

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

ALESSANDRO TWOMBLY

Plaintiff,

- against -

FRED TORRES, an individual d/b/a FRED  
TORRES COLLABORATIONS and FINE ART  
ACCOUNT, INC, a corporation d/b/a FRED  
TORRES COLLABORATIONS,

Defendants.

Date Purchased:

Index No.

**SUMMONS**

To: Fred Torres  
Fred Torres Collaborations  
527 West 29<sup>th</sup> Street  
New York, New York 10001

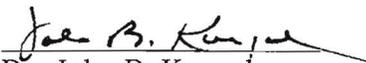
Fine Art Account, Inc.  
Fred Torres Collaborations  
527 West 29<sup>th</sup> Street  
New York, New York 10001

**YOU ARE HEREBY SUMMONED TO** answer the complaint in this action and to serve a copy of your answer on the Plaintiff's attorney within **20** days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of jurisdiction and venue is CPLR §§ 301 and 503.

Dated: New York, New York  
May 29, 2013

**The Koegel Group LLP**

  
By: John B. Koegel  
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New York, New York 10013  
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*Attorney for Plaintiff*

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COMPLAINT

(Jury Trial Demanded)

Plaintiff, Alessandro Twombly (“Plaintiff”) by his attorneys the Koegel Group LLP for his Complaint against Fred Torres and Fine Art Account, Inc. (“Defendants”) alleges as follows, upon knowledge as to himself and his conduct, and upon information and belief as to all other matters:

**NATURE OF ACTION**

1. This action arises from the Defendants’ unlawful withholding of, and/or failure to account for, valuable original works of art created by and belonging to the Plaintiff, an artist, despite the Plaintiff’s repeated demands. Plaintiff brings this action principally to secure the safe return of his unsold artworks and for a full and complete accounting of transactions including any and all consigned artworks that are not being returned.

**PARTIES, JURISDICTION AND VENUE**

2. Plaintiff, Alessandro Twombly, is an accomplished and respected visual artist solely engaged in the creation of works of art. Plaintiff maintains a studio and principal place of business in Rome, Italy.

3. Defendant Fred Torres and Defendant Fine Art Auction, Inc. are engaged in

operating an art gallery and acting as an agent for artists for the exhibition and sale of their artworks. Defendants use the name Fred Torres Collaborations for this business. Defendants have the following address for their business: 527 West 29th Street, New York, New York 10001

4. Defendant Fred Torres and Defendant Fine Art Auction, Inc. have assets and business identities that have been so merged and intermingled together that these two parties are alter egos of each other. As such, Defendant Fred Torres and Defendant Fine Art Auction, Inc. are each liable for the actions, obligations, and debts of one another.

5. Each Defendant is an “art merchant” within the meaning of New York Arts and Cultural Affairs Law § 11.01 and § 12.01.

6. This Court has personal jurisdiction pursuant to C.P.L.R. § 301 over Defendants because Defendants reside in New York, maintain a principal place of business in New York and have committed the wrongful acts complained herein in New York.

7. Venue is proper in this Court pursuant to C.P.L.R. § 503 because Defendants reside in New York County.

## **FACTS**

8. Beginning in or about 2008 and from time to time thereafter, Plaintiff entrusted artworks created and owned by him to Defendants. Although no formal, written agreement of any kind was ever entered into, Defendants were authorized by Plaintiff to seek sales of these artworks and were entitled to receive a commission on any sale generated by the gallery or on any sale of a consigned work made by other galleries to which such entrusted artworks may have been reconsigned.

9. This entrustment of works of art was done on a non-exclusive basis although the Defendants were the only representative of the Plaintiff in the United States. This

entrustment of works of art and the agency relationship established by virtue of that entrustment was an agency at will and could be terminated by Plaintiff at any time for any reason. The agency was also subject to termination by the Defendants for any reason. By letter dated March 11, 2013, Plaintiff sent a formal notice of termination and a copy of that notice is annexed hereto as Exhibit A. As it now stands, all parties have made it clear to one another that this agency relationship is terminated and yet Defendants have refused to properly carry out their contractual and statutory obligations to Plaintiff.

10. Since Plaintiff is an artist and each Defendant is an art merchant, and since the artworks were entrusted by Plaintiff to Defendants within New York State, the status of the entrusted works, the proceeds of any sale of the entrusted works, as well as the relationship between Plaintiff and each Defendant are all governed by and determined under the New York Arts and Cultural Affairs Law (hereinafter “NYACAL”).

11. Pursuant to NYACAL § 12.01(1)(a)(ii), all of the artworks entrusted by Plaintiff to each Defendant were and are trust property in the hands of each Defendant for the benefit of Plaintiff.

12. Pursuant to NYACAL § 12.01(1)(a)(iii), all proceeds of the sales of artworks entrusted by Plaintiff to each Defendant were and are trust funds in the hands of each Defendant for the benefit of Plaintiff.

13. Pursuant to NYACAL § 12.01(2) and § 11 – 1.6 of the New York Estates Power and Trust law, all proceeds from the sale of Plaintiff’s artworks must have been deposited and maintained in an account separate from any account for funds belonging to Defendants.

14. As trust property and trust funds in the hands of each Defendant, Plaintiff has an absolute ownership right to the artworks entrusted to each Defendant (up to and until any authorized sale) and in the event of any authorized sale an absolute ownership right to the proceeds of any such sale. Any purported sale after termination of authority and/or after

any demand for a return of any work(s) would be unauthorized and would constitute an unlawful, improper exercise of dominion and control and a breach of fiduciary duty.

15. Pursuant to NYACAL §§ 12.01(a)(i), (ii) and (iii), with respect to every artwork entrusted to Defendants by Plaintiff, including but not limited to every artwork consigned for sale, each Defendant was Plaintiff's agent, with responsibility for the conservation of such trust property and the remittance of any trust funds from any and every sale of a consigned artwork.

16. As Plaintiff's agent for the conservation and sale of any artwork, and for the remittance of any trust funds from any sale of any artwork consigned by Plaintiff, each Defendant was a fiduciary on behalf of Plaintiff, and subject to all requirements such a relationship entails, including, but not limited to, an obligation to accurately and fully account for any and all transactions and to promptly remit any trust funds due Plaintiff.

17. Each and every consignment was made pursuant to the understanding and agreement that Defendants would remit to Plaintiff 50% of the purchase price paid by any purchaser which would constitute Plaintiff's share of any sale. Defendants in turn were authorized to engage in the sale of consigned works either directly or through others and was entitled to a sales commission in the event that a sale of a consigned work was effected through the efforts of either Defendant or through the efforts of a gallery to which a consigned artwork may have been reconsigned by a Defendant.

18. Implicit in the agreement between the parties and as an obligation imposed upon a bailee as matter of law, Defendants were responsible for the care and conservation of consigned works and other entrusted property while in his custody or control. Since Defendants were obligated to return any works which were not sold upon demand, this obligation exists up to and until the works are delivered back into the possession of Plaintiff.

19. Plaintiff expressly and explicitly terminated Defendants' authority to act on his behalf and has repeatedly demanded a return of all artworks belonging to him.

20. Defendants possess and/or have control of a significant number of Plaintiff's artworks.

21. Based on information provided by the Defendants, there are at least 93 works of art created and owned by the Plaintiff within the custody and/or control of the Defendants. The aggregate fair market value of these 93 works is \$1,434,176.

22. Defendant has refused to return those artworks notwithstanding numerous demands from Plaintiff and from others on behalf of Plaintiff.

**AS AND FOR A FIRST CAUSE OF ACTION  
(Replevin)**

23. Plaintiff was and still is the owner of numerous works of art (known to be at least 93) in the possession, custody or control of the Defendant. Plaintiff is entitled to immediate unconditional possession of all such artworks.

24. Defendants, having full knowledge of Plaintiff's rights to ownership and possession of these artworks, have wrongfully and unlawfully deprived and continued to deprive Plaintiff of the lawful possession, use, and benefit of his property.

25. Defendants have refused and still refuse to return these works although Plaintiff has made a proper demand for the return of this unique and valuable property.

26. Pursuant to C.P.L.R. § 7109(b), Plaintiff is entitled to an order, enforceable by contempt of court, directing Defendants to immediately deliver to Plaintiff all of the artworks that remain in Defendants' possession, custody or control belonging to the Plaintiff.

**AS AND FOR A SECOND CAUSE OF ACTION**

**(Accounting)**

27. Pursuant to NYACAL § 12.01(1)(a)(i), each Defendant was and continues to be Plaintiff's agent with respect to the artworks owned by the Plaintiff and is subject to fiduciary obligations/duties pursuant to that agency relationship.

28. Defendants have breached such obligations/duties, with the precise damages known only to Defendants.

29. Defendants have failed to provide a full and legally sufficient accounting for any and all sales and for any artworks that remain in Defendants' possession, custody and/or control.

30. By reason of the foregoing, Plaintiff is entitled to an equitable accounting which should: (i) identify with particularity all artworks belonging to the Plaintiff that Defendant has sold, or for which Defendant has collected any fee of any kind, and set forth for each such artwork the date of such transaction, the name and address of the purchaser and the price for which the artwork sold or fees or other expenses deducted by Defendants from amounts paid to Plaintiff; and (ii) identify with particularity any artworks in Defendant's possession that remain unsold.

31. Plaintiff has suffered, is suffering and will continue to suffer irreparable harm absent the grant of relief sought herein

32. Plaintiff has no adequate remedy at law.

**AS AND FOR A THIRD CAUSE OF ACTION**

**(Violation of NYACAL § 12.01)**

33. Plaintiff was the sole creator and sole owner of all the subject artworks delivered to Defendant since 2008.

34. By delivering or causing to be delivered the consigned works to Defendants, a trust relationship was created under NYACAL § 12.01, under which Defendants were obligated to hold the consigned works and all sales proceeds therefrom as trust property for the benefit of Plaintiff.

35. Defendants' actions constitute a breach and violation of statutory obligations to Plaintiff under the NYACAL § 12.01. More specifically, Defendants have among other things:

a. refused to release/return certain consigned works despite Plaintiff's demands therefor:

b. refused to provide a fully and legally sufficient accounting with respect to the consigned works despite Plaintiff's demands therefor;

c. failed to deposit and maintain trust funds belonging to Plaintiff in an account separate from accounts for funds belonging to Defendants;

d. failed to timely inform Plaintiff of sales and failed to pay over sales proceeds held in trust for the Plaintiff;

e. unreasonably and unjustifiably claimed entitlement to compensation (to offset Plaintiff's demand for a return of his artworks);

f. may have knowingly misrepresented selling prices in order to obtain excessive compensation;

g. may have committed other acts of misconduct which are not currently known to Plaintiff but will be learned upon further discovery.

36. By reason of the foregoing, Plaintiff is entitled to: (i) the return of all unsold artworks belonging to Plaintiff which are in Defendant's possession; (ii) a full, legally

sufficient, and sworn accounting; (iii) compensatory damages in an amount to be proven at trial plus prejudgment interest, pursuant to C.P.L.R. § 5001; and (iv) an award of costs and attorneys' fees pursuant to NYACAL § 12.01 (2) and § 12.01 (3).

**AS AND FOR A FOURTH CAUSE OF ACTION**  
**(Conversion)**

37. Plaintiff has properly and rightfully demanded a return of all artworks belonging to him and entrusted to the Defendants including a formal request on March 11, 2013 and followed by numerous subsequent requests.

38. Defendants have refused these demands and have failed to return at least 93 works of art belonging to Plaintiff.

39. Defendants' refusal to return property to Plaintiff despite repeated demands has been conscious and deliberate in disregarding the rights of the Plaintiff and given the duty owed to the Plaintiff demonstrates with a high degree of moral culpability.

40. The aggregate fair market value of 93 works that Defendants are admittedly withholding from the Plaintiff is \$1,434,176.

41. Plaintiff has been damaged by Defendants' conversion of his trust property by an amount to be determined upon a trial of this action by at least the sum of \$1,434,176 plus interest from March 11, 2013.

42. In light of Defendants' willful and wanton actions and the high degree of moral culpability in connection with this conversion of trust property, Plaintiff demands an additional award of punitive damages in an amount to be determined by the Court.

**AS AND FOR A FIFTH CAUSE OF ACTION**  
**(Breach of Consignment Agreement)**

43. Defendants have breached the consignment agreement by failing to return or properly account for works of art entrusted to them by Plaintiff.

44. Defendants' refusal to return works has prevented Plaintiff from exhibiting and selling those works and as such has damaged Plaintiff in an amount to be determined at trial based on the period of time that Plaintiff has been prevented from marketing those works.

**AS AND FOR A SIXTH CAUSE OF ACTION**  
**(Unjust Enrichment)**

45. Defendants have received and taken fees, commissions, alleged reimbursements, artworks, and other monies from Plaintiff to which they were not entitled and from which they wrongfully benefitted. As a direct and proximate result of Defendants' wrongful taking of these items of value and from the wrongful benefits they received, Plaintiff has been damaged and Defendants have been unjustly enriched.

46. To allow Defendants to keep the wrongful benefits that they have taken would unjustly enrich Defendants at the expense of Plaintiff, who is rightfully due the taken monies and property and who rightfully owns the funds and other items of value improperly taken by Defendants in an amount to be determined at trial.

**AS AND FOR A SEVENTH CAUSE OF ACTION**  
**(Breach of Fiduciary Duty)**

47. Defendants have improperly appropriated artworks belonging to Plaintiff by refusing to return or release them pursuant to Plaintiff's clearly expressed demands.

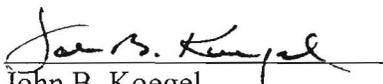
48. Defendants also have breached their clear fiduciary and statutory duties to Plaintiff by holding trust funds belonging to Plaintiff and failing to pay over all such funds to Plaintiff, as required.

49. Plaintiff has been damaged by such breaches of Defendants' fiduciary and statutory duties in an amount to be determined at trial.

50. In light of Defendants' intentional and deliberate breaches of his fiduciary and statutory obligations and their conscious and wanton disregard of Plaintiff's rights, Plaintiff demands an additional award of punitive damages in an amount to be determined by the Court.

WHEREFORE, Plaintiff, Alessandro Twombly, demands judgment against the Defendant Fred Torres, and Defendant Fine Art Account, Inc., jointly and successively follows: i.) an order directing Defendants to deliver any and all works of art that belong to Plaintiff; ii.) an award of damages equal to the total amount of sales proceeds properly due to Plaintiff plus interest from the date that any such purchase price proceeds were received by Defendants; iii.) an award of damages for works of art belonging to Plaintiff which have been converted by Defendants; iv.) an award of consequential damages in an amount to be determined at trial due to Plaintiff's inability to exhibit and sell the works which have not been returned; v.) an accounting for any additional monies owed to Plaintiff as a result of any acts by Defendants which would entitle Plaintiff to additional funds; vi) an award of punitive damages in the amount determined by the Court; vii) an award of attorney's fees pursuant to NYACAL § 12.01 (2) and § 12.01 (3); and viii) any further relief that this court may find just and proper, together with the costs and disbursements of this Action.

Dated: New York, New York  
May 29, 2013

By:   
John B. Koegel

THE KOEGEL GROUP LLP  
Attorney for Plaintiff  
161 Avenue of the Americas  
New York, New York 10013  
Tel: (212) 255-7744  
[jbk@artlaw.biz](mailto:jbk@artlaw.biz)

# EXHIBIT A

Alessandro Twombly  
Via Gregoriana 34  
00187 Roma  
Phone - Fax: +39 06 45 65 41 57

Rome, March 11, 2013

Mr. Fred Torres  
Fred Torres Collaborations  
527 West 29th Street  
New York, NY 10001  
United States  
Fax: +1 (212) 244-5075

- By registered letter anticipated by fax -

Re: Breach of contract and fiduciary duty

Fred,

I hereby inform you that I terminate the consignment agreement and any representation arrangement between us with immediate effect, due to your breach of contract and fiduciary duty.

I reached such decision because I was recently informed by Slavka Glaser that on May 4, 2012 you sold her one of the works I consigned to you, namely Untitled (Poppy!) 2008 (oil on canvas, 78.75" H x 74.75" W), for USD 48,000. You never informed me about this sale and you never paid me the relevant proceeds.

This is consistent with the lack of professional care that you showed in the last months when it has been almost impossible to communicate with you. I repeatedly contacted you and your employees requesting updates and the return of my works temporarily exported to the US. I received nothing but evasive and vague answers.

As a matter of fact, you not only failed to provide me with regular accounts regarding the sales and to disclose to me information relevant to our artist-dealer relationship, but you also failed to deal fairly and honestly with me by misappropriating the proceeds obtained from the sale of my works.

In light of the above, while I irrevocably terminate any outstanding agreement between you and me with immediate effect, I hereby request you to:

- (i) Provide me with a comprehensive and accurate list of all my works that I either consigned to you or that I gave to you in custody for exhibition purposes only;
- (ii) Provide me with the account of any and each sale of my works that you completed since October 2008;

A.T.

Alessandro Twombly  
Via Gregoriana 34  
00187 Roma  
Phone - Fax: +39 06 45 65 41 57

- (iii) Pay me USD 24,000 for the sale of Untitled (Poppy!) 2008, as well as any further proceeds obtained from the sale of other works that I consigned to you;
- (iv) Ship to me all my reminding works, including but not limited to the works listed in Annex I enclosed hereto, c/o Art Crating, Inc., located in 26 Van Dam St, Brooklyn, NY 11222, in compliance with the highest standards of care and at your sole expenses;
- (v) Provide at your sole expenses adequate insurance to my works at all times.

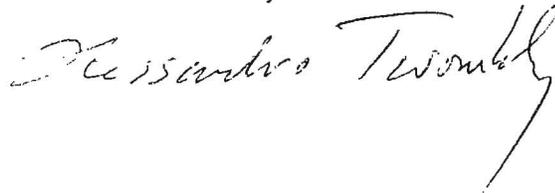
The above-mentioned actions must be taken immediately and in any case no later than 10 (ten) days of the date of receipt of this letter. All my works must be returned no later than 5:00 pm on Friday, March 22, 2013. If I do not receive my works by that time, I will instruct my lawyers to file an action to recover them the following week.

In the meantime, I warn you to: (1) refrain from taking any action in connection with any of my works in your possession, other than shipping them in accordance to my instructions; and (2) immediately cease and abstain in the future to cause any third party to believe that you have authority to represent me.

Please note that this letter constitutes neither an express nor an implied waiver of any right I might have under any applicable law in connection with our past artist-dealer relationship.

Regards,

Alessandro Twombly



Encl.: Annex I