App. 1

950 F.3d 155 (2d Cir. 2020)
United States Court of Appeals, Second Circuit

Maria CASTILLO, James Cochran, Luis Gomez, Bienbenido Guerra, Richard Miller, Carlo Nieva, Kenji Takabayashi, Nicholai Khan, Plaintiffs-Appellees,

Jonathan Cohen, Sandra Fabara, Luis Lamboy, Esteban Del Valle, Rodrigo Henter De Rezende, William Tramontozzi, Jr., Thomas Lucero, Akiko Miyakami, Christian Cortes, Carlos Game, James Rocco, Steven Lew, Francisco Fernandez, Plaintiffs-Counter-Defendants-Appellees,

Kai Niederhause, Rodney Rodriguez, Plaintiffs,

v.

G&M REALTY L.P., 22-50 Jackson Avenue Owners, L.P., 22-52 Jackson Avenue LLC, ACD Citiview Buildings, LLC, and Gerald Wolkoff, *Defendants-Appellants*.

Nos. 18-498-cv (L), 18-538-cv (CON)
August Term 2019

Appeal from the United States District Court
for the Eastern District of New York
Nos. 15-cv-3230 (FB) (RLM), 13-cv-5612 (FB) (RLM),
Frederic Block, District Judge, Presiding.

Argued August 30, 2020

Decided February 20, 2020

Amended February 21, 2020

**Attorneys and Law Firms**

ERIC M. BAUM (Juyoun Han, Eisenberg & Baum, LLP, New York, NY, Christopher J. Robinson, Rottenberg Lipman Rich, P.C., New York, NY, *on the brief*), Eisenberg & Baum, LLP, New York, NY, for Plaintiffs-Appellees.

MEIR FEDER (James M. Gross, *on the brief*), Jones Day, New York, NY, *for Defendants-Appellants*.

Before: PARKER, RAGGI, and LOHIER, Circuit Judges.

BARRINGTON D. PARKER, Circuit Judge:

Defendants-Appellants G&M Realty L.P., 22-50 Jackson Avenue Owners, L.P., 22-52 Jackson Avenue LLC, ACD Citiview Buildings, LLC, and Gerald Wolkoff (collectively "Wolkoff") appeal from a judgment of the United States District Court for the Eastern District of New York (Frederic Block, J.). The court concluded that Wolkoff violated the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A ("VARA"), by destroying artwork of Plaintiffs-Appellees, artists who created and displayed their work at the 5Pointz site in Long Island City, New York. We hold that the district court correctly concluded that the artwork created by Appellees was protected by VARA and that Wolkoff's violation of the statute was willful. Furthermore, the damages awarded involved no abuse of discretion. Accordingly, we affirm the judgment below.

The facts as found by the district court established that in 2002, Wolkoff undertook to install artwork in a series of dilapidated warehouse buildings that he owned in Long Island City, New York. Wolkoff enlisted Appellee Jonathan Cohen, a distinguished aerosol artist, to turn the warehouses into an exhibition space for artists. Cohen and other artists rented studio spaces in the warehouses and filled the walls with aerosol art, with Cohen serving as curator. Under Cohen's leadership, the site, known as 5Pointz, evolved into a major global center for aerosol art. It attracted thousands of daily visitors, numerous celebrities, and extensive media coverage.

"Creative destruction" was an important feature of the 5Pointz site. Some art at the site achieved permanence, but other art had a short lifespan and was repeatedly painted over. An elaborate system of norms—including Cohen's permission and often consent of the artist whose work was overpainted—governed the painting process. Cohen divided the walls into "short-term rotating walls," where works would generally last for days or weeks, and "longstanding walls," which were more permanent and reserved for the best works at the site. During its lifespan,

5Pointz was home to a total of approximately 10,650 works of art.

In May 2013, Cohen learned that Wolkoff had sought municipal approvals looking to demolish 5Pointz and to build luxury apartments on the site. Seeking to prevent that destruction, Cohen applied to the New York City Landmark Preservation Commission to have 5Pointz designated a site of cultural significance. The application was unsuccessful, as were Cohen's efforts to raise money to purchase the site.

At that point, Cohen, joined by numerous 5Pointz artists, sued under VARA to prevent destruction of the site. VARA, added to the copyright laws in 1990, grants visual artists certain "moral rights" in their work. *See* 17 U.S.C. § 106A(a). Specifically, the statute prevents modifications of artwork that are harmful to artists' reputations. *Id.* § 106A(a)(3)(A). The statute also affords artists the right to prevent destruction of their work if that work has achieved "recognized stature" and carries over this protection even after the work is sold. *Id.* § 106A(a)(3)(B). Under §§ 504(b) and (c) an artist who establishes a violation of VARA may obtain actual damages and profits or statutory damages, which are enhanced if the artist proves that a violation was willful.

Early in the litigation, Plaintiffs applied for a temporary restraining order to prevent the demolition of the site, which the district court granted. *See Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 214 n.1 (E.D.N.Y. 2013). As the TRO expired, Plaintiffs applied for a preliminary injunction. On November 12, 2013, the court denied the application in a minute order but told the parties that a written opinion would soon follow. *See id.* at 214.

That night, Wolkoff began to destroy the artwork. He banned the artists from the site and refused them permission to recover any work that could be removed. Several nights later (and before the district court's written opinion could issue), Wolkoff deployed a group of workmen who, at his instruction, whitewashed the art.

On November 20, 2013, the district court issued its opinion denying the preliminary injunction. Judge Block concluded that, although some of the 5Pointz paintings may have achieved recognized stature, resolution of that question was best reserved for trial. The court also decided that, given the transitory nature of much of the work, preliminary injunctive relief was inappropriate and that the monetary damages available under VARA could remediate any injury proved at trial.

Following the destruction of the art, nine additional artists sued Wolkoff. The two lawsuits were consolidated for trial, which would primarily address whether the artwork had achieved recognized stature and, if it had, the value of the art Wolkoff destroyed. The three-week trial included testimony from 29 witnesses and saw the admission of voluminous documentary evidence.

Although Plaintiffs had initially demanded a trial by jury, near the conclusion of the trial, the parties agreed to waive a jury, and the district court converted it to an advisory jury. On November 15, 2017, the advisory jury returned its verdict. It made individualized findings as to each artist and work and found violations of VARA as to 36 of the 49 works that were whitewashed. More precisely, the advisory jury found that 28 works had achieved recognized stature and had been unlawfully destroyed and that 8 other works had been mutilated or distorted to the detriment of the artists' reputations. It recommended an award of $545,750 in actual damages and $651,750 in statutory damages.

On February 12, 2018, the district court issued its findings of fact and conclusions of law. Drawing on a vast record, the court found that 45 of the works had achieved recognized stature, that Wolkoff had violated VARA by destroying them, and that the violation was willful. More specifically, the court observed that the works "reflect[ed] striking technical and artistic mastery and vision worthy of display in prominent museums if not on the walls of 5Pointz." S. App'x at 13. The findings emphasized Cohen's prominence in the world of aerosol art, the significance of his process of selecting the artists who could exhibit at

5Pointz, and the fact that, while much of the art was temporary, other works were on display for several years. Judge Block credited the artists' evidence of outside recognition of the 5Pointz works and expert testimony as to the works' stature. The court declined to impose liability with respect to the four remaining works because they had not achieved long-term preservation, were insufficiently discussed outside of 5Pointz, and were not modified to the detriment of the artists' reputations.

Where a violation of VARA is established, the statute permits the injured party to recover either actual damages and profits or statutory damages. 17 U.S.C. § 504. The statute fixes statutory damages between $750 and $30,000 per work but authorizes damages of up to $150,000 per work if a litigant proves that a violation was "willful." *Id.* § 504(c). There was extensive expert testimony as to actual damages. Elizabeth Littlejohn, the artists' expert, testified that each of the works in question had a substantial monetary value, employing a complex formula that attempted to scale that value to account for the relative merit and recognition of each work. On the other hand, Christopher Gaillard, Wolkoff's expert, testified that, given the difficulties of removing and selling the 5Pointz paintings and the 5Pointz artists' limited sales history, the destroyed works did not have a reliable market value. Ultimately, the district court concluded that it could not reliably fix the market value of the destroyed paintings and, for that reason, declined to award actual damages. The court said that Littlejohn's formula was flawed and that Gaillard credibly testified to challenges that would impede calculation of a market value.

Nonetheless, the court did award statutory damages. It determined that statutory damages would serve to sanction Wolkoff's conduct and to vindicate the policies behind VARA. In addition, and in accord with the advisory jury's verdict, the court found that Wolkoff had acted willfully. This finding was based on Wolkoff's awareness of the ongoing VARA litigation and his refusal to afford the artists the 90- day opportunity provided by the statute to salvage their artwork, some of which was removable. *See* 17 U.S.C.

§ 113(d)(2)(B). Judge Block was unpersuaded by Wolkoff's assertion that he whitewashed the artwork to prevent the artists from engaging in disruption and disorderly behavior at the site. Instead, he found that Wolkoff acted out of "pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art." S. App'x at 44. Judge Block awarded the maximum amount of statutory damages: $150,000 for each of the 45 works, for a total of $6.75 million.

Appellants then moved, pursuant to Fed. R. Civ. P. 52(b) and 59(a), to set aside the court's findings of fact and conclusions of law and to retry the case. The district court denied this motion and, in a lengthy appendix, marshalled the evidence in the record supporting the court's findings as to the recognized stature of each work in question.

The court also offered additional support for its finding of willfulness. The court concluded that Wolkoff's affidavit testimony submitted during the preliminary injunction proceedings contained material untruths. Wolkoff's affidavit stated that the demolition of 5Pointz had to be completed by the beginning of 2014, with construction to commence in April 2014. At trial, however, Wolkoff testified that he did not apply for a demolition permit until March 2014. The district court stated that it would have granted the preliminary injunction had Wolkoff testified earlier that demolition could be delayed until March. This appeal followed.

## DISCUSSION

In reviewing a district court's decision in a bench trial, we review the district court's findings of fact for clear error and its conclusions of law de novo. Mixed questions of law and fact are also reviewed de novo. *White v. White Rose Food*, 237 F.3d 174, 178 (2d Cir. 2001).

### I.

VARA creates a scheme of moral rights for artists. "The right of attribution generally consists of the right of an artist to be recognized by name as the author of his work or to publish anonymously or pseudonymously . . . ." *Carter v.*

*Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995). It further includes the right to prevent the artist's work from being attributed to another and to prevent the use of the artist's name on works created by others. *Id.* "The right of integrity allows the [artist] to prevent any deforming or mutilating changes to his work, even after title in the work has been transferred." *Id.*[1]

Most importantly for this appeal, VARA gives "the author of a work of visual art" the right "to prevent any destruction of a work of recognized stature" and provides that "any intentional or grossly negligent destruction of that work is a violation of that right." 17 U.S.C. § 106A(a)(3)(B); *see also Carter*, 71 F.3d at 83. VARA further permits the artist "to prevent any intentional distortion, mutilation, or other modification of [his or her work] which would be prejudicial to his or her honor or reputation," and provides that "any intentional distortion, mutilation, or modification of that work is a violation of that right." 17 U.S.C. § 106A(a)(3)(A). The latter provision applies regardless of a work's stature. These rights may not be transferred, but they "may be waived if the author expressly agrees to such waiver in a written instrument signed by the author." *Id.* § 106A(e)(1).

Additionally, the statute contains specific provisions governing artwork incorporated into a building. If the artwork is incorporated "in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work," then the artist's rights may be waived if and only if he "consented to the installation of the work in the building . . . in a written instrument." *Id.* § 113(d)(1). This instrument must be "signed by the owner of the building and the author" and

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[1] The statute recognizes that, unlike novelists or composers, for example, visual artists depend on the integrity of the physical manifestations of their works. Artists' moral rights "spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved." Carter, 71 F.3d at 81.

must "specif[y] that the installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal." *Id.*[2] However, "[i]f the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work," then the artist's rights prevail unless one of two things has occurred. *Id.* § 113(d)(2). First, the building's owner "has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art." *Id.* Or second, the owner has "provide[d] such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal." *Id.*

Damages for violations of VARA's rights of attribution and integrity are governed by general copyright law and include both actual and statutory damages. Statutory damages may range from $750 to $30,000 per work "as the court considers just." *Id.* § 504(c)(1). However, if "the [artist] sustains the burden of proving, and the court finds, that [a violation of VARA] was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000 [per work]." *Id.* § 504(c)(2).

II.

The crux of the parties' dispute on this appeal is whether the works at 5Pointz were works of "recognized stature," thereby protected from destruction under § 106A(a)(3)(B). We conclude that a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community. *See Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324-25 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in*

[2] The statute contains additional provisions regarding works installed prior to its effective date, but those provisions are impertinent here, as all relevant events transpired long after VARA became effective.

*part*, 71 F.3d 77; *see also, e.g.*, *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999). A work's high quality, status, or caliber is its stature, and the acknowledgement of that stature speaks to the work's recognition.

The most important component of stature will generally be artistic quality. The relevant community will typically be the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts. Since recognized stature is necessarily a fluid concept, we can conceive of circumstances under which, for example, a "poor" work by an otherwise highly regarded artist nonetheless merits protection from destruction under VARA. This approach helps to ensure that VARA protects "the public interest in preserving [the] nation's culture," *Carter*, 71 F.3d at 81. This approach also ensures that the personal judgment of the court is not the determinative factor in the court's analysis. *See* Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev. 1935, 1945 n.84 (2000).

After all, we are mindful of Justice Holmes's cautionary observation that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [visual art]," *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251, 23 S.Ct. 298, 47 L.Ed. 460 (1903); *accord Pollara v. Seymour*, 344 F.3d 265, 271 (2d Cir. 2003) ("We steer clear of an interpretation of VARA that would require courts to assess . . . the worth of a purported work of visual art . . . ."). For that reason, aside from the rare case where an artist or work is of such prominence that the issue of recognized stature need not be tried, expert testimony or substantial evidence of non-expert recognition will generally be required to establish recognized stature.

III.

Accordingly, to establish a violation of VARA in this case, the artists were required to demonstrate that their work had achieved recognized stature. Judge Block found that they did so. He concluded that "the plaintiffs adduced

such a plethora of exhibits and credible testimony, including the testimony of a highly regarded expert, that even under the most restrictive of evidentiary standards almost all of the plaintiffs' works easily qualify as works of recognized stature." S. App'x at 30. These findings of fact are reviewable only for clear error. *See* Drew Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision*, 67 Clev. St. L. Rev. 351, 365 n.81 (2019) ("[R]ecognized stature is a question of fact."). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Wu Lin v. Lynch*, 813 F.3d 122, 132 (2d Cir. 2016) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). Appellants do not hurdle this high bar.

In attempting to do so, Wolkoff takes issue with a number of the decisions Judge Block made in the process of reaching his conclusions. The proceedings below were contested by able counsel and involved voluminous exhibits and extensive lay and expert testimony. On this appeal, Wolkoff would have us revisit and reconsider a number of those decisions that were debatable. But on this appeal, Wolkoff must demonstrate that Judge Block abused his discretion or that findings of fact he made were clearly erroneous, not simply debatable.

Initially, Wolkoff contends that the great majority of the works in question were temporary ones which, for that reason, could not meet the recognized stature requirement. We disagree. We see nothing in VARA that excludes temporary artwork from attaining recognized stature. Unhelpful to this contention is the fact that Wolkoff's own expert acknowledged that temporary artwork can achieve recognized stature.

The statute does not adopt categories of "permanent" and "temporary" artwork, much less include a definition of these terms. VARA is distinctive in that "[a] work of visual art is defined by the Act in terms both positive (what it is) and negative (what it is not)." *Carter*, 71 F.3d at 84. In narrowing the scope of the statute, Congress adopted a highly

specific definition of visual art. *See* 17 U.S.C. § 101. In light of this specificity, we see no justification for adopting an additional requirement not included by Congress, even if that requirement is styled as a component of recognized stature. To do so would be to upset the balance achieved by the legislature.

Additionally, at least as recently as 2005, New York City saw a clear instance where temporary artwork achieved recognized stature. That winter, artists Christo Vladimirov Javacheff and Jeanne-Claude Denat, known collectively as "Christo," installed 7,503 orange draped gates in Central Park. This work, known as "The Gates," lasted only two weeks but was the subject of significant critical acclaim and attention, not just from the art world but also from the general public. *See* Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 Colum. J.L. & Arts 583, 597-98 (2018). As Wolkoff concedes, "The Gates" achieved recognized stature and would have been protected under VARA.

In recent years, "street art," much of which is "temporary," has emerged as a major category of contemporary art. As one scholar has noted, "street art" has "blossomed into far more than spray-painted tags and quickly vanishing pieces . . . painted by rebellious urbanites. In some quarters, it has become high art." *Id.* at 583. For example, noted street artist Banksy has appeared alongside President Barack Obama and Apple founder Steve Jobs on Time magazine's list of the world's 100 most influential people.[3] Though often painted on building walls where it may be subject to overpainting, Banksy's work is nonetheless acknowledged, both by the art community and the general public, as of significant artistic merit and cultural importance. Famously, Banksy's *Girl with a Balloon* self-destructed after selling for $1.4 million at Sotheby's, but, as

[3] Shepard Fairey, *Banksy*, Time (Apr. 29, 2010), http://content.time.com/time/specials/packages/article/0,28804,1984685_1984940_1984945,00.html.

with Banksy's street art, the temporary quality of this work has only added to its recognition.[4]

A Banksy painting at 5Pointz would have possessed recognized stature, even if it were temporary.[5] Even if "The Gates" had been replaced with another art exhibit, that work would have maintained its recognized stature. Although a work's short lifespan means that there will be fewer opportunities for the work to be viewed and evaluated, the temporary nature of the art is not a bar to recognized stature.

The district court correctly observed that when Congress wanted to impose durational limits on work subject to VARA, it knew how to do so. For example, the statute provides that "[t]he modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A)." 17 U.S.C. § 106A(c)(1). For that reason, the gradual erosion of outdoor artwork exposed to the elements or the melting of an ice sculpture does not threaten liability. Congress also imposed a durational limit insofar as the statute protects only works that are "fixed"—"sufficiently permanent . . . to be perceived . . . for a period of more than transitory duration." *Id.* §§ 101, 102(a). We have held that a work that exists for only 1.2 seconds is of merely transitory duration but have noted with approval cases holding that a work "embodied . . . for at least several minutes" is of more than transitory duration. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127-28 (2d Cir. 2008). It is undisputed that the 5Pointz works survived far longer

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[4] Scott Reyburn, *How Banksy's Prank Might Boost His Prices: 'It's a Part of Art History'*, N.Y. Times (Oct. 7, 2018), https://www.nytimes.com/2018/10/07/arts/design/banksyartwork-painting.html.

[5] Banksy himself has participated in creative destruction, which has only drawn further attention to his work. The documentary Graffiti Wars (2011), for example, describes a creative feud between Banksy and rival artist King Robbo, which involved repeated modification and overpainting of each other's work. The feud did not detract from the recognition or stature of either artist's work.

than this and therefore satisfied the statute's minimal durational requirement.

As a variation on the theme that temporary artwork does not merit VARA protection, Wolkoff contends that because the artists were aware that the 5Pointz buildings might eventually be torn down, they should have expected their work to be destroyed.[6] The district court correctly observed, however, that VARA accounts for this possibility. Under § 113(d), if the art at 5Pointz was incorporated into the site such that it could not be removed without being destroyed, then Wolkoff was required to obtain "a written instrument . . . that [was] signed by the owner of the building and the [artist] and that specifie[d] that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal." 17 U.S.C. § 113(d)(1)(B). It is undisputed that no such instrument was executed. If, on the other hand, the 5Pointz art could have been safely removed, then Wolkoff was required to provide written notice of the planned demolition and to allow the artists 90 days to remove the work or to pay for its removal. *See id.* § 113(d)(2)(B). Again, it is undisputed that Wolkoff did none of this.

## IV.

In addition to his contention that temporary artwork cannot achieve recognized stature, Wolkoff argues that the district court erred in several other respects. He contends that the court erroneously focused on recognized quality, rather than recognized stature, and that, contrary to the approach allegedly taken by the district court, recognized stature must be assessed at the time of a work's destruction, not at the time of trial. He argues that the court improperly credited the testimony of Renee Vara, the artists' expert, because she had not actually seen certain of the works prior to their destruction and had based her testimony on images she had examined. Finally, Wolkoff objects

[6] Although Cohen acknowledged his awareness that the buildings would eventually be torn down, other plaintiffs testified that they were unaware of Appellants' plans.

to the district court's reliance on Jonathan Cohen's testimony about his curation of the artwork, as well as its consideration of the overall quality of 5Pointz as a site.

None of these contentions, considered separately or in the aggregate, convinces us that any of Judge Block's findings were clearly erroneous. There is no merit to Wolkoff's contention that the court improperly focused on recognized quality as opposed to recognized stature. The court's detailed findings are dispositive on this point. Nor are we persuaded that the district court evaluated the works' recognition at the time of trial, since it explicitly stated that the "focus of [its] decision was the recognition the works achieved prior to the whitewash." S. App'x at 126. In any event, the quality of a work, assessed by an expert after it has been destroyed, can be probative of its pre-destruction quality, status, or caliber.

Nor do we see merit in Wolkoff's criticism of the court's decision to credit the artists' experts. As is almost always the case where competing expert testimony is adduced, the trier of fact accepts one side's experts over the other's. Judge Block did so here and gave sound reasons for his choice. Renee Vara, the artists' expert, testified to the high artistic merit of the 5Pointz art but also testified that she had not seen the works before their destruction and had assessed them on the basis of images. We see nothing wrong and certainly nothing clearly erroneous with this approach, one well within a district court's broad discretion to accept or reject evidence.

Next, Appellants object to the district court's reliance on Jonathan Cohen's testimony about his curation of the artwork. The district court reasoned that Cohen's selection process, which involved review of a portfolio of an artist's work and a plan for his or her 5Pointz project, screened for works of stature. Appellants, however, contend that this determination was irrelevant because Cohen made his evaluation before the artists painted their 5Pointz works. Nonetheless, the district court cogently reasoned that a respected aerosol artist's determination that another aerosol artist's work is worthy of display is appropriate evidence of

stature. An artist whose merit has been recognized by another prominent artist, museum curator, or art critic is more likely to create work of recognized stature than an artist who has not been screened. This inference is even stronger where, as here, Cohen reviewed a plan for the subject work before allowing it to be painted.[7] Accepting and crediting such testimony easily falls within a district court's trial management responsibilities and in this instance involved no abuse of discretion or clear error.

Finally, Wolkoff contends that the district court erroneously focused on the stature of the 5Pointz site rather than the individual 5Pointz works. Yet again we see no error. The district court did not focus exclusively on the stature of the site. The court considered the individual works at the site and determined that some were not of recognized stature. Setting that aside, we easily conclude that the site of a work is relevant to its recognition and stature and may, in certain cases, render the recognition and stature of a work beyond question. Appearance at a major site—*e.g.*, the Louvre or the Prado—ensures that a work will be recognized, that is, seen and appreciated by the public and the art community. The appearance of a work of art at a curated site such as a museum or 5Pointz means that the work has been deemed meritorious by the curator and

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[7] The House Judiciary Committee Report on VARA confirms our conclusion that an artist's "pre-existing standing in the artistic community" is relevant to "recognized stature." H.R. Rep. No. 101-514 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6925. *See generally United States v. Epskamp*, 832 F.3d 154, 165 (2d Cir. 2016) (noting that legislative history may be invoked for confirmatory purposes). Indeed, several courts have recognized the possibility that, in extreme cases, an artist's prominence might render all of his work of "recognized stature," even if particular works are unknown to the public. *E.g.*, *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004) ("[T]he court can imagine a set of circumstances where an artist's work is of such recognized stature that any work by that artist would be subject to VARA's protection . . . ."); *Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525, 531, 53 Cal.Rptr.2d 24 (1996) (inferring that art was "of recognized stature" because the creators were "recognized artists who have created and exhibited their paintings and drawings for over 40 years" (citing *Carter*, 861 F. Supp. at 325)).

therefore is evidence of stature. When the curator is distinguished, his selection of the work is especially probative Consequently, we see no error when the district court considered the 5Pointz site itself as some evidence of the works' recognized stature.

The evidence before the district court was voluminous—sufficient to persuade both the advisory jury and Judge Block. In addition to extensive lay testimony and documentary evidence, it included much expert testimony, which is often the linchpin of claims of "recognized stature." *See Carter*, 861 F. Supp. at 325. The evidence supporting the district court's findings is vast, and we do not arrive at "the definite and firm conviction that a mistake has been committed." *Wu Lin*, 813 F.3d at 126. Because the district court applied the correct legal standard and did not commit clear error, its determination as to liability is affirmed.

V.

Appellants next challenge the district court's award of damages. The court did not award actual damages because it could not quantify the market value of the 5Pointz art. However, the court found that Appellants' violation of VARA was willful, and the advisory jury arrived at the same conclusion. *See* 17 U.S.C. § 504(c)(2). A violation is willful when a defendant had knowledge that its conduct was unlawful or recklessly disregarded that possibility. *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 143 (2d Cir. 2010).

We review the district court's finding of willfulness for clear error, and we see none. *See 4 Pillar Dynasty LLC v. N.Y. & Co.*, Inc., 933 F.3d 202, 209 (2d Cir. 2019). As Judge Block found, Wolkoff admitted his awareness, prior to destroying 5Pointz, that the artists were pressing VARA claims.[8] Additionally, VARA contains provisions limiting

[8] Appellants point out that only some of the present plaintiffs had advanced claims before the artwork was whitewashed. Nonetheless, claims by even some of the artists sufficed to notify Appellants that the 5Pointz artists' rights under VARA could be implicated by destroying the artwork. Moreover, in whitewashing the artwork, Appellants did

artists' rights vis-à-vis building owners when owners give them 90 days' notice and the opportunity to remove their artwork, 17 U.S.C. § 113(d)(2), but Wolkoff testified that, although he was advised by counsel both before and after the destruction, he chose "to hire people to whitewash[ ] it in one shot instead of *waiting for three months*," S. App'x at 43 (alteration in original). The district court found that this testimony evinced a deliberate choice to violate VARA rather than to follow the statutory notice procedures. Wolkoff did not help his cause when he later reminded the district court that he "would make the same decision today." J. App'x at 2427.

Most troubling to the district court and to us is Wolkoff's decision to whitewash the artwork at all. Nothing in the record indicates that it was necessary to whitewash the artwork before beginning construction of the apartments. The district court found that Wolkoff could have allowed the artwork to remain visible until demolition began, giving the artists time to photograph or to recover their work. Instead, he destroyed the work immediately after the district court denied the preliminary injunction and before the district court could finalize its promised written opinion.

Wolkoff testified that he whitewashed the work to prevent the artists from illegally salvaging their work. However, he offered no basis for this belief and, to the contrary, testified that the artists had always behaved lawfully. The district court was entitled to conclude, based on this record, that Wolkoff acted willfully and was liable for enhanced statutory damages.

## VI.

Finally, we address Wolkoff's challenge to the amount of the statutory damages awarded—$6,750,000—the maximum amount allowed. District courts enjoy wide discretion in setting statutory damages. *Bryant*, 603 F.3d at 143. We review the award of those damages for abuse of discretion. *Id.* To find an abuse of discretion, we must be convinced that the district court based its decision on an error

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not differentiate between the works involved in ongoing litigation and those whose creators sued only later.

of law, applied the incorrect legal standard, made a clearly erroneous factual finding, or reached a conclusion that cannot be located within the range of permissible decisions. *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 627 (2d Cir. 2018). We see no abuse here.

The district court carefully considered the six factors relevant to a determination of statutory damages and concluded that "Wolkoff rings the bell on each relevant factor." S. App'x at 45. Those six, drawn from copyright law, are "(1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties." *Bryant*, 603 F.3d at 144.

First, Wolkoff's state of mind is documented in the district court's extensive finding on willfulness, which we see no reason to disturb. In other respects, this factor cuts in the artists' favor. As the district court properly found, Wolkoff, a sophisticated real estate developer, was "willing to run the risk of being held liable for substantial statutory damages rather than to jeopardize his multimillion dollar luxury condo project." S. App'x at 45 n.20. Moreover, Wolkoff whitewashed the artworks without any genuine business need to do so. It was simply, as the district court found, an "act of pure pique and revenge" toward the artists who had sued him. S. App'x at 44. As the district court also found, Wolkoff set out in the dark of night, using the cheapest paint available, standing behind his workers and urging them to "keep painting" and "paint everything." J. App'x at 2423. The whitewashing did not end the conflict in a single evening. The effects lingered for almost a year. The district court noted that the sloppy, halfhearted nature of the whitewashing left the works easily visible under layers of cheap white paint, reminding the artists on a daily basis of what had happened to them. Moreover, the mutilated artworks were visible to millions of people passing the site on the subway.

The lost revenue prong is not as straightforward but nonetheless also tips toward the artists. The district court declined to award actual damages, which Wolkoff takes to mean that the artists suffered no loss in revenue. However, as the district court said, this decision was based on the difficulty of quantifying Appellees' loss, not on the absence of any loss. Unlike actual damages, statutory damages do not require the precise monetary quantification of injury. *See, e.g.*, *Davis v. The Gap, Inc.*, 246 F.3d 152, 170 (2d Cir. 2001); *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989). Consequently, the district court was within its discretion in determining that Appellees' loss was significant, for purposes of statutory damages, but not compensable through actual damages. As the district court expressly recognized, "[t]he value of 5Pointz to the artists' careers was significant, and its loss, though difficult to quantify, precluded future opportunities and acclaim." S. App'x at 48.

The deterrent effect on the infringer and third parties also supports the amount of statutory damages imposed by the court. Wolkoff admitted that he had no remorse for his actions. To the contrary he confessed that he "would make the same decision today." J. App'x at 2427. In these circumstances, a maximum statutory award could serve to deter Wolkoff from future violations of VARA. It could further encourage other building owners to negotiate in good faith with artists whose works are incorporated into structures and to abide by the 90-day notice provision set forth in VARA when incorporated art can be removed without destruction or other modification.

The final factor—the conduct and attitude of the parties—also cuts in favor of the maximum statutory award. During the preliminary injunction phase, Wolkoff testified that it was critical that demolition of the site occur within a few months at most because otherwise he stood to lose millions of dollars in credits and possibly the entire project. Wolkoff later changed his testimony and stated that at the time of the preliminary injunction hearing, there was at most a "possibility" that a delay would have caused him financial loss. S. App'x at 114. Subsequently, the evidence at

trial established that Wolkoff had not even applied for a demolition permit until four months after the whitewashing, and he admitted that he suffered no loss for the delay. The district court described these statements as "conscious material misrepresentation[s]" and noted that had they not been made, it would have granted the preliminary injunction. S. App'x at 116.

In contrast, throughout the proceedings below, the artists complied with what the law required. Cohen sought landmark designation and, when that option became unavailable, sought to purchase the site. Judge Block noted that the artists "conducted themselves with dignity, maturity, respect, and at all times within the law." S. App'x at 49. In sum, we conclude that the district court appropriately analyzed each relevant factor and see no abuse of discretion. We have considered Wolkoff's other contentions and conclude that they lack merit.

## CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

2018 WL 2973385
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U.S. District Court, Eastern District of New York

Jonathan Cohen, Sandra Fabara, Stephen Ebert, Luis Lamboy, Esteban Del Valle, Rodrigo Henter De Rezende, Danielle Mastrion, William Tramontozzi, Jr., Thomas Lucero, Akiko Miyakami, Christian Cortes, Dustin Spagnola, Alice Mizrachi, Carlos Game, James Rocco, Steven Lew, Francisco Fernandez, and Nicholai Khan, Plaintiffs,

v.

G&M Realty L.P., 22-50 Jackson Avenue Owners, L.P., 22-52 Jackson Avenue, LLC, ACD Citiview Buildings, LLC, and Gerald Wolkoff, Defendants.

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Maria Castillo, James Cochran, Luis Gomez, Bienbenido Guerra, Richard Miller, Kai Niederhausen, Carlo Nieva, Rodney Rodriguez, and Kenji Takabayashi, Plaintiffs,

v.

G&M Realty L.P., 22-50 Jackson Avenue Owners, L.P., 22-52 Jackson Avenue, LLC, ACD Citiview Buildings, LLC, And Gerald Wolkoff, Defendants.

Case Nos. 13-CV-05612 (FB)(RLM), 15-cv-3230 (FB)(RLM)
E.D. New York.

Signed 06/13/2018

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For the Defendant: MEIR FEDER, Jones Day, 250 Vesey Street, New York, NY 10281, DAVID G. EBERT, MIOKO TAJIKA, Ingram Yuzek Gainen Carroll & Bertolotti, LLP, 250 Park Avenue New York, NY 10177.

**DECISION**

FREDERIC BLOCK, Senior United States District Judge

On February 12, 2018, I issued my decision granting plaintiffs $6,750,000 as statutory damages for the willful destruction of 45 of plaintiffs' 49 works of visual art by defendant Gerald Wolkoff ("Wolkoff"). *Cohen v. G&M Realty L.P.*, 2018 WL 851374, at *2 (E.D.N.Y. Feb. 12, 2018) ("*Cohen II*").[1] Defendants now move pursuant to Federal Rules of Civil Procedure 52(b) and 59(a) "to set aside the Court's findings of fact and conclusions of law and grant a new trial or, alternatively, to vacate the judgment in plaintiffs' favor and enter judgment for defendants, or, alternatively, for remittitur." Def.'s Br. at 1. The essence of their motions is that none of plaintiffs' art qualified as works of "recognized stature" under the Visual Artists Rights Act of 1990 ("VARA"), and that, in any event, there was no basis for the Court to find that Wolkoff had acted willfully and award the full extent of allowable statutory damages under VARA.

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

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

now cite "chapter, book, and verse" in the Appendix in support of my findings that the 45 works of art were of such stature.

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

**Willfulness**

**A**

As I wrote in my decision, "[i]f not for Wolkoff's insolence, [the maximum statutory] damages would not have been assessed" since "[i]f he did not destroy 5Pointz until he received his permits and demolished it 10 months later, the Court would not have found that he had acted willfully," and "a modest amount of statutory damages would probably have been more in order." *Cohen II*, 2018 WL 851374, at *19. Granted, my finding of willfulness was triggered by Wolkoff's decision to whitewash the plaintiffs' art as soon as I denied their motion for preliminary injunctive relief rather than wait until the buildings were ready to be torn down. But in doing so, he acted "at his peril." *Jones v. Sec. and Exch. Comm'n,* 298 U.S. 1, 17-18, 56 S.Ct. 654, 80

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

L.Ed. 1015 (1936). He was represented by skilled counsel[3] who presumably advised him of the well-established principles governing the denial of the "extraordinary and drastic remedy"[4] of a preliminary injunction, and that "[t]he judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction . . . is by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-being-ness." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953).

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

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

There were, therefore, two dynamics at play throughout this litigation, as identified during the preliminary injunction hearing and in my decision denying injunctive relief: First, given "the transient nature of plaintiffs' works," I would not preclude Wolkoff from developing his property and demolishing 5Pointz. *Cohen v. G&M Realty L.P.*, 988

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

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

F.Supp.2d 212, 227 (E.D.N.Y. 2013) ("*Cohen I*"). But second, "[s]ince, as defendants' expert correctly acknowledged, VARA protects even temporary works from destruction, defendants [were] exposed to potentially significant monetary damages if it [were] ultimately determined after trial that the plaintiffs' works were of 'recognized stature.'" *Id.* In that latter regard, I cautioned that "[t]he final resolution of whether any do indeed qualify as such works of art [was] best left for a fuller exploration of the merits after the case [had] been properly prepared for trial." *Id.* at 226.

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

To begin, there was never any doubt in my mind from defendants' submissions opposing preliminary injunctive relief, and his counsel's representations during the hearing, that Wolkoff had to demolish 5Pointz at once or run the risk of losing his condo project. I had issued a temporary restraining order ("TRO") and was contemplating extending it to give the City's Landmark Preservation Commission ("LPC") another opportunity to decide to preserve 5Pointz. I asked counsel, "[I]s there a view of the case where I can give the authorities an opportunity to reflect upon that by staying the implementation of my denial of the preliminary injunction? . . . It seems I have the authority to hold it in abeyance for a period of time." Preliminary

Injunction Hearing ("PI"), Nov. 8, 2013, HTr. at 61:4-6; 62:1-2.[5] In response, defendants' counsel submitted a letter on November 11 opining that the TRO, which was due to expire the next day, could not be further extended under the law. Def's. Letter, Nov. 11, 2013, DE32, at 1-3. Defendants were correct. Therefore, I was pressed to issue the terse order the next day, upon which Wolkoff relies for his reckless and irresponsible behavior.[6]

Significantly, the letter further stated, "As explained in defendants' papers opposing the preliminary injunction motion, defendants stand to lose hundreds of millions of dollars in tax credits and benefits if the project is not completed within the required time frame and, in order to meet those constraints, asbestos removal must begin now." *Id.* at 3, 56 S.Ct. 654(footnotes omitted).

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

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

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

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

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

> MR. EBERT: There are portions that can be done way before then. There's a lot of buildings there."

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

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

> 22. As explained in the accompanying affidavits of Jay Seiden, Israel Schechter, and Linda Shaw, attorneys assisting G&M Realty on the Project, phases of the Project must be completed before the [tax] statutes expire, or else G&M Realty will lose the benefits of hundreds of millions of dollars in tax exemptions and benefits. And as Peter Palazzo, our Construction Manager for the Project, explains in his affidavit, in order to meet these critical deadlines, we are scheduled to start asbestos removal within the next three to four weeks, with demolition of the building scheduled to be completed by the beginning of 2014 and construction to start in April of 2014.
>
> 23. The damages that G&M Realty will suffer if the Project is delayed include the loss of 259 million dollars in 421a tax benefits (as explained by Seiden) and the loss of 35 million dollars in tax benefits under the Brownfield Cleanup Program (as explained by Shaw). In addition, G&M Realty pays 389,000 dollars in annual taxes on the Property, and annual maintenance charges (heat, electric and salaries) totaling 245,000 dollars. The longer these carrying charges continue without G&M realizing any income from the Property, the greater the loss G&M Realty will sustain.
>
> 24. If G&M Realty loses these critical tax benefits and incurs these additional losses, *the Project will no longer be economically viable. We will be forced to reassess whether to proceed at all, and may have to simply scrap the Project.* A great deal of work has been done over the past years to put G&M Realty in a position to qualify for these tax-related benefits because we recognized that it might not be possible

> without them to proceed with our plans. *I can assure the Court that the effects of losing these benefits will be devastating and I highly doubt we would be able to proceed if we lose these benefits.*
>
> 25. The process of vacating the Property is approximately 85% completed. 99% of the tenants will vacate by November 30, 2013 and all residential and commercial tenants will be displaced from the Property by no later than January 5, 2014, which will leave us in the position of realizing no revenue from the Property until the Project starts to become occupied.

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

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

> MR. BAUM: So the question is did you advise the Court during that proceeding that you had to take the building down by the end of December 2013, early January 2014?
>
> MR. WOLKOFF: Yes. As fast as I can . . . .

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

> MR. BAUM: In fact, you didn't take the building down in December of 2014 [sic]; correct?
>
> MR. WOLKOFF: Correct.
>
> MR. BAUM: You didn't obtain the demolition permit until approximately March of 2014?
>
> MR. WOLKOFF: Correct.

Trial Tr. at 2028:9-14.

> MR. BAUM: But you told the Court that you were going to demolish it by the end of December and

start construction two or three months later; correct?

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

Trial Tr. at 2929:16-19.

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

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

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

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

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

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

. . .

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

MR. WOLKOFF: I don't know.

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

MR. WOLKOFF: I don't doubt it.

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

MR. WOLKOFF: *Yes.*

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

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

MR. WOLKOFF: It is a possibility, yes.

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

Trial Tr. at 2031:12-17.

> MR. BAUM: You didn't lose hundreds of millions of dollars; correct?
>
> MR. WOLKOFF: No.
>
> MR. BAUM *And you were aware that the Court was relying on this affidavit in making its decision in this case; correct?*
>
> MR. WOLKOFF: No, it was an affidavit that I put in. I didn't know—there was [sic] other affidavits, I imagine, that was [sic] put into the courts for them to make a decision.
>
> THE COURT: It was one of the things.
>
> MR. WOLKOFF: *Yeah, it was one of the things.*

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

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

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

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

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

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

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

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

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

[11] I may have been overly charitable when I stated in my decision that "Wolkoff in the main testified truthfully." *Cohen II*, 2018 WL 851374, at *6. But when it came to the critical parts of his testimony concerning his irrational reasons for whitewashing the plaintiffs' works of art, I took pains to explain why his precipitous conduct was "fanciful and unfounded" and a willful "act of pure pique and revenge." *Id.* at *17, 56 S.Ct. 654.

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

**B**

As recognized in my decision, "[a] copyright holder seeking to prove that a copier's infringement was willful must show that the infringer 'had knowledge that its conduct represented infringement or . . . recklessly disregarded the possibility.'" *Cohen II*, 2018 WL 851374, at *16 (quoting *Bryant v. Media Right Prods.*, 603 F.3d 135, 143 (2d Cir. 2010)). Defendants conjure up an argument out of whole cloth that this means that willfulness cannot be found unless the defendant violated "clearly established law."[12] They draw this conclusion from a passing parenthetical reference to qualified immunity law in a "Cf." citation in a Fair Credit Reporting Act ("FCRA") case. Def.'s Br. at 26 & n.72 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007)). Defendants believe that qualified immunity should be extended to copyright law, arguing "the standard [for willfulness] is akin to the 'clearly established' test for qualified immunity under Section 1983." Reply Br. at 9.

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

Qualified immunity is a governmental immunity from suit. *See Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) ("government officials are entitled to some form of immunity from suits for damages"). It has never been extended to private citizens not acting on behalf of the government, and this Court will not be the first to do so. *See Wyatt v. Cole*, 504 U.S. 158, 168, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) ("In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity."). In any event, *Safeco* had nothing to do with qualified immunity. Rather, it simply addressed whether defendants could be held willfully liable for sending improper credit report notices to consumers in violation of the FCRA. *Safeco*, 551 U.S. at 52, 127 S.Ct. 2201. Tellingly, the Supreme Court rejected the defendants' contention that liability "for 'willfully fail[ing] to comply' with FCRA goes only to acts known to violate the Act," *id.* at 56-57, 127 S.Ct. 2201, explaining that "[w]e have said before that 'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears,'" *id.* at 57, 127 S.Ct. 2201(quoting *Bryan v. United States*, 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998)). The Court cited a number of cases exemplifying this broad-based proposition, including *United States v. Ill. Cent. R. Co.*, 303 U.S. 239, 242-43, 58 S.Ct. 533, 82 L.Ed. 773 (1938), which held that "willfully," as used in a civil penalty provision, includes "conduct marked by careless disregard whether or not one has the right so to act." 303 U.S. at 242-43, 58 S.Ct. 533(quoting *United States v. Murdock*, 290 U.S. 389, 395, 54 S.Ct. 223, 78 L.Ed. 381 (1933)).

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

Moreover, the Second Circuit has consistently held that willfulness in cases governed by the Copyright Act can be

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

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

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

**C**

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

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

**Recognized Stature**

**A**

As I explained in my prior decisions, the *Carter* two-tiered test has been accepted as the appropriate standard for determining "recognized stature." *Cohen II*, 2018 WL 851374, at *11 (citing *Carter v. Helmsley-Spear, Inc.*, 861 F.Supp. 303, 325 (S.D.N.Y. 1994)) ("*Carter I*"). Thus, once again, the visual art must be viewed as "meritorious" and its stature must be recognized "by art experts, other members of the artistic community, or by some cross-section of

society." *Carter I,* 861 F.Supp. at 325. These three categories are conjugated with "or"; that is, the artist's work needs recognition by only one of these three groups. Nonetheless, as detailed in the Appendix, each of the 45 works of art meet all three standards.

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

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

**B**

Principally, the defendants are dismissive of Cohen's testimony and expertise, contending that it was "erroneous as a matter of law" for the Court to rely on his "allocation of wall space for works as proof of their recognized stature." Def.'s Br. at 10. I could not disagree more. As I wrote: "that Jonathan Cohen selected the handful of works from the thousands at 5Pointz for permanence and prominence on long-standing walls is powerful, and arguably singular, testament to their recognized stature." *Cohen II*, 2018 WL 851374, at *12. He was, after-all, Wolkoff's long-time handpicked curator, and for good reason. He remains one of the most prominent aerosol artists in the world.

The following is a limited excerpt from his curriculum vitae: He has had over 500 press mentions, including attention from the *New York Times, Wall Street Journal, Huffington Post*, the *Today Show*, and *ESPN*. Trial Tr. at 1640:25-1641:6. He has produced art on commission for Fortune 500 companies, including Louis Vuitton, Nikon, Nespresso, Fiat, and Facebook. Cohen Folio at 7. His work has been featured in art museums and galleries, including the Parish Art Museum, Orlando Art Museum, Rush Arts Gallery, Corridor Gallery, and Gold Coast Arts Center. *Id.* His work was featured in the major motion picture *Now You See Me* and many music videos, and he has been featured in documentaries about aerosol art, including the HBO documentary "BANKSY Does NYC." *Id.* at 7, 10, 56, 56 S.Ct. 654. His work has achieved academic recognition. *Id.* at 9, 56 S.Ct. 654; Tr. at 1643:24-1645:12.

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

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

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

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

**C**

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

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

Second, defendants argue that a work must have "acquired *recognition* of its merit at the time of its destruction." Def.'s Br. at 5. VARA explicitly leaves this question open. *See Carter I*, 861 F.Supp. at 325 n.12 ("Vara does not delineate when a work must attain 'recognized stature' in order to be entitled to protection under this Section."); Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev 1935, 1967 (2000) ("In a footnote, Judge Edelstein strongly implies that a work may obtain recognized stature after the

VARA suit is filed and still fulfil (sic) the terms of the provision."). Regardless, the focus of my decision was the recognition the works achieved prior to the whitewash.

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

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

Defendants further argue that the "public did not have access" to the inside works. Def.'s Br. at 8. However, Cohen conducted regular tours of the inside works, tours which were heavily sought after. For example, pop artist Usher actively sought and was given a tour of the inside of the building, as did Lois Stavksy[16] and Arabic calligraphy artist eL Seed. Tr. at 1393:2-14; 1435:15-19. Vara also identified "about 805 Bates documents, which were e-mails that were written to 5Pointz or Jonathan [Cohen], requests for

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

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

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

visitors to come inside." Tr. at 1043:22-24. The e-mails represented visitors from "something like 70 different countries," including "professors from colleges, high school teachers, kindergarten teachers, private schools, all of them requesting tours to walk throughout the outside and inside of the building in order to look at the work." Tr. at 1044:1-5. Vara compared the inside works to "an exhibition in a gallery in Chelsea or the Lower East Side," Tr. at 1044:8-9, and noted that there were "some very interesting e-mails that were sent to Jonathan talking about how valuable they found the experience. How their students learned so very much," Tr. at 1044:12-15. Therefore, defendants' contention that the inside works were not recognized, much less accessible, prior to their destruction is contradicted by the record.

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

Finally, defendants argue that for some works, the Folios "contain little or no evidence of any recognition." Def.'s Br. at 11. But the Folios were only part of the evidence. They supplemented the three weeks of trial testimony provided by each of the 21 artists, as well as the testimony of Vara, Stavsky, and Madrigale. Vara's opinion was also based on documents not included in the Folios, upon which she also relied in making her determinations that each work achieved recognized stature, including online videos, documentary footage, social media coverage, letters from

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

art professors around the country, letters and e-mails from visitors to 5Pointz, and course syllabi.[18] Defendants' narrow focus on the Folios misses the weight of the evidence.[19]

**D**

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

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

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

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

## CONCLUSION

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

**SO ORDERED**

## APPENDIX

This appendix describes the evidence supporting the Court's determination of recognized stature for each of the 45 works. It includes both documentary evidence submitted at trial and testimonial evidence provided by the parties, fact witnesses, and plaintiffs' expert Vara. It is organized by artist, beginning with an overview of the artist's credentials and career recognition, followed by a work-by-work listing of the most relevant supporting evidence of recognized stature. This evidence embraces three categories, as it was presented at trial and contemplated by *Carter*: recognition by (1) art experts; (2) other members of the artistic community; or (3) some cross-section of society. *Carter I*, 851 F.Supp. at 325.

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

### Jonathan Cohen aka "Meres One"

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

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

***1. 7 Angle Time Lapse***

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

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

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

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

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

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

***2. Outdoor Wildstyle***

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

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

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

***3. Clown with Bulbs***

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

Category Two: Cohen's work received academic recognition. Tr. at 1643:24-1645:12. *Clown with Bulbs* was featured in *Google Arts and Culture*. Cohen Folio at 120. Snyder called the artists in this suit "top artists at the heights of their career" and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to

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

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

***4. Eleanor RIP***

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

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

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

***5. Patience***

Category One: *Patience* was chosen for a "wall"[24] on Crane Street with significant foot traffic. Tr. at 1431:4-9. It was painted in 2013. Tr. at 1431:11. It was recognized by

[24] It was technically painted on a gate.

Vara as both a meritorious work of art, Tr. at 1653:8-14, and a work of recognized stature, Tr. at 1642:24-1646:13; 1654:17-22.

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

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

***6. Character***

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

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

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

***7. Inside Wildstyle***

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

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

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

**Akiko Miyakami aka "Shiro"**

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

***8. Manga Koi***

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

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

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

**Carlos Game aka "See TF"**

Carlos Game is a prominent artist and United States Marine Corps veteran. Tr. at 780:20-21. He has done many exhibitions and commissions, including a portrait of Ivanka Trump that was displayed in Trump Tower and exhibitions at Sacred Gallery, Rue De L'Art, Gold Coast Art

Center, and a 9/11 Memorial at the Railroad Museum of Long Island. Tr. at 804:1-11; Game Folio at 2; 14-17; 20-21; 27-30. His work has been covered by *Into the Urban, In the Wit of an Eye, Artsy*, and *Street Art NYC*. Game Folio at 3-13; 24-26.

***9. Black and White 5Pointz Girl***

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

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

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions on the passing train. Tr. at 797:2-4. Game has thousands of social media followers. Tr. at 1061:2-5. *Black and White 5Pointz Girl* received 82 likes on Instagram. Game Folio at 45. The

jury found it had achieved recognized stature. *See* Verdict Form at 59, DE 165.

***10. Denim Girl***

Category One: *Denim Girl* was chosen by Cohen for placement on a longstanding inside wall. Tr. at 788:1-9. It was painted in 2009 and survived until the whitewash. Tr. at 788:8-10. Game believed it and all his other inside works were "permanent" pieces. Tr. at 793:6-9. It was recognized by Vara as both a meritorious work of art, Tr. at 1046:20-1048:3, and a work of recognized stature, Tr. at 1042:11-13. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

***11. Geisha***

Category One: *Geisha* was "the first image that everybody and anybody that's going into 5Pointz, who are walking to the MoMa or going into the diner or getting off the

train will see." Tr. at 781:9-12. It was chosen by Cohen for placement on a wall at the entrance. Tr. at 783:1-22. It survived for several months and was intended to last longer. Tr. at 783:8-17. It was visible from the train. Tr. at 783:23-25. It was recognized by Vara as both a meritorious work of art, Tr. at 1042:16-1043:13, and a work of recognized stature, Tr. at 1042:11-13. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

***12. Marilyn***

Category One: *Marilyn was* chosen by Cohen for placement on a longstanding inside wall. Tr. at 785:10-15. It was painted in 2009 and survived until the whitewash.[25] Tr. at

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

785:23-25. It was recognized by Vara as both a meritorious work of art, Tr. at 1044:21-1046:2, and a work of recognized stature, Tr. at 1042:11-13. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

***13. Red***

Category One: *Red* was chosen by Cohen for placement on a longstanding inside wall. Tr. at 788:3-6. It was painted in 2009 and survived until the whitewash. Tr. at 788:8-10. It was recognized by Vara as both a meritorious work of

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defendants did not challenge Game's testimony as to the date of the piece on cross-examination.

art, Tr. at 1046:3-19, and a work of recognized stature, Tr. at 1042:11-13. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

**Christian Cortes**

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

***14. Skulls Cluster aka Up High 1***

Category One: *Skulls Cluster* was chosen by Cohen for placement on the highest floor in the loading dock area. Tr. at 540:17-20. It was painted in 2009 and achieved longstanding status as one of the oldest works on the site, intended to survive "for the life of the building." Tr. at 542:7-15. It was recognized by Vara as both a meritorious work of art, Tr. at 748:12-750:12, and a work of recognized stature, Tr. at 771:15-776:8. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

***15. Up High Blue Skulls aka Up High 2***

Category One: *Up High Blue Skulls* was chosen by Cohen for placement on a high longstanding wall at 5Pointz as part of an effort to "raise 5Pointz to another level." Tr. at 543:19-544:15. It was painted in 2009 and achieved longstanding status as one of the oldest works on the site.

Tr. at 544:16-25. It was recognized by Vara as both a meritorious work of art, Tr. at 750:16-752:15, and a work of recognized stature, Tr. at 771:15-776:8. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

***16. Up High Orange Skulls aka Up High 3***

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

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

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

***17. Jackson Avenue Skulls aka Scraps***

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

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

5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

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

**Estaban Del Valle**

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

***18. Beauty and the Beast***

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

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

the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

Category Three: *Beauty and the Beast* was seen by hundreds or thousands of daily visitors to 5Pointz. It was searchable on Google. Tr. at 633:5-10. He has thousands of social media followers. Tr. at 632:10-16. One Instagram posting of the photo received over 33,000 likes. Tr. at 118:1-7. The jury found it had achieved recognized stature. *See* Verdict Form at 31, DE 165.

**Francisco Fernandez aka "DASIC"**

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

***19. Dream of Oil***

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

Category Two: *Dream of Oil* was featured in The re: art, an online art publication. Fernandez Folio at 35-38. It was featured in online documentaries about 5Pointz. Tr. at 1656:16-18. It was recognized by Simmons. Tr. at 1656:16. It was published in The Guardian. Tr. at 1656:24. Snyder called the artists in this suit "top artists at the heights of

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

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

**James Cochran aka "Jimmy C"**

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

***20. Subway Rider***

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

Category Two: *Subway Rider* was featured *Street Art NYC, Google Arts and Culture, Time Out New York, The Guardian, Global Street Art*, and *Bit Rebels*. Cochran Folio

at 71-87. Snyder called the artists in this suit "top artists at the heights of their career." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

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

**James Rocco aka "Topaz"**

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

***21. Bull Face***

Category One: *Bull Face* was chosen by Cohen for placement on a longstanding, highly trafficked wall at the loading dock. Tr. at 992:18-23. It was created in 2009 and survived until the whitewash. Tr. at 994:24-25. It was visible from the 7 train. Tr. at 992:18-23. It was intended to be up "indefinitely." Tr. at 995:3-4. It was recognized by Vara as

both a meritorious work of art, Tr. at 1096:14-1097:4, and a work of recognized stature, Tr. at 1098:14-1101:12. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

***22. Lord Paz***

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

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

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

***23. Face on Jackson***

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

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

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

**Kenji Takabayashi aka "Python"**

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

and advertising firms, including Pepsi, Samsung, Sony, Google, and Ogilvy. Tr. at 307:6-11.

***24. Starry Night***

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

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

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

**Luis Gomez aka "Ishmael"**

Luis Gomez is a prominent artist who works in aerosol, murals, sculptures, and canvas. Tr. at 893:14-17. He and his work have been featured in *The New York Times, The Post and Courier, Charleston City Paper, Mountain Xpress,*

*Citizen-Times, The Old Wood Company, Street Art Walk, Brooklyn Street Art, Street Art NYC, Street Art News, Global Street Art, Court McCracken*, ilovedetroitmichigan.com, and *Lily Knights*, as well as the websites of Charleston and Spartanburg, South Carolina. Gomez Folio at 3-50; Tr. at 893:22-903:7. He has painted works for five major motion pictures. Tr. at 904:19-21.

***25. Inside King Kong***

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

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

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

**Luis Lamboy aka "Zimad"**

Luis Lamboy is a prominent aerosol artist who worked as a general foreman and art handler for Sotheby's Auction

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

***26. Blue Jay Wall***

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

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

Category Three: *Blue Jay Wall* was seen was seen in the private tours of the inside works. Lamboy has thousands of social media followers. Tr. at 1075:15-17. It was searchable on Google. Tr. at 1075:11-14. The jury found it had achieved recognized stature. *See* Verdict Form at 21, DE 165.

***27. Electric Fish***

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

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

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

***28. Inside 4th Floor***

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

Category Two: College professors, high school teachers, kindergarten teachers, and private schools all requested tours for their classes to see his interior works. Tr. at 1044:1-20. Snyder called the artists in this suit "top artists

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

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

***29. Clothing Brand aka Monopoly Man***

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

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

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

***30. World Traveler***

Category One: *World Traveler* was chosen by Cohen for placement on a longstanding inside wall between 2010 and

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

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

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

**Nicholai Khan aka "Twin" aka "Think"**

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

***31. Dos Equis Man***

Category One: *Dos Equis Man* was chosen by Cohen for placement on a longstanding wall. Tr. at 1162:10-1163:1. It was recognized by Vara as both a meritorious work of art, Tr. at 1622:23-1623:14, and a work of recognized stature, Tr. at 1622:2-22; 1623:15-1624:24. Cohen testified it was a

piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

***32. Orange Clockwork***

Category One: *Orange Clockwork* was chosen by Cohen for placement on a longstanding wall. Tr. at 1165:25-1166:2. It was recognized by Vara as both a meritorious work of art, Tr. at 1619:16-1622:1, and a work of recognized stature, Tr. at 1623:15-1624:24. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

"equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

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

**Richard Miller aka "Patch Whiskey"**

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

***33. Monster I***

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

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

the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

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

***34. Monster II***

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

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

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

**Rodrigo Henter de Rezende aka "AK47"**

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

***35. Fighting Tree***

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

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

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. De Rezende has thousands of social media followers. Tr. at 1639:4-9. *Fighting Tree* has

received over 100 likes on social media. Tr. at 1639:14-17. It was featured on a third party's Flickr. Tr. at 1638:25; De Rezende Folio at 45. The jury found it had achieved recognized stature. *See* Verdict Form at 33, DE 165.

**Sandra Fabara aka "Lady Pink"**

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

***36. Green Mother Earth***

Category One: *Green Mother Earth* was chosen by Cohen for a high wall on Jackson Avenue visible from the train. Tr. at 1238:21-24. It was one of two works that were intentionally saved in 2009 after the stairwell collapse. Tr. at 1532:2-15. It was recognized by Vara as both a meritorious work of art, Tr. at 1597:21-1600:10, and a work of recognized stature, Tr. at 1600:11-1605:24. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

Category Two: *Green Mother Earth* was featured in several travel bloggers' pieces on 5Pointz. Tr. at 1627:9-20; 1629:11-19. Snyder opined that, "The destruction of the graffiti of Lady Pink would warrant a significant lawsuit. Lady Pink is without question one of the most accomplished graffiti artists," and specifically referenced *Green Mother Earth* as a piece of recognized stature. Tr. at

1601:3-10; 20-24. It was published in *The Guardian* and *Complex Magazine*. Tr. at 1602:24-1603:1. It was featured in the documentaries *We Don't Need More Rats Here, 5Pointz Documentary, 5Pointz Long Island City*, and *Don't Bomb These Walls*. Tr. at 1603:2-4; 1604:15-17; 1605:14-17. It was included in *Google Arts and Culture*. Tr. at 1603:22-23. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

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

**Steven Lew aka "Kid Lew"**

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

***37. Crazy Monsters***

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

in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

**Thomas Lucero aka "Auks One"**

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

***38. Black Creature***

Category One: *Black Creature* was chosen by Cohen for placement on a highly trafficked wall at the loading dock. Tr. at 464:4-23. It was intended to be a longstanding piece. It was recognized by Vara as both a meritorious work of art, Tr. at 730:21-734:10, and a work of recognized stature,

Tr. at 737:21-742:7. Cohen testified it was a piece of "high standing" and confirmed it "[fell] into a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

**Collaborative Works**

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

Cohen's artistic credentials are listed in the decision.

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

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

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

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

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. Castillo has over seven thousand social media followers. Tr. at 647:3-7. *Love Girl and Burner* has hundreds of likes on social media. Castillo Folio at 54-63. The jury found it had achieved recognized stature. *See* Verdict Form at 85, DE 165.

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

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

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

Category Two: Miyakami's work was described as "instantly recognizable" by Simmons. Tr. at 1615:11-12. It

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

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

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

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

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

Category Two: Miyakami's work was described as "instantly recognizable" by Simmons. Tr. at 1615:11-12. *Underwater Fantasy* was featured in *Google Arts and Culture*. Tr. at 1615:15-16. It was featured in a Gallery Nine

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

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

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

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

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

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

Category Two: Miyakami's work was described as "instantly recognizable" by Simmons. Tr. at 1615:11-12. Snyder called the artists in this suit "top artists at the heights of their career" and said Miyakami and Game's works at 5Pointz "reflect mastery of the form in addition to

their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

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

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

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

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

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

a different category in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

Category Three: It was seen by hundreds or thousands of daily visitors to 5Pointz. It was seen by millions on the passing train. Both Guerra and Nieva have over one thousand social media followers. Nieva Folio at 24. *Return of New York* has more than one hundred likes on social media. Nieva Folio at 25-28; Guerra Folio at 21-22. It was featured on a third party's Flickr account. Guerra Folio at 19-20. The jury found it had achieved recognized stature. *See* Verdict Form at 97, DE 165.

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

James Rocco's credentials are listed above.

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

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

in terms of [his] decision as the curator" compared to other works at the site. Tr. at 1508:8-19.

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

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

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

The artists' credentials are listed above.

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

Category Two: *Angry Orchard* was featured in *Google Arts and Culture*. Lucero Folio at 29-30. Snyder called the artists in this suit "top artists at the heights of their career"

and said Cohen's works at 5Pointz "reflect mastery of the form in addition to their obvious aesthetic characteristic." Tr. at 1060:8-18. It was attested to as a work of high quality by Stavsky. Tr. at 1397:14-19. It was part of the "curated," Tr. at 1205:9-10, 5Pointz collection considered by Madrigale as "equal to" the Lincoln Center and the Apollo Theater in cultural significance in New York, Tr. at 1203:20-21.

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

320 F. Supp. 3d 421 (E.D.N.Y. 2018)
U.S. District Court, Eastern District of New York

Jonathan Cohen, Sandra Fabara, Stephen Ebert, Luis Lamboy, Esteban Del Valle, Rodrigo Henter De Rezende, Danielle Mastrion, William Tramontozzi, Jr., Thomas Lucero, Akiko Miyakami, Christian Cortes, Dustin Spagnola, Alice Mizrachi, Carlos Game, James Rocco, Steven Lew, Francisco Fernandez, and Nicholai Khan, Plaintiffs,

v.

G&M Realty L.P., 22-50 Jackson Avenue Owners, L.P., 22-52 Jackson Avenue, LLC, ACD Citiview Buildings, LLC, and Gerald Wolkoff, Defendants.

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Maria Castillo, James Cochran, Luis Gomez, Bienbenido Guerra, Richard Miller, Kai Niederhausen, Carlo Nieva, Rodney Rodriguez, and Kenji Takabayashi, Plaintiffs,

v.

G&M Realty L.P., 22-50 Jackson Avenue Owners, L.P., 22-52 Jackson Avenue, LLC, ACD Citiview Buildings, LLC, And Gerald Wolkoff, Defendants.

Case Nos. 13-CV-05612 (FB)(RLM), 15-cv-3230 (FB)(RLM)
E.D. New York.

Signed 02/12/2018

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## DECISION

FREDERIC BLOCK, Senior United States District Judge

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This marks the latest chapter in the ongoing saga of what has commonly become known as the 5Pointz litigation. Plaintiffs, 21 aerosol artists, initiated this lawsuit over four years ago by seeking a preliminary injunction under the Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. § 106A, against defendants Gerald Wolkoff ("Wolkoff") and four of his real estate entities to prevent the planned demolition by Wolkoff of his warehouse buildings in Long Island City and consequent destruction of plaintiffs' paintings on the walls of the buildings.

**I**

On November 12, 2013, after a hearing, the Court issued an order denying preliminary injunctive relief and stating that "a written opinion would soon be issued." ECF No. 34. Rather than wait for the Court's opinion, which was issued just eight days later on November 20th, Wolkoff destroyed almost all of the plaintiffs' paintings by whitewashing them during that eight-day interim.

In its extensive opinion the Court initially noted that Wolkoff's buildings "had become the repository of the largest collection of exterior aerosol art . . . in the United States" and that this litigation "marks the first occasion

that a court has had to determine whether the work of an exterior aerosol artist—given its general ephemeral nature—is worthy of any protection under the law." *Cohen v. G & M Realty L.P.*, 988 F.Supp.2d 212, 214 (E.D.N.Y. 2013) ("*Cohen I*").

In denying the plaintiffs' application for preliminary injunctive relief, the Court recognized that the rights created by VARA were at tension with conventional notions of property rights and tried to balance these rights. It did so by not interfering with Wolkoff's desire to tear down the warehouses to make way for high-rise luxury condos, but cautioned that "defendants are exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs' works were of 'recognized stature'" under VARA. *Cohen I*, 988 F.Supp.2d at 227. The trial has now happened. It lasted three weeks. At plaintiffs' insistence, it was tried before a jury, but just prior to summations, plaintiffs—with defendants' consent—waived their jury rights. Rather than summarily dismiss the jury after it had sat through the entire trial, the Court converted it to an advisory jury. During its charge, the Court carefully explained the parties' rights and obligations under VARA, including the plaintiffs' entitlement to substantial statutory damages if the jury determined that Wolkoff had violated plaintiffs' VARA rights and that he had acted willfully. On a 98–page verdict sheet, the jury found liability and made various damage awards in respect to 36 of plaintiffs' 49 works of art that were the subject of the lawsuit. In every case they found that Wolkoff had acted willfully.

Although the Court does not agree with all of the jurors' findings, it does agree that Wolkoff willfully violated plaintiffs' VARA rights in respect to those 36 paintings. The Court further finds that liability and willfulness should attach to an additional nine works.

Given the abject nature of Wolkoff's willful conduct, the Court awards the maximum statutory damages under

VARA for each of the 45 works of art wrongfully and willfully destroyed in the combined sum of $6,750,000.[1]

## II

### A. The Relevant Statutory Framework

As the Court explained in *Cohen I*, "VARA amended existing copyright law to add protections for two 'moral rights' of artists: the rights of *attribution* and *integrity*." *Cohen I*, 988 F.Supp.2d at 215. VARA has codified the right to integrity to provide "the author of a work of visual art" the right

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

17 U.S.C. § 106A(a)(3).

Thus, in *Cohen I*, the Court held that plaintiffs' aerosol art comes under VARA's protection as works of "visual art", *Cohen I*, 988 F.Supp.2d at 216, and that, under § 106A(a)(3)(B), VARA "gives the 'author of a work of visual art' the right to sue to prevent the destruction of [the] work if it is one of 'recognized stature,'" *Cohen I*, 988 F.Supp.2d at 215. VARA also permits the artist to seek monetary damages under § 106A(a)(3)(A) if the work was distorted, mutilated, or otherwise modified to the prejudice of the artist's honor or reputation.

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[1] This decision constitutes the Court's combined findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Section 113(d)(1) of VARA provides that

> In a case in which—
>
> (A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and
>
> (B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.[2]

Section 113(d)(2) provides, in part, that

> If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—
>
> (A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

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[2] Paragraph (2)—not applicable in this case—protects the right of attribution by affording the artist "the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation[.]"

> (B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

Thus, § 113(d) provides for two possibilities when a protected work of art has been integrated into a building subsequent to June 1, 1991, VARA's effective date. "Section 113(d)(1) deals with works of visual art that *cannot be removed* without causing destruction, mutilation, or other modifications to the work. Section 113(d)(2) deals with works of visual art that *can be removed* without causing such harm." 5 William F. Patry, *Patry on Copyright* § 16:32 (2017) ("*Patry*") (emphasis added).[3]

Under § 113(d)(1), if a work *is not removable* without destroying, mutilating, distorting, or otherwise modifying the work, the artist's VARA right of integrity under § 106A(3) attaches, and the artist may sue to prevent the destruction of the work unless the right is waived "in a *written instrument* . . . that is *signed by the owner of the building and the author* and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal." § 113(d)(1)(B) (emphasis added).

Under § 113(d)(2), if a work *is removable* without destroying, mutilating, distorting, or otherwise modifying it, VARA gives the artist the opportunity to salvage the work upon receipt of a 90 days' written notice from the building owner of the owner's "intended action affecting the work of visual art." 17 U.S.C. §§ 113(d)(2)(A)–(B). If the artist fails to remove or pay for the removal of the works within the 90 days—or if the owner could not notify the artist after making a "good faith effort," 17 U.S.C. § 113(d)(2)(A)—the artist's VARA rights are deemed waived for the removable

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[3] Patry participated in the drafting of VARA in his role as a Policy Planning Advisor to the Register of Copyrights. *Patry* § 16:1 n.1. Accordingly, the Court accords his treatise, which is highly regarded on all copyright issues, particular weight when examining provisions of VARA.

work, and the owner may destroy them without consequences.[4]

Damages that may be awarded for the violation of the artist's rights of attribution and integrity under § 106A(a)(3) are the same that apply for copyright infringement, namely actual (including profits) and statutory. 17 U.S.C. § 504(a). As the House Judiciary Committee Report explained:

> Section 6(a) of the bill simply amends section 501(a) of title 17 to add those authors covered by new section 106A . . . . It thereby makes all title 17 remedies [except criminal sanctions] available to those authors . . . . [VARA] thereby provides for monetary damages, and for injunctive relief to prevent future harm. *The same standards that the courts presently use to determine whether such relief is appropriate for violations of section 106 rights will apply to violations of section 106A rights as well.*

H.R. Rep. No. 101–514, at 21–22 (1990) (emphasis added).

There is no limit to the amount of actual damages for each work, but statutory damages for each may be "not less than $750 or more than $30,000 as the court considers just." 17 U.S.C. § 504(c)(1). If, however, the plaintiff "sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages" for each work "to a sum of not more than $150,000." 17 U.S.C. § 504(c)(2). The plaintiff is not entitled to both actual and statutory damages but must elect one or the other "before final judgment is rendered[.]" 17 U.S.C. § 504(c)(1).

**B. The Advisory Jury**

"A proper demand [for a jury trial] may be withdrawn only if the parties consent." Fed. R. Civ. P. 38(d). Here the defendants, through counsel, consented to submitting the case to the Court.

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[4] Section 113(d)(2)(B) also provides that if the artist successfully removes a work at his or her own expense, title to the work passes automatically to the artist. *See* 17 U.S.C. § 113(d)(2)(B).

Under the federal rules, where the right to a jury trial does not attach, "the court, on motion or on its own: (1) may try any issue with an advisory jury[.]" Fed. R. Civ. P. 39(c). "Because advisory juries permit community participation and may incorporate the public's views of morality and changing common law, their use is particularly appropriate in cases involving community-based standards." *NAACP v. Acusport Corp.*, 226 F.Supp.2d 391, 398 (E.D.N.Y. 2002) (Weinstein, J.).

"[A district court] is not bound by the findings of the advisory jury, which it is free to adopt in whole or in part or to totally disregard[.]" *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993) (quoting *Sheila's Shine Prods., Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 122 (5th Cir. 1973)). "[T]he court retains the ultimate responsibility for findings of fact and conclusions [of law] . . . in reliance upon the advisory jury's verdict if the court so chooses, and to explain how it arrived at those findings and conclusions." *DeFelice v. Am. Int'l Life Assurance Co. of New York*, 112 F.3d 61, 65 (2d Cir. 1997).

Under these principles, the Court will take the jury's verdicts under advisement in making its independent findings of fact and conclusions of law, especially on issues that require judgment of the community.[5]

The Court would be remiss if it did not pause to acknowledge the extraordinary work of the eight jurors. Rarely were they late during the course of the extensive trial, and the Court was impressed with their rapt attention to the difficult task that awaited them in having to assess the defendants' liability in respect to each of the 49 works of art. Since the jurors had spent the better part of a

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[5] During the trial and in their post-trial brief, defendants argued that several comments by the Court, and the Court's rejection of defendants' requested jury instructions, prejudiced the jury to the point of requiring a mistrial. The Court disagrees for the reasons stated on the record at the time of the objections. However, even assuming arguendo that the jury had been prejudiced, because the jury was advisory, and the Court is making its own findings of fact and conclusions of law, any prejudice would have been harmless.

month in anticipation of deliberating, the Court was disinclined to summarily dismiss them when, at the veritable 11th hour, the plaintiffs suddenly decided to convert the case to a bench trial. Moreover, since 5Pointz had achieved worldwide community recognition, the Court was keen to learn whether the jurors, as members of the community, would view the works as having achieved recognized stature under VARA. To enhance the integrity of their verdicts, the Court decided it best not to tell the jurors that their findings would only be advisory.

The complexity of the litigation did not deter the jurors from making individualized findings in respect to each of the 21 artists and their 49 works on the 98-page verdict sheet. They were tasked with having to determine whether each destroyed work was of recognized stature and/or was mutilated, distorted, or otherwise modified to the prejudice of the artist's honor or reputation by the whitewashing. They found that 28 of the 49 destroyed works had achieved recognized stature, and eight more had been mutilated, distorted, or otherwise modified to the prejudice of the artists' honor or reputation.[6] Each of the 21 plaintiffs were adversely affected in one way or the other, and the jury had to individually assess whether actual and statutory damages were warranted in regard to each work. It awarded a total of $545,750 in actual damages and $651,750 in statutory damages.

### C. The Witnesses and Evidentiary Landscape

Each of the 21 plaintiffs/artists testified; they were respectful, articulate and credible. Folios for each were admitted into evidence collectively containing their professional achievements and recognition in the form of an impressive array of fellowships, residences, public and private commissions, teaching positions, media coverage, and social media presence. Not surprisingly, each of the 21 Fo-

[6] The jury also found that of the 28 works of recognized stature that were destroyed, 20 had also been mutilated, modified, distorted or otherwise modified in a manner prejudicial to the artist's honor or reputation.

lios contained beautiful color prints of the artists' respective aerosol works of art which are the subject of the lawsuit. They are appended to this opinion. It is apparent that they reflect striking technical and artistic mastery and vision worthy of display in prominent museums if not on the walls of 5Pointz. The Folios also contain photos showing how almost all of these works of art were partially or wholly whitewashed by Wolkoff.

5Pointz was an egalitarian place. The artists came from many backgrounds. Some of the plaintiffs testified via Skype from international residences. Many who live in New York had immigrated from other countries to join the 5Pointz community. One artist flew from London to testify; another came of age in rural West Virginia. Some artists came from highly prestigious art schools; others were self-taught. Some were fixtures in elite, traditional art circles; others were simply dedicated to street and community art. The Court was impressed with the breadth of the artists' works and how many of the works spoke to the social issues of our times.

The principal testimony about the advent, evolution and demolition of 5Pointz came from plaintiff Jonathan Cohen, one of the world's most accomplished aerosol artists. Wolkoff had designated Cohen as 5Pointz's *de facto* curator, appointing him to run the site and pick the works he thought were of merit: "I gave him permission, plain, Jonathan, you are in charge, bring whoever you think is right to come and display their work on my building." Tr. at 2025:4–8.

In addition to the artists, three experts testified for the plaintiffs. Renee Vara, a certified art appraiser, former head fine art expert at Chubb Insurance and art professor at New York University, testified to the quality and recognized stature of the works; Elizabeth Littlejohn, an art appraiser certified through the Appraisers Association of America, testified to their appraisal value; and Harriet Irgang Alden, the chief paintings conservator at Art Care NYC, testified as to the removability of each of the artworks from the 5 Pointz walls.

Plaintiffs also called two fact witnesses. Angelo Madrigale, Vice President and Director of Contemporary Art at Doyle New York, an auction house, wrote a letter upon which Vara relied in formulating her report. He testified to the artistic importance of the works. Lois Stavsky developed a 5Pointz exhibit for Google Arts and Culture and testified to the creation of that exhibit and why Google believed that 5Pointz was a culturally significant site.

Wolkoff was the defendants' principal witness. He testified to his rise from a poor childhood to become a successful real estate developer and explained his role in the advent and success of 5 Pointz. He was adamant that the artists knew that the day would come when the warehouse buildings bearing their works of art would come down and be replaced by high-rise residential condos.

Although the Court believes that Wolkoff in the main testified truthfully, he was a difficult witness. He frequently ignored or challenged instructions by the Court. He was argumentative and prone to tangents and non-responsive answers. Eliciting coherent testimony was a chore and was only achieved after the Court threatened to hold him in contempt. *See, e.g.*, Tr. at 2033:18–2034:2; 2036:19–2037:24; 2045:23–2047:6; 2087:22–2088:13; 2092:13–22.

In addition to Wolkoff, two experts testified for the defendants. Erin Thompson, a professor of art history at the City University of New York and practicing art lawyer, testified as to the issue of recognized stature, and Christopher Gaillard, a fine art appraiser with the art appraisal and acquisition firm Gurr Johns, testified as to the works' appraisal value.

The story of 5Pointz that follows comes primarily from the lips of Cohen and Wolkoff.

## III

### A. The Advent and Evolution of 5Pointz

What became 5Pointz originated as Phun Phactory in the early 1990s. The warehouses were largely dilapidated and the neighborhood was crime infested. There was no control over the artists who painted on the walls of the

buildings or the quality of their work, which was largely viewed by the public as nothing more than graffiti. This started to change in 2002 when Wolkoff put Cohen in charge. Cohen and several other artists also rented studio space in the warehouse buildings. Collectively, they worked to improve conditions. As Cohen explained:

> We took it upon ourselves to clean the loading dock . . . . The dumpsters were overflowing. We took it upon ourselves, we hired his employees, we paid for the lighting. We put motion sensors up so that when you came to the loading dock it was inviting. It actually drew you in as opposed to scaring you away.

*Id.* at 1448:20–1449:3.

Wolkoff recognized the merit of the art. As he acknowledged: "I liked it and they did more and more and I thought it was terrific. They were expressing themselves." *Id.* at 2082:4–5. And he approved of the job Cohen did in curating the art: "I have no feelings even today against Jonathan Cohen. I thought he was terrific handling my building . . . . Anything to do with art I left up to Jonathan. He had good taste in the artists that came there." *Id.* at 2086:13–17.

Until Wolkoff decided over a decade later that the economic climate was ripe to convert the site into luxury condos, he and Cohen had a copacetic relationship.

But nothing was ever reduced to writing and Wolkoff only verbally laid out three rules for what could be put on the walls: no pornography, no religious content, and nothing political. In his role, Cohen established a system of rules for both the creation and curation of the art, spending seven days a week without pay to bring 5Pointz to fruition.

Cohen oversaw the site, kept it clean and safe, allotted wall space, and explained the site's rules and norms to new artists. Over time, crime in the neighborhood dropped and the site became a major attraction drawing thousands of daily visitors, including busloads of tourists, school trips, and weddings. Movie, television, and music video producers came; it was used for the 2013 motion picture *Now You*

*See Me*, starring Jesse Eisenberg and Mark Ruffalo, and was the site of a notable tour for R & B singer Usher.

As the plaintiff Castillo explained, "street art became a new form," which "now has become an industry." Tr. at 202:6, 202:10. And 5Pointz became "this outdoor museum where kids can touch the wall, and TT you can't do that at a museum. You can't go and touch a Van Gogh or like a Mona Lisa." *Id.* at 202:2–5.

Wolkoff had nothing to do with day-today operations. Under Cohen's control, he witnessed his buildings emerge as a mecca for the world's largest collection of quality outdoor aerosol art.

**B. The Walls**

**1. Covering**

5Pointz was a site of creative destruction; most artworks had short lifespans and were repeatedly painted over by successive artists. The rules behind covering were important; as virtually every artist testified, "going over" someone else's piece without permission was a sign of disrespect that could cause conflicts. Going over another piece partially or sloppily was another insult. As Cohen explained:

> [Y]ou respect your wall, you clean up when you're done, you cover what you go over completely. If you do not cover what you went over, you do not last. That was rule number one. Respect in our game is everything, and if you don't have respect then you don't get respect.

Tr. at 1443:15–22. As a result, Cohen established an elaborate system of rules and norms governing how long pieces would remain and when a piece could be covered by a new artwork. As he testified:

> THE COURT: Let me ask you a question. Can anybody paint over your paintings without your permission, aside from vandalism?

> A: No. Everything was done with permission and there was a system that grew over the period of time I was there. You know, we perfect as we go along.

*Id.* at 1423:18–23.

**2. Short-Term Rotating Walls vs. Long-Standing Walls**

5Pointz was organized into short-term rotating walls and long-standing walls. The short-term walls would change on a daily or weekly basis. As Cohen explained: "There were allocated spaces that were for straight beginners that had no idea how to paint. And those, I would say you could utilize the space, but it more than likely will be gone tomorrow or the next day or whatever." *Id.* at 1441:18–22. "Short-term rotating walls, it was communicated up front so they'd know you could have several weeks or whatever." *Id.* at 1444:13–15.

On the other hand, pieces on long-standing walls were more permanent, although a high-quality piece could achieve permanence even if not initially placed on a longstanding wall; but an artist's reputation was not sufficient to secure long-standing status. As Cohen further explained:

> [T]he prime real estate that faces the train were the most sought after spots to paint and those went to more advanced writers. You've got to understand, as well, because you are an advanced writer doesn't mean that you are going to perform on an advanced level. You may just want to blow off steam one afternoon, but that doesn't mean your piece should last a long time. And you could be a beginner and do the performance of your lifetime and produce a piece that is so amazing that it's decided it will stay.

*Id.* at 1441:22–7.

While Cohen had the final say as to the duration of the pieces, he always spoke with the artists about their planned lifespan and eventual replacement. As he testified: "For long term productions, where people invested time and money, I would communicate with them. I would reach

out to them. In some instances, I would tell them to come back and actually egg them on to do something real better. As the bar got raised, everybody performed better." *Id.* at 1444:14–19.

In other words, 5Pointz operated not just as a creative space, but a competitive place. Artists would compete to outdo one another and earn prominent placement on a long-standing wall. In addition to the walls facing the passing 7 train, which were seen by millions of commuters, the artists prized the walls near the loading docks, which had the most foot traffic, and the walls inside the buildings, which were generally long-standing. While as many as 10,000 works were destroyed while Cohen was in charge, it was not anarchy. Most of the best works by the best artists achieved permanent or semi-permanent placements on the long-standing walls.

**C. The Planned Destruction**

Starting in 2011, rumors that Wolkoff had plans to shut down 5Pointz and turn it into luxury condos began to concern the artists. In May 2013, the rumors became reality: Cohen learned that Wolkoff had started to seek the requisite municipal approvals for his condos.

Hoping to save 5Pointz, Cohen filed an application with the City Landmark Preservation Commission to preserve the site as one of cultural significance. It was denied because the artistic work was of too recent origin. *See* Letter from NYC Landmarks Preservation Commission, August 20, 2013, ECF No. 31.

Cohen also sought funding to buy the property, which had been valued at $40 million. However, this fell through in October 2013 when Wolkoff obtained a necessary variance, instantly raising the property value to more than $200 million. The higher price was out of reach of Cohen's potential investors. Plaintiffs then initiated this litigation to enjoin Wolkoff from destroying 5Pointz.

### D. The Whitewashing

As soon as the Court denied the plaintiffs' application for preliminary injunction, Wolkoff directed the whitewashing of virtually all the artwork on the 5Pointz site with rollers, spray machines, and buckets of white paint.[7]

The whitewashing was inconsistent. Some works were completely covered in white paint. Others were only partially covered. Some were fully covered, but by such a thin layer of paint that the artwork was easily visible beneath the paint. What was consistent was that none of the covered works was salvageable. And plaintiffs were no longer allowed on the site, even to recover the scattered remnants of their ruined creations.

Since their works were effectively destroyed,[8] plaintiffs were relegated to seeking monetary relief under VARA.

## IV

### A. Temporary Works of Art

Defendants' overarching contention is that plaintiffs knew that the day would come when the buildings would be torn down and that, regardless, the nature of the work of an outdoor aerosol artist is ephemeral.[9] They argue,

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[7] Some other colors were sporadically used, including black and blue paint, but the vast majority of the whitewashing was done with white paint.

[8] The Court notes that one work, Richard Miller's *Monster II*, survived the whitewashing but was later destroyed by a backhoe. The plaintiffs did not have direct evidence of whitewashing for seven others because the works were inside a building to which they had no access after the whitewashing—Jonathan Cohen's *Character* and *Inside Wildstyle*, Luis Gomez's *Inside King Kong*, Richard Miller's *Monster I*, and Luis Lamboy's *World Traveler*, *Logo for Clothing Brand aka Monopoly Man*, and *Electric Fish*. However, several plaintiffs testified that they believed the inside works were destroyed in the whitewashing, and the Court credits the plaintiffs' testimony that they were not allowed onto the property to retrieve the works after the whitewash and were threatened with arrest if they tried.

[9] While Cohen acknowledged that he knew that Wolkoff intended to eventually tear down the buildings to make way for his new condos, other plaintiffs testified that they had no such knowledge. Regardless, even if the artists were allowed to waive their VARA rights orally (which they were not), none of the other artists ever spoke to Wolkoff.

therefore, that VARA should not afford plaintiffs protection for their temporary works.[10]

VARA does not directly address whether it protects temporary works. However, in the context of works on buildings, it is clear from 17 U.S.C. § 113(d) that temporary works are protected. Moreover, relevant case law conceptually supports this conclusion. In short, there is no legal support for the proposition that temporary works do not come within VARA's embrace.

First, § 113(d)(1) specifies that an unremovable work incorporated in a building is protected by VARA unless the artist waives his or her rights in a writing signed by both the artist and the building owner. If the building owner could orally inform the artist that the building is coming down someday, and thereby convert the work into an unprotected temporary work, the written consent provision would be rendered nugatory. As the House Judiciary Committee Report explains: "The purpose of [the written waiver] is to ensure that the author is made fully aware of the circumstances surrounding the installation and potential removal of the work and has nevertheless knowingly subjected the work to possible modifications that would otherwise be actionable under section106A." H.R. Rep. No. 101–514, at 21. And as Patry adds: "In light of this provision's purpose of ensuring that artists be made aware fully of the circumstances surrounding installation and potential destructive removal, it should be strictly construed." *Patry* § 16:33.

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As he acknowledged at trial: "I didn't know any of the artists. I only dealt with Jonathan Cohen." Tr. at 2023:16–17.

[10] Defendants also assert the affirmative defense of "abandonment." It is meritless since it only affects ownership of the work's copyright. *See Capitol Records, Inc. v. Naxos of America, Inc.*, 372 F.3d 471, 483 (2d Cir. 2004) (holding "abandonment" of *copyright* requires "(1) an intent by the *copyright holder* to surrender rights in the work; and (2) an overt act evidencing that intent." (emphasis added)). Defendants have not pointed to any overt act showing an intent to abandon ownership. Quite the opposite: The moment the artists learned of defendants' intent to destroy their works, they began legal proceedings to save them. This was the antithesis of abandonment.

Second, § 113(d)(2), specifying that artists are entitled to 90 days' written notice to allow them to salvage their removable works, contemplates that such works may be temporarily on the side of a building. Thus, VARA resolves the tension between the building owners' rights and the artists' rights through § 113(d), not by excluding temporary works from protection.

Of the limited available case law, *Board of Managers of Soho International Arts Condominium v. City of New York*, 2003 WL 21403333 (S.D.N.Y. June 17, 2003) perhaps best illustrates this point. There, an artist sought to prevent his work from being permanently removed from the wall of a condo under VARA. There was conflicting testimony as to whether the work was intended to be kept on the wall permanently or temporarily. Nonetheless, the Court, in denying summary judgment, held VARA only allowed the artist to remove the mural, not keep it in its place. The court rejected the artist's argument that removal was "tantamount to the Work's destruction" as "[n]owhere in the [dictionary] definition of 'remove' does the temporality of the act of removal arise." *Id.*, at *10. Therefore, it was "clear to the Court that what Congress intended in bifurcating § 113(d)'s protections was to separate removal situations based not on the temporality of the removal but on the consequences of the removal." *Id.*[11]

Thus, VARA draws no distinction between temporary and nontemporary works on the side of a building, particularly when all that makes a work temporary is the building owner's expressed intention to remove or destroy it.

[11] A key difference between *Board of Managers* and this litigation is that the *Board of Managers* artwork was installed before VARA was enacted. This meant that the § 113(d)(1) written waiver provision did not apply in that case, and if a jury would find that the work was unremovable, VARA would not protect it. However, any unremovable work at 5Pointz would be protected by VARA because Wolkoff failed to obtain a written waiver.

VARA protects such works; how it protects them is governed by the carefully crafted provisions of § 113(d) based on the removability of the works, not their permanence.[12]

Also supporting the conclusion that VARA applies to temporary works is 17 U.S.C. § 106A(c)(1), which provides that modifications that are "the result of the passage of time or the inherent nature of the materials" are not violations of VARA. This exception was applied in *Flack v. Friends of Queen Catherine Inc.*, 139 F.Supp.2d 526 (S.D.N.Y. 2001), where the court dismissed a VARA claim because the head of a statue was exposed to the elements, causing the clay to deteriorate, but there was no evidence that the defendant otherwise directly damaged the work. 139 F.Supp.2d at 534–35. The exception is not applicable here. The whitewashing was not caused by the "passage of time" or the "inherent nature of the materials"; it was caused by Wolkoff throwing paint on the works.

Thus, Congress chose to exclude protection for the passage of time and natural deterioration but not for other types of temporary works. Under the principle of statutory interpretation *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others), this choice lends support to the conclusion that there is no categorical exception for temporary works.

Moreover, the First Circuit has held that VARA protects unfinished works. *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 65 (1st Cir. 2010). An unfinished work is inherently in a temporary state since the ultimate goal is always to finish the work; thus, VARA protects the interim, unfinished work even though it is only temporarily in that form.[13]

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[12] Damages under VARA could, of course, vary depending on whether the works were permanent or temporary.

[13] Contrast *Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2003), which held that a poster created for a one-time event was not protected by VARA because it was advertising material, an express exception. Notably, the Court declined to adopt the district court's alternative reasoning, which would have held the work was not of recognized stature because it was made for a one-time event.

Analogy to traditional copyright law is also relevant. Under the Copyright Act—of which VARA is a part—a work is "'created' when it is fixed in a copy or phonorecord for the first time[.]" 17 U.S.C. § 101. And a work is "'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is *sufficiently permanent or stable to permit it to be perceived . . . for a period of more than transitory duration*." *Id.* (emphasis added). For copyright protection, therefore, fixation for even a short period will suffice.

Thus, in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), the Second Circuit held that copies of television programs were not capable of being perceived "for a period of more than transitory duration" when they existed in the defendant's data buffers for only 1.2 seconds. 536 F.3d at 129. However, the court suggested that a work would exist for "more than transitory duration" if it was embodied in the data buffers for "at least several minutes." *Id.* at 128. With no indication to the contrary, it is reasonable to assume that Congress intended to apply the same minimal fixation requirement to works of visual art under VARA. *Cf. Buchel*, 593 F.3d at 51 (applying § 101's fixation requirement to conclude that unfinished works are protected under VARA).

In sum, § 113(d) contemplates temporary works, § 106A(c) excludes only a narrow category of temporary works unrelated to this case, and analogous case law is consistent with the conclusion that temporary works are protected under VARA.[14]

**B. Works of Recognized Stature**

As the Court stated in *Cohen I*, the district court's decision in *Carter v. Helmsley–Spear, Inc.*, 861 F.Supp. 303 (S.D.N.Y. 1994) ("*Carter I*"), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995) ("*Carter II*") remains

[14] Common sense also supports this conclusion. Who would argue, for example, that if Picasso had painted *Guernica* on the walls of 5Pointz with the building owner's consent it would not be worthy of VARA protection?

the seminal case interpreting the phrase "recognized stature"—which is not defined in VARA—to require "a two-tiered showing: (1) that the visual art in question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society." 861 F.Supp. at 325.

The Second Circuit on appeal never had occasion to address the correctness of this formulation since, in reversing, it held that the work did not qualify for VARA protection because it was made for hire. *Carter II*, 71 F.3d at 85–89. But one circuit court did thereafter embrace and apply the district court's standard for evaluating whether a work of visual art is of "recognized stature."

As explained in *Cohen I*, the Seventh Circuit in *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999), noted that the *Carter I* test "may be more rigorous than Congress intended," *id.* at 612, but nonetheless affirmed the district court's grant of summary judgment and its award of damages for a sculpture that had been destroyed, under the *Carter I* test utilized by the district court. In doing so, it noted that "plaintiff offered no evidence of experts or others by deposition, affidavit or interrogatories," but nonetheless established the work's recognized stature via "certain newspaper and magazine articles, and various letters, including a letter from an art gallery director and a letter to the editor of *The Indianapolis News*, all in support of the sculpture." *Id.*

The circuit court's decision in *Martin* appropriately recognizes, therefore, that expert testimony is not the *sine qua non* for establishing that a work of visual art is of recognized stature, and indeed the district court in *Carter I* cautioned that plaintiffs need "not inevitably . . . call expert witnesses to testify before the trier of fact." 861 F.Supp. at 325. This is in keeping with Congress's expansive recognition of the moral rights of attribution and integrity of the visual artist and the consequent need to create "a climate of artistic worth and honor that encourages the author in the arduous act of creation." *Carter II*, 71 F.3d at 83 (quoting H.R. Rep. No. 101–514, at 5). As the Second Circuit

noted in *Carter II*, therefore, the courts "should use common sense and generally accepted standards of the artistic community in determining whether a particular work" is a work of visual art since "[a]rtists may work in a variety of media, and use any number of materials in creating their works." *Id.*

The same common sense should be utilized in assessing whether the visual work is of recognized stature since "[b]y setting the standard too high, courts risk the destruction of the unrecognized masterwork; by setting it too low, courts risk alienating those . . . whose legitimate property interests are curtailed." Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev 1935, 1968 (2000). Thus, as one court has held, even inferred recognition from a successful career can be considered in determining whether a visual artist's work has achieved recognized stature. *See Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525, 531, 53 Cal.Rptr.2d 24 (1996).

In the present case, the Court need not dwell on the nuances of the appropriate evidentiary standard since the plaintiffs adduced such a plethora of exhibits and credible testimony, including the testimony of a highly regarded expert, that even under the most restrictive of evidentiary standards almost all of the plaintiffs' works easily qualify as works of recognized stature.

To begin, that Jonathan Cohen selected the handful of works from the thousands at 5Pointz for permanence and prominence on long-standing walls is powerful, and arguably singular, testament to their recognized stature. They were walls that spanned multiple stories, walls visible to millions on the passing trains; walls near the entrances. Many of these works had survived for years. As 5Pointz's curator, Cohen considered them outstanding examples of the aerosol craft. And as Wolkoff himself acknowledged, Cohen was qualified to assess the artistic merits of the works since "he had good taste in the artists that came there." Tr. at 2086:17. They were 5Pointz's jewels.

Wolkoff's faith in Cohen was not unwarranted. The multitude of artists painting on the walls marched to Cohen's beat. He called the shots and had the respect of his artistic community. That it was he who chose the works that are worthy of VARA protection in this litigation speaks volumes to their recognized stature.

But there is so much more. All of the plaintiffs had also achieved artistic recognition outside of 5Pointz. And in their Folios they collectively presented over a thousand exhibits in support of their claims that their works at 5Pointz had achieved recognized stature. The Folios covered the highlights of their careers, as well as evidence of the placement of their works at 5Pointz in films, television, newspaper articles, blogs, and online videos, in addition to social media buzz.

And plaintiffs' highly qualified expert, Vara, provided detailed findings as to the skill and craftsmanship of each of the 49 works, the importance of 5Pointz as a mecca for aerosol art, the academic and professional interest of the art world in the works, and her professional opinion that they were all of recognized stature. The Court finds Vara highly credible and affords great weight to her testimony, although, as explained *infra*, it finds that four of the 49 works do not qualify as having achieved recognized stature.

Defendants' expert Thompson's testimony had two fatal flaws: First, she used an unduly restrictive interpretation of recognized stature that was more akin to a masterpiece standard. Second, she relied heavily on her inability to find the works on social media or in academic databases; but, as effectively drawn out by plaintiffs' counsel on cross-examination, her search methodology was unduly restrictive and almost designed to avoid finding results. Tellingly, her searches did not even uncover many of plaintiffs' social media exhibits, demonstrating the weakness of her approach. Her final conclusion that none of the works had achieved recognized stature defies credibility. If not a single one of these works meet the recognized stature standard, it is hard to imagine works that would, short of a Caravaggio or Rembrandt.

### 1. Recognized Stature of Individual Artworks

The Court now turns to making the requisite individualized findings as to each of the 49 works:

#### a. The Long-Standing Works

The Court finds that 37 works on long-standing walls all achieved recognized stature by virtue of their selection by Cohen for these highly coveted spaces, as reinforced by the supportive evidence in the plaintiffs' Folios and Vara's compelling expert testimony as to their artistic merit and embrace by the artistic community. They are:

- Jonathan Cohen's *Eleanor RIP*, *7–Angle Time Lapse*, *Patience*, *Character*, *Clown with Bulbs*, *Meres Outdoor Wildstyle*, and *Inside Wildstyle*
- Sandra Fabara's *Green Mother Earth*
- Luis Lamboy's *Blue Jay Wall*, *Inside 4th Floor*, *World Traveler*, *Logo for Clothing Brand aka Monopoly Man*, and *Electric Fish*
- Esteban Del Valle's *Beauty and the Beast*
- Christian Cortes's *Skulls Cluster*, *Jackson Avenue Skulls*, *Up High Blue Skulls*, and *Up High Orange Skulls*
- Carlos Game's *Geisha*, *Marilyn*, *Red*, *Denim Girl*, and *Black and White 5Pointz Girl*
- James Rocco's *Bull Face*, *Lord Paz*, and *Face on Jackson*
- Steven Lew's *Crazy Monsters*
- Nicholai Khan's *Dos Equis Man*
- James Cochran's *Subway Rider*
- Luis Gomez's *Inside King Kong*
- Richard Miller's *Monster I*
- Jonathan Cohen and Maria Castillo's *Love Girl and Burner*
- Jonathan Cohen and Akiko Miyakami's *Underwater Fantasy*

- William Tramontozzi, Jr. and James Rocco's *Jimi Hendrix Tribute*
- Akiko Miyakami and Carlos Game's *Japanese Fantasy*
- Bienbenido Guerra and Carlo Nieva's *Return of New York*
- Jonathan Cohen, Luis Lamboy, and Thomas Lucero's *Angry Orchard*

**b. Other Works**

Ten works on the walls were of recent origin; two were not on walls at all. For these 12 works, the Court "adopt[s] in whole" the jurors' findings. *Ragin*, 6 F.3d at 907. As representatives of the community and a "cross-section of society," *Carter*, 861 F.Supp. at 325, their input as an advisory jury was of value to the Court, "particularly . . . in cases [such as this one] involving community-based standards." *NAACP v. Acusport Corp.*, 226 F.Supp.2d at 398.

The jury found recognized stature for Rodrigo Henter de Rezende's *Fighting Tree*, Thomas Lucero's *Black Creature*, Akiko Miyakami's *Manga Koi*, Francisco Fernandez's *Dream of Oil*, Nicholai Khan's *Orange Clockwork*, Kenji Takabayashi's *Starry Night*, Richard Miller's *Monster II*, and Jonathan Cohen and Akiko Miyakami's *Save 5Pointz*. These eight works garnered third party attention, social media presence, and/or promises from Cohen that they would be long-standing.

The jury did not find recognized stature for Jonathan Cohen's *Drunken Bulbs*, Akiko Miyakami's *Japanese Irish Girl*, Carlos Game's *Faces on Hut*, and Jonathan Cohen and Rodrigo Henter de Rezende's *Halloween Pumpkins*.

*Drunken Bulbs* and *Japanese Irish Girl* were gifts to the Shannon Pot Bar.[15] They were not part of the curated 5Pointz collection. Furthermore, neither attracted significant third-party attention or social media buzz during their short life spans.

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[15] Though unclear from the testimony of Miyakami and Cohen, this bar appears to have been on the 5Pointz site.

*Faces on Hut* was not on a 5Pointz wall; it was on a tin shack near the loading dock. As its creator, Carlos Game testified: "[N]obody wanted to paint on it because it was a tin shack, you know, and it was rusted out . . . ." Tr. at 794:12–13. Game also did not adduce any social media coverage or commentary regarding the work.

Halloween Pumpkins was created in very late October 2013, less than a month before the whitewash, and did not achieve any third party recognition. Moreover, because it was Halloween-themed, it was unlikely to have survived the holiday season.

In sum, the Court finds 45 of the 49 works achieved recognized stature. *Drunken Bulbs*, *Japanese Irish Girl*, *Faces on Hut*, and *Halloween Pumpkins* did not.

### C. Mutilation and Prejudice to Honor or Reputation

As noted, even if a work is not of "recognized stature," VARA also protects works from "intentional distortion, mutilation, or other modification . . . [that] would be prejudicial to [the artist's] honor or reputation." 17 U.S.C. § 106A(a)(3)(A). "[I]n determining whether 'intentional distortion, mutilation, or modification' of [a] Work would be 'prejudicial to [plaintiffs'] honor or reputation,' [a court should] consider whether such alteration would cause injury or damage to plaintiffs' good name, public esteem, or reputation in the artistic community." *Carter I*, 861 F.Supp. at 323.

This concept is inherently murky. *Carter I* held that an artist's honor or reputation may be harmed if the artwork "present[ed] to viewers an artistic vision materially different from that intended by [the artist]." *Id.* In *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Buchel*, 593 F.3d 38 (1st Cir. 2010), the circuit court held that changes made to an unfinished art installation by a museum against the artist's wishes were sufficient to raise a question of fact as to whether the artist's honor or reputation were injured. The court focused on evidence that newspapers covering the exhibit after the changes had a negative opinion of the altered work.

Here, the question is academic in respect to the 45 works of recognized stature since the Court is not awarding any actual damages, as explained *infra*, and only one statutory damages award may be awarded per artwork "for all infringements involved in the action." 17 U.S.C. § 504(c)(1). Thus, whether defendants are additionally liable under this second prong is not of any practical consequence.

Of the remaining four, *Japanese Irish Girl* was destroyed and therefore not "distorted, mutilated, or otherwise modified." *Faces on Hut* was not destroyed until the demolition of the building and apparently survived the whitewash. Therefore, it too was not "distorted, mutilated, or otherwise modified."

*Drunken Bulbs* was only partially whitewashed; the outlines of the bulbs are dimly visible underneath the white paint. However, these vague outlines are unrecognizable as Cohen's original work. Nobody looking at the work would know that it was his. Therefore, the Court holds this distortion did not prejudice his honor or reputation.

*Halloween Pumpkins* was almost entirely covered in black paint, but Cohen's "wild style" contribution to the painting was apparently left untouched. However, Cohen testified that he was able to recover this portion of the work, and once the piece was removed, the final result was a black wall; the original artwork was not visible at all under the black paint, except for one purple cloud at the top of the wall, a minor detail in the painting. Therefore, the Court holds this distortion also did not prejudice the artists' honor or reputation.

Having determined that the defendants have violated plaintiffs' rights by intentionally destroying their works of "recognized stature," the Court now turns to damages.

## V

### A. Actual Damages

As for actual damages,[16] the parties presented dueling experts as to the valuation of the destroyed works. Plaintiffs' expert, Elizabeth Littlejohn, testified that the works were worth from $50,000 to $80,000 per artwork. She arrived at this number through a complicated formula that began with the sale price of a Banksy[17] piece and awarded each artwork a percentage of that value based on the artist's reputation, the merit of the work, and other factors.

The Court finds this methodology flawed. First, it does not account for the removal costs of the works, which plaintiffs' own removal expert, Alden, testified could run in the hundreds of thousands of dollars. Second, there is no evidence that these artists have ever achieved a fraction of Banksy's sales history; most testified that they had never sold a work for more than a few thousand dollars. Third, Littlejohn's method did not account for the unique problems in selling artwork that is the size of a wall of a building.

The Court finds defendants' appraisal expert, Christopher Gaillard, credible. Gaillard testified that because of the unique challenges and costs of selling those artworks at 5Pointz which were the size of a building wall, they did not have a provable market value. The Court agrees and

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[16] In addition to actual damages, 17 U.S.C. § 504(a)(1) awards "any additional profits of the infringer" to the winning plaintiff. However, while the plaintiffs established that Wolkoff profited indirectly from the destruction of their artwork by building a profitable luxury condominium, they provided no evidence to establish the precise amount of these profits. Nor have plaintiffs suggested a fair way to apportion the luxury condominium's profits between those caused by the legal development of the site as a business venture and the illegal destruction of the artwork to clear the site for construction. Therefore, the Court finds the plaintiffs have not met their burden to establish a basis to award profits. The gain realized by Wolkoff and his companies is best addressed in calculating an award under the statutory damages factors, see *infra*.

[17] Banksy is widely considered the world's most prominent aerosol artist.

holds that plaintiffs failed to establish a reliable market value for their works.

Therefore, the Court does not award actual damages.[18]

**B. Statutory Damages**

The Copyright Act affords the trial court "wide discretion . . . in setting the amount of statutory damages." *Fitzgerald Pub. Co., Inc. v. Baylor Pub. Co., Inc.*, 807 F.2d 1110, 1116 (2d Cir. 1986). Statutory damages are "not fixed or readily calculable from a fixed formula." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352–53, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998) (citation omitted). "Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233, 73 S.Ct. 222, 97 L.Ed. 276 (1952). There need not be a correlation between statutory damages and actual damages. *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 127 (2d Cir. 2014). "To suggest otherwise is to ignore the various other factors a court may consider and the purposes of statutory damages in the willful infringement context." *Id.* "Statutory damages exist in part because of the difficulties in proving—and providing compensation for—actual harm in copyright infringement actions." *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F.Supp.2d 455, 460 (D. Md. 2004).

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[18] Plaintiffs contend that they are entitled to damages for emotional distress. Under traditional copyright law, plaintiffs cannot recover such damages. *See Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) ("[A]uthors cannot seek emotional damages under the Copyright Act, because such damages are unrelated to the value and marketability of their works."); *Kelley v. Universal Music Group*, 2016 WL 5720766, at *2 (S.D.N.Y. Sept. 29, 2016) ("Because emotional distress damages are not compensable under the Copyright Act, this claim must also be dismissed."). Since VARA provides damages under "the same standards that the courts presently use" under traditional copyright law, H.R. Rep. No. 101–514, at 21–22 (1990), emotional damages are not recoverable.

As such, statutory damages are particularly appropriate "when no actual damages are proven or they are difficult to calculate." *Warner Bros. Inc. v. Dae Rim Trading*, Inc., 877 F.2d 1120, 1126 (2d Cir. 1989). They are "not meant to be merely compensatory or restitutionary. The statutory award is also meant 'to discourage wrongful conduct.'" *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 113 (2d Cir. 2001) (rejecting defendant's argument that statutory damages award should be overturned because it "bears little relationship" to actual damages) (citation omitted).

As previously explained, the factfinder may award between $750 and $30,000 per work, unless the infringement was committed willfully; if so, the award may be as high as $150,000 per work. Review of a statutory damages award made after a finding of willfulness "is even more deferential than abuse of discretion." *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.*, 74 F.3d 488, 496 (4th Cir. 1996) (citing *Douglas v. Cunningham*, 294 U.S. 207, 210, 55 S.Ct. 365, 79 L.Ed. 862 (1935)). "Within [the statutory] limitations the court's discretion and sense of justice are controlling . . . ." *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 34 (2d Cir. 1990) (quoting *L.A. Westermann v. Dispatch Printing Co.*, 249 U.S. 100, 106, 39 S.Ct. 194, 63 L.Ed. 499 (1919)).

**1. Willfulness**

"A copyright holder seeking to prove that a copier's infringement was willful must show that the infringer 'had knowledge that its conduct represented infringement or . . . recklessly disregarded the possibility.'" *Bryant v. Media Right Prods.*, 603 F.3d 135, 143 (2d Cir. 2010) (quoting *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1382 (2d Cir. 1993)). "This knowledge may be 'actual or constructive.'" N.*A.S. Import, Corp. v. Chenson Enters.*, Inc., 968 F.2d 250, 252 (2d Cir. 1992). "In other words, it need not be proven directly but may be inferred from the defendant's conduct." *Id.*

The jury found that in each case Wolkoff acted willfully. The Court could not agree more. Wolkoff knew from the

moment the lawsuit was initiated that the artists were pressing their VARA claims. He admitted as much at trial:

> Q: And you were aware that the artists were trying to apply under the Visual Artists Rights Act?
>
> A: Yes.
>
> . . .
>
> THE COURT: You heard about VARA at that time?
>
> A: Yes.
>
> THE COURT: You have a generalized view—
>
> A: At that time, yes.
>
> . . .
>
> Q: And you had hired Mr. Ebert's law firm at the time; correct?
>
> A: Yes.
>
> Q: You had a general counsel—an in-house lawyer advising you on legal matters; correct?
>
> A: Yes.

Tr. at 2016:24–2017:22.

As previously explained, under VARA, Wolkoff could have given the plaintiffs 90 days' notice to allow them the opportunity to salvage their works. And indeed, plaintiffs' expert conservator, Alden, convincingly testified that curation techniques had evolved to the point where removal of works of art from the wall of a building was feasible and had been done. As an example, she referenced the Berlin Wall, from which hundreds of works of graffiti on the wall have been preserved and sold, auctioned, or given as gifts, including five works which were successfully transported to New York City. Alden also testified that she had personally successfully removed a mural from a building.

And in respect to the plaintiffs' works at 5Pointz, Alden explained that many could have been totally or partially removed by the artists, at little cost, because the works were on "siding or plywood or sheetrock" or they "incorporated doors or windows from the building [which] could

have been easily removed," Tr. at 1971:23–1972:4; and many others could be removed by a conservator and contractors. *See* Exhibit 1270 (identifying 12 "Works for Which Artists' Removal Was Possible"; 9 "Works Which Artists Were Able to Partially Remove," and 28 "Works Which Could Only Have Been Removed by Conservator and Contractors").[19]

But Wolkoff could care less. As he callously testified:

> I decided—I alone decided to hire people to whitewash[ ] it in one shot instead of *waiting for three months* and them going to do something irrational again and getting arrested. I will go and end it and whitewash it. I decided to do that. It was pretty much a spur-of-the-moment thing.

Tr. at 2059:1–6 (emphasis added).

Wolkoff's reference to the artists doing "something irrational again and getting arrested" is fanciful and unfounded. Plainly, the evidence does not support the notion that he cared much for what was best for the artists. After the whitewash, he refused to let them onto his property to recover what had survived and even attempted to have them arrested when they tried to do so.

And his claim that he was worried that the plaintiffs may do something reckless and illegal is also belied by the evidence. The plaintiffs operated within the law in attempting to protect their works: They sought legal advice, filed a claim with the Landmark Preservation Commission, sought to generate public pressure to preserve the site, raised money, and filed this lawsuit. Wolkoff's only justification for his concern that the plaintiffs may attempt to break the law to preserve their work is that he heard non-

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[19] It would logically seem that if Wolkoff did give the 90 days' notice and none of the works were removed by the artists, he would have the burden of proving which works were removable in order to avoid liability for their destruction. If that were to have happened, Alden would have been a good witness for him. However, since the notice was not given, Wolkoff was liable under VARA for the destruction of all the works of recognized stature.

specific "rumblings." *Id.* at 2042:5. But he could not identify any particular source of the rumblings, nor had he ever personally had a problem with the artists:

> Q: So this information that you received that the artists could be emotional is from someone you cannot identify; correct?
>
> A: Yes.
>
> Q: The artists were never violent; correct?
>
> A: Correct.
>
> Q: They always followed the law when then were on your property; correct?
>
> A: Yes.
>
> Q: You have never had any problems with the artists; right?
>
> A: Absolutely correct.

Tr. at 2047:13–23.

As Cohen confirmed: "I followed the rules from day one. I went by my lawyer and he did not." *Id.* at 1464:2–3.

Wolkoff's recalcitrant behavior was consistent with the manner by which he testified in court. He was bent on doing it his way, and just as he ignored the artists' rights he also ignored the many efforts the Court painstakingly made to try to have him responsively answer the questions posed to him.

From his testimony, the only logical inference that the Court could draw from Wolkoff's precipitous conduct as soon as the Court denied the artists' preliminary injunction application was that it was an act of pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art. This was the epitome of willfulness.[20]

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[20] It may also well be that Wolkoff wanted to strike "while the iron was hot" and was willing to run the risk of being held liable for substantial statutory damages rather than to jeopardize his multimillion

It remains for the Court to fix the amount of statutory damages.

### 2. The Statutory Factors

"When determining the amount of statutory damages to award for copyright infringement, courts consider: (1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties." *Bryant*, 603 F.3d at 144.[21]

Wolkoff rings the bell on each relevant factor.

#### a. The Infringer's State of Mind

Because Wolkoff acted willfully in destroying the works of art, this factor weighs in favor of a high statutory damages award. As noted, Wolkoff's two alleged justifications for the whitewash—that it would be better for the plaintiffs to lose their works quickly, and that he was concerned the plaintiffs might do something reckless and illegal in an attempt to save the works—are implausible.

The whitewash did not end the conflict in one go; the effects lingered for almost a year. The sloppy, half-hearted nature of the whitewashing left the works easily visible under thin layers of cheap, white paint, reminding the plaintiffs on a daily basis what had happened. The mutilated works were visible by millions of people on the passing 7

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dollar luxury condo project. Indeed, with a fully developed record, permanent injunctive relief might have been available under the literal reading of VARA. Such behavior would be equally willful.

[21] The fifth factor does not fit this case. It is designed for traditional copyright cases where a defendant is liable for selling infringing material and the plaintiff's damages proof requires evidence of defendant's sales that can only be provided by defendant. *See Curet–Velazquez v. ACEMLA de Puerto Rico, Inc.*, 656 F.3d 47, 59 (1st Cir. 2011) (upholding maximum statutory damages award because defendants "did not provide comprehensive and accurate [accounting] reports" showing how they profited by selling plaintiff's work). Here, defendants destroyed, rather than sold, plaintiffs' works, so this factor is inapplicable, and the Court will not consider it.

train. One plaintiff, Miyakami, said that upon seeing her characters mutilated in that manner, it "felt like [she] was raped." Tr. at 1306:24–25. It is simply untenable that a rational person could view the whitewashing as being in the best interest of the artists.

**b. The Expenses Saved, and Profits Earned, by the Infringer**

This factor is not a clean fit for VARA since, unlike a traditional copyright infringement case, Wolkoff did not sell the plaintiffs' art; hence, there were no direct profits. However, he indirectly profited when the value of the site increased from $40 million to $200 million as soon as the variance was obtained. Destroying 5Pointz allowed Wolkoff to realize this gain. He also charged licensing fees to film at the site that netted him hundreds of thousands of dollars. Because Wolkoff realized significant profits by violating VARA, this factor cuts in favor of a high statutory damages award.

**c. Revenue Lost by the Copyright Holder**

While the plaintiffs were never able to place a dollar figure on how the whitewash of 5Pointz impacted their careers, it often had a negative effect. As plaintiff Takabayashi testified: "I would actually have clients . . . come by and observe the work to get an idea of what they would be getting if I was going to execute a mural on their property . . . . There were possibilities—there was business that I probably lost because of the fact that the artwork was eliminated." Tr. at 315:23–316:4. And plaintiff Del Valle testified: "It definitely took away a lot of opportunities that I would have had. I was consistently getting contacted about opportunities . . . all coming from me building my career from [5Pointz]." *Id.* at 131:15–22.

Furthermore, as Cohen testified, the salvageable artwork at 5Pointz "could have adorned a museum, a full wing of a museum . . . . I don't think you guys really get a full idea of the picture of this building and its property . . . . It was eight stories tall. We could have filled a wing, if not more, of a museum." *Id.* at 1466:18–23.

The value of 5Pointz to the artists' careers was significant, and its loss, though difficult to quantify, precluded future opportunities and acclaim. Therefore, this factor also supports a significant statutory damages award.

**d. The Deterrent Effect on the Infringer and Third Parties**

This is perhaps the most important factor in this case. Without a significant statutory damages award, the preservative goals of VARA cannot be met. If potential infringers believe that they can violate VARA at will and escape liability because plaintiffs are not able to provide a reliable financial valuation for their works, VARA will have no teeth. It will simply be cost-effective for infringers to violate the statute. This would not further its preservative goals.

Wolkoff has been singularly unrepentant. He was given multiple opportunities to admit the whitewashing was a mistake, show remorse, or suggest he would do things differently if he had another chance. He denied them all:

> Q: Let me ask you a hypothetical question. Let's go back in time.
>
> A: Yes.
>
> Q: Would you have done it again?
>
> A: Yes.

Tr. 2052:25–2053:4.

> A: But that was the decision I made. I would make the same decision today if that happened today.

*Id.* at 2056:2–3.

Thus, Wolkoff remains undeterred, and unrepentant that his thoughtless act violated the law and had a devastating impact on people he claims he was trying to help. This factor could not cut more strongly in favor of a high statutory damages award.

### e. The Conduct and Attitude of the Parties

The Court has discussed at length the problematic conduct of Wolkoff during the whitewashing and on the witness stand. Needless to say, he has not helped his case. On the other hand, the plaintiffs have conducted themselves with dignity, maturity, respect, and at all times within the law. Therefore, this factor also cuts heavily in favor of a high statutory damages award.

### 3. The Statutory Damages Award

Collectively, all five relevant factors support the maximum award of statutory damages. Therefore, the Court awards $150,000 for each of the 45 works, for a total statutory damages award of $6,750,000.

If not for Wolkoff's insolence, these damages would not have been assessed. If he did not destroy 5Pointz until he received his permits and demolished it 10 months later, the Court would not have found that he had acted willfully. Given the degree of difficulty in proving actual damages, a modest amount of statutory damages would probably have been more in order.[22]

The shame of it all is that since 5Pointz was a prominent tourist attraction the public would undoubtedly have thronged to say its goodbyes during those 10 months and gaze at the formidable works of aerosol art for the last time. It would have been a wonderful tribute for the artists that they richly deserved.

## CONCLUSION

Judgment will be entered for each individual plaintiff in the following amounts:[23]

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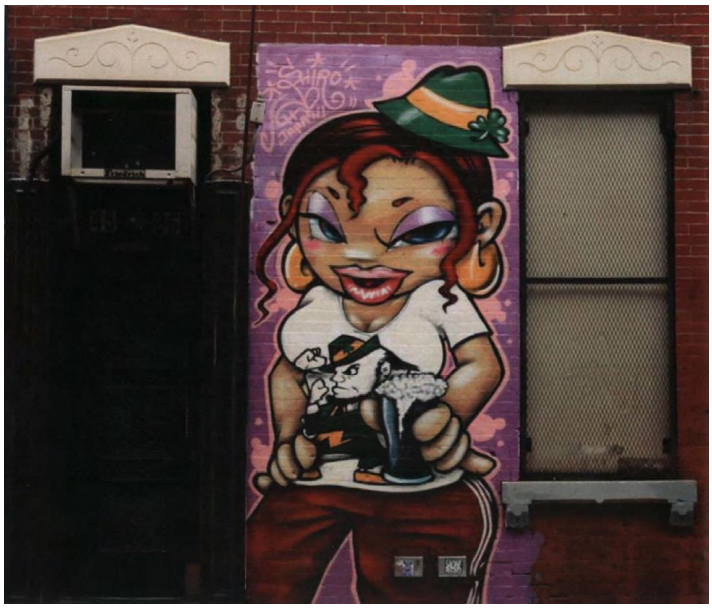
[22] Of course, all this could have been easily avoided with a written waiver of the artists' VARA rights up front, as § 113(d) expressly contemplates.

[23] While § 504(c)(1) requires the plaintiffs to elect statutory damages in lieu of actual damages "before final judgment is rendered," the Court will deem that the plaintiffs have chosen to accept these statutory damages rather than no damages at all.

| **Artist** | **Total Award** |
|---|---|
| Jonathan Cohen | $1,325,000.00 |
| Sandra Fabara | $150,000.00 |
| Luis Lamboy | $800,000.00 |
| Esteban Del Valle | $150,000.00 |
| Rodrigo Henter de Rezende | $150,000.00 |
| Thomas Lucero | $200,000.00 |
| Akiko Miyakami | $375,000.00 |
| Christian Cortes | $600,000.00 |
| Carlos Game | $825,000.00 |
| James Rocco | $525,000.00 |
| Steven Lew | $150,000.00 |
| Francisco Fernandez | $150,000.00 |
| Nicholai Khan | $300,000.00 |
| James Cochran | $150,000.00 |
| Luis Gomez | $150,000.00 |
| Richard Miller | $300,000.00 |
| Kenji Takabayashi | $150,000.00 |
| Maria Castillo | $75,000.00 |
| William Tramontozzi | $75,000.00 |
| Carlo Nieva | $75,000.00 |
| Bienbenido Guerra | $75,000.00 |
| Total | $6,750,000.00 |

**SO ORDERED.**

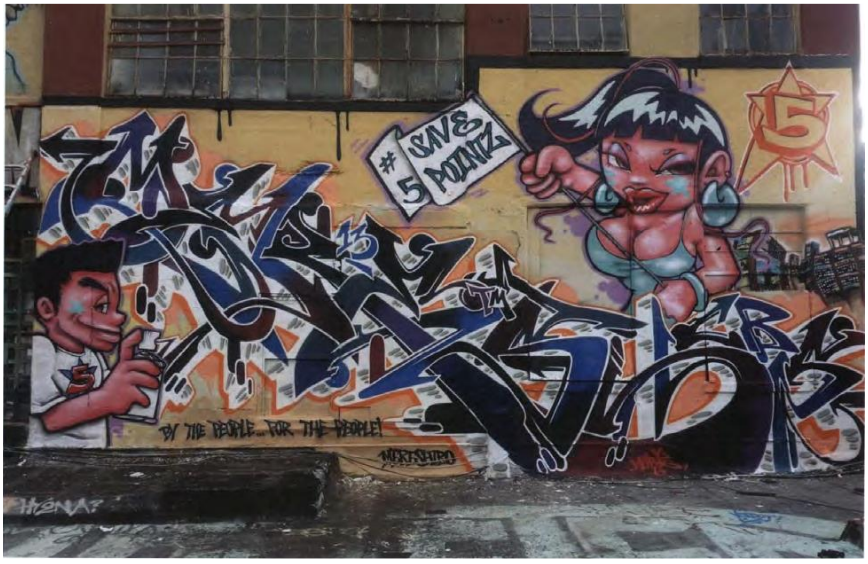
## APPENDIX



Akiko Miyakami – *Japanese Irish Girl*

Akiko Miyakami – *Manga Koi*

Akiko Miyakami and Carlos Games – *Japanese Fantasy*

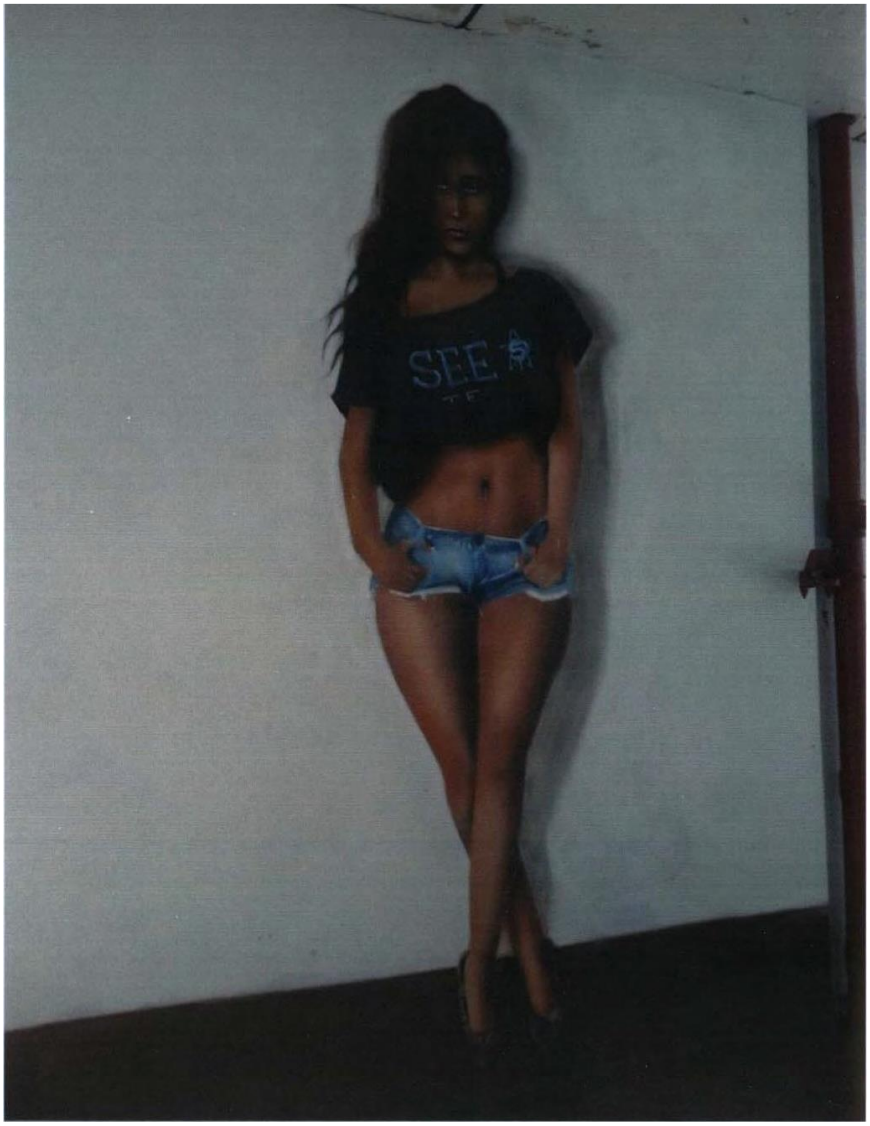



Akiko Miyakami and Jonathan Cohen – *Save 5Pointz*

Akiko Miyakami and Jonathan Cohen – *Underwater Fantasy*

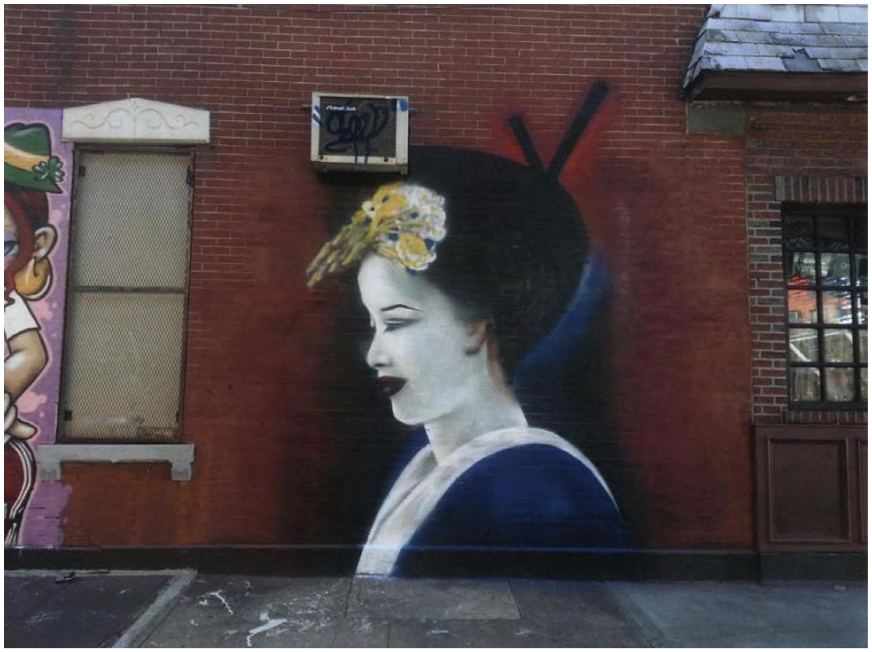
Bienbendio Guerra and Carlo Nieva – *Return of New York*


Carlos Game – *Black and White 5Pointz Girl*



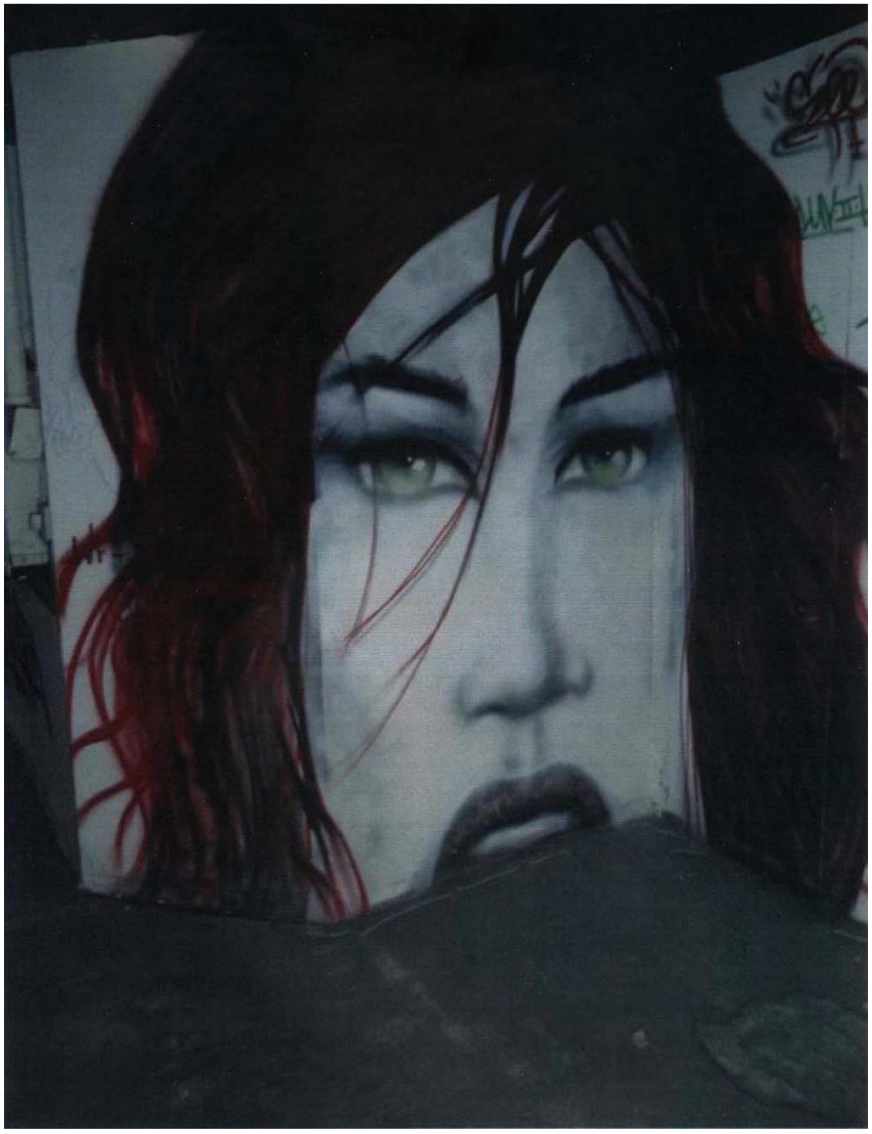

Carlos Game – *Denim Girl*

Carlos Game – *Faces on Hut*



Carlos Game - *Geisha*

Carlos Game - *Marilyn*



Carlos Game – *Red*


Christian Cortes – *Jackson Avenue Skulls*

Christian Cortes – *Skulls Cluster*

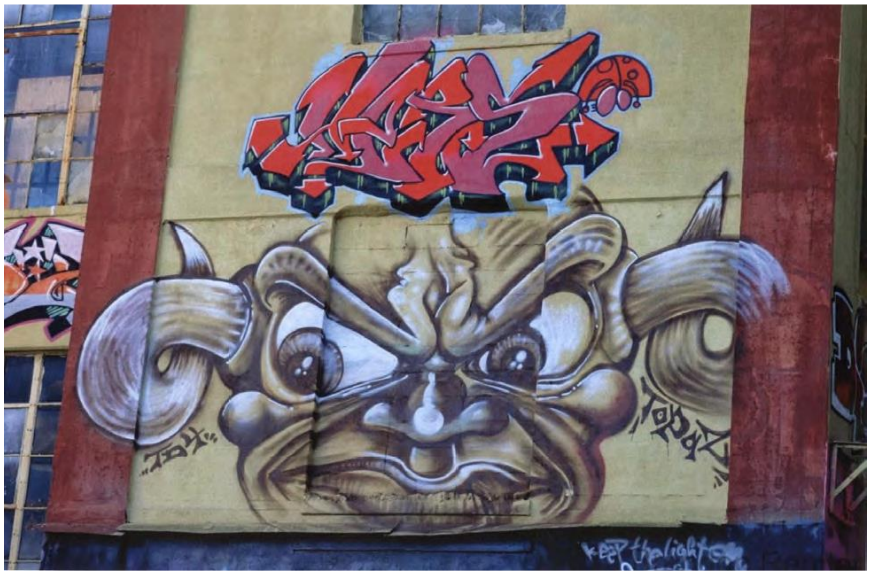
Christian Cortes – *Up High Orange Skulls*

Christian Cortes – *Up High Skulls*


Esteban Del Valle – *Beauty and the Beast*


Francisco Fernandez – *Dream of Oil*

James Cochran – *Subway Rider*



James Rocco – *Bull Face*


James Rocco – *Face on Jackson*

James Rocco – *Lord Paz*

Jonathan Cohen – *7-Angle Illusion*

Jonathan Cohen - *Character*

Jonathan Cohen – *Clown with Bulbs*

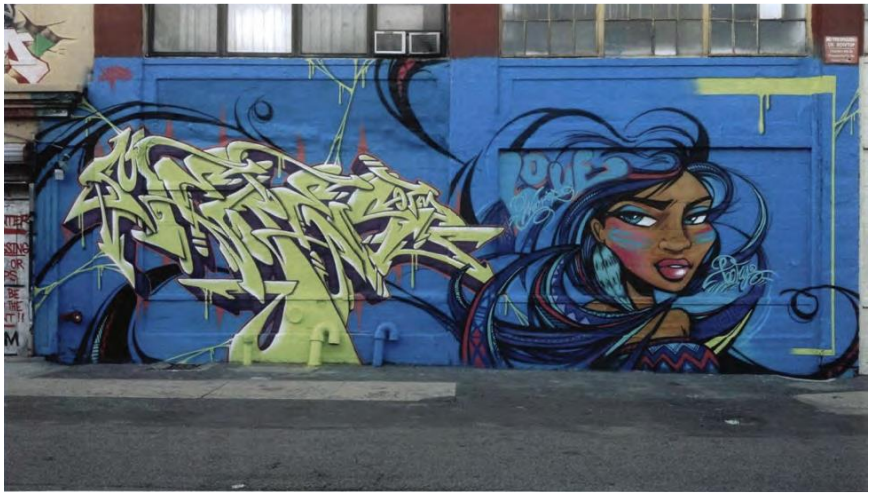
Jonathan Cohen – *Drunken Bulbs*

Jonathan Cohen – *Eleanor RIP*

Jonathan Cohen - *Inside Wildstyle*

Jonathan Cohen – *Outdoor Wildstyle*


Jonathan Cohen – *Patience*



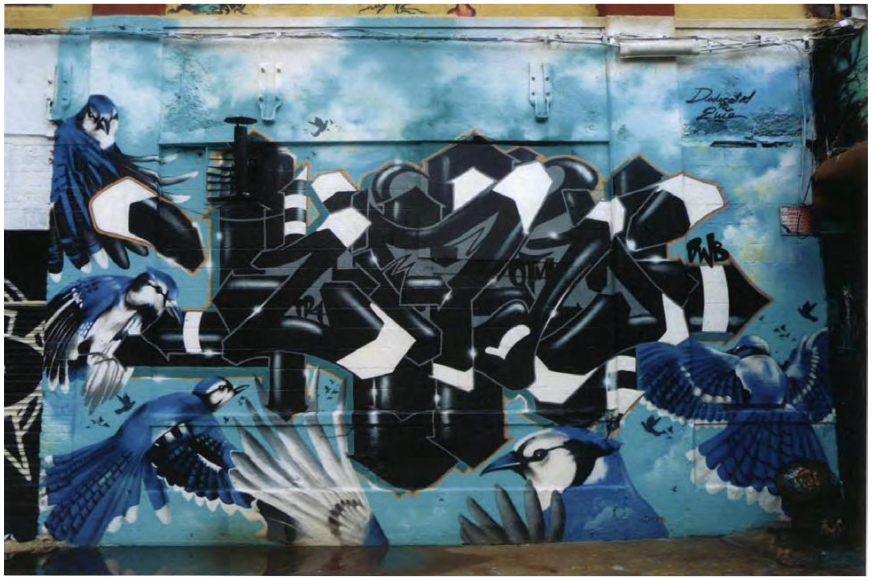
Jonathan Cohen and Maria Castillo – *Burner and Love Girl*

Jonathan Cohen and Rodrigo Henter de Rezende – *Halloween Pumpkins*

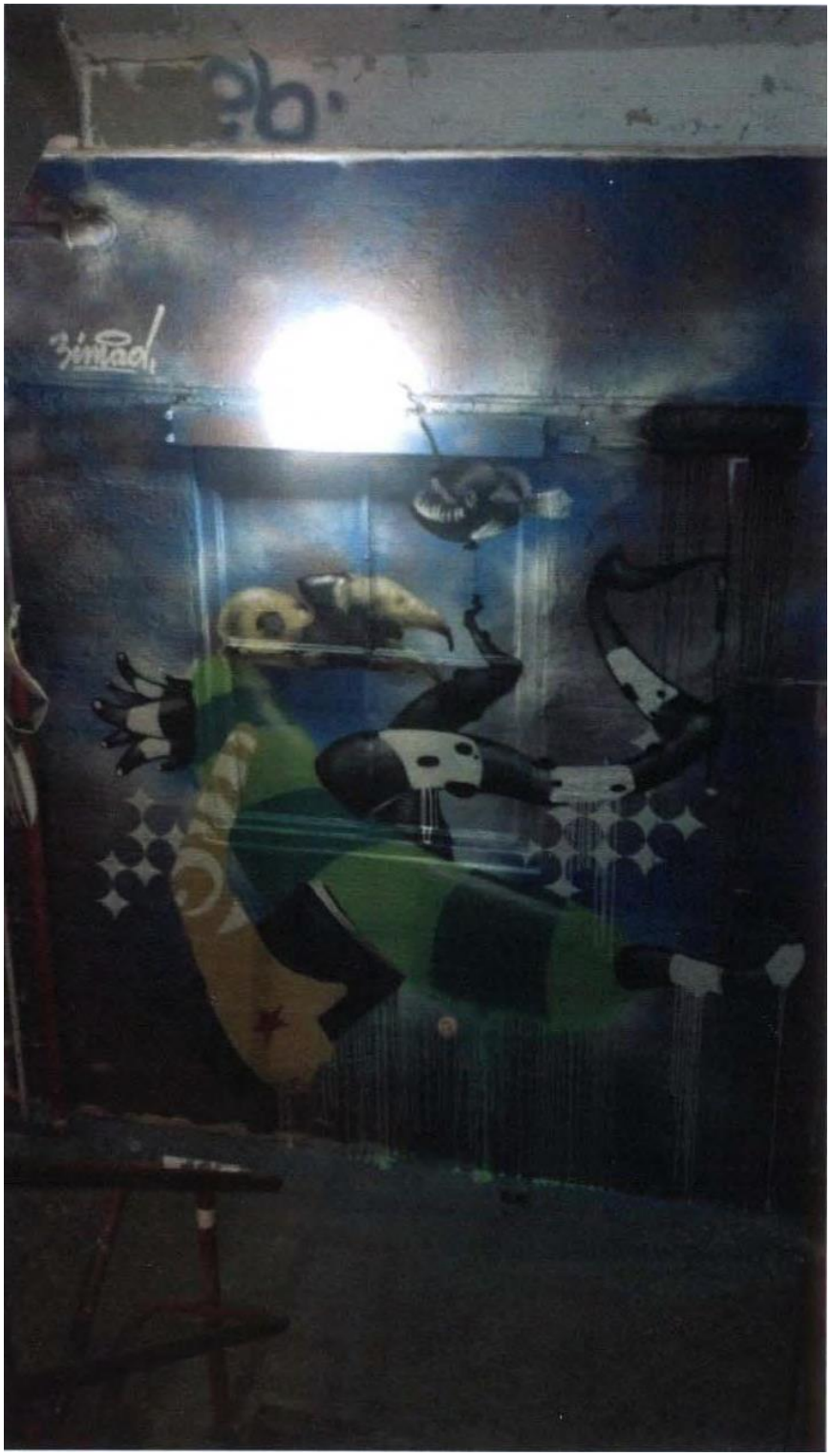
Jonathan Cohen, Luis Lamboy, and Thomas Lucero – *Angry Orchard*


Kenji Takabayashi – *Starry Night*

Luis Gomez – *Inside King Kong*



Luis Lamboy – *Blue Jay Wall*



*Luis Lamboy* – Electric Fish

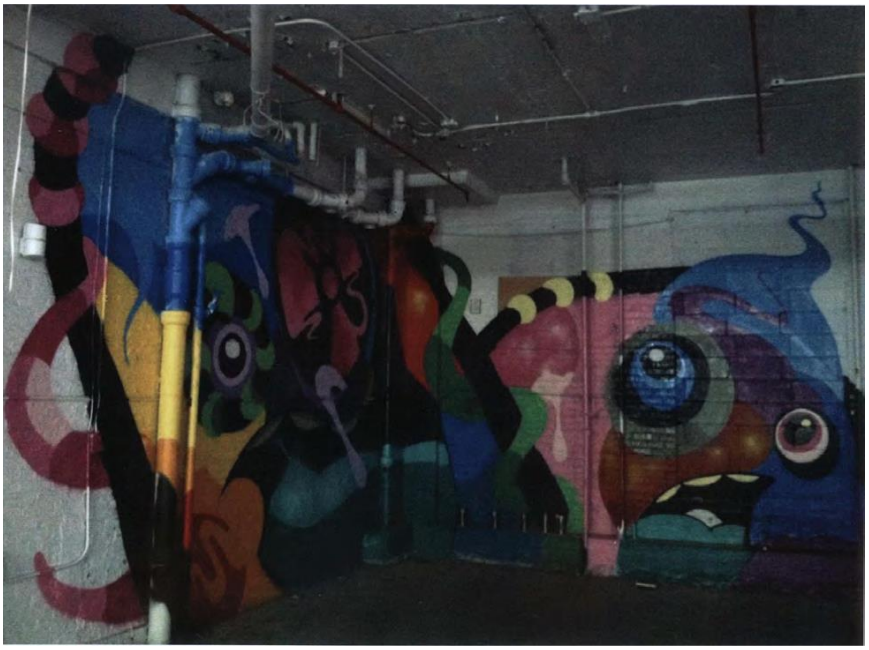
Luis Lamboy – *Inside 4th Floor*

Luis Lamboy – *Clothing Brand aka Monopoly Man*

Luis Lamboy – *World Traveler*

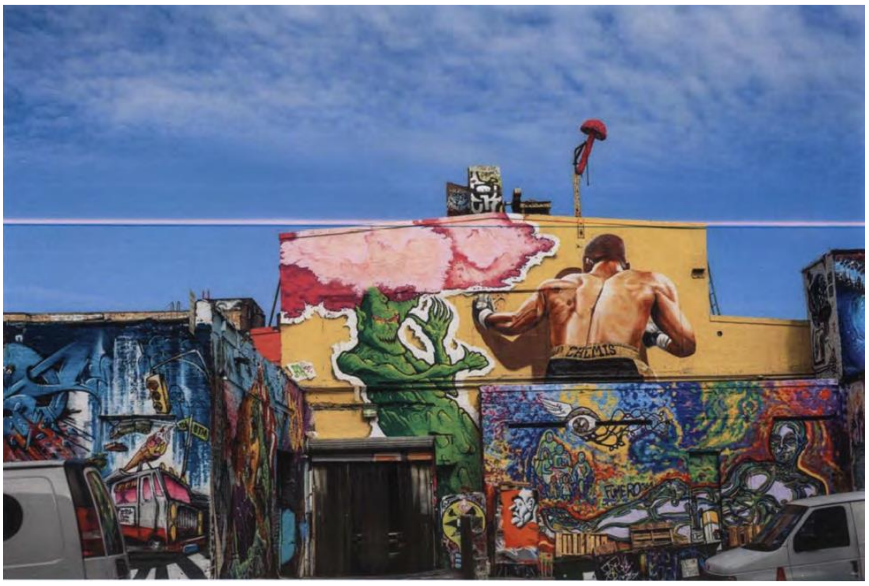

Nicholai Khan – *Dos Equis Man*

Nicholai Khan – *Orange Clockwork*

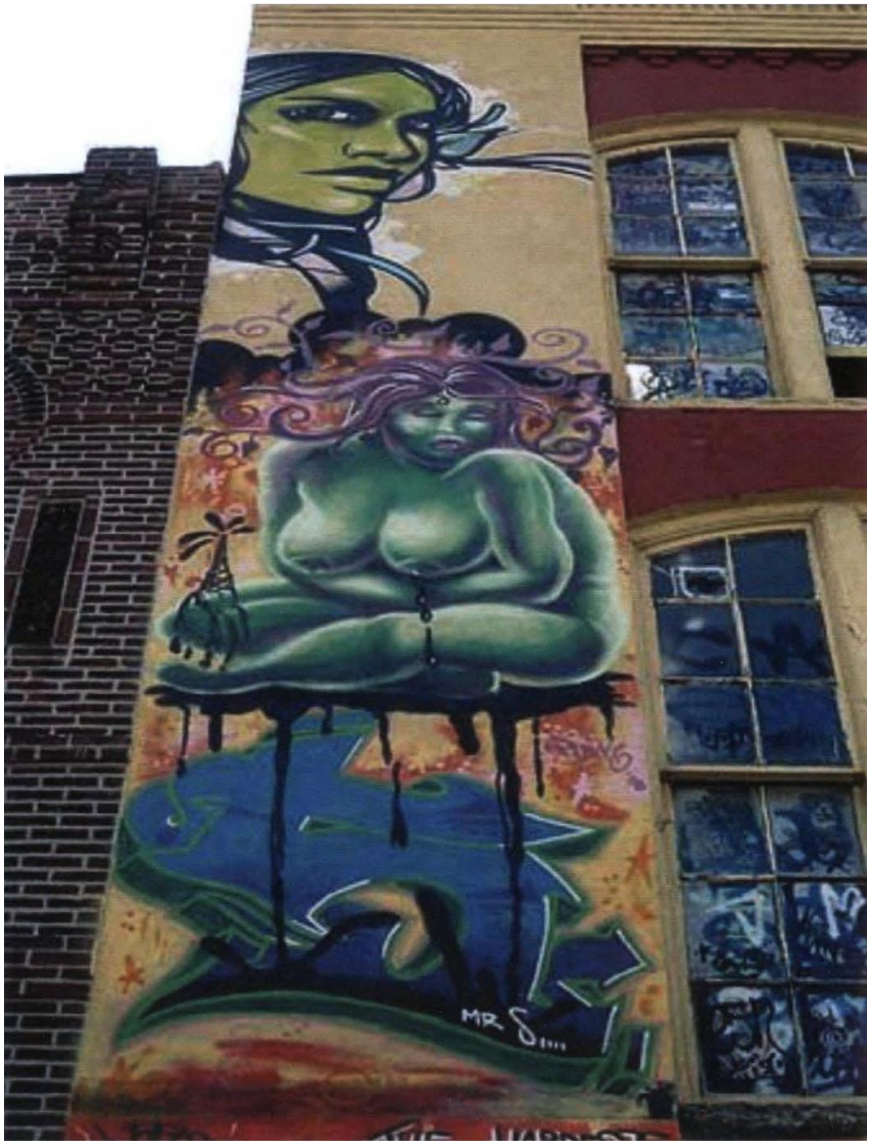


Richard Miller – *Monsters I*


Richard Miller – *Monsters II*



Rodrigo Henter de Rezende – *Fighting Tree*



Sandra Fabara – *Green Mother Earth*


Steven Lew – *Crazy Monsters*


Thomas Lucero – *Black Creature*


William Tramonitozzi and James Rocco – *Jimi Hendrix Tribute*

**United States Constitution, Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**17 U.S.C. § 106A. Rights of certain authors to attribution and integrity**

(a) **RIGHTS OF ATTRIBUTION AND INTEGRITY.** Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) **SCOPE AND EXERCISE OF RIGHTS.** Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

(c) **EXCEPTIONS.**

(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

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

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) **DURATION OF RIGHTS.**

(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) **TRANSFER AND WAIVER.**

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

**17 U.S.C. § 501. Infringement of copyright**

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

**17 U.S.C. § 504. Remedies for infringement: Damages and profits**

(a) **IN GENERAL.** Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) **ACTUAL DAMAGES AND PROFITS.** The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) **STATUTORY DAMAGES.**

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than

$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(3) (A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term "domain name" has the meaning given that term in

section 45 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes" approved July 5, 1946 (commonly referred to as the "Trademark Act of 1946"; 15 U.S.C. 1127).