open and notorious possession by Plaintiff. The Work, from its creation, occupied the wall of 599 Broadway and remained there until it was removed for repair work to be done to the wall. The location or "possession" of the Work did not change from the time the title holder had it placed on the wall until it was removed. The continued placement of the Work on the building wall could not then be the kind of open and notorious possession necessary to provide any notice of an adverse claim of the Work by Plaintiff to either City Walls or the public.

c. Hostile and Under Claim of Right

"The hurdle that defeats most claims of adverse possession is that of hostility. This requirement, which is governed by an objective standard, leaves absolutely no room for equivocation. ***HN13***[↑] The initial entry on the property must be under a claim of absolute right without recognition or deference to the interest or rights of any other." *In re Haynes, 283 B.R. 147, 151 (S.D.N.Y. 2002)* Adverse use is presumed if the elements **[*30]** of open, notorious and continuous possession are proven. *Pirman v. Confer, 273 N.Y. 357, 363, 7 N.E.2d 262*; *West v. Tilley, 33 A.D.2d 228, 231, 306 N.Y.S.2d 591 (4th*

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[15] City Defendants also argue that Plaintiff included a description of the Work in legal documents included as Defs.' Ex. ("DX") V-1, W-1 and U-1 without referencing specific pages. The Court's own review of these legal papers, namely the Condominium Declaration, the Offering Plan and Title Insurance for Plaintiff's building, reveals no specific reference to the Work.

Dep't 1970) (citing Belotti v. Bickhardt, 228 N.Y. 296, 302, 127 N.E. 239 (1920)). However, "where the possession is permissive in its inception, its character will be changed to adverse, so as to permit the running of the statutory period only when the possessor evinces a claim of ownership by some tangible act in hostility to the rights of the real owner." Rabinof, 329 F.Supp. at 841 (S.D.N.Y. 1971) (emphasis added); see also In re Harlem River Drive, 307 N.Y. 447, 458, 121 N.E.2d 414 (1954) ("When the entry upon land has been by permission or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner.").

Counsel for City Defendants argues that the hostility element has been met because: (1) Mr. Tanenbaum believed he owned the Work and this belief made his claim hostile; and (2) the claim is hostile **[*31]** even if Mr. Tanenbaum erroneously believed he owned the Work. (Trans. of Mar. 18, 2005, at 321-32; City Defs.' Mem. of Law II at 17-18.)

City Defendants' argument that the hostility element is met because Mr. Tanenbaum believed he had title, even if it was a mistaken belief, is without merit. A mistaken belief of ownership is only presumed to be hostile when the elements of open, notorious and continuous possession have been established by clear and convincing evidence. Such is not the case here.

Even if actual, open and notorious possession of the Work had been met by Plaintiff's maintenance and insurance of the Work, these responsibilities were initially taken on with the permission of City Walls. (See PX 53.) Therefore, any "possession" of the Work by Plaintiff through the continuation of obligations undertaken by Mr. Tanenbaum in PX 53 began as permissive and Plaintiff has not made any "tangible act in hostility" that would convert permissive possession into adverse possession. [16]

[16] City Defendants have made the argument many times that Plaintiff is bound by earlier "admissions" that they owned the Work.

Accordingly, the Court finds that the hostile and under-claim-of-right prong has not been satisfied.

[*32] d. Exclusive

Exclusive possession is defined as follows:

> This requirement means that the claimant must not share his possession with anybody other than one to whom he gives permission to use his land. As is true with several of the other requirements of adverse possession, the purpose of the exclusiveness requirement is to put the true owner on notice of the claimant's adverse possession of his land. Whether or not the claimant's possession of the true owner's land was exclusive is often determined in light of the nature of the land, its uses, and the purposes for which it is naturally adapted. The intention of the claimant in holding the land, as evidenced by his statements and acts, must also be considered.

39 AmJur POF 2d 261, § 6. "Use or occupation in common with third persons or the public generally is not exclusive possession." 2 CJS Adverse Possession § 60. See also 56 A.L.R.3d 1182 ("Courts which have dealt with the question whether one can acquire title by adverse possession to land which has been used by the public . . . have held that no title can be acquired if the public use indicates a claim of common or public right. The rationale **[*33]** most frequently relied upon has been that public use has destroyed the element of exclusiveness necessary for the acquisition of title.").

During City Defendants' closing argument, the Court asked counsel for City Defendants: "How is it

Plaintiff may have initially thought that it owned the Work, or may have, as Plaintiff's counsel states, made such representations as part of its legal arguments. Regardless of Plaintiff's initial belief and basis for its belief, the Court, after reviewing the many submissions in deciding two separate motions for summary judgment, found that the issue of ownership was a disputed issue of material fact. This conclusion by the Court has been further supported by the most recent discovery by the Parties on the issue of ownership. That discovery has uncovered evidence which demonstrates that Plaintiff did not ever own the Work, and does not presently own the Work.

exclusive?" (Trans. of Mar. 18, 2005, at 321.) Counsel for City Defendants never answered this question posed by the Court either in her argument or in her post-trial briefs.

While City Walls held title to the Work, it did not intend to nor did it ever exercise exclusive possession over it. It was conceived as a public work, with open and equal access to it for all from the beginning:

. "The Project is not for private use, but is intended as an artistic creation to beautify the city and to enhance public awareness of art in the city." (City Wall Petition to the Board of Estimate, DX M.)

. "We are writing to you at the suggestion of Forrest Myers who has been working with us for over a year on an extremely exciting and innovative public art project." (Letter from Doris Freedman to various prospective donors on December 1, 1972, PX 5.)

. "I was therefore delighted when I was approached by City Walls Inc. . . . for a public art **[*34]** project for this wall, designed by Forrest Myers." (Letter from Charles Tanenbaum to Mr. Donald M. Oenslager, Art Commission, City Hall on January 19, 1973, PX 11.)

. "It is a historical landmark in the field of public art." (Letter from Susan Freedman, director of the Public Art Fund to Stanley Riker, PX 59.)

. Altman's opening statement: "This work has become a part of the fabric of Soho and it has really become a piece of public art in the truest sense. It is really owned by everyone. It has been known by everyone. It has been widely publicized." (Trans. of Mar. 15, 2005, at 27.)

. Dr. Krauss' testimony: "I was just very happy that there should be this public work of art in this area that I was -- that I had a great affection for. It seemed to me somehow a kind of announcement about the nature of that district of New York." (Trans. of Mar. 16, 2005, at 251.)

(emphases added). Since the original owner never possessed it exclusively, no subsequent owner claiming from him can.

Plaintiff is a private entity, and not a non-profit corporation whose purpose is to provide art to the public. In Plaintiff's case, exclusive possession would require that it **[*35]** successfully take away public access to the Work, which under these circumstances, would pose an insurmountable task.

City Defendants have not set forth sufficient evidence that there was actual, open and notorious, hostile, and exclusive possession of the Work by Plaintiff. [17] Accordingly, the Court finds that adverse possession has not been and cannot be established by clear and convincing evidence.

3. City Walls' Ability to Hold Title to the Work

City Defendants' final argument that Plaintiff, and not City Walls, owns the Work is based on their assertion that City Walls is not able to hold title to the Work.

City Walls was incorporated under the laws of the State of Delaware, (PX 88), and was authorized to do business in New York State. (PX 89 at 2.) Doris Freedman passed away in 1981. (Susan Freedman **[*36]** Aff. P2.) No evidence is before the Court that City Walls as a corporation was formally dissolved. [18]

PX 96 is a certificate issued by **[*37]** Harriet Smith Windsor, Secretary of State of the State of

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[17] Because the Court finds there has been no actual, open and notorious, hostile or exclusive possession, the Court does not address the "continuous for the statutory period" element of adverse possession.

[18] City Defendants argue that City Walls was "deliberately terminated in 1977," two years before Doris Freedman slipped into a coma. (City Defs.' Mem. of Law II at 13.) City Defendants base this on a rather equivocal statement made by Susan Freedman in her trial affidavit: "Although I am not sure of the exact date, City Walls, Inc. ceased to exist before the [Public Art Fund] was founded [in May 1977]." (Susan Freedman Aff. P7.) This unsubstantiated statement by Susan Freedman (i.e., no documents indicating that City Walls was every formally dissolved, such as a certificate of dissolution), who elsewhere states that she was 15 years old in 1973 and thus had "no personal knowledge of the facts and circumstances surrounding the installation of the sculpture created by Forest [sic] Myers . . .", (Id. P3), is not conclusive evidence that City Walls was terminated in 1977.

Delaware stating that City Walls is no longer "in existence and good standing under the laws of the State of Delaware having become inoperative and void the first day of March, A.D. 1984 for non-payment of taxes." In PX 97, the Secretary of State of the State of New York certifies that upon a diligent examination of the corporate index, no certificate, order or record of a dissolution was found and that according to the Department of State's records, City Walls "is an existing corporation."

HN14[↑] "Corporate existence and the capacity of a corporation to sue or to be sued are governed by the laws of the state of incorporation." *Sevits v. McKiernan-Terry Corp., 264 F. Supp. 810, 812 (S.D.N.Y. 1966)*. ***HN15***[↑] Under Delaware law, a corporation which has been proclaimed forfeited "for non-payment of taxes is not completely dead. It is in a state of coma from which it can be easily resuscitated, but until this is done its powers as a corporation are inoperative and the exercise of these powers is a criminal offense. It still can serve as repository of title and as obligor of debt." *Wax v. Riverview Cemetery Co., 41 Del. 424, 2 Terry 424, 24 A.2d 431, 436 (Del. Super. Ct. 1942)*; **[*38]** see also *Frederic Krapf & Son, 243 A.2d 713, 715 (Del. Sup. Ct. 1968)*. [19]

[19] City Defendants state that Plaintiff's claim that City Walls continues to exist and hold title to the sculpture is "factually and legally wrong."

City Defendants appear to base this argument on their claim that City Walls has been dissolved, although it has not filed a certificate of dissolution. (City Defs.' Mem. of Law II at 13.) City Defendants provide no support for this argument.

"Dissolution" of a corporation is a specific legal term and is not the legal equivalent of a corporation declared inactive for non-payment of franchise taxes. The procedures for dissolution in Delaware can be found in *8 Del. C. § 275*. Nowhere in Delaware's General Corporation Law, or its Corporation Franchise Tax Law, is a corporation whose charter has been forfeited for non-payment of taxes, referred to as dissolved. It is consistently referred to as void. See *8 Del. C. §§ 312-13, 510*. Moreover, Delaware statute specifically mandates that a corporation cannot be dissolved or merged until all due or assessable franchise taxes have been paid. See *8 Del. C. § 227*. There has been no declaration of dissolution of City Walls by City Walls or any other entity. Hence, AmJur2d Corporations § 2892, cited by City Defendants for the principle that the dissolution of a corporation terminates its power to hold property, does not apply.

City Defendants also argue that Plaintiff errs in relying on Wax v. Riverview Cemetery because Wax and Frederic Krapf are based on the rights of a corporation to wind down its business during a three-year period under *§ 278* of the Delaware Charter. (City Defs.' Mem. of Law II at 14-15.) However, a careful reading of these cases reveal that they are not based on rights of a corporation winding down its business.

The Wax court addressed this three-year "winding-down" period only when it explained a Supreme Court case which held that the three-year period did not include a corporation whose charter was proclaimed forfeited by the Governor for non-payment of taxes. *24 A.2d 431, 433-34*. Wax itself did not have anything to do with the rights of a corporation to wind down its business during the statutory three-year period. The question in Wax was whether a corporation that had forfeited its charter for non-payment of taxes could be a defendant in foreclosure proceedings. The corporation in Wax had forfeited its charter in 1924, almost twenty years before the Delaware court's decision. The Wax court answered the question in the affirmative. In coming to its conclusion, the court discussed the Franchise Tax Act, which it noted, had previously imposed a two-year time limit on a corporation to be reinstated after a forfeiture, and also noted that these time limits were abandoned in 1927. The current version of this provision, found in Delaware's General Corporation Law also does not set time limits on a corporation's ability to renew, revive, extend and restore its certificate of incorporation. See *8 Del. C. § 312, 313* (2005).

Nor can the Court decipher why City Defendants argue that Krapf is based on the right of a corporation to wind down its business pursuant to *§ 278* of the Delaware Charter when the case makes only one brief mention of this provision when it dismisses an argument by one of the parties as without merit. *243 A.2d at 715*.

[*39] Although City Walls no longer functions as an independent entity, according to Delaware law, it is not "completely dead" and is able to hold title to property. Accordingly, City Walls remains the owner of the Work.

Having considered all of the City Defendants' arguments, the Court finds that Plaintiff does not own the Work. City Walls had title to the Work from the time it was first installed on the wall, and title was never transferred to Plaintiff.

C. Takings

The Court undertook a thorough analysis of the *Takings Clause* in Board III. *2004 U.S. Dist. LEXIS*

*17807, 2004 WL 1982520, at *16-20*. As the Court stated in Board III, "Ownership . . . plays a crucial role in determining the nature of government conduct in physical occupation cases. If the physical occupation belongs to a third party, it is a direct physical takings to which a per se rule is applied." *2004 U.S. Dist. LEXIS 17807 [WL] at 18*. In such a situation, the government has a categorical duty to compensate the owner, even when the government does not physically take possession but instead only authorizes a third party to occupy the owner's property. Id.

The Supreme Court has described a permanent physical occupation of one's property by the government, **[*40]** or by authorization of the government, as "the most serious form of invasion of an owner's property interests . . . The government does not simply take a single strand from the bundle of property rights: it chops through the bundle, taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982)* (citations and internal quotations omitted). These property rights are composed of the rights to possess, use and dispose of the property. Id. "To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights." Id.

Although this Court has resolved the issue of ownership, there is currently no permanent physical occupation of Plaintiff's property because the Work was removed in 2002, subsequent to the Commission's granting of a Certificate of No Effect on August 27, 2002, which allowed Plaintiff to remove the Work in order to conduct repairs to the building wall. To date, the Work has not been reinstalled.

However, according to the Certificate of No Effect, Plaintiff must reinstall the Work with fabricated lightweight replicas of the Work after the building wall is repaired. **[*41]** (PX 74.) If the Work is reinstalled on Plaintiff's building, Plaintiff will have its rights to possess, use and dispose of its property taken away. By the Commission's decision, Plaintiff will not be able to use its wall in any way other than as a mount for the Work; even if it could sell the property, "the permanent occupation of that space by a stranger will . . . empty the right of any value, since the purchaser will also be unable to make any use of the property." *Loretto, 458 U.S. at 436*. Accordingly, the Court finds that should the Work be reinstalled, since Plaintiff does not own the Work, that reinstallation would be a permanent physical occupation, and therefore, a taking of Plaintiff's property. The reinstallation of the Work will cause Plaintiff to suffer an unconstitutional physical takings for which it will be entitled to "just compensation."

The issue of compensation is not before this Court because the taking of Plaintiff's property has not yet occurred. [20] Plaintiff has attempted to argue that damages should be granted to it because it has been unable to use its wall for advertising signage. However, the Landmarks Preservation Commission never made **[*42]** a determination on an application by Plaintiff for advertising signage. (See PX 70, 74.) Plaintiff withdrew its application requesting permission to have advertising signage put up on the building wall before the Commission made a determination. (Compl. P59.) There are no damages until there is a taking. There is no taking unless and until the Commission interferes with Plaintiff's use of the property in some other way, such as insisting on reinstallation or preventing the placement of advertising signage on the building wall. The Court therefore finds that the issue of damages is not ripe for judicial review.

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[20] Plaintiff has never contested that the prior installation of the Work was an unconstitutional taking of its property. In the Complaint, Plaintiff stated that by the Commission's most recent decision compelling Plaintiff "to restore the mural or replicate it with different materials . . ., the Commission is compelling Plaintiff . . . to accept a physical occupation of a portion of their real property without compensation. Therefore the Commission's actions violate the *Fifth Amendment's* proscription against the taking of private property . . . ." (Compl. P65(b).)

Prior to the most recent Certificate of No Effect in 2002, the Commission never declared that the Work must remain on Plaintiff's wall. In 1997, the Commission approved the interim removal of braces. However, that permit did not require the reinstallation of the braces. *Board I, 2003 U.S. Dist. LEXIS 10221, 2003 WL 21403333, at *5*.

[*43] III. Conclusion

For the foregoing reasons, the Court finds that the Work is destroyed for purposes of VARA and thus Defendant Myers has no claim under VARA to the Work.

The Court also finds that Plaintiff does not own the Work. The Work was never conveyed to Plaintiff from City Walls and City Walls still retains title to the Work.

The Court finds that any future reinstallation of the Work on Plaintiff's property will be a taking in violation of the *Fifth Amendment*, as applied to the states by the *Fourteenth Amendment*, requiring compensation.

The validity of the Commission's determination to require the Plaintiff to restore the Work is a question not for this Court but for the state courts pursuant to an Article 78 proceeding. The import of this Court's determination is merely that if the Commission prevails, the act of making the Plaintiff keep the Work which it does not own on its building, would be an unconstitutional taking, requiring just compensation to Plaintiff.

The Clerk of the Court is DIRECTED to close this case and remove it from the docket.

SO ORDERED.

DATED: New York, New York

May 13, 2005

[*44] DEBORAH A. BATTS

United States District Judge

End of Document

Cohen v. G&M Realty L.P.

United States District Court for the Eastern District of New York

June 13, 2018, Decided; June 13, 2018, Filed

Case No. 13-CV-05612(FB)(RLM); Case No. 15-CV-3230(FB)(RLM)

Reporter
2018 U.S. Dist. LEXIS 99250 *; 2018 WL 2973385

JONATHAN COHEN, SANDRA FABARA, STEPHEN EBERT, LUIS LAMBOY, ESTEBAN DEL VALLE, RODRIGO HENTER DE REZENDE, DANIELLE MASTRION, WILLIAM TRAMONTOZZI, JR., THOMAS LUCERO, AKIKO MIYAKAMI, CHRISTIAN CORTES, DUSTIN SPAGNOLA, ALICE MIZRACHI, CARLOS GAME, JAMES ROCCO, STEVEN LEW, FRANCISCO FERNANDEZ, and NICHOLAI KHAN, Plaintiffs, -against- G&M REALTY L.P., 22-50 JACKSON AVENUE OWNERS, L.P., 22-52 JACKSON AVENUE, LLC, ACD CITIVIEW BUILDINGS, LLC, and GERALD WOLKOFF, Defendants.MARIA CASTILLO, JAMES COCHRAN, LUIS GOMEZ, BIENBENIDO GUERRA, RICHARD MILLER, KAI NIEDERHAUSEN, CARLO NIEVA, RODNEY RODRIGUEZ, and KENJI TAKABAYASHI, Plaintiffs, -against- G&M REALTY L.P., 22-50 JACKSON AVENUE OWNERS, L.P., 22-52 JACKSON AVENUE, LLC, ACD CITIVIEW BUILDINGS, LLC, and GERALD WOLKOFF, Defendants.

Prior History: *Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212, 2013 U.S. Dist. LEXIS 165242 (E.D.N.Y., Nov. 20, 2013)*

Core Terms

artists, stature, featured, work of art, media, collection, meritorious, heights, career, high quality, attested, top, site, longstanding, placement, visitors, followers, terms, high standing, confirmed, Street, inside, tours, painted, plaintiffs', documentaries, graffiti, aesthetic, mastery, train

Counsel: [*1] For Plaintiff: ERIC BAUM, ANDREW MILLER, Eisenberg & Baum LLP, New York, NY.

For Defendant: MEIR FEDER, Jones Day, New York, NY; DAVID G. EBERT, MIOKO C. TAJIKA, Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York, NY.

Judges: FREDERIC BLOCK, Senior United States District Judge.

Opinion by: FREDERIC BLOCK

Opinion

DECISION

BLOCK, Senior District Judge:

On February 12, 2018, I issued my decision granting plaintiffs $6,750,000 as statutory damages for the willful destruction of 45 of plaintiffs' 49 works of visual art by defendant Gerald Wolkoff ("Wolkoff"). *Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *2 (E.D.N.Y. Feb. 12, 2018)* ("*Cohen II*").[1] Defendants now move pursuant to *Federal Rules of Civil Procedure 52(b)* and *59(a)* "to set aside the Court's findings of fact and

[1] The decision incorrectly states: "Plaintiffs, 21 aerosol artists, initiated this lawsuit over four years ago." *Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *1 (E.D.N.Y. Feb. 12, 2018)*. However, only 13 of the 21 artists were named in the original complaint; of the remaining, one was added to the second amended complaint on June 17, 2014, DE64, and the remaining seven were plaintiffs in the related *Castillo v. G&M Realty L.P.* litigation, 1:15-cv-3230(FB)(RLM), which was filed in 2015 but tried simultaneously with the original *Cohen* action.

conclusions of law and grant a new trial or, alternatively, to vacate the judgment in plaintiffs' favor and enter judgment for defendants, or, alternatively, for remittitur." Def.'s Br. at 1. The essence of their motions is that none of plaintiffs' art qualified as works of "recognized stature" under the *Visual Artists Rights Act of 1990 ("VARA")*, and that, in any event, there was no basis for the Court to find that Wolkoff had acted willfully and award the full extent of allowable statutory damages under VARA.

"[A] trial court should **[*2]** be most reluctant to set aside that which it has previously decided unless convinced that it was based on a mistake of fact or clear error of law, or that refusal to revisit the earlier decision would work a manifest injustice." *LiButti v. United States, 178 F.3d 114, 118 (2d Cir. 1999)* (citing *Arizona v. California, 460 U.S. 605, 618 n.8, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)*). Under this standard, there is no basis to grant the defendants' motions. But since the case has generated a considerable amount of public interest and is bound for the circuit court of appeals, the public and the appellate court should have the fullest explication of the bases for my decision. Thus, I now cite "chapter, book, and verse" in the Appendix in support of my findings that the 45 works of art were of such stature.

Moreover, defendants now argue that Wolkoff was warranted in immediately destroying the plaintiffs' works of art because I supposedly "gave him permission to destroy" them, Def.'s Br. at 30, when I "denied plaintiffs' preliminary injunction motion," Def.'s Br. at 28. Although my willfulness determination was drawn from the facts adduced at the trial, defendants have opened the door to what transpired at the hearing by putting the preliminary injunction proceeding in play. As now explained, it reinforces my willfulness determination **[*3]** and justification for imposing the maximum allowable statutory damages.[2]

[2] "It is settled, of course, that the courts, trial and appellate, take notice of their own respective records in the present litigation, both as to matters occurring in the immediate trial, and in previous trials or hearings." *2 McCormick on Evidence* § 330 Facts Capable of Certain Verification (7th ed. 2016). "Although not required to take judicial notice, courts often recognize part of the record in the same proceeding or in an earlier stage of the same controversy." *1 Weinstein's Federal Evidence § 201.12* Facts Capable of Ready and Accurate Determination (2018). The Court takes judicial notice of these proceedings for the purpose of responding to Wolkoff's contentions.

Willfulness

A

As I wrote in my decision, "[i]f not for Wolkoff's insolence, [the maximum statutory] damages would not have been assessed" since "[i]f he did not destroy 5Pointz until he received his permits and demolished it 10 months later, the Court would not have found that he had acted willfully," and "a modest amount of statutory damages would probably have been more in order." *Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *19*. Granted, my finding of willfulness was triggered by Wolkoff's decision to whitewash the plaintiffs' art as soon as I denied their motion for preliminary injunctive relief rather than wait until the buildings were ready to be torn down. But in doing so, he acted "at his peril." *Jones v. Sec. and Exch. Comm'n, 298 U.S. 1, 17-18, 56 S. Ct. 654, 80 L. Ed. 1015 (1936)*. He was represented by skilled counsel[3] who presumably advised him of the well-established principles governing the denial of the "extraordinary and drastic remedy"[4] of a preliminary injunction, and that "[t]he judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction . . . is by its very nature, interlocutory, tentative, provisional, **[*4]** ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness." *Hamilton Watch Co. v. Benrus Watch*

[3] *See N.A.S. Import, Corp. v. Chenson Enters., Inc., 968 F.2d 250, 253 (2d Cir. 1992)* (finding willfulness where defendant's "excuse evaporated once [defendant] hired an attorney").

[4] *Munaf v. Geren, 553 U.S. 674, 689-90, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008)* (quoting 11A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2948, p.129 (2d ed. 1995) (footnotes omitted)).

Co., 206 F.2d 738, 742 (2d Cir. 1953).

But regardless of what advice his lawyer may or may not have given him, Wolkoff was bent on doing it his way and could not wait until I rendered my written decision before destroying plaintiffs' works. As he blatantly acknowledged, "That was the decision I made. I would make the same decision today if that happened today." Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *19.

As I pointed out in my decision, "with a fully developed record, permanent injunctive relief might have been available under the literal reading of VARA," Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *17 n.20, and Wolkoff, as an astute real estate developer, may have been "willing to run the risk of being held liable for substantial statutory damages rather than to jeopardize his multimillion dollar luxury condo project," *id.*

There were, therefore, two dynamics at play throughout this litigation, as identified during the preliminary injunction hearing and in my decision denying injunctive relief: First, given "the transient nature of plaintiffs' works," I would not preclude Wolkoff from developing his property and demolishing 5Pointz. Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212, 227 (E.D.N.Y. 2013) ("*Cohen I*"). But second, "[s]ince, **[*5]** as defendants' expert correctly acknowledged, VARA protects even temporary works from destruction, defendants [were] exposed to potentially significant monetary damages if it [were] ultimately determined after trial that the plaintiffs' works were of 'recognized stature.'" *Id.* In that latter regard, I cautioned that "[t]he final resolution of whether any do indeed qualify as such works of art [was] best left for a fuller exploration of the merits after the case [had] been properly prepared for trial." Id. at 226.

The minutes of the three-day preliminary injunction hearing make it perfectly apparent that, although I was impressed by what the plaintiffs accomplished at 5Pointz, I was sensitive to Wolkoff's plight because he was supportive of the plaintiffs' art and had made it clear to them that the day would come when 5Pointz would be demolished. Why, then, did I turn against him four years later after the extensive three-week trial which, unlike the three-day preliminary injunction hearing, fully developed the law and facts? The answer is that, in addition to his incredible rationales for immediately whitewashing the plaintiffs' art works—essentially, that he was doing it in the artists' best **[*6]** interests—I found out at the trial that Wolkoff had misled me at the preliminary injunction hearing. If he had not done that, I would not have rendered the same decision following that hearing.

To begin, there was never any doubt in my mind from defendants' submissions opposing preliminary injunctive relief, and his counsel's representations during the hearing, that Wolkoff had to demolish 5Pointz at once or run the risk of losing his condo project. I had issued a temporary restraining order ("TRO") and was contemplating extending it to give the City's Landmark Preservation Commission ("LPC") another opportunity to decide to preserve 5Pointz. I asked counsel, "[I]s there a view of the case where I can give the authorities an opportunity to reflect upon that by staying the implementation of my denial of the preliminary injunction? . . . It seems I have the authority to hold it in abeyance for a period of time." Preliminary Injunction Hearing ("PI"), Nov. 8, 2013, HTr. at 61:4-6; 62:1-2.[5] In response, defendants' counsel submitted a letter on November 11 opining that the TRO, which was due to expire the next day, could not be further extended under the law. Def's. Letter, Nov. 11, 2013, DE32, at **[*7]** 1-3. Defendants were correct. Therefore, I was pressed to issue the terse order the next day, upon which Wolkoff relies for his reckless and irresponsible behavior.[6]

Significantly, the letter further stated, "As explained in defendants' papers opposing the preliminary injunction motion, defendants stand to lose hundreds of millions of dollars in tax credits and

[5] "HTr" refers to the transcript of the preliminary injunction hearing, which occurred on November 6, 7, and 8.

[6] The Order stated in its entirety: "Plaintiffs' motion for a preliminary injunction is denied. The temporary restraining order issued on October 17, 2013, and extended on October 28, 2013, is dissolved. A written opinion will soon be issued." Order Denying Preliminary Injunction, Nov. 12, 2013, DE34.

benefits if the project is not completed within the required time frame and, in order to meet those constraints, asbestos removal must begin now." *Id.* at 3 (footnotes omitted).

The letter referenced several affidavits which had been attached to defendants' opposition to the initial motion for an Order to Show Cause ("OTSC"), including one from Wolkoff, which his counsel had referenced during the hearing:

> MR. EBERT: But the other thing I want to just point out, as we put in the affidavit . . . the timing of this thing is meaningful, and if it gets held up —
>
> THE COURT: I think you said December. You have the wrecking crews coming when?
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> MR. EBERT: *We have to get the place demolished by the end of December.*
>
> MS. CHANES:[7] Actually, I believe Mr. Wolkoff testified that there are tenants in place into January 2014.
>
> MR. EBERT: There are portions that **[*8]** can be done way before then. There's a lot of buildings there."

HTr. at 62:11-23, Nov. 8, 2013 (emphasis added).

Wolkoff's affidavit, sworn to October 17, 2013, which I had read during the hearing, stated, in relevant part:

> 22. As explained in the accompanying affidavits of Jay Seiden, Israel Schechter, and Linda Shaw, attorneys assisting G&M Realty on the Project, phases of the Project must be completed before the [tax] statutes expire, or else G&M Realty will lose the benefits of hundreds of millions of dollars in tax exemptions and benefits. And as Peter Palazzo, our Construction Manager for the Project, explains in his affidavit, in order to meet these critical deadlines, we are scheduled to start asbestos removal within the next three to four weeks, with demolition of the building scheduled to be completed by the beginning of 2014 and construction to start in April of 2014.
>
> 23. The damages that G&M Realty will suffer if the Project is delayed include the loss of 259 million dollars in 421a tax benefits (as explained by Seiden) and the loss of 35 million dollars in tax benefits under the Brownfield Cleanup Program (as explained by Shaw). In addition, G&M Realty pays 389,000 dollars **[*9]** in annual taxes on the Property, and annual maintenance charges (heat, electric and salaries) totaling 245,000 dollars. The longer these carrying charges continue without G&M realizing any income from the Property; the greater the loss G&M Realty will sustain.
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> 24. If G&M Realty loses these critical tax benefits and incurs these additional losses, *the Project will no longer be economically viable. We will be forced to reassess whether to proceed at all, and may have to simply scrap the Project*. A great deal of work has been done over the past years to put G&M Realty in a position to qualify for these tax-related benefits because we recognized that it might not be possible without them to proceed with our plans. *I can assure the Court that the effects of losing these benefits will be devastating and I highly doubt we would be able to proceed if we lose these benefits*.
>
> 25. The process of vacating the Property is approximately 85% completed. 99% of the tenants will vacate by November 30, 2013 and all residential and commercial tenants will be displaced from the Property by no later than January 5, 2014, which will leave us in the position of realizing no revenue from the Property until the **[*10]** Project starts to become occupied.

Affidavit of Gerald Wolkoff in Opposition to Application for Temporary and Preliminary Injunctive Relief ¶¶ 22-25 ("Wolkoff Affidavit") (emphasis added).

But at the trial four years later, I learned that Wolkoff knew that he had never applied for the requisite demolition permit until at least four months after he destroyed the plaintiffs' works of art. As plaintiffs' counsel adduced during his cross-examination of Wolkoff:

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[7] Ms. Chanes was plaintiffs' prior counsel.

MR. BAUM: So the question is did you advise the Court during that proceeding that you had to take the building down by the end of December 2013, early January 2014?

MR. WOLKOFF: Yes. As fast as I can . . . .

Trial Tr. at 2027:25-2028:3.

MR. BAUM: In fact, you didn't take the building down in December of 2014 [sic]; correct?

MR. WOLKOFF: Correct.

MR. BAUM: You didn't obtain the demolition permit until approximately March of 2014?

MR. WOLKOFF: Correct.

Trial Tr. at 2028:9-14.

MR. BAUM: But you told the Court that you were going to demolish it by the end of December and start construction two or three months later; correct?

MR. WOLKOFF: That's correct. That was the intent, yes.

Trial Tr. at 2929:16-19.

MR. BAUM: There was no way to take it down **[*11]** in December, correct, because you didn't even have the permit until March; right?

MR. WOLKOFF: I thought I would get the permit sooner.

MR. BAUM: When did you apply for the permit?

MR. WOLKOFF: I can't remember the date.

MR. BAUM: Was it not in March of 2014?

MR. WOLKOFF: Well, I probably had my expediters or people trying to get it way before.

. . .

MR. BAUM: The application was filed in March; is that right?

MR. WOLKOFF: I don't know.

MR. BAUM: Can I show you a document that might refresh your recollection?

MR. WOLKOFF: I don't doubt it.

THE COURT: *So you accept the fact that the application for the demolition of the building was filed in March of 2014?*

MR. WOLKOFF: *Yes.*

Trial Tr. at 2030:11-2031:6 (emphasis added).

MR. BAUM: Did you also state in your affidavit that, if you didn't take the building down by the end of December 2014 [sic], you would lose millions of dollars?

MR. WOLKOFF: It is a possibility, yes.

MR. BAUM: You didn't say it was a possibility in your affidavit, did you?

Trial Tr. at 2031:12-17.

MR. BAUM: You didn't lose hundreds of millions of dollars; correct?

MR. WOLKOFF: No.

MR. BAUM *And you were aware that the Court was relying on this affidavit in making its decision in this case; **[*12]** correct?*

MR. WOLKOFF: No, it was an affidavit that I put in. I didn't know—there was [sic] other affidavits, I imagine, that was [sic] put into the courts for them to make a decision.

THE COURT: It was one of the things.

MR. WOLKOFF: *Yeah, it was one of the things.*

Trial Tr. at 2034:13-21(emphasis added).

If I knew that at the time I rendered my decision denying, without qualification, plaintiffs' preliminary injunction application, I would have issued a different decision: *I would have granted the injunction until such time that the buildings were demolished.*[8]

Wolkoff's egregious behavior was compounded by his incredible testimony during the trial that he was justified in whitewashing the plaintiffs' works of art "in one shot instead of *waiting for three months*[9] and them going to do something irrational again and getting arrested." Trial Tr. at 2059:1-6 (emphasis added). As explained in my decision, there was simply no basis for that testimony. *See Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *17*. Tellingly, he no longer took the position that he had put forth during the preliminary

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[8] "Especially in fast-paced, emergency proceedings like those at issue here, it is critical that lawyers and courts alike be able to rely on one another's representations." *Azar v. Garza, 138 S. Ct. 1790, 201 L. Ed. 2d 118, 2018 U.S. LEXIS 3383, 2018 WL 2465222, at *2 (June 4, 2018)*.

[9] Wolkoff's reference to "waiting for three months" shows that he was aware of the 90-day notice provision in VARA to allow the artists time to remove or otherwise preserve their works, reflecting once again his callousness and disregard for the law.

injunction hearing that he "may have to simply scrap the [condo] Project" if the buildings were not immediately demolished. Wolkoff Affidavit ¶ 24.

Equally **[*13]** incredible was Wolkoff's other justification for the whitewash: "[T]hat it would be better for the plaintiffs to lose their works quickly." *Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *18*. Specifically, he testified: "So I said why should these young people, or the people themselves, get into problems and end up going to court or to jail. So I figured the quickest way to do it is get men, whitewash it and get it over. It would be better for myself *and I believed it would be better for them*, and would stop confrontation." Trial Tr. at 2042:24-2043:4 (emphasis added). While it may have been better for Wolkoff to take such precipitous action, it can hardly be that he truly believed it would also be better for the artists.

In short, Wolkoff's rationales did not make any sense and were not credible. Clearly he was not doing the artists any favors. I had observed his demeanor on the witness stand and his persistent refusal to directly answer the questions posed to him by me and under cross-examination. I did not believe him.[10] Moreover, it simply stuck in my craw that I was misled that the demolition of the buildings was imminent when there was not even an application for a demolition permit extant. I was appalled at this conscious material **[*14]** misrepresentation.[11]

If Wolkoff truly cared about the artists he could easily have taken the position that their works of art could remain until the demolition would occur. And, once again, as I concluded in my post-trial decision: "The shame of it all is that since 5Pointz was a prominent tourist attraction the public would undoubtedly have thronged to say its goodbyes" which "would have been a wonderful tribute for the artists that they richly deserved." *Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *19*.

B

As recognized in my decision, "[a] copyright holder seeking to prove that a copier's infringement was willful must show that the infringer 'had knowledge that its conduct represented infringement or . . . recklessly disregarded the possibility.'" *Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *16* (quoting *Bryant v. Media Right Prods., 603 F.3d 135, 143 (2d Cir. 2010)*). Defendants conjure up an argument out of whole cloth that this means that willfulness cannot be found unless the defendant violated "clearly established law."[12] They draw this conclusion from a passing parenthetical reference to qualified immunity law in a "Cf." citation in a *Fair Credit Reporting Act ("FCRA")* case. Def.'s Br. at 26 & n.72 (citing *Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 70, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007)*). Defendants believe that qualified immunity should be extended to copyright law, arguing "the standard [for willfulness] is akin **[*15]** to the 'clearly established' test for qualified immunity under

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[10] "It is within the province of the district court as the trier of fact to decide whose testimony should be credited." *Krist v. Kolombos Rest. Inc., 688 F.3d 89, 95 (2d Cir. 2012)*. "And as trier of fact, the judge is 'entitled, just as a jury would be, to believe some parts and disbelieve other parts of the testimony of any given witness.'" *Id.* (quoting *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC, 631 F.3d 42, 52 (2d Cir. 2011)*) (citations omitted).

[11] I may have been overly charitable when I stated in my decision that "Wolkoff in the main testified truthfully." *Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *6*. But when it came to the critical parts of his testimony concerning his irrational reasons for whitewashing the plaintiffs' works of art, I took pains to explain why his precipitous conduct was "fanciful and unfounded" and a willful "act of pure pique and revenge." *2018 U.S. Dist. LEXIS 22662, [WL] at *17*.

[12] Notably, defendants did not challenge the jury instruction on willfulness on this ground. *See* Def.'s Proposed Revisions and Objections to Court's Proposed Jury Charges, DE159, at 17. Nor did defendants challenge the jury's finding of willfulness in their post trial brief. *See* Def.'s Post-Trial Brief, DE 167. "It is well-settled that *Rule 59* is not a vehicle for . . . presenting the case under new theories . . . ." *Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012)* (quoting *Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998)*). Nonetheless, since the circuit court has "'discretion' to consider an 'issue[] not timely raised below,'" *id. at 53* (quoting *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 159 (2d Cir. 2003)*), I will address defendants' new legal arguments.

Section 1983." Reply Br. at 9.

Qualified immunity is a governmental immunity from suit. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) ("government officials are entitled to some form of immunity from suits for damages"). It has never been extended to private citizens not acting on behalf of the government, and this Court will not be the first to do so. *See* Wyatt v. Cole, 504 U.S. 158, 168, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992) ("In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity."). In any event, Safeco had nothing to do with qualified immunity. Rather, it simply addressed whether defendants could be held willfully liable for sending improper credit report notices to consumers in violation of the FCRA. Safeco, 551 U.S. at 52. Tellingly, the Supreme Court rejected the defendants' contention that liability "for 'willfully fail[ing] to comply' with FCRA goes only to acts known to violate the Act," id. at 56-57, explaining that "[w]e have said before that 'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears,'" id. at 57 (quoting Bryan v. United States, 524 U.S. 184, 191, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998)). The Court cited a number of cases exemplifying this broad-based proposition, **[*16]** including United States v. Ill. Cent. R. Co., 303 U.S. 239, 242-43, 58 S. Ct. 533, 82 L. Ed. 773 (1938), which held that "willfully," as used in a civil penalty provision, includes "conduct marked by careless disregard whether or not one has the right so to act." 303 U.S. at 242-43 (quoting United States v. Murdock, 290 U.S. 389, 395, 54 S. Ct. 223, 78 L. Ed. 381, 1934-1 C.B. 144, 1934-1 C.B. 145 (1933)).

This fits Wolkoff's conduct to a tee. As explained in my decision, "Wolkoff knew from the moment the lawsuit was initiated that the artists were pressing their VARA claims." Cohen, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *16. His conduct was the epitome of recklessness, let alone "careless disregard" for the plaintiffs' rights.

Moreover, the Second Circuit has consistently held that willfulness in cases governed by the Copyright Act can be found without an affirmative showing of knowledge of infringement, but can be "inferred" from the defendant's conduct. Island Software & Computer Serv., Inc. v. Microsoft Corp., 413 F.3d 257, 264 (2d Cir. 2005); Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996, 1010 (2d Cir. 1995); N.A.S. Imp. Corp. v. Chenson Enters., Inc., 968 F.2d 250, 252 (2d Cir. 1992). Allowing courts to infer willfulness is inconsistent with a notion that the plaintiff must prove the defendant violated clearly established law.

Further Second Circuit precedent is also anathema to defendants' "clearly established" postulation. *See* Hamil Am. Inc. v. GFI, 193 F.3d 92, 99 (2d Cir. 1999) (defendant acted willfully despite attempting to create product with "sufficient changes so that the redesigner does not get sued for copyright infringement"); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1382 (2d Cir. 1993) (defendant acted willfully despite attempted fair use defense); N.A.S. Import. Corp., 968 F.2d at 253 (defendant acted willfully **[*17]** because it could not argue that "it 'reasonably and in good faith' believed that its conduct did not constitute" at least "reckless disregard of [plaintiff's] rights")).

International Korwin Corp. v. Kowalczyk, 855 F.2d 375 (7th Cir. 1988), is also instructive. There, the district court found willfulness based on the defendant's "cavalier attitude" towards plaintiffs' rights. Kowalczyk, 855 F.2d at 380. The lower court held that while the defendant's "initial refusal may have come from ignorance of the intricacies of copyright law . . . [he] certainly came to understand his obligations under the law. Yet his answer, time and time again, was essentially—'Sue me . . . .'" *Id.* The circuit court affirmed, holding that the district court "follow[ed] the approach of other district courts that have considered such evidence as relevant on the issue of willfulness." Id. at 381. It also noted that the district court's determination that the defendant "was not a credible witness as to the testimony that he at least attempted to give from the witness stand," *id.*, was "especially important with respect to his contention," *id.* that he had a "good faith belief" in his legal defense to the action. Id. at 382. So it is here.

C

In the final analysis, in addition to Wolkoff's other reckless behavior, knowingly misleading **[*18]** the Court on a material issue simply cannot be condoned. *See* United States v. Herrera-Rivera, 832 F.3d 1166, 1177 (9th Cir. 2016) (characterizing "attempt to mislead the court" as "willful"); United States v. Parker, 594 F.3d 1243, 1251 (10th Cir. 2010) (false statements made with "willful intent to mislead the court"); Milbourne v. Hastings, 2017 U.S. Dist. LEXIS 206494, 2017 WL 6402635, at *2 n.2 (D.N.J. Dec. 15, 2017) ("Willful attempts to mislead the Court will not be tolerated"); Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc., 2016 U.S. Dist. LEXIS 34929, 2016 WL 6601650, at *2 (C.D. Cal. Mar. 16, 2016) (defendant's "willful attempts to mislead the Court are well-documented"); Sara Lee Corp. v. Bags of New York, Inc., 36 F. Supp. 2d 161, 168 (S.D.N.Y. 1999) ("[a]ctive effort to mislead the court about continued willful counterfeiting is a traditional aggravating factor in statutory damages inquiries").

Defendants' "willful [behavior] . . . [and] deliberate efforts to mislead the court . . . squandered their opportunities to convince the court that they should be held liable to plaintiff for anything less than the total amount of damages sought by plaintiff." State Farm Mut. Auto. Ins. Co. v. Grafman, 968 F. Supp. 2d 480, 484 (E.D.N.Y. 2013). Therefore, the Court sees no reason to disturb its finding that Wolkoff acted willfully in destroying the artwork and that the full complement of permissible statutory damages was warranted.

Recognized Stature

A

As I explained in my prior decisions, the *Carter* two-tiered test has been accepted as the appropriate standard for determining "recognized stature." Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *11 (citing Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994) ("*Carter I*"). Thus, once again, the visual art must be viewed as "meritorious" and its **[*19]** stature must be recognized "by art experts, other members of the artistic community, or by some cross-section of society." Carter I, 861 F. Supp. at 325. These three categories are conjugated with "or"; that is, the artist's work needs recognition by only one of these three groups. Nonetheless, as detailed in the Appendix, each of the 45 works of art meet all three standards.

Notably, as the Seventh Circuit recognized in *Martin*, the *Carter* test "may be more rigorous than Congress intended." Martin v. City of Indianapolis, 192 F.3d 608, 612 (7th Cir. 1999). This is perhaps so because VARA's underlying rationale is to be solicitous of the works of the visual artists who "work in a variety of media, and use any number of materials in creating their works." Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83 (2d Cir. 1995) ("*Carter II*"). Therefore, once again, the courts "should use common sense," Carter I, 861 F. Supp. at 316, and not rigid views as to whether a particular work is worthy of protection as a work of visual art. Indeed, VARA was not intended to denigrate plaintiffs' profound works but was more likely designed to "bar[] nuisance law suits, such as [a law suit over] the destruction of a five-year-old's fingerpainting by her class mate." Id. at 325 (quoting Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection For Visual* **[*20]** *Art*, 39 Cath. U.L. Rev. 945, 954 (1990)).

Defendants' challenges to the plaintiffs' works of art should be viewed through this prism.

B

Principally, the defendants are dismissive of Cohen's testimony and expertise, contending that it was "erroneous as a matter of law" for the Court to rely on his "allocation of wall space for works as proof of their recognized stature." Def.'s Br. at 10. I could not disagree more. As I wrote: "that Jonathan Cohen selected the handful of works from the thousands at 5Pointz for permanence and prominence on long-standing walls is powerful, and

arguably singular, testament to their recognized stature." *Cohen II, 2018 U.S. Dist. LEXIS 22662, 2018 WL 851374, at *12*. He was, after-all, Wolkoff's long-time hand-picked curator, and for good reason. He remains one of the most prominent aerosol artists in the world.

The following is a limited excerpt from his curriculum vitae: He has had over 500 press mentions, including attention from the *New York Times, Wall Street Journal, Huffington Post*, the *Today Show*, and *ESPN*. Trial Tr. at 1640:25-1641:6. He has produced art on commission for Fortune 500 companies, including Louis Vuitton, Nikon, Nespresso, Fiat, and Facebook. Cohen Folio at 7. His work has been featured in art museums and galleries, including the Parish Art Museum, Orlando Art Museum, Rush Arts Gallery, Corridor Gallery, **[*21]** and Gold Coast Arts Center. *Id.* His work was featured in the major motion picture *Now You See Me* and many music videos, and he has been featured in documentaries about aerosol art, including the HBO documentary "BANKSY Does NYC." *Id.* at 7, 10, 56. His work has achieved academic recognition. *Id.* at 9; Tr. at 1643:24-1645:12.

Jonathan Cohen, to Wolkoff's delight, was perhaps principally responsible for transforming his crime-infested neighborhood and dilapidated warehouse buildings into what became recognized as arguably the world's premium and largest outdoor museum of quality aerosol art, drawing hundreds or thousands of daily visitors from all over the world. And he was as qualified to do this as any other museum curator. No one would contend that a work of art selected by the curator of the Museum of Modern Art, the Guggenheim, or the new Whitney Museum should not qualify as a work of recognized stature. The same can be said of the curator of 5Pointz.[13] Jonathan Cohen was uniquely qualified to recognize the stature of plaintiffs' works of art.

And the record reflects how careful and meticulous he was in his selections. He only chose to recognize eight of his own solo works out of his hundred-plus works remaining **[*22]** at the time of the whitewash. Trial Tr. at 1537:7. Admirably, "[he] treated the rules the same [for himself] as [he] would for other artists." Tr. at 1424:4-5.

Nor should Cohen's expertise be marginalized because he was one of the plaintiffs. His status as a party was only a factor for me to consider; it was not a bar to crediting his testimony. *See United States v. Norman, 776 F.3d 67, 77 (2d Cir. 2015)* ("It is the job of the factfinder in a judicial proceeding to evaluate and decide whether or not to credit, any given item of evidence. Whether, and to what extent, testimony that has been admitted is to be credited are questions squarely within the province of the factfinder. A jury is properly instructed that it is free to believe part and disbelieve part of a defendant's trial testimony."). Cohen had been the curator for over a decade before he joined in this litigation to save 5Pointz. And I found his credibility as a witness to be unimpeachable.

C

Defendants make a litany of other categorical attacks on the recognized stature evidence. None are meritorious.

First, they argue that merit is an "impermissible factor." Def.'s Br. at 4. This ignores that merit is an explicit part of the *Carter* test, requiring plaintiffs to show that the artwork **[*23]** is "viewed as meritorious." *Carter I, 861 F. Supp. at 325*.

Second, defendants argue that a work must have "acquired *recognition* of its merit at the time of its destruction." Def.'s Br. at 5. VARA explicitly leaves this question open. *See Carter I, 861 F. Supp. at*

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[13] Angelo Madrigale ("Madrigale") described 5Pointz as "ground zero" of the aerosol art movement, Trial Tr. at 1203:11-12, and testified that it was "equal to" the Lincoln Center and Apollo Theater in cultural significance, *id.* at 1203:17-21. Madrigale is the vice president and director of contemporary art at the Doyle New York art auction house on the Upper East Side of Manhattan, Tr. at 1195:4-6. He also taught the courses Understanding the Global Art Market and The Business of Art at Pennsylvania College of Art and Design. Tr. at 1194: 25-1195:3. He conducted "the first ever auction of street art in the United States." Tr. 1195:25-1196:1.

325 n.12 ("Vara does not delineate when a work must attain 'recognized stature' in order to be entitled to protection under this Section."); Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev 1935, 1967 (2000) ("In a footnote, Judge Edelstein strongly implies that a work may obtain recognized stature after the VARA suit is filed and still fulfil (sic) the terms of the provision."). Regardless, the focus of my decision was the recognition the works achieved prior to the whitewash.

In the same vein, defendants argue that the opinion of the plaintiffs' expert, Renee Vara[14] ("Vara"), that the works have merit is irrelevant because it was rendered after the works' destruction. *See* Def.'s Br. at 5 ("[A] single person's 2017 opinion that a work has artistic merit is of no relevance to whether the work had recognized stature in 2013.") But as detailed in the Appendix, Vara testified both to the merit of the works and the recognition they had achieved *prior* ***[*24]*** *to their destruction*.

Defendants argue that "it would defeat the very purpose of the 'recognized stature' requirement" if the determination was not made in time to provide "a building owner . . . guidance about what works are required to be preserved." Def.'s Br. at 6. Defendants cite no law for this dubious proposition. Regardless, Wolkoff knew before he whitewashed the works of art that he was facing the prospect of being liable for significant monetary damages.[15]

Defendants further argue that the "public did not have access" to the inside works. Def.'s Br. at 8. However, Cohen conducted regular tours of the inside works, tours which were heavily sought after. For example, pop artist Usher actively sought and was given a tour of the inside of the building, as did Lois Stavksy[16] and Arabic calligraphy artist eL Seed. Tr. at 1393:2-14; 1435:15-19. Vara also identified "about 805 Bates documents, which were e-mails that were written to 5Pointz or Jonathan [Cohen], requests for visitors to come inside." Tr. at 1043:22-24. The e-mails represented visitors from "something like 70 different countries," including "professors from colleges, high school teachers, kindergarten teachers, **[*25]** private schools, all of them requesting tours to walk throughout the outside and inside of the building in order to look at the work." Tr. at 1044:1-5. Vara compared the inside works to "an exhibition in a gallery in Chelsea or the Lower East Side," Tr. at 1044:8-9, and noted that there were "some very interesting e-mails that were sent to Jonathan talking about how valuable they found the experience. How their students learned so very much," Tr. at 1044:12-15. Therefore, defendants' contention that the inside works were not recognized, much less accessible, prior to their destruction is contradicted by the record.

Defendants next argue that for the works on high walls, they "remained on the walls not by choice, but by necessity," as a "function of how difficult it was to reach the spot." Def.'s Br. at 9. But height and merit were fundamentally intertwined at 5Pointz. Cohen chose those walls for longstanding, higher quality works by the best artists because they were higher and harder to access. The decision as to whether a specific work would be longstanding was a holistic one, made partly prior to approving an artist for a longstanding wall and **[*26]** continuously ratified by allowing the work to remain. Therefore, the height of a particular work reinforces its quality, rather than detracts from it.[17]

Finally, defendants argue that for some works, the

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[14] Not to be confused with the statute VARA.

[15] *See, e.g.*, OTSC Tr. at 6 (explaining that plaintiffs "can go forward with this case" and they will have "all the time in the world" to establish monetary damages); HTr. at 44-45 (commenting that "we'll see" whether plaintiffs are "entitled to damages later on."). In any event, Wolkoff created his own hardship by taking the law into his own hands rather than to await the Court's preliminary injunction decision and the trial.

[16] Stavsky is a graffiti art writer based in New York. She runs *Street Art NYC* and created the 5Pointz exhibit for *Google Arts and Culture*. Tr. at 1387:15-1391:11. She also led tours of 5Pointz for students, journalists, and artists. Tr. at 1392:1-1393:14.

[17] Cohen also confirmed that these pieces were of "high standing" and "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Trial Tr. at 1508:8-19.

Folios "contain little or no evidence of any recognition." Def.'s Br. at 11. But the Folios were only part of the evidence. They supplemented the three weeks of trial testimony provided by each of the 21 artists, as well as the testimony of Vara, Stavsky, and Madrigale. Vara's opinion was also based on documents not included in the Folios, upon which she also relied in making her determinations that each work achieved recognized stature, including online videos, documentary footage, social media coverage, letters from art professors around the country, letters and e-mails from visitors to 5Pointz, and course syllabi.[18] Defendants' narrow focus on the Folios misses the weight of the evidence.[19]

D

Finally, defendants criticize the Court for not making its work-by-work findings explicit. Normally, including a "recital" of exhaustive evidence and testimony is "unhelpful" in a Court's findings of fact. *Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 613 (8th Cir. 2009)* (quoting 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice [*27] and Procedure* § 2579 at 330 (3d ed. 2008)). Nonetheless, since defendants make particularized challenges to the recognized stature of each work of art, the Appendix sets forth work-by-work the primary evidence supporting my recognized stature determinations.

Thus, although I believe that Cohen's selections of the 45 works of art satisfied VARA's "recognized stature" requirement, the Appendix details that even if Cohen had not selected them, there was sufficient evidence to independently come to those conclusions.

CONCLUSION

Accordingly, defendants' motions are denied in their entirety.[20]

SO ORDERED

/s/ Frederic Block

FREDERIC BLOCK

Senior United States District Judge

Brooklyn, New York

June 13, 2018

APPENDIX

This appendix describes the evidence supporting the Court's determination of recognized stature for each of the 45 works. It includes both documentary evidence submitted at trial and testimonial evidence provided by the parties, fact witnesses, and plaintiffs' expert Vara. It is organized by artist, beginning with an overview of the artist's

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[18] Experts may properly rely on such facts and data even if they have not been admitted. *See Federal Rule of Evidence 703* ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.").

[19] Defendants' doomsday argument that this decision will operate as a deterrent to future building owners has no merit. It simply encourages future parties to negotiate VARA rights in advance, or, at minimum, abide by the scriptures of *17 U.S.C. § 113(d)*, as contemplated by Congress. In fact, the New York Times reported just two weeks ago that graffiti artists have been commissioned to "bring[] a 5Pointz vibe to Lower Manhattan" by installing works at the World Trade Center. Jane Margolies, *Think Graffiti, With Consent*, N.Y. Times, June 4, 2018, at C1. Clearly the decision has not operated as such a deterrent.

[20] I have considered defendants' other arguments, including their arguments regarding application of the statutory damage factors and remittur, and likewise find them without merit. I note that I have discovered one additional fact supporting my finding under the statutory factors that Wolkoff and G&M Realty continue to profit from the destruction of 5Pointz: G&M Realty's attempt to secure a trademark in the brand name "5Pointz," of which the Court takes judicial notice. U.S. Trademark Application Serial No. 86210325 (filed Mar. 4, 2014). Wolkoff knew that this application had been made at the time of the trial. This is further evidence of his deceptiveness since he claimed to have "no knowledge" of efforts to brand his new luxury condos with the 5Pointz logo. Trial Tr. at 2061:8-11.

credentials and career recognition, followed by a work-by-work listing of the most relevant supporting evidence of recognized stature. This evidence embraces **[*28]** three categories, as it was presented at trial and contemplated by *Carter*: recognition by (1) art experts; (2) other members of the artistic community; or (3) some cross-section of society. *Carter I, 861 F. Supp. at 325*.

In addition to the evidence listed below, Cohen's curation is evidence of recognized stature for all works. Some of the testimony at trial applied broadly to multiple works; this testimony is separately referenced for each work to which it applied.

Jonathan Cohen aka "Meres One"

Cohen's credentials were presented in the body of the opinion. *See* Opinion at 21-22.

1. 7 Angle Time Lapse

Category One: *7 Angle Time Lapse* was the first of its kind and provided "worldwide recognition" to Cohen. Tr. at 1409:21-23. It was chosen for placement in the loading dock, "the heart of 5Pointz," Tr. at 1412:22-24. It was visible from the 7 train. *Id.* It was intended to be a longstanding piece. It was recognized by Vara as both a meritorious work of art, Tr. at 1649:11-24, and a work of recognized stature,[21] Tr. at 1642:24-1646:13; 1654:17-22.

Category Two: Cohen's work received academic recognition. Tr. at 1643:24-1645:12. *7 Angle Time Lapse* was featured in *Google Arts and Culture*. Cohen Folio at 119. An art blogger who covered 5Pointz called it the best piece **[*29]** at the site. Cohen Folio at 128. Gregory Snyder ("Snyder"), a professor at Baruch College who wrote *Graffiti Lives*, called the artists in this suit "top artists at the heights of their career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky.[22] Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale[23] as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *7 Angle Time Lapse* was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions of commuters on the passing train. He was featured in 14 documentaries. Tr. at 1647:12-15. The jury found it achieved recognized stature. *See* Verdict Form at 7, DE 165.

2. Outdoor Wildstyle

Category One: *Outdoor Wildstyle* was chosen for a wall visible from the 7 train, Long Island Railroad, and Metro North. Tr. at 1420:22-1421:5. It was intended to remain for at least a year. Tr. at 1422:3-10. It was recognized by Vara as both a meritorious work of art, Tr. at 1651:20-23, and a work of recognized stature, **[*30]** Tr. at 1642:24-1646:13; 1654:17-22.

Category Two: Cohen's work received academic recognition. Tr. at 1643:24-1645:12. Snyder called the artists in this suit "top artists at the heights of their career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. *Outdoor Wildstyle* was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-

[21] The Court notes there is a difference between the step one determination of merit and the step two determination of recognition. While the works arguably must be recognized prior to their destruction, nothing precludes an expert from analyzing the works' merit after the fact. Indeed, any VARA lawsuit where the expert is retained after the works' destruction will feature this dynamic. The explanation of what makes a certain work meritorious informs *why* the works achieved the recognition that they did.

[22] Stavsky's credentials are listed at page 25, footnote 16.

[23] Madrigale's credentials are listed at page 22, footnote 13.

21.

Category Three: *Outdoor Wildstyle* was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions of commuters on the passing train. He was featured in 14 documentaries. Tr. at 1647:12-15.

3. Clown with Bulbs

Category One: *Clown with Bulbs* was chosen for a wall at the highly coveted loading dock. Tr. at 1423:13-17. It was painted in 2012 or 2013 and intended to remain until the summer of 2014. Tr. at 1424:12-15. It was recognized by Vara as both a meritorious work of art, Tr. at 1651:24-1652:4, and a work of recognized stature, Tr. at 1642:24-1646:13; **[*31]** 1654:17-22.

Category Two: Cohen's work received academic recognition. Tr. at 1643:24-1645:12. *Clown with Bulbs* was featured in *Google Arts and Culture*. Cohen Folio at 120. Snyder called the artists in this suit "top artists at the heights of their career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Clown with Bulbs* was seen by hundreds or thousands of daily visitors to 5Pointz. He was featured in 14 documentaries. Tr. at 1647:12-15. The jury found it achieved recognized stature. *See* Verdict Form at 13, DE 165.

4. Eleanor RIP

Category One: *Eleanor RIP* was chosen for a high wall at the highly coveted loading dock. Tr. at 1429:8-12. It was painted shortly after the loading dock collapse and intended to be a permanent piece. *Id.* Cohen described it as one of his "favorite" pieces. Tr. at 1430:2-5. It was recognized by Vara as both a meritorious work of art, Tr. at 1653:3-7, **[*32]** and a work of recognized stature, Tr. at 1642:24-1646:13; 1654:17-22.

Category Two: Cohen's work received academic recognition. Tr. at 1643:24-1645:12. Snyder called the artists in this suit "top artists at the heights of their career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Eleanor RIP* was seen by hundreds or thousands of daily visitors to 5Pointz. He was featured in 14 documentaries. Tr. at 1647:12-15.

5. Patience

Category One: *Patience* was chosen for a "wall"[24] on Crane Street with significant foot traffic. Tr. at 1431:4-9. It was painted in 2013. Tr. at 1431:11. It was recognized by Vara as both a meritorious work of art, Tr. at 1653:8-14, and a work of recognized stature, Tr. at 1642:24-1646:13; 1654:17-22.

Category Two: Cohen's work received academic recognition. Tr. at 1643:24-1645:12. Snyder called **[*33]** the artists in this suit "top artists at the heights of their career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Patience* was seen by hundreds or thousands of daily visitors to 5Pointz. He was featured in 14 documentaries. Tr. at 1647:12-15.

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[24] It was technically painted on a gate.

6. Character

Category One: *Character* was chosen for an inside wall. Tr. at 1435:4-5. It was painted in 2012 or 2013. Tr. at 1435:14. It was featured in the private tours given by Cohen. Tr. at 1435:15-19. It was recognized by Vara as both a meritorious work of art, Tr. at 1654:3-7, and a work of recognized stature, Tr. at 1642:24-1646:13; 1654:17-22.

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his interior works. Tr. at 1044:1-20. Cohen's work received academic recognition. **[*34]** Tr. at 1643:24-1645:12. Snyder called the artists in this suit "top artists at the heights of their career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Character* was seen in the private tours of the inside works. He was featured in 14 documentaries. Tr. at 1647:12-15.

7. Inside Wildstyle

Category One: *Inside Wildstyle* was chosen for an inside wall. Tr. at 1436:6-8. It was painted in 2011 or 2012 and had achieved longstanding status. Tr. at 1436:7. It was recognized by Vara as both a meritorious work of art, Tr. at 1654:10-14, and a work of recognized stature, Tr. at 1642:24-1646:13; 1654:17-22.

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his interior works. Tr. at 1044:1-20. Cohen's work received academic **[*35]** recognition. Tr. at 1643:24-1645:12. Snyder called the artists in this suit "top artists at the heights of their career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Inside Wildstyle* was seen in the private tours of the inside works. He was featured in 14 documentaries. Tr. at 1647:12-15.

Akiko Miyakami aka "Shiro"

Akiko Miyakami is a well-recognized Japanese artist who has been featured in 170 exhibitions and dozens of additional projects, primarily in Japan and New York, but also in Germany, India, and China. Miyakami Folio at 6-14; Tr. at 1608:5-11. She has been featured and interviewed in many art magazines and media outlets, including *Complex, Street Art, Untapped Cities*, and *NPR*. Miyakami Folio at 15-31; Tr. at 1608:10-11. She has been recognized by academic Jessica Pabon as a "top four graffiti artist," Tr. at 1608:15-17.

8. Manga Koi

Category One: *Manga Koi* was chosen by Cohen for placement on highly coveted rooftop **[*36]** space. Tr. at 1287:21-22. It survived for several months before the whitewash. Tr. at 1289:2-3. It was prominently placed between murals of two other famous artists and visible from the train. Tr. at 1287:22-1288:3. It was recognized by Vara as both a meritorious work of art, Tr. at 1613:3-22, and a work of recognized stature, Tr. at 1614:12-1619:11. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: Her work was described as "instantly recognizable" by Danny Simmons, a gallery owner and collector of graffiti art. Tr. at

1615:11-12. Snyder called the artists in this suit "top artists at the heights of their career" and said Miyakami's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21. **[*37]**

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions of commuters on the passing train. Miyakami has thousands of social media followers. Tr. at 1617:2-7. *Manga Koi* is included in photo collections on Flickr, Hide Miner, and Getty Images. Tr. at 1618:10-1619:10. The jury found it had achieved recognized stature. *See* Verdict Form at 39, DE 165.

Carlos Game aka "See TF"

Carlos Game is a prominent artist and United States Marine Corps veteran. Tr. at 780:20-21. He has done many exhibitions and commissions, including a portrait of Ivanka Trump that was displayed in Trump Tower and exhibitions at Sacred Gallery, Rue De L'Art, Gold Coast Art Center, and a 9/11 Memorial at the Railroad Museum of Long Island. Tr. at 804:1-11; Game Folio at 2; 14-17; 20-21; 27-30. His work has been covered by *Into the Urban, In the Wit of an Eye, Artsy*, and *Street Art NYC*. Game Folio at 3-13; 24-26.

9. Black and White 5Pointz Girl

Category One: *Black and White 5Pointz Girl* was chosen by Cohen for placement on a highly coveted longstanding wall visible from the train. Tr. at 797:2-4. Game described it as his "calling card." Tr. at 798:2. It was painted in summer 2013 and survived until the whitewash. Tr. at 798:13-15. It was recognized by Vara **[*38]** as both a meritorious work of art, Tr. at 1055:7-16, and a work of recognized stature, Tr. at 1042:11-13. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his interior works. Tr. at 1044:1-20. Joseph Austin ("Austin"), a professor at University of Wisconsin-Milwaukee, called his works at 5Pointz "world-class displays of extraordinary, global, multi-cultural barring [sic] that has defined urban art as a significant movement in art history." Tr. at 1059:9-1060:2. Snyder called the artists in this suit "top artists at the heights of their career" and said Game's works at 5Pointz specifically "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the **[*39]** Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions on the passing train. Tr. at 797:2-4. Game has thousands of social media followers. Tr. at 1061:2-5. *Black and White 5Pointz Girl* received 82 likes on Instagram. Game Folio at 45. The jury found it had achieved recognized stature. *See* Verdict Form at 59, DE 165.

10. Denim Girl

Category One: *Denim Girl* was chosen by Cohen for placement on a longstanding inside wall. Tr. at 788:1-9. It was painted in 2009 and survived until the whitewash. Tr. at 788:8-10. Game believed it and all his other inside works were "permanent" pieces. Tr. at 793:6-9. It was recognized by Vara as both a meritorious work of art, Tr. at 1046:20-1048:3, and a work of recognized stature, Tr. at 1042:11-13. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-

19.

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his work, including his interior works. Tr. **[*40]** at 1044:1-5. Austin called his works at 5Pointz "world-class displays of extraordinary, global, multi-cultural barring [sic] that has defined urban art as a significant movement in art history." Tr. at 1059:9-1060:2. Snyder called the artists in this suit "top artists at the heights of their career" and said Game's works at 5Pointz specifically "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Denim Girl* was seen in the private tours of the inside works. Game has thousands of social media followers. Tr. at 1061:2-5. *Denim Girl* received 56 likes on Instagram. Game at 46.

11. Geisha

Category One: *Geisha* was "the first image that everybody and anybody that's going into 5Pointz, who are walking to the MoMa or going into the diner or getting off the train will see." Tr. at 781:9-12. It was chosen by Cohen for placement on a wall at the entrance. Tr. at 783:1-22. It survived **[*41]** for several months and was intended to last longer. Tr. at 783:8-17. It was visible from the train. Tr. at 783:23-25. It was recognized by Vara as both a meritorious work of art, Tr. at 1042:16-1043:13, and a work of recognized stature, Tr. at 1042:11-13. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his work, including his interior works. Tr. at 1044:1-5. Austin called his works at 5Pointz "world-class displays of extraordinary, global, multi-cultural barring [sic] that has defined urban art as a significant movement in art history." Tr. at 1059:9-1060:2. Snyder called the artists in this suit "top artists at the heights of their career" and said Game's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, **[*42]** 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Geisha* was seen by hundreds or thousands of daily visitors to 5Pointz. Game has thousands of social media followers. Tr. at 1061:2-5.

12. Marilyn

Category One: *Marilyn was* chosen by Cohen for placement on a longstanding inside wall. Tr. at 785:10-15. It was painted in 2009 and survived until the whitewash.[25] Tr. at 785:23-25. It was recognized by Vara as both a meritorious work of art, Tr. at 1044:21-1046:2, and a work of recognized stature, Tr. at 1042:11-13. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Marilyn* was featured in *In the Wit of the Eye*, the website of Hans Van Rittern, a European arts and culture tourist guide that led Europeans on tours to New York, including

[25] Defendants take issue with this date in their brief, claiming that an Instagram post on October 7, 2013 implies the piece was not created until 2013. Game Folio at 44. However, this is only the date that the Instagram post was created; it says nothing about when the artwork itself was placed on the wall. Despite challenging other creation dates, defendants did not challenge Game's testimony as to the date of the piece on cross-examination.

5Pointz. Folio at 35; Tr. at 1061:6-18; 1062:22-23. College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his work, including **[*43]** his interior works. Tr. at 1044:1-5. Austin called his works at 5Pointz "world-class displays of extraordinary, global, multi-cultural barring [sic] that has defined urban art as a significant movement in art history." Tr. at 1059:9-1060:2. Snyder called the artists in this suit "top artists at the heights of their career" and said Game's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Marilyn* was seen in the private tours of the inside works. Game has thousands of social media followers. Tr. at 1061:2-5. *Marilyn* received 88 likes on social media. Game Folio at 44. The jury found it had achieved recognized stature. *See* Verdict Form at 51, DE 165.

13. Red

Category One: *Red* was chosen by Cohen for placement on a longstanding inside wall. Tr. at 788:3-6. It was painted in 2009 and survived until the whitewash. Tr. at 788:8-10. It was recognized by Vara as both **[*44]** a meritorious work of art, Tr. at 1046:3-19, and a work of recognized stature, Tr. at 1042:11-13. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his work, including his interior works. Tr. at 1044:1-5. Austin called his works at 5Pointz "world-class displays of extraordinary, global, multi-cultural barring [sic] that has defined urban art as a significant movement in art history." Tr. at 1059:9-1060:2. Snyder called the artists in this suit "top artists at the heights of their career" and said Game's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21. **[*45]**

Category Three: *Red* was seen in the private tours of the inside works. Game has thousands of social media followers. Tr. at 1061:2-5.

Christian Cortes

Christian Cortes has been a prominent New York graffiti artist since the 1980s. He has been featured in *The Source, Rap Pages, Vibe, Videograf, Street Art NYC, Senses Lost*, Off Track Planet's *Travel Guide for the Young, Sexy, and Broke, Elnuevodia, Wapa.tv, Time Out New York*, and *Spray Ground*. Cortes Folio at 7; 10-27. He produced an art exhibit for the lobby of One Police Plaza, artwork and graphic packages for many prominent 90s artists, including Wu-Tang Clan and Jeru the Damaja. Cortes Folio at 8. He won the 2007 grand prize in the Heineken Mural Search contest at P.S.1 Contemporary Art Center. Folio at 9. He has painted at 5Pointz since its early days as Phun Phactory. Folio at 9; Tr. at 553:2-6.

14. Skulls Cluster aka Up High 1

Category One: *Skulls Cluster* was chosen by Cohen for placement on the highest floor in the loading dock area. Tr. at 540:17-20. It was painted in 2009 and achieved longstanding status as one of the oldest works on the site, intended to survive "for the life of the building." Tr. at 542:7-15. It was recognized by Vara as both a meritorious work of art, Tr. at 748:12-750:12, and a work of recognized stature, Tr. at 771:15-776:8. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision

as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category [*46] Two: His work at 5Pointz was described by Austin as "world class displays." Tr. at 745:12-14; 747:11-15. It was included in *Google Arts and Culture*. Tr. at 772:11-14. His Skulls works at 5Pointz have been featured in the *New York Times, Street Art NYC, Senses Lost*, and Off Track Planet's *Travel Guide for the Young, Sexy, and Broke*. Tr. at 772:17-774:21; Cortes Folio at 10-19. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Skulls Cluster* was seen by hundreds or thousands of daily visitors to 5Pointz. It was searchable on Google. Tr. at 775:20-776:2. Cortes has thousands of social media followers. Tr. at 775:1-6. The jury found it had achieved recognized stature. *See* Verdict Form at 41, DE 165.

15. Up High Blue Skulls aka Up High 2

Category One: *Up High Blue Skulls* was chosen by Cohen for placement on a high longstanding wall at 5Pointz as part of an effort to "raise 5Pointz to another [*47] level." Tr. at 543:19-544:15. It was painted in 2009 and achieved longstanding status as one of the oldest works on the site. Tr. at 544:16-25. It was recognized by Vara as both a meritorious work of art, Tr. at 750:16-752:15, and a work of recognized stature, Tr. at 771:15-776:8. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: His work at 5Pointz was described by Austin as "world class displays." Tr. at 745:12-14; 747:11-15. It was included in *Google Arts and Culture*. Tr. at 772:11-14. His Skulls works at 5Pointz have been featured in the *New York Times, Street Art NYC, Senses Lost*, and Off Track Planet's *Travel Guide for the Young, Sexy, and Broke*. Tr. at 772:17-774:21; Cortes Folio at 10-19. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in [*48] New York, Tr. at 1203:20-21.

Category Three: *Up High Blue Skulls* was seen by hundreds or thousands of daily visitors to 5Pointz. It was searchable on Google. Tr. at 775:20-776:2. Cortes has thousands of social media followers. Tr. at 775:1-6. The jury found it had achieved recognized stature. *See* Verdict Form at 45, DE 165.

16. Up High Orange Skulls aka Up High 3

Category One: *Up High Orange Skulls* was chosen by Cohen for placement on a high longstanding wall visible from the 7 train at 5Pointz. Tr. at 546:18-547:17. Cortes describes it as "the height of my, so far, of my graffiti career . . . ." Tr. at 546:20-21. It was painted in 2009 and achieved longstanding status as one of the oldest works on the site. Tr. at 550:15-16. It was recognized by Vara as both a meritorious work of art, Tr. at 752:19-753:23, and a work of recognized stature, Tr. at 771:15-776:8. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: His work at 5Pointz was described by Austin as "world class displays." Tr. at 745:12-14; 747:11-15. It was included in *Google Arts and [*49] Culture*. Tr. at 772:11-14. His Skulls works at 5Pointz have been featured in the *New York Times, Street Art NYC, Senses Lost*, and Off Track Planet's *Travel Guide for the Young, Sexy, and Broke*. Tr. at 772:17-774:21; Cortes Folio at 10-19. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by

Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Up High Orange Skulls* was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions on the passing 7 train. It was searchable on Google. Tr. at 775:20-776:2. Cortes has thousands of social media followers. Tr. at 775:1-6. *See* Verdict Form at 47, DE 165.

17. Jackson Avenue Skulls aka Scraps

Category One: *Jackson Avenue Skulls* was chosen by Cohen for placement on a wall at 5Pointz near the stairwell to reach the site's interior. Tr. at 551:1-551:11; 754:22-755:25. It was painted on an unknown date (prior to July 2013). Tr. at 551:22-552:5; Cortes Folio at 44. It was recognized by Vara as both **[*50]** a meritorious work of art, Tr. at 754:22-755:9, and a work of recognized stature, Tr. at 768:16-771:1. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: His work at 5Pointz was described by Austin as "world class displays." Tr. at 745:12-14; 747:11-15. It was included in *Google Arts and Culture*. Cortes Folio at 43-44. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Jackson Avenue Skulls* was seen by hundreds or thousands of daily visitors to 5Pointz. Cortes has thousands of social media followers. Tr. at 775:1-6.

Estaban Del Valle

Estaban Del Valle is an award-winning artist who has produced dozens of exhibitions and murals. Del Valle Folio 4-6. He has attended some of the most prestigious art schools in the world as both a student **[*51]** and a resident. *Id.*; Tr. at 607:24-609:7. His work has been featured in the *New York Times* and *Brooklyn Street Art*. Folio at 7-10; 19-22. His work has sold at prestigious contemporary art auction houses. Folio at 23-24; Tr. at 631:1-7.

18. Beauty and the Beast

Category One: *Beauty and the Beast* was chosen by Cohen for placement on a longstanding wall. Tr. at 117:3-8. It was up for more than a year. Tr. at 117:9-12. It was recognized by Vara as both a meritorious work of art, Tr. at 625:22-630:6, and a work of recognized stature, Tr. at 606:1-3. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Beauty and the Beast* was featured in *Arts Observer* magazine, the Queens Library digital archive, and *Google Arts and Culture*. Del Valle Folio at 27-32. Del Valle was commissioned to draw a copy of the work for the cover of the book *Dumb Animals* by Damien Colon. Tr. at 118:15-19. He was commissioned to paint a copy of the image to promote a festival in the Dominican Republic. Tr. at 118:10-14. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. **[*52]** Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Beauty and the Beast* was seen by hundreds or thousands of daily visitors to 5Pointz. It was searchable on Google. Tr. at 633:5-10. He has thousands of social media followers. Tr. at 632:10-16. One Instagram posting of the photo received over 33,000 likes. Tr. at 118:1-7. The jury

found it had achieved recognized stature. *See* Verdict Form at 31, DE 165.

Francisco Fernandez aka "DASIC"

Francisco Fernandez is a prominent Chilean muralist. He has done murals all around the United States and South America, including New York, Miami, Detroit, Chicago, Texas, San Miguel, Chile, Santiago, Chile, Buzios, Brazil, Valparaiso, Chile, and cities in Argentina, Uruguay, and Peru. Fernandez Folio at 2-30. His work has been featured in the *New York Times, The Guardian, Americas Quarterly, Hi-Fructose, Street Art NYC*, the *Holland Sentinel*, the *Art Elephant* blog, *Complex*, and documentary films. Fernandez Folio at 4-26; Tr. at 1655:21-1657:1.

19. Dream of Oil

Category One: *Dream of Oil* was one of the largest pieces at 5Pointz. Tr. at 1572:19-22. It was chosen by Cohen **[*53]** for placement on highly coveted rooftop space visible from the train. Tr. at 1570:13; 1574:3-10. It was recognized by Vara as both a meritorious work of art, Tr. at 1655:9-19, and a work of recognized stature, Tr. at 1655:21-1657:5. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Dream of Oil* was featured in The re:art, an online art publication. Fernandez Folio at 35-38. It was featured in online documentaries about 5Pointz. Tr. at 1656:16-18. It was recognized by Simmons. Tr. at 1656:16. It was published in The Guardian. Tr. at 1656:24. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Dream of Oil* was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions of commuters on **[*54]** the passing train. Fernandez has thousands of social media followers. Fernandez Folio at 32. *Dream of Oil* received hundreds of likes on his social media accounts. Fernandez Folio at 40-41. The jury found it had achieved recognized stature. *See* Verdict Form at 69, DE 165.

James Cochran aka "Jimmy C"

James Cochran is a prominent London aerosol artist credited with inventing the artform "aerosol pointillism." Cochran Folio at 8; Tr. at 690:14-15. His murals and exhibitions can be viewed all over the world, particularly the United Kingdom, France, and Australia. Cochran Folio at 4-6. He has been featured in ten major videos from major press outlets, and 78 articles by journals, newspapers, and art critics. Tr. at 1033:1-12. He has been interviewed by *The Guardian, Street Art United States*, and *Support Street Art* and profiled by the *New York Times* and *CNN*. Cochran Folio at 7-12; 49-61.

20. Subway Rider

Category One: *Subway Rider* was chosen by Cohen for placement on a longstanding wall in 2011. Tr. at 696:13-24. It was recognized by Vara as both a meritorious work of art, Tr. at 1024:4-1032:18, and a work of recognized stature, Tr. at 1022:19-24. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Subway Rider* was featured **[*55]** *Street Art NYC, Google Arts and Culture, Time Out New York, The Guardian, Global Street Art*, and *Bit Rebels*. Cochran Folio at 71-87. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo

Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Subway Rider* was seen by hundreds or thousands of daily visitors to 5Pointz. Cochran has tens of thousands of social media followers. Tr. at 1038:7-13; Cohran Folio at 62-66. *Subway Rider* received hundreds of likes on his social media accounts. Cohen Folio at 75-76. The jury found it had achieved recognized stature. *See* Verdict Form at 75, DE 165.

James Rocco aka "Topaz"

Rocco is a well-recognized muralist and aerosol artist. His works have been featured at the Graffiti Hall of Fame, the Ryan and Chelsea Clinton Community Health Center, and the Haven Arts Gallery. Rocco Folio at 3-15. He and his work have been covered by *Street Art NYC*. Rocco Folio at 4-5; 16-17. He is the founder and owner of multimedia company Skygod Studios. Rocco Folio at 17. He has created murals and graphic design for DJ Premier, Saiers Capital, CNBC, New York City Council, Tombstone Productions, Dark Castle Entertainment, Groupe Renault, Peugeot France, MTV, Pradaxa, Nestle, Toshiba, Ford Motor Company, Sony Music Entertainment, 50 Unit Films, MC Craig G, Jacob & **[*56]** Co., and McGraw Hill Publishing Co., among others. Rocco Folio at 18-19. He has also done graphics for hip hop artists 50 Cent, Marley Marl, Rahzel, DJ JS-1, and DJ Ody Roc. Rocco Folio at 22.

21. Bull Face

Category One: *Bull Face* was chosen by Cohen for placement on a longstanding, highly trafficked wall at the loading dock. Tr. at 992:18-23. It was created in 2009 and survived until the whitewash. Tr. at 994:24-25. It was visible from the 7 train. Tr. at 992:18-23. It was intended to be up "indefinitely." Tr. at 995:3-4. It was recognized by Vara as both a meritorious work of art, Tr. at 1096:14-1097:4, and a work of recognized stature, Tr. at 1098:14-1101:12. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. **[*57]** at 1203:20-21.

Category Three: *Bull Face* was seen by hundreds or thousands of daily visitors to 5Pointz. Rocco has over one thousand social media followers. Tr. at 1100:24-1101:6.

22. Lord Paz

Category One: *Lord Paz* was chosen by Cohen for placement on a high, longstanding column with "heavy" foot traffic on Crane Street. Tr. at 996:22-997:3; 998:14-18. It was created in 2009 and survived until the whitewash. Tr. at 997:22-23. It was intended to be up "permanently." Tr. at 998:3-4. It was recognized by Vara as both a meritorious work of art, Tr. at 1097:6-1098:4, and a work of recognized stature, Tr. at 1098:14-1101:12. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, **[*58]** Tr. at 1203:20-21.

Category Three: *Lord Paz* was seen by hundreds or thousands of daily visitors to 5Pointz. Rocco has over one thousand social media followers. Tr. at 1100:24-1101:6.

23. Face on Jackson

Category One: *Face on Jackson* was chosen by Cohen for placement on a longstanding high column above Jackson Avenue, "the highest traffic street of 5Pointz." Tr. at 998:25-999:4; 999:15-16. It was created in 2009 and survived until the whitewash. Tr. at 1000:6-7. It was intended to be up "permanently." Tr. at 1000:8-13. It was given space next to Lady Pink, an "important position" that "is a significant recognition of his qualities and characteristics" according to Vara. Tr. at 999:1-2; 1098:24-1099:2. It was recognized by Vara as both a meritorious work of art, Tr. at 1098:5-1099:2, and a work of recognized stature, Tr. at 1098:14-1101:12. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high **[*59]** quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Face on Jackson* was seen by hundreds or thousands of daily visitors to 5Pointz. Rocco has over one thousand social media followers. Tr. at 1100:24-1101:6.

Kenji Takabayashi aka "Python"

Kenji Takabayashi is an accomplished artist and professional visual designer. In addition to his success as a muralist, he was a senior visual designer for Major League Baseball for twelve years. Takabayashi Folio at 5. Takabayashi has been commissioned for several murals around New York City and is registered with the Brooklyn Arts Council's Artist Registry. Takabayashi Folio at 9-19. He created art for the redesign of the Apollo Theater. Tr. at 304:14-16; 305:6-9. He has been featured on *Good Morning America*. Tr. at 304:23-25. He has been commissioned to do graffiti-inspired artwork by many Fortune 500 companies and advertising firms, including Pepsi, Samsung, Sony, Google, and Ogilvy. Tr. at 307:6-11.

24. Starry Night

Category One: *Starry Night* was chosen by Cohen for placement on a wall on highly trafficked Crane Street. Tr. at300:8-15. **[*60]** It was visible from the passing 7 train. Tr. at 300:16-19. It was recognized by Vara as both a meritorious work of art, Tr. at 658:21-660:17, and a work of recognized stature, Tr. at 662:2-668:19. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Starry Night* was featured in a post by prominent graffiti writer and curator Olivia Strauss in the *New York City Street Art Blog*. Tr. at 662:9-18. It was featured in *The Guardian*. Tr. at 663:9-25; Takabayashi Folio at 26-27. It was included in a course syllabus by a professor at Baruch college. Tr. at 664:6-19; Takabayashi Folio at 28-29. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Starry Night* was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions of **[*61]** commuters on the passing train. It was searchable on Google. Tr. at 665:12-19. Takabayashi has thousands of social media followers. Tr. at 666:15-667:3. *Starry Night* was included on a third party's *Flickr* page. Tr. at 668:5-17. The jury found it had achieved recognized stature. *See* Verdict Form at 83, DE 165.

Luis Gomez aka "Ishmael"

Luis Gomez is a prominent artist who works in aerosol, murals, sculptures, and canvas. Tr. at

893:14-17. He and his work have been featured in *The New York Times, The Post and Courier, Charleston City Paper, Mountain Xpress, Citizen-Times, The Old Wood Company, Street Art Walk, Brooklyn Street Art, Street Art NYC, Street Art News, Global Street Art, Court McCracken*, ilovedetroitmichigan.com, and *Lily Knights*, as well as the websites of Charleston and Spartanburg, South Carolina. Gomez Folio at 3-50; Tr. at 893:22-903:7. He has painted works for five major motion pictures. Tr. at 904:19-21.

25. Inside King Kong

Category One: *Inside King Kong* was chosen by Cohen for placement on an inside wall in April 2013. Tr. at 887:6-8; 889:19-20. It was recognized by Vara as both a meritorious work of art, Tr. at 1076:7-1077:17, and a work of recognized stature, Tr. at 1077:15-1081:1. Cohen testified it was a piece of "high standing" and confirmed it **[*62]** "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: Based on *Inside King Kong*, Gomez was invited to create a similar mural by the curator of the Bushwick Collective, another prominent aerosol art collection. Tr. at 1077:24-1078:6. College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his interior works. Tr. at 1044:1-20. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: Gomez has thousands of social media followers. Tr. at 1079:4-6. *Inside King Kong* had hundreds of likes on Instagram. Gomez Folio at 65. The jury found it had achieved recognized stature. *See* Verdict Form at 77, DE 165.

Luis Lamboy aka "Zimad"

Luis Lamboy is a prominent aerosol artist who worked as a general foreman and art handler for Sotheby's Auction House **[*63]** for 18 years and has also designed clothing for musicians. Tr. at 854:1-5. He has done gallery shows since 1984. Tr. at 854:6. His work has been exhibited across the United States and Europe, and he works with major brands, including Nike, MTV, Modello, Corona, Red Bull, Lionsgate Films, Jacob & Co., and State Farm. Lamboy Folio at 5-7. He and his work have been featured in *Art & Fashion Magazine, The Courier Journal, Graphotism, Hall of Fame New York City, Diva International, Name Tagging, Boombox Magazine, Street Art NYC*, and on *Project Runway*. Lamboy Folio at 11-24; 27-40; 46-51. He has a permanent installation at the United Nations in Geneva. Lamboy Folio at 42.

26. Blue Jay Wall

Category One: *Blue Jay Wall* was chosen by Cohen for placement on a longstanding wall at the loading dock. Tr. at 841:5-17. It was visible from the 7 train. Tr. at 841:17-20. It was recognized by Vara as both a meritorious work of art, Tr. at 1068:21-1069:17, and a work of recognized stature, Tr. at 1074:6-1075:20. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Blue Jay Wall* was featured in *Google Arts and Culture* and a *Street Art NYC* interview. Tr. at 1074:6-1075:2; Lamboy Folio at 57-58. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at **[*64]** 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Blue Jay Wall* was seen was seen in the private tours of the inside works. Lamboy

has thousands of social media followers. Tr. at 1075:15-17. It was searchable on Google. Tr. at 1075:11-14. The jury found it had achieved recognized stature. *See* Verdict Form at 21, DE 165.

27. Electric Fish

Category One: *Electric Fish* was chosen by Cohen for placement on a longstanding inside wall. Tr. at 850:1; 17-24. It was recognized by Vara as both a meritorious work of art, Tr. at 1072:2-14, and a work of recognized stature, Tr. at 1074:6-1075:20. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his interior works. Tr. at 1044:1-20. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested **[*65]** to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Electric Fish* was seen was seen in the private tours of the inside works. Lamboy has thousands of social media followers. Tr. at 1075:15-17. It was searchable on Google. Tr. at 1075:11-14.

28. Inside 4th Floor

Category One: *Inside 4th Floor* was chosen by Cohen for placement on a longstanding inside wall between 2010 and 2012. Tr. at 843:21-22; 844:8-9. It was recognized by Vara as both a meritorious work of art, Tr. at 1069:22-1070:17, and a work of recognized stature, Tr. at 1074:6-1075:20. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his interior works. Tr. at 1044:1-20. Snyder called the artists in this suit "top artists **[*66]** at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Inside 4th Floor* was seen in the private tours of the inside works. Lamboy has thousands of social media followers. Tr. at 1075:15-17. It was searchable on Google. Tr. at 1075:11-14.

29. Clothing Brand aka Monopoly Man

Category One: *Clothing Brand aka Monopoly Man* was chosen by Cohen for placement on a longstanding inside wall between 2010 and 2012. Tr. at 847:10-13. It was recognized by Vara as both a meritorious work of art, Tr. at 1071:6-1072:1,and a work of recognized stature, Tr. at 1074:6-1075:20. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his interior **[*67]** works. Tr. at 1044:1-20. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Clothing Brand aka Monopoly*

Man was seen was seen in the private tours of the inside works. Lamboy has thousands of social media followers. Tr. at 1075:15-17. It was searchable on Google. Tr. at 1075:11-14.

30. World Traveler

Category One: *World Traveler* was chosen by Cohen for placement on a longstanding inside wall between 2010 and 2012. Tr. at 845:25-846:1. It was recognized by Vara as both a meritorious work of art, Tr. at 1070:20-1071:5, and a work of recognized stature, Tr. at 1074:6-1075:20. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: College professors, high school teachers, kindergarten teachers, **[*68]** and private schools all requested tours for their classes to see his interior works. Tr. at 1044:1-20. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *World Traveler* was seen was seen in the private tours of the inside works. Lamboy has thousands of social media followers. Tr. at 1075:15-17. It was searchable on Google. Tr. at 1075:11-14.

Nicholai Khan aka "Twin" aka "Think"

Khan is a New York artist whose work has been featured in the Chelsea Art Gallery, the Bronx Museum of the Arts, Art Galleries Europe, Paris, and the Agora Gallery, among others. Khan Folio at 4-7; 17-18. He has been commissioned to do portraits for Martha Stewart and Andrew Cuomo. Khan Folio at 10-11; Tr. at 1168:22-1169:3. He and his work have been featured in the *Times Ledger* and *Art Dish*. Khan Folio at 7-8; 14-16.

31. Dos Equis Man

Category One: *Dos Equis Man* was chosen by Cohen for placement on a longstanding wall. Tr. at 1162:10-1163:1. It was recognized by Vara as both a meritorious **[*69]** work of art, Tr. at 1622:23-1623:14, and a work of recognized stature, Tr. at 1622:2-22; 1623:15-1624:24. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Dos Equis Man* was featured in a Russian newspaper. Khan Folio at 28-29. It was featured in 5Pointz documentaries *We Don't Need Rats*, *5Pointz Long Island City*, and *Urban Explorer: Exploring 5Pointz*. Tr. at 1623:15-1624:3; 1624:18-24. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Dos Equis Man* was seen by hundreds or thousands of daily visitors at 5Pointz. Khan has nineteen thousand social media followers. Tr. at 1622:5-7. *Dos Equis Man* received hundreds of likes on social media. Khan Folio at 32-33. The subject of the painting, Jonathan Goldsmith, recognized it publically. **[*70]** Tr. at 1622:9-22; Khan Folio at 35-37. It was found to be a work of recognized stature by the jury. *See* Verdict Form at 71, DE 165.

32. Orange Clockwork

Category One: *Orange Clockwork* was chosen by Cohen for placement on a longstanding wall. Tr. at 1165:25-1166:2. It was recognized by Vara as both a meritorious work of art, Tr. at 1619:16-1622:1, and a work of recognized stature, Tr. at 1623:15-1624:24. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator"

compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Orange Clockwork* was featured in 5Pointz documentaries *We Don't Need Rats, 5Pointz Long Island City*, and *Urban Explorer: Exploring 5Pointz*. Tr. at 1623:15-1624:3; 1624:18-24. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Orange Clockwork* was seen by hundreds or thousands **[*71]** of daily visitors at 5Pointz. Khan has nineteen thousand social media followers. Tr. at 1622:5-7. *Orange Clockwork* received over one hundred likes on social media. Khan Folio at 34. It was found to be a work of recognized stature by the jury. *See* Verdict Form at 73, DE 165.

Richard Miller aka "Patch Whiskey"

Richard Miller is a prolific West Virginian street artist who had exhibitions at The Bushwick Collective, Art Basel Miami, Low Brow Artique, and the Butcher Gallery. Miller Folio 12-20. He has also done installations and murals for numerous restaurants and brand, including Nella Mushrooms, Pabst Blue Ribbon, and Absolute Vodka. Tr. at 927:2-8. His work was featured in Hollywood film *Rock of Ages*. Tr. at 927:11-14. His work has been featured in *Street Anarchy, Street Art NYC, DoSavannah*, and *Vandalog*. Miller Folio at 14-25.

33. Monster I

Category One: *Monster I* was chosen by Cohen for placement on a longstanding inside wall at 5Pointz. Tr. at 918:23-919:3. It was recognized by Vara as both a meritorious work of art, Tr. at 1083:22-1085:20, and a work of recognized stature, Tr. at 1086:17-1090:12. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category **[*72]** Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his interior works. Tr. at 1044:1-20. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Monster I* was seen on the tours of the inside works. Miller has more than ten thousand social media followers. Tr. at 929:2-4. The jury found it achieved recognized stature. *See* Verdict Form at 79, DE 165.

34. Monster II

Category One: *Monster II* was chosen by Jonathan Cohen for placement on a rooftop structure visible from the train. Tr. at 922:6-22; 924:13-14. It was recognized by Vara as both a meritorious work of art, Tr. at 1085:21-1086:16, and a work of recognized stature, Tr. at 1086:17-1090:12. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" **[*73]** compared to other works at the site. Tr. at 1508:8-19.

Category Two: It was photographed by Martha Cooper, "one of the most important photographers and historians of the graffiti art movement." Tr. at 1087:3-9. It was featured in HBO documentary *Banksy Does New York*. Tr. at 1087:14-22. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Monster II* was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions on the passing 7 train. Tr. at 924:13-14. Multiple online videos from third parties feature *Monster II*. Miller Folio at 37-40. Miller has more than ten thousand social media followers. Tr. at 929:2-8. *Monster II* had over one hundred likes on social media before it was destroyed. Tr. at 1089:7-13. It had over one thousand social media likes after its destruction. Miller Folio at 41-45. The jury found it had achieved recognized stature. *See* Verdict Form at 81, DE 165.

Rodrigo Henter de Rezende [*74] aka "AK47"

Rodrigo Henter de Rezende is a prominent Brazilian artist who moved to New York for six months to paint at 5Pointz and join the New York hip hop and graffiti culture. Tr. at 1120:13-21; 1126:19-1127:8. He has had exhibitions in many galleries and worked with clients including Smirnoff Vodka, Compactor Makers, UNI POSCA, Suvinil, Worx, and Colorgin. De Rezende Folio at 5. He has been featured in *O Globo Rio* and *Street Art NYC*. De Rezende Folio at 9; 29. He has painted at the *Graffiti Hall of Fame* in East Harlem. De Rezende Folio at 29.

35. Fighting Tree

Category One: *Fighting Tree* was chosen by Cohen for placement on a high, longstanding wall near the loading dock. Tr. at 1125:21-1126:9. It was intended to be a longstanding piece. *Id.* It was recognized by Vara as both a meritorious work of art, Tr. at 1634:16-1637:5, and a work of recognized stature, Tr. at 1638:5-1639:19. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Fighting Tree* was featured in a Russian newspaper article and the Stephen Wise Photography collection. De Rezende Folio at 39-42. It was featured in a *Village Voice* article. Tr. 1638:10-11. It was featured in Brandon Rembler's photography collection. Tr. at 1638:13-16. It was featured in the videos *The Graffiti Mecca 5Pointz* and **[*75]** *5Pointz Long Island City*. Tr. at 1639:1-6. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. De Rezende has thousands of social media followers. Tr. at 1639:4-9. *Fighting Tree* has received over 100 likes on social media. Tr. at 1639:14-17. It was featured on a third party's Flickr. Tr. at 1638:25; De Rezende Folio at 45. The jury found it had achieved recognized stature. *See* Verdict Form at 33, DE 165.

Sandra Fabara aka "Lady Pink"

Sandra Fabara is "considered an icon, legendary, historic." Tr. at 1596:18. She "is credited, both of [sic] in art history and a [sic] hip-hop culture, as one of the originators of the language, meaning the style that you understand, the different forms of graffiti art . . . ." Tr. at 1596:19-22. She has had more than 120 exhibitions, more than 85 commercial installations, and has been featured **[*76]** in multiple films about graffiti art. Tr. at 1596:25-1597:6. She has given more than 30 lectures on art. Tr. at 1597:6-9. She has been featured in the *New York Times, Time Out New York*, and the *Observer*, among others. Fabara Folio at 4-5; 8-9; 12-14; 30-31; 35-37. She has been exhibited in the Museum of the City of New York, the New Museum of Contemporary Art, New York, the Queens Museum, the Woodward Gallery, the Brooklyn Museum, and the El Museo del Barrio. Fabara Folio at 10-11; 15-23; 26-29; 35-40.

36. Green Mother Earth

Category One: *Green Mother Earth* was chosen by Cohen for a high wall on Jackson Avenue visible from the train. Tr. at 1238:21-24. It was one of two

works that were intentionally saved in 2009 after the stairwell collapse. Tr. at 1532:2-15. It was recognized by Vara as both a meritorious work of art, Tr. at 1597:21-1600:10, and a work of recognized stature, Tr. at 1600:11-1605:24. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Green Mother Earth* was featured in several travel bloggers' pieces on 5Pointz. Tr. at 1627:9-20; 1629:11-19. Snyder opined that, "The destruction of the graffiti of Lady Pink would warrant a significant lawsuit. Lady Pink is without question one of the most accomplished graffiti artists," **[*77]** and specifically referenced *Green Mother Earth* as a piece of recognized stature. Tr. at 1601:3-10; 20-24. It was published in *The Guardian* and *Complex Magazine*. Tr. at 1602:24-1603:1. It was featured in the documentaries *We Don't Need More Rats Here, 5Pointz Documentary, 5Pointz Long Island City*, and *Don't Bomb These Walls*. Tr. at 1603:2-4; 1604:15-17; 1605:14-17. It was included in *Google Arts and Culture*. Tr. at 1603:22-23. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions on the passing 7 train. *Green Mother Earth* was featured multiple times in Pinterest galleries. Tr. at 1604:1-3. It was featured on a Harvard professor's blog. Tr. at 1603:12-14. The jury found it had achieved recognized stature. *See* Verdict Form at 19, DE 165.

Steven Lew aka "Kid Lew"

Steven Lew is well recognized graffiti artist and graphic designer. Lew Folio at 5. His work has been featured in several exhibitions, **[*78]** galleries, and art publications. Lew Folio at 7-19. He has a strong sales history both of his canvases and related shoe designs. Lew Folio at 20-29. His work at 5Pointz has been featured in many publications, including *Getty Images, Complex Magazine, DNAinfo, Artnet News*, and *Source Magazine*. Tr. at 1627:5-1629:10.

37. Crazy Monsters

Category One: *Crazy Monsters* was chosen by Cohen for placement on previously untouched columns in a highly trafficked area near the original stairway collapse in mid-2013. Tr. at 1346:9-22; 1348:5-16. It was intended to be a longstanding piece. Tr. at 1349:6-10. An additional layer was added below the columns at a later date. Tr. at 1348:1-4. It was recognized by Vara as both a meritorious work of art, Tr. at 1625:1-1627:4, and a work of recognized stature, Tr. at 1627:5-1630:6. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: His work at 5Pointz was regularly covered by art magazines and news organizations, as described above. *Crazy Monsters* was featured in *Google Arts and Culture*. Tr. at 1627:6-8. It was featured in several travel **[*79]** bloggers' pieces on 5Pointz. Tr. at 1627:9-20; 1629:11-19. It was included in several online documentaries as a featured work at 5Pointz. Tr. at 1630:2-8. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. Lew has over one thousand social media followers. Tr. at 1628:11-13. His series of social media posts documenting the creation of *Crazy Monsters* received over 100 likes. Lew Folio at 30-40. *Crazy Monsters* is included the photo collection of Getty Images. Tr. at 1627:24-1628:3. The jury found it had achieved recognized stature. *See* Verdict Form at 67, DE 165.

Thomas Lucero aka "Auks One"

Thomas Lucero is a self taught artist based in Southern California who works primarily in spiritual themes. Tr. at 729:18-24. He has had dozens of exhibitions of his art work and over a dozen press mentions. Lucero Folio at 5-6. He was commissioned **[*80]** by the mayor of Bakersfield to paint a mural for that city's Martin Luther King Jr. Park. Lucero Folio at 7-9.

38. Black Creature

Category One: *Black Creature* was chosen by Cohen for placement on a highly trafficked wall at the loading dock. Tr. at 464:4-23. It was intended to be a longstanding piece. It was recognized by Vara as both a meritorious work of art, Tr. at 730:21-734:10, and a work of recognized stature, Tr. at 737:21-742:7. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Black Creature* was featured on the travel blog of digital marketer Dominic Sawyer. Tr. at 739:19-740:1. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Black Creature* was seen by hundreds or thousands of daily visitors to 5Pointz. Lucero has over **[*81]** one thousand social media followers. Tr. at 741:1-8. The jury found it had achieved recognized stature. *See* Verdict Form at 35, DE 165.

Collaborative Works

39. Jonathan Cohen and Maria Castillo aka "TooFly" - *Love Girl and Burner*[26]

Cohen's artistic credentials are listed in the decision.

Maria Castillo has been called a "graffiti legend" who has a long, illustrious career of exhibitions and murals around the world, including the tallest mural painted in the country of Ecuador. Castillo Folio at 4-9. She has also collaborated with many major brands, including Nike, RayBan, MOTUG X JB, and KidRobot. Castillo Folio at 16-21; Tr. at 640:14-642:22. Her works have been featured on 30 Rock, in 11 significant online videos and performances, and 35 news articles, including the *New York Times*, and seven major volumes on graffiti. Tr. at 642:18-19; 645:14-19; 648:17-19.

Category One: *Love Girl and Burner* was chosen by Cohen for placement on a longstanding wall. Tr. at 204:13-17. It was intended to be up for over a year. *Id.* It was recognized by Vara as both a meritorious work of art, Tr. at 635:8-637:19, and a work of recognized stature, Tr. at 635:3-6.

Category Two: *Love Girl and Burner* was featured in *Google Arts and Culture*. Cohen Folio at 122. It was featured in the *Vandalog* art blog. **[*82]** Cohen Folio at 130. Snyder called the artists in this suit "top artists at the heights of their career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. Castillo has over seven thousand social media followers. Tr. at

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[26] This piece is alternatively referred to as "*Love Warrior and Burner*" and "*Love Girl and Burner*" throughout the record. In the original decision, the Court referred to this piece as *Love Girl and Burner* based on the name in the Cohen Folio. The Court continues to use this name now but notes the discrepancy.

647:3-7. *Love Girl and Burner* has hundreds of likes on social media. Castillo Folio at 54-63. The jury found it had achieved recognized stature. *See* Verdict Form at 85, DE 165.

40. Akiko Miyakami and Jonathan Cohen - *Save 5Pointz*

Akiko Miyakami and Jonathan Cohen's credentials are listed above.

Category One: *Save 5Pointz* was chosen by Cohen for placement on a longstanding wall visible from the passing 7 train on the rooftop. Tr. at 1283:11-19. It was intended to be a long lasting wall. Tr. at 1285:7-9. It was recognized by Vara as both a meritorious work of art, Tr. at 1610:21-1611:10, and **[*83]** a work of recognized stature, Tr. at 1614:12-1619:11.

Category Two: Miyakami's work was described as "instantly recognizable" by Simmons. Tr. at 1615:11-12. It was featured in multiple video tributes to 5Pointz, including a video by *Future Sound TV* and a documentary by *Video Sparleck*. Tr. at 1616:15-16; 1618:6-9. It was a featured in an article by Jacqueline Hadel[27] ("Hadel"), a "renowned blogger on street art in travel culture." Tr. at 1616:8-9. Snyder called the artists in this suit "top artists at the heights of their career" and said Miyakami and Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions on the 7 train. Tr. at 1283:16-19. Miyakami has thousands of social media followers. Tr. at 1617:2-7. *Save 5Pointz* has hundreds of **[*84]** likes on social media. Miyakami Folio at 48-49. The jury found it had achieved recognized stature. *See* Verdict Form at 91, DE 165.

41. Akiko Miyakami and Jonathan Cohen - *Underwater Fantasy*

Akiko Miyakami and Jonathan Cohen's credentials are listed above.

Category One: *Underwater Fantasy* was chosen by Cohen for placement on a longstanding wall with a lot of foot traffic on Crane Street, Tr. at 1278:2-12. It was intended to be a long lasting wall. Tr. at 1281:19-1282:3. It was recognized by Vara as both a meritorious work of art, Tr. at 1609:9-1610:20, and a work of recognized stature, Tr. at 1614:12-1619-11.

Category Two: Miyakami's work was described as "instantly recognizable" by Simmons. Tr. at 1615:11-12. *Underwater Fantasy* was featured in *Google Arts and Culture*. Tr. at 1615:15-16. It was featured in a Gallery Nine review of a group exhibit. Tr. at 1615:17-19. It was featured in multiple video tributes to 5Pointz, including a documentary by Alexander Henry and a video by *Future Sound TV*. Tr. at 1615:24-1616:4,12-16. It was a featured in an article by Hadel. Tr. at 1616:8-9. It was reviewed by *Street Art in New York City*. Tr. at 1616:17-18. Snyder called the artists in this suit "top artists at the heights of their career" **[*85]** and said Miyakami and Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. Miyakami has thousands of social media followers. Tr. at 1617:2-7. *Underwater Fantasy* has hundreds of likes on social media. Miyakami Folio at 45-47. The jury found it had achieved recognized stature. *See* Verdict Form at 87, DE 165.

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[27] The transcript incorrectly refers to her as "Jacqueline Heigl." *See* Guerra Folio at 26 (correct spelling).

42. Akiko Miyakami and Carlos Game - *Japanese Fantasy*

Akiko Miyakami and Carlos Game's credentials are listed above.

Category One: *Japanese Fantasy* was chosen by Cohen for placement on a longstanding wall. Tr. 1278:2-12. It was painted in 2012 and survived until the whitewashing. Tr. at 1290:11-15. It was recognized by Vara as both a meritorious work of art, Tr. at 1613:23-1614:11, and a work of recognized stature, Tr. at 1614:12-1619:11. Cohen testified it was a piece of "high standing" and confirmed **[*86]** it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: Miyakami's work was described as "instantly recognizable" by Simmons. Tr. at 1615:11-12. Snyder called the artists in this suit "top artists at the heights of their career" and said Miyakami and Game's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. Miyakami has thousands of social media followers. Tr. at 1617:2-7. *Japanese Fantasy* has hundreds of likes on social media. Miyakami Folio at 51; Game Folio at 43.

43. Bienbenido Guerra aka "Benny" aka "FCEE" and Carlo Nieva aka "Diego" - *Return of New York*

Bienbenido Guerra is an artist and art teacher. He has been commissioned to do murals by business and schools, including St. John's University. Tr. at **[*87]** 507:17-21; Folio at 10-14. He has been painting at 5Pointz, and its predecessor, Phun Phactory, since 1994. Guerra Folio at 5. His works have been auctioned at Guensey's Action House. Guerra Folio at 8-9.

Carlo Nieva is a successful artist who has done murals across New York City. He has worked with many fashion brands as a graphic designer, including A-life, L'Zinger, and Bodega Skates, as well as with many New York night clubs, including Limelight, Palladium, and The Tunnel. Tr. at 381:2-9. His work has been featured in *Expresso 77 Photograph, DNAinfo*, and the *Hibridos Collective*. Tr. 381:13-382:23; 383:10-11; Nieva Folio at 4-18. He has created murals in collaboration with Jackson Heights Green Alliance, El Museo del Barrio, and The Renaissance Charter School. Tr. at 381:19-382:21; Nieva Folio at 6-16.

Category One: *Return of New York* is nearly three stories high and was chosen by Cohen for placement on a longstanding wall at the highly coveted loading dock. Tr. at 376:9-14; 377:17-21. It was recognized by Vara as both a meritorious work of art, Tr. at 670:15-675:4, and a work of recognized stature, Tr. at 677:6-687:10. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the **[*88]** site. Tr. at 1508:8-19.

Category Two: *Return of New York* was featured by Hadel, Etsy, Red Bubble, Fine Art America, and Shutterstock. Guerra Folio at 25-34. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions on the passing train. Both Guerra and Nieva have over one thousand social media followers. Nieva Folio at 24. *Return of New York* has more than one hundred likes on social media. Nieva Folio at 25-28; Guerra Folio at 21-22. It was featured on a third party's Flickr account. Guerra

Folio at 19-20. The jury found it had achieved recognized stature. *See* Verdict Form at 97, DE 165.

44. William Tramontozzi aka "Jerms" and James Rocco - *Jimi Hendrix Tribute*

James Rocco's credentials are listed above.

William Tramontozzi is an aerosol artist specializing in lettering and a DJ. He and his work has been featured in *Time Out New York, The Word is Bond*, and *Fresh Paint NYC*. He was featured in Elizabeth Currid's book *The Warhol Economy* as an **[*89]** artist who "embodies" the fusion of art and music with the modern creative economy. Tr. at 1093:6-1094:5.

Category One: *Jimi Hendrix Tribute* was chosen by Cohen for placement on a longstanding wall with significant foot traffic on Davis Street. Tr. at 956:25-957:7. It was intended to be a longstanding piece. Tr. at 957:8-16. It was recognized by Vara as both a meritorious work of art, Tr. at 1090:16-1092:18, and a work of recognized stature, Tr. at 1092:19-1095:14. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Jimi Hendrix Tribute* was featured in *Google Arts and Culture*. Tramontozzi Folio at 26-27. It was featured on *Urban Media Showcase*. Tramontozzi Folio at 23; Tr. at 967:2-9. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. Tramontozzi's work at 5Pointz was recognized by Austin. Tr. at 1094:8-10. *Jimi Hendrix Tribute* was featured in Hadel's blog on New York City graffiti art. Tr. at 1094:17-1095:4. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale **[*90]** as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. It was featured on a Japanese blog post. Tramontozzi Folio at 20-21. Rocco has over one thousand social media followers. Tr. at 1100:24-1101:6. *Jimi Hendrix Tribute* has hundreds of likes on social media, on both the artists' and third parties' accounts. Tramontozzi Folio at 22-25. The jury found it had achieved recognized stature. *See* Verdict Form at 93, DE 165.

45. Jonathan Cohen, Luis Lamboy, and Thomas Lucero - *Angry Orchard*

The artists' credentials are listed above.

Category One: *Angry Orchard* was painted collaboratively in 2013 between Cohen, Lamboy, and Lucero. Tr. at 458:1-460:19; 851:6-852:25; 1431:14-1432:23. It was recognized by Vara as both a meritorious work of art, Tr. at 734:12-737:13, and a work of recognized stature, Tr. at 738:3-742:7. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Angry Orchard* was featured in *Google Arts and Culture*. Lucero Folio at 29-30. Snyder called the artists in this suit "top artists at the heights of their **[*91]** career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. The three artists have significant social media followings, as discussed above. *Angry Orchard* was recognized by the company Angry Orchard, from which the artists drew inspiration. Lucero Folio at 27-28. The jury found it had achieved recognized stature. *See* Verdict Form at 99, DE 165.

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