SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY **J.S.C.** **PART** 48
Justice

Index Number : 655489/2016
MAYOR GALLERY LTD
vs.
AGNES MARTIN CATALOGUE
SEQUENCE NUMBER : 001
DISCONTINUE

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

motion is decided in accordance with accompanying memorandum decision in motion sequence 001

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

Dated: 4/3/18

HON. ANDREA MASLEY, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

THE MAYOR GALLERY LTD.,

Plaintiff,

-against-

THE AGNES MARTIN CATALOGUE RAISONNÉ LLC, ARNOLD GLIMCHER, TIFFANY BELL, MEMBERS OF THE AUTHENTIFICATION COMMITTEE OF THE AGNES MARTIN CATALOGUE RAISONNÉ, *i.e.*, John Doe or Jane Doe ##1-6,

Defendants.

Index No.: 655489/2016
Mot. Seq. No.: 001

Decision and Order

Masley, J.:

Defendants, The Agnes Martin Catalogue Raisonné LLC (AMCR), Arnold Glimcher, Tiffany Bell, and Members of the "Authentification [sic] Committee of the Agnes Martin Catalogue Raisonné" (Committee), "*i.e.*, John Doe or Jane Doe ##1-6,"[1] move, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7), to dismiss the amended complaint of plaintiff, The Mayor Gallery Ltd., an international art dealer and gallerist organized under the laws of the United Kingdom.

This action arises from the submission of 13 artworks to AMCR, a private non-profit organization that authenticates and compiles a catalogue of works by deceased artist Agnes Martin, which is periodically updated and published online (Catalogue). Prior to the formation of AMCR in 2012, plaintiff had sold those artworks, purportedly created by Martin, to four separate private art collectors.

[1] Plaintiff has learned the identities of the Committee members, denoted "John Doe or Jane Doe ##1-6," however, the parties stipulated that "[t]he identities of the John Doe/Jane Doe defendants shall remain Attorneys' Eyes Only" until five business days after this motion to dismiss (Mot. Seq. No. 001) is decided, and/or five days after any appeal from this decision is concluded (NYSCEF Doc. No. 23 [stipulation, so ordered 12/20/2016, Oing, J.]; *see also* Doc. No. 22 [confidentiality stipulation, so ordered 12/20/2016, Oing, J.]).

After AMCR was founded, the collectors each submitted their purchased artworks to AMCR to be included in the Catalogue, but AMCR declined after examining the works and the collectors' accompanying applications. After AMCR declined to include one particular work—a painting entitled *Day and Night*—plaintiff refunded its purchaser, retook possession of the work, and resubmitted the painting to AMCR, which again declined to include the artwork in the Catalogue. In sum, plaintiff refunded two of the collectors and accepted the return of two works; the two remaining collectors retained possession of their respective 11 artworks, but plaintiff alleges that it has agreed to refund those collectors if it does not prevail in this action.

Background

The following allegations are taken from the amended complaint, except as otherwise noted.

A "catalogue raisonné" is a collection of a specific artist's artworks that have been authenticated by some designated person or group, and which often takes the form of a continuously-updated, published compilation that identifies and records (i.e., photographically) the accepted works of the artist (*see* plaintiff's amended complaint [compl.] ¶¶ 2-3).

Martin was an abstract expressionist and minimalist artist whose artworks "regularly sell at auction and worldwide for hundreds of thousands to millions of dollars" (*see id.* ¶¶ 1, 7). The amended complaint challenges, among other things, the policies and procedures of AMCR, which created and maintains the Catalogue, a digitally-published compilation of Martin's paintings and works on paper, and the Committee,

which authenticates and compiles those works for inclusion in the Catalogue. According to plaintiff, Christie's and Sotheby's—"the two dominate [sic] auction houses in the United States and the world"—recognize the Catalogue "as the definitive compilation of authentic artworks of Agnes Martin;" thus, plaintiff alleges that the Committee's decision to not include a work in the Catalogue is "recognized in the worldwide marketplace as a conclusive statement to the public that the artwork is a fake," and such works are rendered "worthless" and unsaleable (*id.* ¶¶ 16-18).

The Parties

Plaintiff is an international art dealer and gallerist that sells works of art at auction and in private sales (*id.* ¶ 6). Its principal is James Mayor.

According to plaintiff, individual defendant Glimcher is "the primary if not the exclusive owner and manager and Chairman" of the Pace Gallery (Pace), "a leading . . . international art dealer and gallery" (*id.* ¶ 9), the founding member of AMCR, as well as the founder, and current member of, the Committee (*see id.* ¶¶ 6-8, 13). Pace and Glimcher "claim that they have represented Agnes Martin . . . from 1975 to the present," and presently represent her estate (*id.* ¶ 10). AMCR is a New York company formed in November 2012, eight years after Martin's death, to authenticate Martin's paintings and works on paper and to compile and maintain the Catalogue (*see id.* ¶¶ 7, 13). Individual defendant Bell is the editor of the Catalogue and a member of the Committee. Plaintiff alleges that the four remaining members of the Committee—whose identities are kept secret from the public—were revealed to plaintiff only through documents produced in this action (*id.* ¶ 14).[2]

[2] As the court dismisses plaintiff's claims as against the four misnamed defendants, it need not reveal their identities in this decision.

Submissions to the Catalogue

Plaintiff alleges that "collectors have no choice but to submit their Agnes Martin artworks to defendants for vetting," and "[c]ollectors are required" to complete a "non-negotiable" "Examination Agreement" (Agreement) for each work submitted (*id.* ¶ 19). After reviewing the submitted work, "[t]he defendants then take only one of two actions: they either accept or reject the artwork for inclusion in the [Catalogue]," and the collector is notified of the decision by a "cursory form letter, without any explanation of any kind" (*id.* ¶ 20). Plaintiff alleges that "defendants also refuse to answer . . . reasonable inquiries from the owners of rejected artworks who[] . . . seek an opportunity for rebuttal and detailed information" (*id.* ¶ 21). However, nothing in the Agreements requires AMCR, or any defendant, to provide such opportunities or information (*see e.g.* plaintiff's exhibits B, D, E, F, G).

1. Levy's and plaintiff's submissions of *Day and Night*

Plaintiff alleges that it sold a painting, *Day and Night*, to private collector Jack Levy for $2.9 million in September 2010. On May 1, 2014, Levy submitted the work to AMCR with a completed Agreement. Levy was informed by AMCR, via "Notification Letter," dated September 25, 2014, that *Day and Night* would not be included in the Catalogue (compl. ¶¶ 22-25; plaintiff's exhibit [ex.] D). Plaintiff thereafter refunded the sale price and sales tax to Levy, and accepted the return of the painting.

On May 14, 2015, Plaintiff submitted its own Agreement—which corrected "a number of important errors" made by Levy—to AMCR for *Day and Night*, along with additional documents supporting the work's exhibition history, photographs of Martin with the work, and radiocarbon test results for its canvas; plaintiff did not, however,

resubmit the painting itself, allegedly because Bell told plaintiff's principal, Mayor, that it was "unnecessary" (compl. ¶ 28-31; ex. B). Plaintiff was advised, by Notification Letter dated October 21, 2015, that *Day and Night* would not be included in the Catalogue. Plaintiff also received a letter, addressed to plaintiff's principal, Mayor, and dated October 22, 2015, from defendants' law firm that stated that: "[o]ther submitted works referencing [plaintiff] in their provenance raised material legal concerns;" and "advised that you will be held responsible for compensatory and punitive damages" "[i]f you bear personal responsibility for the nature of these works and their questionable provenance" (*see* ex. B).

2. Kolodny, Shainwald, and Labouchère's submissions

Plaintiff sold a work on paper, *Untitled*, to Patricia and Frank Kolodny in 2009, who gifted the work to their daughter, Johnanna Kolodny (Kolodny). Kolodny submitted *Untitled* with her Agreement to AMCR on August 15, 2015, and was informed by Notification Letter, dated November 24, 2015, that the work would not be included in the Catalogue. Kolodny "decided to retain ownership of *Untitled*, but only until and if [plaintiff] established that it was authentic and marketable" (compl. ¶¶ 34-39; ex. E).

In December 2012, plaintiff sold a work on paper, *The Invisible*, to Sybil Shainwald for $180,000. Shainwald submitted that work and an Agreement to AMCR on August 15, 2015, and was informed by Notification Letter, dated November 24, 2015, that the work would not be included in the Catalogue. Shainwald returned *The Invisible* to plaintiff, and was refunded the purchase price (compl. ¶¶ 40-45; ex. F).

Plaintiff sold 10 paintings to Pierre de Labouchère in March and October 2013 for a € 3,250,000, "currently converting to $3,625,000." Labouchère submitted those

works, with 10 "identical" Agreements, to AMCR on October 13, 2014, and was notified that the works would not be included in the Catalogue by Notification Letters dated November 24, 2015. He "decided to retain ownership . . . only until and if [plaintiff] established that [they] were authentic and marketable" (compl. ¶¶ 46-51; ex. G).

Plaintiff alleges that, in each instance, "defendants' refusal to approve" each of the above works in the Catalogue "had as its purpose and was in substance and effect a declaration by defendants to [Levy, plaintiff, Kolodny, Shainwald, and Labouchère, respectively,] and the marketplace that the artwork[s are] fake, rendering [the works] worthless" (compl. ¶¶ 26, 33, 38, 45, 51).

The Amended Complaint

Following the above events, plaintiff's attorney repeatedly sent communications to defendants' attorneys requesting, among other things: the identity of the person who signed the Notification Letters on behalf of AMCR; the names and curriculum vitae of each Committee member; the "steps and procedures" followed by AMCR and the Committee in rejecting the works; the "detailed reasons" the works were rejected from the Catalogue; copies of "any and all documents that were relied upon in connection with each rejection;" a copy of AMCR's operating agreement; and an opportunity for Mayor, "and perhaps others with relevant information, . . . to fully examine and respond to the [] requested documents and facts" (ex. H; *see* compl. ¶¶ 52-65). Those requests were ignored.

On October 17, 2016, plaintiff commenced this action by filing a summons and complaint, and filed an amended complaint on January 9, 2017. The amended complaint contains seven causes of action: (1) product disparagement "for all thirteen

artworks" (compl. ¶¶ 66-75); (2) tortious interference with contract "for all thirteen artworks" (*id.* ¶¶ 76-81); (3) tortious interference with prospective business relations "for all thirteen artworks" (*id.* ¶¶ 82-88); (4) negligent misrepresentation "for all thirteen artworks" (*id.* ¶¶ 89-95); (5) gross negligence and breach of contract for "all thirteen artworks" (*id.* ¶¶ 96-102); (6) breach of implied duty of good faith and fair dealing as to plaintiff's resubmission of *Day and Night* (*id.* ¶¶ 103-110); and (7) violation of General Business Law (GBL) § 349 (*id.* ¶¶ 111-112).

Plaintiff seeks damages in the amount of $7,233,438, the total value of the 13 artworks it sold, and the amount plaintiff has already, or "must be," refunded to the four collectors; plaintiff also seeks an injunction enjoining defendants to answer the inquiries posed by plaintiff's attorney's letters, or enjoining defendants from engaging in the allegedly deceptive business practices (*id.* at 26).

Defendants now move to dismiss the amended complaint pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7), and seek legal fees, costs, and expenses for the defense of this action, as provided under the Agreement plaintiff entered with AMCR when it resubmitted *Day and Night* (Plaintiff's Agreement).

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable

intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

Part I: Threshold and Preliminary Matters

1. Standing, generally

Defendants contend that plaintiff lacks standing to raise claims challenging the Agreements entered into by the four collectors (Collectors' Agreements) or the rejection of the collectors' submissions because plaintiff was neither a party to, nor a third-party beneficiary of, the Collectors' Agreements.

Plaintiff responds that its first, second, third, fourth, fifth, and seventh claims sound in tort, "wholly independently from the [Plaintiff's] Agreement," and "arise from defendants' duties in the marketplace of Agnes Martin artworks and to the public at-large [sic], which includes plaintiff." However, plaintiff's seventh cause of action alleges a violation of GBL § 349, a statutory claim that is separately addressed in Part II, below.

The parties' arguments are misguided.

> "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation. Standing is a threshold determination, resting in part on policy considerations, that a [party] should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria. That an issue may be one of 'vital public concern' does not entitle a party to standing. . . . [A] litigant must establish its standing in order to seek judicial review" (*Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 769 [1991] [citations omitted]).

Generally, a party has standing to pursue tort claims when it has been actually aggrieved; that is, absent an injury, there is no controversy to be adjudicated by the court (*see* Siegel, NY Prac § 136 at 232-233 [4th ed 2005]; *see Kronos, Inc. v AVX*

Corp., 81 NY2d 90, 94 [1993] ["[A]s a general proposition, a tort cause of action cannot accrue until an injury is sustained."]). To have standing to enforce or challenge a contract, on the other hand, a plaintiff must be a party to, or a third-party beneficiary of, the agreement at issue (*see generally Carrieri v Kim*, 2014 WL 5342524 [Sup Ct, NY County 2014). Further, "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*OP Sols., Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [1st Dept 2010], quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

Plaintiff's standing to raise its tort claims necessarily depends on its allegations of injury. Plaintiff alleges as to each of its claims that it was injured by the Notification Letters, and the implicit publication of the 13 works' inauthenticity by defendants, "in the amount of $7,233,438 – the total amount paid by and that has already been or must be refunded to [all four collectors]" (*see e.g.* compl. ¶¶ 71-72, 74). However, only two of the collectors—Levy and Shainwald (Rescinded Collectors)—actually "rescinded" their contracts and received refunds from plaintiff (*see* compl. ¶¶ 27, 45). Neither Kolodny nor Labouchère demanded or received a refund for their purchased works (*id.* ¶¶ 34, 46). Accordingly, no injury to plaintiff has accrued with regard to the Kolodny or Labouchère artworks, and, thus, it does not yet have standing to raise tort claims as to those transactions.

Furthermore, plaintiff's only allegation of injury that is not wholly tied to contract rescission and refunds is its vague, unsupported allegation that defendants interfered with plaintiff's "profitable business relationship[s]" with the four collectors (compl. ¶¶ 82-88). Plaintiff does not, however, allege that those collectors, or any other customers,

ceased doing business with it (*see id.*). In fact, in the paragraphs supporting the tortious interference with prospective business relations claim, plaintiff alleges that it was damaged in the amount of $7,233,438—the total value of refunds it has, or which "must be," paid to the four collectors (*see id.*). For each of its tort claims, plaintiff alleges only damages it sustained by rescinding, or potentially rescinding in the future, its past contracts with the four collectors.

Inasmuch as plaintiff has any standing to raise tort claims, that standing extends to only its accrued injuries relating to the Rescinded Collectors; thus, plaintiff's first, second, third, and fourth causes of action are dismissed to the extent that they pertain to plaintiff's contracts with, and works sold to, Kolodny and Labouchère.[3]

2. The individual defendants

Defendants contend that each of plaintiff's seven claims must be dismissed as against the individual defendants because the amended complaint does not allege that the individual defendants acted outside of the scope of their employment or sought a personal benefit in connection with the alleged acts or omissions.

Plaintiff responds that piercing the corporate veil to reach the individual defendants is proper because each individual defendant, as a member of the Committee, may be held personally liable for participating in the commission of the torts, even if the tortious acts or omissions were committed in furtherance of AMCR. Plaintiff also argues that the facts "relevant to piercing the corporate veil are within the exclusive knowledge and control of defendants;" thus, dismissing those defendants should be considered "only after issue is joined and discovery completed."

[3] The same reasoning applies to the tort prong of plaintiff's fifth cause of action, a hybrid claim alleging gross negligence and breach of contract, which is addressed in Part II, below.

Limited Liability Company Law § 610 states that "[a] member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member's right against or liability to the limited liability company." Recognizing "the essential distinction between a corporation and those individuals who administer its affairs, and that sound public policy restricts the imposition of liability on corporate officers and directors for the acts of the corporation," the First Department employs an "enhanced pleading requirement" for tort claims allegedly committed by corporate officers (*Petkanas v Kooyman*, 303 AD2d 303, 305 [1st Dept 2003]).

Accordingly, a plaintiff's pleadings must contain "particularized . . . allegations that the acts of the defendant corporate officers which resulted in the tortious [conduct] either were beyond the scope of their employment or, if not, were motivated by their personal gain, as distinguished from gain for the corporation" (*id.*). In that context, "personal gain" means that "the challenged acts were undertaken 'with malice and were calculated to impair the plaintiff's business for the personal profit of the [individual] defendant' " (*id.*, quoting *Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 110 [1st Dept 2002]; *see also Hoag v Chancellor, Inc.*, 246 AD2d 224, 230 [1st Dept 1998] [an individual corporate officer/director "is liable when he acts for his personal, rather than the corporate interests."]).

Here, plaintiff's amended complaint contains only general, conclusory allegations that the individual defendants participated in the claimed tortious acts; there are no specific allegations that the individual defendants committed any specific tortious act or omission. Plaintiff also does not allege particularized facts that demonstrate that the

individual defendants benefited from the alleged torts. Accordingly, plaintiff's pleadings are insufficient with respect to its claims against the individual defendants. Further, absent privity between plaintiff and those parties, plaintiff lacks standing to pursue its sixth cause of action—a breach of contract claim relating to Plaintiff's Agreement with AMCR—against the individual defendants (*see e.g. Albstein v Elany Contr. Corp.*, 30 AD3d 210 [1st Dept 2006]). For those reasons, the first through sixth claims are dismissed as against the individual defendants.

3. Whether the Agreement(s) preclude plaintiff's claims, generally

Defendants claim that all of plaintiff's claims are barred by the waiver provisions contained in all 14 Agreements. Plaintiff responds that its claims are not precluded because the Agreements are unenforceable, and that the Collectors' Agreements do not apply because plaintiff was not a party to those contracts.

Plaintiff's Agreement is the only one of the 14 total Agreements that was submitted by plaintiff to AMCR. Plaintiff is neither a party to, nor an intended beneficiary of, the 13 Collectors' Agreements; thus, the Collectors' Agreements do not bar plaintiff's claims. Plaintiff's Agreement pertains to only plaintiff's submission of *Day and Night*, and does not bar plaintiff's claims as to any of the other 13 submissions to AMCR.[4]

[4] The extent to which the claims-waiver provision in Plaintiff's Agreement is enforceable is not addressed in this decision as the court finds, as discussed in Part II, below, that plaintiff does not adequately allege the necessary elements of its claims relating to its own, as opposed to Levy's, submission of *Day and Night*.

Part II: Plaintiff's Seven Causes of Action

1. First cause of action for product disparagement

Defendants contend that plaintiff fails to establish the necessary elements of a product disparagement claim. Plaintiff responds that the elements are adequately pleaded.

"[P]roduct disparagement is an action to recover for words or conduct which tend to disparage or negatively reflect upon the condition, value, or quality of a product or property, and . . . the elements of a product disparagement which must be proven are: (1) falsity of the statement; (2) publication to a third person; (3) malice (express or implied); and (4) special damages" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 105 [1st Dept 2009] [alteration in original], *lv denied* 15 NY3d 703 [2010], quoting 44 NY Jur 2d, Defamation & Privacy § 273).

Preliminarily, plaintiff's standing to raise its product disparagement claim against AMCR depends upon plaintiff's allegations of special damages resulting from AMCR's malicious publication to a third person of a false statement. In support of this claim, plaintiff alleges the following harm: "Solely because of the [false statements published to the general public via] the Notification Letters, Kolodny, Shainwald, and Labouchère sought recission of their contracts under which they agreed to purchase the artworks;" plaintiff, "solely because of the Notification Letter, cannot again offer *Day and Night* for sale;" and plaintiff "was damaged by defendants' product disparagement in the amount of $7,233,438 – the total amount paid by and that has already been or must be refunded to [all four collectors]" (compl. ¶¶ 71-72, 74).

Setting aside the Kolodny and Labouchère transactions, which were not

rescinded or refunded, the only special damages plaintiff alleges are the refund amounts paid to the two Rescinded Collectors. Plaintiff, thus, has standing, tenuously, to raise its product disparagement claim as against AMCR in relation to the two rescinded sale contracts. Nonetheless, plaintiff does not sufficiently plead this claim. Even accepting as true plaintiff's allegations that the Notification Letters constituted false statements published to the general public,[5] plaintiff has not met its burden of pleading malice.

In opposition to this motion, plaintiff argues that "[s]pecific allegations" establishing malice are contained in paragraphs 69 and 98 of the amended complaint:

> "69. . . . [the false] statements [of inauthenticity] were made without a full and careful examination of the facts relating to authenticity and without providing- indeed refusing to provide- information and documents explaining and supporting the decision. Nor did defendants give [plaintiff], Kolodny, Shainwald and Labouchère an opportunity to review and rebut any documents or information relied upon by defendants in connection with their decisions. In substance, defendants conducted their vetting peremptorily and dictatorially much like a Star Chamber- without disclosing their identities or their policies, practices and procedures and without disclosing the evidence supporting or justifying their decisions and without affording The Mayor Gallery, Kolodny, Shainwald and Labouchère an opportunity to review, respond or dispute their conclusions.
>
> 70. The statements made in the Notification Letters were therefore made with 'malice,' *i.e.*, willfully and with a reckless disregard for whether the statements were true or false.
>
> . . . .

[5] As to the falsity element, plaintiff alleges that the artworks are authentic, but does not allege any facts supporting that conclusion. As to the element of publication to a third person, the law is not settled: the First Department has discussed, but not answered, a similar question of whether a catalogue raisonné's silent rejection of an artwork from inclusion in its catalogue can effectively constitute a false statement published to a third person (*see Thome*, 70 AD3d 88). In dicta unrelated to its holding, the First Department noted: "as some commentators have suggested, as a practical matter, the denial of authentication is arguably indistinguishable from a direct assertion of inauthenticity" (*id.* at 106). In any event, the First Department ultimately affirmed the trial court's dismissal of the product disparagement claim as time barred (*id.* 106-107). Here, the court declines to needlessly answer those questions.

> 98. Defendants had a duty to perform-and represented to the plaintiff and the public at-large, expressly or by implication, that they would perform - all tasks necessary and appropriate to determine whether the thirteen artworks were authentic. *See, e.g.,* "Examination Agreement," for *Day and Night,* Exhibit "B" hereto, 2 and 5, under which defendants admit the importance of conducting a careful physical examination of the artworks (rather than relying on photographs), consulting other experts and obtaining scientific verifications, *e.g.* taking tests of paint samples. Defendants intentionally failed to perform such tasks in connection with all thirteen artworks [sic]."

These allegations are speculative, unsupported, and contradicted by other facts in the amended complaint. The only instance in which AMCR did not review an artwork in person was upon the second submission of *Day and Night*, and the Committee had reviewed that work in person when Levy originally submitted it a short time before plaintiff's submission occurred. Further, there is nothing in the Agreements which requires defendants to: provide "information and documents explaining and supporting [AMCR's] decision;" permit any person to "review and rebut any documents or information relied upon by defendants;" reveal the identities of the Committee members; or share the policies, practices, and procedures of AMCR (*see* compl. ¶¶ 69, 98). In fact, the Agreements grant AMCR sole discretion as to how it reviews submitted artworks (*see e.g.* ex. B).

Disregarding the refuted allegations, as well as plaintiff's logically-circular, conclusory allegations of malice, plaintiff's product disparagement claim must be dismissed. While "malice may be inferred in a variety of situations" (*Van-Go Transp. Co., Inc. v New York City Bd. of Educ.*, 971 F Supp 90, 106 [EDNY 1997] [discussing New York cases]), the court declines to infer malicious intent on this record. Accordingly, plaintiff's first cause of action is dismissed as against all defendants.

2. Second cause of action for tortious interference with contract

Preliminarily, plaintiff has standing to raise this claim only insofar as it alleges that it sustained pecuniary loss as a result of AMCR's interference with the contracts of the Rescinded Collectors.

Defendants argue that the tortious interference with contract claim must be dismissed as insufficiently pleaded because plaintiff alleges only contracts with the collectors that had been fully performed years prior to the Notification Letters, and, even if contractual relations continued to exist, plaintiff fails to allege that defendants were aware of such contracts and intentionally interfered with them.

Plaintiff alleges that the artworks sold to all four collectors included warranties of authenticity (*see e.g.* compl. ¶¶ 27 [refunding Levy for *Day and Night*, "honoring its warranty of authenticity"], 45 [honoring "warranty of authenticity" by refunding Shainwald for purchase of *The Invisible*]). Further, plaintiff alleges that its principal, Mayor, met with Bell "on several occasions" prior to the various submissions; thus, "defendants knew . . . [plaintiff] would be adversely affected" by not including the works in the Catalogue, that "any adverse determination would have the purpose and effect of foreclosing any sale of the artworks by [plaintiff]," and that plaintiff would be "impelled to rescind the sales" to the collectors (compl. ¶¶ 92-93).

"[I]ntentional interference with contractual relations is comprised of four elements: (1) the existence of a contract, enforceable by the plaintiff, (2) the defendant's knowledge of the existence of that contract, (3) the intentional procurement by the defendant of the breach of the contract, and (4) resultant damages to the plaintiff" (*Joan Hansen & Co., Inc.*, 296 AD2d at 111).

Plaintiff does not plead a contractual relationship that it could have enforced; nothing in the amended complaint establishes that any collector had a continuing obligation to plaintiff arising from the contracts for sale. Further, even if plaintiff's allegations of existing contractual relationships are sufficient, the claim must be dismissed because plaintiff does not meet its burden of establishing AMCR's intentional interference. Plaintiff's conclusory allegations that defendants rejected the artworks for the "purpose" of harming plaintiff's existing contracts are not adequate. Affording the non-conclusory facts, and those that are not inherently incredible, every favorable inference, the allegations that Mayor verbally criticized AMCR and Glimcher while talking to Bell, and that that Glimcher has a "conflict of interest" as a gallerist and art dealer, do not sufficiently plead AMCR's intentional procurement of a breach of the Rescinded Collectors' contracts.

3. Third cause of action for tortious interference with prospective business relations

Plaintiff has standing to bring this claim only insofar as it alleges that prospective business relationships were actually harmed. As plaintiff fails to allege any harm to its prospective business with anything other than conclusory assertions, it lacks standing to raise this claim (*see Kronos, Inc.*, 81 NY2d at 94 Siegel; *see also* Siegel, NY Prac § 136 at 232-233).

In any event, to state a valid cause of action for tortious interference with prospective economic relations, a plaintiff must plead that the defendant used "wrongful means" to disrupt the prospective business relationship, or the defendant was motivated solely by malice (*Carvel Corp. v Noonan,* 3 NY3d 182, 190 [2004]). "Wrongful means" include actions that amount to a crime or an independent tort, including physical

violence, fraud or misrepresentation, or civil suits (*id.* at 191). Plaintiff fails to adequately plead these required elements.

Plaintiff's assertion of prospective economic relations is limited to its unsupported statement that it had "profitable business relationship[s]" with the four collectors until the Notification Letters were sent; plaintiff then identifies only the original sale prices of the artworks as the resulting damages (compl. ¶¶ 82-88). There is no assertion that any actual prospective business was curtailed or harmed, and the computation of damages for this claim illustrates its inherent incredibility. Plaintiff also fails to plead non-conclusory facts supporting either that AMCR intentionally acted to harm plaintiff's prospective business relationships, or that AMCR was motivated solely by malice (*see Bank Leumi Trust Co. of New York v Samalot/Edge Assoc.*, 202 AD2d 282, 283 [1st Dept 1994]). This claim is dismissed.

4. Fourth cause of action for negligent misrepresentation

Plaintiff's standing to raise this claim is limited to the Rescinded Collectors, as no injury has accrued with respect to the collectors to whom plaintiff did not issue a refund.

"The elements of a claim for negligent misrepresentation are: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011] [internal quotation marks and citations omitted]).

Even assuming a privity-like relationship between plaintiff and AMCR by virtue of AMCR's position as an arbiter of authenticity of Martin's works, this claim must be

dismissed (*see Parrott v Coopers & Lybrand, LLP*, 95 NY2d 479, 483-484 [2000]). Here, the amended "complaint is devoid of any allegation as to defendants' conduct evincing their understanding of plaintiff's reliance" (*Mandarin Trading Ltd. v Wildenstein*, 17 Misc 3d 1118(A), 2007 NY Slip Op 52059[U], *6 [Sup Ct, NY County 2007], *affd* 65 AD3d 448 [1st Dept 2009], *affd* 16 NY3d 173 [2011]). Accordingly, this claim must be dismissed.

5. Fifth cause of action for gross negligence and breach of contract

Defendants argue that plaintiff's fifth claim must be dismissed as there is no duty on the part of AMCR to plaintiff as to the collectors' submissions, and there is no breach of Plaintiff's Agreement. Plaintiff responds that its fifth claim—styled a tort claim for gross negligence as to all 13 artworks, generally, and a breach of contract claim as to Plaintiff's Agreement and resubmission of *Day and Night*—is adequately plead. Plaintiff contends that defendants owed and breached a duty of care to the general public as to all the artworks, and breached an implied contractual duty, in Plaintiff's Agreement, to perform their duties competently and professionally.

a. *Gross negligence tort claim as to all 13 artworks*

To state a claim for gross negligence, plaintiff must establish the following three elements: "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). Here, plaintiff's claim fails as a matter of law because plaintiff has not established a duty owed to it by AMCR arising from the Collectors' Agreements. Plaintiff was not a party to, or a third-party beneficiary of, any of the Collectors' Agreements, and plaintiff cannot fabricate a duty owed to it, or the

entire public, on the basis of solely AMCR's expertise or position in the realm of Martin's work (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181 [2011] [finding that "art expertise alone cannot create a special relationship where otherwise the relationship between the parties is too attenuated"]). Plaintiff's gross negligence tort prong of its fifth cause of action is, therefore, dismissed.

b. *Gross negligence contract claim as to Plaintiff's Agreement*

Plaintiff's breach of contract prong of its fifth claim is premised upon conclusory allegations that defendants were "careless, grossly negligent and reckless in the performance of their obligations to the plaintiff and the public at-large [sic] in their vetting of the 13 artworks" under Plaintiff's and the Collectors' Agreements (*see* compl. ¶¶ 96-102).

Grossly negligent conduct, as a tort or contract claim, is "that [which] evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Morgan Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings LLC*, 143 AD3d 1, 8 [1st Dept 2016]). A contractual gross negligence claim is an exception recognized in cases involving extraordinary circumstances, such as residential mortgage crisis litigation (*see id.* at 8-9 ["(A)llegations of serious and pervasive misrepresentations regarding the level of risk in an investment with widespread, massive failures will support a claim for contractual gross negligence."], citing *Ambac Assur. UK Ltd. v J.P. Morgan Inv. Mgt., Inc.*, 88 AD3d 1, 3-13 [1st Dept 2011]). However, "merely alleging that breach of contract duty arose from lack of due care will not transform simple breach of contract into tort" (*Saint Patrick's Home for the Aged & Infirm v Laticrete Intl.*, 267 AD2d 166, 166 [1st Dept 1999]).

Plaintiff does not have standing to raise this contractual claim as to any transaction other than that contemplated in Plaintiff's Agreement. In any event, plaintiff's conclusory allegations that the artworks were not properly examined are insufficient to establish a contractual claim for gross negligence. Those allegations are also refuted by Plaintiff's Agreement, in which plaintiff granted AMCR the "sole discretion" to examine the submitted work as it deems fit (ex. B). Disregarding the refuted, conclusory, and inherently incredible allegations, plaintiff does not adequately plead that AMCR recklessly disregarded another's rights or engaged in intentional wrongdoing. Accordingly, the contractual gross negligence prong of plaintiff's fifth cause of action is dismissed.

6. Sixth cause of action for breach of implied duty of good faith and fair dealing

Plaintiff's sixth claim is duplicative of the breach of contract prong of its fifth cause of action as the sixth claim for breach of implied duty of good faith and fair dealing is "not separate and apart from" plaintiff's fifth cause of action for grossly negligent breach of contract; "[t]he claims are predicated upon precisely the same purported wrongful conduct," and seek essentially the same relief (*OP Sols., Inc*, 72 AD3d at 622).

Even if the claim is not duplicative, it is insufficiently plead. As discussed above, Plaintiff's Agreement refutes plaintiff's assertions in support of this claim. Additionally, as noted in the discussion of plaintiff's product disparagement claim, neither AMCR or any defendant has an obligation to engage in the conduct of which plaintiff complains (*see generally e.g.* ex. B at 2-4). Under Plaintiff's Agreement, AMCR is not required to turn over any information other than its decision to accept or decline to include the

submitted work by letter, and does not have to grant any person an opportunity to rebut its decision (*see id.*). In fact, Plaintiff's Agreement, like the Collectors' Agreements, provides that AMCR shall have absolute discretion as to when and how it will evaluate submitted artworks (*see* ex. B). This claim is dismissed.

7. Seventh cause of action for violation of GBL § 349

Plaintiff's seventh cause of action alleging a violation of GBL § 349 must also be dismissed. GBL § 349 (h) creates a cause of action for "any person who has been injured by reason of any violation" of § 349 (a), which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." "To successfully assert a section 349 (h) claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]).

Plaintiff fails to adequately plead each of those elements. Plaintiff does not allege that it is a consumer, or that defendants are merchants, within the ambit of GBL § 349. Moreover, plaintiff's conclusory allegations that the Agreements are materially misleading are refuted by the Agreements; specifically, Plaintiff's Agreement informed plaintiff of its responsibilities and, albeit limited, rights under the contract (*see* ex. B at 2-4). Plaintiff also does not allege with non-conclusory facts that it suffered a harm as a result of consumer-oriented conduct under either its own Agreement or the Collectors' Agreements (*see Kramer v Pollock-Krasner Found.*, 890 F Supp 250, 258 [SDNY 1995] [analyzing and dismissing a similar GBL § 349 claim involving an art authentication

foundation]). Accordingly, this claim is dismissed with prejudice.

Part III: Attorneys' Fees

Plaintiff agreed, as clearly provided in Plaintiff's Agreement: "In the event [that plaintiff] make[s] a legal claim of any kind against AMCR and/or the AMCR Companies and Personnel, [plaintiff] will be fully responsible for payment of any and all reasonable legal fees, costs, and expenses . . . of AMCR and the AMCR Companies and Personnel" (ex. B, ¶ 10). Contract provisions such as this are enforceable in New York (*see generally Breed, Abbott & Morgan v Hulko*, 139 AD2d 71 [1st Dept 1988], *affd* 74 NY2d 686 [1989]).

Defendants' request is granted. The issue of reasonable attorneys' fees shall be severed and referred to a Special Referee to hear and report (or, if the parties shall so stipulate, to hear and determine).

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted and the amended complaint is dismissed; and it is further

ORDERED that plaintiff is granted leave to serve a second amended complaint so as to replead the first through sixth causes of action within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing the action in its entirety, with prejudice; and it is further

ORDERED that the portion of defendants' motion that seeks the recovery of attorney's fees, costs, and disbursements is severed, and the issues of the amount of reasonable attorneys' fees, costs, and disbursements the defendants may recover against the plaintiff, The Mayor Gallery Ltd., are referred to a Special Referee to hear and report (or, if the parties shall so stipulate, to hear and determine); and it is further

ORDERED that counsel for the defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M),[6] who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

ENTER:

DATED: 4/3/18

HON. ANDREA MASLEY

[6] Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).