

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ML PRIVATE FINANCE LLC,

Plaintiff,

- against -

HALSEY McLEAN MINOR, THE HALSEY  
McLEAN MINOR REVOCABLE TRUST  
DATED NOVEMBER 3, 2004 and  
DOES 1 through 50,

Defendants.

No. 08 CV 11187 SHS

**DEFENDANTS' ANSWER, AFFIRMATIVE DEFENSES,  
COUNTERCLAIMS, AND JURY DEMAND**

Defendants Halsey McLean Minor and The Halsey McLean Minor Revocable Trust Dated November 3, 2004, by their attorneys, Browne Woods George LLP, hereby answer the Amended Complaint, dated February 23, 2009 (the "Complaint"), on knowledge and as to their own acts and otherwise on information and belief, as follows:

1. Deny the allegations of paragraph 1, except admit that this action purports to seek remedies arising from an alleged breach of contract, and admit that defendants executed the Loan Agreement and refer to that document for its contents.

2. Deny the allegations of paragraph 2, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

3. Deny the allegations of paragraph 3, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

4. Deny the allegations of paragraph 4, except admit that this action purports to seek remedies arising from an alleged breach of contract.

5. Admit that plaintiff executed the Loan Agreement, and state that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5.

6. Deny the allegations of paragraph 6, except admit that Mr. Minor is a resident of California, and admit that Mr. Minor executed the Loan Agreement and refer to that document for its contents.

7. Deny the allegations of paragraph 7, except admit that the Trust has an address in California, admit that Mr. Minor is a trustee of the Trust, and admit that Mr. Minor executed the Loan Agreement on behalf of the Trust and refer to that document for its contents.

8. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8.

9. Deny the allegations of paragraph 9, except admit that plaintiff purports to invoke the jurisdiction of this Court pursuant to the statute cited therein.

10. Deny the allegations of paragraph 10, except admit that defendants executed the Loan Agreement and refer to that document for its contents, and admit that plaintiff purports to invoke the jurisdiction of this Court pursuant to the Loan Agreement.

11. Deny the allegations of paragraph 11, except admit that plaintiff purports to establish venue pursuant to the statute cited therein and the Loan Agreement.

12. Deny the allegations of paragraph 12, except admit that defendants executed the June 2007 Loan Agreement, a promissory note, and security agreement and refer to those documents for their contents.

13. Deny the allegations of paragraph 13, except admit that defendants executed the June 2007 Loan Agreement, a security agreement, and certain pledge agreements and refer to those documents for their contents.

14. Deny the allegations of paragraph 14, except admit that defendants executed the June 2007 Loan Agreement and refer to that document for its contents.

15. Deny the allegations of paragraph 15, except admit that defendants executed the June 2007 Loan Agreement and refer to that document for its contents, and that defendants were in compliance with all of their obligations under the June 2007 Loan Agreement.

16. Deny the allegations of paragraph 16, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

17. Deny the allegations of paragraph 17, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

18. Deny the allegations of paragraph 18, except admit that defendants executed the Loan Agreement and the Amended and Restated Revolving Note and refer to those documents for their contents.

19. Deny the allegations of paragraph 19, except admit that defendants executed the Note and refer to that document for its contents.

20. Deny the allegations of paragraph 20, except admit that defendants executed the Note and refer to that document for its contents.

21. Deny the allegations of paragraph 21, except admit that defendants executed the Loan Agreement and the Note and refer to those documents for their contents.

22. Deny the allegations of paragraph 22, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

23. Deny the allegations of paragraph 23, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

24. Deny the allegations of paragraph 24, except admit that defendants executed the Loan Agreement and security agreements and refer to those documents for their contents.

25. Deny the allegations of paragraph 25, excepts admit that defendants executed the Note and refer to that document for its contents.

26. Admit that plaintiff improperly claimed a first-priority security interest in certain art and furniture owned by Mr. Minor, and state that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 26.

27. Deny the allegations of paragraph 27, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

28. Deny the allegations of paragraph 28, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

29. Deny the allegations of paragraph 29, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

30. Deny the allegations of paragraph 30, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

31. Deny the allegations of paragraph 31, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

32. Deny the allegations of paragraph 32, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

33. Deny the allegations of paragraph 33, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

34. Deny the allegations of paragraph 34, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

35. Deny the allegations of paragraph 35, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

36. Deny the allegations of paragraph 36, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

37. Deny the allegations of paragraph 37, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

38. Admit the allegations of paragraph 38.

39. Admit that defendants have repaid amounts borrowed under the Loan Agreement, but deny that a substantial portion remains outstanding.

40. Deny the allegations of paragraph 40.

41. Deny the allegations of paragraph 41.

42. Deny the allegations of paragraph 42.

43. Admit the allegations of paragraph 43.

44. Deny the allegations of paragraph 44, except admit that the untitled "Cowboy" by Richard Prince was originally pledged as collateral under the Loan Agreement, but at the time Mr. Minor sold the work for \$1,200,000.00, plaintiff had sufficient collateral for the outstanding Loan balance, without the Cowboy.

45. Deny the allegations of paragraph 45.

46. Deny the allegations of paragraph 46.

47. Deny the allegations of paragraph 47, except admit that defendants were under no obligation to pay plaintiff any part of the proceeds of the sale of the work since it was fully collateralized at the time.

48. Deny the allegations of paragraph 48, except admit that Mr. Minor entered into two consignment agreements with Phillips de Pury & Company to sell four Damien Hirst works.

49. Deny the allegations of paragraph 49, except admit that the four Hirst works were originally pledged as collateral under the Loan Agreement, but plaintiff subsequently pledged sufficient substitute collateral for the outstanding Loan balance.

50. Deny the allegations of paragraph 50.

51. Deny the allegations of paragraph 51, except admit that defendants were under no obligation to pay plaintiff any part of the proceeds of the sale of the works since it was fully collateralized at the time.

52. Deny the allegations of paragraph 52, except admit that Mr. Minor entered into an agreement with Haunch Of Venison to sell for \$25,000,000.00 seven Richard Prince works, admit that the works were shipped to Christie's in London (where the sale was to take place), and admit that the works were improperly retained by Christie's when the buyer backed out of the deal; also admit that although plaintiff was well aware that Mr. Minor had frequently moved works that were collateral for the Loan, on this occasion plaintiff told defendants for the first time that Mr. Minor was required to obtain plaintiff's consent before moving any collateral – which was a change from plaintiff's prior course of conduct.

53. Deny the allegations of paragraph 53, except admit that the seven works were originally pledged as collateral under the Loan.

54. Deny the allegations of paragraph 54, except admit that Mr. Minor entered into an agreement with Haunch Of Venison to sell for \$25,000,000.00 seven Richard Prince works, admit that the works were shipped to Christie's in London (where the sale was to take place), and admit the works were improperly retained by Christie's when the buyer backed out of the deal; also admit although plaintiff was well aware that Mr. Minor had frequently moved works that were collateral for the Loan, on this occasion plaintiff told defendants for the first time that Mr. Minor was required to obtain plaintiff's consent before moving any collateral – which was a change from plaintiff's prior course of conduct.

55. Deny the allegations of paragraph 55, except admit that Mr. Minor entered into an agreement with Haunch Of Venison to sell for \$25,000,000.00 seven Richard Prince works, admit that the works were shipped to Christie's in London (where the sale was to take place), and admit that the works were improperly retained by Christie's when the buyer backed out of the deal; also admit that although plaintiff was well aware Mr. Minor had frequently moved works that were collateral for the Loan, on this occasion plaintiff told defendants for the first time that Mr. Minor was required to obtain plaintiff's consent before moving any collateral – which was a change from plaintiff's prior course of conduct.

56. Deny the allegations of paragraph 56, except admit that Mr. Minor entered into an agreement with Haunch Of Venison to sell for \$25,000,000.00 seven Richard Prince works, admit that the works were shipped to Christie's in London (where the sale was to take place), and admit that the works were improperly retained by Christie's when the buyer backed out of the deal; also admit that although plaintiff was well aware that Mr. Minor had frequently moved works that were collateral for the Loan, on this occasion plaintiff told defendants for the first

time that Mr. Minor was required to obtain plaintiff's consent before moving any collateral – which was a change from plaintiff's prior course of conduct.

57. Admit the allegations of paragraph 57.

58. Deny the allegations of paragraph 58, except admit that Sotheby's has filed suit against Mr. Minor, and Mr. Minor has filed a counterclaim, arising from a Sotheby's auction of certain works.

59. Deny the allegations of paragraph 59.

60. Deny the allegations of paragraph 60, except admit that Sotheby's has filed suit against Mr. Minor, and Mr. Minor has filed a counterclaim, arising from a Sotheby's auction of certain works.

61. Admit the allegations of paragraph 61.

62. Deny the allegations of paragraph 62.

63. Deny the allegations of paragraph 63, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

64. Deny the allegations of paragraph 64, except admit that plaintiff sent a letter dated September 11, 2008 and refer to that document for its contents.

65. Deny the allegations of paragraph 65, except admit that plaintiff sent a letter dated December 19, 2008 and refer to that document for its contents.

66. Deny the allegations of paragraph 66.

67. Deny the allegations of paragraph 67, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

68. Deny the allegations of paragraph 68, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

69. Deny the allegations of paragraph 69, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

70. Deny the allegations of paragraph 70, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

71. Deny the allegations of paragraph 71.

72. Deny the allegations of paragraph 72, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

73. Deny the allegations of paragraph 73, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

74. Deny the allegations of paragraph 74.

75. Deny the allegations of paragraph 75, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

76. Deny the allegations of paragraph 76, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

77. Deny the allegations of paragraph 77, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

78. Deny the allegations of paragraph 78.

79. Deny the allegations of paragraph 79, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

80. Deny the allegations of paragraph 80, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

81. Deny the allegations of paragraph 81.

82. Deny the allegations of paragraph 82, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

83. Deny the allegations of paragraph 83, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

84. Deny the allegations of paragraph 84.

85. Deny the allegations of paragraph 85, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

86. Deny the allegations of paragraph 86, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

87. Deny the allegations of paragraph 87, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

88. Deny the allegations of paragraph 88, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

89. Deny the allegations of paragraph 89.

90. Deny the allegations of paragraph 90, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

91. Deny the allegations of paragraph 91, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

92. Deny the allegations of paragraph 92.

93. Deny the allegations of paragraph 93, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

94. Deny the allegations of paragraph 94, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

95. Deny the allegations of paragraph 95, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

96. Deny the allegations of paragraph 96, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

97. Deny the allegations of paragraph 97, except that defendants still possess the Collateral.

98. Deny the allegations of paragraph 98.

99. Deny the allegations of paragraph 99.

100. Deny the allegations of paragraph 100.

101. Deny the allegations of paragraph 101.

102. Deny the allegations of paragraph 102, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

103. Deny the allegations of paragraph 103, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

104. Deny the allegations of paragraph 104, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

105. Deny the allegations of paragraph 105.

106. Deny the allegations of paragraph 106.

107. Deny the allegations of paragraph 107, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

108. Deny the allegations of paragraph 108, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

109. States that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 109.

110. States that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 110.

111. Deny the allegations of paragraph 111, and further repeat, reallege, and incorporate herein by reference their responses to each such allegation as if fully set forth herein.

112. Deny the allegations of paragraph 112, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

113. Deny the allegations of paragraph 113, except admit that defendants executed the Loan Agreement and refer to that document for its contents.

114. Deny the allegations of paragraph 114.

**GENERAL DENIALS**

115. Except as otherwise expressly admitted in paragraphs 1 through 114 above, defendants deny each and every allegation contained in paragraphs 1 through 114 of the Complaint, including, without limitation, the headings contained in the Complaint, and specifically deny liability to plaintiff, or that plaintiff has suffered any legally cognizable damages for which defendants are responsible, or which purportedly entitles plaintiff to equitable relief. Pursuant to Rule 8(d) of the Federal Rules of Civil Procedure, allegations contained in the Complaint to which no responsive pleading is required shall be deemed denied. Defendants expressly reserve the right to amend and/or supplement their answer.

116. With respect to all paragraphs in the Complaint in which plaintiff prays for damages or other relief, defendants deny that plaintiff is entitled to such relief.

**AFFIRMATIVE AND OTHER DEFENSES**

Defendants assert the following affirmative and other defenses. In asserting these defenses, defendants do not assume the burden of proof with respect to any issue as to which applicable law places the burden of proof upon plaintiff.

**FIRST AFFIRMATIVE DEFENSE**

Plaintiff fails to state claims against defendants upon which relief may be granted, and its complaint must therefore be dismissed.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff is barred by the doctrine of unclean hands from seeking equitable relief such as an injunction or specific performance.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by reason of waiver.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

**SIXTH AFFIRMATIVE DEFENSE**

Defendants reserve the right to raise any additional defenses not asserted herein of which they become aware through discovery or other investigation.

**COUNTERCLAIMS**

Defendants, by and through their undersigned attorneys, bring these counterclaims against plaintiff and allege as follows:

1. These counterclaims concern a company that, when faced with a catastrophic financial crisis of its own making, tortiously mistreated one of its most loyal and productive

customers. For over 10 years, Halsey McLean Minor (“counterclaimant” or “Minor”) was a model client for ML Private Finance LLC (“defendant-in-counterclaim” or “MLPF”). During that period, Mr. Minor borrowed and repaid approximately \$90 million from MLPF, never once missing a payment. Mr. Minor also sold some \$300 million in assets through MLPF, enabling it to earn substantial commissions on the sales. Mr. Minor even brought new clients, including a billionaire, to MLPF during their decade-long relationship.

2. All of that changed in 2008, when MLPF’s parent company, Merrill Lynch & Co. (“Merrill”), began collapsing under the weight of its bad investments. As has been widely reported, Merrill was a heavy investor in mortgages with a particular emphasis on the high-risk subprime variety. Blinded to the hazards by the promise of even greater riches, Merrill became a main purveyor of securities and other financial vehicles backed by these high-risk mortgages. When homeowners defaulted on their mortgages in ever greater numbers throughout 2007 and into 2008, Merrill was hit with \$45 billion in losses and left with billions more in bad investments. By mid-2008, it was clear the company faced insolvency.

3. In a bid to avoid the fate of bankrupt competitors like Lehman Brothers, Merrill began frantically looking for a buyer. To make itself as attractive as possible to purchasers like Bank of America, Merrill took desperate measures to improve the company’s financial picture. These efforts included a pattern of harmful and egregious conduct against formerly valued clients like Mr. Minor, to whom Merrill had lent money. Shockingly, even as Merrill was seeking to squeeze every last cent from the likes of Mr. Minor, the company’s then- (and final) CEO (John Thain) accelerated approximately \$4 billion in bonuses to company executives just prior to the close of the deal with Bank of America.

### **The Loan Agreement**

4. In or about April 2007, Peter Arbogast, counterclaimant's broker at Merrill Lynch Private Banking & Investment Group, with whom Mr. Minor had worked for over nine years, approached counterclaimant about a new loan product that Merrill Lynch had recently started to offer. He explained to Mr. Minor that Merrill Lynch had recently begun to offer lines of credit to high-net worth individuals, where fine art served as the collateral. The line of credit was marketed to Mr. Minor as a "low cost source of capital."

5. Based upon Mr. Arbogast's representations, Mr. Minor indicated that he was interested in this line of credit. Mr. Arbogast then put counterclaimant in touch with Nathaniel Cooke, a vice-president of MLPF.

6. On or around June 7, 2007, Mr. Minor signed loan documents for a line of credit of up to \$20,000,000.00 (the "Loan").

7. On December 19, 2007, Mr. Minor signed amended loan documents (the "Loan Documents") to increase the line of credit under the Loan to \$25,000,000.00.

8. All parties to the Loan understood that the purpose of the Loan was to provide Mr. Minor with credit for his personal hobby of buying and selling artwork.

### **The Parties' Custom and Practice Concerning Collateral**

9. As was represented to counterclaimant by Mr. Cooke, and subsequently set forth in the Loan Documents, MLPF required Mr. Minor to provide it with a security interest in collateral that was twice the value of the outstanding Loan balance (*i.e.*, the amount of the Loan that counterclaimant had drawn down). This was effectuated through MLPF's continuing appraisal of artwork in which Mr. Minor had agreed to grant MLPF a security interest. When, for example, the line of credit under the Loan was increased to \$25 million and Mr. Minor drew

down the full amount, he provided MLPF a security interest in further works, bringing the total appraised value of the collateral to \$50 million.

10. Consistent with the representation that the Loan was a low source cost of capital, the Loan was structured as a line of credit. Thus, Mr. Minor was not required to make any principal payments prior to maturity. Counterclaimant was only required to make monthly interest payments, which payments were made by MLPF drawing the funds directly from an account Mr. Minor maintained at Merrill Lynch.

11. Consistent with the structure of the Loan, MLPF frequently provided Mr. Minor's assistant, Laura Childress, with schedules setting forth the "loanable value" of his artwork and furniture. This loanable value was always 50% of the appraised value of any piece of art or furniture, where the appraised value was greater than \$100,000.00. No loanable value was assigned to items with an appraised value of less than \$100,000.00. Additionally, other pieces on the schedule also were not assigned loanable value, either because MLPF had not yet appraised them, or because counterclaimant was sufficiently collateralized such that appraisal was unnecessary.

12. Based on the foregoing arrangement, MLPF only prepared, and asked counterclaimant to sign, UCC financing statements for pieces of art and furniture that provided Mr. Minor with loanable value.

13. Mr. Minor never pledged all of his artwork or furniture as collateral for the Loan. Thus, based upon market value fluctuations and personal considerations, when Mr. Minor would sell art, counterclaimant or Ms. Childress would inform Mr. Cooke, who would then assign loanable value to other art on the schedule (that had not yet been assigned loanable value) in

order to ensure that Mr. Minor was sufficiently collateralized. In all instances, Mr. Minor always made sure that MLPF had sufficient collateral for the amount he had drawn down the Loan.

14. Often, Mr. Minor would provide MLPF with collateral that was worth in excess of twice the amount he had drawn down the Loan. In many of those instances, as the collateral would not provide Mr. Minor with additional loanable value, MLPF would not immediately perform an appraisal of the collateral. Instead, it opted to wait until it believed that it had a sufficient number of pieces such that an appraisal would be worth obtaining.

15. As offers to buy artwork are often short-lived, by providing MLPF with excess collateral Mr. Minor put himself in a position of being able to sell art quickly, while still insuring that MLPF was sufficiently collateralized. At all times, Mr. Minor recognized that if he sold art in which MLPF had a security interest, he would need to make sure that it remained sufficiently collateralized based upon the outstanding loan balance. Thus, if Mr. Minor sold artwork at a time when MLPF had exactly twice the loanable value as collateral, he knew that he would need to pay to MLPF its portion of the proceeds that were sufficient to maintain the appropriate collateral ratio (*i.e.*, 50% of appraised value). However, if MLPF had excess collateral after the sale of artwork, or Mr. Minor made up any collateral shortfall that existed after a sale, he was under no obligation to pay down the Loan.

16. For example, in February 2008, Mr. Minor accepted a \$1,200,000.00 offer to sell an untitled painting that was one of several "Cowboys" by Richard Prince that Mr. Minor owned and that he had pledged to MLPF as collateral for the Loan. At that time, Ms. Childress informed Mr. Cooke by telephone that the Cowboy was being sold for \$1,200,000.00.

17. The sale of the Cowboy was completed on April 11, 2008. At that time, MLPF had sufficient collateral for the outstanding Loan balance, without the Cowboy, which had been

removed from the loanable value schedule on March 4, 2008. Thus, in the absence of any obligation to make a principal payment to MLPF, Mr. Minor retained all of the proceeds from the sale. Moreover, since the Cowboy was not on the loanable value schedule at the time Mr. Minor received the proceeds, he had no reason to believe that MLPF had any security interest in that work.

18. In addition, on or around April 16, 2008, Mr. Minor entered into two consignment agreements with Phillips de Pury & Company (“Phillips”) to sell four Damien Hirst works, two at an auction in New York in May and two at an auction in London in June.

19. On July 7, 2008, Mr. Minor received \$4,000,000.00 from Phillips for the sale of the two Hirst works at the New York auction. At that time, with the knowledge and consent of Mr. Cooke, counterclaimant provided MLPF with additional collateral, such that it was sufficiently collateralized for the outstanding Loan balance. Thus, in the absence of any obligation to make principal payment to MLPF, Mr. Minor retained all of the proceeds from the sale.

20. Subsequent to the London auction, Phillips informed Mr. Minor that due to the failure of the auction to meet expectations, it could not immediately pay him the \$6,000,000.00 that had been guaranteed to him pursuant to their agreement. Instead, Mr. Minor entered into an agreement whereby Phillips would pay him \$1,500,000.00 immediately and the remaining \$4,500,000.00 by October 15, 2008.

21. On August 25, 2008, Mr. Minor received \$1,500,000.00 from Phillips. At that time, MLPF had sufficient collateral for the outstanding Loan balance. Thus, in the absence of any obligation to make a principal payment to MLPF, counterclaimant retained all of this partial payment of the proceeds from the sale of the Hirsts.

### **The Additional Short-Term Loan**

22. Due to Phillips's unexpected failure to timely meet its obligations to Mr. Minor, in late August 2008, he had a shortfall in the cash necessary to meet his personal and business obligations. Thus, Mr. Minor approached Mr. Arbogast to request a short-term, temporary increase of the amount he was permitted to borrow pursuant to the Loan. MLPF agreed to increase that amount to \$27,500,000.00 for 60 days – *i.e.*, MLPF agreed to lend Mr. Minor an additional \$2,500,000.00 for 60 days.

23. In connection with that additional Loan amount of \$2.5 million, Mr. Minor agreed to pledge to MLPF a significant amount of additional artwork and furniture. Because these additional pieces were pledged solely as collateral for this additional short-term Loan amount, MLPF never appraised the additional collateral, never excluded pieces with appraised values of less than \$100,000.00, never verified the locations and images of the pieces, and never asked Mr. Minor to execute UCC financing statements, all of which the Loan agreement required. Even so, MLPF clearly understood that the pieces Mr. Minor had pledged were worth well in excess of the \$5,000,000.00 necessary to create additional loanable value of \$2,500,000.00.

24. On August 25, 2008, Mr. Minor signed a document with MLPF memorializing its agreement to lend counterclaimant \$2,500,000.00 for 60 days.

### **The Unjustified Account Freeze**

25. On September 9, 2008, two wire transfers in the total amount of \$700,000.00 that Mr. Minor had initiated from his account at Merrill Lynch bounced, even though he had in excess of \$2,100,000.00 in the account for a collar transaction. As a result of these bounced wire transfers, Mr. Minor's reputation as an honest and solvent businessman suffered.

26. When Mr. Minor called Mr. Arbogast to find out why this had happened, Mr. Arbogast had his assistant access counterclaimant's account information. Mr. Arbogast then told Mr. Minor that Merrill had frozen Mr. Minor's account on or about September 5, 2008. As Mr. Arbogast had learned about the account being frozen at the same time that Mr. Minor did, he said that he would investigate and quickly respond.

27. Thereafter, Mr. Arbogast informed Mr. Minor that he had been told that the account would remain frozen and that MLPF would only unfreeze the account to take the money and apply it to the Loan, even though the repayment of the additional \$2,500,000.00 that Mr. Minor had borrowed was not due until October 24, 2008. At that time, Mr. Arbogast told Mr. Minor that this was the first time in 25 years that Merrill Lynch had frozen a client's funds without consulting him first.

28. In a blatant display of bad faith, Mr. Minor subsequently learned that MLPF's hold on his account entitled it to *all proceeds up to a penny less than a billion dollars (i.e., \$999,999,999.99)* – far in excess of the total amount he had borrowed under the Loan agreement, none of which was due to MLPF at that time. The timing of this hold, which was put in place September 5, 2008, without any warning to Mr. Minor, was particularly suspicious given the precarious financial state of MLPF's parent, Merrill Lynch, at the time. That same day, Merrill's creditors cut off the company's credit, forcing Merrill to sell itself over the weekend or face the prospect of opening bankrupt on Monday. The hold was placed on counterclaimant's account the Friday before then-CEO Thain's pivotal weekend in which he convinced Bank of America to purchase Merrill.

29. Later in the day on September 9, 2008, Mr. Minor had a telephone call with Mr. Cooke, Mr. Arbogast, and Scott Kennedy and Elizabeth Murray of MLPF, to discuss the Loan.

Mr. Minor explained how extremely concerned he was that MLPF had frozen his funds without any explanation or advance notice. Additionally, because Mr. Minor had been unable to meet the Loan's liquidity requirement, the conversation focused on re-working the Loan prior to when it was due to mature on December 18, 2008. During that conversation, Mr. Cooke and Ms. Murray stated that the Loan would be "re-rolled," but that there would need to be some changes to address the liquidity covenant. The conversation ended with an agreement that Mr. Minor would make a proposal for the re-rolled Loan agreement. During the conversation, there was no suggestion whatsoever that MLPF was going to call the loan in December when it matured.

30. Pursuant to the discussions on the September 9, 2008 telephone conference, on September 10, 2008, Mr. Minor participated in a videoconference with Ms. Childress and his accountants, during which counterclaimant instructed his accountants to work diligently to come up with the proposal for re-rolling the Loan that MLPF had requested. On September 12, 2008, Mr. Minor's accountants conducted a telephone conference with Mr. Cooke during which they made a detailed proposal for the re-rolling of the loan.

31. Aside from tainting Mr. Minor's reputation as an honest and solvent businessman, MLPF's unjustified hold on counterclaimant's account also caused him direct financial harm. Specifically, on or about September 12, 2008, Mr. Minor was forced prematurely to unwind a collar transaction with Bank of America. At the time of their unwinding, the collars would have been worth approximately \$7.8 million if they had been allowed to mature – some \$2.3 million more than Mr. Minor received.

32. Since Mr. Arbogast had informed Mr. Minor that MLPF would only release the funds to repay the Loan (and interest on the amount that had been frozen was accruing even though MLPF had improperly deprived counterclaimant of access to those funds), Mr. Minor

eventually had no choice but to agree, on or about September 18, 2008, that the funds could be applied to the Loan.

33. During this same period, and continuing through October and November 2008, Mr. Minor and his representatives had numerous communications with Mr. Cooke about altering the master schedule of Loan collateral to include the additional works that counterclaimant had pledged as security for the now-repaid \$2,500,000.00. Mr. Cooke agreed and expressed MLPF's desire to reappraise these additional works, which had been valued at \$5,000,000.00. But MLPF, no doubt preoccupied by the troubles of its parent, failed to reappraise the additional works. Because of this failure, Mr. Cooke agreed to add the additional works to the master schedule of collateral at a value equal to counterclaimant's cost of purchase, once the Loan was re-rolled.

#### **The Two Cowboys Sale**

34. On December 12, 2008, Mr. Minor received an offer from the Gagosian Gallery ("Gagosian") to sell two of the untitled Richard Prince Cowboys for \$3,000,000.00. On December 14, 2008, Ms. Childress called Mr. Cooke to arrange for the release of MLPF's security interest in the works. On that call, Ms. Childress explained to Mr. Cooke that since MLPF was fully collateralized at the time and the works were listed on the loanable value schedule with an appraised value of \$4,000,000.00 and a corresponding loanable value of \$2,000,000.00, upon release of MLPF's security interest, Gagosian would send MLPF \$2,000,000.00 and Mr. Minor would receive \$1,000,000.00. Mr. Cooke indicated to Ms. Childress that this was acceptable to him, but that Mr. Cooke needed the consent of his supervisors in Chicago.

35. On December 15, 2008, Mr. Cooke informed Ms. Childress that, due to counterclaimant's "default," MLPF would only release its lien if it received all of the proceeds.

36. MLPF's insistence on the entire proceeds of the transaction violated the Loan Documents -- the loan had never been accelerated, it had yet to mature, and MLPF was fully collateralized.

**MLPF's False Assertion of a "Perfected Security Interest"**

37. On December 18, 2008, MLPF sent a threatening letter to Gagosian warning the gallery not to do business with Mr. Minor concerning several lists of artwork and furniture in which MLPF asserted that it had "a perfected security interest." These lists included all of the artwork and furniture that Mr. Minor had pledged as security for the \$2,500,000.00 loan in August, most of which MLPF had improperly forced Mr. Minor to repay nearly three months before.

38. Moreover, the letter falsely indicated that MLPF had a "perfected security interest" in all of the artwork and furniture on the lists even though MLPF had never appraised the additional collateral, never excluded pieces with appraised values of less than \$100,000.00, never verified the locations and images of the pieces, and never asked Mr. Minor to execute UCC financing statements.

39. MLPF also sent subpoenas to Phillips, Christie's, and Sotheby's, falsely informing the recipients that the entire collection of Mr. Minor's personal art was subject to lien even though not collateral. These subpoenas, moreover, revealed the entirety of Mr. Minor's art holdings.

40. The disclosure of Mr. Minor's art holdings to third parties places him at a severe disadvantage in any transactions to buy or sell artwork. As described in a recent *New York Times* article, "the postwar art world is basically a stock market with a couple of thousand really valuable shares. Few people have any idea where those shares are located, because they're

hanging in the homes and sitting in the warehouses of collectors, who, for obvious security reasons, tend to keep their holdings well-guarded secrets.” David Segal, “Pulling Art Sales out of Thin Air,” *N.Y. Times*, March 7, 2009.<sup>1</sup>

41. On February 27, 2009, Phillips also received a threatening letter substantially similar to the one received by Gagosian.

42. MLPF’s actions lacked any sound basis and were done for the purpose of harming Mr. Minor. As a result of the MLPF’s misconduct, Mr. Minor’s artwork has been “burned” – *i.e.*, saleable only at a fraction of its fair market value – and he has gained a false reputation as a businessman who is untrustworthy and unwilling to pay his debts.

43. In or around December 18, 2008, Mr. Minor called Merrill Lynch’s then-CEO, John Thain, concerning MLPF’s unjustified refusal to release its security interests on the Cowboys. During the conversation, Mr. Thain promised to investigate the matter and get back to counterclaimant promptly. Mr. Minor never heard from Thain again after that telephone call.

#### **The Demand Letter and Lost Nurse Sale**

44. On December 19, 2008, despite its representations that it would re-roll the Loan, and despite its failure to respond substantively to the proposal Mr. Minor’s accountants had made to restructure the Loan, or to the other concepts that had been discussed extensively over the past three months, MLPF sent Mr. Minor a demand letter for the entire amount due on the Loan.

45. On December 20, 2008, Mr. Minor sent an email to Mr. Thain, concerning MLPF’s unjustified refusal to release its security interests on the Cowboys, its improper sharing of information concerning Mr. Minor’s personal assets with Gagosian, and its breach of its promise to re-roll the Loan. Mr. Thain never responded.

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<sup>1</sup> [www.nytimes.com/2009/03/08/business/08larry.html?\\_r=1&sq=gagosian&st=cse&scp=1](http://www.nytimes.com/2009/03/08/business/08larry.html?_r=1&sq=gagosian&st=cse&scp=1).

46. On December 24, 2008, MLPF received \$2,000,000.00 for the sale of the Cowboys and Gagosian forgave \$1,000,000.00 that Mr. Minor owed to it. MLPF received the exact same amount in this transaction than it would have received from the transaction that was proposed to it on December 14, 2008. However, MLPF did not confirm that it was releasing its liens on the Cowboys until January 5, 2009.

47. In addition, in December 2008, Mr. Minor received several offers to sell for \$5,000,000.00 the Nurse, another Richard Prince work that had been pledged to MLPF as collateral for the loan. Due to MLPF's refusal to timely release its liens on the Cowboys, on December 18, 2008, Deborah McLeod, Director at the Gagosian Gallery, emailed Mr. Minor and expressed her concern that MLPF might not release its lien on the Nurse. "Let me know when someone at ML makes their position clear on when and how they will release. I have interest in the Nurse, but am worried about having offered what I cannot produce. Do you think that selling the nurse would be received by ML the same as the cowboys?"

48. At this time, Mr. Minor informed Ms. McLeod that he could not guarantee the release of MLPF's lien on the painting because he knew that MLPF would improperly insist on receiving 100% of the proceeds, even though it was only entitled to 50% of the painting's appraised value on the loanable value schedule. Gagosian flatly refused to do business under those conditions. Thus, Mr. Minor lost the sale due to MLPF's misconduct.

#### **The Lost Gulfstream G650 Aircraft**

49. Mr. Minor had entered into a contract June 3, 2008 for purchase of a Gulfstream G650 airplane. Because demand for the G650 far outstripped Gulfstream's production capacity – the planes were sold out until 2017 – buyers were allotted delivery dates based upon a lottery.

Mr. Minor was lucky enough to receive slot 51 in the lottery, which entitled him to delivery of his G650 in 2013. To secure his purchase, Mr. Minor paid a \$3 million deposit to Gulfstream.

50. During the rest of 2008, Mr. Minor approached a number of parties, including Bank of America and Wells Fargo, to obtain financing for the G650. Typically, the process of obtaining financing for Gulfstream aircraft is simple because their value holds up over many years (lesser planes than the G650 were trading for \$7-10 million four years out) and the deals are structured so that the banks always recover their capital. Not surprisingly, therefore, Bank of America was initially enthusiastic about financing counterclaimant's purchase. On or about January 6, 2009, however, Bank of America informed Mr. Minor's assistant, Laura Childress, that the financing would be impossible because of the merger with Merrill and counterclaimant's estranged relationship with MLPF.

51. With the deadline for a payment on the airplane approaching, Mr. Minor approached Gulfstream for an extension of time and a temporary return of a portion of the \$3 million deposit. On or about December 19, 2008, Gulfstream wired \$1.5 million to Mr. Minor under the condition that he pay this amount back by January 30, 2009, or lose the airplane and the remaining \$1.5 million deposit upon it.

52. Ultimately, as a result of MLPF's outrageous interference, Mr. Minor was unable to secure financing for the airplane and thus unable to meet the January 30, 2009 deadline. Mr. Minor lost the remainder of the \$1.5 million deposit, as well as the G650 itself. Due to the aforementioned backlog of orders, the G650 had a substantial option value and, if sold at the time of delivery, would have fetched a substantial premium in excess of \$15 million above the base cost of \$20 million.

**Other Effects of MLPF's Tortious Misconduct**

53. Mr. Minor has suffered terribly as a result of MLPF's tortious mistreatment. In addition to the injuries described above, he was forced to retain counsel in New York for a hearing, under the false pretext of an emergency, and forced to defend against allegations supported by an affidavit that MLPF now admits was false.

54. Mr. Minor has also sustained substantial investment losses due to MLPF's misconduct. For example, MLPF outright appropriated a \$440,000 payment that Mr. Minor gave to Merrill in support of a letter of credit for the commercial lease for Mr. Minor's company Minor Ventures. MLPF had promised that if the landlord did not demand this money, the remainder would be paid to Mr. Minor and his company Minor Ventures. Now, however, MLPF has unilaterally rescinded that agreement.

**FIRST COUNTERCLAIM**

**Tortious Interference with Business Relations**

55. Counterclaimant repeats and realleges each and every allegation contained above as if fully set forth herein.

56. The above-described tortious misconduct of MLPF is without legal justification and constitutes knowing and willful tortious interference with business relations between Mr. Minor and both current and prospective buyers of artwork he owns.

57. The said conduct of MLPF had caused Mr. Minor undue damages and expense, including attorneys' fees, and has had the effect of damaging Mr. Minor's viability as a businessman.

58. By reason of the foregoing, counterclaimant demands an award of compensatory damages in an amount to be determined at trial, but not less than \$ 10 million.

**SECOND COUNTERCLAIM**

**Defamation**

59. Counterclaimant repeats and realleges each and every allegation contained above as if fully set forth herein.

60. The above-described libelous misconduct of MLPF is without legal justification and constitutes knowing, willful, and malicious defamation of Mr. Minor.

61. The said libelous conduct of MLPF had caused Mr. Minor undue damages and expense, including attorneys' fees, and has had the effect of damaging Mr. Minor's personal and business reputation.

62. By reason of the foregoing, counterclaimant demands an award of compensatory damages in an amount to be determined at trial, but not less than \$10 million.

63. Because of the willful and intentional nature of plaintiff's conduct, counterclaimant also demands an award of punitive damages in an amount to be determined at trial.

**THIRD COUNTERCLAIM**

**Breach of Fiduciary Duty**

64. Counterclaimant repeats and realleges each and every allegation contained above as if fully set forth herein.

65. MLPF owed fiduciary duties to Mr. Minor by virtue, *inter alia*, of the comprehensive and highly confidential financial information that MLPF possessed concerning Mr. Minor.

66. The above-described misconduct of MLPF is without legal justification and constitutes knowing and willful breach of the aforementioned fiduciary duties owed by plaintiff to Mr. Minor.

67. The said conduct of MLPF had caused Mr. Minor undue damages and expense, including attorneys' fees, and has had the effect of damaging Mr. Minor's viability as a businessman.

68. By reason of the foregoing, counterclaimant demands an award of compensatory damages in an amount to be determined at trial, but not less than \$10 million.

#### **FOURTH COUNTERCLAIM**

##### **Breach of Implied Covenant of Good Faith and Fair Dealing**

69. Counterclaimant repeats and realleges each and every allegation contained above as if fully set forth herein.

70. The above-described misconduct of MLPF is without legal justification and constitutes knowing and willful breach of the implied covenant of good faith and fair dealing in the Loan Agreement.

71. The said conduct of MLPF had caused Mr. Minor undue damages and expense, including attorneys' fees, and has had the effect of damaging Mr. Minor's viability as a businessman, as well as his ability to perform in accordance with the parties' understanding of the Loan Agreement.

72. By reason of the foregoing, counterclaimant demands an award of compensatory damages in an amount to be determined at trial, but not less than \$10 million.

#### **FIFTH COUNTERCLAIM**

##### **Abuse of Process**

73. Counterclaimant repeats and realleges each and every allegation contained above as if fully set forth herein.

74. The prosecution of this action by MLPF, including, among other things, its use of subpoenas to disclose counterclaimant's confidential information to third parties, constitutes a willful use of the legal process for a malicious purpose, not justified by law.

75. The said conduct of MLPF has caused Mr. Minor undue expense, including attorneys' fees, and has had the effect of damaging his viability as a businessman.

76. By reason of the foregoing, counterclaimant demands an award of compensatory damages in an amount to be determined at trial, but not less than \$10 million.

### **SIXTH COUNTERCLAIM**

#### **Permanent Injunction**

77. Counterclaimant repeats and realleges each and every allegation contained above as if fully set forth herein.

78. Plaintiff's refusal to release UCC liens on the Collateral unless it receives 100% of the sales proceeds is causing irreparable harm to counterclaimant by depriving him of his ability to sell art and meet his liquidity needs.

79. Without an injunction, plaintiff (or other persons acting in concert with plaintiff) will likely continue encumbering or impairing counterclaimant from selling artwork by unlawfully refusing to release UCC liens on the work.

80. Counterclaimant has no adequate remedy at law.

81. By reason of the foregoing, counterclaimant is entitled to a permanent injunction enjoining plaintiff from encumbering or impairing counterclaimant from selling artwork by unlawfully refusing to release UCC liens on the work.

### **JURY DEMAND**

Defendants hereby demand a trial by jury on all issues so triable.

**PRAYER FOR RELIEF**

WHEREFORE, defendants pray for judgment as follows:

- (i) dismissing with prejudice plaintiff's Complaint in its entirety;
- (ii) denying plaintiff any relief and entering judgment on behalf of the defendants;
- (iii) awarding damages of not less than \$10 million to defendants on each of the above counterclaims;
- (iv) awarding punitive damages to defendants in an amount sufficient to deter plaintiff;
- (v) enjoining plaintiff (and its agents, servants, officers, employees and all those acting under its control, on its behalf or in concert with it) from encumbering or impairing counterclaimant from selling artwork by unlawfully refusing to release UCC liens on such work;
- (vi) awarding defendants' costs and expenses, including reasonable attorneys fees; and
- (vii) granting and further relief that this Court deems just.

Dated: March 10, 2009

Respectfully submitted,

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