

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

ART CAPITAL GROUP, INC.,

Plaintiff,

- against -

ANNIE LEIBOVITZ, LEIBOVITZ STUDIO, INC., 305-
307 WEST 11TH STREET, LLC and 311 WEST 11TH
STREET, LLC,

Defendants.

Index No.:

SUMMONS

Basis of venue: CPLR §503(a), Plaintiff's
Residence

TO THE ABOVE-NAMED DEFENDANTS:

Annie Leibovitz
755 Greenwich Street
New York, New York 10014

Leibovitz Studio, Inc.
755 Greenwich Street
New York, New York 10014

305-307 West 11th Street, LLC
755 Greenwich Street
New York, New York 10014

311 West 11th Street, LLC
755 Greenwich Street
New York, New York 10014

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

09602334

YOU ARE HEREBY SUMMONED to answer the Complaint in this action, within
twenty (20) days after service of this Summons, exclusive of the day of service, or within thirty
(30) days after service if this Summons is not personally delivered to you within the State of
New York. In case of your failure to answer, judgment will be taken against you by the default
for the relief demanded in the Complaint.

Dated: New York, New York
July 28, 2009

WOLLMUTH MAHER & DEUTSCH LLP

By: _____


William F. Dahm

Jennifer L. Rudolph

500 Fifth Avenue
New York, New York 10110
Tel: (212) 382-3300

Attorneys for Plaintiff Art Capital Group, Inc.

Index No.:

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COMPLAINT

JURY TRIAL DEMANDED

09602334

Plaintiff Art Capital Group, Inc. ("Plaintiff" or "ACG"), by its undersigned counsel, for its Complaint against Defendants Annie Leibovitz ("Ms. Leibovitz"), Leibovitz Studio, Inc., 305-307 West 11th Street, LLC and 311 West 11th Street, LLC (collectively, the "Leibovitz Entities") (collectively, "Ms. Leibovitz" and "Leibovitz Entities" are referred to as "Leibovitz" or "Defendants"), alleges upon knowledge with respect to its own actions and upon information and belief as to all other matters as follows:

NATURE OF THE ACTION

1. In or about June 2008, Leibovitz approached Plaintiff, a well-known experienced consultant and advisor to artists and art owners, concerning Leibovitz' dire financial condition arising from Leibovitz' mortgage obligations, tax liens and unpaid bills to service providers and other creditors. In an effort to restructure Leibovitz' debts and assets, such that Leibovitz could gain some element of control over their financial condition, Leibovitz initially obtained a \$22,000,000 secured credit facility from Plaintiff's affiliate, American Photography, LLC ("American Photography"), against which Leibovitz drew down \$5,000,000. In connection with the negotiation of this \$22,000,000 credit facility, Leibovitz discussed and acknowledged that Leibovitz' fine art, intellectual property and real estate assets, all collateral for the loan,

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would likely need to be sold, in whole or in part, as part of the process of Leibovitz' financial restructuring. Accordingly, the secured loan agreement, which memorializes the loan transaction, expressly gave Plaintiff the right of first refusal to act as Leibovitz' agent with respect to any sale of such assets so that Plaintiff could use its expertise and relationships to maximize the value of the fine art, intellectual property and real property collateral for both Leibovitz' benefit and the benefit of Plaintiff and its affiliate, American Photography.

2. Several months later, in or about December 2008, Leibovitz requested that the credit facility be increased from \$22,000,000 to \$24,000,000 and that the interest rate for the loan be reduced by 275 basis points. Plaintiff and its affiliate agreed, and Leibovitz successfully was positioned to address the issues with Leibovitz' creditors. As part of the consideration for the increase in the credit facility, upon which Leibovitz drew down the entirety of the \$24,000,000 credit facility, and for receiving a reduced interest rate for the now \$24,000,000 loan, which significantly reduced the payments during the term of the loan, Leibovitz entered into a certain sales agreement with Plaintiff and its affiliate (the "Sales Agreement") in which Leibovitz expanded on the right of first refusal set forth in the secured loan agreement. A true and correct copy of the Sales Agreement entered into as of December 17, 2008 between Plaintiff, on the one hand, and Ms. Leibovitz and the Leibovitz Entities, on the other hand, as of December 17, 2008 is annexed hereto as Exhibit A with certain financial details redacted. In the Sales Agreement, Leibovitz expressly authorized Plaintiff to act as Leibovitz' irrevocable exclusive agent for any sale of fine art and intellectual property owned and created by Ms. Leibovitz and the Leibovitz Entities (the "Fine Art Collateral") and certain real property (the "Real Property Collateral") via licensed real estate brokers throughout the term of the loan and for a two-year period after Leibovitz' obligations under the loan are satisfied (the "Tail Period"). The Fine Art

Collateral includes every photographic image ever taken by Ms. Leibovitz and those taken from December 17, 2008 through the Tail Period. Plaintiff's rights under the Sales Agreement are secured by a first priority security interest in the Fine Art Collateral and Real Property Collateral through the Tail Period.

3. In connection with the negotiation of the Sales Agreement, which culminated in the very straightforward two-page agreement, each of the sophisticated parties were represented by able and sophisticated counsel and financial advisors and the likelihood that certain of the collateral would need to be sold to satisfy Defendants' obligations under the secured loan agreement again was directly discussed with Ms. Leibovitz, Leibovitz' attorneys and Leibovitz' financial advisors, Starr & Co. Ms. Leibovitz again specifically communicated her understanding of this likelihood. In addition, Ms. Leibovitz and her advisors also discussed and acknowledged, as set forth in the Sales Agreement, that even if such assets need not be sold during the term of the loan to ultimately satisfy Leibovitz' obligations under the secured loan agreement, given the significant monies foregone by the reduced interest rate, Plaintiff's right to commissions for any sale of those assets continues through the Tail Period.

4. Notwithstanding the clear Sales Agreement and the candid and fair negotiations, Ms. Leibovitz and the Leibovitz Entities now seemingly pretend that they do not understand the Sales Agreement and seek to ignore their obligations under it. Specifically, after having received the benefits of the \$24,000,000 loan at a reduced interest rate from American Photography, which is due to be repaid on September 8, 2009, and her restructuring to address myriad creditors, Leibovitz has disregarded the Sales Agreement and has blocked Plaintiff's rights to act as Leibovitz' exclusive sales agent, both directly for the Fine Art Collateral and through prominent licensed real estate brokers retained by Plaintiff for the Real Property Collateral. This

is boldly deceptive conduct, and it is impeding Plaintiff's ability, as Leibovitz' exclusive agent to maximize the value of the Fine Art Collateral and Real Property Collateral for both Leibovitz' benefit and the benefit of Plaintiff and its affiliate, American Photography, including Plaintiff's right to commissions on sales. It appears that Leibovitz entered into the Sales Agreement with no intention of performing or permitting performance under it.

5. Defendants' breaches of the Sales Agreement are knowing, willful and flagrant. Specifically, Defendants have stated that they will not cooperate with Plaintiff in any sale of the Fine Art Collateral, which is nonsensical given that Plaintiff obtained an appraisal for certain of the Fine Art Collateral which exceeds the loan amount and, if sold at that amount, would not only allow Defendants to satisfy their loan and other obligations to Plaintiff and its affiliate, but also allow Leibovitz to earn a profit, and to obtain financial comfort and financial stability going forward. In addition, Defendants have refused to allow Plaintiff, through licensed real estate brokers, to access the Real Property Collateral for the purpose of showing the Real Property Collateral to interested potential buyers.

6. Moreover, Leibovitz' conduct indicates that Defendants have taken actions and are engaging in conduct which effectively harms or otherwise impairs the collateral subject to the Sales Agreement. Defendants have also failed to pay invoices totaling hundreds of thousands of dollars currently due Plaintiff under the Sales Agreement. By this conduct, Defendants have – in bad faith – breached the Sales Agreement to Plaintiff's harm and detriment and in derogation of Plaintiff's exclusive agency rights.

7. Accordingly, this is an action for declaratory judgment, seeking a declaration confirming that the Sales Agreement is in full force and effect, and that pursuant to the Sales Agreement, ACG, as Defendants' irrevocable exclusive agent during the term and for the Tail

Period, has the right to: (i) sell the Fine Art Collateral without impediment by Ms. Leibovitz; (ii) access and sell the Real Property Collateral through licensed real estate brokers; and (iii) the payment of sale commissions and default sale commissions from Defendants for any sale of the Fine Art Collateral or Real Property Collateral through the Tail Period. Plaintiff also seeks an order compelling Defendants to provide access to the Real Property Collateral by licensed real estate brokers retained by Plaintiff. In addition, Plaintiff seeks judgment against Defendants for their willful breach of contract and breach of the covenant of good faith and fair dealing to date, as well as judgment in the full amount of damages incurred, plus pre- and post-judgment interest, costs and attorneys' fees.

PARTIES

8. ACG is a Delaware corporation with its principal place of business located in New York, New York.

9. Upon information and belief, Defendant Annie Leibovitz is an individual residing in the State of New York.

10. Upon information and belief, Defendant Leibovitz Studio, Inc. is a New York corporation that conducts business in the State of New York.

11. Upon information and belief, Defendant 305-307 West 11th Street, LLC is a limited liability company organized and existing under the laws of the State of New York that conducts business in the State of New York.

12. Upon information and belief, 311 West 11th Street, LLC is a limited liability company organized and existing under the laws of the State of New York that conducts business in the State of New York.

JURISDICTION AND VENUE

13. This Court has jurisdiction over Defendants because they are residents of the State

and New York and continuously and systematically do business in the State of New York. This Court also has jurisdiction over each of the Defendants pursuant to CPLR §302(a) because the present causes of action arise from Defendants' transaction of business and commission of tortious acts within the State of New York.

14. Venue is proper in this Court pursuant to, among other things, CPLR §503(a) because Plaintiff is a resident of New York County.

FACTUAL BACKGROUND

A. The Secured Loan Agreement

15. Plaintiff and its affiliate, American Photography, provide financial and consulting services to artists and art owners, providing liquidity to individual artists, owners and art galleries from their intellectual property and fine art assets. Among other services, Plaintiff and its affiliate offer recourse and non-recourse asset-based loans to artists, individuals, galleries, and other businesses utilizing their intellectual property and art assets as the collateral securing the loan or as a component of the collateral package. Plaintiff also engages in art sales, art purchases and art advisory services.

16. On or about September 8, 2008, American Photography, as Lender, and Plaintiff ACG's predecessor in interest, Fine Art Finance, LLC, as Arranger, entered into a Secured Loan Agreement (the "Secured Loan Agreement") with Ms. Leibovitz and certain entities controlled by her, specifically, Leibovitz Studio, Inc., 305-307 West 11th Street, LLC and 311 West 11th Street, LLC. Pursuant to the Secured Loan Agreement, Defendants obtained a credit facility (the "Credit Facility") for up to \$22,000,000 (the "Credit Facility Amount") against which American Photography agreed to make an initial loan to Defendants in the amount of \$5,000,000. American Photography further agreed to make additional loans to Defendants up to the Credit Facility Amount as may be requested by Defendants from time to time ("Advances").

17. As collateral security for the loan, Defendants granted a first priority security interest in and to certain collateral (the "Collateral"), subject only to those permitted liens identified in the Secured Loan Agreement. The Collateral includes, among other things, certain fine and intellectual property created by the Defendants, including Ms. Leibovitz' photographic archive and all real and personal property and fixtures located at 165 Ferncliff Drive, Rhinebeck, New York and 305-311 West 11th Street, New York, New York. Defendants also granted Plaintiff and its affiliate a right of first refusal to act as agent in connection with the sale of any of the Collateral or the engagement by third parties of photographic services provided by Ms. Leibovitz or the Leibovitz Entities at any time during the term of the Secured Loan Agreement and for the Tail Period, a two-year period following the date upon which all obligations of the Defendants under the Secured Loan Agreement are satisfied.

18. Due to the risk American Photography and Plaintiff were taking by making this substantial loan to Defendants, the parties also negotiated for commissions in connection with the right of first refusal. These commissions for the sale of any Collateral are also secured Collateral under the Secured Loan Agreement, in which Plaintiff has a first priority security interest through the Tail Period.

19. The likelihood that Collateral would need to be sold to satisfy Defendants' obligations under the Secured Loan Agreement was discussed explicitly and directly with Ms. Leibovitz, her attorneys and her financial advisors, Starr & Co., and she specifically communicated her understanding of this likelihood and assented to this provision.

B. The Parties Amend The Secured Loan Agreement and Enter Into an Exclusive Sales Agreement

20. On or about October 15, 2008, the parties to the Secured Loan Agreement entered into the First Amendment to the Secured Loan Agreement pursuant to which American

Photography, as the Lender, agreed to issue an Advance to Defendants, as the Borrower, against the Credit Facility for the total amount of \$140,826.00.

21. Thereafter, on or about December 17, 2008, the parties to the Secured Loan Agreement entered into the Second Amendment to the Secured Loan Agreement (the "Second Amendment"). By the Second Amendment, Defendants sought and obtained an increase in the Credit Facility Amount from \$22,000,000 to \$24,000,000, a reduction of the interest rate under the Secured Loan Agreement by 275 basis points, and an Advance in the amount of \$18,859,174 for the balance of the \$24,000,000 Credit Facility Amount.

22. In exchange for the increase in the Credit Facility and the reduction of the interest rate negotiated in the Second Amendment, which increased the risk that Plaintiff and American Photography were taking at Defendants' request, the parties simultaneously negotiated and entered into the Sales Agreement with Ms. Leibovitz and the Leibovitz Entities in which they irrevocably authorized ACG to, among other things, act as their exclusive agent for: (i) the sale of Fine Art Collateral, which includes fine art and intellectual property owned or previously or newly created by Defendants until two-years following the date on which all of their obligations under the Loan Agreement are satisfied, the Tail Period; and (ii) the sale of Real Property Collateral located at 147-165 Ferncliff Drive, Rhinebeck, New York and 305-311 West 11th Street, New York, New York through the Tail Period. See Exhibit A. Plaintiff's rights in this regard derive from the previously agreed right of first refusal negotiated in September 2008, as discussed above. In connection with any sale of the Fine Art Collateral or Real Estate Collateral, the Sales Agreement also provides that Defendants shall pay ACG commissions. See id. at ¶1. These commissions are also secured Collateral under the Secured Loan Agreement in which Plaintiff has a first priority security interest through the Tail Period.

23. Pursuant to the terms of the Secured Loan Agreement, Defendants agreed to repay the entire aggregate unpaid principal balance of all monies loaned to them by American Photography, now \$24,000,000, together with any accrued but unpaid interest, costs, fees, expenses and all other indebtedness or liabilities to American Photography and Plaintiff on or before September 8, 2009, the Maturity Date.

24. Upon information and belief, absent any sale of the Fine Art Collateral and Real Property Collateral, Leibovitz will be unable to satisfy their obligations on the Maturity Date – a point which was discussed and acknowledged by the parties at the outset of the restructuring and reaffirmed in connection with the Second Amendment. Even if Leibovitz could repay the loan without any sale of such Collateral, Plaintiff has the irrevocable right to act as exclusive agent for the Fine Art Collateral and Real Property Collateral through the Tail Period, as agreed by the parties to the Sales Agreement in recognition of the reduced interest rate on the Loan, and Plaintiff has a first priority security interest in such rights.

C. Defendants Have Refused to Honor Their Obligations Under The Sales Agreement

25. Defendants have communicated that they will not cooperate with Plaintiff in any sale of the Fine Art Collateral, which, given the nature of such collateral (that includes a photographic archive), harms the ability to obtain full market value for the Fine Art Collateral.

26. Defendants have also failed to pay Plaintiff's invoices currently rendered to them pursuant to the Sales Agreement totaling hundreds of thousands of dollars.

27. In addition, under the Sales Agreement, Plaintiff has made numerous requests to Defendants, over a more than four-month period, to allow licensed real estate brokers retained by Plaintiff to gain access to the Real Property Collateral for the purpose of showing the properties to interested potential buyers. Notwithstanding these requests, Defendants have refused and are

refusing to allow such access to the Real Property Collateral.

28. The actions and inactions by Ms. Leibovitz and the Leibovitz Entities are clear breaches and their knowing, willful and flagrant conduct is depriving Plaintiff of its rights and is harming the value of the Fine Art Collateral and Real Property Collateral, comprised of fine art and intellectual property and unique real estate, that is available to satisfy Plaintiff's and its affiliate's secured and other interests, as well as the rights under the Sales Agreement. In fact, Defendants' conduct suggests that they have impaired or have engaged conduct that has the effect of impairing the value of the Collateral subject to the Sales Agreement. Accordingly, Plaintiff requires immediate access to the Fine Art Collateral and Real Property Collateral to determine whether, and to the extent to which, Leibovitz has engaged in conduct that has harmed or otherwise impaired the value of such Collateral.

29. Ms. Leibovitz and the Leibovitz Entities, sophisticated parties, represented by able counsel and financial advisors, must not be permitted to avoid their obligations under the Sales Agreement after having requested and received the benefit of a reduced interest rate under the Secured Loan Agreement and a significant increase in the Credit Facility provided to them. Indeed, Plaintiff's affiliate would not have made the significant concessions they agreed to and would not have taken on material additional risk without having negotiated and entered into the Sales Agreement.

FIRST CAUSE OF ACTION
(Declaratory Judgment)

30. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 29 as if set forth herein.

31. An actual, present and justiciable controversy exists between Plaintiff and Defendants concerning Plaintiff's rights with respect to the Fine Art Collateral and Real Property

Collateral, which is causing injury to Plaintiff.

32. Pursuant to the Sales Agreement, ACG is the irrevocable exclusive agent for sale of the Fine Art Collateral and Real Property Collateral during the Term and the Tail Period. Defendants have breached and continue to materially breach Plaintiff's rights under the Sales Agreement by: (i) communicating that Defendants will not cooperate in any sale of the Fine Art Collateral; (ii) refusing to allow licensed brokers to access the Real Property Collateral for the purpose of showing the properties to interested potential buyers; and (iii) otherwise denying the enforceability of the Sales Agreement.

33. Plaintiff is entitled to a declaration that the Sales Agreement is in full force effect and that, pursuant to the Sales Agreement, ACG, as Defendants' irrevocable exclusive agent during the Term and the Tail Period, has the right to sell the Fine Art Collateral, without impediment by Ms. Leibovitz, the right to access the Real Property Collateral through licensed real estate brokers retained by Plaintiffs for the purpose of selling the Real Property Collateral, and the right to the payment of commissions by Defendants for any sale of the Fine Art Collateral or Real Property Collateral.

SECOND CAUSE OF ACTION
(Breach of Contract)

34. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 33 as if set forth herein.

35. The Sales Agreement is a valid and enforceable contract that gives rise to certain obligations on the part of Defendants with respect to Plaintiff.

36. By their willful misconduct alleged above, including: (i) Defendants' communication that they will not cooperate with Plaintiff in any sale of the Fine Art Collateral; (ii) Defendants' refusal to allow licensed real estate brokers retained by Plaintiff to gain access to

the Real Property Collateral for the purpose of showing the properties to interested potential buyers; and (iii) Defendants' failure to pay invoices currently due Plaintiff totaling hundreds of thousands of dollars, Defendants have breached their contractual obligations under the Sales Agreement.

37. Defendants' breaches are material.

38. Plaintiff has fully performed its obligations under the Sales Agreement.

39. As a result of said breaches, Plaintiff has suffered damages in an amount to be proven at trial.

THIRD CAUSE OF ACTION
(Breach of Covenant of Good Faith and Fair Dealing)

40. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 39 as if set forth herein.

41. By the conduct described above, and refusing to honor the spirit and terms of the Sales Agreement, Defendants have, without justification or excuse, breached their implied obligation of good faith and fair dealing owed to Plaintiff pursuant to the Sales Agreement.

42. Defendants breached the covenant of good faith and fair dealing by illegitimately, unreasonably, unfairly, arbitrarily and capriciously failing to cooperate with Plaintiff in any sale of the Fine Art Collateral and Real Property Collateral, and have actually interfered with, obstructed, and delayed any sale of such Collateral. Defendants' conduct is designed to evade performance of the Sales Agreement. Indeed, Defendants' conduct suggests that they entered into the Sales Agreement without having any intention of performing thereunder, and solely for the purpose of receiving the benefit of a larger loan amount and a lower interest rate to Plaintiff's detriment.

43. Defendants' actions fundamentally alter the nature of the parties' bargain and, if

allowed, would destroy Plaintiff's reasonable expectations and deprive Plaintiff of the value of the Sales Agreement.

44. Plaintiff has duly performed all of the conditions and duties imposed on it under the Sales Agreement, and at all times has remained ready, willing and able to continue doing so.

45. As a result of said breaches, Plaintiff has suffered, and continues to suffer, damages in an amount to be proven at trial. In addition, because Defendants' conduct is sufficiently willful and malicious, Plaintiff is entitled to an award of punitive damages.

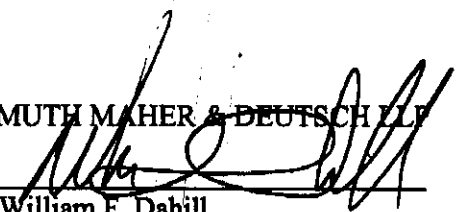
PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

- A. For an order declaring that the Sales Agreement is in full force and effect and that Plaintiff has the right pursuant to the Sales Agreement to sell the Fine Art Collateral, without impediment by Ms. Leibovitz, the right to access the Real Property Collateral through licensed real estate brokers retained by Plaintiff for the purpose of selling the Real Property Collateral, and to the payment of commissions for any sale of the Fine Art Collateral or Real Property Collateral through the Tail Period;
- B. For an order directing Defendants to provide access to the Real Property Collateral;
- C. For an award of damages against Defendants, in an amount to be proven at trial, arising from Defendants' breaches of their obligations under the Sales Agreement;
- D. For attorneys' fees and costs in an amount to be determined at trial;
- E. For punitive damages for Defendants' willful and malicious conduct;
- F. For prejudgment interest at the maximum legal rate; and
- G. For such other and further relief the Court may deem just and proper.

Dated: New York, New York
July 28, 2009

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