

JUDGE STANTON

15 CV 7008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARCHIV FRANZ WEST,

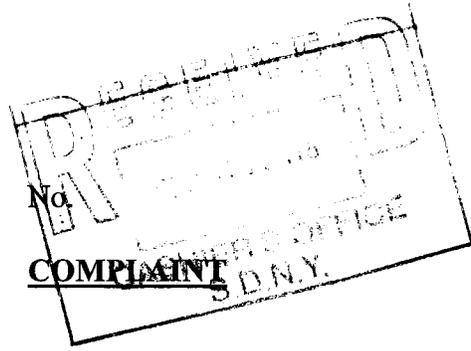
Plaintiff,

- against -

GAGOSIAN GALLERY, INC.,

Defendant.

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Plaintiff Archiv Franz West (the “Archive”), by its undersigned counsel, for its complaint against defendant Gagosian Gallery, Inc. (“Gagosian”), alleges:

NATURE OF THE ACTION

1. The Archive holds the exclusive license to produce and sell certain furniture works (the “Furniture,” further defined below) designed by the late Austrian artist Franz West, as well as a separate exclusive license to make, use, and exploit any and all photographs (the “Photographs,” further defined below) of all works of art created by West during his lifetime.

2. The Archive’s exclusive licenses with respect to the Furniture and Photographs were declared by the Commercial Court of Vienna in April 2015 in an action brought by the Archive against nonparty Franz West Privatstiftung (the “Foundation”), a private foundation that also claimed rights in certain of West’s works.

3. In violation of the Archive’s exclusive licenses, and of the foreign copyrights to which they relate, Gagosian has announced its intention, in collaboration with the Foundation, to conduct an exhibition and sale of West’s work, including some or all of the

Furniture, at one of its art galleries in Manhattan starting September 11, 2015. Upon information and belief, Gagosian plans to issue, in connection with the exhibition, a catalog that includes Photographs that the Archive is exclusively licensed to exploit.

4. By this action, the Archive seeks to enjoin Gagosian's planned exhibition and sale of West's work and exhibition and sale of photographs of his work to the extent that they violate the Archive's licenses and copyrights, and to recover damages from Gagosian resulting from such violations.

PARTIES AND JURISDICTION

5. The Archive is a *Verein* organized under the laws of Austria, with its principal place of business in Vienna, Austria. The Archive was founded in 1999 as a non-profit organization following the wishes and intentions of West to ensure the documentation of his works and to administer certain intellectual property rights relating to those works. The Archive is currently led by a board that includes a leading art historian and curator of West's work, a former director at the Museum of Modern Art Ludwig Foundation (MUMOK) in Vienna, and a managing director of the Universalmuseum Joanneum in Graz, Austria.

6. Gagosian is a corporation organized under the laws of the State of New York, with its principal place of business in New York, New York.

7. The matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

8. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1338 in that this matter (a) arises under the laws of the United States; (b) is between a citizen of a State and a citizen or subject of a foreign state; and (c) arises under an Act of Congress relating to copyrights.

9. Venue is appropriate in this Court pursuant to 28 U.S.C. §§ 1391 and 1400 because (a) the defendant resides or may be found in this district and (b) a substantial part of the events giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, in this district.

ALLEGATIONS COMMON TO ALL COUNTS

10. West was one of the most important and internationally prominent Austrian contemporary artists. His work, which included furniture sculpture, is contained in museums worldwide, including New York City's Museum of Modern Art and Solomon R. Guggenheim Museum.

11. In 2011, West entered into two license agreements with the Archive, each to become effective upon his death and have an unlimited term. Each license agreement was signed by West on May 27, 2011 and countersigned by the Archive on July 14, 2011.

12. One license agreement, referred to herein as the "Furniture Agreement," granted to the Archive an exclusive worldwide license to produce and sell certain furniture designed by West that is protected by copyright under Austrian law and listed in an attachment to the agreement, as well as any other furniture designed by West after the entry into the agreement that enjoys copyright protection (collectively, the "Furniture"). In return for the license, the Archive agreed to pay West's heirs a percentage of the net sales price from all sales of the Furniture.

13. The Furniture listed in the attachment to the Furniture Agreement consists of the following:

<i>Title (in German/English)</i>	<i>Item #</i>	<i>Year</i>	<i>Material</i>	<i>Size</i>
Clubfauteuil/Club chair	777	From 1998	Steel, wood, foamed plastic, cotton, linen	Each approx. 75 x 81 x 88 (H) cm
Trog/Trough	799	From 1997	Steel, foamed plastic, linen	Approx. 80 (H) x 170 x 70 cm
Diwan/Divan	964	From 1998	Steel, foamed plastic, linen	Approx. 100 (H) x 230 x 85 cm
Chaiselongue/Chaise longue	5535	From about 1992	Iron, foamed plastic, linen	Approx. 99 x 92 x 128 cm
“Sinnlos”/“Useless”	5746	2008	Steel, synthetic resin varnish	199 x 39 x 11.5 cm
“Künstlerstühle”/“Artists’ Chairs”	6039	From 2010	Nirosta, epoxy resin, acryl varnish	Each approx. 85 (H) x 45 x 55 cm
Pouf/Pouf	6134	From 2000	Steel, foamed plastic, linen, cardboard	80 x 220 x 150 cm

14. The other license agreement, referred to herein as the “Photograph Agreement,” granted to the Archive an exclusive worldwide license to use and exploit any and all photographs, by whomever created, both analog and digital, of all works of art created by West during his lifetime (whether created before or after the signature of the agreement) (collectively, the “Photographs”). The Archive was also given the exclusive right to photograph, or permit photography of, West’s work. In return for the license, the Archive agreed to pay West’s heirs a percentage of all net income from the exploitation of the Photographs.

15. West died on July 25, 2012.

16. Five days before West died, and shortly before he was admitted to the intensive care unit of a hospital in Vienna, the Foundation was established by some of West’s associates, ostensibly to receive assignments of copyrights and usage rights in West’s work. At the time the alleged assignments occurred, West was severely weakened and suffering severe pain.

17. The Foundation claimed that West’s deathbed assignments prevented the assignments contained in the Furniture Agreement and Photograph Agreement from coming into

effect upon West's death. On April 28, 2015, the Commercial Court of Vienna, in response to a declaratory judgment action brought by the Archive against the Foundation, rejected the Foundation's claim. The court held that West, having previously transferred the post-death rights to the Furniture and the Photographs to the Archive, could have transferred only the remaining pre-death rights to them to the Foundation (assuming there was a valid transfer of rights to the Foundation at all, a question the court left open). The Court accordingly declared that the Archive has the exclusive rights to the Furniture and the Photographs.

18. Upon information and belief, at the time the dispute between the Archive and the Foundation was proceeding, Ealan Wingate, a director of Gagosian, was a member of the Advisory Board of the Foundation.

19. On August 14, 2015, Gagosian issued a press release in which it announced that, in collaboration with the Foundation, it would conduct an exhibition and sale of West's works entitled *Möbelskulpturen/Furniture Works* (the "Exhibition"). The Exhibition was to be held at Gagosian's gallery at 976 Madison Avenue in New York City, and run from September 11, 2015 to November 7, 2015.

20. In its press release announcing the Exhibition, Gagosian described the works it would be exhibiting and selling as follows:

The individual furniture works in the current exhibition include divans, chaise longues and poufs upholstered in plain raw linen; *Artist's Chairs*, elegantly minimal dining chairs whose seats and backs are made from canvas lacquered in monochrome hues (literally paintings to be sat on); a square table with steel legs encased in cardboard tubing; a mobile tubular steel bookshelf; and *Sinnlos*, a metal coat rack of sinuous pink squiggles, inspired by fellow Austrian Ludwig Wittgenstein's perception of life and death as "a senseless loop."

21. As demonstrated by the press release, Gagosian plans to include in the Exhibition at least two items covered by the Furniture Agreement – "Künstlerstühle"/"Artists' Chairs" and "Sinnlos"/"Useless" – and the Exhibition appears also to include other items

covered by the Furniture Agreement; namely, Diwan/Divan, Chaiselongue/Chaise longue, and Pouf.

22. Indeed, a photograph of Artists' Chairs appears in the press release and on Gagosian's website – a photograph that is covered by the Photograph Agreement. A brochure prepared by Gagosian of items to be available at the Exhibition includes at least seven items of Furniture (a majority of those in the brochure) that are virtually identical to those included in the Furniture Agreement.

23. Upon information and belief, in connection with the Exhibition, Gagosian plans to publish a catalog of West's work that will necessarily include additional photographs covered by the Photograph Agreement.

24. In announcing its intent to stage the Exhibition and sell certain items of Furniture, and in exploiting certain Photographs, Gagosian has relied on the purported authorization of the Foundation to do so. That authorization is undermined by the Furniture Agreement, the Photograph Agreement, and the decision of the Commercial Court of Vienna declaring the Archive's exclusive rights under them.

25. Upon information and belief, Gagosian knew of the Furniture Agreement and Photograph Agreement, and of the decision of the Commercial Court of Vienna, when Gagosian announced the Exhibition.

26. As Gagosian acknowledges in the press release, furniture designed by West is produced in "annually limited, certified and numbered editions." The limitation imposed on the number of items of Furniture in existence increases the value of the Furniture that the Archive can currently sell and the value of the Furniture that the Archive can sell under the Furniture Agreement in the future. Conversely, sales of Furniture in violation of the Furniture

Agreement undermine those values in perpetuity in a manner difficult to measure, and thereby irreparably injure the Archive (and West's heirs, who are deprived of license fees and royalties).

27. The unauthorized production, sale, and exploitation of West's works in violation of the Furniture Agreement and Photograph Agreement also irreparably injure the Archive in that they interfere with the Archive's right to manage West's artistic legacy with respect to the works covered by those agreements. Indeed, at least some of the works Gagosian seeks to sell include unauthorized alterations from West's original designs.

28. The fact that the Furniture that Gagosian plans to sell is an unauthorized – essentially, an imitation – version of West's work is not disclosed to the potential buyers. The distribution of unauthorized copies of West's work will lead to confusion among art buyers and collectors and a reduction in the confidence of art market participants as to whether works by West being offered are genuine, which confusion is very likely to spill over to all works of West, thereby damaging the artistic and commercial value of West's work generally. Once the art market is aware of unauthorized works of an artist in circulation, the market becomes cautious concerning such artist's work. The doubts that will thereby be created will inevitably lead to an erosion in the value of all of West's art offered in the market, including the authentic works the Archive is authorized to sell.

29. The Archive has acted promptly after learning of the Exhibition in seeking the relief sought herein against Gagosian and in seeking injunctive relief against the Foundation from the Commercial Court of Vienna to supplement the declaratory relief it has already obtained.

COUNT I – COPYRIGHT VIOLATION

30. The Archive repeats and re-alleges the allegations set forth in paragraph 1 through 29 as if fully set forth here.

31. The Furniture is subject to copyright under the Austrian Federal Law on Copyright in Works of Literature and Art and on Related Rights (1998) (the “Copyright Law”). In the Furniture Agreement, West gave the Archive the exclusive right to exploit the Furniture pursuant to Section 24 of the Copyright Law. Pursuant to Sections 15 and 16 of the Copyright Law, the exploitation rights thereby conveyed included the exclusive right to execute reproductions of the Furniture according to West’s plans or designs, and the exclusive right to distribute copies of the Furniture. The exclusive right to distribute includes the right to prevent copies of the work from being offered for sale or put into circulation to the public without the Archive’s consent. Section 21 of the Copyright Law protects an artist’s moral interest in his or her work by prohibiting unauthorized alterations in that work.

32. The U.S. Copyright Act of 1976 authorizes this Court to grant injunctions and award actual damages and profits to a holder of a foreign copyright whose copyright has been infringed.

33. By virtue of its planned Exhibition, Gagosian has infringed and threatened to infringe the Archive’s copyrights in the Furniture.

34. As a consequence of Gagosian’s infringement, the Archive has suffered and, unless Gagosian is enjoined, will suffer irreparable injury.

35. The Archive has been and will be damaged by Gagosian’s infringement and is entitled to recover those damages, as well as any additional profits resulting from the infringement, from Gagosian.

COUNT II – LANHAM ACT VIOLATION

36. The Archive repeats and re-alleges the allegations set forth in paragraph 1 through 35 as if fully set forth here.

37. In its press release announcing the Exhibition, Gagosian stated in connection with the Furniture being presented by Gagosian:

In collaboration with the Franz West Privatstiftung, Gagosian New York is pleased to present *Möbelskulpturen/Furniture Works* by Franz West.

* * *

Since 2014, the Franz West Privatstiftung has produced selected furniture works made by West during his lifetime in annually limited, certified and numbered editions. The works continue to be handcrafted by West's staff at his Vienna studio.

38. The statements quoted in the preceding paragraph constitute a false designation of origin, false or misleading description of fact, or false or misleading representation of fact, in that the statements suggest that the pieces of Furniture being offered for sale are authorized executions of West's work, when in fact they are not. The statement is likely to cause confusion, or to cause mistake, or to deceive as to the approval of the Foundation's work by West when in fact the Foundation's work is unapproved and in violation of the license and copyrights given by West to the Archive, as declared by the Commercial Court of Vienna.

39. Gagosian's statement constitutes a violation of the Lanham Act, 15 U.S.C. § 1125(a).

40. The Archive has no adequate remedy at law with respect to the injury caused by Gagosian's violation of the Lanham Act and it will be irreparably harmed unless Gagosian is enjoined.

41. The Archive has been and will be damaged by Gagosian's violation of the Lanham Act and is entitled to recover those damages from Gagosian.

COUNT III – UNFAIR COMPETITION

42. The Archive repeats and re-alleges the allegations set forth in paragraph 1 through 41 as if fully set forth here.

43. The Archive has valid and enforceable exclusive worldwide licenses to produce and sell the Furniture and to use and exploit the Photographs.

44. Notwithstanding its actual knowledge of the Archive's licenses and of the decision of the Commercial Court of Vienna declaring the Archive's exclusive rights under them, Gagosian is unfairly, in bad faith, and without justification, for its own benefit and in competition with the Archive, proceeding with the unauthorized sale of Furniture using a description that falsely and misleadingly suggests that the sale is authorized, and with the unauthorized sale and exploitation of Photographs.

45. Gagosian's conduct will, among other things, create confusion between the authorized sale and exploitation of Furniture and Photographs and their unauthorized copies.

46. Gagosian also is proceeding with the unauthorized sale and exploitation of Photographs for its own benefit and to the detriment of the Archive by misappropriating the Archive's exclusive rights under the license to photograph and permit photography of Furniture, and to use and exploit Photographs.

47. As a result of Gagosian's unfair competition and misappropriation, Gagosian has obtained, or will obtain, proceeds and profits from the unauthorized sale and exploitation of Furniture and Photographs.

48. As a result of Gagosian's unfair competition and misappropriation, Gagosian is causing injury to the Archive by diluting the value of the Archive's exclusive licenses, its rights thereunder, and the present and future value of Archive-authorized sale and exploitation of Furniture and Photographs.

49. By reason of the foregoing, the Archive is entitled to judgment against Gagosian, awarding the Archive compensatory damages in an amount to be determined at trial.

COUNT IV – CONVERSION

50. The Archive repeats and re-alleges the allegations set forth in paragraph 1 through 49 as if fully set forth here.

51. The Archive has a valid and enforceable exclusive worldwide license to use and exploit the Photographs.

52. By using and exploiting Photographs, Gagosian is exercising rights, dominion, and control over Photographs without authority or any legal right to do so, in derogation of and in interference with the Archive's rights under its exclusive license.

53. By reason of the foregoing, the Archive is entitled to judgment against Gagosian, awarding compensatory damages in an amount to be determined at the trial of this action and the return of all Photographs in the possession of Gagosian.

COUNT V – UNJUST ENRICHMENT

54. The Archive repeats and re-alleges the allegations set forth in paragraph 1 through 53 as if fully set forth here.

55. The Archive has a valid and enforceable exclusive worldwide license to use and exploit the Photographs.

56. The Archive has not given authorization, permission, or consent to Gagosian to use and exploit the Photographs.

57. By using and exploiting the Photographs, Gagosian has unjustly enriched itself with any proceeds or profits it has obtained, or will obtain, from its sale of any of the Furniture using the Photographs, or from its sale of any catalog or other medium containing any Photographs.

58. Gagosian's unjust enrichment has directly and causally resulted in a detriment to the Archive.

59. Gagosian has accepted, or will accept, the benefit from the unauthorized use and exploitation of the Photographs under such circumstances that it would be inequitable and unjust for that benefit to be retained by Gagosian without payment to the Archive.

60. As a direct result of Gagosian's conduct, the Archive has been injured.

61. By reason of the foregoing, the Archive is entitled to judgment against Gagosian, awarding the Archive compensatory damages in an amount to be determined at the trial of this action.

PRAYER FOR RELIEF

WHEREFORE, by reason of the foregoing, the Archive respectfully requests that this Court enter judgment against Gagosian as follows:

- A. Preliminarily and permanently enjoining Gagosian from producing, exhibiting, offering for sale, or selling any of the Furniture, at the Exhibition or otherwise;
- B. Preliminarily and permanently enjoining Gagosian from using or exploiting, through distribution, exhibition, publication, sale, or otherwise, any of the Photographs, including but not limited to in brochures, catalogs, and on the Internet;
- C. Impounding and then directing the destruction or delivery to the Archive of all Furniture or Photographs in Gagosian's possession;
- D. Awarding the Archive actual damages and profits, in an amount to be established at trial;
- E. Imposing a constructive trust for the benefit of the Archive on all proceeds (including gross sales price, commissions, and fees) from the sale by

Gagosian of any of the Furniture, or of any catalog or other medium containing any of the Photographs;

- F. Awarding the Archive interest and costs; and
- G. Granting the Archive such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 4, 2015

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