

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

GAGOSIAN GALLERY INC.,

Plaintiff,

v.

PELHAM EUROPE LTD.,

Defendant.

PELHAM EUROPE LTD.,

Counter-Claimant and Third Party Plaintiff,

v.

GAGOSIAN GALLERY INC., LARRY
GAGOSIAN, DIANA WIDMAIER-PICASSO,
and LEON BLACK,

Counterclaim and Third Party Defendants.

Civil Action No.
1:16-CIV-214-WHP

**DEFENDANT PELHAM EUROPE LTD'S
THIRD PARTY COMPLAINT AGAINST LARRY GAGOSIAN
DIANA WIDMAIER-PICASSO, AND LEON BLACK**

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Defendant Pelham Europe Ltd. (“Pelham”), by its undersigned attorneys, asserts these counterclaims and claims and alleges and states as follows:

NATURE OF THE ACTION

It is an infrequent occurrence that siblings’ competing curry for their mother’s favor and fortune leads to a flagrant breach of contract, and resulting proceedings in three countries implicating the interests of parties residing in three continents. But that is exactly what happened here, where the two siblings are progeny of Pablo Picasso, and one is aligned with and financed by the art dealer and magnate Larry Gagosian.

Olivier Widmaier-Picasso (“Olivier”) (the grandson of Pablo Picasso) and Maya Widmaier-Picasso (“Maya”) (Olivier’s mother and Pablo’s daughter) negotiated and effectuated an arms-length sale to Pelham of the original plaster sculpture by Pablo Picasso, titled *Buste de Femme (Marie Thérèse)*, or *Bust of a Woman (Marie Therese)*, Boisgeloup, 1931 (the “Sculpture”). Throughout the negotiations, Olivier and Maya were represented by the renowned art dealers Connery Pissarro Seydoux, S.A. (“CPS”). At the closing, which occurred in November 2014, the sale price of almost \$50 million set a new record-high price for comparable sculptures, and was \$20 million in excess of the prior record for a sculpture by Pablo Picasso. That price was at a significant premium to the fair valuation as independently determined by CPS (on behalf of Maya and Olivier) and Pelham. Not surprisingly, Maya initially was extraordinarily pleased with the result and immediately inquired whether Pelham would be interested in acquiring additional works by her father. Then Maya’s daughter learned of the sale.

For good reason, Maya had directed Olivier and CPS not to apprise her daughter Diana Widmaier-Picasso (“Diana”) of the contemplated sale of the Sculpture: Maya sought to avoid the anticipated entreaties that the Sculpture be sold through Diana to her long-term ally

Larry Gagosian, without a care or concern for the Sculpture's intrinsic artistic value. Rather, Maya was adamant that the Sculpture was to be sold to a museum, with stipulations against its reproduction that could commoditize the artwork and risk its further damage during the casting process. Pelham complied with Maya's wishes and expressly agreed to the restriction on reproduction of the Sculpture in the contract (the "Pelham Sale Agreement").

As a petulant child is wont to do, however, when Diana learned of the sale to Pelham, she flew into a rage, demanded that the Pelham Sale Agreement be repudiated, and that a new sale be made to Gagosian and his gallery (together "Gagosian"). As indulgent mothers are wont to do, Maya acceded to her daughter's demands. She repudiated the Pelham Sale Agreement on the eve of the last of three installment payments, and then entered into a secret second sale of the Sculpture to the Gagosian Gallery. Although Maya's actions may be understandable from a familial perspective, they are in utter disregard of the valid and enforceable contractual rights of the counterparty to the sale agreement she entered into months earlier.

Diana's conduct was entirely unjustified. She directly interfered with the contract that she knew her brother and mother had effectuated with Pelham, both out of evident animosity over being excluded from the initial sale and in order to further her long-term relationship with Gagosian. Moreover, by acting as Gagosian's agent in connection with the second sale, Diana secured a lucrative commission from the art merchant. The conduct by Diana constitutes tortious interference with Pelham's contract.

As the principal pulling the strings, Gagosian is equally and indeed primarily liable for tortious interference with the Pelham Sale Agreement. In a failed attempt to deflect that liability, Gagosian asserted in prior submissions to this Court that it blindly entered into the

second sale with no knowledge of Pelham's interest. That position is legally and factually deficient. It fails first because Diana's undisputed knowledge of the Pelham Sale Agreement is attributed to Gagosian under black letter agency law. It also is an insufficient defense in view of the art merchant's due diligence obligations, which at a bare minimum required a reasonable and good faith inquiry into the provenance of the Sculpture before it was acquired. Further, Gagosian's purported ignorance is incredible. After Maya repudiated the Pelham contract, Gagosian rushed to close a back-to-back purchase and re-sale of the Sculpture by paying a grossly-inflated price of \$105 million, just days after Pelham advised Maya it would pursue a suit—and the very day before it commenced suit—to enforce its contract. Gagosian's claim that, head-in-the sand, it was unaware of Pelham's interest is belied by the urgency and magnitude of the second sale; and for all the reasons stated, is insufficient to insulate it from tort liability—or allow it to take clean title as a *bona fide* purchaser for value.

The credibility of Gagosian's position is further belied by the extraordinary and coordinated efforts that Gagosian, Diana and Maya undertook to conceal Gagosian's role, and to delay Pelham's relief in related proceedings by advancing untenable positions. On May 13, 2015, fully nine months before this action was commenced, Pelham brought a proceeding against Maya and CPS for specific performance of the Pelham Sale Agreement. The action was filed in Switzerland pursuant to the contract's exclusive forum selection clause. On the same day Pelham obtained and served a Writ of Seizure in France, enjoining Maya from moving or transferring the Sculpture. Maya did **not** respond to those actions by stating that a valid sale had been made to Gagosian, which would have been the natural rejoinder had a legitimate \$105 million sale occurred. Maya's counsel instead asserted that Maya had suffered from a **temporary** mental incapacity that rendered the Pelham agreement invalid, and concealed the second sale to

Gagosian. This “incapacity” argument was a smokescreen. First, Maya’s counsel was never able to persuasively substantiate the claim. Second, the claim conveniently ignored the fact that Maya did not do the deal with Pelham on her own. As noted, she was assisted and protected by her son and CPS who assured that the Pelham Sale Agreement was fair and served her avowed interests. Finally, it strains credulity to assert that Maya was incompetent when she and Olivier made the agreement with CPS and Pelham, yet competent shortly thereafter when she and Diana sold the Sculpture to Gagosian.

Through Maya and Diana’s concerted effort in the pending proceedings, Gagosian’s name did not surface in this matter until almost a year after the Pelham Sale Agreement was executed, when Pelham’s counsel discovered by happenstance that the Sculpture was on display at the Museum of Modern Art in New York City, “[c]ourtesy [of] Gagosian Gallery.” In other words, the Sculpture had been secreted out of France with no notice to Pelham, despite the pending proceedings in Switzerland and despite the Writ of Seizure in France. Maya’s counsel in Europe and Gagosian’s counsel here in New York steadfastly refused to provide Pelham with information about a sale of the Sculpture, or what it was doing in New York. Consequently, Pelham sought and obtained from this Court an order pursuant to 28 U.S.C. § 1782 for discovery in aid of the foreign proceedings. The Court ordered Diana and Gagosian to produce discovery relating to, *inter alia*, when they learned of the Pelham sale, their role in the repudiation of that sale, and the effectuation of the subsequent purported sales of the Sculpture. On December 21 and 23, 2015, this Court ordered Diana and Gagosian to make that production on a rolling basis. To date, ***Diana has yet to produce a single document*** and Gagosian has disclosed a smattering of irrelevant materials from 2011. The principal and its agent thus continue their collusive stonewalling to conceal the true extent of their knowledge and

involvement in these matters.

But each incremental disclosure obtained further undermines Gagosian's claim to the Sculpture. Diana's counsel conceded, for example, that she was paid a commission by Gagosian in connection with the second sale, affirming the agency relationship. Then Maya disclosed in the French proceeding an invoice purporting to memorialize the sale to Gagosian. Remarkably, the invoice purports to have been executed on May 12, 2015, the day before Pelham commenced legal proceedings in Switzerland and the Writ of Seizure was issued in France. The invoice also unusually calls for the transfer of title to Gagosian before full payment was to be made. And again quite remarkably, the invoice called for the title transfer on October 2, 2015 shortly before Pelham served Gagosian with formal notice of its priority claim on October 19, 2015. The highly coincidental timing of the two events raises red flags. Even if that invoice is not a back-dated fabrication, there is no circumventing the fact that Diana and therefore her principal, Gagosian, **knew** of the Pelham Sale Agreement, **and thereafter**, intentionally interfered with that contract to effectuate a purported second sale to Gagosian.

The facts further show that Gagosian acquired the Sculpture for sale to Leon Black (or an entity under Black's control) ("Black"), a highly sophisticated art collector who has access to and works with some of the best art professionals in the world. This sale was no exception. As with Gagosian, the onus was on Black to conduct reasonable due diligence to assess the provenance of the Sculpture. Any *de minimis* due diligence would have revealed Pelham's priority claim. Gagosian cannot claim, therefore, that Black is entitled to take the Sculpture free and clear of Pelham's interest.

For the foregoing reasons, Pelham brings these counterclaims and claims, first, for a declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), that

Gagosian and Black are not owners and have no title or interest in the Sculpture, and therefore must relinquish the Sculpture. Second, Pelham respectfully requests an order that Diana and Gagosian tortiously interfered with the Pelham Sale Agreement, entitling Pelham to general, consequential and punitive damages, as well as its attorneys' fees and expenses. Third, Pelham respectfully contends is entitled to actual and punitive damages from Gagosian for conversion of the Sculpture. Fourth, and finally, Pelham respectfully submits it is entitled to an order on its replevin claim, requiring Gagosian to convey the Sculpture to Pelham.

THE PARTIES

1. Third Party Plaintiff and Counterclaim-Plaintiff Pelham is an art advisory firm based in London, United Kingdom. Pelham's principal place of business is 5 Hanover Square, London NW1S HE, United Kingdom. At all times relevant to this dispute, Pelham has purchased art for sale to Sheikh Jassim bin Abdul Aziz Al-Thani and the Qatar Museums Authority. Guy Bennett, the principal of Pelham, is currently the Chief of Collections and Acquisitions of the Museums Authority of Qatar.

2. Counterclaim-Defendant Gagosian Gallery, Inc. ("Gagosian Gallery") is a chain of art galleries. It is a corporation organized under the laws of the State of New York, with its principal place of business at 980 Madison Avenue, New York, NY 10075.

3. Third Party Defendant Lawrence ("Larry") Gagosian is the owner of Gagosian Gallery, Inc. He is an art dealer and merchant who owns a number of galleries, several of which are in the Southern District of New York. Larry Gagosian resides in and is domiciled in New York, New York.

4. Third Party Defendant Diana Widmaier-Picasso is the granddaughter of Pablo Picasso and the daughter of Maya. She resides in and is domiciled in New York, New

York. In connection with the events material to this action, Diana acted in the capacity of agent for Gagosian.

5. Third Party Defendant Leon Black is highly sophisticated and world-renowned art collector. As an experienced buyer and seller of art and a museum trustee, Black has access to and avails himself of the services of some of the most sophisticated art professionals in the world. Black resides in and is domiciled in New York, New York.

JURISDICTION AND VENUE

6. The Court has diversity subject matter jurisdiction and supplemental subject matter jurisdiction over the claims in this action pursuant to 28 U.S.C. §§ 1332 and 1367. Pelham is a citizen of the United Kingdom and all of the other parties are citizens of New York.

7. The Court has personal jurisdiction over the Gagosian Gallery because it consented to jurisdiction by initiating this action, and because it participated in a purported sale of the Sculpture in New York that, among other occurrences, gave rise to this action. The Gagosian Gallery also resides within this jurisdiction, and also has consented to the jurisdiction of the Southern District of New York in another action related to this matter, *In re Application of Pelham Europe Ltd. for Judicial Assistance Pursuant to 28 U.S.C. § 1782*, No. 15 Misc. 370 (Part 1) (S.D.N.Y. Nov. 18, 2015) (“Pelham’s 1782 Application”).

8. The Court has personal jurisdiction over Larry Gagosian because he is a resident of New York, and because he participated in a purported sale of the Sculpture in New York that, among other occurrences, gave rise to this action. He has also consented to the jurisdiction of the Southern District of New York in another action related to this matter, Pelham’s 1782 Application.

9. The Court has personal jurisdiction over Diana because she is a resident of New York, and because she participated in a purported sale of the Sculpture in New York that, among other occurrences, gave rise to this action. She has also consented to the jurisdiction of the Southern District of New York in another action related to this matter, Pelham's 1782 Application.

10. The Court has personal jurisdiction over Black because he resides in this jurisdiction, and because he participated in the purported sale of the Sculpture in New York that, among other occurrences, gave rise to this action.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because the purported sales of the Sculpture to Gagosian and Black, facilitated by Diana, occurred in this District. The Sculpture currently remains in this district.

12. Alternatively, venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(3) because the counterclaim and third party defendants all reside here and are subject to this Court's personal jurisdiction.

13. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b).

14. Joinder of Diana, Larry Gagosian, and Black is proper pursuant to Fed. R. Civ. P. 19(a)(1)(A) and (B) as they are required parties without which the Court cannot provide complete relief. Diana and Gagosian are liable for damages to Pelham arising from their tortious interference with the Pelham Sale Agreement. Additionally, Gagosian and Black are required parties because they claim an interest relating to the Sculpture that is the subject of the action and because their absence would impede Pelham's ability to protect its interests.

FACTS

15. This action implicates three sales of the same Sculpture, only the first of which is valid and enforceable.

A. The First Sale of the Sculpture To Pelham

16. At the end of 2012, Maya met with a representative of the art advisory firm CPS, and proposed that they sell three of her father's sculptures to Pelham, to be put on display by the Museums Authority of Qatar. Among these works was the Sculpture.

17. Maya advised CPS at the time that she did not want her daughter Diana to know about the transaction or to be involved in the sale in any way. Maya was concerned that Diana would make reproductions of the Sculpture through casting, to which she was firmly opposed. Casting could potentially damage the Sculpture physically and in terms of its unique artistic value. Maya thus wanted a firm commitment from the buyer to protect the Sculpture from being casted in the future. Maya also was concerned that Diana would sell the Sculpture to Gagosian. Maya did not want to sell the Sculpture to a dealer because she did not want to lose control over the Sculpture's future ownership. During these discussions, Maya did not demonstrate any lack of capacity or mental impairment whatsoever, but rather was clear in her intent.

18. CPS advised Pelham of the works that Maya had made available for sale to Pelham. Pelham expressed interest in the Sculpture, and also in one other work not at issue in this litigation. CPS communicated Pelham's interest in the works to Maya. However, no sale took place at the time.

19. In June of 2014, Maya's son Olivier (through his company "Welcome") entered into an agreement with CPS to provide consulting services to CPS consisting of the identification of Pablo Picasso's works potentially available for sale through CPS. Maya, Olivier

and CPS then renewed the discussions regarding a sale of the Sculpture to Pelham, which they collectively agreed to pursue.

20. During these discussions, Maya again did not demonstrate any lack of capacity or mental impairment whatsoever, but clearly articulated the same intent expressed during her prior discussions with CPS. Once again Maya directed CPS not to disclose the potential sale to Diana. Maya repeated that she did not want Diana to involve Gagosian in a potential sale. She said she would personally inform Diana of the sale when she felt it was appropriate. Maya reiterated that the Sculpture was to be sold for display in a museum without reproduction rights.

21. With that clear and reasonable directive, on October 10, 2014, Maya executed a Mandate of Sale which granted CPS “irrevocable” authority to sell the Sculpture on her behalf. Specifically, Maya authorized CPS to offer the Sculpture only to Pelham.

22. CPS then set an asking price for the Sculpture. In the 2012 period, CPS had estimated that the Sculpture was likely worth between €28 million and €30 million. In 2014, after careful consideration and analysis, CPS arrived at a similar, but higher price of the Sculpture. CPS based the offering price for the Sculpture on its understanding of the market at the time and the circumstances of the sale, including the specific provisions that Maya required in the Mandate of Sale. In setting the offering price, CPS considered, among other things, that (1) the publicly available world record price paid for a Picasso sculpture (*Tête de Femme (Dora Maar)*) at the time was approximately \$29 million, including a buyer’s premium; (2) the world record price for a Picasso plaster (*Le Taureau*) was approximately \$3 million; (3) the closest comparable plaster sculpture sale was the sale of Constantin Brancusi’s *Une Muse* for approximately \$12.4 million; (4) the *Une Muse* price constituted the record price ever paid in a

public sale for any plaster sculpture by any artist; and (5) another version of the Sculpture had been insured for between \$45 to \$50 million when displayed at the “Picasso Black and White” exhibition at the Solomon R. Guggenheim Museum in 2012.

23. With no prior knowledge of CPS’s valuation, Pelham independently derived a value for the Sculpture, using a similar standard methodology. In setting the price for the Sculpture Pelham considered the fact that the highest world price paid for a Picasso sculpture at the time was approximately \$29 million and that the record price for Amedeo Modigliani’s stone sculpture of a woman’s head at the time was €43.18 million. Pelham considered Modigliani’s *Head* to be a comparable sculpture because Modigliani was the artist of the same generation as Picasso and was one of just three artists in his generation to achieve distinction in three different media, including sculpture.

24. CPS engaged in arms-length negotiations with Pelham with respect to the sale of the Sculpture. During the course of the negotiations, Pelham increased its offer for the Sculpture several times.

25. Pelham never communicated directly with Maya during the course of the negotiations.

26. Through CPS, Maya and Olivier were directly involved in the sale process. Both were kept fully informed of the negotiations.

27. CPS sold the Sculpture to Pelham on November 13, 2014, pursuant to a Sale Agreement. The Pelham Sale Agreement provided for the sale of the Sculpture to Pelham in exchange for payment of €38,000,000, which, at the time of the sale was the equivalent of approximately \$47,000,000. Pelham in turn agreed to convey the Sculpture to the Sheikh Jassim bin Abdul Aziz Al-Thani for exhibit by the Qatari Museums Authority at the same price that

Pelham purchased the Sculpture from Maya.

28. Maya was pleased with her decision to sell the Sculpture to Pelham. In fact, she was open to further dealings with Pelham and offered for sale additional works by Pablo Picasso. In particular, Maya offered Pelham a Pablo Picasso oil painting of Maya as a child titled *Maya à la poupée et au cheval de bois* (Maya with doll and wooden horse).

29. The Pelham Sale Agreement provided that the purchase price would be paid in three installments. The first installment payment of €1,900,000.00 was due before December 1, 2014; the second payment of €4,000,000.00 was due before January 15, 2015; and the final installment payment of €32,000,000.00 was due on or before April 20, 2015. Pelham performed in accordance with the Sale Agreement and submitted the first two payments required by the agreement. These payments were received and accepted without reservation by CPS, who transferred the payments to Maya and Olivier.

30. On April 10, 2014, just days before the final payment was due, counsel for Maya repudiated the Pelham Sale Agreement. Pelham rejected that repudiation and tendered the final payment, which was not accepted.

**B. *Larry Gagosian and Diana Widmaier-Picasso
Tortiously Interfere with Pelham's Sale Agreement***

31. Diana and her long-term acquaintance Larry Gagosian were the architects of the Maya's purported repudiation of the Pelham Sale Agreement.

32. Diana had a longstanding and close relationship with Larry Gagosian. They frequently attend each other's events and support each other's endeavors. For example, Larry Gagosian has provided initial funding for a catalogue raisonné of Picasso sculptures being authored by Diana. He also financed Diana's filmed interviews for "Picasso.mania."

33. Diana also had long acted and advocated on Larry Gagosian's behalf in an attempt to persuade Maya to sell the Sculpture to Gagosian. Her interests were not altruistic. She had an oral agreement for a commission on the sale of Sculpture to Gagosian.

34. After Maya, Olivier and CPS negotiated and effectuated the Pelham Sale Agreement, but before the final payment was due, Diana learned of the transaction. As discussed below, to this date Diana has concealed when exactly she discovered the sale to Pelham took place.

35. Diana was enraged when she learned that Maya sold the Sculpture to Pelham without her knowledge. Diana felt that the price for the Sculpture was too low because she had previously made a higher offer for the Sculpture to Maya, who rejected it at the time. Diana demanded that her mother repudiate Pelham Sale Agreement and sell the Sculpture to Gagosian.

36. Acting on behalf of Gagosian, and in the scope of her paid agency relationship with Gagosian, Diana effectuated the repudiation of the Pelham Sale Agreement, so the Sculpture could be sold to Gagosian.

37. Gagosian and Diana then rushed to close a back-to-back purchase and resale of the Sculpture. Coordinating the logistics on Gagosian's behalf, Diana arranged for an expert for the party buying the Sculpture from Gagosian to fly to Paris on May 7, 2015, and to be immediately shuttled from the airport to the warehouse where the Sculpture was housed under Maya's control. As discussed below, Gagosian and Diana then finalized the purchase of Sculpture from Maya pursuant to a letter invoice dated just five days later, on May 12, 2015. The expediency and timing of this transaction raises yet another red flag, particularly insofar as the price was an incredible \$105.8 million.

C. Maya's Counsel Directs CPS to Cancel its Mandate Due to Maya's Purported Temporary "Incapacity" Without Disclosing the Second Sale to Gagosian

38. On April 10, 2015, Maya's counsel sent a letter to CPS requesting that CPS cancel the sale of the Sculpture to Pelham. In this letter, Maya's counsel contended for the first time that Maya lacked the mental capacity to enter into the Mandate of Sale with CPS. Significantly, two days later, Maya's counsel clarified for CPS that, notwithstanding her request, ***"Guy Bennett [of Pelham] and the buyers for whom he is acting were not at fault in this deal."***

39. CPS was surprised by the contention that Maya lacked the mental capacity to enter into the Mandate of Sale with CPS, which was inconsistent with CPS's observations during its discussions with Maya and Olivier regarding the Sculpture across several years. Indeed, CPS would not have entered into the Mandate of Sale or the Pelham Sales Agreement had it had any indication that Maya's capacity to sell the Sculpture was in the least impaired.

40. Notably, Maya's counsel did not contend that *Olivier* suffered from any mental defect that would have inhibited his ability to protect Maya's interests during his substantial involvement in the negotiation of the Mandate of Sale with CPS and the Pelham Sale Agreement. In fact, Maya's counsel's correspondence was completely silent with respect to Olivier's involvement in the sale to Pelham.

41. Maya's counsel was not able to provide reliable evidence sufficient to establish Maya's incapacity at the time of sale of the Sculpture. The counsel produced medical reports that were wholly inconclusive and unpersuasive.

42. Accordingly, on May 5, 2015, Pelham's counsel wrote to Maya's counsel, noting her failure to provide reliable evidence of Maya's purported lack of capacity and stating that Pelham intended to proceed with the sale of the Sculpture.

43. Nonetheless, Maya's counsel asked CPS to cancel the Pelham Sale Agreement. ***CPS correctly responded by stating that it had no authority to do so.***

44. After being pressured by Maya's counsel, CPS cancelled its exclusive Mandate of Sale on May 11, 2015. That cancellation, however, had no legal import with respect to Pelham's priority rights under the Pelham Sale Agreement. The Pelham Sale Agreement was validly executed with CPS, and Pelham tendered full performance of the agreement.

45. Remarkably, the secret sale of the Sculpture to Gagosian was being orchestrated during the letter writing campaign initiated by Maya's counsel that followed the repudiation of the Pelham's Sale Agreement on the ground of Maya's incapacity. While Maya was allegedly incapacitated to sell the Sculpture to Pelham with *Olivier's* assistance, she apparently was well enough to sell the Sculpture to Gagosian with *Diana's* assistance.

D. Pelham Commences Litigation in Switzerland and France

46. The Pelham Sale Agreement required adjudication of disputes arising thereunder in the courts of Geneva, Switzerland. Faced with the unjustified repudiation of that agreement, on May 13, 2015, Pelham instituted legal action against CPS and Maya in the Geneva Court of First Instance (*i.e.*, the equivalent of a U.S. District Court) seeking specific performance under the Sale Agreement ("Swiss Litigation").

47. Also on May 13, 2015, Pelham petitioned for and obtained a Writ of Seizure from the High Court of Paris. The Writ of Seizure was served on Maya, who spoke to her counsel while service of process was taking place. The Writ of Seizure had the effect of rendering the Sculpture legally unavailable for any disposition, which meant that Maya was prohibited from "alienat[ing] [the Sculpture] or "mov[ing] it . . . under penalty of sanctions provided in Article 314-6 of the [French] the Criminal Code." Documentation recently obtained

by Pelham establishes that the Sculpture was under the control of Maya when the Writ was served. Maya thus was obligated to maintain the Sculpture in France pending the resolution of the Swiss Litigation.

48. Pelham then proceeded with a good faith adjudication of the Swiss Litigation with the expectation that Maya would do so as well, particularly insofar as Maya did not raise any objection to the validity of the Writ of Seizure with the court at that time. Seeking a reasoned resolution, Pelham's counsel arranged to meet with Maya's counsel for a court-ordered conciliation hearing at the end of August 2015.

49. Unbeknownst to and without notice to Pelham, however, Diana had persuaded Maya to effectuate a second sale of the same Sculpture to Gagosian and to secrete the Sculpture out of France in violation of the Writ of Seizure. The Widmaier-Picasso family and Gagosian actively concealed this malfeasance from Pelham, which only discovered the truth through piecemeal disclosures over time.

E. Maya's Counsel Refuses to Provide Details of a Purported Second Sale

50. After the conciliation hearing, Pelham and CPS sought specification of Maya's position in the litigation. By letter dated September 9, 2015, Maya's counsel responded to CPS's request by asserting that a ***second*** sale of the Sculpture "took place in May 2015" pursuant to a "firm" offer that purportedly was made before October 10, 2014. That position was remarkable in two regards. First, Maya and her counsel had made no mention of a second sale in May 2015, when the Swiss Litigation was commenced and the French Writ of Seizure was obtained. Second, the assertion that a "firm" offer had been made for the Sculpture before October 2014 was contrary to the representations Olivier and Maya made to CPS, and contrary to the representations all three made to Pelham. Further, no evidence of this purported "firm" offer

– let alone any acceptance of that offer - has ever been produced, and Gagosian has not made any reference to a firm offer in subsequent proceedings. It apparently was a pure fabrication.

51. Pelham and CPS understandably made repeated requests for further details on the purported second sale and prior firm offer, but Maya's counsel refused to make any disclosures, concealing whatever additional information existed. Pelham therefore determined it had to proceed with formal disclosure demands. Before it did so, a second remarkable revelation occurred that required Pelham to seek those disclosures in the United States.

F. The Sculpture is Secreted from France

52. On September 14, 2015, the Museum of Modern Art in New York City ("MoMA") opened an exhibition entitled "Picasso Sculpture." The Sculpture is displayed in the "Boisgeloup Sculpture Studio" part of the exhibition. The exhibition materials list the Sculpture as provided "[c]ourtesy [of] Gagosian Gallery." Neither Maya nor her counsel advised Pelham that the Sculpture had been removed from France, provided to Gagosian, and put on display. Rather, Pelham learned of the exhibition from public disclosures.

53. As a consequence, Pelham was not immediately aware that Gagosian had purported to acquire the Sculpture. Pelham therefore provided Gagosian with a formal written notice of its priority claim to the Sculpture and the pending Swiss Litigation and French proceedings by letter dated October 19, 2015. Pelham's counsel also asked Gagosian's counsel to explain how Gagosian obtained possession of the Sculpture to temporarily convey it for exhibit at the MoMA. Gagosian refused to provide any information, which sent up another red flag, particularly in view of Gagosian's well known and long-term relationship with Diana.

54. On October 16, 2015, Pelham commenced a contempt proceeding against Maya in the High Court of Paris for violating the Writ of Seizure by moving the Sculpture out of France. On November 26, 2015, the High Court of Paris held that it could not enter a contempt

finding because a factual ambiguity existed as to whether Maya exercised control over the Sculpture at the time that the Writ of Seizure was served upon her. Pelham thus also required additional disclosures to ascertain when the Sculpture was taken from Maya's control and secreted to the United States.

G. Pelham Discovers a Purported Second Sale of the Sculpture to Gagosian

55. To ascertain the details of the purported subsequent sale of the Sculpture, as well as the particulars of when and how the Sculpture was transferred from France, on November 18, 2015, Pelham commenced a proceeding in this Court for discovery from Gagosian and Diana in aid of the foreign proceedings, pursuant to 28 U.S.C. § 1782. After full briefing and argument, on December 21 and 23, 2015, the Honorable Gregory Woods rejected each of the myriad challenges advanced by Gagosian and Diana, and ordered both to make production of the disclosures Pelham sought "on a continuing basis" to be complete by February 29, 2016. Pelham's 1782 Application, Dkt. 32 at 2. Judge Woods also ordered both to appear thereafter for deposition. *Id.*

56. Of significance here, during the briefing of discovery application, Gagosian and Diana conceded that Diana effectuated a purported second sale of the Sculpture to Gagosian. *See generally id.* at Dkt. 18 & Dkt. 21. Diana and Gagoisan carefully avoided specific disclosure of when and how Diana learned of the sale to Pelham, and thereafter made the alleged sale to Gagosian. In the submissions, Gagosian implausibly asserts he had no knowledge of Pelham's prior purchase, claiming his gallery blindly took title to the Sculpture in May 2015. *Id.* at Dkt. 21 at 4, 13. That position is contrary to the invoice of sale that Maya subsequently disclosed in the French proceeding, which stated that title was to pass to Gagosian on October 2, 2015. The shifting positions relating to this second sale further undermine its credibility.

57. Gagosian also asserted in its briefing that it had acquired the Sculpture “for more than \$100 million,” and subsequently sold it to an undisclosed buyer “for the amount of the Buyer’s offer. Gagosian’s remuneration consisted of the difference between [Gagosian Gallery’s] purchase price and the later resale price.” *Id.* at Dkt. 21 at 3-4. Diana and Gagosian also claimed to have received offers for the Sculpture in the same amount as early as 2011 and 2012. *Id.* at Dkt. 18 at 3 and Dkt. 21 at 4. ***Neither Gagosian nor Diana provided documentation to support these positions in their papers, and have not done so to date.***

58. Gagosian and Diana have instead flouted the Court’s order to produce documents on a continuing basis. Diana has yet to produce a single document. Gagosian likewise only has made one production of a few entirely irrelevant materials. Notably, neither has produced the most salient and readily accessible documents in these litigations, including the documents evidencing payments from Gagosian to Diana as consideration for her role in securing the second purchase, which Diana’s counsel admitted exist.

59. In other words, both Diana and Gagosian continue to conceal the details of their interference with Pelham’s contract. These efforts taken to conceal the truth are themselves telling, but in the end unavailing. The irrefutable fact remains that their interference was intentional, with Diana acting as Gagoisan’s agent, with full knowledge of Pelham’s prior sale.

H. Maya Discloses An Invoice Pertaining to the Second Sale to Gagosian

60. While Pelham continues its efforts to obtain transparency through the Section 1782 proceedings in this Court, Maya made a limited disclosure in an attempt to bolster her position in the on-going French proceeding. Of interest, Maya disclosed an invoice that purports to reflect the sale of the Sculpture by Maya to the Gagosian Gallery (the “Gagosian

invoice”). Unlike the Pelham Sale Agreement, the Gagosian invoice does not contain any conditions prohibiting the reproduction of the Sculpture. Rather, the deal is all about the money.

61. Moreover, there are two aspects of the terms of sale that are so coincidental as to defy credulity. First, the Gagosian invoice purportedly was executed on May 12, 2015, the day before Pelham commenced the Swiss Litigation and obtained the Writ of Seizure from the French court. It is incredible to contend that it was pure fortuity that Gagosian—without any awareness of the Pelham contract and threatened litigation—executed an invoice the day before Pelham brought the Swiss Litigation and obtained the Writ of Seizure. Second, the Gagosian invoice called for passage of title before full payment was made, which is atypical, particularly in a sale of this magnitude. Moreover, the passage of title purportedly occurred per the invoice on October 2, 2015, which remarkably, was shortly before Gagosian received formal notice from Pelham of its priority rights. Again, the timing defies credulity.

62. Regardless of how the record now may be papered, Gagosian had a duty as an art merchant to undertake reasoned due diligence concerning the ownership of the Sculpture in order to take good title to the artwork. Any reasoned diligence would have discovered Pelham’s priority claim. Further still, Diana’s knowledge of that prior sale is attributable to Gagosian, as she acted as his paid agent in connection with the sale. Gagosian simply has no legitimate claim to the Sculpture.

I. The Third Purported Sale to Leon Black

63. Gagosian purportedly has entered into an agreement for the sale of the Sculpture to Black, who is a well-known and sophisticated art collector, highly experienced in the purchase and sale of art. Black has a staff of people in his family office who take care of his collection. Black has access to and avails himself of the services of some of the best art

professionals in the world—advisors, lawyers, and curators, among them. This sale was no exception. Black therefore is a “merchant” as defined in the Uniform Commercial Code. Like Gagosian, he cannot take good title because any reasoned due diligence would have demonstrated Pelham’s priority rights to the Sculpture. Gagosian concedes that no title has yet passed to Black. Gagosian Gallery Complaint, Dkt. 1 at 4.

J. Gagosian’s Complaint and Press Statement

64. On January 12, 2016, the Gagosian Gallery initiated the complaint in the instant action seeking a ruling that it has clean title to the Sculpture. For the reasons stated, that claim fails on the facts and the law.

65. When it filed its complaint, Gagosian went to the press with a number of false and misleading statements. Among other things, Gagosian issued a statement that Sheikh Jassim bin Abdul Aziz Al-Thani is “a long-time friend of the Gallery.” In fact, as Pelham was advised, Sheikh Al Thani is not a long-term friend of, and has never purchased nor does he intend to purchase anything from Gagosian.

CLAIMS FOR RELIEF

FIRST CLAIM

**DECLARATORY JUDGMENT (28 U.S.C. § 2201 *ET SEQ.*)
(Against Larry Gagosian, Gagosian Gallery, Inc., and Leon Black)**

66. Pelham realleges and incorporates by reference each and every allegation contained in the foregoing paragraphs of this Counterclaim and Third Party Complaint as if fully set forth herein in full.

67. Pelham is entitled to the Sculpture pursuant to the Pelham Sale Agreement and Pelham’s tender of full performance thereunder. The Pelham Sale Agreement was executed prior to, and has priority over, any later purported sale of the Sculpture.

68. Gagosian is not a good faith purchaser for value under New York law because Gagosian was aware that Maya had sold the Sculpture to Pelham before Gagosian purported to purchase Sculpture. Gagosian also is not a good faith purchaser for value under New York law because Gagosian failed to undertake reasonable due diligence before purporting to purchase the Sculpture.

69. Black is not a good faith purchaser for value under New York law because he was aware or should have been aware that Maya had sold the Sculpture to Pelham before he reached any agreement to purchase the Sculpture. Black also is not a good faith purchaser for value under New York law because Black is a merchant who failed to undertake reasonable due diligence before purporting to purchase the Sculpture. Additionally, it is undisputed that no title has transferred to Black.

70. Pelham seeks a declaration from this Court that neither Gagosian nor Leon Black are owners of, or have a priority claim over Pelham to, the Sculpture and, therefore, must relinquish possession of the Sculpture to Pelham.

SECOND CLAIM

TORTIOUS INTERFERENCE WITH CONTRACT (Against Larry Gagosian, Gagosian Gallery, Inc., and Diana Widmaier-Picasso)

71. Pelham realleges and incorporates by reference each and every allegation contained in the foregoing paragraphs of this Counterclaim and Third Party Complaint as if fully set forth herein in full.

72. Gagosian tortuously interfered with the Pelham Sale Agreement, in violation of New York law.

73. Diana, individually and as the paid agent for Gagosian, tortuously interfered with the Pelham Sale Agreement, in violation of New York law.

74. As the agent of Gagosian, Diana's knowledge is imputed to Gagosian.

75. Diana and Gagosian knew of the existence of the Pelham Sale Agreement between Maya (through CPS) and Pelham.

76. Diana and Gagosian intentionally and improperly procured an anticipatory repudiation and breach by Maya of the Pelham Sale Agreement. The procurement of the breach was improper for various reasons, including the fact that it was done to further the relationship between Diana and Gagosian, to secure or justify payments from Gagosian to Diana, and to secure a sales commission for Gagosian in connection with the sale to third buyer.

77. The tortious interference by Diana and Gagosian with the Pelham's Sale Agreement has caused Pelham harm entitling it to general and consequential damages.

78. Pelham further is entitled to an award of punitive damages in an amount equal to multiple times Pelham's actual damages, plus its attorneys' fees and expenses.

THIRD CLAIM

REPLEVIN

(Against Larry Gagosian and Gagosian Gallery, Inc.)

79. Pelham realleges and incorporates by reference each and every allegation contained in the foregoing paragraphs of this Counterclaim and Third Party Complaint as if fully set forth herein in full.

80. Pelham has a superior right of possession to the Sculpture by virtue of a valid Sale Agreement for which Pelham tendered full performance and that entitles it to the delivery of the Sculpture.

81. Gagosian is in possession of the Sculpture.

82. Pelham has demanded that Gagosian transfer the Sculpture to Pelham and Gagosian has refused to do so.

83. Gagosian has deprived Pelham of its rightful possessory right to the Sculpture.

84. Pelham seeks the return of the Sculpture pursuant to common law of New York and CPLR Article 71, or if repossession is not possible, the replacement value of the Sculpture.

FOURTH CLAIM

CONVERSION

(Against Larry Gagosian and Gagosian Gallery, Inc.)

85. Pelham realleges and incorporates by reference each and every allegation contained in the foregoing paragraphs of this Counterclaim and Third Party Complaint as if fully set forth herein in full.

86. Pelham has a superior right of possession to the Sculpture by virtue of a valid Sale Agreement for which Pelham tendered full performance and that entitles it to the delivery of the Sculpture.

87. Gagosian willfully, intentionally, and fraudulently exercised wrongful dominion and control over the Sculpture and converted the Sculpture in interference with Pelham's rights.

88. In direct contravention of Pelham's superior rights and title to the Sculpture, Gagosian willfully, intentionally, and fraudulently deprived Pelham of its right to possession of the Sculpture.

89. As a result of Gagosian's wrongful conversion of the Sculpture, Pelham has been damaged and is entitled to an award of actual and punitive damages, plus its attorneys' fees and expenses.

PRAYER FOR RELIEF

WHEREFORE, Defendant Pelham prays for the following:

- A. A declaration that Gagosian and Leon Black are not the owners of, and do not have priority claims over Pelham to the title to, the Sculpture.
- B. An order directing the transfer to Pelham of title to and physical possession of the Sculpture.
- C. An award of general damages against Diana Widmaier-Picasso, Larry Gagosian, and Gagosian Gallery, Inc.
- D. An award of consequential damages in an amount to be determined at trial.
- E. An award of punitive damages in the amount no less than multiple times the actual damages award.
- F. An award of Pelham's attorneys' fees and expenses, and costs.
- G. An award of pre-judgment and post-judgment interest.
- H. Any other relief the Court deems just.

Dated: New York, New York
February 3, 2016

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