

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS
Justice

PART 9/2

Index Number : 655446/2017
CLARK, ALLISON
vs.
CASTOR AND POLLUX LIMITED
SEQUENCE NUMBER : 007
HEAR AND DETERMINE

E-FILE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is Disposed.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

PAPERS RECEIVED
SEP 18 2019
NYS SUPREME COURT - CIVIL
ORDER SECTION - RM 119A

Dated: 9/18/19

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

E-FILE

NEW YORK COUNTY SUPREME COURT - SPECIAL REFEREE CALENDAR (PART SRP) INFORMATION SHEET

Title of Action: Allison Clark v. Castor and Pollux Limited Liability Company, et al. Index No.: 655446/2017

Issues Referred: (1) Actual damages; (2) Restitution; (3) Punitive damages; (4) Fees, expenses, costs, and interest

IMPORTANT: IN ORDER THAT THIS MATTER MAY BE ASSIGNED EFFICIENTLY TO A JUDICIAL HEARING OFFICER/SPECIAL REFEREE, ALL COUNSEL MUST CONSULT ONE ANOTHER AND PROVIDE THE FOLLOWING ESSENTIAL INFORMATION AS ACCURATELY AS POSSIBLE:

Estimated Time Needed for Entire Hearing: 1 hour

Number of Witnesses to be Called by All Counsel: 2

Is an interpreter of a language other than Spanish required? No Yes (Language _____)

If a matrimonial case, has custody been resolved? : Yes No Not Applicable

If a matrimonial case, has there ever been, or is there now, an order of protection in effect? :

Yes No Not Applicable

If yes, date of expiration: _____

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PAPERS RECEIVED

APR 22 2019

NYS SUPREME COURT - CIVIL
ORDER SECTION - RM 119A

Please submit this form (with additional pages if needed to identify other counsel), with a copy of the Order of Reference, as soon as possible after issuance of that Order and in any event within 15 days of the date thereof, to the Special Referee Clerk by fax ((212) 401-9186) or e-mail (sprof@nycourts.gov). You will be notified of the date and time of the hearing or, if the court has ordered such, the prehearing conference.

Cases are assigned to a Judicial Hearing Officer/Special Referee on the original appearance date in Part SRP and the hearing or, if the Order of Reference directs a prehearing conference, the conference will commence on that date. Except where a prehearing conference is directed, counsel must appear with witnesses and evidence, and be prepared to proceed with the hearing, on the original date. If a conference is ordered, the hearing date will be fixed at the conference. See the Rules of the Special Referees Part for information about adjournments (which are limited) and other relevant matters. See also the Uniform Rules of the Judicial Hearing Officers and Special Referees. Please direct all inquiries to the Special Referee Clerk by phone (646-386-3028) or e-mail (address above).

E-FILE

NEW YORK SUPREME COURT – SPECIAL REFEREE CALENDAR (PART SRP)
INFORMATION SHEET

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

E-FILE

-----X
ALLISON CLARK a/k/a LALA ABADDON,

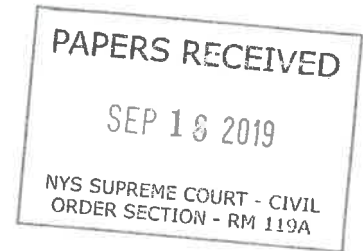
Plaintiff,

-against-

Index No.: 655446/2017

CASTOR AND POLLUX LIMITED LIABILITY
COMPANY d/b/a CASTOR GALLERY,
SEAN T. NICHOLAS, and JUSTIN A. DEDEMKO,

Defendants.
-----X



Hon. C.E. Ramos, J.H.O.

This case involves the claim of malicious theft of an artist's entire catalog by her art dealers, who she alleges were bound to act as her fiduciaries. The alleged misconduct by Castor Gallery and its proprietors ("Defendants") towards Ms. Clark included their threatening to burn her works in order to force her into accepting their wishes.

The plaintiff seeks a panoply of remedies pursuant to New York law for an award of the value of her misappropriated work, disgorging Defendants' commissions, an imposition of punitive damages and the attorney's fees, costs, and expenses that Ms. Clark reasonably incurred in vindicating her rights. Ms. Clark's claims for conversion, violation of the Arts and Cultural Affairs Law, breach of fiduciary duties, violation of the Estates, Powers and Trusts Law, promissory estoppel, unjust enrichment, trespass to chattels, replevin, tortious interference with prospective business advantage, civil conspiracy, constructive trust, accounting, and violation of the Civil Rights Law, have each been asserted against all Defendants.

The Court's April 4, 2019 order directed this reference to hear and "determine the following issues of fact: (1) Actual, compensatory, consequential, exemplary, and special

damages; (2) Restitution for unjust enrichment; (3) Punitive damages; [and] Fees, expenses, costs, and interest."

By virtue of that Court's order striking Defendants' answer, the Defendants are deemed to have admitted the facts alleged in the Complaint as to liability. Those facts will be recounted herein to provide context for this Court's findings as to damages and the other facts within the scope of this reference. In addition, Defendants are jointly and severally liable for Ms. Clark's claims, as alleged in the Complaint.

Despite having requested an adjournment to July 17, 2019, Defendants did not appear and submitted no evidence at the rescheduled inquest hearing.

Ms. Clark provided live testimony. Ms. Clark's counsel submitted a 22-page Memorandum in Support of Plaintiff's Damages with thirteen exhibits; an 18-page Affirmation in Support of Application for Fees, Costs, and Expenses with appendices and twenty-seven exhibits; as well as written statements of several witnesses, including Ms. Clark; the artists Micaela McLucas, Robert Lazzarini, and Stacy Leigh; and Nicole Grammatico, an art adviser and the director of the ARTHA Project, a privately funded platform supporting the advancement of careers in the visual arts.

The Plaintiff Allison Clark is a multimedia artist professionally known as Lala Abaddon. Ms. Clark currently resides in Texas. Defendant Castor and Pollux Limited Liability Company ("Castor Gallery") is a New Jersey limited liability corporation and an art merchant in the business of dealing in works of fine art, including artworks created by Ms. Clark. In 2015, Castor Gallery's offices in New York were located at 254 Broome Street on Manhattan's Lower East Side, at 548 West 28th Street, in Chelsea and at 90 Ludlow Street, in the Lower East Side.

Defendant Justin A. DeDemko, a principal at Castor Gallery, is an art merchant in the business of dealing in works of fine art. Mr. DeDemko was Castor Gallery's curator. The Defendant Sean T. Nicholas, also a principal at Castor Gallery, is an art merchant in the business of dealing in works of fine art. Mr. Nicholas is Castor Gallery's financial backer.

Ms. Clark creates works of fine art comprised of large-format photographic prints that she hand-weaves into layered images, which exhibit undulating geometric patterns. To create these hand-woven pieces, Ms. Clark will pair two photos, hand-cut them into three-millimeter pieces, weave them back together, mount them and frame them. As described by Defendant Castor Gallery in its promotional materials for Ms. Clark's work:

[Ms. Clark] begins with photographs shot with 35 mm film of her own bedlam miniature paintings, overlaid with earthly elements representing the algorithmic processes of nature. Each image is then printed into a large-scale photograph, which is deconstructed by hand with painful precision. The meticulously shredded photographs are then hand woven together into one, utilizing patterns to push and pull space in a unique and unconventional way, in a time-consuming repetitive process that creates a meditation between artist and materials.

Compl. ¶ 35

In addition, certain of Ms. Clark's artworks are sliced and rejoined using wire and other objects. Accordingly, the resulting artworks are delicate and need to be framed through a costly and labor-intensive process.

In 2014, Ms. Clark agreed to create and consign works of fine art to Mr. DeDemko. Mr. DeDemko agreed to frame, exhibit, and sell Ms. Clark's work in exchange for a 50% commission on any sale proceeds, with any unsold works to be returned to Ms. Clark in their frames. Ms. Clark performed all her obligations to Mr. DeDemko, creating and consigning numerous artworks to Mr. DeDemko for exhibition and sale in 2014.

Among other artworks, Ms. Clark consigned six pieces, each measuring thirteen by nineteen inches, to Mr. DeDemko for an exhibition held in August 2014. These six artworks were titled with computer-generated symbols known as "emoji." Three of the six "emoji" artworks were sold. Of the three unsold "emoji" artworks, Mr. DeDemko returned two of them to Ms. Clark in their frames. As for the remaining work, entitled "(_)" (2014), Ms. Clark permitted Mr. DeDemko to retain it temporarily while he continued to try to sell the work, but did not convey title to him.

Following Ms. Clark's August 2014 exhibition with Mr. DeDemko, Defendants invited Ms. Clark to be the first artist to exhibit work in a solo show at the Castor Gallery. Ms. Clark accepted Defendant's offer, agreeing to create and consign artworks for exhibition and sale at the Castor Gallery on the same terms as her prior dealings with Mr. DeDemko. Ms. Clark's solo exhibition, entitled Fractal Realities (the "Solo Show"), was held at the Castor Gallery at 254 Broome Street in Manhattan, and ran from February 26 through March 29, 2015.

Ms. Clark created and consigned numerous artworks for the Solo Show. Ms. Clark testified that she spent everything she had and thousands of hours over a six-month period creating eighteen unique pieces for the Solo Show. The artworks Ms. Clark created and consigned to Defendants for the Solo Show were entitled: "Death Is To Life As ____ Is To ____" (2015), "Liminal Dwelling" (2015), "Dear Paloma" (2015), "Metaverse" (2015), "Over Spilled Milk" (2015), "How Ironic Is This?" (2015), "If the Sun Were to Spontaneously Combust" (2015), "The Dark Matter of Gravitrons" (2015), "Fractal a" (2015), "Fractal b" (2015), "Fractal c" (2015), "Fractal d" (2015), "Fractal e" (2015), "Fractal f" (2015), "Fractal g" (2015), "Fractal h" (2015), "Fractal i" (2015), and "Fractal j" (2015).

Three of Ms. Clark's works were sold at the Solo Show, including the artwork entitled "If the Sun Were to Spontaneously Combust" (2015) and two of the "Fractal" works.

Ms. Clark requested an invoice for the sale of "If the Sun Were to Spontaneously Combust" (2015), but Defendants never provided one. Pursuant to prior order, the Defendants have been held liable for their failure to provide Ms. Clark with an accounting for the disposition of "If the Sun Were to Spontaneously Combust" (2015), along with Ms. Clark's other consigned artworks.

Following the Solo Show, Defendants refused to return or account for several of Ms. Clark's artworks from that exhibition, including those entitled "Liminal Dwelling" (2015), "Metaverse" (2015), "Over Spilled Milk" (2015), "How Irony Is This?" (2015), and "The Dark Matter of Gravitrons" (2015). In March 2015, Ms. Clark requested the return of her unsold artworks upon the conclusion of the Solo Show, but a Castor Gallery employee advised her that it would "hold on to the work for 2-3 months to follow up on potential sales." Ms. Clark gave her consent, and the parties agreed that she would pick them up in three months.

Accordingly, Ms. Clark arranged to display her largest piece, entitled "Liminal Dwelling" (2015), at an exhibition to be held at Gowanus Ballroom at 55 9th Street in Brooklyn (the "Gowanus Exhibition") on June 25, 2015, about three months after the solo show. Ms. Clark expressly asked Mr. DeDemko to return "Liminal Dwelling" (2015) so that she could exhibit it in the Gowanus Exhibition on June 25, 2015, and Mr. DeDemko agreed and said he would drop it off for her. However, Defendants reneged on their promise. However, instead of returning "Liminal Dwelling" (2015), Mr. DeDemko dropped off a different piece that was smaller and of lower value.

In mid-August 2015, Ms. Clark again asked Defendants, through Mr. DeDemko, to return her works from the Solo Show, so that she could exhibit them in her studio for a video feature by MTV to be filmed on August 20, 2015. After first promising to deliver Ms. Clark's work at her request, Mr. DeDemko did not deliver it.

Finally, the Plaintiff was informed by the Defendants that she and they needed to agree on what pieces she was going to leave with them before they would return any of her work.

This was the first time Defendants had ever suggested to Ms. Clark that she might be required to relinquish her artworks to them, which was contrary to her agreement and course of dealing with Defendants.

During the parties' ensuing discussions, Mr. DeDemko told Ms. Clark (on August 17, 2015) that the Castor Gallery intended to keep three of her artworks to recoup their expenses on the Solo Show. Ms. Clark's response was that she never agreed to that and demanded that her work be returned as agreed. Mr. DeDemko then told Ms. Clark that her artworks would be returned only after Defendants removed the works from their frames. Mr. DeDemko's message was in fact a threat to damage the works because removing the frames would cause irreparable damage to the artworks, while rendering the custom frames unusable. Removing the frames would serve no purpose except to reduce the value of the artworks. Mr. Nicholas later admitted that he had directed Mr. DeDemko to threaten the removal of the frames in order to hurt the Plaintiff.

DeDemko also demanded that Plaintiff deliver to the Defendants two other artworks that were not in the Castor Gallery's possession to have their frames removed.

On August 21, 2015, Ms. Clark demanded the return of all her works from the Solo

Show, plus the "emoji" artwork still in Mr. DeDemko's possession. Ms. Clark also terminated Defendants' authority to act on her behalf, instructing Defendants to remove anything affiliated with her or her work off their website or anywhere else on the internet.

On Mr. Nicholas's instruction, Mr. DeDemko ignored Ms. Clark's demands. Instead, Mr. Nicholas arranged for an in-person meeting with Ms. Clark on August 27, 2015, where he told Ms. Clark that the Castor Gallery would retain all of her work, not just the three that Mr. DeDemko identified on August 17, 2015, and threatened to burn the work or to sell it all.

Following the August 27, 2015 meeting, Defendants never again communicated with Ms. Clark about her demands to return her artworks and, except as noted below, have never accounted for their disposition or whereabouts.

Defendants continued to publish Ms. Clark's name and copyrighted images on their website and at least one e-commerce platform,.

After demanding the return of her artworks on August 21, 2015 and again in a letter dated September 15, 2016, and being refused, Ms. Clark commenced this suit against Defendants asserting claims for: conversion; breach of fiduciary duties; violation of Article 12 of New York's Arts and Cultural Affairs Law; violation of Section 11-1.6 of New York's Estates, Powers, and Trusts Law; violation of Article 5 of New York's Civil Rights Law; breach of contract; breach of the covenant of good faith and fair dealing; promissory estoppel; unjust enrichment and restitution; trespass to chattels; return of chattels pursuant to Article 71 of the CPLR; tortious interference with prospective business advantage; tortious interference with contract; civil conspiracy; aiding and abetting breach of fiduciary duties; constructive trust; and accounting.

On April 4, 2019, the Court granted Ms. Clark's motion for an order pursuant to CPLR

3126(3) striking Defendants' answer and holding Defendants liable on all of Ms. Clark's claims.

Accordingly, the only remaining issue in the case is the extent of her recoverable damages.

During the course of their representation of Ms. Clark, Defendants received at least \$5,050 in commissions from the sale of her artworks.

In August 2014, Mr. DeDemko sold three of Ms. Clark's "emoji" artworks measuring 13 inches by 13 inches at a price of \$1,200 for each. For each of these sales, Mr. DeDemko took a fifty-percent (\$600) commission and paid the remaining \$600 in sale proceeds to Ms. Clark. Accordingly, Mr. DeDemko received a total of \$1,800 in commissions from the sale of three "emoji" artworks sold in 2014.

Defendants received commissions for the sale of three of Ms. Clark's artworks at the Solo Show, including "If the Sun Were to Spontaneously Combust" (2015) and two "Fractal" works (2015).

The price of each artwork in the Solo Show was listed in a catalog (the "Exhibition Catalog") that Defendants prepared for the Solo Show. Both "Fractal" works were listed and sold for \$500, and Defendants received their fifty-percent (\$250) commission for both sales, or \$500 in total.

The sale price for "If the Sun Were to Spontaneously Combust" (2015) was never disclosed to Ms. Clark, and Defendants have been held liable for refusing to account to Ms. Clark for the sale of that work. "If the Sun Were to Spontaneously Combust" (2015) was listed for \$5,500 in the Exhibition Catalog, and Defendants never sought or received Ms. Clark's authorization to sell this piece at a discount.

Accordingly, Ms. Clark has established that "If the Sun Were to Spontaneously Combust" (2015) was sold for \$5,500, and that Defendants received their fifty-percent commission (\$2,750) for the sale of this piece.

In sum, Defendants received \$3,250 in commissions from the Solo Show—\$500 for the two "Fractal" works, and \$2,750 for "If the Sun Were to Spontaneously Combust" (2015)—plus the \$1,800 received by Mr. DeDemko for the three "emoji" artworks, for a total of \$5,050 in aggregate.

Ms. Clark also did not receive her full share of the proceeds from the sale of "If the Sun Were to Spontaneously Combust" (2015), which should have equaled \$2,750 (50% of \$5,500).

Instead, Ms. Clark received only a \$2,250 "deposit" on the total by a check signed by Mr. Nicholas and dated March 11, 2015. Defendants have never accounted to Ms. Clark for the \$500 discrepancy between this "deposit" and the artwork's list price.

Accordingly, Ms. Clark is still owed \$500 for the sale of "If the Sun Were to Spontaneously Combust" (2015).

Ms. Clark has established that her artworks were worth \$39,700 in aggregate as of August 21, 2015, the date that Ms. Clark demanded their return in writing and was rebuffed.

The value of the artwork entitled "(_)" (2014) was \$1,200, based on the sale prices of three other "emoji" artworks of comparable size, quality, and vintage in August 2014. Ms. Clark testified credibly that this work continued to be worth \$1,200 a year later, in August 2015, consistent with the prices at which three other "emoji" artworks with the same (13" x 19") dimensions that were sold in 2014.

For the five artworks displayed in the Solo Show, the contemporaneous market values are

set forth in the Exhibition Catalog: \$15,000 for the artwork entitled "Liminal Dwelling" (2015), \$6,000 for "Metaverse" (2015), \$6,000 for "Over Spilled Milk" (2015), \$6,000 for "How Ironic Is This?" (2015), and \$5,500 for "The Dark Matter of Gravitrons" (2015).

Defendants shall be bound by their admission as to the value of the artworks in the Solo Show. *Orange & Rockland Utils., Inc. v Assessor of Town of Haverstraw*, 801 N.Y.S.2d 238 (Sup. Ct. 2005).

Ms. Clark's artworks have appreciated in value since August 21, 2015, and are currently worth \$54,200 based on current "listing prices," actual sales and Ms. Clark's knowledge of the art market generally. Ms. Clark credibly attributed the appreciation in the value of her artworks to the upward mobility of her career, her exposure and continued involvement, her public installations, including permanent installations in the Facebook headquarters and other residencies and shows she has done around the country.

As Ms. Clark testified, the artwork entitled "Liminal Dwelling" (2015) would be listed at \$20,000 now. "Metaverse" (2015), "Over Spilled Milk" (2015), and "How Ironic Is This?" (2015) are each worth \$8,000 based on list prices for Ms. Clark's pieces of the same size. Ms. Clark testified that "The Dark Matter of Gravitrons" (2015) would likely list for \$6,500. The current value of the artwork entitled "(_)" (2014) is \$3,700, as Ms. Clark currently charges \$3,700 for that size work and has recently sold at least one at that price.

As summarized below (based upon the credible testimony) the artworks in Defendants' possession were worth \$39,700 as of August 21, 2015, and have since appreciated in value by \$14,500, to \$54,200.

"Liminal Dwelling" (2015)

42" x 62"

\$15,000 to \$20,000

"Metaverse" (2015)

26" x 38"

\$6,000 to \$8,000

"Over Spilled Milk" (2015)

26" x 38"

\$6,000 to \$8,000

"How Ironic Is This?" (2015)

26" x 38"

\$6,000 to \$8,000

"The Dark Matter of Gravitrons" (2015)

26" x 34"

\$5,500 to \$6,500

"(_)" (2014)

13" x 19"

\$1,200 to \$3,700

Total \$39,700 to \$54,200.

Ms. Clark has provided other compelling evidence of her artworks' value, beyond their market value. Ms. Clark's artworks were the product of enormous personal investments of time and expense. For example, Ms. Clark testified that it took "anywhere from three to five hundred hours, total" for her to create "Liminal Dwelling" (2015), Tr. 52:11–14, her "masterpiece." Tr. 20:13. As Ms. Clark testified, "weaving alone took at least 200 hours," Tr. 52:11–14, and she further added "woven threading" that "connects [the] pieces" and "also lays . . . a web over the entire piece." Tr. 52:15-53:11. Ms. Clark testified that "Over Spilled Milk" (2015) and "How Ironic Is This?" (2015) each took "one to two hundred hours" to create. Tr. 54:6–7, 54:16–17. Creating the artwork entitled "Metaverse" (2015) took Ms. Clark about two hundred hours, with the weaving alone requiring "at least a hundred hours." Tr. 53:24–54:1.

Ms. Clark also established that her converted artworks are irreplaceable. Unlike typical photographic works, each of Ms. Clark's artworks is unique, as they are constructed from a manual process of slicing and weaving that cannot be reproduced with precision.

Defendants' conduct did more than deprive Ms. Clark of her property. Pursuant to their default, Defendants will be held liable for intentional interference with Ms. Clark's business prospects, as they intentionally left her unable to fulfill other commitments and pursue other opportunities by depriving her of her work to display to the public, including at the Gowanus Exhibition, for her interview with the New York Times, and in her video showcase on MTV.

Nearly three months after the close of the Solo Show, Defendants broke their promise to

deliver "Liminal Dwelling" (2015), even though Ms. Clark had informed Mr. DeDemko of her commitment to display this work at the Gowanus Exhibition on June 25, 2015 and was relying on his promise to deliver it. Instead of returning "Liminal Dwelling" (2015), Mr. DeDemko delivered a smaller work called "Dear Paloma" (2015). Having specifically requested Ms. Clark's largest piece, the organizers of the Gowanus Exhibition were surprised when Mr. DeDemko delivered a different piece that was smaller and of lower value. As a result, Ms. Clark's best and most valuable work was not shown.

Defendants' wrongdoing also deprived Ms. Clark of invaluable opportunities to gain exposure and stature as an artist. Defendants' misconduct also prevented Ms. Clark from exhibiting artwork with other galleries or finding new representation. Ms. Clark testified that Defendants' representing her as an artist kept other galleries from contacting her.

Defendants also deprived Ms. Clark of the assets she needed to scale up her work. Because the exhibition with Castor Gallery was Ms. Clark's very first solo show, the artworks in Defendants' possession represented substantially all of her inventory. Deprived of both marketable inventory and funds, Ms. Clark lacked the means and liquidity to hire interns or assistants to help her produce additional work at a crucial moment in her career.

As noted above, Defendants continued to display Ms. Clark on Castor Gallery's website and hold her artworks for sale online through the Artsy e-commerce platform, even after she clearly instructed Defendants to take everything down from their websites, and revoked Defendants' authority to sell her work. Defendants thus continued to exploit Ms. Clark for purposes of advertising and trade in violation of her clear instructions.

Defendants' conduct also risks damaging Ms. Clark's precious artworks themselves. Ms.

Clark testified that "if it's not stored correctly, in a climate-controlled environment or at the right angle" her work could be damaged because "it will warp the wrong way." Ms. Clark has testified that one of her works from the Solo Show, entitled "How Ironic Is This?" (2015), showed physical damage when it was observed on July 9, 2015. In addition, Defendants have broken down one of her other artworks, an installation entitled "Death Is To Life As ____ Is To ____" (2015), and threw it in the trash. Defendants' misconduct has not only damaged the career of a promising artist but also risks destroying or diminishing her unique artistic contributions.

There is no suggestion that Defendants' retention of Ms. Clark's artworks was unintentional or negligent. There is no dispute that Defendants knew Ms. Clark was entitled to possession of her artworks, as evidenced by, among other things: the parties' agreement and year-long course of dealing, industry custom in dealings between artists and galleries, Defendants' promise to return Ms. Clark's artworks 2-3 months after the Solo Show; and Defendants' repeated promises to return Ms. Clark's work during the summer of 2015. Moreover, Defendants have admitted that Ms. Clark has always been the rightful owner of her artworks. Corrected Answer to Complaint and Counterclaim (July 17, 2018) [NYSCEF No. 51], at ¶ 204.

Despite knowing that Ms. Clark was entitled to immediate possession of her work, this Court concludes that Defendants sought to coerce Ms. Clark into giving up ownership of several of her artworks, by wantonly holding her other works hostage. In mid-August 2015, after Mr. DeDemko represented that he was in the act of delivering Ms. Clark's artworks to her, Mr. DeDemko backed out of the delivery and, at the direction of Mr. Nicholas, advanced a series of baseless pretexts to retain possession of Ms. Clark's artworks. Numerous facts and

circumstances establish that Defendants' bad faith and wanton disregard for Ms. Clark's rights.

During Mr. DeDemko's phone call to Ms. Clark on the day he was to deliver her artworks in mid-August 2015, he told her they needed to agree on what pieces she was going to leave with them before they returned any of her work. This was the first time Defendants ever suggested they might keep any of Ms. Clark's work for themselves. When Ms. Clark insisted that she was entitled to her artworks and inquired into their whereabouts, Mr. DeDemko would not confirm the location of the work.

Ms. Clark has established by clear and convincing evidence that Defendants expropriated her artworks with the motive of holding her works hostage until she agreed to relinquish her rights to several of the works. Defendants further attempted to coerce Ms. Clark by threatening to do irreparable damage to her works by removing their custom frames. These facts are more than sufficient to establish that Defendants knowingly and intentionally retained Ms. Clark's property and exhibited a wanton disregard for her rights.

Ms. Clark has also established by clear and convincing evidence that Defendants knew after August 21, 2015, that they were not authorized to use Ms. Clark's name or copyrighted images for purposes of advertising and trade. On August 21, 2015, as Ms. Clark was attempting to negotiate the consensual return of her artworks, she revoked Defendants' authority to publish her name or copyrighted images. Ms. Clark testified that: on August 21, 2015, she told Mr. DeDemko, that she would never will work with him or Sean Nicholas again and instructed Defendants to take anything affiliated with her or her work off their website or anywhere else on the internet.

Accordingly, this Court finds that all three Defendants had actual knowledge of Ms.

Clark's instructions. After Ms. Clark gave her instructions to Mr. DeDemko on August 21, 2015, Mr. Nicholas told Ms. Clark the same day that her instruction was turned over to him upon his request.

Based upon the inquest conducted on July 17, 2019 and the submissions therein, including testimony and written statements adduced pursuant to 22 NYCRR 202.46(b), this Court determines that Ms. Clark is entitled to damages, restitution, fees, expenses, costs, and interest as set forth below.

Actual Damages

Ms. Clark's actual damages for the failure to return the work are \$59,750.

Conversion Damages

On August 21, 2015, Ms. Clark demanded that Defendants return to her possession several artworks of her own creation that she had consigned to Defendants to be exhibited at Castor Gallery, as well as an additional artwork she had consigned to Defendant Justin A. DeDemko. Defendants wrongfully refused Ms. Clark's demand and have been held jointly and severally liable for their conversion of Ms. Clark's artworks.

Compensatory damages for Ms. Clark's conversion claim comprise "the value of the property at the time and place of conversion, plus interest." *Fantis Foods, Inc. v Standard Importing Co.*, 49 N.Y.2d 317, 326 (1980). The proper measure of damages is "the market value of the works—without any discount for the Galleries' right to retain 50% of the profits." *Al Hirschfeld Found. v Margo Feiden Galleries Ltd.*, 328 F. Supp. 3d 232, 237 (S.D.N.Y. 2018).

The catalog that Defendants prepared for the exhibition of Ms. Clark's artworks at the Castor Gallery between February 26, 2015 and March 29, 2015, along with Ms. Clark's oral

testimony at the inquest, establishes their respective values of Ms. Clark's artworks as follows: \$15,000 for the artwork entitled "Liminal Dwelling" (2015), \$6,000 for "Metaverse" (2015), \$6,000 for "Over Spilled Milk" (2015), \$6,000 for "How Ironic Is This?" (2015), and \$5,500 for "The Dark Matter of Gravitrons" (2015). As aforesaid, the Defendants are "bound by their admission" as to the value of the artworks. *Orange & Rockland Utils., Inc. v Assessor of Town of Haverstraw*, 801 N.Y.S.2d 238 (Sup. Ct. 2005).

Moreover, Ms. Clark provided un-rebutted testimony that certain of her artworks, and comparable artworks, were sold at the prices listed by Defendants. Such un-refuted testimony is sufficient to establish the real value of the missing items. *O'Rourke v. Pub. Storage*, 964 N.Y.S.2d 61, 61 (App. Term 1st Dep't 2012).

The Castor Gallery's catalog prices for Ms. Clark's artworks is a conservative measure of damages. The prices were determined at the beginning of the Solo Show, nearly six months prior to the date of Defendants' conversion of Ms. Clark's artworks and Ms. Clark testified that she subsequently sold works of comparable size and quality for even higher prices.

Ms. Clark has also proven that the artwork she consigned to Mr. DeDemko, entitled "(_)" (2014), was worth \$1,200, based on prices collectors had recently paid for several other works of comparable size, vintage, and quality.

The Court accordingly awards Ms. Clark conversion damages in the amount of \$39,700, representing the total value of her artworks as of August 21, 2015, together with interest at the statutory rate computed from that date forward. CPLR 5001.

Appreciation Damages

Notwithstanding the foregoing, the value of Ms. Clark's artworks as of August 21, 2015

does not reflect the full amount of Ms. Clark's damages or of Defendants' unjust enrichment. At the inquest, Ms. Clark adduced oral testimony and a written statement detailing the additional, consequential damages that she suffered as a result of Defendants' wrongdoing. Moreover, because Ms. Clark's artworks cannot be replaced and have appreciated significantly in value, awarding Ms. Clark only the value of her artworks as of the time of conversion, plus interest, would neither adequately compensate Ms. Clark nor fully disgorge Defendants' ill-gotten gains.

Where a "fiduciary's misconduct consisted of deliberate self-dealing and faithless transfers of trust property," *Matter of Janes* 90 N.Y.2d 41, 55 (1997), the Court of Appeals has held that "[t]o make the injured party whole . . . since the paintings cannot be returned, the [plaintiff] is therefore entitled to their value at the time of the decree, i.e., appreciation damages." *Matter of Rothko's Estate*, 43 N.Y.2d 305, 322 (1977). "Subsequent cases have upheld the *Rothko* rule in both estate and other fiduciary situations, awarding appreciation damages when a fiduciary has engaged in self-dealing." *Frame v. Maynard*, 922 N.Y.S.2d 48, 52 (1st Dep't 2011). Such amounts may be awarded as "consequential damages," *Estate of Rothko*, 379 N.Y.S.2d 923, 969 (N.Y. Sur. 1975), decree modified sub nom. *Will of Rothko*, 56 A.D.2d 499 (1st Dep't 1977), aff'd sub nom. *Matter of Rothko's Estate*, 43 N.Y.2d 305 (1977), and are appropriate here.

In addition, it would be inequitable for Defendants to retain the ill-gotten benefits flowing from the appreciation in value of Ms. Clark's artworks. Thus, Defendants should pay Ms. Clark appreciation damages to prevent their unjust enrichment. Cf. *Zane v Minion*, 63 A.D.3d 1151, 1153 (2d Dep't 2009) (claim that "defendant was unjustly enriched [by] receiving . . . the property and the benefit of its appreciation . . . state[s] a cause of action to . . . recover damages

for unjust enrichment").

To calculate such damages, the Court may "resort to reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgment and common sense." *Rothko's Estate*, 43 N.Y.2d at 323. Here, Ms. Clark has proven her appreciation damages by proving that the market value of her artworks has increased substantially since 2015. Ms. Clark testified that the present market value of her stolen artworks, which are irreplaceable, totals \$54,200—\$14,500 greater than at the time of conversion—based on sales of Ms. Clark's works of comparable size and quality, as well as the general increase in value of her artworks as her career as progressed. Cf. *In re Estate of Warhol*, No. 824/87, 1994 WL 245246, at *3 (N.Y. Sur. Apr. 14, 1994) ("No better indicator of fair market value exists than the price a buyer has actually paid for a comparable work of art.").

This Court finds that awarding appreciation damages is further justified as a measure of the damage Defendants' misconduct inflicted on Ms. Clark's career, as detailed in Ms. Clark's testimony and the written statement of Ms. Grammatico.

For the foregoing reasons, Ms. Clark is awarded \$14,500 in appreciation damages, as consequential damages and restitution, together with interest at the statutory rate computed from August 21, 2015. CPLR 5001.

Commission Damages

In addition to the value of the artworks themselves, Ms. Clark is entitled to recover the benefits Defendants have received as Ms. Clark's faithless agents. New York's faithless servant doctrine "allows the principal to recover any commission or salary that it paid to the faithless servant," *Flaxer v Gifford (In re Lehr Constr. Corp.)*, 528 B.R. 598, 607 (Bankr. S.D.N.Y. 2015),

aff'd, 551 B.R. 732 (S.D.N.Y. 2016), aff'd, 666 F. App'x 66 (2d Cir. 2016), plus statutory interest, see *Carco Group, Inc. v Maconachy*, 718 F.3d 72, 75 (2d Cir. 2013). "[D]isgorgement of compensation received by a faithless employee" is distinct from "the imposition of punitive damages." *In re Blumenthal (Kingsford)*, 32 A.D.3d 767, 768 (1st Dep't 2006).

At inquest, Ms. Clark proved that Defendants have received benefits from their representation of Ms. Clark even as they committed extensive breaches of their fiduciary duties towards her. "Where, as here, a Defendant has engaged in multiple acts of disloyalty over a significant period of time . . . and which 'persisted boldly through an opportunity to correct' that disloyalty, forfeiture of any compensation owed during that time is clearly warranted." *Khaldei v Kaspiev*, 135 F. Supp. 3d 70, 85-86 (S.D.N.Y. 2015).

Defendants must therefore disgorge the \$5,050 in commissions they have received from the sale of Ms. Clark's artworks, specifically \$2,750 from the artwork entitled "If the Sun Were to Spontaneously Combust" (2015), \$250 (each) for the two "Fractal" (2015) artworks, and \$1,800 for the three artworks sold by Mr. DeDemko in 2014.

This amount is awarded together with interest at the statutory rate computed from August 21, 2015. CPLR 5001.

Additional Breach of Contract Damages

Defendants are also liable for breach of contract based on their failure to pay Ms. Clark her 50% contractual share of the sale proceeds for the artwork entitled "If the Sun Were to Spontaneously Combust" (2015). Ms. Clark's compensatory damages are the difference between her contractual entitlement and the amount she was paid. See, e.g., *Chesapeake Energy Corp. v Bank of New York Mellon Tr. Co., N.A.* 837 F.3d 146, 150-51 (2d Cir. 2016).

Ms. Clark adduced proof that Defendants sold this artwork for \$5,500, and that Defendants were bound not to sell it for a lesser amount without her express consent, which she never provided. Because Ms. Clark is contractually entitled to 50% of the sale price, or \$2,750, but was paid only \$2,250 on March 11, 2015, Ms. Clark is awarded compensatory damages of \$500, plus interest at the statutory rate accruing from March 11, 2015. CPLR 5001.

Punitive Damages

For Ms. Clark to recover only her compensatory damages would leave unaddressed Defendants' campaign of outright theft and abuse, evincing a high degree of moral culpability. Compensatory damages are intended to have the wrongdoer make the victim whole. Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future. Subjecting a wrongdoer to punitive damages serves to deter future reprehensible conduct. *Ross v Louise Wise Servs., Inc.* 8 N.Y.3d 478, 489 (2007). Mindful of this distinction, this Court concludes that a substantial punitive damages award is required in view of Defendants' outrageous conduct, which undermines the core values of the art market.

"To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another." *Don Buchwald & Assocs., Inc. v Rich* 281 A.D.2d 329, 330 (1st Dep't 2001) (citing *Swersky v Dreyer & Traub*, 219 A.D.2d 321, 328 (1st Dep't 1996)). In addition, "[p]unitive damages are available" upon a claim for breach of contract where the plaintiff "not only demonstrate[s] egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a

pattern of similar conduct directed at the public generally." *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 N.Y.2d 603 (1994). Punitive damages may be established by a preponderance of the evidence. See *Greenbaum v Svenska Handelsbanken*, N.Y., 979 F. Supp. 973, 982 (S.D.N.Y. 1997); *Carpenter v New York Evening Journal Pub. Co.*, 111 A.D. 266, 272 (1st Dep't 1906); *Rose v Brown & Williamson Tobacco Corp.*, 809 N.Y.S.2d 784, 802 (Sup. Ct. 2005).

The foregoing standards provide numerous independent bases for an award of substantial punitive damages here. Even without the benefit of discovery, Ms. Clark has proven—not merely by a preponderance of the evidence, but by clear and convincing evidence—Defendants' breach of fiduciary duties, intentional wrongdoing, malice, wanton disregard her rights and a wide-ranging assault on the public interest.

Punitive damages are recoverable for conversion where the conduct was "criminal in nature and amounts to an attack on a fundamental public interest." *Muhlfield v Bak*, 664 N.Y.S.2d 427, 429 (Sup. Ct. 1997). "Certainly, one engaging in conduct which, by virtue of the public policy of this State, as enunciated in its statutes, constitutes a misdemeanor or a felony, is engaging in 'morally culpable' conduct" supporting the imposition of punitive damages. *Colligan v Fera*, 76 Misc.2d 22, 25 (N.Y. Civ Ct. 1973).

The Legislature has specifically made it a crime for art merchants to misappropriate artworks entrusted to their care. The Arts and Cultural Affairs law provides that if an art merchant fails to treat consigned artworks "in accordance with the requirements of fiduciaries in section 11-1.6 of the estates, powers and trusts law, such failure shall constitute a violation of [that] section . . . and shall be subject to the penalties provided therein." N.Y. Arts & Cult. Aff. Law § 12.01(2). The cross-referenced section of the Estates, Powers and Trusts Law provides

that "[e]very fiduciary shall keep property received as a fiduciary separate from his individual property" and that "[a]ny person violating any of the provisions of this section shall be guilty of a misdemeanor." Estates, Powers and Trusts Law § 11-1.6. Thus, the Arts and Cultural Affairs Law "makes clear that a breach of such obligations include the penalties for committing a misdemeanor." N.Y.C. Bar Ass'n, Report on Legislation by the Art Law Committee (May 2012), at 4.

Defendants have been held liable for misappropriating Ms. Clark's artworks, a criminal violation of the Arts and Cultural Affairs Law and the Estates, Powers and Trusts Law. Defendants' attack on the public policy of the State, as enacted in its statutes specifically enacted to protect artists like Ms. Clark, evinces a moral culpability justifying the imposition of punitive damages. C.f. *Werner, Zaroff, Slotnick, Stern & Askenazy v Lewis*, 155 Misc.2d 558, 563 (N.Y. Civ Ct. 1992) (awarding punitive damages exceeding 2.5 times the plaintiff's actual damages where "Defendant's actions in breaching his contract with plaintiff were morally culpable and seemingly criminal").

Defendants' actions, standing alone, support an award of punitive damages. "[W]here the conduct is criminal in nature . . . there is no need to show a 'pattern' of similar conduct towards others" because it "amounts to an attack upon a fundamental public interest." *Muhlfield*, 664 N.Y.S.2d at 429.

For the foregoing reasons, the Court determines that Ms. Clark is entitled to punitive damages based on the criminal nature of Defendants' wrongdoing in an amount set forth below.

Defendants' breach of fiduciary duties provides independent grounds for an award of punitive damages. "To obtain punitive damages for breach of fiduciary duty in a tort case, [a]

plaintiff [is] not required to allege that defendant's conduct was directed to the general public." *Mejia-Gonzalez v Storch*, 148 A.D.3d 467, 469 (1st Dep't 2017) (citing *Buchwald*, supra); accord *Airlines Reporting Corp. v Aero Voyagers, Inc.*, 721 F. Supp. 579, 586 (S.D.N.Y. 1989) ("New York law recognizes a breach of fiduciary duty as an exception to the general rule against punitive damages for breach of contract.") (citing *Thyssen, Inc. v S.S. Fortune Star*, 777 F.2d 57, 63 (2d Cir. 1985)).

To deter future violations, punitive damages for breaches of fiduciary duty may exceed compensatory damages. See, e.g., *Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 528 (S.D.N.Y. 2011) (finding that "punitive damages for [defendant's] breach of the duty of loyalty should be set equal to two times the compensatory damages awarded to Plaintiffs for the breach").

Here, Defendants breached their duties to Ms. Clark and the artworks she consigned to them, which they were required to hold as "trust property . . . for the benefit of the consignor." N.Y. Arts & Cult. Aff. Law § 12.01(1)(a)(ii). The Arts and Cultural Affairs Law's purpose is to prevent art galleries "from violating their fiduciary duties to protect the consignor's work" by "unrightfully taking works of art from artists and not properly compensating them." N.Y. State Assembly, Memorandum in Support of Legislation (June 1, 2012), at 1.

The Castor Gallery's mistreatment of Ms. Clark is not only damaging to Ms. Clark's career and ability to earn a living – its sheer brazenness undermines the core values that the art market depends on. Artists' ability to earn a living and advance their careers depends on the maintenance of trust between artists and galleries. Artistic production is impaired, and artists' careers can be destroyed, if their investment in their artwork can be taken from them without

accountability.

For the foregoing reasons, the Court determines that Ms. Clark is entitled to punitive damages based on Defendants' breach of their fiduciary duties towards her and her artworks as provided below.

It is well settled that punitive damages are awardable "where the alleged wrongdoing has been intentional and deliberate." *Sardanis v Sumitomo Corp.*, 279 A.D.2d 225, 230 (1st Dep't 2001) ; see *Buchwald* ("To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another.") (citing *Swersky*, 219 A.D.2d at 328); *U.S. Tr. Corp. v Newbridge Partners, LLC*, 278 A.D.2d 172, 172 (1st Dep't 2000).

Ms. Clark has adduced clear and convincing evidence that Defendants intentionally and deliberately acted to deprive her of her property and harm her career. Defendants' conduct to carry out their scheme, going so far as to threaten to burn Ms. Clark's artworks, was "so flagrant as to transcend mere carelessness." *Gruber v Craig*, 208 A.D.2d 900, 901 (2d Dep't 1994) (citing *Minjak Co. v Randolph*, 140 A.D.2d 245 (1st Dep't 1988)).

Such intentional misappropriation of an artist's work demands punishment to deter future wrongdoing, purposes well served by the imposition of punitive damages on these Defendants. See, e.g., *Universal-MCA Music Publ'g v Bad Boy Entm't, Inc.*, No. 601935/2002, 2003 WL 21497318, at *8 (N.Y. Sup. Ct. June 18, 2003) (finding "persuasive justification" to award punitive damages for "deliberate and intentional" wrongdoing "based on Defendants' alleged fraudulent concealment of a contractual provision that would potentially deprive Plaintiffs of

virtually all royalty income and for breach of fiduciary duty"); *Buchwald*, supra (punitive damages approved where "defendants secretly formed a competitive agency, and then stole a number of their former employer's clients"); *Sardanis*, 279 A.D.2d at 230 ("Defendants' alleged plot to destroy [its competitor] meets this standard," namely, that "the alleged wrongdoing has been intentional and deliberate.") (citing *Prozeralik v Capital Cities Comm'ns*, 82 N.Y.2d 466, 479 (1993)).

Punitive damages should be awarded to punish "conduct having a high degree of moral culpability which manifests a 'conscious disregard of the rights of others.'" *Home Ins. Co. v Am. Home Prods.*, 75 N.Y.2d 196, 203 (1990) (internal citation omitted) (quoting *Welch v Mr. Christmas Inc.*, 57 N.Y.2d 143, 150 (1982)). "Punitive damages are available for conversion 'where circumstances show that the conversion was accomplished with malice, insult, reckless and willful disregard for plaintiff's rights, or by other proof evidencing the aggravated nature of the act.'" *Morales v Kavulich & Assocs., P.C.*, 294 F. Supp. 3d 193, 198 (S.D.N.Y. 2018); accord *Airlines Reporting Corp.*, 721 F. Supp. at 586.

Ms. Clark has adduced proof of Defendants' malicious and wanton disregard for her rights, as evidenced by Defendants' brazen theft of her property, see, e.g., *Giblin v Murphy*, 73 N.Y.2d 769, 772 (1988) ("Punitive damages are allowable . . . here on the established findings of defendants' wrongful diversion and squandering of corporate assets . . . and other acts constituting willful, wanton and reckless misconduct."), as well as the false accusations and outrageous threats Defendants employed to coerce her into submission, see, e.g., *Hudson Motors P'ship v Crest Leasing Enters., Inc.*, 845 F. Supp. 969, 975 (E.D.N.Y. 1994) ("Defendants went beyond a mere breach of their contracts and embarked on a course to thwart at every turn

plaintiff's contractual rights.").

The evidence establishes that Defendants knew their misconduct was wrongful. Ms. Clark has proven that Mr. DeDemko's threats to remove the custom frames from her fragile artworks clearly had no purpose other than to "hurt" her, and that even his dishonest pretexts for retaining some of Ms. Clark's artworks could not justify retaining all of them. When Ms. Clark sought a mediated compromise, Defendant Mr. Nicholas "showed no inclination to act in good faith," behaved in an "imperious and provocative" manner and sought "to intimidate Ms. Clark by threatening to burn Ms. Clark's work. Defendants have wrongfully held Ms. Clark's artworks for more than four years, even after admitting ownership of the artworks has belonged to Ms. Clark all along. Corrected Answer to Complaint and Counterclaim (July 17, 2018) [NYSCEF No. 51].

An award of punitive damages here would thus well serve the policy of the law, "i.e., 'to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights.'" *Prozeralik*, 82 N.Y.2d at 479-80. For the foregoing reasons, the Court determines that Ms. Clark is entitled to punitive damages based on the malice and conscious disregard of Ms. Clark's rights evidenced by Defendants' wrongdoing, as provided below.

Ms. Clark's claim for punitive damages also finds an independent basis in Article 5 of the Civil Rights Law, which provides that the Court, "in its discretion, may award exemplary damages." N.Y. Civ Rights Law § 51.

It is "sufficient for recovery of such damages to prove that 'defendant shall have knowingly used' plaintiff's name, portrait or picture" for advertising purposes or for the purposes

of trade. *Welch v Mr. Christmas Inc.*, 57 N.Y.2d 143, 145 (1982). "Neither malice nor recklessness need be shown for recovery in such an action of exemplary damages." *Id.*

For purposes of awarding exemplary damages, "[k]nowing use' refers to a defendant's knowledge of a subject's lack of consent, not to knowledge of use per se." *Sherman v Bell Atlantic*, No. 95-cv-1817, at *4 (S.D.N.Y. Aug. 29, 1996) (citing *Welch*, 57 N.Y.2d at 145); accord *Marano v Aaboe*, No. 05-cv-9375, 2010 WL 6350785, at *7 (S.D.N.Y. Oct. 20, 2010); see *Cohen v Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978) (whether "Hallmark acted knowingly" turned on when "Hallmark knew . . . that it did not have written consent to use plaintiffs' pictures"); *Welch v Mr. Christmas Inc.*, 85 A.D.2d 74, 78 (1st Dep't 1982) ("Here, defendant was warned that the permissible period of use for the commercial had expired. Thus, the evidence was sufficient to support the factual conclusion that Mr. Christmas acted knowingly.") (citing *Hallmark*, 45 N.Y.2d at 499), *aff'd*, 57 N.Y.2d 143 (1982).

"Such knowledge could be factual or constructive and may be inferred from a defendant's conduct." *Marano*, 2010 WL 6350785, at *7. "In any action where it is necessary to take an inquest before the court, the party seeking damages may submit the proof required by oral testimony of witnesses in open court or by written statements of the witnesses . . . signed and sworn to." 22 NYCRR 202.46(b). "At inquest, the standard of proof is 'not stringent,' but it must amount to 'some firsthand confirmation of the facts.'" *Herman v Herman*, No. 650205/2011, 2017 WL 1650117, at *4 (N.Y. Sup. Ct. Apr. 28, 2017) (citing *Whittemore v Yeo*, 117 A.D.3d 533 (1st Dep't 2014)); accord *Diamond State Ins. Co. v Utica First Ins. Co.*, No. 104910/2005, 2009 WL 4009122 (N.Y. Sup. Ct. Nov 12, 2009) (quoting *Feffer v Mapleso*, 210 A.D.2d 60, 60 (1st Dep't 1994)).

Here Ms. Clark proved by clear and convincing evidence that Defendants knew of her lack of consent when, on August 21, 2015, she told Mr. DeDemko, she would never work with him or Mr. Nicolas again, and instructed Defendants to take anything affiliated with her or her work off their website or anywhere else on the internet. Ms. Clark has also established that this instruction was turned over to Defendant Sean Nicholas upon his request, the same day Mr. DeDemko received it, August 21, 2015. All three Defendants thus had actual knowledge of Ms. Clark's instructions.

Faced with this communication, it is clear that no reasonable person would imply approval of Castor Gallery's continued use of Ms. Clark's name and artwork. *Roberts v Conde Nast Publ'ns*, 286 A.D. 729, 730 (1st Dep't 1955). In response, Defendants have neither pleaded nor submitted evidence that their continuing misuse of Ms. Clark's name and copyrighted images was anything but intentional, or that they were in any way prevented from removing these materials from their website or Artsy page. See *Conde Nast*, 286 A.D. at 731 ("Unless defendant pleads facts in mitigation it cannot prove them in this kind of action.").

An award of exemplary damages is warranted when such an award is necessary to deter future conduct that violates Section 51. *Marshall v Marshall*, No. 08-cv-1420, 2012 WL 1079550, at *27 (E.D.N.Y. Mar. 30, 2012), *aff'd*, 504 F. App'x 20 (2d Cir. 2012). In this case, an award is especially warranted given the "grave and incalculable damage" Defendants' misconduct has visited upon Ms. Clark, by diverting art collectors and dealers from Ms. Clark to an art gallery falsely representing itself as Ms. Clark's agent in the art market. An award of exemplary damages here would serve the public interest by deterring and punishing art galleries who steal opportunities from artists by masquerading as the authorized agents of artists they do

not represent.

While an award of Ms. Clark's actual damages goes some way towards ameliorating the wrong done to her, it does little to deter and punish future wrongdoing. Ms. Clark's request for punitive damages is therefore awarded in full, to make unmistakably clear that such baneful abuses of artists' trust are offensive to public policy and will not escape consequence.

The standards for determining an award of punitive damages are as follows:

In determining the amount of punitive damages, the trier of fact may properly consider all the facts and circumstances immediately connected with the incident tending to exhibit or explain: defendant's motive; the existence or absence of malice or intentional disregard for plaintiff's rights or reckless indifference thereto, the nature, quality and duration of harm inflicted upon plaintiff, defendant's financial wealth or assets and the degree of deterrent resulting from a punitive award. *Deborah S. v Diorio*, 583 N.Y.S.2d 872, 878-79 (N.Y. Civ Ct. 1992) (awarding \$200,000 in punitive damages "'to send a message' to deter others") aff'd as modified on other grounds, 612 N.Y.S.2d 542 (1st Dep't 1994) (per curiam); accord *Laurie Marie M. v Jeffrey T.M.*, 159 A.D.2d 52, 60 (2d Dep't 1990), aff'd, 77 N.Y.2d 981 (1991). Because the purpose of an award is to deter and punish rather than to compensate, courts reject the requirement of a mathematical relationship between actual and punitive damages. See, e.g., *Star Credit Corp. v Ingram*, 347 N.Y.S.2d 651, 654 (N.Y. Civ Ct. 1973).

Based on the foregoing considerations, an award of \$158,800—equal to four times the aggregate value of Ms. Clark's artworks at the time they were converted, or just over 2.5 times her actual damages—is well founded given the numerous bases for such an award and the criminal nature of Defendants' misconduct.

The requested award is reasonable in light of the applicable criminal penalties Defendants face, which include fines of up to double the value of Ms. Clark's artworks. By failing to treat Ms. Clark's property "in accordance with the requirements of fiduciaries in section 11-1.6 of the estates, powers and trusts law," N.Y. Arts & Cult. Aff. Law § 12.01(2), to wit, to "keep property received as a fiduciary separate from his individual property," Estates, Powers & Trusts Law § 11-1.6(a), Defendants are "guilty of a misdemeanor," *id.* § 11-1.6(d). The appropriate sanction for Defendants' misdemeanor could include a monetary fine equal to "double the amount of the defendant's gain from the commission of the offense," N.Y. Penal Law § 80.05(5), that is, double "the value of property derived from the commission of the crime," *id.* § 80.00(2). The monetary component of the penalty could thus total at least \$79,400, or double the \$39,700 value of Ms. Clark's artworks at they were converted. Such a calculation is conservative given that Ms. Clark's artworks have appreciated considerably in value, to \$54,200.

The award sought is reasonable given the potential terms of imprisonment Defendants could face for their acts of theft. It is well settled that an award of punitive damages may be enhanced where "[i]mprisonment . . . could also be required of an individual in the criminal context." *Pac. Mut. Life Ins. Co. v Haslip*, 499 U.S. 1, 23 (1991). Here, the law authorizes imprisonment for Defendants' misdemeanor violation of the Arts and Cultural Affairs Law and the Estates, Powers and Trusts Law. See N.Y. Penal Law § 70.15(1). Defendants could face years in prison if their theft of tens of thousands of dollars' worth of artworks were deemed grand larceny. See *id.* §§ 70.00(2)-(3). Such penalties far exceed the severity of the applicable criminal fines. Thus, an award of at least double the appropriate monetary fine, or \$158,800, is reasonable given the serious criminal repercussions for Defendants' wrongdoing. Cf. *Sanders v*

Gardner, 7 F. Supp. 2d 151, 178 (E.D.N.Y. 1998) ("The availability of criminal proceedings and injunctive relief . . . reveals a congressional intent to make harsh sanctions available for potential violations. Even exorbitant punitive damage awards are not inconsistent with these potential penalties.").

The requested award is principled and, at just over 2.5 times Ms. Clark's actual damages (including disgorged commissions), is well within the 10:1 ratio that New York courts view as "the outside ratio" of punitive damages to the amount in dispute. *Rosenberg, Minc & Armstrong v Mallilo & Grossman*, 798 N.Y.S.2d 322, 331 (Sup. Ct. 2005) . See, e.g., *Bouveng v NYG Capital LLC*, 175 F. Supp. 3d 280, 351 (S.D.N.Y. 2016) (10:1 ratio approved); *Denman v Sanders*, 2006 WL 452018, at *9 (S.D.N.Y. Feb. 24, 2006) (4:1 ratio approved); *Kauffman v Maxim Healthcare Servs., Inc.*, 509 F. Supp. 2d 210, 221 (E.D.N.Y. 2007) (4:1 ratio approved). Punitive damages exceeding 2.5 times actual damages—almost identical to the ratio sought here—have been awarded where the court found that "Defendant's actions in breaching his contract with plaintiff were morally culpable and seemingly criminal." *Werner, Zaroff, Slotnick, Stern & Askenazy v Lewis*, 155 Misc.2d 558, 563 (N.Y. Civ Ct. 1992).

The nature and circumstances of the wrongdoing provide no basis to reduce the award based on the factors enumerated in *Deborah S.*, 583 N.Y.S.2d at 878-79, *supra*. Defendants' motive for misappropriating Ms. Clark's artworks and trust funds was indisputably to commit a blatant theft. Defendants' intolerable threats to burn her work and remorseless resort to false promises, false accusations, and other coercion tactics demonstrates a wanton and malicious disregard for their artists' rights. Such conduct is particularly inexcusable given Defendants' fiduciary duties as Ms. Clark's agents and caretakers of her irreplaceable artworks. The nature

and quality of the harm inflicted upon Ms. Clark was to deprive her of her most valuable work, sabotage her career, and punish her for asserting her statutory rights. Defendants have unjustifiably persisted in Ms. Clark's victimization for years, even after admitting ownership of the artworks has belonged to Ms. Clark all along. Defendants' conduct is repugnant to public policy, as reflected in the criminal sanctions the Legislature has chosen to impose on it, and should be met with an appropriate expression of societal outrage.

The evidence indicates Defendants have abundant resources at their disposal and would not be deterred except by a substantial award. While Defendants have refused to comply with disclosure that would shed light on their financial standing, Ms. Clark has established that Defendants had sufficient means to operate three different gallery spaces in fashionable neighborhoods in Manhattan, at 254 Broome Street in the Lower East Side, 548 West 28th Street in Chelsea, and 90 Ludlow Street in the Lower East Side. Mr. Nicholas boasted to Ms. Clark about employing exotic dancers as an owner of one or more establishments of that kind, and of having lawyers on retainer. Defendants' counsel has represented that both individual Defendants frequently travel internationally. To "add teeth" to a judgment against these unscrupulous Defendants for preying on comparatively impecunious artists would serve the remedial purpose of the Arts and Cultural Affairs Law, NYSBA Mem. at 2, and Defendants' obvious means indicate that a significant award would be required.

The Defendants' brazen conduct demonstrates that a substantial award is required to deter them. Defendants have reaped profits from their wrongdoing and they have reacted to the proceedings against them with open defiance of their obligations as litigants. Defendants' cavalier attitude to their civil obligations cannot go unpunished, *Figdor v City of New York*, 33

A.D.3d 560, 561 (1st Dep't 2006), and their conduct gives the Court every reason to expect that only a substantial punishment will overcome their wanton disregard for the rights of others. As the Court of Appeals has aptly observed:

An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.
Walker v Sheldon, 10 N.Y.2d 401, 406 (1961).

Having engaged in wide-ranged looting of their artist and simply ignored the proceedings against them, Defendants show every outward sign that they will be unmoved by anything short of a costly rebuke.

Ms. Clark's request for punitive damages is reasonable and would serve the important public purpose of protecting artists by punishing and deterring Defendants' criminal wrongdoing, breach of fiduciary duties, intentional and deliberate wrongdoing, malicious and conscious disregard for Ms. Clark's rights, and pattern of egregious wrongdoing to numerous artists. For the foregoing reasons, the Court determines an award of punitive damages in the amount of \$158,800 is appropriate.

Attorney's Fees, Costs, and Expenses

The Arts and Cultural Affairs Law provides that the court may award reasonable attorney's fees, costs, and expenses to a prevailing plaintiff in any action" to enforce the statute. N.Y. Arts & Cult. Aff. Law § 12.01(3). The Legislature intended that artists "would be entitled

to attorney's fees should they prevail in a claim against a gallery for breach of fiduciary duty." NYSBA Mem. at 2 [Post-Inquest Aff. Ex. 6, at 000017]. The statute's unambiguous purpose is to ensure that aggrieved artists can pursue the rightful return of artworks or proceeds, often against art merchants with far greater resources.

"When granting fees, a trial judge has broad discretion in deciding whether, and in what amount attorneys' fees should be awarded." *White v Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974). The fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved. *In re Freeman's Estate*, 34 N.Y.2d 1, 9 (1974); see also *Gordon v Verizon Commc'ns, Inc.*, 148 A.D.3d 146, 165 (1st Dep't 2017).

Here, Ms. Clark obtained a good result, winning the case outright. Quinn Emanuel's work clearly enhanced the result Ms. Clark achieved, both in bringing her lawsuit to an early conclusion. The requested fee of \$79,082 is reasonable in light of the total amounts awardable to Ms. Clark, including punitive damages. The amount in controversy affords no basis to reduce the fee awarded. See, e.g., *Anderson v City of New York*, 132 F. Supp. 2d 239, 245 (S.D.N.Y. 2001) ("There is a strong presumption that the lodestar figure represents the 'reasonable' fee, even when that figure is disproportional to the amount of damages obtained by the successful plaintiff."); *Podhorecki v Lauer's Furniture Stores, Inc.*, 201 A.D.2d 947, 948 (4th Dep't 1994) ("There is no bright-line rule that a fee award cannot exceed three times the amount at issue in

the lawsuit or that the amount of the fee must be proportional to the amount at issue.").

The hours Ms. Clark's counsel incurred are also reasonable in light of the time, labor, and skill required to vindicate her claims. This action required substantial time and labor from Quinn Emanuel—the vast majority of which was driven by Defendants' recalcitrant conduct. At the outset, Defendants could have avoided this litigation entirely by responding in good faith to Ms. Clark's patient efforts to secure the consensual return of her artworks. Instead, they rebuffed her at every turn. Forced to seek legal recourse, Quinn Emanuel filed a sixty-page complaint pleading twenty causes of action in exceptional detail. As the action progressed, Quinn Emanuel was forced to engage in motion practice—all of it resulting from Defendants' procedural misconduct—which ultimately led the Court to strike Defendants' pleadings and direct this reference. While the time and labor invested by Quinn Emanuel in this action in and of itself supports a full fee award here, the fact that the bulk of Quinn Emanuel's time was driven by Defendants' own misconduct only further supports the reasonableness of its fee application. See, e.g., *Johnson v City of New York*, No. 11-cv-6176, 2015 WL 13730884, at *11 (E.D.N.Y. Feb. 25, 2015) (finding "plaintiff's counsel's time was not unreasonable given the litigation strategy pursued by her adversaries," including their "failure to comply with their discovery obligations in a timely fashion"), *Kittay v Korff (In re Palermo)*, No. 08-cv-7421, 2011 WL 3874866, at *21 (S.D.N.Y. Sept. 2, 2011) ("Since it was the delaying and untimely conduct of Defendant and his counsel that caused these expenditures of legal services, it is only equitable that the Defendant should bear the cost."), *aff'd*, 549 F. App'x 38 (2d Cir. 2014).

In addition, the skill required to successfully prosecute this action weighs in favor of a full fee award. This action involved, inter alia, novel issues of art law; development of evidence

regarding Defendants' abuse of Ms. Clark; preparation of detailed pleadings, including responses to numerous counterclaims; extensive motion practice; and numerous hearings on discovery issues and dispositive motions.

The number of hours for which Quinn Emanuel seeks compensation, both as to specific tasks and as a whole, is well within reason. As an example, Ms. Clark seeks a fee for just over twelve hours of work on her lengthy and detailed Complaint, an amount that is reasonable on its face. Cf. *Ognibene v Parkes*, No. 08-cv-1335, 2014 WL 3610947, at *3 (S.D.N.Y. July 22, 2014) ("Given the scope of the complaint, the Court finds this number of hours [174.8 hours] reasonable and will compensate Plaintiffs accordingly . . ."); *Robinson v City of New York*, No. 05-cv-9545, 2009 WL 3109846, at *7 (S.D.N.Y. Sept. 29, 2009) ("78 hours to draft a 33–page complaint . . . is not excessive"); *Berry v New York State Dep't of Corr. Servs.*, 947 F. Supp. 647, 653 (W.D.N.Y. 1996) (approving "50 hours to draft a complaint with some partner supervision and paralegal support").

Ms. Clark further seeks fewer than ten hours each for time spent briefing her detailed, well-supported, and successful motions to compel disclosure and strike Defendants' pleadings. Cf. *Brummer v Wey*, No. 153583/2015, 2018 WL 3528213, at *2 (N.Y. Sup. Ct. July 20, 2018) (approving 92 hours spent on a motion to compel); *A.V.E.L.A., Inc. v Estate of Monroe*, No. 12-cv-4828, 2014 WL 3610902, at *4 (S.D.N.Y. July 18, 2014) (mem.) (awarding 117 hours for briefing a motion to compel). Ms. Clark likewise seeks no more than ten hours for each of her submissions to the inquest, which included a detailed attorney affirmation and a fulsome memorandum in support of her damages, supported by numerous witness statements and live testimony. See, e.g., *Caban v Emp. Sec. Fund of the Elec. Prod. Indus. Pension Plan*, No.

10-cv-389, 2015 WL 7454601, at *8 (E.D.N.Y. Nov 23, 2015) (mem.) (awarding "fees for 58 hours of work on this fee application").

The overall fee sought is well within the range of fees awarded under comparable circumstances. For example, in *MSC Mediterranean Shipping Co. Holding S.A. v Forsyth Kownacki LLC*, the prevailing plaintiff was awarded \$405,320 in attorney's fees upon a default judgment entered shortly after the suit was commenced and based on "unopposed, relatively straightforward breach of contract and anticipatory breach claims." No. 16-cv-8103, 2017 WL 1194372, at *3 (S.D.N.Y. Mar. 30, 2017). In contrast, Ms. Clark seeks a fee of just \$79,082. This amount is also far below fees awarded in cases where the prevailing party was a defendant who submitted no pleadings and immediately prevailed over claims that were deemed "objectively frivolous," *U.S., ex rel. Fox Rx, Inc. v Omnicare, Inc.*, No. 12-cv-275, 2015 WL 1726474, at *1 (S.D.N.Y. Apr. 15, 2015) (awarding \$168,967.61), or so obviously untimely that counsel need only have "walked out into the hallway [and] grabbed the first mid-level associate that walked by" to obtain dismissal. *Cruz v Seward Park Hous. Corp.*, No. 155244/2016, 2018 WL 3377538, at *4 (N.Y. Sup. Ct. July 11, 2018) (awarding \$175,000).

In this regard, it is clear that Quinn Emanuel exercised substantial billing judgment prior to submitting its fee request. "Counsel for a prevailing party must exercise 'billing judgment,' that is, 'act as he would under the ethical and market restraints that constrain a private sector attorney's behavior in billing his own clients.'" *Schumacher*, 2014 WL 2696581, at *2 (quoting *Hensley v Eckerhart*, 461 U.S. 424 (1983)). Here, Ms. Clark has sought compensation for just under one hundred hours of work—a small fraction of the time her counsel actually incurred in this matter, as reflected in Quinn Emanuel's exceptionally detailed and high-quality submissions.

Among other things, Ms. Clark's application omits time Quinn Emanuel incurred preparing for and appearing at the inquest hearing and on the drafting of Ms. Clark's proposed findings of fact and conclusions of law. Ms. Clark has not sought any fee at all for her counsel's extensive work on other tasks for which fees are routinely awarded, including for "reasonable work done in advance of the actual commencement of suit." *U.S. Bank Nat'l Ass'n v Dexia Real Estate Capital Markets*, No. 12-cv-9412, 2016 WL 6996176, at *9 (S.D.N.Y. Nov 30, 2016) .

The fact that Quinn Emanuel has requested only a fraction of the time incurred prosecuting this action weighs heavily against a reduction of the award sought. See, e.g., *Widjaja v Kang Yue USA Corp.*, No. 09-cv-2089, 2016 WL 1056565, at *2 (E.D.N.Y. Mar. 16, 2016) (declining to reduce fee where "hours expended by all attorneys at the firm were voluntarily reduced by a 'significant margin'"); *Demonchaux v Unitedhealthcare Oxford*, No. 10-cv-4491, 2014 WL 1273772, at *8 (S.D.N.Y. Mar. 27, 2014) (noting "Plaintiff's voluntary ten percent reduction to the overall fee request, the Court finds that the number of hours for which Plaintiff seeks reimbursement is reasonable and not excessive, redundant, or unnecessary"); *Caporicci v Berlin*, 950 N.Y.S.2d 490 (Sup. Ct. 2012) (declining to reduce fees where "counsel ha[d] already voluntarily reduced his billed hours by 20%").

Counsel's experience, ability and reputation further supports the requested fees. Ms. Clark was fortunate to obtain the capable assistance of Quinn Emanuel, "one of the top litigation firms in the country," *Transweb, LLC v 3M Innovative Props. Co.*, No. 10-cv-4413, 2013 WL 11312429, at *15 (D.N.J. Sept. 24, 2013), *aff'd*, 812 F.3d 1295 (Fed. Cir. 2016), whose "experience, reputation, and ability" are widely regarded as "outstanding." *ResCap Liquidating Trust v Home Loan Ctr., Inc. (In re RFC & ResCap Liquidating Tr. Action)*, No. 13-cv-3451,

2019 WL 2567566, at *25 (D. Minn. June 21, 2019) (mem.). Ms. Clark's attorneys were guided by Maaren Shah and Luke Nikas, recently recognized as The American Lawyer's "Litigators of the Week" for "a pair of wins in the rarefied world of art litigation." Goralnik Aff. The Court's firsthand observations during the inquest hearing reinforce the Court's determination that Ms. Clark was ably represented.

Quinn Emanuel's rates are reasonable for a firm of its stature and comparable to those charged by other leading firms. Cf. *APEX Emp. Wellness Servs., Inc. v APS Healthcare Bethesda, Inc.*, No. 11-cv-9718, 2018 WL 5784544, at *5 (S.D.N.Y. Nov 5, 2018) (approving rates of "between \$185 per hour for the most junior paralegal and \$1058.25 for the most senior partner" at Clifford Chance), appeal withdrawn sub nom. *Summit Health, Inc. v APS Healthcare Bethesda, Inc.*, 2019 WL 1077008 (2d Cir. Mar. 5, 2019); *Themis Capital v Democratic Rep. of Congo*, No. 09-cv-1652, 2014 WL 4379100, at *7-8 (S.D.N.Y. Sept. 4, 2014) (approving Dechert's rates of \$871.04 for a partner, \$742.84 for an of counsel, and \$505.55 for associates). There is "no reason, in the absence of any evidentiary challenge, to reduce the plaintiff's counsel's normal rate." *Getty Petrol. Corp. v G.M. Triple S. Corp.*, 187 A.D.2d 483, 484 (2d Dep't 1992). A discount to Quinn Emanuel's customary rates is particularly unwarranted given its voluntary reduction in the number of hours it incurred.

The fact that a prevailing party is represented "pro bono . . . does not impact its ability to recover reasonable attorneys' fees." *Hing v Abreu*, No. 14083/09, 2016 WL 7745087, at *2 (N.Y. Sup. Ct. Dec. 22, 2016). Indeed, "courts routinely award legal fees to pro bono attorneys, who charge their clients nothing." *Ross v Congregation B'Nai Abraham Mordechai*, 814 N.Y.S.2d 837, 844 (Civ Ct. N.Y. Cnty. 2006) . That Quinn Emanuel enjoyed no "certainty of

compensation" for this commendable representation is, if anything, a factor favoring a fee award.

In re Freeman's Estate, 34 N.Y.2d at 9.

Finally, the Arts and Cultural Affairs Law's unambiguous purpose is to ensure that aggrieved artists can pursue the rightful return of artworks or proceeds, often against art merchants with far greater resources. Shifting the cost of litigation to the wrongdoing gallery thus serves the remedial purpose of the Arts and Cultural Affairs Law regardless of whether that cost is initially borne by the artist or her pro bono counsel.

Accordingly, Defendants are ordered to pay \$79,082 in attorneys' fees to Ms. Clark's counsel, together with statutory interest from the date of this decision, as well as the requested costs and expenses.

Ms. Clark's application for \$2,918.15 in costs and expenses incurred by Quinn Emanuel is reasonable and should be granted in full. Ms. Clark's request includes itemized disbursements for filing fees, postage, printing, and notary fees, as well as the non-refundable airfare incurred as a result of Defendants' last-minute adjournment of the inquest hearing. Such out-of-pocket expenses are reasonable and were necessary for the prosecution of Ms. Clark's action. Moreover, Ms. Clark's request is modest, and excludes numerous actual disbursements by Ms. Clark and her counsel, including fees charged for legal research services, docket alert services, and public record searches.

The Court thus awards these reasonable amounts in full, which, in any event, have not been challenged by Defendants. Cf. *William P. Pahl Equip. Corp. v Kassis*, 182 A.D.2d 22, 33 (1st Dep't 1992) ("The amount sought in . . . costs and expenses incurred . . . is supported by an appropriate evidentiary showing, which was not challenged, and appears fair and reasonable.").

Interest

"[A] cause of action for conversion accrues when the conversion takes place. If possession of the property is originally lawful, a conversion occurs when the defendant refuses to return the property after a demand." *Ash v Richards*, 572 Fed. App'x 52, 53 (2d Cir. 2014) (quoting *White v City of Mt. Vernon*, 221 A.D.2d 345 (2d Dep't 1995)). "[A] cause of action for breach of fiduciary duty accrues at the time of the breach." *Kaufman v Cohen*, 307 A.D.2d 113, 121 n.3 (1st Dep't 2003). Accordingly, interest on Ms. Clark's \$39,700 in damages from Defendants' conversion of Ms. Clark's artworks and breach of their fiduciary duties is computed from August 21, 2015, the date Ms. Clark demanded the return of her artworks and was refused.

"[A] claim for breach of contract exists on the date of the breach." *Vill. of Ilion v Cnty. of Herkimer*, 993 N.Y.S.2d 648, 652 (2014) (collecting authorities). Interest on the \$500 in unpaid proceeds that Ms. Clark is owed for the sale of the artwork entitled "If the Sun Were to Spontaneously Combust" (2015) is thus computed from March 11, 2015, the date on which Defendants paid Ms. Clark less than her contractual share of those proceeds.

Interest on Ms. Clark's legal claims shall be at the rate of nine percent per annum. CPLR 5004.

As to the disgorgement of Defendants' commissions, an equitable remedy, see, e.g., *Webb v RLR Assocs., Ltd.*, No. 03-cv-4275, 2004 WL 555699, at *2 (S.D.N.Y. Mar. 19, 2004), "interest and the rate and date from which it shall be computed shall be in the court's discretion." CPLR 5001(a).

Here, awarding interest on Ms. Clark's faithless servant claim at the same rate and from the same date as her underlying cause of action for breach of fiduciary duties is "presumptively

fair and reasonable." *Rodriguez v New York City Hous. Auth.*, 91 N.Y.2d 76, 81 (1997); see, e.g., *CARCO GROUP, Inc. v Maconachy*, 718 F.3d 72, 89 (2d Cir. 2013) (affirming award of prejudgment interest on faithless servant claim); *Shamrock Power Sales, LLC v Scherer*, No. 12-cv-8959, 2016 WL 7647597, at *15 (S.D.N.Y. Dec. 8, 2016) ("[R]egardless of whether Plaintiff's claim is essentially equitable or legal in nature, I find that it would be a proper use of the Court's discretion to award prejudgment interest."), (S.D.N.Y. Jan. 4, 2017). Thus, the disgorgement of Defendants' \$5,050 in ill-gotten commissions shall bear interest at the statutory rate, computed from August 21, 2015.

Ms. Clark is also awarded \$14,500 in appreciation damages. Whether awarded as consequential damages on Ms. Clark's legal claims or as restitution for unjust enrichment (an equitable remedy), interest shall be awarded on this amount "from a single reasonable intermediate date" as prescribed by CPLR 5001(b). Since the appreciation in value of Ms. Clark's artworks took place between August 21, 2015, when they were worth \$39,700, and December 13, 2017, the date of Ms. Clark's affidavit as to the present value of her work, Clark Aff. ¶ 4, the Court selects the mid-point, October 16, 2016, as the single reasonable intermediate date from which prejudgment interest is computed on Ms. Clark's \$14,500 in appreciation damages.

Based on the foregoing, Ms. Clark shall recover: \$44,750, consisting of \$39,700 in compensatory damages and \$5,050 in disgorged commissions, together with \$16,110 in prejudgment interest computed at a rate of nine percent per annum from August 21, 2015 through August 21, 2019; \$14,500 in appreciation damages, together with \$3,712.24 in prejudgment interest computed at a rate of nine percent per annum from October 16, 2016 through August 21,

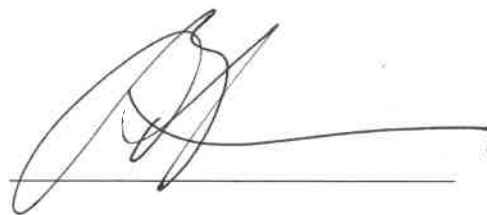
2019; and \$500 in unpaid sale proceeds, together with \$200.11 in prejudgment interest computed at a rate of nine percent per annum from March 11, 2015 through August 21, 2019.

Finally, "[i]nterest shall be recovered upon the total sum awarded . . . from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment," CPLR 5002, and thereafter from the date the judgment is entered, id. § 5003. Accordingly, interest shall accrue on the total sum awarded by the Court forward from the date of this decision.

Based on the foregoing, Ms. Clark shall have judgment against Defendants for \$59,750, together with \$20,022.35 in pre-judgment interest as set forth above; \$158,800 in punitive damages; and \$82,000.15 in reasonable attorney's fees, costs, and expenses, for a total judgment amount of \$320,572.50, and post-judgment interest on the total sum at nine percent per annum, or \$79.05 per diem.

Long after this Court concluded its hearing of this matter, we have been informed by an unsworn statement, that some of the works have been returned to Ms. Clark. In the order to be settled herein, counsel for the Plaintiff may adjust the terms of the order and judgment to be settled to reflect such returns.

Dated: September 18, 2019

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a horizontal line extending to the right.

J.H.O.