

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JONATHAN COHEN, SANDRA
FABARA, STEPHEN EBERT, LUIS
LAMBOY, ESTEBAN DEL VALLE,
RODRIGO HENTER DE REZENDE,
DANIELLE MASTRION, WILLIAM
TRAMONTOZZI, JR., THOMAS
LUCERO, AKIKO MIYAKAMI,
CHRISTIAN CORTES, DUSTIN
SPAGNOLA, ALICE MIZRACHI,
CARLOS GAME, JAMES ROCCO,
STEVEN LEW, FRANCISCO
FERNANDEZ, and NICHOLAI KHAN,

Case No. 13-CV-05612(FB)(RLM)

Plaintiffs,

-against-

G&M REALTY L.P., 22-50 JACKSON
AVENUE OWNERS, L.P., 22-52
JACKSON AVENUE, LLC, ACD
CITIVIEW BUILDINGS, LLC, and
GERALD WOLKOFF,

DECISION

Defendants.

-----X
MARIA CASTILLO, JAMES COCHRAN, Case No. 15-CV-3230(FB)(RLM)
LUIS GOMEZ, BIENBENIDO GUERRA,
RICHARD MILLER, KAI
NIEDERHAUSEN, CARLO NIEVA,
RODNEY RODRIGUEZ, and KENJI
TAKABAYASHI,

Plaintiffs,

-against-

G&M REALTY L.P., 22-50 JACKSON
AVENUE OWNERS, L.P., 22-52
JACKSON AVENUE, LLC, ACD
CITIVIEW BUILDINGS, LLC, and
GERALD WOLKOFF,

Defendants.

-----X

Appearances:

For the Plaintiff

ERIC BAUM
ANDREW MILLER
Eisenberg & Baum LLP
24 Union Square East
New York, NY 10003

For the Defendant

MEIR FEDER
Jones Day
250 Vesey Street
New York, NY 10281

DAVID G. EBERT
MIOKO C. TAJIKA
Ingram Yuzek Gainen Carroll &
Bertolotti, LLP
250 Park Avenue
New York, NY 10177

BLOCK, Senior District Judge:

On February 12, 2018, I issued my decision granting plaintiffs \$6,750,000 as statutory damages for the willful destruction of 45 of plaintiffs' 49 works of visual art by defendant Gerald Wolkoff ("Wolkoff"). *Cohen v. G&M Realty L.P.*, 2018 WL 851374, at *2 (E.D.N.Y. Feb. 12, 2018) ("*Cohen II*").¹ Defendants now move

¹ The decision incorrectly states: "Plaintiffs, 21 aerosol artists, initiated this lawsuit over four years ago." *Cohen II*, 2018 WL 851374, at *1 (E.D.N.Y. Feb. 12, 2018). However, only 13 of the 21 artists were named in the original complaint; of

pursuant to Federal Rules of Civil Procedure 52(b) and 59(a) “to set aside the Court’s findings of fact and conclusions of law and grant a new trial or, alternatively, to vacate the judgment in plaintiffs’ favor and enter judgment for defendants, or, alternatively, for remittitur.” Def.’s Br. at 1. The essence of their motions is that none of plaintiffs’ art qualified as works of “recognized stature” under the Visual Artists Rights Act of 1990 (“VARA”), and that, in any event, there was no basis for the Court to find that Wolkoff had acted willfully and award the full extent of allowable statutory damages under VARA.

“[A] trial court should be most reluctant to set aside that which it has previously decided unless convinced that it was based on a mistake of fact or clear error of law, or that refusal to revisit the earlier decision would work a manifest injustice.” *LiButti v. United States*, 178 F.3d 114, 118 (2d Cir. 1999) (citing *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). Under this standard, there is no basis to grant the defendants’ motions. But since the case has generated a considerable amount of public interest and is bound for the circuit court of appeals, the public and the appellate court should have the fullest explication of the bases for my decision.

Thus, I now cite “chapter, book, and verse” in the Appendix in support of my

the remaining, one was added to the second amended complaint on June 17, 2014, DE64, and the remaining seven were plaintiffs in the related *Castillo v. G&M Realty L.P.* litigation, 1:15-cv-3230(FB)(RLM), which was filed in 2015 but tried simultaneously with the original *Cohen* action.

findings that the 45 works of art were of such stature.

Moreover, defendants now argue that Wolkoff was warranted in immediately destroying the plaintiffs' works of art because I supposedly "gave him permission to destroy" them, Def.'s Br. at 30, when I "denied plaintiffs' preliminary injunction motion," Def.'s Br. at 28. Although my willfulness determination was drawn from the facts adduced at the trial, defendants have opened the door to what transpired at the hearing by putting the preliminary injunction proceeding in play. As now explained, it reinforces my willfulness determination and justification for imposing the maximum allowable statutory damages.²

Willfulness

A

As I wrote in my decision, "[i]f not for Wolkoff's insolence, [the maximum statutory] damages would not have been assessed" since "[i]f he did not destroy 5Pointz until he received his permits and demolished it 10 months later, the Court would not have found that he had acted willfully," and "a modest amount of statutory

² "It is settled, of course, that the courts, trial and appellate, take notice of their own respective records in the present litigation, both as to matters occurring in the immediate trial, and in previous trials or hearings." 2 *McCormick on Evidence* § 330 Facts Capable of Certain Verification (7th ed. 2016). "Although not required to take judicial notice, courts often recognize part of the record in the same proceeding or in an earlier stage of the same controversy." 1 *Weinstein's Federal Evidence* § 201.12 Facts Capable of Ready and Accurate Determination (2018). The Court takes judicial notice of these proceedings for the purpose of responding to Wolkoff's contentions.

damages would probably have been more in order.” *Cohen II*, 2018 WL 851374, at *19. Granted, my finding of willfulness was triggered by Wolkoff’s decision to whitewash the plaintiffs’ art as soon as I denied their motion for preliminary injunctive relief rather than wait until the buildings were ready to be torn down. But in doing so, he acted “at his peril.” *Jones v. Sec. and Exch. Comm’n*, 298 U.S. 1, 17-18 (1936). He was represented by skilled counsel³ who presumably advised him of the well-established principles governing the denial of the “extraordinary and drastic remedy”⁴ of a preliminary injunction, and that “[t]he judge’s legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction . . . is by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.” *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953).

But regardless of what advice his lawyer may or may not have given him, Wolkoff was bent on doing it his way and could not wait until I rendered my written decision before destroying plaintiffs’ works. As he blatantly acknowledged, “That

³ See *N.A.S. Import. Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 253 (2d Cir. 1992) (finding willfulness where defendant’s “excuse evaporated once [defendant] hired an attorney”).

⁴ *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (quoting 11A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2948, p.129 (2d ed. 1995) (footnotes omitted)).

was the decision I made. I would make the same decision today if that happened today.” *Cohen II*, 2018 WL 851374, at *19.

As I pointed out in my decision, “with a fully developed record, permanent injunctive relief might have been available under the literal reading of VARA,” *Cohen II*, 2018 WL 851374, at *17 n.20, and Wolkoff, as an astute real estate developer, may have been “willing to run the risk of being held liable for substantial statutory damages rather than to jeopardize his multimillion dollar luxury condo project,” *id.*

There were, therefore, two dynamics at play throughout this litigation, as identified during the preliminary injunction hearing and in my decision denying injunctive relief: First, given “the transient nature of plaintiffs’ works,” I would not preclude Wolkoff from developing his property and demolishing 5Pointz. *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 227 (E.D.N.Y. 2013) (“*Cohen I*”). But second, “[s]ince, as defendants’ expert correctly acknowledged, VARA protects even temporary works from destruction, defendants [were] exposed to potentially significant monetary damages if it [were] ultimately determined after trial that the plaintiffs’ works were of ‘recognized stature.’” *Id.* In that latter regard, I cautioned that “[t]he final resolution of whether any do indeed qualify as such works of art [was] best left for a fuller exploration of the merits after the case [had] been properly prepared for trial.” *Id.* at 226.

The minutes of the three-day preliminary injunction hearing make it perfectly apparent that, although I was impressed by what the plaintiffs accomplished at 5Pointz, I was sensitive to Wolkoff's plight because he was supportive of the plaintiffs' art and had made it clear to them that the day would come when 5Pointz would be demolished. Why, then, did I turn against him four years later after the extensive three-week trial which, unlike the three-day preliminary injunction hearing, fully developed the law and facts? The answer is that, in addition to his incredible rationales for immediately whitewashing the plaintiffs' art works—essentially, that he was doing it in the artists' best interests—I found out at the trial that Wolkoff had misled me at the preliminary injunction hearing. If he had not done that, I would not have rendered the same decision following that hearing.

To begin, there was never any doubt in my mind from defendants' submissions opposing preliminary injunctive relief, and his counsel's representations during the hearing, that Wolkoff had to demolish 5Pointz at once or run the risk of losing his condo project. I had issued a temporary restraining order ("TRO") and was contemplating extending it to give the City's Landmark Preservation Commission ("LPC") another opportunity to decide to preserve 5Pointz. I asked counsel, "[I]s there a view of the case where I can give the authorities an opportunity to reflect upon that by staying the implementation of my denial of the preliminary injunction? . . . It seems I have the authority to hold it in abeyance for a period of time."

Preliminary Injunction Hearing (“PI”), Nov. 8, 2013, HTr. at 61:4-6; 62:1-2.⁵ In response, defendants’ counsel submitted a letter on November 11 opining that the TRO, which was due to expire the next day, could not be further extended under the law. Def’s. Letter, Nov. 11, 2013, DE32, at 1-3. Defendants were correct. Therefore, I was pressed to issue the terse order the next day, upon which Wolkoff relies for his reckless and irresponsible behavior.⁶

Significantly, the letter further stated, “As explained in defendants’ papers opposing the preliminary injunction motion, defendants stand to lose hundreds of millions of dollars in tax credits and benefits if the project is not completed within the required time frame and, in order to meet those constraints, asbestos removal must begin now.” *Id.* at 3 (footnotes omitted).

The letter referenced several affidavits which had been attached to defendants’ opposition to the initial motion for an Order to Show Cause (“OTSC”), including one from Wolkoff, which his counsel had referenced during the hearing:

MR. EBERT: But the other thing I want to just point out, as we put in the affidavit . . . the timing of this thing is meaningful, and if it gets held up –

⁵ “HTr” refers to the transcript of the preliminary injunction hearing, which occurred on November 6, 7, and 8.

⁶ The Order stated in its entirety: “Plaintiffs’ motion for a preliminary injunction is denied. The temporary restraining order issued on October 17, 2013, and extended on October 28, 2013, is dissolved. A written opinion will soon be issued.” Order Denying Preliminary Injunction, Nov. 12, 2013, DE34.

THE COURT: I think you said December. You have the wrecking crews coming when?

MR. EBERT: *We have to get the place demolished by the end of December.*

MS. CHANES:⁷ Actually, I believe Mr. Wolkoff testified that there are tenants in place into January 2014.

MR. EBERT: There are portions that can be done way before then. There's a lot of buildings there."

HTr. at 62:11-23, Nov. 8, 2013 (emphasis added).

Wolkoff's affidavit, sworn to October 17, 2013, which I had read during the hearing, stated, in relevant part:

22. As explained in the accompanying affidavits of Jay Seiden, Israel Schechter, and Linda Shaw, attorneys assisting G&M Realty on the Project, phases of the Project must be completed before the [tax] statutes expire, or else G&M Realty will lose the benefits of hundreds of millions of dollars in tax exemptions and benefits. And as Peter Palazzo, our Construction Manager for the Project, explains in his affidavit, in order to meet these critical deadlines, we are scheduled to start asbestos removal within the next three to four weeks, with demolition of the building scheduled to be completed by the beginning of 2014 and construction to start in April of 2014.

23. The damages that G&M Realty will suffer if the Project is delayed include the loss of 259 million dollars in 421a tax benefits (as explained by Seiden) and the loss of 35 million dollars in tax benefits under the Brownfield Cleanup Program (as explained by Shaw). In addition, G&M Realty pays 389,000 dollars in annual taxes on the Property, and annual maintenance charges (heat, electric and salaries) totaling 245,000 dollars. The longer these carrying charges continue without G&M realizing any income from the Property, the greater the

⁷ Ms. Chanes was plaintiffs' prior counsel.

loss G&M Realty will sustain.

24. If G&M Realty loses these critical tax benefits and incurs these additional losses, *the Project will no longer be economically viable. We will be forced to reassess whether to proceed at all, and may have to simply scrap the Project.* A great deal of work has been done over the past years to put G&M Realty in a position to qualify for these tax-related benefits because we recognized that it might not be possible without them to proceed with our plans. *I can assure the Court that the effects of losing these benefits will be devastating and I highly doubt we would be able to proceed if we lose these benefits.*

25. The process of vacating the Property is approximately 85% completed. 99% of the tenants will vacate by November 30, 2013 and all residential and commercial tenants will be displaced from the Property by no later than January 5, 2014, which will leave us in the position of realizing no revenue from the Property until the Project starts to become occupied.

Affidavit of Gerald Wolkoff in Opposition to Application for Temporary and Preliminary Injunctive Relief ¶¶ 22-25 (“Wolkoff Affidavit”) (emphasis added).

But at the trial four years later, I learned that Wolkoff knew that he had never applied for the requisite demolition permit until at least four months after he destroyed the plaintiffs’ works of art. As plaintiffs’ counsel adduced during his cross-examination of Wolkoff:

MR. BAUM: So the question is did you advise the Court during that proceeding that you had to take the building down by the end of December 2013, early January 2014?

MR. WOLKOFF: Yes. As fast as I can

Trial Tr. at 2027:25-2028:3.

MR. BAUM: In fact, you didn't take the building down in December of 2014 [sic]; correct?

MR. WOLKOFF: Correct.

MR. BAUM: You didn't obtain the demolition permit until approximately March of 2014?

MR. WOLKOFF: Correct.

Trial Tr. at 2028:9-14.

MR. BAUM: But you told the Court that you were going to demolish it by the end of December and start construction two or three months later; correct?

MR. WOLKOFF: That's correct. That was the intent, yes.

Trial Tr. at 2929:16-19.

MR. BAUM: There was no way to take it down in December, correct, because you didn't even have the permit until March; right?

MR. WOLKOFF: I thought I would get the permit sooner.

MR. BAUM: When did you apply for the permit?

MR. WOLKOFF: I can't remember the date.

MR. BAUM: Was it not in March of 2014?

MR. WOLKOFF: Well, I probably had my expeditors or people trying to get it way before.

...

MR. BAUM: The application was filed in March; is that right?

MR. WOLKOFF: I don't know.

MR. BAUM: Can I show you a document that might refresh your recollection?

MR. WOLKOFF: I don't doubt it.

THE COURT: *So you accept the fact that the application for the demolition of the building was filed in March of 2014?*

MR. WOLKOFF: *Yes.*

Trial Tr. at 2030:11-2031:6 (emphasis added).

MR. BAUM: Did you also state in your affidavit that, if you didn't take the building down by the end of December 2014 [sic], you would lose millions of dollars?

MR. WOLKOFF: It is a possibility, yes.

MR. BAUM: You didn't say it was a possibility in your affidavit, did you?

Trial Tr. at 2031:12-17.

MR. BAUM: You didn't lose hundreds of millions of dollars; correct?

MR. WOLKOFF: No.

MR. BAUM *And you were aware that the Court was relying on this affidavit in making its decision in this case; correct?*

MR. WOLKOFF: No, it was an affidavit that I put in. I didn't know— there was [sic] other affidavits, I imagine, that was [sic] put into the courts for them to make a decision.

THE COURT: It was one of the things.

MR. WOLKOFF: *Yeah, it was one of the things.*

Trial Tr. at 2034:13-21(emphasis added).

If I knew that at the time I rendered my decision denying, without qualification, plaintiffs' preliminary injunction application, I would have issued a different decision: *I would have granted the injunction until such time that the buildings were demolished.*⁸

Wolkoff's egregious behavior was compounded by his incredible testimony during the trial that he was justified in whitewashing the plaintiffs' works of art "in one shot instead of *waiting for three months*⁹ and them going to do something irrational again and getting arrested." Trial Tr. at 2059:1-6 (emphasis added). As explained in my decision, there was simply no basis for that testimony. *See Cohen II*, 2018 WL 851374, at *17. Tellingly, he no longer took the position that he had put forth during the preliminary injunction hearing that he "may have to simply scrap the [condo] Project" if the buildings were not immediately demolished. Wolkoff

⁸ "Especially in fast-paced, emergency proceedings like those at issue here, it is critical that lawyers and courts alike be able to rely on one another's representations." *Azar v. Garza*, — S. Ct. —, 2018 WL 2465222, at *2 (June 4, 2018).

⁹ Wolkoff's reference to "waiting for three months" shows that he was aware of the 90-day notice provision in VARA to allow the artists time to remove or otherwise preserve their works, reflecting once again his callousness and disregard for the law.

Affidavit ¶ 24.

Equally incredible was Wolkoff's other justification for the whitewash: "[T]hat it would be better for the plaintiffs to lose their works quickly." *Cohen II*, 2018 WL 851374, at *18. Specifically, he testified: "So I said why should these young people, or the people themselves, get into problems and end up going to court or to jail. So I figured the quickest way to do it is get men, whitewash it and get it over. It would be better for myself *and I believed it would be better for them*, and would stop confrontation." Trial Tr. at 2042:24-2043:4 (emphasis added). While it may have been better for Wolkoff to take such precipitous action, it can hardly be that he truly believed it would also be better for the artists.

In short, Wolkoff's rationales did not make any sense and were not credible. Clearly he was not doing the artists any favors. I had observed his demeanor on the witness stand and his persistent refusal to directly answer the questions posed to him by me and under cross-examination. I did not believe him.¹⁰ Moreover, it simply stuck in my craw that I was misled that the demolition of the buildings was imminent when there was not even an application for a demolition permit extant. I was

¹⁰"It is within the province of the district court as the trier of fact to decide whose testimony should be credited." *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 95 (2d Cir. 2012). "And as trier of fact, the judge is 'entitled, just as a jury would be, to believe some parts and disbelieve other parts of the testimony of any given witness.'" *Id.* (quoting *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 42, 52 (2d Cir. 2011)) (citations omitted).

appalled at this conscious material misrepresentation.¹¹

If Wolkoff truly cared about the artists he could easily have taken the position that their works of art could remain until the demolition would occur. And, once again, as I concluded in my post-trial decision: “The shame of it all is that since 5Pointz was a prominent tourist attraction the public would undoubtedly have thronged to say its goodbyes” which “would have been a wonderful tribute for the artists that they richly deserved.” *Cohen II*, 2018 WL 851374, at *19.

B

As recognized in my decision, “[a] copyright holder seeking to prove that a copier’s infringement was willful must show that the infringer ‘had knowledge that its conduct represented infringement or . . . recklessly disregarded the possibility.’” *Cohen II*, 2018 WL 851374, at *16 (quoting *Bryant v. Media Right Prods.*, 603 F.3d 135, 143 (2d Cir. 2010)). Defendants conjure up an argument out of whole cloth that this means that willfulness cannot be found unless the defendant violated “clearly established law.”¹² They draw this conclusion from a passing parenthetical reference

¹¹ I may have been overly charitable when I stated in my decision that “Wolkoff in the main testified truthfully.” *Cohen II*, 2018 WL 851374, at *6. But when it came to the critical parts of his testimony concerning his irrational reasons for whitewashing the plaintiffs’ works of art, I took pains to explain why his precipitous conduct was “fanciful and unfounded” and a willful “act of pure pique and revenge.” *Id.* at *17.

¹² Notably, defendants did not challenge the jury instruction on willfulness on this ground. *See* Def.’s Proposed Revisions and Objections to Court’s Proposed

to qualified immunity law in a “Cf.” citation in a Fair Credit Reporting Act (“FCRA”) case. Def.’s Br. at 26 & n.72 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007)). Defendants believe that qualified immunity should be extended to copyright law, arguing “the standard [for willfulness] is akin to the ‘clearly established’ test for qualified immunity under Section 1983.” Reply Br. at 9.

Qualified immunity is a governmental immunity from suit. *See Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (“government officials are entitled to some form of immunity from suits for damages”). It has never been extended to private citizens not acting on behalf of the government, and this Court will not be the first to do so. *See Wyatt v. Cole*, 504 U.S. 158, 168 (1992) (“In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.”). In any event, *Safeco* had nothing to do with qualified immunity. Rather, it simply addressed whether defendants could be held willfully liable for sending improper credit report

Jury Charges, DE159, at 17. Nor did defendants challenge the jury’s finding of willfulness in their post trial brief. *See* Def.’s Post-Trial Brief, DE 167. “It is well-settled that Rule 59 is not a vehicle for . . . presenting the case under new theories . . .” *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)). Nonetheless, since the circuit court has “‘discretion’ to consider an ‘issue[] not timely raised below,’” *id.* at 53 (quoting *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 159 (2d Cir. 2003)), I will address defendants’ new legal arguments.

notices to consumers in violation of the FCRA. *Safeco*, 551 U.S. at 52. Tellingly, the Supreme Court rejected the defendants' contention that liability "for 'willfully fail[ing] to comply' with FCRA goes only to acts known to violate the Act," *id.* at 56-57, explaining that "[w]e have said before that 'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears,'" *id.* at 57 (quoting *Bryan v. United States*, 524 U.S. 184, 191 (1998)). The Court cited a number of cases exemplifying this broad-based proposition, including *United States v. Ill. Cent. R. Co.*, 303 U.S. 239, 242-43 (1938), which held that "willfully," as used in a civil penalty provision, includes "conduct marked by careless disregard whether or not one has the right so to act." 303 U.S. at 242-43 (quoting *United States v. Murdock*, 290 U.S. 389, 395 (1933)).

This fits Wolkoff's conduct to a tee. As explained in my decision, "Wolkoff knew from the moment the lawsuit was initiated that the artists were pressing their VARA claims." *Cohen*, 2018 WL 851374, at *16. His conduct was the epitome of recklessness, let alone "careless disregard" for the plaintiffs' rights.

Moreover, the Second Circuit has consistently held that willfulness in cases governed by the Copyright Act can be found without an affirmative showing of knowledge of infringement, but can be "inferred" from the defendant's conduct. *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 264 (2d Cir. 2005); *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1010 (2d Cir. 1995);

N.A.S. Imp. Corp. v. Chenson Enters., Inc., 968 F.2d 250, 252 (2d Cir. 1992).

Allowing courts to infer willfulness is inconsistent with a notion that the plaintiff must prove the defendant violated clearly established law.

Further Second Circuit precedent is also anathema to defendants’ “clearly established” postulation. *See Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999) (defendant acted willfully despite attempting to create product with “sufficient changes so that the redesigner does not get sued for copyright infringement”); *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1382 (2d Cir. 1993) (defendant acted willfully despite attempted fair use defense); *N.A.S. Import. Corp.*, 968 F.2d at 253 (defendant acted willfully because it could not argue that “it ‘reasonably and in good faith’ believed that its conduct did not constitute” at least “reckless disregard of [plaintiff’s] rights”).

International Korwin Corp. v. Kowalczyk, 855 F.2d 375 (7th Cir. 1988), is also instructive. There, the district court found willfulness based on the defendant’s “cavalier attitude” towards plaintiffs’ rights. *Kowalczyk*, 855 F.2d at 380. The lower court held that while the defendant’s “initial refusal may have come from ignorance of the intricacies of copyright law . . . [he] certainly came to understand his obligations under the law. Yet his answer, time and time again, was essentially—‘Sue me’” *Id.* The circuit court affirmed, holding that the district court “follow[ed] the approach of other district courts that have considered such

evidence as relevant on the issue of willfulness.” *Id.* at 381. It also noted that the district court’s determination that the defendant “was not a credible witness as to the testimony that he at least attempted to give from the witness stand,” *id.*, was “especially important with respect to his contention,” *id.* that he had a “good faith belief” in his legal defense to the action. *Id.* at 382. So it is here.

C

In the final analysis, in addition to Wolkoff’s other reckless behavior, knowingly misleading the Court on a material issue simply cannot be condoned. *See United States v. Herrera-Rivera*, 832 F.3d 1166, 1177 (9th Cir. 2016) (characterizing “attempt to mislead the court” as “willful”); *United States v. Parker*, 594 F.3d 1243, 1251 (10th Cir. 2010) (false statements made with “willful intent to mislead the court”); *Milbourne v. Hastings*, 2017 WL 6402635, at *2 n.2 (D.N.J. Dec. 15, 2017) (“Willful attempts to mislead the Court will not be tolerated”); *Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc.*, 2016 WL 6601650, at *2 (C.D. Cal. Mar. 16, 2016) (defendant’s “willful attempts to mislead the Court are well-documented”); *Sara Lee Corp. v. Bags of New York, Inc.*, 36 F. Supp. 2d 161, 168 (S.D.N.Y. 1999) (“[a]ctive effort to mislead the court about continued willful counterfeiting is a traditional aggravating factor in statutory damages inquiries”).

Defendants’ “willful [behavior] . . . [and] deliberate efforts to mislead the court . . . squandered their opportunities to convince the court that they should be

held liable to plaintiff for anything less than the total amount of damages sought by plaintiff.” *State Farm Mut. Auto. Ins. Co. v. Grafman*, 968 F. Supp. 2d 480, 484 (E.D.N.Y. 2013). Therefore, the Court sees no reason to disturb its finding that Wolkoff acted willfully in destroying the artwork and that the full complement of permissible statutory damages was warranted.

Recognized Stature

A

As I explained in my prior decisions, the *Carter* two-tiered test has been accepted as the appropriate standard for determining “recognized stature.” *Cohen II*, 2018 WL 851374, at *11 (citing *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994) (“*Carter I*”). Thus, once again, the visual art must be viewed as “meritorious” and its stature must be recognized “by art experts, other members of the artistic community, or by some cross-section of society.” *Carter I*, 861 F. Supp. at 325. These three categories are conjugated with “or”; that is, the artist’s work needs recognition by only one of these three groups. Nonetheless, as detailed in the Appendix, each of the 45 works of art meet all three standards.

Notably, as the Seventh Circuit recognized in *Martin*, the *Carter* test “may be more rigorous than Congress intended.” *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999). This is perhaps so because VARA’s underlying rationale is to be solicitous of the works of the visual artists who “work in a variety of media,

and use any number of materials in creating their works.” *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995) (“*Carter II*”). Therefore, once again, the courts “should use common sense,” *Carter I*, 861 F. Supp. at 316, and not rigid views as to whether a particular work is worthy of protection as a work of visual art. Indeed, VARA was not intended to denigrate plaintiffs’ profound works but was more likely designed to “bar[] nuisance law suits, such as [a law suit over] the destruction of a five-year-old’s fingerpainting by her class mate.” *Id.* at 325 (quoting Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection For Visual Art*, 39 Cath. U.L. Rev. 945, 954 (1990)).

Defendants’ challenges to the plaintiffs’ works of art should be viewed through this prism.

B

Principally, the defendants are dismissive of Cohen’s testimony and expertise, contending that it was “erroneous as a matter of law” for the Court to rely on his “allocation of wall space for works as proof of their recognized stature.” Def.’s Br. at 10. I could not disagree more. As I wrote: “that Jonathan Cohen selected the handful of works from the thousands at 5Pointz for permanence and prominence on long-standing walls is powerful, and arguably singular, testament to their recognized stature.” *Cohen II*, 2018 WL 851374, at *12. He was, after-all, Wolkoff’s long-time hand-picked curator, and for good reason. He remains one of the most prominent

aerosol artists in the world.

The following is a limited excerpt from his curriculum vitae: He has had over 500 press mentions, including attention from the *New York Times*, *Wall Street Journal*, *Huffington Post*, the *Today Show*, and *ESPN*. Trial Tr. at 1640:25-1641:6. He has produced art on commission for Fortune 500 companies, including Louis Vuitton, Nikon, Nespresso, Fiat, and Facebook. Cohen Folio at 7. His work has been featured in art museums and galleries, including the Parish Art Museum, Orlando Art Museum, Rush Arts Gallery, Corridor Gallery, and Gold Coast Arts Center. *Id.* His work was featured in the major motion picture *Now You See Me* and many music videos, and he has been featured in documentaries about aerosol art, including the HBO documentary “BANKSY Does NYC.” *Id.* at 7, 10, 56. His work has achieved academic recognition. *Id.* at 9; Tr. at 1643:24-1645:12.

Jonathan Cohen, to Wolkoff’s delight, was perhaps principally responsible for transforming his crime-infested neighborhood and dilapidated warehouse buildings into what became recognized as arguably the world’s premium and largest outdoor museum of quality aerosol art, drawing hundreds or thousands of daily visitors from all over the world. And he was as qualified to do this as any other museum curator. No one would contend that a work of art selected by the curator of the Museum of Modern Art, the Guggenheim, or the new Whitney Museum should not qualify as a

work of recognized stature. The same can be said of the curator of 5Pointz.¹³

Jonathan Cohen was uniquely qualified to recognize the stature of plaintiffs' works of art.

And the record reflects how careful and meticulous he was in his selections. He only chose to recognize eight of his own solo works out of his hundred-plus works remaining at the time of the whitewash. Trial Tr. at 1537:7. Admirably, "[he] treated the rules the same [for himself] as [he] would for other artists." Tr. at 1424:4-5.

Nor should Cohen's expertise be marginalized because he was one of the plaintiffs. His status as a party was only a factor for me to consider; it was not a bar to crediting his testimony. *See United States v. Norman*, 776 F.3d 67, 77 (2d Cir. 2015) ("It is the job of the factfinder in a judicial proceeding to evaluate and decide whether or not to credit, any given item of evidence. Whether, and to what extent, testimony that has been admitted is to be credited are questions squarely within the

¹³ Angelo Madrigale ("Madrigale") described 5Pointz as "ground zero" of the aerosol art movement, Trial Tr. at 1203:11-12, and testified that it was "equal to" the Lincoln Center and Apollo Theater in cultural significance, *id.* at 1203:17-21. Madrigale is the vice president and director of contemporary art at the Doyle New York art auction house on the Upper East Side of Manhattan, Tr. at 1195:4-6. He also taught the courses Understanding the Global Art Market and The Business of Art at Pennsylvania College of Art and Design. Tr. at 1194: 25-1195:3. He conducted "the first ever auction of street art in the United States." Tr. 1195:25-1196:1.

province of the factfinder. A jury is properly instructed that it is free to believe part and disbelieve part of a defendant's trial testimony."). Cohen had been the curator for over a decade before he joined in this litigation to save 5Pointz. And I found his credibility as a witness to be unimpeachable.

C

Defendants make a litany of other categorical attacks on the recognized stature evidence. None are meritorious.

First, they argue that merit is an "impermissible factor." Def.'s Br. at 4. This ignores that merit is an explicit part of the *Carter* test, requiring plaintiffs to show that the artwork is "viewed as meritorious." *Carter I*, 861 F. Supp. at 325.

Second, defendants argue that a work must have "acquired *recognition* of its merit at the time of its destruction." Def.'s Br. at 5. VARA explicitly leaves this question open. *See Carter I*, 861 F. Supp. at 325 n.12 ("Vara does not delineate when a work must attain 'recognized stature' in order to be entitled to protection under this Section."); Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev 1935, 1967 (2000) ("In a footnote, Judge Edelstein strongly implies that a work may obtain recognized stature after the VARA suit is filed and still fulfil (sic) the terms of the provision."). Regardless, the focus of my decision was the recognition the works achieved prior to the whitewash.

In the same vein, defendants argue that the opinion of the plaintiffs' expert,

Renee Vara¹⁴ (“Vara”), that the works have merit is irrelevant because it was rendered after the works’ destruction. *See* Def.’s Br. at 5 (“[A] single person’s 2017 opinion that a work has artistic merit is of no relevance to whether the work had recognized stature in 2013.”) But as detailed in the Appendix, Vara testified both to the merit of the works and the recognition they had achieved *prior to their destruction*.

Defendants argue that “it would defeat the very purpose of the ‘recognized stature’ requirement” if the determination was not made in time to provide “a building owner . . . guidance about what works are required to be preserved.” Def.’s Br. at 6. Defendants cite no law for this dubious proposition. Regardless, Wolkoff knew before he whitewashed the works of art that he was facing the prospect of being liable for significant monetary damages.¹⁵

Defendants further argue that the “public did not have access” to the inside works. Def.’s Br. at 8. However, Cohen conducted regular tours of the inside works, tours which were heavily sought after. For example, pop artist Usher actively sought

¹⁴ Not to be confused with the statute VARA.

¹⁵ *See, e.g.*, OTSC Tr. at 6 (explaining that plaintiffs “can go forward with this case” and they will have “all the time in the world” to establish monetary damages); HTr. at 44-45 (commenting that “we’ll see” whether plaintiffs are “entitled to damages later on.”). In any event, Wolkoff created his own hardship by taking the law into his own hands rather than to await the Court’s preliminary injunction decision and the trial.

and was given a tour of the inside of the building, as did Lois Stavksy¹⁶ and Arabic calligraphy artist eL Seed. Tr. at 1393:2-14; 1435:15-19. Vara also identified “about 805 Bates documents, which were e-mails that were written to 5Pointz or Jonathan [Cohen], requests for visitors to come inside.” Tr. at 1043:22-24. The e-mails represented visitors from “something like 70 different countries,” including “professors from colleges, high school teachers, kindergarten teachers, private schools, all of them requesting tours to walk throughout the outside and inside of the building in order to look at the work.” Tr. at 1044:1-5. Vara compared the inside works to “an exhibition in a gallery in Chelsea or the Lower East Side,” Tr. at 1044:8-9, and noted that there were “some very interesting e-mails that were sent to Jonathan talking about how valuable they found the experience. How their students learned so very much,” Tr. at 1044:12-15. Therefore, defendants’ contention that the inside works were not recognized, much less accessible, prior to their destruction is contradicted by the record.

Defendants next argue that for the works on high walls, they “remained on the walls not by choice, but by necessity,” as a “function of how difficult it was to reach the spot.” Def.’s Br. at 9. But height and merit were fundamentally intertwined at

¹⁶ Stavsky is a graffiti art writer based in New York. She runs *Street Art NYC* and created the 5Pointz exhibit for *Google Arts and Culture*. Tr. at 1387:15-1391:11. She also led tours of 5Pointz for students, journalists, and artists. Tr. at 1392:1-1393:14.

5Pointz. Cohen chose those walls for longstanding, higher quality works by the best artists because they were higher and harder to access. The decision as to whether a specific work would be longstanding was a holistic one, made partly prior to approving an artist for a longstanding wall and continuously ratified by allowing the work to remain. Therefore, the height of a particular work reinforces its quality, rather than detracts from it.¹⁷

Finally, defendants argue that for some works, the Folios “contain little or no evidence of any recognition.” Def.’s Br. at 11. But the Folios were only part of the evidence. They supplemented the three weeks of trial testimony provided by each of the 21 artists, as well as the testimony of Vara, Stavsky, and Madrigale. Vara’s opinion was also based on documents not included in the Folios, upon which she also relied in making her determinations that each work achieved recognized stature, including online videos, documentary footage, social media coverage, letters from art professors around the country, letters and e-mails from visitors to 5Pointz, and course syllabi.¹⁸ Defendants’ narrow focus on the Folios misses the weight of the

¹⁷ Cohen also confirmed that these pieces were of “high standing” and “[fell] into a different category in terms of [his] decision as the curator” compared to other works at the site. Trial Tr. at 1508:8-19.

¹⁸ Experts may properly rely on such facts and data even if they have not been admitted. *See* Federal Rule of Evidence 703 (“An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for

evidence.¹⁹

D

Finally, defendants criticize the Court for not making its work-by-work findings explicit. Normally, including a “recital” of exhaustive evidence and testimony is “unhelpful” in a Court’s findings of fact. *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 613 (8th Cir. 2009) (quoting 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2579 at 330 (3d ed. 2008)).

Nonetheless, since defendants make particularized challenges to the recognized stature of each work of art, the Appendix sets forth work-by-work the primary evidence supporting my recognized stature determinations.

Thus, although I believe that Cohen’s selections of the 45 works of art satisfied VARA’s “recognized stature” requirement, the Appendix details that even if Cohen had not selected them, there was sufficient evidence to independently come to those conclusions.

the opinion to be admitted.”).

¹⁹ Defendants’ doomsday argument that this decision will operate as a deterrent to future building owners has no merit. It simply encourages future parties to negotiate VARA rights in advance, or, at minimum, abide by the scriptures of 17 U.S.C. § 113(d), as contemplated by Congress. In fact, the New York Times reported just two weeks ago that graffiti artists have been commissioned to “bring[] a 5Pointz vibe to Lower Manhattan” by installing works at the World Trade Center. Jane Margolies, *Think Graffiti, With Consent*, N.Y. Times, June 4, 2018, at C1. Clearly the decision has not operated as such a deterrent.

CONCLUSION

Accordingly, defendants' motions are denied in their entirety.²⁰

SO ORDERED

FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
June 13, 2018

²⁰ I have considered defendants' other arguments, including their arguments regarding application of the statutory damage factors and remittur, and likewise find them without merit. I note that I have discovered one additional fact supporting my finding under the statutory factors that Wolkoff and G&M Realty continue to profit from the destruction of 5Pointz: G&M Realty's attempt to secure a trademark in the brand name "5Pointz," of which the Court takes judicial notice. U.S. Trademark Application Serial No. 86210325 (filed Mar. 4, 2014). Wolkoff knew that this application had been made at the time of the trial. This is further evidence of his deceptiveness since he claimed to have "no knowledge" of efforts to brand his new luxury condos with the 5Pointz logo. Trial Tr. at 2061:8-11.