

# AUTHENTICATION IN ART

AiA Art News-service



## WYWH: Knoedler Trial Cut Short (Week 3)

By Center for Art Law Team\*



Ok Google...

The disappointment of the De Soles' settling their case against Ann Freedman on Sunday night (February 7, 2016), paled in comparison with the disappointment of the remaining defendants, Knoedler and 8-31 Holdings, settling with the De Soles on Tuesday afternoon, two days later. Though the settlement seemed like a hugely underwhelming and sudden end to the trial, the parties appear to be satisfied with the results. On Wednesday, February 10, plaintiffs' counsel told members of the press that the De Soles are "extremely satisfied by this settlement" and happy "to get the truth out and tell their story." Meanwhile, counsel for Knoedler and 8-31 Holdings called the settlement "fair, reasonable and good."

### ***Meet the Plaintiff's Legal Team***

*Gregory A. Clarick (NYU Law Class 1990)*, lead counsel for Eleanore and Domenico De Sole, is the founding partner of Clarick Gueron Reisbaum LLP in New York in 2010. Clarick, an AV-rated litigator who has been peer reviewed by top law firm attorneys, specializes in commercial litigation and art, entertainment and intellectual property law. According to the Clarick Gueron Reisbaum LLP website, Clarick and his colleagues represent high profile clients that include entertainment and media companies in addition to collectors in an array of litigation matters. Before founding his own practice, Clarick was an associate at the entertainment litigation boutique Parcher, Hayes & Snyder and Paul, Weiss, Rifkind, Wharton & Garrison, and a partner of Manatt, Phelps & Phillips where he was co-chair of the firm's Entertainment Litigation. He served as a law clerk to the Honorable Robert R. Merhige, Jr., U.S. District Court, Eastern District of Virginia.

*Emily Reisbaum (NYU Law Class 1996)* is another co-founder and partner of Clarick Gueron Reisbaum LLP who represented the De Soles. In this case, she questioned witnesses like Abstract Expressionist expert Stephen Polcari. At the start of her career, Reisbaum was an associate at Debevoise & Plimpton, then eventually worked at the U.S. Attorney's Office for the Southern District of New York.

*Aaron H. Crowell (Yale Law Class 2006)* was an additional member of the plaintiffs' litigation team. Crowell questioned 8-31 Holdings, Inc., Chief Financial Officer, Ruth Blankschen. Before working at Clarick Gueron Reisbaum LLP, he was an associate at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Thereafter, he was a law clerk for Hon. Denise Cote, U.S. District Court for the Southern District of New York and then for Hon. Reena Raggi, U.S. Circuit Court of Appeals for the Second Circuit.

### ***Attorney for the Defense:***

In some complicated cases, defendants are advised to be represented by separate counsel. Here, Ann Freedman had her own legal team, and Michael Hammer, Knoedler Gallery and 8-31 Holdings had a separate legal team defending them.

### ***Meet Ann Freedman's Legal Team***

A partner in Boies, Schiller & Flexner LLP's litigation practice group, Luke Nikas served as Ann Freedman's lead attorney for the trial. He was assisted by a team of other Boies attorneys, who were pleased to vacate their seats at the table on Monday, February 9th. Nikas is not a newcomer to the field of art law, having represented clients such as the Andy Warhol Foundation for the Visual Arts and CBS. In the past Nikas has represented both plaintiffs and defendants in commercial litigation matters. It seems that in the Knoedler related matters, Nikas represented plaintiffs David Mirvish Gallery and Honest Ed's Limited before being retained by Ann Freedman as her counsel. Nikas graduated magna cum laude from Harvard Law School in 2006 and clerked for Hon. William J. Holloway, Jr., United States Court of Appeals for the Tenth Circuit.

In his opening remarks for the De Sole case, Nikas indicated that the scheme to sell forgeries through the reputable gallery such as Knoedler was created by someone who targeted reputable art historians, art dealers and collectors. Nikas suggested to the members of the jury that as they observe the trial and consider the evidence, they should keep in mind that one more person should be sitting in the hot defendants' chairs — Glafira Rosales.

### **Attorneys for the Gallery and its Owners**

*Charles Schmerler* was lead attorney representing the Knoedler Gallery and related parties. Schmerler is a partner at Norton Rose Fulbright US LLP, a global firm with offices in Austin, Dallas, Denver, Houston, Los Angeles, Minneapolis, New York, Pittsburgh, San Antonio, St. Louis and Washington D.C. He has represented private equity funds, major international banks and media companies involved in film-related litigation. He has a great deal of experience in international disputes and First Amendment litigation. When asked how the Knoedler case compared to his previous cases, he stated that it was not all that different—the theories of law are the same as other cases, just the facts differ. He will continue to represent the Knoedler Gallery in other related cases which involve plaintiffs such as The Martin Hilti Family Trust, Frances Hamilton White, The Arthur Taubman Trust, Eugenia Taubman and Nicholas Taubman

### ***What happened in Court:***

**Day 11, Monday, February 8** opened with a video of deposition from E.A. Carmean, the renowned art historian and consultant for Knoedler Gallery. His edited down testimony, per motions from both sides, focused on the David Herbert narrative. Who was David Herbert, etc.? Herbert a known figure in the New York art scene was suggested as a potential conduit between the artists in the Rosales collection and the unknown Swiss/Mexican collector. Carmean explained that because he believed the paintings were real, then there logically had to be a connector and the only logical connector was David Herbert. Herbert had taken clients to Rothko's studio during his time working at Betty Parson and Sidney Janis, knew Rothko and

Pollock personally, took part in private dealings out of his apartment that sometimes left little in the way of a paper trail and had some sort of connection to the sugar business just like Mr. X. When discussing how he, as an art historian, could judge if a work was the “real McCoy,” Carmean used a series of analogies. First, he claimed that if you listen to 5 records and only one was the real Elvis mixed in with four fakes, you could just pick the real one out. Next, he tried to explain himself by having the listener imagine that he was walking through the airport and saw someone who looked like his mother-in-law, he would just know if it was her or not (this analogy was not successful because questioning attorney’s mother-in-law had passed away). Finally, Carmean discussed the forensic analysis in the Orion report and the opinion of James Martin, who was called as an expert witness during the previous week, that the De Soles painting was inauthentic. Interestingly, parts of Carmean’s deposition conflicted with both Martin’s and Dr. Flan’s accounts of meetings and information conveyed. For example, Carmean claimed that Martin’s report focused solely on the red spattered on the surface of the painting in the De Sole Rothko fake, whereas Martin testified on Friday February 5, that he examined red paint on different paintings, including Motherwell fakes, which gave him reasons for believing the works examined were forgeries.

The trial continued after lunch with the testimony of Laili Nasr who is a curator at the National Gallery of Art in Washington, D.C. (NGA) where she has worked on one of the Rothko catalogue raisonnés, *Mark Rothko: The Works on Paper*. Freedman listed Nasr as one of the “individuals with special expertise” who examined the fake Rothko painting the De Soles purchased. Unlike other art historians listed by Freedman as experts who saw Rosales’ Rothkos, Nasr wrote letters that on their face may have been described as authentication documents. Nasr admitted that in 2002 she wrote an “unusual letter” regarding the Rothkos Knoedler Gallery had on display. Her letter contained characteristics like the full title, description and size of the paintings; however, she explained that she did not do provenance research but relied on the provenance provided by Freedman because she had respect for Freedman and gave the work sold to the De Soles “the benefit of the doubt.”

In response to being questioned about being included in the list Freedman circulated naming “individuals with special expertise” who examined (not authenticated) the fake Rothko, Nasr claimed that she would have raised an issue with being listed as such an expert had she known about the source of the works, the fact that so many previously unknown works had been attributed to the same source and the skeptical IFAR report findings. Nasr stated, “IFAR is a reputable foundation.” Moreover, she noted that the list of experts procured by Freedman was improper and “just an odd thing.” Nonetheless, Nasr did not complain because she thought Knoedler would assist NGA in the future.

Nasr also admitted to writing Christopher Rothko's assistant Henry Mandell informing him that she would include the forged Rothko piece sold to the De Soles in future Rothko catalogue raisonné supplements. On January 28, 2005, Nasr wrote a letter to Ann which read, "Congratulations on selling the Rothko."

**Day 12: On Tuesday, February 9,** Ruth Blankschen, the Chief Financial Officer (the "CFO") of 8-31 Holdings, Inc. and the subsidiaries, Knoedler Gallery, LLP, Knoedler Publishing, LLP and Hammer Gallery, LLP, testified. Blankschen explained that in her role as a Secretary for 8-31 Holdings and its subsidiaries and as the CFO for all businesses, she reported directly to her boss Michael Hammer, the owner of 8-31 Holdings. She elaborated that her responsibilities included paying taxes and preparing tax accounting. She advised Knoedler in regards to the Grand Jury subpoena dated September 14, 2009 where she was aware of the "potential unasserted claims" but not of the range of liability.

Most notably, Blankschen described how Freedman instructed her to pay Rosales \$9,000 in cash, which she did. During her testimony, Blankschen explained the nature of various 8-31 Holdings balance sheets and specific terminology used. For example, there was a great deal of emphasis placed on the fact that a specific portion of the balance sheet, "interdivisional receivables," was reclassified as "distributions" six months after the Grand Jury subpoena. In accounting, receivables are considered to be company assets. However, once the interdivisional receivables were reclassified as distributions, they were reflected as shareholder equity on the balance sheet. In cross, she stated that the reclassification went into effect because auditors advised her to do so and "the receivables were never meant to be paid." Blankschen also testified that Michael Hammer received 20% profit sharing of 8-31 Holdings, which paid for his AMEX bills, luxury cars like a \$482,000 Rolls Royce and his wife's trip to Paris. Additionally, she reiterated that Hammer earned a profit from Knoedler's profits. Notably, an entry for nearly 6 million dollars appeared on the financial statement for 2011/2012 under the heading of settlement, which begged the question whether or not this could have been the Lagrange settlement value, although 6 million dollars seems a bit low for a seventeen million dollar forged painting.

Before Judge Gardephe dismissed the court at 2:30 p.m. due to some "unexpected developments," the packed courthouse was teeming with excitement because Michael Hammer and Ann Freedman were scheduled to testify.

### ***Settlement:***

De Sole case, as many others, ended with a confidential settlement. Where the parties to the dispute are concerned, settlement are a logical and desirable outcome for a public trial; however, here the spectators (art collectors, dealers, journalists, art historians, students and attorneys in the

art related practices) were disappointed when the trial was cut short due to what the judge described as “unexpected developments.”

The members of the jury knew not to return on Wednesday for another day of “who’s who in Abstract Expressionism,” but the expectations of hearing Ann Freedman and Michael Hammer testify by the die-hard spectators were dashed by the show of camaraderie exhibited by the opposing counsels and auspicious absence of the presiding judge who, like the proverbial groundhog, predicted changes.

Following is a list of plaintiffs who settled their claims arising from purchasing Rosales forgeries:

- [Pierre Lagrange](#) purchased a fake Jackson Pollock for \$17 million (Settled in 2012);
- [William Lane](#) purchased an alleged Rothko for \$320,000 (Settled in April 2015);
- Martin and Sharleen Cohen bought a fake Mark Rothko for \$385,000 (Settled in July 2015);
- [Stephen Robert](#), purchased an alleged Clyfford Still for more than a \$1 million (Settled in August 2015);
- [John D. Howard](#) bought a fake Willem de Kooning for about \$4 million (Settled in December 2015);
- [Dominico and Eleanor De Sole](#) bought a fake Mark Rothko for \$8.4 million (Settled in February 2016).

***Preview:***

Maybe Freedman and Hammer will get their day in court yet as the remaining civil cases against the Gallery for selling forgeries continue. The cases that are still pending include:

1. ***The Martin Hilti Family Trust v. Knoedler Gallery, Ann Freedman, David Hammer, 8-31 Holdings, Inc., Glafira Rosales, Jose Carlos Bergantinos Diaz, Jesus Angel Bergantinos Diaz, Pei-Shen Qian, Per Haubro Jensen, Jaime Andrade, Hammer Galleries, LLC;***
2. ***The Arthur Taubman Trust, Eugenia Taubman, and Nicholas Taubman v. Knoedler Gallery, Ann Freedman, Glafira Rosales, Jose Carlos Bergantinos Diaz, Michael Hammer, and 8-31 Holdings, Inc.;*** and
3. ***Frank J. Fertitta, III and Eykyn Maclean, LP v. Knoedler Gallery, 8-31 Holdings, Inc., Michael Hammer, Ann Freedman, Jaime Andrade, Glafira Rosales, Jose Carlos Bergantiños Diaz, Oliver Wick, Urs Kraft, and John Does # 1 to 10.***



#### COURTROOM ILLUSTRATION:

**KNOEDLER ON  
TRIAL  
ROTHKO (?)  
AS WITNESS**

ARTIST RECEPTION  
FEBRUARY 23rd 6-8pm

ON DISPLAY UNTILL  
FEBRUARY 27th

**ARTISTS  
ELIZABETH WILLIAMS  
VICTOR JUHASZ**



DOMENICO DESOLE GESTURING TO THE FAKE  
ROTHKO HE PURCHASED FOR 8M DOLLARS

#### *Postscript:*

Though this trial has come to an end, the courtroom artwork of Elizabeth Williams and Victor Juhasz will be exhibited at the World Trade Gallery from February 23-27. A good opportunity for a reunion of the Knoedler spectators and courtroom regulars!

**Disclaimer:** Reading WYWH articles is no substitute to attending art law trials, programs and exhibitions in person. After all, picture is worth a thousand words, even if it's a fake.

#### **Selected Sources and Suggested Readings:**

- Clarick Gueron Reisbaum LLP, <http://cgr-law.com/attorneys.html> (last visited Feb. 16, 2016).
- Bois, Schiller & Flexner LLP, <http://www.bsflp.com/lawyers/data/1681> (last visited Feb. 16, 2016).
- Norton Rose Fulbright LLP, <http://www.nortonrosefulbright.com/people/90165/charlesdschmerler> (last visited Feb. 16, 2016).
- Eileen Kinsella & Sarah Cascone, "Top 9 Takeaways From the Knoedler Trial," Artnet News (Feb. 12, 2016), <https://news.artnet.com/market/top-takeaways-from-knoedler-forgery-trial-426086>.
- Laura Gilbert, "Why Would the De Soles Settle Their Claim Against Knoedler and Freedman," The Art Newspaper (Feb. 11, 2016), <http://theartnewspaper.com/news/news/why-would-the-de-soles-settle-their-claim-against-knoedler-and-freedman/>.

- Colin Moynihan, “Knoedler Gallery and Collectors Settle Case Over Fake Rothko,” N.Y. Times (Feb. 10, 2016), [http://www.nytimes.com/2016/02/11/arts/design/knoedler-gallery-and-collectors-settle-case-over-fake-rothko.html?\\_r=0](http://www.nytimes.com/2016/02/11/arts/design/knoedler-gallery-and-collectors-settle-case-over-fake-rothko.html?_r=0).
- M.H. Miller, “It’s over: Knoedler Settles With the De Soles, Concluding Three-Week Case over \$8.3 M. Fake Rothko” Artnews (Feb. 10, 2016), <http://www.artnews.com/2016/02/10/its-over-knoedler-settles-with-the-de-soles-concluding-three-week-case-over-8-3-m-fake-rothko/>
- Laura Gilbert, “Lawyers Battle to Tip Balance of Evidence Before Knoedler Trial,” The Art Newspaper (Dec. 21, 2015), <http://theartnewspaper.com/news/lawyers-battle-to-tip-balance-of-evidence-before-knoedler-trial/>.