

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARGUERITE HOFFMAN,	§
	§
Plaintiff,	§
	§
vs.	§ Civil Action No. 3:10-CV-0953-D
	§
L&M ARTS, DAVID MARTINEZ	§ JURY TRIAL DEMANDED
and STUDIO CAPITAL, INC.,	§
	§
	§
Defendants.	§

PLAINTIFF’S SECOND AMENDED COMPLAINT

COMES NOW, Plaintiff Marguerite Hoffman and files this her Second Amended Complaint and for grounds therefor would show unto the Court the following:

1. This lawsuit seeks relief for injuries Plaintiff has suffered in connection with Defendants’ sale at public auction of a celebrated painting by Mark Rothko, *Untitled*, dating from 1961 (the “Painting”), which Plaintiff had sold to them privately in 2007 (the “Transaction”).

2. The public auction and the attendant publicity it generated entailed breaking the contractual promise of defendant David Martinez and/or his shell company defendant Studio Capital, and of their agent, defendant L&M Arts, to make “maximum effort” to keep confidential “all aspects” of the transaction through which they acquired it. Their obligation was to continue “indefinitely.” L&M Arts, Martinez and/or Studio Capital made that promise because Plaintiff, the Painting’s previous owner, was unwilling to sell it to them unless they did so.

THE PARTIES

3. Plaintiff Marguerite Hoffman is a businesswoman, philanthropist and patron of the arts. She is past Chair and a present Trustee of the Dallas Museum of Art (the “Dallas Museum”). She lives in Dallas.

4. Defendant L&M Arts (“L&M”) is a Delaware limited liability company that describes itself as “one of the most important galleries in the world.” Its principals are Dominique Levy and Robert Mnuchin. L&M operates galleries at 45 East 78th Street in Manhattan and 660 Venice Boulevard in Venice, California.

5. Defendant David Martinez is a financier and art collector, as well as the founder and managing partner of Fintech Advisory, a firm that specializes in corporate and country debt. Martinez maintains a permanent office at Fintech Advisory in Manhattan at 375 Park Avenue, Martinez maintains a “pied a terre” on the 76th floor of the Time Warner Center, for which he reputedly paid \$54 million. Martinez is also a shareholder of defendant Studio Capital, Inc.

6. Defendant Studio Capital, Inc. (“Studio Capital”) is a company organized and existing under the laws of Belize, with its registered office at 35A Regent Street, Jasmine Court, Suite 101, P.O. Box 1777, Belize City, Belize. Studio Capital is a shell company dominated and controlled by its alter ego, defendant Martinez, for the purposes of maintaining the secrecy of his purchases and sales of art.

7. Non-party Sotheby’s, Inc. (“Sotheby’s”) is a New York corporation that engages in art auction and private sales, with its principal place of business in Manhattan at 1334 York Avenue. Sotheby’s describes itself as “one of the world’s two largest auctioneers of authenticated fine and decorative art, jewelry and collectibles In 2009, Sotheby’s accounted for \$2.3 billion, or 44%, of the total aggregate auction sales of the two major auction houses within the global auction market.” According to its 2010 Form 10-K, Sotheby’s total revenues

for 2009 were approximately \$485 million, based on total sales of \$2,773,467,000. Sotheby's total revenues for 2010 were approximately \$774,309,000 based on total sales of \$4,810,773,000.

8. Non-party Tobias Meyer has been Sotheby's Worldwide Head of Contemporary Art since 1997. He is the Principal Auctioneer for Sotheby's sales of contemporary art. According to Sotheby's website, Meyer "is deeply connected to the world's most powerful and active post-war art collectors in the United States and Europe. As one of the most recognized figures in the Contemporary Art world, Meyer has been closely involved with the sales of many of the most iconic 20th-century works. Under the direction of Mr. Meyer, Sotheby's has produced three of the four highest auction prices ever paid for post-war art, including Mark Rothko's White Center (Yellow, Pink and Lavender on Rose) for \$72.8 million in May 2007."

JURISDICTION AND VENUE

9. This Court has diversity jurisdiction under 28 U.S.C. § 1332 because Plaintiff is a citizen of Texas and Defendants are citizens or subjects of domestic or foreign states other than Texas and the amount in controversy exceeds the sum or value of \$75,000.

10. Venue is proper in this Court under 28 U.S.C. § 1391 because, among other things, jurisdiction is founded on diversity of citizenship and all Defendants are subject to personal jurisdiction in this judicial district.

11. Defendants L&M, Martinez and Studio Capital have made general appearances through counsel in this action and do not dispute this Court's *in personam* jurisdiction.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

12. In 2007, Plaintiff's ownership of the Painting was well known. It was exhibited as part of "Fast Forward: Contemporary Collections for the Dallas Museum of Art," a special two-part exhibition of works from Plaintiff's collection. The catalogue and online description of

the exhibition highlighted five “iconic and rarely displayed works,” including the Painting, “a stunning masterpiece in orange and red.” Press coverage of the exhibition likewise focused on the Painting.

13. Early in 2007, Plaintiff decided to sell the Painting via a private and confidential sale.

14. The decision to limit herself to a private sale was not without cost to Plaintiff, because of the premium a well-publicized auction can produce for such an iconic work as the Painting. Sotheby’s and its Principal Auctioneer, Meyer, for example, enjoyed vaunted reputations for obtaining dramatic premiums from the public sale of major Rothko paintings. According to Meyer, the Painting would have sold at public auction for \$30 to \$40 million in April of 2007, which is exactly when Plaintiff sold it privately for millions of dollars less.

15. For Plaintiff, therefore, securing the benefit of a private sale meant sacrificing the substantial premium Plaintiff could have realized from the public sale of such a famous work.

16. The restriction Plaintiff placed on herself equally diminished the price that L&M, Martinez and/or Studio Capital had to pay to acquire the Painting. L&M, Martinez and/or Studio Capital thereby obtained a corresponding financial benefit by purchasing privately, rather than at public auction.

17. But to obtain that benefit, L&M, Martinez and/or Studio Capital agreed to incur a cost: In the purchase contract, they explicitly promised to make maximum effort to keep confidential *all aspects of the transaction indefinitely*. This meant they could not turn around, sell the Painting at public auction, then pocket the premium that Plaintiff had forgone to protect her privacy.

18. To further ensure the privacy of the sale, Plaintiff relied on intermediaries whose reputations for rectitude and discretion she believed were impeccable. One of these was defendant L&M and, in particular, its principal Robert Mnuchin. L&M acted as agent for Martinez and/or Studio Capital as undisclosed principals.

19. Plaintiff trusted Mnuchin in particular, from whom she had bought the Painting in the first instance. Over the years, Plaintiff had acquired many major contemporary art works through and from L&M, including works by Franz Kline, Philip Guston, Willem de Kooning, and Joseph Cornell.

20. Plaintiff made clear to L&M that preservation of confidentiality would need to be a critical component of any sale. L&M assured Plaintiff that her privacy would be protected, and professed to appreciate her reasons. Mnuchin assured Plaintiff that L&M's undisclosed buyer, whom he consistently referred to as an individual, was "extremely private."

21. Martinez's principal relationship at L&M was not with Mnuchin, however; it was with L&M's other principal, Dominique Levy. In fact Martinez was one of Levy's largest clients. To give the appearance that Martinez valued discretion, Levy and he traveled in secret to Texas to view the Painting where it then hung in the Dallas Museum.

22. To further ensure confidentiality, the first agreement of sale (later superseded), dated February 27, 2007, expressly made confidentiality a key term:

It is the specified wish of the seller that the sale and terms of the sale remain confidential. Any breach in confidentiality prior to payment in full will be considered by the seller grounds for terminating this agreement. It is requested that confidentiality be maintained indefinitely.

23. In case these commitments were not clear enough, the parties made them unequivocally clear through events that transpired in the following weeks.

24. Before the sale was consummated, Plaintiff was contacted by an art-world professional who had somehow heard she was selling the Painting. Because the fact that she was selling the Painting was exactly what she did not want publicly disclosed, Plaintiff reached out to Mnuchin to determine what had gone wrong. Mnuchin acknowledged that his undisclosed buyer had contacted a third party -- another professional in the art world -- about the Painting, and that his undisclosed buyer was very “embarrassed” that this breach of the agreement had been discovered by Plaintiff.

25. This indiscretion alarmed Plaintiff, and she decided not to go forward with the sale.

26. But Defendants L&M, Martinez and/or Studio Capital, were determined to persuade Plaintiff to change her mind.

27. So L&M, through Mnuchin, expressly promised that the Painting would “disappear” into the undisclosed buyer’s “very private” European collection.

28. While this assurance was welcome, standing alone it was not enough to persuade Plaintiff. She only agreed to sell the Painting when L&M and the undisclosed buyer made another promise: an unequivocal written and binding commitment in the purchase agreement (the “Contract”) to “make maximum effort to keep all aspects of this transaction confidential”

29. The duration of the promise to maintain confidentiality was negotiated by L&M and expressly stated that it was to continue “indefinitely.” The confidentiality provision was a material part of the agreement going to the essence of the Contract. L&M, Martinez and/or Studio Capital made that commitment to induce Plaintiff to sell the Painting, because they knew that Plaintiff was unwilling to sell it to them unless they did so.

30. With that promise in hand, Plaintiff was prepared to go forward, subject to the proviso that an additional \$500,000 be paid directly to the Dallas Museum, not to her, and anonymously. Defendants L&M, Martinez, and/or Studio Capital agreed.

31. On April 24, 2007, Plaintiff entered into the Contract with L&M, Martinez and/or Studio Capital for sale of the Painting for a price of \$17,600,000. The Contract obligated L&M, Martinez, and/or Studio Capital to “make maximum effort to keep all aspects of this transaction confidential indefinitely.” A true and correct copy of the Contract is annexed hereto as Exhibit A.

32. The Contract’s words required Defendants to, at least, make every reasonable effort to keep all aspects of the Transaction confidential, measured according to what an average, prudent, and comparable person would or would not have done, under the same or similar circumstances, to make every reasonable effort when exercising due diligence and in the absence of neglect.

33. L&M began breaching the Contract immediately.

34. The invoice that L&M sent to Studio Capital materially distorted the Contract’s confidentiality requirement. (Studio Capital attached the invoice (the “Invoice”) to its Answer, dated March 25, 2011. Studio Capital’s Answer was the first time Plaintiff had seen the Invoice.)

35. In the Invoice, L&M failed to disclose the Contract’s express requirement that the parties make maximum effort to keep *all aspects* of the transaction confidential indefinitely. Instead, L&M affirmatively misrepresented the terms of the Contract, describing a significantly weaker confidentiality clause, and stating merely that “the terms” of the transaction were confidential.

36. Plaintiff has not yet obtained access to Defendants' internal documents, so she cannot know at present whether L&M's material misstatement of the terms of the Contract was a misrepresentation made to L&M's principals, or whether Defendants had already determined among themselves to misstate the terms of their obligations.

37. As set forth in more detail below, the significance of L&M's material distortion of the Contract's key provision in 2007 was to grow over time because until the commencement of this action, including in 2010, L&M continued to insist that the Contract did not require Defendants to keep all aspects of the Transaction confidential indefinitely.

38. On the contrary, at all times until the commencement of this action L&M falsely asserted -- to Sotheby's and Meyer, among others -- that the Defendants had no obligation to keep all aspects of the Transaction confidential indefinitely.

39. And, at all times until the commencement of this action L&M omitted to disclose -- to Sotheby's and Meyer, among others -- that the Defendants were required to keep all aspects of the Transaction confidential indefinitely.

40. Whether L&M's inaccurate statements and misleading omissions were deliberately false, reckless or merely negligent, they breached L&M's obligation to make every reasonable effort to keep all aspects of the Transaction confidential, measured according to what an average, prudent, and comparable person would or would not have done, under the same or similar circumstances, when exercising due diligence and in the absence of neglect.

41. L&M's transmittal of an invoice to the buyer with a confidentiality clause that misstated the buyer's strict confidentiality obligations was less than what an average, prudent and comparable selling agent would have done under the same circumstances when exercising due diligence and in the absence of neglect to make "maximum effort" to maintain all aspects of

the Transaction confidential indefinitely. The average, prudent person who had obliged himself and his principal to specific confidentiality terms would have clearly provided those specific terms to its principal in writing.

42. That wasn't the only distortion in the Invoice. Mnuchin and Plaintiff's dealer had agreed that the sale price of the Painting would be \$19,000,000. Of that amount, \$17,600,000 would be wired to Plaintiff, and the remaining \$1,400,000 would be divided evenly between Plaintiff's agent and L&M, representing a commission of approximately 7 percent for each dealer.

43. Without disclosing the fact to Plaintiff, however, L&M charged an additional \$250,000 for the Painting and thereby increased its own profit by more than 35 percent. The Invoice required the purchaser to pay \$19,250,000, an amount \$250,000 higher than Mnuchin had represented to Plaintiff.

44. In late 2009, Defendants, including L&M, began investigating the prospects for reselling the Painting, and began putting out feelers in the market to generate interest.

45. By early 2010, Defendants had contacted Sotheby's. Defendants knew that Meyer was under tremendous pressure to capture a major treasure for Sotheby's spring sale. So rather than honor the confidentiality they had promised to Plaintiff as part of the consideration for the sale, Defendants elected to sacrifice Plaintiff's privacy, embarking, through Sotheby's, on a high-profile marketing and publicity campaign that inevitably and swiftly exposed Plaintiff's sale.

46. Defendants knew that Meyer was desperate to convince them to sell because, by his own admission, Meyer was under extreme pressure to obtain "brand-name masterpieces" for the May auction. Every spring, Sotheby's and Christie's -- the "two big rival auction houses" --

conduct contemporary art sales. “With Wall Street profits roaring back from the 2007-2008 financial crisis . . . Christie’s and Sotheby’s battled for four months” to win the collection of Frances Lasker Brody, which included Picasso’s “Nude, Green Leaves, and Bust,” estimated to sell for between \$70 and \$90 million. *NY auctions to signal return of good times: art dealers*, Agence France-Presse (English), May 2, 2010. But Christie’s, not Sotheby’s, won that trophy.

47. Meyer had long coveted the opportunity to auction the Painting in particular, admitting in April 2010 that “I’ve known this painting for 15 years and followed it over those years” Mark Brown, *Ghost of Warhol: Sotheby’s to auction late self-portrait*, The Guardian (London), Apr. 16, 2010, at 14.

48. Martinez and/or Studio Capital consigned the Painting to public auction at Sotheby’s on or before March 15, 2010. According to Sotheby’s, the Defendants failed to provide Sotheby’s with a copy of the Contract during the negotiations for the consignment, and failed to notify Sotheby’s that they were required to keep all aspects of the Transaction confidential indefinitely. Defendants concealed their obligations from Sotheby’s in order to avoid the possibility that Sotheby’s would not cooperate in Defendants’ breach of the Contract. In short, Martinez and/or Studio Capital, assisted by L&M, traded their written promise for the promise of a cash bonanza.

49. Plaintiff first learned on March 15, 2010 that the owner of the Painting had entered into a consignment agreement with Sotheby’s and that Defendants intended to sell the Painting at public auction. At that time, Sotheby’s had yet to issue a press release about the sale.

50. Plaintiff immediately took steps to attempt to prevent L&M, Martinez and Studio Capital from publicizing the sale and (further) breaching the Contract, to no avail.

51. L&M contacted Plaintiff, and Mnuchin (again) professed embarrassment and concern, just as he had done when Martinez breached his confidentiality obligation under the predecessor contract. “I feel simply terrible about the way events have evolved,” Mnuchin stated to Plaintiff on March 17, 2010, admitting that the transaction “required a special degree of confidentiality.” “I regret the work is now publicly displayed to the world,” Mnuchin said.

52. But Mnuchin claimed it was not his fault: “Unfortunately, even in retrospect, I see no way I could have changed the course of events when informed that he was selling at Sotheby’s.” That statement was both irrelevant and untrue, because L&M had itself committed to use maximum effort to keep all aspects of the Transaction confidential indefinitely.

53. But L&M pretended this was not so. Parroting the inaccurate words of the Invoice that L&M had prepared three years earlier, and once again misrepresenting the text of the Contract, Mnuchin claimed that the terms of the Contract were merely “that all parties are committed to keep the terms of this transaction strictly confidential.”

54. Despite Mnuchin’s expressions of sympathy and regret, L&M had already breached its obligation under the Contract: first, by misstating and/or failing to inform Martinez and/or Studio Capital of the full extent of their confidentiality obligations under the Contract; and second, by failing to notify Sotheby’s that “all aspects” of the Transaction were to be kept confidential indefinitely. On the contrary, Mnuchin spoke to Sotheby’s about the Painting’s provenance and omitted to tell Sotheby’s that all aspects of the Transaction were to be kept confidential indefinitely.

55. As a result of Defendants’ failure to perform their obligations under the Contract, Sotheby’s embarked on a major marketing blitz. On March 19, 2010, Bloomberg News announced that Sotheby’s had “landed a splashy 1961 red Mark Rothko painting, estimated to

fetch \$18 million to \$25 million. The nearly 8-foot tall painting with two reddish rectangles, is likely to be the May 12 sale's projected top lot." Other media sources ran with the news, including Lindsay Pollock's "Art Market Views" that very day, and the Pittsburgh Tribune Review on March 20th.

56. On March 25, 2010, Sotheby's issued a press release announcing the planned public auction of the Painting on May 12, 2010.

57. After the initial press release, Sotheby's publicity machine continued at full speed, resulting in extensive press coverage between March 25, 2010 and the auction, and continuing thereafter.

58. On April 2, 2010, numerous media sources, including National Public Radio and ABC News, published stories about the auction, many of which were accompanied by a large color photograph of the Painting.

59. To promote the auction, the Sotheby's website posted a large color photo of the Painting and stated that it was exhibited in "Fast Forward: Contemporary Collections for the Dallas Museum of Fine Arts" in 2007. In a similar vein, the Sotheby's catalogue stated that the painting was exhibited "Dallas, Dallas Museum of Art, *Fast Forward: Contemporary Collections for the Dallas Museum of Art*, February - April 2007."

60. Within the art community whose opinion was paramount to Plaintiff, these announcements precipitated precisely the disclosure and embarrassment she had been determined to avoid. Avoiding that embarrassment had been a material and negotiated -- indeed renegotiated -- component of the 2007 sale.

61. The Sotheby's publicity machine was so effective that before long the wider world knew as well. Internet art blogger Lindsay Pollock reported on April 19th:

Three market sources have told me that the Rothko consigned for sale at Sotheby's comes from Mexican financier David Martinez.

If Martinez, or a related holding company, is the owner, it has been a hasty marriage.

In 2007 the painting was exhibited at the Dallas Museum of Art in a *Fast Forward: Contemporary Collections for the Dallas Museum of Art*. The show included works owned by three major area collectors who have promised works to the museum: the Hoffman, Rose and Rachofsky collections.

Lindsay Pollock, Art Market Views, <http://www.lindsaypollock.com/news/sothebys-mystery-seller-disposes-of-red-rothko/> (April 19, 2010).

62. The Painting was auctioned by Sotheby's on May 12, 2010. It sold for \$31,442,500.

63. The goal and purpose of the auction was to procure for Martinez the premium from a public sale that Plaintiff decided to forgo when she contractually elected to engage in what she believed was, and would remain, a private and confidential sale. Plaintiff sacrificed that premium as consideration for preserving her privacy. Defendants, with the Painting in hand, decided not to honor their end of the bargain, and Studio Capital and Martinez cashed in at Plaintiff's expense.

64. Martinez, it bears emphasis, respects privacy, so long as it is his own. Indeed, he is willing to dissemble to preserve it. In April 2010, he attempted to mislead the public into believing he was not the seller of the Painting. See Lindsay Pollock, Art Market Views, <http://www.lindsaypollock.com/news/sothebys-mystery-seller-disposes-of-red-rothko/> (April 19, 2010).

65. Such denials are Martinez's modus operandi. Martinez is so determined -- press reports use the word obsessed -- to conceal his art-buying activities from the public that he

formed Studio Capital in order to disguise his role and ensure his anonymity. As one French court recently found in a case involving Martinez's art-buying activities with L&M, "*Il y a lieu par ailleurs de constater que l'identité de l'acquéreur de la sculpture est apparemment dissimulée par l'interposition de la société STUDIO CAPITAL, société dont le siège est à Belize, paradis fiscal garantissant l'anonymat des associés.*" Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, req. ch., Nov. 6, 2007, 07/12847, obs. F. Picard (Fr.). Translation: "It should also be noted that the identity of the buyer of the sculpture is apparently disguised by the interposition of STUDIO CAPITAL, a company headquartered in Belize, a tax haven guaranteeing the anonymity of shareholders."

66. Defendants' material breach of the Contract has deprived Plaintiff of the benefit of the bargain she entered into in April 2007.

67. Prior to the extensive publicity and auction, Plaintiff searched for ways to remedy the breach, but her efforts were met with contempt on the part of the Defendants. Defendants threatened Plaintiff with public embarrassment unless she agreed to be silent, suggesting that Plaintiff's sale of the Painting in 2007 was itself a breach of her bequest to the Dallas Museum, which of course, it was not. And, while refusing Plaintiff's request to permit her to proceed anonymously in this litigation, they persistently hid behind Martinez's various corporate disguises. Giving new meaning to the phrase "shell game," they insisted that it was not Martinez himself who purchased the Painting from Plaintiff, while refusing to divulge which of his corporate shells he was using this time.

**FIRST CAUSE OF ACTION -- BREACH OF CONTRACT AGAINST
DEFENDANTS L&M, MARTINEZ AND STUDIO CAPITAL**

68. Plaintiff incorporates herein by reference all preceding paragraphs of this Complaint as if fully set forth hereinafter.

69. Defendants L&M, Martinez and/or Studio Capital have breached and continue to breach material express provisions of the Contract as well as the covenant of good faith and fair dealing implied in the Contract by failing to do what comparable parties would have done to make every reasonable effort to keep all aspects of the 2007 transaction confidential indefinitely.

70. Defendants L&M, Martinez and/or Studio Capital, breached the “maximum effort” requirement of the contract by not taking adequate precautions to keep the changed ownership of the Painting private.

71. In causing the Painting to become newsworthy by permitting a large publicity campaign and by choosing to sell by public auction, L&M, Martinez and/or Studio Capital helped disseminate details that would make it more probable that a well-informed member of the art community would be able to deduce from easily-available public information that Plaintiff had sold the painting sometime after when it was displayed at the Dallas Art Museum.

72. Plaintiff has fully performed all conditions, covenants, and promises required to be performed on her part pursuant to the terms and conditions of the Contract.

73. As a direct and proximate result of their breach, Plaintiff has been made to suffer and continues to suffer damages in an amount in excess of the jurisdictional minimum of this Court.

DEMAND FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that, upon final hearing hereof Plaintiff be awarded judgment for the damages she has suffered. Plaintiff additionally prays for attorney’s fees, costs of court, prejudgment and post-judgment interest, all actual out of pocket damages, as well as all other and further relief, whether general, or special, at law, or in equity, to which Plaintiff may show herself to be entitled.

Dated: April 13, 2011

SHACKELFORD, MELTON & MCKINLEY LLP

Bart Wulff
State Bar No. 22086100
3333 Lee Parkway, Tenth Floor
Dallas, TX 75219
BWULFF@shacklaw.net
Tel: (214) 780-1400
Fax: (214) 780-1401

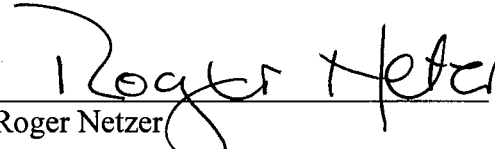
WILLKIE FARR & GALLAGHER LLP

By: 
Roger Netzer (admitted *pro hac vice*)
• Mary Eaton (admitted *pro hac vice*)
Deirdre Hykal (admitted *pro hac vice*)
787 Seventh Avenue
New York, NY 10019-6099
rnetzer@willkie.com
Tel: (212) 728-8000
Fax: (212) 728-8111

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Second Amended Complaint is being served electronically via ECF on all counsel of record on the 13th day of April 2011.


Roger Netzer

6517292