

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

YALE UNIVERSITY
New Haven, Connecticut

Plaintiff,

and

THE NIGHT CAFÉ, a PAINTING
Plaintiff-in-rem

v.

PIERRE KONOWALOFF
Paris, France

Defendant.

Case No.: 309CV00466 AWT

ANSWER AND COUNTERCLAIM

Plaintiff and counterclaim defendant, Pierre Konowaloff (“Mr. Konowaloff”), by his attorneys, hereby answers the complaint upon knowledge with respect to his own acts and actions, and upon information and belief with respect to all other matters. Mr. Konowaloff asserts that he is not required to respond to the section headings which precede each section of numbered paragraphs within the complaint; however, to the extent that said section headings contain assertions or allegations, they are denied.

Yale has brought an action to quiet title under C.G.S. § 47-31 and for declaratory relief seeking to establish that it has good title to a painting by Vincent Van Gogh entitled *The Night Café* (the “Painting”). Under Connecticut law, Yale bears the burden of proving the allegations in its complaint that it has good title. Yale has not alleged that any person or entity, other than Mr. Konowaloff, has some right, title, estate or interest in the Painting as it would be required to do under the statute if it believed there was any other party with an interest in this matter.

Accordingly, the only two potential claimants to the Painting are Yale and Mr. Konowaloff. Yale admits in its complaint that Ivan Morozov was the original owner of the Painting. As a result, if this Court determines that Yale does not have good title, then by its own pleading, title would necessarily reside in Mr. Konowaloff as the sole heir to Ivan Morozov.

While the historical facts relevant to the seizure of the Painting are addressed in the Answer and Counterclaim, to quiet title this Court need not make a determination as to the lawfulness of the Bolshevik confiscation of the Painting in 1918. By assuming control of the Painting through the bequest of Mr. Clark in 1961, with either full knowledge or with reason to know that it had been unlawfully confiscated or “nationalized” without compensation, and by thereafter failing to take available steps to notify the Morozov family of its acquisition, Yale can not possibly establish that it has good title. With appropriate judicial notice of provenance, title necessarily resides with Mr. Konowaloff.

NATURE OF THE ACTION

1. Mr. Konowaloff is without knowledge or information sufficient to either admit or deny that Yale has displayed *The Night Café* for almost fifty years, that it made the Painting accessible to the public free of charge or that it received the Painting in 1961 through a bequest of Stephen C. Clark. Deny the implication that such public display can confer title to stolen art. In neither Connecticut, where the Painting is held, nor in New York, where the sale to Clark was transacted, is there any doctrine of adverse possession of a chattel. Unlike real property, where title can be acquired through public and notorious possession of the premises, mere possession for a lengthy time of a chattel never confers title.

2. Admit on information and belief that *The Night Café* is one of the most renowned paintings in the world. Deny that reproductions of it were accompanied by any recognition that

Yale is the legitimate owner, rather than the party maintaining possession. Deny that no one ever previously questioned Yale's ownership of the Painting and deny all other allegations contained in this paragraph.

3. Admit that Mr. Konowaloff is the great-grandson and heir of Ivan Morozov, who acquired the Painting in 1908 with full legal title. Admit that Ivan Morozov's other property was taken by the Russian government without payment of any compensation. Deny that the taking of the Morozov property, and in particular *The Night Café*, was no different from the taking of other property nationalized by the Russian government in the wake of the October 17th Communist Revolution insofar as contemporaneous international law had carved out a prohibition against confiscation of cultural property under the guise of nationalization.

Admit that the Soviet Government later sold the Painting but deny that the Soviet Government ever had legal title to the Painting. Deny that a European Gallery purchased the Painting and sold it to a New York Gallery, which in turn sold it to Mr. Clark. In fact, the New York Gallery (Knoedler) was acting on behalf of Mr. Clark, using the Matthiesen Gallery in Berlin as a conduit for purchase of the Painting on behalf of Mr. Clark. Deny that Mr. Clark "owned" the Painting for nearly thirty years; in fact, he merely had possession. Admit that Mr. Clark lent the Painting for display, although often anonymously. Admit that Yale came into possession of the Painting following Mr. Clark's death.

Deny that Mr. Konowaloff claims or otherwise mentioned that the Soviet nationalization of property was, as a general matter, illegal. Rather, Mr. Konowaloff's claim is particular to the confiscation of this Painting as contrary to prevailing customary and conventional international law. Accordingly, title never passed from the Morozov family to Russia, or to Clark, or to Yale. Deny that, "The implication of his (Konowaloff's) argument is that American courts should try

to undo the entire program of property reform undertaken by the Russian government in the early part of the 20th century, invalidating the transfers of title of Russian citizens' property that Russia effectuated within its own borders." Mr. Konowaloff makes no such claim or insinuation. His claim, articulated in the Counterclaim, revolves exclusively around the unlawful confiscation of this Painting and other cultural property confiscated from the Morozov collection, and not with regard to the Russian government's nationalization program affecting industry and real property.

4. Deny that paintings confiscated from the Morozov collection can be characterized as nationalization within the legal meaning of that term as defined under international law, which necessarily encompasses just compensation. Deny that they feature prominently in leading institutions and museums outside of Russia, other than one other painting in a major US museum. Deny that the sales by the Soviet government between 1918 and 1933 were considered valid. Deny that such sales of confiscated art are presently considered valid. In fact, Russia is presently investigating through a special Presidential commission the legality of such sales, and its preliminary finding questions their lawfulness.

Deny that any later acquisitions of the Painting were considered valid, at the time of acquisition or any time thereafter. Deny that Yale had no reason to question the legitimacy of Mr. Clark's title to the Painting at the time of the bequest. Deny that Yale has no reason to question title today, insofar as a simple examination of title or provenance would have revealed the invalidity of Mr. Clark's claim to rightful title. Deny that Yale is entitled by law to a declaration of title ("enjoy the repose") to *The Night Café*.

5-9. Admit.

Jurisdiction and Venue

10-13. Admit.

Background

14-26. Mr. Konowaloff is without knowledge or information sufficient to either admit or deny the allegations contained in paragraphs 14-26.

27. The allegations contained in paragraph 27 contain legal conclusions to which no response is required. Deny the implication that insufficient title to bequeathed property becomes good title as a result of the New York probate process despite failure of adequate notification to potential adverse claimants.

28. Mr. Konowaloff is without knowledge or information sufficient to either admit or deny the allegations in the first sentence of paragraph 28. Mr. Konowaloff admits the allegations contained in the second sentence of paragraph 28.

29-33. Mr. Konowaloff admits the allegations contained in the last sentence of paragraph 31 (“[a] line on the Gallery document used to establish the formal accession states ‘Bequest of Stephen Carlton Clark, B.A. 1903.’”) and the second and third sentences of paragraph 32 ([t]he wall didactic stated that it was received through the ‘Bequest of Stephen Carlton Clark, B.A. 1903.’ That language has remained on the wall next to the Painting for the entire period of its display at Yale.”). Mr. Konowaloff is without knowledge or information sufficient to either admit or deny the allegations contained in the remaining allegations of paragraphs 29-33.

34. Admit that the winter 1961-62 issue of the Art Journal reporting on Clark’s bequest and Yale’s exhibit of it referred to the Painting as in the Museum of Modern Western Art, Moscow, thus putting Yale on notice that this Painting, like almost all others in that museum, had been

acquired through confiscation by the Bolshevik regime, and refer to the article for a full and complete recitation of its contents.

35-49. Admit that the articles referenced were published in the publications referenced and refer to those publications and articles for a full and complete recitation of their contents, with the proviso that in none of the cited publications was mention ever made of the Painting's provenance as part of the confiscated Morozov collection although, per paragraph 37, "Yale University Art Gallery also proudly spread the news of the bequest." Deny the remaining allegations contained in paragraphs 35-49. Insofar as Yale concealed the Morozov provenance, Yale furthered publication of incomplete provenances that concealed confiscation.

50. Admit that Yale has a website that has reported since 2005 that *The Night Café* is at the Yale University Art Gallery without any reference to its initial acquisition by the Morozov family. Deny that Yale has ownership of the Painting.

51. Deny the implication that because Yale has "publicly asserted dominion over the Painting," it enables Yale to acquire any rights to the Painting as a result of any "publicly asserted dominion".

52-56. Mr. Konowaloff is without sufficient knowledge or information to either admit or deny the allegations contained in paragraphs 52-56. Deny that Yale has ownership of the Painting and deny that any requests for permission to broadcast the Painting on French television, as alleged in paragraph 56, constitutes any form of notice to plaintiff that Yale claims ownership of the Painting.

57. Admit that Stephen Clark had asked the Knoedler Gallery of New York to purchase the Painting on his behalf in 1933 and deny the remaining allegations in paragraph 57.

58. Admit that the Painting was publicly exhibited at the Museum of Modern Art in 1935, but lack knowledge and information sufficient to confirm that ownership was attributed to Clark rather than displayed on the part of an anonymous donor.

59-60. Admit, except deny that Clark was the lawful owner of the Painting.

61. Admit, but Mr. Konowaloff is without sufficient knowledge or information either to admit or deny that the display of the Painting was accompanied by any caption indicating that it was on loan from Stephen Clark.

62. Admit, except deny the implication that Eudoxie Losine, Eudoxie Morozov, or Ivan Konowaloff was somehow on notice that Clark had been publicly identified as the owner of the Painting.

63. Deny that the Knoedler Gallery purchased the Painting from the Matthiesen Gallery in Berlin insofar as the transaction was not on the behalf of the Knoedler Gallery, but on the behalf of a request by Steven Clark as publicly documented (see text of telegraph in Robert C. Williams, "Russian Art and American Money, 1900-1940", Harvard University Press, 1980). Deny the implication that this was a normal transaction of purchase from the Soviet government through the cited government entity. Rather, on information and belief, the sale was conducted in secrecy to avoid public knowledge of the sale. Admit that the Soviet government held the Painting after it was wrongfully confiscated without any form of compensation to the owner of the Painting, Ivan Morozov.

64. Admit.

65. Admit that there was a program to "nationalize" but deny that nationalization applies to confiscation of this Painting or the Morozov art collection.

66. Admit.

67. Admit that a “Decree” was issued and refer to the Decree for a full and complete statement of its terms but deny that the RSFSR nationalizations of the art collections of Ivan Morozov were part of a general nationalization of art, rather than particular confiscation and deny any implication that the “nationalization” was proper under international law or that the “nationalization” was anything other than theft or confiscation of the art.

68-69. Admit but deny that the quoted language of the Decree was part of a legitimate nationalization.

70. Deny that the Decree represented the act of a sovereign nation. The RSFSR was not recognized by the United States Government as such.

71. Admit that Morozov’s real property was nationalized, but deny that the confiscation of the Morozov art collection was part of a legitimate nationalization.

72. Deny that Russia’s confiscation of the Painting (within the Complaint’s language of “Russian nationalization of property”) did not violate international law. Admit that the Russian nationalization of property was incompatible with American law and public policy values.

73. Admit.

74. Mr. Konowaloff lacks sufficient knowledge or information to either admit or deny the allegations contained in paragraph 74.

75. Admit that the Painting was sold to the Matthiesen Gallery, as a conduit for sale to Mr. Clark through the Knoedler Gallery.

76. Deny with respect to the sale of this Painting as the transaction was conducted secretly. Mr. Konowaloff lacks sufficient knowledge or information to either admit or deny what the Russian émigré community knew in the late 1920s about Soviet sales of art.

77-78. Deny the implication contained in paragraphs 77 and 78 that art was legitimately nationalized rather than confiscated. Admit that the fact of confiscation was discussed by historian Robert C. Williams in the referenced book and refer to that book for a full and complete recitation of its contents. Admit that the publications prepared for an exhibit in Russia and Germany referenced in paragraph 78 refer to the Painting, and refer to those publications for full and complete recitations of their contents.

79-80. Admit.

81. Admit, except deny that works from the Morozov's collection were nationalized since they were confiscated and they were not part of any legitimate nationalization process.

82. Admit.

83. Admit with regard to other confiscated paintings but deny that such paintings were obtained through a legitimate nationalization.

84. Deny that Morozov or his decedents initiated legal actions or threats of legal actions, other than as noted in paragraph 87 of the Complaint, against the owners or displayers of Russian confiscated art. Mr. Konowaloff lacks sufficient information and belief to either admit or deny the allegations with regard to the Shchukin family collection.

85. Mr. Konowaloff lacks sufficient information and belief to either admit or deny the allegations contained in paragraph 85 with regard to the Shchukin family collection.

86. Mr. Konowaloff lacks sufficient information and belief to either admit or deny the allegations contained in paragraph 86 with regard to the Shchukin family collection.

87. Admit that a lawsuit was filed in France. Deny that the French Court ruled substantively on the Morozov claim. Russia's immunity from suit was recognized, the judgment was appealed, and the appeal was denied for lack of jurisdiction because the paintings had already left France.

88. Mr. Konowaloff lacks sufficient information and belief to either admit or deny the allegations contained in paragraph 88 with regard to Shchukin family action.

89. Mr. Konowaloff lacks sufficient information and belief to either admit or deny the allegations contained in paragraph 89 with regard to a similar suit by the Shchukin family in 2003. Deny that that dismissal has any relevance to the present controversy.

90. Admit, except deny that any “nationalization” of art in Russia was part of a legitimate nationalization process.

91. Admit that Katherine Konowaloff, as the wife of Pierre Konowaloff and on his behalf, wrote to Yale University requesting the basis for its claim to lawful retention of the Painting.

92. Admit that Allan Gerson, as an attorney for Pierre Konowaloff, sent a letter to the Director of the Yale University Art Gallery claiming that Konowaloff was the lawful owner of the Painting. Deny that Gerson sent a draft complaint of a federal action with the implication that this was undertaken to warn of intent to initiate litigation. Rather, the “draft complaint” was deliberately and prominently styled as “For Discussion Purposes” and sent in specific response to a request by Yale University’s General Counsel inviting an exchange of views. Seth Waxman, Esq., as counsel for Yale University, acknowledged receipt of the “Draft Complaint for Discussion Purposes” as part of settlement discussions and not to be referenced in litigation. Those scheduled discussions, pursuant to an exchange of positions, were abruptly canceled when Yale University decided to abruptly terminate settlement negotiations and, without any prior notice, institute the filing of this Complaint to quiet title.

93. Deny that Yale ever acquired good title to the Painting by means of its receipt of Steven Clark’s bequest.

94. Deny that Mr. Konowaloff is barred from pursuing an action to recover the Painting or its value because he failed to commence an action within three years from the date of Yale's wrongful detention. Deny that this is the proper standard employed by the pertinent Connecticut statute of limitations and deny that any statute of limitations applies to a quiet title claim.

95. Admit that the bequest was reported, but deny that it was widely reported. Deny that the reproduction of the Painting constitutes any identification in a legal sense of Yale's ownership and further deny that Yale's unsupported claim of ownership provides any basis to determine that it is the rightful owner of the Painting.

96. Deny that Mr. Konowaloff or his predecessors-in-interest either knew or should have known that Yale owned *The Night Café* prior to Pierre Konowaloff's discovery of this fact in 2008.

97. Deny that Konowaloff or his predecessors-in-interest either knew or should have known of Yale's possession of the Painting insofar as it was reasonably assumed that the Painting continued to be in the possession of the Russian museums. The only citation Yale makes to publication listing the Painting as in Yale's possession (1993) was printed in Russian and German and not ordinarily available to French citizens in France.

98. Deny any prominence given to Yale's "ownership" of the Painting and deny any characterizations about the Painting.

99. Deny that Mr. Konowaloff is precluded from pursuing his claim by virtue of any pertinent statute of limitations and deny that Konowaloff slept on any of his rights.

100. Deny that Mr. Konowaloff's interest in recovering the Painting is barred by laches.

101. Admit.

102. Deny that the time period from when the Painting was confiscated from Ivan Morozov to the time when Mr. Konowaloff first contacted Yale is unreasonable as a matter of law.

103. Deny that Yale has been prejudiced, or that Plaintiff has pled any prejudice caused by Mr. Konowaloff.

104. Deny that Yale has suffered prejudice by death of witnesses or loss of pertinent documentary evidence. Deny that the Painting was nationalized as it was illegally confiscated.

105. Deny that Mr. Konowaloff or any of his predecessors-in-interest have failed to discharge any obligations in law or equity or have failed to assert their rights in a timely manner, thus invalidating their claim to the Painting.

First Claim For Relief – Order Quieting Title

106. Mr. Konowaloff repeats his answers to paragraphs 1-105 of the complaint as if set forth here in full.

107. Deny that Plaintiff is the rightful owner of *The Night Café*.

108. Deny that Konowaloff has made any false claims to ownership of the Painting.

109. Deny.

110. Admit.

111. Admit that this Court is entitled to determine the possessor of good title to *The Night Café* but deny that Plaintiff is entitled to an order that it is the owner of the Painting.

112. Admit that this Court may issue a Declaratory Order with regard to valid ownership of the Painting but deny that the Court should order that Mr. Konowaloff has no valid claim of ownership to the Painting.

113. Admit that Yale is entitled to a declaration as to whether the statute of limitation bars Mr. Konowaloff's claim but deny that Yale is entitled to a declaration that the statute of limitation affirmatively bars Mr. Konowaloff's claim of ownership.

114. Admit that Yale is entitled to a declaration as to whether Konowaloff's claims are or are not barred by laches but deny that Yale is entitled to a declaration that the doctrine of laches affirmatively bars Mr. Konowaloff's claim of ownership.

Second Claim For Relief – Injunctive Relief

115. Mr. Konowaloff repeats his answers to paragraphs 1-114 of the complaint as if set forth here in full.

116. Admit that this Court has inherent power to fashion equitable relief as concerns the Plaintiff and Defendant's claims to the Painting, including injunctive relief as appropriate, but deny that Yale is entitled to an order from this Court permanently enjoining the Defendant from threatening and/or instituting any legal or other actions against Plaintiff and/or any of their agents or representatives regarding the Painting.

First Affirmative Defense

As required under C.G.S. § 47-31(d), and as set forth more completely in his counterclaim, which is incorporated in its entirety herein, Mr. Konowaloff claims a complete ownership interest in the Painting because he is the great-grandson of, and direct heir to, the owner of the Painting, Ivan Morozov. Mr. Konowaloff is the legitimate heir to all rights to the Painting insofar as he was designated the sole heir of Jean Konowaloff (the sole heir of Eudoxie Morozov, the sole heir of Ivan Morozov) on March 18, 2002. The Painting was unlawfully confiscated in 1918 by the Russian Socialist Federated Soviet Republic ("RSFSR") on the order of its leader, Vladimir Lenin, from Mr. Konowaloff's predecessor-in-interest, Ivan Morozov. No

compensation was paid to Mr. Morozov for the Painting or any of the other artwork that he owned. The confiscation was in clear violation of international law. Accordingly, the RSFSR never had good title and did not convey good title to any subsequent purchaser of the Painting. Any subsequent purchaser of the Painting was aware, or reasonably should have been aware, that the Painting had been illegally confiscated and that therefore good title could not be passed through a sale. At the very least, Mr. Clark, as the subsequent purchaser, was aware that ownership of the Painting was disputable. Because Yale obtained the Painting through a bequest, it did not take better title than any predecessor-in-interest. Moreover, Yale knew, or reasonably should have known, from even a cursory examination of the Painting's provenance that Mr. Clark either lacked good title or, at the very least, that his title was suspect. Yet, Yale took no meaningful steps to ascertain rightful title. Therefore, Mr. Konowaloff retains lawful title to the Painting.

Second Affirmative Defense

Yale is not entitled to a declaration that it is the owner of the Painting because of the doctrine of unclean hands. Where one has reason to believe that goods are stolen, taking possession of such goods may constitute complicity in a crime, and subject the taker to civil liability under tort law principles. See, e.g., Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983)(girlfriend of burglar should have known that gifts given to her were illicitly obtained, thus subjecting her to liability as a co-conspirator); U.S. v. Jewell, 532 F.2d 697 (9th Cir. 1976)(*en banc*)(willful blindness is equivalent to actual notice); Model Penal Code, MPC 2.02(7).

Third Affirmative Defense

Yale's claim is barred because it fails to state a claim against Mr. Konowaloff upon which relief can be granted.

Fourth Affirmative Defense

The doctrine of estoppel in all forms bars Yale's claim that it is the owner of the Painting.

Fifth Affirmative Defense

No statute of limitations defense applies to actions to quiet title under C.G.S. § 47-31 and if such a statute of limitations defense does apply it is subject to equitable tolling because Mr. Konowaloff did not discover that Yale had possession of the Painting until 2008 and had no reason to know that Yale was either in possession of the Painting or claimed ownership thereto.

Sixth Affirmative Defense

Mr. Konowaloff has not unreasonably delayed bringing these claims since he did not learn of Yale's purported ownership of the Painting until 2008. In any event, Yale has not been prejudiced in any way. Rather, it has had the benefits that come from displaying and asserting ownership rights over a Painting that it did not own.

Seventh Affirmative Defense

The equities do not favor entering the injunctive relief requested by Plaintiff.

Eighth Affirmative Defense

Yale is not entitled to retain possession of the Painting because Yale did not take reasonable steps to inquire as to whether Clark had good title, to locate the heirs of Ivan Morozov and to ascertain whether the heirs to Ivan Morozov had received compensation for the Painting or had voluntarily given up any claims of title to the Painting.

Ninth Affirmative Defense

Yale is not entitled to relief because its possession of the Painting is illegal.

Tenth Affirmative Defense

Because Yale had reason to believe that the Painting was stolen, Yale was complicit in retention of property either actually known or known as a matter of judicial inference, to be stolen.

WHEREFORE, Mr. Konowaloff respectfully requests that this Court:

- a) Declare that Mr. Konowaloff is the rightful owner of the Painting;
- b) Deny Yale's request for declaratory and injunctive relief; and
- c) Grant such other and further relief as this Court deems just and proper.

Request For Jury

Mr. Konowaloff requests a trial by jury on all issues triable by a jury.

COUNTERCLAIM

Pierre Konowaloff ("Mr. Konowaloff"), by his attorneys, as and for his counterclaim, alleges upon knowledge with respect to himself and his own actions and upon information and belief with respect to all other matters, as follows:

1. This is an action for a declaration of title as residing in Pierre Konowaloff as the heir to *The Night Café* painting currently held by the Yale University Art Gallery (the "Painting"). The Counterclaim incorporates in pertinent part all the admissions and demands made in Mr. Konowaloff's answer to Yale's Complaint of March 23, 2009, case number: 309CV00466 AWT. This Counterclaim incorporates as if fully set forth herein the allegations contained in the Complaint at paragraphs 5-13 pertaining to the Parties, Jurisdiction and Venue of this Court, and the answers admitting all such allegations. This Counterclaim further accepts and reaffirms the jurisdiction of this Court and its authority to determine title and provide for equitable and other relief. Yale, bearing the burden of proof under Connecticut law on claims to quiet title, cannot

meet its burden of showing that it has good title to the Painting. By this Counterclaim, Mr. Konowaloff seeks a determination that the Painting is rightfully his and seeks damages resulting from Yale's actions in connection with its acquisition, possession and retention of the Painting.

2. It is undisputed that the title to the Painting was acquired for good value by Ivan Morozov, Mr. Konowaloff's great-grandfather, on June 23, 1908. It is also undisputed that Mr. Konowaloff is the legitimate heir to all rights to the Painting insofar as he was designated the sole heir of Jean Konowaloff (the sole heir of Eudoxie Morozov, who was in turn the sole heir of Ivan Morozov) on March 18, 2002.

3. The Morozov family title to the Painting, as currently held by Mr. Konowaloff, was never alienated or voluntarily transferred to any other party. Mr. Konowaloff is the rightful owner of the Painting. Ivan Morozov offered his paintings for public exhibitions before the Russian Bolshevik revolution and maintained his collection, including the Painting, so that the public could – and did - have access to it.

4. Although Plaintiff has repeatedly characterized the confiscation of this Painting by the Russian Bolshevik revolutionary regime (RSFSR) in 1918 as an act of nationalization, in fact it was simply an act of theft. This theft was deemed by the United States at the time as a violation of customary and conventional international law, and was one of the reasons for the United States' long delay (until 1933) in recognizing the USSR. Nationalization, when undertaken in time of peace, is compatible with international law and subject to recognition by other states only if the nationalization serves public purposes, accords with the law of eminent domain and does not breach the prohibition on the confiscation of cultural property. Alternatively, if the confiscation of the Painting is viewed as a war-time act (as Russia in 1918 was engaged in a civil war and an international conflict), it was nonetheless illegal, because confiscation of cultural

property was prohibited under prevailing customary and conventional international law as inherently unrelated to “military necessity” and effectuated without just compensation (the only exceptions for taking of private property).

5. Stephen C. Clark either had actual knowledge, or reasonably should have known, that Russia had no legal title to the Painting when he sought to acquire it in 1933. He knew or had reason to know that the Painting was unlawfully confiscated by an interim revolutionary government not recognized by the United States, and the subsequent sale of that Painting was legally suspect. He had reason to believe that the Matthiesen Gallery, which was listed as an organization “involved in looting art” in the 1946 Final Report of the Art Looting Investigation Unit (ALIU) of the Office of Strategic Services (OSS), was involved in the purchase and sale of looted art even as early as 1933 when the surreptitious sale to Mr. Clark occurred.

6. As Clark never acquired lawful title, he could not bequeath lawful title to Yale.

7. Clark engaged in two schemes of fraudulent concealment. He agreed to buy the Painting secretly so that neither the Morozov family nor the Russian public itself would know about the transaction. See e.g., ArtNews, April 2008, article by noted Russian art expert Konstantin Akinsha: “Clark wasn’t sure that the sale of art works nationalized after the Revolution met all legal requirements.” Secondly, on information and belief, Clark’s estate, pursuant to Clark’s instructions and in violation of New York State Surrogate law, failed to provide notice to the Morozov family or their descendents of the acquisition despite Clark’s actual knowledge, or knowledge which any responsible person could have acquired, that the Painting came from the confiscated Morozov collection, and that the heirs were residing in Paris.

8. As an institution of higher learning of worldwide renown, Yale knew, or had reason to suspect, that its bequest from Clark involved looted art. Yale, however, did not examine whether

there were any potential claims of ownership to the Painting. Instead of taking reasonable steps to inquire as to whether Clark had good title, to locate the heirs of Ivan Morozov, and to ascertain whether the heirs to Ivan Morozov had received compensation for the Painting or whether the heirs had voluntarily given up any claims of title to the Painting, Yale engaged in a policy of willful ignorance. When the bequest occurred in 1961, the Yale University Art Gallery, like all galleries and museums in the United States, was on notice by the U.S. State Department to avoid acquisition of any Nazi looted art. Moreover, well before the bequest, Allied Authorities had identified the Matthiesen Gallery in Berlin as the chief “fence” or intermediary for the laundering of major Nazi looted art (especially that looted by Hermann Goering, Commander of the Luftwaffe). At the time of the 1933 sale, the Matthiesen Gallery was well known by sophisticated purchasers of art, like Mr. Clark, as having been engaged by the Knoedler Gallery in New York for the purpose of illicitly laundering confiscated art. Although the post-WWII warning by U.S. authorities regarding non-acquisition of Nazi looted art did not apply to Bolshevik looted art, it served to put Yale on further notice to scrutinize suspect looted art and to carefully check the provenance. Instead of heeding this principle, Yale impeded the Morozov family’s opportunity to claim ownership.

9. Yale concealed reference to the Morozov provenance in any of its publications or displays of the Painting. Even today, the Morozov provenance is not mentioned on its website.

10. The United States Executive Branch in its recognition of the U.S.S.R. in 1933 did not confer good title to Russia. Prior to that recognition, U.S. courts repeatedly ruled, as early as 1922, that the Bolshevik confiscations were unlawful. Clark, as a sophisticated buyer of works of art, knew or should have known of these decisions. For example, in Sokoloff v. National City Bank of New York, 199 N.Y.S. 355 (1922), the Supreme Court of New York held that “the

Soviet government of Russia has never been recognized by our government; hence we may not ascribe any of the attributes of sovereignty to it. It follows that all the acts of that government in contemplation of American courts are ineffective.” That ruling was later affirmed by the New York Court of Appeals in 1924, in Sokoloff v. National City Bank of New York, 239 NY 158, 164 (1924), holding that “confiscation by a government to which recognition has been refused has no other effective law than seizure by bandits or by other lawless bodies.” Subsequent to Russia’s sale of the Painting to Stephen Clark and the Russian government via the Knoedler and Matthiesen galleries, President Franklin D. Roosevelt negotiated the U.S.-U.S.S.R. recognition accords (Roosevelt-Litvinov Agreements). That diplomatic accord did not affect, nor was it intended to validate, an otherwise illegitimate sale based on unlawful confiscation. As the Supreme Court made clear in United States v. Belmont, 301 U.S. 324 (1937), and concurring opinions of JJ. Stone, Cardozo, & Brandeis, those accords encompassed extinguishment of such claims held by the United States government, or those specifically assigned to it by private non-governmental parties. The U.S.-U.S.S.R. recognition accords did not provide an opportunity for private parties, like Yale University, which never assigned its claim to the U.S. government, to reap advantage from a scheme intended to improve bilateral relations by profiting from unlawful acts by Russia’s predecessor regime, the RSFSR. Nor was the U.S.-U.S.S.R. recognition ever intended to extinguish the rights of foreign nationals, like Pierre Konowaloff, to exercise their right to claim title to works of art held in the United States.

11. Yale’s deliberate acquisition of suspect stolen art serves as an independent and sufficient basis for this Court’s denial of Yale’s complaint seeking affirmation of good title. If this Court were to thus deny Yale’s claim to good title, it need not then examine the lawfulness or unlawfulness of the Bolshevik seizure. This Court can take judicial notice that all leading

authorities, including the government of the U.S.S.R. and its prominent museums, acknowledge that Ivan Morozov was the initial purchaser for good value and owner of *The Night Café*. Accordingly, the underlying illegality of the taking by the Bolshevik regime becomes pertinent only with regard to Yale's state of mind at time of its acceptance of the Clark bequest. Such an examination reveals that Yale knew or should have known that the RSFSR's taking violated international law. This international law is expressed by The Hague Convention (Regulations) Respecting the Laws and Customs of War on Land (1907) to which Russia was a party and which the RSFSR specifically acknowledged as applicable. The Bolsheviks were an occupying power at the time of the Morozov confiscation on territory where the Morozovs resided and which the Bolsheviks controlled during the civil war. As made clear by customary international law applicable to any reading of the 1907 Hague Conventions, in the event of a civil war, opposing belligerents were and are to be treated as if they are separate states for the purposes of compliance with provisions of the rules of war, including prohibitions against the confiscation of cultural property. Article 46 of the Hague Convention of 1907 provides that "[p]rivate property cannot be confiscated." Article 53 of The Hague Convention of 1907 permits confiscation only of property or provisions "which may be used for military operations." Article 56 of the Hague Convention of 1907 states that "all seizure of . . . works of art and science, is forbidden, and should be made the subject of legal proceedings." It is no defense that the seizure of valuable cultural property was aimed at preserving it in the face of the risks of civil war. Even assuming a factual basis for custodianship, RSFSR and the USSR were under respective duties to revert the Painting to its owner upon termination of hostilities. Thus Yale knew or should have known at the time of the bequest that the sale to Mr. Clark constituted perpetuation of the theft of cultural property.

12. These prohibitions against theft of cultural property were reaffirmed and strengthened in various international instruments to which the United States is a party and which were in effect at the time of Yale's acquisition of the Painting in 1961. Articles 33, 53, and 147 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) reaffirmed the principles of the 1907 Hague Convention with regard to pillage and misappropriation of cultural property. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict expressly prohibits theft, pillage and misappropriation of cultural property and calls upon the parties to put a stop to any form of theft. Although the 1954 Convention expressly imposed duties on governments to put an end to the theft of cultural property, private parties were placed on notice not to aid, abet, or profit from such theft. Instead of avoiding complicity in the violation of prohibitions against confiscation of cultural property, Yale turned a blind eye to those warnings.

13. Further reaffirmation of the policies and prohibitions initially contained in the 1907 Hague Convention and 1954 Hague Convention, is found in Articles 6, 7, and 8 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970). Yale also ignored those policies.

14. The aforementioned treaties are designed to protect cultural property not only from the ravages of war, but also from nationalization independent of warfare. *See, e.g.*, Article 2 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970). ("The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each

country's cultural property against all the dangers resulting there from. . . . To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.”). Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398 (1964), does not indicate a contrary result insofar as it does not deal with cultural property, for which an exception is carved from the general rule that nationalizations will not be questioned by courts of another country. Yale’s obligation to not enable, or validate through its acquiring and displaying stolen art, was again ignored, thus perpetuating violation of the protections accorded to cultural property.

15. Upon the death of his father in January 2002, Mr. Konowaloff became the official heir of the Morozov collection. At that time he undertook an exhaustive effort aimed at documenting the inventory of his great-grandfather, Ivan Morozov. His grandfather did not undertake such an inventory for a variety of reasons, but largely out of the well-founded belief that he was not in a position, for reasons of personal security and due to the lack of any available judicial remedies at the time, to take action against Russia for the art works belonging to his father. In the course of this compilation of the Morozov collection, it came to Mr. Konowaloff’s attention, through research in newly available Russian museum archives, that *The Night Café* had been sold to Mr. Clark in the 1930’s. Mr. Konowaloff later discovered that Mr. Clark had bequeathed the Painting to Yale University. In March 2008, Mr. Konowaloff wrote, through his wife, to Yale on two occasions questioning Yale’s ownership of *The Night Café*. It was unknown to Mr. Konowaloff or his wife what reason Yale might have for legitimately claiming title to this Painting insofar as they had ample reason to believe Yale knew of the circumstances surrounding the illegal confiscation of the Morozov collection.

16. Yale responded to Ms. Konowaloff's inquiry on March 14th, 2008, stating that it would look into the provenance of this Van Gogh Painting and that: "hopefully someone will get back to you as soon as possible." No further communication on this matter was forthcoming from Yale.

17. Yale violated and continues to violate both international treaty law and customary international law by its continued retention of *The Night Café* and refusal to acknowledge Mr. Konowaloff's rightful ownership of the painting.

18. Yale knew, or should have known, at the time it received the bequest and thereafter that they unlawfully acquired the stolen masterpiece, which the RSFSR had seized in violation of international law, a violation that was later reaffirmed and perpetuated by the USSR as the successor regime. Where there is reason to believe that goods are stolen, established principles of law hold that one may be found complicit in a crime and subject to civil liability by taking possession of such goods. *See, e.g., Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *U.S. v. Jewell*, 532 F.2d 697 (9th Cir. 1976)(*en banc*); Model Penal Code, MPC 2.02(7). As Yale knew, or easily could have discovered, the heirs to Ivan Morozov resided in Paris, France, it could readily have provided actual notice to the heirs of its claim to ownership in order to determine if they had any adverse claims. At the least, Yale could have posted notice through a publication in a Paris newspaper. Yale failed to take any of these measures.

19. Yale's retention and refusal to return *The Night Café* to its rightful owner in 2008 violates both Connecticut law and international treaty and customary law as it existed at the time of the seizure, and as reaffirmed and expanded in the treaty instruments noted above, to which the United States is a party. Because the RSFSR is not an extant regime or government, and not one recognized by the United States at the time of the taking, and for other independent reasons, Yale

is not entitled to avail itself of an Act of State defense. *See* the recent ruling by the D.C. Circuit Court of Appeals in Agudas Chasidei Chabad of United States v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008), in contradistinction to the New York District Court ruling in Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 18 (S.D.N.Y. 1976).

20. U.S. courts have consistently affirmed the applicability of customary international law, especially as codified in treaties to which the United States is a party, as applicable US law. Yale's continued and wrongful detention of the unlawfully confiscated *The Night Café* is prohibited by customary and international treaty law and Yale should be held accountable for financially benefiting, and being complicit in the pillage and plunder and unlawful confiscation of cultural property.

21. Yale's wrongful retention of *The Night Café* violates principles prohibiting the taking of cultural property of "universal concern", dating back as far as classical Greece and reflecting legal recognition of the protection of cultural property prevailing through subsequent European history to the present.

22. Yale's failure to return the *The Night Café* and its retention of private and cultural property taken in violation of international law is also actionable in trover and detinue. These causes of action provide for damages and/or the recovery of property and have existed in the common law since feudal times.

23. For centuries, legal actions in detinue, trover, replevin, trespass to chattels, and conversion have provided for the recovery of damages for the wrongful taking of personal property, reflecting the deeply-rooted and widespread recognition of personal property as a protected private property interest.

24. Actions in trover and detinue impose liability for such unlawful taking of property.

FIRST COUNTERCLAIM

(C.G.S. § 47-31 – To Quiet Title)

25. Mr. Konowaloff repeats and realleges the allegations contained in paragraphs 1-24 above as if fully set forth herein.

26. As set forth above, Mr. Konowaloff is the legitimate heir to all rights to the Painting owned by Ivan Morozov.

27. Ivan Morozov acquired the Painting on June 23, 1908 for good value. The Painting was confiscated by the RSFSR in 1918 in an act of theft.

28. Stephen C. Clark acquired the Painting in 1933 but did not obtain good title to it. Yale obtained the Painting by a bequest from Mr. Clark and thus did not obtain good title to it.

29. Mr. Konowaloff has requested that Yale return the Painting to him as the rightful owner of the Painting and Yale has refused.

30. The only person or entity that claims an adverse interest to Mr. Konowaloff's interest is Yale.

31. Pursuant to C.G.S. § 47-31(f), the Court should determine that Mr. Konowaloff is the rightful owner of the Painting and quiet title to the property.

SECOND COUNTERCLAIM

(28 U.S.C. § 2201 – Declaratory Relief)

32. Mr. Konowaloff repeats and realleges the allegations contained in paragraphs 1-31 above as if fully set forth herein.

33. An actual controversy has arisen and now exists between Mr. Konowaloff and Yale in that Mr. Konowaloff contends that he is the rightful owner of the Painting and that Yale is in

wrongful possession of the Painting. Yale disputes Mr. Konowaloff's contentions and asserts that it lawfully possesses the Painting.

34. A judicial declaration is necessary and appropriate at this time under the circumstances so that Mr. Konowaloff may ascertain whether Yale must immediately return the Painting to him as its rightful owner.

35. Mr. Konowaloff is entitled to the imposition of a constructive trust on the Painting obligating Yale to return immediately the Painting to Mr. Konowaloff.

THIRD COUNTERCLAIM

(Conn. Gen. Stat. § 52-515- Replevin)

36. Mr. Konowaloff repeats and realleges the allegations contained in paragraphs 1-35 above as if fully set forth herein.

37. Conn. Gen. Stat. § 52-515 provides that, "[t]he action of replevin may be maintained to recover any goods or chattels in which the plaintiff has a general or special property interest with a right to immediate possession and which are wrongfully detained from him in any manner, together with the damages for such wrongful detention."

38. Mr. Konowaloff, as the heir of Mr. Morozov, is the rightful owner of *The Night Cafe*.

39. Neither Mr. Konowaloff, nor his father, was aware of Yale's acquisition of *The Night Café* at the time it occurred. Neither had reason to suspect that Yale had made the acquisition until shortly before Mr. Konowaloff requested Yale to provide an explanation of the basis of its retention of the Painting.

40. Yale has wrongfully detained *The Night Café* from Mr. Konowaloff and continues to do so. Yale's continued possession constitutes continual and ongoing wrongful conduct with

regard to its unauthorized assumption and exercise of ownership over *The Night Café* is therefore unlawful.

41. Yale's refusal to return *The Night Café* after Mr. Konowaloff's request that it be returned to him as the rightful owner and its actions and continued possession of the Painting constitutes a wrongful detention of property in violation of Conn. Gen. Stat. § 52-515.

42. Yale's conduct is the direct and proximate cause of significant damages and losses to Mr. Konowaloff.

FOURTH COUNTERCLAIM

(Conversion at Connecticut Common Law)

43. Mr. Konowaloff repeats and realleges the allegations contained in paragraphs 1-42 above as if fully set forth herein.

44. As set forth above, the Painting was unlawfully acquired by Russia and both Mr. Clark and Yale knew or should have known of this fact. The taking was unlawful, tainting the rights of others to subsequently acquire good title.

45. Conversion occurs when one, without authorization, assumes and exercises a right of ownership of property belonging to another to the exclusion of the owner's rights. Conversion can occur when the possession is originally rightful, but becomes wrongful as a wrongful detention when one refuses to return the property on demand.

46. Yale is currently claiming unlawful ownership over *The Night Café*, the retention of which violates international, United States, and Connecticut law.

47. On March 14, 2008, Mr. Konowaloff, as the lawful descendant and heir to Mr. Morozov and rightful owner of *The Night Café*, questioned Yale's right to the retention of the Painting and

implicitly asked for its return unless Yale could provide a well-founded justification for its continued retention of the Painting. No such justification or explanation was ever forthcoming.

48. Yale's continued possession of *The Night Café* following Mr. Konowaloff's request that it be returned to him as its rightful owner constitutes a wrongful detention.

49. Yale's refusal to return *The Night Café* to its rightful owner, Mr. Konowaloff, is inconsistent with his right of ownership of the Painting and is the direct and proximate cause of significant harm, damages and losses to Mr. Konowaloff in an amount greater than \$75,000.

FIFTH COUNTERCLAIM

(Violation of C.G.S. §53a-119 Larceny and Treble Damages under C.G.S. § 52-564)

50. Mr. Konowaloff repeats and realleges the allegations contained in paragraphs 1-49 above as if fully set forth herein.

51. As set forth above, Yale's unquestioned acceptance of the Clark bequest amounted to "art laundering" that involved the knowing receipt of stolen goods. Yale has further intentionally and wrongfully withheld the Painting from Mr. Konowaloff, who is the rightful owner of the Painting, even though Mr. Konowaloff requested in 2008 that the Painting be returned to him.

52. Yale unquestioningly accepted the Clark bequest, despite the fact that it knew or should have known that the Painting was stolen from the Morozov family by the RSFSR in violations of international law perpetrated by Lenin in 1918 and reaffirmed by Stalin in 1923. The 1933 sale of the Painting, authorized by Stalin as part of large scale surreptitious sales to the United States, was undertaken in a manner aimed at avoiding any scrutiny in Russia, the United States or Europe. Mr. Clark was party to that scheme. And, Yale perpetuated it in taking possession of the Painting and assert ownership rights thereto.

53. Yale's receipt and concealment of the true legal ownership, title and provenance of the Painting has caused harm to Mr. Konowaloff.

54. Yale's continued withholding of the Painting, with the intent to deprive Mr. Konowaloff of ownership of and title to the Painting even though Mr. Konowaloff is the rightful owner of the Painting and even though Mr. Konowaloff asked Yale in 2008 to return it to him, is a violation of C.G.S. § 53a-119.

55. As a direct and proximate result of Yale's knowing receipt of the Painting, its concealment of the rightful ownership of the Painting and its intentional withholding of the Painting from the rightful owner, Mr. Konowaloff, Mr. Konowaloff has been damaged in an amount to be proven at trial, but which far exceeds \$75,000, and Yale is liable for treble damages under C.G.S. § 52-564.

SIXTH COUNTERCLAIM

(Conn. Gen. Stat. § 42-110, *et seq.* – Connecticut Unfair Trade Practices Act)

56. Mr. Konowaloff repeats and realleges the allegations contained in paragraphs 1-55 above as if fully set forth herein.

57. At all times relevant herein, Yale has been engaged in trade or commerce in the state of Connecticut. Yale has engaged in unfair or deceptive acts in their possession and display of the Painting which offend public policy as it has been established by state, federal and international law governing private property and cultural property, causing substantial financial detriment to the interests of the Plaintiff.

58. The display of the Painting at Yale and on loan to other entities, for financial compensation, constitutes improper interference with Mr. Konowaloff's business expectancies as the rightful owner.

59. Yale engaged in unfair and deceptive acts or practices by, among other things: 1) acting in concert with Mr. Clark to avoid public scrutiny of the stolen art; 2) retaining the Painting even though it knew or should have known the Painting was illegitimately confiscated from Ivan Morozov; and 3) not contacting the heirs and descendants of Mr. Morozov to notify them that Yale had come into possession of the Painting, in spite of having the wherewithal and ability to do so.

60. These practices are prohibited under the Connecticut Unfair Trade Practices Act, Connecticut General Statutes §§ 42-110 *et seq.* and entitle the Defendant to damages, injunctive relief under § 42-110(g), punitive damages, costs and attorneys' fees.

61. Yale's conduct is the direct and proximate cause of significant injury, ascertainable damages, and losses to Mr. Konowaloff in an amount greater than \$75,000.

SEVENTH COUNTERCLAIM

(Injunctive Relief against All Defendants)

62. Mr. Konowaloff repeats and realleges the allegations contained in paragraphs 1-61 above as if fully set forth herein.

63. Konowaloff seeks equitable and injunctive relief: (1) enjoining Yale and their agents and those acting in concert with them from selling, copying, destroying, altering, damaging, and disposing of the Painting in any manner whatsoever; and (2) mandating the immediate return of the Painting to Mr. Konowaloff.

64. The Court should issue the requested injunction because there is a likelihood that Mr. Konowaloff will prevail on the merits of its claims.

65. There is a substantial threat that Mr. Konowaloff will continue to suffer irreparable injury or harm if the requested injunction is denied because the Painting is unique and irreplaceable.

66. Damages would be an inadequate legal remedy due to the unique and irreplaceable nature of the Painting.

67. The threatened injury and harm outweighs any damage the injunction might cause to Yale. The public interest favors issuance of the injunction. The hardship to Yale is minimal.

WHEREFORE, Pierre Konowaloff respectfully requests that this Court enter judgment in his favor and against Yale, and award him all relief as allowed by law and equity, including but not limited to, the following:

- a. Appropriate legal and equitable relief including a declaratory judgment and an order to quiet title, that includes, but is not limited to, a declaration that Konowaloff has good and full title to the Painting, that Yale is in wrongful possession of the Painting, and that Yale should immediately return the Painting to Mr. Konowaloff;
- b. Injunctive relief, including, but not limited to, an order from this Court (1) enjoining Yale and their respective agents and those acting in concert with them from selling, copying, destroying, altering, damaging, displaying, transferring or disposing of the Painting in any manner whatsoever; and (2) mandating that they immediately return the Painting to Mr. Konowaloff;
- c. Actual monetary damages as established at trial;
- d. Compensatory damages, including, but not limited to, those for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses;

- e. Punitive damages, including treble damages under C.G.S. § 52-564 for the Fifth Counterclaim, in an amount to be determined at trial;
- f. For a writ of replevin and order compelling Yale to turn over the Painting to Konowaloff;
- g. Attorney's fees and costs;
- h. Pre- and post- judgment interest at the highest lawful rate; and
- i. Such other and further relief as justice requires.

REQUEST FOR TRIAL BY JURY

Mr. Konowaloff requests a trial by jury on all issues and claims triable by a jury.

Dated: May 21, 2009

Respectfully submitted,
Pierre Konowaloff,
By his Attorneys,
/s/ James R. Oswald

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CERTIFICATE OF SERVICE

This is to certify that on this 21st day of May, 2009, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/James R. Oswald

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